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Thomas F. Guernsey

University of Richmond

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TRUTHFULNESS IN NEGOTIATION

Thomas F. Guernsey*

I. INTRODUCTION

A great deal has been written on truthfulness in trial advocacy. In his talks and writing, Monroe Freedman sparked the most current version of the debate, though the debate is much older. Given the age of this debate, it is surprising to find that there has been little discussion of truthfulness in the related area of negotiation. A survey of law review articles, cases and ethical opinions reveals little in the way of discussion or guidance. Indeed, books prepared on negotiation are quite limited in their consideration of the ethical issues involved.

The Model Code of Professional Responsibility and the A.B.A.
Model Rules of Professional Conduct provide only general statements covering truthfulness. Specifically, DR 7-102(A)(5) of the Code provides that "[i]n his representation of a client, a lawyer shall not knowingly make a false statement of law or fact." Model Rule 4.1 provides that

[i]n the course of representing a client a lawyer shall not:
(a) Knowingly make a false statement of fact or law to a third person; or
(b) Knowingly fail to disclose a fact to a third person when:
   (1) In the circumstances failure to make the disclosure is equivalent to making a material misrepresentation;
   (2) Disclosure is necessary to prevent assisting a criminal or fraudulent act, as required by Rule 1:2(d); or
   (3) Disclosure is necessary to comply with other law.

Interestingly, the debate which has been waged in the trial advocacy area has resulted in various guidelines. It has been suggested, however, that there is no general overriding principle to govern truthfulness in negotiations. The solution of the Model Rules is to rely, to a large extent, on existing "conventions" to determine truthfulness and false statements.

II. RELIANCE ON CONVENTIONS CAUSES PROBLEMS

Treating the question of truthfulness as being governed by conventions causes numerous problems. One such problem is the difficulty of determining among what community of lawyers to measure conventions. Further, on a related point, the Reporter for the Model Rules himself has pointed out that the "lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation." If there is a lack of consensus on the nebulous concept of "fairness," it seems likely there can be little agreement on the equally nebulous con-

11. See infra text accompanying note 21.
13. Hazard, supra note 4, at 193.
cept of “truthfulness.” Lawyers are left then with both their own interpretation of the appropriate conventions, and their own decisions whether the opposing side is governed by the same conventions. Articulation of these conventions would provide, at a minimum, guidance for the lawyer wishing to act ethically while avoiding disclosure harmful to the client.14

Another problem with conventions is that they differ not only geographically but by “strata” within the profession.15 Lawyers in criminal trial practice, for example, have conventions considerably different from those of lawyers in securities exchange practice.16 Difficulties arise when one stratum confronts another, just as when one geographic area confronts another. In the words of Hazard: “Lawyers in other strata of the professional community have their own conventions. When levels are crossed, the less sophisticated lawyer must decide whether to trust the opponent or to associate someone else, research into the night, or perhaps even abort the transaction.”17 To the extent that reliance on conventions perpetuates a system in which members of the same profession must meet widely different minimum levels of ethics (and, at least implicitly, competence) such reliance appears to do a great disservice to clients.18 Lawyers’ ethics are so often drawn into question these days that officially to approve varying standards seems unacceptable.19 The result of varying standards is to reinforce less ethical practice.20

Codification of rules is certainly not the solution. As has been pointed out:

Pious and generalized assertions that the negotiator must be “honest” or that the lawyer must use “candor” are not helpful. They are at too high a level of generality, and they fail to appreciate the

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14. Id. at 195; see infra text accompanying note 70.
15. See Hazard, supra note 4, at 193-94; White, supra note 4, at 927.
16. See Hazard, supra note 4, at 193-94; White, supra note 4, at 927. Lawyers in criminal trial practice, for example, have conventions considerably different from those in Security and Exchange Commission practice.
17. Hazard, supra note 4, at 195.
18. Id. at 196.
19. See generally Brazil, The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice, 3 J. LEGAL PROF. 107, 113 (1978) (“A system that virtually compels this kind of behavior invites disrespect for itself and promotes the development of undesirable psychological characteristics in the human beings who run it.”).
20. The suggestion could be made that existing conventions should be changed. See generally M. Frankel, PARTISAN JUSTICE (1980); Rubin, supra note 4.
fact that truth and truthful behavior at one time in one set of circumstances with one set of negotiators may be untruthful in another circumstance with other negotiators.\textsuperscript{21}

Indeed, general assertions are not helpful and are, perhaps, even counterproductive.\textsuperscript{22} To some extent, the acceptable puffery in one situation would clearly be unethical in other situations under present views on ethics.\textsuperscript{23} Certainly more can be done, however, than simply “proscribe fraud.”\textsuperscript{24} We can just as certainly begin to develop guidelines as to what circumstances dictate what definition of truthfulness.

If conventions control ethical conduct, there are a host of circumstances that will affect “appropriate” behavior in a negotiation.\textsuperscript{25} As stated in the comments to the discussion draft of the Model Rules of Professional Conduct, “[t]he precise contours of the legal duties concerning disclosure, representation, puffery, overreaching, and other aspects of honesty in negotiations cannot be concisely stated.”\textsuperscript{26}

To say rules cannot be developed, however, raises perhaps the most important problem of reliance on conventions. Such reliance on conventions may very well inhibit discussion as to what the existing conventions are and whether particular conventions are appropriate. Further, such reliance tends to ignore what limited guidance does exist in case law and in opinions on ethics. Existing authority, for example, raises serious questions about what many might feel are appropriate conventions.\textsuperscript{27}

It is correct to say that lawyers seeking determination of ethical standards in negotiation are, in fact, “hunting for the rules of the game as the game is played in that particular circumstance.”\textsuperscript{28} The question becomes, why the rules are not stated beforehand more specifically. Fraud is already proscribed in the law of contracts and in the criminal law. Both areas of law are highly situational, yet still subject to some overriding principles. Puffery for example is

\textsuperscript{21} White, \textit{supra} note 4, at 929.
\textsuperscript{22} \textit{Id.} at 938.
\textsuperscript{23} \textit{See infra} note 44 and accompanying text.
\textsuperscript{24} Hazard, \textit{supra} note 4, at 196.
\textsuperscript{25} \textit{See infra} note 126 and accompanying text.
\textsuperscript{26} White, \textit{supra} note 4, at 931 n.15 (quoting \textsc{Model Rules of Professional Conduct} Rule 4.2 comment (Discussion Draft 1980)).
\textsuperscript{27} \textit{See, e.g., infra} notes 36, 73 and accompanying text.
\textsuperscript{28} White, \textit{supra} note 4, at 929.
permitted, but case law determines what is puffing, what is lying. Why should the area of negotiation be different?

Given the private nature of negotiation, case law does not develop and, given this private nature, rules are of limited enforcement value. Two solutions, however, come to mind. First, discussion could provide guidance to those seeking to act ethically. Second, absent a discussion, the profession should accept the fact that there is no guidance. Hence, the alternative suggestion: When it comes to truthfulness the rule is caveat lawyer.

III. ALTERNATIVE ONE: TO ARTICULATE CONVENTIONS

The usefulness of discussion in sorting out the problems raised by relying on conventions can be illustrated by an examination of some relatively straightforward negotiation tactics designed to conceal information.\textsuperscript{29} For purposes of demonstrating these tactics,\textsuperscript{30} assume a simple borrower-lender negotiation. Borrower wishes to obtain from a bank at least five million dollars at no more than the prime interest rate plus four percent. Borrower needs the money badly and does not see any source other than this lender; all other banks have turned him down. Lender is in a situation where it desires to expand its commercial loan activity and, after some preliminary investigation of borrower (looked at books, for example), believes borrower is a good credit risk. Accordingly, lender is willing to lend up to eight million dollars for a minimum interest rate of prime plus two percent.

\textsuperscript{29} Negotiation has been characterized "as a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise. . . . It is accomplished consensually as contrasted with force of law." G. Bellow & B. Moulton, supra note 5, at 440 (quoting Mathews, Negotiation: A Pedagogical Challenge, 6 J. Legal Educ. 93, 94 (1955)). Crucial to such a process is the transfer of information between participants. G. Williams, Effective Legal Negotiation 19 (1981). It is, of course, during the transfer of this information that the issue of truthfulness arises.

\textsuperscript{30} The tactics to be discussed were chosen for two reasons. First, they all are related in that they involve statements (as opposed to the myriad of tactics involving such things as timing, inspection and agenda control) or the specific decision not to make a statement. Further, all are designed to mislead to some extent. Second, each tactic specifically has been recommended as useful in some of the leading books and articles in the field of negotiation. See, e.g., G. Bellow & B. Moulton, supra note 5, at 529, 537; H. Edwards & J. White, supra note 5 at 112-41; G. Nierenberg, Fundamentals of Negotiating 133-36 (1973), cited in G. Bellow & B. Moulton, supra note 5, at 520-22; G. Williams, supra note 29, at 73-86; Baer & Broder, How to Prepare and Negotiate Cases for Settlement—Pointers for Plaintiff, 1968 Trial Law. Guide 302, 306.
A. *Lying As a Negotiation Tactic*

The first general tactic concerns lying and variations on lying. Assuming borrower's lawyer is fully aware of the facts, may the lawyer state:

1. My client has been investigating the possibility of borrowing money. Bank X has agreed to lend him ten million dollars at prime plus two percent. Can you match that?

Most people would agree that this outright statement, directly contrary to known fact, is a lie.

Knowing that the past three years have seen progressively decreasing sales, however, may the lawyer for the borrower say:

2. My client's company is on the move and poised for an expansion which will double its sales.

Is this a lie, or is it merely acceptable puffery? Clearly, the statement is designed to mislead; just as clearly, "on the move" is not subject to precise definition.

Compare the following statement by the borrower's lawyer:

3. My client *does not want* to accept less than ten million dollars at prime plus two percent.

On its face the third is the most truthful of the statements. The lawyer's intent here is, however, as much to mislead as in the first and second statements. The hoped-for interpretation is the same for all.

Compare the third statement to the following:

4. My client *will not* agree to borrow any of your money unless you agree to charge no more than prime plus two and agree to lend ten million dollars.

Here we clearly have the excessive demand. Most people are aware that as a normal rule people ask for as much as they can get. Does this expectation, however, justify a distinction? "Will not" is much different from "does not want to." It simply is not true that the
client will accept only these provisions.⁴³

On a philosophical level, a lie must be distinguished from broader questions of truth and misrepresentation.⁴² Defining truth, of course, has given rise to much debate in philosophy.⁴³ No attempt is made here to place this discussion within this broad philosophical debate. For our purposes, less refined definitions are appropriate.

As used here, a lie is a statement made with the intent to deceive which purports to state the existence, in unequivocal terms, of facts or law contrary to the declarant's express knowledge.⁴⁴ This is a definition with which many philosophers might disagree;⁴⁵ however, it does provide a convenient means of distinguishing various negotiating tactics which a philosopher might regard as involving lies, but which are more crudely distinguished by lawyers on an operational level. Under the above definition, all lying in a negotiation would be considered a violation of DR 7-102(A)(5).⁴⁶

B. Distinguishing Facts from Opinions

A statement by the borrower's lawyer that bank X is, contrary to fact, willing to lend the money would be unethical. A.B.A. Informal Opinion 1283 provides a clear guideline in this area. The questions presented in the opinion involved the representation of a cli-

31. Obviously the ethical questions raised by this paradox can become more complicated by ambiguities in the fact situation. If borrower is not sure what he will accept, for example, can the lawyer state “will not agree” and then add to himself “at this time, but maybe later.” There is a whole body of philosophical thought on such “mental reservations.” See S. Bok, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 37 (1979). Such multiplication of possibilities is beyond our scope here, but suffice it to say that the discussion that follows is equally applicable to these variations.

32. See id. at 6 (stating that truthfulness is a moral question).

33. See generally F.H. Bradley, ESSAYS ON TRUTH AND REALITY (1944) (criticizing author William James); W. James, PRAGMATISM (1975); W. James, THE MEANING OF TRUTH (1975); J.L. Mackie, TRUTH, PROBABILITY AND PARADOX (1973); N. Rescher, THE COHERENCE THEORY OF TRUTH (1973).

34. This definition clearly is much narrower than many philosophers would say is justified. Professor Bok, for example, defines a lie as “any intentionally deceptive message which is stated.” S. Bok, supra note 31, at 14 (emphasis added). Acceptance of such a broad definition essentially would preclude negotiation since inherent in all negotiations is some element of an attempt to mislead the other side. White, supra note 4, at 927.

35. See supra note 34. One distinction, however, which is consistent with the present discussion and a more philosophical approach, is that lying is a subcategory of deception. S. Bok, supra note 31, at 14.

36. See supra text accompanying note 8.

ent who would authorize expansion of his suit into a class action only on the condition that he would not be liable for any increased costs associated with such expansion. The first issue addressed was whether counsel could advance these additional costs and subsequently be reimbursed out of any judgment award that might be obtained. The Ethics Committee stated: "[I]f [the costs] are not placed by the court on some other party or the class, the lawyer should not bring the class action."38

Having placed the limitation, the Committee then addressed the question, may the lawyer "use the threat of a class action to bring about a settlement favorable to his client?"39 In a blanket prohibition, the opinion stated "[i]t would not be proper to misrepresent, in settlement negotiations, that a class action might be brought when in fact it could not ethically be brought in view of the client's unwillingness to assume ultimate liability for the class action costs."40 The first statement above that Bank X is, contrary to fact, willing to lend the money and the statement in A.B.A. Informal Opinion 1283 that the client, contrary to his stated intention, will bring a class action appear indistinguishable.

In fact, one finds it difficult to distinguish the statement prohibited in Opinion 1283 from a number of common statements made in negotiation. It is clearly a logical extension to prohibit such statements as those of a lawyer threatening to bring suit initially when it is known that the client will not go to court, as well as those statements of rock bottom figures when the lawyer knows there is flexibility.

Our second statement concerning the company being "poised for expansion" raises more difficult questions concerning truthfulness. It could be argued that this is not a statement of fact, but merely statement of an opinion and therefore not a lie. Barnes v. Barnes41 is an interesting example of the distinction based on statements of opinion versus statements of fact in a negotiation setting. In Barnes, the decedent left all his property to his wife as long as she remained unmarried. Upon remarriage or death the property was to be divided among the wife and seven children. The wife secured

38. Id.
39. Id.
40. Id. See generally Cuyahoga County Bar Ass'n v. Whitaker, 42 Ohio St. 2d 1, 325 N.E.2d 889 (1975) (improper to name client as inventor knowing that he is not the inventor).
the release of one daughter for the remainder. A son's lawyer then sought a release of the wife's stepson (apparently for his mother's benefit), stating in his letter that the wife was not obligated to leave the stepson anything, "and if nothing is done, I doubt very much that he [the stepson] will get anything when she dies."42

The trial court found that the stepson had been misled. The Supreme Court of Virginia, however, held that there was no fraud or misrepresentation in the statement. The court stated "this was an expression of opinion as to the correct interpretation of the will . . . . It is well settled that misrepresentations which amount to fraud . . . must be positive statements of fact and not mere expressions of opinion."43

Would the result have been different had the lawyer written "I know that he will not get anything when she dies"? Probably not, since given the context, the statement could still be taken as nothing more than an opinion. In our original hypothetical case, is there a distinction between "it is our belief (or opinion) that this company is on the move" and the same statement simply omitting the word belief or opinion? There really is no distinction.

The futility of saying a distinction exists is apparent in the attempt to distinguish fact from opinion. The problem is not unlike distinguishing fact from opinion in the evidentiary context. This distinction, as McCormick pointed out, between fact and opinion is "the clumsiest of all the tools . . . . It is clumsy because its basic assumption is an illusion."44 The distinction is based merely on how "concrete" the statement is. "Facts" require fewer inferences for interpretation than do "opinions." The more concrete the statement, the less it is subject to competing inferences, and the more likely it is to be a "fact."45

Furthermore, because all statements of fact are, to some degree, merely opinions, involving inferences drawn from observations, it makes little sense to require an explicit statement that this is "my opinion." This type of approach clearly would fall within the contemplation of Model Rule 4.1 and its comments, indicating that puffery is permissible.46 Puffery always has been likened to giving

42. Id. at 120, 148 S.E.2d at 794 (emphasis added).
43. Id. at 121, 148 S.E.2d at 795.
45. Id. at 22-26.
46. See infra text accompanying note 66.
an opinion, which essentially is a statement of one's interpretation of given facts. At some point, however, the line is crossed and the lack of competing inferences makes the statement a lie. For example, the attorney would be lying if he said "my client did not run the red light," when the client has admitted she did run the light.

Some facts are more subject to competing inferences than others. Consequently, an analysis of the type of fact offered in the negotiation may aid in determining whether the statement is opinion or lie. Transactional facts are those facts related to the situation being negotiated and are often more susceptible to interpretation. Examples of transactional facts would include, in a litigation setting, facts relating to an automobile collision and, in a setting involving a business transaction, facts concerning the quality of the leased premises. More latitude in the definition of fact may be inherent with these "transactional facts," and the argument that there is no such thing as the truth, the whole truth, and nothing but the truth is particularly applicable.

The standard to be applied to transactional facts is similar to the standard applied to a lawyer's arguing of law. The Code of Professional Responsibility states that a lawyer is permitted to contend the existence of any fact which can reasonably be inferred from the existing circumstances. Just as the lawyer may make an argument that the law dictates a certain result, even though he does not personally believe that the argument should be successful, a lawyer may make all reasonable assertions even though he does not personally believe that these asserted facts are true. The lawyer, however, may not assert as a transactional fact anything that he knows is not true or anything that cannot reasonably be inferred from the information available to him.

48. Dr. Johnson's oft quoted statement is particularly appropriate. "Boswell asked: 'But what do you think of supporting a cause which you know to be bad?' Dr. Johnson responded: 'Sir, you do not know it to be good or bad till the judge determines it.'" 2 Boswell's Life of Samuel Johnson 47 (G.B. Hill ed. 1887), quoted in M. Freedman, supra note 1, at 51.
50. There is the obvious problem of what precisely a lawyer knows to be the truth. As Professor Bok states, however, even though no clear lines can be drawn, information that would indicate truthfulness can be adequate for such a determination. S. Bok, supra note 31, at 13. Intentional ignorance provides no defense. See, e.g., Standards for Criminal Justice Standard 4-3.2 commentary (2d ed. 1979); M. Freedman, supra note 1, at 35-36; see also United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964) (Evidence was sufficient to
Facts of a transactional nature often can be distinguished from those facts which are related to the authority to settle which a client has given to his attorney or facts related to planned actions. In a pre-trial negotiation, for example, these are facts such as the amount for which the parties are willing to settle or whether the parties are contemplating the pursuit of certain legal actions. In a case involving joint planning rather than litigation these facts might include the willingness of a party to lease a building or the ability of the lawyer to commit the client. These facts, like those in Informal Opinion 1283,\textsuperscript{51} are less subject to individual interpretation than transactional facts. To the extent that the lawyer is aware of a fact, puffing and opinion are much less likely to be acceptable.

Certainly, basic outer limits can be discerned. The plaintiff in Sainsbury v. Pennsylvania Greyhound Lines\textsuperscript{52} was injured while in the military service. Counsel for the defendant, in obtaining a release for $500, told plaintiff that civilians might get more compensation because "[t]hose in the service . . . were in a different situation in the eyes of the law because they obtained from the Government, free of charge, medical and hospital care and were also entitled to disability payments . . . ."\textsuperscript{53} In voiding the release, the court held the lawyer’s statement to be a false statement of law, and that it was "inconceivable [that it was made] without knowledge of its falsity or without . . . reckless disregard for the truth."\textsuperscript{54}

Similarly, In re Wines\textsuperscript{55} involved a lawyer engaged in personal injury representation. In a nine count information, Wines was found guilty, among other things, of making misrepresentations. In filing claims, he stated that medical expenses of ninety dollars and eighty-five dollars had been "incurred,"\textsuperscript{56} when the actual expenses were only sixty-five dollars in each case.\textsuperscript{57} Furthermore, Wines had submitted false car repair receipts.\textsuperscript{58}

\[\text{establish knowledge on part of auditor who prepared finance statements used to defraud investors).}\]

\textsuperscript{51}See supra notes 37-40 and accompanying text.
\textsuperscript{52}183 F.2d 548 (4th Cir. 1950).
\textsuperscript{53}Id. at 550.
\textsuperscript{54}Id.
\textsuperscript{55}370 S.W.2d 328 (Mo. 1963).
\textsuperscript{56}Id. at 334.
\textsuperscript{57}Id. at 330.
\textsuperscript{58}Id. at 334.
Both Sainsbury and Wines, as opposed to Barnes,\(^59\) depict more clearly impermissible negotiation techniques. Both are also entirely consistent with Informal Opinion 1283,\(^60\) which also turned on a fact situation less subject to individual interpretation. In our borrower-lender example, above, these cases indicate that puffing would not allow the "creation" of another offer to use as leverage. The statement concerning business expansion would also be unethical, given the statement's concrete nature.

The third and fourth statements set forth above present more difficult problems than the first two statements set forth above. These statements demand resolution of the following question: Whether an unequivocal excessive demand is ethical or whether an excessive demand must be stated in equivocal terms. Examination of the third statement—my client does not want to accept less than ten million dollars—reveals that it is both truthful and ethical. Objectively, such statements are truthful, even though designed to mislead. Clearly a philosophical argument may be made that lying even includes the stating of truths designed to mislead; however, on a practical level such argument is indefensible, since many negotiation techniques necessarily involve misleading the opponent. This type of misleading, yet precise, language would have made the lawyer's conduct in Informal Opinion 1283\(^61\) acceptable. For example, had the lawyer in 1283 said "This case is ripe for expansion into a class action," there would not have been an ethical problem.

The importance of the precise language used has been recognized by some courts. In In re Brown,\(^62\) Brown, an attorney represented a woman who had borrowed $200 from a bank. In the course of that representation, Brown wrote the bank that he had filed a suit on behalf of his client to settle an estate, and that the client expected to receive $600 from the estate. Relying on this letter, the bank loaned the client an additional $200. In fact, Brown had not filed suit. The court rejected Brown's defense that he meant to say his client intended to file suit. In upholding the Trial Committee's recommendation of a reprimand, the court stated: "[a]n attorney's willful making of a false statement, even though not affecting a court or his client, but the interest of a third person

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59. See *supra* notes 41-43 and accompanying text.
60. See *supra* notes 37-40 and accompanying text.
61. *Id.*
62. 279 S.W.2d 773 (Ky. 1955).
relying thereon, constitutes grounds for disciplinary proceeding against him.”

The law as to misrepresentation provides useful guidance in deciding when language has not been precise enough. *McVeigh v. McGuerren* illustrates a relatively straightforward example. In *McVeigh*, the defendant, an attorney representing plaintiff’s former husband, knew that the husband had inherited $20,000, but nevertheless stated to plaintiff that if she was planning to collect $18,000 due under a property settlement agreement she might as well forget it, because the husband was “broke.” Plaintiff, relying on the attorney’s statements, executed for $1,250 a release of the indebtedness under the property settlement agreement. The court held that plaintiff was entitled to recover damages from defendant in an action of fraud brought by her in her own behalf and on behalf of her children. An out-and-out statement that the husband was “broke” was simply contrary to fact.

The “does not want to” in the third statement set forth above is much more precise than the statements in both *Brown* and *McVeigh* and appears proper. Consider, however, opening positions in negotiations which are traditionally higher than what will often be acceptable. Must an excessive demand be so precise? Some commentators would seem to say not. Professor Geoffrey Hazard, Reporter for the American Bar Association Commission on Evaluation of Professional Standards, echoing the Commission’s comments, has stated that “[c]onventions governing social intercourse do not require strict truthfulness at all times. On the contrary, those conventions give license to make certain kinds of statements that are literally false.” The comment to Model Rule 4.1 reflected this position when it stated that what constitutes a fact “can depend on the circumstances.” The comment acknowledges that, despite any apparent truth to the statement, “[u]nder gener-

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63. *Id.* at 774; *see also In re Gladstone*, 16 A.D.2d 512, 229 N.Y.S.2d 663 (1962) (involving, *inter alia*, findings that lawyers had “cause[d] to be submitted to . . . carriers bills of particulars, medical reports, medical bills, and, in at least one instance, a spurious letter, containing willfully exaggerated or knowingly false statements of the injuries, medical expenses or loss of earnings”).

64. 117 F.2d 672 (7th Cir. 1940).

65. Hazard, *supra* note 4, at 182-83 (quoting White, *supra* note 4, at 926-27). *But see In re Wines*, 370 S.W.2d 328 (Mo. 1963) (rejecting just such a defense), *supra* note 55 and accompanying text; *infra* note 92 and accompanying text.

ally accepted conventions in negotiation certain types of statements ordinarily are not taken as statements of fact.”\(^6\) Examples of such conventions\(^6\) are estimates of price or value, a party's intentions as to an acceptable settlement, and the nondisclosure of a principal unless it would result in fraud.\(^6\)

To the extent that “conventions” allow a false statement, the commentary would appear on its face to be contrary to Informal Opinion 1283. The conventions allowing less than complete truth would be unethical, unless we imply in such statements more precise language such as “what my client wants” or “what my client will accept at this instant” in place of “what my client's bottom line is.” At a minimum, usage of such implied statements must be limited to contact between lawyers. If we limit such usage to lawyers, however, must we not also be concerned with education of lawyers as to what are the existing “conventions.” Unless it is ethical to state the implied “convention,” the bar must face the following problems: 1) Ethics are going to vary from area to area, and hence, “accepted” conventions will not be known among even experienced lawyers; and 2) new lawyers, unaware of the “accepted” conventions, must seek their knowledge from other people who may have varying opinions on ethical proscriptions which have developed without systematic discussion. Consequently, one is tempted to suggest that statements such as “my client does not want” are preferable to conventions suggested by the Model Rules.\(^7\)

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67. Id. But see M. FRANKEL, supra note 20, at 82.
68. See supra note 66. “Conventions” is an appropriate term since the Commission cites no opinions authorizing such statements. The current formulation of the Model Rules and its accompanying comment can be contrasted with an earlier version where the rule mandated that a lawyer “be fair in dealing with other participants.” The comment then provided, “[f]airness in negotiation implies that representations by or on behalf of one party to the other party are truthful.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (Discussion Draft 1980), quoted in White, supra note 4, at 928. Responding to commentary that the rule was too general in the sense that it failed to recognize the relativity of truth, the Commission adopted the present Rule 4.1, essentially replicating DR 7-102(A)(5). MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (Proposed Final Draft 1981). See M. FRANKEL, supra note 20, at 82.
70. Intimately wrapped up in this debate is the fact that the attorney-client privilege is also at work. Monroe Freedman has stated it well in his review of Judge Marvin Frankel's work:

[Judge Frankel] begins with the proposition that lawyers know a great deal of truths about their client’s matters . . . . He then proceeds to the notion that if lawyers were to share that knowledge with their clients' adversaries and judges, there would be more truth in the legal system. This is wrong, or, at least it is correct only in the short
C. Avoidance Techniques and Nondisclosure

1. Avoidance Techniques

A second set of tactics which raises questions of truthfulness is nondisclosure. May the lawyer, for example, simply not inform the opposing party of a material fact? Consider our original borrower-lender hypothetical case. If the president of the borrower has cancer and the lawyer knows that the president’s reputation for integrity will be an important factor in the outcome of the negotiation, the lawyer may not say “the president is in excellent health.” Is there a distinction, however, between this blatant lie and a decision simply not to bring up the matter?

Related to refusal to inform is an assortment of tactics called avoidance techniques. These techniques may be used by a lawyer to fend off specific inquiries with the hope of misleading his opponent. Three specific examples will illustrate the point. Assume the borrower’s lawyer asks the lender’s lawyer: “What is your standard interest rate for this type of loan?” Lender’s lawyer, desiring to avoid being pinned down to a figure that is too low, tries an avoidance technique. Knowing that the bank would like to lend the money for this type of business at prime rate plus three percent, what is the ethical standing of each of the following approaches?

1. Leaving the opponent with the assumption the question was answered, lender’s lawyer says “We have no standard charge.” What the lawyer has done is answered very precisely the question asked, not the question the opponent more likely intended to ask (What is the interest rate your bank would normally charge me?)
2. Narrowing the focus of the question and then answering it incompletely, the lender’s lawyer says “We really don’t have a standard charge since each loan is different.” The lawyer ignores that part of the question regarding “this type of loan.”
3. Restating the question to his liking, the lender’s lawyer says “you mean, is there a price we always charge no matter who the

run. The inevitable result would be that clients would withhold the less pleasant and comfortable truths from their lawyers.


71. A related example is responding to compound questions by answering only one part. For example:

Q: “How much will you lend me and what will be the interest?”
A: “We can lend you as much as your operation demands.”
There are numerous variations of the above avoidance techniques, but they all have a single thread. The lawyer makes an apparent effort to answer the question while, at the same time, concealing information and misleading the opponent. The effect of such tactics is the same as if the lawyer lied; indeed, some philosophers might even consider such tactics to be lies.\footnote{72}

\textit{In re Cadwell}\footnote{73} raises interesting questions whether failure to disclose information with an intent to mislead is unethical. Cadwell was, in an unrelated matter, suspended from the practice of law for five and one-half years. After serving a twenty-two month jail term, Cadwell began working as a paralegal. A man came to Cadwell’s place of employment and was referred to Cadwell because the attorney was out. Cadwell interviewed the client, told the client that the client’s wife was seeking a divorce, and received authorization to write one letter and hold one conference. At no time during the interview did Cadwell say he was a lawyer nor did he say he was a paralegal. Following this interview, Cadwell telephoned the opposing party’s counsel stating “[t]his is the office of Mr. Blanchard and my name is David Cadwell.”\footnote{74} During this conversation, a tentative settlement was reached. Cadwell then sent a letter to opposing counsel signed “LESTER L. BLANCHARD, BY Cadwell.”\footnote{75} Again, no mention was made of Cadwell’s status.

Eventually, the judge who approved the settlement realized that Cadwell had been suspended. The only indication ever given to the opposing party that Cadwell was not a lawyer was a letter sent by Cadwell to opposing counsel during the same month that the judge made his discovery which indicated Cadwell was a legal assistant. There is no indication whether the letter came before or after the judge’s discovery. In upholding the finding that there had been a violation of ethics, the California Supreme Court stated that “Cadwell’s conduct in holding himself out as practicing law while under suspension involved moral turpitude . . . . A member of the bar should not under any circumstances attempt to deceive another.”\footnote{76}
common negotiation tactics. Does the court mean that failure to disclose information with an intent to mislead constitutes deception? If so, much of everyday negotiation is unethical. If we go back to our borrower-lender hypothetical case, many of the tactics discussed rely on the lawyer's intentionally withholding information so as to mislead and deceive the other side as to his position. Clearly, however, we cannot expect lender's attorney to begin by saying, "here is my bottom line," and then disclose relevant information.

Under the Model Rules, a lawyer negotiating a contract is prohibited from failing to disclose when "[i]n the circumstances failure to make the disclosure is equivalent to making a material misrepresentation." Failure to disclose, however, is rarely a misrepresentation. Since the Cadwell court was quite explicit that no harm was caused to either party by failure to disclose, it is hard to imagine that Cadwell's failure to disclose was material, much less a "material misrepresentation." If the court meant to say that the failure to disclose was not material, Cadwell could not have violated either DR 7-102(A)(5) or Model Rule 4.1. Which leaves the question, what ethical provision did Cadwell violate?

Did the court mean merely that it is improper for one to deceive another as to one's professional status by a calculated effort to avoid disclosure, even absent a specific question? If the Cadwell court had restricted its holding to statements regarding professional status, there would be less difficulty in applying the decision to another set of facts. Perhaps one's identity as a lawyer (or as a non-lawyer) is so central to the relationship among members of the bar that it justifies a rule forbidding all forms of deception. Such a rule, requiring disclosure, would not be unprecedented. The Model Rules provide that a lawyer representing a client before an administrative hearing must identify himself as such. In fact, there is authority that an attorney acting in a representative capacity should always disclose his role. Given the court's failure to dis-

77. See White, supra note 4, at 928.
80. See supra note 78.
82. CANONS OF PROFESSIONAL ETHICS 26 (1908); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(2) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 comment (Proposed Final Draft 1981).
cuss the matter adequately, it is difficult to know if it intended to limit its holding to either of these two narrow views.

Regardless of how Cadwell is interpreted, certain matters of form are so important that it is improper to fail to apprise the other side. One of the key factors in determining the applicable rules or conventions of a particular negotiation is who are the participants. If conventions control, the rules change depending on whether the other side is represented by a lawyer. The rules as to what tactics are permissible change and, as a consequence, what actions are expected from the other side also change. The other side is either bound by the conventions or is not bound, and the other side's expected adherence to standards higher than those of the general business market clearly should affect how one weighs the information one obtains. Looked at this way, Cadwell is a special area where there is an increased obligation that would come under DR 7-102(A)(3) providing that a lawyer shall not conceal "that which he is required by law to reveal." 83

2. Nondisclosure

As stated, avoidance techniques are closely related to nondisclosure, and the distinctions between ethical and unethical conduct in dealing with avoidance are just as difficult. Silence, as stated, would not generally constitute unethical conduct, absent some additional legal obligation. Of course, any number of situations arise in specialized areas where a specific legal obligation imposes a duty not to use silence or avoidance techniques. 84 The three most common situations involving increased legal obligations (from the standpoint of reported decisions) are those where misrepresentations with respect to contracts are involved, where the lawyer is acting as an officer of the court as well as adversary, and where the lawyer is subject to securities regulation laws. An examination of these three areas gives us not only a specific look at ethical obligations involved in specialized areas, but also provides a source of information from which we can draw analogies to more general practice, including the specific tactics under discussion.


a. Misrepresentation

Disciplinary Rule 7-102(A)(3), as stated, provides that a lawyer shall not “conceal or knowingly fail to disclose that which he is required by law to reveal.” A.B.A. Model Rule 4.1(b)(1) provides that a lawyer shall not “knowingly fail to disclose a fact . . . when in the circumstances failure to make the disclosure is equivalent to making a material misrepresentation” and (b)(3) requires disclosure if “necessary to comply with other law.”

“[I]n a bargaining transaction there is generally no duty to disclose information to the other party.” As a general rule, therefore, DR 7-102(A)(3) and Model Rule 4.1(b) do not require disclosure. In the law of contracts, however, there are six basic exceptions to the rule that disclosure is not required. The drafters of the Model Rules adopted the essentials of the exceptions in the Legal Background Comments to Rule 4.1(b). Four situations specifically are identified as requiring disclosure, three of which relate to negotiation: A lawyer has a duty to disclose where 1) the lawyer, having made a statement he believes to be true, later finds out that it is false; 2) the lawyer knows that materially false statements or omissions have been made by the client or agent of the client; and 3) disclosure is required “to prevent a statement made by a lawyer from being so materially misleading as to be a misrepresentation.” Although the first two exceptions are relatively straightforward, the cases with respect to the third exception—partial disclosure by the lawyer or half truths—are a source of useful guidance in negotiations since once the lawyer abandons silence in any negotiation, the possibility of conveying half truths arises.

There are numerous “half truth” cases. In Wines, previously discussed, alleged misconduct involved taking medical reports and preparing “resumes” or summaries of their contents and submit-
ting them to insurance companies. In summarizing the reports, Wines omitted information harmful to his clients. Furthermore, he prepared the summaries in such a manner that they appeared to be originals, except for the word "resume" typed at the top. The court, rejecting a defense based on custom, stated that any material omission would constitute a misrepresentation.

A custom may not be regarded as a complete vindication when a lawyer is charged with misrepresentations. We agree that a lawyer in his negotiations . . . may give as much or as little medical information as he pleases . . . . But when he gives any, it should not be in such form as is likely to mislead or deceive . . . .

In Scofield v. State Bar of California, Scofield, a lawyer, represented a couple who was involved in two car accidents within two weeks of each other. Scofield filed identical claims against two separate insurance companies for the combined amount of damages. At no time did Scofield tell the separate insurance companies that there had been two accidents. In suspending Scofield, the California Supreme Court held that he had committed fraud by "suppression of that which is true . . . to deceive another."

Half-truth cases such as these provide direct guidance as to proper conduct. Returning to our examples, it would appear all three statements are permissible. Assuming none of the statements literally is untrue, the bank's lawyer has no obligation to disclose further information. None of these statements misleads the borrower concerning the substance of the eventual arrangement. The lender, having chosen to talk, has given the full truth, and therefore, no problem of half truth arises.

Scofield and Wines involved charges of unethical conduct. In distinguishing between ethical and unethical conduct, misrepresentation in contract cases may provide guidance. If the conduct rises to the level of an intentional material misrepresentation, re-

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93. In re Wines, 370 S.W.2d at 334.
95. The companies were aware, however, that two identical claims had been filed since this information was shared by insurance companies through the Los Angeles Index Bureau.
96. 62 Cal. 2d at ___, 401 P.2d at 219, 43 Cal. Rptr. at 827. See also Cole v. Lumbermens Mut. Casualty Co., 160 So.2d 785 (La. Ct. App. 1964) (release invalid because injured child's father induced to sign by implied representation that there was only one insurance policy); In re Malloy, 248 N.W.2d 43 (N.D. 1976) (failure to disclose second insurance policy).
97. See supra text accompanying note 64.
quired in contract law if fraud is to be found, the conduct should certainly be unethical, since materiality is not necessary for disciplinary action. Care must, nonetheless, be taken in using misrepresentation cases to determine the presence of unethical conduct. The areas of contracts and professional responsibility do not completely overlap. It is conceivable that a lawyer could violate principles of contract law relating to misrepresentation and not violate proscriptions of unethical conduct. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* illustrates the differences. In *Roberts*, the law firm wrote a letter for a client expressing its opinion that the client's entity constituted a general partnership. The firm knew the letter was to be used to secure a loan. Plaintiff, relying on the letter, granted a loan to the client. Some of the fourteen partners subsequently claimed to be limited, rather than general partners; and consequently, plaintiff sued the law firm for fraud and misrepresentation.

In reversing a dismissal by demurrer, the court recognized that a cause of action for negligent misrepresentation had been stated. The firm, the court held, may have been negligent in failing to disclose facts concerning the uncertainty of the general partnership. This holding is consistent with the idea that contract law controls negligent and innocent misrepresentations as well as intentional misrepresentations. It does not follow, however, that the firm's negligence was unethical. Negligent misrepresentation is not a violation of any standard requiring knowledge. Although it may violate other ethical rules requiring competent representation, it is not an intentional, and hence unethical, misstatement.

When speaking of intentional misrepresentation, however, the standards applied to both ethical and contractual problems are

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98. *See In re Cadwell*, 15 Cal. 3d 762, 543 P.2d 257, 125 Cal. Rptr. 889 (1975), discussed *supra* in text accompanying note 73; McKinney v. State Bar, 62 Cal. 2d 194, —, 397 P.2d 425, 426, 41 Cal. Rptr. 665, 666 (1965) ("immaterial whether any harm was done"); see also *infra* text accompanying note 99.


101. Id.

102. This situation, of course, must be distinguished from intentional ignorance. It has been pointed out that "knowledge may be shown by proof that the lawyer "deliberately closed his eyes to facts he had a duty to see... or recklessly stated as facts things of which he was ignorant."

"Model Rules of Professional Conduct Rule 4.1 comment (Proposed Final Draft 1981). Even this language, however, does not go so far as to say that mere negligence constitutes knowledge. Deliberate ignorance always has been rejected as an explanation of lack of knowledge. *See generally supra* note 50.
quite similar and, as a consequence, commentators and the A.B.A. Model Rules103 repeatedly analogize to misrepresentation in the law of contracts. For instance, puffing illustrates this similarity. As stated above, most commentators recognize the weakness of any distinction based on fact versus opinion.104 Indeed, it is this weakness that provides at least one rationale for puffing;105 other rationales have also been posited for allowing puffing in the contracts area, at least one of which strengthens the connection between ethical and contractual liability.106 Puffing is justified on the theory that the opponent has no right to rely on certain types of statements.107

If a person has no right to rely upon the statement of a lawyer because it constitutes mere opinion, the ethical and contractual standards are the same. Furthermore, to the extent that the law of contracts takes into account individual education and experience, it is consistent with ethics, though ethics may require a good deal more. As stated in Kendall v. Wilson,108 "the law will afford relief even to the simple and credulous who have been duped by art and falsehood."109 If ethics are designed to require more than common behavior, it seems reasonable to assume that a bar association should also protect the "simple and credulous."110

Finally, recognition should be made of one major difficulty in


There are fewer cases where the lawyer, having breached the contract standard of misrepresentation, has been disciplined. See, e.g., The Bar Ass'n of Baltimore City v. Cockrell, 274 Md. 279, 334 A.2d 85 (1975).
104. See supra notes 44 & 49 and accompanying text.
106. Another justification for puffery is the immateriality of the statements. Id. at 279. As discussed previously, however, immateriality has not stopped courts from disciplining lawyers. See supra note 8 and accompanying text. But see Model Rules of Professional Conduct Rule 4.1(b) (Proposed Final Draft 1981) (disclosure required when failure to disclose would be material misrepresentation); Restatement of Contracts § 476 comment c (1932) (injury is not relevant to claim of misrepresentation).
108. 41 Vt. 567 (1869).
109. Id. at 571, quoted in J. Calamari & J. Perillo, supra note 47, at 280.
drawing guidance from a misrepresentation case. "Misrepresentation" is as nebulous a term as misstatement of fact. As has been stated: "Whilst I had little difficulty in deciding on the morality of a single given case, I found it much less easy to lay down any general rules or definitions . . . ."

b. Negotiations with the Court

Much of the discussion involved in advocacy ethics has stressed the conflict between the duty to the client and the duty to the court, and also, to a lesser extent, to the public in general. It is not the purpose here to rehash this debate. It is sufficient to say that most courts would hold that a special duty is owed to them—a duty which would make what is permissible in private transactions, impermissible in court transactions.

The courts' expectation, of course, impacts on negotiation in at least two ways. First, much of a lawyer's dealing with judges in court involves the same process as negotiation. A lawyer does, in fact, negotiate with a court, and special requirements as to ethical conduct apply. Second, many of the tactics used in negotiation find expression in the litigation process. The initial negotiation demand, for example, may appear in the plaintiff's complaint.

_Di Sabatino v. The State Bar,_ provides an interesting example of nondisclosure, which may be ethical in private negotiations, but unethical when appearing before a court. In _Di Sabatino_ the petitioner, a lawyer, represented three defendants charged with a crime who were arraigned and for whom bail had been set at $50,000 each by a commissioner. Later in the day, the lawyer appeared before a municipal court and requested that the bail be re-

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111. _Id._ at 284.
112. See _supra_ note 1.
duced. The judge refused the request. That evening, the lawyer went to the bail commissioner for the superior court. The lawyer told the commissioner that he had appeared in court with his clients, but did not mention the two previous bail reduction motions. In upholding disciplinary action against the lawyer, the court stated that

[p]etitioner clearly had an affirmative duty to inform Commissioner Ziskrout fully and completely as to all relevant facts and circumstances regarding his request for bail reduction. The fact that the commissioner could have asked about the existence of prior bail reduction motions does not relieve petitioner of his duty of disclosure. It is disingenuous to suggest that a bail commissioner asked to take after hours action would consider it irrelevant that two prior motions for bail reduction had been denied.\(^{114}\)

The dissent, however, characterized the incident as being trivial in nature. It pointed out that

[t]he superior court commissioner could not have been deceived for he was advised bail had been set at $50,000 and he was being asked for a reduction to $10,000. Since it was his duty to independently determine the appropriate bail, the conclusion—actually the mere deferment of action—of a judicial officer at a lower level should have been of no significance.\(^{115}\)

The case is interesting in that the dissent alludes to what is a sound basis for requiring disclosure to a court. To the extent possible, the court does not take an active role in the development of the facts of the case, and for the most part, the court is unable to verify independently the assertions made by the parties. Because of this reliance on the parties to bring out facts and since failure to disclose is more likely to mislead the court, a higher duty is imposed.\(^{116}\)

Despite this higher duty, the dissent infers that the commissioner should not have been misled by this particular failure to disclose. The failure to disclose was trivial and not a proper subject for disciplinary action. Under these circumstances the superior

114. 27 Cal. 3d at 163, 606 P.2d at 767, 162 Cal. Rptr. at 460.
115. Id. at 165, 606 P.2d at 768, 162 Cal. Rptr. at 461 (Mosk, J., dissenting).
court commissioner should not rely solely on the parties to bring out the relevant facts. Regardless of whether the commissioner was in fact misled, the distinction implicit in the dissent's analysis has direct applicability to more traditional negotiation settings. If one of the reasons why failure to disclose is unethical when dealing with a court is that there is a greater likelihood that the court will be misled, then the less ability the parties have to develop the facts themselves, the more likely the failure to disclose a relevant fact will constitute unethical conduct.

c. SEC Rule 10b-5

The frequent citation to cases involving Rule 10b-5 in the A.B.A. Model Rules reflects the applicability of this security regulation rule to negotiation situations. The rule provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud;

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.\textsuperscript{117}

The similarity of Rule 10b-5 to the ethics of negotiation is striking. Clause 1 prohibits fraud, clearly within the contemplation of ethical standards. Clause 3 is very similar to clause 1 and, as has been pointed out in discussing SEC Rule 10b-5, "[n]othing comes to mind that would be in clause 1 but not in clause 3."\textsuperscript{118}

Clause 2, however, provides more interesting problems. First, the rule prohibits untrue statements of material facts. The basic distinction between Clause 2 and DR 7-102(A)(5) is the word "material" (if we may assume "false" is the same as "untrue"). Interestingly, the Model Code and contract misrepresentation differ in the same manner.\textsuperscript{119} This distinction is understandable given the dif-

\textsuperscript{117} 17 C.F.R. § 240.10b-5 (1982).
\textsuperscript{118} A. Bromberg, Securities Law: Fraud, SEC Rule 10b-5 49 (1968).
\textsuperscript{119} See supra note 106 and accompanying text.
ferent goals involved—regulating professional conduct versus regulating commercial transactions.\textsuperscript{120}

Clause 2 of Rule 10b-5 also requires disclosure of a material fact in order to insure that previous statements are not misleading. Total silence, therefore, does not violate clause 2, just as silence is generally permissible when dealing with misrepresentation in contract law.\textsuperscript{121} Silence may, however, constitute fraud in some circumstances and therefore may be proscribed by clauses 1 and 3.\textsuperscript{122}

The correlation between Rule 10b-5 and ethical standards of negotiation is even greater since the United States Supreme Court's recent decisions requiring scienter for there to be a violation of SEC Rule 10b-5.\textsuperscript{123} Both DR 7-102(A)(5) and the Model Rules of Professional Conduct 4.1 use the term "knowingly," and hence, imply that scienter is required. One might conclude that anything which violates SEC Rule 10b-5 should also violate DR 7-102(A)(5) and Model Rule 4.1, but because the materiality requirement in 10b-5 is lacking from DR 7-102(A)(5), much that would pass muster under SEC Rule 10b-5 would not under DR 7-102(A)(5).

Concern has been expressed over the lack of specificity in SEC Rule 10b-5 even more than its lack in the Code of Professional Responsibility. Consider, however, the argument most commonly used to reject any increased specificity:

\[\text{[S]ince the importance of a particular piece of information depends on the context in which it is given, materiality has become one of the most unpredictable and elusive concepts of the federal securities laws. The SEC itself has despaired of providing written guidelines to advise wary corporate management of the distinctions between material and non-material information, and instead has chosen to rely on an after-the-fact, case-by-case approach, seeking injunctive relief when it believes that the appropriate boundaries have been breached.}\textsuperscript{124}\]

\textsuperscript{120} See generally A. Bromberg, supra note 118; Rosenfeld, The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations, 33 Hastings L.J. 495 (1982).
\textsuperscript{121} A. Bromberg, supra note 118, at 51.
\textsuperscript{122} See supra text accompanying note 79.
The similarity of this language to that concerning misrepresentation and DR 7-102(A)(5) is striking.\textsuperscript{125}

Returning to our hypothetical case of negotiation, how do the nondisclosure and avoidance tactics stand up ethically? Failure to disclose the president's cancer would not be unethical, since generally, disclosure is not required and there does not seem to be any special relationship between the borrower and the lender. The avoidance techniques are also ethical, since no half truths were stated. The information given—though of limited value and nonresponsive—was complete.

IV. \textsc{Alternative Two: Caveat Lawyer}

Failure to articulate appropriate conventions, whether done willingly, or out of frustration with the difficulty of the task, is merely to ignore the problem. The question of truthfulness should be dealt with by the legal profession. If there is no ability, or, more likely, no willingness to explore and state these conventions, a new rule is needed to govern lawyer truthfulness. The profession, for example, could justify adoption of a rule requiring absolute truthfulness. In other words, we could require a strict reading of DR 7-102(A)(5). Absolute truth, however, is not an acceptable approach. If the rules we have are difficult to enforce, adding such a rule would only increase violations without any corresponding increase in the ability to regulate. Furthermore, absolute truthfulness conflicts with too many other ethical obligations, such as client confidentiality, to be a practical solution.

An alternative that would work, however, is the following: in negotiations, absent a clearly expressed specific duty to the contrary—such as to a court—caveat lawyer. A rule by which a lawyer knows that anything goes when dealing with other lawyers has several advantages. The ease with which it could be administered is readily apparent. Since lack of truth generally would impose no risk of discipline, lawyers need not be concerned that ethical proscriptions could be violated with impunity. If we cannot enforce the rules, it may be advisable to eliminate them. Caveat lawyer would also be consistent with most of the limited authority existing with respect to truthfulness in negotiation. Statements vio-

\textsuperscript{125} \textit{See supra} text accompanying note 111. \textit{But see} Blackstone, \textit{A Roadmap for Disclosure vs. A Blueprint for Fraud}, 26 U.C.L.A. L. Rev. 74 (1978) (the SEC fears greater definition of materiality would “invite corporations to circumvent disclosure”). \textit{Id. at} 75.
lating Rule 10b-5 would still be prohibited, constitutional require-
ments would still demand disclosure by the prosecutor, and
agreements would still be subject to principles in the law of con-
tracts with respect to misrepresentation. Furthermore, caveat law-
yer would control dishonesty in negotiation as much as any alter-
native rule. Although no empirical data are available, few lawyers
conform their conduct to any articulated rule solely to avoid ethi-
cal misconduct. Peer pressure and the desire to maintain an appro-
priate reputation play important roles. Consequently, caveat law-
yer may do little to change the behavior of most experienced
lawyers acting within their own geographic area or professional
stratum. When a lawyer crosses a stratum or geographic boundary,
caveat lawyer merely makes explicit the understanding any compe-
tent lawyer would take with him.

Finally, caveat lawyer would effectively abolish the schizoid na-
ture of existing guidelines. These guidelines, established by the
A.B.A. Code and the Model Rules, would not have to be qualified
by commentary which states that certain misstatements are not
misstatements. There even seems to be increased morality in elimi-
nating a public position that is not honored as written.

V. Conclusion

A variety of circumstances have been suggested as requiring va-
rying degrees of truthfulness in negotiations. Although Professor
Hazard has recognized the difficulty of simultaneously developing
rules for "Type A Lawyers and Type B Lawyers," courts have
accomplished a similar feat with Type A customers and Type B
customers in Uniform Commercial Code settings. Furthermore,
specificity is not unknown in negotiation settings. The Truth in Lending Act is a prime example of very specific negotiation
guidelines. An even more varied control is found in the Truth in Negotiation Act which, although specifically referring to the armed
services, requires disclosure of a wide variety of specific informa-
tion by government contractors.

126. Hazard, supra note 4, at 195.
127. See supra text accompanying note 109.
The discussion has not come from the courts or the bar associations, and given the non-public nature of the negotiation process, it is not likely to be forthcoming. Interpretation might come from public discussion and from recognition that guidelines beyond mere "conventions," do exist. If the profession is unable or unwilling to develop such a discussion, then the rules should be conformed to existing conduct.

Sir Frederick Pollock, in writing to Oliver Wendell Holmes, stated "I never heard any real authority for any such proposition as that one owes full disclosure of the truth to all men at all times." One suspects he also never heard any real authority on when one does not owe such disclosure.

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130. See generally White, supra note 4, at 926. One would hope that additional discussion could be generated more precisely—for example, lawyers involved in real estate transactions discussing their particular circumstances. It should be made clear that what is addressed here is what is ethical. The concern at this stage is with minimal levels of conduct, not what should be done, but what can be done. See generally L. Patterson & E. Cheatham, The Profession of Law (1971); Blackmun, Thoughts About Ethics, 24 Emory L.J. 3 (1975).
