**7.5: Alternative Dispute Resolution**

*You never give me your money. You only give me your funny paper. And in the middle of negotiations, you break down.*[[1]](#footnote-0)

Attorneys have a duty to inform their clients about all of the options available to them. Accordingly, in relation to potential civil litigation, attorneys must inform their clients about alternative dispute resolution mechanisms, when available and appropriate under the circumstances. Among other things, attorneys should advise their clients about the possibility of negotiating a settlement, entering mediation, or pursuing arbitration.

The overwhelming majority of civil actions never go to trial. While settlement rates depend on the jurisdiction, about 95% of civil actions end in a settlement. More often than not, settlement produces a better outcome for all parties. Litigation is expensive, time-consuming, and risky. It can result in a large award, or it can result in nothing. Settlement allows the parties to arrive at a compromise that reflects their mutual assessment of the value of the claims and the likelihood of success.

In addition, settlements can be more flexible than litigation, allowing the parties to negotiate an outcome that litigation could not produce. Of course, there are limits on negotiation and settlement. For example, the parties cannot agree on an illegal settlement. And settlement requires a meeting of the minds, which may not always be possible, especially if the parties have different assessments of the value of the claims and the likelihood of success.

Mediation is a form of negotiation that involves a neutral third-party mediator, who helps the parties reach a resolution. Mediators typically do not decide the outcome of the mediation. But in some cases, they may give the parties their own assessment of the value of the claims and their likelihood of success. The mediator’s third-party opinion may help the parties reach a meeting of the minds and settle.

Arbitration resembles mediation, in that it involves a neutral third-party arbitrator. But unlike in mediation, the arbitrator typically provides a binding decision on the merits. Parties must agree to arbitration and agree to be bound by the arbitrator’s decision. While judicial review of the arbitrator’s decision is possible in some circumstances, it is very deferential, in order to preserve the finality of the arbitration. Typically, judicial review of an arbitrator’s decision is limited to arbitrator bias and misconduct. Even a manifest error of law is usually not grounds for review.

Notably, parties can agree to arbitration in advance, and it is an increasingly common feature of many contracts. Many people worry that these arbitration agreements result in people unwittingly signing away their right to litigate. Some states have resisted enforcing arbitration agreements, but those state laws are often preempted by the Federal Arbitration Act.

[**Model Rule 4.1: Comments**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others/comment_on_rule_4_1/)

Misrepresentation

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

Statements of Fact

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

[***Kentucky Bar Ass’n v. Geisler*, 938 S.W.2d 578 (Ky. 1997)**](https://scholar.google.com/scholar_case?case=17683855627168270438)

**Summary:** Milton McNealy was injured by a car in Louisville, Kentucky. Maria Geisler represented McNealy in an action against the driver. Defendant’s counsel Kevin Ford asked to depose McNealy, but Geisler postponed because he was too sick. When McNealy died, Geisler contacted Ford and told him her client wanted to settle, but didn’t tell him McNealy was dead. Geisler and Ford agreed on a settlement, which McNealy’s son signed, and Ford learned McNealy was dead. Ford paid the settlement, but filed a bar complaint against Geisler for failing to disclose McNealy’s death. The Kentucky Supreme Court held that attorneys must notify opposing counsel if their client dies and reprimanded Geisler.

The Board of Governors of the Kentucky Bar Association, as a result of charges instigated against respondent, Maria T. Geisler of Louisville, found her guilty of violating SCR 3.130-4.1 by failing to divulge the fact of her client’s death to opposing counsel prior to entering into and consummating settlement negotiations. Neither the KBA nor the respondent requested review of this case. However, this Court, on its own motion, elected to review the question of whether the respondent’s actions were within the scope of SCR 3.130-4.1.

The critical facts in the present case involve respondent’s filing of a civil action on behalf of Milton F. McNealy for injuries he sustained when he was struck by an automobile while walking along a street in Louisville, Kentucky on November 26, 1993. Subsequent to the filing of the initial complaint, defendant’s counsel, P. Kevin Ford, filed a notice to take the deposition of McNealy. Respondent contacted Ford and told him that McNealy was physically unable to give a deposition since he was in very poor health. Consequently, the deposition of McNealy was never taken.

McNealy died on January 26, 1995. Shortly thereafter respondent contacted Ford and stated that her client wanted to settle the case and asked him to forward an offer of a settlement. After an exchange of offers and counter-offers, a settlement was reached on February 9, 1995. On February 23, 1995, McNealy’s son, Joe, was duly appointed as the administrator of his father’s estate. Ford eventually forwarded the settlement documents along with a settlement check to respondent on March 13, 1995. On March 22, 1995, Ford received back the settlement documents which had been executed by Joe. Upon receipt of the signed documents, Ford learned for the first time of McNealy’s death. Ford took no further action to bring the court’s attention to the settlement documents that were signed by the Administrator, but instead, sent the agreed order of dismissal to the circuit court which was signed and entered by the court. No appeal was taken.

Thereafter, Ford filed a bar complaint against respondent on May 5, 1995 due to her failure to advise Ford that her client, McNealy, had passed away during the settlement negotiation period of January 26, 1995 through February 9, 1995. The chair of the inquiry tribunal of the KBA charged respondent with violating SCR 3.130-4.1 for failing to divulge the fact of her client’s death to opposing counsel prior to entering into and consummating settlement negotiations. After submission to the Board of Governors, the Board determined that respondent was guilty of the charge and recommended to this Court that it issue a private reprimand and a public opinion against an unnamed attorney for the benefit of other members of the KBA.

In its recommendation to this Court, the KBA noted that there is no KBA Ethics Opinion on point with this matter and no Kentucky case law dealing directly with this issue. However, the American Bar Association Standing Committee on Ethics and Professional Responsibility hereinafter ABA, squarely addressed this issue when it issued Formal Opinion 95-397 entitled, “Duty to Disclose Death of Client.”

Deciding that counsel has the duty to disclose the death of her client to opposing counsel and to the court when the counsel next communicates with either, the ABA specifically stated in its opinion:

When a lawyer’s client dies in the midst of the 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 communications with either after the lawyer has learned of the fact.

The ABA’s opinion further addressed the question of whether an attorney even has authority to act when her client dies. The opinion determined that prior to death, a lawyer acts on behalf of an identified client. When the death occurs, however, the lawyer ceases to represent that identified client. The ABA maintained that any subsequent communication to opposing counsel with respect to the matter would be the equivalent of a knowing, affirmative misrepresentation should the lawyer fail to disclose the fact that she no longer represents the previously identified client.

Basically, the ABA determined that a lawyer must inform her adversary of the death of her client in her first communication with the adversary after she has learned of that fact. Likewise, the lawyer must also inform her adversary, in the same communication, that the personal representative, if one has been appointed, of her former client is accepting the outstanding settlement offer. Thus, the ABA concluded that a failure to disclose the death of a client is tantamount to making a false statement of material fact within the meaning of Model Rule 4.1(a).

Respondent argues that the ABA’s opinion should not apply to her as it was issued on September 18, 1995, many months after the relevant facts in this disciplinary proceeding. She further maintains that ABA Opinion 95-397 is subject to conflicting conclusions and, thus, should not be followed.

Relying on the additional comments to SCR 3.130-4.1, respondent contends that she did have a duty to disclose “facts” or “evidence.” Respondent asserts, however, that an attorney is typically not required to affirmatively reveal evidence that is unknown and potentially helpful to the adverse party. Respondent further maintains that McNealy’s death had no significant bearing on the ultimate settlement that was achieved, and that Ford did not oppose the settlement even after it was revealed that McNealy was dead. Finally, respondent contends that Ford knew McNealy had been in poor health and that McNealy’s death was a matter of public record reported in the daily newspaper. Respondent argues that she felt she had an ethical duty not to volunteer information about her client’s passing. Thus, respondent maintains that it was Ford’s own fault to have mistakenly believed that McNealy was alive at the time the settlement was negotiated, because if Ford had wanted to know whether McNealy was dead, all he had to do was ask respondent about it.

Kentucky’s SCR 3.130-4.1 specifically provides: “In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.” This Court recently considered the application of that rule in *Mitchell v. Kentucky Bar Assoc*. That case involved a public administrator of an estate who admitted that he had lied to two heirs by falsely stating that an action to determine ownership of some property had been filed, when in fact, no such action had been taken. The respondent in *Mitchell*, after offering extensive mitigating evidence, including the fact that the heirs’ interest had not been impaired, received a public reprimand.

Moreover, in *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, the federal district court, relying on Model Rule 4.1 held that a plaintiff’s attorney had a duty to disclose the death of her client. The circumstances in that case are strikingly similar to the case at bar in that:

Here, plaintiff’s attorney did not make a false statement regarding the death of the 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.

Ultimately, the *Virzi* court came down on the side of disclosure stating:

This Court feels that candor and honesty necessarily require disclosure of such a significant fact as the death of one's client. Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate.

Thus, we hold that the respondent’s failure to disclose her client's death to opposing counsel amounted to an affirmative misrepresentation in violation of our SCR 3.130-4.1. While the comments to SCR 3.130-4.1 do indicate that there is no duty to disclose “relevant facts,” those same comments go on to state that:

A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Consequently, respondent cannot reasonably argue that her failure to reveal this critical piece of information constituted ethical conduct within the framework of SCR 3.130-4.1.

Furthermore, respondent’s argument that the burden of correcting the mistaken belief that her client was alive should be placed on Ford, is incorrect. 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. Here, respondent obtained authority to act on the behalf of Joe, the administrator, but not McNealy, once he passed away. 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 still had the authority to do so on behalf of McNealy. Her letters to Ford clearly imply this. Accordingly, this Court cannot go so far as to say that such conduct was ethical under the circumstances and within SCR 3.130-4.1.

It should be noted, that this Court fails to understand why guidelines are needed for an attorney to understand that when their client dies, they are under an obligation to tell opposing counsel such information. This seems to be a matter of common ethics and just plain sense. However, because attorneys such as respondent cannot discern such matters and require written guidelines so as to figure out their ethical convictions, this Court adopts the ruling of ABA Opinion 95-397.

Thus, upon our careful review of the record, we find that the evidence does not support the recommendation of the KBA and consequently we adopt the following order.

IT IS HEREBY ORDERED:

That respondent, Maria T. Geisler, be, and hereby is, publicly reprimanded for failing to notify her opposing counsel that her client had died during settlement negotiations. The respondent is further ordered to pay the costs of this action pursuant to SCR 3.450.

JOHNSTONE, J., dissents and would concur with the recommendation of the Board of Governors by issuing a private reprimand against an unnamed attorney.

**Questions:**

1. Why would it be material to Ford and Ford’s client whether McNealy was alive at the time of the settlement? Is it possible that it could have affected their decision whether to settle or the amount of the settlement?
2. The court assumes that Geisler should have known that she had a duty to disclose McNealy’s death. Do you agree? Could she have reasonably believed that she had a duty to McNealy’s estate not to disclose?

[**ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-439, Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation (April 12, 2006)**](http://apps.americanbar.org/labor/lel-aba-annual/papers/2006/42.pdf)

*Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered ‘‘false statements of material fact” within the meaning of the Model Rules.*

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiffs demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as “posturing” or “puffing,” are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered “posturing” for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a). That rule prohibits a lawyer, “In the course of representing a client,” from knowingly making “a false statement of material fact or law to a third person.” As to what constitutes a “statement of fact,” Comment [2] to Rule 4.1 provides additional explanation:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute bud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer’s own client. Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law. Still others have suggested that lawyers should strive to balance the apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards. Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370 that, although a lawyer may in some circumstances ethically decline to answer a judge’s questions concerning the limits of the lawyer’s settlement authority in a civil matter; the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

While a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party’s actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387, we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397 that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client’s death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died. Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for stating to opposing counsel that, to the best of his knowledge, his client’s insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage. Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions, and the setting aside of settlement agreements, as well as civil lawsuits against the lawyers themselves.

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s “bottom line” position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of “telephone,” the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called “deception synergy,” proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation - particularly in a caucused mediation - precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a “tribunal,” the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow “understood that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.

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

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.

[***In re Fee*, 898 P.2d 975 (Ariz. 1995)**](https://scholar.google.com/scholar_case?case=15456407028653841771)

ZLAKET, Justice.

Respondents’ client gave birth to a severely brain-damaged boy. In 1987, after unsuccessfully seeking representation from three other attorneys, she retained respondents on a 40% contingent fee. They filed a medical malpractice suit against the State of Arizona and Pima County on behalf of both mother and son. The child’s claim was dismissed, as was a pending conservatorship, after the trial court determined that *Pizano ex rel. Walker v. Mart* precluded all but the mother’s action for losses and expenses relating to the boy’s condition.

The medical negligence claim was admittedly weak. Respondents’ success in developing a colorable racketeering theory, however, prompted negotiations. After an unproductive initial settlement conference, a second was scheduled for January 21, 1991, the day before trial. On Friday the 18th, the defense offered a structured settlement consisting of a cash lump sum followed by periodic payments. This proposal designated a separate amount for attorneys’ fees. After consulting an annuities expert, respondents and their client decided that her needs would likely be greater than those contemplated by the offer.

The following Monday at 3:30 P.M., the parties, attorneys, and annuities experts met with the settlement judge. In a private conference with respondents’ group, the judge brought up the latest proposal. This prompted a discussion about the “common defense tactic” of making separate offers of attorneys’ fees. Respondents and the judge agreed that such a move frequently had the effect of “driving a wedge” between a plaintiff’s lawyer and his or her client by causing fees to become a source of discomfort, disagreement, and potential conflict.[[2]](#footnote-1) Despite his recognition of this strategy, however, and respondents’ argument that the reasonableness of their fee was an issue for the trial court at the conclusion of the case, the settlement judge indicated that, in his opinion, the contingent fee being charged here was excessive. Testimony before the disciplinary hearing committee shows that the relationship between the court and respondents deteriorated from that point and became progressively antagonistic over this issue. The judge allegedly raised his voice and cursed at respondents. He threatened that if the case did not settle, he would advise the trial judge the failure was because of respondents’ greed. All of these statements were made in the presence of the client.

Respondents asserted at the disciplinary hearing that during these negotiations they spoke with their client about the insufficiency of the attorneys’ fees being offered by the defense. They claimed that she authorized them to demand more money for the care of her son, thereby possibly securing an increase in fees as well. Although he was not technically a party to these proceedings, the record shows that the son’s interests were important to all participants, particularly the court. Consequently, following respondents’ pleas, the judge agreed to seek more money from the defendants.

Late in the day, the settlement judge called both sides into the courtroom to discuss a new offer, consisting of $175,000 in cash, annuities for both mother and son, $400,000 in attorneys’ fees, and $55,000 in costs. According to the judge, this offer was higher than the previous one because of respondents’ representations that the client needed, among other things, better housing and “specially equipped transportation” for her son, as well as additional funds for his possible future surgeries.

After conferring briefly, respondents met privately with the client and proposed that she pay them an additional $85,000 in attorney’s fees from her share of the cash proceeds.[[3]](#footnote-2) During this discussion, the judge approached the trio and asked if they needed his help. Respondent Fee testified that he felt pressured by the judge’s presence and told him, “I don’t want you here.” Fee also told the client that she should not allow herself to feel coerced by her attorneys or the judge and that she could refuse the offer or take additional time to consider it.

After repeatedly advising the client of her right to seek independent advice and obtaining numerous assurances from her that she was satisfied with the arrangement, Fee prepared a handwritten agreement concerning the additional fees. This document included a “confidentiality provision,” which the committee found was for the client’s protection and “to maintain the confidential nature of the settlement conference.”

The three then returned to the courtroom where respondents informed their annuities expert about the new agreement. They asked the expert to review the proposed settlement with the client one final time to ensure that the available funds would be sufficient to meet her needs and that the overall agreement was fair. After meeting for approximately ten minutes outside respondents’ presence, the expert became satisfied that the client understood and agreed to the terms. The client then signed the additional fee agreement and returned to the judge's chambers with her attorneys.

Respondent Fee announced that they agreed “in principle” to the settlement. However, when the judge repeated the terms previously discussed, nobody disclosed the existence of the newly-enacted fee agreement. Both the committee and the commission found that respondents, not wanting to upset the settlement and believing it was not this judge’s role to determine reasonableness of fees, planned to reveal the separate agreement to the trial judge in connection with the formal approval of attorneys’ fees required by Rule 3, Uniform Medical Malpractice Rules.[[4]](#footnote-3) The lawyers never got the chance to do so.

Ten days after the conference, the client telephoned the settlement judge, informed him of the separate agreement, and asked whether she was required to comply with it. The judge obtained a copy of the agreement, held a hearing during which he removed respondents from the case, appointed pro bono counsel to complete the settlement, and provided for the proceeds to be relayed through the clerk of the court for “proper” distribution. He then initiated these disciplinary proceedings.

The hearing committee found that respondents violated ER 3.3(a)(1) (candor toward a tribunal) and ER 8.4(c) (conduct involving a knowing misrepresentation and causing an adverse or potentially adverse effect on a legal proceeding). It recommended 30-day suspensions. A majority of the disciplinary commission found an additional violation of ER 8.4(d) (conduct prejudicial to the administration of justice) and recommended 60-day suspensions. The state bar asks this court to disregard both recommendations and impose six-month suspensions.

We agree that respondents breached ER 3.3(a)(1), which states: “A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.” The comments to ER 3.3 state that “there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.” Respondents knowingly failed to disclose the separate agreement to the settlement judge in violation of this rule. At the same time, they engaged in “conduct involving dishonesty, fraud, deceit or misrepresentation” in violation of ER 8.4(c).

There are remarkably few cases applying the rules of professional conduct in a settlement context and none that we find directly on point. The bulk of ethical rules seem to have been designed with litigation scenarios in mind. Nevertheless, the scope of their applicability to settlement discussions has been the subject of frequent scholarly debate.

A few commentators have even gone so far as to question the wisdom of demanding truthfulness in settlement conferences, suggesting that a certain amount of gamesmanship is considered acceptable. As one author notes, “the operational necessities of the bargaining process yield an ethical ‘functionalism’ that results in the minimal truthfulness and fairness necessary for an agreement.” Although this court is by no means naive to the realities of the marketplace, we are unwilling to accept or endorse such a flimsy ethical standard. It is not unreasonable to expect more from members of the bar, and we do.

Early drafts of the Model Rules of Professional Conduct contained a separate section devoted to settlement negotiations. It was, however, deleted from the final version. There also appear to be few formal guidelines for judicial officers acting as mediators, which may serve to explain their occasional use of inappropriate techniques. “Because of a ‘judicial zeal for settlement,’ the increased opportunity for abuse may lead to judges punishing parties and lawyers who fail to cooperate in settlement.”

Thus, misguided strategies believed to be endemic to the bargaining process and the lack of clearly-defined roles for settlement judges may, regrettably, combine to create an environment ripe for occurrences such as this.[[5]](#footnote-4) The commission found that ambiguities in these areas played a significant role in the misconduct at issue. Also contributing were circumstances peculiar to this case. The hour was late, and trial was scheduled to begin the following morning. The judge, although deservedly recognized as a seasoned and fair mediator, became somewhat adversarial on this particular day. He not only allowed defense counsel to “drive a wedge” but may unwittingly have assisted them in doing so. Respondents did not want to lose a favorable settlement for their client. At the same time, they neither wished to permit the defense to dictate the amount of their fees, nor felt comfortable with pressure from the judge to reduce them. Moreover, respondents clearly attempted to ensure that their client fully understood and concurred in the separate agreement. Both the committee and commission specifically found that the modification was fair and that the client understood it. The uncontradicted evidence also suggests that respondents thought they were not obligated to disclose the arrangement to the settlement judge.

Nevertheless, we cannot condone their conduct. In our judgment, respondents should have either disclosed the complete arrangement or politely declined any discussion of fees. Fear that this might have jeopardized the settlement, while understandable, does not excuse their lack of candor with the tribunal. The system cannot function as intended if attorneys, sworn officers of the court, can lie to or mislead judges in the guise of serving their clients. “Zealous advocacy” has limits. It clearly does not justify ethical breaches.

We note that neither the committee nor the commission found any aggravating factors. Both, however, cited numerous mitigating circumstances, including the absence of prior disciplinary records, lack of dishonest or selfish motives, full and free disclosures to the disciplinary authorities, and cooperative attitudes throughout these proceedings. The committee also found that respondents “demonstrated a high level of competence in their representation” of this plaintiff.

Although we adopt the factual findings of both the committee and the commission, we are compelled to agree with the dissenting commissioners that the recommended sanction “exceeds the misconduct.”[[6]](#footnote-5) The goal of discipline is to protect the public, not to punish lawyers. Nothing in the record suggests that respondents pose any threat to the public. Moreover, they already have suffered a considerable penalty by virtue of the extensive negative publicity surrounding this case.

We wish to discourage the previously-described tactic of “driving a wedge” between lawyer and client in negotiations. Although nothing in our ethical rules expressly prohibits separate offers of attorneys’ fees, we agree with the New York City Bar ethics committee that they frequently pose a serious dilemma for lawyers. Quite simply, such offers are often intended to place attorneys in the uncomfortable position where they may be caught between their own need to be compensated for legal services and what might otherwise be in their clients’ best interests. We therefore urge judges to carefully scrutinize attempts to employ this practice.

Moreover, although it is certainly not forbidden for a judge to raise the topic of attorneys’ fees during settlement discussions, we believe it unwise and unfair to focus on the fees of one party without corresponding inquiry into those of the other. With such a selective approach, the judge may easily overstep his or her bounds. An attorney on the receiving end of this type of treatment should be entitled to some measure of self-protection. We have indicated that a more appropriate reply here was for respondents to have politely but firmly declined to discuss their fees. We concede that, considering the level of tension evident in this conference, such a response may have destroyed any chance of settlement. Nevertheless, a good end does not justify deceitful means.

The dissent deserves a brief response. First, it reaches factual conclusions that are diametrically opposed to those of the committee, the commission, and the majority of this court. Second, in positing “4 things that might have happened” if respondents had later “disclosed their side fee agreement to the trial judge and opposing counsel,” the dissent completely ignores the possibility that the trial judge might have approved the fees after reviewing the matter in detail and applying the factors set out in ER 1.5(a). Neither the committee nor the commission concluded that the fees were unfair. Moreover, because the issue has not properly been presented to us and there are no findings made by a trial court, which is where the inquiry properly belongs in the first instance, see Rule 3, Uniform Medical Malpractice Rules, the record contains little information from which we can independently determine the overall reasonableness of the fees.

Additionally, the dissent’s criticism of the “terms of respondents’ fee agreement” simply has nothing to do with the issues presently before us. We also note that it fails to even mention the fact that, according to both the committee and the commission, the client knowingly and voluntarily entered into the contract.

In conclusion, we hold that respondents violated their duties of candor and truthfulness pursuant to ER 3.3(a)(1) and ER 8.4(c) and censure them for their conduct. We emphasize that a judge acting as mediator is still a judge to whom the ethical duty of candor is owed.

Each respondent is assessed costs in the amount of $1,922.91.

CORCORAN, Justice, dissenting:

I respectfully dissent.

I view the facts in this case differently from the majority. The respondents Fee and Montijo lied to the settlement judge so that they would get more money and their client would get less money. It is especially egregious for a lawyer to lie to a judge for the purpose of increasing his own fees at the direct expense of his client. I cannot agree with the committee, the commission, and the majority that respondents lacked dishonest or selfish motives. Res ipsa loquitur. Such conduct warrants at least a suspension and not a mere censure.

Respondents allege that they intended to reveal their side fee agreement to the trial judge. However, this assertion does not ring true. If respondents had disclosed their side fee agreement to the trial judge and opposing counsel, which would have required admitting that they had lied to the settlement judge, 4 things might have happened: (1) the trial judge could have refused to honor the side agreement; (2) the trial judge could have referred the matter back to the settlement judge who possessed the most information about the case; (3) defendants’ attorneys could have sought to enforce the settlement agreement as communicated to the settlement judge; or (4) defendants’ attorneys could have sought to withdraw their settlement offer. Any one of these events would have ruined respondents’ scheme to collect attorneys’ fees in excess of those communicated to the settlement judge. In addition, all parties who became aware of the secret fee agreement would have been required to report respondents’ misconduct to the state bar. In fact, when the settlement judge learned of respondents’ misconduct, he filed a complaint with the state bar.

I agree with the majority that: (1) “the bulk of ethical rules seem to have been designed with litigation scenarios in mind,” and (2) there are “few formal guidelines for judicial officers acting as mediators.” That, however, does not excuse the misconduct here. For lawyers dealing with judges, whether they be trial or settlement judges, the guiding rule is never lie to or mislead a judge. Respondents claim that they were lying in order to secure the best settlement agreement for their client. Nonetheless, it is often the case that lawyers who lie for the client will also lie to the client.

I also emphasize that the terms of respondents’ fee agreement in conjunction with the secret side agreement would have resulted in respondents receiving an overwhelmingly disproportionate share of the client’s up-front cash payment. The client signed three fee agreements dated October 29, 1986, January 29, 1987, and December 19, 1989. Only the last fee agreement addressed the possibility of a structured settlement. It provided that “in the event this case is settled by way of a structured settlement the attorney’s fees will be computed on the basis of a percentage of the present value of the settlement. The attorney’s fees will be paid out of the initial cash payment(s).” If respondents had successfully recovered $485,000 in attorneys’ fees payable from the initial cash payment, as contemplated by the side fee agreement, they would have received 84% of the client’s up-front cash recovery (excluding the $55,000 designated as costs). Furthermore, by collecting their fees from the up-front cash payment, respondents left the client to bear all the risk that the annuity provider would become insolvent. A less onerous fee agreement is one in which the plaintiff’s attorney collects his fees only if, as, and when the plaintiff receives the funds. Under an “if, as, and when received” fee arrangement, respondents would only have been entitled to 40% of the client’s up-front cash recovery, or $230,000.

For the above reasons, I agree with the hearing committee, the disciplinary commission, and state bar counsel that respondents Fee and Montijo should be suspended.

**Questions:**

1. The parties agreed to a settlement. After the settlement conference, the plaintiff’s attorneys privately convinced their client to pay them an additional $85,000 from her cash settlement, and did not disclose that additional fee agreement to the judge. The majority suggests that the arrangement was ultimately fair to the client, but the dissent disagrees. What do you think?
2. Did the client provide informed consent to the additional attorney’s fees? Is the problem that the respondents convinced their client to pay them an additional $85,000 or that they didn’t disclose it to the judge?
3. Do you think the punishment was adequate under the circumstances?

**Further Readings:**

* [Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. Rich. L. Rev. 99 (1982)](https://scholarship.richmond.edu/lawreview/vol17/iss1/4/?utm_source=scholarship.richmond.edu%2Flawreview%2Fvol17%2Fiss1%2F4&utm_medium=PDF&utm_campaign=PDFCoverPages)
* [Geoffrey C. Hazard Jr., *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. Rev. 181 (1981)](https://digitalcommons.law.yale.edu/fss_papers/2403/)
* [Charles B. Craver, *Negotiation Ethics: How to Be Deceptive without Being Dishonest/How to Be Assertive without Being Offensive*, 38 S. Tex. L. Rev. 713 (1997)](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1515&context=faculty_publications)
* [Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 Ohio St. L.J. 1 (1987)](https://kb.osu.edu/bitstream/handle/1811/64355/OSLJ_V48N1_0001.pdf)
* Eleanor H. Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. Rev. 493 (1989)
* [Daisy H. Floyd, *Can the Judge Do That? — The Need for a Clearer Judicial Role in Settlement*, 26 Ariz. St. L.J. 45 (1994)](https://ttu-ir.tdl.org/ttu-ir/bitstream/handle/10601/555/dfloyd3.pdf?sequence=1)

1. Paul McCartney, *You Never Give Me Your Money*, Abbey Road (1969). [↑](#footnote-ref-0)
2. Indeed, the defense here has since acknowledged that this was its purpose in making a separate offer of fees. [↑](#footnote-ref-1)
3. Respondents testified that according to their calculations at the time, receipt of these additional funds would have left them with a total fee amounting to only 34% of the structured package’s present value. We have calculated that the final fee percentage was higher than that, but still slightly less than the 40% originally agreed upon by the client. In any event, neither the committee nor the commission found that the fee charged was excessive. [↑](#footnote-ref-2)
4. The record also shows that, within hours of the conference, respondents discussed what they had done with other practitioners and retired judges, all of whom reportedly agreed that their conduct had been proper. [↑](#footnote-ref-3)
5. Although the conduct of defense counsel is not at issue here, respondents point out that they also were not forthcoming about their ultimate settlement authority when questioned by the judge. [↑](#footnote-ref-4)
6. A majority of the commission concluded that suspension was necessary because the additional hearing and the judge’s removal of respondents from this case caused “an adverse or potentially adverse effect on the legal proceeding.” Both actions, however, were initiated by the offended settlement judge, who believed that respondents had engaged in severe professional, and possibly criminal, misconduct. We also note the absence of any finding that respondents’ actions caused “injury or potential injury to a party to the legal proceeding.” Thus, under these specific facts, we disagree that suspension is required. [↑](#footnote-ref-5)