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Ethics for Mediation Advocates

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EASTERN DISTRICT OF NEW YORK

Contents

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TRAINER BIOGRAPHIES

PROFESSOR SHAWN WATTS

Shawn Watts is the associate director of the Edson Queiroz Foundation Mediation Program at Columbia Law School.

A Citizen of the Cherokee Nation of Oklahoma, Watts won the Jane Marks Murphy Prize for clinical advocacy and was a Strine Fellow while he was a student at Columbia Law School. He developed and teaches a course in Native American Peacemaking, which is a traditional indigenous form of dispute resolution.

He has mediated in the New York City Civil Court, Harlem Small Claims Court, and the Institute for Mediation and Conflict Resolution, and he has also supervised student mediations in court-related programs in New York City.

Prior to serving as the mediation program's associate director, Watts was an associate in the finance and bankruptcy practice group at the New York office of Sheppard Mullin Richter & Hampton, where—in addition to representing both creditors and debtors in multimillion-dollar bankruptcies—he specialized in federal Indian law and tribal finance.

Prior to receiving his J.D. degree at the Law School, Watts served as the president of the National Native American Law Students Association and was a Harlan Fiske Stone Scholar as a student. During that time, he was also managing editor of Law School's Journal of Law and Social Problems. Watts earned a B.A. from St. John's College in Santa Fe, N.M. in 2000.

PROFESSOR WATT'S RESEARCH TEAM

JOSEPH FOLDS

Joseph Folds is a third year J.D. student at Columbia Law School and a member of the Columbia Advanced Mediation Clinic. He has been mediating since the fall of 2016 and is a qualified mediator with the New York Peace Institute.

DEUL LIM

Deul Lim is a third year student at Columbia Law School. She grew up in South Korea and will start her career at Simpson Thacher & Bartlett upon graduation.

JACQUELINE STYKES

Jacqueline Stykes is a 3L at Columbia Law School and is originally from Long Island, New York. She joined the Mediation Clinic last year and is excited to be part of the Advance Mediation Clinic this semester. After graduation, Jacqueline plans to practice litigation at Quinn Emanuel's New York office.

ETHICS FOR LAWYERS REPRESENTING CLIENTS IN MEDIATIONS

John A. Sherrill[1]

Today, a progressively larger percentage of the activity in civil dispute resolution occurs through mediation, and it is now the preferred method of alternative dispute resolution (ADR) for business disputes.[2] In addition to offering potential cost savings, mediation is consensual, with the mediator acting as a neutral facilitator, and thus offers the possibility of maintaining long-term business relationships between disputants.

As the popularity of mediation has increased, rules and standards have been adopted to address the ethical standards to which mediators must adhere. There is far less formal guidance, however, regarding the ethical standards that the attorneys representing the mediation participants should follow. Some commentators assert that the role of the lawyer in mediation should go beyond advocating for the client by requiring the attorney to help ensure that the process itself is a fair one that seeks to attain the goal of a settlement satisfactory to all participants.[3] Yet, should the goals of representation within mediation be any different from those in the more traditional adversarial setting of litigation or arbitration? This article addresses emerging ethical standards for mediators, ethics for mediation advocates, allocation of authority between lawyers and their clients in mediation, the obligation for truthfulness in mediation, mediation confidentiality, and good faith requirements in mediation.

Emerging Standards - Ethics for Mediators

As mediation has become more widely used, much has been written and many sets of rules and standards have been adopted to address the ethical responsibilities of mediators. These standards include requirements for mediator neutrality, an obligation to assure that each party has the capacity to participate in the mediation, and admonitions against coercion of parties to obtain a settlement. In September of 2005, the American Bar Association (ABA), the Association for Conflict Resolution, and the American Arbitration Association (AAA) jointly adopted

Model Standards of Conduct for Mediators (the "Model Standards").[4] Although only advisory, the Model Standards addressed many of the ethical issues facing mediators, including self-determination; impartiality; conflicts of interest and competence of the mediator; confidentiality; quality of the process; and the advancement of mediation practice.

Muddier Waters - Ethics for Mediation Advocates

At the threshold level, should attorneys be mandated by ethical standards or rules to behave differently in mediations than when representing clients in other dispute resolution settings such as arbitration or litigation? Alternatively, do clients have the right to expect their attorneys to also zealously represent them within mediation by acting to maximize their interests? Or, would such a supposition mean that meditation is merely another adversarial proceeding that must be handled in the same manner as litigation? To address these issues, it is helpful to consult the ABA Model Rules of Professional Conduct ("Model Rules").[5]

The Preamble to the Model Rules notes the various functions that an attorney assumes. These functions include the obligation as an advocate to "zealously [assert] the client's position under the rules of the adversary system," as well as the lawyer's duty as a negotiator to seek "a result advantageous to the client but consistent with requirements of honest dealing with others."[6] This acknowledgement within the Model Rules of the multiple roles that an attorney performs supports the proposition that the Model Rules are intended to apply to lawyers representing clients in mediation, as well as in traditional adversarial settings. In fact, the Preamble specifically mentions that "a lawyer may also serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter"[7], confirming the applicability of the Model Rules to lawyers acting as neutrals.

Zealous Advocacy is Not Incompatible with Mediation

Some commentators seem offended by the notion that litigators should play a meaningful role in mediation.[8] Lawyers who represent clients in mediation, however, should not allow this argument to compromise the fundamental principle that an attorney

should zealously advocate on behalf of his/her client in mediation, just as is required in arbitration or litigation. Nevertheless, the lawyer representing a client in mediation may find it appropriate to exercise that zeal in a less adversarial manner that is more consistent with the tone of mediation.[9]

Allocation of Authority in Mediation Between Lawyer and Client

Rule 1.2 of the Model Rules ("Scope of Representation") states in pertinent part as follows:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.[10]

Again, the rule makes no setting-based distinction as to its application, and thus it applies to representation in business transactions, mediation or litigation. Indeed, a client often may play a bigger role in the mediation process than he/she might assume in a business transaction or in the trial of a case. Additionally, it is important to remember that it is also up to the client to describe the objectives of representation, which may range from complete vindication to preserving a continuing business relationship with the other party. In all cases, however, the objectives and means of representation should be defined through consultation between lawyer and client.[11]

Of course, the client must decide whether he/she wants to enter into mediation in the first place, as well as deciding whether to accept an offer of settlement that arises during the course of a mediation.[12] The attorney, however, must provide the client with the information necessary to make such decisions. Specifically, Rule 1.4 of the Model Rules ("Communication") obligates the lawyer to explain the matter "to the extent reasonably necessary to permit the client to make an informed decision."[13] Further, Rule 2.1 ("Advisor") requires that the attorney deliver this advice in a

candid manner and "not be deterred . . . by the prospect that the advice might be unpalatable to the client."[14]

In Georgia, the State Supreme Court has adopted the ABA Model Rules as the Georgia Rules of Professional Conduct ("GRPC"), and has made them binding on Georgia lawyers, delegating to the State Bar of Georgia the authority to administer and enforce the GRPC. The Bar has added advisory comments to the GRPC to assist Georgia lawyers in determining their ethics responsibilities. The Georgia advisory comments to Rule 2.1 go into more detail with respect to a lawyer's duty of candor in providing information and advice to a client, and are instructive. The Georgia commentary states that a client is entitled to straightforward advice expressing the lawyer's honest assessment, which often may involve presenting unpleasant facts and alternatives.[15] Furthermore, in providing advice, an attorney 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."[16] Accordingly, an attorney's advice in mediation must address issues beyond the mere merits of the controversy. Rather, the attorney must invite the client to examine issues such as reasonable alternatives to a monetary settlement; the client's psychological preparedness to endure the expense, delay and intrusiveness of a trial; and the likelihood and cost of a total victory. Nevertheless, because no case is risk free, after all is said and done, the final decision on all of these issues belongs to the client.[17]

Telling Lies – Obligation for Truthfulness in Mediation.

Rule 4.1 of the Model Rules ("Truthfulness in Statements to Others") in pertinent part, states:

> 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 . . .[18]

In litigation or arbitration, a lawyer is bound by Rule 4.1 insofar as the lawyer is dealing with third parties. To the extent the lawyer is dealing with a tribunal (i.e., a court or an arbitration panel), then Rule 3.3 of the GRPC ("Candor Toward the Tribunal") would control the truthfulness requirement. It is generally recognized, however, that a mediator is not a "tribunal" as defined by Rule 3.3, and that the requirements of Rule 4.1, therefore, govern the conduct of lawyers in mediation as to the obligation for truthfulness.

Accepting that Rule 4.1 applies to mediation,[19] ethical issues abound when attempting to define a material fact that must be accurately represented. First, there is the "puffing" issue. Although Rule 4.1 requires lawyers to be truthful, again, comments to the Georgia Rule 4.1 recognize puffing as part of the negotiation process, so long as that puffing does not materially misstate facts. Specifically, Comment 2, in pertinent part, reads as follows:

> 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. Comments which fall under the general category of "puffing" do not violate this rule. 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 in this category….[20]

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-439,[21] which also analyzed the obligations of Model Rule 4.1 ("Truthfulness in Statements to Others") even more thoroughly in the context of mediation. Referring to the Restatement of the Law Governing Lawyers, the Opinion states:

> Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole, are a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regarded as merely an expression of the speaker's state of mind.[22]

The Opinion goes on to add that "statements regarding negotiating goals or willingness to compromise . . . ordinarily are not considered statements of material fact within the meaning of the Rules."[23]

The final footnote to Opinion 06-439 opines that there may be circumstances in which a greater degree of truthfulness may be required in mediation in order to achieve the client's goals. The footnote states that additional information may be required "to gain the mediator's trust or provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement."[24] In such cases, a failure to be forthcoming, though probably "not in contravention of Model Rule 4.1, could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1."[25]

Telling Secrets – Confidentiality in Mediation.

It is a well-recognized proposition that confidentiality is necessary to the success of mediation because parties may be hesitant to engage in settlement discussions if statements made during the negotiation process can be used against them later in subsequent litigation. In addition, if a mediator is required to

testify with respect to the mediation proceedings, the mediator's neutrality might be compromised.

Rule 1.6 of the Model Rules ("Confidentiality of Information") states, in pertinent part, as follows: "(a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client . . . ."[26] In the mediation context, the confidentiality and inadmissibility of communications made and information generated during mediation are generally accepted.[27] In an interesting Georgia opinion, the privilege was first clearly enunciated and discussed at length in a criminal case, *Byrd v. State*.[28] In *Byrd,* the Court of Appeals reversed the defendant's conviction of theft by taking because it found that the trial court erred in allowing evidence from an earlier related mediation proceeding in a related civil proceeding.[29] The court hearing the criminal matter had initially stayed the prosecution to see whether a resolution could be reached in the civil case before proceeding, but settlement was not reached.[30]

The Georgia Court of Appeals noted that "no criminal defendant would agree to 'work things out' and compromise his position if he knows that any inference of responsibility arising from what he says and does in the mediation process will be admissible as an admission of guilt in the criminal proceeding which will eventualize if mediation fails."[31] The court pointed out that the policy reasons for excluding from later court proceedings offers of compromise and other information from mediation were based partially upon the fact that offers of compromise are privileged[32] because public policy encourages the settlement of disputes without trial.

The bottom line is that in most jurisdictions, any statement, evaluation, document or other evidence generated in connection with mediation is not subject to discovery, and the neutral or anyone present at the mediation may not be subpoenaed or otherwise required to testify concerning any of this information created during a mediation process.[33]

Another instructive decision from Georgia is the Georgia Commission on Dispute Resolution's Committee on Ethics' Advisory Opinion 6.[34] Based upon the principle that

"confidentiality is the attribute of the mediation process which promotes candor and full disclosure,"[35] the Opinion states that a mediator (and presumably parties and counsel, as well) "may not directly or indirectly share with courts any information, including impressions or observations of conduct, from a mediation session."[36] The Opinion also cites certain instances in which this confidentiality principle does not apply, such as when there are threats of imminent violence; possible child abuse; or a statutory duty to report information.[37] In addition, confidentiality does not apply to documents relevant to a disciplinary complaint against a mediator arising out of the ADR process or to the executed mediation agreement itself.[38] The Opinion, however, emphasizes that in Georgia, even information falling within one of these specific exceptions may be revealed only "to the extent necessary to prevent the harm or meet the obligation to disclose."[39]

However, there are numerous cases from various jurisdictions around the country that indicate that this confidentiality principle may not be ironclad. The Georgia Supreme Court recently issued a troubling decision that permitted the admission into evidence of a mediator's testimony concerning his observations on the capacity of one of the parties to enter into the written settlement agreement reached at the mediation. In *Wilson v. Wilson*,[40] the parties in a divorce action participated in a mediation without their attorneys and entered into a settlement agreement as a result. When Mrs. Wilson sought to enforce the agreement, Mr. Wilson raised issues concerning his mental capacity to enter into the agreement on the day of mediation.[41] Citing concerns for fairness and the integrity of the mediation process, the court created an exception to mediation confidentiality based on case law and section 6(b)(2) of the Uniform Mediation Act,[42] which exception had not previously been adopted in Georgia by either the courts or the Georgia Commission on Dispute Resolution.[43] The court noted that Section 6(b)(2) provides as follows:

> [W]hen a party contends that a mediated settlement agreement is unenforceable, the mediator may testify regarding relevant mediation communications if a court determines that 'the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise

> available, [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.'[44]

The Georgia Supreme Court found that the trial court did not err in calling the mediator to testify where the "mediator did not testify about specific confidential statements that [a party] made during the mediation, but only testified about his general impression of [that party's] mental and emotional condition."[45] The court noted that the mediator was the only witness to virtually all of Mr. Wilson's conduct during the mediation, as well as the difficulty the court would face in resolving the issue of enforceability without the mediator's testimony.[46] The court, however, also recognized the importance of mediation confidentiality along with supporting policy considerations and "urge[d] trial courts to exercise caution in calling mediators to testify."[47]

In a California case, *Olam v. Congress Mortgage Co.*,[48] Judge Wayne Brazil, a United States Magistrate who is well-respected with regard to ADR-related issues, ordered a mediator to waive confidentiality and testify about what had led to the alleged agreement reached at the mediation. Judge Brazil explained that he was balancing the benefits to justice of receiving the evidence against the burden on the mediator and the mediation process, and he allowed the testimony after concluding that in the case at hand the benefit was great and the burden was modest.[49] Similarly, in *Lawson v. Brown's Day Care Center*,[50] the Vermont Supreme Court held that reporting unethical or illegal conduct in mediation was appropriate and was not a violation of mediation confidentiality unless the complaint was made in bad faith by the reporting party.[51]

Nevertheless, it remains clear in most jurisdictions that a strong presumption of confidentiality generally exists for any document or information created or developed in connection with mediation. Accordingly, the confidential nature of these documents or information must be honored by lawyers and clients involved in the mediation process.

"Using" Mediation – Is Good Faith Required?

It has been suggested by some commentators that a good faith requirement in mediation should be imposed by rule or statute.[52] If good faith participation in mediation were to be required, however, how would good faith be defined? For instance, would lawyers and parties be required to alter their negotiating style to meet this requirement, and, if so, what would that mean? Further, although lawyers are obligated not to pursue litigation tactics solely for delay,[53] if a lawyer believes that mediation may bring the parties closer to settlement, should he/she be able, in good faith, to recommend mediation, even though other motivation to mediate also may be present, such as the desire to obtain "free discovery" or even to secure a needed delay? When considering many of the issues that would be involved, the inevitable conclusion is that trying to define what constitutes good faith in some, or all, aspects of mediation would be extremely difficult and might well create more problems and issues than the imposition of any such obligation would solve. Furthermore, the principle of mediation confidentiality would probably prevent any effective enforcement of such a requirement.[54]

Several other adjacent states are in agreement that mediators cannot testify about the parties' good faith or lack thereof during a mediation. For example, a Florida Mediator Ethics Advisory Committee expressed similar concerns about mediation confidentiality as related to a requirement to mediate in good faith. The Committee acknowledged that while "[t]here are no [Florida] statutes, rules, or common law governing court-ordered mediation that require the parties to negotiate in good faith," a mediator may be faced with a court order that incorporates a good faith requirement and calls for the mediator to report a party's non-compliance to the court.[55] The Committee, however, went on to find that that the mediator who sought guidance on this issue could not comply with both the applicable Florida rules for court-appointed mediators and any such order requiring the mediator to "report a party who fails to mediate in good faith."[56] In fact, the Committee advised that a mediator should decline to participate in mediation "when a mediator is informed by the court in advance of the mediation that the confidentiality of the session would not be honored."[57] Further, in a decision of the

Tennessee Supreme Court Alternative Dispute Resolution Commission, the Commission suspended a mediator, finding that the mediator's disclosure to the court that a party did not mediate in good faith violated court rules, including the rule providing for confidentiality of ADR proceedings.[58]

Therefore, although everyone generally agrees that parties and counsel should approach mediation in good faith to make the process effective and successful, there unfortunately appear to be no legal consequences to a party or lawyer who fails to bargain in good faith in a mediation.

Conclusion.

There are few bright-line requirements that differentiate the ethical obligations of lawyers representing clients in mediations from those in other types of representation. Conclusions and inferences from the materials cited above, however, do provide guidance on appropriate conduct for lawyers and clients in mediation. In particular, the mediation advocate certainly must be familiar with, and prepared to explain, the subtleties of mediation to the client, especially if the client is not familiar with the mediation process. The lawyer should assist the client in the identification of the his/her goals and should put together the right mediation team to achieve those goals. The attorney also must be cognizant of the nuances of employing negotiating techniques that fall within the parameters of the requirement for truthfulness found in Rule 4.1 of the Model Rules, as well as the requirement for confidentiality in the mediation process, and the admonition that parties should be prepared to negotiate in good faith. When all is said and done, however, the primary objective of the lawyer representing a client in mediation is and must be the same as in any other representation – the successful implementation of the client's overall goals and objectives.

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[1] Mr. Sherrill is senior partner in Commercial Litigation Practice Group of Seyfarth Shaw LLP based in Atlanta, GA. Mr. Sherrill also is an active mediator and arbitrator and is the current chair of the Dispute Resolution Section of the State Bar of Georgia.

[2] *See, e.g.*, David B. Lipsky and Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the*

Growing Use of ADR by U.S. Corporations, 9 (1998), *available at http://digitalcommons.ilr.cornell.edu/icrpubs/4* ("We conclude that ADR has made substantial inroads into the fabric of American business, with [general] counsel overwhelmingly preferring mediation (63 percent); arbitration was a distant second (18 percent").)

[3] *See* Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325, 338-39 (1988); Cary Menkel-Meadow, *Ethics in ADR Representation: A Roadmap of Critical Issues,* DISPUTE RESOLUTION MAGAZINE (Winter 1997), at 2.

[4] THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf.*

[5] ABA MODEL RULES OF PROF'L CONDUCT (2002).

[6] *Id.* at pmbl. § 2.

[7] Id. at pmbl § 3.

[8] *See,* Cary Menkel-Meadow, *Ethics in ADR Representation: A Roadmap of Critical Issues,* DISPUTE RESOLUTION MAGAZINE (Winter 1997), at 2.

[9] *Id.* at 4-5.

[10] *Id*. R. 1.2.

[11] *Id.* R. 1.2 cmt. 1.

[12] *Id.* R. 1.2(a).

[13] *Id.* R. 1.4.

[14] *Id.* R. 2.1 cmt. 1.

[15] *Id.*

[16] *Id.* R. 2.1 cmt. 2.

[17] *Id.* R. 1.2.

[18] *Id.* R. 4.1.

[19] *See,* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 n. 2 (2006)("Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a 'tribunal.' It does not apply in
mediation because a mediator is not a 'tribunal' as defined in Model Rule 1.0(m).")

[20] GEORGIA RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2001).

[21] ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Op. 06-439 (2006).
[22] *Id.* at 3, n.3 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 98 cmt. c (2000) (citations omitted)).
[23] *Id.* at 6.
[24] *Id.* at 8, n.22.
[25] *Id.*
[26] ABA MODEL RULES, R. 1.6(a). This principle of confidentiality also is effectuated in a related doctrine, the attorney-client privilege.
[27] *See*, RDM Holdings, Inc. v. Equitex, Inc. (*In re* RDM Sports Group, Inc.), 277 B.R. 415, 426-432 (Bankr. N.D. Ga. 2002)(summarizing the federal mediation confidentiality privilege).
[28] 186 Ga. App. 446, 447-49, 367 S.E.2d 300, 427-30 (1988).
[29] *Id.* at 448-49, 303.
[30] *Id.* at 448, 302.
[31] *Id.*
[32] The evidentiary principle dealing with the inadmissibility of offers of compromise is found in Federal Rule of Evidence 408 and, in Georgia, in O.C.G.A. section 24-3-37. Of course, these evidentiary rules address only the inadmissibility of settlement negotiations and offers; the broader principle of mediation confidentiality means that the mediator and all parties in mediation agree to forego any further use of the protected information.
[33] The general rule excludes from protection any information or document that is "otherwise discoverable." Accordingly, if a document was created outside the context of mediation, it is not protected from discovery by the mere fact that it was used or referred to in a mediation.
[34] Georgia Comm'n on Dispute Resolution's Comm. on Ethics, Advisory Op. 6 (2005).
[35] *Id*. at 1 (citing GEORGIA ALTERNATIVE DISPUTE RESOLUTION RULES, app. C, ch. 1, § II).
[36] *Id.* at 1.
[37] *Id.* at 2.
[38] *Id.*
[39] *Id.*
[40] 282 Ga. 728, 653 S.E.2d 702 (2007).
[41] *Id.* at 731-32, 706.

[42] UNIFORM MEDIATION ACT (2003).
[43] Wilson, 282 Ga. at 732-33, 653 S.E.2d at 706.
[44] *Id.* at 732, 706 (citing UNIFORM MEDIATION ACT, § 6(b)).
[45] *Id.* at 733, 707.
[46] *Id.*
[47] *Id.*
[48] 68 F. Supp. 2d 1110 (N.D.Cal. 1999).
[49] *Id.* at 1136-39.
[50] 172 Vt. 574, 776 A.2d 390 (Vt. 2001).
[51] *Id.* at 576-77, 393-94.
[52] *See, e.g.,* Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith,* DISPUTE RESOLUTION MAGAZINE (Winter 1997).
[53] ABA MODEL RULES, R.1.8 (2001).
[54] In the aforementioned Advisory Opinion 6, the Georgia Committee on Ethics notes that the principle of confidentiality trumps any ability of a mediator to report a lack of good faith participation in the mediation to a referring court. The Committee stated that the mediator must maintain confidentiality regarding a party's good faith or lack thereof, and that the unwillingness of a party to bargain in good faith is consistent with the party's right to "refuse the benefits of mediation."

[55] Mediator Ethics Advisory Comm. Advisory Op. 2004-006 at 3 (citing Avril v. Civilmar, 605 So.2d 988, 989-90 (Fla. 4th DCA 1992), *available at http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202004-006.pdf.*
[56] *Id.*
[57] *Id.*
[58] *In re Finney*, Decision of Tennessee Supreme Court Alternative Dispute Resolution Commission on Grievance filed January 3, 2006, *available at: http://www.tsc.state.tn.us/geninfo/Publications/ADR/Rule%2031%20Mediator%20ADRC%20Grievance%20Decision%2011-2-06.pdf.*

Defining The Ethical Limits Of Acceptable Deception In Mediation

by John Cooley

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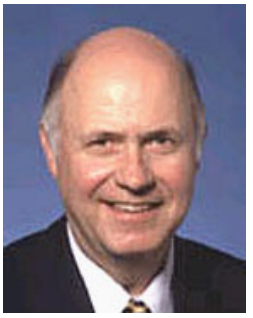

In a recent law review article I authored for the Loyola University of Chicago Law Review, *Mediation Magic: Its Use and Abuse*,[(1)] I addressed the perplexing problem of the current lack of ethical guidance available to mediators and mediation advocates on the question of permissible uses of deception in mediation generally and in caucused mediation, in particular.[(2)]

This article is a sequel to that publication, offering the reader a condensation of some of the ideas contained in that article and some additional thoughts on criteria that might be appropriate to consider when designing a truthfulness standard for mediation.

I. Introduction

Deception has been defined generally as "the business of persuasion aided by the art of selective display," and it is effected by two principal behaviors: hiding the real and showing the false.[(3)] Deception of various types is generally accepted as integral to the American way of life.[(4)] "White lies" permeate all aspects of social practice: "How nice to see you!" -- when it is not; giving false excuses in response to invitations or requests in order to avoid hurt feelings; flattering the ordinary; bestowing a cheerful interpretation on depressing circumstances; showing gratitude for unwanted gifts; teachers giving inflated grades; employers preparing inflated evaluations or recommendations.[(5)]

Modern society tolerates outright lying in a variety of circumstances. In some circles, lying is justified when it avoids harm, produces an overriding benefit, maintains fairness, or preserves confidence or reputation.[(6)] Widely acceptable deceptive behaviors in our society include: lying to protect oneself or someone else from physical harm, the government using undercover agents, lawyers manipulating facts in arguments before juries, physicians withholding information from dying patients to spare them fear and anxiety, and parents concealing from children for years that there really isn't an Easter Bunny or a Santa Claus -- at least one that rides in an airborne sleigh and comes down the chimney.

The point is that both society, in general, and, as will be made clearer *infra*, the legal profession in particular, consider many types of deception acceptable. The purpose of this article is to explore what the ethical limits of acceptable deception in mediation, and by inclusion negotiation, should be.

II. The Problem

This article proceeds from the premise that *consensual* deception is the essence of caucused mediation. This statement should not come as a shock to the reader when it is considered in the context of the nature and purpose of caucusing. Actually, it is quite rare that caucused mediation, a type of informational game,[(7)]

occurs without the use of deception by the parties, by their lawyers, and/or by the mediator in some form. This is so for several reasons.

First, a basic groundrule of the information system operating in any mediated case in which there is caucusing is that *confidential* information conveyed to the mediator by any party cannot be disclosed by the mediator to anyone (with narrowly limited exceptions).[(8)] This means that: (1) each party in mediation rarely, if ever, knows whether another party has disclosed confidential information to the mediator; and (2) if confidential information has been disclosed, the nondisclosing party never knows the specific content of that confidential information and whether and/or to what extent that confidential information has colored or otherwise affected communications coming to the nondisclosing party from the mediator. In this respect, each party in a mediation is an actual or potential victim of constant deception regarding confidential information -- granted, agreed deception -- but nonetheless deception. This is the central paradox of the

caucused mediation process. The parties, and indeed even the mediator, agree to be deceived as a condition of participating in it in order to find a solution that the parties will find "valid" for their purposes.(9)

Second, mediation rarely occurs absent deception because the parties (and their counsel) are normally engaged in the strategies and tactics of competitive bargaining during all or part of the mediation conference, and the goal of each party is to get the best deal for himself or herself.(10)

These competitive bargaining strategies and tactics are layered and interlaced with the mediator's own strategies and tactics to get the best resolution possible for the parties -- or at least a resolution that they can accept. The confluence of these, initially anyway, unaligned strategies, tactics, and goals creates an environment rich in gamesmanship and intrigue, naturally conducive to the use of deceptive behaviors by the parties and their counsel, and yes, even by mediators. Actually, even more so by mediators because they are the conductors -- the *orchestrators* -- of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations, undefined disclosure rules in which the mediator is the Chief Information Officer who has near-absolute control over what nonconfidential information, critical or otherwise, is *developed*, what is *withheld*, what is *disclosed*, and *when it is disclosed*. As mediation pioneer Christopher Moore has noted: "The ability to control, manipulate, suppress, or enhance data, or to initiate entirely new information, gives the mediator an inordinate level of influence over the parties."(11)

Third, the information system manipulated by the mediator in any dispute context is itself imperfect. Parties, rarely, if ever, share with the mediator all the information relevant, or even necessary, to the achievement of the mediator's goal -- an agreed resolution of conflict.(12) The parties' deceptive behavior in this regard -- jointly understood by the parties and the mediator in any mediation to fall within the agreed "rules of the game" -- sometimes causes mediations to fail or prevents optimal solutions from being achieved.(13)

Thus, if agreed deception is a central ingredient in caucused mediation, the question then becomes what types of deception should be considered constructive, within the rules of the mediation game, and ethically acceptable and what types should be considered destructive, beyond the bounds of fair play, and ethically unacceptable. Or, perhaps more simply, in the words of mediator Robert Benjamin, in mediation what are the characteristics of the "noble lie" -- deception "designed to shift and reconfigure the thinking of disputing parties, especially in the conflict and confusion, and to foster and further their cooperation, tolerance, and survival"?(14) Because formal mediation is generally viewed as "nothing more than a three-party or multiple-party negotiation,"(15) we can begin to formulate an answer to this question by examining the current limits of acceptable deception as employed by lawyer-negotiators.

III. Acceptable Deception by Lawyer-Negotiators

The launch point for our exploration of the ethical norms governing the extent to which a lawyer must be truthful in negotiations is Rule 4.1 of the ABA Model Rules of Professional Conduct. Rule 4.1 provides:

Rule 4.1 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.

In relation to lawyers *representing* clients in *negotiation*, there is a wide chasm dividing expert opinion on the applicable standard of truthfulness.(16) At one extreme on the "truthfulness spectrum," Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit, writing in the mid-1970s, proposed two "precepts" to guide a lawyer's conduct in negotiations: (1) "The lawyer must act honestly and in good faith," and (2) "The lawyer may not accept a result that is unconscionably unfair to the other party."(17) In 1980, Professor James J. White published an article in which he asserted his belief that misleading the other side is the very "essence of negotiation" and is all part of the game.(18) White observed that truth is a relative concept that depends on the definition one chooses and the circumstances of the negotiator(19). He further pointed out that lawyers hunt "for the rules of the game as the game is

played in the particular circumstance."[20] He identified the paradox of the lawyer's goal in negotiation -- how to "be fair but also mislead."[21] In 1981, Yale Law Professor Geoffrey C. Hazard, Jr., principal draftsman of the Model Rules of Professional Conduct, after reviewing Judge Rubin's and Professor White's articles and other pertinent literature of the day concluded that "legal regulation of trustworthiness cannot go much further than to proscribe fraud."[22] In 1982, Professor Thomas F. Guernsey sought a middle-ground solution. He suggested that conventions regarding truthfulness dilemmas be formulated to guide those lawyers aspiring to be ethical, but that the default standard in all negotiations should be "caveat lawyer."[23] More recently, other commentators have advocated various truthfulness standards for lawyers in negotiation in terms of "total candor";[24] of avoiding "creating an unreasonable risk of harm";[25] of forbidding all deception;[26] of "permissible conventions of untruthfulness";[27] of allowing "advantageous results ... consistent with honest dealings with others";[28] of "the golden rule" -- reciprocal candor;[29] of defining "what is not a lie is and what lies are ethically permissible."[30]

These varying perceptions of what standards of truthfulness *should* guide lawyers' conduct in representing a client in negotiation offer little by way of identifying the standards that *do currently* guide them. Under Model Rule 4.1 (a), what exactly is a false statement of material fact in negotiation? What is a false statement of law? And, under subparagraph (b) of that rule, when is a lawyer's disclosure of a material fact necessary to avoid a client's fraudulent act in negotiation? Pertinent Comments of Model Rule 4.1 provide little help in answering these questions.

The Comments actually complicate the search for answers to the questions presented by the text of Model Rule 4.1 and the formal and informal *Recent Ethics Opinions* published by the ABA similarly offer little assistance in interpreting Model Rule 4.1's application to a lawyer's permissible conduct in negotiation.

Determining what constitutes unethical conduct is also difficult because of numerous excuses and justification lawyers typically marshal for lying in negotiation[31] and the plethora of well-recognized negotiation strategies and tactics that have developed in recent years. Such strategies and tactics are widely considered to be within the rules of the negotiation game. Lawyers have names for them; law books describe them in detail, law professors teach them to students in law school.[32] Many of these strategies and tactics rely for the effectiveness on techniques of timed disclosure, partial disclosure, nondisclosure, and overstated and understated disclosures of information -- all of which involve degrees of deception.[33] Their effectiveness is also dependent on lawyer's avoidance techniques and on subtle distinctions between what information consists of *facts* as opposed to what is lawyer's *opinion*.[34] "Puffing" -- a type of deception -- is generally thought to be within the permissible limits of a lawyer's ethical conduct in negotiation,[35] yet even with puffing, at some mysterious, undefined point the line may be crossed and "the lack of competing inferences makes the statement a lie."[36]

An article published in 1988 poignantly illustrates the differences of opinion and confusion among the experts regarding truthfulness standards in negotiation.[37] Using four hypothetical negotiation situations, the author conducted a survey of fifteen participants which included eight law professors who had written on ethics and negotiation, or both; five experienced litigators, a federal circuit court judge, and a U.S. Magistrate. The chart below contains the four situations and shows how the fifteen experts answered the ethical question posed by each of the situations.

Situation 1 Your clients, the defendants, have told you that you are authorized to pay $750,000 to settle the case. In settlement negotiations after your offer of $650,000, the plaintiffs' attorney asks, "Are you authorized to settle for $750,000?" Can you say, "No I'm not?"

Yes: Seven No: Six Qualified: Two

Situation 2 You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing?"

Yes: One No: Fourteen Qualified: None

Situation 3 You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did?

Yes: Five No: Eight Qualified: Two

Situation 4 In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression?

Yes: Nine No: Four Qualified: Two

In the midst of all this confusion and disagreement about the appropriate truthfulness standard, one could reasonably conclude, as apparently did Professor Hazard, that with respect to negotiation, the present ethical norms for lawyers do little more than proscribe fraud in negotiation -- or, at most, they proscribe only very serious, harmful misrepresentations of material fact made through a lawyer's false verbal or written statement, affirmation, or silence. Assuming that this is the current standard of truthfulness for lawyers who are advocates in negotiation, the question then becomes: does this same standard of truthfulness apply to lawyers who are advocates in mediation, as opposed to negotiation? To that topic, we now turn.

IV. Acceptable Deception by Mediation Advocates

Very little has been written about the ethical standards for lawyers who represent clients in mediation, much less the standards of truthfulness which should guide them.(38) Nothing in the ABA Model Rules of Professional Conduct for lawyers addresses lawyer truthfulness in mediation. In mediation, of course, the advocate's duty of truthfulness has to be measured not only in relation to "others" but also a special kind of "other" -- a neutral who is sometimes a judge or a former judge. Thus, two questions emerge: (1) do the ethical standards for truthfulness in negotiation described in the immediately preceding section also govern the advocate's truthfulness behavior vis-a-vis the opponents in mediation; and (2) do those ethical standards also govern the advocate's truthfulness behavior vis-a-vis a neutral (lawyer, nonlawyer, or judge) in mediation?

First, since the Model Rules are silent on the truthfulness standards for mediation advocates vis-a-vis their opponents, one would seemingly be safe in concluding that the rules regarding truthfulness in negotiation apply. However, one could make a persuasive argument that a heightened standard of truthfulness by advocates in mediation should apply because of the "deception synergy" syndrome resulting from a third-party neutral's involvement. We know from practical experience that the accuracy of communication deteriorates on successive transmissions between and among individuals. Distortions also have a tendency to become magnified on continued transmissions. Also, we know from the available behavioral research concerning mediator strategies and tactics that mediators tend to embellish information, translate it, and sometimes distort it to meet the momentary needs of their efforts to achieve a settlement. To help protect against "deception synergy" perhaps we should require more truthfulness from mediation advocates and commensurately require more truthfulness of mediators. But the practicality of such proposal is questionable. Can we reasonably expect advocates to behave any differently in mediation than they do in negotiation? Would such truthfulness distinctions be impossible to define and even less possible to enforce? It seems very likely. Thus, it appears that the standards governing advocates' truthfulness in negotiation vis-a-vis each other would also govern their conduct in mediation. Second, with respect to truthfulness standards for mediation advocates vis-a-vis the mediator, apparently the only available guidance having even a modicum of applicability appears to be Model Rule 3.3, "Candor Toward the Tribunal." It is arguable, of course, that Rule 3.3 applies only to court tribunals which adjudicate matters in a public form -- and not to mediators, special masters, part-time judges, or former judges, and the like, who conduct settlement conferences. If that is the intent of this rule, the Model Rules do not specifically say so. Nowhere do they define "tribunal". It is not even clear whether Rule 3.3 applies to a lawyer's conduct before a *private* tribunal consisting of an arbitrator or arbitrators, although it reasonably could be. If they do apply in arbitration, would they also apply in hybrid ADR processes, such as med-arb or binding mediation? While it is true that the Comments to the above-quoted Rule 3.3 make no reference to settlement conference or mediation, it is also true that they do not explicitly exclude settlement conferences and/or mediation from its coverage.

Other Model Rules further obfuscate the scope of the coverage of Model Rule 3.3. For example, Comments to Rule 3.9, "Advocate in Nonadjudicative Proceedings", refers to "court" and not "tribunal", except *administrative* tribunal. So the question becomes: is "court" different in meaning than the unmodified term "tribunal"? Comment [1] to Rule 1.12, "Former Judge or Arbitrator," defines "adjudicative officer" as including such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges." Is the term "tribunal" then broader than "adjudicative officer". That is, does the unmodified term "tribunal" include both "adjudicative" and "nonadjudicative" officers? If so, would mediators or settlement officers fall within the scope of "nonadjudicative" officers, thus making Rule 3.3 applicable to mediators? For those readers who believe this analysis is an exercise in tautology, you may be correct. The objective of all this is to make two important points: (1) the current Model Rules are currently thoroughly deficient in providing guidance to mediation advocates on what their truthfulness

behavior should be vis-a-vis mediators (whether or not the mediators are judges, former judges, or court-appointed neutrals); and (2) if Model Rule 3.3 were deemed to apply to mediation advocates, it would significantly enhance the standards of advocates' truthfulness-to-mediator responsibilities, most probably to the point that no advocate would find it sensible to participate in the mediation process. This describes the current state of affairs regarding mediation advocates, but what about mediators?

V. Acceptable Deception by Mediators

Neither the Ethical Standards of Professional Responsibility of the Society of Professionals in Dispute Resolution ("Ethical Standards" nor the Model Standards of Conduct for Mediators ("Model Standards") prepared by a joint committee of the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution addresses the question of how truthful a mediator must be in conducting a mediation. The Ethical Standards merely make a passing reference to a duty they owe to the parties, to the profession, and to themselves and state that mediators "should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties."(39) The Ethical Standards contain no explanation of what "honest" means.

The Model Standards are similarly void of any specific guidance to the mediator regarding standards for truthfulness. They do, however, provide general guidance to the mediator in handling confidential information. Thus, while the Model Standards come closer than the Ethical Standards toward the topic of mediator truthfulness, the Model Standards fail to address this crucial topic directly, opting, perhaps wisely for the time being, to keep standards regarding the matter vague and ambiguous. Although the Model Standards recognize that the parties and the mediator may have their "own rules" regarding confidentiality and that the mediator should discuss the nature of private sessions and confidentiality with the parties, they do not identify any specific information or types of information that must, *at a minimum*, be communicated regarding confidentiality rules or the private session procedure in order to be in ethical compliance with the Model Standards. And perhaps just as importantly, the Model Standards, unlike the ABA's Model Rules of Professional Conduct for lawyers (as discussed *infra*), do not identify or define any specific type or types of mediator untruthfulness that is intended to be ethically proscribed.

Thus, mediators -- lawyers and nonlawyers -- currently have no specific formal guidance regarding how truthful they must be in conducting mediations. Put another way, they do not know exactly what kinds of mediator deception is acceptable, ethically, and what kinds are not. This is an important realization. The role of mediator which is quickly becoming an adjunct or full-time practice area for thousands of lawyers across the United States currently has no uniform, ethical standards officially sanctioned by the American Bar Association.

Despite this serious lack of guidance, even if lawyer-mediators were to look to the ABA Model Code of Judicial Conduct (August, 1990) to find analogous guidance for themselves as to required standards of truthfulness to guide their specific behavior in conducting mediations, they would be disappointed to find that there are none.(40) Remarkably, no canon or commentary of the ABA's Model Code of Judicial Conduct offers any specific guidance regarding judge's duty to be truthful to others, although such requirement might be presumed from Canon 1 which states that "a judge shall uphold the integrity and independence of the judiciary." But that requirement is so general as to be of no utility whatsoever to our inquiry here.

VI. Some Specific Questions Confronting the Legal Profession Regarding Required Standards of Truthfulness in Mediation

The above discussion of the legal profession's minimal regulation of the use of deception in mediation triggers some very important questions about what standards of truthfulness should be developed to guide mediators and mediation advocates in performing their functions. Here is a short list that immediately comes to mind:

To what standards of truthfulness should a mediator be held?

What types of deception are constructive, within the bounds of fair play, and acceptable?

What types of deception are destructive, outside the bounds of fair play, and unacceptable?

Should there be different standards of truthfulness in mediation for lawyers and nonlawyers?

Should the standards of truthfulness be any different for the lawyer-mediator than the lawyer-advocate in either negotiation or mediation?

Should there be different standards of truthfulness for a mediator when parties are unrepresented by legal counsel?

To what standards of truth and honesty should a judge who conducts a settlement conference be held?

Should the standards be higher than the non-judge mediator -- lawyer or lay person?

Should a judge who conducts a caucused settlement conference in a case be ethically precluded from deciding a case on the merits?

Should mediators be held to a higher level of truth or honesty when they are appointed by a judge to conduct the mediation?

Should lawyer-advocates be held to a higher level of truth and honesty when representing a client in a mediation where the mediator is court-appointed?

Should mediators (lawyers, nonlawyers, or judges) be required to explain certain "rules of the mediation game" before the mediation begins?

If "game rules" should be explained, of what would they consist?

Would the "game rules" vary depending on the sophistication of the parties?

Would the "game rules" vary depending on whether the parties were represented by legal counsel?

VII. Some Preliminary Thoughts Regarding the Search for Answers to These Questions

If you set about to define rules of a game, you must take care to ensure that those rules:

- are compatible with the game's nature and its purpose;
- do not significantly interfere with the means by which the players can accomplish the game's purpose;
- are comprehensible, reasonable, and fair; and
- are capable of compliance by all of the game's players in all situations.

Otherwise -- depending on the degree of inappropriateness of the rules -- the game will not be played, the rules will be ignored, they will not be enforced, or their application and enforcement will result in unfair treatment of some of the players. For example, if you prescribed a new rule in basketball that all shots at the basket must be taken from a point behind the center line of the court, many players might decide not to play the game anymore. They might opt for some other sport. Or, if you required that the basketball be dribbled no more than ten times between passes, players and the referees might have trouble keeping track of the dribble count and the rule might not be enforced. Or, if it were enforced, it might be enforced nonuniformly, leading to player discontentment and possibly to abandonment of the game.

Similarly, when designing rules to govern ethical conduct in mediation (and by inclusion, negotiation), one must be careful to balance the rigor of an imposed duty, on the one hand, against the reasonable likelihood of compliance in the context in which the duty is to be fulfilled, on the other. To impose an ethical rule in negotiation and mediation that charges lawyers (and non-lawyers) with a duty antithetical to the nature and purpose of these processes, that is incomprehensible, unreasonable, or unfair, and/or that is incapable of compliance by many of the people it is designed to regulate would be a futile act. People would not comply with it, and if such rule or rules were enforced, people would not play the mediation game. They would litigate in court as much as possible. So, our goal should be to find the described balance as derivable from the four rule-making criteria appearing at the outset of this section.

A. Rules must be compatible with the game's nature and purpose

Let's first consider the nature and purpose of mediation. The nature of mediation is an information management process and its purpose is to resolve conflict. The process is not static; rather it is dynamic in the sense that, in it, parties continuously develop and share information face-to-face or through the mediator. Infusion of new information may cause the parties to rethink what, at any particular moment, their risks are and what they really desire in the settlement. In some situations, these changes may literally occur minute-to-minute. Truth may likewise change from minute-to-minute. What is true for a party in mediation now, may not be true for a party 15 minutes from now in the same mediation. So, in designing ethical rules, we must keep clearly in mind that truth, in the context of an ongoing mediation session, is also dynamic -- not static in nature. A party may start a mediation stating that he will not accept less than $50,000 to settle the case; yet he walks out happily embracing a $37,500 settlement. Thus, whatever truthfulness standard is adopted for mediators and mediation advocates, it must be able to accommodate the mediation process's integral and unalterable truth-mutating nature and it must not interfere in any significant way with mediation's conflict resolution purpose.

B. Rules must not significantly interfere with the means by which the players can accomplish the game's purpose

That mediation's purpose is to resolve conflict says nothing of the means that may be used to accomplish resolution. And that brings into focus the second criteria for ethical rule design: the rule should not interfere in any significant way with the means by which the mediator or the mediation advocate can accomplish the purpose of mediation. The question that must be addressed here is: may a good end justify any means? May truth be bent, colored, tinted, veneered, or hidden by a mediator or mediation advocate if the result is achieving a satisfactory resolution, or better yet, a win-win solution without harm to any party? In short, is there such a thing as a noble lie? Our immediate instincts beckon us to answer "no"; but the reality is that many of us lied to our children so long about Santa Claus -- with no catastrophic results and no tinge of shame -- that deep down we know that something like a "noble lie" exists and it's okay. Thus, whatever truthfulness standard is adopted, it must accommodate. or at least acknowledge, the concept of the "noble lie."

C. Rules must be comprehensible, reasonable, and fair

The third criteria for ethical rule design is that any imposed rule should be comprehensible, and it should be reasonable and fair, both in its content and its application. As to comprehensibility, an ethical rule must be stated clearly and unambiguously. A rule that is capable of various interpretations can produce unfair, unwanted, and even nefarious results.

As to content, this third criterion stimulates inquiry into what types of communication (written, verbal, or nonverbal) or withholding of information should be prescribed or proscribed by the ethical rule; or whether there should be any prescriptions or proscriptions at all. My own personal reaction to this question currently is that it would make much more sense for the rules to proscribe certain specifically defined types of untruthful statements, behavior, conduct, or omissions rather than use vague blanket terms like "false statement of material fact or law." In this regard, a review of some of the literature on development of conventions of truthfulness,[(41)] untruthfulness,[(42)] and good faith[(43)] may be of some help to the designers of the truthfulness standard for mediation.

As to the reasonable and fair *application* of an ethical rule, the third criterion forces consideration of whether the same standard of truthfulness should apply across the board to all participants in mediation whether they be lawyer or nonlawyer mediators, lawyer-advocates, judges, or former judges. My intuitive response is that the standard of truthfulness should be the same for all, unless some exception can be identified and justified. Conceptually, there should be no separate rules for judge-mediated cases as compared to non-lawyer or lawyer mediated cases. The key is selecting a truthfulness standard that is capable of both comprehension and compliance, and therefore respect. And this leads us to the discussion of the fourth criteria for ethical rule design -- the rules must be capable of compliance by all persons whom they intend to regulate.

D. Rules must be capable of compliance by all of the game's players in all situations

Whatever truthfulness standard is selected, there must be a final check to determine whether all persons that the standard is designed to regulate can reasonably be expected to comply with it in all predictable situations. This requires a type of "troubleshooter" thinking to imagine the variety of ways that the truthfulness standard might come into play. There might be certain types of situations, party configurations, or claims or defense types in which the standard needs

to be modified by making it more or less rigorous or by limiting its application in some way. By this process, it may be concluded that certain specific exceptions to the truthfulness standards need to be provided and specifically explained in the text of the rule or its accompanying comments. This criterion also requires the designers to consider whether the mediator, for example, should be required to explain the "rules of the game" and truthfulness expectations at the beginning of the mediation, and if so, what the content of that explanation should be.

VIII. Conclusion

In July, 1997 the American Bar Association established the Commission on Evaluation of the Rules of Professional Conduct, commonly known as "Ethics 2000" whose work is currently underway. Its purpose is to examine and consider updating the ABA's Model Rules of Professional Conduct in light of changes in the legal profession, being brought about by new and developing practice areas and by the impact of rapid innovations in global communications and technology. The Chair of the Commission hopes to report to the ABA House of Delegates at the Association's annual Meeting in July, 2000 -- an ambitious challenge, indeed, considering the breadth of the task and the comprehensiveness of the analysis that will be required. Some of the issues this Commission will most likely be addressing will include complex ethical questions relating to the field of alternative dispute resolution -- both mediation and arbitration.(44) It is hoped that this article and the *Mediation Magic* article from which it derives will offer the Commission some useful insights into the tasks of defining the limits of acceptable deception by lawyers engaged in mediation and of determining an appropriate truthfulness standard for lawyers in the practice of law, generally.

End Notes

1. 29 Loyola U. of Chicago L. Rev. 1.

2. Caucused mediation is a commonly employed type of mediation procedure in which the mediator conducts separate and private discussions with the parties and their counsel. *See generally*, Dwight Golann, Mediating Legal Disputes 68 (Little, Brown and Co., 1996).

3. *See* David Nyberg, The Varnished Truth: Truth Telling and Deceiving in Ordinary Life 66-67 (1992); J. Barton Bowyer, Cheating: Deception in War & Magic, Games & Sports, Sex & Religion, Business & Con Games, Politics & Espionage, Art & Science 48-49 (1982).

4. *See* Nyberg, *supra* note 3 at 66. *See also*, Michael Lewis and Carolyn Saarni (Eds.), Lying and Deception in Everyday Life (New York: The Guilford Press, 1993); Robert W. Mitchell and Nicholas S. Thompson (Eds.), Deception: Perspectives on Human and Nonhuman Deceit (Albany: State University of New York Press, 1988).

5. *See* Sissela Bok, Lying: Moral Choice in Public and private Life 58-59 (1989).

6. Id. at 76.

7. Howard Raiffa, The Art & Science of Negotiation 128-29,359-60 (Cambridge, Mass.: Harvard University Press, 1982).

8. *See* Jay Folberg and Alison Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation 263-80 (San Francisco: Jossey-Bass Publishers, 1984).

9. *See* Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators,* 13 Mediation Q. 3, 15-16 (1995).

10. *See* Christopher M. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 35-43 (San Francisco: Jossey Bass Publishers, 1986).

11. Id. at 269.

12. Id. at 187-98.

13. Id. at 189.

14. Benjamin, *supra* note 9 at 17.

15. Benjamin, *supra* note 9 at 12.

16. *See generally,* Scott S.Dahl, *Ethics on the Table: Stretching the Truth in Negotiation,* 8 Rev. Litig. 173 (189). *See also* Eleanor Holmes Norton, *Bargaining and the Ethic of Process,* 64 N.Y.U.L. Rev. 493 (1989).

17. Alvin Rubin, *A Causerie on Lawyers' Ethics in Negotiation,* 35 La. L. Rev. 577, 589 (1975).

18. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation,* 1980 Am. B. Found. Res. J. 926, 928.

19. Id. at 929-31.

20. Id. at 929.

21. Id. at 928.

22. Geoffrey C. Hazard, Jr. *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties,* 33 S.C. L. Rev. 181, 196 (1981).

23. Thomas F. Guernsey, *Truthfulness in Negotiation,* 17 U.Rich. L. Rev. 99, 103 (1982).

24. Professor Walter W. Steele, *Deceptive Negotiating and High-Toned Morality,* 39 Vand. L. Rev. 1387, 1403 (1986).

25. Rex R. Perschbacher, *Regulating Lawyers' Negotiations,* 27 Ariz. L. Rev. 75, 133-34 (1985).

26. Geoffrey M. Peters, *The Use of Lies in Negotiation,* 48 Ohio State L. Jour. 1, 50 (1987).

27. Dahl, *supra* note 16 at 199.

28. Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations,* 1990 Jour. of Dispute Res. 103, 115 (1990).

29. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor,* 138 U. Pa. L. Rev. 761, 782 (1990).

30. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations,* 75 Iowa L. Rev. 1219, 1272 (1990).

31. Id. at 1236 to end.

32. *See* Ted A. Donner & Brian L. Crowe, Attorney's Practice Guide to Negotiations Chs. 11 and 12 (2d ed., 1995).

33. *See* Id.

34. Guernsey, *supra* note 23 at 105-127.

35. Wetlaufer, *supra* note 30 at 1244-45.

36. Guernsey, *supra* note 23 at 107-08.

37. *See* Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?* 2 Inside Litigation 1 (1988).

38. *See* John W. Cooley, Mediation Advocacy (NITA, 1996); Eric Galton, Representing Clients in Mediation, (Dallas, Tex. Texas Lawyer Press, 1994).

39. Ethical Standards of Professional Responsibility, Society of Professionals in Dispute Resolution (Adopted June 1986), "General Responsibilities."

40. *See generally,* Jeffrey M. Shaman, Steven Lubet, and James J. Alfini, Judicial Conduct and Ethics (2d Ed.) (Charlottesville, Va.: Michie, 1995).

41. *See* Guernsey, *supra* note 23 at 103.

42. Dahl, *supra* note 16 at 199.

43. Kimberly K. Kovach, *Good Faith in Mediation -- Requested, Recommended, or Required? A New Ethic*, 38 S.Tex. L. Rev. 575, 622 (1997).

44. Ethics of *advocacy* in mediation and arbitration seems to be a proper topic for the Commission's work in revising the Model Rules of Professional Conduct. Whether *mediator* and *arbitrator* ethics fall within the charge of this Commission is not altogether clear. It would seem more appropriate to include consideration of the ethics of these two neutral functions -- not currently categorized as the practice of law -- in connection with a revision of the ABA Model Code of Judicial Conduct -- which regulates another neutral, non-practice function of lawyers. It further seems advisable, if not imperative, that a study and evaluation of the Model Rules and the Model Code occur simultaneously so that any overlapping considerations can be fully developed, addressed, and coordinated.
John Cooley biography and additional articles: http://www.mediate.com/people/personprofile.cfm?auid=63

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When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal

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When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal

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This article examines whether the punch line that you can tell when lawyers are lying by confirming that their lips are moving applies to their conduct when negotiating in mediations. General surveys of lawyer honesty suggest that this perception probably does apply to the way lawyers negotiate in mediations. Only 20% of people surveyed in a 1993 American Bar Association poll described the legal profession as honest, and that number fell to 14% in a 1998 Gallup poll.[1] A more recent poll revealed that one-third of the American public believes that lawyers are less truthful than most people.[2]

A lawyer friend who mediates circuit court cases and other substantial matters in Florida told me that his professional life is lived in a "fog of lies and spin" emanating from lawyers with whom he works.[3] Another mediator commented that "the spinning that goes on in mediation is truly enough to make one dizzy."[4]

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1. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 528 n.3 (2002).

2. E. Cliff Martin & Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 1.4 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 779 (2002).

3. J. Joaquin Fraxedas, discussion with author (March 26, 2004).

4. Ed Ahrens Jr., *There Are Lies and There Are Lies*, http://www.floridamediationgroup.com/ (last visited Feb. 27, 2006).

When I asked another friend who mediates in Florida how frequently lawyers lie during his mediations, he said, "Practically all the time."[5] An Arizona mediator who often teaches others studying to become mediators tells them not to believe "anything a lawyer tells you during a mediation."[6]

I. INTRODUCTION

These findings and comments piqued this author's interest in investigating how lawyers are handling a core ethical choice to act honestly when negotiating on behalf of clients during mediations. Little published empirical work exists on how honestly lawyers negotiate generally and none this author could find describes attorney behaviors when they negotiate in voluntary, contractually-required, or court-ordered mediations. The topic of lawyer honesty in mediations also has received little focused attention from scholars. This article approaches both gaps by integrating data derived from questionnaires answered at a continuing legal education workshop for lawyers and mediators[7] with analysis of information categories commonly disclosed during third-party assisted negotiations.

This article analyzes survey information using the categories the legal profession employs to regulate negotiating honesty: material facts, non-material facts, and opinions. It then examines other important groupings of information essential to negotiating and mediating not mentioned directly in ethics regulations including agreement alternatives, interests, and priorities. This article concludes by making and defending a claim that regulatory reform is needed to encourage more truth-telling about interests, the core component of value-creation and problem-solving in negotiation and mediation.

Adopting the definition of lying proposed by Professor Gerald Wetlaufer, the questionnaire investigated the frequency of intentional statements by which speakers attempt to create in others understandings different from the speakers' actual views[8] regarding the above information categories. Designed to avoid concerns and debates about what truth is and whether knowable truth exists, this definition focuses on speakers' intentions to create beliefs in listeners that diverge from negotiators' own understandings. Because communication recipients seldom have direct knowledge of speakers' intentions and understandings, the questionnaire focused on observations and defined them as personal witnessing of remarks produced by others or themselves, including both actual knowledge and strong suspicions.[9] This broad definition allowed respondents to self-disclose anony-

5. Chester Chance, discussion with author (February 9, 2006).

6. Bruce E. Myerson, *Telling the Truth in Mediation: Mediator Owed Duty of Candor*, DISP. RESOL. MAG., Winter 1997, at 17.

7. This Conference was the annual workshop sponsored by the ADR Committee of the Litigation Section of the Florida Bar, held on March 26, 2004, in Orlando, Florida. It was attended by forty lawyers and mediators and this essay reports data from twenty-three completed questionnaires. This essay reports averages of the estimates respondents shared on each inquiry and their occasional written comments. Ranges and medians for each mean are provided in these notes.

8. Gerald B. Wetlaufer, *The Ethics of Lying in Neogtiations*, 75 IOWA L. REV. 1219, 1223 (1990).

9. Of course, this definition does not establish that lies actually were told, often a very difficult event to establish. As one respondent noted, "if the negotiator/lawyer is lying, it is rare that I would know. My percentages are based more on suspicion than fact." Survey response (March 26, 2004) (on file with author).

mously the frequency with which they engaged in deceptive statements about these information categories[10] and to estimate how often they suspected others lied about these categories of information in negotiations and mediations. Responses came from twenty-three lawyers, five of whom were practicing mediators.[11] Although far from rigorous empirical investigation, this survey employed methods similar to those used in much of the limited research regarding attorney truthfulness in negotiation.[12]

II. LYING ABOUT MATERIAL FACTS

Communications regarding material facts constitute the category of information most directly regulated by existing ethical rules and substantive doctrines. Nothing in the American Bar Association's Model Rules of Professional Conduct (Model Rules), as enacted by the forty-four states which pattern their ethical governance substantially on these guidelines, directly addresses lawyers' obligations to be truthful when negotiating during mediations. Despite arguments to do so, the Ethics 2000 Commission charged with making necessary amendments to the Model Rules, chose not to recommend for mediation the more stringent standard of honesty which applies to trials and forbids false statements regarding all facts regardless of materiality.[13] This makes it safe to assume that the regulations regarding truthfulness in negotiation apply to mediations.

Model Rule 4.1 applies to lawyers' statements to others, and it prohibits attorneys from knowingly making false statements of material fact or law to third

10. My questionnaire did not attempt to discern whether responses came from personal or suspicion-based experiences. Lawyers responding to questions about caucuses, however, had only their behavior to evaluate. This may partially explain the higher average estimates for lies in joint sessions than caucuses. *See infra* notes 33, 34, 81, 82, 98, 99.

11. Respondents included sixteen males and seven females and averaged nineteen years of experience, ranging from a high of forty to a low of three. The five mediators were men and averaged twenty-eight years of experience.

12. Virtually all of the published articles describing negotiation honesty involve similar approaches collecting information based on questionnaires or interviews. *See, e.g.*, Terry Carter, *Ethics by the Numbers*, 83 A.B.A. J. 97 (Oct. 1997) (survey of nearly 100 lawyers attending an ABA Annual Meeting); Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173 (1989) (interviews presenting 10 scenarios to 14 attorneys); Larry Lempert, *In Settlement Talks, Does Telling The Truth Have Its Limits*, 1 INSIDE LITIG. 1 (1988) (interviews presenting four hypothetical situations to nine law professors who have written on ethics, five experienced litigators, and one judge). One of this survey's respondents accurately commented: "I do not believe that this survey nor the way in which it was given constitutes empirical data." Survey response (March 26, 2004) (on file with author). My questionnaire was an explorative study of a group that can hardly be called a sample of anything other than lawyers and mediators who were willing to share their observations. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, n.4 (1990). The group surveyed was small and its members may easily represent a biased collection. *Id.*

13. Model Rule of Professional Conduct R. 3.3 prohibits knowingly making false statements of fact to tribunals regardless of their materiality. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2004). Despite urgings to do so, the ABA did not include mediation in its definition of tribunal as part of the Ethics 2000 Commission's revision of the Model Rules of Professional Conduct. Focusing on the non-adjudicative nature of mediation rather than its frequent direct connection to judicial proceedings when mandated by courts, the Model Rules define tribunal as "a court, an arbitrator in a binding arbitration proceeding, or other body acting in an adjudicative capacity." MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2004).

parties when representing clients. This Rule prohibits lawyers from lying about material facts when negotiating inside and outside of mediation. Although Model Rule 8.4 generally prohibits lawyers from engaging in dishonest, deceitful, and fraudulent conduct, many scholars and commentators conclude that the more specific provisions of Model Rule 4.1 govern lawyer truthfulness when negotiating.[14]

The prohibition of Model Rule 4.1 against lying about material facts largely replicates substantive doctrines of fraud which can make agreements vulnerable to invalidation.[15] American fraud law touches many negotiation behavioral decisions and seems to be expanding its reach.[16] Reflecting these substantive trends, the Ethics 2000 Commission amended the Comments to Model Rule 4.1 to announce that material fact lies can occur if lawyers "incorporate or affirm" statements of others they know are false. Material fact lies also occur when lawyers use "partially true but misleading" assertions in contexts that make them the "equivalent of affirmative false" communications.[17] Courts are likely to find this equivalence when other facts are vital and not easily accessible to the persons who receive selective, partial communications.[18]

Lawyers who lie about material facts when negotiating inside or outside of mediation risk ethical discipline by the legal profession for violating Rule 4.1[19] and for assisting their clients in committing fraud.[20] They also risk civil liability for fraud,[21] deceit,[22] and legal malpractice.[23] Although instances where lawyers

14. Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937, 939-40 (2002) (Model Rule 8.4(c) intended to be broad and cover conduct that otherwise might slip through the cracks and not be banned by more specific rules provisions). Model Rule 8.4 (c) "can and has been invoked" to ensure lawyers comply with their duties "to be honest and fair in negotiation." Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation, in* DISPUTE RESOLUTION ETHICS, A COMPREHENSIVE GUIDE 119, 137-38 (Phyllis Bernard & Bryant Garth eds., 2002) [hereinafter ETHICS IN NEGOTIATION].

15. Courts have always imposed liability on those who knowingly misrepresent facts in negotiation. Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 416 (1988). A contract theory of fraudulent misrepresentation allows parties induced into contracts by another's lies to rescind and a tort theory of deceit permits recovery for resulting economic harm. *Id.* Professor Geoffrey C. Hazard, Jr., a principal drafter of the comments to the Model Rules of Professional Conduct, concluded that "legal regulation of lawyer trustworthiness cannot go much further than to proscribe fraud." Geoffrey C. Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 196 (1981).

16. G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 206 (1999). State legislatures, courts, and other regulatory organizations such as the American Law Institute and National Commissioners on Uniform State Laws have been broadening the meaning and scope of American fraud law. Menkel-Meadow, *supra* note 14, at 141.

17. MODEL RULES OF PROF'L CONDUCT R. 4.1 CMT. 1 (2004).

18. *See* SHELL, *supra* note 16, at 208-09.

19. *See, e.g.*, Fla. Bar v. Varner, 780 So. 2d 1 (Fla. 2001) (lying about filing suit); Fla. Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996) (lying about who would be using leased office equipment); Fla. Bar v. McLawhorn, 505 So. 2d 1338 (Fla. 1987) (falsely told health care providers with unpaid bills that his client's verdict was not sufficient to satisfy outstanding financial obligations); *In re* Eliasen, 913 P.2d 1163 (Idaho 1996) (falsely told debtor he would lose his driver's license if he did not pay a loan); Ausherman v. Bank of Am. Corp., 216 F. Supp. 2d 530 (D. Md. 2002) (lawyer lied about making confidential arrangements to learn identity of employee allegedly engaging in misconduct to obtain a dollar settlement); *In re* Hendricks, 462 S.E.2d 286 (S.C.1995) (lying to title insurer).

20. Model Rule of Professional Conduct 1.2(d) prohibits lawyers from assisting clients "in conduct the lawyer knows is . . . fraudulent." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004).

21. *See, e.g.*, Slotkin v. Citizen's Casualty Co., 614 F.2d 301 (2d Cir. 1979) (lawyer who misrepresented amount of insurance coverage available in settlement negotiations of an infant's medical malpractice claim held liable for fraud); Hansen v. Anderson, Wilmarth & Van Der Maaten, 657 N.W. 2d

are disciplined for lying about material facts and assisting client frauds seem to be increasing,[24] most actual regulation of lawyer honesty regarding this information category occurs when parties later seek to challenge agreements they negotiated inside or outside of mediation.[25] While aggrieved participants have the ability to challenge agreements based on lies about other negotiation topics, they typically have greater motivation to discover that important external facts, independent of lawyers' negotiation strategies, were not as represented.

Despite these prohibitions and risks, and despite concerns about reputation in repeat encounters, empirical research suggests that lawyers lie about material facts when negotiating. A survey of a national sample of lawyers showed that 51% believe that "unfair and inadequate disclosure of material information during pre-trial negotiation is a regular or frequent problem."[26] Another survey of civil litigators in Illinois, Indiana, and Michigan showed that 20% believed that opposing lawyers routinely lied about material facts during non-mediated negotiations.[27] Mirroring that research, the average of estimates from respondents answering the questionnaire regarding lying about material facts was that such lying occurred in 23% of the non-mediated negotiations in which they participated.[28]

Many facets of mediation constrain opportunities to lie about material facts successfully. Concerns for reputation and effectiveness in future encounters with mediators encourage truth-telling. The presence of clients typically required for

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711 (Iowa 2003) (lawyer who lied about client owning a business in negotiation to sell that business held liable for fraud); Cresswell v. Sullivan & Cromwell, 922 F.2d 60 (2d Cir. 1990) (lawyer who denied regulatory investigation of client could be sued for fraud). Negotiator-agents are not relieved of liability for their torts simply because they acted on behalf of clients. Rex Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ L. REV. 75, 87 (1985).

22. *E.g.*, *In re* Shorter, 570 A.2d 760, 767 (D.C. 1990) (lawyer's deliberately misleading answers to IRS agent constituted deceit); McVeigh v. McGurren, 117 F.2d 672 (7th Cir. 1940) (attorney who lied about his client's ability to pay a large child support debt when client had just received a substantial inheritance held liable for deceit).

23. Perschbacher, *supra* note 21, at 107-12.

24. *Supra* note 19. Other cases disciplining lawyers for lying during non-mediated negotiations include: Fla. Bar v. Varner, 780 So. 2d 1 (Fla. 2001) (lying about filing suit and submitting a fictitious notice of voluntary dismissal); Fla Bar v. Adams, 641 So. 2d 399 (Fla. 1994) (letter falsely accusing another attorney of suborning perjury); *In re* Skinner, 214 N.W. 652 (Minn. 1927) (willfully making false statement to a third person warrants disciplinary proceeding). Cases disciplining lawyers for assisting client fraud involving negotiating outside of mediation include: Fla. Bar v. Beaver, 248 So. 2d 477 (Fla. 1977) (counseling client to conceal assets during divorce and helping client disperse money in trust account warrants suspension); *In re* Mussman's Case, 286 A.2d 614 (N.H. 1971) (helping client create fraudulent transfer unethical).

25. Menkel-Meadow, *supra* note 14, at 139. Litigating the enforceability of mediation agreements supplies one of two most common components of the rapidly growing law about mediation as it becomes more institutionalized and more widely used. James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of Emerging Case Law*, 54 ARK. L. REV. 171, 172 (2001). Most issues surrounding confidentiality of statements made in civil mediations deal with claims of misconduct by parties such as fraud or capacity to contract issues. James M. Bowie, *Ethical Issues in Construction Mediation: Are There Any Rules*, 24 CONSTR. LAW. 33, 37 (2004).

26. Steven D. Pepe, Standards of Legal Negotiations: Interim Report and Preliminary Findings (1983) (unpublished manuscript, on file with New York University Law Review).

27. *Id. See generally* Robert B. Gordon, Note, *Private Settlement as Alternative Adjudication: A Rationale For Negotiation Ethics*, 18 U. MICH. J.L. REFORM 503, 508 n.29 (1985).

28. Survey responses (March 26, 2004) (on file with author). The range for the 21 responses to this question ranged from a high of 89% to a low of 0% and the median was 20%. *Id.* The questionnaire defined material facts as "event, subject, and other specifics affecting deals or dispute resolutions that fraud law would consider actionable as going beyond puffing or acceptable exaggeration." *Id.*

court-connected mediations often means that material fact lies require party complicity. Caucuses give mediators opportunities to converse directly about and indirectly around suspected misrepresentations. With capable attorney representation, effective use of broad civil discovery provisions also limits opportunities to lie about material facts.

Nevertheless, reported decisions[29] and anecdotal evidence suggest that lawyers lie about material facts when negotiating during mediations. One mediation scholar reported that "some attorneys, operating under the assumption that . . . [mediations are] entirely confidential, have bragged about resolving the case by misrepresentation."[30] Another noted the reports of several Texas mediators that lawyers regularly lie during mediations.[31] Survey respondents were asked to indicate how often they believed they observed lies about material facts in joint sessions versus caucuses. The average of survey respondents' estimates was that lies occurred in 25% of the joint sessions in which they participated.[32] The average of respondents' estimates of lies about material facts in caucuses was that they occurred in 17% of the mediations in which they participated.[33]

Respondents' estimates that more material fact lying occurred in joint sessions than in caucuses probably reflect the questionnaires' option only to self-disclose when lawyers evaluate caucus behaviors.[34] This difference may suggest that lawyers occasionally choose to communicate deception directly in joint sessions to avoid how mediators translate, embellish, diminish, reframe, and ignore lawyer statements when carrying messages between caucuses. In addition, predic-

29. *E.g., In re* Waller, 573 A.2d 780 (D.C. 1990) (lawyer's lie to mediator about representing an apparently liable but non-named defendant held not material).

30. KIMBERLEE KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 142 (1994). Attorneys typically lead negotiations and talk more during mediations. An empirical study showed that lawyers talked more than clients in 63% of the matters and talked an equal amount of time in 31% of the sessions. Rosselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 658 (2002).

31. Lynne H. Rambo, *Impeaching Lying Parties With Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation Privilege Statutes*, 75 WASH. L. REV. 1037, 1091 n.210 (2000).

32. Survey responses (March 26, 2004) (on file with author). The range for the twenty responses on this question was from a high of 80% to a low of 0% with a median of 20%. *Id.*

33. *Id.* The range for the eighteen responses was from a high of 80% to a low of 0% with a median of 10%. *Id.*

34. Most of this discrepancy probably results from the fact that respondents who were not mediators would have to answer this question by estimating their own lies about material facts because they presumably did not observe other lawyers in caucuses except in multi-party contexts. Respondents who were mediators, however, also estimated observing more lying about material facts in joint sessions than in caucuses. The average of the estimates from the four mediators who shared them regarding these categories was that material fact lies occurred in 30% of joint sessions and 15% of caucuses on the mediations in which they participated. *Id.* The likelihood that lawyers may not have negotiated substantially before court-ordered mediations, which presumably supplied the bulk of these respondents' experiences, may explain these estimate averages regarding material fact lying occurring more in joint sessions than in caucuses. Whatever the explanation, this response does not confirm predictions that the mere presence of a mediator will produce positive changes in negotiating behavior in the amount of truth-telling regarding material facts that occurs. *See* Daniel Bowling & David A. Hoffman, *The Personal Qualities of the Mediator and Their Impact on the Mediation*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 19-21 (Daniel Bowling & David Hoffman eds., 2003) (arguing the presence of mediators produces positive changes in negotiating behavior).

tions that lawyers will exploit the confidentiality that attaches to caucuses to lie about material facts more than in private sessions may not be accurate.

On the other hand, some lawyers might choose to lie about material facts in caucuses to take advantage of opportunities to influence mediations within these confidential sessions. They also may hope that mediators will communicate these falsehoods in ways that participants deem more legitimate and persuasive.

Mediators may not know when lawyers lie about material facts during mediations, particularly when misrepresentations relate to information that is not readily available to and beyond the reach of other participants. Studies show most humans are not particularly adept at detecting lies.[35] If the limited research and respondents' estimates accurately predict that lawyers lie about material facts in 17% to 23% of all mediations, it follows that undetected lies occasionally influence mediated outcomes and resulting agreements.

Sometimes contexts, prior communications, caucus conversations with clients, or earlier experiences with attorneys raise legitimate concerns about the truthfulness of important fact representations made in joint sessions or caucuses. When this happens, mediators may use the common advocacy technique of asking questions to which they already know the answers as a way to check attorney truthfulness.[36] Mediators also may pursue several options if they suspect the truthfulness of material fact statements.

One option includes encouraging parties to include representation or warranty provisions in mediated agreements for fact statements that are essential to inducing acceptance of proposals. Representations are detailed statements about important facts, and warranties are promises that these assertions are true. Both of these provisions lessen the need to base agreements solely on trust. Both supply standard tools transactional lawyers use to deal with the strategic opportunism presented by the ability to deceive about material components of deals. This option can be raised by parties or mediators and, because agreements are usually readily admissible in evidence, these provisions can avoid many later controversies about the content of key representations and can focus disputes directly on the truth of these statements.

Lawyers who reject using representations and warranties naturally increase mediators' concerns about the truthfulness of the material fact statements they make. Mediators confronting this challenge may privately discuss the risks of discovery through pretrial procedures and subsequent challenges to encourage lawyers and their clients to reframe these situations and reconsider their refusals to change or warrant their representations. Mediators also may encourage negotiators to make suspected misstatements confidential communications to avoid confronting dilemmas regarding whether and how to share them. Finally, mediators can choose not to transmit material information that they suspect is false.

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35. Robin Marantz Henig, *Looking for the Lie*, N.Y. TIMES, Feb. 5, 2006, at 47. Research suggests that although most people think they are skilled at spotting liars, fewer than 5% of people have innate abilities to detect lies with accuracy. Most humans, when tested, spot liars at a level not much better than chance. *Id.*; *see* Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913 (1991).

36. Menkel-Meadow, *supra* note 14, at 149; Jan Frankel Schau, *Secrets and Lies: The Ethics of Mediation Advocacy*, http://www.mediate.com//articles/frankelschauJ1.cfm (last visited April 7, 2007) (lies about undiscovered material facts can confound and impede the progress of negotiations).

Assuming that none of these approaches resolves concerns, mediators may need to terminate mediations to avoid helping create agreements that involve fraud.[37] Discussing their ethical obligation to avoid fraudulent agreements at appropriate moments in caucuses may generate modifications of earlier statements and decisions not to use or make additional false representations.

Current legal trends exempt challenges to mediated agreements based on claims of material fact misrepresentations from the confidentiality rules that ordinarily apply to mediation proceedings.[38] Mediators also may be compelled to testify regarding the existence of subsequently challenged material fact statements during the mediation.[39]

III. FAILURES TO DISCLOSE MATERIAL FACTS

Analysis of truthful negotiating in and out of mediation typically focuses on affirmative misstatements, which generally must exist before fraud or ethical scrutiny occurs. Circumstances, however, may make the failure to disclose facts or other information fraudulent and unethical. Explicitly linking ethical regulation to the American law of fraud, Model Rule 4.1(b) prohibits lawyers from knowingly failing to disclose a material fact when disclosure is necessary to avoid "assisting" fraudulent acts by clients unless disclosure is barred by the confidentiality rule. Comment 1 to Model Rule 4.1 notes that although American lawyers generally have "no affirmative duty to inform" opposing parties of relevant facts, omitting facts or other information may be "the equivalent of affirmative false statements." Section 98(3) of the Restatement (Third) of the Law Governing Lawyers also provides that attorneys negotiating may not fail to make disclosures required by law.

American fraud law generally recognizes disclosure duties when making partial statements that are or become misleading in light of all facts, parties stand in a fiduciary relationship to each other, non-disclosing parties have vital information

37. *E.g.*, Florida's Standards of Professional Conduct for Mediators provide that mediators shall terminate mediations entailing fraud. FLA. R. CERT. & CT.-APP'T MEDIATORS 10.420(b)(4) (2003).

38. *E.g.*, UNIF. MED. ACT § 6(b)(2) (2006). The act, adopted in eight states as of March 2006, exempts from confidentiality mediation communications offered in claims "to rescind or reform . . . contracts arising out of mediation" if proponents can show at an in camera hearing that the evidence is not otherwise obtainable and the need for the evidence substantially outweighs the interests in protecting it. *Id.* Florida's confidentiality statute exempts mediation communications "offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation." FLA. STAT. § 44.405(4)(a)(5) (2005). *See* F.D.I.C. v. White, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999) (Federal ADRA does not create a privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation.).

39. Several opinions allow mediators to disclose the existence of allegedly fraudulent statements. *E.g.*, Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (permitting mediator to testify regarding allegations of duress); *White*, 76 F. Supp. 2d at 738 (alleged duress charge justified disclosure of mediation communications from all parties); McKinlay v. McKinlay, 648 So. 2d 806, 809-10 (Fla. Dist. Ct. App. 1995) (holding confidentiality privilege was waived when wife testified so that husband could rebut and authorize mediator to testify regarding alleged duress and intimidation during mediation). UNIF. MED. ACT § 6(c) (2006) (provides that mediators may not be compelled to testify regarding post-mediation fraud claims based on material fact lies).

not accessible to others, or special statutory obligations apply.[40] Negotiated agreements have been set aside for attorneys' failures to disclose the death of the plaintiff,[41] a life-threatening injury about which the plaintiff was ignorant,[42] major procedural developments affecting a case,[43] existence of insurance coverage,[44] an autopsy,[45] and changed testimony.[46]

This author's research found no empirical studies regarding the frequency with which attorneys' failures to disclose material facts in these situations occur in negotiations inside or outside of mediation. The questionnaire did not investigate this issue. The broad reach of civil discovery and the presence of skilled lawyers lessen risks of this happening in high stakes, court-connected mediations. This seems particularly likely when duties exist to correct representations that lawyers learn were false when made or have become false because of changed circumstances.[47] Although the ABA's House of Delegates deleted a draft recommendation generally establishing this duty when enacting the Model Rules in 1983, such obligations are created by discovery provisions[48] or common law.[49] Mediators

40. SHELL, *supra* note 16, at 208-09; Barry R. Tempkin, *Misrepresentation by Omission in Settlement Negotiations, Should There Be A Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 181 (2004) (current trend in ethical analysis suggests that lawyers in some circumstances must correct misapprehensions that did not emanate from them or anyone acting on their behalf).

41. Virzi v. Grand Trunk Warehouse & Cold Storage, 571 F. Supp. 507 (E.D. Mich. 1983); *see also* Ky. Bar Ass'n v. Geisler, 938 S.W. 2d 578 (Ky. 1977) (attorney's failure to disclose the death of her client to opposing counsel amounted to an unethical affirmative misrepresentation); Kingsdorf v. Kingsdorf, 797 A.2d 206 (N.J. Super. 2002) (court refused to enforce a settlement agreement where a lawyer failed to disclose husband had died rendering property wife had given to husband hers by joint tenancy). The American Bar Association has opined that personal injury lawyers must disclose the death of their clients before accepting settlement offers. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 95-397 (1995). Although the court's rationale in *Virzi* was that the plaintiff's lawyer needed to correct the material misimpression of the other side, the ABA Comm. on Prof'l. Ethics and Grievances, Formal Op 94-387 (1994), approved settling a claim the lawyer knows was barred by the statute of limitation without disclosing the adversary's apparent misimpression to the contrary. Menkel-Meadow, *supra* note 14, at 140 n.68.

42. Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962). This Court held that the failure to disclose the additional injury was a fraud upon the court because the plaintiff was a minor and settlement required court confirmation rather than an omission tantamount to an affirmative misrepresentation. Menkel-Meadow, *supra* note 14, at 140.

43. Hamilton v. Harper, 404 S.E.2d 540 (W.Va. 1991) (lawyer failed to disclose that summary judgment had just been granted to insurer deciding no coverage when accepting pre-existing offer from it).

44. State *ex rel.* Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855 (Neb. 1987) (lawyer disciplined after failing to reveal existence of insurance coverage to hospital administrator when negotiating release of hospital's lien).

45. Miss. Bar v. Mathis, 620 So. 2d 1213 (Miss. 1983) (lawyer sanctioned for failing to disclose that an autopsy had been performed in an action for bad faith denial of insurance coverage).

46. Kath v. W. Media, Inc., 684 P.2d 98 (Wyo. 1984) (settlement invalidated because attorney failed to disclose letter from witness contradicting previous deposition testimony).

47. Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1076-82 (1999) (arguing lawyers have an ethical duty to disclose in these situations). *See In re* Williams, 840 P.2d 1280 (Or. 1992) (lawyer disciplined for failing to tell landlord that earlier representation that he would hold tenant's payments in escrow was no longer correct); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. d (2000) (recognizing duty of corrective disclosure).

48. FED. R. CIV. P. 26(e) (imposes a duty on parties to amend and supplement discovery responses if material information is incomplete or incorrect and the new or changed information is not known to other parties whether ordered by the court or not).

traveling between private sessions with participants also may discern what material facts really matter to them and thereby identify when significant failures to disclose occur.

Mediators encounter challenges if lawyers confidentially disclose material facts that create serious fraud concerns and then instruct mediators not to reveal them. This disclosure puts in conflict mediators' duties to maintain the confidentiality of caucus disclosures and to not produce fraudulent agreements. When this situation happens, mediators typically explore the risks run by going forward without disclosure in terms of successful challenges to resulting agreements and personal exposure to fraud, intentional or negligent misrepresentation, and malpractice claims. They also may mention their ethical duties to terminate rather than go forward with deals they believe may be later determined to be fraudulent. Oregon has decided that mediators must terminate mediations in this situation.[50] Mediators who go forward after discovering lawyers or participants are fraudulently withholding material information from others participate in the perpetration of fraud.[51]

IV. LIES ABOUT NON-MATERIAL FACTS AND OPINIONS

Even though it added materiality to ethical analysis of negotiating, the Model Rules do not define the term "material" directly. Definitions of material fact statements under the law of contracts and torts vary. Statements about facts have been deemed material to rescind contracts if they would induce reasonable persons to enter into agreements.[52] Similarly, statements have been deemed material in tort deceit actions if they would induce reasonable persons to act on them,[53] or if speakers' had reason to know that respondents would rely on them even if reasonable persons would not.[54]

In assessing materiality, the Comments to Model Rule 4.1 make clear that whether statements should be regarded as material facts depends on the circumstances. Comment 2 suggests that "under generally accepted negotiation conventions certain types of statements ordinarily are not taken as statements of material fact."[55] This Comment then lists three examples of statements generally not

49. Tempkin, *supra* note 40, at 195-207; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. d (2000).

50. ABA/BNA Lawyers Manual on Professional Conduct, Ethics Opinion No. 2002-167 (2001-2005) (mediator may not mediate a matter to conclusion when lawyer representing a party in a domestic relations matter confidentially disclosed the existence of marital assets unknown to other party, refused to permit the mediator to share this information, and mediator knew that the assertions were important to the other party's decision-making).

51. *Id.*; Rebecca H. Hiers, *Navigating Mediation's Unchartered Waters*, 57 RUTGERS. L. REV. 531, 574 (2005); *see* Michael Moffat, *Suing Mediators*, 83 B.U. L. REV. 147, 159 (2003) (potential mediator liability for tort-based actions).

52. RESTATEMENT OF CONTRACTS § 470(2) (1932).

53. RESTATEMENT (SECOND) OF TORTS § 538(2) (1965).

54. *Id.*

55. The Model Rules provide no substantiation or examples of this empirical claim causing scholars to wonder who generally accepts these conventions. Menkel-Meadow, *supra* note 14, at 132. Research showing large and consistent differences among lawyers, judges, and academics, regarding the ethical appropriateness of common negotiation statements also undermine regulatory reliance on the actual existence of such conventions. *E.g.*, Dahl, *supra* note 12; Lempert, *supra* note 12.

deemed material facts by negotiation conventions, including "estimates of price or value placed on" transaction subjects, "party's intentions as to acceptable settlement" of claims, and the "existence of undisclosed" principals except when non-disclosure constitutes fraud.

In addition, Comment 2 declares that Rule 4.1 applies only to "statements of fact." This decision to follow old commercial law doctrine that buyers cannot justifiably rely on a seller's "puffing" about the value of items sold,[56] together with the inclusion in Comment 2 as examples estimates of price and value regarding negotiation subjects, creates ambiguities regarding whether all lawyer lies about their opinions are ethically permitted. Although not exclusive, the examples of Comment 2 declare neither factual nor material many communications commonly used by negotiating lawyers seeking to claim the value involved in bargained-for items. The categories of Comment 2 encompass a wide array of information frequently exchanged during negotiations including inflated or deflated offers, counteroffers, and concessions; representations regarding clients' settlement intentions; false estimates of value and worth concerning bargaining subjects; and lies about target points, reservation plans, and bottom lines. All of this information is unquestionably important to negotiations, yet is defined as non-material or non-factual by Comment 2.

Comment 2 promotes a vision that negotiating is either exclusively or predominantly a process for claiming value in the issues involved. It encourages many common value-claiming negotiating behaviors designed to maximize client gain that are premised on assumptions that doing this inherently requires deception and misrepresentation. It invites actions that conceal, mislead, and deceive by purposefully sequenced disclosures, partial disclosures, non-disclosures, and overstated and understated disclosures. It opens a door for lawyers to lie when negotiating.[57]

Available evidence suggests that lawyers routinely use this rule-encouraged pass from truth-telling in negotiation and make false statements regarding these information categories seeking to create beliefs in others that differ from their own.[58] A study of one hundred lawyers surveyed at the 1997 American Bar Association Annual Meeting showed 73% admitting they engaged in these types of statements when they negotiated.[59] Lawyers commonly exaggerate both the value of their claims and the strength of their arguments and positions.[60] Sixty-one percent of the lawyers responding to this 1997 survey indicated a belief that it was ethically permissible to engage in negotiation puffing by stating false value esti-

56. *E.g.* Kimball v. Bangs, 11 N.E. 113, 114 (Mass. 1887). The court noted: "The law recognizes the fact that men will naturally overstate the value and qualities of articles which they have to sell. All men know this, and a buyer has no right to rely upon such statements." *Id.*

57. James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule* 4.1, 19 N. ILL. U. L. REV. 255, 267 (1999).

58. Tempkin, *supra* note 40, at 182 (negotiating lawyers often mislead others by half-truths, partial truths, and misdirection). For example, a leading dispute resolution scholar admits to his students that he has "rarely participated in legal negotiations in which both participants did not use some misstatements to further client interests." Charles B. Craver, *Negotiation Ethics: How To Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 715 (1997).

59. Carter, *supra* note 12, at 97.

60. ROGER HAYDOCK, NEGOTIATION PRACTICE 211 (1984); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. BAR. FOUND. RES. J. 926, 931-32, 934.

mates and price opinions.[61] Attorneys often view abilities to mislead adversaries as a virtue.[62]

Questionnaire respondents confirmed that lawyers frequently lie about settlement intentions and value and price estimates. The average of respondents' estimates was that they observed lawyers lying about the value of negotiation subjects, defined as "the items, claims, and objectives" involved in bargaining interactions, in 35% of negotiations in which they participated.[63]

Negotiators' resistance levels, or bottom lines, are intimately connected to their clients' intentions regarding claim settlement. They describe the points beyond which negotiators would rather do something else than agree and, in monetized exchanges, they connote the amount beyond which clients will not pay or accept. The average of respondents' estimates was that they observed lawyers lie about their resistance levels in 43% of the negotiations in which they were involved.[64]

Not surprisingly, this evidence coincides with data suggesting that a majority of American lawyers prefer to use value-claiming negotiation approaches.[65] A survey of 5,000 Denver and Phoenix lawyers showed pervasive use of value-claiming approaches.[66] Another study of 515 lawyers and 55 judges in New Jersey revealed that about 70% of the cases in which they participated were settled using predominantly value-claiming actions.[67]

Although the survey here did not seek frequency estimates for these types of lies in mediations, mediators report that lawyers make false statements about these topics in both joint sessions and caucuses. Lawyer mediators understand that truth-telling on these topics is not ethically required and, consequently, do not expect candor when attorneys initiate disclosures regarding them in either joint sessions or caucuses. Mediators also know that lawyers often use the phrases "in my opinion" and "I believe," and that the information linked to these opinion-framing remarks is frequently less than candid.

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61. Carter, *supra* note 12, at 97.

62. Tempkin, *supra* note 40, at 183.

63. Survey responses (March 26, 2004) (on file with author). The range for the twenty-two responses on this question was from a high of 100% to a low of 0% and the median was 30%. *Id.*

64. *Id.* The range for the 21 responses on this question was from a high of 100% to a low of 0% and the median was 50%. *Id.* The questionnaire defined resistance level as "the point beyond which a negotiator would rather pursue an agreement alternative than reach a negotiated agreement." *Id.*

65. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING SKILLS 374 (1990); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 764-65 (1984); Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 914 (1996).

66. DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 29, n.6 (1989); Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1, 28 n.113 (1993). This study was done by Professor Gerald Williams and it showed that 67% of these lawyers reported that they primarily used adversarial, competitive, value-claiming strategies when they negotiated. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-40 (1983).

67. Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*, 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997). Sixty percent of the respondents in this survey indicated their belief that value-creating methods should be used more often. *Id.*

In addition, discussing value and price estimates supplies a significant component of most court-connected mediations. Extensive conversations about likely trial outcomes, including projections regarding recoverable damage items, predictions of how decision makers will value claims, and estimates concerning the effects of evidential strengths and weaknesses, usually occur in caucuses. Mediators understand that virtually everything lawyers say on these topics is influenced by partisan perception and gain-maximizing objectives, highly malleable, and generally susceptible to revision as conversations continue. The frequency with which these kinds of deceptive statements occur in negotiating in mediations largely explains the mediators' comments that began this article.

Little harmful deception generally occurs when mediation negotiations are led by skilled and prepared lawyers for all participants. Regrettably, lawyers do not always bring comparable levels of skill, experience, and preparation to mediated negotiations. Consequently, some of these ethically permitted lies probably accomplish gain-maximizing objectives.

Knowing that statements regarding settlement intentions need not be truthful, effective mediators seldom inquire about resistance points. They rarely assign much credence to statements lawyers make about their resistance points during early and mid-points of mediations. Skilled mediators also remain alert to the persuasive value of resistance level lies late in mediations when negotiating has reached appropriate bargaining ranges. It is at this point where lawyer lies about resistance levels often exert significant anchoring and persuasive influences on other participants. Although mediators seek to narrow remaining gaps and find other ways to reach agreement after receiving these statements, these lies may also subtly influence how mediators behave in subsequent caucuses.

Some mediations present particular challenges caused by the potential impact ethically permissible lies can have on unrepresented participants unsophisticated in value-claiming negotiation practices.[68] Opportunities to face these challenges increase as court-connected mediation expands in small claims and in low- and middle-income family matters. Reliance on the assumption contained in Comment 2 of Model Rule 4.1—that general understanding of non-truth telling conventions regarding these matters exists—does not work in these circumstances. Neither does depending upon frequently offered justifications offered for this debatable approach to regulating truth-telling, including that allowing lies about these information categories is necessitated by either the adversarial system or the inherent nature of negotiation.[69]

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68. Most lawyers possess legal knowledge, negotiating experience (if not ability), and familiarity with court procedures and judges, which typically gives them advantages when interacting with inexperienced participants representing themselves. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenant's Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 556-57 (1992); Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 92-93 (1996); Marc Galanter, *Why the 'Haves' Come Out Ahead, Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974); Beatrice A. Mouton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1662 (1969). One commentator asserted that attorney misconduct permeates negotiation interactions between lawyers and unrepresented parties with "misleading presentation of facts and law and over-reaching common." Note, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles*, 67 FORDHAM L. REV. 1987, 2006 (1999).

69. Lowenthal, *supra* note 15, at 430-41.

Unrepresented and unsophisticated participants may believe these lies and make decisions accordingly. Dealing with this challenge puts mediators in a difficult conflict between their obligations to remain impartial and to promote a level of informed consent essential to self-determination.[70] Mediators may respond to this challenge by using caucuses to coach unrepresented clients regarding standard value-claiming negotiation practices and to explore with lawyers who make these misrepresentations the risks of subsequent actions invalidating these agreements. With lawyers, mediators can discuss how fraud law is expanding to reach false opinion statements that use specific language, imply knowledge of facts supporting the opinion, invite reliance on a lawyer's greater expertise, conceal contrary facts, and are directed at vulnerable negotiators.[71] Many mediations, however, will predictably not include these conversations because (1) mediators rarely know with accuracy when lawyers lie about rule-defined non-material facts, (2) the ultimate fairness of outcomes is not a mediator's responsibility,[72] and (3) the bureaucratic and time pressures found in many of these mediation contexts discourage spending time using these options.[73]

V. LIES ABOUT NEGOTIATION AUTHORITY

Lawyers negotiate on behalf of clients. This reality makes the extent of their authority to commit to agreement terms an important issue and creates opportunities to generate bargaining leverage by misrepresenting settlement authority. Misrepresentations regarding authority include direct falsehoods, such as asserting no authority to settle for $100,000 when clients have authorized paying precisely that sum. They also encompass arguably true but deceptive statements, such as claiming no authority to pay $80,000 when clients have authorized giving up to $100,000, so long as the precise dollar limit is not claimed.

Lawyers disagree about whether these statements are ethically permissible lies regarding claim settlement intentions falling within the safe harbor of Comment 2. Some lawyers contend that settlement authority lies are permissible negotiation tactics,[74] while others assert that the specific, declarative nature of many of

70. This is one of the more frequent and difficult dilemmas mediators encounter. Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Practices and Policy Implications*, 1994 J. DISP. RESOL. 1, 17-28.

71. *See* SHELL, *supra* note 16, at 209-12; Lowenthal, *supra* note 15, at 421.

72. For example, Florida's mediation ethics standards provide that mediators must honor parties' right of self-determination, and parties must make decisions. Fla. R. for Cert. and Ct.-App't Mediators 10.300, 10.310(a) (2000), *available at* http://www.mediate.com/articles/floridarules.cfm.

73. *See* Don Peters, *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 FLA. L. REV. 761, 830-31 n.139 (1998).

74. Lempert, *supra* note 12 (presented the first example to fifteen legal ethics scholars, lawyers, judges, and magistrates and reported that seven said yes you can do this but they personally would not, while six said no, this was unethical); JETHRO LIEBERMAN, CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 31-32 (1978) (quoting a leading lawyer approving this tactic); MICHAEL MELTSNER & PHILIP SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 232, 237 (1974) (describing this tactic as commonly used by lawyers while not personally endorsing it).

these statements makes them unethical.[75] The average of survey respondents' estimates was that bargaining authority lies occurred in 36% of the negotiations in which they participated.[76]

Participation by parties with authority to settle is usually critical to successful mediation. The presence of human clients typically required in mediations usually prevents the effective use of authority lies by lawyers because mediators can question and clarify these assertions in caucuses.

VI. LIES ABOUT AGREEMENT ALTERNATIVES

The existence and value of options away from negotiating tables supplies a key factor in most negotiations and mediations. Comparing BATNAs (best alternatives to a negotiated agreement), or BATMAs (best alternatives to a mediated agreement), to proposals developed during negotiations and mediations supplies a central method for measuring whether negotiators have found solutions that exceed what they could obtain elsewhere.

Communications about agreement alternatives take place when parties make disclosures or respond to questions about them. Whether lies about agreement alternatives concern material or non-material facts revisits ambiguities created by Comment 2. These lies also prompt debate regarding whether they should be considered claim settlement intentions.

Negotiators occasionally lie about available alternatives.[77] The average of survey respondents' estimates regarding lies about agreement alternatives was that they occurred in 22% of the matters in which they have participated.[78] Like non-material fact and opinion falsehoods, these lies are likely to have little impact when received by lawyers and other sophisticated negotiators who do not expect truth-telling on these topics. As discussed earlier, lawyers run risks using these lies with unrepresented and unsophisticated negotiators. Courts have found lies about agreement alternatives fraudulent when professionals were negotiating with small business owners[79] and consumers.[80]

Survey responses suggest that lawyers often lie about alternatives when negotiating in mediations. The average of respondents' estimates of lies about agreement alternatives was that they occurred in 25% of joint sessions in which they

75. Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 NEGOT. J. 105, 106 (1985); Lempert, *supra* note 12, at 1. Professor Gary Luban argues that "people have to be able to rely on flat-out declarations . . . or the process breaks down or, at best, becomes incredibly time-consuming." *Id.*

76. Survey responses (March 26, 2004) (on file with author). The range for the twenty-one responses to this question was from a high of 100% to a low of 0% and the median was 20%. *Id.*

77. SHELL, *supra* note 16, at 210. A well known and successful lawyer argued that it was ethically permissible to lie about another offer's existence because "'other offers are ancillary' to the intrinsic value of the item being bargained for." Menkel-Meadow, *supra* note 14, at 142 n.75 (strongly disagreeing with this perspective).

78. Survey responses (March 26, 2004) (on file with author). The range for the twenty responses on this question was from a high of 75% to a low of 0% and the median was 10%. *Id.*

79. *E.g.*, Kabatchnick v. Hanover-Elm Bldg. Corp., 103 N.E.2d 692 (Mass. 1952) (landlord's lie that another tenant was waiting to pay asking price held fraudulent).

80. *E.g.*, Beavers v. Lamplighter Realty, Inc., 556 P.2d 1328 (Okla. Civ. App. 1976) (realtor's lie that rival buyer was willing to pay asking price that same day held fraudulent).

participated.[81] In caucus, mediators will typically analyze agreement alternatives as they help parties explore their predictions regarding likely non-agreement options and their economic, social, and psychological costs. Survey respondents suggested that lawyers may act slightly more truthfully in caucuses as the average of their estimates was that lies about agreement alternatives in caucuses occurred in 20% of the mediations in which they participated.[82]

VII. LIES ABOUT INTERESTS AND PRIORITIES

Accepting a premise that all negotiations present opportunities to create as well as claim and distribute value,[83] mediators typically encourage negotiators to minimize costs and explore other ways to generate gain for all participants. When doing this, mediators often direct conversations to additional information categories beyond than those regulated by current ethical rules. These information categories emphasize interests and priorities.

Mediation participants inevitably define their interests as maximizing gain regarding the issues they present to negotiate. However, mediators usually pursue a vision of interests broader than the negotiating subjects presented with their claims and defenses—issues that are always monetized in court-connected mediations. Honest disclosures and responses to questions posed about non-monetized interests and priorities facilitate value-creating negotiation by helping parties identify solutions that can generate mutual benefit.

Disclosures and responses to questions about non-monetized interests permits one to get to the heart of a situation by uncovering what claims and issues are really about. Often conducted in caucuses, these conversations explore the core of what participants seek as well as what motivates them most strongly. Non-monetized interests and needs lie underneath the divergent and conflicting positions, justifications, and supporting and attacking argumentation that supply the bulk of value-claiming negotiation discourse. Explaining why money is needed, and discovering other ways negotiators can satisfy their interests, supplies different directions mediators can pursue to explore non-monetized interests.

Non-monetized interests and needs also exist on several levels beyond substantive issues including procedural, process, and emotional dimensions. Developing specific information about participants' underlying interests on all of these levels often reveals that negotiators possess shared and independent, as well as directly conflicting, needs. This realization frequently helps negotiators discover options and proposals that create value.

Linked to interest discussions are conversations about priorities, in which participants assess their needs in terms of which needs are most and least important. Research and human experience shows that negotiation participants rarely value

81. Survey responses (March 26, 2004) (on file with author). The range for eighteen responses to this question was from a high of 75% to a low of 0% and the median was 25%. *Id.*

82. Survey responses (March 26, 2004) (on file with author). The range for the eighteen responses to this question was from a high of 50% to a low of 0% with a median of 15%. *Id.*

83. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 4 (2000) (arguing that all negotiations, while inevitably involving distributive issues regarding who gets how much, also present opportunities to create joint value and find joint gain).

all aspects of issues subject to negotiation identically.[84] Honest disclosures and responses to questions about priorities often generates trading, the most common form of value creation, where negotiators exchange items they value slightly less in return for things they value more. Confidential communication made possible by caucusing increases chances that mediators can gather and use this type of data.[85] This enables mediators to enhance negotiations by moving them from the win-lose approach of value-claiming to more individualized and contextualized conversations and outcomes that create value.

Lawyers also lie about their client's interests and priorities when negotiating outside mediations.[86] These lies usually occur when lawyers use a negotiating tactic variously labeled as phony issues, false demands, red herrings, or decoys. This tactic involves falsely asserting interests in and priorities concerning specific issues or claims to gain bargaining chips that can be exchanged for issues negotiators really care about. A common example in family law involves asserting a false interest and priority in gaining custody of children solely to create leverage for economic issues in divorce negotiations. Although the American Academy of Matrimonial Lawyers strongly disapproves of using this lie in divorce negotiations,[87] in a 1994 survey of California lawyers, 61% reported that they or their clients received at least one of these threats.[88]

Lawyers justify lies about interests and priorities by arguing that they are value estimates or settlement intentions.[89] Some assert that these lies comprise standard behavior for negotiators in certain contexts.[90] The average of respondents' estimates of lies about interests, defined as "the needs, objectives, and issues of importance to negotiators' clients," was that they happened in 17% of the negotiations in which they participated.[91] Their average estimate of observed lies about priorities was that they occurred in 18% of the negotiations in which they participated.[92]

Research shows that misrepresenting interests and priorities often leads to favorable value-claiming outcomes in non-mediated negotiations.[93] Unless detected, these lies also are likely to lead to favorable outcomes in mediated negotiations. Limited evidence suggests that lawyers lie about both interests and priorities in mediations. For example, an Indiana lawyer maintained a website suggest-

84. BASTRESS & HARBAUGH, *supra* note 65, at 377, 379-84.

85. *See* Robert A. Baruch Bush, *"What Do We Need Mediation For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DIS. RES. 1, 13 (1996).

86. Lawyers frequently assert phony demands, lie about their clients' needs, and deceive about their interest in agreement when their real objective is delay. HAYDOCK, *supra* note 60, at 212.

87. Rule 6.2, American Academy of Matrimonial Lawyers' Goals for Family Lawyers provides that lawyers should not permit clients to contest custody for financial leverage.

88. Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 499 (1994).

89. Lowenthal, *supra* note 15, at 423.

90. White, *supra* note 60, at 934-35.

91. Survey responses (March 26, 2004) (on file with author). The range of the twenty responses to this question was from a high of 70% to a low of 0% and the median was 15%. *Id.*

92. *Id.* The range of the twenty-one responses to this question was from a high of 50% to a low of 0% and the median was 10%. *Id.*

93. Kathleen M. O'Connor & Peter J. Carnevale, *A Nasty but Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 23 PERSONALITY AND SOC. PSYCHOL. BULL. 504 (May 1997).

ing that clients lie and create "throw away" demands to achieve successful mediation results.[94]

Survey responses verified the concern expressed by several scholars that lawyers will transfer their adversarial negotiating tactics to mediations in ways that undermine its potential to develop value-creating outcomes.[95] The average of respondents' estimates of lies about interests in joint sessions of mediations was that they occurred in 19% of the mediations in which they participated.[96] Their average estimate of lies about priorities in joint sessions was that they occurred in 16% of the matters in which they participated.[97] In caucus, respondents reported only slightly less frequency. Their average estimate of lies about interests in caucuses was that they occurred in 15% of the mediations in which they participated.[98] The average of respondents' estimates of lies about priorities in caucuses was that they also occurred 15% of the time.[99]

In light of these estimates, the common practice of effective mediators to maintain an optimistic skepticism regarding how lawyers and their clients describe their interests and priorities, particularly during initial conversations, seems warranted. This skepticism probably diminishes the effectiveness of lies about interests and priorities in early mediation stages when mediators expect descriptions to be tentative and dependent upon information and ideas that emerge as the process unfolds.

Many characteristics of contemporary mediation constrain lawyers' abilities to lie successfully about interests and priorities. Opportunities for expanded private conversations allow mediators to explore and assess the genuineness of assertions about interests and priorities. The presence and participation of clients also provide frequent clues about candor when these topics are discussed. Effective mediators observe and listen actively to the emotional dimensions of communications when participants share them. These emotional components often provide insights about what really matters and clues regarding truthfulness when conversations turn later to potential solutions that include non-monetized interests.

On the other hand, common aspects of mediation practice may increase opportunities for lawyers to lie about interests and priorities later in mediated negotiations. Mediators frequently seek to expand negotiation agendas by asking ques-

94. *In re* Philpot, 820 N.E. 2d 141 (Ind. 2005) (attorney stipulated to discipline for engaging in false, fraudulent, and misleading public communication).

95. Kimberlee K. Kovach, *Ethics for Whom: The Recognition of Diversity in Lawyering Calls for Plurality in Ethical Considerations and Rules of Representational Work*, *in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 57, 62-63 (Phyllis Bernard & Byrant Garth eds., 2002). *See infra* note 106.

96. Survey responses (March 26, 2004) (on file with author). The range for the eighteen responses to this question was from a high of 50% to a low of 0% and the median was 23%. *Id.*

97. *Id.* The range for the twenty responses to this question was from a high of 50% to a low of 10% and the median was 10%. *Id.* The questionnaire defined priorities as "how clients comparatively rank their interests, needs, objectives and includes resources, relative valuations, future forecasts, willingness to take risks, and time preferences." *Id.*

98. *Id.* The range for the eighteen responses to this question was from a high of 50% to a low of 0% and the median was 10%. *Id.* The average of estimates from mediator respondents was that slightly more lying occurred about interests in caucuses, 15%, than in joint sessions, 14%. *Id.*

99. *Id.* The range for the eighteen responses to this question was from a high of 50% to a low of 0% and the median was 10%. *Id.* The average of estimates from mediator respondents was that more lying about priorities occurred in caucuses, 15%, than in joint sessions, 10%. *Id.*

tions regarding other, typically non-monetized, issues that may be of value to participants. These questions target things that, while measurable in money, exist apart from negotiators' interests in maximizing their gain regarding initially identified bargaining items and claims. Doing this late in mediated negotiations often helps participants bridge remaining monetary gaps between their articulated bargaining positions.

Mediators explore non-monetized interests and priorities seeking low-cost, high-value trades and other ways to move past the narrow ways disputing parties usually frame negotiations and the limited remedies courts can provide. These efforts often help lawyers and clients realize that agreements can include "things other than money, such as structured annuities, future work, letters of apology, product discount programs, bartered services, use of equipment, joint undertakings to raise settlement dollars, and bid invitations."[100] However, information generated about these and other agenda-expanding possibilities provides opportunities for alert negotiators to learn that their counterparts value something highly that their clients do not desire. This may encourage some negotiators to lie about their clients' interests and priorities regarding these items in order to extract significant concessions.

Mediation practice also facilitates successful lying about interests and priorities by providing confidential caucuses where lawyers can skillfully integrate their deceptions into relative value trades. This permits lawyers using such lies to avoid the risk of winning on phony issues and ending up with things not really valued.[101] Although skillful questioning and listening by mediators in caucus may unmask clumsy lies about interests and priorities,[102] and although contexts and clients may provide additional clues regarding unreliability, it seems likely that lawyers can integrate strategically timed lies about interests and priorities into discussions about potential value-creating trades.

This leaves mediators vulnerable to skillful interest and priority lies, particularly late in mediations when they seek to shift participants from apparent impasse to more flexible, need-based options. Mediators may then use these lies to present trades to other participants that promote false value-creation proposals. Believing they are promoting joint gain, mediators may unwittingly help substitute deception-based outcomes for agreements based on genuine interest and priority accommodations. Mediators may reduce this risk by asking lawyers and their clients to stipulate to making only honest disclosures about non-monetized interests and priorities.

100. Lawrence M. Watson, *Initiating the Settlement Process-Ethical Considerations*, *in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 7, 16 (Phyllis Bernard & Bryant Garth eds., 2005); *see also* Steven Schwartz, *The Mediated Settlement: Is It Always Just About The Money? Rarely!*, 4 PEPP. DISP. RESOL. L.J. 309, 314 (2004) (Most mediations include some non-monetized interests.).

101. *See* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 284 (5th ed. 2005).

102. *See* O'Connor & Carnevale, *supra* note 93, at 505; *see also* Ken Kressel et al., *The Settlement Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994) (Lies about interests and priorities in custody were detected in one case where the negotiator made no attempt to accomplish his false demands.).

VIII. A PROPOSED REFORM TO ENCOURAGE TRUTHFULNESS IN VALUE-CREATION

It is not surprising that many lawyers use their win-lose negotiation habits featuring extensive lying in ways that undermine mediation's potential to reach different outcomes.[103] These behaviors flow from a frame of reference most lawyers use resulting from their immersion in an adversary system. This frame then supplies the action orientation with which many lawyers are most familiar and comfortable. Our current regulatory approach in Model Rule 4.1 and its Comments accommodates and promotes this orientation. It creates an ambiguous regulatory approach based on a categorical structure that is "patch work and intuitive,"[104] "primitive and obtuse,"[105] and "very nebulous."[106]

Changing these behavior habits will not be easy. Lies about interests and priorities, particularly with respect to non-monetized issues, do the most harm to mediation's potential to help parties find solutions that differ from the win-lose outcomes adjudication supplies. Lies about non-monetized interests and priorities help deceivers claim value, but do nothing to create value. They help negotiators divide a pie favorably in their self-interests, but do nothing to expand a pie to benefit all. Lies about non-monetized interests and priorities often obscure efforts to identify other possibilities beyond the win-lose, gain-maximizing solutions that benefit some, but not all, negotiators.

Lawyers who lie about this information leave behind opportunities to find joint gain that benefits them as well as other participants. Lawyers victimized by these lies may needlessly sacrifice value that could be retained if genuine value-creating occurred. If done successfully in mediations, lies about non-monetized interests and priorities transform efforts to create joint gain into disguised, but ultimately the same, gain-maximizing outcomes that value claiming produces.

The disappearance of non-monetized interest and priority lies, when they are exchanged for items genuinely valued, does not diminish the harm they do to the mediation process. Effective mediators can help participants diminish the outcome influence of deception condoned by the legal profession's approval of lies about value estimates and settlement claim intentions. They do this by encouraging conversations to move from value-claiming discussions toward potentially value-creating options involving non-monetized interests and priorities.

Mediators, however, have no reframing options when lawyers lie about their non-monetized interests and priorities. They can do nothing beyond what they already do in distributional bargaining: help negotiators manage the tensions gen-

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103. Menkel-Meadow, *supra* note 14, at 148 n.89 (mediators report encountering, especially in caucuses, the same dissembling and deceptive negotiating behaviors that occur in non-mediated negotiation); *see also* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. L. REV. 1 (1991) (fearing that adversarial actions will co-opt mediation rather than predicting that ADR ideology will transform litigation influenced, win-lose practices).

104. Tempkin, *supra* note 40, at 180.

105. Walter M. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986).

106. Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J, 935, 951 (2001).

erated by value-claiming, and find objective standards and other ways to reach midpoints within largely preset exchange parameters. Although important, this work does not accomplish mediation's potential to create value.

Lying begets more deception and lessens our expectations of each other and the systems in which misrepresentations occur.[107] The expectations created by the approach of Rule 4.1 is that lawyers will lie about certain things when negotiating so attorneys and mediators do not anticipate truth-telling about these topics. These assumptions and actions that they inspire easily become self-fulfilling prophecies.[108] This may be tolerable for value-claiming negotiating because we have experienced it so long that it has become engrained in lawyers' attitudes and behavioral habits. The legal community may also accept this situation because mediators have ways of moving beyond these actions to pursue value-creating.

When lies about non-monetized interests and priorities become expectations, however, lawyers will soon experience them as requirements and then start deceiving others about these topics to avoid exploitation.[109] This defeats lawyers' inclinations to share information about non-monetized interests and priorities honestly in mediations. It lessens mediators' abilities to explore genuine needs accurately in order to develop complimentary outcomes and joint gain.[110]

The proposed regulatory reform is to amend state versions of Rule 4.1 and its Comments to clarify current ambiguities by prohibiting false statements about interests and priorities. Putting this in the text of Rule 4.1 as a separate subsection gives it the most binding effect, but adding it to comments will also accomplish important objectives. Defining interests to include all aspects of clients' needs and concerns that do not directly involve efforts to maximize gain regarding original claims or transaction subjects will help clarify ambiguities. This definition also helps distinguish interests from value estimates and settlement intentions concerning presented claims and negotiation subjects where lies are now permitted by Comment 2.

The need to preserve mediation's potential as a viable forum for interest-based negotiating provides the primary justification for this proposal. Legislative and administrative bodies that create or encourage mediation schemes frequently endorse the interest-based negotiating that these approaches allow.[111] Many lawyers and participants use mediation to help them determine whether sharing important information privately can help them obtain outcomes that exceed what they can negotiate on their own.[112] Mediators cannot foster joint, interest-based negotiating and use privately shared information effectively to create value if lawyers are ethically permitted to lie about non-monetized interests and priorities.

Enacting this reform now makes sense because many American lawyers are either not familiar with mediation or do not know how to represent clients effectively before and during it. Perhaps respondents' estimates suggesting that interest and priority lies were observed in only 15% to 19% of mediation joint sessions

107. *See generally* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).
108. Menkel-Meadow, *supra* note 14, at 147.
109. *Id.*
110. *Id.*
111. *E.g.*, FLA. STAT. § 44-1011(2) (2005) (defining the role of a mediator as in part "fostering joint problem-solving").
112. Menkel-Meadow, *supra* note 14, at 147.

and caucuses reflect lawyers' unfamiliarity with the value of discussing non-monetized interests in mediations. This proposal provides guidance and helps lawyers better balance their advocacy roles with an appreciation for and behaviors consistent with mediation's potential to achieve different, and often better, outcomes than adjudication and value-claiming negotiation typically produce. When complying with this standard lawyers will not have to make statements about their non-monetized interests and priorities if they do not want to. If they do make statements about their clients' non-monetized interests and priorities, however, they must communicate truthfully.

The difficulty, if not impossibility, of enforcing violations of this proposed rule supplies a strong argument against adopting this proposal. Interests and priorities, like value estimates and claim settlement intentions, are malleable and reside primarily within the minds of lawyers and their clients. Like value estimates and claim settlement intentions, interests and priorities evolve and shift during mediations as relationships among participants and mediators develop. Mediations are usually dynamic experiences that continually develop new information which often causes participants to re-evaluate risks and reframe objectives.[113] These re-evaluations and reframes are typically strongly influenced by participants' emerging sense of what is important to themselves and others and what is possible in the negotiation.[114] These dynamic events influence perceptions of interests and priorities so earlier expressions can give way to later revisions without conscious attempts to lie. This fluid environment makes it even more difficult to discern and prove lies regarding non-monetized interests and priorities.

Unlike concerns that mandating an ambiguous standard like good faith participation in mediation will generate more adversarial struggle,[115] this proposed reform will not produce many claims of violations. One negotiator seldom knows with certainty what another's claim settlement intentions are, and genuine interests and priorities similarly reside so strongly in the minds of lawyers and their clients that lies about them can rarely be detected. So while the proposed reform is admittedly difficult to enforce, it also is not likely to generate unintended and negative consequences.

This proposal's prohibition may influence the beliefs and actions of lawyers even if it is difficult to enforce.[116] The relatively low estimates of interest and priority lies suggests that the rule will not be undercut by an overwhelming tendency on the part of lawyers to violate it, a justification often offered for the approach of Rule 4.1.[117] Lawyers know when efforts to broaden negotiating agendas beyond original claims and negotiation subjects inject non-monetized interests into discussions. This proposal will let lawyers know that when this happens, they must make an ethical choice to speak honestly or falsely about these different topics.

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113. John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 275 (2004).

114. David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, 2 NEG. J. 73, 88 (1986).

115. *E.g.*, John Lande, *Using Dispute Resolution Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 86-108 (2002).

116. Lowenthal, *supra* note 15, at 443.

117. *Id.* at 441-44.

Creating an objective rule may help lawyers change their behavior because lawyers are generally familiar with rules and comfortable measuring their actions against regulations. Simplifying this ethical choice also may encourage compliance with the admittedly imperfect guideline and increase ethical behavior.[118] Finally, just as many believe that Rule 4.1 and Comment 2 were adopted to preserve adversarial, value-claiming bargaining, so should this proposal be adopted to preserve problem solving, value-creating negotiating, particularly in mediations.

IX. CONCLUSION

Questionnaire respondents shared average estimates confirming, as many mediators have noted, that lawyers are lying in mediated negotiations. This data reflected the level of lying discovered by research concerning prohibited lies about material facts. This limited information suggests that deception concerning interests and priorities, the core ingredients of value-creating negotiation, occurs at about the same 20% rate. Estimated averages regarding information categories of negotiation authority and alternatives reflected the ambiguities inherent in the legal profession's current regulatory approach. Greater estimated averages were shared regarding information categories where the legal profession's ethical regulation posits debatable general conventions and allows lying about common value-claiming negotiating actions.

This data adds to an emerging general sense that relying on lawyer truth-telling in mediated negotiations is risky. It also supports often expressed concerns that lawyer behaviors suited for win-lose adjudicative environments threaten mediation's potential to generate different outcomes. Why lawyers who often participate in imposing and enforcing strict standards of truth-telling on other professionals when they bargain should be less subject to candor requirements when they negotiate remains a puzzling and questionable premise. Although no direct linkages have been established, little doubt exists that the latitude given to lawyers to lie while negotiating contributes to the public's generally low impression of attorney honesty.

Effective lawyers know that they do not need to lie to negotiate effectively.[119] They refrain from making false statements about value estimates and settlement intentions and deflect or reframe questions they receive about these topics. Lawyers who frame negotiations on these categories often display lesser skills levels, lack of comprehensive preparation,[120] and greater willingness to lie to claim value.

Research demonstrates a connection between honest negotiating and perceived effectiveness. The study of 5,000 Denver and Phoenix lawyers mentioned earlier found that honest, ethical, and trustworthy behavior were among the important traits of effective negotiators.[121] A more recent study of 727 Chicago and Milwaukee attorneys showed that when asked to described the characteristics of

118. Tempkin, *supra* note 40, at 227.

119. Scott R. Peppet, *Can Saints Negotiate: A Brief Introduction to Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 94 (2002).

120. One questionnaire respondent noted that "some lawyers come to mediation so poorly prepared that they don't know that they don't know what they are talking about." Survey response (March 26, 2004) (on file with author).

121. WILLIAMS, *supra* note 66, at 20-30.

effective problem-solving negotiators, "ethical" was the most common adjective used while trustworthy was the fifth most frequent descriptor.[122] Reforming the approach of Rule 4.1 as suggested encourages effective negotiation through truth-telling when it is needed most to let mediation actually pursue outcomes other than compromised win-lose results.

122. Andrea Kupfer Schneider, *Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 179-80 (2002).

Ethical Considerations for Advocates in Mediation*

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I. Introduction

As litigation counsel, have you at some point bluffed your opponent, protected sensitive information, overstated your case, or been less than candid? If so, would you have considered it part of the zealous representation you owe your clients in preparing for trial?

As mediation counsel, your role is very different. Rather than "winning" through adjudication, in mediation, you help your clients work toward resolution by recognizing their interests, addressing case weaknesses, and exploring solutions.

In transitioning from litigation to mediation advocacy, lawyers often struggle with how – or whether – to use adversarial litigation tactics in the settlement process. The first question is whether such tactics are ethical in mediation, but there are no easy answers. The Model Rules of Professional Conduct provide little guidance for lawyers in mediation[1], and while the Ethical Guidelines for Settlement Negotiations (ABA 2002) ("Ethical Guidelines") address ethical behavior in mediation, they have not yet been approved to represent the policy of the ABA or any state.[2]

This essay examines some of the common litigation tactics and client-management practices used in mediation and explores whether they are ethical and/or effective in that process.

II. "Bluffing or Puffing"

A. About the value of the case

[1] The Model Rules address behavior within the litigation system, in which discovery, trial, and the appellate processes are defined by three critical components: procedural rules, an impartial arbiter, and partisan advocates. This framework is not present in mediation. See, Haussmann, Brian, "The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic", 89 Cornell L. Rev. 1218 (2004).

[2] See, Introduction, Ethical Guidelines for Settlement Negotiations" (ABA 2002).

Mediators often explore with each party its best alternative to a negotiated agreement ("BATNA"). In so doing, the mediator will challenge the lawyers to discuss candidly their case weaknesses and any key concerns. Lawyers often respond by shrugging the negative evidence, overstating the supporting evidence, or both. The tactic is clear – to bluff the mediator to pressure the other side to make greater concessions. Is this ethical?

The Model Rules recognize the need for zealous advocacy in representing a client,[3] and specifically allow a lawyer to bluff about the value of his or her case in mediation:

> "... 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. . ."[4]

The Guidelines concur:

> "The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker's state of mind. . ."[5]

Bluffing that is more extreme would likely impact negatively the negotiation process and is never recommended. It could offend the opponent or the mediator, and in particularly egregious cases, jeopardize the client's ability to settle. In this circumstance, the conduct could be grounds for legal malpractice claims or discipline under the Model Rules.[6]

B. About settlement authority

Case example: Counsel for the employer in an age discrimination case tells the mediator that she and her client value the case below $30,000, which is the limit of her settlement authority. Because of the complexity of her client's corporate structure, she would not be able to reach the individuals needed to obtain any additional authority that day. In reality, she is authorized to settle at $40,000 and could reach the individuals for more authority at any time. Is this conduct ethical?

The Model Rules do not address bluffing about settlement authority. Although the Guidelines specify that "a lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing",[7] bluffing about settlement authority is a tactic

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[3] Model Rule 1.3 (1) states, "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." (MRPC, ABA 2003).

[4] Model Rule Section 4.1, Comment 2 (MRPC, ABA 2003).

[5] Section 4.1.1, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002).

[6] It is the client who decides the objectives of the representation and the lawyer is required to pursue them. If the lawyer fails to carry out these objectives, through, for example, a lack of diligence or competence, this will, a fortiori, constitute a violation of Rule 1.2. See, e.g., People v. McCaffrey, 925 P.2d 269 (Colo. 1996); In re Hagedorn, 725 N.E.2d 397 (Ind. 2000); see also Model Rule 1.1 (MRCP, ABA 2003).

[7] Section 2.3, Ethical Guidelines for Settlement Negotiations (ABA 2002).

commonly used to test the opponent and establish a negotiating range, and it often yields effective results. In addition, settlement authority is not something a party would otherwise be compelled to disclose. Therefore, the conduct most likely would be permitted under Section 1.3 of the Model Rules.[8]

C. About the applicable law

Bluffing about the applicable law is more risky. If counsel can make a good faith argument about the applicable law, it might be tolerated.[9] If not, it could be viewed as a misrepresentation of the law, which is unethical conduct under both the Guidelines[10] and the Model Rules.[11]

Bluffing about the applicable law is not recommended in any event for tactical reasons. Mediators often are lawyers or retired judges who tend to be experienced in the industry and knowledgeable about the law. Misstating the law could make the lawyer look unprepared, not credible, or both. The consequence will be an erosion of trust with the mediator, which could make settlement less likely, and potentially harm the client.[12]

D. About the state of the evidence

Occasionally, a lawyer knows of evidence that would harm the opponent's case, but rather than share it in mediation, he or she prefers to save it as "ammunition" for trail if the mediation fails.

Case example: the plaintiff claims she was terminated in retaliation for complaining about sexual harassment. She denies having had any "performance issues" until after the initial discriminatory incident. During the private caucus session, the owner of company tells the mediator that the plaintiff had been warned repeatedly for poor performance, and that several days before the alleged harassment, he sent an email her supervisor, instructing her to terminate the plaintiff. Initially, the company's lawyer is unwilling to share the email with the plaintiff, thinking that it would be powerful evidence to save for trial. Is this advisable?

Lawyers often struggle with the question of whether to "lay all of their cards on the table" at mediation or save some of them for trial. The real questions are (a) what is the goal of the process, and (b) how is the client better served? If the goal is to prepare the case for trial, it

[8] See, footnote 3 above.
[9] See, United States v. Cavin, 39 F.3d 1299 (5th Cir. 1994) (duties of client loyalty and zealous representation include advocacy of positions that lawyer, in good faith, believes have arguable basis, despite contrary authority).
[10] "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". Section 4.1.1, Ethical Guidelines for Settlement Negotiations (ABA 2002).
[11] "A lawyer is required to be truthful when dealing with others on a client's behalf". Comment 1, Model Rule 4.1 (MRPC, ABA 2003); see also In re Richards, 986 P.2d 1117 (N.M. 1999) (lawyer's misplaced reliance upon U.S. Supreme court case would have become apparent had lawyer researched and read cases distinguishing it).
[12] See, footnote 6 above.

would not be ethical to proceed with the mediation process.[13] In addition, if the email would be produced eventually in discovery, protecting it during mediation wouldn't further that goal in any event.

If the goal is settlement, the lawyer should maximize the value of the evidence in mediation – as negotiating leverage – to help the opponent re-value its case. In this example, the defendant's lawyer eventually agreed to share the email with the plaintiff, who, with her lawyer's input, reduced her demand from one year's salary to $500.

III. Misrepresentations and Omissions

A. About material facts

Case example #1: In mediation, the lawyer for the plaintiff in a sexual harassment case demands out-of-pocket damages for the cost of the visits to her psychologist for emotional distress, even though the visits were paid for by her health insurance. Is this ethical?

As in judicial proceedings, misrepresentations of material fact are not acceptable in mediation: "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."[14] A misrepresentation of damages would qualify as a false statement of material fact under Model Rule 4.1.[15]

Case example #2: In mediation, the lawyer representing a terminated employee alleges gender discrimination, but fails to mention that immediately before being terminated, his client punched her supervisor and was removed from the premises by police. Is this a misrepresentation of material fact?

Under Model Rule 4.1, counsel is not required to disclose this fact.[16] Similarly, the Guidelines provide, "A lawyer generally has no ethical duty to make affirmative disclosures of fact when dealing with a non-client. . . .[17] Regardless of whether the lawyer for the

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[13] See, Section "V" below.

[14] See, Section 4.1.1, Ethical Guidelines for Settlement Negotiations" (ABA 2002). This rule is based upon Model Rule, 4.1 which states, "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…(b) fail to disclose a material fact which disclosure is necessary to avoid assisting a… fraudulent act by a client… Comments: [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements…." (MRPC, ABA 2003).

[15] See, Spaulding v. Zimmerman (116 N.W.2d 704 (Minn. 1962) (vacated settlement where defendant knew and failed to disclose true damages caused by accident); Ausherman v. Bank of Am. Corp., 212 F.Supp.2d 435 (D.Md.2002) (lawyer referred to disciplinary committee for untruths in letter to defendant's counsel proposing settlement terms); Watson v. White, 408 S.E.2d 66 (W.Va 1991) (lawyer admonished for seeking damages in suit when remedy not available in underlying deed of trust). See also, Model Rule 8.4(c): It is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." (MRPC, ABA 2003).

[16] See, Footnote 14 above.

[17] Section 4.1.2, Committee notes (citing MRPC 4.1(b) and MRPC 4.1, comment 3), Ethical Guidelines for

plaintiff is required to disclose, the issue would be moot as the defendant's lawyer most likely would raise this fact at the first opportunity. To establish credibility, it is best advised to raise and discuss candidly facts that weaken the case.

B. About insurance coverage

In mediation, defendants often are reluctant to disclose the limits or even the existence of insurance coverage. If asked directly, counsel usually will ask the mediator not to share information about coverage with the plaintiff. The fear is the plaintiff will insist on negotiating in a higher range if he or she knows that deeper pockets are involved.

Courts are split on whether misrepresentations about insurance coverage are actionable, and there is not a clear mandate in non-coverage cases. Until recently, the failure to disclose insurance in litigation or in settlement negotiations was considered to be a failure to disclose a material fact.[18] In 2002, however, the California Court of Appeals held that the absolute litigation privilege protects misrepresentations regarding limits of coverage.[19]

III. Disclosure of Confidential Information Obtained in Mediation

Under the Guidelines, lawyers are free to disclose to a third party information relating to settlement negotiations, unless the disclosure is prohibited by the law, rules, or an agreement.[20] However, since in most jurisdictions, mediations are confidential by agreement and the applicable laws, lawyers generally are not at liberty to discuss with others what transpired during the mediation.[21]

IV. Conflicts of Interest

A. Fees

The tension between the interests of the plaintiff and his or her lawyer are manifest in cases where the plaintiff is asked to forego attorney's fees in exchange for other favorable settlement terms.[22] The Supreme Court resolved that tension by holding that attorney's fees

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Settlement Negotiations" (ABA 2002).

[18] See, Nebraska State Bar Ass'n v. Addison (226 Neb. 585, 412 N.W.2d 855 (Neb. 1987) (failure to disclose insurance was failure to disclose material fact); Slotkin v. Citizens Cas. Co. of New York, 614 F.2d 301, (2d. Cir. 1979) (court overturned settlement and allowed fraud claim against defendant's lawyers for failure to disclose availability of excess coverage).

[19] Home Ins. Co. v. Zurich Ins. Co., 116 Cal. Rptr.2d 583 (Cal. Ct. App. 2002).

[20] See, Section 2.4, Ethical Guidelines for Settlement Negotiations" (ABA 2002). However, under Model Rule 1.6, information learned during settlement discussions may be confidential as "information relating to representation of the client, therefore requiring client consent to disclose" (MRPC, ABA 2003). Even with client consent, if disclosure has "substantial likelihood of materially prejudicing the proceeding", disclosure may be prohibited under Model Rule 3.6.

[21] See, Roth, et. al., The Alternative Dispute Resolution Practice Guide at Chapter 27 "Confidentiality Issues and the Mediated Settlement Agreement (West Group 2004). Note also, that while statements made in the mediation and the mediator's work product are protected under statute in Mass, the law defines "mediator" as well as the required "mediation agreement" so narrowly that protection under the statute is limited. See, White v. Holton, 1 Mass. L. Rptr. 213, 1993 WL 818800 (Mass. Super. Ct. 1993).

[22] Section 4.2.2, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002).

recovered belong to the plaintiff, not the plaintiff's attorney.[23]

Case example: An employee claimed that his supervisor discriminated against him on religious grounds and sued for equitable relief (a transfer to another department). During mediation, the defendant agreed to the transfer and to pay the plaintiff's "reasonable attorney's fees", which the plaintiff's lawyer was unable to calculate during the mediation. After the mediation, the plaintiff's attorney submitted his final bill, which was three times what the defendant expected, based on it's own lawyer's bill. When the defendant refused to pay the plaintiff's bill in full, the plaintiff's attorney discouraged his client from accepting the other settlement terms until the fee issue was resolved. Is this ethical?

According to the Guidelines, it would be unethical for the plaintiff's lawyer to interfere with the settlement: "When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee".[24] As a general rule, should take any available procedural steps to reduce the possibility that the lawyer's professional judgment, in negotiating other settlement terms, will be adversely influenced by the lawyer's interest in the fee.[25]

B. Representing parties "for the purposes of mediation only"

1. Multiple parties

Lawyers often represent both individual and corporate defendants, even though their interests may not be aligned, "for the purposes of mediation only". The Model Rules generally do not preclude the multiple representation of adverse parties in mediation unless the lawyer will not be able to provide competent and diligent representation to each affected client[26]or if the parties 'interests are directly adverse.[27] The standard for potential conflicts appears to be more relaxed in mediation than in litigation; according to Model Rules 1.8 and 1.0(m), mediation is not considered "a tribunal" for the purposes of representing adverse parties.[28]

2. Former relationship with a party

Case example: At a mediation for a sexual harassment case, the lawyer representing the plaintiff had met his client several months earlier when he was hired by the company to train its employees in discrimination prevention. Since he had not formerly represented or advised the company, and had not obtained confidential information in connection with the training, he did not feel compelled to disclose to the company his intent to represent the plaintiff "for the purposes of mediation only". The company believed his lack of loyalty and opportunism was actionable. Could he ethically represent the plaintiff in mediation against her employer?

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[23] On that basis, the Court upheld a settlement that required waiver of claim for attorney's fees. See, Evans v. Jeff, 101 S. Ct 1531 (1986).
[24] See, Section 4.2.2, Ethical Guidelines for Settlement Negotiations" (ABA 2002).
[25] Section 4.2.2, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002).
[26] Model Rule 1.7(b)(1) (MRPC, ABA 2003).
[27] Model Rule 1.7(a)(1) (MRPC, ABA 2003).
[28] See, Model Rules 1.8 and 1.0(m) (MRPC, ABA 2003).

Neither the Guidelines nor the Model Rules define what it means to represent a party "for the purposes of mediation only", nor do they address how the limited representation affects the ethical duties of the lawyer. Under Model Rule 1.9, despite his duty of loyalty to the former client, since he did not represent the company in a specific "matter" or "transaction", and therefore did not have access to the defendant's confidential information, it is unlikely that his conduct would be actionable.

V. Misuse of Mediation Process

A. Lack of good faith

Occasionally in mediation, a lawyer shows no interest in reaching settlement. He or she may initially resist advancing a settlement proposal (or one that seems reasonable), and indicates instead an interest in learning more about the case. Is this ethical?

Under the Guidelines, "An attorney may not employ the settlement process in bad faith",[29] such as "using the settlement process solely to delay the litigation or to embarrass, delay, or burden the opposing party or other third person" or "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."[30]

However, it is "not bad faith for a party to refuse to engage in settlement discussions or refuse to settle. . . ."[31]

Thus, the Guidelines seem to distinguish between refusing to pursue settlement and deceiving the other side into settlement negotiations.[32]

Despite a possible negative outcome, it would be unwise to require a higher level of good faith participation for many reasons, including enforceability[33] and the fact that once in mediation, the lawyer and his or her client might decide to participate in the process. A good mediator will work with the reluctant party to facilitate the exchange of information as long as the process is fruitful.

However, if it is clear that a party is abusing the mediation process, the mediator will terminate the session and refuse further participation.

B. Threats

[29] Section 4.3.1, Ethical Guidelines for Settlement Negotiations (ABA 2002).
[30] Id.
[31] Id.
[32] Id.
[33] See, Comment, Laissez-"Fair": An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators, 13 Ohio St. J. on Disp. Resol. 611 (1998) (imposing further good-faith and fair-dealing requirements for negotiations would be unworkable and create more problems than it would solve).

Case example #1: In mediation, the lawyer for a terminated teacher in a race discrimination case states that if the case does not settle, he will contact the press and let them know how the school system treats its educators. Case example #2: In mediation, the plaintiff in a sexual harassment case threatens to file a criminal complaint for sexual assault if the matter is not resolved. Are these threats ethical?

The Guidelines prohibit lawyers from making extortionate or otherwise unlawful threats to attempt to obtain settlement.[34] However, not all threats are impermissible, including the threat to file a civil lawsuit if there is a good faith basis in the claim,[35] and the threat to file a criminal lawsuit in certain circumstances.[36] A threat for negative publicity is even more complex. While it is ethical to point out that a private resolution could avoid public embarrassment, specific threats to contact the press generally are not favored.[37]

Threats are not recommended in mediation in any event. More often than not, the opponent will become defensive and look for ways to fight back. Escalating a conflict with threats will make it more difficult to reach resolution in mediation and create more issues between the parties.

VI. Interference with Settlement

Perhaps the most unfortunate mistake lawyers make is not recognizing their client's interests. As an extreme case, during mediation the defendant's lawyer refused to acknowledge his client's desire to pay the modest sum demanded by an ex-employee, because he believed his client could ultimately prevail at trial. His client was an elderly, infirmed owner of a hairdressing salon, who had a strong defense but wanted the litigation to end. In other common examples, the lawyer confirms for the defendant client that "paying to settle is the same as admitting wrongdoing", or advises the plaintiff client that "the final settlement offer doesn't fully compensate [his or her] losses, so it should be rejected."

These are examples not only of poor counseling, but questionable ethics. Model Rule 1.2 requires the lawyer to abide by a client's decision concerning the objectives of representation, and consult with the client as to the means by which they are to be pursued.[38] Since it the client, not the lawyer, who decides the objectives of the representation,[39] the lawyer is obligated to explore the client's interests in mediation. The most effective lawyers separate out their own views from their client's needs and desires, and counsel their clients

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[34] See, Section 4.3.2, Ethical Guidelines for Settlement Negotiations (ABA 2002).
[35] Id, at Committee Notes.
[36] See, ABA Formal Op. 92-363 (1992) (if the matters are related, the report would be warranted by the law and the lawyer does not try to influence the criminal process).
[37] See, e.g., In re Finkelstein, 901 F.2d 1560 (11th Cir. 1990)(reversing order suspending plaintiff's lawyer from practice where lawyer threatened, among other things, to report the case to the NAACP and the SCLC; to send the story to ABC News; and a widespread boycott of defendant's products).
[38] See, Model Rule 1.2 (a): "… a lawyer shall abide by a client's decision whether to settle a matter…." "Comment [1]: The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See, Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation." (MRPC, ABA 2003).
[39] See, footnote 6.

accordingly.

VII. The Lawyer's Obligation to Consult with the Client in Mediation

During mediation, the mediator may request private caucuses with the lawyer, in order to bypass the attorney-client dynamic and communicate more efficiently. Similarly, if the lawyer believes that the client's emotion is a potential barrier to settlement, he or she might also request private caucuses with the mediator. After sharing and receiving information from the mediator, can the lawyer edit the information he or she relays to the client, or is he or she obligated to report everything back to the client?

This question illustrates the tension between the ability of the lawyer to conduct negotiations for the client,[40] and his or her obligation to consult with the client on the means in which the client's objectives are to be pursued.[41] Model Rule 1.2 permits a lawyer to act on behalf of the client "as impliedly authorized to carry out the representation".[42] This provision was added in 2002 specifically to avoid any implication that a lawyer must always consult to obtain authority to act.[43] Therefore, the Model Rules support the lawyer having discretion to decide how to present information to the client to help move it toward settlement.

If the lawyer is insulted by an offer, can he or she reject it without discussing it with the client?

The Model Rules permit this, as long as the lawyer and client made the decision in advance,[44] although it is never advised in mediation. Since mediation is a process that requires full participation throughout the entire process and often transforms the parties' perceptions, it is impossible for a party to decide its firm bottom line before the conclusion of the mediation. If the client is unable to participate in the mediation process in person, the lawyer should communicate each offer along with the information conveyed by the mediator in presenting it. Similarly, if the mediation fails, the lawyer should inform the client and consult with the client on how to proceed.[45]

VIII. Power Imbalances

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[40] See, Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990) (Rule 4.2 of MRPC prevents lawyers from eliciting "unwise statements" from opponents, protects privileged information, and facilitates settlements by allowing lawyers to conduct negotiations).

[41] See, Section 3.1.3, Ethical Guidelines for Settlement Negotiations (ABA 2002): "With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation."

[42] See, Model Rule 1.2 (MRPC, ABA 2002).

[43] ABA Report to the House of Delegates, No. 401 (Aug. 2001), Model Rule 1.2, Reporter's Explanation of Changes.

[44] See, Comment 2, Model Rule 1.4 (MRPC, ABA 2003): "Lawyer who receives from opposing counsel an offer of settlement… must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer." The lawyer may not make a settlement decision without the client's authorization. See, In re Friesen, 991 P.2d 400 (Kan.1999).

[45] The "lawyer must notify a client of a decision to be made by the client… and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."(MRPC 1.4(a)(1) and (3) (ABA 2003)).

The most successful mediations often involve a balance of power between the parties, i.e., each side is represented by competent counsel. Occasionally, however, the sides are not adequately represented – either a corporation is represented by a director, or the plaintiff appears pro-se or with a lawyer unsophisticated in the law. Under these scenarios, the mediator will face many challenges to try to "level the field" without providing legal advice to either side.[46]

The question for lawyers is whether they have a duty to help create a "fair process," or are they responsible only for the success of their client?

The Model Rules make clear that the lawyer owes a duty of loyalty to the client,[47] although the Guidelines recommend that, "A lawyer who negotiates a settlement with an unrepresented person must (a) clarify whom the lawyer represents and that the lawyer is not disinterested, (b) make reasonable efforts to correct any misunderstanding about the lawyer's role in the matter, (c) avoid giving advice to an unrepresented person whose interests are in conflict with those of the lawyer's client, other than advise to obtain counsel, and (d) avoid making inaccurate or misleading statements of law or material fact."[48]

IX. The Value of Collaboration

Parties and lawyers unfamiliar with the mediation process initially may be wary of the frequent ex-parte communications with the mediator, or the professional relationship the mediator may have with the other side. As they gain experience with the process, they will appreciate the benefits of a strong working relationship with the mediator and the opponent. Relationships of trust and collaboration enable lawyers to better address the challenges to their case and help move their clients toward settlement. For this reason, it is advised to work with mediators proposed by the other side and negotiate collaboratively to reach resolution.

[46] See, Nance, Cynthia, "Unrepresented Parties in Mediation", 15 No. 3 Pract. Litigator 47 (2004).
[47] See, Model Rules 1.2, 1.3, 1.7, 1.8 (MRPC, ABA 2002).
[48] Section 4.3.4, Ethical Guidelines for Settlement Negotiations (ABA 2002).

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Some Ethical Issues Surrounding Mediation

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SOME ETHICAL ISSUES SURROUNDING MEDIATION

*Robert P. Burns**

INTRODUCTION

A progressively larger portion of the activity of dispute resolution, of social ordering,[1] occurs through mediation. Mediation is now the preferred method of "alternative dispute resolution," or, as some of its proponents, seeking to dislodge litigation from its position as the default method of social ordering, like to put it, "*appropriate* dispute resolution."[2] Large corporations have embraced mediation as a method that offers the promise of cost savings as well as maintaining the quality of the long-term relationships on which many businesses depend.[3] It is almost certainly true, however, that in the majority of mediations, at least one of the participants, if not both, is a person of modest means. Mediation through neighborhood justice centers or community justice centers is available to address disputes among neighbors. The largest employer in the United States sponsors an ambitious mediation program to resolve disputes that arise in the work place.[4] Prosecutors and courts often refer minor, though often potentially dangerous, criminal or juvenile matters to mediation. Many jurisdictions encourage, or even require, mediation in the half of American marriages that end in divorce. It is increasingly likely that individual Americans will participate in mediation and it is thus increasingly important that lawyers who represent individuals consider seriously the ethical issues that such representation raises.

In this Essay, I first describe the two most important issues in the ethics of negotiation and ask whether mediation conceived as facilitated negotiation changes the appropriate resolution of those

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1. Lon Fuller, The Principles of Social Order 27 (1981).

2. Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 Fla. St. U. L. Rev. 153, 162 (1999).

3. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 536 (1994) (providing an economic interpretation of the increasing interest of corporations in alternative dispute resolution).

4. Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 Hofstra Labor & Employment L.J. 375 (2001).

issues. Then I shift to a different question, one raised by mediation's most robust claims, to be a mode of social ordering uniquely capable of making participants better people, of occasioning moral growth. Here I must employ a more philosophical idiom, to explore the terrain surrounding the appropriate place of lawyers in "transformative mediation." I suggest that these very practical questions quickly open out to more basic issues concerning what is and what is not possible within the social structure that we have created for ourselves, a structure in which the moral, political, and legal spheres have relative independence from one another.

I. TWO TRADITIONAL ISSUES IN NEGOTIATION ETHICS

A. *The Question of Truthfulness*

The most important ethical issues surrounding the mediations in which lawyers participate relate to: (1) the appropriate level of candor for the dialogue that occurs during the mediations and (2) the appropriate division of authority between lawyer and client before and during the mediations. These are the very same issues that surround negotiation ethics, though the addition of the mediator changes the context within which they arise.

At one extreme, mediation can simply be facilitated share bargaining. Here the underlying premise of a mediation is that there is a relatively fixed pie to divide and that the mediation is a "zero-sum game." One person's gain is the other person's loss and neither party gains in any way from the other party's "success." The process of the mediation, like share-bargaining negotiation, is employed both to determine whether there is a zone of cooperative success, a so-called bargaining range created by the overlap between the parties bottom lines,[5] and then to settle as close to the other party's bottom line as possible. The ethical issues surrounding this style of negotiation are all intertwined with obligations of candor or truthfulness; and one can easily see why. Both parties to this kind of negotiation perceive themselves better off settling anywhere in the settlement range created by the overlap between bottom lines than not settling.[6] But, both parties are conceived as solely self-interested and so each is better off settling at the point in the settlement range that represents precisely the "opponent's" bottom line. From a purely self-interested point of view, each party is best served by the opponent's

5. *See, e.g.*, Robert H. Mnookin et al., Beyond Winning: Negotiating To Create Value In Deals and Disputes 18-21 (2000).

6. In the jargon, each party's BATNA (best alternative to a negotiated agreement) is perceived as worse than a negotiated settlement anywhere in the settlement range. *See* Robert Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In 97-106 (2d ed. 1991).

misunderstanding the party's own bottom line, believing that it is identical to his own. So if a plaintiff will settle for $10,000 and a defendant will offer as much as $20,000 to avoid further litigation, it is in our purely self-interested plaintiff's interest that the defendant perceive that he will accept no less than $20,000. For it is still in the interest of the defendant that he settle for $20,000 rather than go to trial. The process of this sort of negotiation involves "information bargaining" to discover the opponent's bottom line, while convincingly sequencing offers and engaging in other behaviors, of which the negotiation literature offers a full panoply, to convince the opponent that the bottom line is other than where it actually is.

The obvious way to avoid this morally distasteful, if sometimes subtle, dance of deception, or at least misdirection, is simply to be utterly candid about the underlying facts of one's own situation as well as one's bottom line. Indeed, full candor would not involve simply answering questions posed by one's negotiating partner honestly. It would involve volunteering all information that each party would like to know. Such candor would suggest the apparently courteous expedient of splitting the difference between the bottom lines, something that would seem to provide "equal respect" to the participants. Of course, splitting the difference is dependent on a high level of candor from each side, candor that is inconsistent with our assumption of the mutual indifference of the parties and cannot practically be guaranteed by the usual means of incentives and penalties.

Even assuming that such candor could be achieved, the *moral* appeal of splitting the difference is largely illusory. What determines each party's bottom line is his aversion to the best alternative to a negotiated settlement. That aversion may stem from a range of particular circumstances *of which my negotiating partner has no moral right to take advantage.* Assume that I will sell my house for $100,000 today because I need that money today to make a necessary down payment for needed surgery for my child. I normally would not consider a penny under $130,000. Assume a buyer is willing to pay $140,000 since all equivalent houses cost $145,000. Is it morally right for a buyer to learn of my exigencies and then benefit from them, something that splitting the difference and agreeing to the $120,000 would implicitly do? I would surely believe that my peculiar needs ought not in any way to determine the price I get from the sale.

The ethical and legal rules that control this sort of negotiation try to balance the ideals of "telling the truth" and "preventing the negotiating partner from taking advantage." Because these are incommensurable values, we have a range of different sorts of rules striking slightly different balances in different jurisdictions. The continuum of candor here runs from:

(1) complete candor, including disclosure of the negotiator's bottom line and his analysis of his Best Alternative To a Negotiated Agreement; to

(2) full disclosure of all interests, wants, needs, and negotiating vulnerabilities; to

(3) full disclosure of all the facts of the situation, of which the negotiator is fairly certain his negotiating partner is unaware and of which that partner is likely to be interested; to

(4) disclosure only of those interests and needs where the possibility of collaborative bargaining to achieve a "bigger pie" outweighs the dangers of being "taken advantage of"; to

(5) answering specific questions about issues of fact candidly and fully, but not volunteering information as in (3); to

(6) seeking to avoid answering specific questions of fact, which reveal needs and desires ("blocking"), but refusing to make a false statement of material fact; to

(7) failing to correct the opponent's misunderstandings of fact or law that favor one's position, while remaining scrupulous about not affirming or endorsing the misunderstanding; to

(8) actively misleading the opponent as to one's bottom line and one's eagerness to settle by (a) false statements about such "immaterial" facts and (b) other negotiating behaviors, such as the sequencing and timing of offers; to

(9) active misrepresentations as to fact and law that are likely to result in settling closer to one's opponent's bottom line.

Although there exist in some jurisdictions authority that the line is drawn in a more demanding way in specific contexts,[7] current norms forbid clearly only the last and do not require any of the more candid behaviors described in numbers (1) to (5).

A good deal of the "technique" of negotiation as it is generally taught in law schools and in professional education programs involves "information bargaining" designed to reveal as much as possible about the opponent's situation and positions. This involves asking direct questions and listening carefully to the answer or for "blocking"[8] attempts that often reveal that a negotiator feels morally

7. Specifically there are a few cases where lawyers have been disciplined for failing to disclose particularly significant facts in negotiation. *See, e.g.*, Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578 (Ky. 1997) (unethical for lawyer to settle case without disclosing client's death to opponent); ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (same); State *ex rel.* Nebraska State Bar Ass'n v. Addison, 412 N.W. 2d 855 (Neb. 1987) (finding that lawyer negotiating with hospital on client's behalf had an obligation to inform hospital of insurance that was a potential source of payment). It is very difficult to identify the principle that emerges from these cases, though they certainly set the norm for specific factual contexts in the relevant jurisdiction.

8. The relative ineffectiveness of "blocking" that is not supplemented by actively misleading the negotiating partner is one of the reasons that negotiators subjectively

constrained not to lie but does not want to reveal what the opponent can then assume to be an answer that suggests a more favorable bottom line. Of course, more skeptical negotiators do not assume that their opponents feel constrained even by the minimal norm expressed by number (9), and will be alert to determine whether or not that opponent is willing to lie outright about matters of fact.

The current lawyer codes strike the following balance along this continuum.[9] There is generally no requirement that a lawyer inform a negotiating partner of any fact,[10] however clear it is that the negotiator would want to know that fact, would profit from knowing it, or suffers from major misunderstanding of that fact. In that sense, they are wholly coherent with the share bargaining style of negotiating described above. Current rules impose some limits on a purely strategic style by prohibiting "false statement[s] of material fact or law"[11] to opponents. Practically, that limits strategic misdirection solely to "agenda setting" that avoids whole areas that contain factual material of which the negotiator seeks to avoid discussion and "blocking" of specific inquiries. Both these "techniques" are to some extent learnable, though their effective use seems largely a matter of the force of personality of the negotiator.

The complexity and ambiguity of the authoritative interpretations of the Rule shows the depth of the tensions among the competing moral considerations here. The Comment to Model Rule 4.1 provides some consolation to the hard bargainer: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."[12] The exception to the exception, however, can create situations that call for extraordinarily, if not impossibly, refined judgments: "A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act."[13] The Comment to the Ethics 2000 Commission version of Comment 1 to Rule 4.1 drops the extremely unhelpful last phrase "failure to act," but substitutes language that may not be more helpful in resolving individual cases: "Misrepresentations can also occur by . . . partially true but misleading statements or omissions that are the equivalent of affirmative false statements."[14]

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feel that it is almost "unfair" to impose the relatively undemanding current standard of truthfulness in arms-length negotiations.

9. The literature on this question is already quite large. For useful analyses, see Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 Iowa L. Rev. 1219 (1990) and Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 Ohio St. L.J. 1 (1987).

10. Model Rules of Prof'l Conduct R. 4.1 cmt. 1 (1999).

11. R. 4.1(a).

12. R. 4.1 cmt. 1.

13. *Id.*

14. ABA Ethics 2000 Comm., Proposed R. 4.1 cmt. 1, *at* http://www.abanet.org/

The Comment to the current version of the Model Rules goes on to incorporate language that has caused a fair degree of consternation:

> 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 in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.[15]

Other than the examples provided by the Comment, there seems to be one other major category of statements that would be outside the confines of "material fact," namely the willingness of a client to go to trial rather than reach a settlement. Assume, for example, an observant Christian whose child has been injured in an automobile accident and who believes that actually going to trial is inconsistent with his religious beliefs. Assume on the other side of this dispute a publicly held insurance company with a highly rationalized internal structure which takes a purely instrumental maximizing attitude toward its claims adjustment, justified in their minds by their legally defined first obligation toward their stockholders. I believe that most lawyers would take the view that the client's attitude toward settlement is not a "material fact" as to which the opponent is entitled to truthfulness.

Thus, one of the reasons that the ABA and the states that have enacted versions of Rule 4.1 have been so minimalist in imposing obligations of truthfulness is the moral ambiguity of truthfulness as an ideal in the context of share bargaining. A second reason is the difficulty in enforcing a rigorous rule and the strategic benefit to be derived by all of those likely to be privy to the knowledge that a lawyer has not been candid, namely that "community of two," lawyer and client. Liberal law is limited practically by its ability to actually create the incentives that achieve a high level of conformity. It is true that cloaking a norm with the authority of law will likely increase the level of conformity to that norm. But especially in competitive contexts where information about violations is hard to come by, law may be strictly limited in what it can accomplish. My own experience suggests that lawyers find it extremely difficult to even conform to the limited obligations that the current rules impose. Absent a sea change in lawyers' sensibilities in these matters—one that powerful trends in law practice make less, not more, likely—and even putting aside the moral ambiguity of absolute candor in all negotiation situations,

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cpr/e2k-rule41.html.

15. R. 4.1 cmt. 2.

raising the bar on candor may well confirm an additional advantage on those least deserving of it.[16]

This extremely strategic attitude toward truth-telling, doling out bits of information often out of context, may get in the way of "problem solving" or "integrative" styles of negotiation and the "broad facilitative" style of mediation that parallel it. Problem solving is normally thought to require a higher level of candor between negotiating partners. This is because a key aspect of the problem-solving enterprise is to separate positions taken for the kinds of strategic reasons just described from the underlying interests or "needs" that animate the parties. Purely positional bargaining may blind both parties to the negotiation of possibilities for collaboration (ways that "enlarge the pie" for distribution). To give an extreme example, one of the classic strategic ploys is "br'er rabbit," where the negotiator insists that one outcome (that he secretly desires above all) is the most disfavored of all outcomes. If the opponent wants him to submit to *that* outcome, the opponent is going to have to pay a very high price indeed. From a problem-solving point of view, however, the use of such a ploy may well prevent the negotiating partner from proposing alternatives that provide even more of the secretly desired alternative.

Problem-solving negotiation is often a strategic choice. Indeed the fundamental ethical ambiguity of *Getting to Yes* and its considerable progeny is the spirit within which a negotiator chooses the principle that should control the so-called principled negotiation that is thought more appropriate for problem solving. There is no consideration offered in that book that makes the choice of principle anything other than strategic. In the classic negotiation between roommates who are a trumpeter and a flutist about the rules that should control their common life, the trumpeter's advocacy of "individual freedom to play whenever we want" can be no less self-interested for being fully principled.

B. *The Question of Client Authority*

The other set of ethical issues that surround negotiation have to do with the fostering of client autonomy. Specifically, they involve the

16. The Comment to Rule 4.1 in the Ethics 2000 Commission's version adds the following sentence: "Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation." ABA Ethics 2000 Comm., *supra* note 14, Proposed R. 4.1 cmt. 2. The last phrase should remind the lawyer that his obligations of truthfulness are not exhausted by the ethical rules that control negotiation, but may be controlled by the laws of tort and fraud. Furthermore, since certain kinds of misrepresentations, or even failures to disclose, may prevent the meeting of the minds required for a binding contract, including the contract embedded in the consensual settlement of a case, a lawyer may be guilty of malpractice by a failure of candor that provides the basis for avoiding the agreement.

interpretation of Model Rule 1.2, which provides that "[a] lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[17] The Rule provides explicitly that a lawyer "shall abide by a client's decision whether to accept an offer of

17. R. 1.2(a). The Ethics 2000 recommendations change the relevant language to read "[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." ABA Ethics 2000 Comm., Proposed R. 1.2(a), *at*, http://www.abanet.org/cpr/e2k-rule12.html. The Ethics 2000 recommendations would also somewhat expand Rule 1.4, which mandates reasonable communication with the client, to require that a lawyer "reasonably consult with the client about the means by which the client's objectives are to be accomplished." ABA Ethics 2000 Comm., Proposed R. 1.4(a)(2), *at* http://www.abanet.org/cpr/e2k-rule14.html. Though the change seems insignificant, at least one commentator has worried that moving the provision to a Rule that addresses communication (Rule 1.4), rather than the division of authority (Rule 1.2), may expand the lawyer's discretion as to the choice of means. Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 Fordham Urb. L.J. 895, 908 (2001). The Comment to the new Rule 1.4 provides as follows:

> [3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of action the lawyer has taken on the client's behalf.

ABA Ethics 2000 Comm., Proposed R. 1.4 cmt. 3, *at* http://www.abanet.org/cpr/e2k-rule14.html.

The current Model Rules provide a demanding definition of consultation: "'Consult' or 'consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Model Rules of Prof'l Responsibility, Terminology. The Ethics 2000 recommendations do not define consultation. In the new scheme of the Ethics 2000 recommendations, it is significant that a lawyer's choice of means do not require what is a defined term, "informed consent." ("'Informed consent' denotes the agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA Ethics 2000 Comm., Proposed R. 1.0(e), *at* http://www.abanet.org/cpr/e2k-rule10.html). Nor does the Comment to either Rule 1.2 or 1.4 in the recommendations contain the following language now contained in the Comment to Rule 1.2:

> A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

R. 1.2 cmt. 1.

The new ALI Law Governing Lawyers is clearer that the client holds ultimate authority with regard to means. Restatement (Third) of the Law Governing Lawyers § 21(2) (2000).

settlement of a matter."[18] This provision includes as an obvious corollary a requirement that a lawyer convey to the client any offer concerning which the lawyer does not already have clear authority to accept or reject.

Two sorts of difficulties arise in the application of this rule. The first has to do with the choice in negotiating strategy itself. Is the decision to pursue a hard positional bargaining strategy or an integrative or problem-solving approach a choice of means or a choice of the goals of the representation? It seems that it could be either.[19] If the client's goals in the representation are solely extrinsic to the process—maximizing recovery in a tort claim—it would seem that choice of negotiating style would be a means. If the client includes maintaining cordial relations with the opposing party as a goal of the representation, it would *still* seem that the choice of negotiating strategy is a means rather than an end, though here the choice of an integrative strategy might be the only competent[20] one. One could, however, envision a client who saw it as a *goal* of the representation to communicate with the negotiating party in a candid and non-manipulative manner, even if that surrendered some tactical advantages. Such a client would consider integrative bargaining to be a matter of ethics, not of strategy. In a Kantian idiom, he might say not that honesty is the best policy, but that honesty is better than any policy. For such a client, negotiating in a certain manner could well become a goal of the representation on which, according to the casuistry suggested by Rule 1.2, the client holds ultimate authority.[21] We will return to this subject when I consider the promise of certain forms of mediation to be intrinsically superior to adversary forms of dispute resolution and the role that a lawyer might have in mediation so conceived.[22]

The second set of problems surrounding the application of the rule are practical. In lawyer-to-lawyer negotiation, the attorneys face a shifting set of proposals in an indeterminate relationship to each other. Often one's opponent[23] is offering trade-offs between possibilities, each precise combination cannot easily be anticipated and the movement from one to the other may be fluid. Withdrawal

18. R. 1.2(a).

19. The Comment to Rule 1.2 notes that the distinction between ends and means is at best provisional and sometimes decidedly unhelpful. R. 1.2 cmt. 1.

20. R. 1.1 (noting that a lawyer shall provide competent representation).

21. Of course, if the lawyer regards such a course of action "repugnant or imprudent," the lawyer would traditionally have the right to withdraw. R. 1.16(b)(3). I would hope that few lawyers would consider integrative bargaining to be *repugnant*, though I would imagine some would think it imprudent in one or another set of circumstances.

22. *See infra* Part III.

23. I use this term here with full knowledge that it is problematic. For an integrative negotiator, the negotiating partner should not be conceived as an "opponent."

from the negotiation to consult with the client every time a slight modification is tentatively proposed may be impractical and, from a purely strategic point of view, may reveal aspects of the client's position that ought to be withheld. I do not think there is any easy answer to this practical problem, though its force can be blunted by good initial client interviewing and a firm sense of the priorities among the client's goals.

The second difficulty in the application of the rule requiring client control of the goals of representation in negotiation is more a problem in the lawyer's moral psychology.[24] In lawyer-to-lawyer negotiation the attorney largely controls the pattern of offers from the opponent and completely controls the flow of information to the client. The client is dependent on the lawyer's reporting of the opponent's factual assertions and the offers made. More importantly, the client is dependent upon his lawyer's *judgment* about what resolutions are feasible and when the opponent has reached his resistance point. When a lawyer says to his or her client, this point is "non-negotiable" or "they will not budge on this," it is likely that the client will follow his lead. Finally, the ethical rules all but prevent a lawyer from contacting a represented opposing party when he or she believes that offers (and, *a fortiori*, information) are not being conveyed to that party by his or her lawyer.[25]

The client is thus highly dependent upon the lawyer's honesty—primarily with himself[26]—about what he is saying to his client and what he is doing in the negotiation. And there are strong motives to be less than candid with oneself. Often a lawyer will honestly believe that his client is not acting in her own best interests, that she is too willing to settle on unfavorable terms in a divorce, perhaps, simply to avoid even the threat of a trial that the lawyer believes is extremely remote. The temptation to resort to the paternalistic manipulation of information here can be great. Second, every fee structure will create some potential conflict of interest[27] between client and lawyer. This is true whether the lawyer is charging a flat fee, an hourly fee, or a

24. Several of the essays in The Good Lawyer: Lawyer's Roles and Lawyers' Ethics (David Luban ed., 1983), address the importance of considering a lawyer's dispositions and moral psychology.

25. The Model Rules do not absolutely prohibit client-to-client contact under these circumstances but there is a risk here that a lawyer will be accused of orchestrating an improper end-run around the lawyer representing the opposing party. *See, e.g.*, Trumbull County Bar Ass'n v. Makridis, 671 N.E.2d 31 (Ohio 1996).

26. On self-deception as a particularly deadly sin, see Hannah Arendt, Between Past and Future 227, 254 (1968).

27. The phrase "conflict of interest" is not exactly apposite here. For the lawyer's obligation is not to pursue his or her client's "interests," as the lawyer perceives them, but his client's stated goals in the representation. A good lawyer will surely try to ensure, through the counseling process, that the client's genuine interests are considered, but the client's goals, not his interests, should be the standard of the legal representation.

contingent fee. In each case, it is a matter of purely contingent fact that the lawyer's financial self-interest will be exactly congruent with his client's goals in the representation. Only the lawyer's sense of professional obligation—his or her "purity of heart"—can assure that it is the client's goals that are being advanced.[28]

II. THE IRRELEVANCE OF MOST FORMS OF MEDIATION TO THE LAWYER'S OBLIGATIONS

Broadly speaking mediation is the practice through which a third party engages in a conversation seeking resolution of a situation that the parties find problematic. This description has to be so generic because the forms of mediation and the styles of mediation have become so diverse. Though I cannot provide even the barest outline of the varying goals and methods of mediation, some description may be helpful as a background for a discussion of specific ethical issues that arise in this context and for my concluding discussion of the particularly interesting ethical issues surrounding one form of mediation: so-called "transformative mediation."

The primary organization of dispute resolution professionals in the United States has described alternative dispute resolution's "*conflicting* values and goals, including:

1. increased disputant participation and control of the process and outcome;
2. restoration of relationships;
3. increased efficiency of the judicial system and lowered costs;
4. preservation of social order and stability;
5. maximization of joint gains;
6. fair process;
7. fair and stable outcomes; and
8. social justice."[29]

Given that range of possible goals, it should come as no surprise that mediators employ a broad range of methods, some of which are

28. We try to dramatize both threats to the client's autonomy in a simulated negotiation exercise in Robert P. Burns et al., Exercises and Problems in Professional Responsibility 35-36 (2d ed. 2001).

29. Ensuring Competence and Quality in Dispute Resolution Practice, Report 2 of the SPIDR Commission on Qualifications 5 [Soc'y of Prof'ls in Dispute Resolution] (1995) (emphasis added), *quoted in* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 17 n.34 (1996).

inconsistent with those possible goals that a particular mediator (1) does not recognize as legitimate or important, (2) does not think appropriate for the particular dispute,[30] or (3) must subordinate to other goals placed higher on the mediator's hierarchy of values.

The most prominent divide between mediator styles is between so-called facilitative mediation and evaluative mediation.[31] In facilitative mediation, the mediator takes a purely maieutic role, striving to be the midwife of solutions that the parties themselves propose.[32] In evaluative mediation, a mediator is willing to offer his own solutions, to offer his own judgments about the workability or wisdom of the solutions proposed by the parties, or, at the extreme, to offer what seems to the mediator to be the best resolution of the problematic situation.[33] Facilitative mediators place mediator "neutrality" high on their hierarchy of values and so are more willing to aid in the identification of solutions that are attractive to the parties, but about which they may have serious doubts, especially on fairness grounds.[34] Two problems beset facilitative mediators: (1) the problem of power and information imbalances between the parties which may lead to unfair agreements and (2) the practical elusiveness of true or complete neutrality in the conduct of the mediation. By contrast, evaluative mediators struggle with questions about the sources of their authority to "impose" their own values on the participants, especially because the parties usually do not give informed consent for evaluative mediation.[35] If the evaluative mediator in a litigated or potentially litigated case offers his judgment of the appropriate terms of the settlement based on his own estimates of the likely outcome at trial, he faces empirical questions about his predictive capacities. The latter is especially problematic in those cases where the parties are

30. The question of the particular kinds of problematic situations appropriate for mediation has been one of the most fundamental questions in the field. The seminal work remains Lon L. Fuller, *Mediation—Its Forms and Functions,* 44 S. Cal. L. Rev. 305 (1971); *see also* Robert P. Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss,* 4 Ohio St. J. on Disp. Resol. 129 (1989).

31. *See, e.g.,* James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion,* 24 Fla. St. U. L. Rev. 919 (1997); Riskin, *supra* note 29.

32. Riskin, *supra* note 29, at 24.

33. *Id.* at 23-24.

34. It seems that facilitative mediators have fewer qualms about exploring the workability or practicality of the solutions offered by the parties than they do about addressing its fairness.

35. "'Informed consent' denotes the agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA Ethics 2000 Comm., Proposed R. 1.0(e), *at* http://www.abanet.org/cpr/e2k-rule10.html. The discussions among proponents of mediation can become quite polemic. *See, e.g.,* Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron,* 14 Alternatives to High Cost Litig. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate,* 24 Fla. St. L. Rev. 937 (1997).

attempting to take full advantage of mediation by resorting to it early in the case before formal discovery is complete.[36] The disagreements among mediators as to the appropriate style of mediation can be intense.[37]

Insofar as mediation is facilitated negotiation, the parties may adopt either of the negotiating styles already described in the course of a mediation. Indeed, some of the strongest proponents of mediation as a method of dispute resolution have recently expressed their dismay at the appearance of all the ploys and methods of distributive bargaining in the context of mediation.[38] For there are many reasons why a lawyer who is intent upon engaging in hard bargaining of the chilliest sort may still opt for mediation. A mediator, through the effective use of caucuses (separate meetings with individual parties), may diffuse the interpersonal hostility that may cause one or more parties to act "irrationally," that is, to refuse to settle even though settlement may be in their interest. Even if the parties have no interest in integrative bargaining, a mediator who speaks to each side separately under protections of confidentiality may notice opportunities for "enlarging the pie" to which the parties were oblivious. Sometimes a lawyer may correctly believe that his opponent overestimates the value of his case, measured by likely outcomes if the case goes to trial, and the likelihood a settlement will be enhanced by the mediator's "reality testing," that is, providing his evaluation of the case or even asking probing questions of the opponent. Sometimes a lawyer may believe that the lawyer with whom he may negotiate lacks the credibility with his own client to counsel that client to accept a resolution that really is in the client's interest. And sometimes a lawyer may admit to lacking a similar credibility with his own client. So it is surely possible that a lawyer convinced of the wisdom of a hard bargaining style will still opt for mediation. Perhaps more significantly, given the prevalence of mandatory mediation in a large number of court systems, a share bargainer by choice or instinct may find himself in a mediation he or she did not choose.

One author, himself an extremely reflective mediator of deep experience, has summarized the essential practices in which a good mediator engages:

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36. *See* James S. Kakalik et al., An Evaluation of Mediation and Early Neutral Evaluation Under The Civil Justice Reform Act 44 (1996) (describing the problems that arise from referrals to mediation too early in a case).

37. Professor Riskin notes as well that mediators (or mediation programs) may choose to define the problem either "broadly" or "narrowly." Thus, there are four quadrants on his mediation grid: Evaluative-Narrow, Facilitative-Narrow, Evaluative-Broad, and Facilitative-Broad. Riskin, *supra* note 29, at 25.

38. *See infra* note 50 and accompanying text.

> Stated simply, the mediator has three basic strategies that operate in a continuing iterative cycle during the course of a mediation: gathering information, interpretation and diagnosis, and encouraging movement. In carrying out the first two strategies the mediator uses active listening and intuitive and rational thinking skills. For those two strategies to be effective, the parties must share with the mediator as much relevant information as possible regarding the source and status of the dispute and suggested proposals for resolution. In carrying out the third strategy—the movement strategy—the mediator typically uses a variety of tactics that may be categorized under three headings: communication, substantive, and procedural.[39]

Even without a fuller description of the methods of a good mediator,[40] one can see how the very same issues of candor that arise in negotiation inevitably arise in mediation. Indeed, Cooley counsels an advocate to listen carefully to what a mediator says about his negotiating partner's beliefs and positions to discern telling verbal clues of those beliefs and positions that his partner would prefer to hide.[41] He counsels as well that an effective advocate in mediation should begin with a high reasonable offer supported by reasons, move off that initial offer only with several supporting reasons, "hold back some information favorable to you or unfavorable to the opposing side until the final caucuses,"[42] and be careful not to reveal one's bottom line to the mediator early in the mediation.[43] In other words, the very same methods of positional bargaining, strategically "principled"[44] negotiation, and information bargaining that a share bargainer might use with an opponent, can effectively be used with a mediator.

The narrow ethical issue this raises is the level of candor which a lawyer owes to a mediator. The mediator is surely entitled to that degree of candor required by Rule 4.1. But, the latter is heavily qualified in the ways we have discussed above. The remaining question is whether the mediator is entitled to a higher level of candor—specifically, whether a mediator is entitled to the protection of Rule 3.3, which provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;

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39. John W. Cooley, Mediation Advocacy 114 (1996).
40. *Id.* at 117-19 (discussing strategies for effective mediation).
41. *Id.* at 118.
42. *Id.* at 121.
43. *Id.* at 116-23.
44. "Principled" in the sense advanced by Fisher and Ury: the use of a potentially strategically chosen principle to slow the movement off a position. Fisher et al., *supra* note 6, at 10-14.

> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> . . .
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.[45]

The Model Rules do not provide a definition of a "tribunal." The Ethics 2000 recommendations remedy this omission in a way that is, I think, consistent with the current rules:

> RULE 1.0: TERMINOLOGY
>
> (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.[46]

It is clear that mediation would not fall under this definition of "tribunal." Indeed, it almost seems that the definition has been written carefully to exclude mediation from its scope.[47] It appears then, that the same ethical obligations concerning candor that apply when negotiating with an "opposing party" apply to statements to the mediator. Although the case could be made that a party owes a higher level of candor particularly to an "evaluative" mediator than to an opposing party, I know of no authority so holding.

Does positional or integrative negotiation within the context of mediation change the ethical terrain concerning a lawyer's obligation to defer to the client's setting of goals for the representation and consulting on means?[48] I think not, though the participation of the

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45. Model Rules of Prof'l Responsibility R. 3.3 (1999).

46. ABA Ethics 2000 Comm., Proposed R. 1.0(m), *at* http://www.abanet.org/cpr/e2k-rule10.html.

47.The Annotated Model Rules of Prof'l Conduct note that:

> Although the term 'tribunal' is not defined in the Terminology section of the Rules, or in Rule 3.3 or its Comment, the context in which the term is used in the Rules makes clear that 'tribunal' refers to a trial-type proceeding in which witnesses are questioned, evidence is presented, the parties and their counsel participate fully, and the decision is rendered by a fact finder. *Cf.* ABA Comm. On Ethics and Professional Responsibility, Op. 93-375 (1993) (noting that disclosure provisions of Rule 3.3 do not apply to nonadjudicative proceedings, such as routine examinations by bank regulatory agency).

Ctr. on Prof'l Responsibility, Annotated Model Rules Of Prof'l Conduct 316 (4th ed. 1999)

48. Shortly, I will argue that a different form of mediation, transformative mediation or mediation as moral dialogue, raises more basic questions of legal ethics.

client in most forms of mediation may well reduce, though not eliminate, the dangers implicit in the lawyer's control of the flow of dialogue in negotiation and in the dependence of the client on the lawyer for information about the settlement process. Otherwise the issues surrounding client authority in the process of mediation remain much the same.[49]

III. BASIC LAWYERING STYLES AND THE PROMISE OF MEDIATION

Many of those writers most dismayed[50] at the transplantation of the tools of hard bargaining into the world of mediation have urged that the genius of mediation is its ability to enhance integrative or problem-solving approaches to dispute resolution. And much of the proposed attraction of mediation for some of its proponents is the possibility it offers to transform lawyers from hired guns to "problem-solvers" who "add value" to transactions and disputes by integrative methods.[51] This style of mediation is not fundamentally different from

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See supra notes 52-56 and accompanying text.

49. There has been some discussion of whether a lawyer is obliged to present the possibility of mediation to a client who would otherwise pursue litigation (or negotiation) and then defer to the client's decision. The most complete treatment concludes that current Rules would have to change in order to impose such an obligation, a change that the author urges. *See* Cochran, *supra* note 17, at 897; *but see* Va. Code Ann. R. pt. 6 § II, R. 1.2 cmt. 1 (Michie 2001). The Virginia Comment adds the following sentence to the Comment in the Model Rules: "In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives." Cochran, *supra* note 17, at 902-03 (quoting Va. Code Ann. R. pt. 6 § II, R. 1.2 cmt. 1).

50. A federal magistrate judge, Wayne Brazil, has described the following range of behaviors among lawyers participating in court-annexed mediation:

> [P]ressing arguments known or suspected to specious, concealing significant information, obscuring weaknesses, attempting to divert the attention of other parties away from the main analytical or evidentiary chance, misleading others about the existence or persuasive power of evidence not yet formally presented (e.g., projected testimony from percipient or expert witnesses), resisting well-made suggestions, intentionally injecting hostility or friction into the process, remaining rigidly attached to positions not sincerely held, delaying other parties' access to information, or needlessly protracting the proceedings—simply to gain time, or to wear down the other parties or to increase their cost burdens.

Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts,* 2000 J. Disp. Resol. 11, 29 (2000), *quoted in* Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation,* 28 Fordham Urb. L.J. 935, 945 (2001). Judge Brazil has also described the appearance of courses like "How to Win in ADR" and "Successful Advocacy Strategies for Mediations." *Id.* Carrie Menkel-Meadow recounts the story of one lawyer who threatened a potential opponent, "I am filing an ADR *against* you!" Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. Tex. L. Rev. 407, 408 n.1 (1997).

51. *See, e.g.*, Robert H. Mnookin et al., Beyond Winning: Negotiating to Create Value In Deals and Disputes (2000).

integrative bargaining, though it may well profit from the presence of an imaginative and perceptive mediator who knows how to enhance the communication between the parties. Once again, problem-solvers can be strategic and self-interested, though it is an enlightened self-interest to which they appeal.[52] This is not in any way to denigrate the importance of a fully competent attorney's understanding of the situational advantages of the problem-solving style.

To my mind, however, the most challenging set of ethical questions surrounding lawyers' participation in mediation concerns the possibility and extent of a lawyer's participation in so-called transformative mediation. I have concluded above that the specific ethical issues that surround mediation as facilitated arms-length negotiation are really no different from those that surround such negotiation engaged in without a mediator's intervention. Nor is the ethical terrain surrounding mediation any different when it occurs in the so-called "problem-solving mode" that takes place for the usually assumed self-interested reasons.

It is the existence of so called "transformative mediation" that poses the greatest challenge to the American lawyer's "standard philosophical map."[53] I will argue below that such mediation is discontinuous with the ways in which American lawyers generally conceive of their roles and counsel their clients.[54] By contrast, transformative mediation is strangely coherent with a style of lawyering that Professor Thomas Schaffer has described eloquently and at some length and calls "moral discourse."[55] That style of lawyering and transformative mediation are both attempts to transcend a kind of instrumental rationality dominant in many spheres of American life. It is that style that proponents of transformational mediation and proponents of lawyering as moral discourse see as preventing the realization of basic human good; they prevent the realization of moral sources.[56] I will argue that the dominant style of legal counseling makes it very difficult for a client to realize the benefits of transformative mediation. On the other hand, the style of lawyering that Shaffer urges makes it very easy to realize those benefits. The challenge for such a lawyering style is to protect a client against its dangers.

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52. *See* Blanton v. Womancare, Inc., 696 P.2d 645, 656 (Cal. 1985) (Bird, J., concurring) ("An attorney should explain to the client the *strategic* considerations that determine whether a jury trial or some other form of dispute resolution should be utilized." (emphasis added)), *quoted in* Cochran, *supra* note 17, at 912.

53. Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 43-48, 57-59 (1982).

54. *See infra* notes 80-84.

55. Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients, and Moral Responsibility 113-34 (1994).

56. On the concept of a moral source, see Charles Taylor, Sources of the Self: The Making of the Modern Identity (1989).

Those who speak of the "genius of mediation" or the "magic of mediation" or, in the words of the seminal work on the subject,[57] "the promise of mediation," are often speaking of so-called "transformative mediation." The twin goals of transformative mediation are mutual recognition and empowerment. The authors who use this term are trying to capture something of the experience of moral destiny that occurs during mediation, the felt certainty that the parties are moving beyond their day-to-day selves in the course of the process and realizing aspects of their respective selves that usually remain dormant. Put simply, many mediators and authors are convinced that this kind of mediation regularly makes the participants better people.[58]

There have been different and quite varying attempts to provide a philosophical explanation or justification for this kind of mediation. One can be skeptical about any one explanation while remaining sympathetic to the basic perception that something extraordinary, something substantial,[59] occurs in the course of some mediations. And, in fact, the limited or partial capacity of any one explanation may well be an indication of the richness of what can occur. One author invokes Girard's notion of the creation of a sacred space cleared by individuals' witnessing of the mutual victimization of each party and becoming consciously identified with the universal norms violated in that kind of victimization.[60] Other authors find this perceived richness in its felt congruence with a kind of post-modern "relational" society toward which we are groping and which is neither an individualist liberal society nor a pre-modern organic society.[61]

A simpler and more traditional explanation is that "transformational" mediation is itself a form of distinctively moral discourse. Moral discourse may always have been out of the ordinary, because most people have always related to each other in more primitive or instrumental ways. Or there may be something to Alasdair MacIntyre's view that modern market societies are so woven with instrumental rationality that we barely remember the moral point of view and the modes of moral conversation.[62]

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57. Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition 81-112 (1994).

58. This is precisely the claim Shaffer makes for the form of client counseling that he endorses. *See supra* note 55 and accompanying text.

59. The word invokes Hegel's notion of "ethical substance," the norms that are already realized and embedded in the institutions and practices of a society. *See* Charles Taylor, Hegel 365-88 (1975).

60. *See* Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 Fordham Urb. L.J. 1017, 1022 (2001).

61. Bush & Folger, *supra* note 57, at 244.

62. MacIntyre has described the difference between a characteristically twentieth-century understanding of the moral world and traditional understandings this way:

> [E]motivism entails the obliteration of any genuine distinction between manipulative and non-manipulative social relations. Consider the contrast

The center of gravity of authentically moral discourse is the conversation between an agent and one who is actually or potentially adversely affected by his actions.[63] Moral conversation places actions into a traditional moral vocabulary that is enormously rich and which willy-nilly forms an important part of the identity of the speakers.[64] That vocabulary allows for a range of verbal actions: denials, justifications, and excuses among them. Moral conversation provides a way of

> healing tears in the fabric of relationship and of maintaining the self in opposition to itself or others.... [I]t provides a door through which someone, alienated or in danger of alienation from another through his action, can return by the offering and the acceptance of explanation, excuses and justifications, or by the respect one human being will show another who sees and can accept the responsibility for a position which he himself would not adopt.[65]

Moral conversation need not actually achieve agreement, though the possibility of agreement animates the enterprise. "The point of moral argument is not agreement on a conclusion, but successful [not strategic] clarification of two people's positions."[66]

> Its function is to make the positions of the various protagonists clear—to themselves and to the others. Moral discourse is about what was done, how it is to be understood and assessed, what

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between, for example, Kantian ethics and emotivism on this point. For Kant—and a parallel point could be made about many earlier moral philosophers—the difference between a human relationship uninformed by morality and one so informed is precisely the difference between one in which each person treats the other primarily as means to his or her ends and one in which each treats the other as an end. To treat someone else as an end is to offer them what I take to be good reasons for acting in one way rather than another, but to leave it to them to evaluate those reasons. It is to be unwilling to influence another except by reasons which that other he or she judges to be good. It is to appeal to impersonal criteria of the validity of which each rational agent must be his or her own judge. By contrast, to treat someone else as a means is to seek to make him or her an instrument of my purposes by adducing whatever influences or consideration will in fact be effective in this or that occasion. The generalisations of the sociology and psychology of persuasion are what I shall need to guide me, not the standards of a normative rationality.

Alasdair Macintyre, After Virtue 22-23 (1981).

63. Hanna Pitkin, Wittgenstein and Justice 150 (1972).

64. As John Austin put it in a famous essay:

> [O]ur common stock of words embodies all the distinctions men have found worth drawing, and the connexions [sic] they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our armchairs of an afternoon—the most favoured alternative method.

J. L. Austin, *A Plea for Excuses,* 57 Proc. of the Aristotelian Soc'y 1, 8 (1957).

65. Pitkin, *supra* note 63, at 151-52.

66. *Id.* at 153.

> position each is taking toward it and thereby toward the other, and hence what each is like and what their future relations will be like. The hope, of course, is for reconciliation, but the test of validity in moral discourse will not be reconciliation but truthful revelation of self. . . .
>
> Moral discourse is useful, is necessary, because the truths it can reveal are by no means obvious. Our responsibilities, the extensions of our cares and commitments, and the implications of our conduct, are not obvious . . . the self is not obvious to the self.[67]

We have other important ways of speaking on matters of moment.[68] Moral conversation has a different tone and characteristics than do other important forms of conversation in which we engage and which are constitutive of important forms of life that we regard as legitimate. Most significantly, it is unlike forms of political dialogue and legal discourse.

There are two competing understandings of what constitutes "political" discourse. I use "political" here in the ordinary language sense in that many different institutions, private and public, have their "politics."[69] The perhaps dominant interest group, liberal[70] understanding of politics, conceives it as "a tale of dominance and power, in which political institutions serve to protect the interests and property of some men against the rest; or a tale of mutual accommodation among essentially separate, private individuals or groups, each with its own needs or interests, its own claims against the others."[71] Within that understanding, speech in political contexts will tend to be manipulative rhetoric, guided by the psychology of persuasion, much as share bargaining conceives of negotiation. There is a competing republican or deliberative understanding of political speech, where deliberation is "neither just manipulative propaganda, *nor just a moral concern with the cares and commitments of another person*, but something like an addressing of diverse others in terms which relate their separate, plural interests to their common enterprise, to a shared, public interest."[72] But, this too, is discontinuous with moral conversation.

Nor, of course, is legal discourse identical with moral conversation in Pitkin's distinctive sense. Legal discourse is at least in part

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67. *Id.* at 153-54.

68. In a previous article, Burns, *supra* note 30, I tried to demonstrate concretely the ways in which the parties to a mediation may move in and out of the different linguistic realms that correspond to different spheres of human interaction, specifically the moral, legal, and political.

69. George Kateb, Hannah Arendt: Politics, Conscience, Evil 7 (1984) (arguing that genuine politics exists in many nongovernmental contexts).

70. *See* Theodore Lowi, The End of Liberalism (2d ed. 1979).

71. Pitkin, *supra* note 63, at 211.

72. *Id.* at 216 (emphasis added).

"formalistic." Metaphors of "construction" that invoke "craft" are likely to be the most illuminating here. Much of legal discourse, in different ways at different levels, involves the fitting of a particular situation within a structure of authoritative categories while subtly modifying those categories to accommodate new situations. We need this worldly legal structure to maintain our distance from one another—Arendt talks about the importance of the legal system in maintaining the "hedges" between men[73]—and so to maintain our freedom. (Totalitarian regimes press us up against each other to the point where we cannot speak and act freely.)[74] Speech within that structure has a kind of generality and impersonality that is discontinuous with moral speech in the sense that I have described. Much of it involves maintaining "positions" that are determined by the operative legal categories. Speakers wear masks and speak from behind them.[75]

All this is a fancy way of saying that people do, and think they should, talk differently in different contexts. "Moral" is an analogous term, and that speech within the political realm, the legal realm, the market, and what we normally call the "moral" sphere (that controlling face-to-face interpersonal relations) can in that analogous sense be "moral." This is true even though the distinctive languages and spirits of these spheres are, as we have seen, quite different. This is true even if the legal world and the economic world are in one sense "artificial," even "mechanical."[76]

Almost everyone accepts some version of this view. Very few persons believe that all political and legal discourse is wrong.[77] But philosophical questions surrounding the appropriate relationships among these realms abound. One set of questions surround the flexibility of the boundaries within the spheres: whether there is a political dimension to law or a moral dimension to politics, for example, and if so, how should we understand these relationships. There is another set of problems concerning the extent to which the legal and political are always second best, a concession of the darkness of the human heart and so always to be avoided if possible. Further, views exist that there is a single line of "progress" by which one of the spheres "colonizes" or "should colonize" the others. For some, "progress" involves the extension of the market at the expense of the

73. *See* Hannah Arendt, The Origins of Totalitarianism 429-39 (1951).

74. *See id.* at 376-98.

75. *See* John Noonan, The Persons and Masks of The Law: Cardozo, Holmes, Jefferson, and Wythe and Makers of the Masks (1976).

76. John MacMurray, Persons in Relation 153 (1961) (noting that the personal world depends on artificial, not organic, structures).

77. The exceptions tend to be radical antinomian forms of Christianity for whom life within the kingdom of God precludes interacting in legal or political contexts. It is not surprising that such forms of Christianity find mediation a peculiarly appropriate form of dispute resolution.

political sphere, or vice-versa, or the gradual withering away or qualification of strict market relations by modes of human interaction controlled by moral norms in the narrower sense, a sense in which there is a relatively lower level of purely instrumental interaction. The reader will recognize the contemporary exponents of each of these views and the visions of the human good that underlie them.

Lawyers' professional identities seem closely wound up with political and legal discourse. After all, if there were no political and legal worlds, there would be no lawyers. What place do lawyers have in moral discourse, and therefore in transformative mediation? I have argued that the distinctive training and, much more importantly, the distinctive experience of a lawyer, *particularly* a litigator,[78] inclines lawyers to a tone-deafness to the language spoken in distinctively moral conversations.[79] On the other hand, that same training and experience make lawyers sensitive to the distortions and corruption of those kinds of conversations. The central question concerns what lawyers may contribute to a situation that can be resolved through moral conversation. Is the lawyer's function to stand on the sidelines here and consistently remind his or her client of the dangers of moral conversation, of the dangers of being manipulated, however subtly, by someone who is playing by different rules? Is the lawyer to be a partisan of political and legal discourse over moral discourse?

Of course, there is no one American lawyering style.[80] It seems to me, though, that the dominant style among lawyers who are self-conscious about their role is first to enhance the client's *autonomy*, the client's effective freedom. This self-understanding is dominant in the most widely used texts in interviewing and counseling.[81] It is shared by lawyers from varied practice backgrounds.[82] The lawyer's role here

78. *See* William F. Coyne Jr., *The Case for Settlement Counsel*, 14 Ohio St. J. on Disp. Resol. 367 (1999) (suggesting that litigators should not be involved at the settlement stage); James E. McGuire, *Why Litigators Should Use Settlement Counsel*, 18 Alternatives to the High Cost of Litig. 107 (2000);.

79. *See* Robert P. Burns, *A Lawyer's Truth: Notes for a Moral Philosophy of Litigation Practice*, 3 J. L. & Relig. 229, 252-63 (1985).

80. Thomas Schaffer has identified four approaches to legal representation: lawyer as godfather; lawyer as hired gun; lawyer as guru; and lawyer as friend. The godfather style is dominant among advocates and stresses the lawyer's real power to achieve a stylized view of the client's interest. The guru style is an older, *nobless oblige* of the "gentleman lawyer," who makes moral decisions for the client in a paternalistic manner. The other styles are discussed in the text. Shaffer & Cochran, *supra* note 55, at 5-52.

81. *See*, Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating: Skills for Effective Representation (1990); David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (1991); David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977).

82. *See, e.g.*, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 Yale L.J. 1060 (1976); Steven Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049 (1970); *see also* Stephen L. Pepper, *The Lawyer's*

is to help the client realize, and in some versions to maximize, his satisfactions through the use, perhaps the manipulation, of a somewhat alien legal system. The counseling function follows a competent fact interview that allows the lawyer to ascertain how the legal system will likely categorize the situation and therefore the probabilities of achieving one or another of the client's possible objectives.[83] In counseling, the lawyer seeks to identify the client's goals and then to help the client weigh the advantages and disadvantages, as measured by the client's own goals, of each possible course of action. Although proponents of "client-centered counseling" disagree about the precise place of the lawyer's own moral judgments in the process,[84] the overwhelming thrust of this lawyering style is to realize the client's preexistent goals through the devices of the legal system. As Edward Dauer and Arthur Leff put it more dramatically:

> The client comes to a lawyer to be aided when he feels he is being treated, or wishes to treat someone else, not as a whole other person, but (at least in part) as a threat or hindrance to the client's satisfaction in life. The client has fallen, or wishes to thrust someone else, into the impersonal hands of a just and angry bureaucracy. When one desires help in those processes whereby and wherein people are treated as means and not as ends, then one comes to lawyers, to us.[85]

How would such a lawyer treat the proposal that a client engage in mediation? He would weigh the probability that mediation was more or less likely to achieve the client's satisfactions, as determined in the course of a lawyer-client conversation in which the lawyer was seeking to identify the client's goals, as determined by the client's predetermined values. And, of course, it is possible that facilitative or evaluative mediation in which the lawyer negotiated using positional or problem-solving methods could do just that.

How would a client-centered lawyer consider that option and advise his or her client? Particularly, how would a lawyer understand what he or she is doing if transformative mediation really is equivalent to what we understand to be simply moral discourse? This places the client-centered lawyer in a strange position. His task is to counsel the client as to whether mediation is likely to be the method by which he will best realize his interests or satisfactions. However, transformative mediation, genuine moral dialogue, may well place a client in a

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Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613 (1986) (offering justification for lawyer's amoral ethical role).

83. Of course, this can be done only in a preliminary way in a first interview.

84. *See* Shaffer & Cochran, *supra* note 55, at 19-27.

85. Edward A. Dauer & Arthur Leff, *Correspondence: The Lawyer as Friend*, 86 Yale L.J. 573, 581 (1977), *quoted in* Shaffer & Cochran, *supra* note 55, at 18.

situation where he is likely to relinquish his ability to achieve his interests. How should we understand this paradox?

A distinctively modern philosophical position is that the moral point of view, with its traditional vocabulary, and its root commitment to non-instrumental speech, is a matter of *choice.* In its classical expression, it is a choice between subjecting oneself to traditional moral norms and to the non-instrumental speech that accompanies those norms, on the one hand, and a way of life that involves the *freedom*, that is to say, "autonomy," to pursue satisfaction as it appears to the individual, on the other. When the modern lawyer helps the client decide whether he wants to engage in transformative mediation, he is engaged in a kind of distinctively modern conversation. And, some would argue that it is an incoherent conversation, because morality *cannot* be a matter of choice—it imposes its obligations categorically.[86] The very practices of client-centered counseling are inconsistent with an understanding of mediation as moral discourse. The moral point of view has a kind of absoluteness.[87] You cannot *weigh* acting morally, speaking morally in this case, against other possible *satisfactions. The problem of the relation between client-centered lawyering and transformative mediation is clear: you can't get there from here.*

The situation for Shaffer's understanding of legal counseling seems just the opposite. Transformative mediation is *completely continuous* with client counseling as moral dialogue. And so, the problem is how to avoid or *escape* from transformative mediation in those cases where it is inappropriate, where the situation should be treated "politically" or legally. Shaffer recommends his style of client counseling in the following terms:

> The client-centered counselors suggest that after identifying the alternatives, the lawyer and client consider the advantages and disadvantages *to the client* of each alternative. Under their model, effects on others are considered only if they might affect the client. We suggest that the lawyer and the client list the likely effects on others as factors with *independent* significance. This may convey to clients that they should consider the interests of others as well as the interests of clients, but we think that is a good thing to convey. Some might say that the lawyer here is "imposing his or her morals" on the client. But we think that the lawyer is only pointing to reality—and effects on others if a real part of the law office decision.[88]

Shaffer suggests that the conversation between the lawyer and the client itself be a kind of moral conversation. He suggests that the lawyer articulate the reasonable perspectives of others with whom the

86. *See* Macintyre, *supra* note 62, at 39-45.
87. Burns, *supra* note 79, at 240-43.
88. Shaffer & Cochran, *supra* note 55, at 120 (footnote omitted).

client has his or her problems and resist the easy instinct to become a single-minded partisan of the client's self-absorbed perspective. He suggests further that the lawyer should "introduce moral judgment as a legitimate objective,"[89] while being careful not to "make . . . a just resolution of the dispute and then impose it on clients."[90]

> If clients are to fully participate in decisions, *and experience the moral development that we feel is an important part of the attorney-client relationship* (or the autonomy that others feel is at the heart of it), lawyers must be careful not to announce and insist on their perception of justice. (Lawyers often have enough power to do that.) The client must be a partner.[91]

It can be no surprise that mediation is a natural way to continue, this time with the persons with whom the client has his problem, the very dialogue that the lawyer has initiated with his client. Transformative mediation easily develops out of Shaffer's notion of lawyer-client moral dialogue. In fact, in the extended example Shaffer offers of what that kind of dialogue would look like, he suggests that mediation would be the form of dispute resolution that can continue that very moral dialogue.

What further role does the lawyer committed to moral dialogue have once he or she and the client have decided that they want to resolve their dispute through the further moral dialogue that mediation provides? Transformative mediation seems to require that the client himself participate in the mediation.[92] It seems to me that a

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89. *Id.* at 126.

90. *Id.*

91. *Id.* (emphasis added). This sort of dialogue is consistent with the notion of moral judgment that Shaffer borrows from philosopher Gerald Postema:

> Judgment is neither a matter of simply applying general rules to particular cases nor a matter of mere intuition. It is a complex faculty, difficult to characterize, in which general principles or values and the particularities of the case both play important roles. The principles or values provide a framework within which to work and a target at which to aim. But they do not determine decisions. Instead, we rely on our judgment to achieve a coherence among the conflicting values which is sensitive to the particular circumstances. Judgment thus involves the ability to take a comprehensive view of the values and concerns at stake, based on one's experience and knowledge of the world. And this involves awareness of the full range of shared experience, beliefs, relations, and expectations within which these values and concerns have significance.

Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 68 (1980). For a similar notion of the complexity of moral decision-making, see Martha Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy 69 (1986). Shaffer provides a more detailed description of what these kinds of conversations would look like. Shaffer & Cochran, *supra* note 55, at 119-34.

92. John Cooley's advice to advocates involved in mediation seems to suggest that the decision to allow the client to speak extensively in the mediation process is normally a strategic decision. *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995).

lawyer could be a participant in the kind of moral dialogue that transformative mediation promises, though it surely will require a kind of imagination and dialogue that contrasts sharply with the kind required by litigation. Experience will, of course, be a much better guide than logic here, as to whether lawyer involvement is consistent with the central moral goals of this important form of mediation.

Further, even Bush and Folger recognize that not all problematic situations are appropriate for mediation and it may often be true that a decision about appropriateness cannot really be made until after the mediation has commenced. Indeed their argument for a style of mediation that is sharply distinctive presupposes the existence of other institutions—courts, for example—that function through different languages and with different priorities. Can the lawyer committed to Shaffer's vision of legal counseling and mediation as moral dialogue act as a kind of bridge between the moral realm and the more public worlds of law and politics?

Historically, American lawyers, even those who were committed to a style of law practice far less strictly instrumental than those currently dominant, have viewed themselves as somewhat world-weary figures standing against the dangers of "enthusiasm," perhaps especially religious enthusiasm.[93] Some clients are naïve. Many poor and working class Americans have their disputes with highly rationalized bureaucracies represented by lawyers who practice in a highly instrumental style.[94] Many of those lawyers could hardly imagine any other style of resolving disputes. And there may be ranges of disputes where individual moral dialogue is simply an inappropriate mode of social ordering, while others are appropriate, even morally appropriate.

CONCLUSION

Is there a legitimate function for a lawyer committed to the primacy of moral dialogue to provide the escape routes for a client engaged in a moral dialogue in a mediation where that kind of dialogue proves impossible or goes bad? Is it possible for a lawyer to protect his client without constantly whispering in his ear during mediation that his interests are in danger, without undermining exactly what this kind of mediation may accomplish? Even if moral dialogue is *generally* the best path, it is not *always* the best path. Even if it should be given every chance, it is sometimes not available. A lawyer is usually someone who knows the legal, political, and bureaucratic worlds

93. Perry Miller, The Life of the Mind in America From the Revolution to the Civil War 15-18 (1965).

94. *See, e.g.*, Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 Baylor L. Rev. 963 (1998).

better than most individual clients of modest means. His task is to put this knowledge to the service of clients without imposing a style of purely instrumental thinking and speaking that may make clients worse. The only real certainty is that the interpersonal and legal skills necessary to fulfill this role are extremely subtle.