THE ETHICS OF NEGOTIATION: ARE THERE ANY?

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1. **THE TUGS AND PULLS**

Those who represent business entities must advance the interests of the company and its stakeholders while carefully threading their way through a thicket of state and federal statutes, international laws, the current Maine Code of Professional Responsibility and the proposed Maine Rules of Professional Conduct. Much has been written about the state and federal statutory and regulatory attempts to make those who serve companies’ legal needs into “whistle-blowers” or informers about corporate activities, and those issues are beyond the scope of this paper. In addition, there are many internet resources on ethics that may provide a source for research and links to a number of useful sites.

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2. DISCLAIMER: The author is not licensed to practice law in Maine; this paper constitutes a Louisiana lawyer’s general, non-comprehensive, non-academic, and non-binding thoughts which are subject to revision and rethinking at any time.

3. 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.


5. As reported on the web site of the Maine Board of Overseers of the Bar, [http://www.mebaroverseers.org/Ethics%202000%20Web/EthicsMaine.html](http://www.mebaroverseers.org/Ethics%202000%20Web/EthicsMaine.html)


This paper considers how the current Maine Code and proposed Maine Rules, along with the current ABA Model Rules, may 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 GIVE 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” 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 only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others.”

“Zealous advocate” is a term that is often used by lawyers to describe their role; however, that term has not been used in any iterations of the ABA Model Rules since they first superseded the Model Code of Professional Conduct in 1983. 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

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9 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.


11 The term “zealous” advocacy appeared in the EC 7-1 of the Model Code.
client.” This commentary has continued, almost verbatim, into the current (2002) Revision to the Model Rules.

The ABA Model Rules relegate language about “zeal” and “zealous” advocacy to comments and to the non-binding Preamble. The term “zealous advocate” does not appear at all in the current Maine Code, and the language in the ABA Preamble concerning zealous advocacy has been deleted from the current draft of the Maine Rules.

The fact that “zealous advocacy” has not been a requirement of the ABA’s lawyer’s rules since 1983, however, has not stopped lawyers from using the phrase or courts from extolling it. Even law journals continue to use the phrase (sometimes even with approval) in titles to articles. Yet, the phrase “zealous advocate” has appeared in only three reported Maine cases, with the last usage being in 1991. The proposed Maine Rules expressly decline to use the term “zeal” in relation to a lawyer’s duties because of the fear that it may encourage to inappropriate conduct.

Similar results occur in other states. For instance, no Texas civil case since 1979 has been located that uses the term “zealous advocate,” although 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.”

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13 The three cases are: Sirois v. Winslow, 585 A.2d 183 (Me. 1991) (dissenting opinion); Board of Overseers of the Bar v. Campbell, 539 A.2d 208 (Me. 1988); and State v. Campbell, 497 A.2d 467 (Me. ‘98). In the two companion Campbell cases, the Supreme Judicial Court rejected the argument that there is an “uncertain line” between “zealous advocacy and contumacious conduct.” 539 A.2d at 209.

14 The Reporter’s Notes (p. 17) to the Proposed Rules state: “The Task Force discussed the use of the term “zeal” as used in Model Rule 1.3 Comment [1] (2002). The Task Force determined that the term “zeal” was often used as a cover for a lawyer’s inappropriate behavior. Moreover, the Task Force thought the term was not needed to describe a lawyer’s ethical duties. Accordingly, the Task Force recommended its deletion.”

15 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
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.”

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,” a term that suggests moral relativism. A “neutral partisan” is one who “passes no judgments,” whose “zeal on behalf of the client is unmitigated and noncontingent.” The ABA revisions to the Model Rules maintain the view that the lawyers’ personal morality is not impugned because of a 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 40 years ago: “Though owing a public responsibility, an attorney in acting as the client's advisor, defender, advocate and confidant enters into a personal relationship in which his principal concern is with the interests and rights of his client. The requirement of the [Exchange] Act of certification by an independent accountant, on the other hand, is

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16 ALI §16, Comment (d).
intended to secure for the benefit of public investors the detached objectivity of a disinterested person.”19

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.”20 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 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.”21

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 Responsibility and its predecessor, the Code of Professional Conduct. These 1983 Model Rules and the 2002 Ethics 2002 Model Rules, however, do not use the word “ethics” at all, other than in the Scope section to indicated that the rules “simply provide a framework for the ethical practice of law.” The question is whether the Rules actually do this.

20Dolovich at 1633.
One critic of the lack of ethical emphasis in the Model Rules uses the pejorative term “amoral technicians”\textsuperscript{22} 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.”\textsuperscript{23} Another has commented that a lawyer “sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality.”\textsuperscript{24}

The three primary federal rules and statutes that regulate sanctionable conduct (FRCP 11, FRAP 38, and 28 U.S.C. §1927) do not use the term “ethics.” The sanctions are for conduct before a federal tribunal.

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.

\textsuperscript{22}Id. at 1638.

\textsuperscript{23}Id., describing the views of Deborah L. Rhode in her book, \textsc{In The Interests Of Justice: Reforming The Legal Profession}, 2000.

\textsuperscript{24}Nancy Lewis, \textit{supra} at 813, quoting William H. Simon.
These two tensions are apparent by looking at what some have said about a lawyer’s role.

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

Justice Stevens: “I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation.”

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

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

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

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26 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.
1887 Code of Ethics and from there back to two books published in 1836 and 1854.²⁷ 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 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 was rightly called one of “Professional Ethics,” we tend to think that the current Model Rules are also ethical standards; they are not. An attorney can 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

²⁷A 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.
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 ABA 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.\(^{28}\) 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.

**a. ABA Model Rule 4.1 and “Truthfulness” in Negotiations**

The current Maine Code does not appear to directly address negotiations. It does caution against “misrepresentation,”\(^{29}\) mandates that lawyers not make “false statements”

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\(^{29}\) Maine Code Section 3.2(f)(3): “(f) Other Misconduct. A lawyer shall not * * * (3) engage in conduct involving dishonesty, fraud, deceit, or misrepresented. . . .”
concerning members of the judiciary,\textsuperscript{30} and requires reporting to the bar of unprivileged knowledge of “a violation of the Maine Bar Rules” concerning trustworthiness and honesty;\textsuperscript{31} yet, no provision of the Code appears to require absolute, unconditional honesty in negotiations.

The proposed Maine Rule’s Preamble exhorts lawyers to “strive to provide clients with a favorable outcome consistent with honest and courteous dealings with others,”\textsuperscript{32} but, as will be shown elsewhere in this paper, the Rule adopts the ABA’s position that puffing and bluffing in negotiations, as well as misleading others about things that are not “material,” is apparently acceptable.

ABA Model 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.\textsuperscript{33}

\textsuperscript{30} Maine Code Section 3.2(c)(1): “A lawyer shall not make a false statement of fact, with knowledge that it is false or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge or other adjudicatory officer in the court system or a candidate for election or appointment to office as a judge or other adjudicatory officer in the court system.”

\textsuperscript{31} Maine Code Section 3.2(e)(1): “(e) Disclosure of Misconduct by Other Lawyers. (1) A lawyer possessing unprivileged knowledge of a violation of the Maine Bar Rules that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall report such knowledge to the appropriate disciplinary or investigative authority.”

\textsuperscript{32} Maine proposed Rule, Preamble (5).

\textsuperscript{33} 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.”
In light of Model Rule 4.1, other language of the Rules, such as that in Rule 2.1 allowing (but not mandating) lawyers to consider moral issues,\textsuperscript{34} may tend to ring somewhat hollow.

Model Rule 4.1, relating to \textit{negotiation}, stands in sharp contrast to 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 legislative history notes, "the duty of candor toward the court was regarded as paramount."\textsuperscript{35} The ABA Comment to Rule 4.1 specifically allows statements about "a party's intention as to an acceptable settlement of a claim" to be exempted from the rule prohibiting false statements of "material fact"; apparently you can lie with impunity about your settlement authority. There is, however, no such exemption in the comments to Rule 3.1 concerning candor to the tribunal, and probably for good reason. A lawyer who, during a settlement conference with a judge, misstates the client's intention as to an acceptable settlement undoubtedly acts at his or her peril. While there is a special rule (3.4) relating to "fairness to opposing party and counsel," it seems solely directed at trial procedure.

\textsuperscript{34} Model Rule 2.1 provides:

"Rule 2.1 Advisor
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer \textit{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)."

Maine’s Proposed Rule 2.1 adopts the ABA’s black letter law and comments intact.

\textsuperscript{35} ABA Rules Legislative History, p. 122.
The proposed Maine Rule 4.1 adopts the ABA’s Model Rule and comments intact with one minor change. On the other hand, the Proposed Maine Rule 3.3 does differ significantly from the ABA Model Rule in that, under the ABA Rule, a lawyer must disclose controlling authority that is known to the lawyer. In contrast, under the Maine Proposed Rule, a lawyer may remain silent about controlling authority as long as the lawyer does not misquote authority the lawyer knows has been overruled. Thus, it is apparently permissible under the proposed Maine Rule 3.3(a) to fail to cite any authority in the course of a brief that takes a position which has been clearly overruled by a case or statute that the brief simply fails to mention; this apparent result differs from the ABA’s approach.

36 Maine Proposed Rule 4.1, showing the Maine addition to the Model Rule’s language, is:

“Rule 4.1 - Truthfulness In Statement to Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

37 The ABA Model Rule’s comments to 4.1 and Maine’s proposed comments are identical:

“Statements of Fact
[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

38 A redline comparing the Maine Proposed Rule 3.3(a) and the ABA Model Rule follows:

(a) A lawyer shall not knowingly:
   (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
   (2) fail to disclose to the tribunal legal 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
   (2) misquote to a tribunal the language of a book, statute, ordinance, rule or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute, ordinance or rule that has been repealed or declared unconstitutional;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s

39 This view is bolstered by the fact that the following portion of the ABA Comment to Rule 3.3 has apparently been deleted from the Comment (4) to Maine Proposed Rule 3.3 (redline showing Maine change):

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must not knowingly misrepresent pertinent legal authority. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction.
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."

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 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.

b. Protecting Client Confidences and "Truth"

Current Maine Code Section 3.6(h) contains strong protections for client confidences, and there appear to be few exceptions. The exceptions seem limited to crimes; if only fraud is involved, then the client confidence must be preserved unless the

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40 Maine Code Section 3.6(h)(1) provides:

“(1) Except as permitted by these rules, or when authorized in order to carry out the representation, or as required by law or by order of the court, a lawyer shall not, without informed consent, knowingly disclose or use information (except information generally known) that:

(i) Is protected by the attorney-client privilege in any jurisdiction relevant to the representation;
(ii) Is information gained in the course of representation of a client or former client for which that client or former client has requested confidential treatment;
(iii) Is information gained in the course of representation of the client or former client and the disclosure of which would be detrimental to a material interest of the client or former client; or
(iv) Is information received from a prospective client, the disclosure of which would be detrimental to a material interest of that prospective client, when the information is provided under circumstances in which the prospective client has a reasonable expectation that the information will not be disclosed.”
fraud is on a tribunal. The proposed Maine Rule 1.6 varies from the ABA’s Model Rule.

The ABA, in its initial 2002 adoption the Model Rules, rejected any broad expansion of a lawyer’s traditional role and refused to lessen the stringent requirements of confidentiality under Rule 1.6. 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.

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41 Maine Code Sections 3.6(h)(4) and (5) provide (emphasis supplied):

(4) A lawyer may disclose information gained in the course of representation of a former client or client, or learned from a prospective client, to the extent that the lawyer reasonably believes disclosure is necessary:

   (i) To prevent the commission of a criminal act that is likely to result in death or bodily harm to another person; or

   (ii) To avoid the furthering of a criminal act.

(5) A lawyer who receives information clearly establishing that a client or former client has, during the representation, perpetrated a fraud upon any person or tribunal shall promptly call upon the client or former client to rectify the same; and if the client or former client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. If a person other than a client or former client has perpetrated a fraud upon a tribunal, the lawyer shall promptly reveal the fraud to the tribunal.

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42 As the Proposed Maine Preamble notes: “In some instances language found in the Maine rules is imported into a particular provision. In other instances additional regulatory principles are introduced into a rule. Some rules do not follow the ABA rules, for example Rule 1.6 Confidentiality of Information. Therefore, it is critically important that the user of these Maine Rules of Professional Conduct understand that the Maine Rules of Professional Conduct are not identical to the ABA Model Rules.”

43 The current Model Rule 1.6 reads (emphasis supplied):

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

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

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

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

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

   (4) to secure legal advice about the lawyer’s compliance with these Rules;
The Maine Proposed Rule’s variations from Model Rule 1.6 were deliberate, as explained in the Maine Comments. A redline comparison of the Maine proposed Rule 1.6 and the ABA Model Rule 1.6 follows:

Rule 1.6 – Confidentiality of Information
(a) A lawyer shall not reveal information relating to the representation a confidence or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that the disclosure is impliedly authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b).

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

44 See Comments 6 and 7 to Maine Proposed Rule 1.6 (emphasis supplied), which appear under the caption “Disclosure Adverse To the Client”:
[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of confidences and secrets of clients’ information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain substantial bodily harm or death. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims. The requirement in ME Rule 3.6(h)(4)(f) requiring that an act that is likely to result in death or bodily harm be a criminal act has been eliminated. Rule 1.6(b)(1) also requires that the potential harm be substantial. The elimination of the requirement of criminality and the inclusion of the requirement of substantiality is consistent with the approach taken in the 2002 Model Rules and the RESTATEMENT.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client’s misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances. As noted in Comment [6], this provision is a departure from recently amended ME Rule 3.6(h)(4), which draws the permissive disclosure line at whether the client’s conduct is “criminal,” and not at the nature and extent of the harm. At the time the lawyer makes the decision as to whether he or she can or will disclose the client’s act, it may be difficult to determine whether the client’s “fraud” rises to the level of a crime. Accordingly, the Task Force deleted the categorical limitation to crime and follows the Model Rule 1.6 (2002) inclusion of fraud, so long as the harm could be substantial.
(1) to prevent reasonably certain death or substantial bodily harm or death;
(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; professional obligations;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(6) to comply with other law or a court order.

(c) Before revealing information under paragraph (b) (1), (2), or (3), the lawyer must, if feasible, make a good-faith effort to counsel the client to prevent the harm and advise the client of the lawyer’s ability to reveal information and the consequences thereof. Before revealing information under paragraph (b)(5) or (6), in controversies in which the client is not a complainant or a party, the lawyer must, if feasible, make a good faith effort to provide the client with reasonable notice of the intended disclosure.

(d) As used in Rule 1.6, “confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information relating to the representation if there is a reasonable prospect that revealing the information will adversely affect a material interest of the client or if the client has instructed the lawyer not to reveal such information.

As can be seen, however, except for “reasonably certain substantial bodily harm or death, confidences are protected by Maine’s Proposed Rule and other actions that can cause injuries cannot be revealed at all unless a crime or fraud is involved “in furtherance of which the client has used or is using the lawyer’s services.”
Maine’s Proposed Rule 1.6 has two subsections that are not part of ABA Model Rule 1.6; these deal with defining “confidences” and “secrets” as well as requiring the lawyer to make a “good faith effort” to dissuade the client from the proposed conduct. Yet, in instances where the confidences cannot be revealed at all (because the requirements of Rule 1.6(b)(1)-(3) have not been met), the lawyer’s only option may be to withdraw. In that event, Rule 1.16 must be consulted. Maine Proposed Rule 1.16 is identical to the Model Rule, and nowhere does it allow for the withdrawing attorney to breach any confidence or secret by alerting others that the withdrawal was caused by the client’s failure to follow the lawyer’s advice under Maine Proposed Rule 1.6(c). In other words, there can be no “noisy withdrawal.”

A comparison of some other state’s variations from the ABA Model’s Rule can provide some helpful insight. For example, the Texas Rules are even more restrictive than the ABA’s Model Rule. While the ABA Model Rule allows for disclosure of confidential information if 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. This approach was rejected in Maine.\(^{45}\) Another example of the differences between the Texas Rule 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 Texas Rule does not contain this provision.\(^{46}\)

\(^{45}\) See Maine Comment 2 and 6 to proposed Maine Rule 1.6.
\(^{46}\) Texas Rule 1.5 on Confidentiality provides.
Rule 1.05 Confidentiality of Information

(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 client’s 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 lawyers 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.

5) 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.

6) 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.

7) 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 lawyers 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).

Author’s Note The exception referring to Rule 4.01(b) refers to this provision:
“(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.”
6. **WHAT DO THE COMMENTATORS SAY ABOUT TRUTHFULNESS IN NEGOTIATIONS?**

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

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

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

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**Compare this to ABA Model Rule 1.6:**

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

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

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

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."

The rules that apply to lawyers prohibit misleading the other party, in non-court and tribunal settings, about things that could be “material” facts. The question becomes what constitutes “facts” and which facts are “material.” The Rules of Professional Conduct do not otherwise differentiate between lies told for a good purpose and those told for a less valid purpose. Carl Cannon has written that all lies “unlike all men, are not created equal. Philosophers from Aristotle to Niebuhr have made moral distinctions among falsehoods, whether ‘white lies’ told for social convenience or to spare feelings, “excuses” that are only half true but that rationalize our own behavior, lies told during a crisis, lies told liars, paternalistic lies told to protect those we care about, and lies told for the social good – also known as ‘noble lies.’"

The remainder of this paper focuses on whether either protecting our client’s interests or protecting our client’s confidentiality can qualify as “noble lies.”

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48 Bok, Lying.
7. **ETHICS, PROFESSIONALISM, AND NEGOTIATION TACTICS**

Applying concepts of “ethics” and “professionalism” is not merely a matter of litigation tactics, where “hard-ball” antics are a matter of record, either in depositions or in trial. The daily process of negotiations (whether in transactional or litigation settings) 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 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. At the other end of the spectrum are those who argue that obtaining the best interest of the client is the proper overall goal and should be pursued vigorously in the absence of outright fraud. Discussions of this view can be found in the writings of Professors James J. White and Charles Curtis. 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”;

“Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive”;

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50 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.*


“Professionalism: Lip Service or Life Style”;\(^55\) 
“Ethics on the Table: Stretching the Truth in Negotiations”\(^56\) and 
“Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?”\(^57\)

Many of these articles contain a search for principles that should guide attorneys during negotiations. The fact that the authors of these articles 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’ this has been noted succinctly and clearly by Professor Wetlaufer:

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

\(^{54}\) Craver, 38 S. Tex. L. Rev. 713 (1997) 
\(^{56}\) Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 Review of Litigation, 173 (1979). 
\(^{57}\) 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).
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. . . .

8. **THE NOT SO SUBTLE ART OF MISDIRECTION**

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

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61Lawry, Central Moral Tradition at 331.
Other categories where a "lie" or "mistruth" has been stated, according to Wetlaufer, fall into some of the following groups:

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

As Professor Wetlaufer has written:

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

Whether one calls it "misdirection," "puffing," "bluffing," or some other term, one need not resort to biblical injunctions to find a discussion of whether absolute truthfulness is always desirable. Kant wrote about lies made with benevolent motives, although others have claimed that a Kantian approach leads to "philosophical anarchism." The Talmud admonishes one to refrain from all varieties of dealings

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63 See, for example, Immanuel Kant, On a Supposed Right to Tell Lies from Benevolent Motives, in Kant's Critique of Practical Reason 361, 361 (Thomas Kingsmill Abbott trans., 6th ed. 1909) (1873) (quoting Henri Benjamin Constant de Rebecque, On Political Reason, 6 France 12, 124 (1797))


65 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.
which depend upon obtaining a false value for things, or placing a false value on things. It also urges that 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." 66

Aeschylus had Prometheus say: "The worst disease of all, I say, is fabricated speeches and disguise." 67

Cicero, in his letters to his son, describes a system of moral rectitude. 68. 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 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

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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.

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, straightforward, 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.69

Cicero traces the requirement of honesty and fair dealings to the Twelve Tables, the earliest and most fundamental of Roman laws, circa 450 B.C., and to the Plaetorian law, circa 192 B.C. Pointing out that honesty and fair dealing are appropriate criteria, Cicero notes that "the laws in our Civil Code relating to real property stipulate that in a sale any defects known to the seller have to be declared." A suppression of facts not asked about was impermissible. Cicero writes that although the civil law does not rectify all moral wrongs, there is nobility in the aspirational goal that, "between honest men there must be honest dealing and no deception."70

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69Cicero, Selected Works, Grant Translation, at 178-179.
70Cicero, Selected Works, Grant Translation, at 185.
Cicero then discusses what is honest dealing. This Roman view of the law was adopted by the French in their Civil Code.\textsuperscript{71}

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 \textit{caveat venditor}.\textsuperscript{72}

In \textit{Laidlaw v. Organ}, a famous common law case arising from a Louisiana transaction, Chief Justice Marshall rejected the concept of honesty and fair dealings when facts are "equally accessible to both parties."\textsuperscript{73} The buyer, Organ, sought to compel delivery of tobacco that he had purchased. Laidlaw, the seller, claimed that he was deceived by Organ and did not have to deliver the tobacco. Laidlaw had asked whether Organ knew of anything that might affect the tobacco's value and Organ said nothing. In fact, Organ knew that the price of tobacco had risen steeply because the Treaty of Ghent had been signed, ending the War of 1812.\textsuperscript{74} Organ, the buyer, won because there was no


\textsuperscript{72}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.


\textsuperscript{74} The \textit{Laidlaw} opinion quotes from the “bill of exceptions” filed in the court below:

And it appearing in evidence in the said cause, that on the night of the 18th of February, 1815, Messrs. Livingston, White, and Shepherd brought from the British fleet the news that a treaty of peace had been signed at Ghent by the American and British commissioners, contained in a letter from Lord Bathurst to the Lord Mayor of London, published in the British newspapers, and that Mr. White caused the same to be made public in a handbill on Sunday morning, 8 o'clock, the 19th of February, 1815, and that the brother of Mr. Shepherd, one of these gentlemen, and who was interested in one-third of the profits of the purchase set forth in said plaintiff's petition, had, on Sunday morning, the 19th of February, 1815, communicated said news to the plaintiff; that the said plaintiff, on receiving said news, called on Francis Girault, (with whom he had been bargaining for the tobacco mentioned in the petition, the evening previous,) said Francis Girault being one of
obligation, said Justice Marshall, to speak. Remaining silent was permissible,\textsuperscript{75} even though Organ knew that Laidlaw was under a misapprehension.\textsuperscript{76} 

It is this type of outcome, where sharp bargaining on behalf of one client obtains an advantage that would not otherwise be there but for the silence or for the misdirection, that leads to "the sense of injustice."\textsuperscript{77} 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.\textsuperscript{78}

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

\textsuperscript{75}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.

\textsuperscript{76}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.


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.”  

The wall of privity, however, was breached first in will contests 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. 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.”  

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’).” 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

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79Dolovich, *supra*, at n.22.
81For a detailed discussion of these cases nationally, see: D. Culver Smith, III, *supra*.
83D. Culver Smith, III, *supra*.
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. 84

Concerned with the expanding scope of liability, lawyers began creating
voluntary standards that they hoped the courts would adopt in determining their liability
to third parties. These were useful, however, only in transactional matters, where the
potential for liability was typically to third parties who might rely upon a borrower’s
counsel opinion, and even in these instances, these voluntary standards have not proven
as effective as their proponents had hoped.

On the other hand, the American Law Institute has two Restatements that directly
relate to lawyer liability to third parties which apply in both litigation and transactional

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”; 86 assisting a client commit a tort through acts
which are themselves tortious; 87 a fraudulent misrepresentation that is something more

84 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).
86 ALI Lawyers Restatement §56, Comment c, p. 417.
87 Id.
than “legally innocuous hyperbole”; as well as liability under federal securities laws, antitrust statutes, RICO, and consumer protection laws.

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 the sole (rather than simply one) of the primary purposes of the lawyer’s actions, 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.

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. 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

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88 ALI Lawyers Restatement §56, Comment f, p. 418. This comment begins: “Misrepresentation is not part of proper legal assistance . . .”

89 Id., Comments (i) and (j), pp. 419-420.


92 See ALI Restatement of the Law Governing Lawyers §51, Comment (e).
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” a “substantial financial loss” to a third person caused by a client crime or fraud even if the “loss has not yet occurred,” 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.” 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” if this is feasible or ask the client to “warn the victim” 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” 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.

Yet, ALI Lawyer Restatement §66’s black letter text contains a number of additional restrictions on the lawyer before disclosure, including making “a good-faith

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93 ALI Lawyer Restatement §67(2).
94 ALI Lawyer Restatement §67(1)(a).
95 ALI Lawyer Restatement §67(1)(b).
96 ALI Lawyer Restatement §67(1)(d).
97 ALI Lawyer Restatement §67(3).
98 Id.
99 ALI Lawyer Restatement §67(4).
100 ALI Lawyer Restatement §66 is entitled “Using or Disclosing information to Prevent Death or Serious Bodily Harm.”
effort to persuade the client not to act” and to ask the client to warn the victim if the action already has occurred. Some of the Illustrations to §66 attempt to provide guidance to the lawyer faced with a substantial bodily harm issue.

Concerning financial harm, there are two 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.”¹⁰¹ This nondisclosure is mandated even if there are penalties for continuing offenses.¹⁰² 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.¹⁰³ 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 lawyers can no longer

¹⁰¹ ALI Lawyer Restatement §67, Illustration 3.
¹⁰² Id., Illustration 4.
¹⁰³ 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. 104

10. NON-LITIGATION NEGOTIATIONS AND LIABILITY TO THIRD
PARITIES

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. 105 The American Law Institute has
completed the Restatement of Law Governing Lawyers. The Restatement goes beyond
the Model Code and the Model Rules in some respects and allows for discipline in
negotiations even though the conduct may not be civilly actionable, but “puffing” is still
allowed.

When it comes time for a court to rule on the limits of ethical behavior of lawyers,
the court's view often may be colored by the separate statutory and jurisprudentially
evolved standards that control an 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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105 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 out weigh obligations to clients or to a corporation. A famous example is the Dirks case. 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. 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." The dissent would have found Dirks liable, claiming that an inquiry into motives was not necessary. 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." If the courts have difficulty in delineating ethical duties in the highly regulated securities field, then it is not unusual that the regulation of ethics in general negotiations is said by some to be even more troublesome.

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107 "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.

108 463 U.S. at 667, 103 S.Ct. at 3268.

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

110 Emphasis supplied; 463 U.S. at 678, 103 S.Ct. at 3273.
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” and may “misrepresent the value their client places on particular items.”

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

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.

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*. Arising 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

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112 Id.


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? as 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 financial fraud is involved, and if you’re in a state which still has the text of old ABA Model Rule from 1983 and which contains nothing express on financial injury, then revealing information, even for serious client financial fraud, may expose the lawyer to potential adverse disciplinary action and a claim by the client whose confidences are revealed. On the other hand, not to reveal the fraud may expose you to litigation claims by the adverse party, particularly in light of the language of the ALI Lawyer Restatement §§ 51, 52, and 67. Maine’s current Code is silent on this type of matter, although the Maine Proposed Rules do deal with it.

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.\(^{116}\) ALI Lawyer Restatement §54(1) states that a “lawyer is not liable under §48 or §49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule.”

The ABA Model Rule Preamble changed the old rule. The ABA former preamble stated (Preamble 18) that nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. The current ABA Model Rule changed that. This language was deleted, and in its place was substituted the phrase that “since the Rules do establish standards of

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\(^{116}\)See the comments to the Preamble to ABA Model Rule. 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.”
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 (see, generally, ABA Model Rule 5.5), where the disciplinary rules of the various states differ and the status of state-adoption of the ABA Model Rule is not uniform. 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. Which state rule controls is a difficult issue, particularly in states that have not adopted the ABA multi-jurisdictional Model Rule.

Once you have figured out what rule applies and that you are in fact at risk, what are you to do? ABA Model Rule 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 further, such as a disavowal of work product. 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.

Assuming that a noisy withdrawal is allowed at all, what are you do if you want to make a noisy withdrawal and whom do you tell? Assuming that you won’t get into

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117 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](http://www.abanet.org/cpr/mjp-home.html).


120 See: Pope and Pope, supra, 63 Def. Counsel J. 543 at 544.
trouble with the client (who may sue you 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.”\(^{121}\) 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, however, also allows a withdrawal if the client is persisting “in a course of action involving the lawyer’s services that the lawyer has reason to believe is criminal or fraudulent”\(^{122}\) or if “the client has used the lawyer’s services to perpetrate a crime or fraud”\(^{123}\) or the client insists upon “taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,”\(^{124}\) or when “other good cause of withdrawal exists.”\(^{125}\) It is important to note, however, that the withdrawal under ABA 1.16 is never mandatory; it is always discretionary.

Even the ABA, 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 disaffirm any opinion, document, affirmation, or the like,”\(^{126}\) 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

\(^{121}\)ABA Model Rule 1.16(b)(1).
\(^{122}\)ABA Model Rule 1.16(b)(2).
\(^{123}\)ABA Model Rule 1.16(b)(3).
\(^{124}\)ABA Model Rule 1.16(b)(4).
\(^{125}\)ABA Model Rule 1.16(b)(7).
\(^{126}\)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).”
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.”127 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.

Maine, it appears, attempted to avoid the ABA Model Rules on “noisy” withdrawals,128 although the comments to a number of the Maine Proposed Rules nonetheless refer to an attorney’s duty to disclose under certain circumstances.

Thus, trying to do a noisy withdrawal in states that adopt the ABA Model Rules intact may be as difficult as Odysseus’ task of steering between Scylla and Charybdis.129

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127This language is found in ABA Model Rule 1.6, Comment 12, 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.”

The Maine Comment is somewhat different. Comment 12 to Maine Model Proposed Rule 1.6 reads (redlined):

[12] 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 of a client confidences or secrets 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 the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. In situations in which confidences and secrets may be revealed in connection with a controversy in which the client is not a party, prior to disclosure, paragraph (c) requires the lawyer to make a good faith effort to provide notice to the client that a confidence or secret under paragraph (b)(5) or (6) may be revealed.

128 Maine Proposed Rule Rule 1.13 (dealing with representing an entity and withdrawal) differs significantly from the ABA Model Rule. See, for example, Maine Reporter’s Notes (pg. 84) to Maine Proposed Rule 1.13 (emphasis supplied):

The Maine Task Force recommended adoption of the language of the original Model Rule 1.13 rather than the new language recommended by the ABA Task Force on Corporate Responsibility. The Maine Task Force recommended that, lawyers, in their representation of organizations, not be permitted to “report out” confidences and secrets, beyond the disclosures already allowed, for all clients, under Rule 1.6. Rule 1.13(b) and (c) must be read in light of Rule 1.16, which requires lawyers to withdraw “if further representation will result in the lawyer’s violation of the law or rules of ethics” (meaning if the client is using the lawyer’s services for criminal or fraudulent purposes). See also Comment [7], Rule 1.6 (duty of confidentiality does not prevent lawyer from giving to interested persons notice of fact of withdrawal, and disaffirming any opinion or document that lawyer previously rendered). In addition, ABA Formal Ethics Opinion 92-366 (1992) permits a client to make a “noisy withdrawal” if the lawyer’s work product is being used in the commission of an ongoing crime or fraud. The Maine Task Force recommended that Model Rule 1.13(e) not be adopted as part of the Maine Rules of Professional Conduct. It was thought that this subparagraph requiring the discharged attorney to “report out” his discharge opens a Pandora’s box: lawyers would be placed in the uncomfortable position of publicly justifying their conduct.
No wonder that one commentator wrote, 16 years ago, the trouble with Rule 1.6 and the noisy withdrawal comment “is that some fools may not understand that Rule 1.6 does not mean what it seems to mean.”

b. **What’s the Jurisprudence on Noisy Withdrawals?**

A Westlaw search conducted on December 28, 2007 reveals no state and only two federal cases that have used the term “noisy withdrawal.” A federal district court, in a case involving SEC enforcement, indicated that simply “going up the ladder” in the corporation to alert some people can be insufficient, even though the SEC had not adopted “noisy withdrawal rules” at that time. In October, 2007, the Second Circuit issued a lengthy opinion on an in-house lawyer’s duties in an entity with a parent-subsidiary structure. In holding that shareholders in a derivative suit can obtain otherwise privileged information “for good cause,” the Second Circuit noted that 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

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129As you recall, both were monsters of Greek legend between whom Odysseus had to steer in the Strait of Messina. Scylla, who ate several of Odysseus' seaman, had “the face and breast of a woman, but from her flanks grew six dog-heads and twelve dog-feet,” and she had a serpentine tail. Charybdis, a daughter of Poseidon and Gaia, was turned into a monster by Zeus and lived in a cave opposite Scylla. [Quotation is translation from Apollodorus E7.20 21, as found at www.theoi.com/pontos/skylla.html.]


132For 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 and gave an affidavit that his client “had engaged in a ‘flat-out-lie’” and revealed confidential information.

133Securities and Exchange Commission v. Spiegel, Inc., 2003 WL 22176223 (N.D.Ill. 2003): “However, this was a case where reporting “up the ladder” was not enough. The advice from the lawyers here was rejected by Spiegel's audit and board committees, and the material information that should have reached investors was kept under wraps. * * * None of Spiegel's legal advisers withdrew -- “noisily” or otherwise -- from representing Spiegel. If the SEC's proposed withdrawal rule had then been in effect, the SEC would have been alerted to take action sooner, and investors would have received information they could have acted on to make informed investment decisions about Spiegel. In this case, the absence of a “noisy withdrawal” requirement allowed Spiegel to keep investors and the SEC in the dark”

134Teleglobe Communications, Corp. v. BCE, Inc., 493 F.3d 345 (2nd Cir. 2007).
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.\footnote{Teleglobe at 369.}

In at least one case, \textit{Scholes v.Stone, McGuire and Benjamin}, 786 F.Supp. 1385 (N.D. Ill.1992), a lawyer who withdrew from representation and informed some people, but not investors in a company, was unable to dismiss, at pleading stage, a claim by the investors that the lawyer should have engaged in a noisy withdrawal as to them.

While the facts are complex, in essence\footnote{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.} 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 also that her client was a convicted felon. Douglas prepared rescission materials for the offering that only indicated the securities were unregistered; they did not reference the prior misrepresentations or the fact that the offeror was a felon. All the 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 had to “distance himself”\footnote{786 F. Supp. at 1392.} from it. Douglas recommended a second law firm (“SMB”) to assist in criminal defense matters for the client. The plaintiffs also contended (although SMB denied it), that SMB was
asked to also assist in corporate and securities matters. There were allegations in the complaint that SMB assisted Douglas in preparing the rescission documents that omitted reference to both the client’s prior criminal history and the material misrepresentations in the offering materials.

Eventually, a new entity was formed and some of the lawyers’ other clients ended up as officers. When Douglas and her firm finally withdrew from representation, after finding out about further client deceit, they informed the independent officers to “disassociate themselves”\(^\text{138}\) 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.”\(^\text{139}\)

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”\(^\text{140}\) 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

\(^{138}\) Id.
\(^{139}\) 786 F. Supp. at 1395.
\(^{140}\) 786 F. Supp. at 1396.
law firm thought it was representing the organizer and the entities, not the passive investors.

- Even if there was no attorney-client relationship with the investors, nonetheless there was a relationship that mandated disclosure to investors of the fraud – this, in essence, is the noisy withdrawal assertion: “. . . SMB as lawyers for the . . . entities owed a duty to the plaintiff investors to disclose [the client’s] fraudulent conduct with respect to the . . . entities. As there was no express contract between SMB and the plaintiff investors, it logically follows that the duty was extracontractual.”

  141 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.”

  142 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.”

  143 SMB’s motion for sanctions against the plaintiffs, on the grounds that SMB was only criminal counsel for the individual client and did not represent the entities, was denied, for the allegations ‘are not so baseless,
specious, or off the mark as to warrant the imposition of sanctions * * *

[P]laintiffs have raised issues which relate to the very fluid and evolving areas of the law. Plaintiffs’ complaint is not so tenuous as to warrant the imposition of sanctions.” 144

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 MIGHT HURT YOU**

Whether one looks at the 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).

144 786 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 Rule requires some waivers to be “confirmed in writing”\textsuperscript{145} (\textit{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.”\textsuperscript{146}

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.\textsuperscript{147} The first article one might look at, however, was 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 contains a broad overview of how the ABA Model Rules continued and, in some cases, altered the conflict of interest rules.

\begin{footnotesize}
\textsuperscript{145} “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.”

\textsuperscript{146} ABA Model Rule 1.0(e).


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
\end{footnotesize}
14. **CONCLUSION**

We should not deceive ourselves into believing that we are “ethical” lawyers because we have not directly violated the Model Rules or even some version of a bar’s ethical “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 a client’s interest. We should not be shocked if courts find ways to impose liability on lawyers by 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. 148

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 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. 149


149 Judge Alvin B. Rubin, writing in 35 La.L.Rev. 577 at 589 (1975), A Causerie on Lawyers' Ethics in Negotiation.
Lawyers should stand apart not merely by their training but by their behavior and the mutual philosophical principles to which they hold one another.

I submit 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." Yet, it would be hard to argue with a more practical formulation, given the serious possibility that a single standard will ultimately evolve jurisprudentially. I submit that the following formulation may prove helpful:

*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.*

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