REGULATING LAWYERS' NEGOTIATIONS

*Rex R. Perschbacher**

Negotiation is one of the most important activities of the practicing lawyer.[1] It is the dominant method for resolving civil and criminal disputes[2] and

* Acting Professor of Law and Director of Clinical Education, University of California, Davis. A.B. 1968, Stanford University; J.D. 1972, University of California, Berkeley. I want to thank my colleague, Gary Goodpaster, for his encouragement and helpful comments on earlier drafts of this Article. U.C. Davis law students Martha Lofgren, Michael Laurence and Debbie Hamilton provided valuable editorial assistance. The University of California, Davis campus-wide administration and School of Law provided funding that made my research and writing possible.

This Article is dedicated to the memory of my father, Robert Ray Perschbacher.

1. *See* R. HAYDOCK, NEGOTIATION PRACTICE xi-xiii, 1-2 (1984); G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 1-5 (1983).

2. Few statistical studies have discussed how often settlement negotiations occur. Notable and recent exceptions are Galanter, *Reading the Landscape of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious And Litigious Society*, 31 UCLA L. REV. 4 (1983) (available data suggest only a very few disputes end up as court actions and even fewer are tried; negotiated resolutions dominate at every stage), and Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (among the author's findings is that the lawyers studied devoted more time to negotiation than to either legal research or trials). *See generally, Litigation in America*, 31 UCLA L. REV. 1 (1983) (symposium). However, existing data does provide a basis for inferring the prevalence of negotiation. One type of information that allows inference about the prevalence of negotiation is the number of filed cases proceeding to trial. Although some cases failing to reach trial do so for lack of merit, most cases do not reach trial because the parties settle. The small number of filed cases actually resolved by trial suggests that negotiation occurs in almost every case. In 1982, only 6% of the cases filed in federal courts ended in trial. ADMINISTRATIVE OFFICE OF THE COURTS, 1983 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE COURTS A-2, A-3 (1983). In the Missouri state courts in 1980, only 19% of filed cases were tried. OFFICE OF THE STATE COURT ADMINISTRATOR OF MISSOURI, ANNUAL STATISTICAL REPORT 1979-80, at 22. In 1979, only about 11% of the filed cases in Oregon went to trial. OFFICE OF THE STATE COURT ADMINISTRATOR, ANNUAL REPORT RELATING TO JUDICIAL ADMINISTRATION IN THE COURTS OF OREGON 37, 45 (1979). In the New Jersey state courts between 1960 and 1975, only about 19% of the filed cases reached trial. ADMINISTRATIVE OFFICE OF THE COURTS, NEW JERSEY ANNUAL REPORT 1974/1975, at E-7.

In criminal litigation, negotiation usually takes the form of plea bargaining. Accordingly, one good measure of the extent of negotiation is the number of cases disposed of by guilty plea. Most studies agree that roughly 90% of all criminal defendants plead guilty. *See* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.2 (2d ed. 1982); JUDICIAL COUNCIL OF CALIFORNIA, 1982 REPORT TO THE GOVERNOR AND THE LEGISLATURE 66 (over 87% of California criminal filings in 1982 disposed of without trial); NORTH DAKOTA JUDICIAL COUNCIL, NORTH DAKOTA JUDICIAL COUNCIL ANNUAL REPORT 1981, at 13 (in North Dakota between 1978 and 1981, over 83% of the juvenile cases resolved by plea); VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 7 (1977) (in New York in 1971, 97% of felony convictions were by plea). *See also* Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. I), 76 COLUM. L. REV. 1059, 1063 n.20 (1976) (95% plea rate for Houston in 1975).

is also important in a nonlitigation or transactional context such as in setting contract terms.[3] The significance of negotiation in lawyers' work is evident from the professional attention recently given it. In the past decade both legal scholars and practitioners have turned their attention to the negotiation process and produced a substantial amount of literature on negotiation theories and strategies.[4] In addition, negotiation and alternative dispute resolution courses have become commonplace in the law schools.

While the legal profession has recognized the importance of negotiation and negotiation skills, there has been no development of a specialized body of legal rules to regulate lawyers' conduct as negotiators. This is so even though lawyers negotiate far more matters than they litigate. There is no body of law regulating negotiation that even remotely compares to the extensive law regulating litigation practice.[5] Even lawyers' rules of professional

---

3. *See* R. HAYDOCK, *supra* note 1, at xi-xii, 1; G. WILLIAMS, *supra* note 1, at 2-4. For an analysis of the differences and continuities between dispute settlement and rulemaking (or transactional) negotiation, see Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

4. Professor Menkel-Meadow's recent writings stand out as examples of the scholarly attention negotiation commands and for their bibliographic thoroughness. *See* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 755-58 nn.1-6 (1984) (comprehensive catalogue of the recent literature in the area) [hereinafter cited as Menkel-Meadow, *Problem Solving*]; Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RESEARCH J. 905 (in-depth review of the recent literature on negotiation emphasizing the need for additional empirical research and the use of this literature in law school teaching [hereinafter cited as Menkel-Meadow, *Legal Negotiation*]. Other significant writing appearing within the last two years includes R. HAYDOCK, *supra* note 1, and G. WILLIAMS, *supra* note 1 (books), and Professor Lowenthal's article, *A General Theory of Negotiation: Process, Strategy, and Behavior*, 31 KAN. L. REV. 69 (1982).

What this Article is and is not. As Professor Lowenthal noted, "Although negotiation has been studied extensively by game theorists, economists and social psychologists, legal scholars have not examined the process of bargaining." Lowenthal, *supra* at 70 & nn.2-5. On the other hand, Professor Menkel-Meadow's essay, *Legal Negotiation*, demonstrates that there has been substantial writing both by legal and nonlegal scholars in the area but that much remains to be done. Menkel-Meadow, *Legal Negotiation*, *supra*.

This Article is not a study or analysis of negotiation itself. Except by exclusion, it does not purport to instruct lawyers on effective negotiation techniques. Rather this Article attempts to uncover the sources and develop some guidelines for the conduct of lawyers as negotiators.

Whenever possible, this analysis treats different types or categories of negotiation alike. The best system of regulation would provide rules for lawyers whether they are negotiating settlement of a lawsuit, drafting a complex lease, dealing with government regulators, or buying and selling property. The pioneering theoretical work demonstrating both the differences and some underlying continuities between the two major types of negotiation—settlement of disputes and establishing rules for future conduct—is Eisenberg, *supra* note 3, at 637-38. Although the lawyer's role in the two types of negotiation varies, this does not mean that a single set of rules cannot regulate the lawyer's conduct as a negotiator. *See* Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 675-76 (1978) (arguing that a different, but coherent, set of principles of professional behavior and responsibility should guide the lawyer in advocate and non-advocate functions—the latter category includes both compelled and voluntary negotiations).

This Article, then, describes and analyzes limitations on how lawyers can act in all types of negotiations. The emphasis will be on civil rather than criminal law practice because the process of criminal litigation settlement is a distinct one with its own important rules. *See infra* notes 158-61 and accompanying text.

5. For example, on the federal side, Title 28 of the United States Code, much of Title 18, and the Federal Rules of Civil, Criminal, and Appellate Procedure and Evidence, plus local rules of court for the supreme court, each circuit and each district, all regulate the litigation conduct. The states have comparable systems. For example, California has an extensive Code of Civil Procedure, Penal Code, statewide Rules of Court for its supreme court, courts of appeal, superior courts and municipal and justice courts, plus local court rules for each of its counties, all of which regulate litigation in its courts. Relatively insignificant parts of these regulatory systems directly affect nego-

ethics,[6] largely premised on the litigation model of legal practice, slight or completely ignore negotiation practice. Some law regulates negotiations in certain specific subject matter areas, for example, in labor-management collective bargaining practice.[7] Nevertheless, there is no specific code designed to regulate what lawyers generally can and cannot do as negotiators.

Thus, the only guidance lawyers receive for the conduct of negotiations tends to be either intensely practical and pragmatic or rhetorically moralistic. The guidance focuses on what techniques are successful under what circumstances,[8] or broadly recommends that the good lawyer be resolutely honest and that he conduct principled negotiations in good faith.[9] It almost appears that lawyers' negotiations are largely beyond the law, that no law governs the negotiation process. But this is simply untrue.

Although there is no lawyers' code of negotiation ethics,[10] there are

---

tiations. *See, e.g.*, LOCAL R. OF PRAC. 109, U.S.D.C., E.D. Cal. (court settlement conferences); CAL. R. COURT 207.5 (settlement calendar); *see also* R. HAYDOCK, *supra* note 1, §§ 5.10-5.11.

6. Most prominent are the American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as ABA MODEL CODE] and the new MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as ABA MODEL RULES]. The history and evolution of the current professional ethics codes are briefly traced in Kutak, *The Law of Lawyering*, 22 WASHBURN L.J. 413 (1983) and D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 171-84 (1973). The ABA's Model Code was eventually adopted in every state but California and even there serves as a model for California's Rules of Professional Conduct. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 632 & n.52 (1978). The new Model Rules have not been as readily accepted, and it remains to be seen if they will ever become a national model of regulation for lawyers. *See Ethics 'Domino': Early Going on Code is Slow*, 70 A.B.A.J. Jan. 1984, at 33.

7. Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), and 158(b)(3) (1976), make it an unfair labor practice for employers and unions to refuse to bargain collectively. *See also infra* notes 314, 318-21 and accompanying text.

8. The leading example of this approach is M. METSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION ch. 13 (1974). In dealing with more powerful opponents in negotiation they advise, "[a]rrange to negotiate on your own turf . . . [b]alance or slightly outnumber the other side . . . lock yourself in . . . [u]se two negotiators who play different roles . . . be tough—especially against a patsy . . . [a]ppear irrational when it seems helpful;" and "[c]laim you do not have authority to compromise." *Id.* at 232-34, 236-37. Professor Menkel-Meadow calls this the "instrumental" view of negotiation, that is, a discussion of negotiation strategies without any examination of goals or evaluation of negotiation outcomes. Menkel-Meadow, *Legal Negotiation*, *supra* note 4, at 922-23. Although the instrumental approach is particularly prominent in the adversarial litigation negotiation model, *see* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: NEGOTIATION (1981); H. EDWARDS & J. WHITE, THE LAWYER AS A NEGOTIATOR (1977), it can also be found in commentaries recognizing the alternative problem-solving approach. *E.g.*, G. WILLIAMS, *supra* note 1; Lowenthal, *supra* note 4. *See also* Menkel-Meadow, *Problem Solving*, *supra* note 4, at 755-64.

9. Two leading commentaries on this approach are Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975) and Schwartz, *supra* note 4 (both emphasizing ethical issues for legal negotiators). However, most scholarly advocates suggest that a cooperative or problem-solving approach to negotiations is morally better. *See* Menkel-Meadow, *Problem Solving*, *supra* note 4, at 763-64. In part this is because problem-solving negotiation takes into account moral issues and ethical needs of lawyers and clients, while the adversarial approach leaves them out of its analysis.

A similar tactical-versus-moral debate also characterizes the dispute over lawyers' lying. *See, e.g.*, J. LIEBERMAN, CRISIS AT THE BAR 23-32 (1978); Burke, *"Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1 (1984); Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy"*, 4 STAN. L. REV. 349 (1952). *See also* Lowenthal *supra* note 4, at 100-01.

10. An earlier version of the ABA's new Model Rules of Professional Conduct, the 1980 Discussion Draft, had a section devoted to negotiation. AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT, Rules 4.1-4.3 (Discussion Draft 1980) [hereinafter cited as ABA MODEL RULES (Discussion Draft)]. *See*

rules regulating how negotiations may be conducted and how negotiators must conduct themselves with their clients and their adversaries.[11] Two examples illustrate the problem of the possible gulf between technically effective and ethically proper negotiation conduct. The lawyer representing a defendant in a civil case has been instructed by her client to accept any settlement offer under $100,000. The plaintiff's lawyer tells her, "I think $90,000 will settle this case. Will your client give $90,000?"[12] The defendant's lawyer is in a bind. If she answers truthfully she forecloses further negotiation and the possibility of a much lower settlement. If she lies about what her client will do, she may well benefit her client. But is it proper for the lawyer to lie?[13]

Consider further the case of a lawyer representing the proposed buyer of a financially distressed business. After initially showing an interest in accepting the seller's asking price of $90 million, the lawyer and his client, knowing there are no other likely buyers, agree on a strategy of delay in reaching final agreement in order to take advantage of the seller's deteriorating business prospects. As a result, the seller eventually accepts the buyer's offer of $45 million.[14] As a bargaining technique the strategy is successful; the buyer has obtained the business at half the original asking price. But in doing so the lawyer may have breached a duty of fairness owed to others in negotiations to bargain in good faith.[15]

---

also, id., Preamble: A Lawyer's Responsibilities, at 1 Introduction (Negotiator), at 86-87. This separate treatment of lawyers' negotiation ethics was deleted from the Model Rules as finally adopted in August 1983. *See infra* note 123. In H. EDWARDS & J. WHITE, *supra* note 8, two questions are posed as "critical" and come within the scope of this Article: "(1) the drawing of the line between impermissible lying and permissible puffing and (2) the drawing of the line between appropriate use of the opponent's weaknesses and inappropriate use of weaknesses and other factors extraneous to the negotiation to coerce a settlement." *Id.* at 372. These questions remain unanswered, although some commentators have advanced their analysis by developing lines of further inquiry. *See, e.g.*, Hazard, *The Lawyer's Obligation to be Trustworthy when Dealing with Opposing Parties*, 33 S.C. L. REV. 181 (1981); Lowenthal, *supra* note 4, at 71-72, 98-105. Recently Professor White raised yet another unanswered question: what are the appropriate bounds of negotiating behavior for the use of threats? White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RESEARCH J. 926, 928 n.5; *cf.* Livermore, *Lawyer Extortion*, 20 ARIZ. L. REV. 403 (1978).

11. *See* Lowenthal, *supra* note 4, at 71 (citing examples of the "broad array of statutes, court decisions, administrative regulations and rules of professional conduct . . . designed to regulate aspects of the negotiation process or to limit the extent to which one negotiator can take advantage of another"); *see also* G. WILLIAMS, *supra* note 1, at 90-109.

12. This example is taken from Professor White's thought-provoking review of lawyer conduct in negotiation, *supra* note 10, at 932-33. Professor White offered five cases to illuminate the difficulty of drafting acceptable general rules concerning truthfulness in negotiations. His immediate concern was with ethical norms, and his analysis suggested that rules general enough to cover the great variety of lawyers' negotiations and negotiation practices will offer little specific guidance for lawyers dealing with concrete cases. *Id.* at 938.

13. *See* ABA MODEL RULES, *supra* note 6, Rule 4.1 (Truthfulness in Statements to Others); ABA MODEL CODE, *supra* note 6, DR 7-102(A)(5), DR 7-102(A)(3). *See also* White, *supra* note 10, at 933-34 for an example from criminal plea bargaining negotiations; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 4-6.2 (1979) (The Defense Function) (counsel may not plea concessions favorable to one client at another's expense) [hereinafter cited as ABA STANDARDS]. Plea bargaining is sufficiently distinct from other lawyers' negotiations to require a separate analysis that is beyond the scope of this Article. *See generally* J. BOND, PLEA BARGAINING AND GUILTY PLEAS (2d ed. 1982).

14. This example is based loosely on *In re* Consolidated Pretrial Proceeding in Air West Securities Litigation, 436 F. Supp. 1281 (N.D. Cal. 1977).

15. Such a duty was proposed in the ABA MODEL RULES (Discussion Draft), *supra* note 11,

These cases are difficult because the lawyers' roles as client advocate and ethical practitioner appear inconsistent and lead to different results. But they are difficult only on the assumption that the law does not resolve the conflict of roles. A factor is missing from these cases, one usually as important to the lawyer as knowing what technique will be most effective and what the rules of professional ethics will allow. That factor is the law—the legal effects of each of the choices involved. The choices may not be any easier, but would not the litigation lawyer want to know whether misrepresenting her client's instructions to the plaintiff may, if discovered, make the resulting agreement voidable or expose her or her client to an action for fraud? Would she not want to know whether, by making the misrepresentation, she risked a suit by her own client for failing to follow instructions, or whether she may be liable for malpractice if no settlement results and the case must be tried?

Similar issues arise for the buyer's lawyer. Will the agreement finally reached be enforceable, or can it be avoided by the seller on the ground of duress? Does the lawyer, alone and with the buyer, risk liability to the seller for the economic harm that is suffered? Is the lawyer liable for malpractice if the agreement is avoided or if the buyer is found liable to the seller?

The examples pose basic questions regarding a lawyer's responsibility for the conduct of negotiations—the kinds of questions a "law of lawyers' negotiations" should answer. The examples also disclose the basic relationships such a law must address: (1) negotiators' relations with their clients, and (2) negotiators' relations with adversaries and other third parties.

While no express code governs the conduct of negotiations, significant elements of such a code can be extrapolated from other fields of law. This Article derives a "law of lawyers' negotiations" from contract, tort, agency, and malpractice law, as well as rules of professional ethics. This article also explains the implications of these rules on lawyers' conduct in dealing with their clients and third parties.

As a preview, the law of lawyers' negotiations that emerges is as follows. Lawyers are subject to most of the same regulatory constraints as other negotiators. Where negotiations are not an adjunct to civil or criminal litigation, lawyers' responsibilities to their clients are subject to control along the lines of traditional agency law.[16] They must ordinarily abide by client instructions and provide adequate information to the client to facilitate informed decisionmaking. Their obligation to use due care and skill in acting for the client is enforceable through malpractice actions.[17] Lawyer-negotia-

---

Rule 4.2(a), (c)(1), and has been advocated by Judge Rubin, Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, *supra* note 9, at 589-92; *see also infra* notes 307-23 and accompanying text.

16. *E.g.*, Brinkley v. Farmers Elevator Mut. Ins. Co., 485 F.2d 1283 (10th Cir. 1973); *see also infra* notes 199-250 and accompanying text. *See generally* Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 48-65 (1979).

17. *E.g.*, Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); *see also infra* notes 169-98 and accompanying text. *See generally* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE §§ 100-120 (2d ed. 1981). Lawyers' potential malpractice liability extends beyond the immediate client to intended beneficiaries of their services. *E.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (lawyer owed duty to beneficiaries of client's estate to use reasonable care in drafting client's will), *cert. denied*, 368 U.S. 987 (1962).

tors also have a duty of loyalty enforceable in a malpractice action, or more directly in a suit to recover damages for breach of fiduciary duties.[18] In litigation settlement negotiations, however, lawyers' special obligations to the tribunal require some modification of these rules. The strict application of agency principles is relaxed and lawyers are more free to exercise judgment without being subject to malpractice liability if that judgment is mistaken.[19] The duty of candor, part of lawyers' responsibilities as officers of the court, also limits their otherwise absolute loyalty to their clients.[20]

Tort and contract-based rules restrain lawyer-negotiators in dealing with adversaries and other third parties. At the extreme, these rules require lawyers to limit their tactics to avoid engaging in criminal activities on a client's behalf.[21] A wider variety of tactics may be acceptable, depending upon the circumstances in which they are employed, including the relative sophistication of the adversary and the extent of any dependency relationship between the parties. Thus, threats and economic and litigation pressures may either be acceptable negotiation tactics or may amount to duress or misrepresentation voiding any resulting agreement.[22] Furthermore, the rules of fraud and deceit are generally applicable to lawyers' negotiations.[23] Whether misrepresentations will either undercut agreement or subject lawyers to a potential damage action largely depends upon whether the disad-

18. *See, e.g.*, Ishmael v. Milligton, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Hansen v. Wightman, 14 Wash. App. 78, 92-93, 538 P.2d 1238, 1248-49 (1975). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 121-166.

19. *E.g.*, Glenna v. Sullivan, 310 Minn. 162, 245 N.W.2d 869 (1976) (no liability for exercise of judgment in advising clients to settle malpractice claim before trial in light of damaging information presented with little time to counteract information). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 211-217.

20. *E.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983) (settlement set aside for failure of plaintiff's lawyer to disclose plaintiff's death to opposing counsel and court); Kath v. Western Media, Inc., 684 P.2d 98 (Wyo. 1984) (counsel had duty to disclose to opposing counsel information that contradicted deposition testimony of crucial witness; settlement set aside). In both opinions the courts relied on ABA MODEL CODE, *supra* note 6, DR 7-102(A)(3) ("In his representation of a client, a lawyer shall not . . . conceal or knowingly fail to disclose that which he is required by law to reveal"), MODEL RULES, *supra* note 6, Rule 3.3(a)(2) ("A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . . ."), and Judge Rubin's article, *supra* note 9, at 589-90.

21. *E.g.*, People v. Beggs, 178 Cal. 79, 172 P. 152 (1918) (lawyer guilty of extortion in holding and threatening his clients' debtor in order to collect debt); *see also infra* notes 253-58 and accompanying text.

22. *See, e.g., In re* Consolidated Pretrial Proceedings in Air West Sec. Litig., 436 F. Supp. 1281 (N.D. Cal. 1977) (failure to set closing date in violation of purchase of assets agreement constituted coercion when buyer knew that delay threatened seller's financial stability and the tactic was used to obtain more favorable terms for buyer); Slocum v. Nelson, 72 Cal. App. 2d 33, 163 P.2d 888 (1945) (court disallowed plaintiff's recovery on promissory note obtained by threats of criminal prosecution. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 176 and comments d-f (1981); Dawson, *Duress Through Civil Litigation*, 45 MICH. L. REV. 571 (Part I), and 679 (Part II) (1947); Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981); *See also infra* notes 66-78, 259-76 and accompanying text.

23. *See, e.g.*, Slotkin v. Citizens Casualty Co., 614 F.2d 301, 314 (2d Cir. 1979) (lawyer liable for fraudulent misrepresentation made in settlement negotiations); *In re* Cohen, 6 Bankr. 708 (Bankr. N.D. Ga. 1980) (settlement invalidated by fraud). *See generally* Lowenthal *supra* note 4, at 102-05. Misrepresentations have been a particular source of frustration for commentators trying to develop ethical rules for lawyers' negotiations. *See generally*, Hazard, *supra* note 10; White, *supra* note 10.

vantaged party reasonably relied on the statements.[24] Even when the misrepresentations do not result in an unenforceable agreement, third party reliance on a lawyer's statements made during negotiations may nevertheless expose lawyers to liability for resulting damages.[25] Finally, there are emerging duties of good faith owed to third parties in negotiations—duties to supply certain necessary information and not to negotiate without the expectation of any agreement.[26] A requirement of good faith negotiations may be judicially enforced directly in litigation negotiation and may also develop independently into a basis for tort liability analogous to the existing abuse of process action.

Lawyers' negotiations are but a subclass of negotiations generally. Thus, as a foundation for the regulation of lawyers' negotiations, Part I of this Article examines the general legal regulation of negotiators and negotiations. Part II considers how lawyers' special professional obligations modify this general scheme. Part III then articulates legal standards for lawyer-negotiators' dealings with their clients and with third parties, including the consequences that can follow from violations of these standards.

I. SOURCES OF LAW GENERALLY APPLICABLE TO THE CONDUCT OF NEGOTIATIONS

A. *Negotiators and Their Clients*

The rules of contract and agency law govern the rights and duties in the negotiator-client relationship. Contract law is relevant initially because it defines the relationship between negotiator and client.[27] However, whether the relationship is or is not formally expressed in a contract, by undertaking to act on the client's behalf with the client's consent, the negotiator becomes an agent for the client-principal.[28] This agency relationship generates rights and duties for both parties, including tort law duties of care and skill owed by the negotiator to the client.[29]

1. *Establishing the relationship*

Since a negotiator usually acts for a client by agreement, the rules of contract law initially determine the negotiator's goals and how they will be

24. *See generally* RESTATEMENT (SECOND) CONTRACTS §§ 159-73 and introductory note; RESTATEMENT (SECOND) OF TORTS chs. 22-23 (1976). *See also infra* notes 96-104, 282-93 and accompanying text.

25. *E.g.*, Slotkin v. Citizens Casualty Co., 614 F.2d 301, 314; *see also* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976) (lawyer may be sued for negligent misrepresentation by third party creditor who lent money to lawyer's partnership-client based on lawyer's opinion letter regarding partnership's entity status); *infra* notes 294-306 and accompanying text.

26. *See infra* notes 307-23 and accompanying text.

27. *See* RESTATEMENT (SECOND) OF AGENCY §§ 32, 33 and comment a (1958). *See also infra* notes 30-34 and accompanying text.

28. *See* RESTATEMENT (SECOND) AGENCY § 1; H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 12 (1979); W. SELL, AGENCY § 1 (1975).

29. Lawyer-negotiators' rights and duties are based on this same pattern. However, lawyers as professionals with special areas of competence have additional obligations to the profession and its institutions that require modifying these basic rules in producing a complete picture of negotiation regulation. *See infra* notes 105-98 and accompanying text.

achieved.[30] The contract by which one party agrees to negotiate on behalf of another with the other's consent—the type of arrangement characteristic of the lawyer's representation of a client in negotiations—constitutes an agency relationship.[31] The lawyer-agent contracts with the client-principal to serve as negotiator. Thus, contract law in the agency context is a source of negotiation regulation. Assuming a valid agency relation is created, both parties must initially perform their contractual obligations. An unexcused failure to perform is a breach of contract.[32]

Central to the agency relationship is the principal's right of control over the agent-negotiator.[33] Usually the outer limits of the agent's responsibilities or authority to act on the principal's behalf are set out in the agreement that established the relationship. Thus, contract rules are also used in interpreting the agent-negotiator's authority to act on behalf of the client. However, the agreement between negotiator and client usually has little detail, particularly regarding the methods the negotiator will use, and therefore must be interpreted according to the customs of the negotiator's profession.[34]

An agent-negotiator is also obligated to follow the client-principal's instructions, apart from any express contractual provisions, and must ordinarily follow instructions even when the principal originally agreed not to issue further instructions.[35] Thus, if *P* employs *A* at a fixed rate to negotiate the sale of certain equipment and makes no reference to how *A* should go about arranging the sale, *A* is under a duty to obey *P*'s later instructions concerning the manner of sale, even if the instructions make the sale more difficult.[36]

Express obligations ordinarily define only a part of the rights and duties between the negotiator and the client. Agency law complements both the responsibilities attached to express provisions and the authority implied from the contract itself. Under agency law, the negotiator has the power to act on the client's behalf as expressly or implicitly authorized and has additional authority inherent in the agency relation itself.[37] Thus, in addition to

30. RESTATEMENT (SECOND) AGENCY §§ 376-377 and ch. 13 introductory note; W. SELL, *supra* note 28, §§ 37, 124.

31. RESTATEMENT (SECOND) AGENCY §§ 1, 15-16; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 12; W. SELL, *supra* note 28, §§ 7-8.

32. RESTATEMENT (SECOND) AGENCY §§ 376, 377, 400 and ch. 13 introductory note.

33. R. STEFFEN, AGENCY-PARTNERSHIP IN A NUTSHELL § 17 (1977).

34. RESTATEMENT (SECOND) AGENCY §§ 32, 34 and comment b, § 385 comment a, and ch. 13 introductory note; W. SELL, *supra* note 28, § 39.

35. RESTATEMENT (SECOND) AGENCY, §§ 14, 385; W. SELL, *supra* note 28, § 129.

36. RESTATEMENT (SECOND) AGENCY § 385 illustration 1.

37. H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 14. The *Restatement* distinguishes between "authority" and "apparent authority" depending on whether the principal communicated assent to the agent, real authority, or to a third party, apparent authority. *Compare* RESTATEMENT (SECOND) AGENCY § 7 (authority) *with* § 8 (apparent authority). An even broader concept is "power". Power, the ability on the part of a person to produce a change in a given legal relation, includes all categories of agent authority. *Id.* § 6; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 13. From the point of view of the negotiator-agent, it is more useful to consider the agent's real authority, that is, authority existing as between principal and agent, rather than apparent or ostensible authority that the law imposes as a consequence of the principal's actions alone. Reuschlein and Gregory and Sell recognize express, implied (incidental), and inherent authority (including necessity) and contrast it with apparent authority. H. REUSCHLEIN & W. GREGORY, *supra* note 28 §§ 14, 15, 23; W. SELL, *supra* note 28, §§ 3-6.

express authority to negotiate the sale of property at a given price, an agent-negotiator has implied authority to give necessary warranties and to receive the purchase price, although neither was explicitly set out in the agency agreement.[38] Similarly, an agent-negotiator has inherent authority to act on behalf of the client-principal when an emergency requires prompt action to protect the client's interests.[39]

2. *Duties arising from the relationship*

While agency rules expand the negotiator's authority to act on a client's behalf, the law also imposes obligations on the negotiator in addition to those expressly undertaken. In general, the negotiator owes duties of loyalty, obedience, care and skill to the client.

a. Duty of loyalty

A negotiator-agent is under a duty to act solely for the benefit of the client-principal in all matters within the scope of the agency. Thus, the negotiator is a fiduciary who must respect conflict of interest rules.[40] The duty

38. McDonald v. Gough, 326 Mass. 93, 93 N.E.2d 260 (1950) (authority to "negotiate and settle" claims includes authority to obtain execution of written instruments to effectuate settlement); *see also* LeRoy v. Beard, 49 U.S. (8 How.) 451 (1850) (authority to convey lands includes power to give warranties); Peck v. Harriott, 6 Serg. & R. 146 (Pa. 1820) (authority to convey lands includes power to receive purchase price); RESTATEMENT (SECOND) AGENCY § 35 and illustration 3; H. REUSCHLEIN & W. GREGORY, *supra* note 28, §§ 14D, 15; W. SELL, *supra* note 28, § 6.

39. Sibley v. City Service Transit Co., 2 N.J. 458, 66 A.2d 864 (1949) (bus driver of disabled bus authorized to obtain replacement bus and driver on winter night after unsuccessful attempt to reach supervisor); RESTATEMENT (SECOND) AGENCY § 47; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 14E. A lawyer retained to represent a client in litigation may settle without express authority (as is usually required, *id.*, § 21) when settlement can only be accomplished immediately and the client cannot be reached. Sockolof v. Eden Point N. Condominium Ass'n, 421 So. 2d 716 (Fla. Dist. Ct. App. 1982).

40. Hobson v. Eaton, 399 F.2d 781 (6th Cir. 1968). RESTATEMENT (SECOND) AGENCY §§ 1(1), 14, 387-98; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 4; W. SELL, *supra* note 28, § 2. A negotiator employed to purchase certain property for a client may not instead purchase it for himself. RESTATEMENT (SECOND) AGENCY § 387 illustration 2. An agent employed by an insurer to represent the insured on a claim in excess of the policy limits has an obligation to keep the insured informed of all settlement proposals and may be obligated to accept offers within the policy limits. *E.g.*, Baker v. Northwestern Nat'l Casualty Co., 22 Wis. 2d 77, 125 N.W.2d 370 (1968); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). This subject is treated in depth in P. MAGARICK, EXCESS LIABILITY: DUTIES AND RESPONSIBILITIES OF THE INSURER (2d ed. 1982 & Supp. 1984). *See also* Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 INS. COUNSEL J. 244 (1978). In the typical liability insurance policy, the insurer agrees to defend the insured in any litigation seeking damages payable under the policy and to indemnify the insured up to the policy limits. When a claimant or plaintiff in a civil action against the insured offers to settle a claim at or near the policy limit, the insurer and its representative are faced with a conflict between the insurer's interest and the insured's. *See* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1137-48 (1954). The insurer's contractual liability for any judgment is limited by the policy, but the insured faces potential liability up to the amount of any judgment the claimant may obtain. Although the insurer may wish to gamble on a trial in which it knows just what it has to lose, the insured may wish to settle for the same reason.

The courts and some legislatures have allowed insureds to recover the excess liability on judgments over their policy limits from the insurer when the insurer in bad faith has refused a reasonable offer to settle. P. MAGARICK, *supra* §§ 10.02-.04. The insured's action is based on a covenant of good faith and fair dealing implied in the insurance contract. The covenant imposes a duty on the insurer to settle claims without litigation in appropriate cases, and to settle within policy limits when there is a risk of liability in excess of the policy limits and the most reasonable disposition of the claim is settlement within the policy limits. *E.g.*, Crisci v. Security Ins. Co., 66 Cal. 2d at 429, 246

of loyalty also prevents a negotiator from disclosing the client's secrets.[41] A negotiator is also required to convey to the client relevant information when it is reasonable to expect the client would want it, even if it will adversely affect the negotiator economically.[42] Thus, if a real estate broker employed to sell the client's property learns that a prospective buyer is acting for someone else with whom the client would be unwilling to deal, the broker must inform the client even though it means the sale will not go forward.[43]

b. Duty of obedience

A negotiator who agrees to act as agent for a client is ordinarily required to obey the client's reasonable instructions even regarding the manner of performance.[44] This is the central agency concept. However, agency law distinguishes between ordinary agents and independent contractor-agents.[45] This distinction is important because lawyers are generally regarded as independent contractors. For independent contractors, the requirement of ab-

---

P.2d at 176, 58 Cal. Rptr. at 16 (insurer unreasonably refused to settle at policy limit of $10,000; judgment for $100,000; Crisci recovered for difference and for mental suffering).

Today insurance bad faith claims are commonplace and can be based on wrongful refusals to pay claims (first party actions) as well as bad faith refusals to accept reasonable settlement offers (third party actions). *See* Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833 (1982). In either case, the doctrine is based on the idea of a conflict of interest. Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 110 Cal. Rptr. 511, 519 (1973); Lysick v. Walcom, 258 Cal. App. 2d 136, 148, 65 Cal. Rptr. 406, 414 (1968); Lieberman v. Employers Ins., 84 N.J. 325, 419 A.2d 417 (1980); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 491-92, 323 A.2d 495, 504-05 (1974). When the insurer retains a lawyer, allegedly to represent both it and its insured, the lawyer is likewise in a position of conflict of interest. *Lysick*, 258 Cal. App. 2d at 149-50, 65 Cal. Rptr. at 415-16; Keeton, *supra* at 1167-71. *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 522, 530-40. The insurer in a third party situation must keep its insured fully informed about settlement negotiations. This duty includes communicating settlement offers, investigation results, and adverse developments bearing on the litigation's outcome. *E.g.*, Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979), *aff'd*, 81 Ill. App. 2d 201, 407 N.E.2d 47 (1980). This also includes a duty to make reasonable investigation of the claim to uncover material information. *See* Keeton, *supra*, at 1140-41; *cf.* R. MALLEN & V. LEVIT, *supra* § 567. The insurer is under a special obligation to make every effort to arrange a reasonable settlement, especially if one is possible within the policy limits. *E.g.*, Smiley v. Manchester Ins. & Indem. Co., 71 Ill. 2d 306, 375 N.E.2d 118 (1978); Baker v. Northwestern Nat'l Casualty Co., 22 Wis. 2d 77, 82-83, 125 N.W.2d 370, 372-73 (1963). *See generally* P. MAGARICK, *supra* § 11.04.

41. RESTATEMENT (SECOND) AGENCY § 395, *cf. id.* § 396; W. SELL, *supra* note 28, §§ 136, 138.

42. RESTATEMENT (SECOND) AGENCY § 381.

43. *Id.* comment b and illustration 2.

44. Theis v. duPont, Glore Forgan Inc., 212 Kan. 301, 510 P.2d 1212, 1217 (1973); RESTATEMENT (SECOND) AGENCY § 385; W. SELL, *supra* note 28, § 129.

45. The RESTATEMENT (SECOND) OF AGENCY distinguishes between agents whose physical acts the principal has a right to control (servants) and agents whose physical acts the principal has no right to control (independent contractors). Principals are not liable in tort to third persons for the physical harm caused by their independent contractor-agents. Not all independent contractors are agents. They must consent to act on behalf of and subject to the control of the principal to be classed as an agent. Thus, an independent contractor who agrees to build a house for another, but not subject to the other's control or direction, is not an agent. RESTATEMENT (SECOND) AGENCY § 1 comment e, § 2. Negotiators ordinarily retain considerable freedom in performing their duties, and are thus classified as independent contractors. Agency law considers lawyers, brokers, factors, auctioneers, selling agencies, and collection agencies independent contractor-agents. *Id.* § 1 comment e; W. SELL, *supra* note 28, § 19; H. REUSCHLEIN & W. GREGORY, *supra* note 28, §§ 2, 7E; R. STEFFEN, *supra* note 33, §§ 8, 17.

solute obedience is circumscribed in several important ways. Unless the contract of employment specifies to the contrary, it is generally understood that the client will not interfere with an independent contractor-negotiator's customary freedom in conducting negotiations.[46] Thus, a real estate broker (or lawyer) "has a right to use customary business methods without interference by the [client]."[47] If the client gives an unreasonable order or one that requires the negotiator to perform illegal or unethical acts, the negotiator may disregard the instructions. If the client insists, a negotiator may withdraw from employment. The negotiator may even have an action against the client for breach of contract.[48]

These limitations on the duty of absolute obedience are crucial for the lawyer-negotiator who has legal and ethical professional obligations to third parties and legal institutions that may require him to ignore or disobey client directions during negotiations.[49] On the other hand, a negotiator is obligated to act within the limits of his authority, and if he makes an unauthorized contract binding on the principal, the negotiator will be liable for any losses.[50]

c. Duty of skill and care

In agreeing to negotiate for a client, the negotiator is subject to an implied duty to the client to act with the standard care, skill, and diligence expected under the circumstances. A lawyer who undertakes to settle a client's claim is liable to the client if he neglects the matter and fails to file the claim or suit before the statute of limitations expires.[51] This duty is imposed in addition to any warranties or promises the negotiator expressly undertakes. Thus, merely by undertaking a matter for a client, a negotiator has an implied duty to perform the task competently. An additional duty arises if any express representations are made. If the negotiator promises but fails to achieve a certain result, the negotiator has breached a contractual duty to the client regardless of the quality of the services.[52]

A corollary duty is the negotiator's duty of good conduct. An agent who acts in a manner that brings disrepute on the client and thereby injures the client's business prospects may be discharged or subjected to a tort action for the injury.[53]

---

46. Donroy, Ltd. v. United States, 301 F.2d 200, 205-06 (9th Cir. 1962). RESTATEMENT (SECOND) AGENCY § 385 comment a; W. SELL, *supra* note 28, § 19.

47. RESTATEMENT (SECOND) AGENCY § 385 comment a.

48. *Id.* comment b; W. SELL, *supra* note 28, § 129. *See, e.g.*, Ford v. Wisconsin Real Estate Examining Bd., 48 Wis. 2d 91, 179 N.W.2d 786 (1970).

49. *E.g.*, ABA MODEL RULES, *supra* note 6, Rule 3.3 (candor toward the tribunal); Rule 4.1 (truthfulness in statements to others); *see also* ABA MODEL CODE, *supra* note 6, DR 7-102(A)(3), (4), (5); DR 7-106(B)(1).

50. RESTATEMENT (SECOND) AGENCY § 383 comment e.

51. RESTATEMENT (SECOND) AGENCY ch. 13 introductory note and § 379 comments a – c; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 66.

52. RESTATEMENT (SECOND) AGENCY §§ 376-77, 379 comment a; W. SELL, *supra* note 28, § 125; *see e.g.*, Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 100-20. *See also infra* note 175 and accompanying text.

53. RESTATEMENT (SECOND) AGENCY § 380; W. SELL, *supra* note 28, § 126. According to the *Restatement (Second)*, other duties owed by any agent to the principal include duties to keep and render accounts both for property received and profits obtained, RESTATEMENT (SECOND) AGENCY

3. *Client remedies*

Because of the varied sources from which the negotiator's duties to the client arise, the client often has a choice of remedies for injuries that result from a breach of those duties.[54] Since the negotiator-client relation is usually based on some form of agreement, any wrongdoing may constitute a breach of contract. If successful in such an action, the client is entitled to damages for the harm suffered and reasonably anticipated lost profits. Thus, a negotiator who breaches an agreement to purchase goods from a third party for a client by failing to make the purchase is liable for the value of the contract that should have been concluded.[55]

When the negotiator breaches one of the duties owed to the client, whether contractual or implied, and causes damage, the client can also sue in tort. Tort-based claims may permit recovery of more remote damages; tort law alone provides the basis for recovery when the agency relation results not from contractual agreement, but from a gratuitous promise by the negotiator.[56]

In addition to these damage remedies, the client can seek restitution from a negotiator who has received money due the client or who benefited from the breach of duty to the client. This remedy is particularly appropriate for breaches of the duty of loyalty. When the negotiator uses confidential information supplied by the client for personal gain or obtains opportunities for himself that should be offered to the client, restitution must be made. Alternatively, courts will impose a constructive trust on the property.[57]

The client is also entitled to rescind a transaction entered into with a negotiator if the negotiator violates the duties owed to the client. A client may refuse to compensate the negotiator for services improperly performed,[58] and discharge the negotiator who has failed to perform substantially or has materially breached the employment agreement.[59]

B. *Negotiators and Third Parties*

Regulation of negotiator-third party conduct draws upon the same basic contract, agency, and tort law sources that provide the framework for regulating negotiator-client conduct. Most negotiation seeks some form of an agreement—whether resolving past problems or creating future arrange-

---

§§ 382, 388; not to attempt the impossible or impracticable (*id.* § 384); and not to act after termination of the agent's authority. *Id.* § 386. Each of these duties can regulate a negotiator-agent's conduct.

54. RESTATEMENT (SECOND) AGENCY § 399 and ch. 13 introductory note; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 70; W. SELL, *supra* note 28, § 139.

55. RESTATEMENT (SECOND) AGENCY §§ 399(a), 400 illustration 1; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 71; W. SELL, *supra* note 28, § 141.

56. RESTATEMENT (SECOND) AGENCY §§ 399(b), 401(a); H. REUSCHLEIN & W. GREGORY, *supra* note 28, §§ 72-73; W. SELL, *supra* note 28, §§ 142-43.

57. RESTATEMENT (SECOND) AGENCY §§ 399(d), 403-04A; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 74.

58. RESTATEMENT (SECOND) AGENCY § 399(k); H. REUSCHLEIN & W. GREGORY, *supra* note 28, §§ 75, 77.

59. RESTATEMENT (SECOND) AGENCY §§ 399(j), 409; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 78; W. SELL, *supra* note 28, § 140.

ments.[60] Therefore, the contract avoidance doctrines of duress, undue influence, misrepresentation, and unconscionability all operate to regulate negotiator conduct. Unless negotiators of contracts act within the limits imposed by these doctrines, they will not succeed in producing a binding agreement.[61] Certain forms of duress, threats, and some misrepresentions may actually expose the negotiator to criminal liability.[62] In many more instances, such conduct may be the basis for an action in tort brought by third parties against the negotiator (and the client) even if the agreement is not challenged.[63]

Agency law also recognizes that negotiator-agents are not relieved of liability to third parties for their torts simply because they are acting on behalf of a client.[64] However, a negotiator may be entitled to exercise the privileges of the client and to reasonably rely upon information from the client that will relieve him of liability to third parties. In particular, a negotiator reasonably relying on the client's information is not liable for misrepresentation simply because the client knew the information was false. Thus, if a negotiator employed to arrange the sale of an article is falsely told that the article is an antique, and the negotiator, reasonably believing the client, represents that it is an antique to a buyer, the negotiator is not liable for fraud or deceit.[65]

1. *Coercive bargaining conduct*

Duress and undue influence are instances of improper pressure by negotiators in the bargaining process. At one extreme, duress by actual physical compulsion produces no real agreement at all: a physically compelled act is not assent.[66] Most instances of duress are less extreme and involve improper threats by a negotiator that leave the third party with no choice but to agree to the negotiator's terms. These threats also span a considerable spectrum. Violence or threats of violence are clearly wrongful and prohibited. This is

60. *See generally* Eisenberg, *supra* note 3, at 637-38.

61. *See generally* RESTATEMENT (SECOND) CONTRACTS ch. 7 introductory note (misrepresentation, duress and undue influence); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9-1 (2d ed. 1977); E. FARNSWORTH, CONTRACTS ch. 4 (1982) (Professor Farnsworth refers to this as "policing the agreement," § 4.1, and the doctrines discussed in the text as policing abuse of the bargaining process, § 4.9, at 232).

62. *E.g.*, United States v. Persky, 520 F.2d 283 (2d Cir. 1975) (lawyer convicted of criminal securities law violations); Rubenstein v. Rubenstein, 20 N.J. 359, 120 A.2d 11 (1956) (threats of gangster violence and arsenic poisoning were adequate showing of duress).

63. Duress and undue influence are not in themselves actionable torts; fraudulent misrepresentations give rise to a tort action for damages. E. FARNSWORTH, *supra* note 61, § 4.9. *Compare* RESTATEMENT (SECOND) CONTRACTS ch. 7 introductory note topic 1 – misrepresentation *with* ch. 7 introductory note topic 2 – duress and undue influence.

64. RESTATEMENT (SECOND) AGENCY §§ 343-344; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 124; W. SELL, *supra* note 28, § 195.

65. Brooks v. Smith, 215 Ark. 421, 220 S.W.2d 801 (1949) (agent entitled to rely on principal's representations unless agent knows facts that should put him on notice of their untrustworthiness); Seckel v. Allen, 67 Cal. App. 2d 146, 153 P.2d 394 (1944) (knowledge of principal not imputed to agent; agent liable only if he knew or should have known of misrepresentation). RESTATEMENT (SECOND) AGENCY § 348 comment b; H. REUSCHLEIN & W. GREGORY, *supra* note 28, § 125; W. SELL, *supra* note 28, § 196.

66. RESTATEMENT (SECOND) CONTRACTS ch. 7 introductory note topic 2, § 174; E. FARNSWORTH, *supra* note 61, § 4.16.

also true of wrongful seizures or retention of goods. In general, if the threatened act is a crime or tort, it is improper and amounts to duress unless the threat is so minimal that the victim had a reasonable alternative.[67]

Threats of criminal prosecution are also improper as a means of obtaining agreement, even when grounds for such prosecution exist.[68] A modern development in this area is the recognition that threats to use civil process—previously insufficient to show duress—may constitute improper bargaining conduct when made in bad faith. Bad faith may be either the maker's knowledge that there is no basis for invoking the threatened process; knowledge that the proposed action is a misuse of the process; or a grossly exorbitant demand.[69] However, when the other party can reasonably defend against the threatened civil action, the threat does not constitute improper duress. This distinction can be illustrated by an example. Assume a negotiator has a valid damage claim against *T*. To obtain a favorable sales agreement from *T*, the negotiator threatens to attach *T*'s perishable goods knowing other nonperishable goods are available for attachment. The threat to use civil process is improper because the negotiator is using it to force *T* into an agreement, not to preserve assets to apply to an eventual judgment. Because *T*'s goods are perishable, defense of the attachment is not a reasonable alternative for *T*.[70] Thus, the negotiator's conduct constitutes duress, and *T* may avoid the agreement.

On the other hand, threats by a party to breach an existing contractual duty are not, in themselves, improper. American contract law has always treated breach of contract, with payment of damages to the non-breaching party, as a legitimate alternative to performance.[71] However, when the threat to breach also amounts to a breach of the implied contractual duty of good faith and fair dealing, it is improper.[72] A typical example is the threat to breach made for some purpose unrelated to that contract, for example, to force the recipient to enter into some other separate agreement. Thus, it is an improper threat for *N*, who has agreed to excavate a cellar for *T*, to refuse to complete the excavation (when *T* has no reasonable alternative) to induce *T* to enter into a favorable contract with *N* or *N*'s client to excavate another cellar.[73]

---

67. RESTATEMENT (SECOND) CONTRACTS §§ 175, 176(a); J. CALAMARI & J. PERILLO, *supra* note 61, §§ 9-3, 9-5.

68. RESTATEMENT (SECOND) CONTRACTS § 176(b) and comment c; E. FARNSWORTH, *supra* note 61, § 4.17. *E.g.*, United States Fidelity & Guar. Co. v. Cook, 43 Wyo. 356, 5 P.2d 294 (1931) (bank teller's repayment of surety company as result of threatened embezzlement prosecution was under duress).

69. RESTATEMENT (SECOND) CONTRACTS § 176(1)(c) and comment d, § 175 comment b; E. FARNSWORTH, *supra* note 61, § 4.17. *See generally* Dawson, *supra* note 22.

70. RESTATEMENT (SECOND) CONTRACTS § 176 illustration 7. *E.g.*, Spaids v. Barrett, 57 Ill. 289 (1870) (attachment of perishable oysters used to extort money).

71. Justice Holmes made this point as early as 1897: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

72. RESTATEMENT (SECOND) CONTRACTS § 176 comment e.

73. RESTATEMENT (SECOND) CONTRACTS § 176 comment e; J. CALAMARI & J. PERILLO, *supra* note 61, § 9-6; E. FARNSWORTH, *supra* note 61, § 4.17; *e.g.*, Austin Instrument Co. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533 (1971). According to the *Restatement (Second)* § 205, "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT (SECOND) CONTRACTS, *supra*. The Uniform Commercial

Finally, there are forms of economic pressure that are not improper threats initially but that become so when the resulting agreement is unfair to the burdened party. Thus, duress shades imperceptibly into the unconscionability doctrine, which limits judicial enforcement of especially one-sided contract terms.[74] The *Restatement (Second) of Contracts* identifies two situations when economic pressure and a resulting unfair bargain may make the agreement suspect. First, there is the situation when the negotiator's threat, if carried out, would harm the victim without significantly benefiting its maker. An example is a threat to reveal embarrassing information about a party unless the party assents to a certain agreement. The lack of benefit to the maker suggests a malicious and vindictive motive. A second situation occurs when one party has achieved a special advantage over the other through unfair dealing early in the bargaining stage and thus has the other at his mercy. An example is a seller who previously supplied goods to the buyer at reasonable prices and misleads the buyer into thinking the seller will again supply the goods. When the buyer no longer has alternative sources for the goods, the seller then demands a exorbitant price for the goods. The seller's conduct amounts to economic duress.[75]

Coercive bargaining behavior that does not itself amount to duress can combine with other factors to produce avoidable or unenforceable bargains, and thus indirectly regulate negotiator conduct. One example is the unconscionability doctrine, both in its own right and combined with economic pressure.[76] More familiar in contract law is the doctrine of undue influence, a milder form of pressure than duress. Undue influence is persuasion that becomes unfair when exerted over a party under the domination of the pres-

---

Code requires a similar duty of good faith. U.C.C. § 1-103 (1977). An implied covenant of good faith and fair dealing in contracts may be imposed as a matter of state common law. Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984).

74. *See* U.C.C. § 2-302 (1977). There is voluminous literature on the unconscionability doctrine in contract law. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 4-1, & n.2 (2d ed. 1980). Under this doctrine, courts can refuse to enforce an entire contract tainted by unconscionability and refuse to enforce or limit an unconscionable clause in a contract. *See generally* E. FARNSWORTH, *supra* note 61, § 4.28. Like its relative, duress, unconscionability is not itself ground for a third party tort damage action against a negotiator. Professors White and Summers, borrowing from Professor Leff, Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967), distinguish between procedural unconscionability (bad bargaining practices) and substantive unconscionability (overly harsh terms in the agreement). J. WHITE & R. SUMMERS, *supra* § 4-3. Both elements combine to make otherwise permissible threats improper under RESTATEMENT (SECOND) CONTRACTS § 176(2). Professor Leff, in turn, traces the idea of procedural unconscionability back to the equity courts. Certain kinds of bargaining, although not involving fraud, duress, misrepresentation, or mistake, supported equity's refusal specifically to enforce the resulting agreement, although the bargaining practices did not render it void. Most of these cases involved particularly vulnerable parties on one side: the young, old, illiterate, ill, and the like. Leff, *supra*, at 528-37. Nevertheless, as the literature suggests, it has proved difficult for the courts to establish clear standards distinguishing acceptable hard bargaining between roughly equal adversaries from unacceptable exploitation of a third party's adversity.

75. RESTATEMENT (SECOND) CONTRACTS § 176(2) and comment f; E. FARNSWORTH, *supra* note 61, § 4.17. *E.g.*, Perkins Oil Co. v. Fitzgerald, 197 Ark. 14, 121 S.W.2d 877 (1938) (in order to get injured employee to sign release, employer threatened to fire employee's stepfather and prevent his employment elsewhere); Hochman v. Zigler's Inc., 139 N.J. Eq. 139, 50 A.2d 97 (1946) (landlord refused to lease to purchaser of tenant's business unless tenant agreed to give up half of purchase price).

76. *See supra* notes 73-75 and accompanying text.

suring party.[77]

Although duress and undue influence include tortious and even criminal behavior, they are not generally actionable torts in themselves. That is, they do not form the basis for affirmative damage actions by third parties against negotiators. Instead, they give third parties the option of avoiding an agreement produced by duress or undue influence.[78]

2. *Misrepresentation in negotiations*

The second major doctrinal regulator of negotiator conduct in the bargaining process—the law of misrepresentation—may be used by third parties to obtain money damages or to avoid the agreement. Both tort and contract law provide remedies for misrepresentations made during negotiations. Contract rules allow the victim of the misrepresentation to avoid the agreement and to restore the parties to their previous positions. These rules are less stringent than the tort law requirements, which alter the status quo by requiring the party who made the misrepresentation to compensate the victim with money damages.[79] This discussion begins by focusing on contractual theories available to an injured third party.

To avoid a contract because of negotiator misrepresentation, the injured party must demonstrate: (1) a misrepresentation—an assertion not in accord with the facts; (2) the misrepresentation must be fraudulent or material; (3) the misrepresentation must have induced the recipient to make the contract; and (4) the recipient's reliance on the misrepresentation must have been justified.[80] The typical misrepresentation is a statement of fact in spoken or written words, but an assertion can also be inferred from conduct.[81] A misrepresentation may also follow from concealment, an affirmative act intended or known to be likely to prevent a third party from learning a fact. For example, a negotiator who reads a written offer to an offeree omitting a part of the offer misrepresents the actual written offer by omission. Similarly, a negotiator may act to prevent the other party from undertaking an investigation that would reveal adverse information, for example, cracks in the foundation of a building offered for sale.[82]

---

77. *See* RESTATEMENT (SECOND) CONTRACTS § 177; J. CALAMARI & J. PERILLO, *supra* note 61, §§ 9-9 to 9-12; E. FARNSWORTH, *supra* note 61, § 4.20. Although most cases involve a confidential relationship between the parties, unfair persuasion and thus undue influence can also be the product of particular circumstances. *E.g.*, Odorizzi v. Bloomfield School Dist., 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1966) (teacher charged with homosexual activity persuaded to resign by school superintendent and principal who visited the teacher after he had gone 40 hours without sleep following his arrest). Undue influence is of particular interest for lawyer negotiator-professionals because they frequently enjoy confidential relationships with clients that are susceptible to dominance by the professional. For this reason lawyer-client dealings are subject to a heightened level of scrutiny. *See* R. MALLEN & V. LEVIT, *supra* note 17, §§ 129-33.

78. *See* RESTATEMENT (SECOND) CONTRACTS §§ 175, 177 and ch. 7, introductory note topic 2; J. CALAMARI & J. PERILLO, *supra* note 61, §§ 9-8, 9-12; E. FARNSWORTH, *supra*, note 61, § 4.19.

79. *See* RESTATEMENT (SECOND) CONTRACTS ch. 7, introductory note topic 1; J. CALAMARI & J. PERILLO, *supra* note 61, §§ 9-13, 9-23. *See generally* RESTATEMENT (SECOND) TORTS chs. 22, 23.

80. RESTATEMENT (SECOND) CONTRACTS § 159 and ch. 7, introductory note topic 1 (misrepresentation); *see also* James & Gray, *Misrepresentation (Parts I, II)*, 37 MD. L. REV. 286, 488 (1977, 1978) (tort law analysis).

81. RESTATEMENT (SECOND) CONTRACTS §§ 159-61; E. FARNSWORTH, *supra* note 61, § 4.11.

82. RESTATEMENT (SECOND) CONTRACTS § 160 and comment b. *See, e.g.*, Jenkins v. McCor-

These situations are different from and easier to handle than deciding when a negotiator must affirmatively make disclosures to an adverse party. Although complete candor has never been required of negotiators, some facts must be disclosed or the agreement may be avoided and the negotiator exposed to liability. Courts have gradually defined the situations in which failure to disclose a fact is treated as an assertion that the fact does not exist. A relation of trust and confidence between nominally adverse parties entitles a third party to disclosure of the fact.[83] Although this rule governs, virtually by definition, the relation between client and negotiator as principal and agent, the rule is less frequently invoked between negotiators and third parties to the negotiation. For them the negotiator is usually treated as someone to be dealt with at arm's length. However, there are exceptions. If only one party in bargaining is represented by a negotiator, the other party may rely on the negotiator's special experience and expertise. This is a special problem for the lawyer-negotiator who often has special expertise in contracting and contract law that may cause third parties to rely on that expertise for protection.[84]

Nondisclosure is also actionable when the negotiator previously made an assertion, even a perfectly honest and reasonable one, that is no longer true. The negotiator has an obligation, upon learning the new information, to correct the misapprehension for which she is responsible.[85]

In the first two cases, the negotiator is responsible in some manner for the other party, either because of a special relationship or because earlier representations have altered the basis of bargaining between them. There are also situations in which no special relation or duty exists, but in which courts impose on a negotiator an obligation to correct a mistaken assumption of the other party. The assumption must be critical to the transaction, and the non-disclosure must "amount . . . to a failure to act in good faith and in accordance with reasonable standards of fair dealing."[86] Ordinarily,

---

mick, 184 Kan. 842, 339 P.2d 8 (1959); Lindberg Cadillac Co. v. Aron, 371 S.W.2d 651. (Mo. Ct. App. 1963) (tort). *Cf.* RESTATEMENT (SECOND) TORTS § 550.

83. RESTATEMENT (SECOND) CONTRACTS § 161(d) and comment f; *see also supra* note 77 and accompanying text (undue influence). The leading authority for the proposition that in bargaining there is no general obligation to disclose information to other parties is Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817). Organ learned of the treaty ending the War of 1812 in advance and purchased tobacco expecting its price to rise when the British blockade was lifted. Laidlaw sought to avoid the sale, claiming fraud. In dictum Chief Justice Marshall stated Organ "was not bound to communicate" his information to the seller. *Id.* at 195. Section 161 of the RESTATEMENT (SECOND) OF CONTRACTS *supra*, along with its counterpart, RESTATEMENT (SECOND) TORTS § 551, contain the exceptions to this general rule. *See generally* J. CALAMARI & J. PERILLO, *supra* note 61, § 9-20; E. FARNSWORTH, *supra* note 61, § 4.11; Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1 (1936).

84. See James & Gray, *supra* note 80, at 524-25.

85. RESTATEMENT (SECOND) CONTRACTS § 161(a) and comment c; E. FARNSWORTH, *supra* note 61, § 4.11, at 239-40. *E.g.*, Monrykwas v. McKnight, 37 Mich. App. 304, 194 N.W.2d 522 (1971) (sale of trailer park); *see also* RESTATEMENT (SECOND) TORTS § 551(c). The need to correct such misapprehension is similar to the rule that prohibits taking advantage of one whom you have made vulnerable to threats. This conduct is treated as duress. *See supra* note 75 and accompanying text.

86. RESTATEMENT (SECOND) CONTRACTS § 161(b); *see also id.* § 616(c) (disclosure required to correct other party's mistake regarding contents of writing embodying the agreement); *id.* § 159 comment b (a half truth may be as misleading as a wholly false assertion); *cf.* RESTATEMENT (SECOND) TORTS § 551(2)(e) (duty to disclose "facts basic to the transaction" when the other party,

a negotiator is entitled to the advantages of acting with superior skill, care, and preparation, and may take advantage of an adversary's indolence, inexperience, ignorance, or bad judgment. But if a negotiator obtains a competitive advantage through unethical or dishonest practices, or has special knowledge or means of knowledge not generally available to one in the other party's position, a court may require an equalizing disclosure.[87] Thus, a prospective buyer who learns through publicly available government surveys that a seller's land is more valuable than the seller thinks need not disclose the information to the seller. But if the buyer or buyer's representative learns of valuable mineral deposits on the seller's land by secretly trespassing on it, the knowledge must be disclosed.[88] This disclosure standard presents dangers for negotiators because it is highly fact-specific and incorporates potentially far reaching ethical rules. The standard limits the extent to which advantages of skill and preparation can be pressed—for example, it may limit zealous advocacy by lawyer-negotiators.[89]

A negotiator's assertions of opinion and intent also present special problems. Ordinarily, roughly equal negotiating parties are expected to form their own opinions on the subject of the negotiation. Neither party may justifiably rely on the other's assertion of opinion.[90] Expressions of general opinion, especially concerning value and quality, are not worthy of reliance. This is particularly true for a seller's favorable opinion concerning the subject of the sale—"this is a great piece of real estate." This kind of general praise is known as "puffing" or "seller's talk."[91]

However, opinions are factual assertions because they are assertions that the person does have a certain state of mind on the matter. They can be compared to statements of knowledge; to the extent that the opinion implies knowledge of facts, reliance on it becomes more justified.[92] A negotiator's statements of opinion on matters incapable of factual verification or on which one should expect different points of view, cannot ordinarily create

---

"because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts"). *See generally* E. FARNSWORTH, *supra* note 61, § 4.11, at 240-41; James & Gray, *supra* note 80, at 526-27.

87. RESTATEMENT (SECOND) CONTRACTS § 161 comment d; RESTATEMENT (SECOND) TORTS § 551 comments k-l.

88. *Compare* Neill v. Shamburg, 158 Pa. 263, 27 A. 992 (1893) (oil deposits) *with* Phillips v. Homfary, L.R. 6 Ch. App. 770 (1871) (trespass; coal deposits).

89. Similar limitations can be found in legal ethical rules. Lawyers realize that an unrepresented adversary must be treated with exemplary fairness. *See* ABA MODEL RULES, *supra* note 6, Rule 4.3 Similarly, when through diligent and skillful application a lawyer-negotiator has gained a special advantage in information over a less skillful adversary, the better informed lawyer may indeed be under a duty to share some of the information he alone possesses, or at least use it judiciously.

90. *See generally* RESTATEMENT (SECOND) CONTRACTS §§ 168-169, 171; RESTATEMENT (SECOND) TORTS §§ 538A-539, 542-544; J. CALAMARI & J. PERILLO, *supra* note 61, §§ 9-17, 9-19; E. FARNSWORTH, *supra* note 61, § 4.14; Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643 (1937); James & Gray, *supra* note 80, at 488-93, 502-06, 508-11.

91. RESTATEMENT (SECOND) CONTRACTS § 169 comment b; RESTATEMENT (SECOND) TORTS § 542 comment e; *cf.* U.C.C. § 2-313(2) (1977) (general statements of value or opinion do not create a warranty in sale of goods); I. PRESTON, THE GREAT AMERICAN BLOW-UP (1975) (a discussion of exaggeration in advertising generally).

92. RESTATEMENT (SECOND) CONTRACTS § 168 comment a; *e.g.*, Markov v. ABC Transfer & Storage Co., 76 Wash. 2d 388, 457 P.2d 535 (1969) (reliance on lessor promise that it would renew lease was reasonable).

justified reliance. On the other hand, a negotiator can give an opinion in circumstances in which a reasonable person would infer that he knows of facts justifying the opinion, or at least that there are no incompatible facts. If so, the statement can be reasonably understood as carrying with it an assertion of such facts and reliance on it may be justified.[93] Thus, if *N*, seeking to induce *T* to become a partner in her client's business, tells *T* the business is a "money-maker," when *N* knows it has always been unprofitable, *T*'s inference that *N* knows of no facts incompatible with the statement is reasonable, and *T* may avoid the resulting partnership agreement.[94]

Even when a negotiator merely states his opinion, a third party's reliance on the opinion may be reasonable. The opinion may be treated as a misrepresentation in the following circumstances: when there is a relationship of trust and confidence between the parties justifying the reliance; when the recipient reasonably believes the other party has special skill, judgment, or objectivity regarding the subject of the opinion; and, when the recipient is particularly vulnerable to the type of misrepresentation made.[95] Just as in the case of undue influence, professional negotiators such as lawyers are particularly at risk in this area. In stating opinions on matters within their special expertise or when a confidential or dependent relationship exists with a third party, negotiator-professionals may undermine the agreements they seek to obtain and even expose themselves to tort damage actions by misled third parties.

3. *Third party remedies*

Contractual remedies are available if a negotiator makes a fraudulent or material misrepresentation, which is justifiably relied upon and induces the recipient to make a contract.[96] If a misrepresentation of the character or essential terms of the contract is so complete that the misled party is unaware of the very nature of the contract, there is no agreement at all.[97] In most cases, justifiable reliance on a fraudulent or material misrepresentation that induces the recipient to make the contract allows the recipient to avoid the agreement.[98] Fraudulent misrepresentation regarding the contents or effect of a written agreement will permit reformation of the agreement.[99]

Misrepresentations are also the basis for an affirmative damages action in tort against the maker. However, to recover, the injured party must prove

---

93. *Compare* RESTATEMENT (SECOND) CONTRACTS § 168 comment b *with* § 168 comment d. See E. FARNSWORTH, *supra* note 61, § 4.14, at 249 and authorities cited therein. *See also* RESTATEMENT (SECOND) TORTS §§ 538A-539 and accompanying comments. *Cf. id.*, § 544 (statement of intention); RESTATEMENT (SECOND) CONTRACTS § 171(2) (same).

94. RESTATEMENT (SECOND) CONTRACTS § 168 illustration 5.

95. *Id.*, § 169; J. CALAMARI & J. PERILLO, *supra* note 61, § 9-17. *See also* RESTATEMENT (SECOND) TORTS §§ 542-543.

96. *See* RESTATEMENT (SECOND) CONTRACTS §§ 159-161 (misrepresentations); *id.* § 162 (fraudulent or material misrepresentations); *id.* § 167 (inducement to make contract). *See generally* E. FARNSWORTH, *supra* note 61, § 4.15.

97. RESTATEMENT (SECOND) CONTRACTS § 163; *see also* J. CALAMARI & J. PERILLO, *supra* note 61, § 9-22.

98. RESTATEMENT (SECOND) CONTRACTS § 164; *see also* J. CALAMARI & J. PERILLO, *supra* note 61, § 9-23; James & Gray, *supra* note 80, at 534-38.

99. RESTATEMENT (SECOND) CONTRACTS § 166.

all the elements required for contractual relief, and the misrepresentation must be both fraudulent and material.[100] The contract remedies of rescission and reformation most directly affect the parties to the agreement, even if negotiator misrepresentations provide the ground for the remedy. However, a tort action for damages can be brought directly against the negotiator for improper bargaining conduct.[101] If a negotiator makes an actionable misrepresentation, the negotiator is not relieved from liability simply because he acts in a representative capacity. However, a negotiator who makes a misrepresentation based on information given by the client is not liable to a third party unless the negotiator knew, or should have known, the true facts.[102] In turn, the client is subject to liability for virtually any of the negotiator's misrepresentations concerning the subject matter of the negotiations, whether authorized or not.[103] Thus, if the client's negotiator sells land to a third party while falsely representing that a nearby river does not overflow onto it, the client is liable if the third party purchases the land in reliance on the negotiator's statement. The lack of authority from the client to make the statement is inconsequential.[104]

The rules of contract, agency, and tort law thus govern all negotiations and regulate negotiation practice. All negotiators owe duties of loyalty and competence to their clients. If they engage in coercive or misleading bargaining practices while representing their clients, third parties may undo the agreements reached or seek damages from them.

II. SPECIAL CONSIDERATIONS FOR LAWYER-NEGOTIATORS

The preceding discussion treats lawyers simply as one example of a negotiator-representative. For many lawyers' negotiations, these rules fully describe the regulatory context. The negotiator's status as a lawyer may mean little in how the bargaining is conducted. Often, however, professional status will add a new dimension to the negotiation context. The parameters within which the negotiator can operate may be circumscribed because the negotiator is a lawyer. For example, in a negotiated settlement of civil or criminal litigation, the legal context is critical, and the lawyer's professional obligations to the court and opposing counsel cannot be ignored.[105] Legal

100. RESTATEMENT (SECOND) TORTS §§ 525-551 (especially § 526, fraudulent misrepresentations; § 538, materiality; § 549, measure of damages). *See generally* James & Gray, *supra* note 80, at 528-34.

101. RESTATEMENT (SECOND) TORTS § 549(1).

102. RESTATEMENT (SECOND) AGENCY § 348. However, a negotiator-agent, acting on the client-principal's behalf, is privileged to make bargaining misrepresentations that the client could make without incurring liability, including misrepresentations of opinion. *Id.* § 348 comment d.

103. *Id.* §§ 257-58.

104. *Id.* § 258, illus. 1.

105. *See generally* G. WILLIAMS, *supra* note 1, at 99-104. The courts affect lawyers' negotiations on several levels. First, at least some phases of negotiated settlement of litigation are directly regulated. Many court systems have mandatory settlement conferences for civil cases (*see, e.g.*, SAN FRANCISCO SUP. CT. RULE 2.6), sometimes with elaborate requirements for submission of settlement memoranda and the presence of counsel and the parties. Other such rules may govern the conduct of criminal plea negotiations. *See, e.g., id.* Rule 10.7. In such cases judicial authorities directly participate in settling litigation.

Second, even when judges are not involved in negotiating settlements, statutes and court rules may influence the process and impose procedural requirements on any agreement reached privately

ethics must be considered whenever the lawyer-negotiator bargains with other lawyers on an ongoing basis.[106] A lawyer's duty of loyalty and the conflict of interest rules also deeply affect the lawyer's obligations as agent.[107] Thus, rules of legal ethics must serve as a complementary source of guidelines for the law of negotiations.

Apart from any professional limitations, lawyers' negotiations are inevitably guided by the threat of a legal malpractice action. By falling below a certain standard in negotiations, a lawyer can be liable to the client for malpractice. Although the preceding discussion elaborated a general duty of negotiator care owed to any principal, legal malpractice doctrine elaborates a specific standard for the legal profession.[108] The following section describes the special rules governing lawyer conduct. The ethical rules defining the appropriate role for a lawyer and the malpractice doctrine providing special remedies to an aggrieved client are a necessary ingredient to the foundation for a law of lawyers' negotiations.

A. *The Role of Professional Ethics*

As professionals, lawyer-negotiators are subject to ethical standards issued by the organized bar and incorporated in some fashion into the laws of the various states.[109] Unlike the general law of negotiation discussed in Part I of this Article, the rules of legal ethics do not, in themselves, impose standards on lawyer-negotiators that must be respected at the risk of legal liabil-

---

by the negotiating lawyers. *See, e.g.*, FED. R. CIV. P. 68; CAL. CIV. PRO. CODE § 998 (West 1980) (offers of compromise and judgment, shifting costs if party refusing such an offer does not do better at trial). Settlements may require judicial approval or be in a specific form. *See, e.g.*, FED. R. CRIM. P. 11 (regulating guilty pleas); FED. R. CIV. P. 23(e) (court approval required for compromise and settlement of class actions); CAL. PROB. CODE §§ 2504, 3400, 3600-3612 (West 1981 & Supp. 1985); CAL. CIV. PRO. CODE § 372 (West Supp. 1984) (court approval required for settlement of minor's or incompetent's claim). *See generally* Renfrew, *Negotiations and Judicial Scrutiny in Civil and Criminal Antitrust Cases*, 57 CHI. B. REC. 130 (1975).

Third, the institution of the courts as a backdrop, and last resort, affects how lawyers negotiate and how they interpret their own clients' goals. *See* Menkel-Meadow, *Problem Solving*, *supra* note 4, at 764-94 (arguing the presence of courts and possibility of judicially imposed solutions drastically narrows most lawyers' approach to negotiations), Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (pioneering work on the influence of law and the courts on private ordering through negotiation); Schwartz, *supra* note 4, at 675-76 (distinguishing between "compelled negotiations" in which litigation is the alternative to agreement and "voluntary negotiations," and further dividing compelled negotiations into those that do and do not require judicial approval of any agreement).

The emphasis in this Article is on rules governing lawyers' conduct as negotiators in addition to the process rules (the first and second levels sketched above). It makes no attempt to develop a general theory of the effect of law and courts on negotiating behavior similar to that found in Mnookin and Kornhauser's and Menkel-Meadow's work.

106. *See* Lowenthal, *supra* note 4, at 105-08. *Cf.* H. EDWARDS & J. WHITE, *supra* note 10, at 14-20. The lawyer's special professional responsibilities as an advocate have always commanded the attention of its ethical rulemakers. *See, e.g.*, Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159 (1958) [hereinafter cited as *Joint Conference Report*]. The new Model Rules contain a section specifically devoted to the lawyer's role as advocate. See ABA MODEL RULES, *supra* note 6, Rules 3.1-3.9 and Preamble: A Lawyer's Responsibilities.

107. *See generally Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981) [hereinafter cited as *Developments*]; *see also infra* notes 132-38 and accompanying text.

108. *See generally* R. MALLEN & V. LEVIT, *supra* note 17. *See also infra* notes 169-98 and accompanying text.

109. *See* Wolfram, *supra* note 6, at 632 & n.52.

ity to clients or third parties. Rather, the ethical norms define the outer boundaries of appropriate professional negotiation behavior in dealing with clients, the courts, and other lawyers representing third parties. In addition to setting a professional ideal, the ethical rules also directly affect legal standards and thus regulate lawyers' negotiations in a number of ways.

Professional ethical rules elaborate on some of the general standards found among the basic contract, tort, and agency rules. The ethical rules strongly influenced courts in developing conflict of interest rules and in defining the duties of skill, care, and diligence required of lawyer-negotiators. The ethical rules also allocate decisionmaking authority between lawyer and client different from agency law. Finally, they impose on lawyers duties of fairness to legal institutions and third parties that limit and may even conflict with the lawyer-negotiator's initial duty of loyalty to the client.[110]

1. *Ethical rules concerning negotiation*

Historically, legal ethics has been little concerned with lawyers as negotiators. Although ethics rules can be found in state statutes regulating lawyer conduct[111] and in rules governing a lawyer's right to appear before the court or agency,[112] the primary source of ethical rules is the American Bar Association's Model Code of Professional Responsibility.[113] The Model Code itself is currently being replaced by the proposed Model Rules of Professional Conduct, which move closer to a regulatory model of legal ethics through one set of specific standards with interpretative comments.[114]

Even the development of this new "law of lawyering"[115] will have a limited effect on lawyers' conduct in negotiations. There are two reasons for this. First, regulation of lawyers' conduct by rules of legal ethics always has been based on the model of the litigating lawyer. The early codes focused exclusively on litigators.[116] The Model Code recognizes other roles, but has limited application to negotiations.[117] Although the Model Rules Discus-

110. An important issue is whether these fairness obligations go beyond the contract and tort standards that limit sharp bargaining practice. *See infra* notes 162-68 and accompanying text.

111. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6126-6131 (West 1974).

112. *See, e.g., Developments, supra* note 107, at 1249 n.18 (listing federal court adoptions). Probably the most well-known agency attempt to regulate the conduct of lawyers practicing before it is the Securities and Exchange Commission's use of Rule 2(e) of the Code of Federal Regulations. 17 C.F.R. § 201.2(e) (1980). *See generally* Kelleher, *Scourging the Moneylenders From the Temple: The SEC, Rule 2(e), and the Lawyers*, 17 SAN DIEGO L. REV. 801 (1980).

113. *See supra* note 6. The Model Code, in effect today in most states, was developed in 1969 to better regulate lawyers' conduct beyond the purely aspirational urgings of the earlier Canons of Professional Ethics. *See* ABA MODEL CODE, *supra* note 6, Preliminary Statement at 1; Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U.L. REV. 1, 3-4 (1982); Kutak, *supra* note 6, at 415-17; Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1055-57 (1984); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281, 283-84 (1979).

114. *See* Kutak, *supra* note 6, at 416-18.

115. *Id.* at 413, 417.

116. *Id.* at 415.

117. *See, e.g.*, ABA MODEL CODE, *supra* note 6, EC 7-3 to 7-8; Haynsworth, *Competent Counseling of Small Business Clients*, 13 U.C. DAVIS L. REV. 401, 403 n.5 (1980). *See generally* Schwartz, *supra* note 4, at 672 (urging that different set of professional-ethical principles should guide conduct of advocates and nonadvocates). Even those general discussions of professional re-

sion Draft contained a section devoted to the negotiating lawyer,[118] the adopted version of the Rules deleted it as a separate section and eliminated or modified its provisions.[119] In other words, the current ethical rules con-

---

sponsibility that recognize lawyers' nonlitigation roles treat them with less detail as secondary to the role of the advocate in litigation. *See, e.g., Joint Conference Report, supra* note 109.

118. ABA MODEL RULES (Discussion Draft), *supra* note 10, Rules 4.1-4.3 & Preamble: A Lawyer's Responsibilities at 1.

119. ABA MODEL RULES, *supra* note 6, at ii. Prominent critics of the single-minded view of the lawyer as litigator in an adversary system have long looked to the law of professional ethics to develop rules regulating lawyers as negotiators. *E.g.*, Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639 (1977); Schwartz, *supra* note 4, at 672. Encouraged by the recognition of nonlitigation roles in the American Bar Association's Model Code of Professional Responsibility, critics of this single-minded view have generally supported the work of the Kutak Commission (the popular name for the American Bar Association Commission on Evaluation of Professional Standards, acknowledging the leading role of its chairman, the late Robert J. Kutak of Omaha, Nebraska). *See, e.g.*, Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RESEARCH J. 953, 960-61. The ABA MODEL RULES (Discussion Draft), *supra* note 10, acknowledged several distinct lawyer's roles: advisor (Rules 2.1-2.5), advocate (Rules 3.1-3.12), negotiator (Rules 4.1-4.3) intermediary (Rules 5.1-5.2), and legal evaluator (Rules 6.11-6.13). *See generally id.*, Preamble: A Lawyer's Responsibilities at 1-3. The Discussion Draft developed specific rules of professional conduct for each of these roles. For the lawyer as negotiator, it proposed rules for dealings with the client, *id.*, Rule 4.1 (Disclosures to a Client) and for dealings with other participants, *id.*, Rule 4.2 (Fairness to Other Participants).

In contracts with the client, the Discussion Draft required full disclosure of information and respect for the client's judgment in reaching settlement. In negotiations with other participants it required fairness and restraint to avoid unconscionable results. The proposed rules attempted to give some specific guidelines for the general duties of loyalty to the client and fairness to others in negotiations. This effort failed. None of the Discussion Draft negotiation rules survived intact in the Model Rules finally adopted. There is no separate section dealing with lawyers as negotiators. The duties to keep clients fully informed and to respect their decisions in negotiations have been subsumed in rules dealing generally with scope of representation and communication. Whatever remains of the obligation to inform clients is now incorporated into Model Rule 1.4, which deals generally with lawyer-client communication. Model Rule 1.4 itself became considerably less specific in the transition from Discussion Draft to Final Draft and adoption. The protection given the client's primary responsibility for deciding whether to accept an offer is now found in Model Rule 1.4(b). *See also* Model Rule 1.2(a). Draft Rule 4.2(a)'s general fairness prescription is gone, and Draft Rule 4.2(b), which now appears as Model Rule 4.1, mandates truthfulness in a narrower range of circumstances. The prohibition on misstatements is restricted to "false statement[s] of material fact or law," ABA MODEL RULE 4.1(a), and disclosure of material facts is required only "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." ABA MODEL RULE 4.1(b). Even then disclosure is limited by Model Rule 1.6. Draft Rule 4.2(c), limiting improper negotiation action (including use of negotiation as a pretense for delay and obstructing other parties' access to information) was generalized into what is now Model Rule 4.4. Draft Rule 4.3, obligating the lawyer as negotiator to refrain from concluding illegal or unconscionable agreements or including legally prohibited terms, has been deleted, although the Model Rules prohibit a lawyer generally from "assist[ing] a client . . . in conduct that the lawyer knows is criminal or fraudulent." ABA MODEL RULES *supra* note 6, Rule 1.2(d) and comment (Criminal, Fraudulent and Prohibited Transactions).

The reasons why this pioneering effort failed are unclear. Considerable opposition came from the bar; some arose from the traditional ideal that loyalty to the client is the lawyer's paramount or only true obligation. The primacy of client loyalty finds its most modern and strident defense in the writings of Monroe Freedman. *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). The ideal of client loyalty is usually linked with acceptance of the adversary system and based on a model of the lawyer as a litigator. *See generally* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29. Attempts to limit zealous advocacy of the client's cause, such as requirements of fairness and truthfulness in dealings with others, were seen as illegitimate and improper. *See generally* Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U. L. REV. 79 (1983). Other opposition stemmed from lawyers uncomfortable with the idea that even the usual prohibitions against unconscionable or fraudulent dealings should apply to them in the course of representing their clients. *See* Hazard, *supra* note 11, at 192-93. Concern was also expressed with

tain no provisions specifically applicable to lawyers' negotiations.

Second, an awkward relationship exists between the profession's ethical rules and civil liability standards for lawyers as negotiators. Ethical rules, like the Code and Model Rules, are not legislated norms of conduct publicly announced and enforced like the rules of the criminal law. They have another purpose entirely—the semi-private regulation of the legal profession.[120] Although penal statutes frequently create or supply standards of conduct in negligence actions through the doctrine of negligence per se,[121] few of the ethical rules are useful in this way. In part they remain aspirational, not regulatory.[122] Even their regulatory character emphasizes the way lawyers should conduct themselves with each other and with purely legal institutions, such as the courts.[123] In short, they do not usually create standards of care for the protection of specific classes of persons.[124] As a result, the courts usually have rejected the profession's ethical rules as a basis for lawyers' civil liability.[125]

Even if they do not directly translate into standards of care applicable to lawyers in civil litigation, the profession's ethical rules do limit lawyer conduct in negotiation. This is especially true of the Model Code's Disciplinary Rules, which are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[126]

---

applying the vague and general tests of fairness and truthfulness to the variety of circumstances and tactics encountered by lawyers as negotiators, especially when the etiquette of practice varies throughout the country. *Id.* at 193-95.

120. *See* ABA MODEL CODE, *supra* note 6, Preamble, Preliminary Statement. This is especially true for the Canons and Ethical Considerations, which are "axiomatic norms" and "aspirational in character." *Id. See generally* Dahlquist, *supra* note 113. The most thoroughgoing critique of the Model Code demonstrating its bias toward lawyer protection is Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

121. RESTATEMENT (SECOND) TORTS §§ 285(b), 286, 288B; W. PROSSER, LAW OF TORTS § 36 at 200-02 (4th ed. 1971).

122. *See supra* note 120. This purely aspirational role is conceded even by proponents of expanded use of the Model Code as a source of lawyers' duties and standards of care. Wolfram, *supra* note 113, at 281-83. For a general critique of expanded use of the Model Code, see Dahlquist, *supra* note 113.

123. Dahlquist, *supra* note 113, at 2-3, 19-20.

124. Similar considerations limit the use of any legislation in defining the standard of care in a negligence action. RESTATEMENT (SECOND) TORTS § 288.

125. *See, e.g.*, Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163 (1981) (negligent last minute withdrawal from representation in civil litigation), *noted* in 1984 DET. C.L. REV. 135. *See also* Bickel v. Mackie, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978) (suit by third party), *aff'd mem.*, 590 F.2d 341 (8th Cir. 1978); Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973) (defendant's attorney not liable to plaintiff for breach of disciplinary rule—interference with plaintiff's attorney-client relationship); Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E.2d 108 (1980) (malicious prosecution claims brought by doctors against unsuccessful malpractice plaintiffs and their lawyers). However, the courts have recognized the Model Code as evidence of the standard for lawyers in dealings with their clients. Woodruff v. Tomlin, 593 F.2d 33 (6th Cir. 1979) (representation of conflicting interests and neglect); Kirsch v. Duryea, 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 218 (1978) (Malpractice judgment against lawyer reversed; lawyer's conduct within ethical rules); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968) (same); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966) (failure to disclose conflict of interest); *cf.* Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979) (lawyer disqualification). *See generally Developments, supra* note 107, at 1489-90.

126. ABA MODEL CODE, *supra* note 6, Preamble. This is also true of the Model Rules with their greater regulatory emphasis. ABA MODEL RULES, *supra* note 6, Scope.

Professional ethical standards generally reinforce the tort and agency law duties that agents owe their principals.[127] Lawyers have been disciplined, as well as subjected to civil liability, for negotiating a settlement of a client's case without authorization;[128] for settling outside of the authority granted by the client;[129] and for failing to settle when the result injured the client.[130] In addition, lawyers who have neglected their clients' cases or handled them incompetently have been subjected to discipline under Canon 6 of the Model Code as well as civil liability.[131]

The conflict of interest rules under Canon 5 elaborate the basic agency law duty of loyalty.[132] Lawyers have been disciplined for representing adverse interests when this resulted in ineffective representation or injury to one of the clients,[133] and when the lawyer failed to disclose the conflict and

127. *See supra* notes 27-59 and accompanying text.

128. Weems v. Supreme Court Comm. on Prof. Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975) (lawyer representing multiple parties in same lawsuit settled all claims without telling clients and deposited funds in his account; lawyer disbarred with leave to apply for readmittance); State v. Dickens, 214 Kan. 98, 519 P.2d 750 (1974) (lawyer pursuing personal injury claim when client died, negotiated a settlement with the defendant's insurer and kept the proceeds requiring administrator of client's estate to request that funds be deposited into the estate; lawyer was suspended); Bar Ass'n v. Carruth, 271 Md. 720, 319 A.2d 532 (1974) (lawyer who settled personal injury claim and kept money as payment for unpaid services failed to inform client who learned of settlement 4 years later; lawyer was disbarred); *In re* Bretz, 168 Mont. 23, 542 P.2d 122 (1975) (lawyer representing clients on workman's compensation claims failed to consult clients on settlement negotiations and settlement and disbursed resulting funds without client's knowledge or consent; lawyer was disbarred); *In re* Stern, 81 N.J. 297, 406 A.2d 970 (1979) (lawyer pursuing personal injury claim accepted settlement offer despite client's refusal and had case dismissed with prejudice; lawyer was disbarred).

129. *See* Silver v. State Bar, 13 Cal. 3d 134, 117 Cal. Rptr. 821 (1974) (lawyer authorized to settle at a certain figure or more, settled for a lesser amount, put the money into a personal checking account, and waited one month to tell the client of the settlement; lawyer was suspended); *In re* Monterey, 511 S.W.2d 805 (Mo. 1974) (attorney settled in excess of authority and was suspended).

130. *E.g.*, Davis v. State Bar, 33 Cal. 3d 231, 655 P.2d 1276, 188 Cal. Rptr. 441 (1983) (attorney suspended for failing to file complaint or settle within statute of limitations).

131. *See* Davis v. State Bar, 33 Cal. 3d 231, 655 P.2d 1276, 188 Cal. Rptr. 441 (1983) (attorney who failed to file the suit within the statute of limitations and was suspended for a violation of California Business and Professions Code §§ 6067 & 6103—failure to represent client); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978) (lawyer who failed to file suit to quiet title for property being purchased by client and turned matter over to a partner who also neglected it; lawyer was suspended for violation of DR 6-101(A)(3)); People v. Yoakum, 191 Colo. 269, 552 P.2d 291 (1976) (lawyer hired to examine client/buyer's real estate transfer papers failed to note invalidity of stock certificates, the assignment, and other inadequacies; lawyer was disbarred for violation of DR 6-107); Attorney Grievance Comm. v. Lockhart, 285 Md. 586, 403 A.2d 1241 (1979) (attorney guilty of neglect and misrepresenting encumbrances for failing to obtain releases for deeds of trust was suspended with costs for violation of DR 6-101(A)(3)); *In re* Stern, 81 N.J. 297, 406 A.2d 970 (1979) (lawyer who failed to file a complaint but showed the client a fake complaint stating it had been filed was disbarred for violations of DR 7-101(A)(1) and (2)); *In re* Greene, 276 Or. 1117, 557 P.2d 644 (1977) (attorney found negligent for not placing the client's foreclosed house for sale on the open market and in failing to discover the trust assets was reprimanded and put on probation for violation of DR 6-101(A)(3)); *In re* Fraser, 83 Wash. 884, 523 P.2d 921 (1974) (attorney who neglected clients' cases censured for violations of Canon 21 of the Canons of Professional Ethics).

132. "A Lawyer Should Exercise Independent Professional Judgment on Behalf of A Client." ABA MODEL CODE, *supra* note 6, Canon 5. DR 5-101(A) prohibits a lawyer from accepting employment if the exercise of his professional judgment will or may be affected by the lawyer's own financial, business, property, or personal interests unless the client consents after full disclosure. DR 5-105 requires a lawyer to refuse to accept or continue employment if the lawyer will be involved in representing differing interests or if the lawyer's independent professional judgment will be adversely affected by representation of another client, except under limited circumstances. *Id.*; *see also* Annot., 17 A.L.R.3d 835.

133. In Attorney Grievance Comm. v. Collins, 295 Md. 532, 457 A.2d 1134 (1983), Collins represented both the buyer and seller of a liquor license. Collins was also the managing partner of

to obtain the client's consent to the dual representation.[134] Case law also supports the proposition that lawyers who represent conflicting interests in negotiations are liable for any resulting harm to their clients and may forfeit any earned fees.[135] Liability usually depends upon whether the lawyer fully disclosed the actual or possible conflict to each party and obtained their consent to the multiple representation, and whether the conflict genuinely injured the complaining party.[136] Courts have generally allowed recovery when the lawyer failed to disclose fully the multiple representation and its potential for harm to the complaining party.[137] The cases finding lawyers hired by insurers liable for failing to give adequate information to insureds about a claim in excess of coverage can thus be characterized as failures to avoid conflicts of interest.[138] Since these cases contain a conflict between the

---

the seller. Collins failed to tell the buyer that the license had expired and told him that a noncompetition clause in the sales contract would be unnecessary. The seller later began competition. Collins was suspended with costs for violating DR 5-105(A) and (B). In Attorney Grievance Comm. v. Lockhart, 285 Md. 586, 403 A.2d 1241 (1979), Lockhart represented the buyer, seller, and title insurance company and failed to tell the buyer and the insurance company of three deeds of trust encumbering the land. The seller defaulted and the insurer had to pay. The court said that generally a lawyer may represent both buyer and seller, so long as both are informed. But "[s]ettlement lawyers in effect representing all interests, as did Lockhart, must recognize that they have a special duty to all parties to the settlement." *Id.* at 1247. The court suspended Lockhart with costs for violating DR 5-105(A) and (B). *See also* Annot., 17 A.L.R.3d 835. In *In re* Skinner, 171 Minn. 437, 214 N.W. 652 (1927) Skinner finalized a house sale between his mother/seller and the buyer. Skinner told the buyer that the house was unencumbered when in fact it had a $700 mortgage. The mortgagee later foreclosed on the buyer. Skinner was disbarred. In *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963), a buyer and seller entered into a property sales contract. The contract specified that lawyer Kamp would handle the title search and escrow. Kamp had previously represented the seller. When the buyer tried to do his own title search, Kamp would not cooperate. Thus, the buyer was bound to accept Kamp's services. As a result, the buyer was forced to rely on Kamp's search, which was not completed before close of escrow. The buyer closed without a title search or insurance. Kamp was reprimanded for his violation of Canon 6 of the Canons of Professional Ethics. In Columbus Bar Ass'n. v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968), Grelle represented his client in a personal injury suit. Grelle also represented both his client and the client's wife in a separation agreement that, in part, provided that the wife got one-third of the proceeds of the suit. Grelle then represented the wife in the divorce that incorporated the separation agreement. When she asked Grelle the amount of the personal injury settlement, he would not tell her. He then represented her husband in opposing her attempt to reduce the claim from a personal injury settlement to a money judgment. Grelle was reprimanded for violating Canons 6 and 37 of the Professional Ethics.

134. *E.g.*, *In re* Lanza, 65 N.J. 347, 322 A.2d 445 (1974). Lanza was hired by the seller of property to negotiate the sale. Lanza agreed to represent the buyer but did not so inform the seller. The buyer asked that $1000 of the balance due on close be by postdated check because buyer was short of funds. Lanza agreed on behalf of the seller and closed the sale. When the check bounced and the buyer refused to pay, Lanza did nothing on behalf of the seller to get the $1000, despite the seller's request. Lanza was reprimanded for violation of DR 5-105.

135. *See* R. MALLEN & V. LEVIT, *supra* note 17, §§ 164-165; *Developments*, *supra* note 107, at 1486-96. One of the clients may also seek to undo the agreement reached or result obtained. R. MALLEN & V. LEVIT, *supra*, § 166; *see e.g.*, C.B. & T. Co. v. Hefner, 98 N.M. App. 594, 651 P.2d 1029 (1982); *cf.* ABA MODEL CODE, *supra* note 6, DR 5-105; ABA MODEL RULES, *supra* note 6, Rules 1.6-1.9.

136. R. MALLEN & V. LEVIT, *supra* note 17, §§ 162, 164; *Developments*, *supra* note 107, at 1303-15.

137. *E.g.*, Baker v. Humphrey, 101 U.S. 494 (1880) (lawyer represented real property purchaser, seller and himself); Hill v. Okay Constr. Co., 312 Minn. 324, 252 N.W.2d 107 (1977) (lawyers represented business borrower and lender). Klemm v. Superior Court, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977) (lawyer represented husband and wife in arranging child support agreement); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968) (lawyer represented insurer and insured in personal injury claim settlement); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966) (lawyer represented husband and wife in property settlement agreement).

138. *See supra* note 40 and accompanying text.

lawyer's loyalty to the insured client and the insurer client, the lawyer owes a duty to disclose fully the nature of the conflict and to keep both clients informed of all material information. Without full disclosure, the lawyer is potentially liable for any harm to either client.

Conflicts of interest and failure to represent the client competently can also result in misrepresentations by the lawyer to the client, rendering the lawyer subject to discipline.[139] If the lawyer avoids actual misrepresentations by failing to communicate with the client, this failure can also result in disciplinary action.

Thus, legal ethical rules complement contract and agency law principles that require lawyer-negotiators to represent their clients loyally and competently. There is apparent conflict between these sets of standards only over the extent to which lawyers are subject to control by their clients.

2. *Allocation of decisionmaking authority*

One of the most fundamental issues in negotiations is how decisions should be made[140] and who—lawyer or client—should make them. Unlike most ethical rules governing lawyers' duties to their clients, here the answers furnished by agency law appear to differ from the view articulated in the ethical rules. According to agency law, the client-principal has ultimate authority to control the manner and means by which the lawyer-agent carries out the principal's instructions.[141] According to the legal profession's ethical rules, however, decisionmaking authority is divided between client and lawyer. Rule 1.2(a) of the Model Rules of Professional Conduct provides:

> A lawyer shall abide by a client's decisions concerning the objectives of representation [subject to limited exceptions set out in later sections of the Rule], and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial,

139. *See* People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978) (attorney who misrepresented status of case was suspended with costs); Attorney Grievance Comm. v. Collins, 295 Md. 532, 457 A.2d 1134 (1983) (described *supra* note 136; attorney suspended with costs for violating DR 1-102(A)(4), and 5-105(A) and (B)); Attorney Grievance Comm. v. Lockhart, 285 Md. 586, 403 A.2d 1241 (1979) (described *supra* note 136; attorney suspended with costs for violating DR 1-102(A)(4)); *In re* Beck, 400 Mich. 40, 252 N.W.2d 795 (1977) (lawyer misrepresented to client that the case had been settled when, in fact, the case had been dismissed for failure to notice the case for trial after filing the complaint; lawyer was suspended with costs); *In re* Monterey, 511 S.W.2d 805 (Mo. 1975) (lawyer settled in excess of authority on behalf of the client/insurer and failed to inform and misrepresented facts of settlement to the insured; lawyer was suspended). Committee on Legal Ethics v. Mullins, 226 S.E.2d 427 (W. Va. 1976) (lawyer who assured clients that the case was progressing when he had done nothing and failed to file suit within the statute of limitations was suspended with costs). *See also* Annot., 96 A.L.R.2d 823, § 9, at 845.

140. Negotiation decisions include setting overall objectives, choosing a particular approach (adversarial or problem solving, etc.), making strategic choices during the negotiation itself, choosing whether to accept offers to settle disputes, and determining how to structure transactions (*e.g.*, is security needed).

141. RESTATEMENT (SECOND) AGENCY §§ 14, 385; *see also supra* notes 30-39, 44-50 and accompanying text. There are, however, limits. Agents are not required to obey unreasonable or unethical directions.

and whether the client will testify.[142]

As the official comment to this Rule makes clear, decisionmaking authority is allocated to client and lawyer on the basis of a distinction between the objectives and the means of the representation.[143] According to the Legal Background discussion to Rule 1.2(a), the lawyer is master of the procedural and tactical aspects of litigation, subject only to the client's control over the decisions expressly mentioned in Rule 1.2(a).[144]

This dramatic contrast between basic agency law principles and the rules of legal ethics in allocating decisionmaking authority between lawyer and client is much clearer in theory than in practice. The distinction drawn in Rule 1.2(a) between objectives and means, itself varies depending upon the representation context, the nature of the decision, and the particular lawyer-client relationship.[145] Critical commentary on this issue suggests that the lawyer-client decisionmaking authority more closely resembles a joint venture or reciprocal agency model in which both parties are simultaneously principal and agent.[146]

The legal ethics decisionmaking model accurately describes the lawyer-client relationship only in the civil litigation context.[147] In civil litigation the client controls the basic decisions regarding the cause of action or claim—whether to bring suit or defend, whether to settle and for how much.[148] The

142. ABA MODEL RULES, *supra* note 6, Rule 1.2(a).

143. *Id.* comment (Scope of Representation).

144. ABA MODEL RULES, *supra* note 6, Legal Background to Rule 1.2. *See* Wainwright v. Sykes, 433 U.S. 72, 93 & n.1 (1977) (Burger, C.J., concurring) (adopting Model Rules' characterization of decisionmaking allocation in criminal defendant-public defender context); *see also* Jones v. Barnes, 103 S. Ct. 3308 (1983) (defense counsel assigned to prosecute an appeal has no constitutional obligation to raise every nonfrivolous issue requested by the client). Similar decisions based on state and general constitutional grounds abound. *See, e.g.*, People v. Norman, 252 Cal. App. 2d 381, 399-407, 60 Cal. Rptr. 609, 624-29 (1967).

145. *See* Maute, *supra* note 113, at 1081-84, 1115. According to Professor Maute, representation context and the specific type of decision initially determine the presumptive spheres of lawyer and client decisionmaking authority. Other factors—the formation, progress and expected duration of the client-lawyer relation, the client's identity and timing considerations—may rebut the presumptive allocation. In particular, Professor Maute distinguishes among office lawyer and litigation and criminal defense representation contexts. *Id.*, at 1082, 1084-1105; *see also* L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY § 2.03, at 2-29 to 2-30 (1982).

146. *See* Maute, *supra* note 113, at 1066-67, 1080-81 (joint venture model with presumptive spheres of client and lawyer authority). Professor Maute in turn relies on the Model Rules of Professional Responsibility (*see* ABA MODEL RULES, *supra* note 6, Rules 1.2 and comment (Scope of Representation), 1.4) and Professor Patterson's work, in which he offers his view of the lawyer-client relationship as one of reciprocal agency in which lawyer and client are both principal and agent with regard to decisionmaking authority. Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, 703-22 (1981); Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 926 (1980).

147. Current critical commentary suggests that the allocation of lawyer-client decisionmaking authority based on the objectives-means distinction should be restricted to litigation decisionmaking. *See, e.g.*, D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE (1974); Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Spiegel, *supra* note 16, at 48-65. Rosenthal's critique rests on highly pragmatic grounds. He analyzed 59 personal injury claims and concluded that clients who actively participated in their cases got significantly better results than their passive counterparts. D. ROSENTHAL, *supra*, at 61. Actively participating clients were also more satisfied with both the results and their lawyers. *Id.* at 168. Spiegel employs several arguments, most significantly relying on the client's underlying ownership interest in the legal claim and the lawyer's role as representative of the client. Spiegel, *supra* note 16, at 73-77.

148. Maute, *supra* note 113, at 1087-89. *See, e.g.*, Harrop v. Western Airlines, 550 F.2d 1143, 1145 (9th Cir. 1977) (lawyer may not settle case over client's timely objection); Coronado Fed.

client presumptively gives control of procedural and tactical issues to the lawyer, and the client is ordinarily bound by the lawyer's tactical decisions.[149] Even in civil litigation, however, the client's and lawyer's spheres of authority overlap. Some procedural decisions affect the client's substantive rights and are outcome related. Either lawyer or client may have ultimate authority over these decisions.[150] The client's authority over the claim is limited by the lawyer's institutional obligations, and the client is not entitled to representation or assistance in violation of law or professional ethics.[151]

Societal interest in the efficient functioning of the litigation process and differences in professional competence justify this allocation of authority in civil litigation. Courts and other litigants need to be able to rely on lawyers' decisions in the course of litigation to ensure the fair, reasonably accurate, and efficient operation of this dispute resolution system. Moreover, the system cannot maintain its claim to legitimacy unless lawyers honor their professional obligations to uphold the integrity of the system against overreaching and frivolous or harassing actions by clients.[152] By professional training and experience, litigating lawyers are especially qualified to make tactical decisions during pretrial and trial proceedings. To function effectively, they must be able to make spontaneous tactical decisions under the exigencies of these proceedings, and the other parties must be able to rely on the decisions as binding.[153]

In contrast with civil litigation proceedings, the sphere of client authority and control is much greater in the settlement of litigation and transactional (office lawyering) negotiations. Lawyers must comply with contractual agreements and express instructions.[154] They have no inherent authority to settle litigation for their clients, and they must inform their cli-

---

Credit Union v. Cameo Club of Newport, 91 R.I. 131, 133, 161 A.2d 410, 411 (1960) (client determines amount of claim); *In re* Parzino, 122 Wash. App. 88, 90, 587 P.2d 201, 202 (1978) (court appointed attorney cannot appeal in absence of client authorization).

149. *See, e.g.*, Link v. Wakash R.R., 370 U.S. 626, 633-34 (1962) (client bound by lawyer's failure to appear at pretrial conference; case dismissed); Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 105-06, 81 P.2d 913, 917 (1938) (extremely broad statement of lawyer procedural authority). *See generally* ABA MODEL RULES, *supra* note 6, Rule 1.2 comments; Maute, *supra* note 113, at 1089-92.

150. Maute, *supra* note 113, at 1093-95. *Compare* Linsk v. Linsk, 70 Cal. 2d 272, 449 P.2d 760, 74 Cal. Rptr. 544 (1969) (lawyer's stipulation over client's objection allowing retrial based on transcript of earlier proceeding held invalid) *with* Gasior v. Wentz, 89 N.W.2d 886 (N.D. 1958) (virtually identical facts, lawyer's stipulation valid). California courts recognize a lawyer's authority to abandon a defense the lawyer considers untenable, but not an essential defense. *Compare* Duffy v. Griffith, Co., 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (2d dist. 1962) *with* Fresno City High School Dist. v. Dillon, 34 Cal. App.2d 636, 94 P.2d 86 (4th Dist. 1939). Professor Spiegel argues courts decide authority disputes in this overlap area based on considerations of fairness to third parties and judicial economy. Spiegel, *supra* note 147, at 61-65.

151. *See* ABA MODEL RULES, *supra* note 6, Rule 1.2(d), (e) and comment (Criminal, Fraudulent and Prohibited Transactions); Maute, *supra* note 113, at 1064-65, 1081, 1094-95.

152. Maute, *supra* note 113, at 1064, 1078-80, 1091-92.

153. *Id.* at 1084, 1091-92, 1094; *e.g.*, Duffy v. Griffith Co., 206 Cal. App. 2d 780, 787, 24 Cal. Rptr. 161, 165 (1962).

154. Maute, *supra* note 113, at 1084-86; *see, e.g.*, Olfe v. Gordon, 93 Wis. 2d 173, 286 N.W.2d 573 (1980) (lawyer liable for malpractice for failing to follow client's instruction to obtain a first mortgage in property sale); Practical Offset, Inc. v. Davis, 83 Ill. App. 3d 566, 404 N.E.2d 516 (1980) (lawyer liable for malpractice for failing to file U.C.C. financing statement "to consummate" sale of business).

ents of good faith settlement offers.[155] The client's right to control the lawyer is limited only by the lawyer's competing obligations to the legal system. The lawyer must refrain from knowingly making false statements of law or fact, knowingly counseling or assisting a client in criminal or fraudulent activity, and acting solely to embarrass, delay, or burden third parties.[156] Thus, in negotiations, the profession's traditional decisionmaking model allocates decisionmaking authority close to the contract-agency rules generally applicable to negotiators.[157]

A significant departure from the usual decisionmaking model occurs in criminal defense representation, a context important in negotiation because most criminal cases are disposed of by negotiation through the plea bargain.[158] Since the defendant's liberty is usually at stake, he is entitled to significant constitutional protections including competent appointed counsel and voluntary, intelligent, and knowing entry of any guilty plea.[159] In nego-

155. *E.g.*, Harrop v. Western Airlines, 550 F.2d 1143, 1145 (9th Cir. 1977) (lawyer may not settle litigation without client's permission); Blanton v. Womancare Clinic, Inc., 38 Cal. 3d 396, 696 P.2d 645, 212 Cal. Rptr. 151 (1985) (lawyer may not agree to binding arbitration of litigation without client's permission); Joos v. Auto-Owners Ins. Co., 94 Mich. App. 419, 288 N.W.2d 443 (1979) (malpractice action; lawyer must disclose and discuss good faith offers to settle with client); *see also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 326 (1970) (lawyer must inform client of every offer from opposing party). *See generally* Maute, *supra* note 113, at 1082, 1085-86, 1088-89.

However, as in the case of other agents, a lawyer's unauthorized settlement may be ratified by the client. Navrides v. Zurich Ins. Co., 5 Cal. 3d 698, 488 P.2d 637, 97 Cal. Rptr. 309 (1971) (ratification by bringing suit to collect money due under unauthorized compromise settlement); City of Fresno v. Baboian, 52 Cal. App. 3d 753, 125 Cal. Rptr. 332 (1975) (ratification of unauthorized stipulation). *See generally* RESTATEMENT (SECOND) AGENCY §§ 82-84, 92-98.

156. *See* ABA MODEL RULES, *supra* note 6, Rule 4.1 (truthfulness in statements to others), Rule 1.2(e) (criminal, fraudulent and prohibited transactions), Rule 4.4 (respect for rights of third persons); *see also* ABA MODEL CODE, *supra* note 6, DR 7-102(A)(5), DR 7-102(A)(3); DR 2-110(C)(1)(C), DR 9-101(C); DR 7-102(A)(1). *See generally* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 38-42 (1978); Hazard, *supra* note 22; Hazard, *The Lawyer's Obligation to Be Trustworthy When Dealing With Opposing Parties*, 33 S.C.L. REV. 181 (1981); Maute, *supra* note 113, at 1065-66.

157. Greater client control is justified outside of litigation because the client can be consulted in advance of the lawyer's action. There is less need for emergency or tactical lawyer authority. Nevertheless such authority is available. *See, e.g.*, Sockolof v. Eden Point N. Condominium Ass'n, 421 So. 2d 716 (Fla Dist. Ct. App. 1982) (emergency authority allowed lawyer to settle litigation where quick action was necessary on eve of trial and client was unavailable); *see also* Maute, *supra* note 113, at 1084.

158. *See supra* note 2.

159. Under the sixth and fourteenth amendments of the United States Constitution no person may be imprisoned unless that person was represented by counsel at trial (or voluntarily waived counsel). Argersinger v. Hamlin, 407 U.S. 25 (1972) (petty offenses); Gideon v. Wainwright, 372 U.S. 335 (1963) (felonies). Appointed counsel must meet minimum constitutional competence standards. Strickland v. Washington, 104 S. Ct. 2052, 2064-65 (1984) (constitutional standard is reasonably effective assistance of counsel); McMann v. Richardson, 397 U.S. 759, 771 n.14, 772 (1970) ("the right to counsel is the right to the effective assistance of counsel . . . defendants cannot be left to the mercies of incompetent counsel"). Since a guilty plea is tantamount to a conviction, and is a waiver of the defendant's constitutional rights including the privilege against self-incrimination, right to trial by jury and right of confrontation, the court's record must reflect that the defendant has made a knowing and voluntary plea, understanding its consequences. Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969). The court must find a factual basis for the plea. North Carolina v. Alford, 400 U.S. 25 (1970); *see also* FED. R. CRIM. P. 11 (pleas).

On the other hand, a guilty plea by a competently counseled defendant is presumed knowing and voluntary and is virtually immune from collateral attack. Tollett v. Henderson, 411 U.S. 258 (1973); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978). The defendant

tiating a guilty plea, defense counsel must be sufficiently familiar with the law and facts to advise the client competently and outline alternatives and defenses.[160] The lawyer may not refuse to convey prosecution plea offers or insist on going to trial over the client's objection. Likewise, a lawyer cannot agree to a plea bargain over the client's insistence on a trial.[161]

Thus, leaving aside the special case of criminal pleas, the legal profession's view of lawyer-client decisionmaking in negotiations is fully compatible with agency and contract law rules for negotiators generally. Lawyer-negotiators must abide by their clients' decisions both in defining the goals of the representation and in choosing the means to achieve those goals. Lawyers are entitled to make decisions on their own in emergency situations and when their special expertise warrants placing tactical choices in their hands, although their clients should be consulted in advance whenever possible.

---

has authority to accept or waive assistance of counsel in the first instance, but when he is represented effectively, he relinquishes control over trial tactics and strategy. Faretta v. California, 422 U.S. 806, 820-21 (1975). *See also* Maute, *supra* note 113, at 1096-98. Although an indigent defendant may have a constitutional right to appointed counsel, the defendant is not entitled to choose the particular lawyer. Morris v. Slappy, 103 S. Ct. 1610, 1617 (1983) (sixth amendment does not require "meaningful relationship" with counsel).

After conviction, a criminal defendant can obtain relief only by showing that the lawyer was both incompetent and that actual prejudice resulted. Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984); *see also* United States v. Cronic, 104 S. Ct. 2039, 2046-51 (1984) (unless surrounding circumstances make it unlikely defendant could have received effective assistance of counsel, showing of specific errors of counsel is required to show prejudice).

The client's personal effective control over the course of the litigation is limited to whether to plead guilty, to request a jury trial, or to appeal. *See* Jones v. Barnes, 103 S. Ct. 3308, 3312 (1984); Strickland v. Washington, 104 S. Ct. 2052, 2065 (1984); Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); ABA STANDARDS, *supra* note 13, Standard 4-5.2 (1982) (The Defense Function) [hereinafter cited as ABA STANDARDS]. However, appointed counsel is not constitutionally required on appeal to raise every nonfrivolous issue requested by the client. Jones v. Barnes 103 S. Ct. at 3314.

160. ABA STANDARDS, *supra* note 13, Standard 4-1.1(b) (Role of Defense Counsel), Standard 4-1.6 (Client Interests Paramount), Standard 4-3.1(a) (Establishment of [lawyer-client] Relationship); Standard 4-5.1 (Advising the Defendant); Standard 4-5.2 (Control and Direction of the Case). *See, e.g.* Henderson v. Morgan, 426 U.S. 637 (1976) (defendant must be informed of nature of offense to which he is pleading guilty); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) (inadequate advice to client required reversal). *See generally* J. BOND, PLEA BARGAINING AND GUILTY PLEAS §§ 4.9-4.16 (2d ed. 1982).

161. *See, e.g.*, Brookhart v. Janis, 384 U.S. 1 (1966) (counsel cannot elect de facto guilty plea without client's consent); People v. Whitfield, 40 Ill. 2d 308, 239 N.E.2d 850 (1968) (defendant has constitutional right to be advised of offer to plead guilty); State v. Barley, 240 N.C. 253, 81 S.E.2d 772 (1954) (counsel cannot enter guilty plea over defendant's wishes). Despite these generally recognized legal standards, the reality of plea bargaining is such that defense counsel have strong institutional pressures on them that lead them to coerce their clients to accept offers to plead guilty. Pressures include a desire to maintain good relations with judges and prosecutors, lack of sufficient resources, and bias against their clients. *See* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206-55 (1975) (discussion of public defenders). A troublesome conflict can result when competent and sophisticated defense counsel insists that a criminal defendant facing serious charges raise the insanity defense over the client's express objection. Ordinarily respect for the client's personal dignity and autonomy requires honoring the client's choice. However, when the consequences are sufficiently grave, the lawyer's special competence and professional obligation to the client and the legal system permit the lawyer's choice to prevail. *See, e.g.*, People v. Merkouris, 46 Cal. 2d 540, 297 P.2d 999 (1956) (abuse of discretion by trial court allowing defendant to withdraw not guilty by reason of insanity plea in capital case). *See also* People v. Mozingo, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (1983) (reasonably competent counsel must investigate insanity and diminished defenses suggested by facts, even over client's objection, in order to present informed report and recommendation to client of available defenses). *Contra* Frendak v. United States, 408 A.2d 364 (D.C. Ct. App. 1979). *See generally* Maute, *supra* note 113, at 1100; Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637 (1980).

3. *Duties of fairness—lawyer and third parties*

Courts have been reluctant to use ethical rules as a basis for imposing duties of care and conduct on lawyers for the benefit of third parties, especially adverse third parties, in civil damage actions. However, courts have disciplined lawyers for violating ethical rules when they deal with third parties. This is one of the few instances in which courts have intervened to limit lawyers' discretion to act for the benefit of their clients. Thus, these disciplinary cases are a good place to begin to search for guidelines that can give meaning to the idea that the lawyer as negotiator must be "fair" in dealings with others.[162]

The few disciplinary cases apply the limitations in only the most egregious circumstances. A number of cases have imposed discipline on lawyers for making factual misrepresentations to third parties. Lawyers have never been free to make material factual misrepresentations to further their clients' interests.[163] In negotiating sales, particularly of real property, lawyers have been disciplined for factual misstatements that cause injury to third parties.[164]

When one of the parties to a commercial transaction or litigation is unrepresented or the lawyer deals directly with the party, courts have been more willing to impose discipline for false or misleading representations.[165] In these cases, the content of the representations or deception matters less than the relationship. Courts emphasize the special reliance that the unrepresented party places on the lawyer, suggesting that the same representations might not result in discipline if made to another lawyer—at least one knowledgeable about the transaction.

Finally, there are certain instances in which courts have disciplined lawyers for overbearing or improper conduct in negotiation not involving misleading representations. In both the civil and criminal context, actions directed solely at harassment or delay will subject the lawyer to discipline.[166]

---

162. *Cf.* ABA MODEL RULES (Discussion draft), *supra* note 10, Rule 4.1(a).

163. SEC v. Frank, 388 F.2d 486, 489 (2d Cir. 1968); United States v. Benjamin, 328 F.2d 854 (2d Cir. (1968)) (affirming conviction of lawyer for conspiracy to defraud in sale of securities using the mails), *cert. denied*, 377 U.S. 953 (1964); *cf.* Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962) (civil liability imposed on lawyer who made false representations to client); *see also* ABA STANDARDS, *supra* note 13, Standards 3-4.1(c) (prosecutor must not knowingly make false statements in plea negotiations); Standard 4-6.2(b) (same, defense).

164. *E.g.*, *In re* Skinner, 171 Minn. 437, 214, N.W.652 (1927), described *supra* note 136. The message is clear. Courts will not countenance outright misrepresentation as a means of furthering the client's interest at the expense of an adverse third party. In People v. Yoakum, 191 Colo. 269, 352 P.2d 291 (1976), the lawyer involved acted both as lawyer and principal in a corporation allegedly formed to distribute a cleaning product. In fact, no valid distributorship existed. The lawyer obtained investors in the corporation, although the corporation lacked proper authority to sell its stock to the public. He misrepresented the corporation's status as distributor of the cleaning product to investors and failed to disclose the nature of his investment in the corporation. The Colorado Supreme Court ordered the lawyer disbarred for this and two unrelated incidents, finding his participation in the stock promotion scheme amounted to common law fraud and violated DR 1-102(A)(3), (4), and (6). *Id.* at 277-78, 552 P.2d at 297.

165. *E.g.*, Carpenter v. State Bar, 210 Cal. 520, 292 P. 450 (1930); *In re* Skinner, 171 Minn. 437, 214 N.W.652 (1927).

166. E.g., *In re* Mussman's Case 111 N.H. 402, 286 A.2d 614 (1971). The lawyer represented the husband in a divorce proceeding. The lawyer arranged to have part of the husband's property transferred to a development corporation the lawyer established. In suspending the lawyer, the New

Violation of an ethical rule results only in disciplinary proceedings, not civil liability claims by the injured third parties. Ordinarily such claims are made against lawyers in malpractice actions, the subject of the next section. Although the rules of the legal malpractice action complement ethical rules to regulate lawyers' negotiations, claims against lawyers by adverse third parties have been strictly limited to intentional torts. Courts do not recognize a duty of reasonable care that applies to litigational or transactional adversaries.[167] The only exceptions to this general rule of nonliability occur when statutes alter the common law rule.[168]

B. *Legal Malpractice*

Agency law imposes on all negotiator-agents a duty to act with the care and skill that is standard for negotiations in that locality and to exercise any of the negotiator's special skills.[169] The specialized law of legal malpractice adds a duty for lawyer-negotiators to exercise the skill and knowledge ordinarily possessed by lawyers under similar circumstances.[170] A breach of that duty, combined with the other elements of a legal malpractice claim, subjects the lawyer-negotiator to liability for money damages to the injured party.[171] In many cases legal malpractice standards reinforce the basic contract, tort, and agency law rules applicable to all negotiators. Furthermore, a reasonably well-developed body of malpractice case law implements the general care, skill, and diligence requirements, and provides explicit and concrete guidance to legal negotiators in many instances. Because it is grounded in tort, a malpractice action requires proof of a duty to the plaintiff, a breach of that duty, causation, and damages. Proving this prima facie case is often burdensome for legal malpractice plaintiffs. Coupled with the

---

Hampshire Supreme Court upheld a trial court finding that the lawyer had engaged in fraudulent conduct (thus violating DR 7-102(A)(7) and 1-202(A)(4)) and that these actions had been taken to harass and delay the wife from obtaining a meaningful property settlement. These actions thus violated DR 7-102(A)(1).

Courts have reached similar conclusions in criminal cases. A district attorney refused to offer a favorable plea bargain to fifteen criminal defendants in *Complaint of Rook*, 276 Or. 695, 556 P.2d 1351 (1976), unless they obtained different counsel, in effect refusing to negotiate with their chosen counsel. The Oregon Supreme Court found this conduct served "only to harass or maliciously injure another" in violation of DR 7-102(A)(1) and DR 1-102(A)(5). *Id.* at 704, 556 P.2d at 1356-57.

167. See R. MALLEN & V. LEVIT, *supra* note 17, § 40, at 71, §§ 79-80. According to these authors, "[t]he general rule is that when representing a client and acting as an agent, the attorney is usually exempt from liability to third persons who may be injured as a result of his acts or omissions." *Id.* § 40, at 87.

168. *Id.* § 40, at 87, § 41, at 109. Mallen & Levit deal primarily with the federal civil rights litigation under 42 U.S.C. §§ 1983 and 1985, particularly that involving appointed counsel. Discussion of this form of liability is beyond the scope of this Article. The authors also mention the federal securities acts. R. MALLEN & V. LEVIT, *supra* note 17, §§ 476-486. The extent to which lawyers may be liable for acts and representations in securities transactions is discussed along with liability for common law fraud *infra* notes 296-306 and accompanying text.

169. RESTATEMENT (SECOND) AGENCY § 379(1). The standard of care and skill stated in subparagraph (1) is virtually identical to the usual tort law malpractice standard. *See infra* notes 169-71, 178-82 and accompanying text.

170. *See generally* R. MALLEN & V. LEVIT, *supra* note 17, at 315-18.

171. *See generally* R. MALLEN & V. LEVIT, *supra* note 17, M. SCHWARTZ & R. WYDICK, PROBLEMS IN LEGAL ETHICS 107-111 (1983); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292 (1963); Comment, *Professional Negligence*, 121 U. PA. L. REV. 627 (1973).

nonliability rule for good faith judgment errors, malpractice actions can only provide limited regulatory guidance to lawyer-negotiators.

Although most litigants in lawyer malpractice cases rely on a negligence theory, the injured party seeking recovery may also rely on breach of fiduciary duty and breach of contract.[172] As a fiduciary,[173] the lawyer owes the client duties of undivided loyalty, confidentiality, and disclosure of material information, as well as duties of care and skill. Breach of any of these duties can give rise to a malpractice claim.[174] In addition, the lawyer may expressly agree to achieve a particular result or specify a degree of diligence. Failure to fulfill the agreement becomes a breach of a contractual duty.[175]

1. *Duty*

In order to prove legal malpractice, an injured party must first establish a duty owed by the lawyer to the party seeking damages. When the malpractice action is one for breach of an express contractual undertaking, there is ordinarily no dispute that the lawyer owes the client a duty of professional care and skill. The usual questions in this area concern whether any attorney-client relationship was ever created, and the extent of the duty owed to third persons who expected to benefit from the lawyer's service.[176] Although the typical case involves a client suing the lawyer, and courts often require proof of an attorney-client relationship, non-clients can also bring malpractice actions.[177]

---

172. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 180-81, 491 P.2d 421, 422-23, 98 Cal. Rptr. 837, 838-39 (1971). The law will imply use of the negligence standard of care as a term of the attorney-client agreement unless another standard is expressly adopted. Although a lawyer may limit the scope of client representation, R. MALLEN & V. LEVIT, *supra* note 17, § 101, lawyers may not limit their malpractice exposure to their clients as a condition of representation. *Id.* § 358; *see also* ABA MODEL CODE, *supra* note 6, DR 6-102; ABA MODEL RULES, *supra* note 6, Rule 1.8(h).

173. *See* R. MALLEN & V. LEVIT, *supra* note 17, at 208.

174. M. SCHWARTZ & R. WYDICK, *supra* note 171, at 107; *see also* Ishmael v. Millington, 241 Cal. App. 2d 520, 526-29, 50 Cal. Rptr. 592, 595-98 (1966). The lawyer who had previously represented the husband represented the wife in an uncontested divorce. The lawyer failed to investigate or verify the husband's financial statement or to inform his client that statement was unconfirmed. As a result his client received a fraction of the community property to which she was entitled. Thus there was a breach of duty question for the jury. *See also Developments*, *supra* note 107, at 1486-93. Some courts treat the fiduciary relationship as simply an alternative statement of the basic negligence rules. *E.g.*, Hansen v. Wightman, 14 Wash. App. 78, 92-93, 538 P.2d 1238, 1248 (1975).

175. *See, e.g.*, Bernard v. Walkup, 272 Cal. App. 2d 595, 77 Cal. Rptr. 544 (1969) (lawyer's failure to file suit violated contingent fee agreement in which lawyer agreed to "commence and prosecute" client's claim and to "do all things necessary to prosecute said claim.").

176. R. MALLEN & V. LEVIT, *supra* note 17, §§ 78-81, 101; M. SCHWARTZ & R. WYDICK, *supra* note 171, at 108. The commentators agree that "[t]he attorney's liability for negligence arises out of the attorney-client relationship." Wade, *supra* note 171, at 756. What this means is that unless the lawyer is acting as a lawyer he cannot be held to exercise the skill, diligence, and prudence of a lawyer as opposed to the duty to use reasonable care expected of a layman. *See* RESTATEMENT (SECOND) TORTS § 299A.

177. *E.g.*, Heyer v. Flagg, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969) (intended beneficiaries of will drawn by lawyer can sue lawyer directly for malpractice); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (same). As Mallen and Levit note, "traditionally, attorneys' malpractice exposure has been limited to their clients." R. MALLEN & V. LEVIT, *supra* note 17, § 71, at 142. Most authority holds that only clients can sue lawyers for malpractice. *Id.* § 79. The authors also note that this is incorrect as a generalization. Except in New York, beneficiaries named in a will prepared for a client can sue the lawyer who negligently prepared it. *Id.* California recognizes a six-part balancing test to decide whether a duty is owed to third parties. *Id.*

2. *Breach of duty—standard of care*

Once a duty owed by the lawyer to the injured party exists, that duty requires the lawyer to meet the accepted standard of care: the exercise of the skill and knowledge ordinarily possessed by lawyers under similar circumstances.[178] Professionals, including lawyers, by definition, possess special skills as a result of their education, training, and experience.[179] Thus, lawyers' standard of competence consists of several elements rather than the usual reasonable person under similar circumstances standard.[180] Although there is no single accepted terminology or definition, the elements usually considered as constituting competence include knowledge, skill, care or diligence, and capacity.[181] The Model Rules provide a useful definition that regards competence and diligence as two separate requirements.[182]

With adequate knowledge, lawyers must exercise reasonable skill applying the law and facts to benefit their clients.[183] Limiting this skill standard is a rule protecting lawyers who exercise reasonable, but faulty, judgment.[184] Thus, lawyers who fail to properly draft or read a document[185] or adequately handle a piece of litigation are liable for malpractice.[186] They are

---

§ 80; *see, e.g.*, Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976). Clearly the most critical factors are whether the lawyer's services are intended to benefit the third party. R. MALLEN & V. LEVIT, *supra*, § 80. When the third party is an adversary, courts will not find duties owed solely on negligence principles. *See* Adams v. Chenowith, 349 So. 2d 230 (Fla. Dist. Ct. App. 1977) (buyer and seller); R. MALLEN & V. LEVIT, *supra*, § 17, at 156 n.84.

178. This all-inclusive attempt at definition is taken from R. MALLEN & V. LEVIT, *supra* note 17, § 251, at 318. As the authors note, there is no agreement on either the elements that together constitute the required standard of care for lawyers or the appropriate verbal expression of the test. *See also* Haynsworth, *supra* note 117, at 413-14 n.46. Mallen & Levit offer the following definitions:

> 1. [T]he correct standard to which the plaintiff is held in the performance of his professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.
> 2. The standard of care to be applied to an attorney in his relationship to his clients is the care, skill and diligence exercised by attorneys practicing in this community or locality.
> 3. Liability will be imposed for a want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise.

R. MALLEN & V. LEVIT, *supra* note 17, § 251, at 318. Haynsworth suggests that the standard found in section 299A of the *Restatement (Second) of Torts (1965)* is gaining general acceptance as the standard of competence required of lawyers to avoid sanctions for malpractice: "Unless he represents that he had greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Haynsworth, *supra* note 117, at 413 n.46. The "similar circumstances" rule is sometimes interpreted to mean that the lawyer need not exceed the level of practice in the local community, although the requirement of a uniform national standard appears to have gained acceptance. *See, e.g.*, Hansen v. Wightman, 14 Wash. App. 78, 90-91, 538 P.2d 1238, 1247 (1975). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, § 254. Courts have been slow to acknowledge that more skill or knowledge can be required even of a lawyer claiming to be an expert in a given legal area. In particular, no court has held a lawyer to any exceptional standard of skill or knowledge based on negotiation expertise.

179. *See* RESTATEMENT (SECOND) TORTS § 299A comments a, b.

180. *See* R. MALLEN & V. LEVIT, *supra* note 17, § 252; Wade, *supra* note 171, at 762 (1959).

181. R. MALLEN & V. LEVIT, *supra* note 17, § 252; *see also* Haynsworth, *supra* note 117, at 417.

182. ABA MODEL RULES, *supra* note 6, Rules 1.1, 1.3.

183. *E.g.*, United States v. Hinton, 613 F.2d 769 (5th Cir. 1979); *see also* R. MALLEN & V. LEVIT, *supra* note 17, § 252; Haynsworth, *supra* note 117, at 430-33.

184. R. MALLEN & V. LEVIT, *supra* note 17, § 250; Haynsworth, *supra* note 117, at 431-32.

185. *E.g.*, Dillard Smith Constr. Co. v. Greene, 377 So. 2d 841 (Fla. Dist. Ct. App. 1976) (lawyer failed to read contract before advising client).

186. *E.g.*, Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980) (lawyer's failure to interview key

not, however, liable for a good faith mistake on an issue of law, or well-informed error in judgment.[187] In addition, lawyers who hold themselves out as specialists must exercise the higher level of knowledge and skill of specialists in that field.[188] General practitioners may be liable for malpractice for failing to refer a client to, or consult with, a specialist on issues in a specialized field.[189]

Finally, a lawyer with adequate general knowledge, thoroughly prepared on the specifics of the task and acting in a skillful manner will nevertheless be liable for malpractice for neglecting the client's matter, that is, failing to act with reasonable diligence and promptness.[190]

3. *Causation and damages*

A plaintiff in a legal malpractice action must also prove actual cause, proximate cause, and damage.[191] Proof of these elements is "a major stumbling block" in malpractice actions.[192] Although damage issues are often

---

factual witnesses in personal injury litigation formed basis for malpractice claim); Palmer v. Nissen, 256 F. Supp. 497 (S.D. Me. 1966) (lawyer drafted ambiguous sales contract and deed); Heyer v. Flagg, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969) (lawyer failed to draft will to avoid claim by post-testamentary spouse).

187. *E.g.*, Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283 (M.D. La. 1973) (tax advice on unsettled legal issue), *aff'd per curiam*, 500 F.2d 1131 (5th Cir. 1954); Davis v. Damrell, 119 Cal. App. 3d 883, 174 Cal. Rptr. 257 (1981) (lawyer not liable for failure to correctly anticipate ultimate resolution of unsettled legal principle); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954) (lawyer not liable for following established service of process practice or anticipating successful court challenge to the practice). Conversely, a lawyer may be liable for damages caused by an uninformed decision even if the lawyer's judgment ultimately proves correct. Aloy v. Mash, 38 Cal. 3d 413, 696 P.2d 656, 212 Cal. Rptr. 162 (1985) (community property interest in military pension).

188. *E.g.*, Walker v. Bangs, 92 Wash. 2d 854, 601 P.2d 1279 (1979) (federal maritime personal injury claims are a specialty area). The most well-known case in this area is probably Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975). Plaintiffs were referred to Williams, a specialist in maritime law, by their regular counsel, who was concerned about possible liens against a vessel plaintiffs wished to buy. Williams arranged the transfer of title, but failed to inform plaintiffs of a commercial use limitation that made the vessel unfit for their purposes. The California appellate court concluded that "a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." *Id.* at 810, 121 Cal. Rptr. at 199. Nevertheless, the court upheld the judgment for defendant Williams because plaintiffs failed to offer any expert testimony to meet their burden of proof on the standard of care required of a reasonably prudent expert in admiralty law. *Id.* at 810-11, 121 Cal. Rptr. at 200. *See generally* R. MALLEN & V. LEVIT, *supra* note 17, § 253; Haynsworth, *supra* note 117, at 423-25, 431-32.

189. Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979) (drafting of "Clifford trust" required use of tax law specialist). A lawyer may also be negligent for not anticipating legal problems beyond the scope of the client's current representation. Daugherty v. Runner, 581 S.W.2d 12, 17 (Ky. Ct. App. 1978).

190. Missing litigation deadlines is the greatest single source of malpractice claims. Bridgman, *Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C.L. REV. 213, 223 n.26 (1979).

191. R. MALLEN & V. LEVIT, *supra* note 17, § 102.

192. Bridgman, *supra* note 190, at 234. In addition, many courts require the injured party to prove the lawyer's failure to use due care, even in the clearest cases, through expert testimony. In Dorf v. Relles, 355 F.2d 493 (7th Cir. 1966), the client sued his former lawyer in the client's personal injury action that had resulted in a defense verdict. In the ensuing malpractice action, the former client claimed that his lawyer failed to inform him of a $75,000 settlement offer made by defendant's counsel. Although the jury returned a verdict for the former client, the judgment was reversed on appeal. Apparently, following Illinois law, the federal appeals court held expert testimony was required to show that the lawyer failed to exercise the requisite degree of skill and care. Since none had been offered, plaintiff could not recover. *See also* Lentine v. Fringe Employee Plans, Inc., 611 F.2d 474 (3d Cir. 1979); Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975) (expert

straightforward,[193] in litigation malpractice it often means determining the recovery for the plaintiff had there been no negligence. Thus, courts hold a trial within a trial: the underlying action is itself tried to determine its probable outcome.[194] Strict adherence to these proof of damage requirements poses a major obstacle to successful recovery for a lawyer's negligent negotiation conduct. Determining what effect better preparation, adherence to the client's instructions, or adequate negotiation skill would have had on the outcome of negotiations is often highly speculative.[195] At the very least, if the plaintiff makes a prima facie showing, through expert testimony, that the actual negotiation outcome was favorable to plaintiff than reasonably expected and that the lawyer's conduct fell below the prevailing standard for lawyer-negotiators, the burden should shift to the lawyer-defendant to show that the negligence could not have caused the disparity.[196]

Given these problems of proof, there are few reported cases of malpractice claims involving lawyers' negotiations and even fewer successful ones. Mallen and Levit identify five areas in which clients have made claims against their lawyers for negligence concerning settlement of litigation:

---

testimony required to show specialist's standard of care). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 664-668. At least in jury cases, however, there is an exception when the negligence claimed is within the common knowledge of lay persons. Hansen v. Wightman, 14 Wash. App. 78, 93, 538 P.2d 1238, 1249 (1975).

193. If the lawyer fails to protect the client's interest through a proper security, the damages should equal the value a proper security intent would yield. This was the situation presented in Olfe v. Gordon, 93 Wis. 2d 173, 286 N.W.2d 573 (1980).

194. *See, e.g.*, Jenkins v. St. Paul Fire & Martine Ins. Co., 422 So. 2d 1109 (La. 1982) (lawyers conceded that negligence in failing to file timely action caused no damage when evidence in underlying action established plaintiff's contributory negligence would have barred any recovery) (dissenting judge argued for abandonment of "case within a case" requirement). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 650, 656-672. Professor Bridgman urges abandoning the rule as an absolute requirement and using "reasonable settlement value" to measure damages in most litigation malpractice actions. Bridgman, *supra* note 190, at 234-36.

195. Hence a lawyer who failed utterly to communicate with a client regarding the subject matter of the representation will not be liable for malpractice in the absence of proof that the failure damaged the client in a monetary sense. *See* R. MALLEN & V. LEVIT, *supra* note 17, §§ 302, 307, 580, 650, 656-657, 656-666. As Mallen and Levit point out, some of this difficulty can be overcome if the court hearing the malpractice claims allows the use of expert testimony to prove what the underlying action should have settled for—the "reasonable settlement value." *E.g.*, Jiffy Foods Corp. v. Hartford Accident & Indem., 331 F. Supp. 159 (W.D. Pa. 1971); Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781 (1974) (dicta). Such use of expert testimony remains controversial and may be excluded as too speculative. R. MALLEN & V. LEVIT, *supra*, § 666; Bridgman, *supra* note 190, at 235-36.

196. As yet, no published opinion has been found adopting such a view. However, some courts allow plaintiffs to use damage estimates in place of more positive proof when the lawyer's misconduct has made such proof difficult or impossible. Bernard v. Walkup, 272 Cal. App. 2d 595, 606, 77 Cal. Rptr. 554, 551 (1969) (lawyer failed to file plaintiff's action before limitations period expired); *cf.* Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (approving approximate jury damage award in malpractice action). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, § 302.

Eventually a different damage standard altogether will be needed since much lawyer conduct below the negligence standard cannot be linked to quantifiable monetary loss. But if lawyer negligence is shown, some recovery ought to be available for the plaintiff—either forfeiture, reduction in fees, or nominal damage based upon breach of fiduciary duty notions since the lawyer has not faithfully discharged the duties owed the client. *See* Clark v. Millsap, 197 Cal. 765, 242 P. 918 (1926); Goldstein v. Lees, 46 Cal. App. 3d 614, 618, 120 Cal. Rptr. 253, 255 (1975); R. MALLEN & V. LEVIT, *supra* note 17, §§ 9, 132, 165; *Developments*, *supra* note 107, at 1493-96; *cf.* Moses v. McGarvey, 614 P.2d 1363, 1372 (Alaska 1980) (disqualified attorney cannot receive fees from either party with conflicting interests).

(1) claims that lawyers settled to avoid liability for their negligence in handling the matter; (2) negligence in recommending or handling the settlement; (3) failure to advise or accept a settlement offer; (4) making a settlement without the client's consent; and (5) negligence in failing to settle.[197] Of these, only the failure to advise of or accept a settlement offer and making an unauthorized settlement have had any success in court.[198]

The contract and agency law principles outlined in the first part of this Article are the primary source of negotiator liability for unauthorized settlements. This means that negligence-based malpractice standards alone cannot bear the entire regulatory burden in lawyers' negotiations. The increasing incorporation of legal ethical standards in the duties of care owed by lawyers to their clients and third parties will make the malpractice action a more effective regulatory tool. But its effectiveness in regulating lawyers as negotiators largely depends upon the extent to which it in turn incorporates the more basic limitations on bargaining conduct found in contract and tort law.

The next section attempts to bring these contract, agency, tort, and legal ethics sources together to fashion a preliminary regulatory framework for lawyers' negotiations. While this framework does not purport to solve all the ethical-tactical dilemmas facing the lawyer-negotiator, it will provide an approach for the conscientious lawyer looking for the "law" of negotiation.

III. A FRAMEWORK FOR THE REGULATION OF LAWYERS' NEGOTIATIONS

In establishing a framework for the regulation of lawyers' negotiations, each of the subject matter areas considered earlier—agency, contract, and tort law, legal ethics, and legal malpractice—has a significant place, although its relative importance varies with the context. In some instances, deviating from the regulatory framework exposes the lawyer to civil liability; in other cases, to professional discipline. Sometimes the only remedy is to void any agreement that results from violations of these negotiation rules. Regardless of the remedy, regulation of the lawyer-negotiator occurs in two major areas: the relationship between the lawyer and the client and the relationship between the lawyer and others, including adversaries. As a negotiator, a lawyer faces a most difficult task. She must attempt to achieve a result that is both advantageous to the client and consistent with the rules regulating conduct toward the other participants.

A. *Lawyer and Client*

In defining the parameters of the lawyer-client relationship in the negotiation context, contract and agency law rules are particularly important.

197. R. MALLEN & V. LEVIT, *supra* note 17, § 580.

198. *Id.* The failure to advise of or accept a settlement offer largely occurs when an insurer assigns counsel to defend an action. Although frequently involving lawyers as negotiators, insurance company bad faith litigation is most strongly affected by substantive policies extrinsic to the general regulation of lawyers' negotiations and cannot be relied upon as a source of regulatory models. *See supra* note 40 and accompanying text.

These general rules should be reinforced by the doctrines of legal malpractice, tort law, and the profession's ethical rules. By synthesizing all these bodies of law, several obligations can be identified as the cornerstones of the law of lawyers' negotiations: (1) the lawyer-negotiator's duty to fulfill the contractual obligations found in the parties' agreement establishing the relationship; (2) the lawyer-negotiator's duty to act within the authority granted by the client and to obey the client's reasonable directions; (3) the lawyer-negotiator's duty to act with due skill, care, and diligence; and (4) the lawyer-negotiator's duty to conduct negotiations with respect for the client.

1. *Duty to fulfill contractual obligations*

The *Restatement (Second) of Agency* suggests that the agent's first duty is to fulfill the contractual obligations found in the agreement establishing the relationship.[199] Thus, a lawyer-negotiator must perform all the specific tasks agreed to in the attorney-client retainer agreement and carry out any other express promises made to the client.[200]

The malpractice action for breach of contract provides the substantive control on lawyer conduct in this area. For example, in *Bernard v. Walkup*,[201] the lawyer and client entered into a contingent fee agreement in which the lawyer agreed to "commence and prosecute" the client's claim and to "do all things necessary to prosecute said claim." The lawyer did not file suit, and the client's claim was eventually barred by the statute of limitations. The court upheld the client's breach of contract claim against the lawyer, finding the lawyer failed to exercise the skill necessary to satisfy the negligence standard.[202]

2. *Duty to act within authority and obey client instructions*

The lawyer's duty to act only within the granted authority during negotiations is well-developed in both general agency law and under professional ethics. For example, agency law provides that, absent express authority, a lawyer has no authority to negotiate a compromise or settlement of a claim or accept an agreement simply by virtue of employment.[203] However, the lawyer's freedom to act on behalf of the client is enlarged by the agency concepts of implied and inherent authority. Thus, in agency law language, the lawyer has implied authority to direct the means of representation and inherent authority to resolve any emergencies that affect the objectives of

199. *See* RESTATEMENT (SECOND) AGENCY introductory note to ch. 13, §§ 376-377.

200. *See* Olfe v. Gordon, 93 Wis. 2d 173, 286 N.W.2d 573 (1980) (property sale agreement; lawyer failed to secure promised first mortgage as security); *cf.* Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918) (lawyer failed to carry out promise to file collection action as promptly as possible). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 103-106.

201. 272 Cal. App. 2d 595, 77 Cal. Rptr. 544 (1969).

202. *Id.* at 602-04, 77 Cal. Rptr. at 548-50; *cf.* Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918) (lawyer disregarded client's instruction to press litigation to collect note and adopted deliberate strategy of delay resulting in dismissal of the action for lack of prosecution; lawyer liable for disobedience to client instructions).

203. *E.g.*, Nellis v. Massey, 108 Cal. App. 2d 724, 239 P.2d 509 (1952) (no authority to bind client to real property sales agreement without specific client authorization or approval). *See generally* Ashworth v. Hawkins, 248 Ark. 567, 571, 452 S.W.2d 838, 841 (1970); Lyon v. Hires, 91 Md. 411, 421, 46 A. 985, 987 (1900). *See also, supra* notes 37-39, 50 and accompanying text.

representation. However, absent any express authority to the contrary, only the client can delineate the objectives of representation. While agency law defines these concepts,[204] ethical standards provide a complementary source for a law of negotiations specifically applicable to lawyers.

Considerations of procedural efficiency and their specialized technical competence qualify litigating lawyers to make spontaneous tactical decisions during pretrial and trial proceedings. The ethical rules thus grant litigating lawyers broad discretionary authority to make such decisions.[205] Likewise, true tactical decisions requiring prompt action during negotiations and negotiation emergencies properly rest with the lawyer-negotiator under the rules of professional ethics. The few court decisions support this approach.[206]

The parameters of the lawyer's authority also define the range of the lawyer's independent decisionmaking power. When acting within the authority controlled and defined by the client, the lawyer has a duty to obey all reasonable client instructions. According to agency law, the client (principal) always has the right of control.[207] The lawyer (agent) owes a general duty of fidelity to the client's objectives and the specific duty to obey specific instructions of the client, even as to the means for achieving those objectives.[208]

Outside the context of litigation, there are relatively few decided cases in which a lawyer acted contrary to the client's specific directions regarding matters other than the power to agree to a settlement. However, those cases suggest a rule in line with the agency law duty to obey all reasonable directions.[209]

---

204. *See supra* notes 35-39, 44-48 and accompanying text.

205. If the lawyer and client disagree sharply over approaches (e.g., the client demands adversarial negotiations, but the lawyer insists on a problem-solving approach), this is something that ought to be resolved at the outset of the representation, allowing lawyer and client to terminate the representation if they cannot accommodate each other's views. *See* Menkel-Meadow, *Problem Solving*, *supra* note 4, at 783, 813-16, suggesting that such disagreements may occur as the advantages of problem-solving negotiation become more obvious to lawyers.

206. *E.g.*, Sockolof v. Eden Point N. Condominium Ass'n, 421 So. 2d 716 (Fla. Dist. Ct. App. 1982) (emergency authority allowed lawyer to settle without express client approval when immediate action was necessary on eve of trial); RESTATEMENT (SECOND) AGENCY §§ 35, 47. *Cf.* Hayes v. Eagle-Picher Indus., 513 F.2d 892, 893 (10th Cir. 1975) (dictum).

207. RESTATEMENT (SECOND) AGENCY § 14. The pure agency principle of control by the client is stronger than that of Rule 1.2(a) of the Model Rules. Rule 1.2(a) requires that "a lawyer shall abide by a client's decisions concerning the objectives of representation." The lawyer controls the means for pursuing the client's objectives; although the rule directs the lawyer to "consult with the client as to the means." ABA MODEL RULES, *supra* note 6, Rule 1.2(a).

208. *See* RESTATEMENT (SECOND) AGENCY §§ 33-34, 383, 385.

209. *E.g.*, Olfe v. Gordon, 93 Wis. 2d 173, 286 N.W.2d 573 (1980). In *Olfe v. Gordon* the client, Olfe, a 62-year-old widow, retained the lawyer Gordon to arrange for the sale of real property to a buyer for $87,000. Gordon was to represent Olfe in completing the sale arrangements, and she specifically instructed Gordon to obtain a first mortgage to secure any unpaid portion of the purchase price. At Gordon's request, Olfe signed an offer under which her security interest was second to a construction loan on the property. The purchaser defaulted, and in the foreclosure proceedings Olfe lost over $27,000. Olfe then sued her former lawyer for negligence. Following a trial court judgment for the lawyer-defendant, the Wisconsin Supreme Court reversed and remanded for a new trial. Applying agency law rules, the court held expert testimony was not required when the lawyer's negligence is the failure to follow the client's specific instructions. *Id.* at 181-82, 286 N.W.2d at 578. The fact that Olfe's attorney properly used his legal expertise and prepared valid documents complying with the applicable requirements of Wisconsin law was held no defense to her action. *Id.* at 182-90, 286 N.W.2d at 577-81. This rule ordinarily applies even when the instructions relate to the conduct of litigation. *See* Lally v. Kuster, 177 Cal. 783, 786, 171 P. 961, 962 (1918)

Insisting on agency law's directive to the lawyer-agent to "obey all reasonable directions" regarding the "manner of performing a service" may limit the lawyer-negotiator's freedom of action, but it represents neither a drastic nor undesirable change in the legal regulation of negotiation. Modern agency law recognizes the agent's privilege to protect his own or another's interest,[210] and modifies the rules of fidelity to the principal for illegal objectives.[211] An agent is under no duty to perform acts that are illegal, unethical, or unreasonable in light of prevailing professional customs and ethics.[212] Thus, the often mentioned special responsibilities of the lawyer to the court and as an independent professional[213] remain valid and prevent the lawyer from becoming a mere puppet of the client.

3. *Duty to provide the client with relevant information*

Complete and accurate information is essential to informed decisionmaking.[214] In this area, agency law and rules of professional ethics coalesce to require that lawyers keep their clients fully informed of all facts that relate to the subject matter of their representation and that are material to the protection of the client's interest.[215] While agency law establishes this general maxim, rules of legal ethics establish the types of information that must be conveyed. In negotiations, the lawyer's duty to keep the client informed has three different aspects. First, the lawyer has the unquestioned obligation to provide the client with the information needed to make those decisions allocated to the client. Second, there is an obligation to disclose information affecting the quality of the lawyer's representation, especially if there is a potential conflict of interest. Third, the lawyer has an obligation, related to the duty of respect, to keep the client fully informed of the progress of the representation.

a. Information relevant to client decisionmaking

Since the clearest example of a decision allocated to the client is whether to make or accept a settlement or plea bargain, it is generally acknowledged that lawyers must inform their clients of settlement offers or plea bargain suggestions.[216] The trend among commentators clearly favors

(lawyer liable for loss caused by dismissal of collection action for lack of prosecution; client repeatedly urged lawyer to pursue litigation as quickly as possible); Trustees of Schools v. Schroeder, 2 Ill. App. 3d 1009, 1012-13, 278 N.E.2d 431, 433 (1971) (lawyers had agreed to raise all possible issues on appeal; no damage shown; dicta); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1302 (1963).

210. RESTATEMENT (SECOND) AGENCY § 385(2).

211. *Id.* § 34(d) and comment g.

212. *Id.* § 385 & comments a-6; W. SELL, *supra* note 28, § 129; *e.g.*, Ford v. Wisconsin Real Estate Examining Bd., 48 Wis. 2d 91, 179 N.W.2d 786 (1970).

213. W. FISHER, WHAT EVERY LAWYER KNOWS 4-13 (1974); ABA MODEL RULES, *supra* note 6, Rules 1.2(b)-1.2(e), 1.16.

214. *Spiegel, The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RESEARCH J. 1003, 1005. This idea has been the basis of the medical informed consent doctrine as well. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 786-88 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

215. F. MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 1207, 1353 (1889); RESTATEMENT (SECOND) AGENCY § 381; ABA MODEL RULES, *supra* note 6, Rule 1.4.

216. *See, e.g.*, ABA Comm. on Professional Ethics and Grievances, Formal Op. 326 (1970) (law-

adopting an informed consent standard for all decisions regularly allocated to clients.[217] This standard would require even more communication between lawyer-negotiator and client than current settlement offer cases require. To obtain an informed consent, the lawyer-negotiator must inform the client not only of settlement offers or plea bargain proposals;[218] the lawyer must also provide the client with all the material facts necessary to make an informed decision about whether to accept or reject those proposals. The federal court for the Southern District of New York considered the issue of what information is material in *Spector v. Mermelstein*,[219] defining material-

---

yer must inform client of every offer from opposing party); Informal Op. 1373 (1976) (criminal defense lawyer must communicate plea proposal to client). *See generally* ABA MODEL RULES, *supra* note 6, Rule 1.4 comment (surprisingly, final version of this Rule retreats from Discussion Draft Rule 1.4, which was more explicit in requiring full disclosure); ABA MODEL CODE, *supra* note 6, EC 7-7, 7-8. California Rule of Professional Conduct 5-105 requires lawyers to "promptly communicate to the [lawyer's] client all amounts, terms and conditions of any written offer of settlement made by or on behalf of an opposing party." Many decisions in this area involve defendants represented by lawyers provided by their liability insurers and thus contain strong conflict of interest elements. Nevertheless, courts appear willing to impose across-the-board rules when confronted by failures to inform clients of settlement offers. *See* Joos v. Auto-Owners Insurance Co., 94 Mich. App. 419, 288 N.W.2d 443 (1979). In the underlying litigation, Joos and others sued Avery for injuries they received in an automobile accident with a car driven by Avery. The insurer, Auto-Owners Insurance Co., was also sued. Avery was represented by a lawyer, Drillock, retained by the insurer. All plaintiffs except Joos settled before trial. Unknown to Avery, Joos also offered to settle before trial within Avery's insurance limits. Drillock never informed Avery of these offers until the first day of trial. When Avery urged Drillock to settle, he first told her he lacked authority to do so for the amount demanded, and when he obtained authority to settle on the second trial day, he refused to because he thought he could "beat the case."

Following a verdict for plaintiff in excess of the policy limits, Avery assigned a portion of her claim to Joos and they filed a malpractice action against Drillock and Auto-Owners. The trial court dismissed plaintiffs' action because they failed to introduce expert testimony on the lawyer's standard of care owed to his client. The Michigan appellate court reversed, holding expert testimony was not required under the circumstances and that "an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle." *Id.* at 423, 288 N.W.2d at 445.

217. *See* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); Martyn, *supra* note 147; L. PATTERSON, *supra* note 145, § 2.04; D. ROSENTHAL, *supra* note 147; Spiegel, *supra* note 214; Spiegel, *supra* note 16; Note, *Balancing Competing Discovery Interests in the Context of the Attorney-Client Relationship: A Trilemma*, 56 S. CAL. L. REV. 1115, 1125-31 (1983). As this last student Note points out, the recently adopted Model Rules 1.2 and 1.4 are heavily flavored with the rhetoric of informed consent and greater client participation in lawyer-client decisionmaking. *See also* ABA MODEL RULES, *supra* note 6, Legal Background to Model Rules 1.2, 1.4. Earlier versions of these Rules were even stronger in their acceptance of client decisionmaking under informed consent. *See* ABA MODEL RULES (Discussion Draft), *supra* note 10, Rules 1.3, 1.4, 4.1; *see also* Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966) (malpractice claim based partly on failure to transmit settlement offers rejected on the ground that expert testimony was required to show the standard of lawyer care and its breach); Odom v. Hilton, 105 Ga. App. 286, 124 S.E.2d 415 (1962) (not negligence to fail to convey a settlement offer made to the named plaintiff to the real party in interest; court refused to rule generally there is a duty to convey all settlement offers made during litigation). Surprisingly, even the simple rule that clients must be informed of all settlement offers has gained only grudging acceptance by the courts.

218. *E.g.*, United States v. Bower, 517 F. Supp. 666 (W.D. Pa. 1975); People v. Ferguson, 90 Ill. App. 3d 416, 413 N.E.2d 135 (1980).

219. 361 F. Supp. 30 (S.D.N.Y. 1972). Mermelstein negotiated on behalf of his client Spector in connection with two loans totaling $250,000 made to the OCM Corporation, owner of a hotel and casino operated by the Riverside Casino Corporation in Reno, Nevada. Independently, Mermelstein knew that both corporations were financially unstable. In the course of representing Spector, Mermelstein gained additional information adding to the poor financial picture, and he learned of major discrepancies in the amount of money OCM needed and the questionable status of the security given for the loan. None of this information was relayed to his client Spector. In the eventual bankruptcy of the casino, Spector lost the entire $250,000. Spector sued his attorney for negligence and breach of fiduciary duties.

ity as: "Material facts are those which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct."[220] Not only does the lawyer-negotiator breach a fiduciary duty to the client by failing to inform of all material facts, but the lawyer is also "liable for the client's losses suffered as a result of the action taken without benefit of the undisclosed material facts."[221]

For the negotiating lawyer the duty to provide information is greater than for the litigating lawyer. Because no immediate litigation decision need be made, there is additional time available to weigh proposals and possible counterproposals and to consider strategic choices. This imports a duty to give the client a more complete review of information.[222] The significant counseling and advising function involved in preparing for and conducting negotiations also requires greater disclosure. Thus, in *Ramp v. St. Paul Fire & Marine Insurance Co.*,[223] two lawyers and their insurer were found liable to their former clients for failing fully to advise them of the effect of a compromise agreement ending a will contest negotiated on their behalf by the lawyers. As drafted, the agreement apparently waived statutory rights to the clients' father's property and ended the will contest. Only with substantial later litigation was the waiver voided, the costs of which were awarded to the former clients as damages.

The client's right to make decisions regarding the representation logically requires that the lawyer provide the client with sufficient information to make those decisions.[224] The courts have developed the materiality standard, an objective test based on the client's perspective, to define the lawyer's obligation to provide information. Although the materiality standard does not resolve the prior question of allocating decisions between lawyer and client,[225] when the client has the power of decision, the test requires the client be given all the information that might affect the decision of a reasonable client.

b. Information relevant to the quality and progress of representation

The lawyer-negotiator has a continuing duty to inform the client of any relevant facts that may affect the quality of representation. Agency law defines this as a duty of loyalty: the negotiator-agent must act solely for the benefit of the client-principal.[226] Thus, the client must be informed when

220. *Id.* at 39-40.

221. *Id.* There were also suggestions in the case, as there are in many of the "information" cases, that Mermelstein may have been representing the borrower, OCM, as well, thus creating an undisclosed conflict of interest. The court also held that Spector probably would not have made the loan if he had received complete information from Mermelstein and that Spector's loss was not a result of his later further entanglements with the casino, but would have occurred in any case. *Id.* at 40-41. On this latter point alone, Mermelstein appealed to the Second Circuit, which affirmed the trial court's judgment. 485 F.2d 474 (2d Cir. 1973).

222. *See* ABA MODEL RULES, *supra* note 6, Rule 1.4 comment.

223. 263 La. 774, 269 So. 2d 239 (1972).

224. *See* ABA MODEL RULES, *supra* note 6, Rule 1.4(b) and comment.

225. *See* Spiegel, *supra* note 16, at 67-70. This standard approximates the current medical informed consent doctrine. *Id.*

226. *See supra* notes 40-43 and accompanying text.

the lawyer may be unable to give undivided loyalty to the representation.[227] Ethical standards add substance to the duty of loyalty, requiring disclosure by the lawyer and defining the extent of appropriate disclosure.[228] Case law also provides several standards for evaluating what information must be given to a client. For example, conflict of interest situations regularly trigger disclosure requirements. The negotiation rules prohibiting lawyers from representing conflicting interests differ little from the relatively well-developed principles that generally apply to lawyers.[229] Lawyers as negotiators are most likely to encounter conflicts between their own interests and those of their clients[230] and conflicts arising from the representation of more than one party.

When a lawyer negotiates on behalf of more than one party and there is some potential for a conflict of interest, the lawyer "must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable [the] client to make free and intelligent decisions regarding the subject matter of the representation."[231] Thus, disclosure is required whenever there is a potential conflict between the client's interests and the lawyer's personal interests, or between the client's interests and the interests of the lawyer's former or current clients.[232] Lawyers must disclose "all the facts and circumstances" necessary for the client to decide whether to risk continued representation by a lawyer with conflicting interests. The adequacy of disclosure is measured by an objective standard—what a lawyer of ordinary skill and capacity would find necessary to disclose—from the client's viewpoint. This standard is articulated in the cases as part of lawyer competence. Agency law uses a purer objective standard: "facts which [the agent] knows or should know would reasonably affect the [principal's] judgment."[233] The results appear consistent with either test. It is insufficient for the lawyer alone to conclude there is no actual conflict.[234]

The conflict of interest cases also provide support for a more generalized obligation to keep the client informed about the course of negotiations

227. *See* R. MALLEN & V. LEVIT, *supra* note 17, § 125; Spiegel, *supra* note 16, at 68; RESTATEMENT (SECOND) AGENCY § 381 comment d.

228. *See supra* note 132-34 and accompanying text.

229. *See generally Developments*, *supra* note 107, for an exhaustive treatment of this area.

230. *See* ABA MODEL CODE, *supra* note 6, DR 5-101(A), DR 5-104; ABA MODEL RULES, *supra* note 6, Rule 1.8; R. MALLEN & V. LEVIT, *supra* note 17, §§ 128-33; Aronson, *Conflicts of Interest*, 52 WASH. L. REV. 807, 815-20 (1977); *Developments*, *supra* note 107, at 1286-88; *see also* Waldeck v. Marks, 328 So. 2d 490 (Fla. App. Dist. Ct. 1976); Howard v. Murray, 43 N.Y.2d 417, 372 N.E.2d 568, 401 N.Y.S.2d 781 (1977); Jacobsen v. National Bank, 65 Ill. App. 3d 455, 382 N.E.2d 277 (1978) (real estate sales transactions with clients upheld on lawyer's proof transactions were fair). Lawyers negotiate with their clients at their peril. Any advantage a lawyer gains from a transaction with a client is presumed to result from undue influence and is voidable by the client unless the lawyer can prove fairness in the arrangement and full compliance with the lawyer's fiduciary obligations.

231. Ishmael v. Millington, 241 Cal. App. 2d 520, 528, 50 Cal. Rptr. 592, 597 (1966) (lawyer represented both husband and wife in negotiating property settlement in divorce action); *see also* Anderson v. Eaton, 211 Cal. 113, 116, 293 P. 788, 789 (1930); Lysick v. Walcom, 258 Cal. App. 2d 136, 151, 65 Cal. Rptr. 406, 416 (1968) (lawyer represented both defendant-insured and liability insurer in attempting to negotiate settlement of wrongful death action); Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958).

232. *See* R. MALLEN & V. LEVIT, *supra* note 17, § 125, at 219.

233. RESTATEMENT (SECOND) AGENCY § 392.

234. R. MALLEN & V. LEVIT, *supra* note 17, § 162, at 263.

and the representation. Again, agency and ethical rules unite in requiring the negotiator to inform the client about the progress of the representation.[235] Under this obligation, lawyers must disclose to their clients any information that could be useful to them in deciding the course of the representation.[236] But the obligation goes further, and includes a duty to respond to requests for information and to keep the client informed even of matters that do not involve client decisions.[237]

4. *Competent Representation: Duty to act with due care, skill and diligence*

As negotiators, lawyers are held to the usual standards of competent representation: sufficient legal knowledge and skill, thorough and adequate preparation, and efficiency.[238] Knowledge of the law—both general legal principles and specific statutory and decisional law—is as necessary to negotiation as any other type of representation. If the lawyer lacks the minimum general knowledge of the profession, the lawyer must do sufficient research to discover those general legal rules obtainable by standard research techniques.[239] The lawyer-negotiator must be familiar with the relevant facts applicable to the transaction.[240] If the negotiation includes matters in actual or potential litigation, the lawyer must also be familiar with the applicable rules of court.[241]

---

235. *E.g.*, Baker v. Humphrey, 101 U.S. 494, 500 (1897) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."); ABA MODEL RULES, *supra* note 6, Rule 1.4(a); F. MECHEM, *supra* note 215, § 1207.

236. *See* Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y.), *modified*, 485 F.2d 474 (2d Cir. 1972); Mageary v. Hoyt, 91 Ariz. 41, 369 P.2d 662 (1962); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill. 2d 201, 407 N.E.2d 47 (1980) (duty to disclose intent to settle; conflict of interest situation).

237. *E.g.*, Passanante v. Yormack, 138 N.J. Super. 233, 350 A.2d 497 (1975) (duty to inform clients of lawyer's failure to act immediately); *see also* Simmons v. State Bar, 2 Cal. 3d 719, 470 P.2d 352, 87 Cal. Rptr. 368 (1970) (disciplinary proceeding); State v. Martindale, 215 Kan. 667, 527 P.2d 703 (1974) (disciplinary proceeding).

238. *See supra* notes 105-20 and accompanying text; *cf.* Strickland v. Washington, 104 S. Ct. 2052 (1984) (standards for effective assistance of counsel under sixth amendment).

239. *See, e.g.*, Smith v. Lewis, 13 Cal. 3d 349, 358-59, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975). In *Smith v. Lewis*, the court upheld a $100,000 malpractice verdict against a lawyer for, *inter alia*, failing to perform adequate research into the community character of retirement benefits. According to the court, "major authoritative reference works which attorneys routinely consult for a brief and reliable exposition of the law relevant to a specific problem" included A.L.R. annotations, *American Jurisprudence 2d, California Jurisprudence 2d, C.J.S.*, Witkin's *Summary of California Law*, and the *California Family Lawyer*, a publication of the Continuing Education of the Bar (C.E.B.). *Id.* at 356, 530 P.2d at 593, 118 Cal. Rptr. at 625; *see also* Wright v. Williams, 47 Cal. App. 3d 802, 809 n.2, 121 Cal. Rptr. 194, 199 n.2 (1975); Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 1, 9, 200 P.2d 7, 12 (1949).

240. Lawyers must make an independent factual investigation if required to gain sufficient factual information for competent representation. *E.g.*, Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962) (lawyer's failure to check title records to discover liens against real property not excused because such inquiry was not customary). This duty of factual inquiry includes asking the client for any undisclosed information. *See* Hansen v. Wightman, 14 Wash. App. 78, 90, 537 P.2d 1238, 1245 (1975). However, lawyers may limit their responsibility for factual inquiry by agreement with their clients if such a limited engagement is reasonable under the circumstances. *See* Franke v. Midwestern Okla. Dev. Auth., 428 F. Supp. 719 (W.D. Okla. 1976); Kurtenbach v. Tekippe, 260 N.W.2d 53 (Iowa 1977) (lawyer engaged for specific work for close corporation is not liable for failure to investigate improper stock sales). *See generally* Haynsworth, *supra* note 117, at 426-30.

241. *See* Sprangler v. Sellers, 5 F. 882 (C.C.S.D. Ohio 1881) (lawyer failed to move for new trial as required by statute as condition for appeal); Goodman & Mitchell v. Walker, 30 Ala. 482, 496

Despite the occasional claim that a lawyer retained to negotiate on the client's behalf is not bound by a lawyer's usual professional duties, but only a general negotiator's standard of care,[242] the better rule is that negotiation is a part of the lawyer's work as a lawyer. Lawyers do not shed their professional standards of care because cases and codes are not a part of the immediate subject of representation.[243] Thus lawyer-negotiators are subject to a dual standard. As lawyers, hired for and using their legal knowledge, training, and skill, they are subject to the usual standards of knowledge, skill, diligence, and prudence that generally apply to lawyers. And, as negotiators, they should be held to the general standard of care applied to nonlawyers who regularly negotiate for all aspects of the negotiation that do not involve specialized legal training. In short, lawyers should not receive any special exemption from the professional standard of care because they have been retained as negotiators.

In preparing for negotiations, a lawyer frequently must predict the potential outcome of litigation to give competent advice to the client considering settlement offers.[244] This forecast—itself a skill—may require making three separate predictions: how disputed factual issues will be resolved; how the trial and appellate courts will rule on unsettled legal issues; and how the trial judge will exercise discretion to decide issues at trial.[245] When the lawyer-negotiator lacks sufficient information to make these predictions, competent negotiating requires consulting other more experienced practitioners to assist in making these predictions.[246] If the lawyer exercises reasonable professional judgment in making these predictions, the lawyer will not be liable if they prove wrong.[247]

(1857); Siegel v. Kramis, 29 A.D.2d 477, 479, 288 N.Y.S.2d 831, 834 (1968); *cf.* United States v. DeCoster, 487 F.2d 1197, 1201-04 (D.C. Cir. 1973) (in a criminal case, counsel did not prepare, investigate or confer adequately with the client; court outlined duties comprising "reasonably competent assistance" of counsel); People v. Pope, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979).

242. *See* Ellenstein v. Herman Body Co., 23 N.J. 348, 354-56, 129 A.2d 268, 272-73 (1957) (lawyer successfully avoided judicial review of fee arrangement claiming he was retained only as a negotiator and not a lawyer in labor negotiations); *cf.* Smith v. Travelers Indem. Co., 343 F. Supp. 605 (M.D.N.C. 1972) (lawyer's malpractice insurance coverage does not cover losses to investor who relied on lawyer's investment advice because lawyer's training not in this field).

243. *Cf.* Golden Nuggett, Inc. v. Ham, 95 Nev. 45, 589 P.2d 173 (1979) (lawyer-director of corporation owed corporation duties of disclosure in both capacities).

244. *Cf.* ABA MODEL RULES, *supra* note 6, Rule 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations as well, such as moral, economic, social and political factors, that may be relevant to the client's situation."

245. *See* D. BINDER & S. PRICE, *supra* note 217, at 142-43.

246. *Id.* at 144; *see also* O'Neil v. Bergan, 452 A.2d 337, 340 (D.C. App. 1982) (suggesting that some lawyers have become negotiation specialists at least within large law firms); 2 CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL § 33.4 (1978) (evaluation for settlement) ("Part of a litigation attorney's function is to assess the level at which settlement would be more beneficial to the client than risking the result of a trial. The attorney will have to gather information by research, investigation, and discovery [to accurately assess] settlement value.").

247. *E.g.*, Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283 (M.D. La. 1973), *aff'd per curiam*, 500 F.2d 1131 (5th Cir. 1974).

5. *Respect in negotiations*

Finally, agency law imposes on agents a duty of good conduct toward their principals.[248] Although there are few cases addressing this issue that involve lawyers, at least one court has recognized the existence of a duty of general respect toward the client and has suggested a lawyer must withdraw if he cannot treat the client with dignity and respect in settlement negotiations.[249] The duty of respect is, in essence, an amalgamation of each of the duties outlined above. Thus, while the exact content of this duty for lawyer-negotiators is difficult to specify, ethical rules are useful as a guideline. At a minimum, respect requires the lawyer to abide by the client's decisions; to provide the client with material information; to keep the client informed; to provide competent representation; and to avoid conflicts of interest. It remains to be seen whether the more far-reaching agency law duty of good conduct will become part of a lawyer-negotiator's obligation requiring competent and respectful negotiation practice.[250]

B. *Lawyer and Third Parties*

Lawyer-negotiators most strongly believe that they operate outside of the usual substantive law restraints and that they do not risk personal liability for their bargaining conduct in their dealings with adversaries and other third parties.[251] This notion is mistaken. Although legal ethics do not regulate lawyers' negotiations in a way that ensures fairness to third parties, the principles and rules found in tort, contract, agency, and even criminal law are present at the negotiating table. In fact, these rules, particularly the law of fraud, provide more regulation than most lawyer-negotiators desire. Because of lawyers' widespread belief that they are unconstrained in third party dealings, it is most important to set out the rules that apply.

Agency rules affirm that agents are not relieved of liability merely because they are acting as agents. A lawyer-agent who acts for or with the client-principal is fully liable to injured third parties for criminal and tortious acts.[252]

Cases dealing with criminal activity, fraud, and misrepresentation by lawyers acting on their clients' behalf, both in negotiations and other legal roles, confirm the existence of a law regulating the negotiators' relations with third parties. A review of the existing case law reveals that the underlying regulatory framework actually approximates the fairness ideal advocated by critics of adversary-based legal ethics. This framework contains five major elements that provide a foundation for this aspect of negotiation regulation.

248. RESTATEMENT (SECOND) AGENCY § 380.

249. Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970).

250. The 1980 Model Rules draft suggested all negotiations be conducted "in a civil and forthright manner." ABA MODEL RULES (Discussion Draft), *supra* note 10, at 4, Negotiator (Introduction). Professor White criticized these as "matters of style, not of ethics," White, *supra* note 10, at 926 n.2, and they were dropped in the finally adopted Model Rules.

251. *See generally* G. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 38-42 (1978); Rubin, *supra* note 9, at 581, 585-86, 588; White, *supra* note 10.

252. RESTATEMENT (SECOND) AGENCY §§ 359A and comment a, 343 (agent who does an act otherwise a tort is not relieved of liability because agent is acting on principal's behalf unless exercising privilege).

In negotiating with adversaries and others, lawyers must: (1) refrain from criminal conduct; (2) refrain from coercive bargaining conduct; (3) refrain from making fraudulent misrepresentations; (4) use reasonable care to avoid foreseeable harm to other third parties; and (5) act in limited good faith.

1. *Avoiding criminal conduct*

When a lawyer engages in criminal conduct the third party primarily affected is society as a whole. Although the principals in a negotiation are certainly harmed by criminal action of the agent, all criminal statutes treat harm to the victim as an offense against society at large. Ethical standards serve a similar function. Third party actions are not authorized when an ethical standard is violated.[253] Rather, the offense is one to the profession, and disbarment is the appropriate remedy. Thus, in evaluating the lawyer's duty to avoid criminal conduct, ethical rules should provide the source of substantive law.

The legal profession's ethical rules prohibit lawyers from assisting clients in conduct the lawyer knows to be illegal and from knowingly engaging in other illegal conduct while representing clients.[254] When negotiating for or advising their clients, lawyers are subject to criminal liability if they become involved in criminal activities. Thus, lawyers are directly liable as principals if they violate criminal statutes. More likely, however, criminal liability will result from aiding and abetting or conspiring with clients in illegal activities.[255]

Cases in which the lawyers actively and personally assist their clients or act on their behalf in carrying out criminal activities are at one extreme. At the other extreme, lawyers may limit their involvement to advising clients of legal requirements without encouraging criminal conduct. This advising role is neither a criminal law violation, nor does it violate the profession's ethical rules.[256] Between these two extremes, there are few guidelines for

253. *See supra* notes 120-25 and accompanying text.

254. ABA MODEL CODE, *supra* note 6, DR 7-102(A)(7), (8); *see also* ABA MODEL RULES, *supra note* 6, Rules 1.2(d), 4.1(b).

255. *E.g.*, United States v. Joyce, 499 F.2d 9 (7th Cir. 1974). Sherre, an Illinois lawyer, and his three associates set up an Illinois land trust and affiliated corporation that turned out to be a scheme to defraud insurance companies and brokers placing insurance risks. Sherre and his associates were later convicted on several counts of federal mail fraud. Sherre's claim that he knew nothing of the misrepresentations and had simply performed legal work for the companies was rejected during his appeal on the criminal conviction. *Id.* at 21-22. In *In re* Sears, 71 N.J. 175, 364 A.2d 777 (1976), a prominent New Jersey lawyer and former legislator became involved with fugitive financier Robert Vesco, and, acting on his behalf, attempted to limit or improperly influence a Security and Exchange Commission (SEC) investigation into Vesco's business activities. The lawyer arranged delivery of an illegal campaign contribution in the 1972 election campaign and gave false testimony during the ensuing investigation. Eventually he admitted his criminal guilt but was granted immunity in exchange for his testimony in another criminal proceeding. As a result of the lawyer's activities he was suspended from practice for three years. *Id.* at 202, 364 A.2d at 789-91.

Lawyers' involvement on behalf of their clients can lead to more violent crimes as well. In Webb v. State, 580 P.2d 295 (Alaska 1978), Webb was the lawyer for Ladd. Ladd forced Rich to sign a power of attorney giving Webb control of all Rich's assets. Ladd then shot Rich to death. After the murder Webb had his secretary witness the power of attorney. Later Webb lied to the police about these events on several occasions. He was convicted of being an accessory after the fact to first-degree murder. *Id.*

256. *See* Hazard, *supra* note 22, at 671.

lawyers seeking to steer clear of potential liability other than the general criminal law rules governing anticipatory offenses and parties to crime.[257] Lawyers must be careful to avoid any direct involvement with client activities the lawyer knows or has reason to suspect may be criminal.[258] Other guidance comes from the contract and tort principles governing all negotiations and are dealt with in the following sections.

2. *Coercive bargaining conduct*

Contract law clearly provides that any negotiator's use of improper threats, including threats of violence, other forms of duress, and undue influence in bargaining, risks making the resulting agreement unenforceable at the option of the affected party.[259] However, prohibited conduct and tactics in the specific context of lawyer negotiations have received little attention from the courts. While agreements are routinely set aside on these grounds, the question of culpability of the lawyer who participated in the transaction is a separate issue. Absent outright fraud or criminal conduct, courts rarely expressly condemn lawyers' negotiating practices toward third parties.[260]

At one extreme are unquestionably improper tactics; most of these constitute criminal conduct. Bribery is obviously an inappropriate means to obtain a negotiated settlement.[261] This, of course, involves offering improper inducements. More frequently, lawyers have gotten into difficulty for using improper forms of coercion. Most of the reported cases involve threatening criminal prosecution against an opposing party unless the matter is resolved in favor of the lawyer's client.[262] In most cases, the lawyer was simply disciplined for violating ethical rules.[263] However, threatening criminal prosecu-

257. *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 58-66 (1972).

258. *See, e.g., In re* la Duca, 62 N.J. 133, 299 A.2d 405 (1973) (lawyer disbarred for attempting to negotiate a ransom, under the guise of a reward, for the return of goods stolen by his client).

259. *See supra* notes 66-78 and accompanying text.

260. Linscott v. State Farm Mut. Auto. Ins. Co., 368 A.2d 1161 (Me. 1977), is illustrative, although it does not directly involve a lawyer's tactics. Linscott, a Maine resident, was injured in an automobile accident in Virginia with a North Carolina resident. State Farm, representing the North Carolina resident, refused to make a reasonable settlement offer with plaintiff, intentionally seeking to exploit the geographic factors present. Plaintiff was seeking $18,000 within the $20,000 policy limits; State Farm offered $2500. Eventually plaintiff had to refer the matter to a Virginia attorney and within six weeks it was settled for $17,000. *Id.* at 1163. Plaintiff then sued State Farm on a variety of theories including duress. Upholding dismissal of the claim, the Maine court ruled that State Farm's refusal to make a reasonable settlement offer until suit was filed in Virginia "was a tactic legally open" to State Farm in the parties' adversary relationship. Delaying until suit was filed and exploiting plaintiff's economic and geographic difficulties to minimize the amount of a final settlement were all permissible and "recognized technique[s] of negotiating." *Id.* at 1164. The court also upheld dismissal of plaintiff's deceit, misrepresentation, and failure to negotiate in good faith claims. *Id.* at 1163-65.

261. Thus a lawyer cannot use bribery to obtain dismissal of criminal charges against his client. *E.g., In re* Farris, 340 Mo. 1206, 105 S.W.2d 921 (1937). Farris was suspended from practice for one year for attempting to bribe a justice of the peace and court clerk to dismiss grand larceny charges brought against his client.

262. *E.g., In re* Charles, 290 Or. 127, 618 P.2d 1281 (1980). Charles was reprimanded for threatening a former resident manager of his client with criminal prosecution in an attempt to negotiate settlement of their dispute over wages and commissions paid by the manager to his wife.

263. The Model Code specifically prohibits lawyers from "threaten[ing] to present criminal charges solely to obtain an advantage in a court matter." ABA MODEL CODE, *supra* note 6, DR 7-105(A). This specific provision is not included in the Model Rules, but the conduct would come within the prohibitions of Rule 3.1. *See, e.g.*, Lindenbaum v. State Bar, 26 Cal. 2d 573, 160 P.2d 9

tion can also lead to criminal conviction of the lawyer for extortion[264] and will invalidate any resulting agreement on the ground of duress.[265] Similarly, a lawyer cannot negotiate what is in effect a ransom demand for a client seeking a "reward" for the return of stolen property.[266]

This category of improper negotiation tactics also includes the use of statutorily proscribed, fraudulent means, a special category of misrepresentation in negotiation. Lawyers are regularly disciplined or exposed to liability for concealing client assets or arranging for their transfer to gain an advantage in negotiation. Prohibited lawyer conduct ranges from taking an active part as a participant in the concealment,[267] to performing the legal work necessary to carry out the transfers,[268] to "merely" advising the client to conceal assets.[269] Yet another species of prohibited fraud occurs when lawyers prepare documentation concealing the transaction's true illegal na-

---

(1945) (6 months suspension for threatening criminal prosecution against client's wife unless fee paid); Barton v. State Bar, 2 Cal. 2d 294, 40 P.2d 502 (1935) (lawyer disbarred for attempted extortion through threat of criminal prosecution for his private gain); *In re* Gelman, 230 A.D. 524, 245 N.Y.S. 416 (1930); *In re* Charles, 290 Or. 127, 618 P.2d 1281 (1980).

264. *E.g.*, People v. Beggs, 178 Cal. 79, 172 P. 152 (1918) (court affirmed lawyer's extorting conviction and rejected his claim he was simply making a good faith effort to collect a debt for his clients in case where lawyer for store owners who believed their employee, Da Rosa, was stealing goods from their store and had Da Rosa arrested and charged with petit larceny; lawyer learned Da Rosa had substantial money in his bank accounts; threatened to have Da Rosa sent to prison for seven to ten years unless he withdrew the money and turned it over to the lawyer).

265. *E.g.*, Slocum v. Nelson, 72 Cal. App. 2d 33, 163 P.2d 888 (1945) (court disallowed plaintiff's recovery on promissory note obtained by threats of criminal prosecution); Merchants Collection Agency v. Roantree, 37 Cal. App. 88, 173 P. 600 (1918) (same; plaintiff's predecessor obtained the promissory note from defendant by threatening to prosecute him for embezzlement growing out of a salary dispute); *cf.* Tiffany & Co. v. Spreckles, 202 Cal. 778, 262 P. 742 (1927) (court refused to enforce agreement to repay plaintiff for a pearl necklace obtained by plaintiff's wife but never paid for when the agreement, signed in England, was obtained by threats of wife's criminal prosecution). It makes no difference in these cases that the coerced party is in fact subject to criminal liability. The courts will not allow the use of such threats as a means of resolving civil disputes. *See* People v. Beggs, 178 Cal. 79, 84, 172 P. 152, 154 (1918).

These principles were applied to plea bargaining in MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970). *MacDonald* involved a habeas corpus petition. Defendant (petitioner) was arrested for driving while intoxicated. The prosecutor agreed to drop the criminal charge if defendant would stipulate that there was probable cause to arrest him, thereby eliminating the possibility that he could bring a civil suit for false arrest. Defendant refused to stipulate. He was then charged with and convicted of resisting arrest. The Ninth Circuit found that the prosecutor's conduct was improper and deprived defendant of his rights. The habeas corpus petition was granted.

As one commentator has noted, *Beggs*, as well as *MacDonald*, brings into question the current efforts to collect past due child support payments through the district attorney's office by the use of implicit or explicit threats of criminal prosecution for nonpayment. *See* Lee, *District Attorney Collection of Child Support: The Need for Reform*, 55 CAL. ST. B.J. 156 (1980).

266. *See In re* la Duca, 62 N.J. 133, 299 A.2d 405 (1973) (lawyer disbarred).

267. *E.g.*, Galbraith v. State Bar, 218 Cal. 329, 23 P.2d 291 (1933) (Galbraith arranged fictitious chattel mortgage and promissory note from client to him to prevent client's wife from obtaining or levying on property; court rejected Galbraith's defense that he was simply 'bluffing" or misleading adversary); Flordia Bar v. Beaver, 248 So. 2d 477 (Fla. 1971) (Beaver both counselled his client to conceal his assets to misrepresent his financial condition during divorce proceedings and assisted him by depositing the client's funds in the lawyer's trust account).

268. *E.g.*, *In re* Farris, 105 S.W.2d 921 (Mo. 1937) (lawyer prepared a deed of trust as part of a fraudulent conveyance plan by his client to avoid execution by client's insurer in dispute over alleged arson); *In re* De Pamphilis, 30 N.J. 470, 153 A.2d 680 (1959) (lawyer arranged property transfers to defraud client's creditors).

269. *E.g.*, Townsend v. State Bar, 32 Cal. 2d 592, 197 P.2d 326 (1948) (Townsend advised client to transfer property to defraud client's judgment creditor); Florida Bar v. Beaver, 248 So. 2d 477 (Fla. 1971).

ture, such as a usurious loan.[270] In these cases, the means employed violate civil or criminal provisions of the law.[271]

Apparently there are no cases in which a lawyer has been held liable to an adverse third party for overbearing bargaining practices without elements of fraud or criminal conduct.[272] Attempts to go beyond these restraints and inferentially regulate lawyers' negotiation conduct by prohibiting them from concluding agreements "that the lawyer knows or reasonably should know . . . would be held to be unconscionable as a matter of law"[273] have not been successful. This is just as well. Regulation of lawyers' unfair bargaining conduct should focus directly on that conduct.[274] Lawyers should not be held responsible to third parties for the substantive fairness of the result in the absence of unfair practices. Lawyers remain answerable to their clients if they negotiate agreements unenforceable in whole or in part.[275] The unconscionability doctrine now functions chiefly in an intangible manner, limiting the form of any final agreement to what may be judicially enforceable.[276]

---

270. *E.g.*, Bryant v. State Bar, 21 Cal. 2d 285, 131 P.2d 523 (1942) (Bryant prepared a purchase money loan and security arrangement to disguise the usurious nature of the transaction); *cf. In re* Giordano, 49 N.J. 210, 229 A.2d 524 (1967) (same, but transaction was to obtain loan to pay Giordano's fee). A related form of misconduct is the species of fraud on the court in which the lawyer prepares papers that knowingly circumvent residency requirements to obtain a quicker or easier divorce for a client. *See, e.g., In re* Feltman, 51 N.J. 27, 237 A.2d 473 (1968) (Alabama divorce for New Jersey resident); *In re* Rubin, 7 N.J. 507, 81 A.2d 776 (1951) (lawyer helped obtain fraudulent Florida divorce for his client).

271. *E.g.*, UNIF. FRAUDULENT CONVEYANCES ACT, 7A U.L.A. 161 (1978).

272. Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977) comes close. In *Newburger*, a lawyer and law firm were held liable to a former partner forced out of the partnership through a series of threats and unlawful conduct by the partners. The partners' law firm claimed it should not be held liable for actions that "went beyond the scope of [the lawyer's] honorable employment." *Id.* at 1080 (citing findings that one of the lawyers had manipulated settlement in bad faith; threatened claimants in bad faith; vilified claimant in complaint issuing false opinion letter, and aided breach of fiduciary duties).

273. ABA MODEL RULES (Discussion Draft), *supra* note 10, Rule 4.3. This language was dropped from the finally approved version of the Model Rules.

274. Professor Lowenthal has critically but sympathetically reviewed the proposed Rule. He concludes the Rule's requirement that a negotiator predict what a court will do in weighing the totality of circumstances to determine whether a contract provision is unconscionable as a matter of law is too vague and imprecise to be meaningful. Moreover, he argues, basing the standard on the Uniform Commercial Code (*see* U.C.C. § 2-302 (1972)) unnecessarily limits its applicability to commercial negotiations. Instead he proposes a standard drawn either to restrain competitive manipulation by lawyer-negotiators or one measured by the contract terms themselves. The standard he suggests would make unethical "the negotiation of a provision which the lawyer-negotiator recognizes as being *outside the range of acceptable agreements for experienced negotiators in the field in question.*" Lowenthal, *supra* note 4, at 102-05 (emphasis in original at 105). Thus, he is willing to accept some form of regulation based on the agreement's terms apart from negotiator behavior. Other commentators have recognized the danger that insuring a transaction's reasonableness will inevitably make the lawyer-negotiator a guarantor for all parties. *See* Hazard, *supra* note 10, at 194. On the other hand Judge Rubin and Professor Schwartz expressly endorse such an approach. Rubin, *supra* note 9, at 591-92; Schwartz, *supra* note 4, at 679-90.

275. The client may be able to claim that her lawyer, who negotiated an agreement so one-sided that a court refuses to enforce it, has not acted with the skill required of a reasonably competent lawyer. Thus the client may have a negligence-malpractice claim against the lawyer. *See supra* notes 183-90, 238-43 and accompanying text.

276. The case settlement agreements in criminal cases—the plea bargain—virtually guarantee the presence of unequal bargaining power by pitting the state against the individual. A disproportionate number of criminal defendants are poor, undereducated, and the victims of racism. However, concepts of duress, undue influence, and unconscionability receive even less attention here than in the civil context. Recent federal and state court decisions have virtually immunized the plea

3. *Fraudulent misrepresentation in negotiations*

Virtually every negotiation involves the possibility that something the lawyers say or neglect to say might be considered a fraudulent misrepresentation. Rules of professional ethics contain fairly strong prohibitions against knowingly making a false statement of law or fact.[277] At the same time commentary on lawyers' negotiations tends to accept or even grudgingly praise the uses of deception in adversarial negotiation.[278] Commentators argue that certain deceptions are an accepted convention of negotiation tactics; adherence to the ethical proscriptions may risk prejudicing the client's interests.[279]

The rules of professional ethics simply do not give clear guidance to lawyer-negotiators. Although lawyers clearly cannot ethically make outright misrepresentations to further their clients' interests,[280] few cases have imposed any limits beyond actual fraud. The well-developed rules of misrepresentation, fraud, and deceit that are applicable in all negotiations[281] provide better guidance. These rules suggest that the lawyer-negotiator has less leeway to make factual misrepresentations than commonly thought. Again, however, the ethical rules are a useful complement to this general body of law. The ethical rules suggest an appropriate context within which to apply these rules. In some situations, the lawyer-negotiator is dealing with an equal adversary, trained with the same tactics that might otherwise appear

---

bargaining process from scrutiny for any but the most extreme abuses involving coercive bargaining practices. *E.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978) (despite defendant's claim of prosecutorial vindictiveness court upheld life imprisonment sentence imposed because prosecutor carried out threat to prosecute defendant as habitual offender if he did not plead guilty to forgery); *see also* Lowenthal, *supra* note 4, at 72, 87-88; Note, Bordenkircher v. Hayes: *Ignoring Prosecutorial Abuse in Plea Bargaining*, 66 Calif. L. Rev. 875 (1978); Note, *Plea Bargaining—Offering Defendant Alternative of Pleading Guilty or Being Reindicted on a More Serious Charge Does Not Violate Constitutional Due Process*—Bordenkircher v. Hayes, 19 Santa Clara L. Rev. 249 (1979). *But see* AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(3) (1975) (limitations on improper prosecutorial pressure). *See generally* Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

277. ABA MODEL CODE, *supra* note 6, DR 7-102(A)(5); ABA MODEL RULES, *supra* note 6, Rule 4.1(a). The Model Rules provision retreats a bit from the Model Code by prohibiting knowing false statements only of *material* fact. Both sets of ethical rules also require disclosure of facts when required by law, ABA MODEL CODE, *supra*, DR 7-102(A)(3), or when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, ABA MODEL RULES, *supra*, Rule 4.1(b). Once again the Model Rules text is narrower in apparent scope and is specifically subject to Rule 1.6's confidentiality requirements. Although the comment to Model Rule 4.1 treats failure to disclose as a misrepresentation in circumstances in which nondisclosure is equivalent to making such a statement, the comment also states that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." *Id.* comment.

278. *See, e.g.*, Hazard, *supra* note 10; Lowenthal, *supra* note 4, at 100-01; White, *supra* note 10. *But see* Menkel-Meadow, *Problem Solving, supra* note 4, at 775-83. Despite its simplicity as a solution, no one has proposed that lawyers as negotiators must be completely candid and honest in representations made to other parties. Judge Rubin comes the closest to this position and might well accept it if pressed. His first "precept" of lawyers' ethics in negotiation is, "The lawyer must act honestly and in good faith." Rubin, *supra* note 9, at 589. Nevertheless, Judge Rubin accepts that "[c]andor is not inconsistent with striking a deal on terms favorable to the client." *Id.* It is hard to imagine how this could be done if at the outset of negotiations the lawyer is under an affirmative duty to reveal to the other parties all information in the lawyer's possession relevant to the negotiation.

279. Hazard, *supra* note 10; Lowenthal, *supra* note 4, at 100-01; White, *supra* note 10.

280. *See supra* note 164 and accompanying text.

281. *See supra* notes 79-95 and accompanying text.

unfair. If the lawyer-negotiator does not recognize this and act accordingly, the client may be disserved. Thus, a lawyer-negotiator should only be liable for misrepresentation when it causes some unfairness in the bargaining situation. The ethical rules provide guidelines for this limitation.

Much of the law of misrepresentation is well-understood and respected by negotiators. And the rules of agency law make it clear that negotiators enjoy no special privilege to make misrepresentations because of their representative position. Nevertheless, as representatives, negotiators are frequently involved in certain particularly troubling positions that increase the likelihood of misrepresentation, especially through nondisclosure and assertion of opinion.

Three factors are relevant in determining whether a statement or nondisclosure made by a lawyer during a negotiation constitutes an actionable misrepresentation: the intent of the lawyer making the statement; the content of the statement; and the likelihood that other participants will rely on the statement.

Contract law provides that not all nonfactual statements are actionable under a misrepresentation theory, even if there was an intent to mislead. General statements of value or belief that make no reference to specific facts or qualities, termed "puffing" in the commercial context,[282] will not lead to liability or endanger the validity of a negotiated arrangement. Such statements are tolerated, not because a lawyer-negotiator lacks the intent to deceive or mislead, but because the nature of the statement makes it unlikely that the negotiator will succeed in doing so.

Distinguishing mere puffing from actionable misrepresentation is dependent upon the specific circumstances under which the statement was made. Assuming an intent to deceive, the next important factor is the specificity of the statement. The more specific the statement, the more likely it will be treated as a factual representation for which the negotiator may be held liable; the less specific, the more likely it will be treated as mere opinion or puffing.

Under this approach, the safest statements a lawyer can make are those with the least factual content. Remarks, such as this is a "great case," a "winner," a "real steal," most closely approach the Restatement ideal of representations that are "nothing more than a statement of the maker's opinion."[283] A negotiating lawyer cannot move very far beyond remarks of this

282. For example, the Uniform Commercial Code § 2-313 distinguishes between affirmations of fact or promises by sellers of goods that create express warranties and affirmations "merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods" that do not create warranties. U.C.C. § 2-313(2) (1978). However, the UCC provisions give no real guidance in drawing the line between the two categories of statements. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 9-3, at 329 (2d ed. 1980). These latter-type statements are usually called "puffing" or "seller's talk." W. PROSSER, *supra* note 121, at 722. The distinct tort of misrepresentation originated from bargaining transactions, and its limitations from the distrust that characterized bargaining between adversaries. *Id.* at 684; RESTATEMENT (SECOND) TORTS scope note to ch. 22, § 525. The distrust was greatest, and reliance least justifiable, when it concerned statements of opinion or the like. Here the law developed rules of nonliability. PROSSER, *supra*, at 721; Keeton, *supra* note 90, at 644, 650-51. The UCC's notion of "puffing" was picked up by the drafters of the ABA Model Rules. *See* White, *supra* note 10, at 528, 530-31.

283. RESTATEMENT (SECOND) TORTS § 542 comment b. Thus courts have not used the prelimi-

character without some danger of liability.

The critical inquiry becomes whether the injured party justifiably relied on the negotiator's statement.[284] The role of reliance and the lawyer's awareness of third party reliance are central to any attempt to develop a notion of fairness that imposes limits beyond simple fraud. While this principle is clearly recognized in both contract and tort law, the disciplinary cases for violation of ethical rules against misrepresentation provide a clearer example. The ethics cases suggest that lawyers have a responsibility to limit their traditional duty of zealous advocacy when the lawyer knows that her statements or other conduct will be acted upon without the usual check of an opposing advocate. Likewise, lawyers cannot bypass opposing counsel to deal directly with the client.[285] In such cases, courts are willing to impose on the lawyer a duty toward the opposing party similar to the duty of loyalty owed to the client.[286] These cases also suggest limitations on zealous advocacy even when opposing or third parties are represented by a lawyer, if that lawyer is likely to rely uncritically on representations or conduct of the first party's lawyer.[287]

In both contract law and the ethics cases, the content of the statement is important. Under the ethics cases, courts are least tolerant of false statements of specific facts. Deliberately altered reports of medical costs are uniformly condemned. On the other hand, courts are reluctant to condemn a lawyer for deleting conclusory statements, such as "favorable for recovery," from seemingly complete medical reports. Again, the crucial distinction turns on the concept of reliance. An opposing lawyer or insurer would not take a medical conclusion, such as "favorable for recovery," or its absence at full value, especially when the more concrete basis for the statement is available. The element of reliance is missing. But nothing about doctored cost figures suggests the need to check or confirm them. As one court stated, "we think that the probability or likelihood of deception is the important ele-

---

nary exchange of remarks between the parties' lawyers who meet to discuss settlement of a personal injury claim (characterized as "fencing" or "bantering") to trigger an insurer's duty to negotiate in good faith. *See, e.g.*, Linscott v. State Farm Mut. Auto. Ins. Co., 368 A.2d 1163 (Me. 1977) (no duty to settle based solely on pretrial negotiations between adversaries); Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 323 A.2d 495, 502 (1974) (rejecting insurer's claim that the insured was also responsible for failure to settle; misleading statements were mere "fencing"); Alt v. American Family Mut. Ins. Co., 71 Wis. 2d. 340, 348, 237 N.W.2d 706, 713 (Wis. 1976) (distinguishing remarks of "bantering nature" or patently jocular or frivolous from "settlement prospects"); Baker v. Northwestern Nat'l Casualty Co., 26 Wis. 2d 306, 313, 132 N.W.2d 493, 497-98 (1965) (same).

284. RESTATEMENT (SECOND) TORTS §§ 537(b), 539, 542-43; RESTATEMENT (SECOND) CONTRACTS §§ 168-69.

285. See ABA MODEL RULES, *supra* note 6, Rule 4.2; ABA MODEL CODE, *supra* note 6, DR 7-104. *See also* Carpenter v. State Bar, 210 Cal. 520, 292 P. 450 (1930) (lawyer representing husband in a divorce suit obtained wife's signature on a property settlement, different from the one the court approved and told her that her attorney's presence was not necessary; lawyer was suspended); *In re* Atwell, 237 Mo. 478, 115 S.W.2d 527 (1938) (lawyer representing plaintiff in a personal injury suit negotiated directly with the defendant, who was represented by an attorney, resulting in settlement of the case without the knowledge or consent of the defendant's attorney; lawyer was reprimanded with costs); Annot., 1 A.L.R.3d 1113 (1965). *In re* Mussman's Case, 111 N.H. 402, 286 A.2d 614 (1971) (lawyer represented the husband in a divorce and obtained settlement stipulations from the wife without presence of her attorney, knowing that she had an attorney; lawyer was suspended).

286. *In re* Skinner, 174 Minn. 437, 439, 214 N.W. 652, 653 (1927).

287. *See In re* Brown, 279 S.W.2d 773 (Ky. 1955).

ment, regardless of any demonstrated, affirmative intent to deceive."[288] Moreover, these courts, although imposing discipline, did not impose any affirmative duties of disclosure. They left the lawyers free to give to their opponents whatever information they wished. What information is given, however, must be in a form unlikely to deceive.

Similarly, under contract law, general comments, such as "this is a million dollar case" or "I've never seen a weaker case on liability," are not actionable. Although they are intended to mislead and distort the parties' bargaining position, reliance on them is unreasonable.[289] However, as indicated above, there is full immunity for negotiation statements only when a statement is nonfactual, and when made in an adversary context between parties equally able to form an opinion, and when there is no fiduciary relationship, assumption of special expertise, or other element suggesting the statement should be relied on.[290]

Few reported cases concern a claim for monetary damages by a third party because of fraud in negotiations. The more common remedy is to undo the agreement that resulted from the fraud.[291] But the reported cases are consistent with the traditional fraud rules found in contract and tort law.[292] Liability for fraud is not limited to situations outside a negotiating

---

288. *In re* Wines, 370 S.W.2d 328, 334-35 (Mo. 1963). *See also* Attorney Grievance Comm. v. Kahn, 290 Md. 654, 431 A.2d 1336 (1981).

289. RESTATEMENT (SECOND) TORTS § 542 comment e.

290. *See id.*, § 542 and comments b, d, e, f, h, & i. Thus, there is a greater likelihood of lawyers' liability for misrepresentations in negotiations with unrepresented parties. *Cf.* ABA MODEL CODE, *supra* note 6, DR 7-104(A)(1); ABA MODEL RULES, *supra* note 6, Rules 4.2, 4.3 (communicating and dealing with unrepresented persons). On the other hand, even a lawyer who makes a factual type misrepresentation should not be found liable if the lawyer does not intend and does not reasonably expect it to be taken at face value.

291. One exception is the federal securities laws antifraud provisions, an area in which damage claims are greatly increasing. *See* R. MALLEN & V. LEVIT, *supra* note 17, § 482.

292. The leading case is Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301 (2d Cir. 1979). Steven Slotkin, a brain damaged infant, and his father sued Beth-El Hospital in New York state court for malpractice in failing to administer insulin to Steven Slotkin's diabetic mother, causing the brain damage. Citizens, the hospital's primary insurer, provided liability coverage of $200,000 for Slotkin's claims. The hospital also had one million dollars of excess coverage with Lloyd's of London. Nevertheless, at the start of the trial and just before the close of plaintiffs' case, lawyers assigned by Citizens to defend the action, an officer of Citizens, and a lawyer and trustee of the Hospital told plaintiffs and stated for the record that the hospital's total insurance coverage was $200,000 and that there was no additional insurance. On the basis of these representations, with the court's approval, plaintiffs settled on the record for $185,000. Shortly after the settlement, Citizens' representatives informed the trial judge and plaintiffs' lawyer of the additional one million dollars in excess insurance coverage. The parties and the court went ahead with the settlement; plaintiffs then brought an action for fraud against the insurers and their lawyers in federal court. *Id.* at 307-11.

A jury returned a verdict in favor of plaintiffs for $680,000 apportioned among Citizens, its representative, and the lawyers involved in the settlement negotiation. But the trial court granted the defendants' motion for a judgment notwithstanding the verdict because plaintiffs went ahead with the settlement after learning of the additional insurance coverage.

The appellate court reversed, holding that plaintiffs did not waive their right to sue for fraud by accepting the settlement. *Id.* at 312 (relying on New York law). More importantly, the appellate court found that both lawyers for Citizens and its officer, Ratner, were liable for fraudulent misrepresentation when they stated there was no additional insurance. Because plaintiffs based their action on fraud, the court found the hospital's lawyer not liable since he was unaware of the additional insurance. Thus the possible negligence claim against him was not reached. *Id.* at 314-16.

Slotkin actually presents a more difficult fraud case than at first appears because the lawyers' fraudulent statement, according to the court, was in misrepresenting their knowledge of the additional insurance, not the amount of insurance. The problem with such statements in the form of "I don't know of X" is that they are just the type of representation that usually puts an adversary on

conference. Thus, negotiators are not immune just because they are lawyers.[293]

4. *Duty to avoid foreseeable harm to third parties*

Most lawyers would concede that knowingly making misrepresentations in negotiation risks exposure to money damages or rescission of an agreement. Although the materiality of any misrepresentation and the reasonableness of any reliance on it may be disputed, these disputes are not unique to lawyers' negotiation representations.[294] However, lawyer-negotiators are also potentially liable to their adversaries and others for negligence-based injuries. Two areas of regulation deserve particular attention: the lawyers' duty to use reasonable care to avoid foreseeable harm to third parties, and the lawyers' duty not to conceal material information from third parties. These two duties are related. Each depends on a duty to use reasonable care;[295] thus each is based in part on negligence standards.

---

guard to inquire further. Thus the court had to confront the reliance issue. Ultimately, the *Slotkin* court pointed to the special position of authority of the insurer's officer and lawyer as the principal reason the lawyers should be liable for the misrepresentations. *Id.* at 314-15. (Both contract and tort law recognize that special relationships make otherwise unjustified reliance on opinions reasonable. RESTATEMENT (SECOND) CONTRACTS § 169; RESTATEMENT (SECOND) TORTS § 542.) These issues—when are lawyer-negotiators liable to adversaries for representations involving opinions and when is a negotiating adversary's reliance on such statements reasonable—are critical in developing a regulatory framework for negotiations.

The same analysis can be applied to lawyers' negotiation statements regarding their clients' intentions such as those in the first example in the introduction. Such statements contain assertions of fact and, if material, can void agreements reached and result in an action for money damages against the lawyer if fraudulently made. *E.g.*, O'Brien v. Larson, 11 Wash. App. 52, 521 P.2d 228 (1974). *See generally* R. MALLEN & V. LEVIT, *supra* note 17, § 43. But like assertions of opinion, statements of intention (whether the negotiator's or the client's) often should not be taken seriously. The negotiation context is critical. In certain circumstances, misrepresenting intentions is, or should be, expected, and reliance on the statement is unreasonable. Thus an affirmative statement such as "my client won't accept less than $100,000" is usually expected to contain exaggeration and cannot be justifiably relied upon. Other statements of intention may very well be intended to induce reliance or to give information with the expectation that a third party will rely on it. *See* Markov v. ABC Transfer & Storage Co., 76 Wash. 2d 388, 457 P.2d 535 (1969).

For example, in Chase Manhattan Bank, N.A. v. Perla, 65 A.D.2d 207, 411 N.Y.S.2d 66 (1978), the New York appeals court ruled that an injured lender could sue the debtor's lawyer for fraud based on the lawyer's statement as to what the debtor would do in the future. The lawyer had persuaded the lender to forbear suing his debtor client on a judgment because money would be available from the debtor's house sale proceeds. The debtor then sold the house to the lawyer's wife and filed for bankruptcy. In rejecting the lawyer's claim that his statement was merely a representation of opinion or prediction, the court held that a statement of intended future action plus knowledge that it will not be carried out is a sufficient allegation of a fraudulent misrepresentation of fact. *Perla* illustrates that the modern law of misrepresentation fully applies to lawyers inside the negotiation room.

293. A lawyer, like any other agent, is not immune from liability for fraud or deceit because he happens to be acting on behalf of a client. RESTATEMENT (SECOND) AGENCY § 348. In Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943), the plaintiff's lawyer represented by conduct (presentation of a release and silence) that a third party's claim against defendants was also released when in fact it was not, and defendants had to pay it. Defendants recovered the payment from plaintiff's lawyer. It was no defense that the lawyer was acting on behalf of his client. *See also* Anderson v. Rubin, 286 Mass. 361, 190 N.E. 544 (1934) (lawyer who falsely represented that only encumbrances on bowling alley and pool room, including furnishings, were on real property held liable to lessees for deceit); Adelman v. Rosenbaum, 133 Pa. Super. 386, 3 A.2d 15, 19 (1938) (suit for malicious abuse of legal process: writ of execution).

294. *See* I. PRESTON, THE GREAT AMERICAN BLOW-UP (1975).

295. *See* RESTATEMENT (SECOND) TORTS § 551 (liability for nondisclosure); RESTATEMENT (SECOND) AGENCY § 350 (agent's liability for negligent action).

Most negligence-based actions brought against lawyers are malpractice claims. Lawyers are usually protected against third party suits by the privity doctrine.[296] However, here, as elsewhere in tort law, the privity shield is under attack and the clear trend is to expand lawyers' duties to third parties.[297]

Two cases illustrate the development of this liability for lawyers. In *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*,[298] a lawyer and his firm were sued by Roberts, who claimed injury from the lawyer's intentional misrepresentation of the status of a partnership to which Roberts lent money.[299] When the money was not repaid, Roberts sued the partnership's lawyers for fraud and negligent misrepresentation. Rejecting the fraud claim, the California appellate court held that plaintiff stated a proper cause of action for negligent misrepresentation.[300]

The *Roberts* case establishes a general duty for lawyers toward third parties, in the absence of any privity constraints. Although the opinion suggests that the lawyer's action be intended to benefit the third party, the court's holding requires only that the lawyer foresee that negligent performance of activities on a client's behalf can cause harm to the potential plaintiff.[301]

Roberts significantly expands the potential liability of lawyer-negotiators. Roberts was a third party whose position in the transaction was adverse to the defendant-lawyers' client. The lawyer defendants wrote and issued an opinion letter as part of loan negotiations, but the lawyers did not actually do the negotiating for their client. Moreover, the lawyers were not accused of making false statements, but of failing to reveal that some of the partners of the entity seeking the loan doubted their status as general partners. In its discussion, the court accepted the idea that third parties can recover from their adversary's lawyers for failure to disclose material information.[302]

---

296. *See generally* R. MALLEN & V. LEVIT, *supra* note 17, §§ 40, 71-81; Note, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. REV. 126 (1982). The American Rule can be traced back to Savings Bank v. Ward, 100 U.S. 195, 199-200 (1879).

297. R. MALLEN & V. LEVIT, *supra* note 17, §§ 78-80; *see also* Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA L. REV. 257 (1970).

298. 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

299. Roberts allegedly lent some $800,000 to a partnership, relying at least in part on the partnership lawyers' opinion letter stating that the partnership was a general partnership. Roberts further claimed that the opinion letter failed to disclose several of the partners' belief that they were not general partners and that he would not have lent the money had he known of the partners' beliefs.

300. *Id.* at 107-08, 128 Cal. Rptr. at 903-04.

301. *Id.* at 110-11, 128 Cal. Rptr. at 905-06. In *Roberts* the lawyers prepared an opinion letter for the client that the lawyers knew would be used to influence third persons to lend the client money. Failure to exercise due care in preparing the opinion letter thus created a risk to the lender. Consequently, the lender who suffered pecuniary losses had a cause of action against the lawyers.

302. Similar claims were made by the SEC against the lawyers involved in the famous *National Student Marketing* litigation. Originally the SEC sought to establish a rule that lawyers involved in regulated securities transactions have a duty to the public to halt transactions in which material information has not been disclosed to all concerned parties. The district court found the lawyers should have disclosed the critical contents of the accountant's comfort letter to protect their own clients. SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978). The case and its impact on the securities bar is discussed in detail in Mallen and Levit's treatise. *See* R. MALLEN & V. LEVIT, *supra* note 17, § 482.

The *Roberts* rationale was followed recently in *Silver v. George*.[303] In *Silver*, the plaintiff borrowed money from outside parties to lend in turn to Pace Corporation. Under the agreement, Pace would borrow the money from the plaintiff at his cost plus six percent interest. A lawyer for the corporation drew up the note with a twenty percent interest rate, a usurious rate that prevented the plaintiff from collecting any interest. A lower court rejected the plaintiff's claim against the corporation's lawyer since there was no attorney-client relation between the plaintiff and the lawyer who drafted the note. The appellate court reversed, holding the lawyer owes a duty to all the parties to draft a nonusurious promissory note.[304] In *Silver*, as in *Roberts*, this duty runs to adverse parties in negotiated transactions.

These cases and others[305] impose an additional duty on lawyers acting as negotiators—a duty to use due care to avoid injuring even adversaries when they know adversaries will rely on information the lawyers supply. Lawyer-negotiators have an obligation to disclose information the lawyers possess if disclosure is necessary to prevent misleading the third party.

The critical question is how far this duty extends: can it be construed as a legal duty to be fully candid? The cases employing this extreme standard involve situations in which the lawyers knew or should have known that third parties would reasonably rely exclusively on the lawyers' information or efforts. The duty should not extend to situations in which the adversary has equal access to the opponent's information, for example, in civil litigation conducted with modern discovery devices. Nor should there be any duty when the information cannot be relied upon reasonably, such as in the early "positioning" stages of negotiations. What appears to be a broad liability rule is really a narrow rule applicable only in situations in which adversaries knowingly act in equal dependence on a lawyer's information or conduct.[306]

---

303. 618 P.2d 1157 (Hawaii Ct. App. 1980).

304. *Id.* at 1159.

305. *See, e.g.*, SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978); *see also supra* note 302.

306. *See* Page v. Frazier, 388 Mass. 55, 445 N.E.2d 148 (1983), *noted in* 52 U. CIN. L. REV. 1069 (1983). In *Page*, the Massachusetts court found no duty owed by the lender's lawyer to borrowers in a real estate purchase transaction when the borrowers were expressly warned that the lawyer represented the lender's interests and the borrowers could engage counsel of their own. The lawyer allegedly conducted a negligent title search and the borrowers did not obtain marketable title.

Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976), illustrates how narrow this liability rule is. Plaintiffs in *Goodman* were stock purchasers from lawyer Kennedy's clients, officers of the corporation that issued the stock. Plaintiffs charged that Kennedy negligently advised his clients that the shares could be issued to plaintiffs as stock dividends and resold by plaintiffs without disturbing the corporation's SEC exemption. Plaintiffs also alleged Kennedy should have disclosed information material to the SEC exemption and the effect the proposed purchase would have on it in a telephone conversation with a lawyer for plaintiffs. When the SEC exemption was forfeited, plaintiffs' stock lost value. *Goodman* thus involves adverse third-party claims of negligent advice and nondisclosure in negotiation.

The California Supreme Court distinguished *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* and earlier third-party liability decisions and held Kennedy owed no duty to plaintiffs. *Id.* at 342-45, 556 P.2d at 742-43, 134 Cal. Rptr. at 380-81. The distinguishing element was the arms-length relationship between plaintiffs and the lawyer, Kennedy. Although the effect of negligent advice and nondisclosure of material facts was foreseeable harm to plaintiffs, *Id.* at 353, 556 P.2d at 759, 134 Cal. Rptr. at 387 (Mosk J., dissenting), nothing in the relationship among the parties gave notice to the lawyer that plaintiffs would put special reliance on the advice given his clients. The opinion concern-

5. *Duty to negotiate in good faith*

Commentators on legal ethics have regularly urged that lawyers owe a duty of fairness to their negotiation adversaries.[307] Even these commentators, however, acknowledge the difficulty in establishing a set of legal rules that express and enforce the general duty of fairness. Fairness either includes or is related to the other restrictions on lawyer-negotiators discussed in this part of the Article. But what the commentators have in mind is clearly something that goes beyond simply avoiding fraud, duress, and unconscionability.[308] Judge Rubin suggests negotiating lawyers ought "to act honestly and in good faith."[309]

Without an overhaul of the representational-adversary system, imposing a general good faith obligation on lawyer-negotiators is impossible. In part the problem is technical. Under agency law rules, lawyer-agents are privileged and do not incur liability to their client-principals by refusing to perform illegal, unreasonable, or unethical acts. Thus, lawyers can respect their obligation to third parties outlined in this section without thereby violating duties and incurring liability to their clients. Currently, there is no general good faith obligation to third parties, and lawyers cannot act according to such a standard without incurring liability to their clients. If this were the only problem, the solution would be simple: add the general good faith obligation to the ethical rules and lawyers will be privileged to act in accord with it. But there are deeper problems.

There is a structural difficulty inherent in the adversary system. Other than rules of professional etiquette, the duties of negotiating lawyers depend upon the existence of a legally recognized relationship. We do not ordinarily talk in terms of a lawyer's duty of fairness to the client because the legally recognized lawyer-client relationship gives rise to the specific obligations of competence, communication, loyalty, and confidentiality.[310] A duty to third parties is recognized only to the extent that the lawyer must not inflict intentional harm or, in those circumstances where the nominal adversary is de-

---

ing the proposed transaction and the SEC exemption was intended solely for Kennedy's clients. In the later telephone conversation, plaintiffs were represented by counsel fully capable of exercising independent judgment. Absent special circumstances of dependence or advice prepared specifically for issuance to third parties, the ordinary rules of nonliability/no duty prevent direct regulation of negotiating conduct. A fortiori, then, lawyers in litigation for one party have no duty to prevent harm to adverse third parties represented by counsel beyond the restraints of the torts of abuse of process and malicious prosecution. Weaver v. Superior Court, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979); Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); *see also* De Luca v. Whatley, 42 Cal. App. 3d 574, 117 Cal. Rptr. 63 (1974) (suit by witness in criminal case, later charged with the crime, against defense counsel rejected).

307. Rubin, *supra* note 9, at 589-92; L. Patterson, *supra* note 145, at 7-1 to 7-2. Commentators have been urging lawyers to negotiate with restraint since at least 1930. *See* G. BELLOW & B. MOULTON, NEGOTIATION 253 (1981). *See also* ABA MODEL RULES (Discussion Draft), *supra* note 10, Rule 4.2.

308. *See* ABA MODEL RULES (Discussion Draft), *supra* note 122, Rule 4.2 comment. European civil law systems have developed a doctrine of precontractual liability, *culpa in contrahendo*, that imposes duties of disclosure and good faith on negotiating parties. Echoes of this doctrine appear in common law practice and may provide an additional source of lawyers' duties as negotiators. *See* Kessler & Fine, *Culpa in contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

309. Rubin, *supra* note 9, at 589.

310. L. PATTERSON, *supra* note 145, at 7-2.

pendent on the lawyer, to avoid creating a unreasonable risk of harm to the third party. Under current legal practice standards, expanding these limited third party duty rules is incomprehensible. If lawyers are required to respect their adversaries' rights throughout the course of representation, in the end the lawyer becomes representative of both parties and guarantor of the fairness of their transaction.[311] The adversary system would have to be abandoned in negotiations. However desirable this may be as an ideal, it is unacceptable and unworkable for the profession today.[312]

Although wholesale changes in negotiating lawyers' obligations to third parties are unlikely, incremental changes seem certain. One such change is an expansion of the duty to bargain in good faith.[313] Currently this obligation is restricted to labor negotiations and insurance, both highly regulated because of perceived special public interests. Most of the elements that comprise good faith bargaining in labor and insurance negotiations are either common to all negotiations, such as the proscription against misrepresentation, or are uniquely dependent on the substantive context, such as mandatory bargaining topics in labor law.[314] Thus labeling them part of

311. *See* Hazard, *supra* note 10, at 192-96.

312. *See* G. HAZARD, *supra* note 251, at 127-35 (critique of the adversary system but stressing difficulty of significant reform). The dominance of the adversarily oriented litigating lawyer is responsible for the rejection of even the modest limitations on duties of absolute client loyalty proposed by the Kutak Commission. *See* Clark, *Fear and Loathing in New Orleans*, 17 SUFFOLK U.L. REV. 79 (1983).

313. This development may already have occurred through extensions of fairly standard fiduciary rules in Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977). Newburger, Loeb & Co. was a struggling brokerage partnership. Gross, its managing partner, eventually withdrew from the firm as a result of its difficulties, and the partnership was finally reorganized as a corporation. There were difficult negotiations with Gross, who opposed the reorganization and insisted on a return of his capital. In the resulting litigation, Gross claimed that the partners, promoters of the corporation, and their lawyers conspired against him and breached fiduciary duties owed to him by threatening him with baseless litigation and questionable claims. In upholding the district court's findings in favor of Gross, the Second Circuit concluded that "[a]lthough the use of threats and the assertion of these questionable claims against Gross may not constitute malicious prosecution, coercion or abuse of process, we find that they were inconsistent with the high standards of loyalty and fair dealings demanded of fiduciaries." *Id.* at 1079. In response to the lawyers' argument that they could not be held liable to third parties for actions as counsel to the partners and promoters, the second circuit upheld liability based on a finding that the lawyer directly involved went "beyond the scope of his honorable employment." *Id.* at 1080 (citing several specific acts of misconduct).

The precise basis for liability in *Newburger* is unclear, as the court's opinion forthrightly recognizes, but imposing liability on some basis seemed entirely appropriate. It would be most accurate to acknowledge the lawyer's actions as an abuse of the negotiation process. He prepared false statements, made baseless threats, manipulated a settlement of litigation to pressure Gross, and coordinated the partners' and promoters' scheme to oust Gross from the business on their terms. Taken together this shows malice and misuse of negotiations for improper purposes, just as the abuse of process tort requires malice and misuse of official process. R. MALLEN & V. LEVIT, *supra* note 17, § 61; W. PROSSER, *supra* note 121, § 121; *e.g.*, Fite v. Lee, 11 Wash. App. 21, 521 P.2d 964 (1974) (garnishment writs). *See generally* Bretz, *Abuse of Process—A Misunderstood Concept*, 20 CLEV. ST. L. REV. 401 (1971).

314. Efforts to develop standards of good faith bargaining in the labor law field demonstrate how difficult it is to identify objective criteria to evaluate good faith in negotiations. Section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d) (1982), imposes a duty to bargain in "good faith" on employers and representatives of employees as part of their collective bargaining obligations. *See* 29 U.S.C. §§ 158(a)(5) (1982), 158(b)(3) (1982) (unfair labor practice for employers and representatives of the employees to refuse "to bargain collectively"). Under the statutory scheme, the National Labor Relations Board (NLRB) and courts had to develop criteria to distinguish negotiations in which one party was merely going through the motions of bargaining (a violation of section 8(a)(5) or 8(b)(3) of NLRA, *e.g.*, NLRB v. Montgomery Ward & Co., 133 F.2d 676

good faith bargaining does not carry any implications for a general fairness good faith principle in negotiations.[315]

However, two ideas taken from both insurance and labor collective bargaining suggest possible directions for change. These are (1) limitations on negotiating only for purposes of delay, and (2) obstructing an adversary's

---

(9th Cir. 1943)) from cases where one party was presenting a legitimate strong bargaining stance. *E.g.*, White v. NLRB, 255 F.2d 564 (5th Cir. 1958) ("hard bargaining" acceptable even under section 8(d) of NLRA, which "does not compel either party to agree to a proposal or require the making of a concession"). *See generally* J. GETMAN & J. BLACKBURN, LABOR RELATIONS: LAW, PRACTICE AND POLICY 206-09 (2d ed. 1983). Certain employer conduct, for example, refusing to meet with or hear from union negotiators, violates the express language of sections 8(a)(5) and 8(d) of NLRA. *See, e.g.*, NLRB v. United States Cold Storage Corp., 203 F.2d 924 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953); NLRB v. Lettie Lee, Inc., 140 F.2d 243, 248-49 (9th Cir. 1944). Attaching pre-conditions to negotiation also violates section 8(a)(5). *E.g.*, American Laundry Mach. Co., 76 N.L.R.B. 981 (1948), *enforcement granted*, 174 F.2d 124 (6th Cir. 1949) (per curiam) (requiring union to withdraw unfair labor practice charge and end strike as condition to bargaining). NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948) (requiring union to abandon wage demands as condition to bargaining). *See generally* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1409-10 (1958). Apart from these easy cases, the Board and the courts initially attempted to apply strict verbal definitions of good faith bargaining. *E.g.*, NLRB v. Montgomery Ward & Co., 133 F.2d at 686 ("It is the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and sincere effort must be made to reach a common ground."); NLRB v. George P. Pilling & Son, 119 F.2d 32, 37 (3d Cir. 1941) ("[T]here must be a common willingness among the parties to discuss freely and fully their respective claims and demands, and, when these are opposed, to justify them on reason"); NLRB v. Reed & Prince Mfg., 118 F.2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941) (the parties must negotiate "with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation"). In a widely respected opinion, Judge Magruder of the First Circuit Court of Appeals approached the definitional problem from the opposite direction. He examined the employer's entire course of conduct in its labor negotiations and found sufficient evidence of bad faith—"a desire not to reach an agreement with the union." NLRB v. Reed & Prince Mfg., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). Eventually, however, the Board and courts established specific rules for good-faith bargaining negotiation that reflected the policies of the National Labor Relations Act. *See, e.g.*, NLRB v. General Elec. Co., 418 F.2d 736, 767 (2d Cir. 1969) (Friendly, J., dissenting); Walther, *The Board's Place at the Bargaining Table*, 28 LAB. L.J. 131 (1977), *reprinted in* J. GETMAN & J. BLACKBURN, *supra*, at 213-14. Cox, *supra*, at 1409-12, 1422-28; Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009, 1032-34 (1968).

These standards, however, tended either simply to restate some of the language of the Act or to advance the Act's original goal of securing recognition for employee representatives. The standards enunciated are not a prescription for negotiation practices generally.

More important to the development of general standards of fairness to others in negotiation are the factors identified by the Board and the courts as objective evidence of good faith or its opposite such as (i) stalling, unwarranted delays, and the imposition of unrealistic time limits on negotiations (*see, e.g.*, Continental Ins. Co. v. NLRB, 495 F.2d 44 (2d Cir. 1974); NLRB v. National Shoes, Inc., 208 F.2d 688 (2d Cir. 1953); Stanislaus Implement & Hardware Co., 101 N.L.R.B. 394 (1952), *enforcement granted*, 226 F.2d 371 (9th Cir. 1955)); (ii) other factors include negotiating through representatives without authority to agree to any terms (*see, e.g.*, NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 467 (2d Cir. 1973)); NLRB v. Coletti Color Prints, Inc., 387 F.2d 298 (2d Cir. 1967)); (iii) finally courts consider factual misrepresentations as indicative of bad faith in negotiations (*see, e.g.*, NLRB v. Reed & Prince Mfg., 205 F.2d 131, 137 (1st Cir. 1953)).

Whether these factors together or separately will coalesce into a doctrine of bad faith negotiation practice remains to be seen. Misrepresentations are already grounds for avoiding agreement and, on occasion, provide a basis for damage actions against negotiators. Elements (i) and (ii) together suggest some basis for liability when one party misuses the negotiation process, that is, bargains, not for the purpose of reaching agreement, but to obtain some other advantage. Misuse of proper processes for improper ends is the essence of the abuse of process tort action. W. PROSSER, *supra* note 121, § 121.

315. Similarly, the good faith obligation in insurance settlement negotiations is based on the peculiar conflict of interest position lawyers for an insurer find themselves in when representing an insured on a claim in excess of the insurance coverage. *See supra* note 40. There is no simple basis for imposing a similar duty in negotiation situations where there is no conflict of interest.

access to information material to the negotiation. Even if these ideas do not constitute a duty of good faith bargaining in negotiations, they could eventually become the bases for possible damage claims against lawyers who fail to live up to their requirements. These two elements are similar to already recognized bases for relief under existing law. For example, negotiating solely for delay or to burden a third party resembles the tort of abuse of process. To recover for abuse of process, ordinarily an injured party must show use of legal process for a procedurally improper purpose and malice.[316] Negotiation seldom involves the use of legal process, but by analogy sham negotiating can substitute for the procedurally improper use. Combined with malice such as using sham negotiations to coerce or extort money from a third party, misuse of apparent negotiations could become a part of the abuse of process tort or gain acceptance as a separate duty of good faith negotiation practice.[317]

Obstructing access to information is more difficult to place with assurance. In labor law, access to information has developed roughly in the form of the civil discovery rules.[318] There must be an appropriate demand for the information;[319] it must be relevant to the subjects under negotiation;[320] and the adversary can provide it in several different forms.[321] In good faith insurance settlement negotiations, the duty to provide information is actually part of the lawyer's duty of loyalty to the client—a duty to provide the client with information necessary to make informed choices concerning the subject of the representation.[322] Obviously the duty of providing negotiation information is not one of full disclosure. Such an obligation would create an unresolvable conflict with the lawyer's duties of loyalty and confidentiality to the client. Instead it involves a duty of noninterference that should include familiar proscriptions on destruction or concealment of evidence, and that requires disclosure when the failure to do so would be deceptive or misleading to an adversary.[323] This, then, takes into account the negligence-based duties toward third parties and requires some assessment of the opponent's position and the third party's need to rely on information held exclusively by a lawyer for the adversary. Of course, this duty is unambiguous when the subject of negotiation is litigation (civil or criminal), and the information requested is subject to discovery or must be disclosed under existing constitutional, statutory, or regulatory standards.

316. R. MALLEN & V. LEVIT, *supra* note 17, § 61.

317. *Cf.* Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1075-80 (2d Cir. 1977). Apart from tort law notions, courts have inherent power to impose monetary sanctions on lawyers who wilfully abuse the judicial process. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980).

318. *E.g.*, FED. R. CIV. P. 26-37.

319. *E.g.*, NLRB v. Movie Star, Inc., 361 F.2d 346 (5th Cir. 1966); NLRB v. Western Wirebound Box Co., 356 F.2d 88 (9th Cir. 1966); Westinghouse Elec. Supply Co. v. NLRB, 196 F.2d 1012 (3d Cir. 1952).

320. *E.g.*, Fafnir Bearing Co. v. NLRB, 362 F.2d 716 (2d Cir. 1966); Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (1st Cir. 1966). The discovery relevance standard is used. *See* NLRB v. Acme Indus. Co., 385 U.S. 432 (1966); NLRB v. Celotex Corp., 364 F.2d 552 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966).

321. Cincinnati Steel Casings Co., 86 N.L.R.B. 592 (1949).

322. *See supra* note 40 and accompanying text.

323. *See, e.g.*, ABA Model Code, *supra* note 6, DR 7-102(A)(3), DR 7-102(A)(7); ABA MODEL RULES, *supra* note 6, Rule 4.1(b). *See also*, Kessler & Fine, *supra* note 308, at 404-05.

IV. CONCLUSION

When lawyers act as negotiators for their clients they are themselves subject to the commands of the law. To determine what the law requires, a lawyer-negotiator needs to consider two sets of obligations—those owed to the client, and those owed to other parties to the negotiation. In dealing with clients, the rules of contract, torts, and agency law regulate and restrict lawyers' freedom to act independently and require close consultation with clients. Lawyers must act within their authority and obey reasonable instructions from their clients, who possess final decisionmaking responsibility over the objectives of the representation. Lawyers must provide clients with all material information to make those decisions, keep them informed of the progress of the negotiations, and act competently and diligently in pursuing clients' interests.

Thus the lawyers in the two cases mentioned at the beginning of this Article must act according to their clients' instructions and overall objectives. If settlement for $100,000 (or less) is possible in the civil case, the lawyer must settle; if the client buyer in the business sale hypothetical wants negotiations prolonged, the lawyer must follow that instruction unless he determines it is unreasonable or unethical. The lawyer's professional obligation gives him a privilege to refuse to obey improper directions and instead withdraw as counsel. Apart from any specific instructions, lawyers are free to conduct the negotiations using reasonable judgment so long as they act for the benefit of their clients. The civil defendant's lawyer in the opening hypothetical should convey the significant information just learned from the plaintiff's lawyer—that the plaintiff is willing to settle for $90,000 (or less)—to her client if it is reasonable to do so. The facts suggest the plaintiff's lawyer wants an immediate answer. Hence, bargaining for a better settlement is a reasonable method of proceeding so long as the defendant's lawyer does not jeopardize the acceptable settlement already offered. Acting within these limits satisfies these lawyers' obligations to their clients under the circumstances.

Lawyers are also subject to legal restraints in negotiating with third parties. Criminal conduct on the part of the lawyer or in conjunction with the client, coercive bargaining conduct, and material misrepresentions subject lawyers to liability or make the resulting agreement voidable by third parties. Additional limitations are emerging based on negligence standards enforced through damage claims brought by third parties. Since few negotiations take place with equal bargaining power and full representation for all parties, these imbalances can produce the special dependence relationships that trigger negligence-based duties of full disclosure and truthful representation owed by lawyers even to adverse parties. Growing judicial impatience over negotiations conducted without intent to reach agreement and dilatory tactics designed to impede the parties' access to information has led to the creation of modest good faith requirements for negotiating lawyers.

Under these standards, the litigation lawyer and business lawyer discussed above are each at risk in dealing with their adversaries. Respectively, the hypotheticals raise serious legal issues of negotiator misrepresentation

and coercive bargaining practices in negotiations. This Article points out that the hypotheticals raise the equally troublesome issue of lawyers' misrepresentations in negotiations. With the limited facts available, there is no sure answer to the question whether this conduct may expose the lawyers to liability for damages to the other parties. However, in the hypothetical civil case it is clear that if the defendant's lawyer misrepresents her client's intention—"No, my client won't give $90,000"—the lawyer has made a fraudulent misrepresentation by which she hopes to obtain a settlement more favorable to her client. If she does do better than $90,000, in part because of the misrepresentation, whether it makes the settlement voidable or not in turn depends upon whether plaintiff's reliance was justified. According to the *Restatement (Second) of Contracts*, reliance in this instance is probably not justified, given the usual unreliability of such statements in legal negotiations.[324] But it doesn't take much to change the balance. Any special dependency relationship or course of dealing that makes reliance more reasonable makes any settlement voidable and the lawyer potentially liable for the plaintiff's resulting losses. In the hypothetical sale of business case, there is a strong possibility that the application of economic pressure and delay for the purpose of enhancing that pressure will make the agreement voidable for duress. On the other hand, there is no real likelihood that the lawyer faces monetary exposure to the third party for his conduct.

It is more difficult to gauge lawyers' potential liability to their clients for their actions. In the hypothetical civil litigation case, if the defendant's lawyer is candid with her opponent, the client could possibly show the lawyer was acting unreasonably in not seeking a more favorable settlement and that a more favorable settlement was possible using adversarial bargaining. In the sale of business example, if the buyer's lawyer chooses the pressure strategy and it taints the agreement, he faces a potential malpractice claim. The argument would be that a reasonably skillful lawyer should know the limits of coercive bargaining (the law of duress) and apply enough pressure to be effective, but not enough to endanger the agreement. In both cases the lawyers' difficulties are easily avoided by consulting the clients in advance and discussing possible strategies in the negotiations. As is often the case, lawyers' real problem with their clients is lack of communication, not incompetence.

Becoming familiar with the legal regulation of negotiation will not solve many of the dilemmas lawyers encounter there. What it does do, however, is to give lawyers their most valuable tool—the law—to take into account while calculating the consequences of their conduct for their clients, other parties, and, most importantly, for themselves. Lawyer-negotiators need to be as rigorous, as thorough, and as dispassionate in examining the legal consequences of their alternative courses of action as they are in assessing the legal consequences of the client's choices.

324. *See* RESTATEMENT (SECOND) CONTRACTS § 171(1) and comment a.