GARIBALDI INNS OF COURT
CLE Presentation
September 14, 2023

Topic:

The Full Pinocchio: Lying for the Sake of the Deal - What 'Zeal for the Deal' Might Cause Parties, Attorneys, and Mediators to do in Mediated Settlement Negotiations!

"Truth is such a precious quantity, it should be used sparingly."
- Mark Twain

"Everyone is entitled to his own opinion, but not his own facts."
- Daniel Patrick Moynihan

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PANELIST BIOS

Rebecca Callahan is a 30-year, AV-rated attorney who acts as a mediator, arbitrator, referee, consultant and ADR trainer. Her area of expertise is complex business disputes. Rebecca is the principal of Callahan Dispute Resolution, an independent resource for the litigation alternative located in Newport Beach, California. She is also a member of the mediation and commercial arbitration panels of the American Arbitration Association. Rebecca earned a master's degree in dispute resolution from the Straus Institute where she is an adjunct professor. She earned her law degree from UC Berkeley (Boalt Hall) and her undergraduate degree from USC. She has held numerous leadership positions with both community and professional associations and is currently serving as a Director of the Orange County Bar Association. For more information, please visit Rebecca's website at www.callahanADR.com. Rebecca is also listed on www.MEDIATION.org.

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DEFINITIONS

What is a lie?

An untruth deliberately told; the uttering or acting of that which is false for the purpose of deceiving; intentional misstatement.

Black's Law Dictionary

An untrue statement.

Miriam Webster Dictionary

To intentionally deliver a false statement to another person which the speaking person knows is not the whole truth.

Wikipedia

What is deception?

To give a false impression; to cause to accept as true or valid what is false or invalid.

Miriam Webster Dictionary

To intentionally trick or mislead somebody: to mislead or deliberately hide the truth from somebody

Bing.com

QUOTES

"Lying is wrong, except in three things: the lie of a man to his wife to make her content with him; a lie to an enemy, for war is deception; or a lie to settle trouble between people.:

Muhammad (Ahmad, 6.459)

"I'm not upset that you lied to me, I'm upset that from now on I can't believe you."

Friedrich Nietzsche

"There are three types of lies – lies, damn lies and statistics."

Benjamin Disraeli

"One good thing about the truth is that you don't have to remember it."

Anonymous

ABA MODEL STANDARDS OF CONDUCT FOR MEDIATORS

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to

proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

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STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1 A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the

mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

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STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

ABA MODEL RULES FOR PROFESSIONAL CONDUCT, RULE 4.1

RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

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.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS

(ABA Litigation Section)

SECTION 1. PREFACE

Settlement negotiations are an essential part of litigation. In light of the courts' encouragement of alternative dispute resolution and in light of the ever increasing cost of litigation, the majority of cases are resolved through settlement. The settlement process necessarily implicates many ethical issues. Resolving these issues and determining a lawyer's professional responsibilities are important aspects of the settlement process and justify special attention to lawyers' ethical duties as they relate to negotiation of settlements.

These Guidelines are written for lawyers who represent private parties in settlement negotiations in civil cases. In certain situations, the Guidelines may not be applicable to lawyers representing governmental entities. The Guidelines should apply to settlement discussions whether or not a third party neutral is involved. To the extent there may be ethical issues specific to mediation and non-binding arbitration proceedings, the Guidelines or Committee Notes may provide guidance, but these specific issues deserve particularized treatment and are beyond the scope of these Guidelines. As a general rule, however, the involvement of a third party neutral in the settlement process does not change the attorneys' ethical obligations.

The Guidelines are intended to be a practical, user-friendly guide for lawyers who seek advice on ethical issues arising in settlement negotiations. Generally, the Guidelines set forth existing ABA policy as stated in the Model Rules of Professional Conduct ("the Model Rules") and ABA Opinions and should be interpreted accordingly. The Guidelines also identify some of the significant conflicts between ABA policy and other rules or law. In circumstances identified in the Committee Notes, the Guidelines suggest best practices and aspirational goals. Counsel should consult not only these Guidelines, but also the applicable rules, codes, ethics opinions, and governing law in the jurisdiction of concern and should be alert for amendments to the Model Rules in connection with the work of the ABA Ethics 2000 Commission.

References in this work are to the Model Rules and comments as amended by the ABA in February 2002. Such amendments may be found at the ABA website. This compendium is limited to the negotiations phase of settlements (which includes client counseling).

These Guidelines do not address the enforcement of settlement agreements or requests for sanctions for conduct in settlement negotiations.

These Guidelines are designed to assist counsel in ensuring that conduct in the settlement context is ethical. They are not intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules, and should not serve as a basis for civil liability, sanctions, or disciplinary action.

SECTION 2. SETTLEMENT NEGOTIATIONS GENERALLY

2.1 The Purpose of Settlement Negotiations

> The purpose of settlement negotiations is to arrive at agreements satisfactory to those whom a lawyer represents and consistent with law and relevant rules of professional responsibility. During settlement negotiations and in concluding a settlement, a lawyer is the client's representative and fiduciary, and should act in the client's best interest and in furtherance of the client's lawful goals.

Committee Notes: Subject to applicable rules and law, the lawyer's work in settlement negotiations, like the work in other aspects of litigation, should be client-centered. A lawyer should not impede a settlement that is favored by a client (or likely to be favored) and consistent with law and ethical rules, merely because the lawyer does not agree with the client or because the lawyer's own financial interest in the case or that of another nonparty is not advanced to the lawyer's or nonparty's satisfaction. But see, infra, Sections 3.3

2.2 Duty of Competence

> A lawyer must provide a client with competent representation in negotiating a settlement.

Committee Notes: With respect to settlement negotiations and any resulting settlement agreement, as is the case generally, Model Rule 1.1 requires counsel to provide competent representation. As part of this obligation of competence, a lawyer should give attention to the validity and enforceability of the end result of the settlement process and should make sure the client's interests are best served, for example, by considering tax implications of the settlement.

2.3 Duty of Fair-Dealing

A lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing.

Committee Notes: While there is no Model Rule that expressly and specifically controls a lawyer's general conduct in the context of settlement negotiations, lawyers should aspire to be honorable and fair in their conduct and in their counseling of their clients with respect to settlement. Model Rule 2.1 recognizes the propriety of considering moral factors in rendering legal advice and the preamble to the Model Rules exhorts lawyers to be guided by "personal conscience and the approbation of professional peers." Model Rules, Preamble, [7]. Cf. infra Sections 4.1.1, 4.1.2, and 4.3.1. Whether or not a lawyer may be disciplined, sanctioned, or sued for failure to act with honor and fairness based on specific legal or ethical rules, best practices dictate honor and4 fair dealing. Settlement negotiations are likely to be more productive and effective and the resulting settlement agreements more sustainable if the conduct of counsel can be so characterized.

2.4 Restrictions on Disclosure to Third Parties of Information Relating to Settlement Negotiations

With client consent, a lawyer may use or disclose to third parties information learned during settlement negotiations, except when some law, rule, court order, or local custom prohibits disclosure or the lawyer agrees not to disclose.

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

Further, lawyers must comply with any other legal or procedural restrictions, including a court order prohibiting disclosure. Among the possible restrictions are mediation rules and rules of evidence, such as Federal Rule of Evidence 408, which excludes proof of offers to settle and "conduct or statements made" during settlement negotiations, when offered to prove "liability for or invalidity of the claim or its amount." At trial, lawyers should not refer to settlement discussions or offer proof relating to settlement discussions absent a good faith basis to believe the proof is admissible notwithstanding Federal Rule of Evidence 408 or other relevant limitations.

If there is a known local or judicial custom or practice restricting the disclosure or use of information learned during settlement discussions, lawyers should act accordingly, unless they have given notice of their intention not to do so. Cf. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule [hereinafter, the Model Code, DR] 7-106(C)(5) (providing that in a judicial proceeding a lawyer may not "[f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply"). (It should be noted that the Model Code was withdrawn in 1983 and is no longer official ABA policy.) In some jurisdictions, the local practice is to confirm the parties' mutual agreement not to disclose any part of settlement discussions through a mutual oral undertaking that the discussion is "off the record and without prejudice." Such agreements should be honored. In other jurisdictions, many lawyers may believe that this agreement is implied even if it is not expressly discussed. Lawyers are encouraged to consult several local peers in attempting to discern relevant custom and practice in this area.

2.5 Required Disclosure to Court of Information Relating to Settlement Negotiations

> When seeking court approval of a settlement agreement or describing in court matters relating to settlement, a lawyer shall not knowingly make a false statement of fact or law to the court, fail to correct a false statement of material fact or law previously made to the court by the lawyer, or fail to make disclosure to the court, if necessary as a remedial measure, when the lawyer knows criminal or fraudulent conduct related to the proceeding is implicated. Failure to make such disclosure is not excused by the lawyer's ethical duty otherwise to preserve the client's confidences.

Committee Notes: Model Rule 3.3 requires candor toward a tribunal. A lawyer "must not allow the tribunal to be misled by false statements of law or fact . . . that the lawyer knows to be false." Model Rule 3.3, comment 2. The duty not to engage in affirmative

misrepresentations or material omissions when seeking court approval of a settlement agreement in accordance with Model Rules 3.3(a)(1) and (3) continues to the conclusion of the proceeding. This duty applies even if compliance requires disclosure of information otherwise protected by the lawyer's ethical commitment of confidentiality under Model Rule 1.6. Further, substantive law may invalidate a settlement agreement where a lawyer's affirmative misrepresentation or material omission prevents the court from making an informed decision about whether to approve a settlement agreement. See, e.g., Spaulding v. Zimmerman, 116 N. W. 2d 704 (Minn. 1962).

Because settlement agreements, by definition, are voluntary undertakings, a lawyer should first consult with the client before disclosing ethically protected confidential information to the court. See generally, infra, Section 3. The attorney also should allow the client to decide whether to seek judicial approval of the agreement with the required disclosures, or to abandon or seek to modify the settlement agreement accordingly. See Model Rule 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," and Model Rule 1.2(a): "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." If a mutually agreeable and proper course of action does not result from the consultation, the lawyer must withdraw from representing the client in accordance with Model Rule 1.16, for the lawyer may not pursue a course of action that would, on the one hand, violate the duties required of counsel by Model Rule 3.3, or, on the other hand, defy the client's directives or wishes.

SECTION 4. ISSUES RELATING TO A LAWYER'S NEGOTIATIONS WITH OPPOSING PARTIES

4.1 Representations and Omissions

4.1.1 False Statements of Material Fact

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

Committee Notes: A lawyer is required to be truthful when dealing with others on a client's behalf. Model Rule 4.1, comment 1. False or misleading statements are unethical when they are knowing misstatements of material fact (or law). The Model Rules define "knowledge" as "actual knowledge of the fact in question," but such knowledge "may be inferred from circumstances." Model Rules, Preamble, Scope and Terminology. The ethical requirement of truthfulness when speaking to others includes not only false

statements to those who have interests adverse to one's client, but also misrepresentations to government officials, opposing counsel, and mediators or other third party neutrals. See generally ABA Annotation to Model Rule 4.1. See also Model Rule 1.2(d), prohibiting a lawyer from counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal or fraudulent.

Unethical false statements of fact or law may occur in at least three ways: (1) a lawyer knowingly and affirmatively stating a falsehood or making a partially true but misleading statement that is equivalent to an affirmative false statement; (2) a lawyer incorporating or affirming the statement of another that the lawyer knows to be false; and (3) in certain limited circumstances, a lawyer remaining silent or failing to disclose a material fact to a third person. This section addresses the first two of these situations; the next section deals with silence and nondisclosure.

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker's state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances. Model Rule 4.1, comment 2. "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. . ." Model Rule 4.1, comment 2. (This comment was amended in February 2002 to make clear that even these types of statements may be statements of material fact.) "Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind Restatement, § 98, comment c. Factors to be considered include the past relationship among the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement (for example, whether the statement is presented as a statement of fact), related communications, the known negotiating practices of the community in which both are negotiating and similar circumstances. Restatement, §98, comment c. In making any such statements during negotiation, a lawyer should consider the effect on his/her credibility and the possibility that misstatements in negotiation can lead not only to discipline under ethical rules, but also to vacatur of settlements and civil and criminal liability for fraud. Model Rule 4.1., comment 2.

Reliance by and injury to another person from misrepresentations ordinarily is not required for purposes of professional discipline. See Restatement, § 98, comment c. Moreover, some jurisdictions do not include the "materiality" limitation that is contained in Model Rule 4.1. Even if materiality is required for disciplinary purposes, as a matter of professional practice in settlement negotiations, counsel should not knowingly make any false statement of fact or law. See Section 2.3, supra, and see also Model Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." Some jurisdictions may interpret Model Rule 8.4(c) not to require the falsity, scienter, and materiality requirements of Model Rule 4.1, thus creating textual and analytical tensions with respect to the interplay between Model Rules 4.1 and 8.4(c). See, e.g., Restatement, §98, comment c.

4.1.2 Silence, Omission, and the Duty to Disclose Material Facts

> In the course of negotiating or concluding a settlement, a lawyer must disclose a material fact to a third person when doing so is necessary to avoid assisting a criminal or fraudulent act by a client, unless such disclosure is prohibited by the ethical duty of confidentiality.

Committee Notes: A lawyer generally has no ethical duty to make affirmative disclosures of fact when dealing with a non-client. Under certain circumstances, however, a lawyer's silence or failure to speak may be unethical. Model Rule 4.1(b) and Model Rule 4.1, comment 3.

The duty to disclose may arise in at least three situations: (1) a lawyer has previously made a false statement of material fact or a partially true statement that is misleading by reason of omission; (2) a lawyer learns of a client's prior misrepresentation of a material fact; and (3) a lawyer learns that his or her services have been used in the commission of a criminal or fraudulent act by the client, "unless such disclosure is prohibited by the ethical duty of confidentiality." Thus, the disclosure duty under Model Rule 4.1(b) is severely limited by the prohibition against revealing without client consent information covered by Model Rule 1.6. For example, under Model Rule 1.6, a lawyer may (but is not required to) reveal information a lawyer has learned during representation of a client (including knowledge of the falsity of representations), but only "to the extent the lawyer reasonably believes necessary" to prevent "reasonably certain death or substantial bodily harm.") Model Rule 1.6.

The ethical duty of confidentiality under Model Rule 1.6, as noted above, trumps the ethical duty of disclosure under Model Rule 4.1(b); however, states have adopted different versions of these rules and there is considerable variation in the rules'

application by the states. Some states either allow or require disclosure in situations where the Model Rules do not. Accordingly, particularly in this area of the law and the ethics governing lawyers, a lawyer should be careful to check the controlling ethical rules in the relevant jurisdiction. Moreover, even if a lawyer is not subject to discipline for failure to disclose, such failure may be inconsistent with professional practice and may possibly jeopardize the settlement or even expose the lawyer to liability. See Section 2.3, supra.

Additionally, the ethical duty of confidentiality under Model Rule 1.6, which, as noted above, trumps the ethical duty of disclosure under Model Rule 4.1(b), is itself trumped by the lawyer's disclosure obligations under Model Rule 3.3 concerning candor before tribunals, regardless of whether the client consents to revelation. And, even where a lawyer's disclosure duties to a tribunal are not triggered directly under Model Rule 3.3, the ABA Standing Committee on Ethics and Professional Responsibility and ethics committees in some jurisdictions have held that lawyers must disclose certain types of information under Model Rule 4.1, even though the revelation arguably would violate Model Rule 1.6. One example is the death of a client during negotiations to settle personal injury claims. ABA Formal Op. 95-397 (1995) (lawyer for personal injury client who dies before accepting pending settlement offer must inform court and opposing counsel of client's death); Kentucky Bar Ass'n v. Geisler, 938 S.W. 2d 578 (Ky. 1997) (lawyer who settled personal injury case without disclosing that her client died violated the state's version of Model Rule 4.1, because failure to disclose equals affirmative misrepresentation of material fact). Another example is the notion that a lawyer should notify opposing counsel of an advantageous scrivener's error in a document, notwithstanding that the lawyer's knowledge of the error is "information relating to the representation" within the meaning of Model Rule 1.6's prohibition against disclosures without client consent. See ABA Informal Op. 86-1518 (1986). See also infra Section 4.3.5, regarding exploiting an opponent's mistake.

4.1.3 Withdrawal in Situations Involving Misrepresentations of Material Fact

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

Committee Notes: In the context of settlements, as generally, "a lawyer shall . . . withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law." Model Rule 1.16(a)(1) (emphasis added). "A lawyer may withdraw from representing a client . . . if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or "the client has used the lawyer's services to perpetrate a crime or fraud." Model Rule 1.16(b)(2) and 1.16(b)(3), (emphasis added). See also Model Rule 1.6, comments 15 and 16, and Restatement Section 32(3)(e). (In any case, however, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Model Rule 1.16(c).)

The text of the Model Rules does not explicitly authorize a "noisy withdrawal." The ABA, however, has interpreted the comments and rules to allow a "noisy withdrawal," i.e., notice of withdrawal and disaffirmance of the lawyer's work product, when (but only when): (i) the lawyer knows that the client will engage in criminal or fraudulent conduct that will implicate the lawyer's past services; (ii) the lawyer's withdrawal from further representation as mandated by Model Rule 1.16(a)(1) in silence will be ineffective to prevent the client from using the lawyer's work product to accomplish its unlawful purpose; and (iii) disaffirmance of the lawyer's work product is appropriate to avoid violating Model Rule 1.2(d), which prohibits assisting a client in conduct that the lawyer knows is criminal or fraudulent. See ABA Formal Op. 92-366 (1992).

4.3 Fairness Issues

4.3.1 Bad Faith in the Settlement Process

An attorney may not employ the settlement process in bad faith.

Committee Notes: It is axiomatic that lawyers may not use the settlement process in bad faith. Ethics rules, procedural rules and statutes forbid the bad faith use of the litigation process. See, e.g., Model Rules 3.2 and 4.4. The ordinary prohibition is applicable to settlement negotiations as to other phases of litigation. Therefore, the settlement process should not be used solely to delay the litigation or to embarrass, delay, or burden an opposing party or other third person. For example, a lawyer would be acting in bad faith if he were to schedule a mediation for the purpose of disrupting the opposing counsel's trial preparation.

It is not bad faith for a party to refuse to engage in settlement discussions or to refuse to settle. Settlement is not an obligation, but an alternative to litigation. The choice to pursue it to fruition should be that of the client. However, it may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, when the client actually has no interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceedings or securing discovery. See supra, Section 2.3.

4.3.5 Exploiting Opponent's Mistake

In the settlement context, a lawyer should not exploit an opposing party's material mistake of fact that was induced by the lawyer or the lawyer's client and, in such circumstances, may need to disclose information to the extent necessary to prevent the opposing party's reliance on the material mistake of fact.

Committee Notes: Ethics rules forbid a lawyer from making misstatements or engaging in misleading or deceitful conduct. See, e.g., Model Rule 4.1. Although there is no general ethics obligation, in the settlement context or elsewhere, to correct the erroneous assumptions of the opposing party or opposing counsel, the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer's client and not to exploit such mistakes. See, e.g., Crowe v. Smith, 151 F.3d 217 (5th Cir. 1998) (upholding sanction where attorney falsely responded to a discovery request that no indemnity agreements were known, then offered to settle on behalf of his clients, emphasizing that his clients were not insured and did not have access to substantial funds for settlement purposes). Additionally, applicable principles of contract law may allow rescission of a settlement agreement that resulted from a party's exploitation of the opposing party's mistake.

In some limited circumstances, even where neither counsel nor counsel's client caused the other party's error, there may be a professional duty to correct the error. See Pa. Eth. Op. 97-107 (1997) (lawyer who learns that mutual release negotiated for client is premised on client's inability to transfer her interest in real estate, which lawyer knows is not necessarily correct premise, must disclose this to opposing counsel); See also ABA Formal Op. 95-397 (1995) (lawyer of client who dies before accepting pending settlement offer must inform opposing counsel of client's death). Further, some may conclude that, as a matter of professionalism, the other party's misconception must be corrected in certain circumstances.

In the context of drafting a settlement agreement, in particular, a lawyer should endeavor in good faith to state the understanding of the parties accurately and completely, and should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention. See ABA Guidelines for Litigation Conduct. It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement. See N.Y. City Eth. Op. 477 (1939) (when opposing lawyer recognizes inadvertent mistake in settlement agreement, lawyer should urge client to reveal the mistake and, if the client refuses, the lawyer should do so); cf. ABA Informal Op. 86-1518 (1986) ("Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.").

MISCELLANEOUS

Cal.Bus. & Prof.Code § 6106 - Moral turpitude, dishonesty or corruption irrespective of criminal conviction

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

Cal.Rules of Professional Conduct, Rule 1-120 - Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

California Civil Code § 47(b) - *the "Litigation Privilege" statute*

In general, communications made in connection with matters related to a lawsuit are privileged under Civil Code Section 47(b). *Rubin v. Green* (1993) 4 Cal. 4th 1187, 1191; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal. App. 4th 1049, 1058; *Knoell v. Petrovich* (1999) 76 Cal. App. 4th 164, 167; *Aronson v. Kinsella* (1997) 58 Cal. App.4th 254, 263. The principal purpose of section 47(b) is to afford litigants and witnesses "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]" *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 213 ("*Silberg*"). The privilege promotes effective judicial proceedings by encouraging "'open channels of communication and the presentation of evidence'" without the external threat of liability. Id., citing *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal. App. 3d 961, 970. The litigation privilege "further promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients' interests." Id. at 214. "Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an

unending roundelay of litigation, an evil far worse than an occasional unfair result. [Citations.]" Id.

To accomplish the foregoing objectives, the litigation privilege is "an 'absolute' privilege, and it bars all tort causes of action except a claim of malicious prosecution." *Hagberg v. California Federal Bank* (2004) 32 Cal. 4th 350, 360 ("*Hagberg*"). Although originally enacted with reference to defamation actions alone, the privilege has been extended to *any* communication, whether or not it is a publication, and has been applied to "numerous cases" involving "fraudulent communication or perjured testimony." *Silberg*, supra, 50 Cal. 3d at 218; see e.g., *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal. App. 4th 17, 20 (attorney's misrepresentation of available insurance policy limits to induce settlement of a lawsuit); *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal. App. 3d 1284, 1300 (subornation of perjury); *Carden v. Getzoff* (1987) 190 Cal. App. 3d 907, 915 (perjury); *Steiner v. Eikerling* (1986) 181 Cal. App. 3d 639, 642-643 (preparation of a forged will and presentation of it for probate); *O'Neil v. Cunningham* (1981) 118 Cal. App. 3d 466, 472-477 (attorney's letter sent in the course of litigation allegedly defaming his client). The privilege has even been held to apply to "statements made prior to the filing of a lawsuit." *Hagberg*, supra, 32 Cal. 4th at 361.

In 1992, the Legislature enacted Code of Civil Procedure Section 425.16 in an effort to curtail lawsuits brought primarily "to chill the valid exercise of . . . freedom of speech and petition for redress of grievances" and "to encourage continued participation in matters of public significance." CCP § 425.16(a). The section authorizes a special motion to strike a cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." CCP § 425.16(b)(1). The statute directs the court to grant the special motion to strike "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Id.; *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal. App. 4th 1388, 1395-1396.

Resolution of a special motion to strike under section 425.16 requires a two-step process. *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 88 ("*Navellier*"). First, the defendant must make a threshold showing that the challenged cause of action arises from constitutionally protected activity. *Taus v. Loftus* (2007) 40 Cal. 4th 683, 703; *Rusheen v. Cohen* (2006) 37 Cal. 4th 1048, 1056; *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 61 ("*Equilon*"). In determining whether a defendant has sustained its initial burden, the court may consider the pleadings, declarations and matters that may be judicially noticed. CCP § 425.16(b)(2); *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal. App. 4th 324, 329, 339.

Second, once a defendant makes a prima facie showing that plaintiff's claim is directed at protected rights, the burden shifts to plaintiff to establish that (a) no such protection exists, and (b) there is a "probability" that plaintiff will prevail on the challenged claim. CCP § 425.16(b); *Equilon*, supra, 29 Cal. 4th at 67. "[P]laintiff must demonstrate that *the complaint is both legally sufficient* and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." *Premier Med. Mgmt. Systems, Inc v. California Ins. Guarantee Ass'n* (2006) 136 Cal. App. 4th 464, 476 (emphasis in original); *Navellier*, supra, 29 Cal. 4th at 88-89. Whether the complaint could be amended to state a valid claim is immaterial. See, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260. The burden is on plaintiff to respond by producing evidence that would be admissible at trial – i.e., to proffer a prima facie showing of facts supporting judgment in plaintiff's favor." *Chavez v. Mendoza* (2001) 94 Cal. App. 4th 1083, 1087.

Code of Civil Procedure Section 425.16 applies when the challenged cause of action arises from "any act . . . in furtherance of the person's right of petition or free speech . . . ." CCP § 425.16(b)(1). The statute defines acts in furtherance of the constitutional right to petition to include "*any* written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." CCP § 425.16(e)(2) (emphasis added). This includes statements or writings made in connection with litigation in the civil courts. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1115 ("*Briggs*"); *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal. App. 4th 1, 4-5. Cases construing section 425.16(e)(2) have held that "a statement is 'in connection with' litigation . . . if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." Courts have adopted a "fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." *Neville v. Chudacoff* (2008) 160 Cal. App. 4th 1255, 1266; see also *Kashian v. Harriman* (2002) 98 Cal. App. 4th 892, 908. In this regard, a number of cases have held that settlement negotiations had with respect to an underlying lawsuit are an exercise of the right to petition and that statements made as part of such negotiation are entitled to protection from subsequent, derivative tort claims under Code of Civil Procedure Section 425.16(e)(2). *Seltzer v. Barnes* (2010) 182 Cal. App. 4th 953, 964-969; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal. App. 4th 901, 908.

The California Supreme Court has held that settlement negotiations are within the scope of section 425.16. In *Navellier*, supra, 29 Cal. 4th 82, the plaintiffs sued defendant for fraud, alleging that the defendant had misrepresented his intent to be bound by the terms of the settlement (specifically, a release in a previous action). Id. at 87. The Court held that the defendant's negotiation and execution of the release involved "'statement[s] or writing[s] made in connection with an issue under consideration or

review by a . . . judicial body' (§ 425.16, subd. (e)(2)), i.e., the federal district court." Id. at 90.

The Court of Appeal followed *Navellier* in *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal. App. 4th 834. In that case, the plaintiff alleged that the defendant made fraudulent promises in exchange for stipulation of judgment in an earlier unlawful detainer action. The Court of Appeal held that the alleged fraudulent statements were made "within the context of negotiating the stipulated judgment" and were within the scope of protection provided by section 425.16. Id. at 842. Accord, *Dowling v. Zimmerman* (2001) 85 Cal. App. 4th 1400, 1418-1420 (motion to strike granted with respect to claim for misrepresentation made in connection with defendant's negotiation of a stipulated settlement); see also *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal. App. 4th 1108, 1118 (entering into a settlement agreement of an underlying lawsuit is protected activity).

For purposes of responding to a special motion to strike and to satisfy the burden of showing the probability of prevailing on his or her claims under Code of Civil Procedure Section 425.16(b)(1), a plaintiff must demonstrate that the claim is both legally sufficient and, assuming his or her proffered evidence is believed, supported by facts sufficient to sustain a favorable judgment. *Navellier*, supra, 29 Cal. 4th at 88-89. That is not possible when a fraud claim is based on alleged communications to which the litigation privilege applies because the California Supreme Court has held that communications that fall within the protection of the litigation privilege "are equally entitled to the benefits of section 425.16." *Briggs*, supra, 19 Cal. 4th at 1115.

HYPOTHETICALS

(Based upon real-life situations)

1. Is it OK for the Mediator to …..?

1.1 Hidden Information

In private caucus with the defendant's attorney and the representative from the defendant's insurer, the mediator is told that the representative has authority to settle for policy limits, but would like the mediator to "work" the other side to get plaintiff's demand below policy limits – with the implicit promise (wink of the eye) that the insurance company uses mediators who help it save money on settled claims.

Q: ***Is it OK for the mediator to cross the hall to the plaintiff's room and say the following:***

"Defendant is so angry about your charge of fraudulent concealment that he is prepared to spend his entire self-liquidating policy of $250,000 on defense unless you drop the fraud charge, publicly apologize for attacking his character and give him a demand that is less than policy limits. Defendant is here to settle the case, but there is some business on his end that needs to be taken care of in the process. It's your choice whether you leave here with a check in hand. What do you want to do?

1.2 Bending the Truth

In private caucus and with the admonition that the information is "confidential" and will not be shared with the other side, the plaintiff's attorney told the mediator that a key, third-party, impeachment witness is not wavering about testifying for fear of losing his/her job. Plaintiff's attorney also tells the mediator that the other side is not aware of this development and probably thinks to the contrary.

Q: ***Is it OK for the mediator to cross the hall to the plaintiff's room and say the following:***

"I am authorized by plaintiff to tell you that I spoke with _____ - the impeachment witness – and to give you my evaluation of the impeachment testimony I heard in the conference call that was conducted during private caucus. If the impeachment testifies as he/she did during our conference call, I believe that your credibility will be impeached on several issues key to your defense and you could lose on all counts. Now, defendant is here to settle the case today, but your opening demand is a non-starter. What do you want to do?

1.3 "Puffing" by the Mediator

In private caucus with plaintiff, the mediator has had a very nice, even-toned discussion with the plaintiff in which plaintiff has said that he carries no grudge against the defendant, that he understands that his attorney thinks he has a very good case and should recover at least "X" at trial, but he really is not interested in vindication or being right or recovering all that might be available under the law; that he would really like to get the dispute resolved and is willing to talk about a settlement in the range of half of "X" – which is about what each side will each pay to their attorneys to take the case to trial. That being said, plaintiff wants defendant to make the first offer and to do so at a number that signals his willingness to get up to the "half of X" range.

Q: ***Is it OK for the mediator to cross the hall to the plaintiff's room and say the following:***

"As you know, I've just spent some time meeting with plaintiff. I believe that plaintiff is so emotionally outraged that he will carry out a program of adverse public attacks on you and your company's business practices. If you want to get this matter resolved, you need to get serious and soon. Plaintiff has insisted that you make the first offer. Based on my assessment of plaintiff's demeanor during our private caucus, I believe that plaintiff may walk out the door if you do not open and do so in the range of what you're going to spend to take this case to trial. Plaintiff is here to settle the case today. What do you want to do?

2. What do you do if the client/party lies?

2.1 The Baseball Player

You represent Major League Baseball Player (MLBP) in a divorce proceeding. At the outset of the engagement in February, MLBP tells you that 90% of his compensation package was a base salary of $4.5 Million per year and that 10% of his compensation – up to $500,000 – was a "bonus" dependent on achieving certain performance benchmarks. Based upon that information, a settlement is negotiated in a mediation with wife and her attorney in which wife agreed to set spousal support for the next 5 years at 50% of MLBP's base salary. The agreement was written up at the mediation and signed by the wife and her attorney. When it is time for MLBP and his attorney to sign, sitting in private caucus, MLBP laughs laughs and says: "What a fool she is! I just renegotiated my contract so that starting next year my base salary will be $2.5 Million and I will be entitled to earn a performance bonus of up to $4.0 Milion by achieving certain benchmarks. And the great thing is that the announcement won't be made until the start of the 2013 season!"

Q: *Is it OK for the mediator to stay silent and allow the signing of the settlement to proceed?*

Q: *Can the mediator say anything to the other side about these newly discovered material facts?*

Q: Does the mediator have an ethical obligation to recuse himself/herself from any further involvement in the mediation? To end the mediation? If so, how? If not, why?

Q: *What do you think happens if the mediator is not in the room at the time MLBP and his attorney review the settlement agreement?*

2.2 The Poor Widow

A widow is in a heated dispute with her deceased husband's creditor/former business partner who is claiming fraud and seeking millions of dollars in damages. [The creditor's claim against husband relates to a failed business venture in which the creditor claims that husband used/spent the money on personal and other business expenses unrelated to the joint venture.] A mediation is convened on the pretense of negotiating a settlement based upon the widow's ability (inability) to

pay even if the creditor were to prevail in his litigation based upon the widow's representations that (a) she has no assets other than a modest home in Costa Mesa worth about $250,000 (for which the homestead exemption in California is $125,000) and a 2005 Lexus with 100,000 miles on it worth about $10,000, (b) she is unemployed, and (c) she is living social security and a small pension from when she was a schoolteacher. Based upon this information, a settlement is negotiated at mediation whereby the creditor agreed to release all claims against the widow in exchange for her assignment of a third-party note obligation owed to husband worth about $75,000. An express term of the settlement required that your client provide a financial statement declaration confirming the represented financial condition.

A settlement agreement is drafted at the mediation and includes an express representation provision stating that the creditor has relied upon the widow's stated financial circumstances in entering into the settlement agreement. When the settlement agreement is being reviewed by the poor widow and her attorney in private caucus, she tells the attorney that she forgot to tell him/her about an "off the books" asset that she's not sure is relevant. The "off the books" asset is a 20,000 square foot commercial building in Irvine that her husband invested in many years ago with a college buddy. Title is held in the name of a limited partnership. The property is owned free-and-clear and generates enough revenue to pay monthly distributions of about $18,000 - $9,000 to each partner (which she has been receiving since husband's death).

The widow's attorney tells the mediator that the widow is uncomfortable signing the settlement agreement with the financial representation provision because she is elderly and unsophisticated and is concerned that the creditor will use that provision to sue her again in the future. The attorney tells the mediator he/she needs to persuade the other side to strike that provision from the settlement agreement if the mediator wants to get a deal done that day.

Q: ***Can the mediator do as instructed if he/she was present during the private caucus discussions between the widow and her attorney and heard about the "off the books" asset? If not, what should the mediator do?***

Q: ***Are there any problems with the mediator proceeding as instructed by the widow's attorney? If so, why?***

Q: ***What do you think happens if the mediator is not in the room at the time the widow and her attorney discuss the settlement agreement?***

3. What do you do if the attorney lies?

A an early / pre-discovery mediation was convened for the purpose of bringing the plaintiff and plaintiff's counsel together with defendant and its insurer. At the time of the mediation, defendant had closed and was out of business (and thus was not a source of potential recovery or contribution to any settlement). Well in advance of the mediation, plaintiff's attorney prepared an extensive brief, complete with expert witness reports on the key issues. According to plaintiff's attorney, plaintiff's damages were in excess of $2 million. Under the circumstances (defendant's demise), plaintiff was willing to settle for policy limits, which plaintiff's attorney assumed must be at least $1 million, but did not know for a fact.

No brief was filed or exchanged on behalf of defendant / defendant's insurer in advance of the mediation. At the start of the mediation, in private caucus, defendant's attorney said to the mediator: "We've read and considered plaintiff's brief and agree that there is exposure for which coverage exists under defendant's policy. That being said, we also belief that a significant portion of plaintiff's alleged damages are not covered under the policy (and he explained in detail). Defendant's attorney then asked the mediator to obtain an opening demand from plaintiff to get the negotiations going."

After several hours of back-and-forth, defendant's attorney finally said that the representative from the insurance company had obtained approval to put policy limits on the table and that the defendant / defendant's insurer's final offer was $500,000." That is where the negotiations ended, with plaintiff accepting this final offer.

In a separate room, plaintiff's counsel wrote out the term sheet memorandum, provided for the settlement amount of $500,000 to be paid by defendant's insurer in full and complete compromise of all claims. Plaintiff signed that memorandum and the mediator took it into the defendant's room for signature. When the mediator presented the term sheet memorandum to defendant's counsel, he/she said: "Great job! My

client and the insurance company are thrilled to get this done at such a bargain price. The real policy limits are $1 million, but defendant has other claims its needs to deal with for which the defendant's principals have personal, uncovered exposure."

Q: ***Is it OK for the mediator to stay silent and allow the signing of the settlement to proceed?***

Q: ***Can the mediator say anything to the other side about these newly discovered material facts?***

Q: ***Does the mediator have an ethical obligation to recuse himself/herself from any further involvement in the mediation? To end the mediation? If so, how? If not, why?***

Q: ***What do you think happens if the mediator is not in the room at the time the defendant and his attorney review the settlement agreement for signature?***