

## Louisiana Law Review

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Volume 56 | Number 2

*The Romanist Tradition in Louisiana: Legislation,  
Jurisprudence, and Doctrine: A Symposium*  
Winter 1996

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# The Ethics of Negotiations: Are There Any?

Michael H. Rubin

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### Repository Citation

Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 La. L. Rev. (1996)  
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# The Ethics of Negotiations: Are There Any?

Michael H. Rubin\*

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## I. QUOTATIONS OF INTEREST

"Thou shalt not bear false witness against thy neighbor."<sup>1</sup>

"Thou shalt neither side with the mighty to do wrong."<sup>2</sup>

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 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.

\* \* \*

While it might strain present concepts of the role of the lawyer in an adversary system, surely the professional standards must ultimately impose upon him a duty not to accept an unconscionable deal. While some difficulty in line-drawing is inevitable when such a distinction is sought to be made, there must be a point at which the lawyer cannot ethically accept an arrangement that is completely unfair to the other side, be that opponent a patsy or a tax collector. So I posit a second precept: *The lawyer may not accept a result that is unconscionably unfair to the other party.*<sup>3</sup>

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1. *Exodus* 30:13.

2. *Exodus* 33:2.

3. Judge Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 La. L. Rev. 577, 589, 591 (1975).

"[T]o mislead an opponent about one's true settling point is the essence of negotiation."<sup>4</sup>

## II. INTRODUCTION

Alternative dispute resolution ("ADR") is designed to avoid the courtroom and litigation. It is designed to operate outside of the court and only to be enforceable, if at all, by a court's confirmatory decree. Participants in creating ADR structures should consider what ethical rules, if any, apply in ADR absent litigation or express agreement of the parties.

Both the Model Code and the Model Rules distinguish between non-litigation behavior and behavior that takes place after a suit is filed. This paper argues for a single ethical standard for non-litigation and litigation lawyer conduct.

## III. THE PROBLEM UNDER THE MODEL CODE

Although lawyers hold themselves out as part of a profession, bar-promulgated rules relating to the ethics of negotiation are, at best, sparse and perfunctory.

The Model Code of Professional Responsibility (Model Code) has been criticized for putting the adversary process above the search for ultimate justice. Under the Model Code of Professional Responsibility, zealous advocacy of a client "within the bounds of the law" is the touchstone concept. Canon 7 of the Model Code requires that all doubts be resolved in favor of the client. Pertinent portions of Model Canon 7 provide:

A Lawyer Should Represent a Client Zealously within the Bounds of the Law

### Ethical Considerations

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client *zealously within the bounds of the law*, which includes Disciplinary Rules and enforceable professional regulations.<sup>5</sup>

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different . . . . *While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.*<sup>6</sup>

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4. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 Am. B. Found. Res. J. 926, 928 (1980).

5. Model Code of Professional Responsibility EC 7-1 (1995) (emphasis added) (footnotes omitted).

6. Model Code of Professional Responsibility EC 7-3 (1995) (emphasis added) (footnotes omitted).

Canon 7, in its Ethical Considerations, distinguishes between the responsibility of a lawyer as advocate in a "tribunal" and the responsibility of a lawyer outside the "tribunal."<sup>7</sup> While courts are clearly "tribunals," the exact scope of the term "tribunal" is not clear. Is a voluntary mediation a "tribunal"? Does it matter if the mediation is commanded through a court-ordered ADR rule? The Model Code provides no answers.

Model EC 7-5 allows a lawyer to continue to represent a client who engages in questionable conduct as long as the conduct is not "illegal;" Model EC 7-4 allows the lawyer to defend the client's actions with "any permissible construction of the law," as long as a position taken in litigation is not "frivolous." The Ethical Considerations further distinguish between criminal acts and other acts. Under the Ethical Considerations, it apparently is acceptable for an attorney to take or imply positions that an attorney would consider of little merit. Likewise, an attorney apparently may allow the client to voice such positions. The only prohibition is against criminal acts or "frivolous" legal positions. The prohibition against asserting "frivolous" legal positions appears weak given the fact that the Model Code requires that all doubts be resolved in favor of the client:

EC 7-4 The advocate may urge *any permissible construction* of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.<sup>8</sup>

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. *He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position.* A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.<sup>9</sup>

While a lawyer should "treat with consideration all persons involved in the legal process"<sup>10</sup> (e.g., smile while you are taking advantage of the other person), the lawyer must always act in the best interest of the client. The lawyer may request that the client give permission for the attorney not to act in a manner that seems unjust, but if the client refuses permission, the Model Code

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7. Compare the detailed Rules in EC 7-19 through 7-38, dealing with tribunals, with the limited discussion elsewhere in Canon 7 about negotiation tactics.

8. Model Code of Professional Responsibility EC 7-4 (1995) (emphasis added) (footnotes omitted).

9. Model Code of Professional Responsibility EC 7-5 (1995) (emphasis added) (footnotes omitted).

10. Model Code of Professional Responsibility EC 7-10 (emphasis added).

is silent.<sup>11</sup> Despite the dichotomy between negotiation and litigation contained in Section 7 of the Model Code's Ethical Considerations, the accompanying Disciplinary Rule uses stronger language than the Ethical Considerations.<sup>12</sup> Under DR 7-102 a lawyer shall not "knowingly make a false statement of law or fact" or fail to reveal a fraud "to the affected person or tribunal, except when the information is protected as a privileged communication." Although making a "false statement of law or fact" is prohibited, DR 7-102 appears to be directed at in-court conduct and seldom, if ever, has been applied to false statements that are not "illegal."

If a lawyer *has* to act as a zealous advocate, then the client's interest becomes paramount; it may overwhelm an even-handed approach to negotiations or trials. Clients never ask for a negotiator who is "equal" to the other side—a client wants a negotiator who is better than the other side.

The "zealous advocate" criterion received criticism during the reworking of the Model Code of Professional Responsibility into the Model Rules. Interest-

11. EC 7-9 provides:

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he *may* ask his client for permission to forego such action.

Model Code of Professional Responsibility EC 7-9 (1995) (emphasis added) (footnotes omitted).

12. DR 7-102 provides:

DR-7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer *shall not*:

- (1) File a suit, assert a position, conduct a defense, delay in trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
- (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
- (3) Conceal or knowingly fail to disclose that which he is required *by law* to reveal.
- (4) Knowingly use perjured testimony or false evidence.
- (5) Knowingly make a false statement of law or fact.
- (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
- (7) *Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.*
- (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a *fraud* upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, *he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.*
- (2) A person other than his client has perpetrated a *fraud* upon a tribunal shall promptly reveal the *fraud* to the tribunal.

Model Code of Professional Responsibility DR 7-102 (1995) (emphasis added) (footnotes omitted).

ingly, in their final formulation, the original draft of the Model Rules was altered significantly. The final text speaks only vaguely of ethical conduct during the course of negotiations outside the Court.

#### IV. THE PROBLEM UNDER THE MODEL RULES

When the Model Rules of Professional Conduct (Model Rules) were drafted, the ABA specifically rejected requiring truth in negotiations.<sup>13</sup> The preamble contained hortatory language:

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

The final draft adopted this language. The Model Rules themselves, however, contain no requirement of honest dealing. As finally adopted, the Model Rules reflect a tension between maintaining the attorney-client privilege and determining under what circumstances an attorney can reveal otherwise privileged communications. Model Rule 1.6, as proposed, required an attorney to reveal communications the lawyer reasonably believed necessary:

to prevent the client from committing a . . . fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another.<sup>14</sup>

As proposed, Model Rule 1.6 did not treat privileged information as a bar; an attorney was required to speak out to prevent substantial financial injury to another even if the client desired the information not be revealed. This rule, as proposed, enshrined the concept of fair dealing. The proposed language was deleted, however, because the drafters feared that the proposed Model Rule would transform a lawyer "into a 'policeman' over a client."<sup>15</sup> The language requiring lawyers to act if the client was going to commit a "fraudulent act" causing substantial injury to the financial interests or property of others disappeared completely from the final text of Model Rule 1.6. Arguably, the disappearance implies that the Bar Association believes it proper for a lawyer to remain silent in the face of actions that, fraudulent or not, can cause substantial injury to the financial interests or property of another as long as the information is privileged. This implication appears to be substantiated by a corresponding change made in the proposed Model Rule 4.1. As proposed, Model 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

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13. Center for Professional Responsibility, American Bar Association, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates (1987)* ["Legislative History"].

14. Model Rules of Professional Conduct Rule 1.6 (Proposed Official Draft 1982).

15. See *Legislative History*, *supra* note 13.

the Rule. In its final version, the language requiring complete truthfulness on all occasions, even if it revealed a potential client confidence, was deleted.<sup>16</sup>

Truthfulness and fair dealing are *not* required by the Model Rules. The Official Comments take a different approach and specifically allow "puffing," "failing to be truthful about settlement amounts" and other matters, as long as such statements or omissions are short of "fraud."<sup>17</sup>

The Comment to Model Rule 1.6 interacts with the Comment to Model Rule 4.1; truth is not the objective. In negotiations, a lawyer is entitled (but never required) to reveal client confidences if making a disclosure "facilitates a satisfactory solution."<sup>18</sup> A satisfactory solution is not necessarily one that is equitable to both sides. A lawyer is not required to reveal a confidence in order to reveal the truth. The Rule contains a clear demarcation: conduct that is "fraudulent" is forbidden, but all else is merely part of negotiating strategy.

In light of these two rules, other language of the Model Rules, such as that in Rule 2.1 allowing (but not mandating) lawyers to consider moral issues, may tend to ring somewhat hollow.<sup>19</sup> The Comment to Model 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

16. 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
  - (2b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6.*
- ~~(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~

Legislative History, *supra* note 13, at 145.

17. The Official Comment to Model Rule 4.1 provides:

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.

Model Rules of Professional Conduct Rule 4.1 cmt. (1995).

18. Model Rules of Professional Conduct Rule 1.6 cmt. (1995).

19. "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." Model Rules of Professional Conduct Rule 2.1 (1995) (emphasis added). These rules, which relate to negotiation, are in sharp contrast to the rules regulating conduct before a tribunal. While the language of the Model Rules 3.3(a)(1) and 4.1(a) is identical in stating a lawyer "shall not knowingly make a false statement of material fact or law, . . ." there was an attempt made to subordinate the lawyer's duty of candor to the court to the rules relating to privilege. The proposed amendments were defeated because, as the discussion notes, "the duty of candor toward the court was regarded as paramount." Legislative History, *supra* note 13, at 122.



fact;" apparently the Rule permits a lawyer to lie with impunity about settlement authority. Model Rule 3.1, however, makes no such exemption in the comments concerning candor to the tribunal, and probably for good reason. A lawyer who, during a settlement conference with a judge, misstates the client's intention as to an acceptable settlement undoubtedly acts at his or her peril. While Rule 3.4 does relate to "fairness to opposing party and counsel," it seems solely directed at trial procedure.

The limited rules relating to negotiation, 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 Eleanor Holmes Norton noted:

The Model Rules do not exempt negotiation from ethical constraints, but neither are the rules drafted to address the demands of bargaining with the same specificity that they address the demands of litigation. No rule or law requires fairness during negotiation . . . \* \* \* [In] negotiation, where there is only the sparsest written guidance, the parties must decide for themselves what is legal, what is factual, and what is ethical.<sup>20</sup>

## V. AN OVERVIEW OF ISSUES

Given the Model Code's emphasis on zealous representation of the client, and the deliberate deletion of a requirement of fair dealing from the Model Rules,<sup>21</sup> one can posit a series of issues that relate to both in-court and pre-litigation negotiations:

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20. Eleanor H. Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L. Rev. 493, 529 (1989).

21. The following list shows the status of the Code and Rules nationwide as of 1994, according to the ABA/BNA Lawyers' Manual on Professional Conduct:

<i>Alabama:</i>	Model Rules as amended; Jan. 1, 1991.
<i>Alaska:</i>	Model Rules as amended; July 15, 1993.
<i>Arizona:</i>	Model Rules as amended; Feb. 1, 1985.
<i>Arkansas:</i>	Model Rules as amended; Jan. 1, 1986.
<i>California:</i>	Follows neither Model Rules nor Model Code; May 27, 1989.
<i>Colorado:</i>	Model Rules as amended; Jan. 1, 1993.
<i>Connecticut:</i>	Model Rules as amended; Oct. 1, 1986.
<i>Delaware:</i>	Model Rules as amended; Oct. 1, 1985.
<i>District of Columbia:</i>	Model Rules as amended; Jan. 1, 1991.
<i>Florida:</i>	Model Rules as amended; Jan. 1, 1987.
<i>Hawaii:</i>	Model Rules as amended; Jan. 1, 1994.
<i>Idaho:</i>	Model Rules as amended; Nov. 1, 1986.
<i>Illinois:</i>	Structure of Model Rules, with substance from both Model Rules and Model Code; Aug. 1, 1990.

- a. Failing to fully disclose the extent of settlement authority
- b. Deliberate lies as a tactic in negotiations
- c. Failing to give complete answers to information and instead giving truthful but deliberately narrow answers
- d. Failing to correct a misapprehension on the part of the opposing side of a fact or law—the question of silence
- e. Failing to speak or to correct a lie or misstatement or misleading statement by your client or co-counsel
- f. Defining issues or facts are “material”
- g. Conflict of Law rules—which rules apply to multi-state negotiations.

Although the first five are all tactics that are designed to mislead an opponent, some of them are entirely permissible under the Model Rules and the Model Code in pre-litigation negotiations; however, they become impermissible in a courtroom setting. The “permissibility” of each tactic in a negotiation depends upon how one views conduct designed to be misleading.

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<i>Indiana:</i>	Model Rules as amended; Jan. 1, 1987.
<i>Kansas:</i>	Model Rules as amended; March 1, 1988.
<i>Kentucky:</i>	Model Rules as amended; Jan. 1, 1990.
<i>Louisiana:</i>	Model Rules as amended; Jan. 1, 1987.
<i>Maryland:</i>	Model Rules as amended; Jan. 1, 1987.
<i>Michigan:</i>	Model Rules as amended; Oct. 1, 1988.
<i>Minnesota:</i>	Model Rules as amended; Sept. 1, 1985.
<i>Mississippi:</i>	Model Rules as amended; July 1, 1987.
<i>Missouri:</i>	Model Rules as amended; Jan. 1, 1986.
<i>Montana:</i>	Model Rules as amended; July 1, 1985.
<i>Nevada:</i>	Model Rules as amended; March 28, 1986.
<i>New Hampshire:</i>	Model Rules as amended; Feb. 1, 1986.
<i>New Jersey:</i>	Model Rules as amended; Sept. 10, 1984.
<i>New Mexico:</i>	Model Rules as amended; Jan. 1, 1987.
<i>New York:</i>	Amended Model Code incorporating substance of some Model Rules; Sept. 1, 1990.
<i>North Carolina:</i>	Takes structure and substance from both Model Rules and Model Code; Oct. 7, 1985.
<i>North Dakota:</i>	Model Rules as amended; Jan. 1, 1988.
<i>Oklahoma:</i>	Model Rules as amended; July 1, 1988.
<i>Oregon:</i>	Amended Model Code incorporating substance of some Model Rules; June 1, 1986.
<i>Pennsylvania:</i>	Model Rules as amended; April 1, 1988.
<i>Rhode Island:</i>	Model Rules as amended; Nov. 15, 1988.
<i>South Carolina:</i>	Model Rules as amended; Sept. 1, 1990.
<i>South Dakota:</i>	Model Rules as amended; July 1, 1988.
<i>Texas:</i>	Model Rules as amended; Jan. 1, 1990.
<i>Utah:</i>	Model Rules as amended; Jan. 1, 1988.
<i>Virginia:</i>	Amended Model Code incorporating substance of some Model Rules; Oct. 1, 1983.
<i>Washington:</i>	Model Rules as amended; Sept. 1, 1985.
<i>West Virginia:</i>	Model Rules as amended; Jan. 1, 1988.
<i>Wisconsin:</i>	Model Rules as amended; Jan. 1, 1988.
<i>Wyoming:</i>	Model Rules as amended; Jan. 12, 1987.

The last two items in the list concern matters not of behavior but of law. Defining which issues or facts are "material" requires exploring which conduct and tactics the Model Rules and the Model Code permit. The definition chosen may impact how a court may interpret conduct.<sup>22</sup> The same conduct may be interpreted entirely differently depending upon which law or standard may be considered applicable—be it a state bar association's applicable Rules or Code, or the federal or state court rules or inherent powers.

How and where one conducts negotiations, and whether the negotiations occur before or after litigation is filed, may lead to vastly different interpretations of permissible activities. Whether there ought to be different interpretations or forms of behavior depending upon the forum is the focus of this paper.

## VI. TACTICS DURING NEGOTIATION

Discussions of what is and is not unethical during negotiations have consumed reams of paper with law review articles containing, in the aggregate, thousands of footnotes. On the one side is Judge Rubin's 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.<sup>23</sup> At the other end of the spectrum are those who argue that obtaining the best result for the client is the proper overall goal and should be pursued vigorously in the absence of outright fraud. Discussions of this view can be found in the writings of Professors James J. White<sup>24</sup> and Charles Curtis.<sup>25</sup>

The legal community's concern with negotiating tactics is illustrated by titles to law review articles such as *Ethics on the Table: Stretching the Truth in Negotiations*<sup>26</sup> and *The Ethics of Lying in Negotiations*.<sup>27</sup> Many of these articles contain a search for principles that should guide attorneys during negotiations. The fact that these authors have felt a need to develop and articulate criteria for negotiations indicates that the Model Code and the Model Rules are seriously deficient in this regard.

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22. It is interesting to note that the word "material" appears nowhere in Rule 11 of the Federal Rules of Civil Procedure. One may speculate whether this is because a court considers every word in every pleading to be "material." If this is so, then it undermines the Model Rules and the Model Code's distinction between "material" issues and facts and those that are not "material" and therefore capable of receiving less than a fully truthful response.

23. Rubin, *supra* note 3, at 589, 591. Norton characterizes this as an "expression of a universalist vision." Norton, *supra* note 20, at 513.

24. White, *supra* note 4, at 926.

25. Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951). Professor Norton calls Professor Curtis' view "stark traditionalism." Norton, *supra* note 20, at 513.

26. Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 Rev. Litig. 173 (1988).

27. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 76 Iowa L. Rev. 1219 (1990).

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

Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one's effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. Our clients, our partners and employees, and our families are all counting on us to deliver the goods. Accordingly and regrettably, lying is not the province of a few "unethical lawyers" who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.

Our discomfort with that fact has, I believe, led us to create and embrace a discourse on the ethics of lying that is uncritical, self-justificatory and largely unpersuasive. Our motives in this seem reasonably clear. Put simply, we seek the best of both worlds. On the one hand, we would capture as much of the available surplus as we can. In doing so, we enrich our clients and ourselves. Further, we gain for ourselves a reputation for personal power and instrumental effectiveness. And we earn the right to say we 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 . . .<sup>28</sup>

## VII. 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,"<sup>29</sup> an "almost pathological pro-client attitude,"<sup>30</sup> or "'total annihilation' of the other side,"<sup>31</sup> or other, less pejorative phrases, "effective" negotiation often is said to involve "misdirection." "Misdirection" can encompass either silence or a true but incomplete statement of facts. Both are designed to lead the other party to an erroneous conclusion about the facts or the client's true position. The excuse

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28. Wetlaufer, *supra* note 27, at 1272.

29. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 Md. L. Rev. 1, 71 (1992).

30. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L. Rev. 311, 330 (1990).

31. Lawry, *supra* note 30, at 331.

for this behavior, 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."<sup>32</sup>

Other methods of justifying a "lie" or "mistruth" exist.<sup>33</sup> All justifications, however, share some common themes. In all cases the negotiation process is claimed by attorneys not to be unfair because the parties expected (or should have expected) such conduct, or the result is justified because of the circumstances or because of the perceived "duty" to one's client.<sup>34</sup> Such justifications, however, proceed from an initial but unspoken assumption—that being less than truthful is acceptable conduct for a member of the legal profession.

#### VIII. AN HISTORICAL CONTEXT

Whether one calls it "misdirection," "puffing," "bluffing," or some other term, one may find numerous philosophical tracts, besides biblical injunctions,<sup>35</sup>

32. Wetlaufer, *supra* note 27, at 1237.

33. Professor Wetlaufer includes:

1. I lied, if you insist on calling it that, but it was an omission of 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.
5. I lied but it was justified by the nature of the negotiations.
6. Lying is within the rules of the game.
7. I lied but it was justified by my relationship to the victim.

Wetlaufer, *supra* note 27, at 1241-50.

34. 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, *supra* note 27, at 1242-43.

35. The Talmud, a 20-volume rabbinic exegesis on the Torah, the first five books of the Bible, contains comments and explanations of biblical language. 2 Nehama Leibowitz, *Studies in Shemot* (1976).

contemplating whether absolute truthfulness is always desirable. The Greeks and Romans wrote much on this subject.

Aeschylus had Prometheus say:

The worst disease of all, I say,  
Is fabricated speeches and disguise.<sup>36</sup>

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

But the most luxuriantly fertile field of all is that of our moral obligations—since, if we clearly understand these, we have mastered the rules for leading a good and consistent life.

*Leviticus* 19:12 states "[a]nd deal not falsely with each other." The Talmud points out that this implies "not only the negative avoidance of actual falsehood, but also meticulous care in refraining from anything which might conceivably savour of untruth, even though it was not obviously dishonest." Leibowitz, *supra*, at 437. Truth could be waived or altered only in the interests of peace. Peace, such as not hurting another's feelings, "in certain instances is more important than telling the whole truth." Leibowitz, *supra*, at 439. Note that variations from the truth were permissible only to further peace, not to obtain a material advantage.

The Talmud also addresses whether silence was appropriate. In illustrating the biblical injunction "[k]eep thee far from a false matter," the Talmud gives the example of a teacher who needs two witnesses to claim some money that was stolen. Leibowitz, *supra* at 445. The teacher tells the student to come along and remain silent; the other side will think that the student is the teacher's second witness and will capitulate, and the student can remain silent the whole time. The teacher tries to contend that this is acceptable, for the student will not have to speak and will not actually utter an untruth. Leibowitz, *supra*, at 445. This conduct, however, is forbidden. The mere act of remaining silent, leading another to an incorrect conclusion, is as unacceptable as an outright verbal lie.

Giving misleading advice is also forbidden. It violates the rule that one should not "put a stumbling block before the blind," *Leviticus* 19:14, whether the person is actually blind or merely figuratively blind from lack of knowledge. Nehama Liebowitz, *Studies in Vayikra* 174, 175 (1980).

Fair dealing in pricing is given as another example. *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, or 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.

Leibowitz, *supra*, at 267.

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.

36. Aeschylus, *Prometheus Bound* (Paul Roche trans., Mentor Classics 1962-64).

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The most thorough analysis of moral obligations is unquestionably that of Panaetius, and on the whole, with certain modifications, I have followed him. The questions relating to this topic which arouse most discussion and inquiry are classified by Panaetius under three headings:

1. Is a thing morally right or wrong?
2. Is it advantageous or disadvantageous?
3. If apparent right and apparent advantage clash, what is to be the basis for our choice between them?

\* \* \*

So let us regard this as settled: what is morally wrong can never be advantageous, even when it enables you to make some gain that you believe to be to your advantage. The mere act of believing that some wrongful course of action constitutes an advantage is pernicious.<sup>37</sup>

Cicero wrote about situations involving hard bargaining in business and sharp practices in the law. Among Cicero's examples was that of a merchant from Alexandria who brought to Rhodes, which was suffering a food famine, a large stock of corn. He was aware that other traders were on their way from Alexandria with substantial cargoes of grain. The dilemma for the merchant 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 although 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 what is 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.<sup>38</sup>

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37. Cicero, *Selected Works* 177 (Michael Grant trans., Penguin Books 1960).

38. Cicero, *supra* note 37, at 178-79.

Cicero traces the requirement of honesty and fair dealings to the Twelve Tables, the earliest and most fundamental of Roman laws, circa 450 B.C., and to the Plaetorian law, circa 192 B.C. Pointing out that honesty and fair dealing are appropriate criteria, Cicero notes that "the laws in our Civil Code relating to real property stipulate that in a sale any defects known to the seller have to be declared." It was impermissible to suppress facts, even if no inquiry was made by the other side. Cicero writes that although the civil law does not reach all moral wrongs, there is nobility in the following formulas:

That I not be deceived and defrauded because of you and because of trust in you. And that other golden phrase: between honest men there must be honest dealing and no deception.<sup>39</sup>

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

Good faith obliges the seller not only to refrain from suppressing the intrinsic faults of what he sells, but universally from concealing anything concerning it, which might possibly induce the buyer not to buy it all, or not to buy at so high a price.<sup>40</sup>

Thus, the civil law system adopted, as a basic tenet, the concept of honest dealing.

#### IX. CIVIL LAW AND COMMON LAW APPROACHES TO NEGOTIATION

Although both the civil law and the common law are based on principles of Roman law,<sup>41</sup> the two systems developed different approaches to the negotiation process.<sup>42</sup>

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39. Cicero, *supra* note 37, at 185.

40. Robert J. Pothier, *Traite Du Contrat de Vente*, in 2 Oeuvres de Pothier 106 (M. Dupin ed., 1823).

41. For a detailed discussion of this point, see Symposium, *Relationships Among Roman Law, Common Law, and Modern Civil Law*, 66 Tul. L. Rev. 1745 (1992).

42. Because all states other than Louisiana have a legal system based on the common law, common-law lawyers tend to ignore the history and structure of the civil law. Litigators who have argued a case before the esteemed and famous 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 elicit a quick response from Judge Wisdom. Judge Wisdom has been known, during such oral argument, to paraphrase Disraeli's famous address to Parliament and state:

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.



While the civil law has long honored truth in negotiations, the common law took the opposite approach, postulating the rule of *caveat emptor*; the civil law rule, however, is *caveat venditor*. In *Laidlaw v. Organ*, Chief Justice Marshall, in fact, rejected the concept of honesty and fair dealings when facts are "equally accessible to both parties."<sup>43</sup> 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, prior to the sale, whether Organ knew of anything that might affect the tobacco's value and Organ said nothing. In fact, Organ knew that the price of tobacco had risen steeply because the Treaty of Ghent had been signed, ending the War of 1812. Organ, the buyer, won because he had no obligation, said Justice Marshall, to speak. Remaining silent was permissible,<sup>44</sup> even though Organ knew that Laidlaw was under a misapprehension.<sup>45</sup>

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, leads to "the sense of injustice."<sup>46</sup> Professor Edmond Cahn's famous book by this title argues for a philosophy that restores a sense of justice and avoids a sense of injustice in the law.

Nevertheless, philosophers have long held the opposing opinion: that justice or righteousness is the source, the substance, and the ultimate end of law. Such a doctrine was announced at least as early as the Book of Leviticus and the masterpieces of the Athenian enlightenment. It developed under the influence of the Stoics through the centuries of decadence in the Roman republic and early empire, assumed a pseudo-Christian guise by the time of Justinian's *Corpus Juris*, flourished amid the brutalities of medieval Europe, and became, in the skillful hands of Thomas Aquinas, an authentic tenet of theology.<sup>47</sup>

#### X. THE LOUISIANA CIVIL CODE AND FAIR DEALING

Three examples will show how the Louisiana Civil Code, which traces its roots directly back to the French *Code Napoleon* and the Spanish *Fuero Real*,<sup>48</sup>

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Bolstered by Judge Wisdom's example, it is now appropriate to review some principles of civil law that address these issues and contrast them to the common law.

43. *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 195 (1817).

44. 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." *Id.* at 193.

45. For a critique of this view, see Professor Shael Herman, *The Louisiana Civil Code, A European Legacy for the United States* 42-43 (Louisiana Bar Foundation 1993).

46. Edmond N. Cahn, *The Sense of Injustice* (1964).

47. *Id.* at 3.

48. For a brief introduction to the clash between those who claim the Louisiana Civil Code is primarily either French or Spanish in origin, see Rodolfo Batiza, *The Actual Sources of the Louisiana*

enshrines notions of good faith, fair dealing, and not taking unconscionable advantage of others: the concept of error, lesion beyond moiety, and redhibition.

#### A. *The Concept of Error in the Louisiana Civil Code*

More than a century before the U.C.C. enacted a rule relating to "good faith,"<sup>49</sup> before the Restatement Second, Contracts, dealt with non-disclosure<sup>50</sup> or half-truths,<sup>51</sup> and before the Restatement, Second, Torts, dealt with materially misleading representations,<sup>52</sup> Louisiana law had codified rules relating to the kinds of error that would nullify contracts. If Party A knew at the time of contracting that Party B was laboring under an error of fact which was the principal cause of the contract,<sup>53</sup> then Party B may revoke the contract if Party B's error proceeded from "ignorance of that which really exists, or from a mistaken belief in the existence of that which has none."<sup>54</sup> A failure by the party with knowledge to correct the mistaken impression "comes under the head of fraud."<sup>55</sup> Likewise, an error in the substance or substantial quality of an object (e.g., the buyer purchased something believing it was silver, but it was not) is cause to revoke the contract.<sup>56</sup> "Fraud" under Louisiana law was a form of error that voided a contract, whether the fraud was caused by a false assertion or a suppression of the truth.<sup>57</sup> The rules of fair dealing embodied in the

*Projet of 1823: A General Analytical Survey*, 47 Tul. L. Rev. 1 (1972); Rodolfo Batiza, *The Influence of Spanish Law in Louisiana*, 33 Tul. L. Rev. 29 (1958); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972); Joseph M. Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 Tul. L. Rev. 585 (1972).

49. U.C.C. §§ 1-201(19) and 1-203.

50. See Restatement (Second) of Contracts § 161 (1979).

51. Restatement (Second) of Contracts § 159 (1979).

52. Restatement (Second) of Torts § 529, § 551(2) (1971).

53. La. Civ. Code art. 1826 (1870). See *Marcello v. Bussiere*, 284 So. 2d 892 (La. 1973).

54. La. Civ. Code art. 1821 (1870). Article 1821 is directly traceable to article 1814 of the Louisiana Civil Code of 1825.

55. La. Civ. Code art. 1832 (1870).

56. La. Civ. Code arts. 1843, 1844 (1870).

57. La. Civ. Code art. 1847 (1870) provided, in pertinent part:

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause inconvenience or loss to the other. From which definition are drawn the following rules:

1. Error is an essential part of the definition . . .
2. The error must be on a material part of the contract . . .
3. A false assertion as to the value of that which is the object of the contract, is not such an artifice as will invalidate the agreement, provided the object is of such a nature and is in such a situation that he, who is induced to contract by means of the assertion, might with ordinary attention have detected the falsehood; he shall then be supposed to have been influenced more by his own judgment than the assertion of the other.
4. But a false assertion of the value or cost, or quality of the object, will constitute such artifice, if the object be one that requires particular skill or habit, or any difficult or

doctrine of error, enacted by statutory law in Louisiana in 1825, remain valid today.<sup>58</sup>

### B. *Lesion Beyond Moiety*

An unconscionably unfair price advantage is not, and has never been, allowed under Louisiana law in sales of immovable property, regardless of the skill (or lack of skill) of the negotiators. Within four years of a sale, if the seller of land discovers that he or she has sold immovable property for less than half its true value, either the sale can be revoked or the purchaser can be forced to pay the true value.<sup>59</sup> The rule not only protects unwary sellers against sharp buyers, but it also applies when both parties are ignorant of the immovable's true value. This indeed is a righteous concept of fair negotiation.

### C. *Redhibition*

Louisiana law allows, and always has allowed, a purchaser to rescind a sale if the thing purchased contains a defect that "renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice."<sup>60</sup> Defects apparent from a simple inspection are not covered.<sup>61</sup> All other defects are covered, including those in animals as well as in inanimate objects and land.<sup>62</sup> The seller's ignorance of the vice or defect is not an excuse that will prevent the sale from being unwound or the price reduced. A good faith seller, however, is liable for a narrower range of damages than a manufacturer of a defective product or a seller who knows about, but fails to reveal, the defect.<sup>63</sup>

inconvenient operation to discover the truth or falsity of the assertion.

5. It must be caused or continued by artifice, by which is meant either an assertion of what is false, or a suppression of what is true . . .

6. The assertion and suppression, mentioned in the last preceding rule, mean not only an affirmation or negation by words either written or spoken, but by any other means calculated to produce a belief of what is false, or an ignorance or disbelief of what is true.

7. The artifice must be designed to obtain either an unjust advantage . . . or a loss or inconvenience to him against whom it is practiced, although attended with advantage to no one.

58. La. Civ. Code arts. 1949, 1950, amended by 1984 La. Acts No. 331, § 1.

59. La. Civ. Code arts. 1860-1880, 2589-2600 (1870). The rule of lesion does not apply to sales of movable property. La. Civ. Code art. 2594.

60. La. Civ. Code art. 2520. Article 2520 traces directly back to Article 1641 of the Code Napoleon.

61. La. Civ. Code art. 2521.

62. La. Civ. Code art. 2526 points out that "the absolute vices of horses and mules are short wind, glanders and founder."

63. Compare La. Civ. Code art. 2531 (dealing with a good faith seller) with La. Civ. Code arts. 2545-2548 (describing the liability of one who conceals defects).

#### D. The Civil Law Enacts Fair Dealing

Taken together, these three concepts—error, lesion, and redhibition—show how the civil law system promotes both truth and fair negotiations. These rules were not evolved by courts, but rather were enacted by the legislature based upon Roman law principles and set forth in clear and concise language which anyone can understand.<sup>64</sup>

### XI. NON-LITIGATION NEGOTIATIONS

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.<sup>65</sup>

When the time comes 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, courts seldom explicitly discuss the differences between the professional rules that relate to negotiations and rules that relate to in-court conduct.

Securities litigation often deals with problems analogous to ethical negotiation, e.g., truthfulness and fair dealing, in the context of purchase and sale of securities. There, a separate body of law defines "material facts" and "material omissions." However, even in the highly regulated securities field, where the liability is statutory, courts have differing views on whether fair dealing obligations to the public outweigh obligations to clients or to a corporation. The *Dirks* case is a famous example.<sup>66</sup> A 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

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64. The Louisiana Civil Code is remarkably easy to read and avoids grammatical contortions. This trait is shared by all true civilian codes. Most Louisiana Civil Code articles do not exceed one paragraph and are free from the kind of convoluted internal cross-referencing that plagues such "codes" as the Internal Revenue Code or even the Uniform Commercial Code. For a discussion of the evolution of the Louisiana Civil Code and its concepts, see Joseph Dainow, *Introduction to The Civil Code of Louisiana* (1961); A.N. Yiannopoulos, *Property*, in 2 Louisiana Civil Law Treatise (1991); 1 Saul Litvinoff, *Obligations*, in 6 Louisiana Civil Law Treatise (1969).

65. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1518 (1986). For a state opinion, see New York 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.

66. *Dirks v. Securities & Exch. Comm'n*, 681 F.2d 824 (D.C. Cir. 1982), *rev'd sub nom. Dirks v. Securities & Exch. Comm'n*, 463 U.S. 646, 103 S. Ct. 3255 (1983).

did not cleanse the failure to disclose the information to the S.E.C. or the public.<sup>67</sup> 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."<sup>68</sup> The dissent would have found Dirks liable, claiming that an inquiry into motives was not necessary.<sup>69</sup> Although the motives may have been "laudable," Justice Blackman wrote for the dissent, "the means he chose were not. . . . As a citizen, Dirks had at least an *ethical obligation* to report the information to the proper authorities."<sup>70</sup> If the courts have difficulty in delineating ethical duties in the highly regulated securities field, then it is not unexpected that the regulation of ethics in general negotiations is even more troublesome.

Some cases deal with negotiations in real estate transactions. Many involve alleged fraud by a seller or lender and the potential liability of a lawyer handling the closing who attempts to satisfy the conflicting demands of the lender, buyer, and seller.<sup>71</sup> What is interesting to note is the difficulty the courts have had in articulating a legal standard for conduct during negotiations. Some courts simply avoid any discussion of the topic.

For example, in *Committee on Professional Ethics and Grievances v. Johnson*,<sup>72</sup> the Federal Third Circuit Court of Appeals reviewed an attorney discipline proceeding based upon alleged self-dealing, failure to follow the client's instructions, and possible conflicts of interest because of multiple representation. The attorney, Johnson, had been asked to try to find a buyer for forty-two acres of land in St. Croix, U.S. Virgin Islands, as long as one acre was set aside for the owner's brother. The attorney received an offer from Richardson and others for \$2,800 an acre, but the offer did not contain the set aside for the brother; the attorney did not communicate this to the seller. Richardson and others allegedly believed the attorney was going to act on their behalf. A few days later, the attorney's law clerk and several others put together a group and made an offer for \$3,000 an acre, which the attorney did transmit to the seller, but the attorney did not tell the Richardson group about the

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67. 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.

*Dirks*, 681 F.2d at 846.

68. *Dirks*, 463 U.S. at 667, 103 S. Ct. at 3268.

69. *Dirks*, 463 U.S. at 673, 103 S. Ct. at 3271 (Blackmun, J., dissenting).

70. *Dirks*, 463 U.S. at 677, 103 S. Ct. at 3273 (emphasis added).

71. See *Louisiana State Bar Ass'n v. Klein*, 538 So. 2d 559 (La. 1989).

72. 447 F.2d 169 (3d Cir. 1971).

\$3,000 an acre offer. The seller cashed the law clerk group's earnest money check. Only then did the attorney tell the Richardson group that the seller had "rejected" their offer. Although the Richardson group subsequently told the attorney to give the seller "whatever she wanted," the attorney neither transmitted this proposal nor told the Richardson group that the property had already been sold. The attorney then entered into a side agreement with the law clerk to purchase a half interest in the property.

The district court suspended the attorney, but the appellate court reversed finding the attorney had been denied due process in not being told expressly about the charges against him. In the course of its discussion, the Third Circuit noted that the crucial issues involved potential conflicts of interest (Canon 7) and potentially misleading a party not represented by counsel (Canon 9); however, absent from the appellate court's discussion (perhaps because of the procedural posture of the case) is any attempt to outline the proper rules that relate to negotiations.

*Stare v. Tate* stands out as one of the few reported cases involving pre-litigation negotiations that do not involve securities or a sale of immovable property.<sup>73</sup> The dispute arose out of a property settlement in a divorce 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 sent the former wife a copy of the mistaken valuation with a notation: "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 based on 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 when 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 Model Rule 4.1, which only prohibits making a "false statement of material facts." While the Comment to Model 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

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73. 98 Cal. Rptr. 264 (Cal. App. 2d 1971).

have no problem disposing of as he did in *Laidlaw*, by holding that the negotiation was fair because the information was equally available to both sides?

Cases where ethics of non-litigation negotiations were the subject of state bar association disciplinary proceedings are few and far between. *Commission on Legal Ethics v. Printz*<sup>74</sup> is an interesting proceeding. In *Printz*, the West Virginia Supreme Court dismissed charges against an attorney for whom the bar had recommended public discipline. The attorney handled negotiations between his father and the father's employee, who embezzled over \$300,000.00 from the company. Originally, the employee agreed to cooperate, to work for the company until it was sold, and to help find the missing funds. The embezzler's father was then called to a meeting whose purpose "unquestionably was to determine if [the father] would cover the losses caused by the son."<sup>75</sup> Afterwards, the lawyer sent the embezzler a "final demand" letter giving him a choice between a "strict financial arrangement" for repayment of the embezzled money or criminal prosecution.<sup>76</sup> Only after the negotiations broke down was the son turned over to the authorities and later convicted. The court found no problem with the attorney's actions, holding they did not violate West Virginia law.<sup>77</sup> Likewise, the court found no violation of West Virginia's Model Code, Disciplinary Rule 7-105(A).<sup>78</sup> The court noted this rule was not incorporated into the Model Rules of Professional Conduct. Disciplinary Rule 7-105(A) prohibited a lawyer from threatening to present criminal charges only to obtain an advantage in civil matters. This Disciplinary Rule was in effect at the time, but was found by the court to be "unworkable." The court relied on Professors Hazard and Hodes' book, *The Law of Lawyering, A Handbook On The Model Rules Of Professional Conduct*, for the proposition that one of the reasons that Disciplinary Rule 7-105(A) was omitted from the Model Rules was that the standards "were overbroad, because they prohibit *legitimate* pressure tactics and negotiation strategies."<sup>79</sup>

A number of lawyers have exhibited great concern that over-regulation of negotiations would be bad for the profession because it would limit a lawyer's

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74. 416 S.E.2d 720 (W. Va. 1992).

75. *Printz*, 416 S.E.2d at 722.

76. *Id.*

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

78. The rule did not differ in any material respect from the ABA Model Code.

79. *Printz*, 416 S.E.2d at 722 (quoting Geoffrey C. Hazard & William W. Hodes, *The Law of Lawyering, A Handbook on the Model Rules of Professional Conduct* § 4.4:103 (1990) (emphasis added)).

ability to get the best deal possible for a client. Arguments that have been raised include:

1. Negotiations need not be "even" at all. The object is to get the best deal for your client. If the other side is not skilled as a negotiator, your client should not be made to suffer but rather should reap the benefits.
2. Why should there be a different standard imposed when the lawyer is doing the negotiation rather than the client? The client can take whatever "unfair" advantage (within the bound of laws relating to securities and general law relating to fraud) the client wants. A lawyer is somewhat more restricted, but to impose additional ethical duties on a lawyer would mean that lawyers would be less involved in transactions, to the detriment of all parties, because at least the few rules that relate to lawyers assure some semblance of ethical conduct during the course of the negotiations.
3. To require a party to state all material facts, to require a party to determine if the other side knows all material facts or law, or to require a party to correct all misunderstandings of material issues, would lead to endless litigation that would be ultimately counter-productive to the negotiation process. It is hard enough to define "material" when a statement or omission has been made in the securities context; to require this to be done for both fact and law during fluid negotiations, most of which are oral, would slow down commerce and prevent transactions from ever being consummated. It would lead to "over lawyering" and far too much expense. Many argue that ascertaining what is "material" in the absence of illegal fraud is unworkable. Arguments about "materiality" lead to abstract discussions of knowledge and whether anything is knowable, particularly insofar as it concerns the truth or falsity of ideas, and philosophers have pondered the issue of "knowledge" for hundreds of years.<sup>80</sup>

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80. See Gottfried Wilhelm Freiherr von Leibniz, *Knowledge and Metaphysics* 283 (Wiener trans., 1951):

Since questions concerning the truth and falsity of ideas are being discussed and argued today by eminent men, and since Descartes himself did not ever give a thoroughly satisfactory solution to this problem, a subject of the greatest significance for the knowledge of truth, I propose here to explain briefly my understanding of the necessary distinctions and criteria of ideas and knowledge. Knowledge is either *obscure* or *clear*; clear ideas again are either *indistinct* or *distinct*; distinct ideas are either *adequate* or *inadequate*, *symbolic* or *intuitive*; perfect knowledge, finally, is that which is both *adequate* and *intuitive*.

Discussion of metaphysics and knowledge is not confined to philosophers—the Model Rules themselves, in the Comments to Rule 1.6, discuss when an attorney may breach the attorney-client privilege in a philosophical vein:

The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. *It is very difficult for a*



#### 4. The current rules are sufficient to protect all parties.

These types of responses, well-argued and logically put forth, nonetheless appear to bypass the basic issue—is a lawyer's duty primarily to the client or to the profession? If it is to the former, then these points all have force. On the other hand, if the profession is ultimately to be grounded in ethics and morality, then these responses are inadequate. Rather, we should strive to create rules that mandate moral and ethical results, not merely adequate ones or defensible ones.

### XII. DO LITIGATION RULES APPLY TO NON-LITIGATION NEGOTIATIONS?

Negotiation is an alternative to litigation. Because the process is voluntary, either party can refuse to negotiate.<sup>81</sup> Therefore, each party agrees with the result. If both parties agree, then it may seem irrelevant to try to determine who is the "winner" and who is the "loser." Yet, it is often the case that one side is perceived as the "winner" because it obtained the better side of the deal.

Because winners seldom complain about the loser's negotiations, it might be argued that unethical conduct on behalf of losers in negotiations should be of little concern because it is never litigated. Put another way, the risk of a "winner" being sued for some alleged unethical negotiation conduct may be significant, while the risk of the "loser" being sued for its conduct may be nominal. "Winners" may console themselves in believing that the risk of future litigation about their negotiation conduct may not be great in the absence of outright fraud, or outside of the securities law context; such a belief may be illusory. Not surprisingly, the cases on negotiation conduct seem to arise either from complaints by the losing side in negotiation, or through court-initiated procedures because a judge feels that the respect for or integrity of the judicial process may have been violated.<sup>82</sup>

As noted, the Model Rules do contain specific provisions on duties to tribunals. In addition, the federal courts have an extensive body of law dealing with a lawyer's duty to the court. This includes Rule 11, 28 U.S.C. §1927 and the court's "inherent powers."

Rule 11<sup>83</sup> requires that a lawyer's signing of a pleading constitutes a representation, made "after an inquiry reasonable under the circumstances," that

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*lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.*

Model Rules of Professional Conduct Rule 1.6 cmt. (1995) (emphasis added).

81. Even binding arbitration is voluntary in the sense that the parties, at some point, must have voluntarily consented to the process of binding arbitration. It is beyond the scope of this paper to explore whether contracts containing binding arbitration clauses can be contracts of adhesion.

82. For example, see *Cotto v. United States*, 993 F.2d 274, 281 (1st Cir. 1993) ("A judge has an abiding obligation to take or initiate appropriate disciplinary measures against a lawyer for professional conduct of which the judge becomes aware.").

83. Rule 11 was amended by the U.S. Supreme Court by its order of April 22, 1993, effective December 1, 1993. The language quoted appears in both the former and current text of Rule 11.

the pleading is not being presented for an improper purpose, that claims and defenses are warranted, and that allegations or denials of fact are believed to have evidentiary support.<sup>84</sup> Although, on its face, the rule governs only written pleadings, courts have applied it to parties signing a non-pleading document submitted to the court.<sup>85</sup>

Section 1927 of the United States Code<sup>86</sup> allows courts to impose sanctions for bad faith conduct in litigation. It specifically allows costs, expenses, and attorneys fees to be assessed against the sanctioned lawyer "or other person."<sup>87</sup>

Finally, federal courts have recognized that actions, which may not violate either Rule 11 or 28 U.S.C. § 1927, still can be sanctioned under the court's "inherent power." The leading case is *Chambers v. NASCO, Inc.*<sup>88</sup> In *Chambers*, a district court imposed almost a million dollars in attorneys' fees against a party whose conduct was found to be improper, although the judge had found no violation of either Rule 11 or of 28 U.S.C. § 1927. The majority, in a 5-4 decision, rejected any notion that Rule 11 or the statute placed a limitation on the court's inherent authority, under Article III of the Constitution, to impose penalties on either counsel or client.<sup>89</sup> The four dissenters objected both to the fee-shifting allowed by the majority<sup>90</sup> and to the "vast expansion of the power of federal courts, unauthorized by rule or statute."<sup>91</sup> In particular, Justice Kennedy warned that the use of inherent powers to punish parties and attorneys was dangerous when applied to matters that occurred prior to suit being filed.<sup>92</sup>

84. Failure to comply with Rule 11 can lead to sanctions.

85. *Business Guides, Inc. v. Chromatic Communications Enter.*, 498 U.S. 533, 111 S. Ct. 922 (1991).

86. "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (1988).

87. *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373 (10th Cir. 1988).

88. 501 U.S. 32, 111 S. Ct. 2123 (1991).

89. Justice White, writing for the majority, stated:

We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above.

These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.

*Chambers*, 501 U.S. at 46, 111 S. Ct. at 2134. "The Court's prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Id.* at 49, 111 S. Ct. at 2135. "Here the District Court did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation." *Id.* at 54, 111 S. Ct. at 2138.

90. *Chambers*, 501 U.S. at 58, 111 S. Ct. at 2140 (Scalia, J., dissenting).

91. *Chambers*, 501 U.S. at 60, 111 S. Ct. at 2141 (Kennedy, J., dissenting).

92. "Because I believe the proper exercise of inherent powers requires exhaustion of express sanctioning provisions and much greater caution in their application to redress prelitigation conduct, I dissent." *Chambers*, 501 U.S. at 61, 111 S. Ct. at 2141. See also Justice Kennedy's extensive discussion at 501 U.S. at 72-76, 111 S. Ct. at 2147-49.

*Chambers* seems to indicate that federal courts can use their "inherent powers" to punish conduct that occurs in court, outside of court, or even before suit is filed. *Chambers* holds that this punishment can extend to compelling one side to pay the other's "entire . . . litigation costs."<sup>93</sup> Therefore, under a broad reading of *Chambers*, negotiating tactics and conduct which are not even mentioned in the Model Code or Model Rules, and which may not be subject to bar disciplinary proceedings, can become sanctionable later in a federal court. Even a narrow reading of *Chambers*, however, demonstrates that federal courts have broad power to impose stringent penalties on lawyers and litigants, even if this behavior does not violate Rule 11 or 28 U.S.C. § 1927.<sup>94</sup>

A lawyer who might, with impunity, remain silent during negotiations if another side is under a misapprehension of law or fact, or who might with impunity fail to set forth all of the material facts during the course of negotiations, acts at his or her peril in the litigation context. The failure to disclose all pertinent authority, both pro and con, is directly sanctionable. The new federal discovery rules take exactly this approach—voluntary disclosure of material facts and issues and witnesses is required, even if the opposing party would not otherwise have asked the correct questions during discovery. Lawyers may have a hard time explaining to a federal court why conduct which seems appropriate and, arguably, is not subject to state bar disciplinary rules when no litigation is involved should be treated differently when the court views a situation. Given the differences between the standards of conduct for in-court and out-of-court negotiation, one might reach two differing conclusions: (1) the two standards of conduct are justified; or (2) there should be only one standard of conduct—the higher one imposed by the courts. Courts may well impose, consciously or unconsciously, the higher standard of conduct in court-analyzed negotiations whether those negotiations occurred prior to or during litigation.

Three cases illustrate how courts deal with litigation-related negotiations: *May v. Winn Dixie*,<sup>95</sup> *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*,<sup>96</sup> and *Kath v. Western Media, Inc.*<sup>97</sup>

In *May*,<sup>98</sup> the plaintiff's attorney filed a petition seeking damages in tort; in accordance with state law, no prayer for a dollar amount of damages was contained in the pleadings. The defendant requested a jury trial. Negotiations ensued and the plaintiff's counsel made an offer to settle for \$75,000; the defendant countered with \$7,500, which was rejected. On the eve of trial, the

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93. *Chambers*, 501 U.S. at 40, 111 S. Ct. at 2130.

94. Note that throughout this portion of the discussion, the references are to federal court sanctions, not to discipline by state bars. One would think that unethical conduct would be subject to state bar discipline; however, there are few reported disciplinary cases by state bars dealing with ethics in negotiations.

95. 613 So. 2d 1026 (La. App. 3d Cir.), writ denied, 616 So. 2d 704 (1993).

96. 571 F. Supp. 507 (E.D. Mich. 1983).

97. 684 P.2d 98 (Wyo. 1984).

98. 613 So. 2d 1026.

plaintiff's attorney moved to strike the demand for a jury trial, claiming that the case did not involve in excess of \$20,000 (the amount needed for a jury trial under state law), and attached the plaintiff's affidavit in support of this proposition. Although the defendant strenuously objected, claiming that the plaintiff ought to be bound by at least the amount her counsel demanded in post-filing negotiations, neither the trial court nor the appellate court found anything wrong with the plaintiff's counsel's tactics.

Although *May* ostensibly involved only a procedural issue, the proper time to fix the damages amount for a jury claim, the appellate opinion is curiously lacking any ethical discussion. Indeed, one might infer from the opinion that the court condoned the plaintiff's attorney's tactics—demanding more money in settlement than was actually owed in damages and then taking a position in court filings that showed the demand itself had no basis in fact. Given the low esteem in which members of the legal profession are said to be held, the apparent condoning of these tactics by a state appellate court may have an adverse impact on the public's perception of the kind of ethical behavior courts can or should tolerate in members of the Bar.

In *Virzi*,<sup>99</sup> the plaintiff's attorney filed a personal injury action against the defendant which was deferred to a mediation panel prior to the final pre-trial conference. After the plaintiff's attorney filed the request for non-binding mediation, the plaintiff died. Although at the time of the mediation the plaintiff's attorney was unaware of his client's death, when he later learned of this fact he did not reveal it during a pretrial conference. After negotiations occurred at the pretrial conference, the parties settled for the amount of the mediation award. Only as they were leaving the judge's chambers did the plaintiff's attorney tell the defendant's attorney about the death of the plaintiff. The court's opinion stated that the plaintiff's attorney had an ethical duty to promptly advise both the court and the defendant's attorney of the death of the plaintiff; the court deemed this an "absolute ethical obligation." The court noted a possible distinction between the duty to disclose information to a court and the duty to make a disclosure to opposing counsel. Without discussing specifically whether the same rule applied in a non-litigation context, the court resolved the issue in favor of a high ethical standard. The court stated:

There is no question that plaintiff's attorney owed a duty of candor *to this Court*, and such duty required a disclosure of the fact of the death of a client. Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel even though counsel did not ask whether the client was still alive. Although each lawyer has a duty to contend, with zeal, for the rights of his client, he also owes an affirmative duty of candor and frankness *to the Court* and to opposing

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99. 571 F. Supp. 507 (E.D. Mich. 1983).

counsel when such a major event such as the death of the plaintiff has taken place.

This Court feels that candor and honesty necessarily require disclosure of such a significant fact as the death of one's client. 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.<sup>100</sup>

In *Kath*,<sup>101</sup> a question arose about which parties an attorney represented; the issue was whether the attorney previously had represented all five shareholders in related litigation, or whether the attorney had represented only two of the five. The deposition of the attorney was taken and he testified that he represented all five and did not know that two of the five were going to file suit against the other three. Based upon the deposition, the defendants offered to settle the case for the \$12,000.00, and the plaintiffs orally accepted the defendants' offer. Only after the settlement agreement was reached orally did the defendants discover that the plaintiffs' attorney had written a letter to the attorney who had been deposed. In that letter, the plaintiff's attorney revealed that he was aware of written evidence by the attorney who had been dropped that contradicted the deposition testimony. After the defendants found out both about the written evidence and that the plaintiffs' counsel had known about it, the defendants revoked the offer to settle and the plaintiffs moved to compel the settlement. The court held that the plaintiffs' attorney had an ethical duty to disclose the written evidence to opposing counsel and to the court. The court apparently based the decision more upon a duty of candor to the court than a duty to opposing counsel, specifically because the matter related to a deposition and to discussions during litigation.

Judges do not take lightly a misstatement of fact made to them. In *Southerland v. County of Oakland*,<sup>102</sup> a plaintiff's attorney with a 50% contingency fee arrangement agreed to a \$500,000.00 settlement and sought court approval. The trial court had some concern about the 50% contingency fee but approved the settlement when the plaintiff's attorney assured the court that he would absorb the cost of litigation and pay a Medicaid lien that had affected the plaintiff's property. When the plaintiff's attorney subsequently failed to pay the lien the court set aside its prior judgment and reduced the attorney's fees to 1/3. The court stated:

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100. *Virzi*, 571 F. Supp. at 512 (emphasis added). See also *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962); *Newman v. Fjelstad*, 137 N.W.2d 181 (Minn. 1965); *Simons v. Schiek's, Inc.*, 145 N.W.2d 548 (Minn. 1966); *Toledo Bar Ass'n v. Fell*, 364 N.E.2d 872 (Ohio 1977). See also *Virginia State Bar Op.* 952 (1987) (indicating a lawyer need not tell the other side of the death of a client unless asked about it).

101. 684 P.2d 98 (Wyo. 1984).

102. 77 F.R.D. 727 (E.D. Mich. 1978), *aff'd*, 628 F.2d 978 (6th Cir. 1980).

Where a fraud upon the Court has been demonstrated, dominating reasons of justice permit the assessment of the costs of the entire proceedings, including attorney's fees against the guilty party.<sup>103</sup>

Apparently the rationale for assessing this penalty was the inherent power of the court. The judgment was affirmed on appeal, with the appellate court finding that the attorney "had committed fraud on the court."<sup>104</sup>

### XIII. CONFLICTS OF LAW

There is no single, nationally-recognized non-litigation ethical rule that applies to all lawyers. Given the lack of a single, uniform set of bar rules on ethical obligations, which law a court later applies may have a huge impact on a lawyer's potential liability for alleged unethical conduct. If a lawyer is licensed in State A, negotiates a deal with a lawyer in State B, involving a corporation located in State C and incorporated in State D, involving a transaction that occurs in State E, then there are potentially conflicting ethical rules in four different states that might apply. An analysis of this area is beyond the scope of this paper. Attorneys engaged in multi-state transactions, however, must proceed cautiously. A court in one state may find a higher standard of conduct applicable than the standard adopted by the bar of the state in which the attorney is licensed.<sup>105</sup>

### XIV. CONCLUSION

The inherent tension between the duty to represent a client and the duty to the profession mirrors a practical tension between wanting to get the best deal possible for your side and the duty of ethical fair dealing. There is a discernable difference between the Model Rules and Model Code's treatment of conduct practiced outside of litigation in negotiation and the judicial rulings concerning the same conduct during litigation, especially conduct occurring in the presence of the court. The fact that the bar has failed to adopt the same rules for non-litigation and litigation negotiations does not make the apparent distinction drawn by the bar one of which we should be proud.

Reported decisions indicate that bar associations have not sought to police the ethics of negotiations. It can be anticipated that developments in ethical

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103. *Southerland*, 77 F.R.D. at 734.

104. *Southerland*, 628 F.2d at 979.

105. For example, in *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120 (W.D. La. 1989), *aff'd and remanded*, 894 F.2d 696 (5th Cir. 1990), a Massachusetts lawyer was sanctioned by a federal judge in Louisiana under the court's "inherent powers." In considering possible reciprocal discipline, the Massachusetts Supreme Court dismissed the complaint after a complete review of the record, finding "no support" for the charges or the sanctions. *In re McCabe*, 583 N.E.2d 233 (Mass. 1991).

standards for negotiations will occur primarily in litigation, when offended parties seek redress concerning alleged unfair or unjust negotiation tactics. Therefore, it will not be surprising if a uniform set of jurisprudential rules governing the ethics of negotiation are adopted by the courts. Likewise, it should not be unexpected 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.

The ethical basis of negotiations 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."<sup>106</sup> Some may disagree; however, 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 would not do something in a courtroom context, if you would not make a misleading statement in a settlement conference with a judge, and if you would not remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you should not do any of these things in non-litigation negotiations, whether or not they take place prior to or after the filing of a lawsuit.*

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106. Rubin, *supra* note 3, at 591.