ETHICAL TRAPS FOR THE UNWARY

IF IT'S NOT PROHIBITED, ISN'T IT ETHICAL TO DO WHAT I DO?
Or:
What the Heck is Wrong with Puffing and Bluffing, And How Can There Be A Conflict When I Got The Fee up Front?

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By
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Professionalism Really Apply?" ALI-ABA Labor Seminar, Spring 2003, and "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients and Angry Third Parties, ABA Construction Forum (2006).

1. WHAT DO CLIENTS WANT IN NEGOTIATIONS AND WHAT CAN YOU GIVE THEM? THE LAWYER AS THE ZEALOUS ADVOCATE.

Clients want a lawyer/negotiator who gets all the client desires, leaves nothing on the table, and gives away the minimum. The dominant model of a lawyer is one who is a "zealous advocate"[2] of the client's position: it is a term indicating that the client's interest is paramount. As far back as 1820, Lord Brougham declared, in 2 Trial of Queen Caroline 8, "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others."[3]

"Zealous advocate" is a term that is often used by lawyers to describe their role; however, that term has not existed since the Model Rules superseded the Model Code of Professional Conduct in 1983.[4] When the 1983 Model Rules ("MR")were adopted, the term "zealous advocate" was deleted, and in its place was a comment to MR1.3 that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." The Comment (although not the black-letter text of MR1.3) goes on to caution that a "lawyer is not bound to press for every advantage that might be realized for a client." This commentary has continued, almost verbatim, into the 2002 Ethics 2000 Revision to the Model Rules ("E2K").

[2] The "zealous advocate" language was contained in Canon 7 of the Canons of Professional Ethics; it was not carried forward in the 1983 Model Rules of Professional Conduct or its subsequent versions.

[3]Quoted by Sharon Dolovich, "Ethical Lawyering and the Possibility of Integrity," 70 Fordham L.Rev. 1629 (2002), in her citing of Deborah L. Rhode's book, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION, 2000 at 15.

[4] The term "zealous" advocacy appeared in the EC 7-1 of the Model Code.

Although "zealous advocacy" has not been a requirement of the lawyer's code since 1983, however, some lawyers still use the phrase and some courts still extol the concept. For example, the Nevada Supreme Court, as recently as 1994, used the phrase with approval when it wrote: "However much it may 'infuriate the jury,' a properly zealous advocate must do all he can to defend his client."[5] Even law journals continue to use the phrase (sometimes even with approval) in titles to articles.[6]

In contrast, the comments to §16 of the ALI's Restatement of the Law Governing Lawyers ("ALI") warns that "zealous advocacy" is not a synonym for hardball tactics. The Comment states that the "term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling."[7]

While the label of "zealous advocate" gives some solace for the forcefulness with which a lawyer can act for the client and gives others concern about hard-ball tactics, the same concept may be restated by describing a lawyer as a "neutral partisan,"[8] a term that suggests moral relativism. A "neutral partisan" is one who "passes no judgments,"[9] whose "zeal on behalf of the client is unmitigated and noncontingent." The E2K revisions

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[5] *Brown v. State*, 110 Nev. 846, 877 P.2d 1071,1073 (Nev. Jul 26, 1994). In the very next sentence, the Brown court wrote: "As one eminent defender wrote, [c]ross examination is the only scalpel that can enter the hidden recesses of a man's mind and root out a fraudulent resolve.... [It] is still the best means of coping with deception, of dragging the truth out of a reluctant witness, and assuring the triumph of justice over venality. Louis Nizer, *My Life in Court* 366 (1961)."

[6] See, e.g., Broderick, "Understanding Lawyers' Ethics: Zealous Advocacy In A Time Of Uncertainty" 8 U. D.C. L. Rev. 219 (2004); Reimer, "Zealous Lawyers: Saints or Sinners?" 59 Or. St. B. Bull. 31 (1998); Brown, "A Plan To Preserve An Endangered Species: The Zealous Criminal Defense Lawyer" 30 Loy. L.A. L. Rev. 21 (1996); and Ventrell, "The Child's Attorney Understanding the Role of Zealous Advocate" 17 WTR Fam. Advoc. 73 (1995).8.

45 Stan. L. Rev. 645 Stanford Law Review February, 1993 Note ADMINISTRATIVE WATCHDOGS OR ZEALOUS ADVOCATES? IMPLICATIONS FOR LEGAL ETHICS IN THE FACT OF EXPANDED ATTORNEY LIABILITY Robert G. Day

[7] ALI §16, Comment (d).

[8]Dolovich, *supra*, (her article fn1), traces the origin of the term to William Simon in his article "The Ideology of Advocacy: Procedural Justice and Professional Ethics," 1978 Wis. L. Rev. 29. For more on ethicist Simon's views, see William H. Simon, THE PRACTICE OS JUSTICE: A THEORY OF LAWYER'S ETHICS (1998).

[9]Sharon Dolovich, "Ethical Lawyering and the Possibility of Integrity," 70 Fordham L.Rev. 1629 (2002).

to the Model Rules maintain the view that the lawyers' personal morality is not impugned because of the client's activities. See the E2K 1.2(b): "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."

It is often said that, by serving the client's interests, a lawyer furthers society's goals, in contrast to the accountant, whose primary duty runs directly to the public and only secondarily to the client. As the Securities and Exchange Commission opined more than 40 years ago: "Though owing a public responsibility, an attorney in acting as the client's advisor, defender, advocate and confidant enters into a personal relationship in which his principal concern is with the interests and rights of his client. The requirement of the [Exchange] Act of certification by an independent accountant, on the other hand, is intended to secure for the benefit of public investors the detached objectivity of a disinterested person."[10]

Whether we prefer to be called "zealous advocates" or "neutral partisans," this standard view of a lawyer's role has been described as "both amoral and highly ethical. It is amoral in the sense that, however morally questionable the clients' ends and however zealous the lawyer is in their pursuit, the lawyer is thought to bear no moral responsibility for either the content of the ends or their achievement."[11] Lawyers look askance at such criticism, claiming that an adversarial system of justice not only is the most just but that, without the ability to represent unpopular interests, constitutional rights cannot be fully protected. Some critics, however, find lawyers' assertions (that they protect the constitutional and statutory rights of all) hollow and instead aim criticism at the profession, claiming that, "[f]or most lawyers, most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral

[10] *In re American Fin. Co.*, 40 S.E.C. 1043, 1049 (1962), quoted by Dolovich, *supra*.
[11] Dolovich at 1633.

world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life."[12]

2. THE "RULES OF ETHICS" ARE NOT REALLY ETHICS AT ALL

"Ethics" is the term that is commonly applied to lectures about the ABA's Rules of Professional Responsibility and its predecessor, the Code of Professional Conduct. These 1983 Model Rules and the Ethics 2002 Model Rules, however, do not use the word "ethics" at all, except in the Preamble.

At base, these rules (both the MR and the E2K) have abandoned the moral high ground claimed by the Canons of the old Model Code of Professional Responsibility (with their "Ethical Considerations" and "Disciplinary Rules") and have become mere quasi-penal statutes in their black letter text, with moral ambiguities and ethical concerns confined to the "comments." Perhaps that is one of the reasons the press and public find lawyer's protestations of lack of moral responsibility for the actions of their clients to be a less than satisfactory response to the literally billions of dollars of losses, fraud, and false financials that have been reported in just the last few months.

One critic of this standard view uses the pejorative term "amoral technicians"[13] to describe lawyers, claiming that the Model Rules provide "a highly simplified moral universe which offers easy guideposts for action that allow lawyers to sidestep wrenching ethical dilemmas, and with the luxury of acting on behalf of clients free from the risk of

[12]Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues," 5 Hum. Rts. 1, 9 (1975), quoted with approval in Dolovich, fn. 33.

[13]Id. at 1638.

moral censure."[14] Another has commented that a lawyer "sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality."[15]

The three main federal rules and statutes that regulate sanctionable conduct (FRCP 11, FRAP 38, and 28 U.S.C. §1927) do not use the term "ethics" either.

The problem is that there is an unresolved tension between two concepts: (a) the need to represent the client fully and zealously and to maintain client confidences, and (b) the expectation of some members of the public and press, and of some federal regulators, that lawyers, as officers of the Court, should reveal matters that can cause losses to others. These two concepts are inherently irreconcilable; you cannot fully protect one without eviscerating the other. The greater the protection one gives to client confidences, the less "truth" the lawyer is able to reveal, for any revelation of a client confidence is a breach of that obligation. On the other hand, the more one seeks to have lawyers disclose information that may prevent losses to non-clients, the less protection a client has for the confidences reposed in and disclosed to the lawyer.

> "I don't see why we should not come out roundly and say that one of the functions of the lawyer is to lie for his client; and on rare occasions, as I think I have shown, I believe it is." Charles Curtis, "The Ethics of Advocacy."[16]

These two tensions are apparent by looking at what some have said about a lawyer's role.

- "To mislead an opponent about one's true settling point is the essence of negotiation." White, MacElvelly "Ethical Limitations on Lying in Negotiations," 1980 American Bar Foundation RES.J. 926, 928.

[14] *Id.*, describing the views of Deborah L. Rhode in her book, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION, 2000.

[15] Nancy Lewis, *supra* at 813, quoting William H. Simon.

[16] *LYING*, Bok, Sissela, pg. 306 & 307, Vintage Books, Second Edition, 1999

- Justice Stevens: "I still believe that most lawyers are wise enough to know that their most precious assets is their professional reputation."[17]

- "Just as the orderly and systematic slaughter which we call war is thought perfectly right under certain circumstances, though painful and revolting: so in the word-contests of the law-courts, the lawyer is commonly held to be justified in untruthfulness within strict rules and limits: for an advocate is thought to be over-scrupulous who refuses to say what he knows to be false, if he is instructed to say it." H. Sidgwick, *The Methods of Ethics*, 7th Ed. (London: Macmillan & Co., 1907).

- "We might exercise our supervisory powers if we thought there were an ethical violation involved." But the Court would not exercise supervisory powers for a breach of a potential professional violation. *U.S. Bautista*, 23 F.3d 726, 732 (2nd Cir. 1994), *cert. den*. 513 U.S. 862 (1994).[18]

3. A BRIEF HISTORY OF THE ABA MODEL RULES

In ascertaining whether there always has been a dichotomy between ethics and professionalism, it is instructive to look at the history of bar promulgations on the subject.

The American Bar Association's original Canon of Professional Ethics was adopted on August 27, 1908 and can be traced back to the Alabama Bar Association's 1887 Code of Ethics and from there back to two books published in 1836 and 1854.[19] For almost a hundred years the Canons formed the touchstone of lawyer conduct.

The Canons evolved in 1969 into the Model Code of Professional Responsibility. The Model Code was divided into "Ethical Considerations," aspirational goals for

[17] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413, 110 S.Ct. 2447, 2464-65 (1990), Justice Stevens, concurring in part and dissenting in part.

[18] The alleged breach was a prosecutor talking to a witness during an adjournment; the Court find no problem with this since the issue was elicited by the prosecutor on re-direct and the witness was subjected to cross-examination on this topic.

[19] A history of the ABA's rules can be found in ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Second Edition, pages 1-2 (1992), published by American Bar Association's Center for Professional Responsibility. The two books were: PROFESSIONAL ETHICS, by Judge George Sharswood (1854), and A COURSE OF LEGAL STUDY (2d ed. 1836) by David Hoffman.

attorneys, written in hortatory language, and "Disciplinary Rules," mandatory provisions akin to penal statutes which formed the basis for disciplinary proceedings.

Among the laudatory goals and formulations that the "Ethical Considerations" articulated were:

- "Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer." EC 1-1.

- "A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified . . . ." EC 1-5.

A lawyer should be "temperate and dignified."

- "To lawyers especially, respect for the law should be more than a platitude." EC 1-5.

- "A lawyer should be courteous to opposing counsel and should accede to reasonable requests . . . which do not prejudice the rights of his client. He should follow local customs of courtesy and practice, unless he gives timely notice to opposing counsel of his intention not to do so." EC 7-38.

- "A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it." EC 7-23.

- "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal . . . is inconsistent with the fair administration of justice, and it should never be participated in or condoned by lawyers." EC 8-5.

- "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism." EC 8-6.

- "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." EC 9-2.

- "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and the courts and the judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety." EC 9-6.

In 1983 the ABA adopted the Model Rules of Professional Conduct. Gone were the aspirational goals that the Ethical Considerations illuminated. In their place were purely minimal standards of conduct written in the style of a penal code – the three phrases used are: "a lawyer shall not," "a lawyer shall," and "a lawyer may." The Bar's transformation was complete. It had come full circle from a profession whose members took it for granted that they owed duties to the public and to the courts, to one whose written rules provided both high-minded guidelines as well as disciplinary rules, to one whose sole guidance was now found in a quasi-criminal statute.

At the same time as the Bar's own rules were evolving, a similar evolution was taking place in the Federal Rules of Civil Procedure. A major shift occurred in 1983 (the same year that the ABA adopted the Model Rules of Professional Conduct) when Rule 11 was amended to become a penal provision allowing sanctions to be imposed against counsel. The former version of Rule 11 had been rarely used, even in the early 1980s, although there was a strong feeling that lawyers were abusing the system[20] and a perceived need to put corrective measures in place. The Rule was amended again in 1993, "motivated by a desire to curb some of the abuses surrounding Rule 11 motion practice."[21]

Under the Federal Rules as well as state disciplinary procedures, only conduct of an egregious nature is dealt with. Unfortunately, because the old Code was rightly called one of "Professional *Ethics*," we tend to think that the current Model Rules are also ethical standards; they are not. An attorney can take positions that many would find

[20]Mansfield, *Compliance with 1983 Changes In Rules of Civil Procedure*, 190 N.Y.L.J. 1 (1983). Also see: Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure §1331 *History of Rule 11* (1990).

[21]Wright and Miller, *id.*

uncivil or even morally questionable and still abide by the Model Rules. Likewise, an attorney can have a reputation in the bar as an unfair "hardball" litigator, intransigent on every issue, even ones of courtesy, and still comply with Rule 11. This may be the reason for the evolution of the "professionalism" standards and the various codes of courtesy that are being adopted by many local bar associations around the country. Although it must be admitted that not all such "professionalism" codes are limited to litigation, when one reviews them as a whole, it is clear that abusive litigation conduct is at the heart of what such formulations are designed to address.

In 2002 the ABA adopted its most current version of the Model Rules, the Ethics 2000 version (E2K).

4. THE CURRENT MODEL RULES CONDONE SOMETHING LESS THAN TRUTHFULNESS

To some, calling the Model Rules "ethical" rules is a misnomer, for the Rules allow for questionable behavior from a moral outlook that is defensible only when looked at from the dual viewpoints of the adversarial process and the perceived need to preserve client confidences.

When the Model Rules were drafted, the ABA specifically *rejected* requiring truth in negotiations.[22] The preamble contained hortatory language which was adopted:

> "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."

[22] The history of the Model Rules is found in "The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates," published by the Center for Professional Responsibility, American Bar Association, 1987.

In the Rules themselves, however, there is no requirement of honest dealing. This is because of the tension between protecting a client's confidences and allowing an adversary system, not only in court but even in negotiations.

Rule 4.1 deals with negotiations. As proposed in 1983, Rule 4.1 prevented a lawyer from knowingly making a false statement of material fact or law and would have required disclosure of client confidences in furtherance of the Rule. The language requiring truthfulness, even if it revealed a potential client confidence, however, was deleted.[23]

Truthfulness and fair dealing were not and are not the requirements of the Model Rules, at least outside of tribunal settings, and outside of fraud and criminal activity. The ABA Comments to the Rules make for interesting reading, for they specifically allow "puffing," "failing to be truthful about settlement amounts," and other matters as long as they do not constitute "fraud."[24]

Truth is not the stated objective of the Model Rules. In negotiations, a lawyer is entitled (but never required) to reveal client confidences if making a disclosure

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[23]The revision of Model Rule 4.1, showing the deleted and added language, is as follows:

> "(a) In the course of representing a client a lawyer shall not knowingly:
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> (1a) make a false statement of material fact or law to a third person; or
>
> (2b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
>
> ~~(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~"

[24]The ABA Official Comment to Rule 4.1 entitled "Statements of Fact," reads:

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. *Under generally accepted conventions in negotiation, **certain types of statements ordinarily are not taken as statements of material fact**. Estimates of price or value placed on the subject of a transaction and a party's intention as to an acceptable settlement of a claim are in this category*, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. [Emphasis supplied]

"facilitates a satisfactory solution." Facilitation of a satisfactory solution is not necessarily one that is equitable to both sides. There is no requirement of revealing a confidence in order to reveal the truth. The Rule contains a clear demarcation; conduct that is "fraudulent" is forbidden, but all else is merely part of negotiating strategy.

In light of Rule 4.1, other language of the Code, such as that in Rule 2.1 allowing (but not mandating) lawyers to consider moral issues, may tend to ring somewhat hollow.[25]

Rule 4.1, relating to *negotiation,* is sharply contrasted by the rules regulating conduct before a tribunal. While the language of 3.3(a)(1) and 4.1(a) is identical in that a lawyer "shall not knowingly make a false statement of material fact or law, . . ." there was an attempt made to subordinate the lawyer's duty of candor to the court to the rules relating to privilege. The amendments were defeated because as the discussion notes, "the duty of candor toward the court was regarded as paramount." Legislative History, p. 122. The ABA Comment to Rule 4.1 specifically allows statements about "a party's intention as to an acceptable settlement of a claim" to be exempted from the rule prohibiting false statements of "material fact"; apparently you can lie with impunity about your settlement authority. There is, however, no such exemption in the comments to

[25]Rule 2.1 provides:

Rule 2.1 and Comment as Adopted

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as *moral,* economic, social and political factors, that may be relevant to the client's situation. (emphasis supplied).

Rule 3.1 concerning candor to the tribunal, and probably for good reason. A lawyer who, during a settlement conference with a judge, misstates the client's intention as to an acceptable settlement undoubtedly acts at his or her peril. While there is a special rule (3.4) relating to "fairness to opposing party and counsel," it seems solely directed at trial procedure.

The limited rules relating to negotiations, as opposed to the broader and more detailed rules relating to litigation, have been the subject of much commentary. In her famous Law Review Article, "Bargaining and the Ethics of Process," Professor Norton noted:

> The Model Rules do not exempt negotiation from ethical constraints, but neither are the rules drafted to address the demands of bargaining with the same specificity that they address the demands of litigation. No rule or law requires fairness during negotiation . . . * * * [In] negotiation, where there is only the sparsest written guidance, the parties must decide for themselves what is legal, what is factual, and what is ethical.[26]

Professor Bok, in her book, Lying, has a similar caveat:

> "But codes of ethics function all too often as shields; their abstraction allows many to adhere to them while continuing their ordinary practices. In business as well as in those professions that have already developed codes, much more is needed. The codes must be but the starting point for a broad inquiry into the ethical quandaries encountered at work. Lay persons, and especially those affected by the professional practices, such as customers or patients, must be included in these efforts, and must sit on regulatory commissions. Methods of disciplining those who infringe the guidelines must be given teeth and enforced."[27]

5. ETHICS, PROFESSIONALISM, AND TACTICS DURING NEGOTIATION

[26]Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L.Rev. 493, 529 (1989).

[27]Bok, *Lying*.

Applying concepts of "ethics" and "professionalism" is not a matter merely of litigation tactics, where "hard-ball" antics are a matter of record, either in depositions or in trial. The daily process of negotiations in which each every lawyer is engaged needs to be considered.

Discussions of what is and is not "ethical" during negotiations have consumed reams of paper with law review articles containing, in the aggregate, thousands of footnotes. On the one side is the view that there are two precepts which should guide the lawyer's conduct in negotiations: honesty and good faith; and that a lawyer may not accept a result that is unconscionably unfair to the other party.[28] At the other end of the spectrum are those who argue that obtaining the best interest of the client is the proper overall goal and should be pursued vigorously in the absence of outright fraud. Discussions of this view can be found in the writings of Professors James J. White[29] and Charles Curtis.[30] The tension, at base, is not necessarily between "ethics" as an abstract notion, but rather whether various negotiation tactics are permitted or prohibited by the Model Rules.

The high regard with which negotiating tactics are viewed by some can be seen in titles to law review articles such as:

- "The Ethics of Lying in Negotiations";[31]
- "Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive"; [32]

[28]What Professor Norton (p. 513) has termed the "universal" position is exemplified and was first expounded in a 1965 law review article by Judge Alvin B. Rubin, 35 La.L.Rev. 577, 589, *A Causerie on Lawyers' Ethics in Negotiation*.

[29]White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. B. Found. RES.J. 926.

[30]Curtis, *The Ethics of Advocacy*, 4 Stanford L.Rev. 3 (1951). Professor Norton calls Professor Curtis's view "stark traditionalism," Norton at p. 513.

[31]Wetlaufer, *The Ethics of Lying in Negotiations*, 76 Iowa L.Rev. 1219 (1990).

[32] Craver, 38 S. Tex. L. Rev. 713 (1997)

- "Professionalism: Lip Service or Life Style";[33]
- "Ethics on the Table: Stretching the Truth in Negotiations";[34] and
- "Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?"[35]

Many of these articles contain a search for principles that should guide attorneys during negotiations. The fact that the authors of these articles have felt a need to develop criteria and to articulate them is indicative of the fact that the Model Code and the Model Rules are deficient in this regard.

The tension is between being an effective negotiator and being truthful and has been noted succinctly and clearly by Professor Wetlaufer:

> Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one's effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. Our clients, our partners and employees, and our families are all counting on us to deliver the goods. Accordingly and regrettably, lying is not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.
>
> Our discomfort with that fact has, I believe, led us to create and embrace a discourse on the ethics of lying that is uncritical, self-justificatory and largely unpersuasive. Our motives in this seem reasonably clear. Put simply, we seek the best of both worlds. On the one hand, we would capture as much of the available surplus as we can. In doing so, we enrich our clients and ourselves. Further, we gain for ourselves a reputation for personal power and instrumental effectiveness. And we earn the right to say we

[33]Sowle, *Professionalism: Lip Service or Life Style,* 59 Jan. Or. St. B. Bull. 33 (1999).

[34]Dahl, *Ethics on the Table: Stretching the Truth in Negotiations,* 8 Review of Litigation, 173 (1979).

[35]Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better,* 87 Ky. L. J. 1019 (1999).

> can never be conned. At the same time, on the other hand, we assert our claims to a reputation for integrity and personal virtue, to the high status of a profession, and to the legitimacy of the system within which we live and work. Even Gorgias, for all his power of rhetoric, could not convincingly assert both of these claims. Nor can we. . . .[36]

6. THE NOT SO SUBTLE ART OF MISDIRECTION

Whether the articulated standard is that lawyers "must use any legally available move or procedure helpful to a client's bargaining position,"[37] an "almost pathological pro-client attitude,"[38] or "'total annihilation' of the other side,"[39] or other, less pejorative phrases, "effective" negotiation often means winning big, and this often involves, to use a kind euphemism, "misdirection." "Misdirection" can include either a true but incomplete statement of facts or silence, both of which are designed to lead the other party to an erroneous conclusion about the facts or your true position. The excuse for this behavior ("I didn't lie"), according to Professor Wetlaufer, can be categorized as follows:

> "[L]awyers sometimes assert that whatever they did was not a lie. These claims are of at least five kinds: (1) 'I didn't lie because I didn't engage in the requisite act or omission'; (2) 'I didn't *mean* to do anything that can be described as lying'; (3) 'I didn't lie because what I said was, in some way, literally true'; (4) 'I can't have lied because I was speaking on some subject about which there is no 'truth'; and (5) 'I didn't lie, I merely put matters in their best light.' "[40]

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[36]Wetlaufer, *Lying in Negotiations*, 75 Iowa L.Rev. at 1272.

[37]Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51:1 Maryland L.Rev. 1, 71.

[38]Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L.Rev. 311, 330.

[39]Lawry, *Central Moral Tradition* at 331.

[40]Wetlaufer, *Lying in Negotiations* at 1237.

Other categories where a "lie" or "mistruth" has been stated, according to Wetlaufer, fall into some of the following groups:

1. I lied, if you insist on calling it that, but it was an omission of a kind that is presumed to be ethically permissible.
2. I lied but it was legal.
3. I lied but it was on an ethically permissible subject.
4. I lied but it had little or no effect, because it was justified by the nature of the negotiations.
5. I lied but it was justified by my relationship to the victim.

As Professor Wetlaufer has written:

> ". . . A lie about a negotiator's authority is told with the same purpose and with the same effect as a lie about the true mileage of a used car. The speaker's hope is that, by creating some belief at variance with her own, she will get a better deal than she could have gotten without having created that belief. The advantages she may hope to secure through these lies are every bit as tangible, every bit as great, and every bit as illegitimate as those she might hope to secure through lies on other subjects. So is the damage that will be caused." Wetlaufer, Lying in Negotiations at 1242, 1243.

Whether one calls it "misdirection," "puffing," "bluffing," or some other term, one need not resort to biblical injunctions to find a discussion of whether absolute truthfulness is always desirable.[41] Thus, the Talmud admonishes one to refrain from all

[41]The Talmud, a 20-volume rabbinic exegesis on the Torah (the first five books of the Bible) dating from the third century, contains numerous comments and explanations of biblical language. Note: All the quotations and materials in this footnote are from *Studies in Shemot*, Book 2, by Nehama Leibowitz.

> The Bible contains a rule of fair dealing in pricing. Leviticus 25:1-17 deals with the concept of the Sabbatical Year and the Jubilee Year. Every seventh year the soil was to be untilled (the Sabbatical Year). Every 50th year the land was to lie fallow and all landed property was to revert to the original owners. During 49 of the years the land could be leased or sold, but during the 50th year it returned to the original owner. Obviously, the closer one got to the Jubilee Year, the less valuable the rights of the possessor/buyer/lessee. Likewise, the further from the Jubilee Year, the more the owner could get for the land. Leviticus 25:14-17 specifically requires that the price reflect the fair value of the land in relation to the Jubilee Year. As Leibowitz notes:
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> [T]he Torah is not concerned with exclusively protecting the interests of the purchaser to save him from exploitation, or those of the vendor, who has been forced by his straitened circumstances to sell his ancestral field. But both parties are equally admonished to abide by the principles of

varieties of dealings which depend upon obtaining a false value for things, or placing a false value on things. More importantly, one should not take advantage of the weakness of another, either by raising false hopes or by making tactless remarks. The Greeks and Romans wrote much on this subject.

Homer wrote, in the *Iliad*, "For hateful in my eyes, even as the gates of Hades, is that man who hides one thing in his mind but says another."[42]

Aeschylus had Prometheus say: "The worst disease of all, I say, is fabricated speeches and disguise."[43]

Cicero, in his letters to his son, describes a system of moral rectitude:

> "But the most luxuriantly fertile field of all is that of our moral obligations - since, if we clearly understand these, we have mastered the rules for leading a good and consistent life.
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> * * *
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> The most thorough analysis of moral obligations is unquestionably that of Panaetius, and on the whole, with certain modifications, I have followed him. The questions relating to this topic which arouse most discussion and inquiry are classified by Panaetius under three headings:
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> 1. Is a thing morally right or wrong?
> 2. Is it advantageous or disadvantageous?
> 3. If apparent right and apparent advantage clash, what is to be the basis for our choice between them?
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> * * *
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> So let us regard this as settled: what is morally wrong can never be advantageous, even when it enables you to make

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justice and honesty, which alone should reign in the world and which should not be crowded out by man's selfish greed.

[42]Iliad, Chapter 9.

[43]Aeschylus, *Prometheus Bound*, Translation by Paul Roche, Mentor Classics (1962-1964).

> some gain that you believe to be to your advantage. The mere act of believing that some wrongful course of action constitutes an advantage is pernicious."[44]

Cicero wrote about situations involving hard bargaining in business and sharp practices in the law. Among Cicero's examples was that of a merchant from Alexandria who brought a large stock of corn to Rhodes, which was in the midst of a famine. The merchant was aware that other traders were on their way from Alexandria with substantial cargoes of grain. The dilemma for the merchant farmer was whether he should tell the Rhodians this and get a lesser price, or say nothing and get a higher price. Cicero also posits the example of an honest man who wants to sell a house knowing that it contains certain defects of which he alone is aware. Should the seller reveal the defects and perhaps not sell the house at all or for a lesser price, or should he conceal them?

Cicero points out, using Antipater and Diogenes as two poles of the argument, that one position is to take a moral view and reveal everything while the other is that one should do only what is commercially advantageous. Cicero's own view is that one should not conceal any defects:

Cicero's examples: the corn merchant from Alexandria; and the seller of the defective house.

> I believe, then, that the corn-merchant ought not to have concealed the facts from the Rhodians; and the man who was selling the house should not have withheld its defects from the purchaser. Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know would be useful for them to know. Anyone can see the sort of concealment that this amounts to - and the sort of person who practices it. He is the reverse of open, straight forward, fair and honest: he is a

[44]Cicero, *Selected Works*, Translated by Michael Grant, Penguin Books, Copyright (1960), page 177.

> shifty, deep, artful, treacherous, malevolent, underhand, sly, habitual rogue. Surely one does not derive advantage from earning all those names and many more besides.[45]

Cicero traces the requirement of honesty and fair dealings to the Twelve Tables, the earliest and most fundamental of Roman laws, circa 450 B.C., and to the Plaetorian law, circa 192 B.C. Pointing out that honesty and fair dealing are appropriate criteria, Cicero notes that "the laws in our Civil Code relating to real property stipulate that in a sale any defects known to the seller have to be declared." A suppression of facts not asked about was impermissible. Cicero writes that although the civil law does not rectify all moral wrongs, there is nobility in the following formulas:

> "That I not be deceived and defrauded because of you and because of trust in you. And that other golden phrase: between honest men there must be honest dealing and no deception."[46]

Cicero then discusses what is honest dealing. This Roman view of the law was adopted by the French in their Civil Code. Robert Pothier, the great French jurist, stated:

> "Good faith obliges the seller not only to refrain from suppressing the intrinsic faults of what he sells, but universally from concealing anything concerning it, which might possibly induce the buyer not to buy it all, or not to buy at so high a price."[47]

Although civilian jurisdictions (such as Louisiana) have long since honored truth in negotiations, even enshrining these concepts in their Civil Codes, the common law

[45]Cicero, *Selected Works*, Grant Translation, at 178-179.

[46]Cicero, *Selected Works*, Grant Translation, at 185.

[47]R. Pothier, *Traite Du Contrait de Vente*, 2 OEUBRES de Pothier 106 (M.Dupin. Ed. 1823), translated by Professor Shael Herman in "The Louisiana Civil Code, A European Legacy for the United States," Louisiana Bar Foundation (1993) at 42.

took the opposite approach, postulating the rule of caveat emptor as opposed to the civilian concept of *caveat venditor*.[48]

In *Laidlaw v. Organ*, a famous common law case, Chief Justice Marshall rejected the concept of honesty and fair dealings when facts are "equally accessible to both parties."[49] The buyer, Organ, sought to compel delivery of tobacco that he had purchased. Laidlaw, the seller, claimed that he was deceived by Organ and did not have to deliver the tobacco. Laidlaw had asked whether Organ knew of anything that might affect the tobacco's value and Organ said nothing. In fact, Organ knew that the price of tobacco had risen steeply because the Treaty of Ghent had been signed, ending the War of 1812. Organ, the buyer, won because there was no obligation, said Justice Marshall, to speak. Remaining silent was permissible,[50] even though Organ knew that Laidlaw was under a misapprehension.[51]

When the facts are "equally accessible," do you really need honesty and fair dealing?

It is this type of outcome, where sharp bargaining on behalf of one party obtains an advantage that would not otherwise be there but for the silence or for the misdirection, that leads to "the sense of injustice."[52] Professor Edmond Cahn's famous book by this

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[48]Common law precepts are not subject to universal approbation. Litigators who had the distinction of arguing a case before the late, esteemed Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, and who have attempted to wax eloquent about the majesty of the Anglo-Saxon common law, sometimes elicited a quick response from Judge Wisdom. He liked to paraphrase Disraeli's famous statement to Parliament. Judge Wisdom was wont to look down at counsel from the Bench and proclaim:

> Counselor, when the Angles and Saxons were howling savages, painted blue and eking out an existence fishing on the fens of England, there was a civil law system of justice for more than 1,000 years on the Continent of Europe from which Louisiana derived its Civil Code.

[49]*Laidlaw v. Organ*, 15 U.S. (2 Wheaton) 178, 179 (1817).

[50]In fact, the brief of the buyer contended: "The maxim of *caveat emptor* could never have crept into the law if the province of ethics had been co-extensive with it." 2 Wheat at 193.

[51]For a critique of this view, see Professor Shael Herman's discussion in "The Louisiana Civil Code, A European Legacy for the United States," (Louisiana Bar Foundation 1993) at 42-43.

[52]Cahn, *The Sense of Injustice*, Indiana University Press (1964), Midland Book Edition.

title argues for a philosophy that restores a sense of justice and avoids a sense of injustice in the law.

> "Nevertheless, philosophers have long held the opposing opinion: that justice or righteousness is the source, the substance, and the ultimate end of law. Such a doctrine was announced at least as early as the Book of Leviticus and the masterpieces of the Athenian enlightenment. It developed under the influence of the Stoics through the centuries of decadence in the Roman republic and early empire, assumed a pseudo-Christian guise by the time of Justinian's *Corpus Juris*, flourished amid the brutalities of medieval Europe, and became, in the skillful hands of Thomas Aquinas, an authentic tenet of theology."[53]

[53]Cahn, *The Sense of Injustice*, Indiana University Press (1964), Midland Book Edition.

7. TRUTHFULNESS v. CLIENT CONFIDENCES

The ABA, in its initial 2002 adoption the E2K Model Rules, rejected any broad expansion of a lawyer's traditional role and refused to lessen the stringent requirements of confidentiality under Rule 1.6. E2K Model Rule 1.6, as proposed, required an attorney to reveal communications the lawyer reasonably believed necessary:

> "To prevent the client from committing a . . . fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

As proposed, confidential or even privileged information was not a bar; an attorney was to be allowed to speak out to prevent substantial financial injury to another if that lawyer's services were or had been used towards this end, even if this meant confidences would be breached and even if this meant that the lawyer's client would get less than if the lawyer had remained silent.

This rule, as proposed, enshrined the concept of a fair deal. The language was deleted by a vote of 63%, which mirrors a similar result in a 1983 proposal, where the fear was that the proposed Rule would transform a lawyer "into a 'policeman' over a client."[54] In view of this action, the ABA's E2K committee withdrew other proposed changes in Rule 1.6.[55]

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[54] Discussion, February, 1993 Mid-Year Meeting, Legislative History, p. 48.

[55] The text of the proposal and the House of Delegate's actions, showing **additions** and ~~deletions~~ to the previous rule, and ***~~deletions~~*** from the text of the ABA's E2K Committee's proposed rule, is set forth below:

1. RULE 1.6: CONFIDENTIALITY OF INFORMATION

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client ~~consents after consultation, except for disclosures that are~~ **gives informed consent, the disclosure**

The language requiring lawyers to act if a client was going to commit a "fraudulent act" causing substantial injury to the financial interests or property of others disappeared completely from the final text of E2K Model Rule 1.6, leading one to the conclusion that the ABA believed it proper for a lawyer to remain silent in the face of

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is impliedly authorized in order to carry out the representation~~, and except as stated in~~ **or the disclosure is permitted by** paragraph (b).

(b) A lawyer may reveal ~~such~~ information **relating to the representation of a client** to the extent the lawyer reasonably believes necessary:

[Amendment to reject the Ethics 2000 version and go back to previous version rejected by a vote of 213 to 207]

(1) to prevent ~~the client from committing a criminal act that the lawyer believes is likely to result in imminent~~ **reasonably certain** death or substantial bodily harm; ~~or~~

[Amendment to delete this provision entirely passed by 63%]

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

[The next provision was withdrawn in light of deletion of 1.6(b)2.]

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

[These provisions passed]

(4) **to secure legal advice about the lawyer's compliance with these Rules**;

~~(2)~~ (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) **to comply with other law or a court order.**

actions that, fraudulent or not, can cause substantial injury to the financial interests or property of another as long as the information is privileged or confidential.

The rule initially adopted by the ABA in 2002, immediately drew controversy, for more than half the jurisdictions had rejected wholesale protection of client privileges, and even before the ABA's E2K project had been put into place, many states had gone far beyond the 1983 Model Rules and had language similar to that rejected by the ABA on protection of rights of third parties.[56]

The advent of the Enron and Worldcom problems added impetus for change by the ABA, and when the ABA met in 2003, it rejected the broad scope of confidences that it just passed the year before and now adopted the E2K Committee's suggestion in full. [57]

8. THIRD PARTY LIABILITY: BEING SUED BY SOMEONE OTHER THAN YOUR CLIENT

It used to be hornbook law that a lawyer could not be liable to non-clients because (a) the only cause of action against a lawyer was in malpractice, and (b) there could be no malpractice claim in the absence of a contractual relationship to the plaintiff. "The classic

[56]For example, New Jersey rejected the text of the final version of the 1983 Model Rule in favor of one that reflected an earlier draft. See New Jersey's Rules of Professional Conduct 1.6.

[57] The current Model Rule 1.6 reads (emphasis supplied):

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm; or

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in **substantial injury to the financial interests or property** of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify ***substantial injury to the financial interests or property of another*** that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order.

case of such a circumstance is *Spaulding v. Zimmerman*, 263 Minn. 346, 116 N.W. 2d 704 (Minn. 1962). In that case, the defendants' lawyers knew the plaintiff, Spaulding, to have an aneurysm, a life-threatening condition of which Spaulding himself was unaware and which could mean instant death unless treated with simple surgery. *Id*. at 707. The lawyers concluded that their duty of confidentiality to their clients required that they keep the fact of the aneurysm confidential, and they did so, a move that came to light only when, two years later, Spaulding had an army physical that disclosed his condition. *Id.* at 708. Spaulding then petitioned to have the original settlement vacated, and although the court granted his motion, it took great pains in so doing to emphasize that 'no canon of ethics or legal obligation' required the lawyers to inform Spaulding or his counsel about the aneurysm. *Id*. at 710."[58]

The wall of privity, however, was breached first in will contests[59] and next in matters where lawyers had given opinion letters to third parties, for then courts could see a written agreement and analogize that to some type of implied contractual relationship, or at least see that claims of "reliance" by the third party were not inappropriate.[60] One ethicist has described these third parties as " 'quasi-clients,' people to whom the lawyer owes a duty greater than that due strangers but secondary to that due to the client."[61]

Most of the cases impose liability under one of two theories: "(1) a multifactor balancing test (sometimes referred to as the 'relational approach'); or (2) a traditional third-party beneficiary contractual concept (sometimes referred to as the 'categorical

[58]Dolovich, *supra*, at n.22.

[59]See Nancy Lewis, *supra* at p. 805, and her discussion of the California decision in *Biakanja v. Irving.* For a more complete discussion of lawyer liability in will contests and the "intended beneficiary exception" to privity, see: D. Culver Smith, III, "Professional Liability of Lawyers in Florida: Theories of Liability," PLLF-FL-CLE 1-1, The Florida Bar, "Professional Liability of Lawyers in Florida" (2002).

[60]For a detailed discussion of these cases nationally, see: D. Culver Smith, III, *supra*.

[61]Nancy Lewis, *supra* at p. 827, quoting from G. Hazard, ETHICS IN THE PRACTICE OF LAW, p. 45 (1978).

approach')."[62] Regardless of the underlying theory used, courts time and time again have held that if a third party reasonably relies upon an attorney's opinion letter, then the attorney is liable to the third party, whether the basis of the liability is "negligent misrepresentation" or "fraud" or some other type of innominate tort.[63]

Concerned with the expanding scope of liability, lawyers began creating voluntary standards that they hoped the courts would adopt in determining their liability to third parties. These were useful, however, only in transactional matters, where the potential for liability was typically to third parties who might rely upon a borrower's counsel opinion, and even in these instances, these voluntary standards have not proven as effective as their proponents had hoped.

On the other hand, the American Law Institute has two Restatements that directly relate to lawyer liability to third parties and which apply in both litigation and transactional situations: the Restatement of the Law Governing Lawyers[64] and the Restatement of Torts.

The Restatement of the Law Governing Lawyers ("ALI Lawyers Restatement") contains a number of provisions that directly relate to third party liability. §56 states that a lawyer can be liable to a nonclient "when a nonlawyer would be [liable] in similar circumstances." The examples given under §56 include: a fraud claim against a lawyer who "knowingly helps a client deceive"[65]; assisting a client commit a tort through acts which are themselves tortious;[66] a fraudulent misrepresentation that is something more

[62]D. Culver Smith, III, *supra*.

[63]See the cases collected by D. Culver Smith, *supra*, and in Steve McConnico and Robyn Bigelow, "Summary of Recent Developments in Texas Legal Malpractice Law," 33 St. Mary's L.J. 607 (2002).

[64]ALI Restatement of the Law Third, The Law Governing Lawyers (2000).

[65]ALI Lawyers Restatement §56, Comment c, p. 417.

[66]Id.

than "legally innocuous hyperbole";[67] as well as liability under federal securities laws, antitrust statutes, RICO, and consumer protection laws.[68]

The basis of this liability is the duty of care that lawyers owe to nonclients under §51 of the ALI Lawyer Restatement.[69] While some have criticized this standard as being too harsh on lawyers, since it does not look to whether the assistance to the nonclient is the sole (rather than simply one) of the primary purposes of the lawyer's actions,[70] it does

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[67] ALI Lawyers Restatement §56, Comment f, p. 418. This comment begins: "Misrepresentation is not part of proper legal assistance . . ."

[68] *Id.*, Comments (i) and (j), pp. 419-420.

[69] §51 of the ALI Lawyer Restatement ("Duty of Care to Certain Nonclients") provides:

For purposes of liability under § 48, lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

(1) to a prospective client, as stated in § 15;

(2) to a nonclient when and to the extent that:

(a) the lawyer or (with lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

(3) to a nonclient when and to the extent that:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

[70] "One commentator characterizes the Restatement approach as 'unique and questionable':

" 'The "primary objectives" inquiry is not the same as the judicially developed, intended-beneficiary standard. The focus of the common law is whether that nonclient is the intended beneficiary of the lawyer's retention; whereas the Restatement asks only if a benefit is "one of the primary objectives." Unlike the common-law principle, the Restatement does not look to the primary purpose, but only for one of several primary purposes. This deviation from the case law raises factual issues regarding the client's motives. Further, the multiple objectives could be inconsistent, so that claimant's perceptions of the lawyer's obligations could be in conflict with the client's objectives. The risk of conflicting interests is minimized, if not eliminated, by "the intended beneficiary" standard.' "

attempt to create a fact-specific balancing test while at the same time apparently allowing lawyers to attempt to limit liability by contractual language. This has been termed the "contractarian" view of liability.[71]

The comments to (but not the black letter of) §51 seem to acknowledge the possibility of contractual limitations on the scope of the duty and even indicate that the duty is less if there is experienced counsel on the other side of the table.[72] There is no explanation, however, why Lawyer X's duties to a nonclient should diminish solely because of the presence or absence of Lawyer Y on the opposite end of the table, apparently leaving one with the possibilities that either (a) experienced counsel Y shouldn't or wouldn't let Lawyer X get away with something bad, or, if something bad did happen, then (b) the nonclient should sue its own counsel Y rather than the other side's Lawyer X. This apparent rationale, however, could be attacked by the argument that, if something bad did happen, then it would appear Lawyer Y really wasn't as experienced as the nonclient anticipated, meaning that Lawyer X's duties to the nonclient shouldn't be diminished.

D. Culver Smith, III, "Professional Liability of Lawyers in Florida: Theories of Liability," PLLF-FL-CLE 1-1 (2002), commenting on and quoting from Mallen & Smith, Legal Malpractice , §7.8 at 697-698 (West Group 5th ed. 2000).

[71]See, e.g., Richard W. Painter, "Rules Lawyers Play By," 76 N.Y.U. Law Rev. 665, 696 (2001).

[72]§51, Comment (e), provides in part (emphasis supplied):

A lawyer may avoid liability to nonclients under Subsection (2) by making clear that an opinion or representation is directed only to a client and should not be relied on by others. Likewise, a lawyer may limit or avoid liability under Subsection (2) by qualifying a representation, for example by making clear through limiting or disclaiming language in an opinion letter that the lawyer is relying on facts provided by the client without independent investigation by the lawyer (assuming that the lawyer does not know the facts provided by the client to be false, in which case the lawyer would be liable for misrepresentation). The effectiveness of a limitation or disclaimer depends on whether it was reasonable in the circumstances to conclude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions *and whether the recipient is represented by counsel or a similarly experienced agent*.

Unlike the ABA's varied position on confidentiality in connection with the obligation to prevent financial loss, the ALI Lawyer Restatement §67 has always allowed a lawyer to disclose confidential information to "prevent, rectify, or mitigate"[73] a "substantial financial loss"[74] to a third person caused by a client crime or fraud even if the "loss has not yet occurred,"[75] but this can occur only if the "client has employed or is employing the lawyer's services in the matter in which the . . . fraud is committed."[76] Even if these criteria are met, §67 cautions that the attorney must first make a "good faith effort to persuade the client not to act"[77] if this is feasible or ask the client to "warn the victim"[78] or fix the problem. §67 closes with the caution that a lawyer who either acts or fails to act under its principles is not "solely by reason of such action or inaction"[79] liable in damages -- apparently it takes action or inaction plus something else.

Thus, both the ABA (since the most current change in Rule 1.6) and the ALI now hinge the lawyer's ability to disclose confidences that can result in substantial financial injury upon a "crime or fraud," and both allow disclosures to prevent reasonably certain death or substantial bodily harm. Yet, ALI Lawyer Restatement §66's black letter text[80] contains a number of additional restrictions on the lawyer before disclosure, including making "a good-faith effort to persuade the client not to act" and to ask the client to warn

[73]ALI Lawyer Restatement §67(2).
[74]ALI Lawyer Restatement §67(1)(a).
[75]ALI Lawyer Restatement §67(1)(b).
[76]ALI Lawyer Restatement §67(1)(d).
[77]ALI Lawyer Restatement §67(3).
[78]*Id.*
[79]ALI Lawyer Restatement §67(4).
[80] ALI Lawyer Restatement §66 is entitled "Using or Disclosing information to Prevent Death or Serious Bodily Harm."

the victim if the action already has occurred. Some of the Illustrations to §66 attempt to provide guidance to the lawyer faced with a substantial bodily harm issue.

Concerning financial harm, there are two Illustrations to §67 pertinent to litigators, whether they be transactional lawyers, litigators or otherwise. These Illustrations attempt to draw a distinction between acts which already have occurred without the lawyer's previous involvement, and those where the lawyer's services had been employed in some way (even without the lawyer's knowledge at the time) in the furtherance of a crime or fraud.

There are also four Illustrations to §67 that are pertinent to transactional lawyers, particularly those who represent developers and borrowers.[81] Two Illustrations contend that a lawyer who was engaged, after the fact, to defend in a regulatory arena a claim that

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[81]These Illustrations are:

> 3. Client has been charged by a regulatory agency with participation in a scheme to defraud Victim. Client seeks the assistance of Lawyer in defending against the charges. The loss to Victim has already occurred. During the initial interview and thereafter, Lawyer is provided with ample reason to believe that Client's acts were fraudulent and caused substantial financial loss to Victim. Because Lawyer's services were not employed by Client in committing the fraud, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.
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> 4. The same facts as in Illustration 3, except that the law of the applicable jurisdiction provides that each day during which a wrongdoer in the position of Client fails to make restitution to Victim constitutes a separate offense of the same type as the original wrong. Notwithstanding the continuing-offense law, commission of the fraudulent act of Client has already occurred without use of Lawyer's services. As in Illustration 3, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.
>
> * * *
>
> 5. Lawyer has assisted Client in preparing documents by means of which Client will obtain a $5,000,000 loan from Bank. The loan closing occurred on Monday and Bank will make the funds available for Client's use on Wednesday. On Tuesday Client reveals to Lawyer for the first time that Client knowingly obtained the loan by means of a materially false statement of Client's assets. Assuming that the other conditions for application of Subsection (2) are present, while Client's fraudulent act of obtaining the loan has, in large part, already occurred, Lawyer has discretion under the Subsection to use or disclose Client's confidential information to prevent the consequences of the fraud (final release of the funds from Bank) from occurring.
>
> 6. The same facts as in Illustration 5, except that Lawyer learned of the fraud on Wednesday after Bank had already released the funds to Client. Under Subsection (2), Lawyer's use or disclosure would be permissible if necessary for the purpose, for example, of enabling Bank to seize assets of Client in its possession or control as an offset against the fraudulently obtained loan or to prevent Client from sending the funds overseas and thereby making it difficult or impossible to trace them.

a client had defrauded a victim is not allowed to disclose the facts, for the lawyer was not "employed by the client in committing the fraud."[82] This nondisclosure is mandated even if there are penalties for continuing offenses.[83] Two other Illustrations allow a lawyer to disclose fraud in loan documents that the lawyer helped to prepare when the lawyer discovers the fraud after the fact, regardless of whether the loan has already closed.[84] These Illustrations, unlike the E2K Model Rules 1.6 and 4.1, recognize that a client cannot have the lawyer perform work that causes grievous financial losses and then expect the lawyer to remain silent, notwithstanding any expectations or rules of confidentiality.[85]

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[82]ALI Lawyer Restatement §67, Illustration 3.

[83]*Id.*, Illustration 4.

[84]*Id*, Illustrations 5 and 6.

[85]The full text of §67 ("Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss) reads:

> (1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:
>
> (a) the crime or fraud threatens substantial financial loss;
>
> (b) the loss has not yet occurred;
>
> (c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and
>
> (d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.
>
> (2) If a crime or fraud described in Subsection (1) has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.
>
> (3) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent, rectify, or mitigate the loss. The lawyer must, if feasible, also advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.
>
> (4) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

While §67 states in a comment (but not in the black letter text) that these exceptions to confidentiality are "extraordinary,"[86] it is clear that no longer can lawyers hide behind the Model Rules; courts can and will be looking to the ALI Lawyer Restatement as another basis to find liability.

The second basis used to impart nonclient liability to lawyers is §552 of the ALI Restatement (Second) of Torts,[87] which concerns justifiable reliance on the advice of a professional. §552 has been used by courts in addressing lawyers liability to those other than their clients.[88]

9. WHICH THIRD PARTIES MIGHT SUE YOU?

A discussion of the jurisprudence on third party suits is beyond the scope of this paper,[89] but one might consider a typical lease transaction to see the range of potential non-client plaintiffs who could be aligned against a lawyer or law firm. For the purpose of this discussion, assume there is a real estate transaction where lawyers on different sides of the table represent, respectively, the lender and the borrower/developer. The primary classes are those who are related, directly or indirectly, as stakeholder or

[86]ALI Lawyer Restatement §67, Comment (b), p. 506.

[87]Torts Restatement §552 reads, in part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

[88]See, e.g., *First National Bank of Durant v. Trans Terra Corporation International*, 142 F.3d 802 (5th Cir. 1999); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (S.Ct. Tex. 1999).

[89] For a more detailed analysis and discussion of this problem and of the jurisprudence, see Rubin, "From Screens and Walls to Screams and Wails: A Selective Look at Screening Among The Various Ethics Rules and Cases and A Consideration of Some Unanswered Questions," The ACREL Papers, Fall, 2001 (ALI-ABA); "Breaching the Protective Privity Wall: Expanding Notions of Real Estate Lawyers' Liability to Non-Clients," The ACREL Papers, Fall 2002 (ALI-ABA).

otherwise, to (a) the borrower/developer or (b) the lender. Given the discussion above, it may not be unexpected that a lawyer who represents solely the lender, or solely a developer or borrower, may find that liability is sought to be imposed by nonclients on the other side of the table.

a. Nonclients on the *Borrower/Developer* Side of the Table

Assume you represent solely the borrower/developer. Despite your best efforts, you may find the following may seek to assert a claim against you for your actions or inactions:

a(i). **Regulators.**

There are many regulators of your client who may have an interest in your actions. Of course, there are always the environmental regulators,[90] and it is clear that there is a pronounced expectation that lawyers provide timely information of environmental dangers.

In fact, E2K Model Rule 1.6 created a specific exception from confidentiality when disclosure is needed to prevent "reasonably certain death or substantial bodily injury." This is a change from the former 1.6, which spoke of "imminent death," and the E2K comments specifically refer to a situation where a lawyer who knows that the client has accidentally discharged toxic wastes that will cause life-threatening or debilitating disease; in such a situation, even if the disease won't manifest itself until some point in the future, the lawyer is given discretion to make disclosure.

It is not far-fetched to imagine a suit brought against an attorney who failed to give such disclosure and the calumny that would be heaped upon an attorney who attempted to defend silence by reliance on the duty of confidentiality.

[90]For an overview of environmental reporting requirements, *see*: Pamela R. Esterman, "Reporting Obligations and Ethical Issues Confronting Environmental Lawyers," 476 PLI/Real 547, Practicing Law Institute Real Estate Law and Practice Course Handbook Series, Dec. 2001.

Other examples of regulators of your client might be the S.E.C., OHSHA, the NLRB, state Blue Sky officials, licensing boards, and zoning officials.

a(ii) **Owners**

A second category of nonclients consists of the owners of your client, whether these be limited partners, limited liability members, or shareholders. While your obligation as counsel runs to the entity, and while E2K Model Rule 1.13 maintains the rule that a lawyer must deal with the organization's "duly authorized constituents,"[91] there is emphasis placed on determining who is best able to watch out for the interest of the entity; it may be that the "highest authority reposes elsewhere, for example, in the independent directors of a corporation."[92]

What is one to do, however, in an organization where there is no "independent" administrator/partner/manager? One can imagine claims being made that, in such an instance, a lawyer may owe a duty directly to the independent, non-managerial owners if the managerial owners are acting in ways that are contrary to the best interests of the entity. Consider, for example, the equivalent of a freeze-out merger[93] being conducted for a limited liability company, where the minority owners are cashed out at an unreasonably low price and the surviving entity is merged into a new ownership vehicle controlled by the former LLC's Managing Member and principal shareholder. In that case, might a claim be made that the lawyer for the LLC owes a duty to the minority owners to disregard both the instructions and "confidentiality" of the Managing Member and give disclosure to the minority owners who do not have their own attorneys?

[91]E2K Model Rule 1.13(a).

[92]E2K Model Rule 1.13, Comment 4.

[93]For a general discussion of appraisal issues in freeze out mergers, see Rutherford B. Campbell, Jr., "Fair Value and Fair Price in Corporate Acquisitions," 78 N.C. L. Rev. 101 (1999).

a(iii) **Guarantors**

Guarantors of loans, while they generally waive almost all waivable rights and face carve-outs from non-recourse loans,[94] may have certain expectations that the entity (and its lawyers) won't leave them deliberately swinging in the wind. Thus, despite waivers given in favor of lenders (including the typical representation and warranty in the guaranty that the guarantors have adequate means of informing themselves about the borrower's financial condition and waive any kinds of notices from the lender), guarantors might assert that they had a reasonable expectation that the borrower and its counsel would inform them of significant matters that would affect their guaranty.

a(iv) **Employees**

Employees, including those whose employment or retirement are implicated by entity action, are increasingly agitating for protection. Given the huge losses in some pension plans of late when companies evaporate, when their stock slides precipitously, or when they seek bankruptcy protection, it is not unthinkable that, even apart from ERISA claims (which may be hard to prove, for lawyers are not necessarily plan fiduciaries[95]), it can be anticipated that employees may consider filing claims against attorneys for the entity who failed to disclose matters that are critical to the employee well being. Although extension of lawyer liability to this arena may be tenuous at best – particularly

[94]For a general discussion of guarantors and carve outs, see: Laura E. Hannusch, "Borrower's Agenda" 478 PLI/Real 747, Practising Law Institute Real Estate Law and Practice Course Handbook Series, Commercial Real Estate Financing: What Borrowers and Lenders Need to Know Now (2001); Joshua Stein, "Lender's Model State-Of-The-Art Nonrecourse Clause (With Carveouts), 469 PLI/Real 119, Practising Law Institute Real Estate Law and Practice Course Handbook Series, Commercial Real Estate Financing: What Borrowers and Lenders Need to Know Now, San Francisco (2001); Caryl B. Welborn, "Guaranty of Borrower's Non-Recourse Obligations, SE15 ALI-ABA 1627, Modern Real Estate Transactions (1999); Meredith J. Kane, 444 PLI/Real 1083, "Borrower's Hot Buttons in Loan Negotiations," Practising Law Institute Real Estate Law and Practice Course Handbook Series, Commercial Real Estate Financing: What Borrowers and Lenders Need to Know Now (1999).

[95]"A provider of professional services to a plan does not thereby become a fiduciary within the meaning of the Act. *Custer v. Sweeny*, 89 F.3d 1156 (4th Cir. 1996) (lawyers); *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991) (lawyers); *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) (lawyers); see also *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1993) (attorney representing ERISA beneficiary in personal injury action not liable as plan "fiduciary" for failing to honor fund's subrogation interest). This comports with U.S. Department of Labor regulations. See 29 C.F.R. s2509.75-5." D. Culver Smith, III, *supra*.

in organizations with unions that supposedly protect employee interests or in states with at-will employment – it cannot be discounted in this increasingly lawyer-unfriendly environment.

a(v). **Bankruptcy Trustee**

If the entity goes bankrupt, the privilege runs to the Trustee, not the former entity or owners, so the lawyer cannot withhold information based on claims of confidentiality.[96] The bankruptcy trustee also has the ability to bring a malpractice action.[97]

If a guarantor or investor could state a claim against an attorney for the entity, then it can be anticipated that the Trustee for the guarantor or investor might make such a claim as well.

b. Nonclients on the *LENDER* Side of the Table

Continuing on with the hypothetical that you represent the borrower, it is clear from the cases, E2K, and the Restatements that the lender might seek to hold you liable for your opinion letters. Whether you will be able to limit that liability by careful language, by opting into the Accord, or whether the presence of experienced counsel on the other side of the table will relieve you of an extra duty of care remains to be seen.

Beyond opinion letters, however, it can be anticipated that assisting your client in the preparation, editing, or distribution of fraudulent or misrepresenting information may lead to lawsuits not only by the lender, but also those who are "related" to the lender, such as: regulatory bodies (the F.D.I.C., FSLIC, state insurance regulators, *etc*.); loan participants; owners/stakeholders of the lender; and even Trustees of lenders placed into rehabilitation.

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[96] *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). *Also see: In re Foster*, 188 F.3d 1259 (10th Cir. 1999).

[97] *Cf. In re Alvarez*, 224 F.3d 1273 (11th Cir. 2000), *cert. denied*, 531 U.S. 1146, 121 S.Ct. 1083 (2001).

It is beyond the scope of this paper to go into all the permutations here, but suffice it to say that it seems inevitable that there will be attempts to expand the universe of potential liability claims that nonclients could assert against lawyers.

c. What if You Are Lender's Counsel?

If you represent the lender, you have the same issues for "related parties" to the lender that borrower's counsel has on the other side of the table. There can be the potential for creative claims by regulators of the lender, owners/investors in the lender, and employees of the lender. There are also potential claims that could be asserted against lender's counsel from the borrower's side, including by the borrower or guarantors.

There is one other possibility, however, that lender's counsel might wish to consider. Sometimes, in multi-state transactions, it is the lender's counsel who contacts local counsel for opinions, but the local counsel actually is writing the opinion on behalf of the borrower (on such matters as qualification to do business and "realization" rights under loan documents) with minimum contact from the borrower. There is some authority to hold a lawyer liable for negligent referral to incompetent counsel;[98] whether that will be extended to the lending area remains to be seen.

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[98]One commentator (D. Culver Smith, III, *supra*) has written:

> A lawyer is not vicariously liable for the negligence of outside counsel to whom the lawyer has referred the client and whom the client has retained independently. *Michael H. Bloom, P.A. v. Dorta-Duque,* 743 So.2d 1202 (Fla. App. 3d DCA 1999); *Christensen, O'Connor, Garrison & Havelka v. State Dept. of Revenue,* 649 P.2d 839 (Wash. 1982). A lawyer can have primary liability, however, for negligent selection of or manner of referral to other counsel. See *Tormo v. Yormark,* 398 F.Supp. 1159 (D. N.J. 1975) (failure to investigate qualifications of lawyer to whom case referred); *Miller v. Metzinger,* 154 Cal.Rptr. 22 (Ca.App. 2d Dist. 1979) (referral to outside counsel without informing client of imminent expiration of statute of limitations).
>
> The rule that a lawyer is not vicariously liable for the negligence of outside counsel to whom the lawyer has referred the client assumes a true referral rather than an association of outside counsel into the case. That is, the referring lawyer must have been divested of all responsibility for handling the client's matter.

10. NON-LITIGATION NEGOTIATIONS AND LIABILITY TO THIRD PARTIES

Although the vast bulk of negotiations take place outside of a litigation context, the rules (if any) that regulate negotiations are determined primarily by judicial decisions that, of necessity, occur after litigation. There are few reported ABA advisory opinions on the ethics of non-litigation negotiations.[99] The American Law Institute has completed the Restatement of Law Governing Lawyers. The Restatement goes beyond the Model Code and the Model Rules in some respects and allows for discipline in negotiations even though the conduct may not be civilly actionable, but "puffing" is still allowed.

When it comes time for a court to rule on the limits of ethical behavior of lawyers, the court's view often may be colored by the separate statutory and jurisprudentially evolved standards that control an attorney's duty to the court and to the judge. In making such rulings, however, seldom do courts explicitly discuss the differences between the professional rules that relate to negotiations as opposed to court-related principles.

Analogies to the need to have truthful, fair dealing can be found in securities litigation. There, a separate body of law regulates what are "material facts" and "material omissions." Professionals can be "aiders and abettors" in securities fraud cases.

Even in the securities field, where the liability is statutory, courts have differing views on whether obligations to the public outweigh obligations to clients or to a corporation. A famous example is the *Dirks* case.[100] The federal court of appeals had held that Dirks, a respected financial analyst, was properly disciplined for failing to disclose to

[99] See, ABA Inf. Opinion 86-1518 (1986). For a state opinion, see N.Y. County Lawyers' Association Committee on Professional Ethics Op. No. 686 (1991) on the responsibilities of a lawyer who discovers that his client may have given materially inaccurate information to the other side; cited in Tentative ALI Draft #9, Restatement of Law Governing Lawyers.

[100] *Dirks v. Securities and Exchange Commission*, 681 F.2d 824 (D.C.Cir. 1982), reversed *sub nom. Dirks v. S.E.C.*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983).

both the S.E.C. and the public information concerning a company's creation of false policies and records. The fact that the financial analyst attempted to get the Wall Street Journal to publish a story about the issue did not cleanse the failure to disclose the information to the S.E.C. or the public.[101] Reversing the appellate court decision, the Supreme Court held that Dirks (as a tippee of a tippee) had no duty to disclose. Because there was no breach of duty to shareholders by insiders, "there was no derivative breach by Dirks."[102] The dissent would have found Dirks liable, claiming that an inquiry into motives was not necessary.[103] Although the motives may have been "laudable, the means he chose were not. * * * As a citizen, Dirks had at least an *ethical obligation* to report the information to the proper authorities."[104] If the courts have difficulty in delineating ethical duties in the highly regulated securities field, then it is not unusual that the regulation of ethics in general negotiations is said by some to be even more troublesome.

One commentator has even asserted that lawyers can “misrepresent” some issues with impunity:

> “Almost all negotiators expect opponents to engage in "puffing" and "embellishment." Advocates who hope to obtain $50,000 settlements may initially insist upon $150,000 or even $200,000. *They may also embellish the pain experienced by their client, so long as their exaggerations do not transcend the bounds of expected propriety*. * * *

[101] “Dirks also acted knowingly when he passed on his information to clients before going to the SEC, in violation of his duty to the public and the SEC and in violation of his informants' disclose-or-refrain obligations. Therefore, it is not precisely relevant whether Dirks subjectively "knew" that his clients would trade. He knowingly took improper actions and put parties who were reasonably likely to trade without disclosure in a position to do so. * * * The record thus amply supports the SEC’s finding that Dirks acted with requisite scienter for aiding or abetting liability under Rule 10b-5.” 681 F.2d at 846.

[102] 463 U.S. at 667. 103 S.Ct. at 3268.

[103] Dissent of Justice Blackmun, joined by Justices Brennan and Marshall, 463 U.S. at 674, 103 S.Ct. at 3271.

[104] Emphasis supplied; 463 U.S. at 677, 103 S.Ct. at 3273.

> "*It is thus ethical for legal negotiators to misrepresent the value their client places on particular items.* For example, attorneys representing one spouse involved in a marital dissolution may indicate that their client wants joint custody of the children, when in reality he or she does not. Lawyers representing a party attempting to purchase a particular company may understate their client's belief regarding the value of the goodwill associated with the target firm. So long as the statement conveys their side's belief--and does not falsely indicate the view of an outside expert, such as an accountant--no Rule 4.1 violation would occur.
>
> *Legal negotiators may also misrepresent client settlement intentions*. They may ethically suggest to opposing counsel that an outstanding offer is unacceptable, even though they know the proposed terms would be accepted if no additional concessions could be generated." [105]

There are cases that deal with negotiations in non-litigation transactions. Most involve alleged fraud by a seller or lender and the lawyer's liability, particularly if there was but one lawyer handling all aspects of the closing for the lender, buyer, and seller.[106] These cases usually involve claims of self-dealing or mixed representation.

In New Jersey, *Baldasarre v. Butler*[107] has provided a cautionary note for all attorneys who attempt to represent both buyer and seller. There, even though the attorney attempted to obtain written consents from both the buyer and seller, the attorney found himself in an untenable conflict when the buyer attempted to "flip" the property to a third party while continuing to negotiate for extensions on the closing with the seller. What is intriguing about the case, however, is not only the conflict-of-interest issue, but also an unspoken issue – consider what would have happened had the attorney represented *only*

[105] Craver, ""Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive," 38 S. Tex. L. Rev. 713, 726 (1997).

[106] See, Louisiana State Bar Association v. Klein, 538 So.2d 559 (La. 1989).

[107] 132 N.J. 278, 625 A.2d 458 (1993).

the buyer. As the Court noted, the problem in the case was the dual representation by the attorney; the Court found no duty by the buyer to inform the seller that the buyer was going to obtain a great profit by executing an assignment or sale of his rights once the sale with the seller was closed. In fact, the Court found that the buyer "had no duty to disclose"[108] his intended use or profit – in other words, the buyer could deceive the seller and refuse to give truthful information. Thus, theoretically, an independent attorney for the buyer would likewise have been under no compunction to reveal the potential "flip" of the property and would not have violated the New Jersey Rules of Professional Conduct in remaining silent, even had the purchaser asked about the buyer's intended use of the property. Indeed, the Court explicitly noted that the buyer's silence was perfectly permissible and that the buyer "did no wrong."[109]

Contrast *Baldasarre v. Butler* with *Petrillo v. Bachenberg*,[110] where there was alleged negligent misrepresentation by a seller's attorney involving percolation tests on the property. While *Baldasarre* held a lawyer culpable because of a conflict of interest involving two clients on opposite sides of a deal, *Petrillo* determined that the attorney could be liable to a non-client in the furnishing of a percolation test report that was not "complete and accurate" but rather was apparently a composite of two different reports. Notwithstanding the broad rule of *Petrillo*, New Jersey has refused to make a violation of the Rules of Professional Conduct "a basis for civil liability against an adversary's

[108] *Id*., 625 A.2d at 464.

[109] *Id.*

[110] 263 N.J.Super. 472, 483, 623 A.2d 272 (App.Div.1993) (same), aff'd, 139 N.J. 472, 655 A.2d 1354 (1995).

attorney." *Baxt v. Liloia*, 155 N.J. 190, 197; 714 A.2d 271, 274 (N. J. 1998).[111] Of course, this does not mean that a violation of the ALI Restatement might not lead to liability.

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[111]The Court in *Baxt* stated (155 N.J. at 206 *et seq.*, 714 A.2d at 279 *et seq.*):

> The record before this Court presents an object lesson in unprofessional behavior by experienced and knowledgeable trial lawyers. For a period spanning the course of at least one month, between November and December 1991, defendants Liloia and Sylvester knowingly and deliberately obstructed the discovery process in the Summit foreclosure action by misleading plaintiffs about the source of the signed modification agreement and by refusing to respond candidly to specific requests for direct and accurate information. The sequence of events during which this behavior took place can be briefly described.
>
> In June 1991, the bank produced its credit file for Grove's inspection. At that time the file contained one copy of the modification agreement signed only by bank officer Jennifer Calenda. From July 31 to August 1, 1991, Grove in turn produced documents for the bank's inspection, wherein defendants found and copied an original modification agreement signed by Paul Hartman and witnessed, notarized and signed by Calenda. Subsequently, on September 27, 1991, Summit filed a motion for summary judgment, attaching in support a copy of the executed modification agreement obtained through discovery. Grove opposed Summit's motion and filed a cross-motion to compel depositions, which was granted.
>
> Grove's attorney, by letter dated November 27, 1991, requested that defendants make the "bank's original credit file" available for her use during her scheduled depositions. Presumably this request was not honored at the November 30, 1991 deposition of Scott Witherspoon, a former bank officer, as Grove's attorney renewed her request by letter dated December 1, 1991. Prior to the next scheduled deposition, defendant Liloia instructed Calenda to insert the copy of the agreement signed by Hartman and found in Grove's files into the bank's credit file.
>
> At the December 4, 1991 deposition of Calenda, Grove's attorney attempted to find out whether the bank had ever received an original copy of the modification agreement signed by Paul Hartman. Defendants Liloia and Sylvester promised to investigate whether the bank had received an original or a facsimile only. During the deposition, Grove's attorney also repeated her request for access to the bank's original files. Although it does not appear that she received the files at the deposition, defendant Sylvester did indicate by letter dated December 5, 1991 that "the original files were produced again" for her inspection on December 4.
>
> On December 7, 1991, prior to a second deposition of Witherspoon, Grove's attorney reviewed what Sylvester characterized as "the original bank files" and listed for the record the documents she found, including the copy of the signed modification agreement. In the deposition which followed, the attorney repeatedly requested that defendant Sylvester produce "the document on which [the bank] moved for summary judgment." Even more specifically, she asked Sylvester if "[t]he copy annexed to the motion for summary judgment[ ] was ... taken from the bank's files?" The following colloquy took place:
>
> Mr. Sylvester: I'm not here to answer questions. I don't know. You know, I'm not going to answer the questions.
> Ms. Chaitman: Can you tell me where else it would have been?
> Mr. Sylvester: I'm not saying where it was taken from, I'm not here.
> Ms. Chaitman: Let me say this. When the documents were produced to us, there was no Mortgage and Note Modification Agreement produced with any signatures on it other than Jennifer's and ... I'm wondering if it came out of some file other than produced to us....
> Mr. Sylvester: Okay. I'll take your request under advisement. Let's proceed.
>
> *At this point, if not before, defendants certainly should have disclosed that the modification agreement on which the bank moved for summary judgment was a copy of the agreement in the bank's files, having been placed there by the defendants after they discovered it among Grove's papers. This disclosure was not made.* (Emphasis supplied).

Moreover, note that the *Petrillo* court seemingly made the attorney liable not to a specific purchaser but to ***any*** *purchaser* who might reasonably be expected to rely upon the composite report. *Petrillo* even recognized (unlike some legal critics) that lawyers are human: ""[i]n many situations, lawyers, like people generally, may not have a duty to act, but when they act, like other people, they should act carefully."[112] *Petrillo* is a cautionary tale for real estate lawyers who prepare or assist in the preparation of misleading documents, even if the document does not contain a traditional "opinion" or even the lawyer's signature on it.

The lack of necessity of expert testimony in certain instances was approved in *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Company,* 58 F.Supp.2d 503, 524 (D. N.J. 1999), for there are certain matters about a lawyer's liability, wrote the court, which are " 'so basic' that 'a layperson's common knowledge is sufficient to permit a finding that the duty of care has been breached.'"[113]

11. A LOOK AT SOME FAMILY LAW NEGOTIATIONS

One of the few reported cases involving pre-litigation negotiations that does not involve securities or a sale of property nor a writing by a lawyer who was alleged to have acted wrongfully is *Stare v. Tate*.[114] The case arose out of a property settlement in a divorce. The wife's attorney, through a series of negotiations, offered a property settlement with a serious mistake in the valuation of the property. The mistake was to the wife's detriment. The husband's attorney was aware of the mistake and counter-offered using the same mistaken valuation number. The counter-offer was accepted by the wife's

[112]*Id*. at 1354.

[113]Quoting with approval from *Sommers v. McKinney,* 287 N.J. Super. 1, 10, 670 A.2d 99 (App. Div. 1996).

[114]21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (Cal. App. 2d 1971).

attorney and the instrument reflecting the counter-offer was later approved by a court as a property settlement.

After the divorce became final, the former husband, apparently seeking to rub salt in the wound, sent the former wife a copy of the mistaken valuation with a notation on it, "Please note $100,000.00 mistake in your figures." After receiving the note, the former wife filed suit to revoke the property settlement. The court allowed the property settlement to be revoked on the notion of unilateral mistake. Underlying the court's holding, although not explicit, is the implication that the former husband's attorney, who had knowledge of the mistake in making the counter-offer, had the duty to inform his opposing counsel of the mistake in valuation.

Arguably the husband's lawyer's behavior did not fall within the prohibition of Rule 4.1, which only prohibits making a "false statement of material facts." While the Comment to Rule 4.1 states that a misrepresentation can occur "if a lawyer incorporates or affirms a statement of another that the lawyer knows is false," the valuation arguably was not false, simply mistakenly low. Would a bar association discipline the husband's lawyer in this instance? Would there be endless arguments whether the valuation was "false" and whether the husband's lawyer made a "statement" or merely remained silent. Was the statement "material?" Is this the type of problem that Justice Marshall would have no problem disposing of as in *Laidlaw v. Organ*, holding that the information is equally available to both sides?

12. BAR DISCIPLINARY PROCEEDINGS INVOLVING NEGOTIATIONS

Cases where ethics of non-litigation negotiations were the subject of state bar association disciplinary proceedings are few and far between.

An interesting proceeding is *Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992), in which the state Supreme Court dismissed charges against an attorney for whom the bar had recommended public discipline. The attorney handled negotiations between his father and his father's employee, who embezzled over $300,000.00 from the company. Originally, the employee agreed to cooperate, to work for the company until it was sold, and to help find the missing funds. The embezzler's father was then called to a meeting whose purpose "unquestionably was to determine if [the father] would cover the losses caused by the son."[115] Afterwards, the lawyer sent the embezzler a "final demand" letter giving him a choice between a "strict financial arrangement" for repayment of the embezzled money or criminal prosecution." Only after the negotiations broke down was the son turned over to authorities and later convicted. The court found no problem with the attorney's action. There was no violation of West Virginia law.[116] Likewise, no violation of Disciplinary Rule 7-105(A) was found, and the court noted this rule was not brought forward into the Rules of Professional Conduct. Although its sanctions applied to the conduct of the attorney at the time, Disciplinary Rule 7-105(A), which prohibits a lawyer from threatening to present criminal charges only to obtain an advantage in civil matters, was found by the court to be "unworkable." The court quoted from Professors Hazard and Hodes' book, *The Law of Lawyering, A Handbook On The Model Rules Of Professional Conduct*,[117] that one of the reasons that Disciplinary Rule 7-105(A) was

[115]*Committee on Legal Ethics v. Printz*, 416 S.E.2d at 722.

[116] Although a West Virginia statute prohibited a victim of a crime from seeking restitution in lieu of criminal prosecution, the court found this statute "void under the Doctrine of Desuetude," 416 S.E.2d 720 and 727. The Doctrine of Desuetude is based upon the concept of an old law so out of use that it would be unfair to apply it today. It is interesting to note that in ruling on Desuetude, the court quoted from *Pryor v. Gainer*, 177 W.Va. 218, 225, 351 S.E.2d 404, 411 (1986), which itself cited the applicable principle "found in Book 10 of the Digest of Justinian." Of course, the Justinian Code was one of the foundations of the civil law.

[117]Section 4.4:103 (Prentice Hall Law & Business 1990).

omitted from the Model Rules was because the standards "were overbroad, because they prohibit *legitimate* pressure tactics and negotiation strategies." (emphasis supplied). Obviously, the West Virginia Supreme Court has a high regard for "legitimate pressure tactics and negotiation strategies." The court did not even address the question of whether the lawyer had an ethical duty to turn the embezzler over once the embezzlement was discovered, particularly since the attorney had no attorney-client relationship with the embezzler, but, rather, with the corporation which was itself defrauded. Why should the attorney's desire to have the corporation made whole allow the attorney to remain silent and refuse to turn over to the law an admitted felon? Certainly, such a rule would not apply had the corporation been a national bank, because there are specific rules that require disclosure of employee-committed crimes to the pertinent authorities.

New Jersey has disbarred lawyers who commit fraud in negotiations. *Matter of Silverman*,[118] involved a lawyer who had put together improper financial statements in an attempt to obtain financing for himself and his client and even had "acquiesced in [the client's] forger of [the client's] wife's signature on the . . . loan guarantee."[119] Yet, as is

[118]113 N.J. 193, 549 A.2d 1225 (N. J. 1988).

[119]Id. at 210, 211:

> Our independent review of the facts admits of no conclusion other than that respondent committed numerous ethical transgressions, demonstrated by clear and convincing evidence in the record. In his zeal to obtain adequate financing to consummate the acquisition of HLW, respondent prepared various statements and documents containing knowing misrepresentations of highly material facts. For example, in the prospectus, containing both his and Ferber's financial statements, and on the Liberty Loan application, respondent exaggerated or created non-existent assets and ignored or understated significant liabilities. Respondent altered the net income figure of the Kaufman 1978 HLW financial statement and, along with the prospectus, submitted it to the Weir group; respondent also altered, without Ferber's knowledge, a key figure on the closing memorandum agreement dictated by Robertson.
>
> Further, several misrepresentations were effected by omissions on respondent's part: (1) in his June Twelfth letter to Waters respondent enclosed the Liberty commitment letter without disclosing that it had been revoked; (2) at the closing respondent signed the Robertson memorandum, which stated inter alia that there had been no material adverse change in HLW's financial condition since the first of the year, but failed to reveal that he had executed an agreement with Waters acknowledging the alleged existence of such adverse change; and (3)

shown by the language in *Baldasarre*, actions short of fraud have not been heavily scrutinized when the lawyer is seen as assisting the client within the scope of the Model Rules, even if a third party is harmed. Whether that result will be the same in the future remains to be seen.

13. SO, WHAT'S A LAWYER TO DO: NOSY LAWYER, NOISY WITHDRAWAL, OR NOISOME SILENCE?

Assume that you come upon a situation where you recognize the possibility of an action against you by a nonclient, such as fraud committed by your client while using your services, or information in documents you prepared that you subsequently come to learn is inaccurate or misleading. A serious dilemma is posed for cautious counsel.

a. What's The Rule, and Where is It Found?

If financial fraud is involved, and if you are in a state which still has the text of old ABA Model Rule from 1983 and which contains nothing express on financial injury, then revealing information, even for serious client financial fraud, may expose the lawyer to potential adverse disciplinary action and a claim by the client whose confidences are revealed. On the other hand, not to reveal the fraud may expose you to litigation claims by the adverse party, particularly in light of the language of the ALI Lawyer Restatement §§ 51, 52, and 67.

Can the mere breach of professional rules be a basis of civil liability? The disciplinary rules expressly disclaim that they can be the basis of non-discipline liability.[120] ALI Lawyer Restatement §54(1) states that a "lawyer is not liable under §48

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respondent withheld from Ferber and Robertson many of the details concerning side agreements he had made with Mento, Weir, and others that affected the stability of HLW. Respondent also acquiesced in Ferber's forgery of his wife's signature on the Manufacturers Hanover loan guarantee.

[120]See the comments to the Preamble to E2K. The following excerpt shows changes from the former 1983 Model Rule:

> "~~[18]~~ 20. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. * * * The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. * * * ~~Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of~~

or §49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule."

The E2K Preamble changed the old rule. Under MR Preamble 18, it was stated that the "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." E2K changed that. This language was deleted, and in its place was substituted the phrase that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

Then, there is the added problem of multi-state transactions, where the disciplinary rules of the various states differ and the status of state-adoption of the ABA Model Rule is not uniform.[121] Conflict-of-law in disciplinary rules is a topic which is beyond the scope of this paper. The issue, however, is one which must be determined before you can decide upon your course of action.[122]

Once you have figured out what rule applies and that you are in fact at risk, what are you to do? E2K Model Rule 1.16 ("Declining or Terminating Representation") suggests that one remedy for a lawyer is withdrawal, and the comments to E2K Model Rule 1.6 ("Confidentiality of Information") indicate that the withdrawal can be "noisy": *i.e.*, that you can signal to the opposing side something more than the mere fact of withdrawal by some indication that puts the opposing side on notice to investigate

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~~lawyers or the extra-disciplinary consequences of violating such a duty.~~ Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct."

[121] For a current update on the status of which states have adopted the ABA Model Rule on multi-jurisdictional practice and other information on this area, see the ABA's Center for Professional Responsibility's Commission on Multijurisdictional Practice web page, http://www.abanet.org/cpr/mjp-home.html.

[122] For more on the choice of law issue, see: Charles W. Wolfram, "What Needs Fixing? Expanding State Jurisdiction to Regulate Out-of-State Lawyers," 30 Hofstra L.Rev. 1015 (2002); Larry E. Ribstein, "Ethical Rules, Law Firm Structure and Choice of Law," 60 U. Cin. L. Rev. 1161 (2001); Harriet E. Miers, "Commission on Multijuridictional Practice," 11 No. 4 Prof. Lawyer 20 (2000); and H. Geoffrey Moulton, Jr., "Federalism and Choice of Law in the Regulation of Legal Ethics," 82 Minn. L. Rev. 73 (1997).

further, such as a disavowal of work product.[123] ABA Formal Opinion 92-366 attempted to illustrate the problem and provide a solution, but the ABA Committee's split 5-3 vote on the resolution did little to provide reassurance that the rules are clear.[124]

What is one to do if you want to make a noisy withdrawal and whom do you tell? Assuming that you won't get into trouble with the client (who may sue your for breaching a confidence), and assuming that you've got to say something, what do you say?

E2K Model Rule 1.16 allows an attorney to withdraw if it can be accomplished without "material adverse effect on the interests of the client."[125] A noisy withdrawal,

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[123]For discussions of "noisy withdrawals," *see*: C.R. Bowles, Jr., "Noisy Withdrawals: Urban Bankruptcy Legend of Invaluable Ethical Tool?" 20 Oct. Am. Bankr. Inst. J. 26 (2001); Daniel Pope and Helen Whatley Pope, "Ethics and Professionalism: Rule 1.6 and the Noisy Withdrawal," 63 Def. Couns. J. 543 (1996); Michael R. Klein and Alan J. Otsfield, "Noisy Withdrawal," 868 PLI/Corp. 529, Practising Law Institute Corporate Law and Practice Handbook Series, 26th Annual Institute on Securities Regulation, Nov. 1994.

[124]Pope and Pope, *supra*, 63 Def. Counsel J. 543 at 544, contains this description:

> "[The opinion concerned a hypothetical involving] a bank loan to a lawyer's client, which was based, in part, on an opinion letter given by the lawyer to the bank. The opinion letter was based on factual representations made by the president of the client to the lawyer. The president later confessed to his lawyer that his representations were false--and intentionally so. The president fired the lawyer, telling him in the process he intended to continue the fraud against the bank, he intended to conceal the misrepresentations from new counsel, and he intended to expand his company's loan with the bank.
>
> In a 5-to-3 opinion, the committee held:
>
> > 1. Under Rule 1.6, the lawyer is prohibited from disclosing the client's prior fraud or the client's intent to perpetuate a future fraud to anybody-- not the bank, not the client, not client's owners, not successor counsel.
> >
> > 2. Under Rules 1.2(d) and 1.16(a)(1), the lawyer must withdraw from any representation of the client.
> >
> > 3. Because in this case the mere withdrawal from the representation will not put the bank on notice that something is wrong, the lawyer also must advise the bank that the lawyer's previous opinion is withdrawn in order to comply with Rule 1.2(d).
> >
> > 4. The client's preemptive firing of its lawyer did not eliminate the lawyer's "noisy withdrawal" option under the comment to Rule 1.6.
> >
> > 5. But, if the client does not intend any future fraud, the lawyer cannot make a noisy withdrawal, cannot withdraw the opinion, or otherwise alert anyone to the previous fraud because of Rule 1.6.
>
> The dissent in the opinion was largely with the third conclusion, on the ground that because the lawyer already had been discharged, there was no representation from which to make a noisy withdrawal."

[125]E2K Model Rule 1.16(b)(1).

however, is clearly designed to alert somebody that something is afoot, so it can be anticipated that there will be an adverse effect on the client.

E2K Model Rule 1.16, however, also allows a withdrawal if the client is persisting "in a course of action involving the lawyer's services that the lawyer has reason to believe is criminal or fraudulent"[126] or if "the client has used the lawyer's services to perpetrate a crime or fraud"[127] or the client insists upon "taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,"[128] or when "other good cause of withdrawal exists."[129] It is important to note, however, that the withdrawal under E2K Model Rule 1.16 is never mandatory; it is always discretionary.

Even E2K, however, does not help much in what you may say. While on the one hand it indicates, in *comments* only, that you may "withdraw or disaffirm any opinion, document, affirmation, or the like,"[130] nothing in the black letter law permits this in the context of fraud or financial harm (remember, the proposal that would have permitted this was defeated by a 63% vote). Thus, while you can withdraw because of client fraud (E2K Model Rule 1.16), the Model Rules do not let you to reveal any confidential information (E2K Model Rule 1.6). Moreover, the comments, but not the black letter of E2K Model Rule 1.6, indicate that whether "other law" requires disclosure prohibited by E2K Model

[126]E2K Model Rule 1.16(b)(2).

[127]E2K Model Rule 1.16(b)(3).

[128]E2K Model Rule 1.16(b)(4).

[129]E2K Model Rule 1.16(b)(7).

[130]E2K Model Rule 1.6, Comment 14. This comment states:

> "If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b)."

Rule 1.6 is "beyond the scope of these Rules."[131] This is not much help in determining whether judicial decisions that allow nonclients to sue for fraud, negligent misrepresentation, or silence are "law" that can trump the duty of confidentiality. For example, one "other law" may well be the Sarbarnes-Oxley Act of 2002, which mandates the SEC by January 2003 to create rules requiring an attorney to report to the chief executive officer, chief legal counsel, audit committee, or other independent members of the board "evidence of a material violation of securities law or breach of fiduciary duty or *similar violation* by the company or any agent thereof" (emphasis supplied). What the SEC will interpret "similar violation" to mean remains to be seen. However, in an August 13, 2001 Associated Press story, SEC Chairman Harvey Pitt was quoted as stating to the American Bar Association, "Lawyers for public companies represent the company as a whole and its shareholder-owners, not the managers who hire and fire them."

Then, of course, there's the not-so-slight problem of insurance coverage. Will your malpractice insurer cover you if:

- your client sues you for revealing a confidence through a noisy withdrawal?

- a nonclient sues you for not engaging in a noisy withdrawal?

Thus, trying to do a noisy withdrawal in states that adopt the ABA E2K Model Rules intact may be as difficult as Odysseus' task of steering between Scylla and Charybdis.[132] No wonder that one commentator wrote, 16 years ago, the trouble with

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[131]This language is found in E2K Model Rule 1.6, Comment 10, which reads:

> "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law."

[132]As you recall, both were monsters of Greek legend between whom Odysseus had to steer in the Strait of Messina. Scylla, who ate several of Odysseus' seaman, had "the face and breast of a woman, but from her flanks grew six dog-heads and twelve dog-feet," and she had a serpentine tail. Charybdis, a daughter of Poseidon and Gaia, was turned into a monster by Zeus and lived in a cave opposite Scylla. [Quotation is translation from Apollodorus E7.20 21, as found at www.theoi.com/pontos/skylla.html.]

Rule 1.6 and the noisy withdrawal comment "is that some fools may not understand that Rule 1.6 does not mean what it seems to mean."[133]

b. What's the Jurisprudence on Noisy Withdrawals?

While a Westlaw search reveals no state or federal cases that have used the term "noisy withdrawal,"[134] in at least one case, *Scholes v.Stone, McGuire and Benjamin*, 786 F.Supp. 1385 (N.D. Ill.1992), a lawyer who withdrew from representation and informed some people, but not investors in a company, was unable to dismiss, at pleading stage, a claim by the investors that the lawyer should have engaged in a noisy withdrawal as to them.

While the facts are complex, in essence[135] a lawyer, Douglas, was engaged to assist a person being investigated for selling unregistered securities. Douglas found out not only that there were material misrepresentations and omissions in the offering materials, but that her client was a convicted felon. Douglas prepared rescission materials for the offering that only indicated the securities were unregistered; they did not reference the prior misrepresentations or the fact that the offeror was a felon. All the investors rejected rescission. Further, Douglas also prepared an affidavit for the client that turned out to be false. Douglas knew the affidavit was being submitted to state officials investigating the stock transactions. When Douglas found out about problems with the

[133]Geoffrey C. Hazard Jr., "Rectification of Client Fraud: Death and Revival of a Professional Norm," 33 Emory L.J. 271, 306 (1984), quoted by Pope and Pope, supra, 63 Def. Counsel J. at 543.

[134] For some other cases on withdrawal during the course of litigation, see: *WSF v. Carter*, 35,581 (La.App. 2d Cir. 12/28/01), 803 So.2d 445, 448, withdrawal allowed when attorney found "certain criminal aspects" in his clients background – attorney not required to state details; *Jones v. Bhatt*, 50 Pa. D. & C. 544 (2001), attorney not allowed to withdraw where petition only asserted it would be in the client's best interest; *Burke v. Cunha*, 2000 WL 1273397 (Mass. Super. 2000), withdrawal proper when attorney realized "the superficiality of his client's claim"; *Lawyer Disciplinary Board v. Faber*, 488 S.E. 2d 460, 463 (W.V. 1997), lawyer suspended from practice for, among other things, in filing a motion to withdraw in which he went beyond mere allegations of reasons and gave an affidavit that his client "had engaged in a 'flat-out-lie'" and revealed confidential information.

[135] For the purposes of this paper, the distinction between the two law firms involved here has not been kept sacrosanct, for the purpose of the discussion is to provide an illustration of potential allegations that might be made rather than an attempt to carefully parse the decision. Since the case was only at the pleading stage, no aspersions are intended (or should be implied) against the lawyers or the firms involved.

affidavit, she notified some people, but not the plaintiffs. Further, while Douglas knew some things, at the same time the client was lying to her about a number of other matters.

Douglas ended up advising the client that, because of his criminal problems, the client could not be associated with the entity and to "distance himself"[136] from it. Douglas recommended a second law firm ("SMB") to assist in criminal defense matters for the client. The plaintiffs also contended (although SMB denied it), that SMB was asked to also assist in corporate and securities matters. There were allegations in the complaint that SMB assisted Douglas in preparing the rescission documents that omitted reference to both the client's prior criminal history and the material misrepresentations in the offering materials.

Eventually, a new entity was formed and some of the lawyers' other clients ended up as officers. When Douglas and her firm finally withdrew from representation, after finding out about further client deceit, they informed the independent officers to "disassociate themselves"[137] from the former client, but did not notify investors or regulators.

Douglas, her firm, and the second firm (SMB) were all sued by investors in the various entities. In refusing to dismiss the claims, the court noted:

- The law firm was not being sued for failing to " 'tattle' on its client to third parties" but rather for being "an active participant in a fraudulent scheme." [138]

  Note that the allegations of the complaint were controlling here, given the procedural posture of the case. Apparently, if, as a factual matter, it was merely a question of refusing to "tattle," the court would not have found a cause of action.

[136] *Scholes*, 786 F. Supp. at 1392.

[137] *Id.*

[138] 786 F. Supp. at 1395.

- The court concludes that the investors had alleged enough facts "to establish an attorney–client relationship"[139] and thus could state a claim for both malpractice and breach of fiduciary duty.

  Again, note that the allegations of the complaint of an attorney-client relationship kept the case alive, even though apparently the law firm thought it was representing the organizer and the entities, not the passive investors.

- Even if there was no attorney-client relationship with the investors, nonetheless there was a relationship that mandated disclosure to investors of the fraud – this, in essence, is the noisy withdrawal assertion: ". . . SMB as lawyers for the . . . entities owed a duty to the plaintiff investors to disclose [the client's] fraudulent conduct with respect to the . . . entities. As there was no express contract between SMB and the plaintiff investors, it logically follows that the duty was extracontractual."[140] This relationship also allowed a breach of fiduciary claim to be brought.

- The fact that the misrepresentations were made not by the lawyers but by the clients did not prevent the suit from going forward. While the lawyer corrected some things in some transmittals to some people, there was no notice to the investors, and regardless of whether the statements to the investors came from the client or from documents that the lawyers had a hand in drafting for the client to send, the lawyers "had a duty to inform."[141]

- The fact that no reliance was alleged by the plaintiffs was not a bar to the suit going forward, for given that there were allegations the law firm

[139] 786 F. Supp. at 1396.

[140] 786 F. Supp. at 1398.

[141] 786 F. Supp. at 1400.

had "omitted material facts and that they had participated in the fraud * * * it is unnecessary to allege reliance by the class plaintiffs."[142]

- SMB's motion for sanctions against the plaintiffs, on the grounds that SMB was only criminal counsel for the individual client and did not represent the entities, was denied, for the allegations 'are not so baseless, specious, or off the mark as to warrant the imposition of sanctions * * * [P]laintiffs have raised issues which relate to the very fluid and evolving areas of the law. Plaintiffs' complaint is not so tenuous as to warrant the imposition of sanctions."[143]

As can be seen, broad ranging allegations in *Scholes* were enough to keep a lawyer and two separate law firms in a case where investors made claims against those representing a business and its organizer.

14. CONFLICTS OF INTEREST: WHAT YOU DO AND DON'T PUT IN WRITING CAN HURT YOU.

Whether one looks at the ABA E2K Model Rules or the 1983 Model Rules the basic parameters of conflicts of interest are relatively similar. Lawyers cannot represent opposite sides in the same matter. Lawyers can represent others against former clients under certain restrictions, generally related to client confidences and whether the underlying facts are similar to the previous representation. A lawyer's personal interests may result in disqualification, and a lawyer's family relationship with a lawyer on the other side of the table may also result in disqualification. Various imputation of knowledge rules apply to law firms; some matters "infect" the entire law firm so that no one in the firm can take on the representation, while other matters can be quarantined so

[142] 786 F. Supp. at 1401.

[143] 786 F. Supp. at 1402.

that the "infected lawyer" does not prevent the rest of the firm from handling the matter. A conflict may even arise in the absence of an express lawyer-client relationship (such as when a lawyer participates in a "beauty pageant" for selection of counsel, the discussion at the selection process discloses confidences, but the lawyer is not chosen by the prospective client).

All of these areas break down into three main topics; there are (a) those conflicts that cannot be waived under any circumstance; (b) those conflicts that can be waived; and (c) things that might be perceived to be conflicts but are not. On those conflicts that can be waived, the E2K Model Rule requires some waivers to be "confirmed in writing"[144] (*i.e*. the lawyer sends the letter explaining what has been agreed to orally), as long as the client has given "informed consent," which is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of conduct."[145]

There are literally hundreds of law review articles and publications on conflicts of interest. Some of the more recent ones that are worth taking a look at are set forth below in a footnote.[146] One of the best was written by the Reporter for the ALI Lawyer

[144] "Confirmed is writing" is defined by ABA E2K Model Rule 1.0(b): " 'Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter."

[145] ABA E2K Model Rule 1.0(e).

[146] *See, e.g.*:Shapiro, Susan P., "Bushwhacking The Ethical High Road: Conflict Of Interest In The Practice Of Law And Real Life," 28 Law & Soc. Inquiry 87 (2003); Shapiro, Susan P., "If It Ain't Broke . . . An Empirical Perspective On Ethics 2000, Screening, And The Conflict-Of-Interest Rules ," 2003 U. Ill. L. Rev. 1299; Morgan, Amanda Kay Morgan "Screening Out Conflict-Of-Interests Issues Involving Former Clients: Effectuating Client Choice And Lawyer Autonomy While Protecting Client Confidences," 28 J.

Restatement, Professor Charles W. Wolfram, "Ethics 2000 And Conflicts Of Interest: The More Things Change" 70 Tenn. L. Rev. 27 (2002); it contains a broad overview of how the E2K Model Rules continued and, in some cases, altered the conflict of interest rules.

15. A BRIEF ASIDE ABOUT THE PATRIOT ACT, THE BANK SECRECY ACT, and GATT

The PATRIOT Act[147] will make significant changes in the way that transactional lawyers involved with real estate deal with their clients and third parties, especially once the Treasury Department promulgates its regulations. There is an excellent article on this topic written by Kevin Shepherd, "The USA PATRIOT Act: The Complexities Of Imposing Anti-Money Laundering Obligations On The Real Estate Industry," 39 Real Prop. Probate Trust J. 403 (2004), so those points will not be reiterated here. Suffice it to say, however, that you may need to become knowledgeable about that Act, about FinCEN (the Treasury Department's Financial Crimes Enforcement Network), about the changes that the PATRIOT Act made in the Bank Secrecy Act[148] rules, as well as about the international money-laundering rules (including the Gatekeeper Initiative that is part of the Financial Action Task Force on Money[149]), as part of your representation of your clients as well as in your negotiations with third parties, especially if an owner or investor is not a U.S. citizen or business entity, or if any of the investment properties are overseas.

Legal Prof. 197 (2004); and Jones, Alexander W., "Defenses To Disqualification: Fact Situations That Allow An Attorney To Avoid Disqualification For A Conflict Of Interest," 27 J. Legal Prof. 195 (2003). An interesting article that examines how law firm compensation systems could affect the creation of conflicts of interest is Bernstein, Edward, A., "Structural Conflicts Of Interest: How A Law Firm's Compensation System Affects Its Ability To Serve Clients," 2003 U. Ill. L. Rev. 1261

[147] Pub. L. No. 107 56, 115 Stat. 272 (2001).

[148] See 12 U.S.C. §§ 1829b, 1951 1959 and 31 U.S.C. §§ 5311 5322.

[149] See http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html

16. ON TO THE HYPOTHETICALS

Rather than try to regurgitate the ABA's E2k Model Rules, however, it may be more instructive to look at a series of hypothetical situations involving conflicts, waiver, disclosures, and other matters.

17. THE DEVELOPMENT DEAL

Your main client, John Getta, is developing GettaLife, Inc. a new mixed-use center in your town. GettaLife will consist of commercial, wholesale, and residential portions, including some subsidized Section 8 apartments on the main road frontage.

While your firm is not Iscariot Bank's sole counsel, your partners and associates have represented the Bank from time to time in loan closings. Several of those loans are secured by tracts adjacent to GettaLife. Those loan closing files are completed.

To make the GettaLife deal work, you'll have to get a zoning change approved, but you know that this will be a major effort (and therefore you'll get to bill a lot) because the neighboring property owners are going to object, not only to the entire concept, but also especially to the Section 8 housing, which they feel will lower their property values.

QUESTIONS:

1. Do you have any problem doing the zoning change work for GettaLife even though it may negatively affect the value of the properties that secure loans to Iscraiot Bank?
2. Would it make any difference if your firm had closed only one deal for Iscariot Bank and did not work for it regularly?
3. Would it make any difference if you personally had negotiated a lost deal for Iscariot Bank on a tract immediately adjacent to GettaLife?

18. GETTING AND KEEPING THE CLIENT

HYPO #1

The Family Business, The Formation.

Dr. Jan and her husband, John, and John's brother, Jack, come to you to form a development corporation.

Dr. Jan will pay all the fees.

Dr. Jan will own 50%, John 40%, and Jack 10%.

WHAT DO YOU DO?[150]

Can you advise them all and form the corporation?
What kind of consent is required?

HYPO #2

The Family Business: Estate Planning Problem:

You've formed the corporation, JJJ, Inc. for Jan, John and Jack.

Dr. Jan's parents need estate planning advice. To help them, you've gotten your firm's best tax lawyer involved. She advises that Dr. Jan's parents should set up a charitable remainder trust, contribute the family acreage to trust, and then have the trust lease the property to Dr. Jan's corporation on a long-term basis. Everyone wins. The parents get a tax deduction an the trust generates income. The corporation gets additional property to develop on a ground lease at a favorable price.

Dr. Jan, who handles her parents finances, asks you to prepare the lease "for all parties." Dr. Jan will gladly pay your fees, just as she paid your firm's fees for her parents' estate planning advice.

WHAT DO YOU DO?

Can you prepare the lease?
Must your firm get three additional lawyers involved, one for the trust, one for Jan's parents, and one for Jan's corporation?
Does it matter that Dr. Jan is paying the fees?
What kind of consent is required? From whom? Will these be valid?

19. THE AUDIT LETTER

a. An audit letter request comes in, but your client is delinquent on payment of fees for 6 months. How do you respond?

b. You've written the audit letter and the auditor calls for an oral update. How do you respond?

20. THE TOXIC SITE ACQUISITION

a. PART ONE:

(i) Conglomerate, Inc., your long-time client, has expanded its site and has bought the defunct plant next door, Ma & Pa Kettle, Inc. Conglomerate is going to erect a multi-use facility on the site,

[150] Does Rule 1.7b help in the analysis?

(b)A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

including a life-style center, an entertainment complex, and a residential component that will include apartment, condos, as well as "McMansions" on large lots. You're to do all the lease documents and to handle all the leasing negotiations with Conglomerate's retail and residential tenants.

(ii) As part of the post-closing due-diligence, you find out that there are buried drums with toxic liquid that are not causing a problem now but which may cause cancer in 20-30 years *if* it seeps into the groundwater.

(iii) What do you do?

b. PART TWO

(i) Conglomerate Inc. decides to sell off part of the tract where the "MacMansions" are to be located "as is where is" to Big Developer.

(ii) The buyer has done a Phase I but has not picked up the contamination.

(iii) What do you do?

c. PART THREE

(i) You withdraw from representing Conglomerate Inc., and your good friend calls you saying that she has taken over the representation and asks you about Conglomerate.

(ii) What do you do?

(iii) Can you tell anyone anything? What are the Rules of Professional Conduct in your state?

(iv) What if the property is located in a different state?

21. CONFLICTS

a. You've represented Big Developer for years. Big Developer wants to sue Contractor, Inc. on a lease dispute. Your partner, however, closed a real estate acquisition for Contractor, Inc. two weeks ago. What do you do?

b. What if the deal for Contractor Inc. had closed four years ago?

c. What if no one in your firm had done work for Contractor, Inc., but your spouses firm represents Contractor, Inc.?

d. What if you're not married, and it is your "significant other" whose firm represents Contractor, Inc.?

e. What if Firm X, in a different city who represents Contractor, Inc., offers you a job to head up its Real Estate Department?

22. CONCLUSION

We should not deceive ourselves into believing that we are "ethical" lawyers because we have not directly violated the Model Rule or even some version of a state's ethical code or "code of professionalism" or "code of civility." We should not be surprised when the public looks askance at lawyers and questions their ethics when the core Rules permit misdirection, bluffing, and even lying (on all "non-material" issues) in furtherance of the client's interest. We should not be shocked if courts find ways to impose liability on lawyers to those who are not their clients, even if there is extensive limitation language in opinion letters or even in the absence of any written opinion to the third party.

There is an inherent tension between the duty to represent a client and the duty to the profession. There is a practical tension in wanting to get the best deal possible for your side and the duty of ethical fair dealing. There is a discernable difference between conduct that is permitted outside of litigation as compared to conduct for which lawyers can be sanctioned during litigation. The fact that the Bar has failed to adopt the same rules for non-litigation and litigation negotiations does not make the difference in standards one of which we should be proud.

Since most Bar Associations seem little interested in policing the ethics of negotiations, and since it can be anticipated that losing parties will bring lawsuits to enforce rules relating to negotiating, we should not be surprised if a uniform set of rules

is ultimately adopted by the courts jurisprudentially. Likewise, we should not be surprised if these court-developed uniform rules reflect the higher standards imposed upon litigation-related conduct, whether or not the negotiations occurred before or after a suit was filed.

We should strive to equate professionalism *with* ethics; the entire goal of law as an honorable profession is to have a higher standard than exists in the marketplace. Two quotes illustrate this proposition. The first is from a case from Michigan:

> Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate.[151]

The other is from a seminal article on legal ethics:

> If he is a professional and not merely a hired, albeit skilled hand, the lawyer is not free to do anything his client might do in the same circumstances. The corollary of that proposition does set a minimum standard: the lawyer must be at least as candid and honest as his client would be required to be. The agent of the client, that is, his attorney-at-law, must not perpetrate the kind of fraud or deception that would vitiate a bargain if practiced by his principal. Beyond that, the profession should embrace an affirmative ethical standard for attorneys' professional relationships with courts, other lawyers and the public: *The lawyer must act honestly and in good faith.* Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule. Good conduct exacts more than mere convenience. It

[151] *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, 571 F.Supp. 507, 512 (E.D. Mich. 1983). See also, *Spaulding v. Zimmerman*, 263 Minn. 346, 116 N.W.2d 704 (Minn. 1962); *Newman v. Fjelstad*, 271 Minn. 514, 137 N.W.2d 181 (Minn. 1965); *Simons v. Schiek's, Inc.*, 275 Minn. 132, 145 N.W.2d 548 (Minn. 1966); *Toledo Bar Ass'n v. Fell*, 51 Ohio St 2d 33, 364 N.E.2d 872 (Ohio 1977).

> is not sufficient to call on personal self-interest; this is the standard created by the thesis that the same adversary met today may be faced again tomorrow, and one had best not prejudice that future engagement.[152]

Lawyers should stand apart not merely by their training but by their behavior and the mutual philosophical principles to which they hold one another. It is submitted that one day we will look back upon the current trend of distinguishing "ethics" and "professionalism" as perhaps misguided and counterproductive. To say that the Model Rules are "ethics" is to denigrate ethics, and to distinguish "ethics" from "professionalism" is to confuse both.

We should strive for the day when all who bear the title of "lawyer" are seen as ethical professionals.

One may not agree with those who contend that the ethical basis of negotiations (or any extra-tribunal actions) should be one of truth and fair dealing, that as professionals lawyers should "not accept a result that is unconscionably unfair to the other party."[153] Yet, it would be hard to argue with a more practical formulation, given the serious possibility that a single standard will ultimately evolve jurisprudentially:

> ***If you wouldn't do something in a courtroom context, if you wouldn't make a misleading statement in a settlement conference with a judge, and if you wouldn't remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you shouldn't do any of these things in non-litigation negotiations of any kind.***

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[152] Judge Alvin B. Rubin, writing in 35 La.L.Rev. 577 at 589 (1972), *A Causerie on Lawyers' Ethics in Negotiation*.

[153] Judge Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 Louisiana Law Rev. at pg. 591 (1965).