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NEGOTIATIONS AND THE DUTIES OF AN ATTORNEY

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RULE 4.1 AND THE DUTY OF HONESTY IN NEGOTIATIONS

Some practitioners may subscribe to the belief that negotiations, whether through mediation or otherwise, are essentially the Wild West, where the parties and their counsel are not governed by the same rules requiring honesty and candor that apply when appearing in front of the tribunal. This is not so. Rule 4.1 of the Virginia Rules of Professional Responsibility states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of fact or law; or
>
> (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

As discussed below, this Rule applies to representations made to opposing parties and their counsel at any time, particularly including negotiations. Attorneys are well advised to be aware of not only the text of the rule, but also the cases and commentary interpreting that Rule in Virginia and other jurisdictions. In these materials we will discuss some of the implications of the attorney's duty of honesty to third parties, and the applicable of that duty in the context of negotiations.

WHAT CONSTITUTES A MISREPRESENTATION IN NEGOTIATION?

It is useful to note that the Virginia Rule appears to be stricter than the ABA Model Rule. ABA Rule 4.1 requires lawyers to speak the truth as they understand it about "material fact or law" but not about nonmaterial facts or law. A material statement is one reasonably viewed as important to a fair understanding of what is being given up and gained in the transaction. Once

Virginia adopted the Rule, it eliminated the word "material." This suggests that the Virginia Rule is intended to broadly cover any factual representation that is made by the attorney in negotiation.

However, not all statements made in negotiation necessarily qualify as statements of fact. Comment 2 to Virginia Rule 4.1 states:

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

Another change that Virginia made to the Model Rule involves clarifying its scope, and specifically bringing negotiations within the ambit of Virginia Rule 4.1. The Committee Commentary to the rule states, "The Committee deleted the ABA Model Rule's references to a 'third person' in the belief that such language merely confused the Rule." It is therefore clear that this Rule fully applies to any representation made to an opposing party or opposing counsel during negotiations.

ABA Formal Opinion 06-439 provides excellent commentary on the ethics of negotiations, and caucused mediations in particular. The Opinion observes:

> In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

In that context, the Opinion notes arguments have been made that a stricter standard of truthfulness might apply in caucused mediations because of the involvement of a neutral and the idea that this version of negotiation involves essentially a game of "telephone," in which "the

accuracy of information deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission." The Opinion also observes that a contrary argument has been put forth that "less attention need be paid to the accuracy of information being communicated in a mediation-particularly in a caucused mediation-precisely because consensual deception is intrinsic to the process." Regardless of the validity of these arguments, the Opinion concludes that "the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings."

The Opinion also provides useful analysis regarding whether a particular representation qualifies as a "fact" in the context of the Rule:

> We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

The Opinion concludes that "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' are ordinarily not considered 'false statements of material fact' within the meaning of the Model Rules." It may remain an open question whether Virginia's removal of the word "material" will change this analysis.

DUTY TO CORRECT A STATEMENT BY OPPOSING ATTORNEY OR PARTY

Questions regarding the application of this rule could arise in the circumstance in which an opposing counsel makes a statement indicating a misapprehension of the facts in the case that indicates he or she believes your case is factually stronger than it may be. For example, counsel might state during mediation that a particular offer that is being made takes into account that your client is permanently unable to work; however, you know that the reality is that your client is presently working and that their injuries do not prevent them from doing so. The misapprehension that opposing counsel expressed was not the result of any misrepresentation made by you (perhaps opposing counsel was confusing this with another case they are working on). Do you have a duty to correct your opposing counsel?

The Rule does not necessarily provide a definitive answer. Comment 1 to Virginia Rule 4.1 states:

> 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 failure to act or by knowingly failing to correct false statements made by the lawyer's client or someone acting on behalf of the client.

It is certainly true that the attorney does not generally have a duty to inform his opposing counsel of relevant facts. But must he correct a false factual impression that he knows his opposing counsel is relying upon in making an offer—specifically when that false impression is not as the result of any prior representation made by the attorney?

One commentator provides the following example, which slightly alters this scenario:

> The case is an employment discrimination claim based on sexual harassment where the claimant is seeking back wages, medical expenses, and future earnings. The matter goes to mediation and does not settle, but the parties agree to reconvene a month later, after the claimant's counsel provides additional information showing the claimant's efforts to obtain other employment. The day before the

> mediation is scheduled to reconvene, the respondent's counsel offers an extra $20,000 to settle the claim, specifically mentioning future wages as the reason behind the new offer. The claimant's counsel calls her client to share the good news. After hearing about the offer, the client shares her own good news: she has accepted a new position paying $15,000 a year more than her prior job. Suddenly recognizing that her new employment could impact the settlement offer, the client says, "Just take the deal, and don't say a word about my new job." The next day the claimant's counsel calls the opposing counsel and accepts the offer.

On Professional Practice: Ethics and Negotiation, Dispute Resolution Magazine, September 12, 2019.[1] The author of that scenario offers the opinion that it clearly violates the Rule because "the respondent's counsel's offer is based upon the claimant counsel's prior representations of a material fact, the future lost earnings, which have now evaporated," and that the Rule "requires claimant's counsel to disclose the new employment." *Id.*

This can create quite an ethical thicket, which could be exacerbated by the fact that these issues can arise very quickly in real time and under circumstances where mistakes can be fairly high. The decision to disclose or not disclose a particular fact, or the decision to correct or not correct a statement by opposing counsel, can have significant financial impact on the attorney's client, while at the same time creating very real ethical peril for the attorney. For example, the decision to disclose may expose the attorney to a claim that they have failed to zealously represent their client or that they have violated a duty of confidentiality, while the decision not to disclose could expose the same attorney to a claim that they have violated Rule 4.1. It can also potentially expose the attorney to civil liability, as discussed below.

[1]https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-on-professional-practice/

EXAMPLE #1: MISREPRESENTATION OF POLICY LIMITS

The case of *Fire Insurance Exchange v. Bell*, 643 N.E.2d 310 (Ind. 1994) presents the following fact pattern:

> On May 28, 1985, sixteen-month-old Jason Bell was severely burned in a fire at the Indianapolis home of Joseph Moore (Moore), Jason's grandfather. Gasoline had leaked onto the floor of Moore's utility room and was ignited by a water heater. The fire department cited Moore for the careless storage of gasoline. The carrier for Moore's homeowner's policy was Farmer's, whose claims manager was Dennis Shank (Shank) and whose attorney was Scaletta. Jason's mother, Ruby Bell (Bell), retained Collins to represent Jason regarding his claims for injuries sustained in the fire. Collins communicated with Scaletta and Shank on many occasions in an effort to obtain information regarding the insurance policy limits. By October, 1985, Farmers informed Scaletta that Moore's policy limits were $300,000. In February, 1986, Scaletta told Collins that he did not know the policy limits, even though Farmers had already provided Scaletta with this information. Collins claimed that Scaletta and Shank told him on separate occasions that Moore had a $100,000 policy limit. Scaletta confirmed his misrepresentation to Collins in a letter he wrote to Shank on February 14, 1986. When Jason's condition stabilized, Shank and Scaletta each represented to Collins that Farmers would pay the $100,000 policy limit. As a result of these conversations, Collins advised Bell to settle. The agreement was approved by the probate court, and after settling with Farmers, Bell filed a products liability action against the manufacturer of Moore's water heater. Through negotiations with the water heater company, Collins learned that Moore's homeowner's policy limits were actually $300,000.

Bell, 643 N.E.2d at 311-12. When the plaintiff's attorney realized that he had been deceived by defense counsel, he advised the plaintiff's mother to consult with independent counsel to assert claims against defense counsel and the insurance company.

The plaintiff subsequently sued defense counsel and the insurance company for fraudulently inducing the settlement by misrepresenting the policy limits. Not surprisingly, the attorneys and the insurance company defended the claim by asserting that the reliance by the plaintiff's counsel is not reasonable, contending that:

> the plaintiff's attorney "had no right to rely on the representations he claims because he had the means to ascertain relevant facts, was in an adverse position, was educated, sophisticated and not involved in any dominant-subordinate relationship." They further argue "that the relationship was adverse, the

> negotiations were protracted and that both sides were at all times represented by counsel," and emphasize that policy limits information was available to Bell's attorney from a variety of sources, including the rules of discovery.

Bell, 643 N.E.2d at 313. This is an important point. Certainly, many attorneys operate under the notion that the parties to a negotiation are well aware that their counterparts are adversarial and that their representations should be taken with a grain of salt. And it is true that there is authority in Virginia for the proposition that a party who settles a fraud claim cannot justifiably rely upon fraudulent representations made by the very party whom they sued for fraud:

> Even fraud cases can be settled. When one party, under these circumstances, freely and for consideration, releases and promises not to sue for failure to disclose material facts and for misrepresentation, that party will not be heard to claim that the promise was fraudulently induced because material information was, in fact, not disclosed. In other words, when negotiating or attempting to compromise an existing controversy over fraud, dishonesty, and self-dealing, it is unreasonable to rely on the representations of the allegedly dishonest party. The "past acts" recited in the release, which underlay the prior litigation, were precisely the same type of conduct that furnishes the basis of the present litigation. The only difference is that the present specific acts of self-dealing, although following the same pattern of activity, were not discovered until after the settlement had been consummated. The release, however, was intended to bar "all claims regardless of nature or source," according to the mailgrams, and to discharge all claims "of whatever nature or kind, whether known or unknown . . . from any matter or source whatsoever," according to the release.
>
> In sum, because the plaintiffs had no legal right to reasonably rely upon the alleged misrepresentations in connection with the compromise and settlement, we hold that the trial court did not err in refusing to rescind the release for fraud in its inducement.

Metrocall of Del. v. Cont'l Cellular Corp., 246 Va. 365, 375-76, 437 S.E.2d 189, 194-95 (1993). The Supreme Court of Virginia has also cited with approval the following observation from the Ninth Circuit:

> Parties involved in litigation know that they are locked in combat with an adversary and thus have every reason to be skeptical of each other's claims and representations. They can use discovery to ferret out a great deal of information before even commencing settlement negotiations. They can further protect themselves by requiring that the adverse party supply the needed information, or

> provide specific representations and warranties as a condition of signing the settlement agreement. Such parties stand on a very different footing from those who enter into an investment relationship in the open market, where it's reasonable to presume candor and fair dealing, and access to inside information is often limited. There are also very important policies that favor giving effect to agreements that put an end to the expensive and disruptive process of litigation.

Murayama 1997 Tr. v. NISC Holdings, LLC, 284 Va. 234, 247-48, 727 S.E.2d 80, 87-88 (2012)(citing *Facebook, Inc. v. Pacific Northwest Software, Inc*., 640 F.3d 1034, 1039 (9th Cir. 2011).

But none of these cases expressly involves a representation by an attorney in the case. This is where the court and *Bell* makes an important distinction. An attorney is presumed to not be acting in violation of the Rules of Professional Responsibility, including the prohibition against making false statements of fact found in Rule 4.1. As the court in *Bell* explained:

> We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.
>
> We therefore reject the assertion of Ice Miller and Scaletta that Bell's attorney was, as a matter of law, not entitled to rely upon their representations. However, rather than finding this to be an issue of fact for determination at trial, as did our Court of Appeals, we hold that Bell's attorney's right to rely upon any material misrepresentations that may have been made by opposing counsel is established as a matter of law.

Bell, 643 N.E.2d at 313. It is unclear how the Supreme Court of Virginia would decide a case in which the fraudulent representations were made directly by a Virginia attorney. However, the reasoning in *Bell* is fairly compelling. And even if a misrepresentation by an attorney does not support a claim for damages or rescission of the settlement agreement under a theory of fraud, it will still subject the attorney to disciplinary action for violation of Rule 4:1.

EXAMPLE #2: SETTLEMENT AFTER FAILURE TO PROVIDE INFORMATION IN DISCOVERY

Another version of this situation can arise when the parties are in litigation, and a settlement is reached after the parties have exchanged discovery, but it is later learned that one of the parties withheld information in their discovery responses. This was the case in *Matsuura v. Alston & Bird*, Nos. 97-16400, 97-17033, 1999 U.S. App. LEXIS 14017, at *2-4 (9th Cir. Feb. 2, 1999). The Court summarized the facts as follows:

> The Matsuuras, commercial nurserymen, alleged in their product liability suits that a DuPont fungicide, Benlate, was contaminated with herbicides, which killed their plants. Many similar suits were filed by commercial growers across the nation. In early trials, DuPont falsely represented that soil tests had produced no evidence of contamination. During consolidated discovery proceedings in Hawaii, which included the Matsuuras' suits, DuPont falsely denied withholding evidence of Benlate contamination, and improperly invoked work product protection to resist disclosure of testing data. The Matsuuras allege DuPont took these steps to induce Benlate plaintiffs to settle their cases for less than their fair value.
>
> After the Matsuuras settled, DuPont disclosed its testing data in the Hawaii discovery proceedings. Contrary to DuPont's prior representations, the tests confirmed that Benlate was contaminated. Additional evidence of Benlate contamination was produced in other Benlate litigation. Two district courts held that DuPont had intentionally engaged in fraudulent conduct by withholding this evidence.

Matsuura v. Alston & Bird, Nos. 97-16400, 97-17033, 1999 U.S. App. LEXIS 14017, at *2-4 (9th Cir. Feb. 2, 1999). Interestingly, the issue in Matsuura was not whether the withholding of discovery disclosures could support a claim that DuPont fraudulently induced plaintiffs to enter into a settlement agreement. Rather, the issue on appeal was the district court's dismissal of the suit on the grounds that it was barred by the releases signed by the plaintiffs as part of their settlement agreements. Specifically, the district court held that the plaintiffs "could have rescinded the settlement agreements because of DuPont's fraud, but forfeited that remedy by failing promptly to tender the settlement proceeds."

The Ninth Circuit reversed the dismissal holding that under Delaware law, which applied in the case, the party who has been fraudulently induced to enter into a contract has a choice of remedies: they may rescind the contract or they may affirm the contract and sue for fraud. This is also the law in Virginia.

EXAMPLE #3: THE ATTORNEY OPERATING WITHOUT AUTHORITY

What should an attorney do if he or she believes that their opposing counsel is not communicating settlement offers to their client or is making settlement demands that have not been authorized by their client? This was the situation in the case of *Blowers v. Lerner*, No. 1:15-cv-889-GBL-MSN, 2016 U.S. Dist. LEXIS 39085 (E.D. Va. Mar. 14, 2016). That case involved a claim against two collection attorneys under the Fair Debt Collection Practices Act (the "FDCPA"). Although the underlying merits of the claim were not particularly strong—the plaintiff admitted owing the debt to the creditor, the procedural defects complained of were dubious, and any damages would have been *de minimis* —the law firm sought to resolve the case for a modest settlement of $3,500. Plaintiff's counsel rejected that offer and filed suit.

Prior to any activity in the litigation, plaintiff's counsel sent a demand letter to defendants' counsel stating that the previous offer from defendants of $3,500 "does not even pass the laugh test." Plaintiff's counsel further wrote:

> In response I am making my "standard" demand in cases in which collection action reached the stage of a legal action in a court of general jurisdiction. I refer to this as a "standard" demand because it is the one that I make in all cases in which collection action has occurred in that context. I simply have no time to do "customized" demands in such cases.
>
> My standard demand in such cases is a payment of $30,000 to my client plus a general release for all parties, including my client. The release would need to exclude claims of my client against American Express and the successor counsel to your clients. The monetary demand assumes $5,000 for the federal action, $5,000 for the confidentiality provision in the settlement agreement, and $20,000 for the defense of the underlying debt collection action.

Plaintiff's counsel provided no basis for either the damages or the fees being sought. No pleadings had been filed other than the initial complaint, no discovery had been propounded, no depositions had been taken, and there had been no court appearances. Furthermore, the past history with this same attorney created a strong suspicion that settlement discussions were not necessarily being conducted with the full knowledge or authority of the plaintiff. In response to the $30,000 demand, defendants' counsel made a written offer of judgment for $1,100, which plaintiff's counsel rejected.

Defendants' counsel subsequently took the plaintiff's deposition. After establishing that the plaintiff did not dispute the underlying debt and did not have any damages in the case, defendants' counsel decided to ask the plaintiff about settlement communications in the case. The result of that inquiry would have significant consequences in the underlying case and for the career of the plaintiff's counsel.

First, defendants' counsel asked about the $30,000 settlement demand that plaintiff's counsel had made at the beginning of the case, which included payment of $5,000 to the plaintiff for damages (and $5,000 for "confidentiality") and $20,000 to plaintiff's counsel for fees:

Q. Did your lawyer send this settlement demand at your authorization?
A. No.
Q. You never authorized this demand?
A. I didn't authorize that.
Q. You had no knowledge it was done on your behalf?
A. No.

This was a remarkable discovery. Defendants' counsel continued this inquiry, next asking about the $1,100 offer that plaintiff's counsel had previously rejected, at which point things got even more interesting:

Q. Have you ever seen that exhibit prior to today, that is, a letter on my letterhead?
A. No.

Q. Were you aware of the fact that an offer of settlement was made to you in the amount of $1,100 plus your attorney's fees and costs?
A. No.
Q. Did you ever authorize rejection of that offer?
A. I've never seen or heard any of this before, no.
Q. Did you ever authorize Mr. Francis to reject that offer?
A. I did not.
Q. And Mr. Francis never conveyed that offer to you?
A. No.
MR. FRANCIS: Objection. You're getting into privileged information. Don't answer that.
Q. I'll ask it differently. Until this moment you have never had any knowledge of the offer made in Exhibit 11; is that correct?
A. That's correct.

Defendants' counsel had now established that the plaintiff had not authorized the $30,000 demand and that the plaintiff's counsel had never even communicated the $1,100 offer.[2] But defendants' counsel was not finished. He wanted to know whether the plaintiff would have accepted the $1,100 offer if he had known about it. The plaintiff's answer surprised everyone:

Q. If you had known about that offer would you have accepted it?
A. No.
Q. Why not?
A. Because it would have been wrong.
Q. Why would it have been wrong?
A. Because I owed a debt.
MR. FRANCIS: Objection. I don't feel that his responses to settlement discussions are an appropriate subject for a deposition.
Q. I'm sorry. Please finish your answer now.
A. No, I would not have accepted that money.
Q. And the answer as to why was what?
MR. FRANCIS: He said he wouldn't have accepted it. I don't think that's a – I'm going to instruct him not to answer at this point.
Q. Your lawyer gave you no advice about that offer, correct?
A. That's correct.
Q. So any answer you give me would not be based on advice of counsel?
A. That's correct.
Q. Okay. Then I'm asking you to tell me why is it you would not have accepted that offer.
A. I did not accept that offer --
MR. FRANCIS: And I'm saying don't answer that.

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[2] Although not addressed in the deposition, the plaintiff also presumably had not been advised of the original $3,500 offer, and had not authorized its rejection.

A. Ernest, I'm going to answer. This is unfair. This isn't right. I owed them a debt, simply put.

Defendants' counsel could have stopped at that point. He did not. Given the testimony of the plaintiff that his attorney refused to communicate the existence and substance of prior settlement offers, defendants' counsel sought to take advantage of the opportunity to address settlement with both the plaintiff and his counsel present:

MR. NEWBURGER: At this point that concludes my questions I am instructed to make the following statement on the record. If Mr. Blowers agrees before we leave here today to the dismissal with prejudice of both his claims in this case and his counterclaims --
MR. FRANCIS: That is not a question. I object.
MR. NEWBURGER: You can object. I'm going to finish -- and withdraws his opposition to my admission pro hac vice, my client will not seek fees against him, neither of my clients will seek fees against him for this litigation.
MR. FRANCIS: Again, I object. That's not a question.
MR. NEWBURGER: Your objection is noted. That is not a question to your client. That is a statement to you on the record, Mr. Francis. That offer expires when I leave here, and I'm happy to step out of the room and let you and your client confer, but when I leave here that offer is gone and I'm authorized to make it today. My clients will not seek fees against Mr. Blowers if this -- if he stipulates irrevocably on the record today --
MR. FRANCIS: Objection.
MR. NEWBURGER: -- as I have stated. Your objection is noted, sir.
MR. FRANCIS: Objection. It's not a question.
Q. (BY MR. NEWBURGER) Mr. Blowers, do you want me to step out so you can confer with your attorney?
A. No. I'd like this dismissed and withdrawn immediately.
MR. NEWBURGER: Am I to -- I can only go through your attorney. Mr. Francis, am I to take that as an acceptance of the offer just made?
MR. FRANCIS: No. If my client wants to discharge me, he can communicate that to me and I'll take appropriate action.
MR. NEWBURGER: Until he says you are discharged, I cannot communicate with him.
THE DEPONENT: Ernest, I would like to discharge you at this time. I'd like this case dropped and withdrawn.
MR. FRANCIS: Okay. Then I will need to move to file a motion to withdraw at this point.
Q. (BY MR. NEWBURGER) Mr. Blowers, are you accepting the offer that was made on the record?
A. Yes.

The result of this exchange was that plaintiff's counsel withdrew from the case, and the claim was settled on the terms presented at the deposition. However, that was not the end of the

matter. Defendants filed a motion for sanctions against plaintiff's counsel pursuant to 28 U.S.C. § 1927. The matter was presented to the magistrate judge who issued a report and recommendation, which was ultimately adopted by the presiding judge. It is a remarkable report, which begins by summarizing the circumstances:

> Plaintiff's sworn testimony establishes that Mr. Francis litigated this case unilaterally, making substantive decisions regarding the course of this litigation without the knowledge or consent of his client. Among other things, Mr. Francis withheld a settlement offer from his client that would have brought this litigation to an early conclusion because Mr. Francis felt the offer did not include adequate attorney's fees. As a result, this case progressed well beyond the point at which Plaintiff had any interest in pursuing it. Mr. Francis thus "multiplie[d] the[se] proceedings . . . unreasonably and vexatiously" within the meaning of § 1927. Accordingly, Defendants are entitled to recover from Mr. Francis reasonable costs and fees incurred as a result of his conduct.

Blowers v. Lerner, No. 1:15-cv-889-GBL-MSN, 2016 U.S. Dist. LEXIS 39085, at *1-2 (E.D. Va. Mar. 14, 2016). In recommending an award of sanctions under the statute, the magistrate judge further stated:

> In short, Plaintiff's sworn testimony establishes that this acrimonious litigation could have been avoided had Mr. Francis adequately communicated with his client. Instead, Mr. Francis arrogated to himself decisions reserved to Plaintiff and pursued this litigation unilaterally beyond the point at which his client had any interest in it. Because Plaintiff's testimony makes clear that this litigation should not have progressed beyond Defendants' September 30, 2015 settlement offer, Mr. Francis' failure to convey that offer serves as a focal point that brings his broader failure to communicate with his client into sharp relief—a moment at which the record clearly shows both that Plaintiff desired no recovery, and that Mr. Francis was duty-bound to make contact with Plaintiff to convey Defendants' offer. In short, it marks the point at which any responsible attorney would have discovered that this litigation should have ended. Proceedings beyond that point were thus "multiplie[d]" within the meaning of § 1927 as a result of Mr. Francis' conduct.

Id. at *25-26. The district court received evidence regarding attorney's fees and sanctioned plaintiff's counsel in the amount of $80,000. The matter was also referred to the Virginia State Bar, and plaintiff's counsel ultimately agreed to the revocation of his license.

Cultural Framework and Bias in Mediation and Negotiation

I. What is implicit bias?

The term "implicit bias" has become ubiquitous in recent years; therefore it only seems prudent to consider how implicit bias may impact attorneys as negotiators in the alternative dispute resolution environment.

Implicit bias is defined as "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner" as compared to explicit bias which is defined as conscious bias or prejudice. http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/. Implicit bias stems from the basic brain function allowing us to divide information into categories. Categories allow our brains to know what to do or how to behave. It is the creation of mental "shortcuts" or "pattern matching." Although our brain could store specific experiences, as humans we have evolved the ability to detect the higher-level structure of experiences, the commonalities across them that allow us to group experiences, or objects, or actions into meaningful categories and concepts. This mechanism is the foundation behind our brain's language processing, logic and reasoning skills, and problem-solving abilities. Pattern matching allows us to be able to instantly recognize and respond appropriately to objects, situations, expressions, etc., even though we may have never actual encountered that specific example before. Normal learning depends on our ability to both generalize across previous experiences and remember specific items and events. Research has shown that pattern matching is inextricably linked to an individual's intelligence and even serves as a basis for modern day IQ tests.

For example, our brains use schemas to sort people into groups, such as male or female, young or old. When you stop your car at a red light, when the light turns green, you push down the gas pedal. The mental association of "green means go" requires no conscious or effortful

thought. Therefore, even if we haven't been at that specific intersection in the past, we are able to immediately respond to the new situation without even thinking about it. These shortcuts are created based on how we consider people, objects and actions are related. However, these categorizations can cause us to overgeneralize.

- Stereotype cars (ex. sports cars are fast)
- Stereotype neighborhoods (ex. suburbs are better)
- Stereotype hairstyles (ex. characterization of cornrows, twists, braids, afros, as unkempt)
- Stereotype of people with physical disabilities (ex. as also having mental disabilities)

These processes that operate outside of our conscious awareness are implicit or unconscious. What is so surprising about the research on implicit bias is that we do not always have conscious control over our mental associations, perceptions, and impressions. Multiple studies have shown that implicit biases often predict how we'll behave more accurately than our conscious values, because these stereotypes influence our judgments, actions, and decisions.

For many people, issues associated with culture, race, class, privilege, bias, and stereotyping are difficult to admit and address. We are hard wired to believe that these biases do not apply to us or that disparities related to these biases do not exist in our cases, with our clients, or in our courtrooms.

Although conversations surrounding implicit bias tend to focus on implicit racial biases, implicit bias can be expressed in numerous ways including: gender, ethnic, age, LGBTQIA+, and religion. While implicit bias is generally associated with negative racial, ethnic, and gender stereotypes, even a positive implicit bias can have a negative impact on the integrity of decision-making.

II. Implicit Bias in Mediation

Some ways implicit bias may play out in a mediation:

(a) How it effects the subject matter of the mediation;

a. Ex. Defamation cases involving sexual assault allegations.
    i. Rape myths – false beliefs people hold about sexual assault that have grown out of long-standing gender roles and incorrect information concerning sexual violation that exists in our society.
    ii. While not everyone endorses all the erroneous views that form the basis for rape myths in society, most people including victims themselves, believe some of the stereotypes upon which rape myths are created.
        1. One of the most commonly held rape myth biases is when comparing acquaintance rape with stranger rape. 85% of Americans hold a false belief that rape occurs most commonly between strangers even though most victims of sexual assault know their perpetrators.
        2. Belief that victims of sexual assault resist their assailants. When women victims rarely resist physically if not attacked with physical violence first.
        3. Belief that victims report the crime, when vast majority of assaults are not reported to police or any authority, doctors, HR depts, etc.
        4. Belief that if a report is made that it is usually done timely. When delayed reporting in the norm, not the exception. Which can go from days to weeks to months to years.
        5. Belief that victims will be able to give a nice chronological, consistent, coherent timeline of what happened. When victims

memories are impacted due to substances in some cases, but even which drugs and alcohol are not involved, by the sexual assault itself.

(b) The interactions between the attorneys;

a. Ex. How we view whether the opposing counsel is a formidable adversary.

(c) The interactions between the mediator and the parties and vice versa.

a. Ex. How truthful or untruthful client is viewed.

Bias can also play out in spontaneous behaviors such as eye contact, tone, seating distance, blinking, smiling, etc. Being able to recognize and address these behaviors in mediation can help parties feel that they were listened to, heard, and understood, and it promotes self-efficacy. It can assist attorneys is more advocacy on behalf of our clients and can assist mediators with neutrality.

III. What are the pro-active steps we as lawyers can take to prepare for and engage with implicit bias?

A. Intention.

Intention requires self-awareness and motivation. Once we are made aware of stereotypes and biases we hold, we can exercise self-correction, which allows us to actively engage in thoughtful reflection, scrutiny, and reasoning. This requires an acceptance that we all have implicit biases, that bias in a normal part of brain functioning, and that bias can have a direct impact on our ability to counsel and represent our clients.

For example, we can take the IAT (Implicit Association Test). This test measures the strength of associations based on response speeds in categorization tasks, and produces an implicit measure. We can go to the Harvard Implicit website and select from a menu of IATs ranging from age, skin-tone, sexuality, weight, race, religion, and even weapons (categorizing images of weapons or harmless objects).

We can look for learning opportunities and demonstrate inclusive behaviors that model openness, active listening, and empathy.

This awareness is usually motivated by one of two reasons: external (appearing non-biased to others) and internal (appearing non-biased to oneself). Both are important considerations to develop sensitivity and deepen self-awareness to combat bias.

B. Attention and Reframing of Negative Associations.

The application of these stereotypes can be moderated. By confronting known implicit bias, we can actively monitor and inhibit stereotype-consistent responses. However, it requires us to first minimize feelings of guilt and shame that are inherent in recognizing and combatting bias.

For example, an individual that becomes aware of a bias can consider the response and association, and actively replace the biased response with an unbiased one.

C. Exposure.

Exposure to counter-stereotypic exemplars decreases implicit bias. Actively seeking out situations which change our brain's association.