THE TENSION BETWEEN PROFESSIONALISM AND NEGOTIATIONS FOR APPELLATE ATTORNEYS.

A Professionalism Presentation for the
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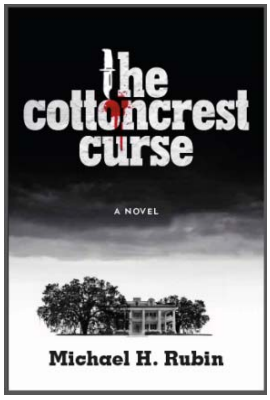
Michael H. Rubin @MichaelHRubin Michael H. Rubin



Book of the Year Gold Award Winner
Thriller and Suspense

INDIEFAB AWARDS THE BEST OF INDIE.

The Cottoncrest Curse
By Michael H. Rubin
Louisiana State University Press

At the 2015 annual meeting in San Francisco of the American Library Association, it was announced that Rubin's novel won the *IndieFab Book of the Year Gold Award* as the *Best Thriller and Suspense Novel* published by a university or independent press.

Book Details

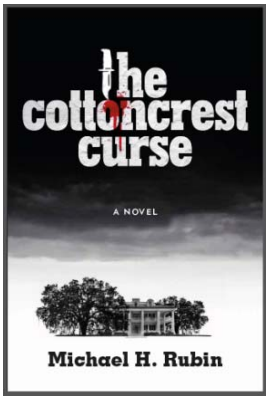
A series of gruesome deaths ignite feuds that burn a path from the cotton fields to the courthouse steps, from the moss-draped bayous of Cajun country to the bordellos of 19th century New Orleans, from the Civil War era to the Civil Rights era and across the Jim Crow decades to the Freedom Marches of the 1960s and into the present.

At the heart of this heart-racing thriller are the relationships among blacks and whites, former slaves and landed aristocracy, freedom fighters and segregationists, and people of different backgrounds and religions.

Two decades after the end of the Civil War, an elderly Confederate Colonel viciously slits the throat of his beautiful young wife and then fatally shoots himself. Sheriff Raifer Jackson, however, believes that this may be a double homicide, and suspicion falls upon Jake Gold, an itinerant peddler who trades razor-sharp knives for fur and who has many deep secrets to conceal.

Jake must stay one step ahead of the law, as well as the racist Knights of the White Camellia, as he interacts with landed gentry, former slaves, crusty white field hands, crafty Cajuns, and free men of color, all the while trying to keep one final promise before more lives are lost and he loses the opportunity to clear his name.

LSU Press



LSU Press

Praise for "The Cottoncrest Curse"

"Rubin's **gripping debut mystery** depicts the bitter racial divides of post-Reconstruction South and its continuing legacy."
Publishers Weekly

This "historical thriller" is "thoroughly researched." It is "literary fiction" taking "readers on **an epic journey.**"
Southern Literary Review

"Michael Rubin proves himself to be an **exceptional storyteller**." "The powerful epic is **expertly composed in both its historical content and beautifully constructed scenery**. I highly recommend picking up this book."
James Carville,
Political strategist and commentator

"Rubin takes his readers on a **compelling multigenerational journey** that begins with the Civil War and ends in the present day. **'The Cottoncrest Curse' is impeccably researched, deftly plotted, and flawlessly executed**…Michael Rubin is a gifted and masterful storyteller. Highly recommended."
Sheldon Siegel,
New York Times best-selling author of the
Mike Daley/Rosie Fernandez novels

"Trust me: this is a fun read, **a page turner likely to keep you up all night**." "*The Cottoncrest Curse* is skillfully and intricately plotted." "Through it all, the writing is sharp, vivid and compelling."
LSBA Journal

The "story is gripping, **the writing is masterful**." "**Rubin has struck 'gold' in his debut novel**."
Chicago CBA Record

"**Talented prose and tack-sharp detail.**"
Alan Jacobson
National bestselling author of "Spectrum"

A "**thrilling murder mystery.**"
225 Magazine

A "**taut thriller.**"
Berkshire Review

Michael H. Rubin is a former professional jazz pianist who has played in the New Orleans French Quarter, a former radio and television announcer, a nationally-known speaker and humorist who has given over 400 presentations throughout the country, and a full-time practicing attorney who helps manage a law firm with offices from the West Coast to the Gulf Coast to the East Coast.

THE TENSION BETWEEN PROFESSIONALISM AND NEGOTIATIONS FOR APPELLATE ATTORNEYS.[2]

BY: MICHAEL H. RUBIN[3]

1. THE TUGS AND PULLS

Those engaged in negotiating litigation and transactional issues, whether as inside counsel or outside counsel, must carefully thread their way through a thicket of technicalities, state and federal court rules, state and federal statutes,[4] regulatory authority, and international laws,[5] as well as each state's version of the Rules of Professional Conduct. The practical problems are many. The potential ethical problems

[2] A portion of this paper consists of adaptations of the author's prior publications, including: "The Ethics of Negotiations In Missouri and Kansas", Shook Hardy Corporate Counsel Meeting, Kansas City, April 2012; "The Ethics of Oil and gas Negotiations in Texas," Texas 63rd Annual American and International Law Institute for Energy Law, February, 2012; "The Ethics of Negotiations in Nebraska," Nebraska Bar Association's 2011 Annual Meeting; "The Ethics of Negotiations in New York," Erie County Bar Meeting (2010); "The Ethical Utah Lawyer: What Are The Limits In Negotiation?," 21 Utah Bar Journal 15 (March/April, 2008); "The Intersection of Conflicts of Interest and Imputation of Knowledge," 22 ABA Probate and Property 53 (Nov. 08); "Ethics," The Construction Lawyer, Fall 2006; and "Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?" ALI-ABA Labor Seminar, Spring 2003, "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties," 26 The Construction Lawyer 12 (2006); "Breaching the Protective Privity Wall: Expanding Notions of Real Estate Lawyers' Liability to Non-Clients," The ACREL Papers, Fall 2002 (ALI-ABA); "From Screens and Walls to Screams and Wails: A Selective Look at Screening Among The Various Ethics Rules and Cases and "A Consideration of Some Unanswered Questions," The ACREL Papers, Fall, 2001 (ALI-ABA); and "The Ethics of Negotiations: Are There Any?" 56 Louisiana Law Review 447 (1995).

[3] The author is licensed to practice law only in Louisiana. This paper, while it refers to and discusses the laws of other states, an outsider's view of these statutes, rules and jurisprudence.

[4] For more on these points, which are beyond the scope of this paper, see, for example: D. DeMott, "THE DISCRETE ROLES OF GENERAL COUNSEL," 74 Fordham L. Rev. 955 (2005); Jill Barclift, "CORPORATE RESPONSIBILITY: ENSURING INDEPENDENT JUDGMENT OF THE GENERAL COUNSEL--A LOOK AT STOCK OPTIONS Z," 81 North Dakota Law Review 1 (2005); Frederick M. Gonzalez, "FOURTH ANNUAL DIRECTORS' INSTITUTE ON CORPORATE GOVERNANCE - - THE CULTURAL, ETHICAL, AND LEGAL CHALLENGES IN LAWYERING FOR A GLOBAL ORGANIZATION: THE ROLE OF THE GENERAL COUNSEL," Practising Law Institute PLI Order No. 9158 September, 2006; Lewis D. Lowenfels, Alan R. Bromberg, Michael J. Sullivan, "ATTORNEYS AS GATEKEEPERS: SEC ACTIONS AGAINST LAWYERS IN THE AGE OF SARBANES-OXLEY," 37 University of Toledo Law Review Summer 877 (2006); Jason Thompson, "THE PARADOXICAL NATURE OF THE SARBANES-OXLEY ACT AS IT RELATES TO THE PRACTITIONER REPRESENTING A MULTINATIONAL CORPORATION," 15 Journal of Transnational Law and Policy 265 (2006); Anita Indira Anand, "AN ANALYSIS OF ENABLING VS. MANDATORY CORPORATE GOVERNANCE: STRUCTURES POST-SARBANES-OXLEY," 31 Delaware Journal of Corporate Law 229 (2006).

[5] For example, in addition to treaties and other matters that affect international transactions, there is the Financial Action Task Force (FATF), an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. FATF seeks to generate legislative and regulatory changes to combat international money laundering.

are huge.[6] There are many internet resources on ethics that may provide a source for research and links to a number of useful sites.[7]

What this paper is directed at, however, is how the concepts of "professionalism" and "ethics," and the Rules of Professional Conduct all interact and relate to the personal moral principles that can guide or restrict the options of attorneys during negotiations.

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

Clients want a lawyer/negotiator who gets all the client desires, leaves nothing on the table, and gives away the minimum. The dominant model of a lawyer is one who is a "zealous advocate"[8] of the client's position: it is a term indicating that the client's interest is paramount. As far back as 1820, Lord Brougham declared, in 2 Trial of Queen Caroline 8, "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and

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[6] *See, e.g.*,

- Art Hinshaw & Jess K. Alberts, Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics, 16 Harv. Negotiations L. Review 95, 109 (2011) ("[L]awyers must be well-versed in several time-tested deceptive bargaining tactics....";
- Keith Call, "Is it Ethical to be Dishonest in Negotiations?" 29 Utah Bar Journal (2016);
- Brasco, Brewer, Taylor and Tuckman, "Understanding Ethical Limits on Attorney Behavior in Settlement Negotiations – A Practical Approach," 45 SPG Brief 12 (2016);
- Usman, "Nurturing the Law Student's Soul: Why Law Schools are Still Struggling to Teach Professionalism and How to do Better in an Age of Consumerism," 29 Marquette Law Review 1021 (2016);
- Lawrence, "Lying, Misrepresenting, Puffing And Bluffing: Legal, Ethical And Professional Standards For Negotiators And Mediation Advocates," 29 Ohio State Journal in Dispute Resolution 35, 36 (2014), "A clever negotiator must be a master of the art of deceit. A reputation for plain and fair dealing will not work to my economic and professional advantage. . . . . Lawyers lie, especially in negotiations, but what is lying is not entirely clear.";
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[7] See, for example the following sites: The ABA Center for Professional Responsibility, http://www.abanet.org/cpr/links.html; The Thomas Cooley Law School ethics site, http://www.cooley.edu/ethics/other_sites_of_interest.htm ; the Cornell Law School Professionalism web links page, http://ww3.lawschool.cornell.edu/faculty-pages/wendel/ethlinks.htm,; the Georgetown Law Library legal ethics link page, http://www.ll.georgetown.edu/guides/legal_ethics.cfm, and the Santa Clara University business ethics links page, http://scu.edu/ethics/links/links.cfm?cat=BUSI.

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

only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others."[9]

"Zealous advocate" is a term that is often used by lawyers to describe their role; however, that term has not existed in the since the Model Rules superseded the Model Code of Professional Conduct in 1983.[10] When the 1983 Model Rules ("MR") were adopted, the term "zealous advocate" was deleted, and in its place was a comment to MR1.3 that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." The Comment (although not the black-letter text of MR1.3) goes on to caution that a "lawyer is not bound to press for every advantage that might be realized for a client." This commentary has continued, almost verbatim into the 2002 Ethics 2000 Revision to the Model Rules.

The fact that "zealous advocacy" has not been a requirement of the lawyer's code since 1983, however, has not stopped lawyers from using the phrase or courts from extolling it. For example, while no Texas civil case since 1979 has been located that uses the term "zealous advocate," the Nevada Supreme Court, as recently as 1994, used the phrase with approval when it wrote: "However much it may 'infuriate the jury,' a properly zealous advocate must do all he can to defend his client."[11] Even law journals continue to use the phrase (sometimes even with approval) in titles to articles.[12]

A look at what other states do about "zealous advocates" can be illuminating.

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

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

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

[12] See, e.g., Broderick, "Understanding Lawyers' Ethics: Zealous Advocacy In A Time Of Uncertainty" 8 U. D.C. L. Rev. 219 (2004); Reimer, "Zealous Lawyers: Saints or Sinners?" 59 Or. St. B. Bull. 31 (1998); Brown, "A Plan To Preserve An Endangered Species: The Zealous Criminal Defense Lawyer" 30 Loy. L.A. L. Rev. 21 (1996); and Ventrell, "The Child's Attorney Understanding the Role of Zealous Advocate" 17 WTR Fam. Advoc. 73 (1995).8. 45 Stan. L. Rev. 645 Stanford Law Review February, 1993 Note, "Administrative Watchdogs Or Zealous Advocates? Implications For Legal Ethics In The Fact Of Expanded Attorney Liability," Robert G. Day

- The Louisiana courts have noted that the phrase "zealous advocate" is no longer part of the Rules of Professional Conduct[13] and have warned that a lawyer "may not violate his professional obligations as an officer of the court under the guise of being a zealous advocate."[14]
- The Mississippi Supreme Court has indicated that a defense counsel's role in a criminal case is to act as a zealous advocate.[15]
- Missouri courts use the term "zealous advocate" primarily in a positive fashion, talking about the need for a lawyer to be "zealous advocate" whose loyalty for the client's interest is "undiluted,"[16] and the requirement that plaintiffs' counsel in a class action be a "zealous advocate for all class members."[17]
- Kansas courts have cautioned that a lawyer must not confuse being a zealous advocate with one whose actions may impugn justice.[18]
- In Texas, the concept of zealous advocacy has been removed from the Rules and placed in the Preamble,[19] and several Nebraska cases have used the phrase

[13] *In re Fornet*, 98-1510 (La. App. 1 Cir. 9/24/99), 757, So.2d 689; *Stroscher v. Stroscher*, 2001-2769 (La.App. 1 Cir. 2/14/03), 845 So.2d 518.

[14] *In re Young*, 2003-0274 (La. 6/27/03), 849 So.2d 25, 31.

[15] *Kiker v. State of Mississippi*, 55 So.3d 1060, 1067 (MS 2/17/11), "Barnett could not have acted as a zealous advocate for Kiker without disclosing information about Crawford which he gained as Crawford's lawyer."

[16] *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 511 (Mo.App. E.D.,2010).

[17] *Dale v. DaimlerChrysler Corp.* 204 S.W.3d 151, 174 (Mo.App. W.D.,2006).

[18] See: *State v. Pham.* 27 Kan.App.2d 996, 10 P.3d 780, 787 (Kan.App.,2000): "This prosecutor appears to have forgotten that she holds a position unique in the bar. Although she is required to be a zealous advocate on behalf the government, she must not pursue conviction at all costs. Her role is to see that justice is done." Also see *State v. Turner,* 217 Kan. 574, 538 P.2d 966, 971 (Kan. 1975): Suffice it to say that Canon 7 does not countenance unrestrained zeal on the part of an advocate; his ardent zeal, commendable in itself, is to be exercised within the bounds of the law. We do not apprehend, as respondent seems to fear, that the decision of the Board, logically extended, would subject a zealous advocate to charges of misconduct whenever he might cause or contribute to trial error. The question posed in this proceeding is not whether error inhered in the Smith trial but whether respondent was guilty of unprofessional conduct. The Board found, in effect, that the respondent had exceeded permissive legal limits."

[19] See Texas Rules Preamble (emphasis supplied): "2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. *As advocate, a lawyer zealously asserts the clients position* under

"zealous advocate" or "zealous advocacy." Some cases have used it to denote approval of conduct designed to protect the client's interest.[20] Other cases, however, have indicated that the zealous advocacy can cross the line into improper conduct. For example, in *State v. Koenig*, 278 Neb. 204, 208, 769 N.W.2d 378, 384 (Neb. 2009), the Court stated: "We agree . . . that attorneys have the right to negotiate on behalf of their clients and are even charged by the Nebraska Rules of Professional Conduct to zealously assert their client's position. A lawyer must zealously advocate, however, 'under the rules of the adversary system.' While [the attorney's] conduct might be considered zealous advocating of his client's position, it does not fall within the ethical bounds of our adversary system."

- Some courts in New York use the phrase "zealous advocate" favorably, but mostly in the context of criminal cases discussing the role of defense counsel.[21] Other New York cases, mostly in a civil or disciplinary or

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the rules of the adversary system. . . . ." "3. In all professional functions, *a lawyer should zealously pursue client's interests within the bounds of the law*."

[20] See, for example, *Smith v. Damato*, 172 Neb. 811, 817, 112 N.W.2d 21, 25 (NE 1961), quoting with approval from *Sonneman v. Atkinson*, 121 Neb. 752, 238 N.W. 5423 (1931): "Both parties had able, vigorous and apparently zealous advocates. In the temperature reached near climax of the trial they went about as far as permissible."

[21] See: *People v. Garcia*, 17 Misc.3d 1106(A), 851 N.Y.S.2d 60, 2007 WL 2871008, (Unreported Disposition, N.Y.Just.Ct., September 24, 2007); "When should an attorney disqualify or recuse himself or herself in a criminal case? The Court finds that an attorney should decline representation or ask to be relieved when the appearance of a conflict rises to the level where the lawyer cannot be a zealous advocate due to the nature of the conflict, and the defendant's rights are being compromised. * * * * Whether they are before the Supreme Court of the United States or this humble Village Court, or whether they are representing the wealthy or the poor, the duty of attorneys remains unchanged, and that is to be zealous advocates for their clients within the bounds of the law"; *Wahid v. Long Island R. Co*., 15 Misc.3d 1120(A), 839 N.Y.S.2d 438, 2007 WL 1119905, 2007 N.Y. Slip Op. 50777(U), Unreported Disposition, N.Y.Sup., April 16, 2007(No. 25132/2004.), "In all cases, attorneys, whether they work as in-house counsel or as outside legal counsel, must be aware that they serve not only as zealous advocates, but also as officers of the Court subject to discovery obligations, the CPLR, and Disciplinary Rules of the Code of Professional Responsibility."; *People v. Henriquez*, 3 N.Y.3d 210, 818 N.E.2d 1125, 785 N.Y.S.2d 384, 2004 WL 2339594, 2004 N.Y. Slip Op. 07407, , N.Y., October 19, 2004, "In this case, the trial court was confronted with a defendant attempting to abuse the process. * * * It is far preferable for an accused, bent on controlling every aspect of the defense case and undermining counsel's ability to act as a zealous advocate, to accept self-representation and proceed pro se with assigned counsel serving not as an attorney but as a standby legal advisor."; Then as well as now, however, it appears that the defense's perception of the trial evidence is as was seen and heard by a zealous advocate. That view is noble and faithful to the highest traditions of the profession."; *People v. Dean*, Not Reported in N.Y.S.2d, 2003 WL 21276355, 2003 N.Y. Slip Op. 50933(U), , N.Y.Co.Ct., May 23, 2003(Ind. No. 2577-2001.), "Then as well as now, however, it appears that the defense's perception of the trial evidence is as was seen and heard by a zealous advocate. That view is noble and faithful to the highest traditions of the profession."; *People v. Toms*, 191 Misc.2d 585, 743 N.Y.S.2d 690, 2002 WL 1315434, 2002

commercial context, however, use the phrase either cautiously or as a method of warning lawyers about improper tactics, although there are still cases extolling the zealous advocate's role.[22]

- Other states similarly have a limited number of cases involving the phrase "zealous advocate."[23]

N.Y. Slip Op. 22565, , N.Y.Co.Ct., May 24, 2002, "What ought to be of greater concern is the appearance and, indeed the potential, that attorneys may be less than zealous advocates because they can-not afford to invest the time to do so in cases that are complex and/or protracted because of an inability to obtain fair compensation for the additional work needed in those cases which present extraordinary circumstances. Attorneys, even the most dedicated ones, are human. Faced with harsh economic realities of being reimbursed at rates which barely cover their office overhead, they will be forced to avoid cases that are complex and/or protracted because of the diminishing economic return for their investment of the additional hours it takes to address such cases at the expense of the balance of their practices." (quoting with approval from *People v. Brisman*, 173 Misc.2d 573, 588, 661 N.Y.S.2d 422 [Sup. Ct. New York County 1996]); *People v. Deblinge*r, 179 Misc.2d 35, 683 N.Y.S.2d 814, 1998 WL 892130, 1998 N.Y. Slip Op. 98680, , N.Y.Sup., November 06, 1998, "Attorneys are required by the rules of ethics to be zealous advocates for their clients' causes. Even if counsel's objections strike at the heart of the court's conduct, there is no excuse for failing to register a timely protest."; *People v. Collins*, 173 Misc.2d 350, 660 N.Y.S.2d 946, 1997 WL 405463, 1997 N.Y. Slip Op. 97367, , N.Y.Sup., May 30, 1997, "Unlike a defense attorney, whose duty is zealous advocacy on behalf of his client, a prosecutor is a quasi-judicial official. His conduct must meet a higher standard because he has the resources and power of the state to utilize against the accused."; *State v. Brisman*, 173 Misc.2d 573, 661 N.Y.S.2d 422, 1996 WL 905940, 1997 N.Y. Slip Op. 97369, , N.Y.Sup., October 09, 1996, "Several competing public policy concerns and issues are implicated in the consideration of the issue-at-bar, to wit: * * * the assertion that an appearance of impropriety may be created in situations in which attorneys are perceived as less zealous advocates for their clients to avoid alienating a judge with the power to increase fees; and 6) the allegation that the fact that some judges * * *";

[22] *See*: *In re Heller*, 9 A.D.3d 221, 780 N.Y.S.2d 314, 2004 WL 1415461, 2004 N.Y. Slip Op. 05529, , N.Y.A.D. 1 Dept., June 24, 2004, "In our view, however, it strains credulity that respondent, the self-proclaimed "zealous advocate", would sign a critical affidavit in a serious matter without thoroughly vetting it. In any event, in signing an affidavit, an affiant swears to the truth of the statements therein."; *B.A. v. L.A.*, 196 Misc.2d 86, 761 N.Y.S.2d 805, 2003 WL 21246118, 2003 N.Y. Slip Op. 23579, , N.Y.Fam.Ct., May 09, 2003, "Since there exists a reasonable possibility that the law guardian can take an adverse position to that of one party in any visitation or custody case in which they represent the child, to describe the law guardian's role as "a neutral" discounts their role as a zealous advocate for the child participating fully in both pre-trial and trial procedures. * * * A trial court cannot substitute its judgement [*sic*] for that of a defense attorney, who, within the bounds of ethics and law, must be a zealous advocate for his client."; *Adams v. Clark*, 224 A.D. 336, 230 N.Y.S. 684, , N.Y.A.D. 4 Dept., September 26, 1928, "We are aware that in a closely contested trial the heat of conflict sometimes partially overcomes zealous advocates, and that oftentimes counsel must be allowed some latitude in their efforts to excel in deportment. But the claimed infractions in the instant case upon the rule that counsel must be fair and temperate may have had an improper influence upon the jury. And, while we are not disposed to base our reversal directly upon irregular conduct of counsel, we feel impelled to express our disapproval."

Cf: *O'Malley v. Macejka*, 44 N.Y.2d 530, 378 N.E.2d 88, 406 N.Y.S.2d 725, , N.Y., June 06, 1978, "For a legislator properly may act as the zealous advocate of the most partisan of causes. Indeed,**90 legislators often seek election on the basis of their support of particular programs or groups with whose special interests they may openly align themselves."; and *Lewis v. Few*, 5 Johns. 1, 1809 WL 1233, , N.Y.Sup., 1809, "The defendant was a man of talents, possessed of great political information, a conspicuous and zealous advocate for liberty, and well instructed in all the rights and privileges of British freedom; yet we do not find a hint of any such privilege of an elector, as that now claimed by the present defendant."

[23] For cases from Rhode Island, see: *See*: *McGinty v. Pawtucket Mutual Ins. Co*., 899 A.2d 504, 508 (R.I. 2006): "the attorney is duty-bound to serve as zealous advocate for his client. . . ."; and *Carlson v. Gillie*, 1997 WL 839902 (R.I. Super. 1997), unreported: "The ethical attack mounted by plaintiff's counsel is a tactical ploy of an overly-zealous advocate who cannot accept the jury's verdict and who is willing to do anything (including attacking the Court and the system) to try and overturn it. I will not be a part of this ploy."

Many cases do not always use the phrase "zealous advocate" in a favorable light, and a number of them criticize lawyers for failing to recognize that zealous advocacy does not excuse improper or sanctionable conduct.[24] Similar comments are found in some state bar's ethics opinions.[25]

There are only a few cases from Kentucky. *Adams v. Lexington-Fayette Urban County Government*, (Cite as: 2009 WL 350600 (Ky.App.), reh. den. 5/28/09): "However, having reviewed the record, we find no reason to believe that [the attorney] was dishonest with the court concerning his participation in the investigation. He was a zealous advocate for his client. Again, we emphasize that disqualification is a drastic action taken only when absolutely necessary . . . ."; *Woodall v. Commonwealth of Kentucky*, (not reported in S.W.3d, 2005 WL 3131603 (Ky., reh. den. 2/232/06) "The record reflects that defense counsel acted reasonably, and advocated Appellant's plight as appropriate under the circumstances. Furthermore, even if defense counsel had been a more zealous advocate of this evidence . . . ." and *Forean v. Bowen,* 7 T.B.Mon. 409, 23 Ky. 409, 1828 WL 1287 (Ky. 1828) "The others are so obviously and palpably against Forean, that even to notice them would give them a consequence which the most zealous advocate can not be presumed to suppose them entitled to."

There appear to be only seven reported cases from Iowa courts that use the term "zealous advocate," and only one of them appears to use the term in a purely favorable fashion: *Iowa Supreme Court Attorney Disciplinary Bd. v. Rauch,* 746 N.W.2d 262 (Iowa,2008). "Our legal system depends on zealous advocates who are diligent and honest. See Comm. on Prof'l Ethics & Conduct v. Bauerle, 460 N.W.2d 452, 453 (Iowa 1990) ("Fundamental honesty is the base line and mandatory requirement to serve in the legal profession."). Rauch possesses neither of these qualities."

Other Iowa cases merely use it in passing, refer to law review articles with this name, or mention it as defense asserted in a disciplinary matter. See: *State v. Boggs*, 741 N.W.2d 492 (Iowa,2007); *Hartnell v. State*, 695 N.W.2d 505 (Table) (Iowa App.,2005), *State v. Williams*, 2000 WL 1157832 (Iowa App.,2000); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Zimmermann*, 522 N.W.2d 619 (Iowa,1994); *State v. Fryer*, 226 N.W.2d 36 (Iowa 1975); and *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738,(Iowa 1883).

Cases from Florida courts, include; *State v. Green*, 395 So.2d 532, 538 (Fl. S.Ct. 3/5/1981), " 'But not even the most zealous advocates suggest coverage of all trials in all courts.' "; *Whipple v. State*, 431 So.2d 1011, 1015 (Fl. 2nd DCA 5/13/1983), "The fact remains, however, that most of the cases cited by zealous advocates as being in direct conflict with our PCA decisions are simply not close enough to write about."; *Wilson v. Wainwright*, 474 So.2d 1162, 1165 (Fl. S.Ct. 8/15/1985): "However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate."; *accord*: *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fl. S.Ct. 6/26/1986) and *Hamilton v. State*, 573 So.2d 109, 111 (Fla. 4th DCA 1/4/1991); *Key Largo Restaurant v. T.H. Old Town Associates, Ltd*., 759 So.2d 690, 692 (Fl. 5th DCA 4/14/2000), involving a motion to disqualify an attorney who received confidences that a "zealous advocate" would likely use; *Yang Enterprises, Inc. v. Georgalis*, 988 So.2d 1180, 1183 (Fl 1st DCT 8/7/08), citing the dissent in *Key Largo* and finding that a writ for certiorari was filed as a "litigation tactic" which "caused the other party prejudice); *National Union Fire Ins. Co. of Pittsburgh, Penn. V. KPMG Peat Marwick*, 742 So.2d 328, 331 (Fl. 3rd DCA 7/28/1999), ". . . an attorney cannot be a zealous advocate for his client if he reveals confidential information about the client."' *Haliburton v. Singletary*, 691 So.2d 466, 472 (Fl. S.Ct. 1/9/1997), "Haliburton first claims that because appellate counsel failed to act as a zealous advocate, he was deprived of his right to the effective assistance of counsel. We disagree with his assertion . . . ."; *Olive v. Maas*, 811 So.2d 644, 654 (Fl. S.Ct. 2/14/2002); "Olive maintains that adhering to these provisions would cause him to violate the Rules of Professional Conduct. Specifically, Olive asserts that these "restrictions" would prohibit him from acting as a zealous advocate by, for example, preventing him from asserting a claim based on a change in the law applicable retroactively, or arguing for the expansion or modification of existing law. This contention lacks merit because the rules themselves prohibit a lawyer from asserting frivolous or successive claims." *Foster v. State*, 929 So.2d 524, 535 (Fl. S.Ct. 3/23/2006), " 'What is abundantly clear is that every member of this group of mostly African-Americans is convinced that neither Mr. Smallwood nor Mr. Kelley has any racial bias whatsoever, and that both attorneys have demonstrated themselves to be zealous advocates for clients of all races. The Court finds no reason to conclude otherwise.' "

[24] *See, e.g. The Florida Bar v. Morgan*, 938 So.2d 496, 500 (Fl. S.Ct. 6/22/2006), in which a lawyer was given a 91-day rehabilitative suspension for a colloquy with the trial judge. In sustaining the suspension, the Florida Supreme Court stated: "Like the attorney in Wasserman, Morgan admits his conduct was inappropriate, but seems to believe it is his obligation as a zealous advocate to take a judge 'to task' if he comes to believe he or his client is being treated unfairly."

Also see De Vaux v. Westwood Baptist Church, 953 So.2d 677, 684-685 (Fl. 1st DCA 4/4/2007) (footnotes omitted): "This case is not an instance of a court chilling creative lawyering. See generally, Monroe H. Freedman & Abbe Smith,

In contrast, the comments to §16 of the ALI's Restatement of the Law Governing Lawyers ("ALI") warns that "zealous advocacy" is not a synonym for hardball tactics. The Comment states that the "term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling."[26]

While the label of "zealous advocate" gives some solace for the forcefulness with which a lawyer can act for the client and gives others concern about hard-ball tactics, the same concept may be restated by describing a lawyer as a "neutral partisan,"[27] a term that

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Understanding Lawyer's Ethics 97-8 (Matthew Bender 2004). Certainly, lawyers are expected to be zealous advocates for the interests of their clients. They are also officers of the court, however, even though these two roles may sometimes appear to be in conflict. See generally, Eugene R. Gaetke, Lawyers as Officers of the Court, 42 Vand. L.Rev. 39, 40 (1989). As an officer of the court, among other things, a lawyer must not file frivolous claims, rule 4-3.1, Rules Regulating The Florida Bar, or unnecessarily burden third parties, rule 4-4.4. See generally, David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L.Rev. 799, 815 (1992). Said another way, an attorney has a duty to refrain from advocacy, such as filing frivolous claims, which undermines or interferes with the functioning of the judicial system. See Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1546 (11th Cir.1993)("An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself."). A lawyer who files a frivolous lawsuit or a meritless appeal on the instructions of the client without informing the client of the weakness of the claim is violating both a duty to serve the client's interests and a duty to the judicial system. See generally, *Mullins v. Kennelly*, 847 So.2d 1151, 1154 (Fla. 5th DCA 2003)."

Further, see *Rosenberg v. Gaballa* 2009 WL 129611 (Fl. App. 4 Dist. 1/21/09): "This Court did not find credible Mr. Rosenberg's testimony that he was acting merely as a zealous advocate for his clients."

The Nevada Supreme Court has used the phrase with approval when it wrote: "However much it may 'infuriate the jury,' a properly zealous advocate must do all he can to defend his client." *Brown v. State*, 110 Nev. 846, 877 P.2d 1071,1073 (Nev. Jul 26, 1994). In the very next sentence, the *Brown* court wrote: "As one eminent defender wrote, "[c]ross examination is the only scalpel that can enter the hidden recesses of a man's mind and root out a fraudulent resolve . . . . [It] is still the best means of coping with deception, of dragging the truth out of a reluctant witness, and assuring the triumph of justice over venality." Louis Nizer, My Life in Court 366 (1961)."

[25] See, e.g., the following Kentucky Bar Association's ethics opinions: E-425 (June 2005) ("Some commentators have suggested that the lawyer's participation in the collaborative process may be inconsistent with the duty of zealous representation. This so-called "duty" has its roots in Canon 7 of the former Code of Professional Responsibility, and was most often associated with the tough lawyer involved in litigation (the hired gun). Today's Rules of Professional Conduct, adopted in Kentucky in 1990, no longer impose a duty of zeal, but rather impose duties of competence and diligence."); E-331 (Sept. 1988) ("The insured is entitled to competent and zealous representation, . . ."); E378 (March, 1995) ("We have previously held that the insured is entitled to competent and zealous representation that is not adversely affected by prohibited conflicts of interest. KBA E-331."); E-272 (July 1983) ("pressure . . . which would prevent the attorney from zealously and independently representing the client (Canon 7 and 5); E-279 (January 1984) ("Canons 6 and 7 of the Code of Professional Responsibility require a lawyer to exercise competence in the zealous representation of his client.") E-159 (Jan. 1977) (When lawyers who share offices represent adverse interests, there must always be some temptation to moderate zeal on behalf of the client in the interest of harmony in the office. . . . However, a large part of the lay public believes that in these circumstances, one or both of the clients will get representation that is less than zealous.")

[26] ALI §16, Comment (d).

[27]Dolovich, *supra*, (her article fn7), traces the origin of the term to William Simon in his article "The Ideology of Advocacy: Procedural Justice and Professional Ethics," 1978 Wis. L. Rev. 29. For more on ethicist Simon's views, see William H. Simon, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS (1998).

suggests moral relativism. A "neutral partisan" is one who "passes no judgments,"[28] whose "zeal on behalf of the client is unmitigated and noncontingent."[29] The revisions to the Model Rules maintain the view that the lawyers' personal morality is not impugned because of the client's activities. See the ABA Model Rule 1.2(b): "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."

It is often said that, by serving the client's interests, a lawyer furthers society's goals, in contrast to the accountant, whose primary duty runs directly to the public and only secondarily to the client. As the Securities and Exchange Commission opined more than half a century ago: "Though owing a public responsibility, an attorney in acting as the client's advisor, defender, advocate and confidant enters into a personal relationship in which his principal concern is with the interests and rights of his client. The requirement of the [Exchange] Act of certification by an independent accountant, on the other hand, is intended to secure for the benefit of public investors the detached objectivity of a disinterested person."[30]

Whether we prefer to be called "zealous advocates" or "neutral partisans," this standard view of a lawyer's role has been described as "both amoral and highly ethical. It is amoral in the sense that, however morally questionable the clients' ends and however zealous the lawyer is in their pursuit, the lawyer is thought to bear no moral responsibility for either the content of the ends or their achievement."[31] While lawyers look askance at such criticism, claiming that an adversarial system of justice not only is the most just but that, without the ability to represent unpopular interests, constitutional rights cannot be

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

[29] *Id.*

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

[31]Dolovich at 1633.

fully protected, others ignore the higher aims of protecting the constitutional and statutory rights of all and aim criticism at the profession, claiming that, "[f]or most lawyers, most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life."[32]

3. ARE THE "RULES OF ETHICS" REALLY ETHICAL?

"Ethics" is the term that is commonly applied to lectures about the ABA's Rules of Professional Conduct and its predecessor, the Code of Professional Responsibility. These current (and previous) iterations of Model Rules, however, do not use the word "ethics" at all, other than in the Scope section of the current Model Rules, which indicate that the rules "simply provide a framework for the ethical practice of law." The question many raise, however, is whether the Rules actually do this.

One critic of the lack of ethical emphasis in the Model Rules uses the pejorative term "amoral technicians"[33] to describe lawyers, claiming that the Model Rules provide "a highly simplified moral universe which offers easy guideposts for action that allow lawyers to sidestep wrenching ethical dilemmas, and with the luxury of acting on behalf of clients free from the risk of moral censure."[34] Another has commented that a lawyer "sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality."[35]

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

[33]*Id*. at 1638.

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

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

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

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

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

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

- Justice Stevens: "I still believe that most lawyers are wise enough to know that their most precious assets is their professional reputation."[36]

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

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

- "We might exercise our supervisory powers if we thought there were an ethical violation involved." But the Court would not exercise supervisory powers for a breach of a potential professional violation. *U.S. Bautista*, 23 F.3d 726, 732 (2nd Cir. 1994), *cert. den*. 513 U.S. 862 (1994).[37]

4. A BRIEF HISTORY OF THE ABA MODEL RULES

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

The American Bar Association's original Canon of Professional Ethics was adopted on August 27, 1908 and can be traced back to the Alabama Bar Association's 1887 Code of Ethics and from there back to two books published in 1836 and 1854.[38] For almost a hundred years the Canons formed the touchstone of lawyer conduct.

The Canons evolved in 1969 into the Model Code of Professional Responsibility. The Model Code was divided into "Ethical Considerations," aspirational goals for attorneys, written in hortatory language, and "Disciplinary Rules," mandatory provisions akin to penal statutes which formed the basis for disciplinary proceedings.

In 1983 the ABA adopted the Model Rules of Professional Conduct. Gone were the aspirational goals that the Ethical Considerations illuminated. In their place were purely minimal standards of conduct written in the style of a penal code – the three phrases used are: "a lawyer shall not," "a lawyer shall," and "a lawyer may." The Bar's transformation was complete. It had come full circle from a profession whose members

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

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

took it for granted that they owed duties to the public and to the courts, to one whose written rules provided both high-minded guidelines as well as disciplinary rules, to one whose sole guidance was now found in a quasi-criminal statute.

Unfortunately, because the old Code, with its "ethical considerations," was thought of as an "ethics" code, we tend to think that the current Model Rules are ethical standards. One might ask, however, are they really "ethical" in the abstract sense of ethics. An attorney is permitted to take positions that many would find uncivil or even morally questionable and still abide by the Model Rules. Likewise, an attorney can have a reputation in the bar as an unfair "hardball" litigator, intransigent on every issue, even ones of courtesy, and still comply with Rule 11. This may be the reason for the evolution of the "professionalism" standards and the various codes of courtesy that are being adopted by many local bar associations around the country. Although it must be admitted that not all such "professionalism" codes are limited to litigation, when one reviews them as a whole, it is clear that abusive litigation conduct is at the heart of what such formulations are designed to address.

5. THE CURRENT MODEL RULES CONDONE SOMETHING LESS THAN TRUTHFULNESS

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

When the Model Rules were drafted, the ABA specifically *rejected* requiring truth in negotiations.[39] The preamble contained hortatory language which was adopted:

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

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

Rule 4.1 deals with negotiations. As proposed in 1983, Rule 4.1 prevented a lawyer from knowingly making a false statement of material fact or law and would have required disclosure of client confidences in furtherance of the Rule. The language requiring truthfulness, even if it revealed a potential client confidence, however, was deleted by the ABA.[40]

A select look at some states' versions of Rule 4.1 shows some of the different approaches that have been used.

- Louisiana,[41] Mississippi,[42] and Missouri[43] adopted the ABA lead.

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

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

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

[41] Louisiana Rule 4.1 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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[42] *See* the Mississippi Rules, found at: https://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf (last visited 09/02/16).

- Kansas modified the ABA Model Rule.[44]
- Texas did not follow the ABA's lead and does not have an exception for client confidences in Rule 4.1[45].

Truthfulness and fair dealing were not and are not the requirements of the Model Rules, at least outside of tribunal settings, and outside of fraud and criminal activity. The ABA Comments to the Rules make for interesting reading, for they specifically allow "puffing," "failing to be truthful about settlement amounts," and other matters as long as they do not constitute "fraud."[46] Truth is not the stated objective of the Model Rules. In negotiations, a lawyer is entitled (but never required) to reveal client confidences if making a disclosure "facilitates a satisfactory solution." Facilitation of a satisfactory solution is not necessarily one that is equitable to both sides. There is no requirement of revealing a confidence in order to reveal the truth. The Rule contains a clear

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[43] Missouri Rule 4-4.1 provides:

> "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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6."

[44] Kansas Rule 226.5.1 states (emphasis supplied, underlined text not in the Model Rule):

> "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 or made discretionary under Rule 1.6."*

[45] Note that the Texas Rule, however, requires a lawyer not to remain silent only if (a) there is a "material fact" involved, and (b) the lawyers' own conduct (as opposed to the clients' conduct) is at issue.
Texas Rule 4.1 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 making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."

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

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

demarcation; conduct that is "fraudulent" is forbidden, but all else is merely part of negotiating strategy.

The negotiation rules under 4.1 must be read in conjunction with the confidentiality rules contained in 1.6,[47] for Rule 4.1 prohibits a lawyer from revealing confidences even if remaining silent might mislead the other side. While Louisiana's version of Model Rule 1.6 is identical to the ABA's version, not all states take the same approach. For example, the following states, among others, do not use the ABA's version: Texas,[48] Mississippi,[49] Missouri,[50] Kansas.[51]

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[47] ABA Model Rule 1.6 reads:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> (6) to comply with other law or a court order; or
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[48] Texas Rule 1.05 states:

> a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
> (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:
> (1) Reveal confidential information of a client or a former client to:
> (i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the clients representatives, or the members, associates, or employees of the lawyers law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information.

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

[49] Mississippi Rule 1.6 state:

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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

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

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

(4) to secure legal advice about the lawyer’s compliance with these rules;

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

As can be seen, the versions of Rule 1.6 adopted in Mississippi, Texas, Missouri and Kansas are even more restrictive than the ABA's Model Rule. While the ABA Model Rule and the Missouri version allows for disclosure of confidential information if

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

(c) A lawyer who participates in an intervention on a lawyer, judge or law student by the Lawyers and Judges Assistance Committee shall not reveal any information learned through the intervention from or relating to the lawyer, judge or law student on whom the intervention is conducted except as may be permitted by the Rules of Discipline of the Mississippi Bar or required by law or court order.

(d) A lawyer shall reveal information to the Lawyers and Judges Assistance Committee in accordance with approved monitoring procedures of the Lawyers and Judges Assistance Committee relating to the status of compliance of a lawyer, judge or law student with the terms and conditions imposed upon the lawyer, judge or law student by the Lawyers and Judges Assistance Committee.

(e) A lawyer may reveal such information to the extent required by law or court order

[50] Missouri Rule 4-1.6 states (italics showing changes from ABA Model Rule and strikeouts showing omissions):

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).

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

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

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

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

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

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

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

[51] Kansas Rule 226.1.6 states (italics showing changes from ABA Model Rule and strikeouts showing omissions):

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, ~~the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)~~ *except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).*

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

~~(1) to prevent death or substantial bodily harm that is reasonably certain to occur;~~

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

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

(1) *To prevent the client from committing a crime; or*

(2) *to comply with requirements of law or orders of any tribunal; or*

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

~~Or (4) to comply with other law or a court order.~~

there is the possibility of "reasonably certain" death of a third party regardless of whether the client's actions are legal or not, the only ability to make a disclosure to prevent "death or substantial bodily injury" under the Texas Rule appear to be limited to the situation where the client is committing "a criminal or fraudulent act"; if there is no crime or fraud, there apparently can be no disclosure. Moreover, there appears to be no exception under the Kansas version to speak up even if death might occur; the only exception seems to involve crimes. Another example of the differences between the Kansas, Missouri, and Texas versions of Rule 1.6 and the Model Rule concerns adverse financial consequences to third parties. For example, while the ABA Model Rule allows for disclosures of confidences concerning certain financial matters, the Rule in Kansas, Missouri and Texas does not contain this provision.

In light of Rule 4.1, other language of the Rules, such as that in Rule 2.1 allowing (but not mandating) lawyers to consider moral issues, may tend to ring somewhat hollow.[52]

Rule 4.1, relating to *negotiation,* are sharply contrasted by the rules regulating conduct before a tribunal. While the language of Model Rule 3.3(a)(1) and 4.1(a) is identical in that a lawyer "shall not knowingly make a false statement of material fact or law, . . ." there was an attempt in the ABA to subordinate the lawyer's duty of candor to the court to the rules relating to privilege. The amendments were defeated because as the discussion notes, "the duty of candor toward the court was regarded as paramount."

[52]Model Rule 2.1 provides:

> Rule 2.1 and Comment as Adopted
>
> Rule 2.1 Advisor
>
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client's situation. (emphasis supplied).

Legislative History, p. 122. (emphasis supplied). The ABA Comment to Rule 4.1 specifically allows statements about "a party's intention as to an acceptable settlement of a claim" to be exempted from the rule prohibiting false statements of "material fact"; apparently you can lie with impunity about your settlement authority. There is, however, no such exemption in the comments to Rule 3.1 concerning candor to the tribunal, and probably for good reason.[53] A lawyer who, during a settlement conference with a judge, misstates the client's intention as to an acceptable settlement undoubtedly acts at his or her peril. While there is a special rule (3.4) relating to "fairness to opposing party and counsel," it seems solely directed at trial procedure.

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

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

[53] See Texas Rule 3.03: "Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

> decide for themselves what is legal, what is factual, and what is ethical.[54]

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

> "But codes of ethics function all too often as shields; their abstraction allows many to adhere to them while continuing their ordinary practices. In business as well as in those professions that have already developed codes, much more is needed. The codes must be but the starting point for a broad inquiry into the ethical quandaries encountered at work. Lay persons, and especially those affected by the professional practices, such as customers or patients, must be included in these efforts, and must sit on regulatory commissions. Methods of disciplining those who infringe the guidelines must be given teeth and enforced."[55]

6. ETHICS, PROFESSIONALISM, AND NEGOTIATION TACTICS

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

Discussions of what is and is not "ethical" during negotiations have consumed reams of paper with law review articles containing, in the aggregate, thousands of footnotes. On the one side is the view that there are two precepts which should guide the lawyer's conduct in negotiations: honesty and good faith; and that a lawyer may not accept a result that is unconscionably unfair to the other party.[56] At the other end of the spectrum are those who argue that obtaining the best interest of the client is the proper overall goal and should be pursued vigorously in the absence of outright fraud.

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

[55]Bok, *Lying*.

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

Discussions of this view can be found in the writings of Professors James J. White[57] and Charles Curtis.[58] The tension, at base, is not necessarily between "ethics" as an abstract notion, but rather whether various negotiation tactics are permitted or prohibited by the Model Rules.

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

- "The Ethics of Lying in Negotiations";[59]
- "Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive"; [60]
- "Professionalism: Lip Service or Life Style";[61]
- "Ethics on the Table: Stretching the Truth in Negotiations";[62] and
- "Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?"[63]

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

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

> Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one's

[57]White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. RES.J. 926.
[58]Curtis, *The Ethics of Advocacy*, 4 Stanford L.Rev. 3 (1951). Professor Norton calls Professor Curtis's view "stark traditionalism," Norton at p. 513.

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

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

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

[62]Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 Review of Litigation, 173 (1979).
[63]Hodes, Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better, 87 Ky. L. J. 1019 (1999).

> effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. Our clients, our partners and employees, and our families are all counting on us to deliver the goods. Accordingly and regrettably, lying is not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.
>
> Our discomfort with that fact has, I believe, led us to create and embrace a discourse on the ethics of lying that is uncritical, self-justificatory and largely unpersuasive. Our motives in this seem reasonably clear. Put simply, we seek the best of both worlds. On the one hand, we would capture as much of the available surplus as we can. In doing so, we enrich our clients and ourselves. Further, we gain for ourselves a reputation for personal power and instrumental effectiveness. And we earn the right to say we can never be conned. At the same time, on the other hand, we assert our claims to a reputation for integrity and personal virtue, to the high status of a profession, and to the legitimacy of the system within which we live and work. Even Gorgias, for all his power of rhetoric, could not convincingly assert both of these claims. Nor can we . . . .[64]

7. THE NOT SO SUBTLE ART OF MISDIRECTION

Whether the articulated standard is that lawyers "must use any legally available move or procedure helpful to a client's bargaining position,"[65] an "almost pathological pro-client attitude,"[66] or "'total annihilation' of the other side,"[67] or other, less pejorative phrases, "effective" negotiation often means winning big, and this often involves, to use a

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

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

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

[67]Lawry, Central Moral Tradition at 331.

kind euphemism, "misdirection." "Misdirection" can include either a true but incomplete statement of facts or silence, both of which are designed to lead the other party to an erroneous conclusion about the facts or your true position. The excuse for this behavior ("I didn't lie"), according to Professor Wetlaufer, can be categorized as follows:

> "[L]awyers sometimes assert that whatever they did was not a lie. These claims are of at least five kinds: (1) 'I didn't lie because I didn't engage in the requisite act or omission'; (2) 'I didn't *mean* to do anything that can be described as lying'; (3) 'I didn't lie because what I said was, in some way, literally true'; (4) 'I can't have lied because I was speaking on some subject about which there is no 'truth'; and (5) 'I didn't lie, I merely put matters in their best light.' "[68]

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

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

As Professor Wetlaufer has written:

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

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

Whether one calls it "misdirection," "puffing," "bluffing," or some other term, one need not resort to biblical injunctions to find a discussion of whether absolute truthfulness is always desirable.[69] Thus, the Talmud admonishes one to refrain from all varieties of dealings which depend upon obtaining a false value for things, or placing a false value on things. More importantly, one should not take advantage of the weakness of another, either by raising false hopes or by making tactless remarks. The Greeks and Romans wrote much on this subject.

Homer wrote, in the *Iliad*, "For hateful in my eyes, even as the gates of Hades, is that man who hides one thing in his mind but says another."[70]

Aeschylus had Prometheus say: "The worst disease of all, I say, is fabricated speeches and disguise."[71]

Cicero, in his letters to his son, describes a system of moral rectitude.[72]: He wrote about situations involving hard bargaining in business and sharp practices in the law. Among Cicero's examples was that of a merchant from Alexandria who brought a large

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

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

[70]Iliad, Chapter 9.

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

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

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

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

> I believe, then, that the corn-merchant ought not to have concealed the facts from the Rhodians; and the man who was selling the house should not have withheld its defects from the purchaser. Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know would be useful for them to know. Anyone can see the sort of concealment that this amounts to - and the sort of person who practices it. He is the reverse of open, straight forward, fair and honest: he is a shifty, deep, artful, treacherous, malevolent, underhand, sly, habitual rogue. Surely one does not derive advantage from earning all those names and many more besides.[73]

Cicero traces the requirement of honesty and fair dealings to the Twelve Tables, the earliest and most fundamental of Roman laws, circa 450 B.C., and to the Plaetorian law, circa 192 B.C. Pointing out that honesty and fair dealing are appropriate criteria, Cicero notes that "the laws in our Civil Code relating to real property stipulate that in a

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

sale any defects known to the seller have to be declared." A suppression of facts not asked about was impermissible. Cicero writes that although the civil law does not rectify all moral wrongs, there is nobility in the aspirational goal that, "between honest men there must be honest dealing and no deception." [74]

Cicero then discusses what is honest dealing. This Roman view of the law was adopted by the French in their Civil Code. [75]

Although civilian jurisdictions (such as Louisiana) have long since honored truth in negotiations, even enshrining these concepts in their Civil Codes, the common law took the opposite approach, postulating the rule of caveat emptor as opposed to the civilian concept of *caveat venditor*.[76]

In *Laidlaw v. Organ,* a famous common law case, Chief Justice Marshall rejected the concept of honesty and fair dealings when facts are "equally accessible to both parties."[77] The buyer, Organ, sought to compel delivery of tobacco that he had purchased. Laidlaw, the seller, claimed that he was deceived by Organ and did not have to deliver the tobacco. Laidlaw had asked whether Organ knew of anything that might affect the tobacco's value and Organ said nothing. In fact, Organ knew that the price of tobacco had risen steeply because the Treaty of Ghent had been signed, ending the War

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

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

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

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

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

of 1812. Organ, the buyer, won because there was no obligation, said Justice Marshall, to speak. Remaining silent was permissible,[78] even though Organ knew that Laidlaw was under a misapprehension.[79]

It is this type of outcome, where sharp bargaining on behalf of one party obtains an advantage that would not otherwise be there but for the silence or for the misdirection, that leads to "the sense of injustice."[80] Professor Edmond Cahn's famous book by this title argues for a philosophy that restores a sense of justice and avoids a sense of injustice in the law. [81]

8. TRUTHFULNESS v. CLIENT CONFIDENCES

The ABA, in its initial 2002 adoption the ABA Model Rules, rejected any broad expansion of a lawyer's traditional role and refused to lessen the stringent requirements of confidentiality under Rule 1.6. A debate ensued over whether a lawyer was bound by client confidentiality even if the lawyer's work, unbeknownst to the lawyer, had caused or would cause harm to others. While initially rejecting any breach of confidentiality rules, the ABA eventually adopted the current version of Rule 1.6, which allows a lawyer to breach confidential communications in certain limited instances.[82]

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

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

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

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

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

> a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

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

It used to be hornbook law that a lawyer could not be liable to non-clients because (a) the only cause of action against a lawyer was in malpractice, and (b) there could be no malpractice claim in the absence of a contractual relationship to the plaintiff. "The classic case of such a circumstance is *Spaulding v. Zimmerman,* 116 N.W. 2d 704 (Minn. 1962). In that case, the defendants' lawyers knew the plaintiff, Spaulding, to have an aneurysm, a life-threatening condition of which Spaulding himself was unaware and which could mean instant death unless treated with simple surgery. *Id*. at 707. The lawyers concluded that their duty of confidentiality to their clients required that they keep the fact of the aneurysm confidential, and they did so, a move that came to light only when, two years later, Spaulding had an army physical that disclosed his condition. *Id.* at 708. Spaulding then petitioned to have the original settlement vacated, and although the court granted his motion, it took great pains in so doing to emphasize that 'no canon of ethics or legal obligation' required the lawyers to inform Spaulding or his counsel about the aneurysm. *Id*. at 710."[83]

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(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(6) to comply with other law or a court order; or
(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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

The wall of privity, however, was breached first in will contests[84] and next in matters where lawyers had given opinion letters to third parties, for then courts could see a written agreement and analogize that to some type of implied contractual relationship, or at least see that claims of "reliance" by the third party were not inappropriate.[85] One ethicist has described these third parties as " 'quasi-clients,' people to whom the lawyer owes a duty greater than that due strangers but secondary to that due to the client."[86]

Most of the cases impose liability under one of two theories: "(1) a multifactor balancing test (sometimes referred to as the 'relational approach'); or (2) a traditional third-party beneficiary contractual concept (sometimes referred to as the 'categorical approach')."[87] Regardless of the underlying theory used, courts time and time again have held that if a third party reasonably relies upon an attorney's opinion letter, then the attorney is liable to the third party, whether the basis of the liability is "negligent misrepresentation" or "fraud" or some other type of innominate tort.[88]

Concerned with the expanding scope of liability, lawyers began creating voluntary standards that they hoped the courts would adopt in determining their liability to third parties. These were useful, however, only in transactional matters, where the potential for liability was typically to third parties who might rely upon a borrower's

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

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

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

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

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

counsel opinion, and even in these instances, these voluntary standards have not proven as effective as their proponents had hoped.

On the other hand, the American Law Institute has two Restatements that directly relate to lawyer liability to third parties which apply in both litigation and transactional situations: the Restatement of the Law Governing Lawyers[89] and the Restatement of Torts.

The Restatement of the Law Governing Lawyers ("ALI Lawyers Restatement") contains a number of provisions that directly relate to third party liability. §56 states that a lawyer can be liable to a nonclient "when a nonlawyer would be [liable] in similar circumstances." The examples given under §56 include: a fraud claim against a lawyer who "knowingly helps a client deceive"[90]; assisting a client commit a tort through acts which are themselves tortious;[91] a fraudulent misrepresentation that is something more than "legally innocuous hyperbole";[92] as well as liability under federal securities laws, antitrust statutes, RICO, and consumer protection laws.[93]

The basis of this liability is the duty of care that lawyers owe to nonclients under §51 of the ALI Lawyer Restatement. While some have criticized this standard as being too harsh on lawyers, since it does not look to whether the assistance to the nonclient is

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

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

[91] *Id.*

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

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

the sole (rather than simply one) of the primary purposes of the lawyer's actions,[94] it does attempt to create a fact-specific balancing test while at the same time apparently allowing lawyers to attempt to limit liability by contractual language. This has been termed the "contractarian" view of liability.[95]

The comments to (but not the black letter of) §51 seem to acknowledge the possibility of contractual limitations on the scope of the duty and even indicate that the duty is less if there is experienced counsel on the other side of the table.[96] There is no explanation, however, why Lawyer X's duties to a nonclient should diminish solely because of the presence or absence of Lawyer Y on the opposite end of the table, apparently leaving one with the possibilities that either (a) experienced counsel Y shouldn't or wouldn't let Lawyer X get away with something bad, or, if something bad did happen, then (b) the nonclient should sue its own counsel Y rather than the other side's Lawyer X. This apparent rationale, however, could be attacked by the argument that, if something bad did happen, then it would appear Lawyer Y really wasn't as experienced as the nonclient anticipated, meaning that Lawyer X's duties to the nonclient shouldn't be diminished.

Unlike the ABA's varied position on confidentiality in connection with the obligation to prevent financial loss, the ALI Lawyer Restatement §67 has always allowed a lawyer to disclose confidential information to "prevent, rectify, or mitigate"[97] a

[94]"One commentator characterizes the Restatement approach as "unique and questionable.". *See* D. Culver Smith, III, "Professional Liability of Lawyers in Florida: Theories of Liability," PLLF-FL-CLE 1-1 (2002), commenting on and quoting from Mallen & Smith, Legal Malpractice , §7.8 at 697-698 (West Group 5th ed. 2000).

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

[96] See ALI Restatement of the Law Governing Lawyers §51, Comment (e).

[97]ALI Lawyer Restatement §67(2).

"substantial financial loss"[98] to a third person caused by a client crime or fraud even if the "loss has not yet occurred,"[99] but this can occur only if the "client has employed or is employing the lawyer's services in the matter in which the . . . fraud is committed."[100] Even if these criteria are met, §67 cautions that the attorney must first make a "good faith effort to persuade the client not to act"[101] if this is feasible or ask the client to "warn the victim"[102] or fix the problem. §67 closes with the caution that a lawyer who either acts or fails to act under its principles is not "solely by reason of such action or inaction"[103] liable in damages -- apparently it takes action or inaction plus something else.

Thus, both the ABA (under current Model Rule 1.6) and the ALI now hinge the lawyer's ability to disclose confidences that can result in substantial financial injury upon a "crime or fraud," and both allow disclosures to prevent reasonably certain death or substantial bodily harm. As noted earlier, both the Kansas and Missouri version of this rule differs from the ABA Model Rule.

Yet, ALI Lawyer Restatement §66's black letter text[104] contains a number of additional restrictions on the lawyer before disclosure, including making "a good-faith effort to persuade the client not to act" and to ask the client to warn the victim if the

[98]ALI Lawyer Restatement §67(1)(a).

[99]ALI Lawyer Restatement §67(1)(b).

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

[101]ALI Lawyer Restatement §67(3).

[102]*Id*.

[103]ALI Lawyer Restatement §67(4).

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

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

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

There are also four Illustrations to §67 that are pertinent to transactional lawyers. Two Illustrations contend that a lawyer who was engaged, after the fact, to defend in a regulatory arena a claim that a client had defrauded a victim is not allowed to disclose the facts, for the lawyer was not "employed by the client in committing the fraud."[105] This nondisclosure is mandated even if there are penalties for continuing offenses.[106] Two other Illustrations allow a lawyer to disclose fraud in loan documents that the lawyer helped to prepare when the lawyer discovers the fraud after the fact, regardless of whether the loan has already closed.[107] These Illustrations, unlike the ABA Model Rules 1.6 and 4.1, recognize that a client cannot have the lawyer perform work that causes grievous financial losses and then expect the lawyer to remain silent, notwithstanding any expectations or rules of confidentiality.

While §67 states in a comment (but not in the black letter text) that these exceptions to confidentiality are "extraordinary," it is clear that no longer can lawyers

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

[106]*Id.*, Illustration 4.

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

hide behind the Model Rules; courts can and will be looking to the ALI Lawyer Restatement as another basis to find liability.

The second basis used to impart nonclient liability to lawyers is §552 of the ALI Restatement (Second) of Torts, which concerns justifiable reliance on the advice of a professional. §552 has been used by courts in addressing lawyers liability to those other than their clients.[108]

10. NON-LITIGATION NEGOTIATIONS AND LIABILITY TO THIRD PARTIES

Although the vast bulk of negotiations take place outside of a litigation context, the rules (if any) that regulate negotiations are determined primarily by judicial decisions that, of necessity, occur after litigation. There are few reported ABA advisory opinions on the ethics of non-litigation negotiations.[109] The American Law Institute's Restatement of Law Governing Lawyers goes beyond the Model Code and the Model Rules in some respects and allows for discipline in negotiations even though the conduct may not be civilly actionable, but "puffing" is still allowed.

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

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

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

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

Even in the securities field, where the liability is statutory, courts have differing views on whether obligations to the public outweigh obligations to clients or to a corporation. A famous example is the *Dirks* case.[110] The federal court of appeals had held that Dirks, a respected financial analyst, was properly disciplined for failing to disclose to both the S.E.C. and the public information concerning a company's creation of false policies and records. The fact that the financial analyst attempted to get the Wall Street Journal to publish a story about the issue did not cleanse the failure to disclose the information to the S.E.C. or the public.[111] Reversing the appellate court decision, the Supreme Court held that Dirks (as a tippee of a tippee) had no duty to disclose. Because there was no breach of duty to shareholders by insiders, "there was no derivative breach by Dirks."[112] The dissent would have found Dirks liable, claiming that an inquiry into motives was not necessary.[113] Although the motives may have been "laudable, the means he chose were not. * * * As a citizen, Dirks had at least an *ethical obligation* to report the information to the proper authorities."[114] If the courts have difficulty in delineating

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

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

[112]463 U.S. at 667. 103 S.Ct. at 3268.

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

[114]Emphasis supplied; 463 U.S. at 678, 103 S.Ct. at 3273.

ethical duties in the highly regulated securities field, then it is not unusual that the regulation of ethics in general negotiations is said by some to be even more troublesome.

One commentator has even asserted that lawyers can "misrepresent" some issues with impunity, claiming that a lawyer may "embellish the pain experienced by their client, so long as their exaggerations do not transcend the bounds of expected propriety"[115] and may ."misrepresent the value their client places on particular items."[116]:

There are cases that deal with negotiations in non-litigation transactions. Most involve alleged fraud by a seller or lender and the lawyer's liability, particularly if there was but one lawyer handling all aspects of the closing for the lender, buyer, and seller.[117] These cases usually involve claims of self-dealing or mixed representation.[118]

11. A LOOK AT SOME FAMILY LAW NEGOTIATIONS

While family law transactions are not the usual realm of transactional lawyers, events that transpire in these proceedings can be instructive when one looks at how courts deal with negotiation issues that seem not to violate the Rules of Professional Conduct or state or federal procedural rules but which nonetheless strike the court as unfair.

In one of the few reported cases involving pre-litigation negotiations that do not involve securities or a sale of property nor a writing by a lawyer who was alleged to have acted wrongfully is *Stare v. Tate*.[119] Arising out of a property settlement in a divorce

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

[116] *Id*.

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

[118] *Cf.:*, *Baldasarre v. Butler* 132 N.J. 278, 625 A.2d 458 (1993).and compare with *Petrillo v. Bachenberg,* 263 N.J.Super. 472, 483, 623 A.2d 272 (App.Div.1993) (same), aff'd, 139 N.J. 472, 655 A.2d 1354 (1995).

[119] 21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (Cal. App. 2d 1971).

case, the wife's attorney, through a series of negotiations, offered a property settlement with a serious mistake in the valuation of the property; the mistake was to the wife's detriment. The husband's attorney was aware of the mistake and counter offered using the same mistaken valuation number. The counter offer was accepted by the wife's attorney and the instrument reflecting the counter offer was later approved by a court as a property settlement.

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

Arguably the husband's lawyer's behavior did not fall within the prohibition of Rule 4.1, which only prohibits making a "false statement of material facts." While the Comment to Rule 4.1 states that a misrepresentation can occur "if a lawyer incorporates or affirms a statement of another that the lawyer knows is false," the valuation arguably was not false, simply mistakenly low. Would a bar association discipline the husband's lawyer in this instance? Would there be endless arguments whether the valuation was "false" and whether the husband's lawyer made a "statement" or merely remained silent. Was the statement "material?" Is this the type of problem that Justice Marshall would

have no problem disposing of as in *Laidlaw v. Organ*, holding that the information is equally available to both sides?

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

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

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

If a client is engaged in financial fraud ABA Model Rule 1.6 prevents a lawyer from revealing any confidential information unless (a) there will be "substantial injury to the financial interests or property of another, and(b) the lawyer's services were used "in furtherance" of the fraud. In other words, if the client is committing financial fraud but the lawyer is not involved in the fraud or furthering the fraud, the lawyer must remain silent to protect the client confidence. Not every state, however, has adopted the ABA's approach. Moreover, there is the possibility that a the failure to reveal the fraud through ta "noisy withdrawal" may expose the lawyer in some states to litigation claims by the adverse party, particularly in light of the language of the ALI Lawyer Restatement §§ 51, 52, and 67.

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

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

> "~~[18]~~ 20. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. * * * The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. * * * ~~Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.~~ Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct."

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

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

Then, there's the added problem of multi-state transactions, where the disciplinary rules of the various states differ and the status of state-adoption of the ABA Model Rule is not uniform.[121] Which state rule controls is a difficult issue, particularly since Nevada has not adopted the ABA multi-state Model Rule, and conflict-of-law in disciplinary rules is a topic which is beyond the scope of this paper, but one which must be determined before you can decide upon your course of action.[122]

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

[121] For a current update on the status of which states have adopted the ABA Model Rule on multi-jurisdictional practice and other information on this area, see the ABA's Center for Professional Responsibility's Commission on Multijurisdictional Practice web page, http://www.abanet.org/cpr/mjp-home.html (last visited 09/02/16).

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

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

On the other hand, the Texas version of this rule (Texas Rule 1.15) contains no information or indication that the withdrawal, even if allowed, can be "noisy."[125]

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

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

[125] See Texas Rule 1.15: Rule 1.15 Declining or Terminating Representation

> (a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:
>
> > (1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;
> >
> > (2) the lawyer's physical, mental or psychological condition materially impairs the lawyers fitness to represent the client; or
> >
> > (3) the lawyer is discharged, with or without good cause.
>
> (b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.
>
> (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a clients interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

The Texas Comment to this Rule states, in part:

> Optional Withdrawal
>
> 7. Paragraph (b) supplements paragraph (a) by permitting a lawyer to withdraw from representation in some certain additional circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. A lawyer is not required to discontinue the representation until the lawyer knows the conduct will be illegal or in violation of these rules, at which point the lawyer's withdrawal is mandated by paragraph (a)(l). Withdrawal is also permitted if the lawyer's services were misused in the past. The lawyer also may withdraw where the client insists on pursuing a

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

ABA Model Rule 1.16 allows an attorney to withdraw if it can be accomplished without "material adverse effect on the interests of the client."[126] A noisy withdrawal, however, is clearly designed to alert somebody that something is afoot, so it can be anticipated that there will be an adverse effect on the client.

ABA Model Rule 1.16 permits a withdrawal if the client is persisting "in a course of action involving the lawyer's services that the lawyer has reason to believe is criminal or fraudulent"[127] or if "the client has used the lawyer's services to perpetrate a crime or fraud"[128] or the client insists upon "taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,"[129] or when "other good cause of withdrawal exists."[130] It is important to note, however, that the withdrawal under ABA Model Rule 1.16 is never mandatory; it is always discretionary. Further, Model Rule 1.16(d) requires that "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests."

Even ABA Model Rules, however, does not help much in what you may say. While on the one hand it indicates, in *comments* only, that you may "withdraw or

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repugnant or imprudent objective or one with which the lawyer has fundamental disagreement. A lawyer may withdraw if the client refuses, after being duly warned, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

8. Withdrawal permitted by paragraph (b)(2) through (7) is optional with the lawyer even though the withdrawal may have a material adverse effect upon the interests of the client.

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

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

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

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

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

disaffirm any opinion, document, affirmation, or the like,"[131] nothing in the black letter law permits this in the context of fraud or financial harm (remember, the proposal that would have permitted this was defeated by a 63% vote). Thus, while you can withdraw because of client fraud (ABA Model Rule 1.16), the Model Rules do not let you to reveal any confidential information (ABA Model Rule 1.6). Moreover, the comments, but not the black letter of ABA Model Rule 1.6, indicate that whether "other law" requires disclosure prohibited by ABA Model Rule 1.6 is "beyond the scope of these Rules."[132] This is not much help in determining whether judicial decisions that allow nonclients to sue for fraud, negligent misrepresentation, or silence are "law" that can trump the duty of confidentiality.

Thus, trying to do a noisy withdrawal in states that have adopted the text of the ABA Model Rules may be as difficult as Odysseus' task of steering between Scylla and Charybdis.[133] No wonder that one commentator wrote, decades ago, the trouble with Rule 1.6 and the noisy withdrawal comment "is that some fools may not understand that Rule 1.6 does not mean what it seems to mean."[134]

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[131]ABA Model Rule 1.6, Comment 14. This comment states:

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

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

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

[133]As you recall, both were monsters of Greek legend between whom Odysseus had to steer in the Strait of Messina. Scylla, who ate several of Odysseus' seaman, had the face and breasts of a women as well as six dogs heads and twelve dogs' feet. Charybdis had been turned in to a monster by Zeus; she had been a daughter of Poseidon and Gaia. Charybdis, who lived in a cave opposite Scylla, sucked up water and spat it out three times a day, wrecking ships.

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

b. What's the Jurisprudence on Noisy Withdrawals?

A Westlaw search reveal only seven cases that have used the phrase "noisy withdrawal,"[135] although other cases have dealt with the issue without using this term.[136]

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[135] The Westlaw search, updated as of 9/2/16, reveals the following cases (emphasis supplied):

- *Dewar v. Smith*, 342 P.3d 328, 332-33 (Wash. App. Div. 1, 1/26/15). "But when Dewar requested a copy of Beddall's return, Smith had choices besides disclosing taxpayer information in violation of federal law or transmitting the misleading original return. He could have requested Beddall's consent to share the amended return. If, as expected, Beddall refused, Smith could have told Dewar that he couldn't share any further information because Beddall had revoked his consent to disclosure. As Dewar noted at oral argument, Smith could also have made a '***noisy withdrawal'*** of representation after Beddall changed the return address."
- *U.S. v. Beckman,* 787 F.3d 466, 482 (8th Cir. 5/12/15), "Morgan Lewis withdrew its services from the Oxford entities on June 27, 2008, sending a '***noisy withdrawal letter***,' because the attorneys 'reached the conclusion [their] advice was not going to be followed.'"
- *Peterson v. Winston & Strawn, LLP*, 729 F.3d 750, 752 (7th Cir. 9/6/13), "The SEC's rules sometimes require disclosure or '***noisy withdrawal,***' but the Funds were established in the Cayman Islands, and the Trustee does not contend that federal law governs the law firm's responsibilities."
- *In re Tolomeo,* 537 B.R. 869, 879 (USBC ND IL 9/15/15), "he Plaintiffs argue that adherence to the fiction of separate existence under the circumstances in this matter would also sanction a fraud. According to the Plaintiffs, this fraud is evidenced by the 'repeated ***noisy withdrawal***' of the Debtor's various attorneys, Laura's 'flagrant' violation of court orders compelling her to cooperate with respect to discovery requests, and various tactics that have been employed to delay this case. While these actions are ill-advised and unacceptable, they do not constitute or rise to the level of fraud."
- *S.E.C. v. Spiegel, Inc.,* 2003 WL 22176223 (D.C. N.D. Ill 9/15/03), "In addition, the SEC has proposed (but not yet adopted) so-called '***noisy withdrawal'*** rules that would require lawyers to assess whether the company has made an "appropriate response within a reasonable time" to the matter the lawyer has reported up the ladder, and if not, whether "substantial injury" to financial interest or property of the issuer or investors has occurred or is likely."
- *U.S. v. Young,* 2011 WL 10548619 (USDC S.D. AL 5/27/2011),

  > "MS. CLEVELAND: Judge, I asked to talk to you a minute. My client has just told me that he intends to take the stand. And in doing so I asked him specifically what things he planned on testifying about. And at this time I need to make a motion to withdraw, because there are some ethical issues that have arisen, if I continue to represent him when he takes the stand. To get into what they were specifically would violate attorney-client privilege. But have you ever heard the term of a "***noisy withdrawal***?"
  >
  > THE COURT: No, I can't say that I have. Well, is what he wants to testify about, would it be admissible? In terms of relevant to this lawsuit?
  >
  > MS. CLEVELAND: Some, some, some of it would. But again Judge, it puts me in an ethical quandary of that. Again, I can't specify what exactly it would be. But, again, Judge I don't make this motion lightly.

- *In re Teleglobe Communications, Corp*., 493 F.3d 345 (3rd Cir. 7/17/2007): "While there is much debate over how corporate counsel should go about promoting compliance with law (e.g., the usefulness of '***noisy withdrawal***' requirements versus going up the corporate chain with concerns), both sides of the debate seem to see in-house counsel as the 'front lines' of the battle to ensure that compliance while preserving confidential communications."
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[136] For some other cases on withdrawal during the course of litigation, see: *WSF v. Carter*, 803 So.2d 445, 448 (La. App. 2d Cir. 2001), withdrawal allowed when attorney found "certain criminal aspects" in his clients background – attorney not required to state details; *Jones v. Bhatt*, 50 Pa. D. & C. 544 (2001), attorney not allowed to withdraw where petition only asserted it would be in the client's best interest; *Burke v. Cunha*, 2000 WL 1273397 (Mass. Super. 2000), withdrawal proper when attorney realized "the superficiality of his client's claim"; *Lawyers Disciplinary Board v. Faber*, 488 S.E. 2d 460, 463 (W.V. 1997), lawyer suspended from practice for, among other things, in filing a motion to withdraw in which he went beyond mere allegations of reasons and gave an affidavit that his client "had engaged in a 'flat-out-lie'" and revealed confidential information.

See, for example, *Scholes v. Stone, McGuire and Benjamin*, 786 F.Supp. 1385 (N.D. Ill.1992), in which a lawyer who withdrew from representation and informed some people, but not investors in a company, was unable to dismiss, at pleading stage, a claim by the investors that the lawyer should have engaged in a noisy withdrawal as to them.

While the facts in *Scholes* are complex, in essence[137] a lawyer, Douglas was engaged to assist a person being investigated for selling unregistered securities. Douglas found out not only that were there material misrepresentations and omissions in the offering materials, but that her client was a convicted felon. Douglas prepared rescission materials for the offering that only indicated the securities were unregistered; they did not reference the prior misrepresentations or the fact that the offeror was a felon. All the investors rejected rescission. Further, Douglas also prepared an affidavit for the client that turned out to be false, an affidavit that the lawyer knew was being submitted to state officials investigating the stock transactions. When the lawyer found out about problems with the affidavit, she notified some people, but not the plaintiffs. Further, while Douglas knew some things, at the same time the client was lying to her about a number of other matters.

Douglas ended up advising the client that, because of his criminal problems, the client could not be associated with the entity and to "distance himself"[138] from it. Douglas recommended a second law firm ("SMB") to assist in criminal defense matters for the client. The plaintiffs also contended (although SMB denied it), that SMB was asked to also assist in corporate and securities matters. There were allegations in the complaint that SMB assisted Douglas in preparing the rescission documents that omitted

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

[138] 786 F. Supp. at 1392.

reference to both the client's prior criminal history and the material misrepresentations in the offering materials.

Eventually, a new entity was formed and some of the lawyers' other clients ended up as officers. When Douglas and her firm finally withdrew from representation, after finding out about further client deceit, they informed the independent officers to "disassociate themselves"[139] from the former client, but did not notify investors or regulators.

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

- The law firm was not being sued for failing to " 'tattle' on its client to third parties" but rather for being "an active participant in a fraudulent scheme." [140]

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

- The court concludes that the investors had alleged enough facts "to establish an attorney- client relationship"[141] and thus could state a claim for both malpractice and breach of fiduciary duty.

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

[139] *Id*.

[140] 786 F. Supp. at 1395.

[141] 786 F. Supp. at 1396.

- Even if there was no attorney-client relationship with the investors, nonetheless there was a relationship that mandated disclosure to investors of the fraud – this, in essence, is the noisy withdrawal assertion: ". . . SMB as lawyers for the . . . entities owed a duty to the plaintiff investors to disclose [the client's] fraudulent conduct with respect to the . . . entities. As there was no express contract between SMB and the plaintiff investors, it logically follows that the duty was extracontractual."[142] This relationship also allowed a breach of fiduciary claim to be brought.
- The fact that the misrepresentations were made not by the lawyers but by the clients did not prevent the suit from going forward. While the lawyer corrected some things in some transmittals to some people, there was no notice to the investors, and regardless of whether the statements to the investors came from the client or from documents that the lawyers had a hand in drafting for the client to send, the lawyers "had a duty to inform."[143]
- The fact that no reliance was alleged by the plaintiffs was not a bar to the suit going forward, for given that there were allegations the law firm had "omitted material facts and that they had participated in the fraud * * * it is unnecessary to allege reliance by the class plaintiffs."[144]
- SMB's motion for sanctions against the plaintiffs, on the grounds that SMB was only criminal counsel for the individual client and did not represent the entities, was denied, for the allegations 'are not so baseless, specious, or off the mark as to warrant the imposition of sanctions * * *

[142] 786 F. Supp. at 1398.

[143] 786 F. Supp. at 1400.

[144] 786 F. Supp. at 1401.

> [P]laintiffs have raised issues which relate to the very fluid and evolving areas of the law. Plaintiffs' complaint is not so tenuous as to warrant the imposition of sanctions."[145]

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

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

Whether one looks at the current ABA Model Rules or the 1983 Model Rules, the basic parameters of conflicts of interest are relatively similar. Lawyers cannot represent opposite sides in the same matter. Lawyers can represent others against former clients under certain restrictions, generally related to client confidences and whether the underlying facts are similar to the previous representation. A lawyer's personal interests may result in disqualification and a lawyer's family relationship with a lawyer on the other side of the table may also result in disqualification. Various imputation of knowledge rules apply to law firms, and some matters "infect" the entire law firm so that no one in the firm can take on the representation, while other matters can be quarantined so that the "infected lawyer" does not prevent the rest of the firm from handling the matter. A conflict may even arise in the absence of an express lawyer-client relationship (such as when a lawyer participates in a "beauty pageant" for selection of counsel, the discussion at the selection process discloses confidences, but the lawyer is not chosen by the prospective client).

[145] 786 F. Supp. at 1402.

All of these areas break down into three main topics; there are (a) those conflicts that cannot be waived under any circumstance; (b) those conflicts that can be waived; and (c) things that might be perceived to be conflicts but are not. On those conflicts that can be waived, the ABA Model Rules requires some waivers to be "confirmed in writing"[146] (*i.e*. the lawyer sends the letter explaining what has been agreed to orally), as long as the client has given "informed consent," which is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of conduct."[147]

There are literally hundreds of law review articles and publications on conflicts of interest. Some of the more recent ones that are worth taking a look at are set forth below in a footnote.[148] The first article one might look at, however, is one written by the Reporter for the ALI Lawyer Restatement, Professor Charles W. Wolfram, "Ethics 2000 And Conflicts Of Interest: The More Things Change" 70 Tenn. L. Rev. 27 (2002), which

[146] "Confirmed is writing" is defined by ABA Model Rule 1.0(b):

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

[147] ABA Model Rule 1.0(e).

[148] *See, e.g.*:Shapiro, Susan P., "Bushwhacking The Ethical High Road: Conflict Of Interest In The Practice Of Law And Real Life," 28 Law & Soc. Inquiry 87 (2003); Shapiro, Susan P., "If It Ain't Broke . . . An Empirical Perspective On Ethics 2000, Screening, And The Conflict-Of-Interest Rules ," 2003 U. Ill. L. Rev. 1299; Morgan, Amanda Kay Morgan "Screening Out Conflict-Of-Interests Issues Involving Former Clients: Effectuating Client Choice And Lawyer Autonomy While Protecting Client Confidences," 28 J. Legal Prof. 197 (2004); and Jones, Alexander W., "Defenses To Disqualification: Fact Situations That Allow An Attorney To Avoid Disqualification For A Conflict Of Interest," 27 J. Legal Prof. 195 (2003).

An interesting article that examines how law firm compensation systems could affect the creation of conflicts of interest is Bernstein, Edward, A., "Structural Conflicts Of Interest: How A Law Firm's Compensation System Affects Its Ability To Serve Clients," 2003 U. Ill. L. Rev. 1261

contains a broad overview of how the ABA Model Rules continued and, in some cases, altered the conflict of interest rules.

14. CONCLUSION

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

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

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

surprised if these court-developed uniform rules reflect the higher standards imposed upon litigation-related conduct, whether or not the negotiations occurred before or after a suit was filed.

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

> Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate. 571 F.Supp. 507, 512.[149]

The other is from a seminal article on legal ethics:

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

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

> standard created by the thesis that the same adversary met today may be faced again tomorrow, and one had best not prejudice that future engagement.[150]

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

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

One may not agree with those who contend that the ethical basis of negotiations (or any extra-tribunal actions) should be one of truth and fair dealing, that as professionals lawyers should "not accept a result that is unconscionably unfair to the other party."[151] Yet, it would be hard to argue with a more practical formulation, given the serious possibility that a single standard will ultimately evolve jurisprudentially:

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

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

[151] *Id*. at p. 591.