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Misrepresentation by Omission in Settlement Negotiations: Should There Be A Silent Safe Harbor?

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Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?

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I. INTRODUCTION

Mark Twain once wrote, “[o]ften the surest way to convey misinformation is to tell the strict truth.”¹ Indeed, a lawyer negotiating on behalf of a client often will mislead an adversary by half-truths, partial truths, misdirection, and, it has been increasingly held, by omissions.

The ethical constraints on a lawyer’s misleading statements and omissions during settlement negotiations have been largely defined on a patchwork and intuitive level. Practitioners seeking guidance in navigating the largely uncharted waters in this area are likely to find themselves bewildered by an internally inconsistent tangle of ethics opinions, rules, moral principles, and precedents that are more likely to reflect judicial viscera and intuitive notions of fairness than any coherent system of legal or ethical principles.

This Article will explore the parameters of factual representations and omissions in the context of settlement negotiations from a legal and ethical perspective. Among other issues, this Article will address the following questions: May a lawyer, acting on behalf of a client, ethically make factually accurate representations which are nonetheless misleading because they are half-truths or because they omit other important facts, and have the effect of misleading one’s adversary? Are there some situations in which a lawyer who says nothing at all may be guilty of misrepresentation by omission, either by operation of substantive law or ethical rule? Are these situations broader than the

1. MARK TWAIN, *Following the Equator*, in THE WIT AND WISDOM OF MARK TWAIN 32 (Dover 1999).

traditional crime/fraud exception contained in the American Bar Association (“ABA”) *Model Rules of Professional Conduct* (“*Model Rules*”)?²

The current trend in ethical analysis among courts, academic commentators, and bar association ethics committees tends to suggest that a lawyer may in some circumstances have a duty to correct a misapprehension on the part of an adversary which did not emanate from any statement by the attorney or anyone acting on the attorney’s behalf. There is, according to many jurists and commentators, a general duty of fairness that trumps the adversary system of justice in general and the attorney’s duty of zealous advocacy to clients in particular. The *Model Rules*, the negotiation guidelines of the ABA Section of Litigation, and the ABA Standing Committee on Professional Ethics all suggest that a lawyer may, in some circumstances, have an affirmative duty to correct an adversary’s own self-inflicted misperception of fact or law, even when the disclosure is not necessary to avoid assisting a criminal or fraudulent act by a client.³ At least two state bars have disciplined attorneys who made no affirmative misrepresentations, but merely remained silent under circumstances in which their adversaries labored under incorrect assumptions.⁴

Analogies drawn from the standards of disclosure required in criminal prosecutions add perspective to the debate on whether a civil litigator should have an ethical duty to disclose the death of a client whose testimony may be critical to the case. And the ethical duties of lawyers have been further complicated by recent developments in substantive law, including the passage into law of the Sarbanes-Oxley Act of 2002⁵ and the rules promulgated by the U.S. Securities and Exchange Commission (“SEC”) thereunder. On August 11, 2003, the ABA amended its *Model Rules* to require corporate lawyers more aggressively to report internal wrongdoing up the corporate ladder. The ABA also relaxed the confidentiality provisions of Model Rule 1.6 to permit disclosure of client confidences to prevent or mitigate injury caused by financial fraud.

This Article suggests that the current trend toward disclosure in settlement negotiations, and in particular, the ABA position, has been overextended. Laudable as general concepts of fairness and decency may be, clients are entitled to expect their attorneys to reconcile those concepts with the duty of zealous advocacy. Equally important, it is difficult for an ordinary practitioner to anticipate and comply with each of the myriad individualized senses of fairness and fair dealing that various judges or ethicists may hold. A lawyer who discloses

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (2003) [hereinafter MODEL RULES].

3. See MODEL RULES Rule 4.1.

4. See *State ex rel. Nebraska State Bar Ass’n v. Addison*, 412 N.W.2d 855 (Neb. 1987) (attorney suspended for failing to disclose existence of insurance policy about which he was asked no questions); *Kentucky Bar Ass’n v. Geisler*, 938 S.W.2d 578 (Ky. 1997) (sanctioning attorney for failing to disclose death of client); see also *infra* Section III.

5. 15 U.S.C. § 7245 (2004).

client information in settlement negotiations in the belief that doing so is morally correct may have to contend with an angry client who paid for and expected more zealous advocacy, more scrupulous preservation of client secrets, and fewer lectures on morality. On the other hand, a lawyer who says nothing misleading but merely stands by silently while an adversary proceeds on a misunderstanding derived from an exogenous source may be exposed to judicial ire, a grievance proceeding, and the potential unraveling of an erstwhile advantageous settlement agreement.

Accordingly, this Article introduces a simplified proposal for analyzing attorney omissions which is derived from principles of substantive securities laws and is consistent with the literal text and, hopefully, the spirit of the *Model Rules*. Specifically, the Article suggests that, absent court rule, principle of substantive law, or prior factual representation, an attorney should have no duty to make any affirmative factual representations in the course of settlement negotiations, subject only to the crime/fraud exception contained in the *Model Rules*. In short, there should be a silent safe harbor. An attorney who makes no representations (and does not condone or repeat those of a client) makes no misrepresentations. Once an attorney speaks, what is said should be truthful, consistent with the attorney's duty to preserve client secrets and confidences.

In the course of this Article, the leading trends in case law will be examined and analyzed, and then reexamined in light of the silent safe harbor proposal. The proposal is intended, by clarifying and simplifying the ethical duties of practicing attorneys, to increase ethical behavior in settlement negotiations.

II. ANALYTIC BACKGROUND

A. THE NO-MAN'S LAND OF PROFESSIONAL ETHICS

Settlement negotiations are, in many respects, the ethical no-man's land of legal practice.⁶ Settlement negotiations are frequently conducted in the absence of judicial supervision and without clear parameters or guidelines in the *Model Rules* or ABA *Model Code of Professional Responsibility* ("*Model Code*").⁷ Lawyers posture, threaten, bluff, wheedle, obscure, misdirect, and, often, outright mislead adversaries in order to obtain advantage for their clients. Scholars of negotiation have widely recognized the "not-so-subtle art of misdirection,"⁸ which can include evasiveness, silence, or a "true but incomplete statement of facts."⁹ In an increasingly competitive legal market, and in the perceived absence of judicial oversight or repercussions for hardball tactics, lawyers frequently push

6. Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447 (1995).

7. See THOMAS F. GUERNSEY, A PRACTICAL GUIDE TO NEGOTIATION 128 (1996) ("Negotiation is usually a very private activity As such, inappropriate behavior will not likely be subject to outside review.").

8. Rubin, *supra* note 6, at 457.

9. *Id.*

the envelope in an effort to impress or gain advantage for clients. A lawyer who deliberately misstates a client's settlement goals and bottom line is engaged in "puffing" which, most legal ethicists agree, "would often be considered permissible."¹⁰ In fact, the ability to mislead and misdirect an adversary is generally considered a virtue among lawyers. As one commentator has observed: "To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation."¹¹ Thus, an effective negotiator, like a good poker player, plays the cards close to the vest and does not display the true strength or weakness of the client's hand.¹² But where is the line to be drawn?

Professor Gerald Wetlaufer has written that "lying works,"¹³ but it comes with a price to society. In explaining the pressures that real world lawyers feel to obtain results for their clients, Wetlaufer observes that: "If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one's effectiveness in negotiations depends in part on one's willingness to lie."¹⁴ However, lest the reader rush to the conclusion that Professor Wetlaufer advocates abrogating the Fourth Commandment,¹⁵ two points should be made. First, Wetlaufer is broadly defining lying not in the commonly accepted definition of making a factually false statement purposely asserted as truth,¹⁶ but rather in the wider sense of "a belief at variance with one's own."¹⁷ This broad definition may cast in its wide net the puffery and exaggerations of a plaintiff's lawyer in a personal injury case and the insincere assertion of a criminal defense lawyer, in plea negotiations, of a belief in a client's innocence.¹⁸ To this extent, Wetlaufer may be identifying the type of misdirection and overzealous advocacy that the

10. GUERNSEY, *supra* note 7, at 125; Rubin, *supra* note 6, at 453 ("Truthfulness and fair dealing are not required by the Model Rules.").

11. Gerald Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219, 1220–21 (1990).

12. See Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest*, 38 S. TEX. L. REV. 713, 716 (1997) ("Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways, he *must* facilitate his opponent's inaccurate assessment.") (emphasis added).

13. Gerald Wetlaufer, *supra* note 11, at 1272.

14. *Id.* at 1220.

15. *Exodus* 20:16 ("Thou shall not bear false witness against thy neighbor.").

16. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 671 (10th ed. 1993).

17. Wetlaufer, *supra* note 11, at 1223.

18. Much has been written about the right of a criminal defense attorney to present a "false defense," or to assert the innocence of a client believed to be guilty. See, e.g., Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987); Joel Cohen, "*U.S. v. Lemrick Nelson*": *My Client is Innocent*, N.Y.L.J., Sept. 29, 2003, at 4, col. 3 (Cohen asks: "if it is permissible to try to make a truthful witness look like a liar through a vigorous and maybe misleading cross-examination, why can't [the attorney] 'argue' that his client is innocent; event though he knows otherwise?"); see also MODEL RULES Rule 4.1 cmt. 2 (distinguishing between impermissible misrepresentations of fact, and mere opinions, puffery, estimates of price or value, the existence of an undisclosed principal, and other "generally accepted conventions in negotiation").

public has in mind when it holds lawyers in general disrepute.¹⁹ Second, Wetlauffer does not actually advocate lying, but merely asks the practicing bar to acknowledge its prevalence, and to make a conscious decision to limit disingenuousness because “ethics and integrity are things for which a price may have to be paid.”²⁰ Lying by lawyers runs the gamut from disingenuous arguments to blatant falsehoods, and, as demonstrated by the case law discussed in Section III of this Article, has caused concern among the bar and among the public at large.²¹ Perhaps lawyers believe that the biblical proscription against “bearing false witness”²² is distinguishable in that it only applies, by its terms, to the conduct of *witnesses*, not advocates.²³ The widespread problem of attorney dishonesty—perceived and reported—raises questions as to whether the existing rules concerning attorney ethics, and misrepresentation in particular, are due for reexamination.

As discussed below, the tension between the lawyer’s duty of zealous advocacy²⁴ and the duties of candor and fair dealing with others underlies much of the opinions and scholarship in this area. It is to this ethical structure, under the *Model Rules* and *Model Code*, that this Article next turns.

B. THE ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY

The *Model Code* traces its origin to the ABA’s original *Canons of Professional Ethics* (“1908 Canons”), developed in 1908.²⁵ The modern *Model Code* was promulgated by the ABA in 1969 and subsequently adopted by most states.²⁶ The *Model Code*, however, was criticized for its bifurcated structure of mandatory “Disciplinary Rules,” and aspirational, but often ignored, “Ethical Consider-

19. See E. Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 779 (2002) (reporting that “a poll revealed that one-third of the American public thinks that lawyers are less truthful than most people”). See generally Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255 (1999) (commenting that the decline of professionalism “has taken on epidemic proportions”).

20. Wetlauffer, *supra* note 11, at 1272.

21. See, e.g., George W. Overton, *Lawyers As Liars*, CBA REC., May 1995, at 46, 46–47; see also Martin & Dees, *supra* note 19, at 779.

22. Exodus 20:16.

23. As Mark Twain has wryly written: “There are 869 different forms of lying, but only one of them has been squarely forbidden: Thou shalt not bear false witness against thy neighbor.” MARK TWAIN, *Following the Equator, in THE WIT AND WISDOM OF MARK TWAIN* 35 (Dover 1999).

24. MODEL RULES Rule 1.3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1980) [hereinafter MODEL CODE].

25. AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT vii (5th ed. 2003) [hereinafter MODEL RULES ANN.]; James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003). Altman’s scholarly article traces the 1908 ABA CANONS to their origins in the 19th Century Alabama Code, the first of its kind, and earlier antecedents. See *id.* at 2437 (The Alabama Code was “the first code of ethics adopted by any state bar association in the country.”) (citation omitted).

26. See Jones, *supra* note 19, at 1337 n. 29.

ations.”²⁷ Following the introduction of the *Model Rules* in 1983, most jurisdictions abandoned the *Model Code* in favor of some version of the *Model Rules*,²⁸ although several jurisdictions, including New York,²⁹ still follow some version of the *Model Code*.

The *Model Code*, while not explicitly addressing the settlement process, does contain general provisions proscribing fraud or misrepresentations by attorneys. For example, DR 1-102(A)(4) prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.”³⁰ DR 7-102(A)(5) provides that a lawyer may not, in representing a client, knowingly make a false statement of law or fact.³¹ A lawyer also may not “[c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal.”³² Subsection (B) of the same rule adds a further responsibility in respect of a client’s fraud in limited circumstances:

A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a privileged communication.*³³

Thus, the *Model Code* requires a lawyer to reveal a fraud occurring in the course of the representation, subject to the confidentiality provisions of DR 4-101. As Professor Roy Simon has observed in connection with the New York Code, the “confidence or secret” exception to the reporting requirement of DR 7-102(B) has virtually consumed the rule: “In virtually no circumstances will a lawyer have information about a client’s fraud that will escape DR 4-101(A)’s definition of ‘confidence’ or ‘secret.’”³⁴ Under DR 4-101 a “confidence” is “information protected by the attorney-client privilege” under applicable law, and “secret” refers to “other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”³⁵ The scope of a secret is broader than that of a confidence in that it can pertain to information derived from sources other than the client.³⁶ If the client requests that such

27. *Id.*

28. *See, e.g., id.*

29. *See* N.Y. COMP. CODES R. & REGS tit. 22, §§ 1200.1–45 (2004) (New York is currently studying the adoption of a version of the *Model Rules*. There are several differences between the New York Code, as discussed below, and the *Model Code*.) [hereinafter N.Y. CODE OF PROF’L RESPONSIBILITY].

30. MODEL CODE DR 1-102(A)(4).

31. *Id.* at DR 7-102(A)(5).

32. *Id.* at DR 7-102(A)(3).

33. *Id.* at DR 7-102(B)(1) (emphasis added).

34. ROY SIMON, SIMON’S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 721 (2003).

35. MODEL CODE DR 4-101(A).

36. *See* James M. Altman, *The Secret About Secrets*, N.Y.L.J., July 14, 2000, at 24. Indeed, under the ABA *Model Rules*, the concept of a secret or confidence is broadened to encompass any “information relating to the

information be kept confidential, or if it is likely to embarrass or injure the client, it is covered by DR 4-101.³⁷

In New York, the lawyer's duty to maintain client secrets and confidences has been described as ranking alongside the duty of loyalty to the client as "the most important duty in the Code and . . . the bedrock of the adversary system."³⁸ However, the duty to maintain client secrets and confidences is not absolute and may yield in a number of circumstances, most notably in order to withdraw a materially inaccurate representation which is believed to be relied upon by a third person or which "is being used to further a crime or fraud."³⁹ In addition, a lawyer may withdraw a materially inaccurate representation previously made in the course of a settlement negotiation which is being relied upon by an adversary.⁴⁰

C. THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

Under the *Model Rules*, settlement negotiations are broadly governed by Rule 4.1, "Truthfulness in Statements to Others."⁴¹ Under the *Model Rules*, a lawyer shall not in the course of the representation knowingly:

- (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁴²

Thus, the *Model Rules* explicitly impose an affirmative duty upon a lawyer to come forward with corrective non-confidential facts to prevent or avoid aiding a criminal or fraudulent act by a client. A lawyer, under the *Model Rules*, may not participate in or affirm a client's fraudulent or criminal misrepresentation, consistent with the lawyer's duty of confidentiality to the client.⁴³

Comment 1 to Model Rule 4.1 notes that "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer

representation of a client," which may not be revealed absent certain enumerated exceptions. See MODEL RULES Rule 1.6 (discussed *infra* in Section II.C).

37. *Id.*

38. See SIMON, *supra* note 34, at 384.

39. N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(5).

40. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 686, (1991). The same committee subsequently opined that a lawyer who may correct such a misrepresentation should do so. See N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731, (2003) ("In addition, a lawyer should withdraw an inaccurate prior material misrepresentation made during settlement negotiations, whether made by the lawyer or his client, about the existence of insurance.").

41. MODEL RULES Rule 4.1; see also MODEL RULES Rule 8.4 (generally prohibiting "dishonesty, fraud, deceit or misrepresentation" by attorneys).

42. MODEL RULES Rule 4.1 (emphasis added).

43. See MODEL RULES Rule 1.6. As was the case with the *Code*, the duty of confidentiality in the *Model Rules* has several exceptions, discussed later in this section.

knows is false,” and cautions that a misrepresentation may occur by a failure to act: “Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”⁴⁴ In 2002, the commentary to this Rule was amended by deleting the sentence: “Misrepresentations can also occur by failure to act.”⁴⁵ Practitioners looking for a message in the 2002 amendment may wonder if a “failure to act” can no longer be considered a misrepresentation but that an “omission” can. Perhaps the ABA was trying to deemphasize, but not eliminate, a lawyer’s duty to come forward and affirmatively correct an adversary’s misperception. Or it may be that the ABA was suggesting that a failure to act is doing nothing whereas an omission can include an affirmative representation which is misleading due to the absence of material information.

One scholar has addressed the omission issue by interpreting Rule 4.1 “to require lawyers to disclose material facts or law when the non-disclosure is the equivalent of a material misrepresentation.”⁴⁶ However, while generally “required to be truthful” in making statements to others, a lawyer “has no affirmative duty to inform an opposing party of relevant facts.”⁴⁷

As was the case with its counterpart in the *Model Code*, Model Rule 4.1 is subject to the duty of confidentiality, which is contained in Model Rule 1.6:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is implicitly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)⁴⁸

Until August 2003, exceptions to Rule 1.6 permitted (but did not require) an attorney to reveal a confidence for the following reasons: (a) in order to prevent a crime believed to be “likely to result in imminent death or substantial bodily harm,” (b) for the lawyer to seek legal advice about the lawyer’s own compliance with the *Model Rules*, or (c) to establish a claim or defense in a proceeding between the lawyer and the client “based upon conduct in which the client was involved.”⁴⁹

Following the Enron and WorldCom corporate accounting scandals, the American Bar Association amended its *Model Rules*, citing “spectacular failures

44. MODEL RULES Rule 4.1 cmt. 1.

45. See Martin and Dees, *supra* note 19, at 778–79.

46. Nathan M. Crystal, *The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1086 (1999).

47. MODEL RULES Rule 4.1 cmt. 1.

48. MODEL RULES Rule 1.6.

49. MODEL RULES Rule 1.6(b).

of corporate responsibility” for which lawyers “bear significant responsibility.”⁵⁰ On August 11, 2003, the ABA House of Delegates amended the *Model Rules* to permit disclosure of client confidences in order to prevent or rectify financial fraud.⁵¹ The amended text to Model Rule 1.6(b), which has not been adopted by all the states,⁵² permits disclosure of confidential information under the following additional circumstances:

(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.⁵³

Thus, the ABA, after twenty years of limiting the crime/fraud exception to situations involving imminent death or substantial bodily harm, has swung back to a broader exception. In so doing, the ABA has specifically acknowledged the unflattering role of lawyers in the corporate and accounting scandals of the preceding several years.⁵⁴ The 2003 amendments to the *Model Rules* bring them into closer alignment with the *Model Code*, which permits the revelation of a confidence when a client reveals an intention to “commit a crime,”⁵⁵ an allowance that, by its terms, includes many mundane, non-violent misdemeanors. In addition, the *Model Rules* now permit the disclosure of client information to prevent or mitigate fraud, where the client has used the lawyer’s services to further the fraud.⁵⁶ The disclosure permitted by the exceptions to Model Rule 1.6(b) is permissive, not mandatory.⁵⁷

The August 2003 amendments also revised Model Rule 1.13, which addresses

50. Am. Bar Ass’n Task Force on Corporate Responsibility, *Recommendation to Amend Rule 1.6(b) of the ABA Model Rules of Professional Conduct and to Amend the Related Comment* at Report sec. II (Aug. 11–12, 2003), available at <http://www.abanet.org/leadership/2003/journal/119a.pdf>.

51. Jonathan D. Glater, *Bar Association’s Guidelines on Client Secrets Are Eased*, N.Y. TIMES, Aug. 12, 2003, at C2.

52. Many states had, prior to the 2003 amendments to the *Model Rules*, already adopted rules which permitted the disclosure of client information to prevent or mitigate a client fraud or crime. Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 50 (2003).

53. MODEL RULES Rule 1.6.

54. See Glater, *supra* note 51; Jason Hoppin, *ABA Delegates OK Changes in Confidentiality*, THE RECORDER, Aug. 12, 2003; *Report of the ABA Task Force on Corporate Responsibility*, 58 BUS. LAW. 189 (2002).

55. MODEL CODE DR 4-101(c)(3).

56. MODEL RULES Rule 1.6.

57. See Hamermesh, *supra* note 52, at 38 (ABA did not adopt proposal for mandatory reporting out of corporate violations).

the ethical duties of a corporate attorney facing “a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization,” and which is likely to result in “substantial injury to the organization.”⁵⁸ As formerly constituted, that rule had given less concrete guidance to an attorney confronted with corporate wrongdoing. The 2003 amendment, instead of leaving referral up the corporate ladder as one of several unranked alternatives, makes it a presumptive duty: “Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer *shall refer the matter* to higher authority in the organization,” including its board of directors.⁵⁹ Moreover, a corporate lawyer faced with serious unlawful corporate misconduct which the board refuses to remedy may now disclose it to non-clients even if the lawyer is not otherwise permitted to do so by Rule 1.6. Under the post-Enron amendment to Rule 1.13, a lawyer made aware of illegal conduct which is “reasonably certain to result in substantial injury to the organization” which the corporation’s highest authority fails to address, “may reveal information relating to the representation *whether or not Rule 1.6 permits such disclosure*,” but if and only to the extent necessary to prevent injury to the organization.⁶⁰ This represents a significant narrowing of the lawyer’s duty to maintain client secrets and confidences, especially when viewed in light of the post-Enron revisions to Model Rule 1.6 itself, which permit disclosure of client materials to prevent or mitigate fraud or crimes.⁶¹

D. RESTATEMENT OF THE LAW GOVERNING LAWYERS

The American Law Institute (“ALI”), in the most recent *Restatement of the Law Governing Lawyers*,⁶² provides that a lawyer communicating with a non-client may not:

- (1) knowingly make a false statement of material fact or law to the non-client;
- (2) make other statements prohibited by law; or

58. MODEL RULES Rule 1.13(b).

59. *Id.* (emphasis added).

60. *Id.* (emphasis added). This provision does not apply to an attorney retained to investigate or defend against an alleged violation of law.

61. This revision permits an attorney to blow the whistle on corporate wrongdoing, and dovetails with the regulations promulgated by the Securities and Exchange Commission under the Sarbanes Oxley Act of 2002. See SEC Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205.3 (2004) (obligating an attorney practicing before the SEC to report evidence of a material violation to the corporation’s chief legal officer or board of directors or its audit or legal compliance committee). Since the SEC has, for the time being, abandoned a proposal requiring a “noisy withdrawal” when the corporate board fails to act on an attorney’s internal protests, the revised Model Rule 1.13 permits more disclosure of client information than that currently required by the SEC. See generally Norman B. Arnoff, *The Lawyer As a Whistleblower*, N.Y.L.J., June 10, 2003, 3, col. 1 (emphasis added).

62. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2000).

(3) fail to make a disclosure of information required by law.⁶³

According to the ALI, the prohibition on misrepresentations derives from “social expectations of honesty and fair dealing and facilitates negotiation and adjudication.”⁶⁴ A misrepresentation can occur through a direct statement or by affirming another’s lie.⁶⁵ In addition, the *Restatement’s* commentary provides that “[a] statement can also be false because only partly true.”⁶⁶

Most interesting in the context of this article is whether subdivision (3) of *Restatement* Section 98 is restricted to omissions “required” by provisions of *substantive law*, court rules, or some other, more vague definition. The commentary on “[a]ffirmative disclosure,”⁶⁷ provides that a lawyer generally “has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient.”⁶⁸ The listed examples of legal principles requiring affirmative disclosure are statutes, regulations, common-law rules and disciplinary rules. Thus, it is not unreasonable to read the *Restatement* as requiring affirmative disclosure only when required by statutory, common law, or regulatory duty.⁶⁹

E. THE ABA NEGOTIATION GUIDELINES

In 2002, the ABA Section on Litigation published its Ethical Guidelines for Settlement Negotiations (“ABA Guidelines”).⁷⁰ The ABA Guidelines are, by definition, merely exhortatory and do not have the teeth provided by state-adopted versions of the *Model Code* or *Model Rules*. Rather, the ABA Guidelines are intended to serve as an informal “guide for lawyers who seek advice on ethical issues arising in settlement negotiations.”⁷¹

An explanatory note suggests that while there is no general obligation “to

63. *Id.*

64. *Id.* § 98 cmt. b (“Rationale”).

65. *Id.* § 98 cmt. c (“Knowing misrepresentation”).

66. *Id.*

67. *Id.* § 98 cmt. e (“Affirmative disclosure”).

68. *Id.*

69. The Reporter’s Note, on the other hand, seeks to hedge its bets by referring to the general, fairness-based duty to disclose contained in the *Restatement (Second) of Contracts*:

[Nondisclosure is equivalent to misrepresentation] where [the maker] knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and . . . non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, Reporter’s Note cmt. e (2000) (citing RESTATEMENT (SECOND) OF CONTRACTS § 161(b)). Compare and contrast the amorphous concept of “fair dealing” in the reporter’s note with the presumably more structured “disclosure of information required by law” standard in the text of § 98(3).

70. AM. BAR ASS’N SECTION OF LITIGATION, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (2002) [hereinafter ABA GUIDELINES].

71. *Id.* at 1.

correct the erroneous assumptions of the opposing party or opposing counsel, the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes *induced by the lawyer or the lawyer's client* and not to exploit such mistakes.⁷² In their discussion of Model Rule 4.1, the ABA Guidelines state that a lawyer must refrain from making “a partially true but misleading statement that is equivalent to an affirmative false statement,” as well as to refrain from incorporating or affirming the statement of another that the lawyer “knows to be false.”⁷³ There are three situations in which the ABA Guidelines posit that an attorney has a duty to disclose information to a counter-party: (a) to withdraw a previous false statement by the attorney; (b) to withdraw a previous false statement by the client; and (c) to prevent the perpetration of a fraud through the representation.⁷⁴ However, the duty to disclose or correct a misrepresentation is subject to the duty of confidentiality under Model Rule 1.6, which “trumps the ethical duty of disclosure under Model Rule 4.1 (b).”⁷⁵

The ABA seems to suggest that a lawyer who sees an adversary laboring under a unilateral misconception of fact may, under some circumstances, have an affirmative duty to correct the adversary's misapprehension. The ABA Guidelines provide that “a lawyer should not exploit an opposing party's material mistake of fact” and “may need to disclose information to the extent necessary to prevent the opposing parties' reliance on the material mistake of fact.”⁷⁶ The example of such a situation given in the ABA Guidelines is an attorney's obligation to correct an adversary's reliance upon an erroneous draft or settlement agreement. According to the ABA: “It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement.”⁷⁷ Thus, subject to the duty of confidentiality, the ABA suggests that there are some situations in which an attorney should protect an adversary from self-inflicted errors.

F. DUTY OF ZEALOUS ADVOCACY

Against these high-sounding ethical principles must be balanced the lawyer's duty of zealous advocacy, which is one of the core values of the legal profession. According to Professor Geoffrey Hazard, Jr., zealousness is “the fundamental

72. *Id.* at 56–57 (emphasis added).

73. *Id.* at 35.

74. *Id.* at 37.

75. *Id.*

76. *Id.* at 56.

77. *Id.* at 57.

principle of the law of lawyering.”⁷⁸ Canon 7 of the *Model Code* provides that: “A lawyer should represent a client zealously within the bounds of the law.”⁷⁹ The *Model Code*’s Ethical Considerations provide that a lawyer serving as an advocate should represent the client zealously within the bounds of the law⁸⁰ and “should resolve in favor of the client doubts as to the bounds of the law.”⁸¹

The *1908 Canons* referred to the duty of zealous advocacy in idealistic, almost poetic terms:

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. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert such remedy or defense.⁸²

The *Model Rules*, forsaking the poetic for the prosaic, have toned down the references to zealous advocacy, relegating them to a comment to Rule 1.3, which itself merely obligates a lawyer to “act with reasonable diligence and promptness in representing a client.”⁸³ Rule 1.1 requires “competent representation” and Rule 1.2 obligates the attorney to “abide by a client’s decisions” concerning the objectives of the representation.⁸⁴

Whether couched in terms of “warm zeal” under the *1908 Canons*, or the more modest language of the current *Model Rules*, there is a potential for tension between the lawyer’s duty to the client and the duty to avoid misrepresentations to others.

III. CASE LAW AND ETHICS OPINIONS CONCERNING MISREPRESENTATION

An analysis of leading case law involving settlement negotiations reveals a continuum running from outright lies through half-truths to cases imposing liability or sanctions for omissions. The reported cases derive their rationales

78. Monroe Freedman, *The Errant Fax*, *LEGAL TIMES*, Jan. 23, 1995, at 26 (citing GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* (1985)).

79. N.Y. CODE OF PROF’L RESPONSIBILITY DR 7-101.

80. MODEL CODE EC 7-1.

81. MODEL CODE EC 7-3.

82. CANONS OF PROFESSIONAL ETHICS Canon 15 (1908) (citing George Sharswood, *Ethics*, 32 A.B.A. REP. 75-76 (1907)).

83. MODEL RULES Rule 1.3. The comment to Rule 1.3 provides that: “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.” MODEL RULES Rule 1.3 cmt. 1.

84. MODEL RULES Rule 1.2(a).

from the *Model Code*, the *Model Rules*, the *Restatement (Third) of Law Governing Lawyers*, and, increasingly, principles of contract construction. The cases are analytically grouped by type of attorney conduct, rather than type of substantive claim. Thus, an omission case seeking rescission of a settlement agreement on contract grounds will be categorized with an ethics opinion disciplining an attorney for the same conduct.

A. CASES INVOLVING AFFIRMATIVE LYING

As is evident from the plain language of both the *Model Rules* and *Model Code*, a lawyer may not affirmatively lie in the course of settlement discussions. In practice, however, misrepresentations sometimes contain elements of affirmative statements and material omissions. A classic illustration is *Slotkin v. Citizens Casualty Co. of New York*,⁸⁵ a federal case in which a lawyer was held liable in fraud for misrepresenting the existence and extent of a client's insurance coverage. In *Slotkin*, the lawyer defending a hospital affirmatively stated on the record that the full extent of insurance coverage was \$200,000, prompting the guardian of a brain-damaged baby to settle the case within the policy limits. Upon learning of the existence of a \$1 million excess policy, the infant's guardian successfully sued the attorney for fraud in a federal court diversity action.⁸⁶ The trial court set aside a verdict in favor of the plaintiffs, reasoning that the settlement of the underlying malpractice case had never been reduced to writing, and that the plaintiffs could not simultaneously affirm the settlement and obtain additional damages.⁸⁷ The Second Circuit reversed, holding that the victims of intentional fraud may elect either to rescind the settlement, or to ratify it and sue for any additional damages caused by the fraud.⁸⁸ In addition, the attorney making the misrepresentation was subsequently disciplined.⁸⁹

The unforgettable facts of *Mississippi Bar v. Mathis*⁹⁰ began with the death of a middle-aged man from a gunshot wound to the head while alone in his bedroom.⁹¹ The county coroner, a family friend, ruled the death an accident, and the deceased was quickly buried without a formal autopsy. The life insurance carrier refused to pay on the policy, claiming that the circumstances of death were suspicious. The widow filed a lawsuit alleging bad faith and failure to pay on the insurance policy. Unbeknownst to the widow, her attorney, together with her son,

85. 614 F.2d 301 (2d Cir. 1979), *cert. denied*, Citizens Cas. Co. of N.Y., 449 U.S. 981 (1980).

86. The substantial jury verdict was upheld on appeal.

87. *Slotkin*, 614 F.2d at 311; *Slotkin v. Citizens Cas. Co.*, 447 F. Supp. 253, 255–56 (S.D.N.Y. 1978).

88. *Slotkin*, 614 F.2d at 313.

89. *In re McGrath*, 468 N.Y.S.2d 349 (1st Dep't 1983).

90. 620 So.2d 1213 (Miss. 1993). This case bears a close resemblance to the facts of *Dixon v. Providential Life Ins. Co.*, a hypothetical case file prepared by Professor James H. Seckinger for training purposes under the auspices of the National Institute of Trial Advocacy ("NITA") in 1977. KENNETH S. BROWN & JAMES H. SECKINGER, *PROBLEMS AND CASES IN TRIAL ADVOCACY* (4th ed. 1993).

91. *Mathis*, 620 So. 2d at 1216.

had secretly arranged for their own autopsy of the deceased. The attorney sat by silently while his client testified in a deposition that “she opposed an autopsy because she could not bear to have her husband’s body torn apart.”⁹² The attorney did not disclose the existence of the autopsy in discovery responses, and vehemently *opposed* an application by the defendant insurance company to exhume the body and perform its own autopsy, thus falsely creating the impression that no autopsy had been conducted. In holding that the attorney’s conduct constituted misrepresentation in violation of both the *Model Rules* and the *Model Code*, the Mississippi Supreme Court reasoned that “Mathis had personal knowledge of the autopsy and his client did not. Still, in the face of such knowledge, Mathis boldly asserted that no autopsy had been performed and that none should be performed. Surely this failure to disclose is the equivalent of an affirmative misrepresentation.”⁹³ The court upheld Mathis’ suspension.⁹⁴

Honorable mention in any rouges’ gallery of attorney misrepresentation belongs to an Iowa transactional attorney who helped a client fabricate corporate documents so that the client could sell a business which he never owned. This amazing chicanery, which calls to mind the antics of the fictional theatrical *impressario* Max Bialystock in the stage and screen classic *The Producers*, is chronicled by the Iowa Supreme Court in *Hansen v. Anderson, Wilmarth & Van Der Maaten*.⁹⁵ The seller’s attorney, Michael Kennedy, assured the buyers’ attorney that his client owned an ongoing business, and in response to the latter’s request for proof, created it.⁹⁶ At the closing, Kennedy handed the buyers’ attorney recently-fabricated documents which falsely stated that his client was an officer and shareholder of the subject corporation.

When the true owners of the corporation recouped ownership from the innocent buyers, the latter sued their erstwhile attorneys, who were permitted to implead Kennedy on an indemnity theory. In upholding the indemnity claims in favor of the buyers’ attorneys against Kennedy, the court articulated a duty to refrain from lying to one’s adversary, based upon Section 98 of the *Restatement (Third) of the Law Governing Lawyers*.⁹⁷ The court’s rationale is instructive: “Because of confidentiality prohibitions, a lawyer may generally refuse to provide information without breaching any duty. However, once the lawyer undertakes to provide information, that lawyer has a duty to provide the information truthfully.”⁹⁸ Thus, under the Iowa formulation, a lawyer has no duty

92. *Id.* at 1217.

93. *Id.* at 1221.

94. *Id.* at 1222.

95. 630 N.W.2d 818 (Iowa 2001).

96. *Id.* at 820–21.

97. See discussion *supra* Section II.

98. *Hansen*, 630 N.W.2d at 825 (citation omitted).

to disclose information, but when the lawyer speaks, it must be done truthfully.⁹⁹

Another example of an impermissible factual misrepresentation is furnished in *Ausherman v. Bank of America Corp.*,¹⁰⁰ an action against a bank for improper dissemination of credit reports. In the course of settlement negotiations, the plaintiff's counsel promised the attorneys for the bank that he would, in exchange for a substantial cash payment, disclose the identity of a confidential informant who had penetrated bank secrecy and leaked confidential credit reports. When the plaintiff's attorney was subsequently forced to concede that he had fabricated the existence of the mole, the judge referred the case to the relevant disciplinary authorities, writing: "It does not require a rule of professional responsibility for a lawyer to know that, during the process of settlement negotiations, he or she may not lie to opposing counsel about a fact that is material to the resolution of the case."¹⁰¹

In *Cresswell v. Sullivan & Cromwell*,¹⁰² a judge held that a lawyer who intentionally omits material information from discovery may be personally sued for money damages by a defrauded adversary. The defendant in *Cresswell* was a law firm, Sullivan & Cromwell ("Sullivan"), which defended a brokerage firm in a securities fraud action. In discovery responses, Sullivan denied that its client was being investigated by any regulators for the same conduct which formed the basis for the civil suit. Sullivan withheld from production a recently received letter from the New York Stock Exchange concerning an investigation of Sullivan's client for the same conduct alleged in the civil case. After settling the case for a fraction of its value, the underlying plaintiffs in the securities fraud action came to learn of the investigation and sued the law firm, claiming that they were hoodwinked by the non-disclosure. In denying Sullivan's motion to dismiss, the court held that the plaintiffs could affirm the earlier settlement and still seek further damages for the additional losses they incurred in reliance upon the misrepresentation.¹⁰³ The defendant attorneys could be held liable for having concealed the regulatory investigation.¹⁰⁴

B. HALF-TRUTHS AND OMISSIONS

Perhaps most perplexing are cases in which the attorney says nothing under circumstances in which the law or ethical principles require affirmative speech.

99. A subsequent decision in the case set aside a jury verdict against the buyers' lawyers. *Hansen v. Anderson, Wilmar & Van Der Maaten*, 657 N.W.2d 711 (Iowa 2003). As of the time of this writing, Kennedy has apparently not been subject to professional discipline in Iowa. Telephone Interview with Patrick M. Roby, Trial and Appellate Counsel for the Defendants in *Hansen* (July 15, 2003).

100. 212 F. Supp. 2d 435 (D. Md. 2002).

101. *Id.* at 443-44.

102. 668 F. Supp. 166 (S.D.N.Y. 1987).

103. *Id.* at 172-73.

104. *Id.* at 173.

As mentioned above,¹⁰⁵ the *Model Code* prohibits a lawyer from failing to disclose “that which the lawyer is required by law to reveal.”¹⁰⁶ The *Model Rules* limit the duty to disclose a material fact to those situations in which, unless prevented by confidentiality concerns, “disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”¹⁰⁷

Consider a lawyer who, unlike the attorneys in *Cresswell*, was not asked any question at all, but concealed information that the adversary should have requested but didn't. For example, the question posed in *Pendleton v. Central New Mexico Correctional Facility*¹⁰⁸ was whether a lawyer, in settling a case, is ethically obligated to reveal a client's intention to bring a related action arising out of the same facts. In that case, the plaintiff settled an employment discrimination action against his employer, explicitly releasing the defendant only for conduct up through the date of a settlement conference. Three days later, after the settlement agreement was executed and the plaintiff had cashed his settlement check, the plaintiff filed a new charge with the Equal Employment Opportunity Commission, alleging retaliatory discharge. The defendant employer complained to the court which approved the settlement that the plaintiff had intentionally withheld from settlement discussions the fact that he was planning to bring a retaliation suit for the same conduct. The district court, while declining to award sanctions against the plaintiff due to technical non-compliance with the safe-harbor provisions of Rule 11 of the Federal Rules of Civil Procedure, was clearly troubled by the conduct of the plaintiff's attorney. The court wrote that “a half truth may be as misleading as a statement wholly false,”¹⁰⁹ and that “the failure to disclose a fact may be a misrepresentation in certain circumstances.”¹¹⁰

An altogether different approach to the problem of omission in settlement negotiations was followed by the court in *Hamilton v. Harper*.¹¹¹ While the *Pendleton* court, as discussed above, was outraged by the conduct of the plaintiff's attorney yet chose to take no action in that regard, the *Hamilton* court, by analysis of basic principles of contract construction, proceeded to eviscerate a settlement agreement procured without full disclosure.

The plaintiff's decedent in *Hamilton* was killed in an automobile accident due to the alleged negligence of a driver whose insurance carrier declined coverage. That carrier commenced a declaratory judgment action in federal court seeking a

105. See *supra* Section II.

106. MODEL CODE DR 7-102; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2000) (A lawyer may not “fail to make a disclosure of information required by law.”).

107. MODEL RULES Rule 4.1. Yet as mentioned in Section II.C., comment 1 to Model Rule 4.1 provides that a lawyer “has no affirmative duty to inform an opposing party of relevant facts.” *Id.* at cmt. 1.

108. 184 F.R.D. 637 (D.N.M. 1999).

109. *Id.* at 641 (citation omitted).

110. *Id.*

111. 404 S.E.2d 540 (W. Va. 1991).

ruling that it had no duty to indemnify or defend the allegedly negligent driver. While the federal declaratory judgment action was pending, the decedent's family accepted the insurance carrier's offer to pay fifty percent of the policy limits, on the understanding that both the personal injury action and the declaratory judgment action would be thereby settled.¹¹² At the time the decedent's family accepted the offer, they, but not the insurance carrier, were aware that the latter had prevailed in its federal declaratory judgment action and that accordingly it would not be required to pay any monies on behalf of its insured. The court held that the settlement agreement was unenforceable due to the failure of underlying consideration, i.e., the dismissal of the federal declaratory judgment action: "Where the consideration to one party is the dismissal of a civil action, a settlement agreement *is not enforceable* when the opposing party tenders acceptance of the offer of settlement with unilateral knowledge that a dispositive ruling has been issued which fully resolves the litigation."¹¹³

As in *Cresswell*, there was no discussion in *Hamilton* of the *Model Code* or *Model Rules*. The court did not criticize the conduct of plaintiff's counsel, but rather concluded, as a matter of basic contract interpretation, that the deceased's family was getting something for nothing, which translated into a failure of underlying consideration.

Although not addressed in the *Hamilton* decision, the question arises as to whether counsel for the plaintiff in that case had an *ethical obligation*, prior to accepting the defendant insurance company's offer of \$100,000, to affirmatively inform his adversary as to the latter's victory in the federal declaratory judgment action. Can a lawyer ethically accept a settlement payment from an adversary which is laboring under a misconception as to its exposure in what it thought was a pending case? Under these circumstances, because no misinformation emanated from the attorney or another acting at the attorney's direction,¹¹⁴ the plaintiff's attorney should have had no affirmative obligation to disabuse an adversary of the misconception.¹¹⁵

Principles of contract interpretation were also used to undo a settlement in *Spaulding v. Zimmerman*.¹¹⁶ *Spaulding* involved the settlement of a personal injury action arising from a motor vehicle accident in which the 20-year-old plaintiff suffered fractured ribs and other injuries to his chest. Prior to trial, the plaintiff was examined by a neurologist designated by the defense who detected the existence of an aortic aneurysm which had not been previously diagnosed by any of the doctors treating the plaintiff, and which may have been caused by the

112. *Id.* at 542.

113. *Id.* at 544 (emphasis added).

114. See N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003).

115. See discussion *infra* Section VI.

116. 116 N.W.2d 704 (Minn. 1962).

automobile accident.¹¹⁷ Although the defense attorneys were aware of the medical report finding a potentially casually-related and life-threatening aneurysm, they did not disclose it to the plaintiff's attorney. The case was settled for \$6,500. Court approval of the settlement was necessary because the plaintiff was an infant under then-existing Minnesota law, and was granted without disclosure of the aneurysm.

When a subsequent medical examination revealed the existence of the aneurysm, the plaintiff successfully petitioned the court to set aside the settlement on the grounds that the defense withheld vital information that the injuries suffered by the plaintiff were much more serious than those represented to the court.¹¹⁸ The Minnesota Supreme Court held that the settlement was properly vacated under principles applicable to approval of settlements on behalf of minors, "where it is shown that in the accident the minor sustained separate and distinct injuries which were not known or considered by the court at the time settlement was approved."¹¹⁹ Using principles of contract law, the *Spaulding* court reasoned that, "while no canon of ethics or legal obligation may have required them to inform plaintiff or his counsel with respect thereto, or to advise the court therein, it did become obvious to them at the time, that the settlement then made did not contemplate or take into consideration the disability described."¹²⁰

Because of the many difficult issues it raises, *Spaulding* has been considered a leading decision in the area of professional liability.¹²¹ The defense attorney who concealed the independent medical examination did not lie or tell a half-truth. He apparently did not even fail to make a disclosure required by substantive law or the relevant code of procedure.¹²² In fact, the Minnesota Rules of Civil Procedure provided for the disclosure of the report of a court-ordered medical examination of an adversary only on request,¹²³ a request which was never made in the

117. *Id.* at 707.

118. *Id.* at 709–10.

119. *Id.* at 709 (citations omitted).

120. *Id.* at 710.

121. Crystal, *supra* note 46; Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 65, 127 n.8 (1998) (referring to *Spaulding* as "one of the great gems of law teaching" and noting its inclusion "in at least five professional responsibility course books").

122. Some jurisdictions, of course, require disclosure of the report of an independent medical examination performed of the plaintiff at the request of the defense. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22 § 202.17(c) (2004).

123. Minnesota's Rule of Civil Procedure 35.02, which was enacted in 1951 and was in effect at the time of the *Spaulding* case, provides as follows:

- (a) if requested by the party against whom an order is made pursuant to Rule 35.01 or by the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examination setting out the examiner's findings and conclusions, together with like reports of an earlier examinations of the same condition. After such request and delivery, the party causing the examination to be made shall be entitled, upon request, to receive from

case.¹²⁴ Rather, defense counsel simply did not share with his adversary the result of an investigation performed at the request of counsel in the course of an adversarial proceeding.

Professor Nathan Crystal has written that the *Spaulding* court did not go far enough, or more specifically, that its principles of contract interpretation should be extended to support a rule of ethical conduct as well.¹²⁵ Crystal argues that attorneys' conduct should at a minimum comply with standards of commercial honesty and fair dealing sufficient to sustain a contract.¹²⁶ In Professor Crystal's analysis of the *Spaulding* case, "defense counsel's failure to disclose was the equivalent of a misrepresentation."¹²⁷ According to Crystal, "defense counsel had a duty to disclose because plaintiff's physical condition was a basic fact about which plaintiff was mistaken, and the failure to disclose violated principles of good faith and fair dealing."¹²⁸

One potential problem with Crystal's analysis—or any analysis derived from *Spaulding*—is that it seeks to derive an analytical system from the facts of a peculiar and difficult case, which involved considerations unique to a minor with a life-threatening disease. In addition, Crystal's conclusion does not flow necessarily from his analysis. For example, in an arm's length settlement agreement between two parties when both parties are represented by counsel, no misrepresentation emanates from defense counsel or anyone else associated with the defense, and defense counsel does not fail to disclose anything required by law,¹²⁹ why should the failure to disclose be deemed the equivalent of a misrepresentation? Further, the *Model Code*, as discussed above, only requires that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."¹³⁰ Counsel for the defense in *Spaulding* did not withhold information that he was obligated by law to disclose, did not violate any procedural rule of the relevant jurisdiction, did not make any affirmative false representations, and did not stand by silently while someone else made an

the party or person examined a like report of any examination, previously or thereafter made, of the same physical, mental, or blood condition. If the party or person examined refuses to deliver such report, the court, on motion and notice, may make an order requiring delivery on such terms as are just, and, if any examiner fails or refuses to make such a report, the court may exclude the examiner's testimony if offered at the trial.

MINN. R. CIV. P. 35.02; see Cramton & Knowles, *supra* note 121.

124. Cramton & Knowles, *supra* note 121, at 74 ("Instead, *Spaulding*'s failure to learn the full scope of his injuries was due to the 'ignorance or incompetence' of his lawyer, Roberts, who failed to 'use available rules of discovery' to obtain Dr. Hannah's report.").

125. Crystal, *supra* note 46.

126. The argument that contract principles should inform attorney ethics has also been made by Professor Trina Jones. See Jones, *supra* note 19.

127. Crystal, *supra* note 46, at 1097.

128. *Id.*

129. MODEL CODE DR 7-102(A)(3).

130. *Id.*

incorrect representation on his behalf.¹³¹ Rather, counsel simply chose not to disclose information that, if disclosed, would likely have been disastrous to the defense.¹³²

Perhaps the most compelling problem arising from the extraordinary facts of *Spaulding* is one of basic humanity. While the lawyer's duty of zealous advocacy to a client is one of the seminal virtues of the lawyer's creed, it seems to be fundamentally inhumane not to disclose to a 20-year-old youth the existence of his life-threatening aneurysm, which presumably required prompt medical attention.¹³³ *Spaulding* is an illustration of Oliver Wendell Holmes' famous maxim that hard cases make bad law.¹³⁴ There is no provision in the *Model Rules* or the *Model Code* which explicitly *obligates* a lawyer to inform another upon learning of a non-client's life threatening disease.¹³⁵ The *Model Rules*, as mentioned in Section II.C., permit but do not obligate a lawyer to reveal otherwise protected client information to the extent necessary to prevent, and, in some cases, rectify, a crime or fraud.¹³⁶ The commentary to Rule 1.6 suggests that a lawyer whose client has accidentally discharged toxic waste into a public water supply "may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease" and the disclosure is necessary to prevent that harm.¹³⁷ Generally speaking, the adversary system does not and should not

131. See Cramton & Knowles, *supra* note 121. These authors conclude that the nondisclosure of the independent medical examination report in *Spaulding*, absent approval by the defendant, was consistent with the *Model Code* and that "disclosure *would not be permitted* under the literal text of Minnesota's current ethics code." *Id.* at 81 (emphasis added).

132. In addition, consider the possibility that the defense medical report constituted confidential material within the meaning of Model Rule 1.6 or a secret or confidence under Disciplinary Rule 4-101 of the *Model Code*. Arguably, if the client's objective was to minimize settlement payments to the plaintiff, then disclosure of the medical report could be detrimental to the interests of the client and accordingly be deemed a secret or confidence of the client. As mentioned, Cramton and Knowles conclude that the disclosure "would not be permitted" under Minnesota's ethics code. Cramton & Knowles, *supra* note 121, at 81. On the other hand, the medical report was presumptively discoverable, thereby undermining any expectation of confidentiality in it.

133. On the unique facts of that case, defense counsel could and should have persuaded the client to permit the disclosure of the aneurysm. The *Model Code's* Ethical Considerations encourage attorneys, when advising clients, "to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions." MODEL CODE EC 7-8. Of course, ultimate decision-making authority belongs to the client. *Id.*

134. *N. Sec. Co. v. United States*, 193 U.S. 197, 362 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law.").

135. Some lawyers and lay persons may wonder why such a provision is even necessary. On the other hand, it is noteworthy that, after 100 years of experience, the ABA found it necessary specifically to tell lawyers not to lie—*three times*. See MODEL RULES Rules 4.1, 7.1, 8.4.

136. MODEL RULES Rule 1.6(b).

137. MODEL RULES Rule 1.6 cmt. 6.

obligate a lawyer to correct the mistakes of an adversary or adverse expert.¹³⁸ In *Spaulding*, the court stepped in to correct a harsh and unjust product of the adversary system.

Perhaps the broadest interpretation of a misrepresentation by omission was *Nebraska v. Addison*, in which an attorney who made no misrepresentations at all, but merely failed to disclose a material fact that was relied upon by his adversary, was suspended from practice.¹³⁹ Addison was a personal injury lawyer who negotiated the compromise of his client's hospital lien for a fraction of its total worth. The attorney made no affirmative representations as to the extent of insurance coverage, but he was aware of the existence of a \$1 million excess policy. He sat by silently when the hospital administrator stated his own (incorrect) understanding that there was total coverage of only \$150,000 for the accident. The attorney, it was held, had an ethical obligation under DR 7-102(A)(5) of the *Model Code* to disclose the existence of the excess insurance policy, notwithstanding the fact that he made no factual representations of any nature to the hospital.¹⁴⁰

Addison goes beyond any other precedent¹⁴¹ in suggesting that a lawyer must correct the misconception of an adversary which emanates from a source exogenous to the lawyer. It appears inconsistent with a lawyer's duty of zealous advocacy to require the correction of any misapprehension under which the other side labors, regardless of whether it emanated from the attorney's side of the bargaining table or not. Both the *Model Code*¹⁴² and the *Model Rules*¹⁴³ generally provide that an attorney is not responsible for a misrepresentation which emanates from an unrelated source.¹⁴⁴ Thus, *Addison* represents the high water mark of the trend embodied in the ABA Guidelines discussed in Section II, above.

C. DEATH OF A CLIENT: PURE OMISSION OR IMPLIED MISREPRESENTATION?

The classic illustration of misrepresentation by omission is when an attorney accepts a settlement offer without disclosing the death of the plaintiff. This

138. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003) (finding that DR 2-107 does not obligate a lawyer to correct misapprehension of one's adversary derived from source other than the lawyer, his client, or someone acting at their direction).

139. 412 N.W.2d 855, 856 (Neb. 1987).

140. *Id.*

141. With the possible exception of the ABA Guidelines on Settlement Negotiations discussed in Section II.E.

142. MODEL CODE DR 7-102(A)(5).

143. MODEL RULES Rule 4.1.

144. One ethics committee has written that a lawyer is not "obligated to correct an adversary's misunderstanding of his client's resources gleaned from independent, unrelated sources." N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003).

subject raises several questions. First, is it the failure to disclose the death that constitutes the misrepresentation, the subsequent conduct in finalizing the settlement, or both? Second, as will be examined below, does it make sense that death of any party should be treated with parity; i.e., is the death of a defendant a disclosable event as well as the death of a plaintiff? Third, should a choice not to disclose the death of a civil litigant be compared to ethical constraints applicable to criminal law, in which a prosecutor is not obligated to disclose the death of a material witness?

The seminal case concerning the duty to disclose the death of one's client in settlement negotiations is *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*,¹⁴⁵ in which the court set aside a settlement agreement due to the plaintiff's attorney's failure to disclose the death of his client. In a comprehensive ruling based on both DR 7-102 and Model Rule 4.1, the court wrote:

Here, plaintiff's attorney did not make a false statement regarding the death of plaintiff. He was never placed in a position to do so because during the two weeks of settlement negotiations defendants' attorney never thought to ask if plaintiff was still alive. Instead, in hopes of inducing settlement, plaintiff's attorney chose not to disclose plaintiff's death, as he was well aware that defendant believed that plaintiff would make an excellent witness on his own behalf if the case were to proceed to trial by jury.¹⁴⁶

The *Virzi* court reasoned that the non-disclosure of the plaintiff's death was a material misrepresentation because the loss of his testimony "would have had a significant bearing on defendants' willingness to settle."¹⁴⁷

The Supreme Court of Kentucky, in *Kentucky Bar Ass'n v. Geisler*,¹⁴⁸ an attorney disciplinary proceeding, similarly held that an attorney's failure to disclose the death of her client to opposing counsel "amounted to an affirmative misrepresentation" in violation of the Kentucky Ethical Rules.¹⁴⁹ The respondent attorney in *Geisler*, as was the case in *Virzi*, accepted a settlement offer in a personal injury case without disclosing the recent death of her client.¹⁵⁰ The defense learned of the plaintiff's death upon receipt of a settlement release executed by the administrator of his estate. The defense attorney consummated the settlement and then filed a grievance against Geisler, claiming that he had been deliberately misled. Citing letters which she had written implying continued authority, the Kentucky court suspended Geisler, reasoning that her authority to act terminated on the death of her client, McNealy, and that she had an obligation to disclose that fact to her adversary:

145. 571 F. Supp. 507 (E.D. Mich. 1983).

146. *Id.* at 511.

147. *Id.*

148. 938 S.W.2d 578 (Ky. 1997).

149. *Id.* at 580. Model Rule 4.1 was the "precursor" to the Kentucky Ethical Rule at issue.

150. *Id.* at 578.

Attorneys in circumstances similar to those at bar operate under a reasonable assumption that the other attorney's client, whether a legal fiction or in actual flesh, actually exists and, consequently, that opposing counsel has authority to act on their behalf. . . . Basically, when the offer was made after McNealy's death, respondent had no authority to act on his behalf. Despite this fact, respondent proceeded to settle the case under the guise that she had the authority to do so on behalf of McNealy. *Her letters to Ford clearly imply this.*¹⁵¹

A Pennsylvania ethics committee took a different approach, concluding, albeit equivocally, that an attorney is not obligated to disclose the death of a client who is a personal injury claimant, at least while the case was in a pre-filing, negotiation stage.¹⁵² The Pennsylvania opinion relied upon the comment to Model Rule 4.1(a) that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts."¹⁵³ It further reasoned that "neither lawyer nor client is under any obligation to come forward unbidden with information that is unknown to the other side, even if the other side will surely lose its case in the absence of knowledge of that evidence."¹⁵⁴ Thus, the Pennsylvania Ethics Committee concluded that, at the pre-suit stage of the case, there was no obligation to disclose the client's death, subject to reconsideration should the case proceed to settlement or trial.¹⁵⁵

In a 1987 opinion, Virginia concluded that a claimant's lawyer need not disclose the client's death following receipt of a settlement counteroffer: "It is not improper . . . for the attorney not to disclose the death of his client to the insurance company absent a direct inquiry from the insurance company regarding the client's health."¹⁵⁶ However, in the next breath, the opinion cautioned that the claimant's attorney, "in order to avoid an appearance of impropriety," should nonetheless "disclose the death of his client at the time he accepts the offer of settlement," provided that the settlement had been authorized by the claimant prior to his death and ratified by the administrator thereafter.¹⁵⁷ The Virginia approach seems to suggest that there is no immediate duty to reveal the claimant's death, absent direct inquiry, but that upon *acceptance* of a settlement

151. *Id.* at 580 (emphasis added).

152. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 93-51 (1993).

153. MODEL RULES Rule 4.1(a) cmt. 1.

154. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 93-51 (1993) (quoting WOLFRAM, MODERN LEGAL ETHICS § 12.3.2 (1986)).

155. In a subsequent memorandum added to the informal opinion, a member of the Pennsylvania Ethics Committee wrote that he was reconsidering the position that he had espoused in Informal Opinion 93-51, in light of the ABA's subsequent Formal Opinion 95-397, which, as will be seen below, reached a contrary conclusion. The Pennsylvania ethicist soliloquized, curiously, that, "I find myself swithering [sic] on the 4.1(a) issue," and that he was reconsidering his views on the subject. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 93-51 (1993).

156. Va. Bar Ass'n Standing Comm. on Legal Ethics, Op. 952 (1987).

157. *Id.*

offer, general principles of fairness require its disclosure.¹⁵⁸

The influential American Bar Association Committee on Professional Ethics weighed in on the debate in ABA Formal Opinion 95-397,¹⁵⁹ which concluded that a personal injury lawyer must disclose the death of the plaintiff before accepting a settlement offer. According to the ABA ethics committee: “When a lawyer’s client dies in the midst of settlement negotiations of a pending lawsuit *in which the client was the claimant*, the lawyer has a duty to inform opposing counsel and the court in the lawyer’s first communication with either after the lawyer has learned of that fact.”¹⁶⁰ In part, the ABA reasoned that the death of a client terminates or at least changes the attorney’s authority to act, and that “a failure to disclose that occurrence is tantamount to making a false statement of material fact” within the meaning of Model Rule 4.1.¹⁶¹ The ABA committee concluded that the client’s death means that “the lawyer, at least for the moment, no longer has a client, and, if she does thereafter continue in the matter, it will be on behalf of a different client.”¹⁶² The ABA opinion, by requiring immediate notification, most significantly departs from those of Virginia and Pennsylvania when it comes to the timing of passing on news of the client’s passing on.

The Illinois State Bar Association followed the ABA in opining that the death of a personal injury plaintiff should be promptly disclosed because “the death of the claimant materially alters the nature of the claim existing at her death.”¹⁶³ Interestingly, the same ethics opinion states that the death of the same client needn’t be disclosed in a *bankruptcy matter* in which she had been the sole remaining officer of a closely-held family business.¹⁶⁴ Because the client in the bankruptcy case was a corporation, and not its individual principal, “the lawyer has no duty under the Rules of Professional Conduct to disclose the deaths of any principal officers or shareholders unless the unique circumstances of the particular matter make the death of the individual officers or shareholders material to the matter.”¹⁶⁵

The question left open by the foregoing authorities is whether the same duty of disclosure would apply upon the death of a *defendant* in a civil action. An assumption underlying *Virzi* and the other authorities cited above appears to be that the testimony of a plaintiff is essential to establish a *prima facie* case in an action for negligence or personal injury, but that the testimony of the defendant is

158. The Virginia Opinion could be harmonized with *Geisler* by arguing that the writing of misleading letters in the latter case triggered the duty to disclose, and that the outcome might have been different without them.

159. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95–397 (1995).

160. *Id.* (emphasis added).

161. *Id.*

162. *Id.*

163. Ill. St. Bar Ass’n Advisory Op. on Prof’l Conduct, Op. 96–03 (1996).

164. *Id.* (The only other shareholder or officer had been the deceased’s husband, who predeceased her. The inquiring attorney was retained to represent the corporation in a claim against one of its debtors. *Id.*)

165. *Id.*

much less important.¹⁶⁶ But this assumption was never critically examined in the ABA Formal Opinion or any of the authorities cited in it. Consider, for example, a hypothetical action for medical malpractice against a surgeon or an anesthesiologist, in which the plaintiff was under anesthesia and is in no position to give meaningful testimony as to liability. Conversely, the defendant's testimony is crucial. Indeed, it is generally acknowledged that the testimony of the defendant physician is often the most dramatic phase of a malpractice trial. In this particular illustration, it would seem that the death of the plaintiff, who cannot give meaningful testimony about liability, would be less significant to the trial's outcome than the death of the defendant. Yet under ABA Formal Opinion 95-397, a plaintiff's attorney who settles a medical malpractice action without disclosing the death of a client is subject to professional discipline. Does a literal reading of the ABA rule preclude professional discipline against a defense attorney who extracts a settlement advantageous to the defendant's malpractice carrier without disclosing the client's death? Or does other language in the ABA Formal Opinion, to wit, that "a failure to disclose that occurrence is tantamount to making a false statement of material fact,"¹⁶⁷ bring defense counsel within its proscription? Conversely, when the real party in interest is not the defendant, but an insurance carrier, is the defendant's death even a material fact?¹⁶⁸

In order further to test the logic of the ABA rule (i.e., the principles set forth in ABA Opinion 95-397), consider this second hypothetical: An attorney represents a husband and wife who were both injured in an automobile accident. The wife, who was driving, is prepared to testify about the occurrence of the accident. The husband was asleep at the time and can give no meaningful testimony as to the defendant's fault. The wife is familiar with the husband's injuries and subsequent physical limitations, which are well documented in the medical records. At an initial meeting with their attorney, settlement parameters are discussed and the husband and wife authorize the attorney to demand and accept a settlement of \$100,000. Two months later, the defense offers \$100,000, and when the attorney

166. In addition, ABA Opinion 95-397 reasoned that the attorney's authority to act ceased upon the client's death. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995).

167. *Id.*

168. An unstated assumption underlying the claimant-defendant disclosure distinction may be that the real party in interest is not the defendant but the insurance carrier. If the carrier is controlling and funding the defense (and any settlement or judgment), the argument would be that the death of the insured is less significant than, say, the insolvency of the carrier. While no opinion has explicitly analyzed this point, the argument could be made that the true analogue to the death of a plaintiff would be the insolvency of the carrier, or the discovery of excess or additional insurance which should be disclosed. These developments could, for obvious reasons, materially affect settlement negotiations or trial strategy. On the other hand, this previously unarticulated analysis fails to take into consideration cases in which the defendant is underinsured or uninsured, or in which the insured has a consent policy, or in which non-economic factors predominate. For example, settlements or awards involving physicians, stockbrokers, and other professionals must be reported to industry regulators and could significantly affect the professional's license and career. Such a professional has a genuine stake in the case and is a real party in interest.

telephones the clients to relay the settlement offer, the wife conveys the news that her husband recently died, that she is the administrator of his estate, and that she still authorizes the attorney to accept the offer. Under this hypothetical scenario, the husband's death does not necessarily affect the overall strength of the plaintiff's case or the previously-given authority to act, which is in any event ratified by the legally-appointed administrator of the estate. Assuming that the deceased's claims for pain, suffering, and economic loss survive his death as a matter of substantive law, the reasoning of *Virzi* and ABA Opinion 95-397 would seem to require disclosure of the death of the husband, who did not witness the accident, and whose testimony on liability issues would not have been significant had he lived. Moreover, since his wife survives him, she can testify to her direct observations of her late husband's non-economic loss including his difficulty climbing stairs or tying his shoes. Conversely, the driver of the other vehicle is only a defendant, and, although more useful as a witness than the sleeping plaintiff, under ABA Opinion 95-397, this person's death need not be disclosed. Thus, the distinction between the death of a plaintiff and death of a defendant is not altogether persuasive.

The limitation of the majority position on this issue may be further illustrated by Illinois State Bar Opinion 96-03,¹⁶⁹ which, as mentioned above, concluded that the death of a personal injury plaintiff must presumptively be disclosed, but that the death of the same individual was presumptively not a discloseable event in a bankruptcy proceeding, even though she was the sole surviving principal of a closely-held corporation, the claimant in the bankruptcy proceeding.¹⁷⁰ It is not difficult to imagine various scenarios in which the death of such a corporate principal would "materially alter[] the nature of the claim" such that the reasoning of Illinois Opinion 96-03 would require its disclosure,¹⁷¹ and, in fairness, the opinion did allow for such a possibility. Assume that a creditor corporation seeks to recover against a customer for goods sold and delivered, yet the principal who negotiated the contract, spoke with the debtor, and can attest to the conforming quality of the goods is no longer available to testify or authenticate documents. Why is this person's death presumptively less material than the death of a personal injury plaintiff?¹⁷²

While the rationale of ABA Opinion 95-397 is, as suggested above, subject to criticism, its conclusion in most cases comports with common sense notions of fairness. As a practical matter, it is difficult to imagine a real-world situation in

169. Ill. St. Bar Ass'n Advisory Op. on Prof'l Conduct, Op. 96-03 (1996).

170. *Id.*

171. *Id.*

172. Although business records can be authenticated by others or received upon admission, so, too, can the elements of liability and damages in a personal injury or wrongful death case be established by a variety of means. Moreover, to the extent that another corporate executive can be appointed to make decisions on behalf of the firm, so, too, can an administrator be appointed to make decisions for the deceased's estate.

which an attorney can work on a case and not make representations as to the status of the health of the client or the attorney's authority to act. Moreover, in many jurisdictions, provisions of substantive law may govern the attorney's authority to act upon the death of the client.¹⁷³

It is difficult to defend the conduct of, or muster sympathy for, a lawyer who withholds from an adversary such a major development in a case as the client's death. The most obvious motivation for withholding such information, aside from sloth or inadvertence, is intentionally to deceive one's adversary. A lawyer who fails to disclose the death of a client is guilty, at a minimum, of sharp practice and harsh dealings and is hardly deserving of the trust or respect of professional colleagues.

But while a bright-line rule may have some appeal in terms of predictability, the line drawn by the ABA is not entirely satisfying for several reasons. As mentioned above, at least one earlier state ethics opinion reached a different conclusion,¹⁷⁴ and, as discussed, the ABA view does not explicitly consider the death of a defendant, which could, in some cases, be more significant than the death of the plaintiff. And, as the next section of this Article will demonstrate, there is an interesting comparison to be made between ethical standards in civil and criminal cases when it comes to the death of a client as opposed to the death of a witness for the prosecution.

IV. PLEA BARGAINING IN CRIMINAL CASES: DEATH OF A WITNESS

As discussed above, the failure to disclose the death of an attorney's client in a civil action can have serious adverse repercussions, including the unraveling of a settlement and institution of a disciplinary proceeding against the attorney. Given the foregoing, it would be natural to expect that the ethical duties imposed upon a criminal prosecutor would exceed or at least equal those of a personal injury attorney. Both the *Model Rules*¹⁷⁵ and the *Model Code*¹⁷⁶ contemplate that a government attorney has a special duty of fairness in the criminal justice system

173. See, e.g., N.Y. C.P.L.R. § 1015(a) (McKinney 1997) ("If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties."); cf. FED. R. CIV. P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest."). However, the Federal Rules of Civil Procedure do not require an action to be stayed or dismissed, but rather allow "a reasonable time" to provide for substitution of an executor or administrator. *Id.* Moreover, in New York, there is no stay of a cause of action which redounds to the benefit of a surviving spouse N.Y. C.P.L.R. § 1015(b) (McKinney 1997) ("Upon the death of one or more of the plaintiffs or defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate.").

174. See Va. Bar Ass'n Standing Comm. on Legal Ethics, Op. No. 952 (1987); Pa. Bar Association Informal Op. 93-51 (1993).

175. See, e.g., MODEL RULES Rule 3.8 ("Special Responsibilities of a Prosecutor").

176. See MODEL CODE DR 7-103.

which in some respects outweighs the duty of zealous advocacy.¹⁷⁷ A prosecutor's "special duty to do justice" imposes considerations of fairness which do not come into play in the representation of a private litigant.¹⁷⁸ The Supreme Court has famously written that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done."¹⁷⁹ Thus, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones."¹⁸⁰

In light of prosecutors' heightened duty to pursue fairness and justice, it is noteworthy that district attorneys do not have an obligation to disclose the death of a material witness prior to accepting a guilty plea.¹⁸¹ The leading authority on the subject is *People v. Jones*,¹⁸² a New York case in which an assistant district attorney accepted a guilty plea without disclosing to the defendant that the primary eyewitness against him had died several days earlier. The defendant in *Jones* had been indicted for armed robbery based upon the testimony of the complaining witness, Rodriguez. Plea negotiations progressed over a period of several months, during which time Rodriguez was located and interviewed by investigators for both the defense and the prosecution.¹⁸³ On February 3, 1976, the prosecution announced that the case was ready for trial. On April 26, the defendant pleaded guilty to robbery, a plea he subsequently sought to withdraw upon learning that the district attorney had been informed of the death of Rodriguez four days prior to entry of the plea. Crying foul, the defendant claimed that the witness' death was exculpatory material within the meaning of *Brady v. Maryland*,¹⁸⁴ which the government was obligated to disclose.

177. See, e.g., MODEL CODE DR 7-103(A); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.1 ("Function of the Prosecutor").

178. David Aaron, *Ethics, Law Enforcement and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 *FORDHAM L. REV.* 3005, 3008 (1999).

179. *Burger v. United States*, 295 U.S. 78, 88 (1966).

180. *Id.*; see also *People v. Rice*, 505 N.E.2d 618, 619 (N.Y. 1987).

181. Aaron, *supra* note 178; Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 *HARV. L. REV.* 1004 (1986).

182. 375 N.E.2d 41 (N.Y. 1978).

183. *Id.* at 42.

184. 373 U.S. 83 (1963). In *Brady*, Justice William O. Douglas wrote that "the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* The phrase "*Brady* material" has come to signify exculpatory evidence which the prosecution is duty-bound to turn over to the defense in a timely manner. See Aaron, *supra* note 178, at 3022-24. Subsequent decisions have expanded the *Brady* rule to require, under some circumstance, the disclosure of exculpatory evidence even without a request. See, e.g., *United States v. Agurs*, 427 U.S. 97 (1976) ("But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."). But see *United States v. Bagley*, 466 U.S. 667, 695 (1985) (modifying disclosure requirement to situations in which "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

The New York Court of Appeals held that the death of the witness was not exculpatory evidence within the meaning of *Brady*. In fact, the court reasoned, “The circumstance that the testimony of the complaining witness was no longer available to the prosecution was *not evidence at all*.”¹⁸⁵ Nor does the prosecution have an ethical duty “to disclose information in its possession which, as here, is highly material to the practical, tactical considerations which attend a determination to plead guilty, but not to the legal issue of guilt itself.”¹⁸⁶

The Court of Appeals next considered the argument that, by announcing the case ready for trial, the government had implicitly “represented to the court and to defense counsel that the complaining witness had been located and would therefore be available to testify at trial.”¹⁸⁷ Interestingly, the court reasoned that the prosecutor’s duty to refrain from misrepresentations under the *Model Code*¹⁸⁸ did not obligate the government to come forward with an appraisal of the strengths and weaknesses of its case. As a general principle of ethics, “it would seem that silence should give rise to legal consequences only if it may be concluded that the one who was silent was under an affirmative duty to speak.”¹⁸⁹ As a result, the New York court held that the tactical decision not to disclose the witness’ death was neither exculpatory material nor an affirmative misrepresentation in violation of the *Code of Professional Responsibility*.¹⁹⁰

Thus, a prosecutor has no duty, ethical or otherwise, to disclose the unavailability of the government’s primary witness, notwithstanding an earlier announcement of readiness for trial. On the other hand, a prosecutor who affirmatively dissembles during a trial for the purpose of misleading defense counsel into believing that a witness is available when that witness is, in fact, dead, crosses the line and commits misrepresentation. The assistant district attorney in *People v. Rice*¹⁹¹ went significantly beyond the conduct permitted in *Jones* by affirmatively inducing both the court and defense counsel to believe that a key witness to a shooting was still alive, when, in fact, he knew that the witness was dead.¹⁹² The death of the sole eyewitness to the crime was not disclosed until the third day of trial, by which time the prosecutor had deliberately misled both the court and defense counsel as to the witness’ availability.¹⁹³ This conduct was

185. *Jones*, 375 N.E.2d at 43 (emphasis added).

186. *Id.*

187. *Id.*

188. New York, as mentioned, is a *Code* state. See N.Y. CODE OF PROF’L RESPONSIBILITY; SIMON, *supra* note 34.

189. *Jones*, 375 N.E.2d at 44 (citations omitted).

190. *Id.* at 45.

191. 505 N.E.2d 618 (N.Y. 1987).

192. The prosecution’s motivation for bluffing on this issue is not explicit in the decision. Presumably the misrepresentation was intended to induce the defendant to plead guilty.

193. *Id.* at 619.

held to be ethically impermissible.¹⁹⁴ Thus, the courts have, in the criminal context, distinguished between a mere passive failure to disclose (*Jones*) and an affirmative attempt to mislead (*Rice*).

Before comparing the ethical analyses in the criminal and civil cases, it is worth considering whether *Jones* is subject to criticism on its own terms. Unlike the prosecutor in *Rice*, the assistant district attorney in *Jones* did not affirmatively seek to mislead an adversary by falsely stating or implying that the witness was alive. However, the district attorney did affirmatively announce on the record that the government was ready for trial. This was a *procedural* announcement that the prosecution had the evidence to make out a *prima facie* case at trial, not to be confused with a *substantive* assertion that the defendant was, in fact, guilty, whether or not the admissible evidence was available to prove the case in court. The prosecutor in *Jones* knew, at the time of the defendant's guilty plea, that the government was in fact *not* ready for trial due to the death of the eyewitness, and that the defense was, in all likelihood, still relying on the earlier announcement of readiness, which was no longer true. Thus, the question arises as to whether the district attorney had a duty to disabuse the defense of a factual representation which was true when made, but no longer true. Under New York law, the district attorney probably had no duty to disclose the death of the witness, as an attorney generally has no obligation to correct a factual representation which was true when made, provided that it is not being used to further a fraud or crime.¹⁹⁵

Bringing these authorities to bear on the matter at hand, a threshold question is whether analysis of criminal cases can shed any light on the ethical dilemmas facing all lawyers. In other words, is the death of a civil client truly analogous to the death of a complaining witness in a criminal prosecution? After all, in a criminal case, the prosecutor's client is the government itself, and the death of a complaining witness does not affect the prosecuting attorney's authority to act. No opinion has stated that a civil litigator must disclose the death or unavailability of a non-party eyewitness, the closest analogy to the situation in *Jones* and its progeny. In addition, one of the premises of ABA Formal Opinion 95-397 is that the death of a client terminates an attorney's authority to act and that any further negotiation by the attorney contains an implicit representation that the client is still alive.¹⁹⁶

Yet the authorities addressing the death of a party, including ABA Opinion 95-397, involve the death of a *plaintiff*. These opinions proceed upon the assumption, sometimes explicitly stated, that the unavailability of the client's

194. Given the overwhelming evidence of guilt, the Court of Appeals held, over a strenuous dissent, that the ethical breach was harmless. *Id.*

195. See MODEL RULES Rule 4.1; MODEL CODE DR 4-101; N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 686 (1991) (no duty to withdraw representation which was accurate when made).

196. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (discussed *supra* Section III.C.).

testimony as a witness is a tactical consideration that one's adversary is entitled to know. For example, recall that the court in *Virzi*, in setting aside a settlement, reasoned that the plaintiff's perceived demeanor as a witness would have had a significant bearing on defendant's willingness to settle.¹⁹⁷ Yet, the quality of a witness' testimony is exactly the type of "practical, tactical consideration" that did not require disclosure in *People v. Jones*.¹⁹⁸ Thus, the defendant's belief "that plaintiff would make an excellent witness on his own behalf" in *Virzi*¹⁹⁹ is logically analogous to the considerations which impelled a different result in *Jones*.

It could be argued that the perceived anomaly is a creation of substantive law and that criminal law and procedure cannot be fairly equated with their civil cousins.²⁰⁰ In addition, a prosecutor, who is duty-bound to disclose exculpatory evidence under *Brady*, is already under a sufficiently heavy responsibility—one that is not imposed upon a civil litigator. While these propositions are plausible, it is nonetheless also the case that the decisions concerning the duties of prosecutors are based upon the same definition of misrepresentation in the *Model Code* and *Model Rules* with, to be sure, an overlay of criminal law concepts.²⁰¹ And, of course, the literal texts of Model Rule 4.1 and DR 7-102 do not, by their terms, distinguish between civil and criminal cases in their definition of misrepresentation.

Several commentators have noted the apparent anomaly, and suggested leveling the playing field by imposing upon prosecutors a duty to disclose the death of a witness.²⁰² David Aaron, for example, writes that "permitting prosecutors to withhold decision-influencing information allows the voting public's demands for convictions to reward morally marginal conduct; requiring prosecutors to disclose such information liberates a prosecutor's office from public pressure."²⁰³ This contention derives from the somewhat altruistic, if not simplistic, premise that fairness requires the superior bargaining resources of the government be offset by a prosecutor's obligation to disclose a material change in the strength or weakness of the government's case.²⁰⁴

197. See *Virzi v. Grand Truck Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 511 (E.D. Mich. 1983) (discussed *supra* Section II.C.).

198. *People v. Jones*, 375 N.E.2d 41, 43–45 (N.Y. 1978).

199. 571 F. Supp. at 511.

200. One commentator has observed that the limited scope of discovery in a criminal prosecution, in which, for example, depositions and interrogatories (in most jurisdictions) are ordinarily not available, "reflects a policy judgment favoring restricting criminal defendants' discovery rights further than those of civil litigants." Aaron, *supra* note 178, at 3018.

201. See, e.g., *Jones*, 375 N.E.2d at 43–45; *People v. Rice*, 505 N.E.2d 618, 618–19 (N.Y. 1987).

202. See Aaron, *supra* note 178; *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004 (1986); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

203. Aaron, *supra* note 178, at 3039.

204. *Id.*

A moment's reflection reveals that Aaron and his colleagues are advocating more than simply leveling the playing field. Under both the *Model Code* and the *Model Rules*, a lawyer who makes an accurate factual representation is generally not obligated to inform an adversary of changed circumstances with the exception of the death of a client, discussed above.²⁰⁵ Under the *Model Code* a lawyer is permitted, but not required, to withdraw a material factual *misrepresentation* which is being detrimentally relied upon by another.²⁰⁶ Under the *Model Rules*, the lawyer's ability to disclose confidential information is limited to those circumstances in which it is necessary to prevent or mitigate a fraud or crime by the client.²⁰⁷ Under either analysis, a prosecutor's announcement of trial readiness, truthful when made, would not have been "a false statement of material fact or law" within the meaning of Rule 4.1(a) or a "criminal or fraudulent act by a client," under Rule 4.1(b) such that disclosure of the charged circumstances should be necessary.

There is no logical or moral reason why the disclosure required by the ABA in a civil case²⁰⁸ should be imposed in the case of the death of a witness in a criminal case. Conversely, it can be persuasively argued that if prosecutors, with their attendant heightened moral and ethical duties, are not obligated to disclose the death of a witness, then why should the same relaxed standard not be appropriate in the case of a civil litigator? In other words, if the conduct at issue is good enough for the government under *Brady*, shouldn't it be good enough for the rest of us as well? The fact that a prosecutor may ethically not disclose the death of a witness casts doubt on one of the two articulated rationales behind compelling a personal injury lawyer to disclose the death of the plaintiff.²⁰⁹ Even without considering this analogy, there is anything but clarity in the law concerning a lawyer's duty to correct a presumed misrepresentation caused by omission.²¹⁰ Considering that the *Model Rules* are, after all, designed as guideposts for practicing attorneys, there is a certain virtue to predictability and internal logic, along with ease of administration. Hence, it is to the proposal of a silent, safe harbor which the Article now turns.

205. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 686 (1991).

206. See MODEL CODE DR 4-101; N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 686 (1991).

207. See MODEL RULES Rule 4.1. Comment 3 to Rule 4.1 says that: "In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud." *Id.* at cmt. 3; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992) (permitting but not requiring attorney for a debtor corporation to "disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance" of misrepresentation of assets to a bank).

208. I.e., the obligation to disclose the death of a client articulated in ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-397 (1995).

209. A lawyer misrepresenting the extent of authority to act should derive no solace from this analysis.

210. See, e.g., *State ex rel. Nebraska State Bar Ass'n v. Addison*, 412 N.W.2d 855 (Neb. 1987) (disciplining attorney for failing to correct a misapprehension about insurance coverage which his adversary derived from a completely independent, exogenous source).

V. THE “SAFE HARBOR” CONCEPT

A. THE SAFE HARBOR IN GENERAL

The safe harbor proposal posits that a lawyer should fully comply with all disclosures required by principles of substantive law and applicable procedural rules. Absent such an affirmative duty, a lawyer may follow the lead of the New York Court of Appeals in *Jones* that “silence should give rise to legal consequences only if it may be concluded that the one who was silent was under an affirmative duty to speak.”²¹¹ On the other hand, ethical liability will attach to a lawyer who speaks yet fails to tell the truth.²¹² As the Iowa Supreme Court wrote in *Hansen v. Anderson, Wilmarth & Van Der Maaten*, while a lawyer generally has no obligation to speak, “once the lawyer undertakes to provide information, that lawyer has a duty to provide the information truthfully.”²¹³

B. ATTORNEY LIABILITY UNDER FEDERAL SECURITIES LAWS

The “safe harbor” concept is inspired by and derived from general principles of substantive securities law.²¹⁴ Under general principles of substantive securities law, a lawyer who makes no representations to the public in the course of representation of a client and does not directly participate in the underlying fraud generally may not be held liable for a primary violation of the law.²¹⁵ On the

211. *People v. Jones*, 375 N.E.2d 41 (N.Y. 1978); *cf. Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818 (Iowa 2001) (while under no general duty to speak, “once the lawyer undertakes to provide information, that lawyer has a duty to provide the information truthfully”).

212. Kathy Patrick, *The Liability of Lawyers for Fraud Under the Federal and State Securities Laws*, 34 ST. MARY’S L.J. 915, 919 (2003).

213. *Hansen*, 630 N.W.2d at 825 (discussed *supra* Section III.A.).

214. *See, e.g.*, 15 U.S.C. § 78t (2004); Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6,296 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205) (“A ‘safe harbor’ provision has been added to protect attorneys, law firms, issuers and officers and directors of issuers.”). Under federal securities laws, a “control person” who is otherwise vicariously responsible for the underlying violations of a subordinate or partner has a potential safe harbor by demonstrating that such person acted in good faith and did not directly or indirectly induce the underlying violation. *See, e.g.*, THOMAS LEE HAZEN, TREATISE ON THE LAWS OF SECURITIES REGULATION §§ 4.24, 4.27 (4th ed. 2002). For example, the Securities Exchange Act of 1934 provides:

Every person who, directly or indirectly controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not direct or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t; *see also* FED. R. CIV. P. 11(c)(1) (21-day safe harbor to correct sanctionable conduct).

215. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (no aiding and abetting liability in private civil action under 1934 Securities Exchange Act); *Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991) (because lawyers only “papered the deal,” a lawyer who was aware of the client’s false financial statement committed no actionable wrong in conveying it to seller); Patrick, *supra* note 212, at 919; HAZEN, *supra* note 214, § 12.25[8] at 767 (“The mere fact that an attorney participates in an offering

other hand, a lawyer who steps beyond the traditional role of attorney–counselor–drafter and makes direct statements to the investing public “is like any other speaker and must speak truthfully.”²¹⁶

Recent developments in securities law, including the enactment of the Sarbanes Oxley Act of 2002²¹⁷ and the regulations promulgated thereunder by the Securities and Exchange Commission have undoubtedly increased the pressures on attorneys to come forward and seek to remedy and report corporate malfeasance and wrongdoing. In January 2003, the SEC issued its “Standards of Professional Conduct for Attorneys,”²¹⁸ which generally obligate an attorney to report evidence of a material violation to the chief legal officer of a corporation, or, if the attorney reasonably believes that it would be futile to make such a report or if the general counsel fails to act, to the board of directors or its audit or legal compliance committee. While there is no private cause of action under the regulations,²¹⁹ an attorney practicing before the Commission can be subject to sanctions and discipline, including “civil penalties and remedies for a violation of the federal securities laws.”²²⁰ Moreover, the 2003 SEC standards influenced the August 11, 2003 amendments to the Model Rules discussed in Section II, above.²²¹

Basic principles of securities law have historically tended to draw a distinction between lawyers as counselors and lawyers as active participants in their clients’ activities. The courts have been reluctant to impose liability on attorneys for securities fraud,²²² reasoning that “lawyers owe no general duty of disclosure to the investing public.”²²³ A lawyer fulfilling the traditional role of advising a corporate client or drafting an offering memorandum is not liable to investors or other non-clients as a general matter.²²⁴ Since the 1994 decision of the U.S.

memorandum without rendering substantial assistance in the fraud will not result in aider and abettor liability.”) (footnote omitted).

216. Patrick, *supra* note 212, at 919.

217. 15 U.S.C. § 7245 (2002).

218. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6,296 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205).

219. 17 C.F.R. § 205.7 (2004).

220. *Id.* § 205.6.

221. Hamermesh, *supra* note 52, at 42.

222. The primary definition of securities fraud is contained in Section 10(b) of the Securities Exchange Act of 1934, which provides, in part, that it is unlawful: “To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78j (2000); *see also* 17 C.F.R. § 240.10b-5 (2004) (proscribing fraud and misrepresentation “in connection with the purchase or sale of any security”).

223. Patrick, *supra* note 212, at 919.

224. *See* HAZEN, *supra* note 214, § 12.25[8], at 767 (“The mere fact that an attorney participates in an offering memorandum without rendering substantial assistance in the fraud will not result in aider and abettor liability.”) (footnote omitted).

Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver*,²²⁵ attorney liability under the federal securities laws has been found only when a lawyer engaged in a primary violation of the law by making an affirmative representation.²²⁶ Thus, “when the lawyer chooses to speak directly to the investing public, for example by providing an opinion to be included in an offering document, the lawyer is like any other speaker and must speak truthfully or risk liability under the securities laws when she does not.”²²⁷

In determining the viability of civil claims by defrauded investors, Judge Melinda Harmon’s decision in *In re Enron Corporation Securities Derivative and ERISA Litigation*²²⁸ distinguished between the conduct of two law firms: Vinson & Elkins, which was a primary and active participant in the ongoing fraud, and Kirkland & Ellis, which at best aided and abetted the misconduct but did not step out of its traditional attorney-client relationship and made no misrepresentations to the investing public.²²⁹ Enron’s fraud was alleged to constitute “an enormous Ponzi scheme,”²³⁰ by which corporate executives created “special purpose entities” that they used to remove corporate liabilities from the balance sheet.²³¹ Assets from the special purpose entities moved in the opposite direction. As a result, Enron’s assets were exaggerated and its liabilities concealed.

In deciding a motion to dismiss civil fraud claims asserted by Enron investors, Judge Harmon reasoned that:

professionals, including lawyers and accountants, when they take the affirmative step of speaking out, whether individually or as essentially an author or co-author in a statement or report, whether identified or not, about their client’s financial condition, do have a duty to third parties not in privity not to knowingly or with severe recklessness issue materially misleading statements on which they intend or have reason to expect that those third parties will rely.²³²

225. See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (private plaintiff may not bring an aiding and abetting action under the 1934 Securities Exchange Act).

226. See HAZEN, *supra* note 214, § 12.25[8], at 769 (“A distinction has thus been drawn between a failure to blow the whistle and the making of an affirmative misstatement.”).

227. Patrick, *supra* note 212, at 919 (citations omitted); see also HAZEN, *supra* note 214, § 12.25[8] at 768 (“When an attorney speaks to investors, he or she assumes a duty to speak truthfully and thus will be held accountable for material misstatements or omissions.”) (citations omitted).

228. 235 F. Supp. 2d 549 (S.D. Tex. 2002).

229. See *id.* at 704–06.

230. The term “Ponzi scheme” denotes a pyramid scheme in which infusions of fresh capital from new investors are used to make payments to older investors, based upon false promises extended about a non-existing underlying investment. The phrase derives from legendary scam artist Charles Ponzi, who, in 1919, took in \$10 million by issuing promissory notes to millions of investors promising to repay \$150 for each investment of \$100 within 90 days. Ponzi “made no investments of any kind, so that all the money he had at any time was solely the result of loans by his dupes.” *Cunningham v. Brown*, 265 U.S. 1, 8 (1924).

231. *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 235 F. Supp. 2d at 613–15.

232. *Id.* at 610.

Under that analysis, Vinson & Elkins “was not merely a drafter, but essentially a co-author of the documents it created for public consumption concealing its own and other participants’ actions.”²³³ Vinson & Elkins was an active and primary participant in the scheme because it negotiated and structured concealed, off-the-books partnerships and advised its client to make an Enron employee a manager of one of the limited partnerships.²³⁴ Vinson lawyers helped Enron shift \$700 million of debt from Enron’s books, while simultaneously reporting profits derived from the off-the-books partnerships.²³⁵ The court noted that had Vinson simply advised its client, and not made public statements, “the attorney-client relationship and the traditional rule of privity for suits against lawyers might protect Vinson & Elkins from liability to non-clients.”²³⁶ However, due to Vinson’s public statements, it had a duty to be “accurate and truthful.”²³⁷

The claims against Kirkland & Ellis, on the other hand, were dismissed because the documents it drafted were not released to the investing public. As a result, Kirkland’s activities were protected by the attorney-client relationship and the traditional rule that an attorney who does not make material misrepresentations to investors or the general public is not thereby liable for the client’s misrepresentations.²³⁸

C. WOULD THE SAFE HARBOR PROPOSAL CHANGE EXISTING LAW?

It is worth considering whether the safe harbor proposal is consistent with the *Model Rules* and decisions rendered under them. The *Model Rules* and *Model Code* proscribe attorney omissions only in narrow circumstances.²³⁹ As mentioned earlier in this Article,²⁴⁰ Model Rule 4.1 limits a lawyer’s ethical duty to affirmatively come forward with a factual representation to those circumstances where “disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,” unless the information is protected as a client secret under the recently-amended Rule 1.6.²⁴¹ The comment to Model Rule 4.1 provides that a lawyer “generally has no affirmative duty to inform an opposing party of relevant facts,” although it does suggest that omissions can be “the equivalent of affirmative false statements.”²⁴²

233. *Id.* at 705.

234. Vinson attorneys also helped Enron mask the source of funding of an ostensibly independent partnership, which was in reality an Enron-funded surrogate. *Id.* at 614.

235. *Id.* at 615–16.

236. *Id.* at 705.

237. *Id.*

238. *Id.* at 117.

239. See MODEL CODE, DR 7-102(A)(3) (“[L]awyer shall not . . . [c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal.”).

240. See *supra* Section II.C.

241. See *supra* Section II (discussing Model Rule 1.6).

242. MODEL RULES Rule 4.1 cmt. 1.

There is nothing in the safe harbor concept that would impel a different result in cases involving outright lying or misrepresentations by attorneys, such as *Slotkin*²⁴³ (misrepresentation about existence of insurance coverage), *Mathis*²⁴⁴ (misrepresentation about prior autopsy performed on deceased), *Ausherman*²⁴⁵ (false implication of existence of corporate mole), *Cresswell*²⁴⁶ (deliberate refusal to disclose regulatory investigation in civil case), and related authorities discussed in Section III of this Article. Moreover, the safe harbor concept, like the *Model Rules* and the *Model Code*, is subject to the crime/fraud exception discussed in Section II, above.²⁴⁷

The primary problem with existing law arises in the omission cases, in which attorneys have been disciplined or sued, and settlement agreements undone, due to attorneys' failures to disclose information that they were not legally obligated to disclose. For example, in *Nebraska v. Addison*,²⁴⁸ a lawyer was disciplined for standing by silently when an adversary announced a unilateral misconception that the attorney had no substantive or procedural obligation to correct. There is no indication in the opinion that the attorney did anything actively to encourage the counterparty to persist in its unilateral misconception. The defense lawyer in *Spaulding*,²⁴⁹ while not subject to professional discipline, suffered the unraveling of an advantageous settlement agreement due to the nondisclosure of a medical report which there was no legal or ethical obligation to disclose. Neither lawyer in these cases should have had a substantive or ethical obligation to speak.

A logical result was obtained in *Pendleton v. Central New Mexico Correctional Facility*,²⁵⁰ in which the plaintiff's attorney was permitted to trick his adversary into believing, naively, that their settlement covered all of the disputes between the parties. The plaintiff's attorney in *Pendleton* intentionally blindsided an adversary by withholding a fully-developed plan to bring a second, related action immediately after the execution of the release in the first case. While the federal judge presiding over the settlement justifiably had some harsh words for the sharp conduct of the plaintiff's attorney, no adverse action was taken. Nor should there

243. See *Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301 (2d Cir. 1979).

244. See *Miss. Bar v. Mathis*, 620 So. 2d 1213 (Miss. 1993). *Mathis* did involve an omission—the failure to disclose a private autopsy. Yet the disciplined attorney in that case also directly misled a judge and adversary in discovery responses and in opposition to a defense motion to compel an autopsy. Thus, *Mathis* should not be considered a pure omission case.

245. See *Ausherman v. Bank of America Corp.*, 212 F. Supp. 2d 435, 443–44 (D. Md. 2002); see also discussion *supra* Section III.B.

246. See *Cresswell v. Sullivan & Cromwell*, 668 F. Supp.166, 173 (S.D.N.Y. 1987); see also discussion *supra* Section IV.B.

247. See MODEL RULES Rule 4.1(b) (lawyer must disclose non-privileged information to “avoid assisting a criminal or fraudulent act by a client”).

248. See *State ex rel. Nebraska State Bar Ass'n v. Addison*, 412 N.W.2d 855 (Neb. 1987); see also discussion *supra* Section III.

249. See *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962); see also discussion *supra* Section III.C.

250. See *Pendleton v. Cent. N.M. Corr. Facility*, 184 F.R.D. 637 (D.N.M. 1999); see also discussion *supra* Section III.B.

have been. The plaintiff's attorney in *Pendleton* was not asked about and did not volunteer any information about the client's intention to bring further claims. A wily negotiator hoodwinked a naïve adversary who neglected to insist on an airtight general release. This is not fraud, but an imperfect, indeed, even harsh, result brought about by the everyday workings of the adversary system.²⁵¹ Under the safe harbor proposal, *Pendleton* was correctly decided.

Next consider the decision in *Hamilton v. Harper*,²⁵² which set aside a settlement agreement when one side failed to disclose to the other the resolution of an underlying declaratory judgment action in which both sides were represented by counsel. While it is difficult to praise the conduct of either lawyer in *Hamilton*, it is equally apparent that the non-disclosing attorney had no ethical, legal or procedural obligation to inform an adversary of a publicly-available decision prior to accepting the settlement. The *Hamilton* decision, it seems, was thus wrongly decided.

The ABA Guidelines, discussed in Section II.D., above, suggest that "a lawyer should not exploit an opposing party's material mistake of fact," and may need to "disclose information" to prevent an adversary's reliance upon a unilateral mistake of fact.²⁵³ The ABA Guidelines, along with judicial decisions such as *Addison*²⁵⁴ and *Spaulding*,²⁵⁵ while laudable for their high-minded and principled approach to negotiations, provide little guidance to practitioners. Rather, these authorities in effect relegate ethics interpretation to the visceral, "I know it when it see it" school of analysis so famously coined by Justice Potter Stewart in the obscenity realm.²⁵⁶ This kind of guideline, while trusting in the judgment of the individual practitioner and jurist, gives little guidance to either. More important, the ABA Guidelines insufficiently consider the nature of the adversary system and the lawyer's duty of zealous advocacy in particular. A lawyer is duty-bound to zealously promote the client's interests, even to the detriment of other persons or society as a whole. Most scholars of negotiation agree that a good negotiator, like a good poker player, will conceal the client's bottom line and seek to exploit an adversary's inferior knowledge or stamina for a fight.²⁵⁷

251. This is not necessarily to commend the conduct of an attorney who springs traps upon unsuspecting adversaries.

252. *Hamilton v. Harper*, 404 S.E.2d 540, 546-54 (W. Va. 1991).

253. See ABA GUIDELINES, *supra* note 70; see also note 70 and accompanying text.

254. *State ex rel. Neb. State Bar Ass'n v. Addison*, 412 N.W. 2d 855 (Neb. 1987).

255. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

256. Justice Stewart's full quote, on the subject of pornography:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

257. See, e.g., *Wetlauffer*, *supra* note 11, at 1272.

Most clients in the adversary system properly expect their attorneys to exploit the weakness of an adversary, within the confines of the *Model Rules*.

The silent safe harbor proposal attempts to draw a clear, bright line distinction which balances the attorney's duty of zealous advocacy to the client with the competing values of honesty and trustworthiness in dealing with others. The most interesting (and ragged) frontier between these competing values is drawn by the question of when to disclose the death of a client to adverse counsel in settlement negotiations.

D. DEATH OF THE CLIENT

Assuming the absence of a substantive legal problem concerning an attorney's authority to act on behalf of the client,²⁵⁸ there is nothing in the plain language of Model Rule 4.1 that requires an attorney, in accepting a settlement offer, to reveal the client's death. Yet, as discussed above, existing case law imposes the obligation to disclose this information, whether requested or not. A plaintiff's attorney who accepts a settlement offer without disclosing the client's death is subject to professional discipline, yet the defense attorney who extends the same settlement offer is not under a corresponding obligation. Nor is an obligation imposed on a prosecutor in a criminal case to disclose the death of a material witness. While these analogies are interesting in the abstract, it is difficult to conceive of a real world situation in which a lawyer can represent a client without continuing to make affirmative representations regarding the client and the lawyer's authority to act. A lawyer who, in accepting a settlement offer on behalf of a deceased client, says, "my client accepts your offer," is lying in violation of Rule 4.1, and would be subject to discipline even under the silent safe harbor provision. Similarly, this lawyer cannot ethically sign pleadings, write letters, execute a settlement release, or endorse a check under circumstances in which the lawyer would represent, explicitly or implicitly, that the client is still alive. Significantly, the sanctioned attorney in *Kentucky Bar v. Geisler* wrote letters which "clearly implied" her continuing authority to act on behalf of her client, without disclosing the client's death.²⁵⁹

ABA Formal Opinion 95-397,²⁶⁰ which obligates a plaintiff's lawyer to disclose the client's death, may be tested by considering a hypothetical situation in which the plaintiff dies while a settlement check is in the mail. The plaintiff's attorney made no representations concerning the availability of the client, but believes that the defense would not have settled had it known of the plaintiff's death. Should the plaintiff's attorney give the money back, assuming that there

258. And this is a significant assumption. See *supra* Section III.C.

259. See *Kentucky Bar v. Geisler*, 938 S.W.2d 578, 580 (Ky. 1997) (discussed *supra* Section III).

260. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995); discussion *supra* Section III.

have been no affirmative misrepresentations? Since the attorney made no misrepresentations during settlement negotiations, there is nothing to withdraw. Why can't that lawyer ethically conclude the settlement? Under the silent safe harbor proposal, this attorney made no affirmative representation, and, hence, no misrepresentation.

The safe harbor proposal is consistent with the distinction drawn by the New York Court of Appeals in *Jones*,²⁶¹ in which the district attorney was silent about the death of his witness, and *Rice*,²⁶² in which the prosecutor explicitly and affirmatively misled the court and his adversary. As mentioned above, DR 4-101(C) of the New York Code permits a lawyer to withdraw or correct a previously given representation that the lawyer subsequently learns was based on materially inaccurate information which is still being relied upon by a third party, or which is being used to further a crime or fraud.²⁶³ However, if the representation was accurate when made, there is no duty to correct it.²⁶⁴ The information that the client was alive or likely to make a good witness was accurate when given; hence the failure to find a misrepresentation by the prosecutor's announcement of readiness, in *Jones*, which was true when made.

E. LEAVING THE HARBOR: NONDISCLOSURE OF INSURANCE IN SETTLEMENT NEGOTIATIONS

This Article next considers the situation in which an attorney makes a literally correct factual representation to an adversary in settlement negotiations which, nevertheless, is materially misleading. For example, assume that an attorney accurately informs an adversary that a corporate client is in severe financial distress and is on the verge of insolvency which could threaten its ability to continue in business. However, the attorney chooses not to reveal the existence of a substantial insurance policy that could fully satisfy the adversary's claims. Further assume that negotiations are conducted prior to the filing of suit or in an arbitration or administrative forum in which the disclosure of insurance information is not required by law. Under this hypothetical, the factual representation of impending financial doom is literally accurate, yet effectively misleading to the extent that it attempts to portray the picture of a corporate defendant which is likely to become bereft of assets with which to satisfy a claim. In this hypothetical situation, is a lawyer who makes an accurate factual

261. *People v. Jones*, 375 N.E.2d 41 (N.Y. 1978).

262. *People v. Rice*, 505 N.E.2d 618 (N.Y. 1987).

263. N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(5). This provision was added to the New York Code of Professional Responsibility in 1990 and is not part of the *Model Code*. SIMON, *supra* note 34, at 441.

264. See N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992) (permitting but not requiring attorney for a debtor corporation to "disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance" of misrepresentation of assets to a bank).

statement which inaccurately implies that an insured client would be unable to satisfy a liability claim under a duty to disclose the existence of the insurance policy?

Before venturing an analysis of this thorny issue, it bears observation that it can be, depending on the circumstances, beyond the scope of the safe harbor proposal, which, after all, would protect a lawyer who says nothing. Once the lawyer elects to speak about the client's financial wherewithal, the ship has left the harbor, so to speak, and the duty to avoid misrepresentation becomes susceptible to traditional analysis.

The New York County Lawyers' Association Committee on Professional Ethics grappled with the disclosure of insurance information, and concluded, in Ethics Opinion 731,²⁶⁵ that "while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead."²⁶⁶ The New York Committee reasoned:

It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in doing so he or she refrains from intentionally adopting or promoting a misrepresentation.²⁶⁷

Thus, the New York committee concluded that while a lawyer may not convey or perpetuate false information to an adversary about insurance, there is no duty to correct an adversary who is laboring from a self-imposed misimpression. Hence, the New York view is contrary to *Addison*.

The commentary to Model Rule 4.1, as noted above, provides that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts."²⁶⁸ Yet the same comment also states that an impermissible misrepresentation "can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."²⁶⁹

Under the silent safe harbor proposal, as under comment 1 to Model Rule 4.1, a lawyer who does not introduce into settlement negotiations the topic of a client's

265. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003).

266. *Id.*

267. *Id.*

268. MODEL RULES Rule 4.1 cmt. 1.

269. *Id.*

ability to pay a judgment is under no obligation to disclose information that would be advantageous to the adversary, such as the existence of an insurance policy, assuming that there is no requirement of substantive or procedural law for that disclosure.²⁷⁰ However, once the lawyer departs from the safe harbor and elects to speak, what is said should not consciously and materially mislead. A lawyer who affirmatively introduces the concept of a client's ability to pay a judgment should also disclose the existence of the liability insurance. A lawyer who pleads poverty in settlement negotiations in order to place on the table the client's ability to pay a judgment should disclose the existence of the insurance policy.

The following hypotheticals illustrate possible scenarios in which the defendant's ability to satisfy a judgment comes into play:

Hypothetical 1: Defense counsel states "My client is going out of business." Defense counsel does not disclose the existence of a substantial liability policy which is available and sufficient to pay any resulting judgment.

The permissibility of this statement in settlement negotiations may depend on its context, whether elicited by the claimant or volunteered by the defense, and whether adduced to create the impression of the collectibility of a future judgment. For example, the following variations on this hypothetical illustrate a continuum of misdirection, ranging from simple avoidance to outright deception:

Hypothetical 1A:

Claimant's attorney: "Tell me a little about your client."

Defense counsel: "I don't want to talk about my client. Let's talk about how you think you are going to prove your case without a credible witness."

Hypothetical 1B:

Claimant's attorney: "Tell me a little about your client."

Defense counsel: "Well it's going out of business."

Hypothetical 1C:

Defense counsel: "I am offering you ten cents on the dollar. Take it or leave it, because my client is going out of business."

Hypothetical 1D:

Claimant's attorney: "I am a little concerned about whether a judgment would be collectible against your client."

Defense counsel: "My client is going out of business."

270. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003).

Hypothetical 1E:

Defense counsel: "I am offering you ten cents on the dollar on this case. You'd better take it because my client is going out of business and you will not be able to collect on your judgment."

In each of the five hypothetical examples, defense counsel omits the existence of insurance coverage, and in the last four, counsel tells the claimant that the defendant corporation is going out of business. On one end of the spectrum of responses, Hypothetical 1A is beyond reproach, as defense counsel desists from making any factual representations about the client's financial status. The defense attorney in that example remains in the safe harbor. Hypothetical 1B is ethically acceptable, as it is not clear from the context that defense counsel is attempting to create a false impression that the firm is without assets with which to pay a judgment. The plaintiff's attorney asked an open-ended question asking for general background information, and the defense attorney replied in kind. On the other end, Hypothetical 1E is manifestly false under the terms of the hypothetical, which postulate the availability of insurance coverage, and should subject the attorney to discipline for falsely stating that a judgment would be uncollectible.

Hypotheticals 1C and 1D are more interesting, as the attorney is implying without expressly stating that a judgment would be uncollectible, thereby creating a false impression without deliberately misstating the facts. In Hypothetical 1C, the defense attorney suggests that the offer may not be available in the future due to the defendant's plan to go out of business. Here, the question of collectibility is not explicit, as in the following two hypotheticals. The defense attorney, in this example, may argue that there are other issues at play beyond the collectibility of a judgment. For example, the offer of ten cents on the dollar may have the advantage of timely payment, whereas a delay by the plaintiff may render a subsequent settlement subject to the whims of a bankruptcy trustee or insurance adjuster. The representation that a corporation is going out of business is not necessarily tantamount to the statement that it has no assets; such a company may well have substantial assets, but also a longer or slower line of creditors awaiting those assets. A defunct company could have insurance coverage or other assets that may require lengthy and expensive litigation to make available. Accordingly, the incomplete information disclosed in Hypothetical 1C represents a permissible misdirection, and not an impermissible misrepresentation.

In Hypothetical 1D, the defense attorney is aware that the plaintiff's attorney is concerned with the collectibility of a judgment, and answers with a truthful statement that fails to disclose additional information useful to the other side. As the New York County Lawyers' Association ethics committee concluded, there is no general ethical duty to disclose insurance information to an adversary. Nor is there an ethical duty to answer an adversary's questions during settlement negotiations. Indeed, there are some circumstances in which the existence of

insurance coverage, while generally discloseable in litigation, can be considered a secret or confidence of the client such that its disclosure could affect the settlement of other cases or encourage numerous additional suits.²⁷¹ It could be argued that it is incumbent upon the plaintiff's attorney, in this example, to ask the follow-up question as to the existence of insurance. But, in the final analysis, it seems that Hypothetical 1D is a classic illustration of an intentionally misleading omission. The defense attorney deliberately contributed to the misconception of the adversary, thereby pouring gasoline on the fire. It would have been preferable to avoid the topic, e.g., by reaffirming the offer, rather than falsely implying that the adversary's fears of collectibility were well-founded. This Hypothetical illustrates a misrepresentation by "partially true but misleading statements or omissions that are the equivalent of affirmative false statements" within the meaning of Comment 1 to Model Rule 4.1.

Thus, while the defense attorney fails to disclose the existence of the insurance in all of the foregoing examples, it is only the intentionally misleading conduct in Hypotheticals 1D and Hypothetical 1E that *should* result in discipline. On the other hand a lawyer who discloses the existence of insurance in Hypotheticals 1A-C is not necessarily praiseworthy, as the client may have an interest in preserving the confidentiality of the insurance information, which its attorney had no duty to disclose. The attorney's duty of zealous advocacy militates toward non-disclosure.²⁷²

Of course, the universe of potential misleading omissions is well-nigh infinite. Just by way of illustration, consider also the following examples of half-truths:

271. See N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003).

A client may have a confidentiality concern about disclosing the details of its finances, and may similarly wish to conceal the existence of an insurance policy. As a matter of general policy, a corporate client may not wish to disclose to the general public, and to the plaintiff's bar in particular, the existence of insurance out of a desire not to encourage numerous frivolous suits.

Id.

272. While these hypotheticals assume the existence of unsupervised negotiations, imagine that each occurred in the chambers of a judge, or, as was the case in *Spaulding*, subject to judicial approval. 116 N.W.2d 704 (Minn. 1962). Such a judge might take a dim view of the non-disclosure upon learning that the defendant which extracted a favorable settlement upon protestations of poverty had a liability insurance policy which was available to pay the entire amount demanded by the claimant. This analysis is complicated in that the *Model Rules* require of attorneys a higher standard in their representations to judges than to others. Under Model Rule 3.3, a lawyer has a duty of candor to a tribunal and may not make a "false statement of material fact or law" to a judge or fail to correct the attorney's own previously made false statement of material fact or law. MODEL RULES Rule 3.3(a)(2). In dealing with other lawyers, an attorney need not be candid, but must simply refrain from misstating material facts. See MODEL RULES Rule 4.1. Judges' expectation of this duty of candor may be one of the reasons behind some of the inconsistencies illustrated in the judicial decisions discussed in Section III. Some judges expect attorneys to accord each other a level of candor and openness, which is not required by the *Model Rules* and which is not entirely consistent with the attorney's duty of zealous advocacy under the adversary system.

Hypothetical 2: A defense attorney truthfully brags to a claimant that similar claims have been dismissed in the past, without disclosing the fact that some of the dismissals were reversed on appeal. None of the reversed cases has come up for retrial.

Hypothetical 2A:

Defense counsel: “We have successfully defended this type of claim in the past. Four similar claims were dismissed by a court.” (Counsel does not reveal the fact that three of the four dismissals were reversed on appeal.)

Hypothetical 2B:

Defense counsel: “We have vigorously defended this type of claim in the past. No one has ever prevailed on such a case.”

Hypothetical 2A is impermissibly misleading. The statement that a prior case was “successfully defended” is untrue, since the reversed cases have, by the terms of the hypothetical, not been resolved. The statement may not be defended as puffery, and it is implausible that it was intended not to convey the invincibility of the defense, but rather the defendant’s willingness to fight the claim tenaciously through verdict and appeal.

On the other hand, Hypothetical 2B could be permissible. Under the terms of the hypothetical, in which none of the cases has come up for trial, this statement is still literally true. It is the job of the claimant’s attorney to verify or request additional information from defense counsel.

Thus, even under the safe harbor provision, determination of the ethics of half-truths can still be a complex and fact-based matter.

F. HOW MUCH TRUTH SHOULD BE DISCLOSED?

Given the generally accepted assumption that misdirection and concealment play legitimate roles in negotiation,²⁷³ the question arises as to how much truth is required under the silent safe harbor provision. Clearly, a lawyer who makes one factual representation is not thereby required to divulge all of the strengths and weaknesses, skeletons, and confidences of the client’s case. For example, in portions of the insurance hypothetical described above, I argue that a defense attorney should not be able affirmatively to mislead a counterparty into believing that there are insufficient assets available to satisfy a judgment by not disclosing the existence of an insurance policy that is not otherwise discoverable by principles of substantive law. But that doesn’t mean that the defendant necessarily has to open all of its books and records for inspection by adverse counsel; only that the lawyer should play no part in the adversary’s misconception. Indeed, the lawyer has a duty to maintain the client’s confidences and

273. See discussion *supra* Section II.E.

secrets, and not unnecessarily to divulge information that would weaken the client's case.

The standard under the safe harbor concept should be no more stringent than that governing an attorney's withdrawal of a prior misrepresentation. In that circumstance, a New York ethics committee has written, the lawyer has no duty to provide "detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a material inaccurate representation" by the attorney or a client.²⁷⁴

Since a lawyer should have no duty to correct an adversary's misconception arrived at from an independent, outside source, a simple avoidance or polite change of subject should suffice to avoid ethical violations. There is a fine line between standing by silently while an adversary labors under a misconception and actively encouraging that misconception. For example, if a counterparty announces an understanding as to the extent of insurance coverage (*Addison*) or the pendency of a case that a lawyer knows has been decided (*Hamilton*), it is one thing to say nothing, but something altogether different to adopt and encourage the misconception.

VI. CONCLUSION

While it has long been apparent that an attorney may not make affirmative factual misrepresentations in settlement negotiations,²⁷⁵ a growing body of authorities and commentators has posited that an attorney is ethically obligated to correct misimpressions caused by half-truths or omissions which are relied upon by adversaries to their detriment.²⁷⁶

The problem with existing authority, despite its volume and intuitive appeal, is its lack of consistency and, as a result, predictability. First, as discussed in detail above, there has been no compelling analysis of the difference in significance between the death of a plaintiff and that of a defendant, or between the death of an individual claimant versus the sole principal of a closely-held corporation.²⁷⁷ Second, as discussed in Section IV, there is a logical inconsistency between the ABA rationale on this subject and the ethical standards applicable to criminal prosecutors, who are theoretically subject to heightened ethical obligations.

Third, there is an inconsistency in the moral premises underlying the ethics of non-disclosure, which apparently would permit a lawyer not to disclose a risk of imminent death or bodily harm to another human being, as was the case in

274. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003).

275. See *Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301 (2d Cir. 1979); *In re McGrath*, 468 N.Y.S.2d 349 (N.Y. App. Div. 1983).

276. See *Pendleton v. Cent. N.M. Corr. Facility*, 184 F.R.D. 637 (D.N.M. 1999); N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 731 (2003).

277. See Ill. St. Bar Ass'n, Advisory Op. on Prof'l Conduct, Op. 96-03 (1996) (distinguishing between death of corporate principal and death of individual claimant); see also discussion *supra* Section III.

Spaulding v. Zimmerman.²⁷⁸ Yet the same lawyer is subject to discipline for non-disclosure of a client's death, an omission which, while hardly commendable, would merely cause the defendant or its insurer to pay additional settlement monies.

A major problem with sanctioning omissions on a case-by-case, "I know it when I see it," basis is one of predictability. The mission of this Article is not to condone or encourage marginal or questionable ethical behavior, but to propose clearer definitions in order to assist practicing attorneys in balancing their duties of zealous advocacy with their ethical obligations of honesty and fair dealing. An explicit and fundamental premise of the safe harbor proposal is, as Professor Wetlaufer has pithily observed, that lying is endemic in the legal profession and in settlement negotiations in particular.²⁷⁹ The range of lying runs the full gamut, from Wetlaufer's curious definition of disingenuous arguments, or "a belief at variance with one's own,"²⁸⁰ through misdirection, omissions, and half-truths right up through good old-fashioned, Mark Twain-style whoppers. The adversary system assumes and requires the zealous and vigorous advocacy of attorneys on behalf of their clients. The more aggressive negotiators, including the most ethically aggressive, often obtain optimal results for their clients and develop successful practices.²⁸¹ The best bluffers frequently clean up at the poker table.

An underlying premise of the safe harbor proposal is that developing a Balkanized, complicated patchwork of logically-inconsistent ethical principles on an intuitive, case-by-case basis is unlikely to be of substantial assistance to the busy, beleaguered practitioners most in need of guidance. Subtle distinctions are of little help to the hired gunslingers of our ethical Wild West. Thus, it is my assumption that simplifying ethical principles will have the beneficial effect of encouraging compliance with clearer, albeit imperfect, guidelines, and thereby increasing ethical behavior. Simple guidelines will also help avoid collateral damage to the careers of attorneys who did not correctly anticipate the intuitive, visceral reaction of an individual jurist or ethics committee to the unfortunate attorney's erstwhile bad judgment.

Accordingly, the safe harbor proposal posits that absent court rule, principle of substantive law, or prior factual representation, an attorney should have no duty to make any affirmative factual representations in the course of settlement negotiations, subject only to the crime/fraud exception. Once an attorney speaks, what is said should be truthful.

Reconciling the duty of zealous advocacy with the highest standards of honesty and fair dealing is one of the most difficult tasks facing attorneys. It is hoped that by critical analysis of existing ethical principles, the debate on reconciling these perennially conflicting values will be advanced.

278. See *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962); see also discussion *supra* Section III.C.

279. See *supra* note 11 and accompanying text (discussing *Wetlaufer*).

280. *Id.*

281. *Id.*