CANDOR, TRUTHFULNESS, AND CONFLICTS OF INTEREST: ETHICS IN NEGOTIATIONS

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No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.[1]

There are no conflicts above $5 million.[2]

I said, "there was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves. . . ."[3]

I. INTRODUCTION

We lawyers are trained to think of ourselves as "zealous advocates" while, at the same time, we are instructed to maintain a high standard of ethics. Not only are those concepts fraught with tension but also those concepts—zealous advocacy and high ethical standards—do not necessarily accurately describe our duties.

The purpose of this paper, therefore, is to explore what is expected of us, what conduct is permitted and what is forbidden, and whether those norms vary according to the situation at hand. To that end, this article will address the ABA Model Rules of Professional Conduct most applicable to these issues—namely Rules 1.7, 1.8, 3.3 and 4.1—and their interaction with other duties to clients (most particularly Rule 1.6), and attempt to provide some needed guidance for lawyers, especially in the context of negotiations.

The reader is reminded that this paper discusses the Model Rules. The rules in the reader's particular jurisdiction may differ and, accordingly, those rules and the comments, ethical opinions, and cases interpreting them, should be consulted. This paper is for information purposes only and does not constitute legal advice. And, of course, the opinions expressed herein are those of the author and not necessarily those of his law firm or its clients.

II. ZEALOUS ADVOCACY, THEN AND NOW

In 1820, Lord Brougham described the lawyer's role thus:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to

1. *Matthew* 6:24 (King James).
2. Attributed to a "famous American lawyer (circa 1984)" *in* Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 185 (9th ed. 2012).
3. Jonathan Swift, Gulliver's Travels, pt. 4, ch. 5, ¶ 11.

> himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others.[4]

But when in 1983 the ABA adopted the Model Rules of Professional Conduct, which superseded the Model Code of Professional Responsibility, the term "zealous advocate" was removed.[5] In his excellent article on ethics in negotiations, Michael H. Rubin comments on the removal:

> In its place was a comment to [Model Rule] 1.3 that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." The Comment (although not the black-letter text of [Model Rule] 1.3 goes on to caution that a "lawyer is not bound to press for every advantage that might be realized for a client." This commentary has continued, almost verbatim, into the Ethics 2000 Commission's Revision to the Model Rules, adopted by the ABA in 2002 (E2K).[6]

Although the term persists in common usage, both by courts,[7] and by legal commentators,[8] the American Law Institute ("ALI"), in its Restatement of

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4. 2 Trial of Queen Caroline 8, *as cited in* Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 Fordham L. Rev. 1629, 1687 n.9 (2002).

5. *Compare* ABA Canons of Professional Ethics, Canon 15, *How Far a Lawyer May Go in Supporting a Client's Cause* ("The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him save by the rules of law, legally applied.") (*cited in* ABA Compendium of Professional Responsibility Rules and Standards 428 (2014 ed.) [hereinafter ABA Compendium], *with* ABA Model Code of Professional Responsibility, Canon 7, *A Lawyer Should Represent a Client Zealously Within the Bounds of the Law*, Ethical Consideration EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .") (ABA Compendium, *supra*, at 287), *with* ABA Model Rule of Pro. Conduct 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client"). *But see* Comment [1] to Rule 1.3 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.") (ABA Compendium, *supra*, at 34–35).

6. Michael H. Rubin, *The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties*, 26 Constr. Law., Summer 2006, at 12, 12. The author highly recommends this article to anyone who wishes to explore the history of the notions of zealous advocacy, professionalism, and ethics. The article is well researched and the footnotes abundant.

7. *See, e.g.*, Brown v. State, 877 P.2d 1071, 1073 (Nev. 1994) ("However much it may 'infuriate the jury,' a properly zealous advocate must do all he can to defend his client.").

8. Rubin, *supra* note 6, at n.5, provides a nonexclusive list of law-review articles with one form or other of "zealous advocate" in the title: Katherine S. Broderick, *Understanding Lawyers' Ethics: Zealous Advocacy in a Time of Uncertainty*, 8 UDC/DCSL L. Rev. 219 (2004); George A. Reimer, *Zealous Lawyers: Saints or Sinners?*, 59 Or. St. B. Bull. 31 (1998); Raymond M. Brown, *A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer*, 30 Loy. L.A. L. Rev. 21 (1996); Marvin Ventrell, *The Child's Attorney: Understanding the Role of Zealous Advocate*, 17 Fam. Advoc. 73 (Winter 1995); Robert G. Day, Note, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 Stan. L. Rev. 645 (1993). In addition, see Larissa M. Whittingham, *Deceit or Duty? What* Azar

the Law Governing Lawyers, advises that zealous advocacy is not a synonym for hardball tactics and further cautions that the "term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling."[9]

Thus, now that "zealous advocacy" has been removed from the Model Rules and is no longer normative behavior for lawyers, the question is begged as to what normative behavior is. Do the Model Rules require us to behave "ethically"? As we shall see in the next section, the answer is "not necessarily."

III. THE MODEL RULES ARE NOT ETHICAL RULES

The Model Rules replaced the Model Code of Professional Responsibility, which included "Ethical Considerations" and "Disciplinary Rules." The Model Rules dispense with these distinctions, focusing instead on what a lawyer "shall not" do, what a lawyer "shall" do, and what a lawyer "may" do.[10] As Rubin comments:

v. Garza *Teaches About an Attorney's Dual Roles as Zealous Advocate and Officer of the Court*, 31 Regent U.L. Rev. 135 (2018); David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 Geo. J. Legal Ethics 275 (2020). For additional cases on this issue, see *In re* Ames, 993 F.3d 27 (1st Cir. 2021) (Although the Court of Appeals respects a lawyer's zealous advocacy for his client, that zeal, in turn, must respect the boundaries of appropriate advocacy, and when zealous advocacy is based on nothing more than a wing and a prayer, it is sanctionable.); Petricevic v. Shin, No. CV 20-00283 LEK-WRP, 2021 WL 2700382, at *7 (D. Haw. June 30, 2021) ("Furthermore, the system of ethical safeguards already in place is specifically designed to address allegedly unethical behavior by attorneys in their representation of clients, and exposing said attorneys to liability as civil conspirators for an aggressive defense (that remains within the scope of representation) is antithetical to the policy of allowing for zealous advocacy. Hence, an attorney's motivation to protect him or herself at the cost of providing less effective or vigorous representation to a client is in direct contrast with the established public interest in protecting '[t]he right of a litigant to independent and zealous counsel [, a right which] is at the heart of our adversary system." *Hefferman*, 189 F.3d at 413. Under the facts as alleged, it is not possible for the Motion Defendants, as attorneys, to have conspired with their clients for purposes of § 1985(2), because their alleged conduct occurred within the scope of representing their clients. Therefore, Plaintiff has failed to plead facts that would support a finding that the Motion Defendants were involved in a conspiracy."); Matter of Lisse, 921 F.3d 629, 645 (7th Cir. 2019) ("Lawyers must represent their clients' interests responsibly, not only zealously. Kapco Mfg. Co. v. C&O Enter., Inc., 886 F.2d 1485, 1497 (7th Cir. 1989). Part of being a responsible counselor to one's client is recognizing when the legal battle is lost and advising the client how to best handle that outcome. Frivolous legal arguments, intentionally dilatory tactics, and unprofessional antagonism toward opposing counsel benefits no one and improperly burdens federal courts. Nora's conduct has crossed the boundaries of acceptable conduct for attorneys in this circuit."); Collins v. Daniels, 916 F.3d 1302 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 203 (2019), *reh'g denied*, 140 S. Ct. 567 (2019) (because adversary system expects lawyers to zealously represent their clients, Rule 11 standard is tough one to satisfy; attorney can be rather aggressive and still be reasonable).

9. Restatement (Third) of the Law Governing Lawyers § 16 cmt. d. (2000).

10. *See* Model Rules of Professional Conduct (Am. Bar Ass'n 1983), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ and the Ethics

> "Ethics" is the term that is commonly applied to lectures about the ABA's Model Rules of Professional Conduct and its predecessor, the Model Code of Professional Responsibility. The 1983 Model Rules and the Ethics 2002 Model Rules, however, do not use the word "ethics" except in the scope section. That section notes that the rules "simply provide a framework for the ethical practice of law," but when one reads the rules, the concept of ethics is not otherwise mentioned.[11]

And it is not only the Model Rules that avoid mentioning ethics. The federal rules and statutes that purportedly regulate sanctionable conduct—Federal Rule of Civil Procedure 11, Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1927—do not use the word either.[12]

Accordingly, the modern American lawyer operates in a world where she:

- must be competent (Model Rule (M.R.) 1.1);
- must carry out the client's objectives (M.R. 1.2(a)) unless the lawyer knows the client intends to do something criminal or fraudulent (M.R. 1.2(d));
- must not breach any confidences (M.R. 1.6(a)) unless an exception applies (M.R. 1.6(b));
- must be loyal (M.R. 1.7–1.12) unless loyalty would result in a breach of other duties, such as to the court (M.R. 1.16);
- must keep track of who is the client and who is not when an organization is involved (M.R. 1.13; Sarbanes-Oxley Act[13]);
- must not allow the party paying for the lawyer's services—if that party is not the client—to interfere with her independence of professional

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2000 Model Rules (2000), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home, *passim*.

11. Rubin, *supra* note 6, at 13.

12. *Id.*

13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. Section 307 of the Act mandates that the Securities and Exchange Commission

> issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—
>
> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 7245.

judgment or with the client-lawyer relationship (M.R. 1.8(f)(2)), must obtain her client's consent to such an arrangement (M.R. 1.8(f)(1)) and must protect the client's confidential information as required by Rule 1.6 (M.R. 1.8(f)(3));
- must know when to withdraw when adherence to other rules render continuation of representation impossible or unreasonable (M.R. 1.16);
- must act with independence (M.R. 5.4) but may consider "moral, economic, social and political factors" (whatever they may be) in her representation (M.R. 2.1);
- must be candid toward a tribunal and take remedial measures if she knows that a person intends to engage in criminal or fraudulent conduct related to the proceeding (M.R. 3.3(a) and (b)) and must follow Model Rules 3.3(a) and (b) "even if compliance requires disclosure of information otherwise protected by Rule 1.6" (M.R. 3.3(c));
- but apparently may "puff," "bluff," "misdirect" or "bluster" in a non-tribunal setting as long as she does not knowingly "make a false statement of material fact or law to a third person" or "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." (M.R. 4.1).

Although there is no *per se* rule about being ethical,

- she may not make a false or misleading statement about her services (M.R. 7.1);
- she may not solicit clients except as permitted by Rule 7.3; and
- she must report the misconduct of other lawyers (M.R. 8.3(a)) but, unlike Rule 3.3 but like Rule 4.1, does not have to disclose information protected by Rule 1.6 (M.R. 8.3(c)).

Finally, she, herself, must not commit any of the types of misconduct set forth in Model Rule 8.4, or violate any of the local rules that may apply to her.

Thus, we are not necessarily "zealous advocates," at least in the traditional sense, and we are not bound by the ethical standards embodied in predecessors to the Model Rules. We operate, rather, in a system that says we "shall," we "shall not," and we "may." Whether we believe that this change is an improvement is beside the point.[14] Our point is to explore

14. Many commentators, however, take opposing views on that question. *See, e.g.*, Dolovich, *supra* note 4; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts. Q. 1 (1975); Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L. Rev. 493 (1989); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 La. L. Rev. 577 (1965); James White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, Am.

whether a framework exists that can guide the practitioner. With that, we look first at the rules regarding negotiations.

IV. TRUTH OR "TRUTHINESS[15]"?: MODEL RULE 4.1 IN THE LAND OF NEGOTIATIONS

Model Rule 4.1, "Truthfulness in Statements to Others," provides:

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

This was not the language originally proposed. According to the drafting history, although the preamble was approved to include language referring to honest dealing with others,[16] proposed language for Model Rule 4.1 that explicitly would have required truthfulness in negotiations, even if it would have caused the lawyer to reveal client confidences, was rejected.[17]

B. Found. Res. J. 926 (1980); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 Iowa L. Rev. 1219 (1990); Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. Tex. L. Rev. 713 (1997); Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 Rev. Litig. 173 (1989); *see also* Bret Linley, *Quis Custodiet Ipsos Custodes: How the Lack of Institutional Concern for Parties to ADR Protects and Incentivizes Lawyer Misconduct*, 45 J. Legal Prof. 115 (2020); Russell Korobkin, *Behavioral Ethics, Deception, and Legal Negotiation*, 20 Nev. L.J. 1209 (2020).

15. *Truthiness* was named Word of the Year for 2005 by the American Dialect Society, http://www.americandialect.org/Words_of_the_Year_2005.pdf; and for 2006 by Merriam-Webster, http://www.merriam-webster.com/info/06words.htm. *See also* https://en.wikipedia.org/wiki/Truthiness (last visited Nov. 15, 2021).

The Oxford English Dictionary defines *truthiness* thus:

> truthiness (noun) (informal): "The quality of seeming or being felt to be true, even if not necessarily true."

https://en.oxforddictionaries.com/definition/truthiness (last visited Nov. 15, 2021).

Dictionary.com defines it thus:

> *noun*
> **1**: the quality of seeming to be true according to one's intuition, opinion, or perception without regard to logic, factual evidence, or the lie:
>
> *the growing trend of truthiness as opposed to truth.*
>
> **2**: *Rare*. Truthfulness or faithfulness.

https://www.dictionary.com/browse/truthiness (last visited Nov. 15, 2021).

16. Paragraph 2 of the Preamble states in pertinent part, "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."

17. The deleted sentence said, "The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." See ABA Center for Professional Responsibility, The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates (1987).

Accordingly, unless the lawyer is operating is a setting governed by Model Rule 3.3—that is, in a proceeding before a tribunal—what is required is that the lawyer make no false statements or fail to disclose a material fact when disclosure is necessary to avoid assisting the client in a criminal or fraudulent act. Except in the circumstances set forth in Model Rule 4.1, truthfulness is not required, and "fair dealing" is not required.

Indeed, it would appear that the Model Rules permit at least some level of conduct that is not precisely truthful. Comment 2 to Model Rule 4.1, "Statements of Fact," provides in full:

> [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.[18]

Thus, in a negotiation, a lawyer essentially is free to do what she feels is necessary to achieve a satisfactory outcome for her client. She is not constrained, for example, by the notion that that outcome may not be one that is equitable to the other side. She need not reveal a client confidence (unless, after conferring with the client and obtaining his consent, she does so in order to facilitate a good outcome). She must not, however, make a false statement of material fact. And she must not engage in conduct that is fraudulent. Short of that, however, nearly everything else is negotiation strategy.

A. *"Knowingly"; Not "Should Have Known"*

The lead-in language to Model Rule 4.1 bars the lawyer from "knowingly" engaging in conduct prohibited by subsections (a) and (b). According to Model Rule 1.0(f), this language requires "actual knowledge of the fact in question," which "may be inferred from circumstances."[19] It is not a "should have known" standard, and the case law tends to agree. For example, in *Brown v. County of Genesee*,[20] defense counsel did not know but only "believed it probable" that plaintiff and her lawyer were mistaken concerning the computation of damages in the employment discrimination case. Under these facts, the lawyer was under no "legal or ethical duty" to

18. Annot. Model Rules of Pro. Conduct 443 (9th ed. 2019) [hereinafter Annot. MRPC].
19. *Id.* at 15.
20. 872 F.2d 169 (6th Cir. 1989).

correct the factual error made during negotiations. Even more to the point, in *In re Tocco*,[21] the Arizona Supreme Court held that a violation of Arizona's Rules 1.2(d),[22] 3.3,[23] and 4.1 requires knowledge, and that a mere showing that the lawyer reasonably should have known her conduct was in violation of the Rules, without more, is insufficient.

B. *And the Fact Must Be "Material"*

Comment [2] to Model Rule 4.1, set forth above, assumes away the meaning of "material." The "Materiality" Annotations to the Model Rules, provide the following critical guidance:

> A statement is material for purposes of Rule 4.1(a) if it could or would influence the hearer. *In re Merkel*, 138 P.3d 847 (Or. 2006) (information is material if it "would or could have influenced the decision-making process significantly"); see *In re Malofiy*, 653 F. App'x 148 (3d Cir. 2016) (false statements to unrepresented defendant were material because they led to default judgment); *Att'y Grievance Comm'n v. Cocco*, 109 A.3d 1176 (Md. 2015) (after presenting third parties with invalid subpoena, lawyer told them they must comply with it); *In re Krigel*, 480 S.W.3d 294 (Mo. 2016) (in attempt to conceal adoption proceedings from birth father, lawyer for birth mother falsely told his lawyer that child would not be adopted without birth father's consent). Whether it actually did influence the hearer is beside the point. See *In re Winthrop*, 848 N.E.2d 961 (Ill. 2006) (lawyer falsely told social service agency's lawyer court order would not be required to freeze client's assets to protect them from client's malfeasing agent; not relevant that false statement had no effect upon agency lawyer's conduct); *In re Warner*, 851 So. 2d 1029 (La. 2003) (to avoid opening estate for client who just died, lawyer had client's daughter endorse settlement check in client's name; insurance adjuster's testimony that he would have made same settlement anyway not relevant to Rule 4.1(a) violation); *In re Smith*, 236 P.3d 137 (Or. 2010) (lawyer's false statements to clinic employees that he had court order or letter from attorney general authorizing his client to physically take over clinic were material even though employees called police anyway; reliance not part of materiality under Rule 4.1); see also *In re Pizur*, 84 N.E.3d 627 (Ind. 2017) (corporate counsel lied to reporter seeking information about dogs seized by the city); cf. *Office of Disciplinary Counsel v. DiAngelus*, 907 A.2d 452 (Pa. 2006) (materiality of defense counsel's

21. 984 P.2d 539 (Ariz. 1999).

22. Model Rule 1.2(d), *Scope of Representation and Allocation of Authority Between Client and Lawyer*, provides:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Annot. MRPC, *supra* note 18, at 31.

23. *See* discussion *infra* Section V.

false statement that arresting officer agreed to withdrawal of one charge was established by prosecutor's reliance upon it; client's actual innocence of that charge not relevant); *In re Carmick*, 48 P.3d 311 (Wash. 2002) (when lawyer's statement became material only because he was negotiating directly with obligee rather than her counsel, court would apply Rule 4.2 rather than Rule 4.1).

Note that DR7-102(A)(5), the analogous provision of the predecessor Model Code, did not include a materiality requirement; many jurisdictions adopting Rule 4.1 retained this approach and omitted the materiality requirement. See http://ambar.org/MRPCStateCharts for the variations.[24]

The *Summer* case[25] is of particular interest. The facts—undisputed or established by clear and convincing evidence—that led to his troubles are as follows.

The "accused"[26] lawyer, Mr. Summer, became a member of the Oregon and Idaho bars in 1996 and, soon after, assumed a heavy caseload at a high-volume personal injury firm in Nampa, Idaho, while also working occasionally at his firm's Oregon office.[27] For each case, Summer relied on support staff to obtain medical records, provide him with summaries of them, and assemble pertinent records in support of demand letters that he drafted. When negotiating settlements with insurers, it was the practice of the firm as well as Summer "to instruct staff to withhold any medical records that might be adverse to a client's claim." On his cases, Summer retained final approval and authority over all demand letters and supporting documentation.[28]

One of Summer's first clients was Michael White, who was involved in two unrelated auto accidents within eleven days of each other. Neither accident was White's fault. The first accident, which occurred in Idaho, resulted in multiple injuries to White. State Farm insured the at-fault driver. The second accident occurred in Oregon but involved a truck and driver from an Idaho-based company, Boise Cascade, which was self-insured. Shortly after the second accident, White told Boise Cascade's adjuster that he had not been injured in the accident.[29]

24. Annot. MRPC, *supra* note 18, at 446.

25. *In re* Summer, 105 P.3d 848 (Or. 2005). This case was cited in the "Omissions That Mislead" annotation to Rule 4,1 in the ninth edition of the Annotated Model Rules of Professiona Conduct. *See* Annot. MRPC, *supra* note 18, at 446.

26. While many states use the term "respondent" to refer to the lawyer under consideration for discipline, Oregon continues to use the term "accused"; that usage, perhaps, is enough to make Oregon lawyers think twice about their obligations under the Rules.

27. *Summer*, 105 P.3d at 850 n.3. As the opinion notes, this case originally was tried under the Oregon Code of Professional Responsibility and not the Oregon Rules of Professional Conduct, which became effective on January 1, 2005. *Id.* at 849 n.1.

28. *Id.* at 849–50.

29. *Id.* at 850.

After Summer notified State Farm that he was representing White, State Farm learned about the second accident. State Farm conferred with Boise Cascade "more than once" about the second accident. In the meantime, Summer sent State Farm a demand letter describing White's injuries and ongoing pain and suffering, In support, Summer submitted White's emergency care, medical, dental, chiropractic, and physical-therapy records. State Farm responded to Summer by inquiring about White's second accident. Summer asked White about the second accident and then wrote to State Farm stating that Summer was not aware of the second accident because White had not been injured in it. State Farm assessed the value of White's injuries and settled the claim for $10,500.00.[30]

A week after settling with State Farm, Summer sent a demand letter to Boise Cascade stating that, although White had been in an earlier accident, White "did not suffer any symptoms nor did he seek treatment until after the accident and injuries caused by [Boise Cascade]." Summer further claimed that Boise Cascade caused White "neck, back, and a laceration to [the] mouth" injuries, and demanded $9,081 to settle White's claim. Although Summer included, with this letter, some new medical records from White's orthopedist and internist, he also submitted *the same* physical therapy, chiropractic, and dental records that he previously sent to State Farm.[31]

Because White previously had reported himself uninjured in the second accident to Boise Cascade's adjuster, and because many of the submitted records referenced the first accident as the source of White's injuries, Boise Cascade denied White's claim, alerted State Farm, and contacted Idaho's insurance fraud investigation department.[32] Although State Farm ultimately concluded that its settlement with White was appropriately valued, the State of Idaho saw other issues. The State criminally charged Summer and a jury found him guilty of attempted grand theft by deception.[33]

The disciplinary case against Summer turned on the following Oregon rules in force prior to January 1, 2005: DR 1-102(A)(2) ("[i]t is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness[,] or fitness to practice law";[34] DR

30. *Id.*
31. *Id.*
32. *Id.* at 850–51.
33. *Id.* at 851.
34. *Id.* at 852. DR 1-102(A)(2) correlates to Model Rules 5.1(c), 5.3(b) and 8.4(a). ABA Compendium 201. Model Rule 5.1(c) states:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with 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 other lawyer practices, or has direct supervisory authority

1-102(A)(3) ("[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation";[35] and DR 7-102(A)(5) ("[i]n the lawyer's representation of a client . . . , a lawyer shall not . . . [k]nowingly make a false statement of law or fact."[36]

In attempting to persuade the court that he had not violated DR 1-102(A)(2), Summer argued that White had suffered injuries in both accidents and thus had legitimate claims against both insurers. He attempted to explain that White had suffered "no symptoms" after the second accident and, accordingly, Summer never falsely asserted White had been uninjured in that accident. The court rejected these arguments, stating:

> The accused's arguments are unconvincing. Resubmitting to Boise Cascade the same medical records previously sent to State Farm does not convey a belief that White had a legitimate claim against Boise Cascade. It conveys an intent to obtain a second recovery for the same injuries and take advantage of the timing of White's medical care. Further, the accused knew that he falsely attributed White's neck, back, and mouth injuries to the second accident. In testimony before the trial panel, the accused admitted that it was "not a completely true statement" to make such attributions. More to the point, the record is clear and convincing that the accused's statement was false.
>
> The accused also admitted in his testimony that he made a conscious effort not to disclose anything to insurers "that would be damning to [his] client" and that he had instructed staff to select supporting medical documentation accordingly. Consciously employing such tactics in this instance evinces a clear intention to deprive Boise Cascade of money wrongfully.
>
> Finally, even if this court were to accept the accused's distinction between symptoms and injuries, asserting to Boise Cascade that White suffered "no symptoms" after the first accident remains deceitful and untrue. White

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> over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Annot. MRPC, *supra* note 18, at 497.

Model Rule 5.3(b) states: "With respect to a nonlawyer employed or retained by or associated with a 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. . . ." Annot. MRPC, *supra* note 18, at 509.

Model Rule 8.4(a) states: "It is professional misconduct for a lawyer to: (a) 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. . . ." Annot. MRPC, *supra* note 18, at 703.

35. 105 P.3d at 853. DR 1-102(A)(3) correlates to Model Rules 8.4(b), (f). ABA Compendium 201. Model Rule 8.4 states: "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. . . ." Model Rule 8.4(f) states: "It is professional misconduct for a lawyer to: . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." Annot. MRPC, *supra* note 18, at 703.

36. 105 P.3d at 853. DR 7-102(A)(5) correlates to Model Rule 3.3(a)(1) (discussed *infra* at Section V) and Model Rule 4.1. ABA Compendium 206.

> received extensive emergency room treatment after the first accident, which demonstrates the presence of both injuries and "symptoms."
>
> We conclude that the accused attempted to deceive Boise Cascade when he falsely attributed White's neck, back, and mouth injuries to the second accident and obscured their source. We further conclude that the accused bolstered his deceit by resubmitting medical records from White's first accident claim against State Farm. Finally, we conclude that the accused committed those acts with the intent to wrongfully deprive Boise Cascade of property. As such, the Bar established by clear and convincing evidence that the accused committed the criminal act of attempted theft by deception under Idaho law.[37]

In considering whether the false statements made by Summer were "material" for purposes of DR 1-102(A)(3) and whether he knowingly had made false statements of law or fact, the court stated that the "materiality" requirement "refers to information that, 'would or could significantly influence the hearer's decision-making process.'"[38] With respect to "misrepresentations by omission," the court explained such misrepresentations "involve information that the lawyer had in mind and failed to disclose and that the lawyer knows is material to the case at hand."[39] The court concluded that Summer violated both of these rules as well:

> Based on our analysis of DR 1-102(A)(2), we already have concluded that the accused engaged in conduct involving dishonesty and deceit, and did so intentionally to deprive Boise Cascade of money. Similarly, we conclude that the accused made both affirmative misrepresentations and misrepresentations by omission to Boise Cascade. White suffered "symptoms" after the first accident, received most of his medical treatment for those "symptoms," and never injured his mouth in the second accident. The accused misrepresented all those facts to Boise Cascade. The accused also failed to disclose to Boise Cascade that White had recovered from State Farm for the same or similar injuries.
>
> The accused made the above misrepresentations to Boise Cascade knowingly. The accused settled White's State Farm claim just one week before he sent his demand letter to Boise Cascade. Three weeks before that, the accused represented to State Farm that White had been uninjured in the Boise Cascade accident. We infer from those facts that the first accident was in the accused's mind when he made contrary representations to Boise Cascade and when he instructed his staff to select only those medical records that supported the purported second accident claim.

37. 105 P.3d at 852–53. The court noted further that its "finding is further supported by the Idaho jury's guilty verdict that the Idaho Supreme Court affirmed in State v. Summer, 139 Idaho 219, 76 P.3d 963 (2003)." 105 P.3d at 853 n.9.

38. *Id.* at 853 (citing *In re* Eadie, 333 Or. 42, 53, 36 P.3d 468 (2001)).

39. 105 P.3d at 853 (citing *In re* Gustafson, 327 Or. 636, 648, 968 P.2d 367 (1998)).

> Finally, the accused's knowing and false statements concerning whether and to what extent White was injured were material. And, contrary to the accused's arguments, Boise Cascade's ultimate denial of White's claim does not alter that conclusion. As noted, materiality is not limited to circumstances in which a misrepresentation successfully misleads, but to those that "would or could significantly influence the hearer's decision-making process." *Eadie*, 333 Or. at 53, 36 P.3d 468. Boise Cascade's claims manager testified before the trial panel that a lawyer's statements have such an influence because they can constitute "the entire basis for * * * negotiation." The accused's misrepresentations could have caused Boise Cascade to expend its resources investigating White's claim, analyzing its value, and negotiating settlement. Because the accused's statements could have influenced those decisions significantly, they were material.
>
> By making false, knowing, and material misrepresentations to Boise Cascade, the accused violated DR 1-102(A)(3). Because the accused made knowing and false statements of fact in the course of White's representation, he also violated DR 7-102(A)(5).[40]

Needless to say, Mr. Summer was suspended from the Oregon Bar and suffered additional criminal penalties and disciplinary sanctions in Idaho.

C. *Silence: The Problem with Omissions and Incomplete Statements*

Salient in the *Summer* case is the notion of "omissions" as having the potential to violate Model Rule 4.1. The first comment to the Model Rule states:

> [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.[41]

The "Omissions That Mislead" Annotation to Model Rule 4.1 explains:

> Comment [1] explains that misrepresentations include "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." This language was added in 2002 to replace the "vague" statement that "[m]isrepresentations can also occur by failure to act." American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 552 (2013); *see In re Summer*, 105 P.3d 848 (Or. 2005) ("misrepresentations by omission involve information that the lawyer had in mind and failed to disclose" though he knew it was material

40. 105 P.3d at 853–54.
41. Annot. MRPC, *supra* note 18, at 443.

> to case at hand). *But see* Neb. Ethics Op. 09-09 (n.d.) (lawyer for third-party defendant must comply with client's instructions not to volunteer that client is in hospice care).
>
> A misrepresentation by omission under Rule 4.1(a) is different from a violation of Rule 4.1(b)'s affirmative obligation to disclose; Rule 4.1(b) comes into play only if nondisclosure would amount to assisting in a client's crime or fraud.[42]

Accordingly, silence or the making of partially true but misleading statements (or omissions), even in nontribunal settings, can result in serious discipline. In a 1986 informal opinion,[43] the ABA Commission on Ethics and Professional Responsibility considered a situation involving negotiations over a commercial contract and set forth the following fact situation:

> A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance.[44]

Under this fact pattern, the Committee considered this to constitute a "scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation."[45] In fact, the Commission further states that it is not even necessary for A's lawyer to tell A about B's lawyer's error:

> A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983). "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty

42. *Id.* at 446. Rule 4.1(b) provides: "In the course of representing a client a lawyer shall not knowingly: . . . (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." *Id.* at 443.

43. ABA Comm. On Ethics & Pro. Resp., Informal Op. 86-1518 (1986).

44. *Id.*

45. *Id.* The Committee noted, however, that "[a]ssuming for purposes of discussion that the error is 'information relating to [the] representation,' under Rule 1.6 disclosure would be 'impliedly authorized in order to carry out the representation.' The Comment to Rule 1.6 points out that a lawyer has implied authority to make 'a disclosure that facilitates a satisfactory conclusion'—in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to exploit the error." *Id.* at n.1. But, of course, the Rules would *not* permit the lawyer to assist the client in exploiting the error, as delved into further in the Informal Opinion.

> to act in the client's best interests and the client's overall requirements as to the character of representation." Comment to Rule 1.4. In this circumstance there is no "informed decision," in the language of Rule 1.4, that A needs to make; the decision on the contract has already been made by the client. Furthermore, the Comment to Rule 1.2 points out that the lawyer may decide the "technical" means to be employed to carry out the objective of the representation, without consultation with the client.[46]

That said, A's lawyer may not assist A in taking *advantage* of B's lawyer's error, as the Commission explains:

> The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2[47] to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by B and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, *Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client*, and Rule 8.4(c)[48] prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[49]

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46. *Id.*

47. Model Rule 1.2, *Scope of Representation and Allocation of Authority Between Client and Lawyer*, provides in full:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Annot. MRPC, *supra* note 18, at 31.

48. Model Rule 8.4, *Misconduct*, subsection (c) provides: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." Annot. MRPC, *supra* note 18, at 703.

49. ABA Comm. on Ethics & Prof. Resp. Informal Op. 86-1518 (emphasis added).

Given the complexity of most contracts today, and the growing number of terms and provisions being negotiated, the possibility for error to creep into the finished document is obvious. Under the Model Rules and the guidance above, it is clear that neither party may take advantage of the other in the event of a scrivener's error, their lawyers may not counsel them to do so, and they may not knowingly assist their clients in doing so.

What is less clear in the Model Rules is whether the passage of time would change the outcome. Although that question is beyond the scope of this article, the Model Rules do raise a fair question about a lawyer, who knows that the other party to a contract has failed to notice that an error has crept into it, nevertheless decides to say nothing and take advantage of the situation should it become an issue many years into the future. Indeed, as Informal Opinion 86-1518 states, "The duty of zealous representation in DR 7-101 is limited to lawful objectives. . . . Rule 1.2 evolved from DR 7-102(A)(7), which prohibits a lawyer from counseling or assisting the client in conduct known to be fraudulent. See also DR 1-102(A)(4), the precursor of Rule 8.4(c), prohibiting the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."[50]

Thus, in a nontribunal setting, lawyers should bear in mind that, while they may bluff, puff and misdirect, they may not make a misstatement of or an omission about a material fact, nor may they knowingly assist their clients in doing so.

In real time, the line between permissible and proscribed conduct in the negotiation setting may be hard to see. The Annotation to Model Rule 4.1 regarding negotiations, bluntly states: "A lawyer who makes a false statement in the course of negotiating may be subject to discipline under Rule 4.1(a)."[51] One can do little to expand on or illustrate that comment other than to provide examples of lawyers being disciplined or referred to disciplinary authorities, as well as notable ethics opinions,[52] such as:

- Lawyer stated "untruths" in a letter he sent to opposing counsel proposing settlement terms;[53]
- Lawyer's misrepresentations leading insurance company to believe his deceased client was still alive (client's "brain wasn't working") or, later, had not died until after settlement, violated Rule 4.1;[54]

50. *Id.* The Informal Opinion concludes by stating that "[t]he delivery of the erroneous document is not a 'material development' of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, *but the omission of the provision from the document is a "material fact" which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer.*" *Id.* n.2 (emphasis added).

51. Annot. MRPC, *supra* note 18, at 448.

52. *Id.*

53. Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435 (D. Md. 2002).

54. People v. Rosen, 198 P.3d 116 (Colo. 2008).

- Lawyer was untruthful to opposing counsel about whether client died before or after settlement agreement reached;[55]
- In a case involving insurance, a personal injury plaintiff's lawyer negotiating release of hospital's lien on client's recovery had duty to tell hospital administrator that defendant had additional umbrella policy;[56]
- Lawyer failed to correct misrepresentation to lawyer for client's partner that certificate of deposit obtained for escrow had been established with liquidated partnership funds;[57]
- Lawyer for defendant in auto accident case under no duty to disclose client's death before serving any pleadings, but serving answer and amended answer on her behalf violated Rule 4.1;[58]
- Lawyer's concealment of intent to recover costs and failure to correct false impression that settlement agreement would resolve case violated Oregon Code provision analogous to Model Rule 4.1; court rejected argument that trial court's denial of motion to set aside on basis of misrepresentation had preclusive effect;[59]
- Lawyer whose personal injury client dies before accepting pending settlement offer must inform court and opposing counsel; failure to disclose is tantamount to making false statement of material fact within meaning of Rule 4.1(a);[60]
- "If opposing side relying upon false information in accepting settlement proposal, *and* if lawyer or his client supplied the false information, lawyer must correct it";[61] and
- Relying on the Michigan Code analogous to Michigan Rule 4.1, as well as to Model Rules 3.3 and 4.1, federal court vacated settlement that plaintiff's lawyer, who knew that defendant believed plaintiff would make excellent trial witness, negotiated without disclosing that client had died;[62] *but see*
- In a case illustrating the difference between holding back fact of client's death and question of client's life expectancy, one ethics commission opined that a lawyer need not disclose employee's one-year life expectancy when settling workers' compensation claim for equivalent of three years of benefits; unless lawyer determines that nondisclosure would work a fraud, Rule 4.1(a) was not implicated because no statement was made and no question was posed regarding life expectancy.[63]

55. *In re* Lyons, 780 N.W.2d 629 (Minn. 2010).
56. State *ex rel.* Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855 (Neb. 1987).
57. Carpenito's Case, 651 A.2d 1 (N.H. 1994).
58. *In re* Edison, 724 N.W.2d 579 (N.D. 2006).
59. *In re* Eadie, 36 P.3d 468 (Or. 2001).
60. ABA Comm. on Pro. Ethics & Grievances, Formal Op. 397 (1995).
61. N.Y. County Ethics Op. 731 (2003) (emphasis added).
62. Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983).
63. Pa. Ethics Op. 26 (2001).

The Annotation on Negotiation provides a nonexclusive list of scholarly sources as well.[64] The closing section of that Annotation—*Generally Accepted Conventions in Negotiation*—provides a final cautionary thought. In considering the sentence in Comment [2] to Model Rule 4.1 regarding "generally accepted conventions," the Annotation states:

> Comment [2] [to Rule 4.1] recognizes that certain statements ordinarily are not taken as statements of material fact "[u]nder generally accepted conventions in negotiation," and goes on to note that these include estimates of price or value and a party's intentions regarding acceptable settlement. This "defines the conduct that is permissible in negotiation by reference to local norms of negotiating behavior," according to James E. Moliterno, *Modeling the American Lawyer Regulation* System, 13 Or. Rev. Int'l L. 47, 51 n.10 (2011) (noting culture-driven norms create opportunities for misunderstanding in cross-border negotiation). See Nelli Doroshkin, *Current Development, Candor and Integration: Codifying Collegial Truthfulness Requirements in Europe*, 25 Geo. J. Legal Ethics 503 (Summer 2012) (norms of lawyer-to-lawyer interactions, which are often more culture-specific than those governing lawyers' relations with clients and judges, become more important as cross-border transactions increase; author calls upon Council of Bars and Law Societies of Europe (CCBE) to adopt negotiation provision that, like Rule 4.1, leaves space for cultural variances).
>
> The word "ordinarily" was added in 2002 to acknowledge that an estimate of price or value or a statement of intention regarding settlement could, under

64. Annot. MRPC, *supra* note 18, at 448–50, cites the following: Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. Disp. Resol. 119, 123 (most "actual regulation" of lawyer honesty in negotiation occurs through challenges to negotiated agreement by party who discovers facts were not as represented (citing Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation*, *in* Dispute Resolution Ethics, A Comprehensive Guide 139 (Phyllis Bernard & Bryant Garth eds., 2002)); Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 Ohio St. J. on Disp. Resol. 299 (2010); Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky. L.J. 1055 (1999); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 Hofstra L. Rev. 771 (2006); James K.L. Lawrence, *Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates*, 29 Ohio St. J. on Disp. Resol. 35 (2014); E. Cliff Martin & T. Karena Dees, *Current Development, The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 Geo. J. Legal Ethics 777 (2002); Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 Ohio St. J. on Disp. Resol. 481 (2009); Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 Geo. J. Legal Ethics 249 (2009); Hiroharu Saito, *Do Professional Ethics Make Negotiators Unethical? An Empirical Study with Scenarios of Divorce Settlement*, 22 Harv. Negot. L. Rev. 325 (2017); Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 19 Geo. J. Legal Ethics 179 (2004); Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 Seton Hall L. Rev. 613 (2005) (analyzing impact of 1975 argument that ethics rules should forbid material omissions and should affirmatively compel certain disclosures); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 Geo. Wash. L. Rev. 1 (2005).

> some circumstances, constitute a false statement of fact. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 552 (2013); *see* ABA Formal Ethics Op. 06-439 (2006) (statements about party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily do not come within Rule 4.1(a)); Cal. Formal Ethics Op. 2015-194 (2015) (agreeing with ABA opinion prior to state's adoption of version of Model Rule 4.1).[65]

This Annotation suggests, of course, that such statements might, perhaps, come within Rule 4.1(b), giving the practitioner added incentive to consider carefully where the line between "puffing" and "false statement of material fact or law" in the lawyer's jurisdiction really lies.

One federal trial-court decision,[66] provides the following:

> The New York Rules of Professional Conduct "do not specifically address the duty of truthfulness in the context of negotiations," and "[t]here is not a large body of New York case law or other ethics opinions on negotiations." David Keyko, *Ethics and Negotiating: Truth or Consequences?* N.Y.L.J. (Apr. 24, 2009), at 4. However, "[i]t is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming." ABA Comm. of Prof'l Ethics & Grievances, Formal Op. 06-439 (2006) (*Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation*). [Footnote at this point provides, "The ABA Opinion concluded that "[u]nder Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' ordinarily are not considered 'false statements of material fact' within the meaning of the Model Rules."] "A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position." *Id.* Indeed, one commentator has observed that "consensual deception is the essence of caucused mediation." John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 Pepp. Disp. Resol. L.J. 263, 264 (2004). [Footnote omitted.] Even so, a lawyer may not knowingly make a false statement of fact or law in a negotiation. N.Y. Rules of Prof'l Conduct 4.1. *See* Karen Wells Roby, *Ethics in Settlement: The Effect of Material Misrepresentation*, 59-AUG. Fed. Law. 42 (Aug. 2012) ("Even though a lawyer is not required to disclose weaknesses in his or her client's case, the lawyer is prohibited from knowingly making a false statement of fact or law to a third party—including opposing counsel, a witness, or a mediator.").[67]

65. Annot. MRPC, *supra* note 18, at 450.

66. Otto v. Hearst Commc'ns, Inc., No. 17-CV-4712 (GHW) (JLC), 2019 WL 1034116 (S.D.N.Y. Mar. 5, 2019).

67. *Id.* at *11.

In footnote 7 to the *Otto* decision, the court writes:

> Cooley cites to an article, now 30 years old but still timely, that "poignantly illustrates the differences of opinion and confusion among the experts regarding truthfulness standards in negotiation. Using four hypothetical negotiation situations, the author conducted a survey of [15] participants, which included eight law professors who had written on ethics and negotiation, or both; five experienced litigators, a federal circuit court judge, and a [federal] [m]agistrate [judge]." 4 Pepp. Disp. Resol. L.J. at 269. The four situations and how the 15 experts answered the ethical question posed by each of the situations are as follows:
>
> > 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: 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: 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: 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: Nine; No: Four; Qualified: Two
>
> 4 Pepp. Disp. Resol. L.J. at 269 (citing Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?* 2 Inside Litigation 1, 15–18 (1988)).[68]

Of course, once a tribunal becomes involved, the playing field changes, as we shall see in the next section.

68. *Id.* at *11 n.7; *see also* Keith A. Call, *Is It Ethical to Be Dishonest in Negotiations?*, Utah B.J., Mar./Apr. 2016, at 40; Yi He, *Free Reign or Strict Courtroom Courtesy? An Ethical Code for Business Negotiators*, 31 Geo. J. Legal Ethics 657 (2018); James K.L. Lawrence, *Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates*, 29 Ohio St. J. Disp. Resol. 35 (2014).

V. MODEL RULE 3.3: CANDOR TOWARD THE TRIBUNAL

It is in reading the "shall nots" of Model Rule 3.3 that the differences in permissible conduct and duties between negotiations and adjudicatory matters come into sharper focus. For example, in a negotiation, there is no requirement under Model Rule 4.1 that a lawyer disclose adverse authority to opposing counsel. Such an omission is not permissible under Model Rule 3.3. With that thought in mind, we turn to the rule itself.

Model Rule 3.3, "Candor Toward The Tribunal," provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, a lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[69]

A. *Determining When the Matter Is Before a Tribunal*

Model Rule 1.0(m) provides that the term "Tribunal":

> denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence

69. Annot. MRPC, *supra* note 18, at 361.

> or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.[70]

The Annotation, "*Tribunal*," to Model Rule 3.3 provides certain guidance as to when a matter is before a tribunal. The test appears to be whether the body is "acting in an adjudicative capacity" or whether it can "render a binding legal judgment directly affecting a party's interests in a particular matter."[71] Examples provided by the Annotation include:

- Lawyer who submitted fraudulent Criminal Justice Act voucher to court for payment violated District of Columbia Rule 3.3(a)(1); the Bar committee erred in holding that neither the accounting branch of the superior court nor the judge functioned as a "tribunal" when processing the voucher;[72]
- Oklahoma's Corporation Commission, charged with supervising public service corporations, was *not* exercising adjudicative powers by requiring change-of-ownership notification letter; lawyer's misrepresentations to it therefore did *not* violate Rule 3.3; [73]
- In Social Security cases, disability hearings before administrative law judges constitute proceedings before a tribunal;[74]
- Lawyer falsely claimed he had filed motion to bring client into lawsuit;[75] and
- Attorney violated rule of professional conduct prohibiting abuse of legal procedure when he relied on evidence that he knew was altered, submitted the altered evidence to the court, and was therefore fraudulent in his representation of his clients who had brought suit against two judges.[76]

Not included in the Annotation (although mentioned in the Ninth Edition of Annot. MRPC) are:

- Court rejected lawyer's argument that false statements in pleading and supporting affidavit were not actually made to a tribunal because the lawsuit was dismissed before statement went to judge or jury; [77]
- Lawyer violated Kentucky's Rule 3.3 by sending letter to bar counsel containing false statements about someone else's pending disciplinary case and enclosing falsified supporting evidence;[78] and

70. *Id.* at 16.
71. *Id.* at 365.
72. *In re* Cleaver-Bascombe, 892 A.2d 396 (D.C. Ct. App. 2006).
73. State *ex rel.* Okla. Bar Ass'n v. Dobbs, 94 P.3d 31 (Okla. 2004).
74. Ill. Ethics Op. 99-04 (1999).
75. *In re* Dixon, No. S-1-SC-37204, 2019 WL 244456, 2019 BL 16132 (N.M. Jan. 17, 2019).
76. Matter of Ogunmeno, 476 P.3d 1162 (Kan. 2020).
77. Diaz v. Comm'n for Lawyer Discipline, 953 S.W.2d 435 (Tex. App. 1997).
78. Andrews v. Ky. Bar Ass'n, 169 S.W.3d 862 (Ky. 2005).

- Lawyer violated South Carolina's Rule 3.3 by knowingly submitting false information on CLE compliance report filed with commission on continuing legal education.[79]

And please compare the previous two cases with the next two.

- Lawyer who lies to bar grievance committee *not* guilty of making false statement to "tribunal" for Florida's Rule 3.3 purposes;[80] and
- Court declined to find violation of Louisiana's Rule 3.3 for failure to make full disclosure to Office of Disciplinary Counsel when giving sworn statement; "while the ODC acts under the auspices of this court, it is not the type of 'tribunal' contemplated by the professional rules."[81]

Clearly, it pays to know the law in the controlling jurisdiction.

Notwithstanding the different interpretations as to whether certain bodies are "tribunals" (as the last four cited cases show), it is virtually axiomatic that a tribunal whose judgment will not be binding is not a tribunal for purposes of Model Rule 3.3. As the Annotation points out, in such cases:

> [T]he lawyer need abide only by Rule 4.1's requirement of truthfulness, rather than Rule 3.3's more rigorous requirement of candor. The major differences are that Rule 3.3 applies to *all* statements *regardless of materiality*, and can even require a lawyer to disclose information protected by Rule 1.6 (Confidentiality of Information).[82]

As to whether a deposition is a "matter before a tribunal," the Annotation states:

> The rule also applies to any "ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." Cmt. [1]. See *In re Michael*, 836 N.W.2d 753 (Minn. 2013) (lying at own contempt hearing); *In re Rodriguez*, 306 P.3d 893 (Wash. 2013) (lying at own deposition in own disciplinary investigation).[83]

But as to *negotiations*, the Annotation says "no," while at least one commentator provides a "not so fast" caution:

> *[S]ee also* ABA Formal Ethics Op. 06-439 (2006) (Rule 3.3 does not apply to mediation except with respect to "statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates"). The ABA opinion was criticized as "debatable" in Douglas R. Richmond, Lawyers' Professional

79. *In re* Diggs, 544 S.E.2d 628 (S.C. 2001).
80. Fla. Bar v. Rotstein, 835 So. 2d 241 (Fla. 2002).
81. *In re* Brigandi, 843 So. 2d 1083 (La. 2003).
82. Annotation, "*Tribunal*," Annot. MRPC, *supra* note 18, at 366 (emphasis added).
83. *Id.* at 365.

> Responsibilities and Liabilities in Negotiations, 22 Geo. J. Legal Ethics 249 (Winter 2009) (suggesting some courts might hold Rule 3.3(a)(1) applicable to "mediations conducted pursuant to the court's adjudicatory authority").[84]

Overall, this Annotation raises an important question; namely: What is the difference between *truth* and *candor*? We shall explore that question in the next subsection.

B. *"Truthfulness" vs. "Candor"*

Nowhere in the Rules, the Comments or the Annotations is the distinction between "Model Rule 4.1's requirement of truthfulness" and "[Model] Rule 3.3's higher requirement of candor" explained. The closest we come to anything approaching an explanation is Comment [2] to Model Rule 3.3:

> [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.[85]

The distinction between "truthfulness" and "candor" appears to turn on whether the integrity of the judicial system itself is imperiled by the conduct. A battle of wits with opposing counsel, with no one else around, over how much a case will settle for or how much settlement authority one has, does not appear to imperil the system's integrity. To tell one's opponent in negotiation that his case is worth *bubkes*[86] when deep down you know it's worth quite a bit more may constitute nothing more than bluster and, accordingly, violates no Model Rule. To say the same thing in a settlement conference to a judge who has seen the plaintiff's damages calculations, without producing countervailing evidence or support, may well be viewed as an attempt to mislead the court.

By comparison, being untruthful about a material fact is unacceptable under both Model Rules. If a defense lawyer *knows* that her opponent is under a complete misapprehension as to the available limits of the defendant's liability insurance where that amount would be considered a material

84. *Id.* at 365–66.

85. Annot. MRPC, *supra* note 18, at 362.

86. "1. Something trivial, worthless, insultingly disproportionate to expectations. 'I worked on it three hours—and what did he give me? *Bubkes!*'; 2. Something absurd, foolish, nonsensical. 'I'll sum up his idea in one word: *bubkes!*'" Leo Rosten, The Joys of Yiddish 55 (1968).

fact under the facts and circumstances of the case, then allowing that misapprehension to go uncorrected likely would violate Model Rule 4.1. And allowing a judge to adopt that misapprehension would certainly violate Model Rule 3.3 as well.

Accordingly, it is important to keep in mind that the language of Model Rule 3.3(a)(1) and Model Rule 4.1(a) is substantially identical on the point that a lawyer shall not knowingly make a false statement of material fact or law.[87] But those Rules diverge on the question of statements about where the lawyer's settlement authority lies. Comment [2] to Model Rule 4.1 explains that statements about a party's intentions as to an acceptable settlement of a claim ordinarily do not constitute "statements of material fact" and are therefore ordinarily exempt from Model Rule 4.1(a). As Michael Rubin says, "[A]pparently you can lie with impunity about your settlement authority."[88]

But there is no such exemption in the comments to Model Rule 3.3. Any lawyer attending a settlement conference with a judge is well advised to keep this distinction in mind. As Mr. Rubin suggests, "A lawyer who, during a settlement conference with a judge, misstates the client's intention as to an acceptable settlement undoubtedly acts at his or her peril."[89]

By way of example, one court admonished counsel for an insurance broker for asserting that the content of a particular conversation between the broker and the customer was an undisputed material fact when, in fact, it was not, eliciting the following threat from the bench:

> In addition, this Court finds it distasteful that [counsel for the insurance broker] listed the conversation with [the insurance agent] as an "undisputed material fact." This Court has noticed that this is part of an increasing habit among practicing attorneys in this district. Attorneys seem to be regularly asserting that certain facts are "undisputed material facts" when they are clearly in dispute. *See, e.g.*, *Ransdell v. Heritage Enterprise*, Case No. 04-1209 (Order Denying Summary Judgment, November 14, 2006) (in which Magistrate Judge Gorman noted that it was wholly improper to characterize such facts as "undisputed"). Rule 3.3 of the Illinois Rules of Professional Conduct (which have been adopted by this Court under Local Rule 83.6) forbids an attorney from making a statement of material fact which the lawyer knows or reasonably should know is false. Asserting that a fact is undisputed when it is clearly in dispute is not only a violation of Rule 3.3, but it also undermines an

87. Model Rule 3.3(a) provides that "[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . ." Annot. MRPC, *supra* note 18, at 361. Model Rule 4.1(a) provides that "[i]n 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 . . . ." Annot. MRPC, *supra* note 18, at 443.

88. Rubin, *supra* note 6, at 15.

89. *Id.*

> attorney's credibility before the Court. Counselors practicing in this district need to take note and cease this distasteful habit.[90]

What might have been considered bluster in a negotiation could easily have resulted in disciplinary action against counsel making the false assertion.

C. *Ancillary Proceedings Are Not Exempt*

Just because a judge or other adjudicative body is not in the room does not mean that Rule 3.3 does not apply.

Comment [1] advises that Model Rule 3.3 "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false."[91]

The impact of this Comment is not to be measured by its brevity.

VI. THE IMPACT OF MODEL RULES 3.3 AND 4.1 ON THE DUTY OF CONFIDENTIALITY UNDER MODEL RULE 1.6

As discussed in Section IV, *supra*, proposed language for Model Rule 4.1 that explicitly would have required truthfulness in negotiations, even if it would have caused the lawyer to reveal client confidences, was rejected.[92] Not so with Model Rule 3.3(c), which explicitly states that "[t]he duties stated in paragraphs (a) and (b) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."[93]

It may be helpful to compare the Annotations to the two Model Rules. The applicable Annotation to Model Rule 4.1 states:

> Disclosure of Confidential Information
>
> Rule 4.1(b) requires disclosure of a material fact to avoid assisting in a client's crime or fraud "unless disclosure is prohibited by Rule 1.6." Rule 1.6 generally bars lawyers from disclosing any "information relating to the representation of a client," but an exception in Rule 1.6(b) permits disclosure when a client is using the lawyer's services to further certain crimes or frauds. Although the language used in Rule 4.1(b) is not perfectly congruent with that used in Rule 1.6(b)(2) and (3), Rule 4.1(b) requires the disclosure if the conditions of both rules are met. *See* Pa. Ethics Op. 2002-3 (2002) (Rule 4.1(b) requires lawyer

90. Nat'l Union Fire Co. of Pittsburgh, Pa. v. Pontiac Flying Serv., Inc., No. 03-cv-1288, 2006 WL 3422166 at *4 n.1 (C.D. Ill. Nov. 27, 2006).
91. Annot. MRPC, *supra* note 18, at 361–62.
92. *See supra* note 17 and accompanying text.
93. Annot. MRPC, *supra* note 18, at 361.

representing family before INS to disclose family member's prior arrest; client's failure to disclose amounted to fraud in which he was using lawyer's services, thus triggering prevention/rectification exception to confidentiality rule); John A. Humbach, *Shifting Paradigms of Lawyer Honesty*, 76 Tenn. L. Rev. 993 (Summer 2009) ("Since Rule 4.1(b) requires its disclosures when Rule 1.6 permits them, a new and wide-ranging 'duty to warn' has emerged."); Peter R. Jarvis & Trisha M. Rich, *The Law of Unintended Consequences: Whether and When Mandatory Disclosure Under Model Rule 4.1(b) Trumps Discretionary Disclosure Under Model Rule 1.6(b)*, 44 Hofstra L. Rev. 421 (Winter 2015); *cf.* ABA Formal Ethics Op. 07-446 (2007) (fact that lawyer gives behind-the-scenes help to pro se litigant is not material; failure to disclose—or ensure that litigant discloses—does not implicate Rule 4.1(b)).[94]

And the applicable Annotation to Model Rule 3.3 provides:

Paragraph (b): When Lawyer Knows of Criminal or Fraudulent Conduct Relating to Proceeding

Until the rule was amended in 2002 this obligation (formerly found in Rule 3.3(a)(2)) was defined as a duty to take reasonable remedial measures necessary to avoid assisting the *client* in a criminal or fraudulent act. *See*, *e.g.*, *In re Winthrop*, 848 N.E.2d 961 (Ill. 2006) (absent proof that lawyer represented client's agent as well as client, cannot discipline lawyer (under former Rule 3.3(a)(2)) for failing to tell court of agent's "suspicious" use of client's funds).

The rule, redesignated as Rule 3.3(b), now states that a lawyer "who knows that a *person* intends to engage, is engaging or has engaged in criminal or fraudulent conduct *related to the proceeding* shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal" (emphasis added). The new wording reflects a "special obligation" on the part of lawyers "to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process." Cmt. [12]. *See also* American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 474 (2013) (amendment means obligation to avoid assisting in client crime or fraud "is replaced by a broader obligation to ensure the integrity of the adjudicative process").[95]

The pertinent Annotation under Model Rule 1.6, *Disclosure Required by Rule 3.3*, explains:

When a matter is before a tribunal, a lawyer may be required by Rule 3.3 to reveal to the court information otherwise protected under Rule 1.6 to avoid assisting a client in perpetrating a crime or fraud. For discussion of a lawyer's duty of candor to a tribunal, see the annotation to Rule 3.3.[96]

94. *Id.* at 451.
95. *Id.* at 376.
96. *Id.* at 123.

Examples of situations involving all three Rules are rare, although one ABA Formal Opinion takes on the challenge. In ABA Formal Opinion 93-375, the Committee on Ethics and Professional Responsibility addressed the following hypothetical situation:[97]

> A lawyer is outside counsel to a bank that is undergoing a routine examination by the banking agency that regulates it. In the course of the examination, an examiner from the agency identifies eight loans that he believes should be aggregated under the loan-to-one-borrower (LTOB) rules governing the bank. See 12 U.S.C. § 84(a)(1). If the eight loans in question are aggregated, the total loans to one person will exceed the 15 percent statutory limit and the bank will be in violation of the LTOB rules. An officer of the client bank believes that the bank has a powerful argument that one of the eight loans identified by the examiner ("Loan 8") should not be combined with the others, in which case the LTOB rules would not be violated. The officer asks the lawyer (who has not heretofore been involved in the bank examination) to review the bank's records and consider the issue before the officer meets with the examiner. The lawyer does so, and agrees that a substantial legal argument can be made that Loan 8 should not be aggregated. In the course of her review of the bank's records, however, the lawyer discovers another loan ("Loan 9") about which the examiner has not made any particular inquiry, that arguably should be aggregated with Loans 1 through 7, in which case also the LTOB rules would be violated. What are the lawyer's obligations under these circumstances? Do they change when the lawyer's role changes from that of a background advisor to that of a front-line representative of the client, articulating a position in behalf of the client or otherwise communicating and dealing directly with the bank examiner?[98]

The Committee proceeded from the following proposition; namely,

> that the banking regulations impose no separate duty of disclosure on a lawyer. Thus, it is the client and not the lawyer who has a duty to respond to the examining agency's inquiries, and the involvement of the lawyer neither increases nor decreases the client's obligations in this regard. Such obligations of disclosure as the lawyer may have rest solely on the rules governing lawyers' ethics. Where, as here, a lawyer is employed simply to advise the client about how the client should respond to the examining agency's inquiries, the duty to respond remains that of the client. Similarly, if the client simply asks the lawyer to represent him before the agency, the client's duty of disclosure does not ipso facto become that of the lawyer.[99]

97. Am. Bar Ass'n Formal Op. 93-375 (Aug. 6, 1993). The Committee comments that this hypothetical is taken from the Report by the ABA Working Group on Lawyers' Representation of Regulated Clients (Discussion Draft, January 1993) at 169–75. ABA Formal Op. 93-375, at n.4.

98. *Id.*

99. *Id.*

Circumstances, however, could change, under which the lawyer's duties *might* change, and not for the better. As the Committee explains:

> However, a lawyer *may* put herself in a situation where she has assumed such obligations. When the lawyer is the only individual to deal directly with the bank examiners during the course of the examination, takes full responsibility for gathering factual information and preparing the client's submissions to the regulators, and cuts off the regulator from access the regulator otherwise might have to employees of the regulated entity, the lawyer may well have taken on the client's own obligation under the regulations to respond.[100]

In the hypothetical as set forth, however, no such heightened duty presents. Accordingly,

> the lawyer's involvement in the bank examination is indirect and attenuated; she is functioning solely as an advisor to the client, and her role is limited to reviewing facts and conclusions that cannot fairly be considered her own work product. The lawyer's duties thus derive *not* from any obligation that the client may have under applicable regulations to respond fully to the bank examiners' inquiries; rather, they derive from her obligations *under ethics rules applicable generally to the legal profession*. The duty to respond to the agency remains that of the client; the *lawyer's sole ethical obligation is not to mislead the agency*, and there is no duty to respond to the agency's inquiries to the client unless the lawyer has put herself in the position of offering, or vouching for, the client's responses.[101]

The Committee analyzed this hypothetical under three Model Rules: 3.3, 3.9[102] and 4.1. As the Committee explained:

> Under all three of these provisions, it is clear that a lawyer may not tell a lie, whether or not it might be considered necessary to protect client confidences. See Rule 3.3(a)(1) and Rule 4.1(a) (a lawyer "shall not knowingly . . . make a false statement of material fact or law . . ."). See also Rule 3.9 (a lawyer "shall conform to the provisions of Rule 3.3(a) through (c) . . ."). This obligation of truthfulness is *unqualified*, applies on *all* occasions, and contains *no* exceptions.[103]

Recall, however, the ambiguity embedded in the hypothetical; namely, that there is a loan ("Loan 9") of which the examiner is unaware or has not thought about, but if she did know about it, might result in a violation

100. *Id.* (emphasis added).
101. *Id.* (emphasis added).
102. As promulgated at that time, Model Rule 3.9, *Advocate in Nonadjudicative Proceedings*, provided: "A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rule 3.3(a) through (c), 3.4(a) through (c), and 3.5." ABA Formal Op. 93-375, at n.6.
103. *Id.* (emphasis added).

of the LTOB rule. The Committee recognizes the lawyer's dilemma and addresses it thus:

> [I]t is somewhat less clear whether and to what extent a lawyer in a regulatory proceeding has an ethical obligation to be forthcoming. We do believe that a "false statement of material fact" includes a statement that the lawyer knows is misleading, whether or not it is intended to mislead. A *more difficult question* is *whether and to what extent a lawyer representing a client in a bank examination by a government regulatory agency has an affirmative obligation to come forward with information that is material to the purposes of the examination, the disclosure of which would be against the client's interests or otherwise violate her duty of confidentiality.* While Rules 3.3, 3.9 and 4.1 all impose a duty on a lawyer to disclose material facts when such disclosure is "necessary to avoid assisting a criminal or fraudulent act by a client," this duty overrides the duty to protect client confidences *only* under Rules 3.3 and 3.9. See Rule 3.3(b) ("The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"), incorporated by reference in Rule 3.9. *By contrast*, the analogous duty of disclosure to "third parties" in Rule 4.1(b) is *expressly qualified* by the lawyer's duty of confidentiality under Rule 1.6. See note 6, *supra*. Thus the duty to disclose takes precedence over the duty to keep client confidences *only* in the context of an "adjudicative proceeding" before a "tribunal" under Rule 3.3 or a "nonadjudicative proceeding" under Rule 3.9.[104]

The Committee queries and then concludes that a bank examination does *not* fall under either Rule 3.3 or 3.9 for purposes of determining whether disclosure may be required. Under this hypothetical, the lawyer's conduct falls under Rule 4.1. As the Committee explained:

> While a regulatory examination does not fit precisely into the category "negotiation or other bilateral transaction," it is more clearly suggested by these terms than it is by the terms "rule-making or policy-making." Accordingly, we conclude that the duty of disclosure applicable in the context of a bank examination is the qualified duty to "third parties" in Rule 4.1, and not the unqualified duty of disclosure in Rules 3.3 and 3.9.[105]

The question remaining, of course, is what the lawyer must do with respect to "Loan 9." On that point, the Committee states:

> Because of the importance the profession places on protecting client confidences, we also believe that the prohibition on disclosure of client confidences expressly stated in Rule 4.1 must be given effect in this context, *even if the result is to allow the client to engage in fraud*. On the other hand, we also believe that a lawyer faced with client fraud is required to conduct herself in such a way that she does not assist the fraud. Courses open to a lawyer in such

104. *Id.* (emphasis added).
105. *Id.*

> circumstances include going up the corporate ladder under Model Rule 1.13, as well as withdrawal from the representation[106] so as to avoid giving assistance to the client's fraud.[107]

To explore further the lawyer's obligation when she learns of information damaging to her client's case, the Committee offers elaborations on the hypothetical and the following advice:

> *What if the lawyer believes that the client has a legal obligation under applicable banking regulations to volunteer the information about Loan 9?*

The lawyer's obligation is to counsel the client as to the lawyer's belief about the client's obligations. If the lawyer does so, she has discharged her duties. This begs the next question, of course, which is: What does the lawyer do if the client doesn't follow the lawyer's advice? As the Committee explained:

> At this point, the lawyer has fulfilled her obligations under the ethics rules by counseling the client as to his own legal obligations. She may continue to represent the client without doing more even if the client decides not to disclose. If the lawyer is of the view that Loan 9 is merely "arguably" aggregable, her own uncertainty about the implications of the client's failure to disclose substantially eliminates the possibility that her continuing to represent the client could be considered improper. Even if she *believes* Loan 9 *must* be aggregated, and that the client's refusal to disclose would be fraudulent, she herself has done *nothing* that could be regarded as assisting the client's fraud in violation of Rule 1.2(d). Given her limited involvement in the bank examination, she has *no obligation herself* to do anything more about the undisclosed Loan 9.[108]

> *What if the lawyer is* sure *that the loan must be aggregated and that the client's failure to report would be unlawful?*

In this elaboration on the hypothetical, the Committee posits that the lawyer has concluded that Loan 9 must be aggregated, that failure to report it to the examiners would be unlawful, and that she has so advised the client. Further, the client, against the lawyer's advice and in the lawyer's presence, makes an unequivocal representation to the bank examiners that

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106. The Committee's footnote states: "Rule 1.16 ("Declining or Terminating Representation") provides in pertinent part that a lawyer "shall withdraw" from a representation if 'the representation will result in violation of the rules of professional conduct or other law.' See Rule 1.16(a)(1). It also provides that a lawyer 'may withdraw' if 'the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent . . . .' See Rule 1.16(b)(1)." ABA Formal Op. 93-375, at n.8.

107. *Id.* The Committee's footnote at the end of this passage states: "While under these circumstances the lawyer may not make actual disclosure of client confidences, withdrawal may be required even if it has the collateral effect of inferentially revealing client confidences. See ABA Formal Opinion No. 92-366 . . . ." ABA Formal Op. 93-375, at n.9.

108. ABA Formal Op. 93-375, § I, "Counseling the Client before the Exit Interview" (emphasis added).

there are no loans beyond those already known to them that even arguably should be aggregated. The Committee's opinion on what the lawyer should do is as follows:

> In the face of this clear misrepresentation by the client, and the client's apparent decision to commit a fraud in the lawyer's presence, the lawyer must act to disassociate herself from the client's intended course of action. She is undoubtedly obliged at the first private opportunity to urge the client to correct the falsehood and to consider the possible courses of action identified in Model Rule 1.13.[109]
>
> However, unless the lawyer knew in advance that the client intended to make such a misrepresentation, she herself to this point cannot be said to be a party to it and has violated no ethical duty. We therefore see no reason, in this context, why the lawyer should be required to do anything that would signal to the bank examiners her disapproval of the client's course of conduct. She is not required to jump to her feet and leave the premises upon hearing the client's false statement. Because she cannot yet be charged with knowledge that her services are being used by the client to assist the fraud, she is not required to terminate the representation on the spot or otherwise make a "noisy withdrawal" that would effectively disaffirm her involvement to date. And it is to everyone's benefit that she makes a final effort to counsel the client and take the opportunity to consider climbing the corporate ladder to persuade the bank to correct the falsehood.
>
> On the other hand, if the client refuses to correct his lie to the examiners about the existence of Loan 9, the lawyer may be required to consider whether or not to terminate the representation. See Rule 1.16(b)(1) * * *. In any event, she should not come to any subsequent meetings with the examiners if she knows the client intends to persist in the deception, since even her silent presence could make her a party to the client's fraud by conveying the impression that she believes the client's statements, now made a second time in her presence, are correct.[110]

What if it is the lawyer herself that makes the false statement to the examiner?

In this situation, the lawyer concludes that Loan 9 was made to the same borrower as Loans 1 through 8, but it is the lawyer *herself* who represents to the bank examiners that the client has made no other loans to that borrower. This is a clear violation of Rule 4.1(a), as further explained by the Committee:

> [T]he lawyer has violated the clear prohibition in Rule 4.1(a) against making false or misleading statements to third parties. It does not matter whether the

109. The Committee's footnote states: "Rule 1.13 ('Organization as Client') provides for consideration of consultation at higher levels of corporate management in the event a lawyer encounters contemplated fraud by a corporate official." ABA Formal Op. 93-375, at n.12.

110. ABA Formal Op. 93-375, § II, "False Statement by Client in Presence of Lawyer."

> false statement was volunteered by the lawyer, or whether the client directed her to offer it. Nor does it matter whether she made the statement in response to a specific question from the regulators. She may not in any circumstances herself make a statement that she knows to be false and misleading. This may, of course, lead to some awkwardness where the client is adamant in his refusal to allow the lawyer to disclose the existence of Loan 9, and if the question is put directly to the lawyer by the bank examiner: in such a circumstance, the lawyer has *no permissible option* but to *decline* to respond, regardless of the inference that the examiner may draw. If the lawyer believes there is significant risk that she will be asked a question that she cannot ethically answer consistently with her client's instructions, she should so inform the client and give the client the choice whether she should attend before the meeting takes place.[111]

Of particular interest about this opinion is the point raised by the Committee concerning the lawyer's belief that "there is a significant risk that she will be asked a question that she cannot ethically answer consistently with her client's instructions." In this case, the lawyer must inform the client *in advance* of the meeting as to allow the client to consider his options. This is good practice and is consistent with the requirements of Model Rules 1.4 and 2.1.[112]

What if the lawyer makes a true *statement but* omits *other "material" information?*

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111. *Id.* § III, "False Statement by Lawyer" (emphasis added).

112. Model Rule 1.4, "Communication," provides:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Annot. MRPC, *supra* note 18, at 57. Rule 1.0(e) provides that "informed consent" "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Annot. MRPC, *supra* note 18, at 15.

Model Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Annot. MRPC, *supra* note 18, at 317.

In this elaboration, the lawyer does not mention Loan 9 but knows that, in the particular context, that omission is likely to mislead the bank examiners. The Committee finds this scenario troubling, as follows:

> Our conclusions respecting false statements by the lawyer extend to circumstances in which the lawyer omits mention of Loan 9, if the context is such that she knows the omission is likely to mislead the bank examiners. An omission may in a particular context be tantamount to an affirmative false statement. For example, if the lawyer knows that the examiners are unaware of Loan 9 and/or its implications for the LTOB rule, and if what she says to them affirmatively leads them to conclude that there is no such loan, or that it need not be aggregated, the lawyer may have violated her ethical obligation under Rule 4.1(a) not to mislead a third party. On the other hand, if the lawyer limits her statements to the question whether Loan 8 should be aggregated, and says nothing at all about any other loans, she cannot be faulted for failing to volunteer information about Loan 9 even if the examiners themselves make statements in the lawyer's presence to the effect that there are no other loans that need be aggregated. If Loan 9 has escaped the examiners' notice through no fault of the lawyer, the lawyer has no ethical obligation to dispel their erroneous impression that no such loan exists, and indeed is precluded from doing so by Rule 1.6.
>
> We stress that a lawyer's ethical obligation to disclose in this context depends upon the role she has herself played in creating any misimpression. As noted earlier, if the client does all of the talking during the examination, and the lawyer does not continue her participation in successive meetings with the examiners on these matters, she has no obligation to come forward to divulge the existence of Loan 9. *However, as the lawyer's role expands, so does her responsibility for making certain the examiners are not misled*. If she is speaking for the client, then her ethical obligations are substantially greater than if she is merely present when the client himself is speaking to the examiners.
>
> Our conclusion here does not depend upon a determination that the lawyer is acting as an "advocate" or as an "agent" for the client; rather, it is based on a purely practical analysis of what the lawyer does or says. We do not believe it helpful to make a lawyer's ethical obligation of disclosure depend upon how she or someone else may abstractly characterize her role in representing a client. Most people, including even lawyers themselves, will doubtless find it easier to decide what responsibility a lawyer had for making or reinforcing a misrepresentation by simply looking at what the lawyer said and did rather than determining what hat the lawyer was wearing when she said or did it.[113]

The key here is inquiring as to who is to blame for the examiner's erroneous assumption. The more the lawyer has to do with it, the higher the lawyer's risk.

113. ABA Formal Op. 93-375 § IV, "True Statement by Lawyer but Omission of Other Material Information" (emphasis added).

What if the lawyer gave the client a written opinion and later learns that the client intends to turn it over the examiners?

In this scenario, the lawyer had given the client a written opinion stating that the bank was not in violation of the LTOB rules. She later learns, however, that the bank plans to submit the opinion to the examiners. The Committee explains that "she would have an obligation to see that her opinion (in effect, her services) did not have the effect of assisting the client's fraudulent course of conduct." As the Committee explained:

> In ABA Formal Opinion No. 92-366, * * * the Committee expressed the view that a lawyer has an affirmative obligation to disaffirm her work product notwithstanding the dictates of Rule 1.6, if failure to do so would have the forbidden effect of lending assistance to the client's continuing or future fraud, even if such disaffirmance would have the collateral effect of inferentially revealing client confidences. However, the obligation to protect client confidences in Rule 1.6 always acts as a counterweight to the lawyer's obligation to disassociate herself from a client's fraud. Thus, before taking any steps to disaffirm the misleading opinion, she should inform the client of her intention to do so, and give the client an opportunity not to use it.[114]

Thus, in this "nontribunal" situation, the principles underlying Rule 1.6 outweigh the lawyer's duties under Rule 4.1. This, of course, would *not* be the outcome under Rule 3.3, as the Committee expressed earlier in this Formal Opinion.[115]

What if the lawyer believes that Loan 9 need not be aggregated but also believes that the bank examiners would be of a contrary view?

The Committee's opinion is that the lawyer has no ethical obligation under Rule 4.1, or any other provision of the rules, to bring the loan to the examiners' attention. As the Committee further explained:

> In deciding what her obligations may be under the ethics rules to disassociate herself from client fraud, the lawyer must be able to rely on her own informed judgment as to whether in fact such a fraud is occurring. If she has a reasonable basis for her legal conclusion, she should not be held liable for an ethical violation simply because the examiners may be of a different view. Nothing in the ethics rules requires a lawyer to bring to the attention of the examiners a violation by a client in which the lawyer has had no role. A fortiori, a lawyer has no obligation to bring to the attention of the examiners conduct the lawyer believes is not a violation, even if she has reason to believe that the examiners may be of a contrary view.[116]

114. *Id.* § V, "The Lawyer's Written Opinion."
115. *See supra* notes 97–102 and accompanying text.
116. ABA Formal Op. 93-375 § VI, "The Regulators' Interpretation of the Law."

VII. SPECIAL SITUATION: THE TRIPARTITE RELATIONSHIP

Litigation practitioners, regardless of whether they concentrate their practices in the area of Insurance Coverage, need to be aware of the applicability of the Model Rules and of the Restatement when there is a "third party" in the room. Such third party often is an insurance company, appearing by virtue of its defense obligations to one or more of the parties (typically, defendants), but may be a noninsurance-party indemnitor, or a surety, or other party with a stake in the outcome of the negotiations. Of special interest to practitioners in such situations, therefore, is the concern over how much, if any, control such third party can exert over how a lawyer, paid by the third party to represent one of the parties, conducts the defense of the underlying case. For convenience and ease of reading, we will assume that the tripartite relationship consists of a plaintiff (and plaintiff's counsel), the defendant insured (and its defense lawyer), and the insurer (who is paying the defense lawyer's bill).

The cases tend to divide among jurisdictions that hold that the defense lawyer has only one client—the insured—and those holding that the defense lawyer has two clients—the insured and the insurer. An example of the first is *Finley v. Home Insurance Company*, which held that "the modern view" is that "the sole client of the attorney is the insured."[117] But then there are cases referring to the insured as the "primary" client, thereby making the insurer a "secondary" client. For example, the Nevada Supreme Court held in *Nevada Yellow Cab Corp. v. Eighth Judicial District Court* that the insured was the "primary" client but the insurer also was a client as long as there was no conflict. The *Nevada Yellow Cab* court cited cases from six other jurisdictions and, on that basis, declared this rule to be the "majority rule"! [118]

In this paper, the author argues that it is irrelevant whether one practices in a so-called "one client" or "two client" jurisdiction. What matters are the applicable conflict rules in the jurisdiction, and an application of those rules to the specific facts and circumstances presented.

A. *Summary of Model Rules 1.7 and 1.8, and the Restatement § 134*

Model Rule 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

117. Finley v. Home Ins. Co., 975 P.2d 1145 (Haw. 1998).

118. Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Ct., 152 P.3d 737 (Nev. 2007); *see also* Xtreme Prot. Services, LLC v. Steadfast Ins. Co., 2019 IL App (1st) 181501, 143 N.E.3d 128, *appeal denied*, 132 N.E.3d 357 (Ill. 2019) (an attorney retained by the insurer to defend its insured owes a fiduciary duty and has the same professional obligations to the insured as would exist had he or she been personally retained by the insured).

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.[119]

Model Rule 1.8(f) provides:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.[120]

Section 134 of the Restatement provides:

(1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 122 and knows of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:
(a) the direction does not interfere with the lawyer's independence of professional judgment;
(b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
(c) the client consents to the direction under the limitations and conditions provided in § 122.[121]

119. Annot. MRPC, *supra* note 18, at 139.
120. *Id.* at 162.
121. Restatement (Third) of the Law Governing Lawyers § 134 (2000) [hereinafter Restatement]. Section 122 of the Restatement provides:

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the

B. *Applicability of Model Rules 1.7 and 1.8, and the Restatement § 134 to the Tripartite Relationship*

Let us consider the following hypothetical:

> Lawyer L is hired by an insurance company to defend its insured, a landlord whose tenant has slipped in a hallway and sustained injury. During preliminary investigation of the matter, L learns facts from the landlord that, if discovered by the tenant, would lead the plaintiff to amend her complaint to charge recklessness instead of negligence. Under the insurance policy there is no coverage for actions of the insured found to be reckless.[122]

And another:

> I do insurance defense work in a small northwestern city. A half dozen carriers hire me to represent insureds who get sued after auto accidents, injuries to guests in their homes, stuff like that. Almost always the insured couldn't care less about the case because the company is paying. They just care about if the premiums will go up. The policies require the insureds to cooperate, however, and they do. An insured I'll call Ed got sued when his car hit a parked car, unfortunately, a high-end BMW, and caused more than $10,000 in damages. His policy is for $50,000. The company sent me the file. Then Ed told me that his daughter was driving, though he was in the car with her. No one was hurt. The thing is the daughter has no license and under the policy, the company is not liable if Ed lets an unlicensed person drive. Ed sure doesn't want the company to know what he told me. But the company hired me and has hired me for a dozen matters each year for seven or eight years now. What do I do?[123]

> lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.
>
> (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:
> (a) the representation is prohibited by law;
> (b) one client will assert a claim against the other in the same litigation; or
> (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Section 121, to which Section 122 refers, provides:

> Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

122. Hypothetical taken verbatim from Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 12.14 at 12-43 (3d ed. 2004 Supp.).

123. Hypothetical taken verbatim from Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 270–71 (9th ed. 2012).

In both situations, the lawyer has a conflict arising out of the fact that someone other than the party being represented is the paymaster; namely, the insurer. Regardless of whether the law in the lawyer's jurisdiction regards the insurer as one of the lawyer's clients, the lawyer has a conflict.

In the first hypothetical, the conflict is a bit more subtle than in the second. In the first, the lawyer has learned from the insured client facts that might lead the plaintiff to amend her complaint to add a count for recklessness, either dropping the negligence count altogether or leaving it intact. At this juncture, however, the lawyer does not know what the plaintiff knows, and she is under no duty to disclose those facts to the plaintiff. At this point, then, there is no conflict because all three parties to the tripartite relationship—the insured, the insurer, and the lawyer—share the same interest: defeat the tenant's claim. But if the tenant plaintiff does amend her complaint, then the insured landlord and the insurer's interest diverge because of the possibility of a verdict based on negligence versus recklessness. Professors Hazard and Hodes provide the following analysis of the problem:

> L [the lawyer], who has the most knowledge about the facts and also the best understanding of the significance of those facts, has no coherent way to choose a litigating tactic. The landlord is her client and deserves a defense that will minimize the risk that the plaintiff will prevail on a recklessness theory. The insurance company is either a co-client or at least a party with a special relationship to L and also has a contractual relationship with L that requires L's best efforts to protect the carrier. When coverage itself is at issue, the conflict of interest is so severe that many courts require the carrier to pay for separate counsel for the insured.[124, 125]

Professors Hazard and Hodes correctly identify the problem for the lawyer. Either the insurer is a co-client or has a "special relationship" to the lawyer. That problem is the precise reason why the question of whether the lawyer practices in a one-client or two-client jurisdiction is irrelevant.

According to the professors, the conflict arises thus:

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124. Hazard & Hodes, *supra* note 122, § 12.14 at 12-44. At this point in the referenced text, the editors offer the following at their footnote 1: "See, for example, Douglas Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 Geo. J. Legal Ethics 475 (1996), written by a practitioner specializing in insurance defense work. In Eric Holmes, *A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net*, 26 Willamette L. Rev. 1 (1989), the author discussed how the conflicts inherent in 'eternal triangle' situations manifest themselves at various stages of the typical third-party insurance case. Professor Holmes, co-author of a leading insurance law text, referred to the lawyer, the insurer, and the insured as a 'triumvirate.'"

125. On the subject of the right of the insured to separate counsel, who gets to select such counsel, and how much the insurer may be required to pay for such counsel, see D. B. Applefeld, J. James Cooper, S. J. Field & R. Garcia, Jr., *Independent Defense Counsel: When Can The Policyholder Select Its Own Defense Lawyer and How Much Does the Insurer Have to Pay?: A 50-State Survey*, (2010) (edited and revised by Neil B. Posner, 2013, 2014, and 2017), available from this paper's author.

> Paradoxically, the situation can become analytically simpler if L *ignores* the potential interests of the insurer and fully accepts the proposition that the insured is her *only* client. She does the job she was paid to do, which is to defend the insured. If the defense is successful, the client is pleased, and the company is not hurt, for it has lost only the expenses of litigation, which it was contractually obligated to provide in any event. If the plaintiff is unable to show recklessness, but wins on a theory of simple negligence, the company still has not been hurt, and the insured has again received the contracted-for defense. If the plaintiff is able to show recklessness, the client has been adequately represented in a losing cause, and the insurer again has not been hurt, for it would have had to provide the insured with a defense in any event, and its liability under the policy remains to be determined.
>
> To carry through on this analysis, L must firmly put out of her mind the possibility that the insurance company will retaliate for her failure to disclose the possibility of noncoverage. She must be prepared to justify herself to the company, if necessary, on the ground that the company had no right to the information, for she was never *its* lawyer. This touchy point also accentuates the hidden conflict of interest that underlies all insurance defense cases: that lawyers in L's position will *not* properly represent the insured, because they are attempting to curry favor with the insurer, which is much more likely than the insured to be a "repeat player." This conflict (which is not triangular at all, but involves the lawyer and her client only) is so pervasive that it is the subject of one of the special purpose conflict rules—Rule 1.8(f).
>
> The case would be completely different, of course, if L concluded that the insured was trying to commit a fraud upon the insurance company by conniving with a friendly plaintiff or otherwise. In that event L could not represent the insured at all, for the representation would constitute aiding a fraud, which is prohibited by Rule 1.2(d) [internal citation omitted]. Whether L should then simply withdraw from representing the insured or should also make revelation to the intended victim of the fraud upon withdrawal are questions treated under Model Rules 1.6 (confidences) and 1.16 (withdrawal) [internal citations omitted].[126]

The professors are correct: whether the insurer is a co-client or simply part of a "special relationship," the lawyer in the first hypothetical has a conflict of interest arising out of the possibility of a verdict based on a noncovered ground: recklessness. In such a case, the insurer wins if the lawyer's trial skills result in a defense verdict, but also wins if the plaintiff proves that the insured was reckless. Either way, the insurer only is liable for defense costs. And, in some jurisdictions, the insurer may even be able to recover defense costs if liability attaches on a noncovered ground.[127] In such a situation, the insured wins only if there is a verdict for the defense.

126. Hazard & Hodes, *supra* note 122, § 12.14 at 12-44 to 12-45 (emphasis in original).

127. *See, e.g.*, Buss v. Superior Court, 939 P.2d 766 (Cal. 1997) (noting that insurer could seek reimbursement for costs incurred in defending those claims in underlying action that were not even potentially covered by its policy; insurer would be entitled to reimbursement if

If the insurer is a client, then the two clients are directly adverse, thereby creating a concurrent conflict of interest under Model Rule 1.7(a)(1). If the insurer is not a client, then the fact that the lawyer has a "special relationship" with the insurer—by virtue of the simple fact that the insurer is more likely than the insured to be a "repeat player"—then Model Rule 1.7(a)(2) is implicated because there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Here, the "significant risk" arises from the lawyer's responsibilities to the insurer if the insurer is a co-client. But if the insurer is *not* a co-client, then the "significant risk" arises from the lawyer's responsibilities to a third person (the insurer) or by the lawyer's personal interest; namely, the desire to keep getting files from the insurer.

Further, the fact that the lawyer is paid by the insurer explicitly implicates Model Rule 1.8(f), which *prohibits* a lawyer from accepting compensation from a third party for representation of a client other than the payer of compensation *unless* all three of the rule's conditions are met: (1) that the client has given informed consent;[128] (2) the third-party payer does not interfere with the representation or with the client-lawyer relationship; and (3) the lawyer continues to observe the confidentiality rule provided for in Model Rule 1.6.

Thus, even if the insurer is a co-client, the lawyer cannot allow those of the insurer's interests that diverge from the insured's interests to interfere with the lawyer's obligations to the insured. If she does, she has violated Model Rules 1.7 and 1.8.

With respect to the second hypothetical—where the insured has disclosed to the lawyer that an uninsured driver was driving the car—there certainly is a conflict, but the lawyer's duties to avoid assisting a client in the perpetration of a fraud arguably supersedes the problem caused by the conflict. In the case of the second hypothetical, Model Rules 1.2(d), 1.6, and 1.16, at a minimum, come into play.

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it could show by preponderance of the evidence that specific costs could be allocated solely to those claims). *Buss* is a controversial decision and is not widely followed. *See*, *e.g.*, Gen'l Agents Ins. Co. v. Midwest Sporting Goods Co., 828 N.E.2d 1092 (Ill. 2005). And there are differences of opinion among the commentators. *Compare*, *e.g.*, Robert H. Jerry, *The Insurer's Right to Reimbursement of Defense Costs*, 42 Ariz. L. Rev. 13 (2000) (generally favorable), *with* Angela R. Elbert & Stanley C. Nardoni, *Buss Stop: A Language Based Analysis*, 13 Conn. Ins. L.J. 61 (2006-07) (unfavorable).

128. Model Rule 1.0(e) provides that "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Annot. MRPC, *supra* note 18, at 15.

Model Rule 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[129]

Model Rule 1.6(b) provides the following exceptions to the duty to protect a client's confidences, which may be implicated by this hypothetical:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[130]

And Model Rule 1.16 provides the grounds for mandatory and permissive withdrawal from a representation:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) the lawyer is discharged.

129. Annot. MRPC, *supra* note 18, at 31.
130. *Id.* at 103.

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.
>
> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.[131]

Thus, while Model Rule 1.2(d) would permit the lawyer to "discuss the legal consequences of any proposed course of conduct with [the] client," in the event the lawyer is unable to persuade the insured to tell the truth (that his unlicensed daughter was driving), then she would be required to withdraw under Model Rule 1.16(a)(1) as to avoid violating the law, or other of the Model Rules (such as the Model Rule regarding Candor Before a Tribunal).

A more vexing question for the lawyer might be this: Can she counsel the client about the client's duties to tell the truth while the lawyer is being paid by the insurance company, who certainly will benefit if the lawyer succeeds? Does that question alone give rise to a conflict of interest? If she were to withdraw at this juncture, what signal would that send to the insurance company? To the plaintiff? Once she learns about the unlicensed daughter, can her withdrawal be other than a "noisy" one? If the insurer

131. *Id.* at 281–82.

already was aware of the potential for a verdict on noncovered grounds, the insurer could file a declaratory judgment action seeking a declaration of no duty to defend, or agree to defend under a reservation of rights. If the insurer chooses the second option, the laws of most jurisdictions would allow the insured to employ counsel of his choosing.

But, in this hypothetical, the insurer does *not* know; only the lawyer chosen by the insurance company knows! In that case, the lawyer already is in possession of information protected by Model Rule 1.6; she cannot disclose it, at least not before she tries to persuade the client to tell the truth. If the client fails to do so, can the lawyer withdraw at that point? What if she has doubts about the client's story? Is it possible that he really was the driver and is trying to shift the blame to his daughter for other reasons? Suppose the plaintiff never discovers, or never even asks, who was driving the car? Would withdrawing at this point send a signal to the plaintiff that the plaintiff might never have thought about in the absence of the withdrawal?

These are the kinds of questions that render the "one client" versus "two client" distinction irrelevant. Regardless of jurisdiction, the analysis must always proceed under the Rules of Professional Conduct applicable in the lawyer's jurisdiction.

With respect to the first hypothetical, it has been suggested that Restatement § 134 provides a bit of a middle ground. As Professors Hazard and Hodes explain:

> Section 134(1) of the Restatement of the Law Governing Lawyers covers essentially the same ground as Model Rule 1.8(f) [internal citation omitted]. It permits a lawyer to accept compensation for representing a client from a third party, but only if the client has given informed consent. This is appropriately responsive to the undeniable risk that a lawyer might be tempted to tailor the representation to advance the interests of the payor rather than the one actually receiving the services. [Internal citations omitted].
>
> Recognizing the realities of practice, however, and especially the realities of liability insurance contracts, Restatement § 134(2) diverges from Rule 1.8(f) and permits the third party to "direct" the lawyer's conduct of the representation, if the direction is "reasonable in scope and character," and if the client consents a second time. So limited, this provision is not only realistic but sensible, because there are many situations in which the legitimate interests of the third party may be served *without* damage to the interests of the client. For example, a lawyer designated by a liability insurance carrier to represent a policyholder might be able to accept the carrier's directions to reduce defense costs by 20% in a matter, while still keeping any verdict or settlement within policy limits.
>
> As an added safeguard, the Restatement section was amended by the members of the American Law Institute to further limit the "directions" that a lawyer may accept from a nonclient payor, by resurrecting the language from Model Rule 1.8(f) respecting "interference with the lawyer's independence

of professional judgment." This amendment was in response to critics who asserted that to allow the insurer to "direct" the lawyer in *any* way, as permitted by § 134 both before and after the last revision, would *necessarily* interfere with the lawyer's traditional concern for client interests. The drafters of § 134 insisted that they had already taken this concern into account, because any *acceptable* "direction" would *presuppose* that the lawyer was exercising independent professional judgment on behalf of the client-insured.[132]

It is difficult for this author to see how the Restatement provides much guidance to practicing lawyers, whether they are acting in the capacity of defense counsel or of coverage counsel. Firstly, the Restatement only has been cited in a small number of jurisdictions, so it hardly can be said to be controlling authority elsewhere.[133] Further, it is comment *f* to Section 134 that explicitly

132. Hazard & Hodes, *supra* note 122, § 12.15, at 12-45 to 12-46 (emphasis in original).

133. As of this writing, cases citing Restatement § 134 include: U.S. v. Pizzonia, 415 F. Supp. 2d 168, 185 (E.D.N.Y. 2006) (subsection (1) quoted in discussion); State and County Mut. Fire Ins. Co. v. Young, 490 F. Supp. 2d 741, 747 (N.D. W. Va. 2007) (comment *f* quoted in case and in support, although § 134 is erroneously cited in the decision as "§ 14"); Zurich Am. Ins. Co. v. Super. Ct., 66 Cal. Rptr. 3d 833, 843 (Ct. App. 2007) (comment *f* quoted in support); Clukey v. Sweeney, 963 A.2d 711, 717 (Conn. App. Ct. 2009) (subsection (1) cited in discussion); *In re* Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 813, 814 (Mont. 2000) (quoted in discussion, comment *f(5)* quoted in discussion; holding that any restrictions imposed by the insurer would constitute interference with the defense lawyer's duties in violation of the Rules of Professional Conduct); Unauthorized Practice of Law Committee v. Am. Home Assur. Co., Inc., 261 S.W.3d 24, 42 (Tex. 2008) (quoted in footnote); Juneau Cnty. Star-Times v. Juneau Cnty., 824 N.W.2d 457, 466 (Wis. 2013) (comment *f* quoted in footnote); Armijo v. Flansas, No. 17-CV-665 WJ-JHR, 2017 WL 6001768, *5 (D.N.M. Dec. 4, 2017); Bell v. Ramirez, No. 13 Civ. 7916 (PKC) (HBP), 2017 WL 4296781, *2 (S.D.N.Y. Sept. 26, 2017); Hansen v. State Farm Mut. Auto. Ins. Co., No. 2:10-cv-014343-MMD-RJJ, 2012 WL 6205722, *8 (D. Nev. Dec. 12, 2012); Progressive Nw. Ins. Co. v. Gant, 957 F.3d 1144, 1155 (10th Cir. 2020) ("The Restatement (Third) of the Law Governing Lawyers § 134 (2000), permits '[a] lawyer's professional conduct on behalf of a client [to] be directed by someone other than the client [only] if . . . the direction does not interfere with the lawyer's independence of professional judgment.' See also *Brinkley v. Farmers Elevator Mut. Ins. Co.*, 485 F.2d 1283, 1287 (10th Cir. 1973) (nothing that insurer had 'no right to direct or control [defense counsel's] courtroom activities'). And '[b]ecause of this professional obligation, most courts have not applied general principles of agency and tort law—such as the doctrines of actual or apparent authority or the related doctrine of respondent superior—to impose vicarious or direct liability on insurers for the professional malpractice of defense counsel.' Restatement of the Law of Liability Insurance § 12, cmt. d (2019) (emphasis added); see George M. Cohen, *Liability of Insurers for Defense Counsel Malpractice*, 68 Rutgers U.L. Rev. 119, 125–26 (2015) ("[A] majority of jurisdictions have rejected vicarious liability of liability insurers, and to the extent that one can identify a 'trend' in the cases, almost all of the more recent cases, as well as most cases decided by the larger jurisdictions, reject vicarious liability.')."); Symetra Life Ins. Co. v. DIJK 2016 Ins. Tr., CV1812350MASZNQ, 2019 WL 4931231, at *3 (D.N.J. Oct. 7, 2019) ("The Third Restatement of the Law Governing Lawyers explains, the attorney-client privilege 'normally applies to communications involving persons who on their own behalf seek legal assistance from a lawyer,' but 'a client . . . may appoint a third person to do so as the client's agent.' Restatement (Third) of the Law Governing Lawyers § 70 cmt e. (2000) (citing as an example Restatement (Third) of the Law Governing Lawyers § 134 cmt. f (lawyer designated by an insurer to represent an insured under a liability insurance policy)). According to the Restatement, '[a] person is a confidential agent for communication if the person's participation is reasonably

applies to the tripartite relationship, and it hardly can be said to provide support for an approach not otherwise provided for in the Model Rules, or under the Rules of Professional Conduct in the lawyer's particular jurisdiction.[134]

necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence.' *Id.* at cmt. 4. The Restatement outlines factors that may be relevant to determining if someone is a confidential agent; those factors include [the] customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice.' *Id.* The Restatement also gives six illustrations of a confidential agent: (1) a friend acting as an intermediary between a client-prisoner and his lawyer where the police will not permit the client-prisoner to speak to his attorney directly, (2) a translator, (3) a secretary who the client regularly employs to record and transcribe business letters, (4) the parents of a minor client, (5) an accountant assisting the client in understanding a complex tax issue, and (6) the guardian of a mentally incapacitated client. *Id.*'"); CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, CIV.A. 11-4753, 2013 WL 315716, at *4 (E.D. Pa. Jan. 28, 2013) ("'Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14.' Restatement (Third) of Law Governing Lawyers § 134 cmt. f. § 14 of the Restatement establishes the factors used to determine whether a client-lawyer relationship arises, including when: '(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services. . . .'"); *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., CIV.A. H-01-3624, 2005 WL 3704688, at *5 (S.D. Tex. Dec. 5, 2005) ("See Restatement (Third) of the Law Governing Lawyers § 134 cmts. b and c (2000)"); N. County Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 47 Tex. Sup. Ct. J. 786 (Tex. 2004) (A defense attorney hired by a liability insurer owes unqualified loyalty to the insured and must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. Restatement (Third) of the Law Governing Lawyers § 134 Comment d.); Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp., 00 CIV. 9212 (DF), 2002 WL 31729693, at *3 (S.D.N.Y. Dec. 5, 2002) ("Accordingly, communications between the retained attorney and the insurer should be considered privileged, to the extent such communications request or provide legal advice or analysis. Indeed, it is generally accepted that, regardless of whether the retained attorney and the insurer can be said to have a distinct attorney-client relationship, their 'communications . . . concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding.' Restatement (Third) of Law Governing lawyers, § 134(f)."); Paradigm Ins. Co. v. Langerman Law Officers, P.A., 200 Ariz. 146, 24 P.3d 593, 349 Ariz. Adv. Rep. 11 (2001) ("Thus, a lawyer cannot allow an insurer to interfere with the lawyer's independent professional judgment, even though, in general, the lawyer's representation of the insured is directed by the insurer. Restatement § 134(2)(a).").

134. Comment f states:

> *f. Representing an insured*. A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment *a*, beyond the scope of the Restatement. Certain practices of designated insurance-defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics.

What comment *f* does support, however, is the irrelevance of the one-client/two-client distinction. In all cases, the lawyer's duties are to be governed by the Rules of Professional Conduct (and the cases and ethics opinions interpreting them) in the lawyer's particular jurisdiction.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are subject to the privilege. Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. Compare § 51, Comment *g*.

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment *d* hereto. With respect to client consent (see Comment *b* hereto) in insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence of the client-insured to an informative letter to the client-insured at the outset of the representation should be all that is required. The lawyer should either withdraw or consult with the client-insured (see § 122) when a substantial risk that the client-insured will not be fully covered becomes apparent (see § 121, Comment *c(iii)*).

Illustration: 5. Insurer, a liability-insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 52), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent (see § 122(2)(c)), the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 122.

VIII. CONCLUSION

The obligations imposed upon lawyers by the various Model Rules raises the stakes for lawyers engaging in negotiations, which is to say: Most Lawyers!

Determining first whether the situation is before a tribunal will help to clarify the analysis that must follow. In such situations, the higher duty of candor applies. What constitutes candor in a particular jurisdiction may require further research, but at least the lawyer is somewhat better informed as to the nature of the search.

In matters not before a tribunal and, therefore, subject to the murkier obligations under Rule 4.1, the questions become harder to articulate, let alone answer. Keeping in mind that it is never permissible to lie about a material fact, or to fail to speak up when not doing so would assist a client in committing a criminal or fraudulent act, is vital to lowering the risk of practicing in this arena.

Additionally, lawyers practicing in situations where a third-party payer (such as an insurance company) is involved, must give strong consideration to circumstances where the lawyer representing the client whose fees are being paid for by someone else, may have a conflict of interest between the client, whom she represents, and the "paymaster" who is paying her fee. All lawyers involved in such situations must analyze the Rules of Professional Conduct applicable in their jurisdictions that likely are to apply, especially Model Rules 1.7, 1.8, 1.2, 1.6, and 1.16, and the cases and ethics opinions

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When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 60) without explicit informed consent of the insured (see § 62). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 60, Comment *l* (confidentiality in representation of co-clients in general)).

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (see § 94) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 60, Comment *l*). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 32 (see also § 60, Comment *l*). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement (see Comment *a* hereto).

Restatement (Third) of the Law Governing Lawyers § 134 cmt. *f*. (2000).

interpreting them. To the extent that the Rules, cases and ethics opinion in the particular jurisdiction are not helpful, Restatement § 134, and comment *f* thereunder, should be consulted.

Finally, it is critical to remember that Model Rules 3.3 and 4.1 impact upon a lawyer's duties under Rule 1.6 differently and are certain to lead to different outcomes.