ARE ETHICS IMMUTABLE?
RUMINATIONS ON DOING DEALS INTERSTATE AND INTERNATIONALLY
Transactional Issues Where the Ethical Rules May Change Depending on Your Location

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1. DOING DEALS: ETHICS AND PROFESSIONALISM

Transactional lawyers exist to do deals. We negotiate with parties concerning the creation of entities. We negotiate with or for lenders and borrowers, developers and contractors, and clients and third parties. We negotiate with local, state and national governmental entities. We document the deals at the front end, work through issues as the deal is ongoing, and negotiate work-outs at the back-end when things go wrong.

We usually do all of this from the confines of our office, using telephones, email, the Internet, pda's, and all the accoutrements of the modern practice. Yet, while we sit in our offices, our deals extend around the country, and sometimes around the globe.

We tend to think that we are fully conversant with the "ethical" rules that apply within our own state, but can we really rely on these rules when our deals are interstate and international?

Layered on top of these issues is the question of "professionalism." There have been reams of paper in journals and law reviews devoted to discussing and parsing the distinctions "ethics" and "professionalism." Across the nation, there are non-binding "codes of conduct" or "codes of civility" or "lawyer's creeds" or "codes of professionalism." This mushrooming mound of aspirational goals, ubiquitous promises of mannered behavior, and grand phrases indicate that the legal profession deems itself to be

in a crisis. There are a plethora of publications professing the palliative of professionalism as a panacea for the perils of practice.[2]

What is the nature of the apparent crisis that has caused the rise in "professionalism" concerns, and why does it require the reaction that has been engendered?

A basic problem is in the use of the term "professionalism." No standard definition of "professionalism" is available. Writers of periodical and law review articles cannot agree on any particular and limited definition;[3] the reaction is more akin to the

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[2] The reader will note a definite tilt towards alliteration in this paragraph. As Justice Cardoza noted, in discussing legal opinions (but using a concept applicable to all effective writing): "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim." P.H. Dunn, "How Judges Overrule: Speech Act Theory And The Doctrine Of Stare Decisis," 113 Yale L.J. 493 (2003), citing Benjamin N. Cardozo, Law and Literature and Other Essays and Addresses 9 (1931).

For essays and articles on professionalism, in addition to those noted in the next footnote, see:

Durham, "Promoting The Standards Of Professionalism And Civility," 19 Utah B.J. 8 (2006); McMahon, "Declining Professionalism In Court: A Comparative Look At The English Barrister," 19 Geo. J. Legal Ethics 845 (2006); Corn, "Lessons From The Law Of War: A New Perspective On The "Legal Warrior's" Code Of Professionalism," 47 S. Tex. L. Rev. 781 (2006); Kennedy, Lantin & York, "Professionalism: Dealing With Unprofessional Conduct In Bankruptcy," 36 U. Mem. L. Rev. 575 (2006); Schofield, "Practice & Professionalism Tips From A Mediator, Arbitrator And Appraiser," 1 Trial Advoc. Quarterly (2006); Gunnarsson, "Professionalism: Judges' Pet Peeves," 94 Ill. B.J. 20 (2006); Alvarado, "A Radical Proposal For Lifetime Professionalism," 37 St. Mary's L.J. 1053 (2006); Johnson, "Applying The Standards Of Professionalism And Civility To The Practice Of Criminal Law, 18 DEC Utah B.J. 28 (2005); Rhode, "Profits and Professionalism," 33 Fordham Urb. L.J. 49 (2005); Uelmen, "The Evils Of "Elasticity": Reflections On The Rhetoric Of Professionalism And The Part Time Paradox In Large Firm Practice," 33 Fordham Urb. L.J. 81 (2005); Creamer, "Professionalism: The Next Level," 79 Tul. L. Rev. 1539 (2005); Ames, "Concerns About The Lack Of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed," 28 Am. J. Trial Advoc. 531 (2005); and Barton, "The ABA, The Rules, And Professionalism: The Mechanics Of Self Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons," 83 N.C. L. Rev. 411(2005).

[3] Rizzardi, "Defining Professionalism: I Know It When I See It?" 79 Fl. B.J. 38 (2005); Ciolini, "Redefining Professionalism as Seeking"," 49 Loyola L. Rev. 229 (2003); -Ravenal, "The Contagion of Example: Attacking the Root of the Problem in Lawyer Professionalism 31 Federal Lawyer (2002); Bien, "A New Way for Courts to Promote Professionalism", 86 Judicature 132 (2002); Coleman, "Professionalism Within the Profession," 65 Tex. B.J. 926 (2002); Sturman, "Professionalism: We Know it When We See It," 6 Nevada Lawyer (2002); Bronson, "Professionalism is a Choice," 23 Montana Lawyer (2002); Vincent, "Aspirational Morality: the Ideals of Professionalism, April Utah B.J. 24 (2002); Harris, "The Professionalism Crisis--the 'Z' Words And Other Rambo Tactics: The Conference of Chief Justices' Solution," 53 S.C. L. Rev. 549 (2002); Spivey, "Ethics: Lawyering and Professionalism," 33 St. Mary's L.J. 721 (2002); Harris, "The Professionalism Crisis," 3 Prof. Lawyer 1 (2001); Morgan, "Real World Pressures

famous statement of Justice Potter Stewart, who, in speaking of pornography, said "I know it when I see it."[4]

On the one hand, there are those who argue that the entire concept of professionalism is illusive and self-defeating, a tacit admission that the Bar either cannot or should not make its members abide by any standards more stringent than that imposed by statutes and the Rules of Professional Conduct.[5] Contrast these views to those who advocate that professionalism can and should be taught, that professionalism is what you ought to do while ethics are what you are required to do.

Should there be a tension between "ethics" and "professionalism"? Are the two different concepts or part of a single continuum? Are the concepts the same state-to-state or even common to every common law jurisdiction? This paper explores these issues.

2. RULE 5.5 AND THE "PRACTICE" OF LAW

The ABA Model Rules attempt to insulate certain lawyers engaged in certain litigation and transactional practices from complaints that they are engaged in the unauthorized practice of law through Model Rule 5.5.[6] In essence, the Rule assert that a

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on Professionalism," 23 U. Ark. Little Rock L. Rev. 409 (2001); Berry, "Civility and Professionalism," Nevada Lawyer (Nov. 2002).

[4] *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (concurring opinion).

[5] See, *e.g.*, Wittmann, "Should 'Professionalism' Be Mandatory? Can Civility Be Taught?", 45 La. B. Journal 19 (1997); Alston, "The Ten Commandments of Professionalism: a Misguided Effort," 4 Prof. Lawyer 24 (2002); Morgan, "What Needs Fixing? Toward Abandoning Organized Professionalism, 30 Hofstra L. Rev. 947 (2002); and Wangen, "Professionalism and Other Myths," March Oregon St. Bar Bulletin 78 (1999).

[6] Rule 5.5: "Unauthorized Practice Of Law; Multijurisdictional Practice Of Law"

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

transactional lawyer doing deals in another state on a "temporary" basis is not engaged in the unauthorized practice of law under certain limited conditions.

There are four basic problems for transactional lawyers who rely on Rule 5.5 to protect themselves.

First, Model Rules were never intended to be more than rules concerning lawyer discipline. In fact, the Preamble to the Model Rules states that a 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."[7] Moreover, the Preamble specifically states that the Rules are "not designed to be a basis for civil liability."[8] Therefore, compliance with the Rules cannot insulate a lawyer from non-disciplinary actions, civil liability, or criminal actions brought against those alleged to have engaged in the unauthorized practice of law.

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(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction."

[7] ABA Model Rule Preamble, Section 20.

[8] *Id.*

Second, not every state's version of Rule 5.5 is identical to the ABA Model Rule.[9] Only 14 states have rules that are identical to the ABA Model Rule 5.5; two states are considering adopting the uniform rule, two states have the issue under active consideration, and the rest of the states have rules that are similar to the ABA rule but do not track it word-for-word.[10] For example, the Virginia version of Rule 5.5[11] does not adopt any of the "safe harbors" found in Model Rule 5.5(c) and (d) and does not adopt any of the ABA Comments. Likewise, New Jersey's Rule 5.5 contains special rules concerning what an out-of-state lawyer must do annually when the practice is authorized under Rule 5.5.[12] In South Dakota, "temporary" practice is authorized, but only if the

[9] See http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf for a chart listing state-by-state variations, current through October, 2009.

[10] *Id.*

[11] The Virginia version is found in the Rules of the Supreme Court of Virginia Part 6, § II effective January 1, 2000.

[12] New Jersey RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law (found at http://www.judiciary.state.nj.us/rules/apprpc.htm#x5dot5) (emphasis supplied):

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

out-of-state lawyer obtains "a South Dakota sales tax license and tenders the applicable taxes."[13]

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or

(iv) the lawyer practices under circumstances other than (i) through (iii) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) ***A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b) above shall:***

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction;

(4) not hold himself or herself out as being admitted to practice in this jurisdiction;

(5) maintain a bona fide office in conformance with R. 1:21-1(a), except that, when admitted pro hac vice, the lawyer may maintain the bona fide office within the bona fide law office of the associated New Jersey attorney pursuant to R. 1:21-2(a)(1)(B); and

(6) ***annually complies with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.***

[13] South Dakota Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law (found at http://www.sdbar.org/Rules/Rules/PC_Rules.htm) (emphasis supplied):

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1)except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2)hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, ***may provide legal services on a temporary basis in this jurisdiction*** that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice, and

Third, the Model Rules do not supersede state civil or criminal statutes regulating the unauthorized practice of law. For example, in Louisiana, the unauthorized practice of law can lead to two years' imprisonment.[14] In Minnesota, the unauthorized practice of law is a misdemeanor, but the statute contains numerous exemptions and exclusions.[15]

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(5) ***in all cases, the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45***.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction, provided that the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45."

[14] LSA R.S. 37:213. entitled "Persons, professional associations, professional corporations, and limited liability companies entitled to practice law; penalty for unlawful practice" (emphasis supplied):

"A. No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state, no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 8 of Title 12 of the Revised Statutes, and no partnership or limited liability company except one formed for the practice of law and composed of such natural persons, corporations, voluntary associations, or limited liability companies, all of whom are duly and regularly licensed and admitted to the practice of law, shall:

(1) Practice law.

(2) ***Furnish attorneys or counsel or an attorney and counsel to render legal services.***

(3) Hold himself or itself out to the public as being entitled to practice law.

(4) ***Render or furnish legal services or advice.***

(5) Assume to be an attorney at law or counselor at law.

(6) Assume, use, or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles in such manner as to convey the impression that he is a practitioner of law.

(7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts, or maintains an office of any kind for the practice of law.

B. This Section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law from furnishing an attorney at law to give free assistance to persons without means.

C. ***Any natural person who violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.***

D. Any partnership, corporation, or voluntary association which violates this Section shall be fined not more than five thousand dollars. Every officer, trustee, director, agent, or employee of a corporation or voluntary association who, directly or indirectly, engages in any act violating any provision of this Section or assists the corporation or voluntary association in the performance of any such violation is subject to the penalties prescribed in this Section for violations by a natural person.

[15] Minn. St. Ann. Ch. 481.02.

Missouri not only makes the unauthorized practice of law a misdemeanor, it allows for treble damages.[16]

Fourth, even if a lawyer masters the intricacies of Rule 5.5 in every jurisdiction affected by the transaction, there is the problem of Rule 8.5, which governs the choice of law on disciplinary matters. As is the case with Rule 5.5, not every state has a uniform version of Rule 8.5. Only 23 states have rules substantially identical to the ABA Model Rule,[17] while 21 other states have rules that are similar in scope but not necessary in content.[18] Thus, one cannot consider Rule 5.5 in a vacuum; rather, for every state whose disciplinary rules might apply, the interrelationship of each state's Rule 5.5 and each state's Rule 8.5 must be considered and evaluated.

As is apparent, a lawyer who engages in cross-border deals (whether the border is that of a state or a country) must be aware of the applicable rules in every jurisdiction where advice is being given as well as in every state containing assets touched (or dealt with) by the transaction.

The potential danger, it is submitted, to lawyers doing multi-state deals and to the jet-setting always-on-the-go lawyer, is not an overzealous state Disciplinary Counsel who will reach out to "prosecute" out-of-state lawyers who have had the trepidation of doing something that might violate a state's rules. Rather, the potential danger is that the Model Rules and the state-by-state variations to those rules may not have kept pace with

[16] Vernon's Annotated Missouri Statutes, Ch. 484.20. Note, however, that a federal court has limited portions of the statute on preemption grounds. See: *Casey v. FDIC*, 583 F.3d 586 (8th Cir. 2009).

[17] According the ABA Center for Professional Responsibility, those states are: Alaska, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont and Washington.

[18] According the ABA Center for Professional Responsibility, those states are: California, Colorado, DC, Florida, Georgia, Indiana, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, South Carolina, Tennessee, Virginia, Wisconsin and Wyoming.

how transactional lawyers actually practice law, and if a disgruntled local lawyer turns a matter over to local Disciplinary Counsel, it may not be possible for Disciplinary Counsel to turn a blind eye to things that transactional lawyers do all the time but which, under a strict reading of the Rules of Professional Conduct, may fall into the questionable or gray area (or even the prohibited arena).

3. THE LAWYER AS THE ZEALOUS ADVOCATE.

America's legal profession stems from and owes a deep debt of gratitude to the English tradition of common law barristers and solicitors. Our concept of the "zealous advocate"[19] stems from the British conception that a barrister is retained not directly by the client but rather by a solicitor, and that regardless of the issue, the barrister is to represent the client's interests fully. The barrister's position is unlike an American trial lawyer. A "specialist" in toxic torts typically represents only plaintiffs or defendants; American trial lawyers (and law firms) typically limit their representation to one point of view - - the view of the injured parties or the view of the part(ies) being sued by those who have been injured. In contrast, British barristers have expertise in a subject matter and, because they are retained by solicitors, take on the first representation offered even if this means that on one case they represent plaintiffs and on the next they represent defendants involving the same basic legal principles.

British barristers are not typically concerned with "positional" conflicts, because their practices are different than our trial lawyer's practices. The British ideal is the barrister who, within the bounds of propriety, leaves no stone unturned for the client. 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

[19] 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.

duty he must not regard the alarm, the torments, the destruction, which he may bring upon others."[20]

This is not to say that barristers and solicitors have no ethical codes. In fact, each has its own, separate regulatory body.

On the other hand, the public's concern about lawyers' ethics is not new. One need only look at Trollope to see the dichotomy. On the one hand, Trollope triumphs the confidence that an English gentlemen reposes in his own lawyer.[21] On the other hand, Trollope excoriates the profession through his characters of Mr. Chaffanbrass and Mr. Haphazard, the former depicted "as a perverter of justice and a tormentor of innocent witnesses," and the latter "as a highly efficient machine devoid of all humanity."[22]

The approach to zealous advocacy differs in the UK and the U.S.

a. The U.S. Approach

The American Bar Association (ABA), a voluntary organization, has passed the Model Rules of Professional Conduct, a comprehensive guide that provides the minimum standards for lawyers and lawyer discipline. The Model Rule is not binding; each state adopts its own rules. Most states, however, have adopted the bulk of the Model Rules, albeit with some variations.[23]

"Zealous advocate" is a term that is often used by lawyers in the U.S. to describe their role; however, that term has not existed since the Model Rules superseded the

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[20]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.

[21] "There is no form of belief stronger than that which the ordinary English gentleman has in the discretion and honesty of his own family lawyer. What his lawyer tells him to do, he does. What his lawyer tells him to sign, he signs. He buys and sells in obedience to the same direction, and feels perfectly comfortable in the possession of a guide who is responsible and all but divine." Trollope, *The Eustace Diamonds*, quoted in *Drinker*, *infra* at footnote 22.

[22] Henry S. Drinker, "THE LAWYERS OF ANTHONY TROLLOPE," 55 Federal Lawyer 50 (Jan. 2008).

[23] An overview of the details on the Model Rules and state-to-state variations can be found on the web site of the ABA's Center for Professional Responsibility, http://www.abanet.org/cpr/

Model Code of Professional Conduct in 1983.[24] When the 1983 Model Rules ("MR") were adopted, the term "zealous advocate" was deleted. The concept was reduced to 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 Ethics 2000 Revision to the Model Rules.[25]

Although "zealous advocacy" has not been a requirement of the lawyer's code since 1983, 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."[26] Even law journals continue to use the phrase (sometimes even with approval) in titles to articles.[27]

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

[25] The American Bar Association's "Ethics 2000" revision was in fact not adopted until 2002, and it has been amended since then, although not in ways pertinent to this paper except as noted. The ABA, a voluntary organization, has a "House of Delegates" consisting of elected members from every state bar association, from some large city bar associations, and members appointed from various sections of the ABA. The ABA's "Model Rules," which are voted on by the House of Delegates, is not binding on any lawyer or any bar association, although typically the Supreme Court of each state adopts its own version of the Rules of Professional Conduct, modeled on the ABA Rules. Each state's Rules usually are promulgated after a detailed study and recommendation by a local state committee. Many states have made changes (usually minor) when they adopt their own Rules. It is the state's rules that are binding on the lawyers in those states, although the Model Rules and its commentary provide persuasive authority and guidance. This paper concerns (unless otherwise noted) only the ABA's Model Rules and not any particular state's variations from the Model Rules.

[26] *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)."

[27] 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

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."[28]

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,"[29] a term that suggests moral relativism. A "neutral partisan" is one who "passes no judgments,"[30] whose "zeal on behalf of the client is unmitigated and noncontingent." The 2002 revisions to the Model Rules maintain the view that the lawyer's personal morality is not impugned because of the client's activities. See the Model Rule 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

[28] ALI §16, Comment (d).

[29]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).

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

intended to secure for the benefit of public investors the detached objectivity of a disinterested person."[31]

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."[32] 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 world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life."[33]

b. The UK Approach

The UK has always had two different governing boards, one for barristers and one for solicitors. In 2006, the procedure was overhauled, but the split between barristers and solicitors remains. The Solicitors Regulation Authority[34] controls solicitors while the Bar Standards Board[35] supervises barristers. In addition, there are separate professional

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

[32] Dolovich at 1633.

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

[34] See http://www.sra.org.uk/solicitors/code-of-conduct/196.article

[35] See: http://www.barstandardsboard.org.uk/

organizations (akin to the ABA) for each group: the Law Society[36] (solicitors) and the Bar Council[37] (barristers).

The SRA (Solicitors Regulation Authority) promulgates a Code of Conduct for solicitors; it was last updated in 2007. The BSB (Bar Standards Board) has a separate Code of Conduct for barristers in England and Wales.

While the BSB Code of Conduct does not use the term "zealous," it does mandate that a barrister "must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any professional client or other intermediary or another barrister),"[38] language that mirrors Lord Brougham's admonition.

The Solicitors' Code of Conduct does not appear to have comparable language, although a "core duty" under the Code includes "acting in the best interest of each client."[39]

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

How "enforceable" are hortatory rules when it comes to ethical matters, particularly if the words "ethics" does not appear in the rules that govern the profession, either in the UK or the U.S.?

It does not appear to this author that, apart from references to other standards that use the term "ethics" in their title, that either the BSB Code or the SRA Code uses the term "ethics" either to define an obligation of a lawyer or to promulgate an aspirational standard.

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[36] See http://www.lawsociety.org.uk/home.law

[37] See http://www.barcouncil.org.uk/

[38] The Bar Standards Board Section Code of Conduct of the Bar of England and Wales, §303.

[39] Section 1.04, Solicitors' Code of Conduct (2007).

"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 have abandoned the moral high ground claimed by the Canons of the old ABA 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 the last few years.

One critic of this standard view uses the pejorative term "amoral technicians"[40] to describe lawyers, claiming that the ABA 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 moral censure."[41] Another has commented that a lawyer "sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality."[42]

On the UK side of the pond, there are commentators who have complained that the ethical rules are more honored in the breach than in the observance:[43]

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[40]Id. at 1638.

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

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

[43] While it appears to this author that the UK does not have the proliferation of law review articles devoted to ethics that the U.S. has, a number of UK articles, books, and book reviews that do deal with legal ethics

> The ease with which U.K. solicitors ignore Law Society guidelines [FN165[44]] is in marked contrast to the considerable effort U.S. lawyers make to comply with state ethics rules. The absence of a realistic threat of external social control in the U.K., [FN166[45]] coupled with the willingness of U.K. courts to apply rules significantly less stringent than those adopted by the Law Society, [FN167[46]] suggests an obvious explanation for these differences."
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> Nancy J. Moore, Review entitled "REGULATING LAW FIRM CONFLICTS IN THE 21ST CENTURY: IMPLICATIONS OF THE GLOBALIZATION OF LEGAL SERVICES AND THE GROWTH OF THE 'MEGA FIRM," Janine Griffiths-Baker, Serving Two Masters: Conflicts of Interest in the Modern Law Firm. Oxford: Hart Publishing, 2002. Pp. xii, 212. Susan Shapiro, Tangled

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either express concern about the level of ethics or stress the importance of ethics to the profession and the public. *See, e.g.*: Chapman, June "Why Teach Legal Ethics to Undergraduates?" (2002) 5(1) Legal Ethics 68; Corbin, Lillian "How "Firm" are Lawyers' Perceptions of Professionalism?" (2005) 8(2) Legal Ethics 265;

Duska, Ronald and Mariellen Whelan (1977) *Moral Development: A Guide to Piaget and Kohlberg Gill and Macmillan ;*Evans, Adrian and Josephine Palermo "Zero Impact: Are Lawyers' Values Affected by Law School?" (2005) 8(2) Legal Ethics 240; Hinett, Karen (2002) "Developing Reflective Practice in Legal Education," UK Centre for Legal Education; Maughan, Caroline and Julian Webb "Taking Reflection Seriously: How Was It For Us?' in (eds) Caroline Maughan and Julian Webb *Teaching Lawyers' Skills London*: Butterworths (1996) pp. 261 – 290 at p. 273; Maughan, Caroline and Julian Webb (2005) *Lawyering Skills and the Legal Process* Cambridge University Press; McVea, Harry "Heard It Through The Grapevine: Chinese Walls And Former Client Confidentiality In Law Firms." (2000) 59(2) Cambridge Law Journal 370; Nicholson, Donald and Julian Webb (1999) *Professional Legal Ethics: Critical Interrogations* Oxford: Oxford University Press; Nicolson, Donald "Making lawyers moral? Ethical codes and moral character" [2005] 25(4) Legal Studies 601; Sherr, Avrom "The Value Of Experience In Legal Competence" (2000) 7(2) International Journal of the Legal Profession 95 – 124' Simon, William "Lawyer Advice and Client Autonomy: Mrs Jones' Case" in (ed) Deborah L. Rhode (2000) *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation* Oxford University Press; Webb, Julian "Inventing the Good: A Prospectus for Clinical Legal Education and the Teaching of Ethics in England and Wales" (1996) 30 Law Teacher 270 – 294; Webb, Julian "Being a Lawyer/Being a Human Being" (2002) 5(1) Legal Ethics 130.

Also see: http://www.hartjournals.co.uk/le/volumes/9/issues/2/index.html (last visited 8/28/08)

[44] [FN165]. "See supra notes 82-90 and accompanying text."

[45] [FN166]. "Solicitors from large City firms, who are the most likely to openly flout the Law Society guidelines, do not fear professional discipline because their sophisticated corporate clients are unlikely to complain. See supra note 90 and accompanying text. Griffiths-Baker does not directly address the threat of malpractice or disqualification, except by implication when she suggests that 'the recent increased interest in conflicts in the United Kingdom has been prompted by the growing presence in Europe of United States law firms and companies,' noting disapprovingly the 'numerous cases brought by disgruntled clients,' the tactical use of conflicts, and the fact that '[c]onflicts are now of such concern in the United States that the Attorneys' Liability Assurance Society has issued guidelines on how firms should protect themselves against potential claims.' GRIFFITHS-BAKER, supra note 34, at 77-78."

[46] [FN167]. "See supra notes 67-81 and accompanying text."

Loyalties: Conflict of Interest in Legal Practice. Ann Arbor: University of Michigan Press, 2002. Pp. xv, 491.
(Footnotes in the original)

The problem is that there is an unresolved tension on both sides of the pond 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/national/UK 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."[47]

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.

- Justice Stevens: "I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation."[48]

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

[48] *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.

- "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).[49]

5. THE CURRENT RULES CONDONE SOMETHING LESS THAN TRUTHFULNESS

Many argue that effective negotiations often involve misleading the other side not with deliberate lies and falsehoods but rather through "bluffing," "puffing," and statements that are true within strict confines but which do not reveal the entire truth. The field of "game theory" explores the effectiveness of such strategies.[50] The issue for this paper, however, is not whether these strategies are effective in negotiations but rather how the ethical rules that control the legal profession inter-relate with common negotiation tactics.

On both sides of the pond there is a distinction drawn between one's duty to the court system and one's duty in negotiations. The ABA Model Rules have special provisions on non-tribunal negotiations; the SRA Code and the BSB Code seem, to this author, to lack comparable provisions, perhaps because non-tribunal negotiations seldom

[49] 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.

[50] For a quick overview of game theory, see the Stanford Encyclopedia of Philosophy, "Game Theory and Ethics," (first published Sat Oct 16, 2004), which can be found at http://plato.stanford.edu/entries/game-ethics/.

occur for barristers (although both the SRA and BSB Codes appear to recognize certain exceptions from their rules when dealing with arbitration or mediation).

a. The SRA and BSB Codes

The SRA Code mandates that a solicitor must "act with integrity"[51] and must "not behave in a way that is likely to diminish the trust the public places in you or the profession";[52] however, at the same time the SRA Code exhorts solicitors to "provide a good standard of service to your clients."[53] It appears to this author that neither the SRA Code nor the SRA Guidance explicitly address the critical issue that every negotiator faces — how to best represent the client (whether through "bluffing" or "puffing") while maintaining client confidences to obtain the best deal.[54]

The dilemma for barristers in negotiations outside of a courtroom/mediation setting[55] appears, to this author, to be similar, for there does not seem to be any BSB Code rule that directly relates to negotiations outside of a courtroom or formal mediation setting. Under the BSB Code, a barrister "must promote and protect fearlessly and by all

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[51] SRA Code 1.02.

[52] SRA Code 1.06.

[53] SRA Code 1.05.

[54] While the SRA Guidance indicates that it would be improper for a solicitor to take "unfair" advantage of an unrepresented party; there is nothing that appears to prohibit a solicitor from driving a hard bargain through "puffing" if another solicitor is on the other side of the table.

See SRA Guidance 10.01(2)(emphasis supplied): "Particular care should be taken when you are dealing with a person ***who does not have legal representation***. You need to find a balance between fulfilling your obligations to your client and not taking ***unfair advantage*** of another person. To an extent, therefore, 10.01 limits your duty to act in the best interests of your client. For example, your duty may be limited where an ***unrepresented opponent*** provides badly drawn documentation. In the circumstances you should suggest the opponent finds legal representation. If the opponent does not do so, you need to ensure that a balance is maintained between doing your best for the client and not taking unfair advantage of the opponent's lack of legal knowledge and drafting skills."

[55] There is a potential difference between the UK and the U.S. on mediation matters. It appears to this author that the UK SRA and BSB Codes treat mediation, in some instances, as an extension of court proceedings. *See, e.g.,* BSB 708.1. In the U.S. however, distinctions are often drawn in the Model Rules between "tribunal" settings (which involve courts and administrative bodies) and out-of-court (non-court-ordered) mediation.

proper and lawful means the lay client's best interests"[56] because a barrister "owes his primary duty . . . to the lay client"[57] and must protect the client's confidences.[58] A barrister must not "engage in conduct whether in pursuit of his profession or otherwise which is dishonest" or which is likely to diminish "public confidence in the legal profession."[59] A barrister "must not deceive or knowingly or recklessly mislead the Court"[60] or a mediator.[61] Although a barrister is cautioned not to "compromise his professional standards in order to please his client the Court or a third party, including any mediator,"[62] there seems to be no specific rule on private negotiations. It appears to this author that nothing in the BSB Code either explicitly deals with "puffing" or "bluffing" in private negotiations[63] or indicates puffing/bluffing would be seen as being barred by the sanctions against being "dishonest" or "misleading" (rather than as simply part of the normal give-and-take of any negotiating process) as long as the puffing/bluffing was not an outright lie or fraud and as long as it is not done "recklessly."[64]

6. The ABA Model Rules

[56] BSB Code 303(a).

[57] BSB Code 303(b).

[58] BSB Code 702.

[59] BSB Code 301.

[60] BSB Code 302.

[61] BSB Code 708.1.

[62] BSB Code 307(c).

[63] The prohibitions in BSB Code 704, concerning drafting documents to advance a client's case, appear to this author to be directed to court and mediation proceedings, not non-tribunal settings.

[64] BSB 708.1 (emphasis supplied) "A barrister instructed in a mediation must not knowingly or ***recklessly mislead*** the mediator or any party or their representative." It is unclear from this rule whether regular negotiation tactics would be treated as "misleading" anyone; taken to the extreme and read literally, this rule would prevent a party from engaging in the normal bantering and give-and-take that form the bulk of any mediation, for if we are to be frank, most statements in a mediation are in some way designed to conceal our side's bottom line.

To some in the U.S., calling the ABA 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 ABA Model Rules were drafted, the ABA specifically *rejected* requiring complete and unmitigated truthfulness in negotiations.[65] 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."

In the ABA Model 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.[66]

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[65] 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.

[66] 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:
>
> (1a) make a false statement of material fact or law to a third person; or
>
> (~~2~~b) 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.~~"

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."[67]

Truth is not the stated objective of the ABA Model Rules. In negotiations, a lawyer is entitled (but never required) to reveal client confidences if making a disclosure "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.[68]

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[67]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]

[68]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 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."[69] 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 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.[70]

[69] ABA Legislative History, p. 122.

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

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."[71]

7. ETHICS, PROFESSIONALISM, AND TACTICS DURING NEGOTIATION

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. For example, one observer of ethical issues involving the international practice of law has noted that there is a "paradox of conflict of interest" and ethics " 'that it is at least as likely to be embraced as to be renounced' " because clients " 'discover that they are better served by fiduciaries most entangled in conflicts of interest.' In other words, '[t]he most able individual and organizational candidates for positions of trust arrive freighted with considerable baggage; independence often comes at the price of

[71]Bok, *Lying*.

inexperience.' "[72] Others have noted that the thrust of injecting ethics into the realm of legal representation began, in the UK, in the ecclesiastical courts.[73]

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.[74] 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[75] and Charles Curtis.[76]

Finally, there are those who have claimed that a comprehensive ethical code to guide lawyers' behavior in difficult legal issues really does not exist in the UK.[77]

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[72] Moore, *supra*, quoting from Susan Shapiro, Tangled Loyalties: Conflict of Interest in Legal Practice. Ann Arbor: University of Michigan Press, 2002.

[73] "At most points in English history, the formal articulation of legal ethics standards distinguished between the type of lawyer at issue. The ecclesiastical lawyers had their own standards, separate from those applicable to lawyers practicing in the English lay courts. Even as to non-ecclesiastical lawyers, the standards often were stated as to the pleaders, serjeants, and barristers, on the one hand, or the attorneys and solicitors, on the other. The distinctions in conduct standards must not be overstated. Although many individual standards purported to address the conduct of only a specific type of lawyer, the basic ethical standards, when taken as a whole, did not vary substantially between the various categories of English lawyers." Carol Rice Andrews, "STANDARDS OF CONDUCT FOR LAWYERS: AN 800-YEAR EVOLUTION," 57 SMU L. Rev. 1385, 1389-90 (2004)

[74]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*.

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

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

[77] See: David O'Donnell, "LEGAL ETHICS IN PRACTICE - FIVE PROBLEM CASES," Scots Law Times, 2001, 4, 33-40 (emphasis supplied): "Where can lawyers find guidance in dealing with ethical problems? * * * [W]here can the details of such a code be found? If it exists, why not simply refer to it rather than to the instincts and feelings of individual lawyers? ***As we know, such a code does not exist***. *It is more likely that what he had in mind was that all lawyers should share a basic standard of morality and should instinctively know when something offends against that standard. This may at first glance seem rather vague but it may also be as close as we can come in some situations to knowing what the right thing is.* Apart from this intuitive standard there is no code and nothing else except a few diverse rules and codes issued by the professional bodies, and decisions of discipline tribunals and courts.

The tension, at base, is not necessarily between "ethics" as an abstract notion, but rather whether various negotiation tactics are permitted or prohibited.

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";[78]
- "Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive"; [79]
- "Professionalism: Lip Service or Life Style";[80]
- "Ethics on the Table: Stretching the Truth in Negotiations";[81] and
- "Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?"[82]

Many of these articles contain a search for principles that should guide lawyers 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

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

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

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

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

[82]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).

> 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 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. . . .[83]

Likewise, British jurists have expressed a dislike of lawyers who stand on the letter of the law in such a fashion as to leave courts with an incomplete understanding of the entire realm of the "truth." See, for example, the comments of Thorpe LJ about how a barrister should respond when he finds that his client, who in this case was claiming severe nervous shock because of an incident, was represented by another barrister in a different case where psychiatric evidence had indicated that the plaintiff "was substantially if not fully recovered from the nervous shock."[84] Thorpe LJ concluded that "there was a duty to disclose the information to the opponent and, unless there was objection from the opponent, to the court."[85]

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

[84] David O'Donnell, "LEGAL ETHICS IN PRACTICE - FIVE PROBLEM CASES," Scots Law Times, 2001, 4, 33-40, discussing *Vernon v Bosley* (No 2) [1997] 1 All ER 614 (CA).

[85] *Id.*

Thorpe LJ's opinion about the how ethical issues should be addressed is revealing. "[Counsel] submitted that in the dilemma of decision counsel had only to look to the authorities and apply them to the circumstances. Counsel was not to be guided by his feelings on the issue in question. I cannot accept that counsel's approach should be so strictly cerebral. There is a value in instinctive and intuitive judgment. The more difficult the decision the greater that value. The course that feels wrong is unlikely to be the safe course to follow" [86]

8. 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,"[87] an "almost pathological pro-client attitude,"[88] or "'total annihilation' of the other side,"[89] 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

[86] *Id.*

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

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

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

> 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.' "[90]

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.[91] Thus, the Talmud admonishes one to refrain from all

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

[91]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

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."[92]

Aeschylus had Prometheus say: "The worst disease of all, I say, is fabricated speeches and disguise."[93]

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.
>
> * * *
>
> 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:
>
> 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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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:

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

[92]Iliad, Chapter 9.

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

* * *

> So let us regard this as settled: what is morally wrong can never be advantageous, even when it enables you to make 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."[94]

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:

> 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

[94]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.[95]

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."[96]

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."[97]

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

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

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

[97]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*.[98]

In *Laidlaw v. Organ,* a famous U.S. common law case, Chief Justice Marshall rejected the concept of honesty and fair dealing when facts are "equally accessible to both parties."[99] 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,[100] even though Organ knew that Laidlaw was under a misapprehension.[101]

Even Trollope's difficult Mr. Chaffanbrass articulated dislike for this *caveat emptor* approach: "*Caveat emptor* is the only motto going, and the worst proverb that ever came from dishonest stony-hearted Rome. With such a motto as that to guide us, no man dare trust his brother."[102]

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[98]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.

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

[100]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.

[101]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.

[102] Trollope, *Phineas Redux.*

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."[103] Professor Edmond Cahn's famous book by this 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."[104]

9. TRUTHFULNESS v. CLIENT CONFIDENCES

Both the SRA Code and the BSB Code deal with client confidences, but in general the only exceptions to maintaining client confidences are the consent of the parties and applicable laws.[105] There apparently are no provisions allowing the breaching of confidentiality to protect public welfare; yet, at least the SRA Code seems to allow a lawyer to keep information ***from*** a client if harm could result to another.[106] Thus, it

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

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

[105] *See, e.g.*, SRA Code Rules 4.01 and 4.02. Also see BSB Code: "702. Whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person (other than another barrister, a pupil, in the case of a Registered European Lawyer, the person with whom he is acting in conjunction for the purposes of paragraph 5(3) of the Registered European Lawyers Rules or any other person who needs to know it for the performance of their duties) information which has been entrusted to him in confidence or use such information to the lay client's detriment or to his own or another client's advantage."

[106] SRA Code Rule 4.02(b)(iii) mandates that a solicitor must reveal to a client all "material" information "regardless of the source of the information" except "where you reasonably believe that serious physical or mental injury will be caused to any person if the information ***is disclosed to a client.***"

appears to this writer that both the SRA Code and BSB Code are highly concerned about a lawyer's relationship to a client and to the court, but have little to say about a lawyer's obligation to the public. In other words, in the balancing test of "truth" v. "confidential communication," the SRA Code and the BSB Code appear to come down on the side of protecting confidential communications as long as a court is not misled.[107]

The UK result stands in contrast to the USA approach, although initially the USA approach was more protective of confidences. The ABA, in its initial 2002 adoption of the 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. ABA 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 lawyer 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

[107] *See, e.g.*, SRA Code Rule 11.01, prohibiting "deceiving or misleading the court."

client."[108] In view of this action, the ABA's Model Rule committee withdrew other proposed changes in Rule 1.6.[109]

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

[109] 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 Model Rule 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 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 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 ABA 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 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 Model Rule 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.[110]

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 ABA Model Rule Committee's suggestion in full. [111]

> 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.**

[110]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.

[111] 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;

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

In the USA, it used to be well-settled 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 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."[112]

The wall of privity, however, was breached first in will contests[113] and next in matters where lawyers had given opinion letters to third parties, for then courts could see

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(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.

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

[113]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).

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.[114] 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."[115]

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 approach')."[116] Regardless of the underlying theory used, courts time and time again have held that if a third party reasonably relies upon an lawyer's opinion letter, then the lawyer is liable to the third party, whether the basis of the liability is "negligent misrepresentation" or "fraud" or some other type of innominate tort.[117]

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

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

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

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

[117]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).

transactional situations: the Restatement of the Law Governing Lawyers[118] 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"[119]; assisting a client commit a tort through acts which are themselves tortious;[120] a fraudulent misrepresentation that is something more than "legally innocuous hyperbole";[121] as well as liability under federal securities laws, antitrust statutes, RICO, and consumer protection laws.[122]

The basis of this liability is the duty of care that lawyers owe to nonclients under §51 of the ALI Lawyer Restatement.[123] While some have criticized this standard as

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

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

[120]Id.

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

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

[123]§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

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,[124] it does 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.[125]

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 lawyer on the other side of the table.[126] There is no

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(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.

[124]"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.' "

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).

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

[126]§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

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, the drafters of the comments believed either that (a) experienced lawyer Y shouldn't or wouldn't let Lawyer X get away with something bad, or, (b) if something bad did happen, then the nonclient should sue its own lawyer 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.

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"[127] a "substantial financial loss"[128] to a third person caused by a client crime or fraud even if the "loss has not yet occurred,"[129] 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."[130] Even if these criteria are met, §67 cautions that the lawyer must first make a "good faith effort to persuade the client not to act"[131] if this is feasible or ask the client to "warn the victim"[132] or fix the problem. §67 closes with the caution that a lawyer who either acts or

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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*.

[127]ALI Lawyer Restatement §67(2).

[128]ALI Lawyer Restatement §67(1)(a).

[129]ALI Lawyer Restatement §67(1)(b).

[130]ALI Lawyer Restatement §67(1)(d).

[131]ALI Lawyer Restatement §67(3).

[132]*Id*.

fails to act under its principles is not "solely by reason of such action or inaction"[133] 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[134] 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 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 pertinent Illustrations contained in §67. 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 four Illustrations to §67 that are pertinent to transactional lawyers, particularly those who represent developers and borrowers.[135] Two Illustrations contend

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[133]ALI Lawyer Restatement §67(4).

[134] ALI Lawyer Restatement §66 is entitled "Using or Disclosing information to Prevent Death or Serious Bodily Harm."

[135]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.
>
> 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

that a lawyer who was engaged, after the fact, to defend in a claim in a regulatory arena that 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."[136] This nondisclosure is mandated even if there are penalties for continuing offenses.[137] 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.[138] These Illustrations, unlike the ABA 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.[139] The key issue under §67, however, is preventing a crime or fraud; if there is no crime or fraud, then this Section is not implicated.

> 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.

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

[137]*Id.*, Illustration 4.

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

[139]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;

While §67 states in a comment (but not in the black letter text) that these exceptions to confidentiality are "extraordinary,"[140] it appears that that lawyers may no longer be able to use the Model Rules as a shield, for courts may 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,[141] which concerns justifiable reliance on the advice of a

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(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.

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

[141]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.

professional. §552 has been used by courts in addressing lawyers' liability to those other than their clients.[142]

11. NON-LITIGATION NEGOTIATIONS AND LIABILITY TO THIRD PARTIES

In the USA, 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.[143] 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 lawyer'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.

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[142]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).

[143]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.

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.[144] The federal court of appeals had held that Dirks, a respected financial analyst, was properly disciplined for failing to disclose to 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.[145] 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."[146] The dissent would have found Dirks liable, claiming that an inquiry into motives was not necessary.[147] 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."[148] 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.

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[144]*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).

[145] "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.

[146]463 U.S. at 667. 103 S.Ct. at 3268.

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

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

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*. * * *
>
> "*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." [149]

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.[150] These cases usually involve claims of self-dealing or mixed representation.

[149] 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).

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

In New Jersey, *Baldasarre v. Butler*[151] has provided a cautionary note for all U.S. lawyers who attempt to represent both buyer and seller. There, even though the lawyer attempted to obtain written consents from both the buyer and seller, the lawyer 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 lawyer represented *only* the buyer. As the Court noted, the problem in the case was the dual representation by the lawyer; 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"[152] his intended use or profit – in other words, the buyer could deceive the seller and refuse to give truthful information. Thus, theoretically, an independent lawyer 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."[153]

Of course, UK solicitors do not face the problems that U.S. lawyers do in representing both sides in a transaction, for SRA Code 3.09 provides that a solicitor may act for both the buyer and seller in a transaction that is at "arms length" if "both parties

[151]132 N.J. 278, 625 A.2d 458 (1993).
[152]*Id*., 625 A.2d at 464.
[153]*Id.*

are established clients;" or "the consideration is £10,000 or less and the transaction is not the grant of a lease; or seller and buyer are represented by two separate offices in different localities" as long as written consent is obtained and "no conflict of interests must exist or arise."[154] By contrast, in the U.S. these types of representations are strictly prohibited, and no waiver is possible, for the ABA Model Code presumes that there is always a conflict in this situation that prevents you from being a the lawyer "for the transaction." The UK rule for solicitors even allows a lawyer to represent both seller and buyer in the same non-arms length transaction[155] under certain limited circumstance. [156]

Contrast the U.S. rule in *Baldasarre v. Butler* with *Petrillo v. Bachenberg*,[157] where there was alleged negligent misrepresentation by a seller's lawyer 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 lawyer 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 lawyer." *Baxt v. Liloia*, 155 N.J. 190, 197; 714 A.2d 271, 274 (N. J. 1998).[158] Of course, this does not mean that a violation of the ALI Restatement might not lead to liability.

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[154] SRA Code 3.10(b).

[155] SRA Code 3.08.

[156] SRA Code 10.06(3) and (4).

[157] 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).

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

Moreover, note that the *Petrillo* court seemingly made the lawyer liable not to a specific purchaser but to *<u>any</u> purchaser* who might reasonably be expected to rely upon the composite report. *Petrillo* even recognized (unlike some legal critics) that lawyers are

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> 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).

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.”[159] *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.’”[160]

12. A LOOK AT SOME FAMILY LAW NEGOTIATIONS

One of the few reported USA 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*.[161] The case arose out of a property settlement in a divorce. The wife's lawyer, 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 lawyer was aware of the mistake and counter-offered using the same mistaken valuation number. The counter-offer was accepted by the wife's lawyer and the instrument reflecting the counter-offer was later approved by a court as a property settlement.

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[159]*Id*. at 1354.

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

[161]21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (Cal. App. 2d 1971).

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 under the rubric of a unilateral mistake. Underlying the court's holding, although not explicit, is the implication that the former husband's lawyer, 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?

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

Both the UK and USA codes envision situations where a lawyer may withdraw from representation under certain limited circumstances.[162] In the UK, however, it

[162] See, for example, this comment by David O'Donnell (see note 77, *supra*) (emphasis supplied): "If, however, it is known that the client is lying about a factual matter, for example previous convictions, then as an officer of the court it would appear that the lawyer must take steps to prevent this. An adjournment to reason with the client, which failing resigning from acting further, would be the appropriate action. There is, however, a further difficulty. If the "lie" relates to something that is not public knowledge, the lawyer

appears that withdrawal is disfavored and there are no specific rules governing what a lawyer should do or say once withdrawal occurs.

The USA has a different approach. 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 lawyer.

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.[163] ALI Lawyer Restatement §54(1) states that a "lawyer is not liable under §48

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may still be using client confidentiality against the client and in that situation there is still the conflict between the duty to the client and the duty to the court. If the "lie" relates to something that would, at least in theory, be public knowledge, e g a previous conviction, then perhaps the conflict is not so acute. However, in both situations the lawyer will require to choose between these duties. (***I would anticipate that most lawyers in this dilemma would favour their duty to the court. They would however still require to maintain client confidentiality and simply resign from acting further in the case.***)"

[163]See the comments to the Preamble to the current ABA Model Rules. 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 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."

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

The ABA Preamble changed the old rule. Under MR Preamble 18, it was stated that "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." The 2002 ABA Model Rules deleted this language; 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.[164] 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.[165]

Once you have figured out what rule applies and that you are in fact at risk, what are you to do? ABA Model Rule 1.16 ("Declining or Terminating Representation") suggests that one remedy for a lawyer is withdrawal, and the comments to ABA Model Rule 1.6 ("Confidentiality of Information") indicate that the withdrawal can be "noisy" — 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 further, such as a disavowal of work product.[166] ABA Formal Opinion 92-366 attempted

[164] 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.

[165] 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).

[166] 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

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.[167]

What should you 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?

ABA Model Rule 1.16 allows an lawyer to withdraw if it can be accomplished without "material adverse effect on the interests of the client."[168] A noisy withdrawal, 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.

(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.

[167]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."

[168]ABA Model Rule 1.16(b)(1).

ABA 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"[169] or if "the client has used the lawyer's services to perpetrate a crime or fraud"[170] or the client insists upon "taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,"[171] or when "other good cause of withdrawal exists."[172] It is important to note, however, that the withdrawal under ABA Model Rule 1.16 is never mandatory; it is always discretionary.

Even the Model Rules, however, do 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,"[173] 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 (ABA Model Rule 1.16), the Model Rules do not permit you to reveal any confidential information (ABA Model Rule 1.6). Moreover, the comments, but not the black letter of ABA Model Rule 1.6, indicate that whether "other law" requires disclosure prohibited by ABA Model Rule 1.6 is "beyond the scope of these Rules."[174] This is not

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[169]ABA Model Rule 1.16(b)(2).

[170]ABA Model Rule 1.16(b)(3).

[171]ABA Model Rule 1.16(b)(4).

[172]ABA Model Rule 1.16(b)(7).

[173]ABA 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)."

[174]This language is found in ABA 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

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.

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 Model Rules intact may be as difficult as Odysseus' task of steering between Scylla and Charybdis.[175] No wonder that one commentator wrote, 16 years ago, the trouble with 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."[176]

b. What's the Jurisprudence on Noisy Withdrawals?

Only a few U.S. cases have used the term "noisy withdrawal,"[177] but none give lawyers an effective guidepost of what to do and how to act. One case laments the fact that because securities regulators had not promulgated a mandatory "noisy withdrawal" rule for securities lawyers, regulators and the public may have been misled.[178] Another

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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."

[175]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.]

[176]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.

[177] See, e.g., *In Re Teleglobe Communications*, 493 F.3d 345 (3rd Cir. 2007); *United States v. Chee*, 2007 WL 2288023 (D. Ariz. 8/9/07); *Securities and Exchange Commission v. Spiegel, Inc.*, 2003 WL 22176223 (D.C. N.D. IL. 9/15/03);

[178] *Spiegel, Inc.*, see footnote 177 *supra:* "None of Spiegel's legal advisers withdrew-'noisily' or otherwise-from representing Spiegel. If the SEC's proposed withdrawal rule had then been in effect, the SEC would have been alerted to take action sooner, and investors would have received information they could have

merely noted that the lawyer had withdrawn in a criminal case, properly notifying the court that the withdrawal was being requested because of disagreements with the client.[179]

While a Westlaw search reveals no other state or federal cases using the phrase "noisy withdrawal,"[180] 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[181] Douglas (a lawyer) 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 also 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

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acted on to make informed investment decisions about Spiegel. In this case, the absence of a ' noisy withdrawal' requirement allowed Spiegel to keep investors and the SEC in the dark."

AUTHOR'S NOTE: It should be noted that most of the commentary about "noisy" withdrawals concern the proposed (but not adopted) SEC rule.

[179] *Chee*; see footnote 177 *supra.* The court found that the lawyer had acted properly in the withdrawal as had other defense lawyers in the case. The trial court stated: ". I explained to Mr. Chee what I would have to do before I could allow him to represent himself and advised him that the problems he was having with his lawyers were his problems and not the lawyers' problems because 'this is now the third lawyer about whom you have said the same thing.'" *Id.*

[180] 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.

[181] 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.

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 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"[182] 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"[183] 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." [184]

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

[183] *Id.*

[184] 786 F. Supp. at 1395.

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.

- The court concludes that the investors had alleged enough facts "to establish an attorney–client relationship"[185] 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."[186] This relationship also allowed a claim of breach of fiduciary duty 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

[185] 786 F. Supp. at 1396.

[186] 786 F. Supp. at 1398.

a hand in drafting for the client to send, the lawyers "had a duty to inform."[187]

- 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 had "omitted material facts and that they had participated in the fraud * * *it is unnecessary to allege reliance by the class plaintiffs."[188]
- 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."[189]

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. WHAT SHOULD A CLIENT EXPECT

If a definitive resolution of these issues is unclear for lawyers, solicitors, and barristers, what is a client to do when legal representation is required in negotiations?

On the one hand, clients believe they have the right (short of breaking the law or committing fraud) to negotiate in any fashion they see fit. Tough business negotiators are

[187] 786 F. Supp. at 1400.
[188] 786 F. Supp. at 1401.
[189] 786 F. Supp. at 1402.

often prized and highly rewarded.[190] There is no code of conduct regulating business negotiations. Unlike a lawyer, barrister, or solicitor, no client risks losing the right to remain in business by violating norms that are ethical rather than legal.

Clients may find it hard to understand why their lawyer should be more constrained in business negotiations than any other employee or agent of the business. They may find it difficult to comprehend that some tactics which are common in business negotiations may give their lawyer pause if the lawyer is asked to take the same approach.

It behooves the client and the lawyer to address these issues directly, prior to the start of any negotiation. There should be a frank and open discussion of the kinds of tactics, statements, and positions that can or should be articulated and of those which might be deemed questionable. The search should be for a mutual understanding of how best to achieve the client's goals within the confines that constrict what lawyers, solicitors, and barristers are permitted to do by their respective codes.

[190] There are literally hundreds of books and articles on business negotiations. Some recent books include: Roy J. Lewicki, Joseph A. Littner, John W. Minton, David M. Saunders, *Negotiation* (2nd Edition) (2006); Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (2006); Howard Raiffa, *The Art and Science of Negotiation* (2006); Max Bazerman and Margaret Neale, *Negotiating Rationally* (2006); Jeswald W. Salacuse, T*he Global Negotiator - Making, Managing, and Mending Deals around the World in the Twenty-First Century;* and Leigh Thompson, *The Heart and Mind of the Negotiator* (2006).

15. CONCLUSION

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 concept (perhaps only aspirational) 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.

It is submitted that 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.[191]

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

[191] *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).

> 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 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.[192]

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."[193] 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.***

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

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