

Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates

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“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”¹

I. INTRODUCTION

A clever negotiator must be a master of the art of deceit. A reputation for plain and fair dealing will not work to my economic and professional advantage. If this represents your resolute and steadfast opinion of the effective negotiator, you may prefer to read no further.²

Lawyers lie, especially in negotiations, but what is lying is not entirely clear. The French writer and skeptic Michel De Montaigne said: “If falsehood, like truth, had but one face, we should know better where we are, for we should then take for certain the opposite of what the liar tells us. But the reverse of the truth has a hundred thousand shapes and a boundless field.”³

Lawyers lie about many issues. In negotiations, lawyers lie about the value of whatever is being discussed; about their goals, priorities, or interests; about their reservation point; about their alternatives; about their willingness, ability, or authority to make deals; about the existence of objective standards; and about a whole host of things that will impact the perceived strength and weakness of their side. In lying, negotiators find common ground and bring unwilling parties to closure. Lying has its advantages, but a lie that crosses the line to what is unprofessional, unethical, or illegal can bring a negotiation to a halt; lawyers will face sanctions, reputations will suffer, and future prospects will diminish. When a lie goes too far, everyone loses.

There are three general types of lies: outright affirmative misrepresentations; truthful statements that are incomplete and misleading; and failures to disclose information necessary to prevent misunderstandings.⁴

¹ *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). *See also* *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 255 (1970) (Stewart, J., concurring).

² *See* David Lax & James Sebenius, *Three Ethical Issues in Negotiation in WHAT'S FAIR: ETHICS FOR NEGOTIATORS* 6–7 (Carrie Menkel-Meadow & Michael Wheeler eds., Jossey-Bass 2004).

³ MICHEL DE MONTAIGNE, *THE ESSAYS OF MONTAIGNE* 30–31 (E.J. Trechmann trans., 1927).

⁴ *See* CHARLES B. CRAVER & JOHN Burwell GARVEY, *SKILLS & VALUES: ALTERNATIVE DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, COLLABORATIVE LAW, AND ARBITRATION* 71. (Matthew Bender & Company, 2013).

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Lawyers will look to the Rules of Professional Conduct and the law to tell them whether they have crossed the line when confronted with these options, but as one scholar declares: "In negotiation, people who rely on the letter of legal rules as a strategy for plotting unethical conduct are very likely to get into deep trouble. But people who rely on a cultivated sense of right and wrong to guide them in legal matters are likely to do well."⁵

Cultivating a sense of right and wrong is easier said than done. Matched against the complex demands of the real world, negotiators often find what little cultivation one has done is not nearly enough to clear them of trouble. It is in these difficult times negotiators find themselves working the hardest to develop a sense of right and wrong for the years yet to come. The Chinese philosopher Confucius asks: "to learn and to practice what is learned time and again is pleasure, is it not?"⁶

Four sections are presented here to help negotiators enhance and practice the disciplines of ethics and professionalism. Section II discusses the three types of lies, and will set out a scenario to engage our process of learning and practice. Section III explores common law fraud principles and rules of professional conduct to develop a general scope of what is illegal, what is unethical, what is unprofessional, and what is permissible in the context of our scenario. A moral mirror is offered as a tool to test a negotiator's commitment to professionalism, an aspirational plateau above a lawyer's legal and ethical obligations. Section IV explores mediation within the framework set-out to gauge its unique contours. Section V draws the conclusion that a mirror, real or imagined, may be a useful means to measure a negotiator's commitment to professionalism. This Article is styled to provide functional guidance, and is not intended as a comprehensive academic review of the topic. It should accommodate learning and practice.

II. THE LIES LAWYERS WILL TELL, OR NOT TELL

There are three classes of misrepresentation. The first is affirmative misrepresentation: when the speaker states something material to the

⁵ G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 MIT SLOAN MGMT. REV. 93, 99 (1991).

⁶ CONFUCIUS, *THE ANALECTS OF CONFUCIUS* 1:1 (Hong Kong: Confucius Publishing Co., Ltd., 1996).

negotiation that is not true.⁷ The second is when the speaker tells the half-truth: the statement being communicated is the truth, but there is something missing from the true statement that is likely material or may cause the listener to misinterpret the meaning and intent of what is communicated. The third is silence: it is a misrepresentation because the speaker knows of the truth but for whatever reason, intentionally or unintentionally, conceals it, misleading the listener.⁸

An affirmative misrepresentation may be an outright lie, but it may not be illegal or unethical if it is immaterial and thus considered puffing. Half-true statements may not be lies, but may constitute actionable misrepresentations when the person making the half-true statements knows the other party is being misled. Lastly, complete silence may shelter a lie. One cannot mislead or misrepresent a material fact through silence.⁹ There are Model Rules that impose an affirmative duty to disclose under certain circumstances.¹⁰

Each class of misrepresentation is not per se illegal, unethical, unprofessional, or permissible. Rather, each class demands attentiveness to the circumstances so that lawyers may cultivate the sense of right and wrong under the guidance of laws, professional rules, and standards of conduct. To understand where negotiators should be confined within their rights, commit no wrongs, and negotiate effectively within the boundaries of legal and ethical norms, a hypothetical problem may be instructive:

⁷ “. . . [I]t reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement.” *Ausherman v. Banking Am. Corp.*, 212 F.Supp.2d 435, 449 (D. Md. 2002).

⁸ While intent to deceive or mislead is present or implied, many jurisdictions also recognize the tort of negligent misrepresentation. *See, e.g.*, *Presnell Constr. Managers Inc., v. EH Constr.*, 134 S.W.3d 575, 580–82 (Ky. 2004); *Devore v. Hobart Mfg. Co.*, So.2d 836, 842–44 (La. 1979); *Ed Schory & Sons Inc. v. Francis*, 75 Ohio St. 3d 433, 439–40 (1996); RESTATEMENT (SECOND) TORTS § 552 (1977) (“Information Negligently Supplied for the Guidance of Others”).

⁹ Avoidance of fraud may require correction of a misimpression. RESTATEMENT (SECOND) TORTS § 551(2)(b) (“Liability for Nondisclosure”); Art Hinshaw, Peter Reilly, & Andrea Kupfer Schneider, *Attorneys and Negotiation Ethics: A Material Misunderstanding?*, 29 *NEGO. J.* 265, 272 (2013).

¹⁰ MODEL RULES OF PROF'L CONDUCT RR. 1.2(d), 8.4(a), 8.4 (c) (2009); *see infra* notes 38 & 56.

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A. Scenario: Negotiating a Distribution Agreement

Dick Distributor and Willie Widgetmaker are negotiating a distribution agreement for Willie's new widgets. It is an exclusive distribution contract and could be very lucrative for Dick's distributorship. During the due diligence phase, Willie discovered Dick hires many veterans as truck drivers. Willie considers himself a peace activist and he is not thrilled that war veterans will be handling his widgets. After the lawyers started their work on drafting the agreement, Willie told his lawyer, Ann Advocate, to include a provision requiring Dick to lay off 20 percent of his workforce in the interest of management efficiency. Along with the provision, Willie named employees he found through an "independent consultant" to be "inefficient" and required that these individuals must be laid off once the distribution agreement was negotiated. The list of names included all of the veterans, with a few non-veteran workers' names thrown in for good measure. Willie told Ann the true reason for wanting these workers out, but told her to keep quiet on the matter and do what it takes to get the deal done.

Dick's distributorship is located in an "at-will" employment jurisdiction.¹¹ He recently hired many veterans to take advantage of the new tax credits. His workers have not joined a union. Dick, a Vietnam veteran himself, suspected Willie's distaste for veterans was the reason for the newly inserted provision. Dick asked his lawyer, Louie Law, not to disclose his own veteran status, and stated that he will agree to the layoff provision only if the final investment price from Willie is twice Willie's original asking price. Dick told his lawyer the higher price is for spite and he will not settle for less because he knows Willie can't get another distributor in the region to do the work. Dick also told his lawyer that in case Willie is not willing to drop the layoff provision, his unreasonably high offer will give him a chance to walk away from the deal with full knowledge of Willie's trade secrets. If Willie agrees to the price, Dick plans to use the money to fund another limited liability company in his son's name to subcontract his distribution of widgets. Dick also plans to rehire all of the veterans he had laid off for his son's new company. Dick instructed his lawyer not to disclose why he wants his unreasonably high investment price or what he is planning to do, but told him to do whatever it takes to get the deal done.

¹¹ *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 909 (Mich. 1980) (holding an employee may be terminated for a good reason, a bad reason or for no reason at all provided that the reason does not violate an employment contract, an express or implied promise, statutory law or the public policy of the jurisdiction).

III. WHAT IS ILLEGAL, UNETHICAL OR UNPROFESSIONAL, AND WHAT IS PERMISSIBLE?

A. Illegal Conduct

Before either side's lawyers decide if they ought to keep confidences for their clients, it is important to consider the common law definition of fraud: a person engages in fraud by "knowingly misrepresenting a material fact upon which the victim reasonably relies and causes damages."¹² The governing Model Rule 1.2(d) regarding lawyer's conduct in relation to client's fraud also states, in relevant part: "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ." ¹³ So lawyers face two questions: (1) is the information they are to keep confidential for their clients a material fact, and (2) does keeping confidential the information constitute assisting their clients in commission of a fraud?

1. Willie Widgetmaker's Layoff Provision

Willie's lawyer, Ann Advocate, faces several difficult decisions. A lawyer cannot "knowingly misrepresent a material fact." But what are the facts? Has Willie said anything to Ann to warrant further inquiries before she goes to the negotiation table? Are the facts material to the negotiation? Would the misrepresented facts induce reasonable reliance on Dick's part? Would Dick incur damages relying on these facts?

The ethical issue presents a puzzle: a person engages in fraud by "*knowingly misrepresenting a material fact upon which the victim*

¹² *Brown v. Cnty. of Genesee*, 872 F.2d 169 (6th Cir. 1989); *James v. Lifeline Mobile Medics*, 341 Ill. App. Ct. 451, 792 N.E.2d 461 (2003) (deliberate misrepresentation of client's financial condition in settlement of wrongful termination litigation); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 728 (5th ed. 1984).

¹³ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009) ("Scope of Representation"). See also MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009) ("Truthfulness in Statements to Others") ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (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."); ABA Formal Op. 06-439 (2006) ("Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation").

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reasonably relies and causes damages.” But there may be more here than meets the eye.

a. Knowing the Truth and Reckless Disregard for Truth

Knowing requires a particular state of mind, and a false statement must be made *knowingly* to satisfy the element of fraud. Courts have stretched the definition of “knowing” to include reckless and conscious disregard for truth.¹⁴ So it is not enough for the lawyer to claim ignorance. If there is a chance the other side will reasonably rely that something stated, or not stated, is factual, and the lawyer suspects the fact may prove to be false; then the lawyer ought to err on the side of caution and make it her business to verify the fact so that there is no chance she is disregarding something upon which the other side may reasonably rely.¹⁵ Before Ann Advocate, Willie’s lawyer, can represent the independent consultant’s report to Dick as something reliable, thus justifying firing 20 percent of Dick’s workforce, she may want to probe into the legitimacy of this report.

b. Misrepresentation of a Material Fact

Assume, for the sake of this exercise, that Willie Widgetmaker’s lawyer, Ann, can verify the legitimacy of this independent consultant’s report. There is still the question of keeping silent Willie’s true intention for wanting to fire the veterans who work for Dick Distributor. Because Willie’s true intention has motivated his desire to negotiate the “layoff provision,” it is material. With respect to facts, however, parties are responsible for the impression they create by what they say or do not say. What matters, then, is whether the independent consultant’s report conceals the true nature of the proposal so that Dick’s lawyer cannot accurately assess an appropriate response for the proposed provision. Dick can assure Willie that there could be training programs developed to improve his existing workers’ efficiency, but what can Dick tell Willie to change his mind about war veterans in general? If Dick can’t gauge Willie’s real intention, how is he able to properly negotiate the terms of their agreement?

¹⁴ See Shell, *supra* note 5, at 94. *E.g.*, Computer Sys. Eng’g., Inc. v. Qantel Corp., 740 F.2d 59, 63 (1st Cir. 1984).

¹⁵ ROBERT H. MNOOKIN, SCOTT R. PEPPET, & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 282–86 (Bellenap Press of Harvard Univ. Press 2000).

Willie's likely response: "Not my problem." Willie's lawyer, Ann, could make the argument that, notwithstanding Willie's motivation, his opinion about these workers' inefficiencies seems to be supported by the independent consultant's findings. The "not my problem" response may pass muster, but Willie and Ann should be cautious that courts have, on occasion, punished statements of intention and opinion as fraudulent. Another way of looking at it: partial nondisclosure may constitute a deliberate misrepresentation of material fact because the speaker very likely realizes that the listener is interpreting the partial disclosure in a more (or less) expansive manner than knowledge of the full facts would permit.¹⁶ If there is no ethical obligation to fully disclose, should there be a moral or professional one?

But aside from the "not my problem" defense, Ann Advocate faces a much more critical, legal and ethical question: is it permissible for her to keep silent on Willie's fraudulent intent and hope that the facts never see the light of day?

Consider Model Rule 1.2(d): "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ." ¹⁷ The Uniformed Services Employment and Reemployment Rights Act ("USERRA")¹⁸ prohibits discrimination in employment based on past, present, or future military service. By keeping silent in furtherance of her client's illegal conduct, Ann is assisting Willie in the commission of a fraud. There lies the keystone of this fact pattern: what Willie is doing is fraudulent. No matter how hard Ann tries to dress the facts, it is still fraud. It is a lawyer's duty, legally and professionally, to prevent such a thing. Before probing the legitimacy of the independent consultant's report or thinking of defenses of hiding the facts, Ann must confront the real issue of misrepresentation as fraud.

Willie's lawyer, Ann, should advise strongly against Willie's layoff provision and inform him that what he is trying to do is illegal.¹⁹ If Willie

¹⁶ See, e.g., *Spaulding v. Zimmerman*, 263 Minn. 346, 352, 116 N.W.2d 704, 709 (1962) (finding no duty to fully disclose, i.e., to supplement information provided earlier).

¹⁷ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

¹⁸ 38 U.S.C. § 4311 (2006).

¹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009). See also ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, A.B.A. SEC. LIT. § 3.3, at 18 (2002), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> [hereinafter GUIDELINES] ("Preserving the Integrity of the Settlement Process; Restrictions on Client Settlement Authority"):

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wishes to proceed with the negotiation of the layoff provision, he must either consent to disclosure or must change his mind about discriminating against veterans. If Willie insists on proceeding with the goal of discharging the veterans, Ann must resign and Willie will have to proceed without her.²⁰ Of

3.3.1 Adherence to Ethical and Legal Rules: A lawyer must comply with the rules of professional conduct and the applicable law during the course of settlement negotiations and in concluding a settlement, and must not knowingly assist or counsel the client to violate the law or the client's fiduciary or other legal duties owed to others.

3.3.2 Client Directions Contrary to Ethical or Legal Rules: If a client directs the lawyer to act, in the context of settlement negotiations or in concluding a settlement, in a manner the lawyer reasonably believes is contrary to the attorney's ethical obligations or applicable law, the lawyer should counsel the client to pursue a different and lawful course of conduct. If a mutually agreeable and proper course of action does not arise from the consultation, the lawyer should determine whether withdrawal from representing the client is mandatory or discretionary, and should consider whether the circumstances activate ethical obligations in addition to withdrawal, such as disclosure obligations to a tribunal or to higher decisionmaking authorities in an organization.

3.3.3 Disagreement With or Repugnant Client Strategies: If a lawyer finds a client's proposed strategy or goal regarding settlement to be repugnant, but not contrary to applicable law or rules, or if the lawyer has a fundamental disagreement with the client's strategy or goal, the lawyer may continue the representation on the condition that the lawyer will not be required to perform acts in furtherance of the repugnant strategy or goal, or may withdraw from the representation.

²⁰ MODEL RULES OF PROF'L CONDUCT R. 1.16 (2009) ("Declining or Terminating Representation"):

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law; (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; ... or (7) other good cause for withdrawal exists; (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . .

GUIDELINES, *supra* note 19, § 3.3, at 18; GUIDELINES, *supra* note 19, § 4.1, at 34–39 ("Representations and Omissions"):

4.1.1 False Statements of Material Fact: In the course of negotiating or concluding a settlement, a lawyer must not knowingly make a false statement of material fact (or law) to a third person.

4.1.2 Silence, Omission, and the Duty to Disclose Material Facts: In the course of negotiating or concluding a settlement, a lawyer must disclose a material fact to a

course, although she resigns, Ann still owes Willie a duty of protecting attorney-client confidential communication, but under no circumstances may she assist in the fraud.²¹

2. *Dick Distributor's Spite*

The first question for Dick's lawyer, Louie, is whether failing to disclose Dick's veteran status constitutes fraud. The second question is whether Louie can negotiate for twice the asking price just for spite. The third question is whether Dick commits fraud when he agrees to Willie's layoff provision and rehires the veterans under a subcontract with his son just so they could carry out the distribution work negotiated in the distribution agreement without telling Willie.

third person when doing so is necessary to avoid assisting a criminal or fraudulent act by a client, unless such disclosure is prohibited by the ethical duty of confidentiality.

4.1.3 Withdrawal in Situations Involving Misrepresentations of Material Fact: If a lawyer discovers that a client will use the lawyer's services or work product to further a course of criminal or fraudulent conduct, the lawyer must withdraw from representing the client and in certain circumstances may do so "noisily" by disaffirming any opinion, document or other prior affirmation by the lawyer. If a lawyer discovers that a client has used a lawyer's services in the past to perpetuate a fraud, now ceased, the lawyer may, but is not required to, withdraw, but a "noisy withdrawal" is not permitted in such circumstances.

²¹ MODEL RULES OF PROF'L CONDUCT R. 1.16 (2009) ("Confidentiality of Information"):

(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 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; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

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The law is multi-layered: a person engages in fraud by “*knowingly misrepresenting a material fact upon which the victim reasonably relies and causes damages.*”²² (emphasis added) But here, the philosophical rubber seems to meet a different proverbial road.

a. Immaterial Misrepresentation: Puffing and Bluffing

Dick Distributor’s veteran status is probably not material to the negotiation. First, Willie Widgetmaker was willing to negotiate with Dick without inquiring into this. Second, even if he had, Dick could have simply told Willie that it was none of his business. Here, even if Dick’s lawyer were pressed with a direct question with regard to any military service, keeping silent on this matter does not attach liability for fraud.

Dick’s negotiating for twice the asking price just for spite hides the fact that his true settling price is lower than what he represents. But lies about reservation points²³ are usually not considered material by the Model Rules or the courts.²⁴ In fact, misrepresenting the reservation price allows Dick to test Willie’s commitment to the layoff provision. If Willie is highly committed to the firing of veterans and he is willing to pay the price, Dick may just as well take his money. If Willie is not as committed, then Dick may believe Willie’s abhorrence for veterans does not run so deep; perhaps a

²² RESTATEMENT (SECOND) OF TORTS § 525 (1977); KEETON ET AL., *supra* note 12, at 728; Shell, *supra* note 5, at 94.

²³ In negotiation, the reservation price is the point beyond which a negotiator is ready to walk away from a negotiated agreement. Reservation price is often referred to as the ‘walk away’ point. Ian Steedman, *Reservation Price and Reservation Demand*, in 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 158, 158–59 (J. Eatwell, M. Milgate, & P. Newman eds., 1987). Note that an exaggerated, announced reservation point by the seller may set a false anchoring expectation by the buyer. Permissible, yes, but the buyer must beware. *See also*, Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299, 306–07 (2010).

²⁴ *See* MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (2009):

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 intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

deal is possible after all. Problems may arise if Dick's lawyer decides to support the price point with lies. Simply refusing to accept a fair offer just for spite may constitute bad faith, but lies about "other potential offers" or "newly discovered operating costs" may lead to sanctions and even punitive damages.²⁵

Dick's willingness to make a false promise is more complicated. It is clearly material, but there is no scheme to defraud Willie. Dick will lay off these workers. If rehiring them and subcontracting work to them through his son is not specifically prohibited in the negotiated provisions, then there is no breach of contract. Nothing Dick does concerning the rehiring of the veterans or the subcontracting of the work will violate any rules or laws except, perhaps, good faith and standards of professional conduct.

b. Good Faith vs. Bad Faith

U.S. law does not impose a general duty of good faith in negotiations—a standard of conduct above simple honesty. The Uniform Commercial Code embraces the concept of good faith, not in the negotiation of a contract, but only in the performance of obligations under a contract.²⁶ Courts often will stretch the law to punish clear instances of bad faith.²⁷ When there is clearly

²⁵ See Shell, *supra* note 5, at 96. *E.g.*, Kabatchnick v. Hanover-Elm Bldg. Corp., 103 N.E.2d 692 (Mass. 1952); Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328 (Okla. Civ. App. 1976).

²⁶ U.C.C. § 1-203 (2001) ("Obligation of Good Faith: Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

²⁷ GUIDELINES, *supra* note 19, § 4.3, at 48 ("Fairness Issues"):

4.3.1 Bad Faith in the Settlement Process: An attorney may not employ the settlement process in bad faith. Committee Notes: It is axiomatic that lawyers may not use the settlement process in bad faith. Ethics rules, procedural rules and statutes forbid the bad faith use of the litigation process. See, e.g., Model Rules 3.2 and 4.4. The ordinary prohibition is applicable to settlement negotiations as to other phases of litigation. Therefore, the settlement process should not be used solely to delay the litigation or to embarrass, delay, or burden an opposing party or other third person. . . . It is not bad faith for a party to refuse to engage in settlement discussions or to refuse to settle. Settlement is not an obligation, but an alternative to litigation. The choice to pursue it to fruition should be that of the client. However, it may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, when the client actually has no interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceedings or securing discovery.

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unequal bargaining power, for example, where an employer is clearly taking advantage of an unschooled applicant for employment or an employee who knows nothing about non-competition agreements or pre-dispute arbitration agreements, courts will strain to find for the unschooled applicant.²⁸

In Dick Distributor's case, if Dick's motive for asking three times the offer price is to walk away with Willie Widgetmaker's trade secrets without committing to an agreement, a court may decide to penalize Dick's bad faith conduct and stretch the law to find fraud.²⁹ While Dick's lawyer, Louie, may lie about the price reservation, he must inform his client, Dick, that such a statement could be viewed as conduct in bad faith and he cannot assist his client in conduct that the lawyer knows is fraudulent.

Finally, lawyers may agree that their negotiations about a matter will be conducted in good faith. Courts today will hold them to their promise.³⁰ Moreover, the failure to negotiate at all and simply file suit may provoke a finding of bad faith.³¹

c. Affirmative Duties to Disclose and Actionable Silence

Both Dick's and Willie's lawyers ought to take note that aside from laws and rules governing when a lie goes too far, there are also affirmative duties to disclose under certain circumstances.

There is an affirmative duty to disclose material information when a lawyer actively conceals it.³² This affirmative duty also applies to when a

See GUIDELINES, *supra* note 19, § 2.3, at 3. (emphasis added); *infra* note 35.

²⁸ *E.g.*, *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1156 (9th Cir. 1998); *Penn v. Ryan's Family Steakhouses*, 95 F. Supp. 2d 940, 946 (N.D. Ind. 2000).

²⁹ *Shell*, *supra* note 5, at 98. See *Smith v. Snap-On Tools Corp.*, 833 F.2d 578, 579 (5th Cir. 1988); see also *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810 (7th Cir. 1987) (discussing the point at which a contract is formed); *Smith v. Dravo Corp.*, 203 F.2d 369, 375 (7th Cir. 1953).

³⁰ *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 277 (7th Cir. 1996) (implicit agreement); *PSI Energy Inc. v. Exxon Corp.*, 17 F.3d 969, 972 (7th Cir. 1994) (explicit agreement).

³¹ *Sahyers v. Prugh, Holliday & Karatinos*, 560 F.3d 1241, 1245-46 (11th Cir. 2009), *reh'g granted [denied]*, 603 F.3d 888 (11th Cir. 2010) (denial of attorney's fees and costs to prevailing party in FLSA action for failing to negotiate before filing suit despite the client's instruction to sue first. The court speaks to the lawyer's duty to the court and the court's inherent right to police and punish).

³² *E.g.*, *Hays v. Meyers*, 107 S.W. 287, 289 (Ky. 1908); *Patten v. Standard Oil Co.*, 55 S.W.2d 759, 761 (Tenn. 1933).

lawyer makes a partial disclosure that is or becomes misleading in light of all facts;³³ when a lawyer voluntarily, or in response to inquiries, speaks on a matter, then “full and fair” disclosure is required;³⁴ when a lawyer has a fiduciary relationship to another;³⁵ when a lawyer has “superior information” vital to the transaction that is not accessible to the other side;³⁶ when special transactions are at issue, such as insurance contracts;³⁷ or when there are special statutory requirements such as when a lawyer negotiates under the umbrella of security regulations or collective bargaining statutes.³⁸

There is no accurate way of predicting how the court will rule on nondisclosure or silence,³⁹ so it is always good to err on the side of caution and disclose when good judgment dictates.

B. Unethical and Unprofessional Conduct

Apart from common law fraud, both Dick’s and Willie’s lawyers also face ethical and professional duties of conduct. Here is where good judgment becomes murky. Where the Model Rules require lawyers to be honest and truthful to others, they also require lawyers to keep their client’s communication strictly confidential. So, while neither Dick’s nor Willie’s lawyer can be dishonest about the material facts, they must also keep in mind their duty of confidentiality to their clients. In addition to the common law fraud analysis that would apply here, a lawyer must also consider if

³³ KEETON ET AL., *supra* note 12, at 696–97.

³⁴ *E.g.*, Pashley v. Pac. Elec. Ry. Co., 153 P.2d 325, 330 (Cal. 1944).

³⁵ Negotiating at arm’s length business deals does not create fiduciary duties between business people; *e.g.*, Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992).

³⁶ *E.g.*, Mann v. Adams Realty Co., 556 F.2d 288, 297 (5th Cir. 1977). The doctrine of promissory estoppel may apply here especially where a material fact changes and a further disclosure is not made. *See* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274–75 (Wisc. 1965) (the value/cost of the franchise subsequently increased).

³⁷ *E.g.*, Weems v. Am. Sec. Ins. Co., 450 So. 2d 431, 436 (Miss. 1984).

³⁸ *E.g.*, National Labor Relations Act, 29 U.S.C. § 158(d) (1988 & Supp. IV 1992) (good faith related to collective bargaining); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78kk (1988); Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–20 (1982); Truth-in-Lending Act, 15 U.S.C. §§ 1601–65 (1982).

³⁹ *See* Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1797 (2005); *see also* Paula J. Dalley, *The Law of Deceit 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 407 (1995).

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disclosure is necessary to avoid fraud and if such disclosure would violate the model rules of confidentiality.⁴⁰

The ABA Model Rule of Professional Conduct on truthfulness in statements to others is similar to the substantive doctrine of fraud. Rule 4.1 applies only to statements of material fact or law that the lawyer knows to be false; it does not cover statements made unknowingly, or statements that concern immaterial matters, or statements that are unrelated to either fact or law.⁴¹ But Rule 4.1 carves off an exception for confidential information, so a lawyer must keep silent even if there are material misrepresentations. Rule 1.6 on confidential information requires that a lawyer may make disclosure only when disclosure is necessary “to prevent reasonably certain deadly or substantial bodily harm” or is necessary “to establish a claim or defense on behalf of the lawyer” Even under those exceptions where a lawyer may disclose a client’s communication, the lawyer still must clearly communicate to the client the intent and necessity to disclose; or else the lawyer must resign, keep silent, and let the client proceed alone.⁴²

Here, neither Dick’s nor Willie’s lies are so serious as to cause certain deadly or substantial bodily harm; there is also no need for the lawyers to establish a claim or defense for themselves, yet.⁴³ So both lawyers are duty-bound to keep silent as their clients suggested. Where the misrepresentations are material and illegal, the lawyers must inform their clients of the nature of fraud and their inability to assist in furtherance of that fraud; but both lawyers are committed to strict confidentiality.⁴⁴ Where the client presses the

⁴⁰ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009) (stating a lawyer “shall not reveal information relating to the representation of a client unless the client gives informed consent”)

⁴¹ MODEL RULES OF PROF’L CONDUCT R. 8.4 (2009) also requires a lawyer not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; but ABA’s Standing Committee on Ethics and Professional Responsibility states that Rule 8.4(c) “does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1.” See Lizabeth L. Burrell, *Between Scylla and Charybdis: The Importance of Internal Calibration in Balancing Zeal for One’s Client with Duties to the Legal System When Your Adversary Is Incompetent*, 23 U.S.F. MAR. L. J. 265, 308 (2011).

⁴² See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2009) (“Communication”); MODEL RULES OF PROF’L CONDUCT R. 1.16 (2009) (“Declining or Terminating Representation”); GUIDELINES, *supra* note 19, § 3.3, at 18 (“Preserving the Integrity of the Settlement Process; Restrictions on Client Settlement Authority”); GUIDELINES, *supra* note 19, § 4.1, at 34 (“Representations and Omissions”).

⁴³ See MODEL RULES OF PROF’L CONDUCT R. 1.16 (2009).

⁴⁴ See *supra* notes 12, 16–19 and accompanying text.

lawyer to proceed, the lawyer must obtain consent to disclose where there will be fraud or else the lawyer must resign. To disclose without consent violates ethical rules.⁴⁵ To conceal material facts commits the lawyers to fraud. Neither path leads to professional or ethical conduct. Neither cultivates the sense of right and wrong from which a lawyer could learn and practice.

What about Dick Distributor's willingness to make a bad faith promise to layoff the workers? Rehiring them and subcontracting work to them is not specifically prohibited unless Willie had bargained for that in the contract. Dick may not actually be violating any rules or laws, but can Dick's lawyer look in the mirror at night and live with this result?

Some would argue—as would the writer—that there is a critical line between being an ethical lawyer and a professional lawyer. The lawyers who would draw the line between ethics and professionalism are the same lawyers who would argue that one can be an ethical lawyer in line with the model rules and still act unprofessionally. Do we mean to make an excuse for being ethical, yet unprofessional? After all, there are no laws or ethical rules that prohibit lawyers from being mean, doing shameful things that are not necessarily unethical, behaving badly, and giving themselves and the profession a bad name. Shouldn't lawyers seek to conduct themselves both ethically and professionally?

Here is where cultivating a sense of right and wrong confronts the ethical rules and the letter of the law. Professor Shell argues that we would likely get into trouble if we rely on the letter of legal rules as a strategy for plotting unethical conduct.⁴⁶ Where we begin with what we think are just mere unprofessional behavior within the ethical rules, we are likely to end up in a place where the rules will bend against us. If, on the other hand, we are to start with cultivating our sense of right and wrong, conform our ethics to our profession, and allow our moral compass to guide us in our practice of law, we are likely to bring credit to our profession and ourselves. So there is no excuse for being unprofessional while acting within the confines of ethical rules.⁴⁷ Alvin B. Rubin, former Judge for the U.S. Circuit Court of Appeals for the Fifth Circuit, suggested an aspirational standard consistent with the

⁴⁵ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

⁴⁶ Shell, *supra* note 5, at 99. *See also* Russell Korobkin, Michael Moffitt & Nancy Welsh, *The Law of Bargaining*, 87 MARQ. L. REV. 839, 843–44 (2004).

⁴⁷ *Lee v. Am. Eagle Airlines, Inc.*, 93 F. Supp. 2d 1322, 1324, 1336 (D.C.S.D. Fla. 2000) (lawyer who won Title VII and § 1981 matter sanctioned with loss of \$358,423.20 in attorney's fees for misconduct including accusing opposing counsel of lies and misrepresentations).

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precept that simply because conduct is not sanctioned by the rules of the game does not make that conduct appropriate: “Negotiate honestly and in good faith, and do not take unfair advantage of another – regardless of his relative expertise or sophistication.”⁴⁸ If a lawyer cannot look in the mirror at night after what he has done during the day, he should cultivate that sense of wrong and aspire to do no more of it. There is no clear line drawn here between what is ethical and what is professional. How one sees oneself in the mirror should matter. It matters to many because they would not want to do business with those who have no willingness to reflect on their moral compass.⁴⁹

IV. DECEPTION IN MEDIATION

The hypothetical exercise continues:

A. Scenario: Mediating a Dispute Over the Distribution Agreement

Dick Distributor and Willie Widgetmaker proceed with their contract negotiation, but their negotiation breaks down. Dick walks away with Willie’s trade secrets and Willie sues in federal court. The court orders mediation; Fran Fairplay is appointed the mediator. Fran is an attorney at a local firm. She had been an elected judge for a number of years and has successfully problem-solved many mediations. Both Dick’s and Willie’s lawyers disclose what is known to the other party and no more; both allege the other side lied about their true intentions coming to the negotiation table and both want to go to trial. Unknown to Willie or Dick, Fran’s neighbor is the independent consultant hired to find support for Willie’s layoff provision. Before Fran knew who Willie and Dick were, her neighbor had mentioned to

⁴⁸ Alvin B. Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 586, 593 (1974–1975). See also Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS, 275, 289 (Carrie Menkel-Meadow & Michael Wheeler eds., Jossey-Bass 2004). (“[A]n aspirational ethic for bargaining should give special attention to issues of fairness”). Note the very restrictive application of “fairness” in the Model Rules, especially Rule 3.4 on Fairness to Opposing Party and Counsel.

⁴⁹ MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009). “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 added).

her a project he was working on “doctoring up” some data to show that a list of employed veterans were inefficient. Fran confirmed with her neighbor the company that hired him. Sure enough, it was Willie’s company, Widgetmakers.

“Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”⁵⁰ Two parties agree to mediation, invite a mediator, and along with the mediator, sign an agreement outlining the rules of the negotiation process. The goal of mediation is for each party to get the best deal possible. What information the parties hold back is layered with the mediator’s own information gathering strategies. Collaboratively, the process proceeds until the parties reach an agreement.

There are few rules governing mediation. The cornerstone rule is that the mediator must keep confidential whatever is told to the mediator by the parties unless a party consents to disclosure.⁵¹ No duty of good faith is

⁵⁰ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, A.B.A. SEC. D.R., at “Preamble” (2005), available at http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf [hereinafter STANDARDS].

⁵¹ *Id.* at Standard III:

(A) A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality. (B) A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator’s actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context. (C) A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation. (D) If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator’s service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation. (E) If a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

UNIF. MEDIATION ACT § 4 (2001) (“Privilege Against Disclosure; Admissibility; Discovery”):

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imposed because, where the mediator would be involved in judging the quality of the parties' bargaining, it could affect the mediator's neutrality or invite a court to review the mediation process, compromising the confidentiality of the process. The mediator, however, has a duty to disclose prior associations to the parties, and the mediator will need to withdraw if there is a conflict of interest that cannot be resolved by full disclosure and

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5. (b) In a proceeding, the following privileges apply: (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication. (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator. (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant; (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

UNIF. MEDIATION ACT § 7 (2001) ("Prohibited Mediator Reports"):

(a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation; (b) A mediator may disclose: . . . (2) a mediation communication as permitted under Section 6; or . . .

UNIF. MEDIATION ACT § 8 (2001) ("Confidentiality: Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State."); GUIDELINES, *supra* note 19, § 2.4, at 4 ("Restrictions on Disclosure to Third Parties of Information Relating to Settlement Negotiations"):

With client consent, a lawyer may use or disclose to third parties information learned during settlement negotiations, except when some law, rule, court order, or local custom prohibits disclosure or the lawyer agrees not to disclose. Committee Notes: Information learned during settlement discussions may be confidential as "information relating to representation" of the client. Therefore, client consent would be needed prior to disclosure of such information to third parties. *Model Rule* 1.6. Moreover, a lawyer must not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent. *Model Rule* 1.8 (b); *Model Rule* 1.9(c) (relating to former clients). Even with client consent, there may be other reasons the information should not be disclosed. For example, if public dissemination of the information has a "substantial likelihood of materially prejudicing" the proceeding, that disclosure may run afoul of applicable ethical rules. *See Model Rule* 3.6; *see also, infra*, Section 4.2.6 for a discussion of when a lawyer may be bound by an express agreement not to disclose settlement information to third parties.

informed consent.⁵² The Uniform Mediation Act focuses on confidentiality absent consent to disclose.⁵³ While this is meant to govern the process, it is also meant to empower the parties and to allow for self-determination. The expectation of confidentiality is therefore essential⁵⁴ but it is not absolute. The Uniform Mediation Act makes exceptions to the rule of confidentiality where there is threat of bodily injury, a statement or plan for a crime of violence, or an intention to commit a crime or to conceal a crime, among other things.⁵⁵

⁵² STANDARDS, *supra* note 50, at Standard II (“Impartiality”):

(A) A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice. (B) A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. (1) A mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason . . . (C) If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

UNIF. MEDIATION ACT § 9 (2001) (“Mediator’s Disclosure of Conflicts of Interest; Background”):

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall: (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation. (b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

⁵³ OHIO REV. CODE ANN. § 2710.07 (West 2006); UNIF. MEDIATION ACT § 8 (2001).

⁵⁴ *Hand v. Walnut Valley Sailing Club*, 475 F.App’x 277, 278 (10th Cir. 2012).

⁵⁵ UNIF. MEDIATION ACT § 6 (2001) (“Exceptions to Privilege”):

(a) There is no privilege under Section 4 for a mediation communication that is: (1) in an agreement evidenced by a record signed by all parties to the agreement; (2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public; (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence; (4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity; . . . (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: (1) a court proceeding involving a felony [or misdemeanor]; . . .

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Good faith dances along the periphery. Federal Rule of Civil Procedure 16(f) gives the trial judge control over pretrial conferences and imposes a duty of good faith.⁵⁶ While it is debatable if mediation is included within the definition of a pretrial conference under the Rules of Civil Procedure, courts have used Rule 16(f) to sanction bad faith in mediation.⁵⁷ There are also numerous local federal district court rules that specifically impose a good faith obligation on parties ordered to mediation.⁵⁸ Numerous districts also allow or require mediators to report bad faith conduct in mediations. Yet good faith in this context cannot be clearly defined. Aside from cooperation in good spirit, good faith may mean more information flow to establish more trustworthiness so that what would otherwise be litigated would be resolved collaboratively. Such are the high hopes of Mediator Fran Fairplay.

First, as discussed above, a lawyer must be truthful in negotiations. Model Rule 4.1 and the common law of fraud require that a lawyer shall not knowingly misrepresent material fact or assist in any fraud.⁵⁹ Second, under Model Rule 3.3 a lawyer has a greater obligation not to make a false statement of fact (whether material or not) to a “tribunal,” which may include a mediation conducted by a court-appointed mediator.⁶⁰ The Model

⁵⁶ FED. R. CIV. P. 16(f)(1):

On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney: (A) fails to appear at a scheduling or other pretrial conference; (B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or (C) fails to obey a scheduling or other pretrial order.

See also U.C.C. § 1-203, *supra* note 26.

⁵⁷ Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 381 (2010). *E.g.*, *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590, 595 (8th Cir. 2001). See also *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1419 (10th Cir. 1997); *Innovative Eng’g & Consulting Corp. v. Hurley & Assocs.*, No. 1:05cv764, 2006 WL 2422910, at *3–4 (N.D. Ohio Aug. 22, 2006) (settled in mediation, Mar. 29, 2007).

⁵⁸ Thompson, *supra* note 57, at 380 n.81. *E.g.*, N.D. Ind. L.R. 16.6(c), S.D.Ind. Local A.D.R. Rule 2.1, D. Kan. Rule 16.3(c)(5), E.D.Mo. L.R. 16-6.02(B)(1), S.D. Ohio Civ. R. 16.3(c)(3)(A)(iii).

⁵⁹ MODEL RULES OF PROF’L CONDUCT R. 4.1 (2009). See also ABA Formal Op. 06-439 (2006) (“Lawyer’s Obligation of Truthfulness when Representing a Client in Negotiation: Applications to Caucused Mediation”).

⁶⁰ See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2009) (“Candor Toward the Tribunal”):

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to

Standards Of Conduct For Mediators, Rule 6(A)(4), states that “A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.”⁶¹ However, although Willie’s conduct may be fraudulent, it is not reportable since there is no threat of bodily injury or harm.

Should the mediator, Fran Fairplay, keep silent about what she knows?⁶² Should Fran disclose the information to Willie’s counsel? Should Fran keep the acquired information from Dick Distributor and would that be fraud if

the tribunal by the lawyer; . . . (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse. [Comments to Rule 3.3] Comment [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. . . . It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition.

See also MODEL RULES OF PROF’L CONDUCT R. 8.4 (2009):

It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Cf. MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2009) (defining “tribunal” as a body “acting in an adjudicative capacity”); Craver & Garvey, *supra* note 4, at 74–75.

⁶¹ STANDARDS, *supra* note 50, at Standard VI(A)(4).

⁶² See N.C. Dispute Resolution Comm’n Formal Op. No. 10-16 (February 26, 2010); http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/complieaor_10-16.pdf (mediator should withdraw); Or. Bar Ass’n Comm. On Legal Ethics, Formal Op. No. 2005-167 (August 2005), <http://www.osbar.org/docs/ethics/2005-157.pdf>; http://content/aba/directories/mediator_ethics_opinion/322 (mediator should withdraw).

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Dick's lawyer asks directly about anything that could show Willie's bad intentions? Should Fran withdraw and terminate the mediation? And most important, what should the lawyers—acting as advocates in this mediation—have done to protect themselves from having a mediator who may have acquired confidential information about the dispute before the mediation began?

The Uniform Mediation Act, Section 6(4), exempts from the confidential privilege anything that is “intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime”⁶³ Should the mediator disclose the information she has about Willie's fraudulent intentions and leverage that to bring the mediation to a successful close? How she discloses or to whom she discloses the information is then part of the process. How she acts will bring the process to different endings. What does Fran Fairplay see in her mirror at night as a result of her chosen course of action earlier that day?

V. CONCLUSION: SEEING THROUGH A MIRROR, CLEARLY⁶⁴

Lawyers are not Kantian idealists. Most are utilitarians on the subject of truthfulness when it comes to representing their clients' interests zealously. But lawyers are also professionals who should seek recognition at a level above compliance with ethical rules. Lawyers see reflections in the mirror and hope the lawyer sitting across the negotiation table also sees them. Lawyers look to the professional rules and laws to give them a little assurance, but the most comforting assurance does not come. There are lawyers who would bend the rules in their favor. The courts will often bend the laws against them. And then, there are mirrors. Your mirror permits you to assess your moral compass, your conscience and your cultivated sense of right and wrong. Avoid discomfort. Aspire to be pleased with, and proud of what you see.

So, lawyers find uncertainty as they negotiate with their colleagues. As the French philosopher Jean-Paul Sartre wrote: “l'enfer, c'est les autres”—hell is other people.⁶⁵ Yet lawyers do not have to practice this way. Lawyers should rely on a cultivated sense of right and wrong to guide them in their interactions with others; lawyers should trust that others will do the same. Lawyers learn and practice, time and again. Lawyers find certainty in

⁶³ UNIF. MEDIATION ACT § 6 (2001).

⁶⁴ *1 Cor.* 13:12.

⁶⁵ JEAN-PAUL SARTRE, *Huis-clos [No Exit]*, Act 1, Sc. 5 (1944).

themselves; their reputation precedes them well. They are respected.⁶⁶ They are trusted. Look in the mirror; others do so as well, but how they see themselves is entirely out of our control. The reflections lawyers see may not be perfect, but they should see them well. They should see what they should do to become better lawyers and earn the reputation not only for exceptional competence and ethical conduct—but also for exceptional professionalism. H. Ross Perot’s advice to young businesspeople should serve as a threshold standard for lawyers: “Don’t govern your life by what’s legal or illegal, govern it by what’s right or wrong.”⁶⁷

Will this Article serve the reader well? Or is it the reader who must serve and serve well?

⁶⁶ Jonathan R. Cohen, *The Ethics of Respect in Negotiation*, in *WHAT’S FAIR: ETHICS FOR NEGOTIATORS*, 257 (Carrie Menkel-Meadow & Michael Wheeler eds. 2004).

⁶⁷ Shell, *supra* note 5, at 99. *See also*, Hinshaw et al., *supra* note 9, at 282 (seeking “aspirational goals of best practice.”).