New York
American Inn of Court
May 15, 2013

When First We Practice to Deceive:
The Ethics of Deception

Written Materials, Outline

and Presenter Biographies

New York

American Inn of Court

May 15, 2013

When First We Practice to Deceive: The Ethics of Deception

Hosted by

Cravath, Swaine & Moore

Sponsored by

Fragomen, Del Rey, Bernsen & Loewy, LLP

5:30-6:30 p.m. – Reception

6:30-7:00 p.m. – Ethics of Civil Undercover Investigations

7:00-7:30 p.m. – Deception in Negotiation

7:30- 8:00 p.m. –Deception in Criminal Investigations

ROBERT S. SMITH

Robert S. Smith, Associate Judge of the Court of Appeals, was born in New York, New York in 1944, and grew up in Massachusetts and Connecticut. He graduated from Stanford University (B.A. 1965, with great distinction) and Columbia Law School (LL.B. 1968, magna cum laude), where he was editor-in-chief of the Law Review. From 1968 to 2003 he practiced law in New York City with the firm of Paul, Weiss, Rifkind, Wharton & Garrison, taking a one-year leave of absence in 1980-81 to serve as Visiting Professor from Practice at Columbia Law School. He was a Lecturer in Law at Columbia Law School from 1981 until 1990. On June 1, 2003, he became an individual practitioner and Special Counsel to the firm of Kornstein Veisz Wexler & Pollard. On November 4, 2003 he was appointed by Governor George E. Pataki to the Court of Appeals. The appointment was confirmed by the State Senate on January 12, 2004. He and his wife, Dian G. Smith, live in New York City. They have three children and three grandchildren.

FULL TIME FACULTY

VISITING FACULTY AND SCHOLARS IN RESIDENCE

ADJUNCT FACULTY

Adjunct Information

AFFILIATED COLUMBIA UNIVERSITY FACULTY

ACADEMIC FELLOWS

ASSOCIATES-IN-LAW

OFFICERS OF RESEARCH

EMERITI

IN MEMORIAM

LAW FACULTY A-Z

FACULTY & FACULTY ASSISTANT DIRECTORY

FACULTY COMMITTEES

WORKSHOPS & COLLOQUIA

INFORMATION ON VISITORS

IN THE NEWS

GRIEVANCE PROCEDURE

FACULTY RESOURCES

POLICIES

Carol L. Ziegler

Adjunct Professor of Law

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Carol L. Ziegler practices and teaches in the area of professional responsibility and legal ethics. She is currently serving as a Reporter for the New York State Bar Association's Committee on Standards of Attorney Conduct's project to comprehensively redraft the disciplinary rules governing lawyers in New York State. From 1988 to 2004, she was a member of the full-time faculty of Brooklyn Law School, where she taught courses in the area of professional responsibility and legal ethics, and served as the Associate Dean for Student Affairs from 1994-2004. Ms. Ziegler continues to teach professional responsibility and legal ethics as an Adjunct Professor of Law at Columbia Law School.

She received her B.A. with honors from Cornell University, College of Arts and Sciences in 1968, her J.D. *cum laude* from New York University School of Law in 1973, and was admitted to the New York Bar in 1974. She is a member of Phi Beta Kappa and the Order of the Coif and is a Fellow of the American Bar Association. Ms. Ziegler has served as General Counsel to the New York City Commission on Human Rights (1986-1988), Special Assistant Counsel and Counsel to the Chancellor of the New York City Public Schools (1979-1985) and as a staff attorney with Brooklyn Legal Services Corporation "A" and the Public Education Association. Ms. Ziegler was a member of the Ethics Commission for the New York State Court System from its inception in 1989 until 1997. She has also served as a member of the Advisory Committee/Committee on Civil Litigation for the United States District Court for the Eastern District of New York, the New York Bar's Committee on Professional Discipline and the New York State Bar Association's Committee on Professional Ethics.

Ms. Ziegler currently serves as a member of the Magistrate Selection Panel for the United States District Court for the Eastern District of New York, as Chair of the Committee on Legal Education and Admission to the Bar of the New York City Bar Association and as a member of the Special Committee on the Bar Examination and Other Measures of Lawyer Competency of the New York State Bar Association. She is a frequent lecturer on various legal issues, including professional ethics, for such organizations as the New York City Bar, the New York State Bar Association, the Federal Bar Council and the Practising Law Institute.

EDWARDS WILDMAN

PROFESSIONALS

David Weild III
Edwards Wildman Palmer LLP
Partner
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New York

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Fax 866.512.9910

AREAS OF PRACTICE

- Intellectual Property
  - IP Litigation
  - Trademarks & Copyrights
  - Media and Technology Licensing & Transactions
- Litigation
  - IP Litigation
- Cross Border
  - Scandinavian & Nordic Region
  - Africa
- Technology, Media & Telecommunications

EDUCATION

- Yale Law School, LL.B.
- Yale University, B.A.

BAR ADMISSIONS

- New York
- U.S. Patent & Trademark Office

COURT ADMISSIONS

- U.S. Court of Appeals, Federal Circuit
- U.S. Court of Appeals, Second Circuit
- U.S. District Court, Southern District of New York
- U.S. District Court, Eastern District of New York

MEMBERSHIPS

- American Bar Association
- American Intellectual Property Law Association
- American Society of International Law
- Asia-Pacific Lawyers Association
- Association of the Bar of the City of New York
- Association of University Technology Managers
- Association pour le Protection de la Propriete Industrielle (AIPPI)
- Chartered Institute of Patent Agents (U.K.) (Foreign Member)
- Federal Circuit Bar Association
- Former Chair of the NYIPLA Committee on Harmonization of the Patent Laws and the International Advisory Group and International Committee of INTA
- Former member of the Editorial Board of The Trademark Reporter and current member

Main Bio | Intellectual Property Bio

David Weild III, a Partner in the New York office, has over 50 years experience in the recognition, preservation, creation, administration, exploitation and enforcement of intellectual property in domestic as well as international commerce. He was head of the International Trademark Copyright and Competition group at the former Pennie & Edmonds – one of the largest US IP boutique firms – where, early in his career, he headed its Foreign Department and oversaw the development, filing, maintenance, exploitation and enforcement of large portfolios of patents, designs and trademarks for clients in diverse businesses, including tobacco, beverages, industrial chemicals, pharmaceuticals, cosmetics, clothing, window fashions fasteners, solid mineral extraction, jewelry, sports equipment and retailing, transportation and storage services.

Mr. Weild has overseen transactions and participated in litigation not only in the United States, but also in foreign jurisdictions, and has appeared as co-counsel in the former Exchequer Court of Canada and before the Commission of the European Communities. He additionally has supervised litigations in Italy, China, Germany, Japan, Mexico, the Netherlands, Belgium, Brazil, Hong Kong, Indonesia, Switzerland and India, among other jurisdictions.

He is admitted to practice at the US Patent and Trademark Office, and is registered at the comparable Canadian and Philippines offices. Mr. Weild is a member of and has held positions in various professional organizations, including the International Trademark Association, the New York Intellectual Property Law Association, the International Association for the Protection of Intellectual Property, the Licensing Executives Society, the Chartered Institute of Patent Agents and is a Member of the Institute of Trademark Attorneys. He assisted in the re-establishment of cooperative intellectual property relations with the People's Republic of China and lectured in China under the auspices of its then Ministry of Foreign Economic Relations and Trade and the China Council for the Promotion of International Trade (CCPIT).

He is an honors graduate of Brooklyn Technical High School, Yale University and the Yale Law School, from which he received his LLB degree in 1959 and was awarded the Ambrose Gherini Prize in International Jurisprudence. From 1953 through 1956, Mr. Weild was on active duty with the U.S. Army, including duty in Berlin, Germany. He is rated AV Preeminent by Martindale-Hubbell.

Recent Speaking Engagements and Publications

- "Curbing the Copyists," *co-author, World Trademark Review, Issue 28*, December/January 2011.
- "Who Owns 'Budweiser', 'Chablis' and the 'Swiss Army Knife'? Use and Misuse of Geographical Indications in the (North) American Hemisphere," *panelist, LES USA & Canada 2009 Annual Meeting,* San Francisco, California, October 18-21, 2009.
- "Dilution/Anti-Dilution Where Are We Going?" *co-author* with Isabel Davies, PTMG 2003.
- "Chinese Enforcement Efforts May Protect IP," *co-author* with Hailing Zhang, *National Law Journal*, May 18, 1998.
- "Overview on the Protection of Intellectual Property," *speaker,* Glasgow, March 5, 1993.
- "Transfer of Technology: Intellectual Property, Copyrights, Trademarks and Patents," *speaker,* The Legal Aspects of Doing Business in the New European Community, 1992.
- "Europe 1992: Transfer of Technology: Some Thoughts and Wider Implications," *speaker*.
- "Europe 1992: Intellectual Property and the Transfer of Technology," *speaker,* New York State Bar Association, New York, January 1991.
- "International Patenting and Foreign Issues: An Organizational Approach for Prospective Markets EEC/Far East," *speaker* with C.E. Miller and J.M. Richardson, Association of University Technology Managers, San Francisco, February 1991.
- "Patent Glasnost in Eastern Europe," *author, American Association of Corporate Patent Counsel*, January 1991.
- "Europe 1992: Intellectual Property: an Overview" *author, Law Journal Seminars Press*, November 1990

Reporter and current member of its ADR subcommittee
- Institute of Trade Marks Agents
- International Bar Association
- International Trademark Association
- Licensing Executives Society
- New York Inn of American Inns of Court
- New York Intellectual Property Association
- New York State Bar Association
- Registered United States, Canadian and Philippines Patent Offices

- Europe 1992: Intellectual Property: an Overview" *author, Law Journal Seminars Press*, November 1990.

- More Publications...

FRAGOMEN

OUR PROFESSIONALS

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MICHAEL D. PATRICK

Michael has over 30 years of experience and is responsible for leading the firm's representation of a diverse group of clients across many industries, including large multinational corporations, small, mid-level and start-up companies, and individuals and investors. He practices exclusively in immigration and nationality law, with emphasis on risk management for global immigration programs, including U.S. Department of Labor and I-9 compliance, immigration due diligence for corporate restructuring, and immigration policy development. At the firm, Michael is Co-Chair of the Corporate Compliance Committee; and he is a member of the firm's Finance and Executive Committees.

Michael joined Fragomen as a partner more than 22 years ago, after having been a founding partner of the general practice firm of Campbell, Patrick & Chin. Before that, he served as a Special Assistant U.S. Attorney and Chief of the Immigration Unit of the U.S. Attorney's Office for the Southern District of New York, where he represented the Immigration and Naturalization Service, the Department of State, the Department of Labor, and other federal agencies in the federal courts. Prior to joining the U.S. Attorney's Office, Michael was an Assistant Corporation Counsel for The City of New York.

REPRESENTATIVE EXPERIENCE

- Represented and defended a number of multi-national firms under investigation for regulatory enforcement of immigration violations. Conducted numerous audits for large and medium companies to ensure that they were compliant with regulatory statutes.
- Advised numerous clients in the establishment of in-house immigration programs to support Basic Pilot/E-Verify programs.
- Worked with multi-billion dollar company to spin off a major division as a separate international company, assisting with due diligence and immigration compliance for the entire transition.

PROFESSIONAL ACCOMPLISHMENTS

MEMBERSHIPS

- Member, American Bar Association
- Member, International Bar Association
- Member, Federal Bar Council (Trustee 2006-2012)
- Member, American Immigration Lawyers Association (AILA)
- Member, American Foreign Lawyers Association (Treasurer 2004-2009)
- Member, Second Circuit Committee on Admissions and Grievances
- Member, World Policy Institute
- Former Chair, Federal Bar Association's Immigration Law Section (1989-1992)
- Former Chair, New York Chapter of the American Immigration Lawyers Association (AILA) (1993-94)
- Former Co-chair, Committee on Immigration Litigation of the Commercial and Federal Litigation Section of the New York State Bar Association (2008-2011)

FACULTY POSITIONS

- Member of the Faculty, National Institute for Trial Advocacy (NITA), Hofstra University
- Member of the Faculty, Intensive Trial Advocacy Program (ITAP), Cardozo School of Law

IMMIGRATION MINUTES

MORE ABOUT MICHAEL PATRICK
April 2011

FRAGOMEN NEW YORK
July 2011

FRAGOMEN'S PRO

BONO WORK
July 2011

THE FRAGOMEN FELLOWSHIP
July 2011

BAR ADMISSIONS

- New York

COURT ADMISSIONS

- U.S. Supreme Court
- U.S. Court of Appeals, Second Circuit
- U.S. District Court, Southern District of New York
- U.S. District Court, Eastern District of New York

EDUCATION

- Hofstra University School of Law , J.D. , 1978 , Law Review and President of Law Fellows
- Syracuse University , B.A. , 1975 , *cum laude*

PUBLICATIONS AND LECTURES

- Authors bimonthly immigration column in the New York Law Journal and monthly column in the Metropolitan Corporate Counsel
- Frequent speaker on business immigration topics before Bar Associations, international trade organizations and human resource groups, including:
- American Council for International Personnel (ACIP)
- Society for Human Resources Management (SHRM)
- American Immigration Lawyers Association (AILA)
- Federal Bar Council

AWARDS

- Chambers USA: America's Leading Business Lawyers - 2006, 2007, 2008, 2009, 2010, 2011, 2012
- International Who's Who of Corporate Immigration Lawyers - 2006, 2007, 2008, 2009, 2010, 2011, 2012
- HR Executive - The Nation's Most Powerful Employment Attorneys - Top 20 for Immigration Law - 2011, 2012
- Best Lawyers In America - 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013
- Super Lawyers - 2006, 2007, 2008, 2009, 2010, 2011, 2012
- Dean's Award for Distinguished Hofstra Law School Alumni - 2000

PRO BONO

- Pioneered the development of the firm’s pro bono practice, including immigration advocacy and support for Sanctuary for Families, a New York-based charity that provides crisis intervention, emergency and transitional housing, individual and group counseling, job readiness and mentoring programs to victims of domestic violence.
- Working with Austin Fragomen, led the establishment of Fragomen’s partnership with the New York City Bar Justice Center, providing support to low-income families with immigration matters.

RSS

Paul J. Mahoney is an Assistant Deputy Attorney General in the Office of the New York State Attorney General Eric T. Schneiderman and, under the Deputy Attorney General for Medicaid Fraud Control, supervises 55 attorneys and over 250 other staffers investigating and prosecuting criminal and civil fraud and abuse by healthcare providers in the $40 billion-per-year New York Medicaid program. Paul was previously Chief of the Civil Enforcement Division of the Medicaid Fraud Control Unit. He has been awarded the *Louis J. Lefkowitz Memorial Award* for outstanding performance by an assistant attorney general by Attorney General Eliot Spitzer and Attorney General Andrew M. Cuomo.

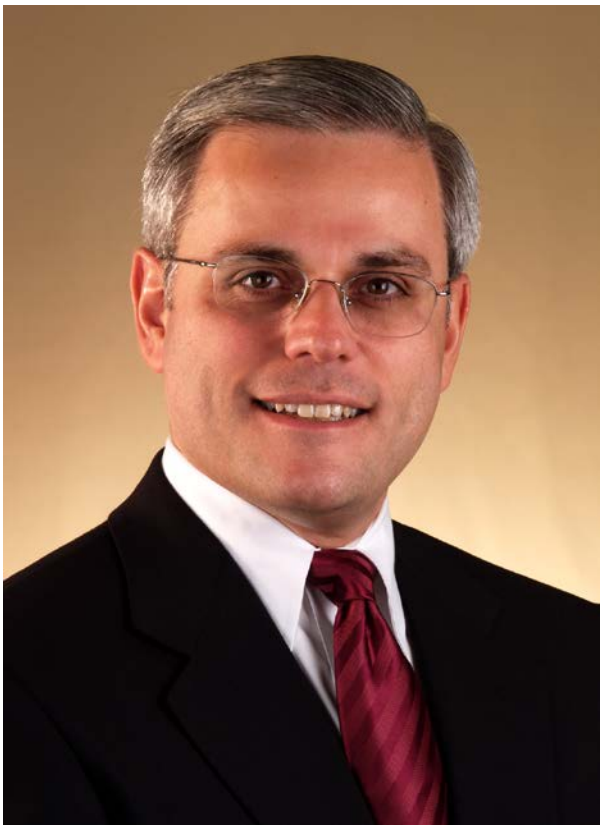
From 1997 to 2004, Paul Mahoney served as an Assistant District Attorney, later Senior Investigative Counsel, in the Frauds Bureau of New York County District Attorney Robert M. Morgenthau. His major prosecutions included a seven-month trial of a securities firm and its principals, several other major securities fraud operations, and numerous prosecutions of banking, accounting, and financial frauds.

Before joining the District Attorney's Office, Paul was a litigation associate for seven years at Paul, Weiss, Rifkind, Wharton & Garrison in New York City with extensive experience in securities litigation, advertising and unfair trade practices, and products liability, and was recognized for *pro bono* work by the Legal Aid Society.

Paul Mahoney is a graduate of Cornell Law School and Williams College.

Susan L. Meekins is a commercial litigation and arbitration attorney who has practiced in state and federal trial and appellate courts in New York for almost 30 years. Ms. Meekins is a graduate of New York University School of Law (J.D. 1983) and the University of Chicago (A.B.1980 with Honors).

Nicholas J. Pappas is a partner in Weil's Employment Litigation Practice Group. Mr. Pappas's practice covers the full spectrum of complex ERISA and employment litigation matters. He focuses primarily on the defense of ERISA class actions challenging the administration of health care benefit plans, 401(k) plans and defined benefit plans. In these matters he regularly litigates and counsels on sophisticated legal issues arising in ERISA litigation, including preemption, standing, exhaustion, fiduciary status, disclosure obligations, withdrawal liability, plan termination, and benefit accrual. Mr. Pappas also litigates and counsels on the full range of class and complex actions arising in the workplace, including antidiscrimination laws, enforcement of non-competition agreements, executive terminations, military leave, plant closings, disability, family leave, union organizing, and enforcement of non-competition agreements.



In 2012, Mr. Pappas was recognized by *Human Resources Executive Magazine* and *Lawdragon* as one of the "Top 20 Lawyers in Employee Benefits," and in 2011 was recognized by *Human Resources Executive* as one of 40 Up-and-Coming Corporate Employment Lawyers. He frequently writes and lectures on ERISA and employment-related topics, and since 1994 has co-authored the Employment Law column in the *New York Law Journal*.

Eugene D. Kublanovsky

Partner at Fensterstock & Partners LLP
ekublanovsky@fensterstock.com

Practice Experience

Mr. Kublanovsky is a Partner in the Firm's litigation practice. He has represented clients throughout all phases of litigation and arbitration, from discovery through trial and appeals. He works with a variety of clients across a range of industries including insurance, finance, entertainment, clean energy technologies, broadband communications technologies, computer software, and digital media.

Mr. Kublanovsky's practice involves extensive day-to-day counseling on a variety of matters such as restrictive covenants and non-competes, employment contracts, complex commercial contract disputes, partnership disputes, intellectual property disputes (including copyright, trademark and patent infringement), and other general litigation matters. Mr. Kublanovsky also has experience conducting internal investigations on behalf of boards of directors, special committees, and assisting companies in responding to SEC and State Attorney General inquiries.

Mr. Kublanovsky has also developed a successful practice in all aspects of mediation and arbitration and has successfully represented clients in a wide variety of arbitrations, including those governed by the rules of the American Arbitration Association, the International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association's International Center for Dispute Resolution.

Representative Matters

Shareholder Disputes

- Representing clients in South Carolina state court, New York state court, and American Arbitration Association proceedings involving dispute between former shareholders in a privately held company.

Securities

- Representing clients in state action against major investment bank alleging breach of contract and other causes of action relating to certain mortgage-backed securities
- Successfully represented private investment fund in breach of contract and declaratory judgment action over the purchase and sale of certain stock warrants
- Representing a publicly traded clean energy technologies company in state and federal court litigations concerning a NASDAQ delisting dispute
- Successfully defended financial services firm in a FINRA arbitration involving claims brought by a former registered representative

Financial

- Successfully defended financial services firm and parent company in state court action against claims for tortious interference with prospective economic advantage, unfair competition and unjust enrichment
- Defending publically listed company in state court litigation brought by hedge funds alleging breach of contract concerning complex financial instruments

Corporate Governance

- Representing executive in breach of fiduciary duty action, and in third party action for contribution, indemnification, and fraudulent representation

Non-Competes and Restrictive Covenants

- Successfully represented clients in defeating temporary restraining order and preliminary injunction alleging breach of their restrictive covenants
- Successfully represented client in limiting temporary restraining order in an action alleging a breach of a restrictive covenants

Intellectual Property

- Successfully represented broadband communications technology company in a patent infringement litigation
- Representing plaintiff charitable organization in federal trademark infringement and unfair competition action

Performance-Rights

- Representing filmmaker and musician in breach of contract action against performance-rights organization

Partnership Disputes

- Represented clients in a dispute regarding a dental partnership in arbitration and state court

proceedings

- Represented group of retired partners in a major accounting firm in class arbitration proceedings before the American Arbitration Association and in related proceedings before the International Chamber of Commerce

Tax Shelters

- Successfully represented plaintiff in state court action against multiple defendants for breach of contract, fraud and professional malpractice, as related to their marketing and promotion of a certain tax-shelter product
- Successfully represented plaintiff in arbitration proceedings against investment bank for breach as related to its involvement in the marketing and promotion of a certain tax-shelter product

Investigations

- Representing financial services firm in SEC investigation
- Representing client in investigation by New York Attorney General's Office
- Conducting internal investigation for Special Committee of Board of Directors of a publically traded company

Negligence

- Representing client against public utility for property damages incurred following Hurricane Sandy

Attachment/Preliminary Injunction Proceedings

- Successfully defended client in pre-judgment attachment and preliminary injunction proceedings brought in state and federal court in aid of arbitration, arising out of breach of contract dispute.

Admissions

- State Bar of New York
- State Bar of New Jersey
- United States Federal District Court for the Southern District of New York
- United States Federal District Court for the Eastern District of New York
- United States Court of Appeals for the Second Circuit
- United States Court of Appeals for the Sixth Circuit

Professional Associations

- New York American Inn of Court (Executive Vice President, Secretary and Treasurer)

- New York City Bar Association
- New York County Lawyer's Association

Education

J.D., Brooklyn Law School, 2005

- Moot Court Honor Society Executive Board, Member of the National Moot Court Team
- Clerk for the Honorable John C. Lifland, United States District Judge for the District of New Jersey
- Recipient of the CALI Excellence for the Future Award for excellent achievement in Intellectual Property Law

B.A., Bard College, 1998

- Majored in Economics and Social Psychology
- Amicus Foundation Scholarship Recipient for Excellence in Economics
- Bard College Junior Fellowship Recipient
- Associate Editor of the Hudson Valley Regional Review
- Varsity Tennis (Co-Captain) and Squash

Publications and Presentations

- Presenter, "The First Amendment Meets the Internet: Struggle Trying to Distinguish Wide-Open, Often Vitriolic, Commentary on the Internet" – March 2012, the New York American Inn of Court
- Presenter, "Grey Goods, Sonny Bono, and Stravinsky: SCOTUS on Copyright" – September 2011, the New York American Inn of Court
- Presenter, "Pumpkins, Panic and Perjury: The Trial of Alger Hiss" – November 2010, the New York American Inn of Court
- Presenter, "Winds of Change - Changes in the Legal Profession" – February 2009, the New York American Inn of Court
- Co-Author, "The Complaint," *Commercial Litigation in New York State Courts, Second Edition* (West, 2007 Update)
- Author, "Contingent Whitewater: Staying Afloat in the Rough Waters of Temporary Work," Bard Journal of Social Sciences, 1998

Honors and Awards

- 2011 Leadership Award, the New York American Inn of Court, January 2011

Languages

- Russian

ABRAMS FENSTERMAN

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP

Attorneys at Law

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Dr. Joshua Lipsman is Of Counsel at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP.

Dr. Lipsman is a licensed, active physician and a practicing attorney. In 2009, Dr. Lipsman completed nearly 10 years as Westchester County Health Commissioner.

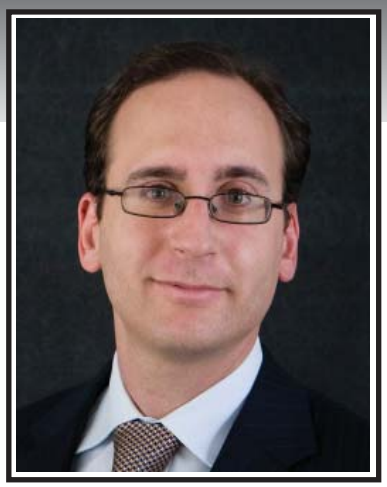
In over two decades as a physician executive, Dr. Lipsman has successfully managed large and complex agencies, programs, budgets and personnel in sophisticated regulatory and political healthcare environments. He has worked at all levels of government and in the non-profit and corporate sectors. He has been active in organized medicine and Bar Association volunteer work, including holding leadership positions in local, state and national professional and specialty societies and organizations.

Dr. Lipsman received the B.A. with General Honors in Biology and the M.S. in Biochemistry from the University of Chicago. His M.D. is from the Albert Einstein College of Medicine. He has an M.P.H. from the University of North Carolina at Chapel Hill, School of Public Health.

While serving as Westchester County Health Commissioner, he attended Pace Law School, where he graduated Magna Cum Laude in 2006. He was a member of the Pace Law Review and received the Dean's Award for the graduate of the Class of 2006, part-time division. He earned First Place in the New York State Bar Association (NYSBA) 2005 Barry Gold Health Law Student Writing Competition. While a student, Dr. Lipsman was a summer Legal Intern with the New York State Attorney General.

Dr. Lipsman is Board Certified in the specialty of Public Health and General Preventive Medicine and is Treasurer of the American Board of Preventive Medicine. He is a member of the Medical Society of the State of New York, the American College of Preventive Medicine, NYSBA and the Association of the Bar of the City of New York.

REID | COLLINS | TSAI LLP
Attorneys and Counselors



Jeffrey Gross | Of Counsel

(212) 344-5211 | jgross@rctlegal.com

Education:
University of Pennsylvania Law School, 1998
Arthur Littleton Legal Writing Instructor
Associate Editor, Journal of International Economic Law

University of Virginia, B.A. 1995
Phi Beta Kappa
Echols Scholar

Admitted to Practice:
- New York, New Jersey, Pennsylvania (inactive)
- U.S. District Courts for the Eastern, Southern, and Western Districts of New York and the District of New Jersey
- U.S. Court of Appeals for the Second and Third Circuits
- United States Supreme Court

Areas of Practice:
- Complex Business and Financial Litigation
- Intellectual Property and Technology Litigation
- Employment Litigation
- Securities/Shareholder Litigation
- Professional Liability Litigation

Jeffrey Gross is Of Counsel resident in the New York office of Reid Collins & Tsai LLP. Jeff has represented clients in a wide variety of high-stakes, complex commercial litigation through trial. He has represented clients in diverse matters and industries, including cases arising from financial frauds, business and partnership disputes, technology and intellectual property matters, and employment matters. Jeff received his J.D. from the University of Pennsylvania Law School, where he was an Arthur Littleton Legal Writing Instructor. He is a Phi Beta Kappa graduate of the University of Virginia, where he was an Echols Scholar.

Representations handled by Mr. Gross, currently or at prior firms, include:

- Obtaining $60M jury verdict on behalf of FDIC in a fraud case concerning sub-prime pools of equipment leases
- Representing two sureties in a billion dollar case against JPMorgan Chase arising out of the Enron bankruptcy, leading to settlement after a four-week jury trial
- Prosecution of $500 million fraud claims on behalf of a European bank against two large U.S. banks relating to a foreign exchange rogue trading scheme
- Representation of minority shareholders in judicial dissolution and breach of fiduciary duty claims against majority shareholders of closely-held businesses, leading to favorable settlements

Jeffrey Gross | Of Counsel

- Representation of parties in injunction proceedings concerning non-competes and trade secret litigation.
- Representation of staffing company in multi-year litigation over development of custom software program. Other technology and IP disputes include representing apparel company in Lanham Act proceedings against competitors and representation of development phase biotech company in dispute with investors over convertible debt secured by the company's patents.

Jeff is a member of the Federal Procedure and E-Discovery Committees of the Commercial and Federal Litigation Section of the New York State Bar Association. He has published and presented on electronic discovery, technology, and complex litigation, including:

- Social Media and Employment Litigation, Strafford webinar series, August 8, 2012.
- Re-Thinking Privilege Logs in the Age of E-Discovery, New York Law Journal, July 11, 2011.
- The Future of E-Discovery: "Predictive Coding" and Computer-Assisted Document Review, May 17, 2011, CLE presentation available for download at www.lawline.com.
- Preservation, Cost-allocation, and Cooperation: An Exploration of E-Discovery Issues in the Hypothetical Case of In re Bugacide, New York Inn of Court, March 2011.
- Second Circuit Rules That Arbitrators Must Decide Whether to Consolidate Multiple Proceedings, NYSBA Commercial & Federal Litigation Section Newsletter, Spring 2009, Vol. 15 at pp. 5-7.
- "Circuit Explores 'Wagoner' Rule on Corporate Management Fraud, New York Law Journal, March 5, 2009.
- Preparing for a Rule 26f Conference, CLE presentation available for download at www.lawline.com, 2009.
- Solicitation or Shrewd Tactics: The Ethics of Speaking for Ex-Employees, New York Law Journal, December 8, 2008, p.4.
- The Needle in the Electronic Haystack: Preserving, Searching, and Producing Relevant Documents in the Age of Electronic Discovery, November 2008. Hudson Valley Bank CLE series
- E-Discovery: One Year of the Amended Federal Rules of Civil Procedure, 64 N.Y.U. Ann. Surv. Am L. 201 (2008).
- Comparing the Utility of Keyword and Concept Searches, 7 Digital Discovery & Electronic Evidence, 188-90 (2007).

He also maintains a blog on litigation and technology issues.

Before joining Reid Collins & Tsai LLP, Jeff was a Partner at Vandenberg & Feliu LLP and Special Counsel to Cooley LLP. He has been recognized by Martindale Hubbell with the highest "AV" rating.

DAVID G. ABRAMS

David G. Abrams is a Special Assistant Attorney General in the New York Office of the Attorney General, Medicaid Fraud Control Unit. He is in the Civil Enforcement Unit, where he has worked on a wide-range of matters to recover unlawfully retained taxpayer money. He has also represented the interests of several states on a team comprised of members of the National Association of Medicaid Fraud Control Units, in cases involving nationwide allegations of fraud. In addition to his civil work, he is currently serving as lead prosecutor on a criminal matter.

Prior to joining the Office of the Attorney General, Mr. Abrams was an associate at the litigation boutique Schlam Stone & Dolan LLP, where he specialized in complex commercial litigation. He served as lead associate on matters for some of the largest companies in the world, as well as personally represented basketball legend Julius Erving in a contract dispute matter. He also handled various other cases, including trademark and unfair competition disputes, and claims against a New York City-based developer under the Interstate Land Sales Act.

Prior to joining Schlam Stone & Dolan, Mr. Abrams was an associate at Buchanan Ingersoll & Rooney, where he primarily handled commercial creditors'-rights cases, as well as other, general litigation matters.

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THE ETHICS OF DECEPTION:

PRETEXT INVESTIGATIONS IN TRADEMARK CASES

*Phillip Barengolts**

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I. THE PROBLEM

Your client or your company has learned of an apparent infringement and wants to stop it via a civil action for an injunction and damages. Or, the infringer who was enjoined a year ago seems to be up to its old tricks again. Or, outside the litigation context, you are clearing a new brand and want to know if the registered mark is still in use or has been abandoned.

Before filing suit, you have an ethical obligation under Rule 11[1] to make reasonably sure the facts support your action, so you investigate or ask outside counsel or a private investigator to check out the infringing acts. If the product is mass-produced and sold to consumers, checking availability in retail stores or on the Internet may be an easy and low-risk solution. But if the product or service is not generally sold in such retail channels, and Internet indications are inconclusive, you may need to contact the other party or even visit its place of business.

The investigator says he will proceed using a suitable ruse to mask his identity and the true purpose of the visit. All this seems reasonable and obvious because any infringer would not knowingly talk to a private investigator or a representative of a potential adversary or its counsel.

However, lawyers have been embarrassed, sanctioned, and disciplined, and evidence has been excluded from court on ethical grounds. These proceedings usually include accusations that a lawyer or his or her agents acted deceptively, contacted unrepresented parties without making necessary disclosures, or improperly contacted represented parties of adverse interest without their lawyer's permission. So how do you investigate without running afoul of ethical prohibitions? Does it make a difference whether the lawyer does the investigation himself or herself or uses a paralegal or private investigator? What instructions should you give the investigator?

A thoughtful examination of these questions for bright-line rules and distinctions will probably leave you disappointed, as the answers are heavily fact-dependent and vary with the governing law where your office is located and where the investigation occurs.

II. APPLICABLE RULES OF ETHICS

The ABA Model Rules of Professional Conduct are noted below. Forty-two states have adopted revised rules based on the work of the Ethics 2000 Commission, and forty-nine states have adopted the Model

1. FED. R. CIV. P. 11.

Rules with some variation (only California has not done so).[2] The Model Rules afford the advantage of extensive accompanying comments that provide more guidance to lawyers than previous statements of rules of ethics. However, the Model Rules and comments do not specifically address the subject at hand.

Pretext investigations of trademark infringement usually implicate one or more of four rules of professional responsibility: truthful communications, communications with adverse parties represented by counsel, communications with parties unrepresented by counsel, and the prohibition of deceptive behavior. There is an additional rule on using paralegals or non-lawyer assistants to do the actual investigation which also comes into play on occasion.

A. Truthful communications

> ABA Model 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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.3

B. Communicating with adverse parties represented by counsel

> ABA Model Rule 4.2 Communication with Person Represented by Counsel
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[4]

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2. *State Adoption of the ABA Model Rules of Professional Conduct (previously the Model Code of Professional Responsibility): Dates of initial adoption*, AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY (2012), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html

3. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2007).

4. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2007).

C. Communicating with parties not represented by counsel

ABA Model Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[5]

D. Deceitful conduct

ABA Model Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

engage in conduct that is prejudicial to the administration of justice;

state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.[6]

5. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2007).
6. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2007).

Oregon Rule 8.4(b)

> Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.[7]

This rule was revised to reverse the result in *In re Gatti*.[8]

E. Using paralegals or other nonlawyer assistants

ABA Model Rule 5.3 dealing with supervising nonlawyer assistants.

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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7. OR. CODE OF PROF'L CONDUCT R. 8.4(b) (2010).

8. 8 P.3d 966 (Or. 2000) (the Oregon Supreme Court held there was no "investigatory exception" to the State ethics rules; lawyer had used several false identities to investigate alleged insurance scheme); *see* Or. Eth. Op. 2003-173, 2003 WL 22397289, at *2 (2003); *see also* Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CINCINNATI L. REV. 577, 591 (2005).

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[9]

III. COURT DECISIONS AND ETHICS OPINIONS

Numerous court decisions and ethics opinions have addressed the ethics of pretext investigations with varying results. In *Apple Corps Ltd. v. International Collectors Society*,[10] the court found no violation of the rules of ethics where an attorney had private investigators call the marketer's sales representatives and order infringing goods. In *Gidatex, S.r.L v. Campaniello Imports, Ltd.*,[11] investigators secretly recorded conversations with defendant's employees. The court found that the attorney had not violated the disciplinary rules because the investigator only recorded normal business routine. In *A.V. By Versace, Inc. v. Gianni Versace, S.p.A.*,[12] an investigator, who posed as a buyer and recorded video of employees, did not violate rules of ethics. In *Design Tex Group, Inc. v. U.S. Vinyl Manufacturing Corp.*,[13] the court found no violation of the rules of ethics where the investigator recorded normal business routine rather than interviewing employees or tricking them into statements they otherwise would not have made. In *Chloe v. Designersimports.com USA, Inc.*,[14] the court admitted evidence gathered by an investigator where the investigator ordered a counterfeit bag and sent a check under a pseudonym. However, in *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*,[15] the court sanctioned counsel for deceptive conduct and interviews under false pretenses.

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9. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2007).
10. 15 F. Supp. 2d 456, 458 (D.N.J. 1998).
11. 82 F. Supp. 2d 119, 119-20 (S.D.N.Y. 1999).
12. No. 96 Civ. 9721 PKLTHK, 2002 U.S. Dist. Lexis 16323 (S.D.N.Y. Sept. 3, 2002).
13. No. 04 Civ. 5002 (JSR), 2005 U.S. Dist. LEXIS 2143 (S.D.N.Y. Feb. 14, 2005)
14. No. 07-CV-1791 (CS)(GAY), 2009 U.S. Dist. LEXIS 42351 (S.D.N.Y Apr. 29, 2009).
15. 347 F.3d 693 (8th Cir. 2003).

A. Apple Corps Ltd. v. International Collectors Society[16]

A seminal case is *Apple Corps Ltd. v. International Collectors Society*.[17] Owners of THE BEATLES trademarks, including Yoko Ono Lennon, sued a stamp producer to enjoin unauthorized reproductions of likenesses of the Beatles on stamps.[18] A consent injunction was entered, but the plaintiffs later believed it was being violated.[19]

Plaintiffs' counsel engaged investigators to make pretext contacts to see if defendants were violating the consent decree.[20] The investigators asked for and recorded recommendations about which stamps to purchase and about the acceptance of orders for infringing stamps.[21] No questions were asked about instructions, practices, or policies governing the stamps.[22] The investigation revealed violations of the consent decree, and plaintiffs moved for contempt sanctions.[23] Defendants cross-moved for sanctions on grounds that the investigators violated Rule 4.2, prohibited contact with persons known to be represented by counsel.[24]

The court found no ethical violation.[25] New Jersey law extended the protection of Rule 4.2 only to the company's litigation control group.[26] The sales clerks did not fall within that group, so the *ex parte* communication was allowable.[27]

With respect to the anti-deception provisions of Rule 8.4, the court gave no weight to the misrepresentations that were limited to the investigators' identity and their purpose in contacting defendant:

> RPC 4.2 cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as member[s] of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to

16. 15 F. Supp. 2d 456, 458 (D.N.J. 1998).
17. *Id.*
18. *Id.*
19. *Id.* at 459.
20. *Id.* at 462.
21. *Id.* at 463-64.
22. *Id.* at 464-65.
23. *Id.*
24. *Id.* at 472.
25. *Id.* at 475.
26. *Id.* at 473.
27. *Id.* at 474.

immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule.[28]

B. Gidatex, S.r.L.. v. Campaniello Imports, Ltd.[29]

The New Jersey *Apple* Corps decision was followed the next year in New York in *Gidatex, S.r.L.. v. Campaniello Imports, Ltd.*[30]

Plaintiff terminated defendant's license to sell Saporiti Italia brand furniture.[31] Defendant continued to sell off its stock and to display the Saporiti Italia trademark, while selling customers other brands after they entered the store.[32] Plaintiff's counsel hired private investigators to pose as interior designers and tape record incriminating conversations with defendant's sales staff.[33]

Defendant filed a motion *in limine* to exclude the evidence on grounds that it was obtained unethically and illegally.[34] The court denied the motion on three grounds: the ethical prohibition of contacting adverse parties who are represented by counsel was inapplicable; plaintiff's attorneys had not violated the ethics rules even if they did apply; and exclusion of evidence was not the proper remedy in any event.[35]

The court reasoned that the purpose of the anti-contact rule was to prevent circumvention of the attorney-client relationship.[36] However, the investigators acted like members of the public and did nothing more (other than taping the conversations) than an ordinary consumer would have done in asking the sales staff questions about their products.[37] The sales clerks and low-level employees would not have disclosed, or even have known, any information protected by the attorney client privilege.[38]

The court noted the salutary purposes of pretext investigations in trademark infringement cases: "These rules of ethics should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover [investigator] posing as a

28. *Id.* at 474-75.
29. 82 F. Supp. 2d 119, 119-20 (S.D.N.Y. 1999).
30. *Id.*
31. *Id.* at 120.
32. *Id.*
33. *Id.*
34. *Id.* at 119-20.
35. *Id.* at 120.
36. *Id.* at 122.
37. *Id.*
38. *Id.*

member of the general public engaging in ordinary business transactions with the target."[39]

C. *A.V. By Versace, Inc. v. Gianni Versace, S.p.A.*[40]

The New York court followed this approach in *A.V. By Versace, Inc. v. Gianni Versace, S.p.A.*[41]

> The Court rejects Alfredo Versace's complaint that the use of a private investigator has caused an unfair invasion of his privacy. . . . Gianni Versace's investigator used a false name and approached L'Abbligiamento posing as a buyer in the fashion industry. . . . The investigator's actions conformed with those of a business person in the fashion industry, and Alfredo Versace makes no allegation that the private investigator gained access to any non-public part of L'Abbligiamento. . . . Further, courts in the Southern District of New York have frequently admitted evidence, including secretly recorded conversations, gathered by investigators posing as consumers in trademark disputes. *See, e.g.*, Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 123-24 (S.D.N.Y. 1999) (permitting introduction of secretly recorded conversations between private investigators and sales people for the defendant in a trademark infringement trial); Nikon, Inc. v. Ikon Corp., 803 F. Supp. 910, 921-22 (S.D.N.Y. 1992), *aff'd*, 987 F.2d 91, 95-96 (2d Cir. 1993) (allowing introduction of investigators' interviews with non-party sales clerks to demonstrate 'passing off' and actual confusion among consumers between Ikon and Nikon cameras); *see also* Louis Vuitton S.A. v. Spencer Handbags Corp., 597 F. Supp. 1186, 1188 (E.D.N.Y. 1984), *aff'd*, 765 F.2d 966 (2d Cir. 1985) (affirming permanent injunction issued after considering secretly recorded videotape of defendants' principals meeting with undercover investigator hired by plaintiff to discuss counterfeiting scheme).[42]

D. *Hill v. Shell Oil Co.*[43]

This was a civil rights case, not a trademark case, and the court endeavored to reconcile *Gidatex*, *Apple Corps*, and the district court opinion in *Midwest Motor Sports* (see discussion *infra*) in the context of

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39. *Id.* at 122.
40. No. 96 Civ. 9721 PKLTHK, 2002 U.S. Dist. Lexis 16323 (S.D.N.Y. Sept. 3, 2002).
41. *Id.*
42. *Id.* at *30-31.
43. 209 F. Supp. 2d 876 (N.D. Ill. 2002).

racial discrimination allegations.[44] Plaintiffs conducted undercover investigations of gas station attendants to prove discriminatory practices.[45] Defendants moved for a protective order under Rules 4.2 and 4.3.[46]

The court found the employees to be represented by counsel, making Rule 4.2 applicable but Rule 4.3 inapplicable.[47] Attempting to find the right balance in applying the rules, the court stated:

> Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. . . . They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course.[48]

The court thus found that videotape recordings of the employees' ordinary course of conduct in reacting to customers was proper under Rule 4.2.[49] The court reserved for trial, however, the admissibility of the substantive conversations, held outside the normal business transaction, between the investigators and the employees.[50]

E. Design Tex Group, Inc. v. U.S. Vinyl Manufacturing Corp.[51]

The court followed *Gidatex* and denied a motion to exclude evidence on the ground that it was obtained in violation of rules of ethics.[52]

> [I]n response to what purported to be an ordinary purchasing inquiry made by an investigator working for plaintiffs, a U.S. Vinyl employee sent a sample book that included the allegedly [copyright] infringing pattern to a New York City address . . . Defendants argue that this action should not be attributed to the company because it was carried out by a low-level employee who had not received an instruction not to mail out the sample book in question. In the absence of any evidence that the employee was actually disobeying a company directive, there is no case law supporting this proposition. Also rejected is defendants'

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44. *Id.* at 877-79.
45. *Id.* at 877.
46. *Id.*
47. *Id.* at 878.
48. *Id.* at 880.
49. *Id.*
50. *Id.*
51. No. 04 Civ. 5002 (JSR), 2005 U.S. Dist. LEXIS 2143 (S.D.N.Y. Feb. 14, 2005).
52. *Id.* at *2-3.

> argument that this evidence should be excluded because plaintiffs' actions violated rules of ethics. It is not "an end-run around the attorney/client privilege" if investigators merely "recorded the normal business routine" rather than interviewing employees or tricking them "into making statements they otherwise would not have made."[53]

F. Chloe v. Designersimports.com USA, Inc.[54]

This case involved the sale of counterfeit CHLOE handbags by defendant.[55] Plaintiff's private investigator called defendant to order a bag and sent a check under a pseudonym.[56] She also made a couple follow up calls to defendant's sales clerks under her pseudonym to find out when the bag would be delivered.[57] Defendant complained about the fraud and duplicity involved in the pretext.[58]

The court rejected the duplicity challenge, stating that courts in the Southern District of New York have frequently admitted evidence gathered by investigators posing as consumers in trademark disputes, citing *Versace* and *Gidatex*.[59]

The court cited and revalidated the broad statement from *Apple Corps*.:

> The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. [*Apple Corps*.], 15 F. Supp. 2d 456, 475 (D.N.J. 1998). Indeed it is difficult to imagine that any trademark investigator would announce her true identity and purpose when dealing with a suspected seller of counterfeit goods.[60]

G. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.[61]

However, the court in *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*[62] decided just the opposite. The case arose from the

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53. *Id.* at *2-3.
54. No. 07-CV-1791 (CS)(GAY), 2009 U.S. Dist. LEXIS 42351 (S.D.N.Y. Apr. 29, 2009).
55. *Id.* at *7.
56. *Id.* at *7-8.
57. *Id.* at *8.
58. *Id.* at *28.
59. *Id.* at *29-30.
60. *Id.* at *30.
61. 347 F.3d 693 (8th Cir. 2003).
62. *Id.*

discontinuance of the sale of a certain snowmobile line at the plaintiff's store.[63] The investigator testified that defendant's lawyers hired him to visit plaintiff's showroom, talk to a salesman about products, to find out which snowmobiles were being recommended, and to look at the equipment.[64] He recorded his conversation to see if the salesman would say anything about the lawsuit.[65] He also said he was supposed to get into "financing, promotions, and close-out pricing" with the sales people.[66] He admitted in his deposition that his purpose was to elicit evidence rather than to reveal evidence of how typical consumers would be treated.[67]

The court analyzed the anti-contact rule, Rule 4.2, by stating its purposes were to prevent getting adverse party statements by circumventing opposing counsel, to protect the attorney-client relationship, to prevent the inadvertent disclosure of privileged information, and to facilitate settlement by channeling disputes through the attorneys.[68]

The court rejected the contention that all corporate employees were within the anti-contact rule and recognized instead a spectrum of categories of employees for purposes of Rule 4.2.[69] Because the salesman's statements would be imputed to the corporate plaintiff, the court found that salesman to be within the protection of Rule 4.2, distinguishing *Apple Corps*. and similar cases which restricted protection to the control group.[70]

The court found that defendant's counsel, via their investigators, had violated the anti-contact rule of Rule 4.2, would have violated Rule 4.3 even if the salesman had been held to be unrepresented by counsel, and sanctioned counsel for deceptive conduct and interviews under false pretenses.[71]

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63. *Id.* at 695.
64. *Id.* at 695-96.
65. *Id.*
66. Midwest Motor Sports, Inc. v. Artic Cat Sales, Inc., 144 F. Supp. 2d 1147 (D.S.D. 2001), *aff'd sub nom.*, 347 F.3d 693.
67. *Midwest Motor Sports*, 347 F.3d at 696.
68. *Id.* at 698.
69. *Id.* at 697.
70. *Id.* at 698.
71. *Id.*

H. NYCLA Committee On Professional Ethics Formal Opinion No. 737

The NYCLA Committee On Professional Ethics Formal Opinion No. 737[72] is one of the small number of ethics opinions specifically directed at the issue.

Entitled "Non-government lawyer use of investigator who employs dissemblance,"[73], the opinion does not address whether the lawyer himself or herself is ever permitted to make "dissembling statements" directly!

> "Dissemblance" is not unauthorized if narrow conditions are satisfied:
>
> Either
>
> The investigation concerns either a civil rights or intellectual property violation which the lawyer in good faith believes is taking place or will take place, or
>
> The dissemblance is expressly authorized by law; and
>
> The evidence sought is not reasonably and readily available through other lawful means; and
>
> The lawyer's and investigator's conduct do not otherwise violate The New York Lawyer's Code of Professional Responsibility or other applicable law; and
>
> The dissemblance does not unlawfully or unethically violate the rights of third parties.[74]

I. Alabama Ethics Opinion No. RO-2007-05[75]

"During pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public."[76]

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72. NYCLA Comm. on Prof'l Ethics, Formal Op. 737 (2007).
73. *Id.* at 1.
74. *Id.* at 5.
75. Ala. Ethics Op. No. RO-2007-05 (2007).
76. *Id.*

J. Office of Lawyer Regulation v. Stephen P. Hurley[77]

Attorney Hurley was defending a client, Sussman, being prosecuted for child pornography.[78] Hurley's defense theory was that the minor, S.B., who was allegedly exposed to the pornography by Sussman, was independently viewing and collecting the same pornography on his own.[79]

Hurley wanted to get S.B.'s computer to see if it contained the pornography.[80] He hired a private investigator who obtained S.B.'s computer through deceit, saying he was conducting a survey concerning computer usage and would provide a free new computer in return for turnover of S.B.'s existing computer.[81]

Hurley instructed the investigator not to contact S.B. unless his mother was present, and to give S.B. an opportunity to remove anything he wanted to from the computer.[82] The computers were swapped, and a forensic computer specialist found pornography on S.B.'s computer.[83]

The District Attorney filed a disciplinary complaint against Hurley, alleging misconduct involving making a false statement to a third party, and engaging in conduct involving fraud, dishonesty, deceit, or misrepresentation.[84]

In the hearing, testimony indicated a widespread belief among the Wisconsin bar that Hurley's conduct was permissible, and common practice among prosecutors.[85] The state supreme court upheld the dismissal of the complaint against Hurley, stating that no Wisconsin statute or rule drew the distinction between prosecutors and private practitioners urged by the District Attorney.[86] The court also noted Hurley's ethical obligation to zealously defend his client's liberty and essentially gave him the benefit of the doubt.[87]

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77. No. 2007AP478-D, 2008 Wisc. LEXIS 1181 (Wis. Feb. 11, 2009), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/6211/Office%20of%C20 Lawyer%C20Regulation%C20v.% 20Hurley.pdf.

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 3.

84. *Id.*

85. *Id.*

86. *Id.* at 4.

87. *Id.* at 3.

K. ABA Formal Opinion 95-396[88]

> 1. Rule 4.2 attaches when you know the other party is represented by counsel in the matter, whether as a potential adversary, witness, or as an interested party.[89]
>
> 2. Representation of a company does not necessarily bar communications with all employees of that organization, but does extend to employees whose actions and statements can be imputed to the company.[90]

IV. SOME SUGGESTED GUIDELINES

This is a thorny area of ethical practice in which the authorities and decisions are in tension if not outright conflict. It is all the more difficult because investigation of facts is necessary and commonplace in trademark clearance and litigation practice. At a minimum, issue awareness and due diligence are essential steps toward staying out of harm's way and complying with legal and ethical obligations.

Check local ethics rules, disciplinary rulings and opinions, and case law before embarking on a pretext investigation in the states where you are admitted to practice, where the case is pending, and where the investigation will take place. The courts in highly commercial jurisdictions, like New York or New Jersey, that handle a greater volume of trademark infringement, counterfeiting, and deceptive trade practices cases, seem to be more tolerant of pretext investigations than courts that see fewer such cases.[91]

The lawyer should not do the pretext investigation himself or herself. It does not necessarily legitimatize the investigation to do it through a paralegal or private investigator, but doing the "dissembling" directly seems unnecessarily risky. Even the New York ethics opinion that approves dissembling under certain conditions is expressly qualified not to apply to actions by the lawyer personally.[92]

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88. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995).

89. *Id.* at 1, 4.

90. *Id.* at 1.

91. *Compare* Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 968, 973 (2d Cir. 1985) (use of private investigators allowed in counterfeit handbags case), *and* Nikon Inc. v. Ikon Corp., 803 F. Supp. 910, 921-22 (S.D.N.Y. 1992), *aff'd*, 987 F.2d 91, 92 (2d Cir. 1993) (investigators allowed to provide evidence of passing off), *with* Midwest Motor Sports v. Artic Cat Sales Inc., 347 F.3d 693, 695 (8th Cir. 2003).

92. New York County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. No. 737 (2007), *available at* http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf.

Distinguish between non-litigation or pre-litigation settings and pending litigation settings. During pending litigation, you are closer to the dangerous end of the spectrum, with the courts likely to apply the rules more stringently against communicating with persons represented by counsel and/or unrepresented persons. Checking to see if current use of a trademark can be found, as a due diligence aspect of routine trademark clearance, is near the safer and more acceptable end of the spectrum as it is within the realm of inquiries that would be made by members of the consuming public who might be looking for the product to purchase.

Checking and documenting business practices and transactions in the ordinary course of business with members of the general public is on the more innocuous and defensible end of the spectrum. It is hard to see how this subverts the attorney-client relationship intended to be protected by the no-contact rules, and characterizations of this type of interchange pervade the decisions holding no violation took place. If the basic interview passes ethical muster, secret audiotaping or videotaping is probably acceptable as well, provided it is lawful under applicable laws on "wiretapping" or taping without permission.

Trying to elicit admissions as to details, decisions, motivations, and effects is on the more dangerous and unacceptable end of the spectrum. Baiting employees to make damaging admissions and reveal damaging details beyond the scope of typical exchanges with members of the general public is more likely to violate rules of ethics.

Consider exactly who is being interviewed. Talking to sale clerks or other "public-facing" employees is on the safer end of the spectrum, as opposed to officers or managers who are more responsible in the corporate hierarchy, who are more likely to interact with counsel and/or bind the company with their statements and actions. However, remember that *Midwest Motor Sports*[93] held that sales clerks' statements would be imputed to the company.

If you use a private investigator, it is probably a good idea to give detailed written instructions including goals. Even with a highly capable investigator who knows the boundaries of legal ethics, it is to your advantage to have a written record of the investigation's scope and limitations, just in case you have to defend it, yourself, and your investigator. If you have used a particular investigator in the past and are confident of his or her standard operating procedures, there is probably less need for detailed instructions on new assignments.

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93. 347 F.3d 693.

Whatever you do, be extra careful if your investigation takes place, or if your case is or would be located in the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota), the venue of the harsh ruling in the *Midwest Motor Sports* case discussed *supra*.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 01-422 **June 24, 2001**

Electronic Recordings by Lawyers Without the Knowledge of All Participants

A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. Formal Opinion 337 (1974) accordingly is withdrawn. A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded. The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.

1. Introduction

In Formal Opinion 337,[1] this Committee stated that with a possible exception for conduct by law enforcement officials, a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation.[2] The position taken in Opinion 337 has been criticized by a number of state and local ethics committees, and at least one commentator has questioned whether it survives adoption of the Model Rules of Professional Conduct.[3] The Committee has reexamined the issue and now rejects the broad proscription stated in Opinion 337. We also describe certain circumstances in which nonconsensual taping of conversations may violate the Model Rules.

The Committee does not address in this opinion the application of the Model Rules to deceitful, but lawful conduct by lawyers, either directly or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversations in investigations of criminal activity, dis-

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1. Formal Opinion 337 (August 10, 1974), in FORMAL AND INFORMAL ETHICS OPINIONS (ABA 1985), at 94.

2. In Informal Opinion 1320 (May 2, 1975) (Reconsideration of Formal Opinion 337), *id.* at 193, the Committee declined to reconsider its view and additionally opined that a lawyer may not ethically direct an investigator to tape record a conversation without the knowledge of the other party.

3. C. WOLFRAM, MODERN LEGAL ETHICS (1986) §12.4.4.

criminatory practices, and trademark infringement.[4] We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical.

2. Reasons for Abandonment of the General Prohibition Stated in Opinion 337

Formal Opinion 337 was decided under the Code of Professional Responsibility, which incorporated the principle that a lawyer "should avoid even the appearance of impropriety."[5] That admonition was omitted as a basis for professional discipline nine years later in the ABA's adoption of the Model Rules of Professional Conduct. Opinion 337 further stated, however, that "conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties."[6] The Model Code's prohibition against conduct involving deceit or misrepresentation was preserved in Model Rule 8.4(c),[7] and thus we must consider whether that conclusion by the Committee in Opinion 337 is correct under the Model Rules.

Reception by state and local bar committees of the principle embraced by Opinion 337 has been mixed.[8] Courts and committees in a number of states have adopted the position of the opinion.[9] The State Bar of Michigan Standing

4. The subject is discussed thoughtfully in David B. Isbell & Lucantonio Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under The Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (Summer 1995). The ethics of supervising investigators who use "pretext" techniques to gather information, often accompanied by secret electronic recording of conversations with their subjects, also is discussed in Apple Corps. Ltd. v. International Collectors Society, 15 F.Supp.2d 456, 475-76 (D. N.J. 1998).

5. Prior to Opinion 337, the Committee had interpreted Canon 22 of the ABA Canons of Professional Ethics, which stated that a lawyer's conduct "should be characterized by candor and fairness," to proscribe surreptitious taping of a court proceeding of conversations with clients, and of conversations with other lawyers. *See* Informal Decision C-480 (Attorney's Use of Recording Device for Court Proceedings) (December 26, 1961), *in* 1 INFORMAL ETHICS OPINIONS, at 81 (ABA 1975); Informal Opinion 1008 (Lawyer Tape Recording Telephone Conversation of Client Without Client's Knowledge) (October 25, 1967), *in* 2 INFORMAL ETHICS OPINIONS, at 180 (ABA 1975); Informal Opinion 1009 (Lawyer Tape Recording Telephone Conversation with Lawyer for Other Party) (October 25, 1967), *id.* at 182.

6. FORMAL AND INFORMAL ETHICS OPINIONS (1985), at 96.

7. Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

8. Ethics opinions on the subject prior to 1990 are discussed in Mark Koehn, Note, *Attorneys, Participant Monitoring and Ethics: Should Attorneys Be Able to Surreptitiously Record their Conversations?*, 4 GEO. J. LEGAL ETHICS 403 (1990).

9. *See* Matter of Anonymous Member of So. Carolina Bar, 404 S.E.2d 513, 513 (S.C. 1991); People v. Selby, 606 P.2d 45, 47 (Colo. 1979); Supreme Court of Texas Professional Ethics Committee Op. 392 (Feb. 1978).

Committee on Professional and Judicial Ethics initially agreed with Opinion 337,[10] but later found that the ethics of nonconsensual recording should be considered on a case-by-case basis.[11] The New York State Bar adopted a *per se* rule condemning nonconsensual recordings,[12] while the New York City Bar recognized exceptions to that position in the case of prosecutors and defense counsel in criminal investigations.[13] The New York County Bar more recently opined that recording of a conversation without the consent of the other party is not, in and of itself, unethical.[14]

In Virginia, a series of opinions condemned nonconsensual recordings by or at the direction of lawyers,[15] but the latest opinion on the subject found such conduct not to be unethical when done for the purpose of a criminal or housing discrimination investigation. The Virginia Standing Committee on Legal Ethics noted there may be other factual situations in which the same result would be reached.[16] Oklahoma, Utah, and Maine have rejected the broad prohibition of Opinion 337, saying that nonconsensual recordings by lawyers are not unethical unless accompanied by other deceptive conduct.[17] The District of Columbia also found a *per se* rule inappropriate,[18] and Kansas has found surreptitious recording by lawyers to be "unprofessional," but not unethical.[19]

Criticism of Opinion 337 has occurred in three areas. First, the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majori-

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10. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Informal Op. CI-200 (interpreting the Code of Professional Responsibility).

11. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. RI-309 (May 12, 1998).

12. New York State Bar Ass'n Committee on Professional Ethics Op. 328 (1974).

13. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Op. 80-95 (1981).

14. New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (Secret Recording Of Telephone Conversations) (July 28, 1993).

15. Gunter v. Virginia State Bar, 385 S.E. 2d 597, 622 (Va. 1989); Virginia Legal Ethics Op. 1324 (Representing a Client Within the Bounds of the Law: Attorney Obtaining Non-Consensual Tape Recordings From Client) (Feb. 27, 1990); Virginia Legal Ethics Op. 1448 (Advising Client/Potential Civil Plaintiff to Record Oral Conversation With Unrepresented Potential Civil Defendant) (January 6, 1992); Virginia. Legal Ethics Op. 1635 (Attorney's Tape Recording Telephone Conversation When Not Acting in Attorney Capacity) (February 7, 1995).

16. Virginia Legal Ethics Opinion 1738 (Attorney Participation In Electronic Recording Without Consent Of Party Being Recorded) (April 13, 2000).

17. Maine Professional Ethics Commission of the Bd. of Overseers of the Bar Op. 168 (March 9, 1999); Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Oklahoma Bar Ass'n Op. 307 (March 5, 1994).

18. D.C. Bar's Legal Ethics Committee Op. 229 (Surreptitious Tape Recording By Attorney) (June 16, 1992).

19. Kansas Bar Ass'n Ethics Op. 96-9 (Secret Tape Recordings of Other Persons by Attorneys and Clients) (August 11, 1997).

ty of states permit recording by consent of only one party to the conversation.[20] Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence acquired by such techniques.[21] Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play,"[22] it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.[23]

Second, there are circumstances in which requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity. For that reason, even those authorities that have agreed with the basic proposition of Opinion 337 have tended to recognize numerous exceptions. The State Bar of Arizona, for example, listed four exceptions to the ethical prohibition for such things as documenting criminal utterances (threats, obscene calls, etc.); documenting conversations with potential witnesses to protect against later perjury; documenting conversations for self-protection of the lawyer; and recording when "specifically authorized by statute, court rule or court order."[24] Other ethics committees have excepted recordings by criminal defense lawyers, reasoning that the commonly accepted "law enforcement exception" otherwise would give prosecutors an unfair advantage.[25] Exceptions also have been recognized for "testers" in investigations of housing discrimination and trademark infringement.[26] And the Ohio Supreme Court, although finding nonconsensual recordings by lawyers generally impermissible, has noted an exception for "extraordinary circumstances" as well as for investigations by prosecutors and criminal defense lawyers.[27]

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline, is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain

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20. *See infra* note 30 and accompanying text.

21. *E.g.,* Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983); Miano v. AC & R Advertising Inc., 148 F.R.D. 68, 88-89, *aff'd*, 834 F.Supp. 632 (S.D. N.Y. 1993).

22. Maine Op. 168, *supra* note 17.

23. As discussed in Part 5, *infra*, the client-lawyer relationship may create a justifiable expectation that the lawyer will not record a client's conversation without the knowledge of the client.

24. Arizona Op. No. 75-13 (June 11, 1975).

25. *See, e.g.,* Board of Professional Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 86-F-14(a) (July 18, 1986); Kentucky Bar Ass'n Op. E-279 (Jan. 1984).

26. Virginia Legal Ethics Op. 1738, *supra* note 16.

27. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).

exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical.

The third major criticism of Opinion 337 has been that whatever its basis under the Canons and the Model Code, it is not consistent with the approach of the Model Rules. The Model Rules do not contain the injunction of the Model Code that lawyers "should avoid even the appearance of impropriety." Furthermore, unlike the Canons or the Code, the Model Rules deal directly with "respect for rights of third persons" in Rule 4.4. That rule proscribes only "means that have no substantial purpose other than to embarrass, delay or burden a third person," and "methods of obtaining evidence that violate the legal rights of such a person."

If a lawyer records a conversation with no substantial purpose other than to embarrass or burden a third person, the lawyer has violated Model Rule 4.4. But there seems no reason to treat recording of conversations any differently in this respect from other methods of gathering evidence.[28] The Committee believes that to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do *not* violate the legal rights of the person whose words are unknowingly recorded, would be unfaithful to the Model Rules as adopted.

3. Nonconsensual Recording In Violation of State Law

Federal law permits recording of a conversation by consent of one party to the conversation.[29] Some states, however, prohibit recordings without the consent of all parties, usually with an exception for law enforcement activities and occasionally with other exceptions.[30] Violation of such laws is a criminal offense, and may subject the lawyer to civil liability to persons whose conversations have been recorded secretly.[31] A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both. Further, because the state statute creates a right not to have one's conversations recorded without consent, nonconsensual recordings of conversations for the purpose of obtaining evidence would violate Model Rule 4.4's proscription

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28. Similarly, if a lawyer falsely states that a conversation is not being recorded, the lawyer likely has violated Model Rule 4.1's prohibition against knowingly making false material statements of fact to third persons, but again there seems no reason to treat the subject of nonconsensual recording differently from any other conduct when it is not accompanied by misrepresentations to third persons.

29. 18 U.S.C. § 2511(2)(d).

30. According to a 1998 law review note surveying state statutes, twelve states at that time prohibited recording without consent of both parties to the conversation: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington. Stacy L. Mills, Note, *He Wouldn't Listen to Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 429 and nn. 126, 127 (Spring 1998). Oregon law permits recording of telephone conversations, but not in-person conversations, with one party's consent. Or. Rev. Stat. § 165.540 (1999).

31. *See* Kimmel v. Goland, 51 Cal. 3d 202, 212 (Cal. 1990), holding that a lawyer is not immune from tort liability for transcribing conversations recorded by a client in violation of California's two-party consent statute.

against using "methods of obtaining evidence that violate the legal rights of [a third] person."[32]

A lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs.

4. False Denial That a Conversation is Being Recorded

That a lawyer may record a conversation with another person without that person's knowledge and consent does not mean that a lawyer may state falsely that the conversation is not being recorded. To do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person. The distinction has been recognized by the Mississippi Supreme Court, which held in *Attorney M. v. Mississippi Bar*[33] that nonconsensual recording of conversations by lawyers generally is not a violation of ethical rules, but then held in *Mississippi Bar v. Attorney ST*[34] that a lawyer who falsely denied to a third person that he was recording their telephone conversation had violated the proscription of Rule 4.1 against false statements of material fact in the course of representing a client.

5. Undisclosed Recording of Conversations With Clients

When a lawyer contemplates recording a conversation with a client without the client's knowledge, ethical considerations arise that are not present with respect to non-clients.[35] Lawyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer's convenience and interests. The duty of loyalty is in part expressed in the Model Rules requiring preservation of confidentiality and communication with a client about the matter involved in the representation. Whether the Model Rules that define and implement these duties permit a lawyer to record a client conversation without the client's knowledge is a question on which the members of this Committee are divided. The Committee is unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation.[36]

Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client's communication in some fashion. But a tape recording that captures the client's exact words, no matter how ill-considered, slanderous or profane, differs from a lawyer's notes or dictated memorandum of the conversa-

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32. That conclusion does not, of course, apply to lawyers engaged in law enforcement whose activities are authorized by state or federal law.

33. 621 So. 2d 220, 223-24 (Miss. 1992).

34. 621 So. 2d 229, 232-33 (Miss. 1993).

35. "A fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients, to whom lawyers owe few duties." THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, ch. 2, topic 1, Introductory Note, at 125 (2000).

36. A lawyer may satisfy the need to inform a client that their conversations are or may be recorded by advising the client, at the outset of the representation or any later time, that the lawyer may follow this practice.

tion. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of law,[37] the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation.

Recordings of conversations may, of course, serve useful functions in the representation of a client. Electronic recording saves the lawyer the trouble of taking notes, and ensures an accurate record of the instructions or information imparted by a client. These beneficial purposes may weigh in favor of recording conversations, but they do not require that the recording be done secretly.

The relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer. Thus, whether or not undisclosed recording of a client conversation is unethical, it is inadvisable except in circumstances where the lawyer has no reason to believe the client might object, or where exceptional circumstances exist. Exceptional circumstances might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality. For example, there is no ethical obligation to keep confidential plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved. Those members of the Committee who believe that the Model Rules forbid a lawyer from recording client conversations without the client's knowledge nonetheless would recognize exceptions in circumstances such as these.

Conclusion

In summary, our conclusions are as follows:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.

2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.

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37. Though a client-lawyer conversation ordinarily will be privileged, there are numerous ways in which disclosure of the recording might nevertheless later be compelled by law, as in a situation where the client is held to have waived the privilege, or where a court finds the crime-fraud exception is applicable. Further, when a recording is made of an officer of a client corporation, the recording may become the property of an unfriendly successor in the case of a bankruptcy, receivership, or hostile takeover.

3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.

4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.

Comment on Rule 4.1

Transactions With Persons Other Than Clients

Rule 4.1 Truthfulness In Statements To Others - 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.

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People v Aveni
2012 NY Slip Op 06968
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Appellate Division, Second Department
Belen, J.
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Decided on October 17, 2012

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

RUTH C. BALKIN, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
ROBERT J. MILLER, JJ.

2010-10110
(Ind. No. 09-00978)

[*1]The People of the State of New York, respondent,

v

Paul Aveni, appellant.

APPEAL by the defendant from a judgment of the Supreme Court (Susan Cacace, J.), rendered September 7, 2010, and entered in Westchester County, convicting him of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, criminal contempt in the first degree, and criminal possession of a controlled substance in the seventh degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Richard Molea, J.), of those branches of the defendant's omnibus motion which were to suppress

certain statements made to law enforcement officials and physical evidence.

John F. Ryan, White Plains, N.Y. (David B. Weisfuse of counsel), for appellant.
Janet DiFiore, District Attorney, White Plains, N.Y. (Raffaelina Gianfrancesco and Richard Longworth Hecht of counsel), for respondent.

OPINION & ORDER

BELEN, J.This case presents us with an opportunity to decide under what circumstances the police, while interrogating a suspect, exceed permissible deception, such that a suspect's statements to the police must be suppressed because they were unconstitutionally coerced. During the early morning of January 13, 2009, the defendant, Paul Aveni, who had been arrested earlier that night for violating a temporary order of protection obtained by his mother, Mary Aveni (hereinafter Mary), was intentionally deceived and threatened by two detectives from the New Rochelle Police Department into making various inculpatory statements. Knowing that the defendant's girlfriend, Angela Camillo, had died in Mary's home earlier that night, Detective Claudio Carpano intentionally deceived and threatened the defendant by telling him that Camillo was receiving medical treatment at a hospital and that, "she's okay now but if you lie to me and don't tell me the truth now . . . it could be a problem" because medical personnel would be unable to properly treat Camillo and the defendant could be held responsible for her death.

Shortly thereafter, the defendant made inculpatory statements that he had procured heroin and had injected Camillo with the drug. The cause of Camillo's death was later determined to be acute mixed drug intoxication involving heroin, ecstasy, and Alprazolam, also known as Xanax.

After a jury trial, the defendant was convicted of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, criminal contempt in the first degree, and criminal possession of a controlled substance in the seventh degree.

The defendant appeals from the judgment of conviction, arguing, among other things, that his statements to the police should have been suppressed because they were involuntarily made as a result of the deception and threats used by the detectives, and that his will was overborne by the [*2]length of the detention, lack of food and water, his intoxication, and false promises made by the police. Furthermore, he contends, since his statements were thus rendered involuntary and, hence, inadmissible, there is legally insufficient evidence to support his convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree. He separately contends, on different grounds, that there is legally insufficient evidence to convict him of criminal contempt in the first degree and that the verdict of guilt with respect to that conviction was against the weight of the evidence.

We agree with the defendant that the statements he made to law enforcement officials at the police station must be suppressed, and that, therefore, his convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree must be vacated as unsupported by legally sufficient evidence, and those counts dismissed from the indictment. However, the defendant's challenge to the legal sufficiency of the evidence supporting his conviction of criminal contempt in the first degree is unpreserved, and, in any event, without merit, and the verdict of guilt with respect to that conviction was not against the weight of the evidence.

The principal issue presented in this case is whether the defendant's will was overborne, in violation of the United States Constitution and *Miranda v Arizona* (384 US 436), the New York Constitution, and the Criminal Procedure Law, when he made inculpatory statements indicating that he had procured heroin and had injected Camillo with the drug. We further consider whether the defendant's conviction of burglary in the second degree was supported by legally sufficient evidence with regard to the elements of "enter[ing] . . . unlawfully," based upon the violation of an order of protection, and "intent to commit a crime therein," based upon the intent to commit the offense of criminal possession of a controlled substance in the seventh degree, as charged in the indictment and the bill of particulars.

The Supreme Court held a pretrial suppression hearing to determine the admissibility of, inter alia, the defendant's inculpatory statements made to the police (*see People v Huntley*, 15 NY2d

72). During the hearing, the People presented the testimony of Detective Carpano, who testified that at approximately 11:30 P.M. on January 12, 2009, after advising the defendant of his *Miranda* rights (*see Miranda v Arizona*, 384 US 436), he interviewed the defendant at the New Rochelle police station. At that time, the defendant stated that he had seen Camillo earlier that day, but had dropped her off at a gas station, and had not seen her again until several hours later, after his brother contacted him and informed him that Camillo was in their mother Mary's home and under the influence of narcotics. When he arrived at Mary's home, he found Camillo unconscious in a chair in his old bedroom. After asking Mary to call 911, he left because there was an order of protection barring him from the home.

The defendant initially told Detective Carpano that some time later, the defendant returned to the house to check on Camillo's condition. The house appeared empty, and he fell asleep in his brother's bedroom. He awoke at approximately 11:15 P.M., fell out of bed, and heard a police officer instructing him to identify himself. According to the hearing testimony of two police officers, the defendant came down a stairway to a landing, was handcuffed by an officer, and was advised of his *Miranda* rights.

At approximately 2:00 A.M., Detective Carpano presented the defendant with a transcription of the above statement, which the defendant refused to sign.

More than four hours later, at approximately 6:30 A.M., the defendant, after again being advised of his *Miranda* rights, was interviewed again at the police station by Detective Carpano and another detective. During that interview, Detective Carpano, who knew that Camillo was dead, testified that he told the defendant,

> "[Camillo] was at the hospital and the doctors are working on her, but it's imperative; did she use any drugs or did she take anything, because whatever medications the doctors give her now could have an adverse effect on her medical condition. You — she's okay now but if you lie to me and don't tell me the truth now and they give her medication, it could be a problem."

Immediately thereafter, the defendant made an inculpatory statement that he had [*3]injected Camillo with heroin.

At approximately 7:00 A.M., Detective Carpano began videotaping the interview. During the recorded interview, the defendant stated that, before going to Mary's home, he had purchased the heroin that he later injected into Camillo. Throughout the recorded interview, Detective Carpano continuously stated that Camillo was alive and that she had told the police she had been forced to take heroin, which contradicted the defendant's assertion that Camillo did so voluntarily. Further, when the defendant asked about the criminal contempt charge arising out of the violation of the order of protection, the detectives promised him, on numerous occasions, that they would help him with that matter if he was cooperative, although the District Attorney would ultimately decide how to proceed.

During her summation at the suppression hearing, defense counsel argued, inter alia, that the police acted improperly by deceiving the defendant into believing that Camillo was still alive and threatening him that his failure to tell them what drugs she had taken would make him responsible for her death.

At the conclusion of the suppression hearing, the hearing court, among other things, declined to suppress the statements made by the defendant at the police station.

The matter then proceeded to trial before a jury. As part of the People's case-in-chief, Camillo's mother testified that, prior to Camillo's relationship with the defendant, Camillo had dated and lived with another man who was a heroin addict. On January 11, 2009, the day before she died, Camillo told her mother that she was going out to lunch with the defendant.

The defendant's mother, Mary, testified that on January 12, 2009, at approximately 4:00 P.M., the defendant and Camillo entered her home, despite the temporary order of protection against the defendant barring him therefrom, and went to his second-floor bedroom. Previously, Mary had unsuccessfully attempted to have the order vacated or modified to allow the defendant to visit her home, and on this date, and on prior occasions, she allowed him to enter and stay in her home notwithstanding the order.

At approximately 8:45 P.M., the defendant told Mary that something was wrong with Camillo. Mary went into the bedroom and saw Camillo sitting in a chair with her legs crossed and her eyes open, looking straight ahead. At approximately 9:10 P.M., Mary called 911.

Meanwhile, the defendant's older brother, Eric Aveni (hereinafter Eric), was watching videos with a friend in a third-floor apartment in Mary's home. According to Eric, the defendant banged on the door and stated that there was something wrong with Camillo. The defendant then grabbed a chair, stood on top of it, and climbed into a crawl space in the attic. Eric heard Mary scream from the second floor and went into the defendant's bedroom, where he found Camillo sitting upright in a chair, with her eyes open. After determining that Camillo was unconscious, Eric put her on the bed and attempted to perform CPR.

At approximately 9:15 P.M., Police Officer Michael Ciafardini responded to Mary's home after receiving a radio transmission from police headquarters. At approximately 9:20 P.M., paramedic Robert Fardella arrived at the home and observed members of the New Rochelle Fire Department performing CPR on Camillo. Fardella testified that, by that time, Camillo showed signs of having been dead for approximately 45 minutes to an hour. After inserting a breathing tube into Camillo, Fardella noticed pink frothy sputum which, he explained, is indicative of a heroin overdose. He also noticed a spoon with a white substance underneath a dresser drawer. The medical examiner testified that the cause of Camillo's death was acute mixed drug intoxication and that she had needle marks on her wrists, which could have been made by Camillo herself.

At approximately 9:45 P.M., Detective Christopher Greco arrived at Mary's home. According to Detective Greco, there were "obvious signs" of drug use in the second-floor bedroom, including a hypodermic needle and wax paper commonly used for packaging heroin.

At approximately 11:15 P.M., Officer Ciafardini and Detective Greco heard a loud noise coming from the third floor. They ordered whoever was there to come down the stairs, and the defendant complied. Based upon the order of protection barring the defendant from Mary's home, the defendant was taken into custody. Officer Ted Pitzel placed the defendant in his patrol car and advised him of his *Miranda* rights, then transported him to the New Rochelle police station. Detective Carpano's trial testimony was similar to his suppression hearing testimony. At trial, he also testified that between 1:20 A.M. and 1:30 A.M., Mary consented to a search of her home, during which the police recovered a bottle of the prescription medication Xanax, hypodermic needles, and several bags stamped "Lock Down." A forensic scientist testified that one of the bags [*4]contained a trace amount of heroin.

The jury found the defendant guilty of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, criminal contempt in the first degree, and criminal possession of a controlled substance in the seventh degree. The defendant appeals from the judgment of conviction.

The Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, provides, in pertinent part, that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law" (US Const Amends V, XIV; *see Duckworth v Eagan*, 492 US 195, 201-202; *Malloy v Hogan*, 378 US 1). "The *Miranda* warnings are procedural safeguards intended to secure the Fifth Amendment privilege against self-incrimination by protecting individuals from the informal compulsion exerted by law enforcement officials during custodial questioning" (*People v Borukhova*, 89 AD3d 194, 211; *see Miranda v Arizona*, 384 US at 444; *People v Paulman*, 5 NY3d 122, 129).

In *Miranda v Arizona*, the United States Supreme Court explained that interrogations in certain custodial circumstances are presumed to be inherently coercive and "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice" (*Miranda v Arizona*, 384 US at 458). Hence, the prosecution may not use any statements that stem from a custodial interrogation unless it establishes that procedural safeguards were properly followed (*see id.* at 444-445).

Miranda emphasizes the "badge of intimidation" created when officers do not make efforts to "afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice" (*id.* at 457). Hence, for a statement to be admissible, the People must prove a voluntary, knowing, and intelligent waiver of the privilege against self-incrimination (*id.* at 444). As the United States Supreme Court explained, "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation" (*id.* at 476). While it is not necessary for a waiver to be expressly oral or written, "a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained" (*id.* at 475).

However, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege" (*id.* at 476). Therefore, the use of a defendant's statement offends due process where his or her "will has been overborne and his [or her] capacity for self-determination critically impaired" (*Culombe v Connecticut*, 367 US 568, 602; *see Rogers v Richmond*, 365 US 534, 540 ["convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand"]).

Furthermore, under the New York State Constitution, "[n]o person shall be . . . compelled in any criminal case to be a witness against himself or herself" (NY Const art I, § 6). Consequently, when a suspect is interrogated without the presence of counsel and gives a statement, at a suppression hearing, the People must demonstrate, beyond a reasonable doubt, that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and his or her right to counsel (*see People v Mateo*, 2 NY3d 383, 413-414, *cert denied* 542 US 946; *People v Davis*, 75 NY2d 517; *People v Anderson*, 42 NY2d 35, 38; *People v Ringer*, 140 AD2d 642; *see also* CPL 60.45[1], [2][a]). If the People meet their burden, the burden then shifts to the defendant to prove that the police acted illegally (*see People v Berrios*, 28 NY2d 361, 367). Determining whether an individual has voluntarily, knowingly and intelligently waived his or her rights is a factual inquiry that is based on the totality of the circumstances (*see People v Anderson*, 42 NY2d at 38-39; *People v Gotte*, 150 AD2d 488).

Generally, the alleged police conduct must not be so "fundamentally unfair as to deny due process" or likely induce a false confession (*People v Tarsia*, 50 NY2d 1, 11; *see People v Gordon*, 74 AD3d 1090; *People v Green*, 73 AD3d 805; *People v Sanabria*, 52 AD3d 743, 745; *People v LaGuerre*, 29 AD3d 820, 822). However, mere deception, without more, is not sufficient to render a statement involuntary (*see People v Tarsia*, 50 NY2d at 11; *People v Pereira*, 26 NY2d 265; *People v McQueen*, 18 NY2d 337, 346).

Here, the defendant argues that his statements should be suppressed because the detectives improperly deceived him when they explicitly lied to him by telling him that Camillo was [*5] alive and that the physicians treating her needed to know what drugs she had taken or else she could die, and implicitly threatened him with a homicide charge by stating, "[I]f you lie to me and

don't tell me the truth now . . . it could be a problem."

Our review of the case law amply demonstrates that when interrogating a suspect, the police may, as part of their investigatory efforts, deceive a suspect, and any resulting statement will not be suppressed for that reason alone (*see e.g. People v Pereira*, 26 NY2d 265; *People v McQueen*, 18 NY2d 337; *People v Thomas*, 93 AD3d 1019; *People v Jordan*, 193 AD2d 890). However, even with a voluntary, knowing, and intelligent waiver of one's *Miranda* rights, there are boundaries the police cannot cross during an interrogation. While deception may be used to obtain a statement, police conduct must not be so "fundamentally unfair as to deny due process" (*People v Tarsia*, 50 NY2d at 11; *see* US Const Amends V, XIV; NY Const art I, § 6; CPL 60.45[1], [2][a]; *Miranda v Arizona*, 384 US 436; *People v Pereira*, 26 NY2d 265; *People v Gordon*, 74 AD3d 1090; *People v Green*, 73 AD3d 805). Notably, in *People v McQueen* (18 NY2d at 346), the officers used mere deception by telling the defendant that "she might as well admit what she had done inasmuch as otherwise the victim, who she had not been told had died, would be likely to identify her," but did not threaten her with repercussions if she chose to remain silent [FN1]. In this case, by contrast, the detectives not only repeatedly deceived the defendant by telling him that Camillo was alive, but implicitly threatened him with a homicide charge by telling the defendant that the consequences of remaining silent would lead to Camillo's death, since the physicians would be unable to treat her, which "could be a problem" for him. While arguably subtle, the import of the detectives' threat to the defendant was clear: his silence would lead to Camillo's death, and then he could be charged with her homicide (*see Culombe v Connecticut*, 367 US at 574-575 ["[T]he risk is great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices"]). [FN2]

In this case, the detectives coerced the defendant's confession by deceiving him into believing that Camillo was alive and implicitly threatening him with a homicide charge if he remained silent. The detectives used the threat of a homicide charge to elicit an incriminating statement by essentially telling the defendant that the consequences of remaining silent would lead to Camillo's

death, which "could be a problem" for him. Faced with this Hobson's choice, the defendant had no acceptable alternative but to talk to the police. By lying to him and threatening him, the detectives eviscerated any sense the defendant may have had that he could safely exercise his privilege against self-incrimination and put the People to their proof. Either he would tell them what he knew or he would face the probability of life imprisonment if Camillo died. In light of the detectives' implicit threat of a homicide charge if the defendant remained silent, we cannot conclude that the defendant voluntarily waived his Fifth Amendment privilege against self-incrimination (*see* US Const Amends V, XIV; *Miranda v Arizona,* 384 US 436; *Columbe v Connecticut,* 367 US at 602; *Rogers v Richmond,* 365 US at 541). Similarly, the detectives used the threat to overcome the defendant's will, and this was so "fundamentally unfair as to deny due process" (*People v Tarsia,* 50 NY2d at 11; *see* NY Const art. I, § 6; CPL 60.45[1], [2][a]; *People v Gordon,* 74 AD3d 1090; *[*6]People v Green,* 73 AD3d 805; *People v Sanabria,* 52 AD3d 743; *compare People v Pereira,* 26 NY2d 265; *People v McQueen,* 18 NY2d 337; *People v Thomas,* 93 AD3d 1019; *People v Jordan,* 193 AD2d 890).

We thus hold that the People failed to establish, beyond a reasonable doubt, that the defendant knowingly, voluntarily, and intelligently waived his rights against self-incrimination. Accordingly, the Supreme Court should have suppressed the defendant's statements made to law enforcement officials at the police station. Since those statements are the only evidence supporting the defendant's convictions of criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree, those convictions are based on legally insufficient evidence, and therefore must be vacated, and those counts dismissed from the indictment (*see* CPL 70.10[1]; *People v Washington,* 8 NY3d 565; *People v Cintron,* 95 NY2d 329; *People v Contes,* 60 NY2d 620; *cf. People v Ridley,* 307 AD2d 269; *People v Carter,* 163 AD2d 320).

The defendant also argues that there was legally insufficient evidence to convict him of criminal contempt in the first degree and burglary in the second degree. Initially, although the defendant's contention that his conviction of criminal contempt in the first degree is based upon legally insufficient evidence is unpreserved for appellate review (*see* CPL 470.05[2]), we review it in the exercise of our interest of justice jurisdiction (*see* CPL 470.15[6]). Under the Penal Law, a person is guilty of criminal contempt in the first degree when

> "he or she commits the crime of criminal contempt in the second degree . . . by violating that part of a duly served order of protection, or such order of which the defendant has actual knowledge because he or she was present in court when such order was issued . . . which requires the . . . defendant to stay away from the person or persons on whose behalf the order was issued, and where the defendant has been previously convicted of the crime of aggravated criminal contempt or criminal contempt in the first or second degree for violating an order of protection as described herein within the preceding five years" (Penal Law § 215.51[c]).

In enacting this statute, the Legislature recognized that " [j]udicial orders of protection are issued chiefly to help protect victims of domestic violence from additional acts of abuse. Yet, they are violated all too frequently; sometimes with lethal—all but invariably with serious—consequences for those the orders are supposed to protect'" (*People v Gellineau*, 178 Misc 2d 790, 795, quoting Mem of Senate, 1996 McKinney's Session Laws of NY, at 2309-2310). Hence,

> "the Legislature was seeking not only to vindicate the right[s] of the individual, the court, or society in the administration of justice, but also to stop a very real and present danger of domestic violence through acts committed between persons who are connected to each other either by blood, by marriage, acquaintance, or who reside in the same household. The major purpose was to prevent the great cost of domestic violence to society as a whole, and not only to the victim" (*People v Gellineau*, 178 Misc 2d at 796).

Here, the order of protection was issued against the defendant, who was present in court when it was issued and, thus, had actual knowledge of the order. At trial, the defendant admitted to a special information which charged that he was previously convicted of criminal contempt in the second degree. Further, although Mary's trial testimony indicated that she attempted to have the order of protection modified or vacated, it was indisputably in effect on January 12, 2009, when the defendant entered her home. Thus, the fact that Mary may have permitted the defendant to enter her home did not render the defendant's entry lawful (*see* Penal Law § 140.00[5]; *People v Jones*, 79 AD3d 1244, 1246; *People v Lewis*, 13 AD3d 208, 211, *affd* 5 NY3d 546; *People v Liotta*, 274 AD2d 751, 753). To find otherwise would subvert the very purpose of orders of protection, which is to protect victims of domestic violence. Accordingly, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt of criminal contempt in the first degree

beyond [*7]a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt with respect to that conviction was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

Turning to the legal sufficiency of the evidence supporting the defendant's conviction of burglary in the second degree, pursuant to the Penal Law, as charged here, "[a] person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein" (Penal Law § 140.25), and "[t]he building is a dwelling" (Penal Law § 140.25[2]).[FN3]

In this case, the indictment, the bill of particulars, and the People's theory at trial accused the defendant of committing burglary in the second degree when he entered Mary's home unlawfully in violation of a duly served order of protection with the intent to commit the offense of criminal possession of a controlled substance in the seventh degree.

Turning to the first element of burglary, "[a] person enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so" (Penal Law § 140.00[5]). Generally, a person is "licensed or privileged" to enter a private premises when such an individual has obtained the consent from the owner or from someone who maintains the authority to consent (*see People v Graves*, 76 NY2d 16, 20). Where there is an absence of "license or privilege," a person may be deemed to have entered or remained unlawfully on the premises (*id.*). Furthermore, an "intruder must be aware of the fact that he has no license or privilege to enter the premises" (*People v Uloth*, 201 AD2d 926, 926 [internal quotation marks omitted]; *see People v Reed*, 121 AD2d 574, 575 [internal quotation marks omitted]).

For example, in *People v Lewis* (13 AD3d at 211), the Appellate Division, First Department, held that the trial court properly instructed the jury that "the complainant could not grant defendant a license or privilege to enter premises from which he had been excluded by a court order" and that "the individual must comply with the order while it remains in effect, regardless of anything said or done by the occupant of the premises." Hence, "[i]n the absence of a stay, the parties are generally obligated to obey a court order until it is vacated or reversed on appeal" (*id.* at 219; *see* Penal Law § 140.00[5]; *People v Jones*, 79 AD3d at 1246; *People v Liotta*, 274 AD2d at 753).

Here, as discussed above, there was a valid temporary order of protection issued against the defendant for the benefit of his mother, Mary, which was indisputably in effect on January 12, 2009, when the defendant, who was aware of the order, entered Mary's home. Accordingly, viewing the evidence in the light most favorable to the prosecution, there was legally sufficient evidence to establish that the defendant entered Mary's home unlawfully.

Turning next to the element of intent, burglary in the second degree, as charged here, is a criminal trespass in a building that is a dwelling "with intent to commit a crime therein" (Penal Law § 140.25[2]; *see People v Lewis*, 5 NY3d at 548). The intent to commit a crime must exist contemporaneously with the unlawful entry (*see People v Gaines*, 74 NY2d at 359-360). "A defendant who simply trespasses with no intent to commit a crime inside a building does not possess the more culpable mental state that justifies punishment as a burglar" (*id.* at 362; *see People v Lewis*, 5 NY3d at 551-552).

Generally, the People do not need to prove that a defendant intended to commit a particular crime (*see People v Gaines*, 74 NY2d at 362 n 1). General intent may be sufficient to establish this element (*see People v Mackey*, 49 NY2d 274, 279). However, where, as here, the People expressly limit their theory of the defendant's guilt of burglary to the intent to commit a specific crime, they are bound to prove the defendant's intent to commit that particular crime (*see People v Shealy*, 51 NY2d 933; *People v Barnes*, 50 NY2d 375, 379 n 3). Accordingly, since the indictment, as amplified by the bill of particulars, expressly charged the defendant, with respect to burglary, with the intent to commit the crime of criminal possession of a controlled substance in the seventh degree, the People had the burden of proving that the defendant, at the time he entered [*8]Mary's home, intended to commit that crime while inside.

Under the Penal Law, "[a] person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance" (Penal Law § 220.03). Generally, "the Legislature has defined criminal possession in terms of dominion and control, and unlawful possession is a continuing offense" (*People v Carvajal*, 6 NY3d 305, 314; *see* Penal Law § 10.00[8]; *Matter of Johnson v Morgenthau*, 69 NY2d 148, 151-152).

Further, "[t]o sustain a conviction [of] the crime of possession of a controlled substance, in its simplest form, the prosecution must prove beyond a reasonable doubt the presence of a controlled substance as statutorily defined, that it was physically or constructively possessed by the accused and that the possession was knowing and unlawful" (*People v Sierra,* 45 NY2d 56, 59-60). To establish constructive possession, "the People must show that the defendant exercised dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini,* 79 NY2d 561, 573, quoting Penal Law § 10.00[8]; *see People v Arnold,* 60 AD3d 960; *People v Tirado,* 47 AD2d 193, *affd* 38 NY2d 955).

Here, the evidence that connected the defendant with the trace amount of heroin in one of the "Lock Down" bags found in his bedroom was the inculpatory statements that he made after he was improperly deceived and threatened by the detectives. As discussed above, those statements must be suppressed. According to the trial testimony of Mary, and of Eric, the defendant's brother, Mary allowed the defendant to enter and stay in her home on a regular basis despite the order of protection issued for her benefit and against the defendant. Although the evidence at trial established the defendant's regular use of that bedroom, and his close proximity thereto when he was taken into custody, no evidence was presented to establish that the defendant possessed heroin on his person at the time of his arrest. Moreover, since Mary's home has multiple bedrooms and occupants, any of whom could have easily accessed the defendant's second-floor bedroom, even viewing the evidence, excluding the defendant's improperly admitted statements, in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), the evidence is legally insufficient to establish that the defendant constructively possessed heroin (*see People v Alicea,* 23 AD3d 572; *People v Brown*, 240 AD2d 675; *People v Webb*, 179 AD2d 707; *People v Harvey,* 163 AD2d 532).[FN4]

Even if the People had established the defendant's constructive possession of the heroin recovered from his bedroom, they nevertheless failed to present legally sufficient evidence establishing that the defendant intended to commit the offense of criminal possession of a controlled substance in the seventh degree at the time he entered Mary's home. Criminal possession, generally, has been defined as a "continuing offense" (*see* Penal Law § 10.00[8]; *People v Carvajal*, 6 NY3d at 314; *Matter of Johnson v Morgenthau*, 69 NY2d at 151-152). Since criminal possession of a

controlled substance in the seventh degree is a "continuing offense," viewing the evidence, excluding the improperly admitted statements, in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), the People could not establish, beyond a reasonable doubt, that the trace amount of heroin found in the second-floor bedroom existed at the moment of the defendant's unlawful entry into Mary's home. The "Lock Down" bag which contained the trace amount of heroin could have been there for days, or placed there immediately before or after his entry. Therefore, the People did not establish that any intent on the defendant's part to commit the offense of criminal possession of a controlled substance in the seventh degree was contemporaneous with the unlawful entry.

Accordingly, the conviction of burglary in the second degree was not supported by legally sufficient evidence.

The defendant's remaining contentions are without merit or need not be reached in [*9]light of our determination.

Accordingly, the judgment is modified, on the law and the facts, by vacating the convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed, and that branch of the defendant's omnibus motion which was to suppress certain statements made to law enforcement officials is granted.
BALKIN, J.P., HALL and MILLER, JJ., concur.

ORDERED that the judgment is modified, on the law and the facts, by vacating the convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed, and that branch of the defendant's omnibus motion which was to suppress certain statements made to law enforcement officials is granted.

ENTER:

Aprilanne Agostino

Clerk of the Court

Footnotes

Footnote 1:. In *People v McQueen* (18 NY2d 337, 342), the defendant's trial commenced on November 9, 1964, and concluded on November 25, 1964, and was not subject to *Miranda v Arizona* (384 US 436), which was decided on June 13, 1966, unless *Miranda* applied retroactively beyond the requirements of the United States Constitution (*see People v McQueen*, 18 NY2d at 342). The Court of Appeals recognized that *Miranda* could apply retroactively for a claim regarding an involuntary statement (*id.* at 344). However, the Court held that the defendant's statements were voluntary (*id.*).

Footnote 2:. In *Culombe v Connecticut* (367 US 568, 577, 620), the petitioner was held without the benefit of counsel and was not advised of his constitutional rights. He was held in custody for five days and questioned intermittently by the police (*id.* at 625). After seeing his wife and sick daughter, and being urged by his wife to tell the truth, the petitioner confessed to participating in a holdup during which two men were murdered (*id.* at 616-617). The confession was admitted at trial and he was convicted of murder in the first degree (*id.* at 568, 619). However, the United States Supreme Court held that the petitioner's confession was involuntary and its admission deprived him of due process in violation of the Fourteenth Amendment to the United States Constitution (*id.* at 621).

Footnote 3:. Historically, burglary was regarded as an "offense against the habitations of men" (*Rodgers v People*, 86 NY 360, 363). The burglary statute is meant to protect an occupant, dweller, or possessor (*see Quinn v People*, 71 NY 561, 570, 573; *People v Scott*, 195 Misc 2d 647, 650-651). The underlying policy for this statute is to protect such individuals from a "heightened danger posed when an unlawful intrusion into a building is effected by someone bent on a criminal end" (*People v Gaines*, 74 NY2d 358, 362).

Footnote 4:. We further note that in *People v Rosado* (96 AD3d 547), the trial court convicted the defendant of two counts of criminal possession of a controlled substance in the seventh degree. On appeal, the defendant argued that the "room presumption" did not apply to seventh-degree possession. While his argument was unpreserved, the Appellate Division, First Department, reached the question in the interest of justice and held that the "room presumption and constructive possession . . . should only apply to crimes requiring intent to sell, or crimes involving amounts of drugs greater than what is required for misdemeanor possession" (*id.* at 548 [internal quotation marks and citations omitted]).

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The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2003-02: Undisclosed Taping of Conversations by Lawyers

TOPIC: Undisclosed taping of conversations by lawyers.

DIGEST: A lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped. A lawyer may, however, engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. NY City 1980-95 and 1995-10 are modified by this opinion.

CODE: DRs 1-102(a)(4), 7-102(a)(5), 7-102(a)(7), 7-102(a)(8)

QUESTION:

May a lawyer tape record a conversation without informing all parties to the conversation that it is being recorded?

OPINION:

In June 2001, the American Bar Association ("ABA") reversed course with respect to whether it is permissible for lawyers to tape a conversation without disclosing that the conversation was being taped. For more than twenty-five years, it was the position of the ABA that undisclosed taping by any lawyers other than law enforcement officials was unethical. See ABA Formal Op. 337 (1974). In Formal Opinion 01-422, however, the ABA reversed its position, opining that undisclosed taping was not in and of itself unethical unless prohibited by the law of the relevant jurisdictions.

The Professional Responsibility Committee of this Association has recommended to this Committee that we follow the lead of the ABA – at least to the extent of modifying our prior opinions declaring all undisclosed taping by lawyers in civil and commercial contexts to be unethical. We have revisited the issue of undisclosed taping by lawyers and conclude that our prior opinions, like the ABA's 1974 opinion, swept too broadly. However, we regard the ABA's new position as an overcorrection.

This Committee remains of the view, first expressed in NY City 1980-95, that undisclosed taping smacks of trickery and is improper as a routine practice. At the same time, however, we recognize that there are circumstances in which undisclosed taping should be permissible on the ground that it advances a generally accepted societal good. We further recognize that it would be

difficult, if not impossible, to anticipate and catalog all such circumstances, and that a lawyer should not be subject to professional discipline if he or she has a reasonable basis for believing such circumstances exist. NY City 1980-95 and 1995-10 are modified accordingly. 1

DISCUSSION:

ABA Formal Opinion 01-422 offers a variety of reasons for abandoning a general prohibition against undisclosed taping. Some of the reasons offered are more persuasive than others. None, in the view of this Committee, provides persuasive support for the conclusion that undisclosed taping, as a routine practice, should be permissible for attorneys.

The ABA's Opinion leads with the suggestion that reversal of the prohibition against undisclosed taping is warranted by an intervening change in societal attitudes and practices with respect to undisclosed taping. Thus, according to the ABA:

> the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence required by such techniques. Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play," it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.

ABA Formal Opinion 01-422 (footnotes omitted).

We are unpersuaded that there has been any material change in societal attitudes or practices with respect to undisclosed taping since the 1970s. While it is certainly true that many states currently permit the recording of conversations without the consent of all parties and that courts routinely accept evidence acquired by such techniques, the same could have been said at the time the ABA issued its 1974 Opinion. Similarly, we are unaware of any reason to believe that undisclosed taping is significantly more prevalent today as an investigative technique than it was in the 1970s. To the contrary, as at least one court has noted, the ABA's 1974 opinion expressly cited the prevalence of surreptitious recording as the reason why a formal opinion on the subject was advisable. See Anderson v. Hale, 202 F.R.D. 548, 557 n.5 (N.D. Ill. 2001). 2
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This Committee likewise does not share the ABA's skepticism with respect to whether individuals today can justifiably assume that a conversation is not being recorded – particularly when the

conversation is with an attorney. Anyone who has ever had occasion to call customer service for a telephone, bank or charge account – i.e., the overwhelmingly majority of U.S. residents – has repeatedly been greeted with a taped message advising callers that their conversations may be recorded for quality control or training purposes. Accordingly, we believe it is neither unlikely nor unjustifiable that many individuals assume that a commercial conversation will not be recorded unless they have been given notice of the possibility that it will be. Nor do we think it unjustifiable for individuals to assume – or advisable for the legal profession to discourage individuals from assuming – that the business practices of lawyers are any less courteous and honorable than those of the local bank or telephone company.

In any event, we regard the state of mind of the recording's target to be considerably less relevant than the state of mind of the individual making the decision to engage in undisclosed taping. And however much the expectations of the target may be subject to debate, it cannot seriously be doubted that an individual who engages in undisclosed taping does so in the hope that the target is not expecting to be taped. Indeed, it is difficult to conceive of any other reason for failing to disclose that the conversation is being taped. It was in recognition of that fact that our first opinion on undisclosed taping characterized the practice as "smacking of trickery," NY City 1980-95, and joined ABA Formal Opinion 337 in concluding that undisclosed taping was, as a general matter, violative of DR 1-102(a)(4)'s proscription against engaging in conduct that "involv[ed] dishonesty, deceit, fraud or misrepresentation." 3

Undisclosed taping smacks of trickery no less today than it did twenty years ago. In that respect, the passage of time has not altered the analysis. What has, however, emerged over the years is an increasing recognition of the variety of circumstances in which the practice of undisclosed taping can be said to further a generally accepted societal good and thus be regarded as consistent with "the standards of fair play and candor applicable to lawyers." NY City 1980-95. 4

We invoked that principle in our 1980 opinion to support an exception to the general rule against undisclosed taping for criminal defense lawyers who may need to secretly record conversations with certain witnesses. Since that time, other bar committees, boards and courts have adopted that exception, recognized a variety of others (such as the investigation of housing discrimination and other actionable business practices and the documentation of threats or other criminal utterances), and/or opined that the permissibility of undisclosed taping should be determined on a case-by-case basis. 5 In addition, some committees have gone so far as to opine that undisclosed taping is not, in and of itself, unethical. 6

ABA Formal Opinion 01-422 cites the variety of approaches that have been taken as support for its conclusion that it is time simply to declare the general rule to be that undisclosed taping is, in and of itself, not ethically proscribed:

> A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline is highly troubling. We think the proper approach to the question of

> legal but nonconsensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical.

In fact, however, most of the opinions cited by the ABA are less at odds with one another than reflective of a cautious case-by-case evolution toward the general principle that if undisclosed taping is done under circumstances that can be said to further a generally accepted societal good, it will not be regarded as unethical.

While that principle carries with it, as many ethical rules do, some risk of uncertainty in its application, attorneys can easily minimize that risk by confining the practice of undisclosed taping to circumstances in which the societal justification is compelling. In addition, even if a disciplinary body does not necessarily share an attorney's assessment of the need for undisclosed taping in a particular set of circumstances, there is little likelihood of, and no need for, the imposition of sanctions as long as the attorney had a reasonable basis for believing that the surrounding circumstances warranted undisclosed taping. We accordingly regard there to be less conflict in the field, and less risk to attorneys in the field, than is suggested by the ABA's Opinion.

We also have yet to see any persuasive argument – either in the ABA's recent opinion or elsewhere – in support of permitting undisclosed taping as a matter of routine practice. The committees that have opined that undisclosed taping is not in and of itself unethical have tended to stress either that the practice is legal in that jurisdiction,7 that there are unquestionably times when there is a good reason to engage in undisclosed taping, 8 and/or that tape recording "is merely a technological convenience, providing a more accurate means of documenting rather than relying on one's memory, notes, shorthand, transcription, etc. for recall." Ok. Bar. Assoc. Op. 307 (1994).

If, however, the only reasons for taping are convenience and increased accuracy, there is no reason to refrain from disclosing that the conversation is being taped. 9 Nor is it correct that undisclosed taping has no effect other than providing an accurate record of what was said. As attorneys are well aware, individuals tend to choose their words with greater care and precision when a verbatim record is being made and some individuals may not wish to speak at all under such circumstances. Undisclosed taping deprives an individual of the ability to make those choices. Undisclosed taping also confers upon the party making the tape the unfair advantage of being able to use the verbatim record if it helps his cause and to keep it concealed if it does not. In addition, because undisclosed taping has those effects, it therefore also has the potential effect of undermining public confidence in the integrity of the legal profession, which in turn undermines the ability of the legal system to function effectively.

See, e.g., Anderson v. Hale, 202 F.R.D. at 556 (noting that open discussion is vital to the advancement of justice and that the public's willingness to speak openly with attorneys is directly affected by public perception of the integrity of attorneys); NY City 80-95 (undisclosed taping has the potential to "undermine those conditions which are essential to a free and open society").

The fact that a practice is legal does not necessarily render it ethical. Moreover, the fact that the practice at issue remains illegal in a significant number of jurisdictions10 is a powerful indication that the practice is not one in which an attorney should readily engage. Similarly, the fact that there are times when a valid reason exists to engage in undisclosed taping does not mean that if should be permitted when there is no valid reason for it. No societal good is furthered by allowing attorneys to engage in a routine practice of secretly recording their conversations with others, and there is considerable potential for societal harm.

Accordingly, while this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.

In situations involving the investigation of ongoing criminal conduct or other significant misconduct that question will often be easy to answer in the affirmative. The same is true with respect to individuals who have made threats against the attorney or a client or with respect to witnesses whom the attorney has reason to believe may be willing to commit perjury (in either a civil or a criminal matter).

The answer is likely to be far less clear with respect to witnesses whom the attorney has no reason to believe will engage in wrongdoing, and the prudent attorney will, absent extraordinary circumstances, refrain from engaging in the undisclosed taping of such witnesses. Similarly, while we are not prepared to state that it would never be ethically permissible to engage in the undisclosed taping of a client or a judicial officer, the circumstances in which doing so would be ethically permissible are likely to be few and far between.

Finally, as we have made clear, merely wishing to obtain an accurate record of what was said does not justify undisclosed taping. Nor, at least with respect to individuals who are not potential witnesses, is undisclosed taping justified by a desire to guard against the possibility of a subsequent denial of what was said. Such practices constitute engaging in undisclosed taping as a routine matter and, for the reasons discussed above, are ethically impermissible.

Conclusion

NY City 80-95 and 95-10 are modified. A lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice.

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1. This opinion assumes that the taping occurs in a jurisdiction where taping without disclosure to all parties is legal and that the attorney has not represented that the conversation is not being recorded. Attorneys may not engage in illegal conduct, see DR 7-102(a)(7), (8), or knowingly make a false statement of fact. See DR 7-102(a)(5).
2. Formal Opinion 337 begins with the following statement:

   > Recent technical progress in the design and manufacture of sophisticated electronic recording equipment and revelations of the extent to which such equipment has been used in government offices and elsewhere make it desirable to issue a Formal Opinion as to the ethical questions involved.

3. We reaffirmed our general disapproval of undisclosed taping in NY City 1995-10, which opined that a lawyer may not tape record a telephone or in-person conversation with an adversary attorney without informing the adversary that the conversation is being taped.
4. As we noted in our 1980 opinion:
   Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources – articulated and unarticulated – which presumably reflects a consensus of the bar's or society's judgments. Without being unduly relativistic, it is nevertheless possible that conduct which is considered unfair or even deceitful in one context may not be so considered in another. (See, e.g.., the ABA's Proposed Model Rules of Professional Conduct, Rule 4.1, Comment concerning assertions made in settlement negotiations.)
5. Mena v. Key Food Stores Co-Operative, Inc., Index No. 6266/01 (Sup. Ct. Kings County, NY) (March 31, 2003) (approving use of undisclosed taping for the purpose of Title VII investigation); Virginia Legal Ethics Opinion 1738 (April 13, 2000) (approving use of undisclosed taping for the purpose of a criminal or housing discrimination investigation and noting that there may be other factual situations in which the same result would be reached); Gidatex v. Campaniello Imports Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999)(investigation of trademark infringement); State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. RI-309 (May 12, 1998) (case-by-case approach); Apple Corps Ltd., MPL v. Int'l Collectors Soc., 15 F. Supp. 2d 456 (D.N.J. 1998)(investigation of compliance with terms of consent decree in copyright action);Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997) (use by prosecutors and criminal defense lawyers and in "extraordinary circumstances"); Minn. Law Prof. Resp. Bd. Eth. Op. 18 (1996) (use by prosecutors, government attorneys charged with civil law enforcement authority, and criminal defense attorneys); Hawaii Sup. Ct. Formal Op. 30 (Modification 1995) (case-by-case approach); Board of Professional Responsibility of the Supreme Court of Tenn. Formal Ethics Op. 86-F-14(a) (July 18, 1986) (use by criminal defense lawyers); Kentucky Bar Ass'n Op. E-279 (Jan. 1984) (same); Arizona Op. No. 75-13 (June 11, 1975) (use to document criminal utterances, to document conversations with potential witnesses to protect against later perjury, to document conversations for self-protection of lawyer, and when "specifically authorized by statute, court rule or court

order").

6. Maine Professional Ethics Commission of the Bd. Of Overseers of the Bar Op. 168 (March 9, 1999); Kansas Bar Ass'n Ethics Op. 96-9 (August 11, 1997); Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Oklahoma Bar Ass'n Op. 307 (March 5, 1994); New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (July 28, 1993).
7. See, e.g., New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (July 28, 1993).
8. See, e.g., Utah State Bar Ethics Advisory Op. Committee No. 96-04 (July 3, 1996); Alaska Ethics Opinion No. 2003-1 (January 24, 2003).
9. In this regard, the Ohio Board of Commissioners on Grievances and Discipline has aptly observed:
   Although the accurate recall of information is important to attorneys in providing legal representation, this on its own does not persuade the Board to condone the routine use of surreptitious recordings in the practice of law. For those who wish to use taping as a way of assisting the memory, consent may be obtained. The fact that an attorney wants to hide the recording from the other person suggests a purpose for the recording that is not straightforward. Recordings made with the consent of all parties to the

   communication are consistent with the ideals of honesty and fair play, whereas recordings made by clandestine or stealthy means suggest otherwise. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).

10. A law review note published in 1998 surveyed the legality of recording a conversation without the consent of all parties and reported that it was illegal in twelve states: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington. See Stacy L. Mills, Note, He Wouldn't Listen to Me Before, But Now…: Interspousal Wiretapping and an Analysis of State Wiretapping Statutes, 37 Brandeis L.J. 415, 429 and nn. 127, 127 (Spring 1998). In addition, while Oregon permits telephone conversations to be recorded without the consent of all parties, it prohibits undisclosed taping of in-person conversations. Or. Rev. Stat. § 165.540 (1999).

Issued: June, 2003

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 737
Date Issued: 5/23/07

TOPIC: Non-government lawyer use of investigator who employs dissemblance

DIGEST: In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the "Code") or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.

CODE: DR 1-102(a)(2)(3)(4), DR 1-104(d), DR 5-102, DR 7-102(a)(5), DR 7-104

QUESTION: Under what circumstances, if any, is it ethically permissible for a non-government lawyer to utilize the services of and supervise an investigator if the lawyer knows that dissemblance will be employed by the investigator?

OPINION:

The word "dissemble" is defined as follows: "To give a false impression about (something); to cover up (something) by deception (to dissemble the facts)." Black's Law Dictionary (8th ed. 2004).

DR 1-102(a)(3) provides: "A lawyer or law firm shall not . . . engage in *illegal* conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer." (emphasis added). DR 1-102(a)(4) of the Code provides: "A lawyer or law firm shall not engage in conduct involving *dishonesty, fraud, deceit, or misrepresentation*." (emphasis added). DR 7-102(a)(5) provides, "In the representation of a client, a lawyer shall not knowingly make a false statement of law or fact." DR 1-104(d) provides, in relevant part, that a lawyer shall be responsible for a violation of the disciplinary rules by another lawyer or non-lawyer through involvement, knowledge or supervisory authority if the lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it.

DR 1-102(a)(2) of the Code provides, "A lawyer or law firm shall not . . . circumvent a Disciplinary Rule through *actions of another*." (emphasis added).

Accordingly, when a lawyer is faced with the option of hiring an investigator who intends to employ dissemblance in order to gather certain evidence[1], the lawyer must consider whether the Code of Professional Responsibility permits the lawyer to proceed.

A plain reading of DR 1-102(a)(4) (the "Honesty Rule"), DR 7-102(a)(5) (the "False Statement Rule"), together with DR 1-102(a)(2) and DR 1-104(d), ("the Integrity Rules"), on their face leave little doubt that "dissemblance" is ethically impermissible in New York if dissemblance is deemed equivalent to "dishonesty, fraud, deceit, or misrepresentation." Moreover, the legality, vel non, of the specific conduct also has a bearing on whether the conduct is covered within the meaning of DR 1-102(a)(3).

Importantly, dissemblance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance. For purposes of this opinion, dissemblance refers to misstatements as to identity and purpose made solely for gathering evidence. It is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful. Dissemblance ends where

[1] This opinion only addresses the situation in which the investigator acts as the lawyer's agent as opposed to the client's agent. *See, e.g., Midwest Motor Sports v. Arctic Cat Sales Inc.*, 347 F.3d 693, 695-6 (8th Cir. 2003) (lawyers had "retained" the investigator and directed the investigator's conduct). The question of agency will likely depend on the facts and circumstances. *See, e.g., Allen v Int'l Truck & Engine*, 2006 U.S. Dist. LEXIS 63720 at *22-25 (S.D. Ind. 2006) (analysis of counsel's level of involvement in investigation).

misrepresentations or uncorrected false impressions rise to the level of fraud or perjury[2], communications with represented and unrepresented persons in violation of the Code, *see* DR 7-104, or in evidence-gathering conduct that unlawfully violates the rights of third parties. *See also* David B. Isbell & Lucantonio Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under The Model Rules of Professional Conduct, 8 Geo. J. Legal Ethics 791, 817 (Summer 1995) ("[ABA Model] Rule 8.4(c) applies to conduct by a lawyer in a private capacity that is so grave as to call into question the lawyer's fitness to practice law . . . .").

This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. Such investigations, which are discussed approvingly in *United States of America v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001), are outside the scope of this opinion. This opinion also does not address whether a lawyer is ever permitted to himself or herself make dissembling statements directly.

Survey of Authorities

We are aware of only three jurisdictions that have adopted explicit rule-based exceptions for the use of dissemblance in an investigation; two of which are limited to government lawyers: Oregon,[3] Alabama[4] and Florida[5]. There is no explicit rule-based exception permitting the use of dissemblance in New York. Accordingly, any ethically permissible use of dissemblance must rely on existing case law and ultimately on a principles-based determination.

Nor can we look to the ABA for firm guidance. In its opinion on surreptitious recording, the ABA left "for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical."[6] Aside from D.C. Opinion 323 (2004) and Oregon Opinion 2005-173, which interpret certain language in Oregon's explicit exception for "covert activity" (Rule 8.4(b)), we are aware of one other ethics opinion, from Utah, on the subject of

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[2] See, e.g., *In the Matter of Malone*, 105 A.D. 2d 455; 480 N.Y.S.2d 603 (Third Dept 1984) (New York State Corrections Inspector General, a lawyer, advised informant to lie in arbitration testimony in order to protect the informant from retribution by fellow correctional officers; the lawyer was censured as a result).

[3] Oregon's Rule 8.4(b) provides an exception for lawyers to advise clients or supervise "lawful covert activity" in the investigation of violations of "civil or criminal law or constitutional rights" provided the conduct is otherwise in compliance with Oregon's Rules of Professional Conduct and that "the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future." *See also* Oregon Opinion 2005-173 (interpreting "advise and supervise" to mean a lawyer may not "participate directly" in the covert activity).

[4] Alabama's Rule 3.8(2) permits a government prosecutor to advise and order "any action that is not prohibited by law" and to have "limited participation in the action."

[5] Florida's Rule 4-8.4(c) permits a government lawyer to supervise an "undercover investigation."

[6] ABA 01-422.

dissemblance in investigations.[7] Utah's Opinion 02-05 (2002) concludes that a government lawyer "who participates in a lawful covert governmental operation" that uses dissemblance "does not, without more, violate the Rules of Professional Conduct."

Certain federal district courts have declined to suppress evidence gained through investigative dissemblance. In *Gidatex*, Judge Shira Scheindlin noted: "As for DR 1-102(a)(4)'s prohibition against attorney 'misrepresentations', hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation."[8] In *Cartier v. Symbolic, Inc.*, the same court cited *Gidatex* in refusing to find that Cartier's use of an investigator demonstrated its consent to any alleged trademark infringement.[9] The New Jersey District Court in *Apple Corps* stated that the Honesty Rule does "not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes."[10] The court rested its conclusion on the prevailing understanding in the legal profession, as evidenced in part by other courts' decisions[11] and on statutory construction.[12]

More recently, another federal district court cited *Gidatex* for the proposition that, "prohibition against attorney misrepresentations in DR1-102(a)(4) is not applicable to use of undercover investigations initiated by private counsel in trademark infringement case." *United States of America v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) (upholding undercover law enforcement sting operation supervised by prosecutor).

While *Gidatex* and *Parker* appear to judicially sanction, as ethically permissible, the use of dissemblance in investigations, the specific issue of whether the use of dissemblance in investigations is ethical was not the actual holding in both cases. Much if not all of the judicial commentary on the issue of the ethical use of dissemblance is dicta. The *Gidatex* court observed that, "a court is not obligated to exclude evidence *even* if it finds that counsel obtained the evidence by violating ethical rules." *Gidatex*, 82 F. Supp. 2d at 126 (emphasis in the original). Similarly, the *Parker* court also observed that, "even if the alleged misconduct, attributed by Defendants to the Government attorneys in this case, were deemed an ethical violation, and the relevant disciplinary rule were applicable to the instant facts, such does not warrant use of the exclusionary rule as a remedy for such violation." *Parker*, 165 F. Supp. 2d at 477 (internal citations omitted). Simply put, these cases dealt primarily with the issue of admissibility of evidence -- not with the ethical issues in obtaining it.

Other courts throughout the country have struggled with this issue to mixed results. The Eighth Circuit in *Midwest Motor Sports* called for the suppression of evidence because it believed the attorneys could have obtained the

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[7] *Cf.*, Ala. Opinion Ro-89-31 (permitting a lawyer to direct an investigator to pose as a customer in order to determine whether plaintiff lied about his injuries).

[8] *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp.2d 119, 122 (S.D.N.Y. 1999).

[9] *Cartier v Symbolix, Inc.*, 2006 U.S. Dist. LEXIS 71446 at *20 (S.D.N.Y. 2006).

[10] *Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456, 475 (D. N.J. 1998)

[11] *Id. (*citations omitted).

[12] *Id.* at 475-576. New Jersey's False Statement rule includes the word "material" unlike New York's rule.

information through "formal procedures, such as a motion to compel."[13] Likewise the Supreme Court of Wisconsin in *In re Wood* held that an attorney in a dispute with a former client violated the Honesty Rule when he hired an investigator to pose as the former client in order to obtain a document, which "could have been subpoenaed."[14] In *Allen v. Int'l Truck & Engine*, the U.S. District Court for the Southern District of Indiana suppressed evidence because a company had sent investigators to talk to employees internally in response to allegations of racial hostility by plaintiff-employees, knowing that some of the employees were represented by counsel in the matter.[15]

On the other hand, the Seventh and Tenth Circuits have explicitly authorized the use of "testers" in racial discrimination cases, the Seventh Circuit noting that the "deception was a relatively small price to pay to defeat racial discrimination."[16] And the U.S. Supreme Court has upheld the standing of "testers" in such cases.[17]

The public and profession's expectations with respect to dissemblance in investigations may evolve over time, and rules such as the Dishonesty Rule must be applied in the light of reason and experience [18] While we recognize that there is no nationwide consensus on this issue at this time, we conclude that the conduct approved by a number of courts as discussed above is most consistent with the overall purposes of the Disciplinary Rules and conforms to professional norms and societal expectations. Non-government attorneys may therefore in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances *where:* (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful

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[13] *Midwest Motor Sports v. Arctic Cat Sales Inc.*, 347 F.3d 693, 700 (8th Cir. 2003). The court observed that the investigator's surreptitious recording *combined* with the fact that counsel had violated the no-contact rule should result in suppression. *Midwest* at 699. *See also Hill v Shell Oil Company*, 209 F. Supp. 2d 876, 880 (E.D. Ill. 2002) (noting a "discernable continuum in the cases from clearly impermissible to clearly permissible conduct.").

[14] *In re Wood*, 190 Wis. 2d 502; 526 N.W.2d 513, 514 (Wisc. 2005).

[15] *Allen v Int'l Truck & Engine*, 2006 U.S. Dist. LEXIS 63720 at *25-26 (S.D. Ind. 2006)

[16] *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983); *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973). The U.S. Supreme Court defined a "tester" as "an individual who, without an intent to rent or purchase a home or apartment, poses as a renter or purchaser for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373; 71 L. Ed., 2d 214, 225 ; 201 S. Ct. 1114, 1121 (1982).

[17] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373; 71 L. Ed., 2d 214, 225 ; 201 S. Ct. 1114, 1121 (1982).

[18] *See, e.g.*, N.Y. State 328 (1974) (secret taping impermissible except under "extraordinary" circumstances); N.Y. County 696 (1993) (secret taping permissible where one party has consented); ABA 01-422 (taping permitted if legal and lawyer does not falsely deny the fact of recording); N.Y. City 2003-2 (permitting non-routine taping in "pursuit of a generally accepted societal good"). *See also* ABA 06-439 (in negotiations, posturing or puffery "are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely.")

means[19]; and (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to, DR 7-104, the "no-contact" rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. Moreover, the investigator must be instructed not to elicit information protected by the attorney-client privilege.

CONCLUSION:

A plain reading of New York's Code of Professional Responsibility supports the view that it is generally unethical for a non-government lawyer to utilize and/or supervise an investigator who will employ dissemblance in an investigation if the dissemblance is unlawful; rises to the level of fraud or perjury; unlawfully violates the rights of third parties; otherwise violates the Code, or where other lawful means of obtaining evidence is available. Nevertheless, under certain exceptional conditions as set forth in this opinion, dissemblance by a non-attorney investigator supervised by an attorney is ethically permissible. Lawyers who supervise investigators employing dissemblance, however, should interpret these exceptions narrowly.

[19] *See Midwest Sports* and *Wood* decisions described supra. In *Pautler*, the court noted that the DA "had several choices" other than dissemblance in pursuing the suspect's apprehension. *Pautler* at 1180.

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Deception in Negotiation: A Study of the Views and Perceptions of Practitioners

by Avnita Lakhani♠

Abstract

This article is part of a larger monograph addressing the nature of deception as a negotiation strategy through a cross-jurisdictional, multi-disciplinary analysis leading to a path of strategic policy reforms.

The goal of this article is to share broad preliminary results of an empirical study conducted with the support and participation of LEADR during 'kon gres, LEADR's 10th International ADR Conference in Melbourne, Victoria. The focus of the study was on gaining the views and perceptions of practitioners on certain negotiation tactics and aspects of the negotiation process.

♠ Avnita is a PhD candidate at Bond University's Faculty of Law and a law and conflict resolution specialist. She has published articles in law and ADR across a variety of law, conflict resolution, and dispute resolution journals. I wish to express my gratitude to Fiona Hollier (CEO) of LEADR for encouraging and supporting this research project as well as to those participants of 'kon gres, LEADR's 10th International ADR Conference, who took the time to complete this survey. I would also like to thank Dante A. Simone and the editorial team of the Rutgers Conflict Resolution Law Journal for their hard work and dedication to publishing this edition of the journal. Through active and sound research and collaboration, we have the opportunity to advance and achieve excellence in our profession, thereby encouraging excellence in society.

I. Introduction to the Research Problem

Negotiation is long considered an essential aspect of a lawyer's professional life,[1] if not *the* essential skill of an effective legal professional.[2] Negotiation is also the foundation of nearly all ADR processes, from negotiation to mediation to adjudication. After nearly twenty years of literature and scholarship on negotiation, there is still ongoing debate on whether deception in negotiation is permissible. This is especially relevant to how legal professionals negotiate because of the special duties, rules, and constraints to they might be subject. Most negotiation literature seems to consider some form of deception as an acceptable part of the 'the game'.[3] At the same time, for lawyers engaged in negotiation or other ADR processes such as mediation, the prevailing professional ethics codes of most common-law jurisdictions seem to forbid either any form of deception in practice,[4] attempt to explicitly define the boundaries of deception in negotiation,[5] or are silent on the subject of negotiation practice altogether.

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[1] JOHN CARVAN, UNDERSTANDING THE AUSTRALIAN LEGAL SYSTEM (5th ed. 2005) 73. ("The term *lawyer* collectively describes members of the legal profession – barristers and solicitors."). Similarly, the term *legal professional* as used in this paper refers to barristers and solicitors. The terms *lawyer*, *attorney*, and *legal professional* are used interchangeably to mean a qualified member of the bar of the legal profession in a particular legal jurisdiction. *See also* Rex R Perschbacher, *'Regulating Lawyers' Negotiations,* 27 ARIZ. L. REV. 75-76 (1985) ("Negotiation is one of the most important activities of the practicing lawyer. It is the dominant method of resolving civil and criminal disputes and is also important in a non-litigation or transaction context such as in setting contract terms."); Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 4 AM. B. FOUND. RES. J., (1983) 905, 911 ("Legal negotiators put together the millions of daily transactions that keep social, economic, and legal structures functioning…").

[2] WILLIAM M SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 111 (2007) (stating that in the late 1970s, the American Bar Association specifically required the teaching of negotiation in law schools after a report on lawyer competency). *See also* American Law Institute - American Bar Association, *Enhancing the Competence of Lawyers: The Report of the Houston Conference XI-XII* (1981); Mark Osler, *The* Role of Negotiation in Criminal Law Teaching (2006), *available at* http://lsi.typepad.com/lsi/2006/12/the_role_of_neg.html (last visited Aug. 26, 2009) ("Over 90% of criminal cases plead out in most jurisdictions, so negotiation is a key skill for criminal practitioners.").

[3] ROY LEWICKI, ET AL., NEGOTIATION, 3 (5th ed. 2006); James J White, *Machiavelli and the Bar: Ethical Limits on Lying in Negotiation*, AM. B. FOUND. RES. J., 926 (1980); Thomas F Guernsey, *Truthfulness in Negotiation* (1983) 17 U. RICH. L. REV. 99, 105 n.34 (stating that "…inherent in all negotiations is some element of an attempt to mislead the other side."); Alan Strudler, *On the Ethics of Deception in Negotiation*, 5 BUSINESS ETHICS QUARTERLY 805, 812-813 (1995).

[4] *See, e.g.,* THE AUSTRALIAN BAR ASSOCIATION MODEL RULES, Preamble (2002), *available at* http://www.austbar.asn.au/images/stories/PDFs/CurrentABAModelRules2002.pdf (last visited Mar. 27, 2009); LEGAL PROFESSION ACT 2007 (Qld); LEGAL PROFESSION (SOLICITORS) RULE 2007 (Qld), at 29 (Statement of General Principle).

[5] *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT: R.4.1 (2004) *available at*, http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM#Rule_4.1 (last visited Mar. 27, 2010); *See* THE LAW SOCIETY OF ALBERTA CODE OF PROF'L CONDUCT: CHAPTER 11 (2006), *available at* http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm (last visited Oct. 18, 2009).

The most recent anecdotal studies seem to indicate that lawyers do tend to use some forms of deception in practice[6] and attempt to justify such behaviour in a variety of ways.[7] These justifications include the argument that, because the legal ethics codes do not explicitly forbid deception in negotiation, such conduct is permissible. While there is some anecdotal research into the use of potentially deceptive tactics in negotiation and how these might be controlled, there is limited empirical research on this topic which incorporates the views and perceptions of practitioners.

The purpose of this article is to make a contribution to this field by presenting the results of such an empirical study. The study was conducted with the generous support and participation of LEADR[8] and the registered participants of 'kon gres, LEADR's 10th International ADR Conference in Melbourne, Victoria during the period of 9 – 11 September 2009.[9] Section II describes the survey instrument, research methodology and data collection process used to conduct this study. Section III presents the results of the data collection and data analysis as well as a brief discussion of any insights gained from the results. Finally, Section IV offers concluding remarks on the study and implications for future research.

II. Methodology and Data Collection

This study consisted of using a survey instrument. Historically, surveys have been used for over 200 years and are considered a valuable and reliable research tool.[10] In addition, the use of

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[6] Lisa G Lerman, *Lying to Clients,* 138 *I. PA. L/ Rev.,* 659 (1990); Rob Davis, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers' (1994) 68 AUSTRALIAN L. J. 734; Warren Pengilley, "'But You Can't Do That Anymore!' – The Effect of Section 52 on Common Negotiating Techniques" (1993) I TRADE PRACS. L. J. 113-129; Jeffrey Krivis, The Truth About Deception in Mediation, Alternatives, 2002, 20 at 121; Alvin B. Rubin, A Causerie on Lawyers' Ethics in Negotiation, 35 La. L. Rev. 577 (1975); George Sharswood, *Professional Ethics* (1844) 168-169 quoted in *Maryland State Bar Ass'n v Agnew*, 271 Md. 543, 548-49, 318 A.2d 811, 814 (1974); Cheryl Rivers, What are they thinking? Considerations underlying negotiators' ethical decisions, Presentation at the annual Meeting Academy of International Business Conference in Stockholm, Sweden (2004).

[7] Gerald Wetlaufer, The Ethics of Lying in Negotiations 75 U. IA. L. Rev. 1219 (1990).

[8] *See*, LEADR, Association of Dispute Resolvers, (2009) *available at* http://www.leadr.com.au/ (last visited Oct. 12, 2009). (LEADR is an Australasian, not-for-profit membership organisation that promotes alternative dispute resolution.)

[9] *See* Kon Gres, LEADR's 10th International ADR Conference (2009) *available at* http://www.leadr.com.au/kongres2009/index.htm (last visited Oct. 12, 2009). *See also* Avnita Lakhani, 'Deception as a Negotiation Tactic: Fact or Fiction' (Paper presented at 'kon gres, LEADR's 10th International ADR Conference, Melbourne Victoria, Sept. 11, 2009) (on file with author), *available at* http://www.leadr.com.au/kongres2009/workshops/papers&ppts/Avnita%20Lakhani.pdf.

[10] H. Russell Bernard, Research Methods in Anthropology: Qualitative and Quantitative Approaches 251-252 (4th ed. 2006). Note, the term 'survey' and 'questionnaire' are used interchangeably.

surveys in negotiation research is well established.[11] Surveys are considered part of a quantitative methodology. Surveys are a structured interviewing technique, where participants "are asked to respond to as nearly identical a set of stimuli as possible."[12] The benefit of exposing each respondent to the same stimuli (e.g., questions or statements) is to maximize the ability to reliably compare the output or results of the responses.[13] This study involved a self-administered survey using a drop-and-collect technique.[14]

The survey instrument used in this study consists of three major sections: 1) demographics, 2) views and perceptions of negotiation tactics, and 3) views and perceptions of the negotiation process. The first section, Demographics, is meant to gain general data about the participant, such as their primary job role, primary work location, gender, and whether they are a member of LEADR. This section is meant to simply gather demographics data for the purpose of analysing this information relative to the other sections of the survey.

The second section, Views and Perceptions of Negotiation Tactics, is derived from the field of negotiation (legal negotiation and business negotiation). As indicated by the survey instrument, this section lists approximately twelve (12) negotiation tactics that are well known and used by lawyers in negotiations. These tactics are listed in the negotiation literature and texts commonly referred to in both law and business. In addition, there are debates in the literature as to whether these tactics are acceptable or not as discussed in Section I. This section of the survey instrument uses a four-point, forced-choice Likert scale to measure the degree to which participants would rate the listed negotiation tactic as 'deceptive'. A four-point Likert scale was used so that participants would provide an opinion and not 'sit on the fence' in terms of their assessment of a particular item. In addition, there is some research and literature indicating that a Likert scale without a mid-point helps to reduce "social desirability bias, arising from respondents' desires to please the interviewer or appear helpful or not be seen to give what they perceive to be a socially unacceptable answer".[15] This section is meant to measure the views and perceptions of law/ADR practitioners about these common negotiation behaviours and the extent to which they are perceived as deceptive.

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[11] Carsten K. W. de Dreu & Peter J. Carnevale, Disparate Methods and Common Findings in the Study of Negotiation in *Methods of Negotiation Research* 354-357 (2006).
[12] *See supra* note 10 at 212-213.
[13] *Id.* at 251.
[14] *Id.* at 258.
[15] Ron Garland, The Mid-Point on a Rating Scale: Is it Desirable?, 2 *Marketing Bulletin* 66-68 (1991); *See also* Bernard, *supra* note 10, at 250 (discussing the social desirability effect).

The third section, Views and Perceptions About Negotiation Practice, is derived from the fields of law, negotiation practice, and negotiation ethics. As indicated by the survey instrument, this section lists ten statements about the use of deceptive behaviour in negotiations and the extent to which this behaviour can be controlled through various means. As in the second section of the survey instrument, these statements are paraphrased from literature and reflect the views of academia, society, and practitioners on negotiation practice and behavior. This section uses a four-point, forced-choice Likert scale to measure the degree to which participants would agree or disagree with each of the statement listed. A four-point Likert scale was also used so that participants would provide an opinion, thereby helping to reduce the effects of social desirability bias.[16] In addition to each of the individual sections described above, a 'Comments' area was included under each of the three major sections to record any comments participants may have related to each of the three sections.

Participants in the study included practitioners who registered to attend 'kon gres, LEADR's 10th International ADR Conference (LEADR Conference). The total population of those who might practice negotiation, or be interested in negotiation as a means to resolving disputes, is hard to measure since negotiation is not only ubiquitous in society, but also serves as a foundation process to lawyering and all major ADR processes such as: mediation, arbitration, and settlement negotiations. The LEADR Conference provided an excellent opportunity of getting an international perspective on this topic as it was open to and attended by an international contingent of practitioners.

The survey methodology consisted of distributing the survey instrument to all registered participants of the conference. At the time of the LEADR Conference, 219 people were formally registered to attend the conference. LEADR placed a copy of the survey in each registered participant's conference satchel. This survey was placed in an easily identifiable clear folder so that participants could see it. When participants arrived at the conference, they proceeded to a registration table where they confirmed their registration and collected their materials. The conference materials, along with the survey, were in their conference satchel. Participants were informed that they were participating in a voluntary survey project. During the initial conference introductions, LEADR introduced the survey again and invited participants to complete the survey. LEADR also explained to the participants the nature and purpose of the survey, the location of the survey in their conference satchel, and where to return the completed survey. This information

[16] *See* Garland, *supra* note 15.

was also included on the survey instrument.[17] It was estimated that most participants would be able to complete the survey within 10-15 minutes. A specially-marked submission box was placed at the registration table. Participants were advised to voluntarily complete the survey and return it to a specially-marked submission box at the registration table, thus reducing researcher bias. These surveys were periodically removed from the box and placed in a secure location so to reduce the possibility that someone could remove the surveys or tamper with them. At the end of the conference, the researcher collected all submitted surveys and place them in a secure location to be used for data analysis and reporting. The participant's role ended when they submitted the completed survey to the designated submission box.[18]

The completed surveys were subsequently counted and placed in a secure location. For the purposes of accounting for each submitted survey, each survey was coded with an identifier starting with 'SR', Survey Respondent, followed by a sequential number. For example, the first survey was marked as 'SR1' followed by 'SR2' until each survey had a survey respondent number. Each survey's data was then entered into a survey processing tool for statistical analysis and reporting.[19] The survey tool also randomly assigned each survey a 'response ID'.[20] The next section discusses the results of the survey and presents some preliminary analysis.

III. Results and Analysis

As indicated above, the conference had 219 registered attendees who were invited to complete the survey.[21] Of these registered attendees, a total of 41 surveys were returned. This means an 18.72% response rate. The following tables indicate the results for each element of the survey followed by a brief discussion of insights gained from the results, where applicable. Where the item indicates a value for 'Avg', this means the average result of all responses for that item. Where the item indicates a value for 'Total', this means the total number of respondents out of the 41 who completed and returned surveys who indicated an answer for that item.

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[17] The complete survey instrument is on file with the author and copyrighted to the author. The survey instrument shall not be used or altered without the express written permission of the author. The survey instrument was approved by an ethics committee and indicated that data will be handled consistent with the Australian Government's National Health Medical Research Council "NHMRC" Guidelines under the Privacy Act 1988 (cth) and the NHMRC *National Statement on Ethical Conduct in Research Involving Humans*.

[18] Submission of the completed survey to the designated submission box also constituted their voluntary approval to include the responses in subsequent data analysis and reporting.

[19] The survey tool, SurveyGizmo was used in this study for data analysis and reporting.

[20] The relationship between the 'SR' code and 'response ID' code is on file with the author.

[21] This information was provided to the author by LEADR.

Table 1: Summary Results of *Demographics*

The following chart indicates the results of the responses received from the 41 completed surveys for Section 1 (*Demographic questions*).

a. I am:

Value	Total Responses	% of Total
Both a legal and ADR professional (e.g., lawyer and mediator)	18	43.90%
Only an ADR professional (e.g., mediator)	11	26.83%
Other (please specify) • Educator/Mediator; • Adjudicator construction disputes, facilitator, and expert examiner; • ADR Professional/educator (2); • Company director, mentor, mediator; • Consultant, coach, and ADR practitioner; • Consultant, mining engineer; • Facilitator, executive coach, mediator, conflict coach; • Mediator and naval officer	12	29.27%

b. I mostly work in:

Value	Total Responses	% of Total
New South Wales	13	31.71%
Victoria	7	17.07%
New Zealand	6	14.63%
Western Australia	4	9.76%
Queensland	2	4.88%
Canada	2	4.88%
Northern Territory	2	4.88%
South Australia	2	4.88%
Tasmania	2	4.88%
SE Asia + QLD, VIC, NSW, ACT	1	2.44%

c. I am:

Value	Total Responses	% of Total
Female	25	60.98%
Male	16	39.02%

d. I am a member of LEADR:

Value	Total Responses	% of Total
Yes	38	92.68%
No	3	7.32%

This section of the survey provides a view of the demographics of the respondent group. Two primary insights are worth noting from this section. First, the respondents represented quite a diverse and international group. Second, consistent with the view that alternative dispute resolution (ADR) reaches a broad spectrum of professionals, those who expressed an interest in the conference and ADR processes as a means of resolving disputes seem to use ADR in a variety

of roles, not just as formal lawyers and mediators. The next table, Table 2, looks at the results of views and perceptions of practitioners regarding certain negotiation tactics.

Table 2: Summary Results of *Views and Perceptions of Negotiation Tactics*

The following chart indicates the results of the responses received from the 41 completed surveys for Section 2 (*Views and perceptions of negotiation tactics*).

To what extent do you agree or disagree that the following tactics are deceptive? (Please tick only one box against each item)

	Strongly agree (1)	**Agree** (2)	**Disagree** (3)	**Strongly disagree** (4)	**Avg**	**Total**
1. 'Lowballing' or understating the value of a negotiation item	20.0% (8)	45.0% (18)	30.0% (12)	5.0% (2)	2.2	40
2. Overstating the value of a negotiation item	25.0% (10)	47.5% (19)	22.5% (9)	5.0% (2)	2.1	40
3. Withhold information from client as part of strategy (e.g., using silence, strategic posturing, not sharing relevant information)	21.1% (8)	47.4% (18)	23.7% (9)	7.9% (3)	2.2	38
4. Misrepresent the strength of your position – to get a good or better negotiated result	20.0% (8)	47.5% (19)	25.0% (10)	7.5% (3)	2.2	40
5. Deliberately delay cases – to increase the financial pressure to settle	50.0% (20)	27.5% (11)	15.0% (6)	7.5% (3)	1.8	40
6. Deliberately start with a very high offer regardless of knowing what client will accept	17.9% (7)	41.0% (16)	35.9% (14)	5.1% (2)	2.3	39
7. Always exaggerate an offer, saying it's your 'final offer'	25.6% (10)	46.2% (18)	25.6% (10)	2.6% (1)	2.1	39
8. Concealing the bottom line or the willingness to settle for as long as possible	16.2% (6)	35.1% (13)	37.8% (14)	10.8% (4)	2.4	37
9. Starting off with inflated demands as an opening offer – then using concessions to get to an acceptable settlement	12.5% (5)	37.5% (15)	45.0% (18)	5.0% (2)	2.4	40
10. Playing a 'game of hide and seek' to keep party uncertain about what client truly values	17.5% (7)	55.0% (22)	20.0% (8)	7.5% (3)	2.2	40
11. Not volunteering relevant facts	30.0% (12)	30.0% (12)	35.0% (14)	5.0% (2)	2.2	40
12. Improving bargaining position by claiming lack of authority	38.5% (15)	48.7% (19)	10.3% (4)	2.6% (1)	1.8	39
Average % (across all values):	**24.6%**	**42.4%**	**27.1%**	**5.9%**	**2.1**	

This section of the survey provides a view of the respondents' perception of whether certain common negotiation tactics may be considered deceptive. A few key insights are worth noting. First, except for the results of item number 9 (45% disagree), the majority of respondents in each individual tactic either 'strongly agree' or 'agree' that each of these negotiation tactics individually is deceptive. The results for item number 9 was expected, as this is consistent with the views of most negotiation literature that 'puffing', or inflating one's opening offer, is an

acceptable tactic in most negotiations. The result of each individual item is surprising, given that most negotiation literature condones such tactics. As such, it was expected that most respondents would rate each individual tactic as 'disagree' or 'strongly disagree' in terms of it being potentially deceptive.

Second, while each item individually seemed to be rated as deceptive, the average for each item appears to indicate that respondents as a group tend to 'disagree' that these tactics are deceptive though most are borderline averages. This view seems to apply to all the tactics, except for item numbers 5 and 12 where the average rating indicates that respondents 'agree' these tactics are deceptive. This average result across each individual item and across this section of the survey is, in many ways, expected given that the most significant views on negotiation tactics comes from negotiation literature which tends to permit potentially deceptive tactics. Combined with the finding that most professional ethics codes in common-law jurisdictions do not include specific regulation of such tactics, it is not surprising to find that the average results indicate a borderline view of the potentially deceptive nature of these negotiation tactics. The absence of specific regulation to the contrary could easily be interpreted as permissible conduct by practitioners.[22] In addition, 29.27% of respondents indicated that they work outside of the legal field where the tactics used in negotiation are likely influenced by prevailing negotiation literature or common practice in the relevant field. Therefore, the results of this section reflect the complex nature of negotiation practice and the varied guidance on appropriate negotiation tactics as provided by prevailing negotiation literature and community practice.

The next table, Table 3, looks at the results of views and perceptions of practitioners regarding negotiation practice as indicated in a series of statements.

Table 3: Summary Results of *Views and Perceptions About Negotiation Practice*

The following chart indicates the results of the responses received from the 41 completed surveys for Section 3 (*Views and perceptions about negotiation practice*).

To what extent do you agree or disagree with each of the following statements? (Please tick only one box against each item.)

	Strongly agree (1)	**Agree** (2)	**Disagree** (3)	**Strongly disagree** (4)	**Avg**	**Total**
1. 'Lying' and 'deception' are the same thing/mean the same thing	17.9% (7)	33.3% (13)	46.2% (18)	2.6% (1)	2.3	39

[22] *See,* e.g., Michael D Daigneault and Jack Marshall, *A House Divided,* 44 *FEDERAL LAWYER* 18 (1997); P L Rizzo, *Moral for Home, Morals for Office: The Double Ethical Life of a Civil Litigator*, 35 CATH. LAW. 79, 82 (1988) ("...if the code does not prohibit an act, the act is moral.").

	Strongly agree (1)	Agree (2)	Disagree (3)	Strongly disagree (4)	Avg	Total
2. Lawyers and ADR professionals use deception in negotiation	15.8% (6)	42.1% (16)	36.8% (14)	5.3% (2)	2.3	38
3. Deception is a normal part of the negotiation process	5.1% (2)	43.6% (17)	41.0% (16)	10.3% (4)	2.6	39
4. Honesty should be required in all negotiations	26.3% (10)	50.0% (19)	23.7% (9)	0% (0)	2.0	38
5. It is impossible to be honest all the time, even in negotiations	5.1% (2)	51.3% (20)	38.5% (15)	5.1% (2)	2.4	39
6. Those who are dishonest in negotiations should be punished	5.1% (2)	15.4% (6)	69.2% (27)	10.3% (4)	2.8	39
7. It is possible to conduct a completely honest negotiation and still achieve a successful outcome	46.2% (18)	38.5% (15)	2.6% (1)	12.8% (5)	1.8	39
8. Laws (rules and regulations) are effective in controlling deceptive conduct by legal/ADR professionals, even in negotiation	5.1% (2)	25.6% (10)	56.4% (22)	12.8% (5)	2.8	39
9. Ethics codes (professional codes of ethics/personal codes of conduct) are effective in controlling deceptive conduct by legal/ADR professionals, even in negotiation	15.8% (6)	36.8% (14)	39.5% (15)	7.9% (3)	2.4	38
10. It is impossible to control deceptive practices in negotiation	17.9% (7)	53.8% (21)	25.6% (10)	2.6% (1)	2.1	39
Average % (across all values):	**16.0%**	**39.0%**	**38.0%**	**7.0%**	**2.4**	

This section of the survey provides a view of respondents' perception of negotiation practice as reflected through a series of statements. Two important insights are worth noting from these results. First, there appears to be a consensus that honesty should be required in negotiations (50% agree) and that a completely honest negotiation can be successful (46.2% strongly agree and 38.5% agree). This result is encouraging in that it indicates that while the use of deceptive tactics in negotiation may be a reality, it is not the preferred approach by the respondents. One way to extrapolate this result is to view this as a challenge for the profession to find ways in which to educate practitioners on conducting honest negotiations within the bounds of their other professional duties so that practitioners have a choice on how a negotiation can be conducted and not be tied to the prevailing yet statistically unproven view that deception is a normal part of the negotiation process. This borderline view is reflected in the results of item number 3 where 48% of respondents agree that deception is a normal part of the negotiation process while 51.3% of respondents disagree.

Second, while respondents would prefer to engage in honest negotiations, the results also reflect the view that this might not be easy given human nature,[23] differences in the definition of the terms 'honesty' and 'deception' by some, and the impact or ability of regulations and ethics codes to control deceptive behaviour.[24] These results are also consistent with the view that rules and codes of ethics, while serving as guides, cannot serve as the sole means of influencing positive behavior or encouraging behavioral change.[25] In conclusion, the results of this section of the survey provide an encouraging view from practitioners on negotiation practice as well as a call to action on potentially challenging the *status quo* on how negotiations can be conducted in the future.

IV. Conclusion

This article has presented the results of a survey study aimed at measuring the views and perceptions of practitioners on two primary areas: negotiation tactics and negotiation practice. The results represent the views of 41 respondents out of a group of 219 registered participants of 'kon gres, LEADR's 10th International ADR Conference in Melbourne, Victoria. The results of the section on negotiation tactics indicate that the majority of respondents perceive certain common negotiation tactics as deceptive while the average results across all respondents indicate that these negotiation tactics are on the borderline between deceptive and not deceptive with a tendency towards the tactics being rated as not deceptive.

The results of the section on negotiation practice indicate the majority of respondents agree that honesty should be required in negotiations. In addition, the majority of respondents agree that honest negotiations can be successful. However, respondents also recognize that it is difficult to be honest all the time and the impact or ability of regulations and ethics codes to control deceptive behavior in negotiations may affect the desire to have honest, successful negotiations.

In conclusion, this study has provided valuable insight into the challenges that practitioners face in negotiations and in navigating the negotiation process. In addition, these results point to

[23] This is reflected by the results of item number 5 which reflects the prevailing majority view that it is impossible to be honest all the time, even in negotiations.

[24] These are reflected in the comments by SR4, SR12, SR18, SR26, and SR33. These comments are on file with the author.

[25] *See*, e.g., Margaret Ann Wilkinson, Christa Walker and Peter Mercer, *Do Codes of Ethics Actually Shape Legal Practice?,* 45 McGILL L. J. 645, 656-679 (2000); R E Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst*,1 GEO. J. LEGAL EHICS 311, 333 (1987-88); T H Morawetz, *Lawyers and Conscience*, 21 CONN. L. REV. 383 (1989).

several opportunities for the profession to provide better negotiation education, options for handling deception in negotiation, guidance on the benefits of conducting honest negotiations, and encouraging future research on this topic.

Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help

by Peter Reilly**[1]

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

Introduction

Niccoló Machiavelli,[2] who enthusiastically endorsed the art of deception, wrote in THE PRINCE nearly five hundred years ago, "[Y]ou must be a great liar….a deceitful man will always find plenty who are ready to be deceived."[3] Was Machiavelli right? Can honing one's ability to lie be advantageous in certain situations? Moreover, are there great liars among us who are willing and able to prey upon the so-called "sucker born every minute?"[4] Finally, if such liars exist, to what extent has the rest of society been trained in the art of defensive self-help, or the mindsets, strategies, and tactics necessary to protect themselves from exploitation?

I wrote this Article to advance a dialogue and debate surrounding a new way to address the thorny and seemingly intractable problem of lying in the context of negotiation. [5]

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[2] Niccoló Machiavelli (1469-1527) was an Italian diplomat, political philosopher, musician, poet, and playwright. A figure of the Italian Renaissance, Machiavelli is perhaps best known for his treatise on realist political theory, THE PRINCE, first published in 1531. *See* NICCOLÓ MACHIAVELLI**,** THE PRINCE (Robert M. Adams trans., W.W. Norton & Company, Inc. 1977). *See also* STUDIES IN MACHIAVELLIANISM (Richard Christie & Florence L. Geis, eds.,1970) (discussing studies indicating that people who demonstrate strength in a personality variable called "Machiavellianism" are more likely to lie when they need to do so, better able to tell lies without feeling anxious, and more persuasive and effective in their lies).

[3] MACHIAVELLI, *supra* note 2, at ch. XVIII.

[4] Although the well-known phrase is often attributed to American showman P.T. Barnum, at least one source attributes it to the famous conman Joseph "Paper Collar Joe" Bessimer. *See* ARTHUR H. SAXON, P.T. BARNUM: THE LEGEND AND THE MAN 336-37 (1989). For an excellent discussion of Machiavelli, Hobbes, Locke, Montesquieu, Rousseau, and others placed into context within the Modern Age of Western political philosophy, *see* BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 47-72 (1994).

[5] *See* MICHAEL POLANYI, THE STUDY OF MAN 68 (1959) ("In an ideal free society each person would have perfect access to the truth: to the truth in science, in art, religion and justice, both in public and private life.

Specifically, although a good deal of ink has been spilled in past law review Articles focusing on the *offending* parties (the liars and deceivers) and how various rules and laws might be altered to control their behavior,[6] in this Article I turn the spotlight on the *defending* parties (those being lied to and deceived) and ways they can shield themselves from such predatory behaviors.

The majority of law review articles written heretofore regarding ethical issues surrounding lying and deception in negotiation have argued, in one form or another, that liars and deceivers could be successfully reined in and controlled if only the applicable ethics rules were strengthened, and if corresponding enforcement mechanisms and powers were sufficiently beefed up and effectively executed. This Article, however, argues that the applicable ethics rules will likely never be strengthened, and, furthermore, that even if they were, they would be difficult to enforce in any meaningful way, at least in the context of negotiation.

The logical conclusion to these arguments is that lawyers, businesspeople, and everyone else who engages in negotiation must learn how to carefully and purposefully implement strategies and behaviors to *defend* themselves against those who lie and deceive—no matter the reasons prompting it. I therefore conclude the Article by offering prescriptive advice (including examples) for minimizing one's risk of being exploited in a negotiation should other parties lie. The advice is undergirded by the notion, expressed throughout the Article, that information exchange (or lack thereof) plays a pivotal role in all negotiations. Indeed, I argue that information is the lifeblood of any negotiation, and therefore that the various strategies and behaviors influencing whether, when, and how information is obtained and/or exchanged are extremely important in the process of defending oneself (or one's client) against lying and deception.

The Article is divided into six Parts. In Part I, I discuss the role that negotiation plays, and that lying plays, in law and in wider contexts. I also describe the kinds of issues people tend to lie about when they negotiate.

Part II analyzes incentives people have to lie in certain kinds of negotiations, as well as possible antidotes to lying within specific hypothetical scenarios.

Part III analyzes the law of truthfulness, from duties of disclosure, to requirements of "good faith" that are just starting to gain a foothold in the context of negotiation, to the long-accepted practice of "puffing."

But this is not practicable; each person can know directly very little of truth and must trust others for the rest. Indeed, to assure this process of mutual reliance is one of the main functions of society.").

[6] *See, e.g.*, Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975); Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1 (2005); Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations*, 1990 J. DISP. RESOL. 103 (1990); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L. J. 1 (1987).

Part IV reports the outcome of a survey illustrating the disagreement and confusion that appears to exist among lawyers regarding truthfulness standards in the law.

Part V analyzes why raising the ethical bar, or why strengthening the duty of candor as currently set forth in rules of professional conduct for lawyers, would likely fail.

Part VI offers prescriptive advice for minimizing the risk of exploitation during negotiation by setting forth mindsets, strategies and techniques that both lawyers and non-lawyers can draw upon when confronting liars and deceivers.

Although the Article is targeted to lawyers and the wider legal community, the suggestions I offer are equally applicable to all sorts of negotiations taking place in most any field, occupation, or circumstance.

I. Lying in Negotiation: Building a Context

A. The Normalcy of Lying

People lie. As one scholar of deception notes, "Lying is not exceptional; it is normal, and more often spontaneous and unconscious than cynical and coldly analytical. Our minds and bodies secrete deceit."[7] Moreover, lawyers lie,[8] especially in negotiations.[9] One legal scholar concludes that lying is "not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law."[10] And business people lie: one business ethics

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[7] DAVID LIVINGSTONE SMITH, WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND 15 (2004). *See also* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE xvii (1978) (suggesting that "in law and in journalism, in government and in the social sciences, deception is taken for granted when it is felt to be excusable by those who tell the lies and who tend also to make the rules.").

[8] Negotiations Professor Charles Craver is fond of starting negotiation workshops with the candid statement: "I've never been involved in legal negotiations where both sides didn't lie." DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 470 (2004). *See also* Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation, in* DISPUTE RESOLUTION ETHICS, A COMPREHENSIVE GUIDE 119, 126 (Phyllis Bernard & Bryant Garth eds., 2002) (pointing out that many professions exhibit "role-based exceptions" to the general commandment against lying and deception, *e.g.*, "doctors deceive or lie to protect their clients' health or confidentiality; journalists, police officers and social scientists use deception to learn the 'truth' and protect their sources; and public officials lie to protect national security, as well as to get elected by large, diverse and contentious constituencies.").

[9] Affirmative misrepresentations by lawyers in negotiation have been the basis for: (1) litigation sanctions (*see, e.g.*, Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005)); (2) for setting aside settlement agreements (*see, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (setting aside settlement agreement because lawyer failed to disclose death of client prior to settlement)); and (3) for civil lawsuits against lawyers themselves (*see, e.g.*, Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations)).

[10] Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219, 1272 (1990). Moreover, lying is not limited to the province of "advocacy" within law—it also occurs in more cooperative realms,

scholar concludes simply, "Commercial negotiations seem to require a talent for deception."[11] This statement is easy to believe in light of corporate scandals such as Enron, [12] Tyco, WorldCom, Global Crossing, Qwest, and Adelphia Communications, and, more recently, the arrest of two former Bear Stearns executives for fraud[13] as well as the arrest of over four hundred (and counting) real estate professionals in a nationwide Justice Department investigation dubbed "Operation Malicious Mortgage."[14]

Nearly twenty years ago, one legal scholar noted that, "Thus far, efforts to improve bargaining ethics have been an empty vessel."[15] Despite prolific and insightful scholarship on the subject,[16] the same statement could be made today. And though

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like mediation. Professional mediator Robert Benjamin defines "noble lies" as those told by mediators that are "designed to shift and reconfigure the thinking of disputing parties, especially in the conflict and confusion, and to foster and further their cooperation, tolerance, and survival." Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3, 17 (1995). *See also* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences By Investors and Others*, 52 STAN. L. REV. 87, 89 (1999) ("Instructions to tell the 'whole truth' notwithstanding, it is generally not considered perjury in a trial or deposition for a witness to give a technically true but evasive answer.").

[11] G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 SLOAN MGT. REV. 93, 93 (1991). *See also* William H. Widen, *Symposium: Threats to Secured Lending and Asset Securitizations: Lord of the Liens: Towards Greater Efficiency in Secured Syndicated Lending*, 25 CARDOZO L. REV. 1577, n.76 (arguing that lying in business is "widespread" in American society). *See also* Albert Z. Carr, *Is Business Bluffing Ethical?, in* ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH 69, 70-71 (Thomas Donaldson & Patricia H. Werhane eds., 1988) ("Most executives from time to time are almost compelled, in the interests of their companies or themselves, to practice some form of deception when negotiating with customers, dealers, labor unions, government officials, or even departments of their companies. By conscious misstatements, concealment of pertinent facts, or exaggeration—in short, by bluffing—they seek to persuade others to agree with them.").

[12] *See* Nancy B. Rapoport, *Symposium: The Legal Profession: Looking Backward: Enron, Titanic, and the Perfect Storm*, 71 FORDHAM L. REV. 1373, 1394-95 (2003) ("[T]he collapse [of Enron] was caused by humans and hubris. We need to ensure that hubris doesn't blind us to the first rule of leadership: It's all about character."); Robert W. Hamilton, *The Crisis in Corporate Governance*, 40 HOUS. L. REV. 1 (2003) (discussing the governance failures of Tyco, Global Crossing, and Qwest); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233 (2002) (discussing future implications of Enron).

[13] The two men, Ralph R. Cioffi and Matthew M. Tannin, were the first senior executives from Wall Street investment banks to face criminal charges stemming from the U.S. economy's still-unfolding credit difficulties. Charging the men with nine counts of securities, mail and wire fraud, Mark J. Mershon, director of the FBI's New York Office, stated at a press conference: "This is not about mismanagement of a hedge fund investment strategy. *It is about premeditated lies to investors and lenders*." Landon Thomas, Jr., *2 Face Fraud Charges in Bear Stearns Debacle*, N.Y. TIMES, June 20, 2008, at A1 (emphasis added).

[14] Beginning in March, 2008, the Justice Department has charged 406 people nationwide with mortgage fraud. Sam Zuckerman, *Mortgage Mess Leads to Arrests; 2 Wall Street Execs Indicted and Cuffed—Federal Fraud Sweep Tops 400 Defendants*, THE SAN FRANCISCO CHRONICLE, June 20, 2008, at A1.

[15] Eleanor Holmes-Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U.L. REV. 493, 577 (1989).

[16] *See, e.g.*, CARRIE MENKEL-MEADOW & MICHAEL WHEELER, WHAT'S FAIR: ETHICS FOR NEGOTIATORS (2004); Scott R. Peppet, Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal

efforts will likely be made to improve bargaining ethics during the *next* twenty years, this Article puts forth recommendations for action—specifically, the use of defensive mindsets, strategies, and tactics—that can be implemented starting *today*, by lawyers, businesspeople, and anyone else who might be confronted with lies and deception in the context of negotiation.[17]

During the last two decades, there have been numerous calls in legal academia to strengthen the ethics rules governing bargaining for lawyers, yet little to none has prevailed.[18] Professor Scott Peppet states, "The minimalist way in which we currently regulate bargaining is one of the most powerful expressions of the profession's conception of the lawyer as adversarial advocate. To reform bargaining ethics is to end the profession as we know it."[19] However, I would suggest that Professor Peppet's

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Profession and the Beginning of Professional Pluralism, 90 IOWA L. REV. 475 (2005); CHARLES CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (2005); ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTE (2000); DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE (Phyllis Bernard & Bryant Garth eds., ABA 2002); ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN (1991); Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739 (2001); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207 (2001); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L. J. 935 (2001); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003).

[17] Some scholars have drawn a distinction between negotiations involving the resolution of legal disputes and negotiations in the context of business transactions. *See, e.g.*, Hilary D. Wells, *Raising the Bar in Settlement Negotiations: A Rationale for Amending Arizona's rules of Professional Conduct*, 33 ARIZ. ST. L. J. 1261, 1268 (2001) ("Arguably, when trial is the ultimate forum for resolving a failed negotiation, practices acceptable in settlement negotiations should more closely emulate courtroom practices than business conventions."). Other scholars suggest the distinction is not particularly meaningful: "Although negotiations may be categorized as aimed at either settling legal disputes or trying to consummate deals, these two categories of negotiations would collapse into a single type were it not for the availability of a court to which parties could resort upon failure of negotiations concerning a legal dispute." Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 S.C. L. REV. 181, 188 (1981).

[18] *See* Wells, *supra* note 17, at 1276-77 (in discussing the "unanswered call to the bar for definitive guidance" regarding lawyer conduct in negotiations, the author concludes that, despite revisions put forth by two separate ABA ethics reform committees (the 1980 Kutak Commission and the ABA Ethics 2000 project), truth-telling requirements in negotiation will remain "hopelessly ineffective" unless substantive revisions are undertaken).

[19] Peppet, *supra* note 16, at 480. *See also* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 909 (1999) ("[T]he formal [ethics] rules represent nothing more than 'the lowest common denominator of conduct that a highly self-interested group will tolerate.'" (quoting Deborah L. Rhode, *Symposium: The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 730 (1994)); Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707, 709 (2007) ("'Thinking like a lawyer' does not refer to lawyers pondering how they can

statement gives too much credence to the power of rules and laws in shaping behavior with respect to lying in negotiation. After all, such rules and guidelines can influence people's behavior only to the extent that they feel they might realistically get caught and ultimately pay a price through the court and penal systems or through a professional disciplinary body. Moreover, there are other potentially powerful factors influencing lying in negotiation, such as one's internal morality (including the "mirror" test, or "how do I appear to myself at the end of the day?")[20] and one's reputational interests.[21]

In writing this Article, I wish to make readers question whether strengthening current bargaining ethics rules is a worthwhile goal to pursue. Indeed, I write the Article with the intention of making readers conclude that there is a certain necessity, perhaps even genius, to the "minimalist way" in which bargaining is currently regulated within the legal profession.

B. The Centrality of Negotiation

The scope of disputes subject to resolution by negotiation is "almost galactic."[22] From negotiating as part of litigation,[23] to negotiating outside the courtroom on matters such as

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assure that their clients obey the law. Rather, it generally means that lawyers strategize how they can accomplish their clients' objectives to the greatest extent possible without running afoul of the law. This approach to advocacy is embodied in the ethical rules and legal culture in the U.S.").

[20] Carrie Menkel-Meadow, *What's Fair in Negotiation? What is ethics in Negotiation? in* WHAT'S FAIR: ETHICS FOR NEGOTIATORS xiii-xvi (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

[21] *See* Menkel-Meadow, *supra* note 8, at 123 (pointing out that lawyers must be wary of reputational concerns because what they say is now witnessed by growing numbers of participants in various ADR processes, including the third-party neutrals like mediators and arbitrators, as well as judges, opponents, and other parties); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 525-27, 561-64 (1994) (recommending that professional groups catering to lawyers create mechanisms to facilitate the building and dissemination of attorney reputations); Peter C. Cramton & J. Gregory Dees, *Promoting Honesty in Negotiation: An Exercise in Practical Ethics, in* WHAT'S FAIR: ETHICS FOR NEGOTIATORS 119 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (discussing how a negotiator with a reputation for being deceitful is likely to be disadvantaged in future negotiations); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 501 (1989) (arguing that a "functionalist" approach to bargaining can produce ethical behavior by making negotiation reputation more public); and ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 350 (Liberty Classics 1976) (1759) ("The prudent man is always sincere, and feels horror at the very thought of exposing himself to the disgrace which attends upon the detection of falsehood.").

[22] James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927 (1980) (discussing negotiation as a "process by which one deals with the opposing side in war, with terrorists, with labor or management in a labor agreement, with buyers and sellers of good, services, and real estate, with lessors, with governmental agencies, and with one's clients, acquaintances, and family.").

[23] *See* Marc Galanter, *"'…A Settlement Judge, Not a Trial Judge:' Judicial Mediation in the United States,"* 12 J.L. & SOC'Y 1 (1985) ("[N]egotiation is not … some unusual alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that might fancifully be called LITIGOTIATION.") (emphasis in original).

adoptions, mergers, wills, contracts, incorporations, and divorces, negotiation is a fundamental task within all aspects of the legal profession, both civil[24] and criminal (through negotiated plea bargains).[25]

One scholar suggests that "[w]e lawyers are generally counted as successful in the degree to which we are effective at producing instrumental results through our strategic speaking. Much of our speaking, perhaps even most, takes place in the arenas of negotiation. That is where we reach almost all of our agreements and settle almost all of our differences."[26] The late Harvard Law School Dean Erwin Griswold suggested that lawyers are constantly negotiating: "[T]hey are constantly endeavoring to come to agreements of one sort or another with people, to persuade people, sometimes when they are reluctant to be persuaded."[27]

C. Lying in Negotiation: Definitions and Parameters

Lying is difficult to define. As Montaigne said, "If falsehood, like truth, had but one face, we should know better where we are, for we should then take for certain the opposite of what the liar tells us. But the reverse of the truth has a hundred thousand shapes and a boundless field."[28] Writing in the context of negotiation, one scholar

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[24] *See* Craver, *supra* note 16, at 2 ("[T]wo professional practitioners who are intimately familiar with the fundamental interests of their respective clients can usually formulate a more efficient resolution of the underlying client problem than can an external decision-maker who will rarely possess the same degree of knowledge or understanding. This would explain why over 95 percent of law suits are resolved without adjudications ….") (citation omitted).

[25] *See* Rebecca Hollander-Blumoff, *Bargaining in the Shadow of the Law: The Relationshiip Between Plea Bargaining and Criminal Code Structure: Insights from the Field of Psychology: Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163 n.1 (2007) ("Plea bargaining accounts for the vast majority of outcomes of criminal cases, and, despite its critics, the process shows no sign of decreasing in importance.").

[26] Wetlaufer, *supra* note 10, at 1220. *See also* Jeffrey W. Stempel, *Symposium: Perspectives On Dispute Resolution in the Twenty-First Century: Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 344, 347 (2002/2003) (suggesting that, within the field of ADR, negotiation is the "horse" while third-party ADR is the "cart," and wondering "if the ADR movement has created new hurdles on the road to dispute resolution even while the negotiation movement has been providing lawyers and disputants with good advice useful in resolving disputes with less cost, delay, and acrimony. To avoid this potential negative result, the legal profession—particularly the judiciary—might better serve society by trumpeting negotiation more and pushing third-party ADR processes or events less.").

[27] Erwin N. Griswold, *Law Schools and Human Relations*, 37 CHICAGO BAR RECORD 199, 203 (1956). *See also* Derek Bok, *A Flawed System*, 85 HARVARD MAGAZINE 45 (1983) (Twenty-five years ago, then Harvard President (and former Harvard Law School Dean) Derek Bok warned that law students were being trained "more for conflict than for the gentler arts of reconciliation and accommodation.").

[28] MICHEL DE MONTAIGNE, THE ESSAYS OF MONTAIGNE 30-31 (E.J. Trechmann trans., 1927). *See also* John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 70 (1997) ("[I]n day-to-day professional and personal lives, people deal with numerous shades of truth, never knowing exactly what truth really is.").

attempts to subdue and organize this "boundless field" by creating two categories ("lies" and "deception") into which any manner of untruth will fall. For this Article I will adopt the following working definitions of these two categories:

> A "lie" is a false statement made by one who knows its falsity and with the intent to deceive another as to the truth.[29]

> A "deception" is any other method of concealing the truth, including silence. That is, deception has taken place if one party, without making a false statement, nonetheless manages to create or preserve an impression in another where that impression is (1) false, (2) known to be so, and (3) intended to conceal the truth.[30]

Interestingly, Roger Fisher, William Ury and Bruce Patton employ various terms and phrases (*e.g.*, "deliberate deception," "misrepresentation," "dirty trick," "trickery," and "false statement") where one might be tempted to use the word "lie" or "lying." Consider, for example, the text appearing immediately after the heading "Deliberate deception":

> Perhaps the most common form of dirty trick is misrepresentation about facts, authority, or intentions….The oldest form of negotiating trickery is to knowingly make some false statement: 'The car was driven only 5,000 miles by a little old lady from Pasadena who never went over 35 miles per hour.'[31]

And might the "posturing," "self-serving stances," and "strategic misrepresentations," as discussed below by Professor Howard Raiffa, be considered by some to be, simply, lies? States Professor Raiffa:

> A common ploy is to exaggerate the importance of what one is giving up and to minimize the importance of what one gets in return. Such posturing is part of the game. In most cultures these self-serving negotiation stances are expected, *as long as they are kept in decent bounds*. Most people would not call this "lying," just as they would choose not to label as

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[29] Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1,11 (1987).

[30] *Id.* at 11 n.9. To what extent is this a distinction without a difference? Sissela Bok notes that "[i]t is perfectly possible to define 'lie' so that it is identical with 'deception.' This is how expressions like 'living a lie' can be interpreted." BOK, *supra* note 7, at 14.

[31] ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN 132 (1991).

> "lying" the exaggerations that are made in the adversarial confrontations of a courtroom. I call such exaggerations "strategic misrepresentations."[32]

Is it fair for Professor Raiffa to say that "most people" would not label these as lying? And at what point do these "strategic misrepresentations" transgress the so-called "decent bounds" to which Professor Raiffa refers? Is it only then that they become lies?

Although one legal scholar concludes that "[t]he problem of lying in negotiations is central to the profession of law,"[33] it is difficult to measure the frequency with which lies are being told (or their level of seriousness) because most negotiations take place in private settings.[34] In one survey on lying, the average of estimates from attorney respondents was that lying about material facts occurred in twenty-three percent of the non-mediated negotiations in which the respondents participated.[35] Another survey of a national sample of lawyers found that fifty-one percent believed that "unfair and inadequate disclosure of material information" during pre-trial negotiation was a "regular or frequent" problem.[36]

The bottom line is that however it is labeled, and whatever the level of seriousness, lying and deception occur in negotiation. In this Article I will focus on *conscious, strategic*

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[32] HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING 142 (1982) (emphasis added).

[33] Wetlaufer, *supra* note 10, at 1220. Professor Wetlaufer states further: "If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one's effectiveness in negotiations depends in part upon one's willingness to lie." *Id.* at 1220.

[34] Such private settings do not provide the safeguards available in a court of law, including (1) elaborate procedural rules; (2) an impartial judge to apply existing law, enforce limits, and rule on alleged abuses; and (3) an impartial trier of fact to decide contested issues. GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER C. CRAMTON & GEORGE M. COHEN, THE LAW AND ETHICS OF LAWYERING 737 (2005). *See* James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 926 (1980) (stating that ethical norms can be violated with greater confidence in negotiation than in other contexts because there will likely be neither discovery nor punishment).

[35] Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 1 J. DISP. RESOL. 119, 123 (2007). The survey, on file with Professor Peters at the University of Florida Levin College of Law, defined material facts as "event, subject, and other specifics affecting deals or dispute resolutions that fraud law would consider actionable as going beyond puffing or acceptable exaggeration." *Id.* at n.28. When the general public is polled on their perception of lawyers, the response is troubling: according to an ABA poll, only one in five Americans considers lawyers to be "honest and ethical" and, furthermore, "the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower [his or her] opinion of them." Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 62.

[36] Steven D. Pepe, Standards of Legal Negotiations: Interim Report and Preliminary Findings (1983) (unpublished manuscript, on file with New York University Law Review), *cited in* Peters, *supra* note 35, at 123. *See also* Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 3 (1987) ("[I]t is against the rules for lawyers to lie, but their ability to deceive through other means is at least accepted and frequently applauded.").

lies that are often motivated by rational economic incentives inherent in certain kinds of negotiations, and that result from a strong desire to "win" by closing the deal with terms that are highly favorable to oneself or one's client.

The issues about which people lie and deceive during negotiations are many and varied. To name but a few, people lie about the following: (1) the current or future value (including long-term performance claims) of whatever is being discussed in the negotiation (whether it be goods, services, or something else); (2) one's goals, priorities or interests[37] in the negotiation;[38] (3) one's reservation point;[39] (4) one's best alternative option if a deal is not agreed upon;[40] (5) one's willingness, ability, or authority to negotiate or to reduce the deal terms to contract form; (6) the existence of objective standards[41] and how they might inform the negotiation; (7) one's own opinions or the opinions of clients, outside experts, or others; (8) the existence of other offers or competing bidders; (9) one's willingness or ability to go to trial; (10) promises (including commitments to future actions)[42] or threats made during the negotiation to entice (or coerce) the other party into agreement; and (11) the substantive strengths of one's lawsuit, or weaknesses of the other side's lawsuit.[43]

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[37] For example, "My client insists he wants custody of the children, although I might be able to talk him out of it if you let him have the house."

[38] *See* White, *supra* note 22, at 932 ("It is a standard negotiating technique in collective bargaining negotiating and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession."). *See also* CRAVER, *supra* note 16, at 284 ("Alert negotiators occasionally discover … that their opponents really desire an item that is not valued by their own client. When this knowledge is obtained, many bargainers endeavor to take advantage of the situation. They try to avoid providing the other side with this topic in exchange for an insignificant term. They instead hope to extract a more substantial concession. To accomplish this objective, they mention how important that subject is to their client and include it with their initial demands. If they can convince their opponents that this issue is of major value to their side, they may be able to enhance their client's position with what is actually a meaningless concession on their part.").

[39] In a negotiation, the reservation point is one's "bottom line," or the maximum amount that a buyer will pay for a good, service, or other legal entitlement. *See* Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791-94 (2000).

[40] This is also called one's Best Alternative to a Negotiated Agreement (or "BATNA"). FISHER ET AL., *supra* note 16, at 100 (defining BATNA as "the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.").

[41] Objective standards are outside, independent, third party experts or information sources that can help determine the value or worth of a deal component within a negotiation in a more objective fashion. For example, the objective standard used in valuing a used car might be the Kelley Blue Book.

[42] *E.g.*, "This stock will be worth $10,000 in a year from now."

[43] White, *supra* note 22, at 934 ("Everyone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of this opponent.").

A major difficulty, of course, is that although some lies (such as the existence of competing bidders or the substantive strength of a given lawsuit) can usually be proven false by consulting with independent sources and experts, many lies (such as a person's priorities, underlying interests, or reservation point) simply cannot be detected, unless one is good at mindreading.

II. Incentives to Lie in Negotiations: Sometimes Cheaters *Do* Prosper

Essentially, negotiation involves dividing a pie. The pie might be "fixed" in size, it might be shrinking, or it might be expanding in size (a process sometimes referred to as "value creation")—yet whatever the case may be, the pie must be ultimately divided,[44] hopefully producing a satisfactory outcome for all parties.[45] While some consider negotiation to be merely a "dance of concessions and a battle of wills,"[46] negotiation scholars, and those they teach, come to realize that the value-added of negotiation from a process perspective is the "potential to use creativity and mutual information exchange to produce deals that actually enlarge the size of the pie for the parties."[47] To be a truly fine negotiator, then, one must be skilled in both enlarging the negotiation pie (when such value creation is possible), and in claiming (at least) a fair portion of that pie.[48]

A. The dynamics of "zero-sum" v. "non-zero-sum" negotiations

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[44] *See* Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1, 90 (2007) ("All bargaining … is a lying game to some extent, and one in which adversarial behavior plays an inevitable role.") (footnote omitted).

[45] One negotiation scholar defines a satisfactory negotiation outcome as "one in which [the agreement reached]:

a) Is better than [one's] best alternative to a negotiated agreement (BATNA);
b) Meets one's interests very well, the interests of the other side acceptably, and the interests of any third parties who may be affected by the agreement at least tolerably enough to be durable;
c) Is the most efficient and value-creating of many possible sets of deal terms;
d) Is based on a norm of fairness or some objective standard, criterion, or principle that is external to the parties themselves;
e) Identifies commitments that are specific, realistic, and operational for both sides;
f) Is premised on clear and efficient communications; and
g) Improves or at least does not harm the relationship between the parties where 'relationship' is defined as the ability of the parties to manage their differences well."

Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1, 16-17 (2005).

[46] *Id.* at 17.

[47] *Id.*

[48] *See generally* MENKEL-MEADOW ET AL., *supra* note 16.

There are times when, no matter how creative the parties involved might be, the negotiation pie is a "fixed pie," *i.e.*, it cannot be enlarged.[49] Such a situation presents a classic "zero-sum"[50] negotiation, sometimes called a "distributive" negotiation. A good example is the negotiation involved in dividing ten dollars between two parties, both of whom equally value money, and both of whom need the money immediately.[51] Every dollar one party receives is a dollar the other party does not. Both sides will make strong efforts to win a fair share (or more)[52] of the ten dollars, knowing that nothing can be done to increase the size of the pie.

A non-zero-sum (sometimes called "positive sum" or "integrative") negotiation is one where both parties focus on expanding the negotiation pie without being concerned about dividing it up.[53] Consider the example of three friends who take a two-week vacation

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[49] *See* Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003) (discussing the "'integrative' possibilities present in *some* negotiations") (emphasis added); *see also* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (stating that one aspect of problem-solving negotiation "seeks *wherever possible* to convert zero-sum games into non-zero-sum or positive-sum games.)" (emphasis added).

[50] In game theory, a "zero-sum" situation is one in which every point (or dollar, cookie, etc.) gained by one party is a point lost by the other party, and vice versa, *i.e.*, one party's gains are the other party's losses. *See* ROGER B. MEYERSON, GAME THEORY: ANALYSIS OF CONFLICT (1997). For a discussion of negotiation as a zero-sum game, *see* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

[51] Robert Mnookin, Scott Peppet, and Andrew Tulumello point out that value is more likely created, and deals are more likely agreed upon, when there are differences in (1) resources ("A vegetarian with a chicken and a carnivore with a large vegetable garden may find it useful to swap what they have"); (2) relative valuation ("[I]f the two parties attach different relative valuations to the goods in question, trades should occur that make both better off"); (3) forecasts ("A singer who expects to draw a standing-room-only crowd might agree to a guaranteed fee based on 80 percent attendance, plus a percentage of any profits earned from higher attendance"); (4) risk preferences ("knowing that my family will face financial hardship if I die [might convince me to] pay the insurance company to absorb that risk"); and (5) time preferences ("Although a standard [apartment] lease would begin on the first of the month, Jim may need to move in earlier. If it is worth more to Jim to move in early than it costs Sara to move *out* early, they may agree to accommodate Jim's schedule in exchange for compensation to Sara"). ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 14-15 (2000). *See also* Mnookin, *supra* note 49, at 12.

[52] *See* Robert E. Thomas & Bruce Louis Rich, *Under the Radar: The Resistance of Promotions Biases to Market Economic Forces*, 55 SYRACUSE L. REV. 301, 301 n.143 (2005) ("Under distributive negotiation, the goal is to get the best deal for yourself by dividing the negotiation subject in a manner that is most favorable to your side regardless of how the division affects the other side.").

[53] Peters, *supra* note 29, at 31. *See also* David Brin, Ph.D., *Disputation Arenas: Harnessing Conflict and Competitiveness for Society's Benefit*, 15 OHIO ST. J. ON DISP. RESOL. 597, 597 n.23 (2000) ("'Positive sum' occurs when both sides in a game or conflict or negotiation realize that there are potential strategies under which both can win at the same time."); John G. Cross, *Negotiation as a Learning Process*, 21 J. CONFLICT RES. 581, 585 (1977) (describing the perspective that the bargaining process is a "mechanism for dividing the fruits of cooperation"); I. William Zartman, *Negotiation as a Joint Decision-Making Process*, 21 J. CONFLICT RES. 619, 622 (1977) (discussing negotiation as a "positive-sum exercise").

every summer. They are negotiating where to go this coming summer. One wants to hike and camp in the Rocky Mountains. Another wants to stay in a five-star hotel in Paris, France. The third person wants to spend the entire two weeks gaming in Las Vegas. After negotiating, the three decide to stay at the Paris Hotel in Las Vegas and hike and camp in nearby Red Rock. They have found an integrative solution that attempts to simultaneously meet (even if not perfectly) the underlying interests of all three people.

Next, consider the example of Matt, who throws his golf clubs on the table and says, "I'm tired of golf and want to stop playing." Matt's friend Sally says, "Well, I'm tired of writing novels," and hoists her laptop computer onto the same table. Matt then says, "Hey, I would like to write a novel!" And Sally says, "Hey, I would like to start playing golf!" They negotiate, and conclude by simply trading the computer for the golf clubs.[54]

B. The Negotiator's Dilemma

Even in the simple negotiation just concluded by Matt and Sally, parties must be mindful of the Negotiator's Dilemma. The Dilemma, which confronts every party at the start of every negotiation, is the following: "How much information should I reveal to the other party, and when should I reveal it?"[55] After all, one needs to disclose information to increase the size of the pie ("I want to stop playing golf, so let's negotiate a deal for my clubs"), and yet, simultaneously, he or she is concerned that particular pieces of information, if disclosed, might be used by another party to claim a larger share of that pie ("If you want to stop playing, then surely you'll sell your clubs for practically nothing. Would you accept ten dollars?").[56]

Professor Howard Raiffa, in a well-known series of lectures delivered at Harvard, argued that value creation in negotiation is maximized under conditions of "FOTE" (Full, Open, Truthful Exchange).[57] However, it appears that negotiating under conditions of FOTE is

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[54] *See* MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 2 (2d ed. 1993) ("The trading process is not a poker game in which one player wins what another loses; rather, it is a kind of joint undertaking which increases the wealth of both parties and from which both emerge with a measure of enhanced utility."); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1122, 1128-29 (1998) ("Two parties can maximize their total utility in the use of their separate resources when they trade assets and services.").

[55] *See* DAVID LAX & JAMES SEBENIUS, THE MANAGER AS NEGOTIATOR 154-82 (1986).

[56] Peters, *supra* note 29, at 48. *See also* MNOOKIN ET AL., *supra* note 51, at 17 ("[W]ithout sharing information it is difficult to create value, but when disclosure is one-sided, the disclosing party risks being taken advantage of."); *see also* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 68 (2000). ("[W]hen both parties fully disclose information, the chances for an excellent agreement rise dramatically because each better understands and can accommodate the other's needs. However, if only one of the parties discloses information, he or she becomes vulnerable to exploitation by the other. When neither party discloses, the chances for an effective agreement are dimmed because neither party knows what the other wants, and it is therefore difficult to explore 'win-win' options.").

[57] HOWARD RAIFFA, LECTURES ON NEGOTIATION ANALYSIS 6 (1997).

in tension with the Negotiator's Dilemma, and a negotiator must therefore balance how "full" and "open" to be, with how the information could potentially be used by other parties for exploitive purposes.

Fisher, Ury and Patton present the paradigmatic story of two sisters fighting over the last orange in the refrigerator. The parents, hearing enough, decide to cut the orange and give each sister half. It is later learned that while one sister was hungry and wanted only the *fruit* of the orange, the other sister was baking and wanted only the *zest*.[58] Fisher et al. argue that if each sister had been able to learn the "underlying interest" of the other, then both sisters could have gotten one hundred percent of what they wanted, instead of fifty percent.[59]

The orange story appears to bolster Professor Raiffa's advice for a "Full, Open, Truthful Exchange." This Article is suggesting that such advice needs to be critically examined and, at times, tempered—especially when other parties are willing to engage in lies and deception for strategic purposes.

Example One

Consider, for example, a similar orange negotiation between two sisters, Mary and Sally. Mary is hungry and wants only the fruit of the orange. Sally is baking and wants only the zest. If Mary is more mindful of the Negotiator's Dilemma, and if she is willing to lie for exploitive advantage, the following exchange could easily take place:

> Mary: I want the orange!
>
> Sally: I want the orange, too!
>
> Mary: Tell me what your underlying interests are—why do you want the orange?
>
> Sally: I'm baking, so I only want the zest.
>
> Mary: That's the only part I'm interested in as well. How about giving me the fruit, which I don't really want that much anyway, and also give me fifty cents. Then you can have the zest.
>
> Sally: Deal!

So Sally receives the zest, but Mary receives the fruit of the orange (which is all she wanted to begin with) and fifty cents on top of it (with which she could purchase yet

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[58] The "zest" is the outermost part of an orange, used for flavoring.

[59] FISHER ET AL., *supra* note 31, at 42.

another orange). The point is this: People lie in negotiations because it can be extremely effective.[60] In every negotiation, no matter how much value-creation occurs to increase the size of the negotiation pie, there comes a point at which that pie needs to be divided.[61]

Consider another example:

Example Two

Assume that Mr. Seller is negotiating to sell a house and that his reservation price (or "bottom line") is $90,000. He will not sell for less than that amount. Ms. Buyer wants to buy the house. Mr. Seller estimates that Ms. Buyer's ceiling price is $120,000. (By the way, Mr. Seller is exactly right regarding this piece of information, even though there's no way for him to confirm it). After negotiating for several weeks, Mr. Seller, by lying about a competing bid, ("Someone has just offered me $110,000!"), has persuaded Ms. Buyer that he will not sell the property for anything less than $110,000 (a figure that is $20,000 above his actual reservation price). They continue to negotiate and eventually split the difference between Mr. Seller's *perceived* reservation price ($110,000) and Ms. Buyer's *actual* reservation price ($120,000). With a final selling price of $115,000, Ms. Buyer is happy because she believes she has captured exactly half of the available surplus. Mr. Seller is extremely happy, believing (correctly) that he has captured $25,000 of the $30,000 surplus, and that he owes it all to his ability as an effective liar.

Now consider yet another example:

Example Three

An art gallery owner has a billionaire client looking for a particular portrait painted by the famed artist, Pigato. The painting will complete the billionaire's collection, and he is willing to pay $500,000 to any gallery that tracks it down. The next day, an impoverished art student walks into the art gallery carrying the very portrait being sought by the billionaire client. The gallery owner immediately recognizes the painting but effectively hides his glee from the student. The following exchange takes place:

> Art Student: I want to sell you this Pigato painting. It's a beloved family heirloom, but I need the money to buy food and medication for my sick grandmother.
>
> Gallery Owner: I might be interested even though I already have three other Pigato paintings currently hanging here in my gallery. According to

[60] Peters, *supra* note 35, at 138 ("Lies about non-monetized interests and priorities help deceivers claim value, but do nothing to create value. They help negotiators divide a pie favorably in their self-interests, but do nothing to expand a pie to benefit all"); *see also* Peters, *supra* note 29, at 40 ("In every negotiation each party has incentives for deception.").

[61] *See* Peters, *supra* note 29, at 40 ("[E]very negotiation has zero-sum elements.").

the OFFICIAL ART AUCTIONS BOOK OF THE WORLD,[62] the most recent auctions selling Pigato paintings, all held in the last two years, sold each of twelve different Pigato paintings, of various sizes and conditions, for somewhere between $2,000 and $3,000. I will therefore offer you $2,750 for the painting.

Art Student: Are you going to hang the painting here in the gallery and hope it sells, or have you already found a buyer for the painting?

Gallery Owner: We purchase paintings from people like you every single day and try to re-sell them as quickly as we possibly can. That's what our business is all about. Do we have a deal or not?

Art Student: OK, $2,750 sounds pretty good—it's a deal.

In the next section I analyze these three examples.

C. Drilling for Information

In Example One, with the orange, one party lied about her underlying interests (she said she wanted the orange's zest when in fact she only wanted the fruit). In Example Two, with the house for sale, one party lied about his best alternative to a negotiated agreement (BATNA).[63] (The party said he had a competing bidder when in fact he did not). In Example Three, the gallery owner did not lie—in fact, according to the working definitions of "lie" and "deception" set forth, *supra*, it could be argued that the gallery owner did not even engage in the (seemingly) lesser evil of deception. Rather, he successfully avoided responding to a question (sometimes called "blocking"[64]) asked by the art student ("Have you already found a buyer for this painting?") and the student failed to dig deeper for a response that would have addressed the question directly.

These three examples illustrate the difficulty in unearthing information necessary to prevent oneself from being exploited during negotiation, whether through lies, deception, or something approaching either one. In each example, how might one have continued to "drill deeper?" What kinds of questions could the duped person have asked to keep the conversation going, and keep the information flowing?

In Example One, the orange negotiation, Sally should have been suspicious when Mary went ahead and took the fruit, even though she had previously claimed she did not want the orange "that much anyway." Sally could have asked, "Why are you taking the orange

[62] This is a fictitious name for a comprehensive book on the art auction world that is similar to the Kelley Blue Book in the automobile world; the book will provide credible objective standards for the negotiation.

[63] *See* footnote 40, *supra*.

[64] *See* Paul F. Eckstein, *Article: Book Review: Seeking Negotiation's Cutting Edge*, 40 AZ ATTORNEY 11 (2004) (discussing various "blocking techniques" to avoid answering difficult questions).

if you aren't that interested in it?" Sally, who said she wanted the zest for baking, also could have asked Mary, "*Why* are you interested in the zest?" Because Mary was lying about wanting the zest, she may not have prepared an answer for such a question. Many times in a negotiation, simply asking "why?," sometimes repeatedly and in different ways,[65] can be an effective tool in getting at important information.

In Example Two, the sale of the house, Mr. Seller lies and says he has a competing bid for $110,000. At that point it was crucial for Ms. Buyer to ask questions about the competing bidder (*e.g.*, "Can we meet with this person? Can we meet with their realtor? Can you document the bid?") in order to ensure that the bid is not a lie. A comfortable and well prepared liar might have quick and confident sounding responses for such questions, but many people will not.

And in Example Three, the gallery situation, the art student asked an excellent question: "Have you already found a buyer for the painting?" The gallery owner was effective in "blocking" the question. The art student should have circled back and asked the same question until he received a satisfactory answer. Of course, the gallery owner could have lied in his initial response to the question by saying, "No, we don't have a buyer in mind. Hopefully we will find one soon." At that point, the art student could request that the gallery owner take the painting on consignment (*i.e.*, act as a broker instead of a cash purchaser in the deal—taking a percentage of whatever amount the painting is eventually sold for and passing the rest on to the art student). The gallery owner might well respond by saying he has a strict policy against doing so. At that point the art student might try to learn, through questioning the gallery owner, *why* that is the case—because not having good reasons for taking firm stances can tend to raise suspicions—and whether an exception could be made for that particular transaction.

The three examples illustrate the power of information in negotiation, and how important it is to attempt to dig up complete and accurate information throughout the process. As Professor Wetlaufer concludes in his seminal Article on the ethics of lying in negotiations:

> Two things … are clear. The most important is that we cannot say as a general matter that honesty is the best policy for individual negotiators to pursue if by "best" we mean most effective or most profitable. In those bargaining situations which are at least in part distributive, a category which includes virtually all negotiations, lying is a coherent and often effective strategy. In those same circumstances, a policy of never lying may place a negotiator at a systematic and sometimes overwhelming disadvantage. Moreover, there are any number of lies, including those involving reservation prices and opinions, that are both useful and

[65] Of course, one can ask "Why?" in countless ways, including, "Could you say a little bit more about that?" or "That's interesting, what do you mean by that?" or "How do you know that to be the case?"—basically, any statement, usually in the form of a question or request, that will keep the other party talking and providing information.

> virtually undiscoverable. Accordingly, if the policy we pursue is one of honesty, we must do so for reasons other than profit and effectiveness. The second point is that one who lies in negotiations is in a position to capture almost all of the benefits of lying while suffering only a small portion of the costs and that, in the language of the economists, this state of affairs will lead, almost automatically, to an overproduction of lies.[66]

The circumstances faced in many negotiations are similar to those faced in many Prisoner's Dilemma problems[67] wherein the incentive to "defect" (that is, to act self-interestedly rather than cooperatively) is very high: (1) the stakes are high in terms of potential gains and losses; (2) information regarding other negotiation parties is in short supply (or is nonexistent); and (3) neither side can predict with certainty whether or not the other side will defect (or in the case of negotiation, lie). Under such conditions, it has been suggested that "only saints and fools can be relied on to tell the truth."[68] This dynamic, however, might be altered if the amount of information flowing between the parties can somehow be increased. The information flow will increase if the parties are taught to engage aggressively and relentlessly in asking questions, seeking information, and digging for answers.

And yet, when attorneys engage in the rough and tumble behaviors that constitute "digging for answers," there is often a tension between honesty and less-than-honesty. On the one hand, the lawyer must be a strong advocate willing to do almost *anything* to prevail: in his famous defense of Queen Caroline, Lord Brougham implores counsel to

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[66] Wetlaufer, *supra* note 10, at 1230. (Of course, Professor Wetlaufer appears to ignore reputational consequences; *see* footnote 21, *supra*).

[67] Prisoner Dilemma problems enable one to think about situations (such as negotiations) in which each party must decide whether to act in a cooperative or a competitive manner toward the other party. The paradigmatic example plays out on TV nearly every night on various crime shows: two crime suspects are in jail awaiting trial for a crime they committed together. The prosecutor says to each suspect, "If you testify against your accomplice, I will give you less time in jail than if you do not testify." If neither party testifies (or defects), they each get two years in jail. If both parties testify, they each get three years. If just one party testifies, that person receives one year and the other receives four years. In such a two-person prisoner's dilemma, a player receives the greatest "payoff" if the other party remains loyal while she herself defects. The prisoner's dilemma serves as a model for certain situations in life in which "the pursuit of self-interest by each leads to a poor outcome for all." ROBERT AXELROD, THE EVOLUTION OF COOPERATION 7 (1984). *See also* RAIFFA, *supra* note 32, at 123-26.

[68] Wetlaufer, *supra* note 10, at 1233. *See also* RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 236 (2002) ("[I]t is intuitively appealing for negotiators to consider misrepresenting and obfuscating their preferences in an effort to claim a larger share of the cooperative surplus."); *see also* Kathleen M. O'Connor & Peter J. Carnevale, *A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 504, 507-13 (1997) (discussing a negotiation simulation in which twenty-eight percent of the subjects engaged in misrepresentation, either by lying or by failing to correct a statement made by the other party. On average, negotiators who misrepresented earned higher scores than those who did not, and 23 of the 25 misrepresenters earned a higher score than their counterpart). *See generally* Scott R. Peppet, *Mindfulness in the Law and ADR: Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002).

"save the client by all means and expedients, and at all hazards and costs to other persons" and to disregard "the alarm, the torments, the destruction which he may bring upon others" in so doing.[69] On the other hand, the Model Rules of Professional Conduct remind lawyers they are "officer[s] of the legal system" and "public citizen[s] having special responsibility for the quality of justice."[70] Toward this end, lawyers are to be fair with opposing parties and opposing counsel,[71] and they are not to make materially false statements to others.[72] There is clearly a similar tension endemic to negotiation:

> Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.
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> Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that *a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position…* To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.[73]

On the one hand, exhibiting cooperative behaviors during a negotiation (including sharing information, brainstorming ways to meet all parties' underlying needs,[74] and

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[69] Statement of Lord Brougham, 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1821), *quoted in* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976). *See also* Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Content*, 41 J. LEGAL EDUC. 29, 29 (1991); *see also Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEX. L. REV. 1003, 1020 (2007) (discussing how, in the context of both mediation and negotiation, the "paradigm of adversarialism … overshadows other approaches."); *see also* RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED 165 (1999) ("A fundamental tenet of the adversary theorem is that lawyers need not be completely candid with the other side.").

[70] MODEL RULES OF PROF'L CONDUCT PREAMBLE (2002).

[71] MODEL RULES OF PROF'L CONDUCT R. 3.4 (2002).

[72] MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002); *see also* ZITRIN ET AL., *supra* note 69, at 3 ("Every day, American lawyers in a wide variety of practices face competing ethical principles—among the most important the choice between representing a client's interests diligently and being truthful in one's words and deeds.").

[73] White, *supra* note 22, at 928 (emphasis added).

[74] ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTE 37 (2000); *see also* STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 303 (2003).

making trades[75] leading to gains for all parties[76]) can allow for effective value creation, for the creation of a "bigger pie." On the other hand, when it is time to divide that pie, the more distributive aspects of negotiation (including bluffing, puffing and lying[77]) can ensure one receives a larger share of that pie.[78] How does one manage that tension?[79] How can one be a truly effective negotiator in terms of growing the largest pie possible, yet still be committed to fairness, ethics, and integrity when the time comes for pie-splitting? Many scholars have concluded that while this tension cannot be completely resolved, it can be managed.[80] The goal of negotiation becomes creating an environment, designing a process, and implementing behaviors that allow value creation to occur where possible, while simultaneously being aware of (and thereby minimizing) risks for exploitation.[81]

III. Rules Regarding Truthfulness

One scholar of negotiation ethics declares that, "In negotiation, people who rely on the letter of legal rules as a strategy for plotting unethical conduct are very likely to get into deep trouble. But people who rely on a cultivated sense of right and wrong to guide them in legal matters are likely to do well."[82] Perhaps an understanding of the "legal rules" on truthfulness can play a foundational role in developing such a "cultivated sense of right and wrong." With that in mind, the starting point for exploring ethical norms governing

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[75] *See generally* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. (1991).

[76] It is clear that "differences are often more useful than similarities in helping parties reach a deal" because it is differences that "set the stage for possible gains from trades." Robert Mnookin, Scott Peppet & Andrew Tulumello, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 14 (2000).

[77] *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 633 (2006) (discussing the motivation for "strategic bargaining behaviors" such as the assertion of excessive valuations, deliberate misrepresentation, "hard" bargaining, calculated delay, obstruction, and other "noncooperative" behaviors).

[78] *See also* JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 15 (1975) ("To sustain the bargaining relationship, each party must select a middle course between the extremes of complete openness toward, and deception of, the other. Each must be able to convince the other of his integrity while not at the same time endangering his bargaining position.").

[79] James J. White states that the paradox of the lawyer's goal in negotiation is how to "be fair but also mislead." White, *supra* note 22, at 928.

[80] MNOOKIN ET AL., *supra* note 74, at 27.

[81] *Id.*

[82] G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 SLOAN MGT. REV. 93, 99 (1991).

lying and deception in negotiations is Rule 4.1[83] of the ABA Model Rules of Professional Conduct.[84] The Rule provides:

> 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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[85]

Rule 4.1 (a), then, applies only to statements of *material* fact or law that the lawyer *knows* to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

Within the context of truthfulness in negotiation, whether the topic of inquiry is misrepresentations, half-truths,[86] or nondisclosure, the focus nevertheless centers on the

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[83] Rule 4.1 only governs lying and deception by lawyers. The Article quickly moves to a broader discussion of common law fraud, which, of course, applies to lawyers and non-lawyers alike.

[84] Model Rule 8.4, which is a bit more general than Model Rule 4.1, broadly proscribes lawyers from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." In a Formal Opinion, the ABA's Standing Committee on Ethics and Professional Responsibility states that Rule 8.4(c) "does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a)." ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-439 n.2. Nevertheless, Model Rule 8.4(c) "can and has been invoked" to ensure lawyers comply with their duties "to be honest and fair in negotiation." Menkel-Meadow, *supra* note 8, at 137-38.

[85] MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002).

[86] A half-truth is a statement that, although technically accurate, is nonetheless misleading in some way. As stated in the Restatement (Second) of Torts, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." RESTATEMENT (SECOND) OF TORTS § 529 (1976). Similarly, the Restatement (Second) of Contracts states that "[a] statement may be true with respect to the facts stated, but may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts." RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. b (1979). *See also* William B. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, *24 (1956)* ("While silence alone may not be actionable, if the vendor undertakes to speak, he must not conceal anything which would tend to qualify or contradict the facts which he had stated. In other words, to tell half of the truth is to make a half-false representation."); Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences By Investors and Others*, 52 STAN. L. REV. 87, 87 n.34 (1999) ("[M]ost treatises assume that the half-truth doctrine is simply a species of actionable nondisclosure.").

same two components: *statements* and *omissions*.[87] Even though Rule 4.1 prohibits false statements of material fact, it has generally been interpreted to permit misrepresentations with respect to estimates of price or value, and with respect to a party's intentions as to an acceptable settlement—*i.e.*, what amount of money or other benefits would make for an acceptable "deal."[88] The official commentary states:

> 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….[89]

The prohibition of Model Rule 4.1 against lying about material facts is similar to substantive doctrines of fraud.[90] One legal ethics scholar points out that state legislatures, courts, and other regulatory bodies (such as the American Law Institute and the National Conference of Commissioners on Uniform State Laws) have been expanding the meaning and scope of fraud law in the United States.[91]

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[87] *See* Langevoort, *supra* note 86, at 96 ("Just as there is no clean distinction between classic misrepresentations and half-truths, neither is there one between half-truths and nondisclosure. … Almost all nondisclosure cases arise in bargaining settings where there is indeed much said between the parties. Under these circumstances, what the court is being asked to do is determine what inferences the buyer can fairly draw from the seller's statements and omissions.") (Citations omitted).

[88] Note, however, that while one is permitted to make misrepresentations to opposing counsel on these matters, one is nevertheless forbidden from lying to a *judge* on these same matters; states the ABA's formal opinion on the issue: "The proper response by a lawyer to improper questions from a judge [on such matters] is to decline to answer, not to lie or misrepresent." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370.

[89] MODEL RULES OF PROF'L CONDUCT R. 4.1 CMT. (1995). Note, moreover, that care must be taken by a lawyer to prevent communications from being conveyed in language that converts them, even inadvertently, into false factual representations. "For example," states the ABA Standing Committee on Ethics and Professional Responsibility in one of its formal opinions, "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." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006) (emphasis added).

[90] *See* Langevoort, *supra* note 86, at 91 ("Fraud is about human discourse, which is necessarily contextual and fact-specific.").

[91] Menkel-Meadow, *supra* note 8, at 141. Reflecting these trends, the Ethics 2000 Commission amended the comments to Model Rule 4.1 to state that a misrepresentation can occur if the lawyer "incorporates or affirms" a statement of another person that the lawyer knows is false, or if the lawyer makes "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." MODEL RULES OF PROF'L CONDUCT R. 4.1 CMT. 1 (2004). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000), including several sections dealing with appropriate negotiation behavior and disclosure requirements; *see, e.g.*, Sections 66 (Disclosure of Information to Prevent Death or Bodily Harm), 67 (Using or Disclosing Information to Prevent, Rectify or Mitigate Substantial Financial Loss), and 98 (Statements to a Non-Client).

Common law fraud requires five elements: (1) a false representation of a material fact made by the defendant; (2) with knowledge or belief as to its falsity; (3) with an intent to induce the plaintiff to rely on the representations; (4) justifiable reliance on the misrepresentation by the plaintiff; and (5) damage or injury to the plaintiff by the reliance.[92] Victims can avoid the deal in contract fraud, or they can sue in tort fraud for damages.[93]

A. The Duty of Disclosure

Generally, the law does not impose a duty on negotiating parties to disclose information that is harmful to their respective positions,[94] thereby burdening all parties to conduct their own background research, vigorously question their negotiation counterpart(s), and take other proactive steps to unearth or extract such information. In some cases, however, the courts have imposed a duty to disclose. Professor Nicola Palmieri has identified the following seven circumstances in which the courts have recognized a duty to disclose:[95]

(1) all material facts that have been actively concealed must be disclosed;[96]
(2) prior statements that are later discovered to be (or turn out to be) false must be corrected;[97]

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[92] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 107-09 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS 525, 531 (1977). Calamari & Perillo state the five elements more succinctly: (1) representation; (2) falsity; (3) scienter; (4) deception; and (5) injury. *See* JOHN D. CALAMARI & JOSEPH PERILLO, THE LAW OF CONTRACTS 9.13 at 326 (4th ed. 1998).

[93] According to Calamari and Perillo, tort damages are usually more difficult to prove than mere restitution: "[I]nasmuch as [restitution] is designed merely to restore the situation that existed prior to the transaction, it is not surprising that the requisites necessary to make out a case for restitution are far less demanding than those necessary to make out a tort action." CALAMARI ET AL., *supra* note 92, at 326.

[94] *See* JOHN D. CALAMARI & JOSEPH PERILLO, THE LAW OF CONTRACTS 9.20 at 337-40 (4th ed. 1998). *See* Mitchell Energy Corp. v. Samson Res. Co., 80 F.3d 976 (5th Cir. 1996) (absent special relationship, no duty to disclose information about gas well).

[95] *See* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 120, 125-141 (1993).

[96] Concealment usually occurs when one party actively attempts to hide the true facts from the other party or parties by using some kind of trick intended to prevent discovery of (or inquiry into) the concealed fact. *See, e.g.*, Hays v. Meyers, 107 S.W. 287, 289 (Ky. 1908); Patten v. Standard Oil Co., 55 S.W.2d 759, 761 (Tenn. 1933).

[97] Even if the original representation was in fact true (or was believed to be true by the speaker) at the time it was communicated, if later events make that original statement false, or if the speaker learns that the original statement he or she made was in fact false, then there is a duty to disclose this information to correct the original representation. *See* KEETON ET AL., *supra* note 92, at 696-97.

(3) if one undertakes voluntarily (or in response to inquiries) to speak on a matter, then "full and fair" disclosure is required;[98]

(4) all material facts must be disclosed when there is a fiduciary or confidential relationship between the parties;[99]

(5) superior material information concerning a transaction must be disclosed when the other party cannot reasonably discover the information and is under a mistaken belief with regard to it;[100]

(6) all material facts must be disclosed in the formation of insurance and suretyship contracts;[101] and

(7) all material facts must be disclosed as required by statute[102]

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[98] Even when there is no duty to disclose, if a party *volunteers* to speak, or if a party speaks in response to questions, then the response must be "full and fair." This rule was set forth by the California Supreme Court: "Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure … . Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action." Pashley v. Pac. Elec. Co., 153 P.2d 325, 330 (Cal. 1944).

[99] Generally, courts have held that sophisticated businesspeople negotiating arm's length business deals are not fiduciaries and therefore are not required to provide full disclosure of all material facts related to the transaction; *see, e.g.*, The Original Great Am. Chocolate Chip Cookie v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992) (stating that parties to a contract are not fiduciaries to each other). However, courts have recognized numerous other confidential or fiduciary relationships requiring full disclosure, including relationships between: employer and employee (*see, e.g.*, U.S. v. Margiotta, 688 F.2d 108, 124 (2d. Cir. 1982)); family members (including people engaged to be married) (*see, e.g.*, U.S. v. Ressler, 433 F. Supp. 459, 464 (S.D. Fla. 1977)); attorney and client (*see, e.g.*, Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d. Cir. 1976)); stockholders and officers of the corporation (*see, e.g.*, Davis Bluff Land & Timber Co. v. Cooper, 134 So. 639, 641 (Ala. 1931)); joint purchasers (*see, e.g.*, Walker v. Pike County Land Co., 139 F. 609, 611 (8th Cir. 1905)); joint owners selling jointly owned property (*see, e.g.*, Upton v. Weisling, 71 P. 917, 920 (Ariz. 1903)); joint venturers (*see, e.g.*, Stevens v. Marco, 305 P.2d 669, 679 (Cal. Dist. Ct. App. 1956)); physician and patient (*see, e.g.*, Nardone v. Reynolds, 538 F.2d 1131, 1135 (5th Cir. 1976)); priest and parishioner or rabbi and congregation (*see, e.g.*, Finegan v. Theisen, 52 N.W. 619, 622 (Mich. 1892)); and principal and agent (*see, e.g.*, A.B.C. Packard, Inc. v. Gen. Motors Corp., 275 F.2d 63, 69 (9th Cir. 1960)).

[100] The duty to disclose is particularly compelling when one party has superior knowledge and the unknowing party has been induced to take action it otherwise might not have taken; *see, e.g*, Mann v. Adams Realty Co., Inc., 556 F.2d 288, 297 (5th Cir. 1977).

[101] The concern is the inequality of knowledge between the parties, which forces the insurer to rely on the information provided by the insured when assessing risk. Note that courts have held that a change in circumstances after the policy has been issued nonetheless requires the insured to inform the insurer of said change, provided it was substantial and would have led the insurer to cancel the policy or increase premiums if the insurer had known about the risk. *See* Weems v. Am. Sec. Ins. Co., 450 So. 2d 431, 436 (Miss. 1984).

[102] For example, section 158(d) of the National Labor Relations Act addresses issues of good faith as it relates to collective bargaining: "[T]he employer and the representative of the employees [will] meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement … ." 29 U.S.C. § 158(d) (1988 & Supp. IV 1992). Congress, too, has mandated a duty to disclose in various consumer protection statutes, *e.g.*, the Interstate

Professor Palmieri argues that these seven exceptions to the general rule that a party may remain silent have been used "in an ever widening array of circumstances," to the point that "the exceptions have almost subsumed the rule of nondisclosure."[103] Indeed, she believes the exceptions are broad enough "that a resourceful judge can almost always find a way to fit the facts of a case within the confines of one of the exceptions."[104] Other scholars have suggested that this area of law is quite murky and that even a list of exceptions such as Professor Palmieri's might not be particularly useful for predictive purposes:

> [N]umerous legal commentators have analyzed the law of fraudulent silence (also referred to as actionable nondisclosure or actionable silence) in an attempt to identify some guiding principle that will rationalize the cases and generate accurate predictions of how courts will rule. Although some commentators point to various specific factors (for example, whether the withheld information related to a latent defect or whether the litigating parties were in a confidential or fiduciary relationship) that courts consider either alone or in some combination, others conclude that courts provide no useful rule of law.[105]

Adding more murkiness still is the notion that there is a privilege of "deserved informational advantage" that can act as a limit on the duty to disclose.[106] Essentially, the advantage is gained by any party willing to invest time and effort into acquiring information through investigation, research and analysis.[107] Professor Alan Strudler states:

> [O]ther things being equal, the more value one brings to the bargaining table, the more one may fairly insist upon as return. … According to the deserved advantage principle account, a buyer's acquisition of information that increases the value of the object being sold in a negotiation warrants

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Land Sales Full Disclosure Act, 15 U.S.C. § 1701-20 (1982); the Truth-in-Lending Act, 15 U.S.C. § 1601-65 (1982); and the Securities Exchange Act of 1934, 15 U.S.C. § 78a-78kk (1988).

[103] Palmieri, *supra* note 95, at 125.

[104] *Id.*

[105] Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1797 (2005). *See* Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 407 (1995) (discussing the law of fraud, including the law of fraudulent silence, and noting that "there does not seem to be any factor which accurately predicts which policy a particular court will find determinative in a particular case, other than the merits of the case.").

[106] Langevoort, *supra* note 86, at 97.

[107] Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 419-20 (1999) (discussing deserved informational advantages in securities trading).

> some additional measure of bargaining strength, and a privilege of buyer nondisclosure…protects the buyer in getting a fair return on the valuable information that she brings to the table.[108]

Consider the buyer who, through diligent investigation, learns the seller's property has been underpriced. Should the buyer have to disclose this information? Professor Donald Langevoort suggests the answer to that and similar questions, though perhaps not always clear-cut, appears to be gaining clarity: "Though the law of nondisclosure is fluid and fuzzy, there is widespread recognition that parties to a negotiation are privileged to withhold at least some crucial information from the other, lest there be a disincentive to the socially beneficial production or discovery of that sort of information."[109]

A further limit on the duty to disclose is woven into Model Rule 4.1(b), which requires disclosure of 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."[110] This "unless" clause imposes a fairly major limitation on disclosure because Rule 1.6(a) forbids a lawyer from revealing confidential client information "unless the client gives informed

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[108] Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337, 374-74 (1997). Professor Strudler adds: "The commercial world teems with…intermediaries or middlemen, from jobbers and distributors to stockbrokers and real estate agents. A financial intermediary is a bargain hunter; whether searching garage sales for impressionist works of art or inexpensive farm land for mineral deposits, she seeks to buy low and sell high. A bargain hunter's job involves exploiting a seller's lack of knowledge." *Id.* at 345. *See also* Anthony Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUDIES 1 (1978) (putting forth an economics based argument about disclosure and information incentives). *But see* Robert L. Birmingham, *The Duty to Disclose and the Prisoner's Dilemma: Laidlaw v. Oregon*, 29 WM. & MARY L. REV. 249 (1988) (criticizing Kronman's economic analysis and arguing that he gets the law of unilateral mistake wrong).

[109] Langevoort, *supra* note 86, at 89-90. Professor Langevoort later states, "The goal of the law here is … to promote efficiency without chilling the incentive people have to produce or discover useful data. Intuitively, this suggests a line that compels disclosure of important but costly-to-obtain information, but with a prima facie privilege of nondisclosure for facts or inferences that are the product of something akin to skill or diligence." *Id.* at 95. *See also* Kronman, *supra* note 108, at 1 (arguing that socially valuable "deliberately acquired information" will disappear if those who obtain it through costly research are forced to share it with other parties); Deborah A. DeMott, *Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions*, 19 DEL. J. CORP. L. 65 (1994) (arguing the law of nondisclosure is fairly fluid, making abstract synthesis quite difficult). Professor Langevoort offers an interesting refinement in this area of the law, centered around the degree of *trust* between two negotiating parties:

> If there is in fact little or no trust between two parties—a truly adversarial setting—it is difficult to justify the [half-truth] doctrine at all. At least ex ante, I suspect that in these settings parties will often prefer a default rule of mere technical accuracy, with its reduced risk of ex post litigation….Conversely, we should expect that negotiations characterized by a high degree of trust should lead to an upward adjustment: a broad half-truth doctrine, one with little privilege to conceal once a matter is addressed at all. In other words, addressing a matter would fully waive the privilege not to disclose.

Langevoort, *supra* note 86, at 98.

[110] MODEL RULES OF PROF'L CONDUCT R. 4.1(B) (2002) (emphasis added).

consent."[111] It follows that if a client instructs the lawyer to keep certain information secret, Rules 1.6 and 4.1 (b) work together to require the lawyer to follow those instructions, effectively limiting disclosure.[112]

In summary, in trying to elucidate the complicated and important duty of disclosure in the context of negotiation, I strongly concur with Professor Langevoort's concise characterization of the current state of the law: "fluid and fuzzy."[113]

B. Good Faith Requirement (or Lack Thereof) and Puffing

In turning to contract law, the general view appears to be that negotiations are excluded from coverage of good faith and fair dealing concepts. The UCC[114] and the Restatement (Second) of Contracts[115] both apply the concept of good faith to the "performance" and "enforcement" of contracts, but neither makes reference to precontractual negotiations. Given that background, most courts have refused to find good faith obligations in precontractual negotiations.[116] However, although there might not be a general duty of

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[111] MODEL RULES OF PROF'L CONDUCT R. 6.1(A) (2004).

[112] Of course, the Comment to Rule 1.6 also makes clear that lawyers must withdraw from representation rather than allow their services to be used to further a fraud. And Model Rule 8.4(c) similarly provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Any attorney placed in such a situation by his or her client may feel compelled to withdraw, unless the attorney can convince the client that disclosure is the more reasonable course of action. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 CMT. 14 (2004) ("If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1)."). *See also* MODEL RULES OF PROF'L CONDUCT R. 8.4(C) (2004).

[113] Langevoort, *supra* note 86, at 89-90

[114] *See* U.C.C. § 1-304 (2001).

[115] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 CMT. C (1979).

[116] *See, e.g.*, Four Nines Gold, Inc. v. 71 Constr., Inc., 809 P.2d 236 (Wyo. 1991); Local 900, Union of Paperworkers Int'l v. Boise Cascade, 713 F. Supp. 26 (D. Me. 1989). At least one scholar argues that neither the UCC nor the Restatement *precludes* the application of good faith and fair dealing to precontractual negotiations, noting that "although the U.C.C. and Restatement (Second) of Contracts imply a duty of good faith and fair dealing only in contract performance, one cannot infer from this that there is no precontractual duty of good faith and fair dealing. The Restatement (Second) of Contracts and, to a lesser extent, the U.C.C., contemplated the potential application of the duty of good faith and fair dealing to contract negotiations and did not intend, by negative inference, to foreclose such application." Palmieri, *supra* note 95, at 90-91. She later states: "Any attempt to characterize the duty of good faith as merely contractual and thus to deny the existence of the duty when there is no contract is unsustainable because the duty of good faith exists before any contract is ever entered into. … The duty of good faith belongs to the prevailing practices of the community of people and their notions as to what constitutes the general welfare. It is a duty permanently present whenever human beings deal with each other. A breach of this duty is contrary to public policy and contra bonos mores as these concepts are understood by the community. A man of probity and intelligence knows that the practices and opinions of his fellow men, practices and opinions in the midst of which he was born and by which his own mind and conscience have been formed and educated would not let breaches of good faith prevail." *Id.* at 105.

"good faith" in commercial negotiations, duties to one's negotiating counterpart, as well as to various third parties, have nevertheless been increasing, and lawyers should be mindful of these changing standards.[117]

At the same time, there has been a *decrease* in some of the duties, such as the duty to investigate, that traditionally burdened parties on the *receiving* end of a negotiation information exchange. Historically, in order to recover for fraud based upon a misrepresentation or an omission, a party had to show that it had no knowledge of the concealed facts, and that the true facts would have been difficult to discover through reasonable diligence. In other words, reliance on a misrepresentation was not reasonable when the plaintiff could have, through reasonable diligence, learned the truth.[118] The modern trend, however, has been to lessen this duty to investigate; parties now have greater entitlement to rely upon a representation made by another party in a negotiation, without being burdened with a corresponding duty to investigate. Professor Palmieri sums it up by saying, "While the traditional view enforced the concept of caveat emptor, or let the buyer beware, cases following the modern trend impose a new standard: caveat mendax, or let the liar beware."[119]

There has also been increasing scrutiny of lawyers' good-faith participation in various court-annexed negotiations, including pre-trial conferences, early neutral evaluation, mediation, and other court-mandated processes designed to encourage parties to settle

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[117] For example, some courts have begun to increase the circle of liability (including malpractice claims) to protect third parties who rely on what lawyers say to each other. *See, e.g.*, Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. TEX. L. REV. 1147 (1996) (discussing cases where lawyers have been found to owe a duty of care to individuals outside the traditional attorney-client relationship in matters ranging from estate planning, to family law, to the representation of partnerships and corporations). Mr. Mallen concludes that lawyers' duty to non-clients continues to expand: "In states where no duty was recognized in the past absent privity of contract, courts are now beginning to recognize a duty owed to an intended beneficiary of the attorney-client relationship. In those states that have acknowledged a concept of expanded privity, the rules governing the exception are becoming well defined, though still developmental." *Id.* at 1166. *See also* Sections 2.3 ("Duty of Fair-Dealing) and 4.3 ("Fairness Issues) in the Ethical Guidelines for Settlement Negotiations published by the ABA's Section of Litigation. While the guidelines aspire to levels of candor and fair dealing that surpass those set forth in the Model Rules of Professional conduct, their overall impact on negotiation behavior is unclear; the preamble to the document states its provisions 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 of Professional Conduct, and should not serve as a basis for liability, sanctions or disciplinary action." AM. BAR ASS'N SECTION OF LITIGATION, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (2002) [hereinafter ABA GUIDELINES].

[118] *See, e.g.*, Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 287 (9th Cir. 1988).

[119] Palmieri, *supra* note 95, at 148. Professor Palmieri concludes that "[t]here has been a slow but steady trend away from caveat emptor towards an application of higher standards of good faith, fair dealing, and morality to all contracts and transactions. The doctrine of caveat emptor is being abandoned and the rule that negotiations must be conducted with openness and in good faith is being affirmed." *Id.* at 120. *See* Harris v. M. & S. Toyota, Inc., 575 S. 2d 74, 78 (Ala. 1991) (suggesting a move away from the doctrine of caveat emptor, and toward the more modern trend that parties should be able to rely on representations that are not patently false); Formento v. Encanto Bus. Park, 744 P.2d 22, 27 (Ariz. Ct. App. 1987) (buyer can rely on representation that was put forth and has no duty to conduct independent investigation).

disputes without having to go to trial. Lawyers have been sanctioned for failing to participate or for participating in bad faith.[120] Even outside the confines of a court-annexed program, certain "bad faith" negotiation behaviors can by addressed by the courts. The matter may be actionable, for example, if a party is using the negotiation process to gain access to trade secrets,[121] or merely for delay.[122]

There is a difference, of course, between a factual representation and mere praise or opinion —known as "puff." Securities law, the common law of contracts, and the common law of torts all permit puffing. General commercial law also allows for puffing. For example, section 2-313 of the UCC provides that an express warranty is created "by any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the 'basis of the bargain.'" Section 2-313 (2) provides, however, that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[123] These latter affirmations fall in the category of "puffs." It can be difficult to draw a distinction between permissible puffing[124] and impermissible factual misrepresentation constituting fraud.[125] Indeed, a leading hornbook on the UCC declares, "[A]nyone who says he can consistently tell a 'puff' from a warranty is a fool or a liar."[126]

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[120] *See, e.g*., G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d. 648 (7th Cir. 1989) (holding that the district court did not abuse its discretion in sanctioning a corporation for failing to send a representative to a pretrial settlement conference, as such a burden was not out of proportion to the benefits to be gained by both the litigants and the court).

[121] *See, e.g*., Smith v. Snap-On Tools Corp., 833 F.2d. 578 (5th Cir. 1988).

[122] *See* Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 74, 135-36 (1985) (discussing how negotiating solely for delay, or to burden a third party, resembles the tort of abuse of process).

[123] *See* U.C.C. § 2-313 (1995).

[124] *See* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156 (Tex. 1995) (holding that manager's statement that building for sale was "superb," super fine," and "one of the finest little properties" in the city was "puffing" and opinion rather than misrepresentation of fact); Cohen v. Koenig, 25 F.3d 1168 (2d. Cir. 1994) (statements are "puffery" or opinions regarding future events, and therefore do not constitute fraud); Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 955 F.2d 1043 (6th Cir. 1992), (mere "sales talk" and "puffing" do not reach the level of fraud).

[125] *See* Garrett v. Mazda Motors of Am., 844 S.W.2d 178 (Tenn. Ct. App. 1992) (salesperson's representation to buyer that car had been used mainly by salesperson and had been "babied to death" when the car had actually been stolen and driven 10,000 miles by the car thief, was deemed fraud rather than mere puffery); Melotz v. Scheckla, 801 P.2d 593 (Mont. 1990) (express warranty created by using the words "good running condition"); Pake v. Byrd, 286 S.E.2d 588 (N.C. Ct. App. 1982) (express warranty created by using the words "good condition").

[126] JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 9.4, at 335 (4th ed. 1995). *See* Charles Pierson, *Does "Puff" Create an Express Warranty of Merchantability? Where the Hornbooks Go Wrong*, 36 DUQ. L. REV. 887 (1998) (arguing that "numerous decisions have found that statements that hornbooks would label 'puff' create express warranties"); *see, e.g*., Ellmer v. Dela. Mini-Computer Sys.,

In summary, in trying to determine whether, and to what extent, there exists a duty of good faith and fair dealing within the context of negotiation, I would characterize the current state of the law as fairly muddled. Through the murkiness one can nevertheless conclude the following: Though the duty does not rise to one of good faith and fair dealing, negotiators are nevertheless subject to a somewhat lesser duty of care, and they are currently being penalized for certain "bad faith" behaviors such as using negotiation merely for delay or to gain access to trade secrets. Moreover, it is clear that parties can now more readily rely upon representations made during a negotiation, and their corresponding duty to investigate has been decreased. Finally, when it comes to providing praise or opinion through negotiation "puffing," it can be quite difficult to draw a distinction between permissible puffing and impermissible factual misrepresentation constituting fraud. Together, all of this suggests there remains a good deal of haze and confusion regarding truthfulness rules and standards in law.

To help confirm this somewhat grim conclusion using more empirically-based information, I conducted a survey modeled on a survey from twenty years ago. Data generated from my current survey suggests that confusion over truthfulness rules and standards not only exists, but has actually *increased* during the last twenty years.

IV. Disagreement and Confusion Regarding Truthfulness Rules and Standards

A. The 1988 Survey

An Article published twenty years ago entitled "*In Settlement Talks, Does Telling the Truth Have Its Limits?*" illustrates the differences of opinion among lawyers regarding truthfulness standards in negotiation.[127] The Article's author, Larry Lempert, surveyed fifteen lawyers, asking them how they would respond to four negotiation situations presenting various ethical challenges. The survey participants included eight law professors, five practicing lawyers, a federal judge, and a U.S. magistrate.[128]

There was strong consensus among the participants on only one of the four questions asked in the survey. Following are the four situations, as well as a listing of how the participants responded—*i.e.*, did they respond with "yes," "no," or "qualified" (meaning a response that was more qualified or tentative than a straightforward "yes" or "no"):

Situation 1: Your clients, the defendants, have told you that you are authorized to pay $750,000 to settle the case. In settlement negotiations after your offer of $650,000, the plaintiffs' attorney asks, "Are you authorized to settle for $750,000?" Can you say, "No I'm not"? Yes or no and please explain.

Inc., 665 S.W.2d 158 (Tex. Ct. App. 1983) (warranty created by describing a computer with the words "first class").

[127] *See* Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 INSIDE LITIGATION 1 (1988).

[128] *Id*. at 15.

Yes: Seven No: Six Qualified: Two

Situation 2: You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing? Yes or no and please explain.

Yes: One No: Fourteen Qualified: None

Situation 3: You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did? Yes or no and please explain.

Yes: Five No: Eight Qualified: Two

Situation 4: In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression? Yes or no and please explain.

Yes: Nine No: Four Qualified: Two

B. The 2008 Survey

Given that two decades have passed since Lempert's work was conducted, I thought it would be helpful to send out another survey. I mailed out the *same* four ethically challenging situations to thirty lawyers throughout the country to see if, twenty years later, there might be greater consensus in the answers given. The survey participants included eight law professors, twenty-one practicing lawyers, and a federal judge.[129]

[129] Survey results are on file in my office at the William S. Boyd School of Law. The lawyers filling out the questionnaires are friends of mine that I met during law school and during my fifteen year career in various law-related jobs (including law clerk, federal government attorney, Hewlett Fellow in conflict resolution, and law professor). My friends, in turn, sent the questionnaire to attorney friends of their own—people I have never met. While the lawyers who responded work in varied practice areas, work in both the public and private sectors, and live in states throughout the country, the survey could hardly be called a valid empirical study, just as the individuals responding to the survey could "hardly be called a sample of anything other than lawyers … who were willing to share their observations." Peters, *supra* note 35, at 119 n.12. *See also* Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor,* 138 U. PA. L. REV. 761, 761 n.4 (1990). Nevertheless, the 1988

Following is a listing of how the participants responded (together with the results from 1988). Both raw numbers and percentages are included, for the sake of comparison:

Situation 1: Your clients, the defendants, have told you that you are authorized to pay $750,000 to settle the case. In settlement negotiations after your offer of $650,000, the plaintiffs' attorney asks, "Are you authorized to settle for $750,000?" Can you say, "No I'm not"? Yes or no and please explain.

Year 1988: Yes: Seven (47%) No: Six (40%) Qualified: Two (13%)

Year 2008: Yes: Eight (27%) No: Eighteen (60%) Qualified: Four (13%)

Situation 2: You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing? Yes or no and please explain.

Year 1988: Yes: One (7%) No: Fourteen (93%) Qualified: None (0%)

Year 2008: Yes: Six (20%) No: Twenty (67%) Qualified: Four (13%)

Situation 3: You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did? Yes or no and please explain.

Year 1988: Yes: Five (33%) No: Eight (53%) Qualified: Two (13%)

Year 2008: Yes: Seven (23%) No: Twenty-two (73%) Qualified: One (3%)

Situation 4: In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression? Yes or no and please explain.

Year 1988: Yes: Nine (60%) No: Four (27%) Qualified: Two (13%)

Year 2008: Yes: Twenty-two (73%) No: Seven (23%) Qualified: One (3%)

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survey and the current survey lend support to the notion that haziness and confusion prevailed both twenty years ago and today regarding truthfulness rules and standards in law.

C. The Results

The results of the most recent survey indicate that strong differences of opinion still exist today, just as they did twenty years ago. In fact, it could be argued that the differences of opinion are even *greater* today, given that there was not a strong consensus among the participants on *any* of the questions in 2008. (Twenty years ago, on the other hand, consensus was expressed in "Situation 2," with fourteen people responding "No" and only one person responding "Yes."). [130] Although a more sophisticated survey, and more sophisticated sampling methods, might have been used both twenty years ago and today, the results nonetheless suggest that confusion regarding truthfulness standards in negotiation was present then, and is still present today—especially given that the ethics situations presented in the surveys were not particularly elaborate or complicated.

V. Why Raising the Ethical Bar for Lawyer-Negotiators Would Likely Fail

One way to try to ensure fairness and integrity in the negotiation process is to simply mandate it: Write strict proscriptions against behaviors such as lying, indeed, *any* kind of lying, into rules of professional conduct for lawyers. In reviewing the negotiation literature in the area of lying and deception, the vast majority of legal academics writing on the subject have advocated strengthening the duty of candor under the rules of professional conduct. [131] In some instances, the proposed solution is to strengthen (or even create from whole cloth) one or more rules of professional conduct. [132] In other

[130] One person who responded "Yes" to this question in 2008 states, "I don't think the two are necessarily mutually exclusive." A person who gave a "Qualified" answer to this question in 2008 states, "I assume for this situation that there is some part of the knee injury which is ongoing or renders the person disabled for the purpose that they would typically use it for (*i.e.*, maybe they can ski with accommodations, but cannot run, or sit in a chair which they need to do for work, etc.). However, if the lawyer is claiming total disability, then they could not make this statement." All answers are on file with the author at William S. Boyd School of Law.

[131] Of course, several academics and practitioners have argued that the rules of professional conduct regarding truthfulness do *not* need to be strengthened. They argue that either the status quo is fine or that the current rules are, in fact, already too stringent and should therefore be interpreted with greater leeway or eliminated all together. More specifically, they make the following arguments: (1) Because lawyers already find it "extremely difficult" to conform to the limited obligations for truthfulness imposed by current rules, imposing any greater burden would be problematic (*see* Robert P. Burns, *Some Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 696-97 (2001)); (2) Because of the inability to enforce rules regarding negotiation truthfulness, all current rules should be eliminated and negotiators should simply adhere to the maxim, "caveat lawyer" (*see* Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 125 (1982)); and (3) The legal regulation of trustworthiness "cannot go much further than to proscribe fraud" (*see* Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 S.C. L. REV. 181, 196 (1981). *See also* Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181, 197 (2004) (concluding that Professor Hazard was correct in his assessment).

[132] *See* Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707, 707 (2007) ("I confess I have an affinity for rules"); Peters, *supra* note 35, at 141 ("Creating an objective rule may help lawyers change their behavior because

instances, the call is far more general, simply imploring negotiators to exhibit "honesty" or "good faith" in their work. Scholars wishing to raise the ethical bar for lawyer-negotiators have advocated the following:

(1) Forbid lying and all other forms of deception in a negotiation, and require disclosure of all facts known to be important to the other party;[133]

(2) Promulgate new Model Rules of Professional Conduct for Lawyers in Negotiation ("MRPCN") that provide sanctions for results failing to "at least adequately meet the interests of both sides."[134] The rules would also omit the word "material" from the current Model Rule 4.1(a), thereby forbidding lawyers from making *any* false statement of fact or law to a third person;[135]

(3) Lawyers, when negotiating, would owe each other an obligation of "total candor and total cooperation to the extent required to insure that the result is fair;"[136]

(4) Lawyers should not misrepresent or conceal relevant facts or legal principles to another person, nor should they intentionally or recklessly deceive another or refuse to answer material and relevant questions in representing clients.[137] In essence, lawyers should "do no harm" and adhere to a "golden rule" of treating all parties to a legal matter as they would wish to be treated themselves;[138]

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lawyers are generally familiar with rules and comfortable measuring their actions against regulations"); and Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 75 (2005) ("Rules of ethics serve a vital educational function. Those who are new to the practice of law need guidance on their role and responsibilities. Similarly, lawyers who are new to a particular practice area benefit from clear rule-based guidance. This is particularly true in the field of alternative dispute resolution.") (footnotes omitted).

[133] Peters, *supra* note 29, at 50. Professor Peters notes that a large impediment to establishing such a convention is "the fact that it is very difficult for one negotiator to know whether the other has used deception." *Id.* at 50.

[134] Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1, 30 (2005).

[135] *Id.*

[136] Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1403 (1986). Professor Steele notes the rule "is not designed for specific situations," but instead "points toward an ethos of high-toned morality among negotiating lawyers." *Id.* at 1403.

[137] CARRIE MENKEL-MEADOW, THE LIMITS OF ADVERSARIAL ETHICS, IN ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 123, 136 (Deborah L. Rhode ed., 2000) [hereinafter MENKEL-MEADOW, LIMITS].

[138] *Id.* The idea of incorporating a greater sense of fair play into the Model Rules is not new; a discussion draft of the Model Rules from 1980 would have included a new Model Rule 4.2 requiring that "in conducting negotiations a lawyer shall be fair in dealing with other participants." Am. Bar Ass'n, Comm'n on Evaluation of Prof'l Standards, Discussion Draft of the Model Rules of Professional Conduct (1980). *See also* Menkel-Meadow, *supra* note 129, at 782 (discussing candor and the "Golden Rule").

(5) Implement a standard of good faith for mediation,[139] including open and frank discussions about the case at hand, not lying when asked a specific and direct question, and not intentionally misleading the other side;[140]

(6) Amend state versions of Model Rule 4.1 (and its Comments) to prohibit false statements about interests and priorities;[141]

(7) Adopt a rule mandating that lawyers negotiate "honestly and in good faith"[142] and prohibiting "unconscionably unfair" results;[143]

(8) Attorneys and clients could choose to conduct negotiations under Model Rule 4.1 as it currently stands, or they could decide to invoke the so-called new Rule 4.1(2), mandating negotiating in good faith[144] with an honest[145] and open[146] exchange of information.[147]

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[139] Mediation is merely a facilitated negotiation. *See* Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 964 (1998) ("Mediation is facilitated negotiation. In mediation the parties retain the decision making authority and thus participate as negotiators in the mediation. Existing literature on negotiation advocacy provides helpful insights for a discussion of effective mediation advocacy.").

[140] Kovach, *supra* note 16, at 963.

[141] Peters, *supra* note 35, at 139. Such amendments, however, would not limit lying about value estimates and settlement intentions, as currently allowed under Model Rule 4.1. *Id.* at 139. Note that another scholar advocates outright repeal of Model Rule 4.1, stating, "Since no one has apparently made a persuasive argument that lawyer negotiators cannot operate on a high plane, the presumption of honest behavior should remain, and the exception to the requirement of truthfulness for lawyers engaged in negotiations, created by Model Rule 4.1 and its Comment, should be repealed." Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations*, 1990 J. DISP. RESOL. 103, 116 (1990). Still another scholar proposes revising Model Rule 4.1 by eliminating the word "material" and eliminating the commentary language attempting to distinguish between "material" facts and other kinds of facts. James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 271 (1999). *See also* Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 95 (2002) (arguing that the misrepresentation permitted by Model Rule 4.1's commentary is problematic because there is "no obligation to volunteer information or to correct misinformation by other parties or lawyers in proceedings unless the duty is imposed by other laws such as state fraud law or rules of civil procedure.").

[142] Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975) (Professor Rubin adds, "Substantial rules of law in some areas already exact of principals the duty to perform legal obligations honestly and in good faith. Equivalent standards should pervade the lawyer's professional environment. The distinction between honesty and good faith need not be finely drawn here; all lawyers know that good faith requires conduct beyond simple honesty." *Id.* at 589-90.).

[143] *Id.* at 591.

[144] Lawyers would agree to negotiate in good faith by, "among other things, abstaining from causing unreasonable delay and from imposing avoidable hardships on another party for the purpose of securing a negotiation advantage." Peppet, *supra* note 16, at 523.

While this would require disclosure of material information about fact and law,[148] parties would *not* be required to disclose their "bottom line" or reservation point, the priority of their interests, or their preferences regarding different settlement issues.[149]

There are, of course, difficult issues surrounding the idea of raising the ethical bar on truthfulness. First, raising the bar might be politically difficult to accomplish, taking years before changes are approved and implemented into the various state versions of the Model Rules.[150] Second, strict rules regarding truthfulness might generate additional legal complaints, actions and maneuvers concerning whether or not the rules have been broken—something that could potentially be used as a weapon for harassment or delay.[151] Third, raising the bar might lead to a preference for hiring non-lawyers to carry out one's negotiations. These individuals, not be bound by strict ethics rules, would be free to lie, deceive, and behave more like "amoral gladiators" in executing their clients' deals.[152] Fourth, stricter rules do not necessarily translate into more ethical attorney

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[145] Lawyers would agree to "be truthful in all respects regarding the matter for which this section has been invoked." *Id.*

[146] Lawyers would agree to "disclose all material information needed to allow the third person in question to make an informed decision regarding the matter." *Id.*

[147] Professor Peppet also draws up new Rule 4.1(3), which goes even further, allowing parties to opt into a requirement for general fairness. Under this provision, lawyers and clients agree to "refuse to assist in the negotiation of any settlement or agreement that works substantial injustice upon another party." It appears that Peppet's new Rule 4.1(3) is even more aspirational than 4.1(2), and the two can be invoked together. *Id.*

[148] *Id.* at 525.

[149] *Id.* at 524-25.

[150] *See* Pounds, *supra* note 131, at 195-96 (discussing how Rule 4.1, with changes in the last decade that have been "few and arguably inadequate," has "withstood the challenge of some twenty years of scholarly debate and criticism" and will "likely continue to survive further challenge"); *see also* Fairman, *supra* note 132, at 736 (discussing how, despite years of advocacy, "it was not until 2002 that recognition of the most basic form of ADR—use of a third-party neutral—found its way into the Model Rules." Professor Fairman suggests the "lesson to be learned" is that "[e]ven the most basic recognition of the reconceptualization of lawyer roles takes a long time.").

[151] *See* ROBERT MNOOKIN ET AL., *supra* note 16, at 294 (discussing how more stringent ethical rules could become "one more weapon in the adversarial arsenal, with each side threatening to bring ethics violation charges against the other"); *see also* Peppet, *supra* note 16, at 536 (discussing strategically motivated disciplinary litigation brought to harass or intimidate opposing lawyers).

[152] *See, e.g.*, Peppet, *supra* note 16, at 536 ("If the bar imposed an aspirational bargaining ethic on all lawyers, some set of clients would stop turning to lawyers as their negotiating agents. That set of clients prefers hard-bargainers, and attorneys would no longer qualify."). Professor Peppet also argues that the "standard conception" of the lawyer's role is that of an "amoral gladiator" and that most lawyers view themselves as "partisan and zealous advocate[s], dedicated to the client's cause, and absolved of responsibility for that cause and its pursuit, so long as the lawyer acts within the bounds of the law." *Id.* at 500; David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 90 (David Luban ed., 1983) (discussing what Luban calls the "adversary system excuse" used by attorneys to justify serving their clients with "moral ruthlessness"); Annette J. Scieszinski, *Return*

behavior.[153] Finally, the enforcement of stricter rules could be quite difficult, especially given that negotiations tend to occur in private locations, with no official record of conversations or events.[154]

Indeed, the enforcement issue presents an especially thorny problem. Many of the proposals, *supra*, took an absolutist approach with respect to truthfulness: No lying, period. But such a standard might be nearly impossible to enforce. The problem is that issues at the core of a negotiation (interests, priorities, value estimates, and claim settlement intentions) reside within the *minds* of the lawyers and their clients. Moreover, these issues are quite malleable, transforming and evolving as negotiations move forward because of changing relationship dynamics, because new information is revealed or becomes available, or because old information is seen in a new or different light based on changing interactions, circumstances or events. One scholar's description of mediation precisely captures the internal dynamics of a typical negotiation:

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of the Problem-Solvers, 81 A.B.A. J. 119, 119 (1995) ("The media, which for better or worse educates the public about the role of the lawyer, paints a gladiator who will end up either the conqueror or the conquered."); Menkel-Meadow, *supra* note 8, at 129 (arguing that the "long-standing American belief" that the adversary system is the most effective way to learn the truth or achieve justice is "still unsubstantiated by empirical verification"); and Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 201 (2004) (describing how some lawyers can experience tension, even an "acute sense of role dissonance," when they switch from traditional advocacy approaches of lawyering to consensus-building and problem-solving approaches).

[153] *See* Pounds, *supra* note 131, at 196 (discussing the "inherent weakness of the written rule" and opining that "[w]ords have a limited capacity to articulate, much less regulate, ethical conduct"); Kovach, *supra* note 16, at 955 ("Not all change will or can be accomplished by ethics alone. … Rules must be complemented by additional efforts"); Greg K. MacCann et al., *The Sound of No Students Clapping: What Zen Can Offer Legal Education*, 29 U.S.F. L. REV. 313, 325 n.53 (1995) ("'Learning the code' is not the answer to the perceived lack of ethics in the profession"). *But see* Deborah L. Rhode, *Symposium: The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 730 (1994) (arguing that, particularly in contexts where the threat of sanctions is remote, an important role of codified norms is "symbolic and educational; they can sensitize professionals to the full normative dimensions of their choices. A collective affirmation of professional values may have some effect simply by supplying, or removing, one source of a rationalization for dubious conduct.").

[154] MNOOKIN ET AL., *supra* note 16, at 293-94 (discussing how more stringent ethical rules would be "very difficult to enforce" and opining that, "[t]o some extent, the minimal nature of Rule 4.1 codifies not only conventional wisdom but also a system that is at least somewhat enforceable"); *see also* Paul Rosenberger, *Laissez-"Fair": An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators*, 13 OHIO ST. J. ON DISP. RESOL. 611, 627 (1998) (discussing difficulties involved in monitoring for enforcement, which would make negotiations "more like a 'tribunal' and remove many of the benefits that have made it such an attractive informal dispute resolution mechanism"); and *id.* at 626-27 (arguing that deceptive behavior is "indigenous" to most legal negotiations and "could not realistically be prevented because of the nonpublic nature of most bargaining interactions." Specifically, says Rosenberger, in a negotiated settlement, there is no trial and no public testimony by conflicting witnesses, and thus no opportunity to examine the truthfulness of the assertions made during the negotiation. In such a situation, Rosenberger believes that "the honest lawyer may be forfeiting a significant advantage for his client to others who do not follow the rules.").

> [They] are usually dynamic experiences that continually develop new information which often causes participants to re-evaluate risks and reframe objectives. These re-evaluations and reframes are typically strongly influenced by participants' emerging sense of what is important to themselves and others and what is possible in the negotiation.[155]

How, then, might one realistically enforce a rule that bans (or drastically limits) lying in negotiation? Proving a violation would require something close to mind-reading ability, not only to know initial stances on interests, priorities, value estimates, and claim settlement intentions, but also to be able to see the constantly changing positions on these matters as the negotiation winds its way from beginning to end.[156] For these reasons, raising the ethical bar for lawyer-negotiators would likely fail.

VI. A Possible Solution: Defensive Self-Help Mindsets, Strategies, and Techniques

Heretofore I have argued that (1) for various reasons, people sometimes lie and deceive during negotiation; (2) there appears to be widespread disagreement and confusion regarding truthfulness rules and standards for lawyers; and (3) even when rules and standards are more clear, enforcement is quite difficult because most negotiations take place in private settings rather than in open court. I have also argued that, although numerous academics have recommended doing so in past law review Articles, simply raising the ethical bar for attorney-negotiators would likely not be an effective solution to the problem. So what to do? One possible solution is to simply *assume* that lying and deception sometimes occur, and therefore arm all negotiation participants (lawyers and non-lawyers alike) with mindsets, strategies and techniques that will enable them to defend themselves against the liars and deceivers.

This final Part of the Article, then, offers prescriptive advice for minimizing one's risk of being exploited in a negotiation should other parties lie. The following suggestions are undergirded by the notion, expressed throughout the Article, that information exchange (or lack thereof) plays a pivotal role in all negotiations.[157] Indeed, information is the lifeblood of any negotiation,[158] and therefore the mindsets, strategies and techniques that

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[155] Peters, *supra* note 35, at 140 (citation omitted).

[156] On the other hand, even if it is difficult (or nearly impossible) to enforce, the proposed rule might influence lawyers' beliefs and conduct. *See* Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 444 (1988) (discussing how rigorous ethics rules, when included in law school curricula and bar examinations, "may influence professional socialization, even without significant changes in enforcement" and how "reinforcing a person's sense of social responsibility might be effective in influencing conduct").

[157] *See generally* Steven Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. ECON. 20 (1994).

[158] *See* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 67-70 (2000) (discussing the importance of information exchange for value creation and positive negotiation outcomes). *But see* Jean Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and*

influence if, when, and how information is obtained and/or exchanged (and that influence how complete and accurate that information will be) are extremely important in the process of defending one's self (or one's client) against lying and deception. These include the following:

Conduct thorough background research

Conducting a search on various Internet search engines (such as Yahoo or Google) can often yield large amounts of information about other parties to the negotiation. Websites established by private companies, government entities, and various nonprofit groups are available for criminal, financial, and other background checks. [159] If possible, speaking with groups or individuals who have previously worked with or negotiated with one's potential negotiation counterparts can be very illuminating.[160] It can be surprising how much of a "reputation" [161] people develop, sometimes favorable and sometimes unfavorable, based on previous negotiation behavior.

Consider the example of the art gallery owner from Part II-B, *supra*, who negotiated the purchase of a painting from a starving art student for $2,750, and who could quickly turn around and re-sell the painting to another client for $500,000. Keep in mind that the art student asked specifically, before the deal closed, if the gallery owner had already located a buyer for the painting, but the owner effectively evaded the question and the student agreed to the deal. Pretend that the art student found out a short time later that the gallery owner *did* in fact have a buyer at the ready, and one who was willing to pay half a million dollars for that specific painting. Once the art student begins talking to his artist friends (or perhaps holds a press conference?) about what transpired, the gallery owner's reputation (among artists, art collectors, and even those outside the arts community) would be negatively impacted, perhaps even drastically so.

Network for potential negotiation counterparts

There are times when one has no control over who will sit on the other side of the negotiation table. However, in those instances when one *can* play a role in selecting

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Counseling Clients, 2008 J. DISP. RESOL. 437, 526-27 (2008) (discussing studies showing that sometimes attorneys have a "tendency to seek out even *irrelevant* information." Professors Sternlight and Robbennolt therefore suggest that "as the attorney feels the need to seek out information she should at least ask herself, 'Is this information really important? If I found out X, what would I do? And if I found out not-X, what would I do?' Perhaps the attorney, having had this internal conversation, will realize that the information she thinks she needs is not important after all.") (emphasis added).

[159] One can also simply ask other negotiation parties directly for credentials, credit records, and references.

[160] *See* HERB COHEN, YOU CAN NEGOTIATE ANYTHING 103 (1980) (urging negotiators to gather information "[f]rom anyone who works with or for the person you will meet with during the event or anyone who has dealt with them in the past. This includes secretaries, clerks, engineers, janitors, spouses, technicians, or past customers.").

[161] *See* footnote 21, *supra*.

negotiation counterparts, one should attempt to do so through referrals, recommendations, or outside introductions. This is a compliment to the party being approached, which can generate feelings of goodwill and help solidify new working relationships should the negotiation process move forward. Initial meetings via referrals and introductions also signal that there is a greater prospect for the development of long-term relationships. Research suggests that, in general, even the *prospect* of a long-term relationship raises people's ethical standards and reduces exploitative conduct such as lying.[162] Using the art gallery scenario again as an example, what if the student had sought a referral to that same gallery from someone else in the community? In other words, what if the art student entered the gallery and said, "My name is Art Student, and I come to you at the recommendation of Walter Warbucks, who has bought many of his best paintings here." Quite likely, the art gallery owner's negotiation behavior would have been different under such circumstances; indeed, the person who referred the art student would have an impact similar to that of a chaperone at the high school prom, even if that person were not present during the negotiations.

Create rapport

A cordial and supportive environment (*i.e.*, one infused with sincerity, understanding, impartiality, empathy, and expressions of genuine concern for the other party[163]) will probably not magically prevent lies or encourage people to disclose their deceitful behavior. However, research suggests that such an environment can lead to these individuals relaxing their defenses and providing information that may be used to secure the truth in the future.[164] Specific tactics can be employed within the more relaxed atmosphere that encourage the responder to share increased amounts of information. This includes using exclamations of encouragement such as "Yes?" or "I hear you …" or "Go on … ." This can be coupled with requests for immediate elaboration on certain topics: "Could you tell me more about that?" or "Can you flesh that out a bit?"[165] Research shows that people are more inclined to lie by *omission* (not revealing the whole

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[162] G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 226 (1999).

[163] *See* Sternlight et al., *supra* note 158, at 503 (discussing behaviors that contribute to building and maintaining a sense of rapport during conversation, including facing the other party directly, leaning forward, keeping arms open instead of crossed, smiling, nodding, and sharing personal or shared interests to develop connection).

[164] STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 81 (2003). *See also* Sternlight et al., *supra* note 158, at 502-03 ("[P]sychological research has found that rapport can result in increased trust and more cooperative interactions. More generally, people tend to remember and disclose greater amounts of information when they feel comfortable and at ease.") (footnotes omitted); Linda Tickle-Degnen & Robert Rosenthal, *The Nature of Rapport and Its Nonverbal Correlates*, 1 PSYCHOL. INQUIRY 285, 287 (1990).

[165] *See* Stephen Moston & Geoffrey M. Stephenson, *The Changing Face of Police Interrogation*, 3 JOURNAL OF COMMUNITY AND APPLIED SOCIAL PSYCHOLOGY 101-115 (1993).

truth) than by *commission* (falsely answering a question when asked),[166] so when they are asked to elaborate and thereby make direct statements that are lies, some people cannot do it and will back away from earlier statements. Finally, one can neutralize the harshness of asking a negative question by implying the question is a playful one. For example, "May I play the devil's advocate for a moment?" is one way to blunt the harshness of a request for information.[167]

In one of the examples from Part II-B, *supra*, the seller of a house lies about a competing bid ("Someone has just offered me $110,000!"), thereby persuading the potential buyer that the seller's "bottom line" is $20,000 higher than is his *actual* "bottom line." By lying, the seller reaps a substantial monetary benefit in the negotiation. But would the seller have lied if more rapport had been created during the negotiation?[168] Moreover, might the seller have backed away from the lie (*e.g.*, "They just withdrew their $110,000 offer!") if the buyer had requested immediate elaboration regarding the bid (*e.g.*, "Can you tell me more about the party?" or "How did that bid come through?" or "Can I speak with their realtor?").

Demand the use of objective standards—but avoid being hamstrung by them

Asking questions such as, "What do you base that number on?" or "Is that according to industry standard?" is essentially asking the other party to justify their position using objective standards. People will be less likely to attempt to lie and deceive if they know from the start of the negotiation that objective criteria and standards will constantly be sought, from other parties as well as outside sources.[169] The art gallery example from Part II-B, *supra*, can shed additional light on the use of objective criteria. The gallery owner justifies his $2,750 offer for the painting through an astute use of objective standards: he references the OFFICIAL ART AUCTIONS BOOK OF THE WORLD (the comprehensive book on art that is similar to the Kelley Blue Book on cars) which tells him the auction price of twelve different paintings (of various sizes and conditions) by the same artist, all sold in the last two years. The owner's offer to the art student falls within the range of the auction prices listed (all of which were between $2,000 and $3,000).

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[166] Maurice E. Schweitzer & Rachel Croson, *Curtailing Deception: The Impact of Direct Questions on Lies and Omissions, in* WHAT'S FAIR: ETHICS FOR NEGOTIATORS 175-99 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (discussing studies in which far more subjects were willing to lie by omission than by commission).

[167] JOHN BRADY, THE CRAFT OF INTERVIEWING 89-107 (1977).

[168] In this particular context, building rapport may have involved the buyer attempting to engage the seller in conversation about family and neighborhood, e.g., "Where are you moving to?", "What activities did you enjoy while you lived in this neighborhood?", "Can you tell me about some of the neighbors I would meet if I lived here?", or "How old are you kids?"

[169] Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 373 (1996).

The lesson to be learned is that using objective criteria alone cannot always prevent one from making a deal that is inferior to one that *could* be made. In this scenario, objective criteria might provide an adequate *floor* for the price of a painting, but one must ask (or discover through investigation) if there are other factors that can raise the price above that floor. In other words, what might be going on in this particular situation that would make someone willing to pay *more* than the objective standard? Or, is there someone who has a personal (or some other) connection to the painting that makes it more valuable to him or her than the "market" would be willing to pay? Or, is there something about this particular painting that somehow differentiates it from the twelve that already sold on the market? In other words, one must not be hamstrung by the power and credibility provided by objective standards.

Strategically limit information revelation

Before the negotiation, one should brainstorm and list *specific* questions that will likely be asked by the other party. With enough preparation, many (if not most) questions can be anticipated. One might practice *aloud* how specific questions will be responded to and addressed, especially difficult and controversial questions. Practicing aloud can make it easier to arrive at word and phrase choices that will prevent or limit the revelation of strategic information. Preparation should also include deciding upon which tactic to employ in responding to questions about information that one does not wish to disclose. For example, should one decide to ignore the question all together? Or pretend to misconstrue the question and answer a less intrusive, specific or direct question? Or perhaps respond not with an answer at all, but instead with a question of one's own?[170] In the art gallery example, the gallery owner may have *anticipated* that he might be asked if there was already a buyer in place for the painting he was acquiring from the art student. The gallery owner's answer ("We purchase paintings from people like you every single day and try to re-sell them as quickly as we possibly can") was quite successful at evading the question (see the next paragraph, "*Recognize and thwart tactics of evasion*") and thereby not revealing the key piece of information that a wealthy buyer was waiting in the wings to purchase the painting as soon as it could be located.

Recognize and thwart tactics of evasion

The simplest way to get information is to ask for it,[171] yet it is sometimes the most obvious (and crucial) questions that don't get asked (or answered) during a negotiation. Prior to negotiating, one should write out a list of all the questions he or she wants answered, in order of importance. During the negotiation, one should listen carefully to the responses provided; many will be mere attempts to evade answering the question. Evasion techniques are abundant and varied (*e.g.*, ignoring the question; offering to

[170] *See* CRAVER, *supra* note 16, at 95-98.

[171] *See* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE ix (2003) ("Women don't ask. They don't ask for raises and promotions and better job opportunities. They don't ask for recognition for the good work they do. They don't ask for more help at home. … [W]omen are much less likely than men to use negotiation to get what they want.").

return to the question later; answering only part of the question; answering a related but less intrusive, specific or direct question; calling the question unfair or inappropriate and therefore not entitled to a response, etc.).[172] These or similar evasion techniques will likely be employed throughout the negotiation, and the most effective antidote is careful listening to determine if one's question is being addressed in full, in part, or not at all. One must continue grilling until the information being sought is either revealed or protected in a very direct manner. Thus, one might continue asking the *same* question (along with reasonable follow-up questions to probe even deeper) until the question (1) can be "checked off" as having been responded to in a (reasonably) complete and forthcoming manner, or (2) is met by the other party saying something to the effect of, "I simply cannot tell you that" or "I cannot speak about that issue at all."[173]

Establish long-term relationships and watch for signs of deception

If one were skilled at detecting liars upon meeting them, one could simply walk away from the negotiation. Unfortunately, research indicates that people are very poor at such immediate detection. This is true even among the so-called "experts" (such as police investigators) who are more confident, but not more accurate, in their determinations of who is lying and who is not.[174] However, research suggests that if one can build a relationship with a person over a longer period of time, then one has a much greater ability to detect lies. Specifically, the research indicates that one of the more reliable indicators of lying is when one's behavior suddenly *changes*: three scholars conducting an extensive study of deceptive behavior suggest that establishing a "baseline" in behavior before attempting to detect deception is extremely important.[175] They conclude that, "The most reliable indicator of deception is likely to be a *change from normal*

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[172] *See* CRAVER, *supra* note 16, at 95-98. *See also* Robert S. Adler, *Negotiating With Liars*, 70 SLOAN MGMT. REV. 48 69-74 (2007) ("As viewers who watch politicians and public officials on Sunday morning interview shows can attest, there is a real art to responding to questions by changing the subject or answering questions that have not been asked.").

[173] It is difficult, if not impossible, for one to know whether a question has been answered in a "complete and forthcoming" manner. Answers given to follow-up questions are key in helping to make such an assessment. It is important to remind oneself that negotiation is a science, but also an art. *See generally* RAIFFA, *supra* note 32.

[174] *See* Sternlight et al., *supra* note 158, at 486-87 (discussing how people widely believe that certain cues (like averting one's gaze, engaging in lots of foot or hand movements, or hesitating while speaking) are indicators of deception even though evidence strongly suggests that (1) there is no particular cue (or set of cues) that can reliably be used to identify a liar and (2) people's performance levels in distinguishing liars from truth-tellers are "little or no better than chance"). *See* Saul M. Kassin, *Symposium: Effective Screening for Truth Telling: Is it Possible? Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809, 810 (2002); and Saul M. Kassin et al., *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211, 213 (2005).

[175] Samantha Mann, Aldert Vrij & Ray Bull, *Suspects, Lies, and Videotape: An Analysis of Authentic High-Stake Liars*, 26 LAW & HUM. BEHAV. 365-376, 372 (2002).

behavior within a particular individual."[176] For example, if a normally aggressive and boisterous negotiator suddenly becomes more passive and soft spoken, it might be a clue that he or she is engaging in deceptive behavior. This conclusion underscores the importance of developing long-term relationships with potential negotiation partners, where baseline behaviors can be established, where changes in those normal behaviors can be observed, and where possible deception can thereby be detected.[177]

Use "come clean" questions strategically

Used at critical moments in the negotiation (often toward the conclusion of covering an important topic within the context of a larger negotiation), one can ask the "come clean" question: "Is there something important known to you, but not to me, that should be, or that needs to be, revealed at this point?"[178] Negotiators on the other side of the table might attempt to deflect the question or change the topic, so one should be prepared to ask the question more than once (perhaps with a new approach and different wording). One should pay close attention to the response given to the question, perhaps even writing it down.[179] After all, the response might later be used to support a claim of fraudulent non-disclosure if it is learned that valuable information was intentionally withheld. Finally, one should be careful to observe body language when asking the "come clean" question, as body language sometimes speaks louder than words.[180]

Conclusion

People lie in negotiations because doing so can sometimes help one close a deal with terms that are highly favorable to oneself or one's client. In every negotiation, no matter how much value-creation occurs to increase the size of the negotiation "pie," there comes

[176] *Id.* at 372 (emphasis added).

[177] Many practicing attorneys will find that many, if not most, of their negotiations will take place by phone. Detecting deception will likely be more difficult over the phone because one cannot see changes in the other person's body language. *See* ALBERT MEHRABIAN, SILENT MESSAGES 248-57 (1971).

[178] Adler et al., *supra* note 158, at 70-71.

[179] One must be mindful, however, that note taking during a negotiation can sometimes be interpreted by other parties as a sign of litigation preparation. Such an interpretation can sometimes be avoided by a brief, disarming comment such as, "I hope you don't mind that I take notes – it's just a habit I have to help me focus on the conversation as we move along toward a deal."

[180] *See* Laurie Shanks, *Whose Story Is It, Anyway? Guiding Students To Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509, 525 (2008) (discussing the role body language, including "mannerism, gesture, tone," can play in conveying information); John W. Kennish, *How to Read Body Language: Non-Verbal Cues Can Turn Into Clues That Help Lead You To The Truth*, 17 PENNSYLVANIA LAW. 28 (1995); MEHRABIAN, *supra* note 177, at 248-57 (Groundbreaking work conducted by Professor Albert Mehrabian demonstrated that fifty-five percent of one's communicated message is conveyed through posture, gestures, and facial expressions; thirty-eight percent is through one's tone of voice; and only seven percent is through the words themselves); *see generally* PAUL EKMAN, EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE (2004).

a point when that pie needs to be divided. Simply put, lying can help one secure a larger share of the pie.

Moreover, information is the lifeblood of any negotiation, and at its core, negotiation is about protecting sensitive information of one's own (to prevent oneself from being exploited) while extracting information from other parties. Good negotiators must therefore learn how to conduct extensive background research, to engage aggressively and relentlessly in asking questions and digging for answers, and to take other proactive steps to unearth or extract the most (and most accurate) information possible from all parties at the table. At the same time, they must be mindful of the information they are disclosing and how other negotiation parties might use that information in an exploitive manner.

A clear tension, then, develops between *growing* the largest possible pie (which is done through sharing information, brainstorming ways to meet all parties' underlying needs, and making trades) and trying to *win* the largest share possible when the pie is finally divided (an outcome that can sometimes be assisted through bluffing, puffing and lying). In attempting to manage this ever-present tension, the goal of negotiation becomes creating an environment, designing a process, and implementing behaviors that allow value creation to occur where possible, while simultaneously being aware of (and thereby minimizing) risks of exploitation.

The rules and ethics requirements surrounding truthfulness in negotiation (such as Model Rule 4.1, the duty of disclosure, and, to the limited extent they exist in negotiation, good faith requirements) are far from crystal clear and appear to yield different interpretations and results depending on the circumstances of the negotiation and the person doing the interpreting. Two separate surveys (one from twenty years ago and one quite recent) suggest continuing disagreement and confusion among attorneys attempting to apply the various lawyer ethics rules to various negotiation scenarios. Moreover, even in the more straightforward cases, enforcement issues can present large hurdles because most negotiations take place in private settings rather than in open court.

In the past, many scholars have suggested that the optimal solution to ensure fairness and integrity in negotiation is to raise the ethical bar—to strengthen the duty of candor as currently set forth in rules of professional conduct for lawyers. However, given a continuum of possible reform approaches, I suggest that the more *absolutist* the approach taken (i.e., the closer the reformed rules come to mandating "No lying about anything, period"), the more impossible it becomes to enforce those new rules. This is because the issues at the core of any negotiation (interests, priorities, value estimates, and claim settlement intentions) reside within the *minds* of the negotiators and their clients. Since these core issues are quite malleable and continuously change and evolve as the negotiation winds its way from beginning to end, proving a violation would require something close to mind-reading ability. For this reason, I argue that raising the ethical bar for lawyer-negotiators would likely fail. (Not to mention the fact that, in those instances where people hire someone to negotiate on their behalf, raising the bar might

lead to a preference for hiring non-lawyer negotiators who are not bound by strict and potentially cumbersome ethics rules).

Rather than focus on rules, my solution is to *assume* that lying might occur in a given negotiation, and to provide people with the defensive mindsets, strategies and techniques that will allow them to minimize the risk of their being exploited. People so informed will be able to better understand, interact with, and protect themselves from others who would try to gain unfair advantage through lies and deception. Although it might be impossible to prevent lying in the context of negotiation, [181] it is my hope that the prescriptive advice set forth in this Article will prove useful in warding off exploitation of both oneself and one's clients.

[181] *See* Arthur Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979) ("All I can say is this: it looks as if we are all we have. Given what we know about ourselves, and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us 'good,' and worse than that, there is no reason why anything should.").