Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics

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PRIVATE SETTLEMENT AS ALTERNATIVE ADJUDICATION: A RATIONALE FOR NEGOTIATION ETHICS

The lawyer's role in facilitating private settlement of civil lawsuits has attracted considerable attention in recent years. A number of popular and academic texts deal extensively with topics in negotiation and alternative dispute resolution, as do notes and articles in the legal literature. Relatively little scholarly treatment, however, has been given to the ethical dilemmas which inhere in the process of negotiating private settlements.


This Note presents a rationale for imposing duties of truthfulness on a lawyer negotiating a private settlement that are, by analogy, coextensive with an advocate’s duty of candor toward the tribunal. It argues that settlement negotiation is in several respects surrogate litigation, mirroring in purpose, if not process, the trial it replaces. Because this shared purpose is the fair and efficient resolution of disputes, a proper goal of negotiation is to produce a pattern of outcomes that reflects the would-be results of the controversies were they formally litigated. One way of ensuring analogous outcomes in the civil dispute context is to safeguard the reliability of information in each process with roughly equivalent protections.

A rule of ethics like the one proposed in this Note takes a step toward this goal. Part I explores the general nature of unethical settlement negotiation, and the inadequate responses offered by both the American Bar Association Model Code of Professional Responsibility and the American Bar Association Model Rules of Professional Conduct. Part II presents a theory for recognizing private settlement negotiation as a substantive component of the adjudicatory process, deserving of all the ethical protections afforded forensic litigation. Part III evaluates certain proposals for reform and responds to various criticisms commonly leveled against efforts to regulate private negotiation with ethical standards and rules. Finally, Part IV concludes with a Model Rule to guide lawyers in their private settlement negotiation conduct.

I. THE NEGOTIATION PROBLEM: ETHICAL DEFICIENCIES AND INADEQUATE RULES

Few would deny the prominence of negotiation in the lawyering enterprise or the vital role played by private settlement in


6. Certain commentators maintain that legal negotiation subsumes too many areas of bargaining to be governed by a single ethical standard. See, e.g., White, supra note 3, at 927. Indeed, what is appropriate in one negotiation arena may be quite inappropriate in another. For this reason, the following discussion of negotiation ethics is restricted to those contexts wherein a lawyer acts in his professional role in settling civil lawsuits. This restriction is not meant to suggest that codification of ethical norms for other types of negotiation is not viable, or that these other types of negotiation are in any less need of such guidance.
dispute resolution. Negotiated settlement is universally recognized as the preeminent and preferred alternative to trial litigation. It is somewhat surprising, therefore, to observe that few of the profession's articulated standards of conduct reach the ethical problems attending private settlement negotiation.

Even opponents of more stringent ethical standards to govern negotiation concede that current regulation of a lawyer's conduct in negotiation is "modest." The Code of Professional Responsibility contains but one Disciplinary Rule whose provisions "touch peripherally" the area of negotiation. DR 7-102(A) commands that a lawyer shall not:

—Conceal or knowingly fail to disclose that which he is required by law to reveal.
—Knowingly use perjured testimony or false evidence.
—Knowingly make a false statement of law or fact.
—Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
—Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

7. See, e.g., S. Thurman, E. Phillips & E. Cheatham, supra note 1, at 250 ("The settlement of disputes in court is not only costly in terms of money, time, and emotions but the administration of justice would soon collapse from overload if the great majority of disputes were not settled prior to court action."); G. Williams, supra note 1, at 90 ("Courts consistently affirm that there is an 'overriding public interest in settling and quieting litigation', and, 'that it has always been the policy of the law to favor compromise and settlement.'") (footnotes omitted); King & Sears, supra note 3, at 454 ("Almost any attorney . . . will agree that litigation is the undesirable alternative to compromise.").
8. See, e.g., Hazard, supra note 3, at 188.
9. The Model Code of Professional Responsibility is in force in every state except Arizona, Minnesota, Missouri, Montana and New Jersey, where versions of the Model Rules of Professional Conduct have recently been adopted.
12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1980) (emphasis added). This provision does little more than remind lawyers to obey the law. It in no way clarifies what the law of disclosure actually is.
13. Id. DR 7-102(A)(4) (emphasis added). The use of the terms "perjured testimony" and "evidence" indicates the intent of the drafters to apply this obligation to a lawyer's courtroom conduct, and not to his role in pretrial negotiations.
14. Id. DR 7-102(A)(5).
15. Id. DR 7-102(A)(6) (emphasis added). As with DR 7-102(A)(4), the use of the term "evidence" restricts the duty described to the forensic setting.
16. Id. DR 7-102(A)(7). This has been interpreted to mean that a lawyer must not himself engage in fraudulent activity. See Rubin, supra note 3, at 580 n.14.
—Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.\textsuperscript{17}

Nowhere in the Code of Professional Responsibility does it appear that a lawyer owes any general duty of fairness or candor to another lawyer or layperson when performing as a negotiator. Furthermore, no such duty may be derived by inference from the foregoing provisions.\textsuperscript{18}

An examination of the Code of Professional Responsibility's Ethical Considerations (EC)\textsuperscript{19} yields no further illumination. EC 7-9 states that "when an action in the best interest of his client seems to him to be unjust [the lawyer] may ask his client for permission to forego such action."\textsuperscript{20} EC 7-10 provides little more edification, stating only that "[t]he duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."\textsuperscript{21} The one Ethical Consideration that guides a lawyer's conduct toward opposing counsel urges merely "courtesy" but not candor.\textsuperscript{22}

At the heart of the controversy over a lawyer's duty of truthfulness generally is the tension between the duty to maintain client confidences\textsuperscript{23} and the obligation not to assist fraudulent or dishonest conduct.\textsuperscript{24} Both the Code of Professional Responsibility, as amended in 1974, and the Model Rules resolve this conflict in favor of protecting privileged communications.\textsuperscript{25} Thus,

\footnotesize
\textsuperscript{17} Model Code of Professional Responsibility DR 7-102(A)(8) (1980) (emphasis added). Like DR 7-102(A)(3), this provision does little to further a lawyer's understanding of what the profession expects from him. It merely states the obvious principle of obedience implicit in any law, without explaining how and when the law itself applies.

\textsuperscript{18} Rubin, supra note 3, at 580.

\textsuperscript{19} "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." Model Code of Professional Responsibility, Preamble and Preliminary Statement (1980).

\textsuperscript{20} Id. EC 7-9 (emphasis added). This provision does little to promote good faith in negotiation, "for such a standard means that the client sets the ultimate ethical parameter for the lawyer's conduct." Rubin, supra note 3, at 584.

\textsuperscript{21} Model Code of Professional Responsibility EC 7-10 (1980).

\textsuperscript{22} Id. EC 7-38 states: "A lawyer should be courteous to opposing counsel . . . . He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so . . . ."

\textsuperscript{23} See id. DR 4-101(B).

\textsuperscript{24} See id. DR 1-102(A)(4).

\textsuperscript{25} Id. DR 4-101(C) permits a lawyer to discuss a client's confidences or secrets in only four narrow circumstances: when the client consents, when permitted by a Disciplinary Rule or required by law, when necessary to prevent a crime intended by the client, and when necessary to establish or collect his fee or to defend himself against an accusa-
any duty of candor or truthfulness that may exist in the negotiation context clearly yields to the duties of loyalty and zealous representation owed the client.

The ethical deficiency of the profession's rules governing negotiation conduct can, and has often, produced morally impoverished results. Courts frequently have overturned private settlements because of fraud or misrepresentation by one of the negotiating attorneys.26 Additionally, the large number of cases evincing lawyers engaged in improper negotiation behavior to secure unfair gains for their clients suggests, at minimum, a higher, undetected incidence of misconduct by negotiating attorneys.27
The following hypothetical situations provide further evidence of the inability of the present Code of Professional Responsibility to deter unethical negotiation and the inequities which result therefrom.

A. Hypothetical One

Lawyer represents Client injured in an automobile accident. The client's problems include a severe back injury. Lawyer, however, is unaware that Client sustained the back injury in a previous accident. Opposing counsel is likewise unaware of the earlier accident, and fails to learn of it during discovery. Lawyer files a complaint alleging that the present accident is the proximate cause of Client's back injury, and, still unaware of the injury's true origin, he begins negotiation. Before a settlement is reached, Lawyer learns of the earlier accident.

The author of this hypothetical concludes that although Lawyer must urge Client to rectify the fraud, disclosure of the prior accident without Client's consent would be unethical, because the information was acquired in the course of the representation and is thus a privileged communication. The author also concludes, however, that because continued representation of Client would violate the duty not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, Lawyer is obliged to withdraw from the representation.
The result is troubling. Assuming he is unable to win the client's consent to a full disclosure, the lawyer is faced with the difficult choice of either becoming involved in a fraudulent settlement or withdrawing from the case altogether. Even if he does what the Code of Professional Responsibility requires, obedience to the ethical rules affords little solace to the defendant whose settlement costs are increased or to the lawyer who must sacrifice business through no fault of his own. Moreover, both the defendant and the system in general go unprotected. The client is free to secure substitute counsel, and will know better than to confide the truth in his new lawyer. Thus, while withdrawal may calm the conscience of the lawyer by preventing his direct complicity in wrongdoing, it does nothing to guard the integrity of the ultimate transaction.  

B. Hypothetical Two

Beach is a small-time attorney representing the Valdezes, a poor immigrant couple whose son was killed in an automobile accident. Kepler is a sophisticated litigator with a downtown law firm, and represents the insurance company of the allegedly negligent car garage. The Valdezes have accused one of the garage's mechanics of failing to check their vehicle's brakes as requested.

Two critical details set up the ethical problems pertaining to a lawyer's duty of truthfulness in a settlement negotiation. The first is that Beach is unaware of the fact that his jurisdiction has recently shifted from contributory negligence to comparative negligence in its tort law, and is thus under the misconception that his clients' failure to protect their son with a seat belt could be a complete bar to recovery. The second is that the defense's key witness, a mechanic named Rossini, has, unknown to Beach, recanted his previous testimony. At an earlier deposition, Rossini swore that at no time did the Valdezes ever ask him to check the car's brakes. Now he remembers that the Valdezes did in fact make such a request, and he so informs Kepler.

33. Although a lawyer's withdrawal of representation during negotiation may alert opposing counsel to a client's misconduct without breaching duties of confidentiality, the Code of Professional Responsibility does little to protect settlement when it leaves the ethical sanctity of an agreement to ambiguous signals that may not be recognized by the opposing counsel.

34. This celebrated problem is borrowed from G. Bellow & B. Moulton, supra note 1, at 253.
In the ensuing settlement negotiation, Kepler neglects to correct Beach’s mistaken belief that the Valdezes’ failure to use seat belts could completely bar their recovery. Kepler further maintains that Rossini’s testimony is “clearly on his side,” a fact which he knows to be untrue. This posturing—a failure to correct an obvious mistake of law and an affirmative misrepresentation of a critical fact—leads the unwitting Beach to conclude that he should take what he can get. The lawyers agree on a settlement of $3,000, which after costs and legal fees might not even cover the Valdezes’ medical expenses.

Even the most hardened insurance company lawyer would flinch. Yet although the settlement is indisputably unfair, the authors correctly inform us that Kepler’s negotiation tactics are permissible under existing provisions of the Code of Professional Responsibility.

What is striking about these examples is the fact that in few instances could any of the described inequities have occurred at trial. In Hypothetical 1, for example, DR 7-102(A) would prohibit the lawyer from knowingly using false evidence, from knowingly making a false statement of fact, and from participating in the preservation of evidence when he knows that the evidence is false. Thus, the true origin of the client’s back injury could not be concealed from a court. In Hypothetical 2, DR 7-102(A)(4) would prohibit Kepler from knowingly using perjured testimony by Rossini. Likewise, Kepler would have an ethical obligation to inform the tribunal of the jurisdiction’s shift from contributory negligence to comparative negligence.

These unjust results raise the question whether any justification exists for having a lower requirement of truthfulness in the negotiation setting than that imposed in the forensic setting.

35. The Federal Rules of Civil Procedure should prevent this by requiring the lawyer to supplement the deposition and correct inaccuracies of which he has become aware. See Fed. R. Civ. P. 26(e); see also C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2048, at 319-21 (1970) (indicating that deposition testimony constitutes a “response” within the meaning of Rule 26(e)).

36. G. Bellow & B. Moulton, supra note 1, at 262-63.


38. Id. DR 7-102(A)(5).

39. Id. DR 7-102(A)(6).

40. Id. DR 7-102(A)(4).

41. See id. EC 7-23 (“Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so . . . .”); see also A.B.A. Comm. on Professional Ethics and Grievances, Formal Op. 146 (1935); Model Rules of Professional Conduct Rule 3.3(a)(3) (1983).

42. This thinking is suggested in Hazard, supra note 3, at 186 (“[I]n light of a law-
Because unequal duties of truthfulness will lead to differentially reliable information being considered in each forum, the outcomes of private settlement negotiation do not always correspond with the results that would have been reached by trial. Often, as in the above hypotheticals, the variance in outcomes is quite extreme. To redress this weakness in our adjudicatory system, a lawyer's duties of truthfulness in private settlement negotiations should be functionally coextensive with his duties of candor toward the tribunal.

II. A RATIONALE FOR DUTIES OF TRUTHFULNESS

A relatively firm standard of truthfulness guides a lawyer's conduct in the forensic setting, although the adequacy of existing standards is fiercely contested. As has already been noted, however, no such standard regulates the behavior of attorneys in the negotiation context.

A. The Prominence of Negotiated Settlement

The absence of ethical standards is particularly disturbing when one considers the extraordinary extent to which private negotiation, and the settlements derived therefrom, dominate our justice system. One published study showed that of 193,000 personal injury claims in New York City, only 7,000 reached trial, of which only 2,500 produced a jury verdict. A study in Chicago disclosed that eighty-five percent of all personal injury...
claims handled by insurers are settled prior to the filing of a suit, and that only ten percent of the suits filed are actually brought to trial. More recent estimates indicate that close to ninety percent of all civil claims filed are settled without trial. Indeed, no one disputes the relief that privately negotiated settlements afford our overburdened judicial system.

B. Exhortations from the Judiciary

The foregoing statistics are punctuated by the fact that, to an ever-increasing extent, lawyers are being encouraged to pursue alternative methods of dispute resolution. Federal judges, including Chief Justice Burger, frequently exhort members of the practicing bar to forego courtroom contest whenever feasible. But under the present rules of professional responsibility, a heightened reliance on extra-judicial conflict resolution permits a greater number of disputes to be administered under a lower standard of ethics. In litigation, both citizens and the system itself are protected by ethical obligations and rules of court that restrain lawyers. Unless corresponding restraints are placed on lawyers when negotiating out of court, such protection is lost.

47. Comment, Settlement of Personal Injury Cases in the Chicago Area, 47 Nw. U.L. Rev. 895, 895 n.5 (1953).
48. See, e.g., 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, 27-28 (1983); Sarat, The role of courts and the logic of court reform: notes on the Justice Department's approach to improving justice, 64 Judicature 300, 303 (1981).
49. "The simple fact is that more law is made and administered and more disputes are adjudicated in the private legal process than in the legislature, the administrative agency, and the courts combined." L. Patterson & E. Cheatham, The Profession of Law 130 (1971).
51. See supra notes 8-41 and accompanying text; see also Shaffer, Negotiation Ethics: A Report to Cartaphila, 7 Litigation, Winter 1981, at 37, 39: [The] modern bias against trials poses a moral problem for the country's lawyer-negotiators. Lawyers no longer are responsible for the justice of their own arguments and their clients' claims. They must get the best results for their clients. The judiciary, operating with an adversary system, is the source of justice. However, a dispute that will never see the inside of a courtroom is never exposed to the system that determines what is just.
52. One could reasonably argue, however, that the imposition of ethical constraints on lawyers in the negotiation setting might diminish the attractiveness of private settlement as an alternative to trial. This, in turn, would lead to more litigation and increased docket crowding. Two responses to this argument suggest themselves. First, those who would be deterred from pursuing private settlement because of the ethical limitations
Negotiated settlement then ceases to be alternative justice, and instead becomes justice circumvented.53

C. A Substantive Part of the Adjudicatory Process

Given the statistics and the apparent predilections of the judiciary, it is surprising that few commentators are willing to recognize private settlement as a substantive part of our adjudicatory system. Despite the fact that private settlement literally takes the place of litigation in an overwhelming number of cases, negotiation is typically viewed as something distinct and fundamentally different from a trial on the merits.64 Although scholars disagree on the extent to which negotiation is more or less adversarial than litigation,65 emphasis is routinely placed on the differences rather than similarities between the two.66 Undoubtel
edly, the bright line drawn between private settlement and courtroom adjudication explains the imbalance in the level of truthfulness required in each.

Other commentators, however, have pointed out certain operative and theoretical resemblances between negotiated settlement and trial on the merits, implying, perhaps, that the two are complementary components of a larger system of adjudication. One pair of authors has explicitly characterized negotiated dispute settlement as part of a "private legal process." That the vast majority of litigable cases are resolved out of court, however, does not alone compel the conclusion that private settlement serves a judicial function. But a look at the substantive aspects of settlement negotiation reveals a process whose purposes and norms correspond closely to its courtroom counterpart.

Negotiation of private settlements, like formal litigation, takes root in a set of circumstances giving rise to the assertion of rights by one party against another. Lawyers come to the bargaining table, however, in an effort to avoid the cost and stress of trial. When negotiation fails, litigation results. With trial thus the omnipresent backdrop to the bargaining process, lawyers not surprisingly negotiate in a way that contemplates litigation. In negotiation, each attorney bargains with a persuasive

conventionally perceived as a norm-bound process centered on the establishment of facts and the determination and application of principles, rules, and precedents. Negotiation, on the other hand, is conventionally perceived as a relatively norm-free process centered on the transmutation of underlying bargaining strength into agreement.

See also Fiss, Against Settlement, 93 Yale L.J. 1073 (1984).

The emphasis on the public responsibility of the lawyer has been focused on the advocate rather than the office lawyer. Yet, the public responsibilities of one are no less than those of the other, for their roles are complementary. The office lawyer shares with the advocate a fundamental problem: how can he best perform his dual role as a private representative of his client and a public representative of the social order?

58. Id. at 308-10.
60. Eisenberg, supra note 2, at 664-65 observes:

Because of their training, and the fact that typically they become involved only when formal litigation is contemplated, lawyers are likely to negotiate on the basis of legal principles, rules, and precedents. When these two elements are combined, the result is that paired legal affiliates typically function as a coupled unit which is strikingly similar to a formal adjudicative unit in terms of both input and output.

But see id. at 665 n.81 (discussing the differences in procedure and style between lawyer-adjudicators and formal adjudicative units).
prediction of what a court would do were the case litigated, and from the confrontation of arguments emerges what the parties believe is a fair agreement.\textsuperscript{61} The lawyers offer versions of the facts in much the same way witnesses would at trial. They interpret these facts and proffer legal arguments for assigning or avoiding liability in a way suggesting trial advocacy.\textsuperscript{62} They eval-

\begin{itemize}
\item \textsuperscript{61} See Galanter, \textit{Worlds of Deals: Using Negotiation to Teach About Legal Process}, 34 J. LEGAL EDUC. 268, 268-69 (1984):
\begin{quote}
The courts are central to the litigation \textit{[combined litigation and negotiation]} game because of the \textquote{bargaining endowments} they bestow on the parties. What might be done by (or in or near) a court, that is, gives the parties bargaining chips or counters. Bargaining chips derive from the substantive entitlements conferred by legal rules and from the procedural rules that enable these entitlements to be vindicated. See also Note, supra note 2, at 68 (\textsuperscript{\textquote{\textit{Settlement negotiations proceed within the bounds of the parties’ expectations about the outcome of . . . litigation. Therefore, settlement negotiations entail acting upon predictions of future events, which involve estimates both of probabilities and of dollar values.}}}). Concededly, these textual statements present an oversimplified model of negotiation by presuming that projected legal rights are the principal determinants of negotiated agreements. Although this is not untrue, other considerations incident to bargaining power, such as relative financial strength and eagerness to avoid trial, are often vitally important to both the process and ultimate content of private settlements. See Fiss, \textit{Against Settlement}, 93 YALE L.J. 1073, 1076 (1984). Because these collateral considerations cannot be categorized in any way, analytical emphasis is placed on the impact of applicable legal rules.
\end{quote}

\item \textsuperscript{62} Cf. Jackson \& Eisenhardt, \textit{Negotiations in Commercial Cases: Assess-Advise-Advocate}, 5 LITIGATION, Fall 1978, at 32 (describing the negotiation process as anticipatory trial advocacy); Wallach, \textit{Settlement in a Personal Injury Case: The Imperfect Art}, 5 LITIGATION, Fall 1978, at 35 (same). But see L. PATTERSON \& E. CHEATHAM, supra note 49, at 121:
\begin{quote}
Conciliation and negotiation both call for advocacy, but advocacy different from that in a trial. The advocate in negotiation presents his facts and arguments to the other party for agreement, rather than to a tribunal for a decision. The difference is best perceived in terms of the assumptions that underlie advocacy in the judicial process of litigation and those which underlie the private process of negotiation. Litigation assumes an irreconcilable conflict between the parties, that one party is wholly at fault, that one party must win, and that the end of the dispute is more important than the right decision. Negotiation assumes that the parties desire to reach an agreement, that each is fair-minded and willing to be convinced, that each will yield to a more reasonable view advanced by the other, and that the right decision requires a coordination of interests for their mutual benefit.

It should be noted, however, that Professors Patterson and Cheatham distinguish negotiation advocacy from trial advocacy in an effort to show that negotiation is more accommodative and less adversarial in character, and that lawyers in the negotiation setting should thus be held to a \textit{higher} standard of ethics:
\begin{quote}
The negotiator in the office and the advocate in the courtroom . . . have two entirely different functions to perform which call for different standards. The negotiator is dealing with the other party not as a plaintiff or a defendant, but as an individual person whose cooperation is desirable, and perhaps essential, to the best interest of his client. Thus, there is only one basic standard for the lawyer that is particularly applicable to his role as negotiator and that is honesty.
\end{quote}
\end{quote}
\end{itemize}

\textit{Id.} at 123 (emphasis added).
uate the merit of these legal arguments like judges. And ultimately, based upon a concerted interpretation of the facts as governed by the applicable law, they decide who should pay whom and how much. Given this structure of the bargaining process, lawyers achieve in settlement something far more significant than a resolution of conflict. They determine the substantive legal rights of the parties, replacing jury verdict with an alternative adjudication. Thus, although the style and procedural format of litigation distinguish it from the relatively informal nature of private settlement negotiation, the objectives and corresponding methodologies of the two processes are quite similar.

As an essentially judicial process—one in which, despite the nonjudicial setting, important legal rights are determined and vindicated—private settlement negotiations deserve all the ethical protections that apply to the forensic setting. This argument is strengthened to the extent that our legal system already recognizes private settlement as a substantive component of the adjudicatory process. Consider, for example, the current Federal

63. See Fisher, Comment, 34 J. LEGAL EDUC. 120, 122 (1984):

Two judges, in trying to reach agreement, will be looking for standards that should decide the case. They may have their predispositions, and even strongly-held views, but they will jointly look for an agreed basis for decision. Each will typically advance law, precedent, and evidence not simply as rationalizations for positions adopted for other reasons, but honestly, as providing a fair basis for decision. . . . Two negotiators can be compared with two judges trying to decide a case. There won’t be a decision unless they agree. It is perfectly possible for fellow negotiators, despite their self-interest, to behave like fellow judges, in that they advance reasoned argument seriously, and are open to persuasion by better arguments.

64. M. Betti, supra note 54, at § 106, endorses the idea of “selling your case” to opposing counsel as one would to a court as an effective negotiation strategy. The so-called “Brochure Method” involves marshalling all of the evidence and legal theories one would present at trial and constructing a case that the adversary would rather purchase than risk letting go to a jury.

65. Cf. Eisenberg, supra note 2, at 662 (“An adjudicative function of a sort is an implicit element of the norm-centered model of dispute-negotiation . . . since resolution of a dispute will turn in large part on the judgment each party renders on the norms and facts adduced by the other.”).

66. See id. at 653-60.

67. One writer even fuses the concepts of negotiation and litigation in his analysis of private dispute settlement:

On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it is litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call litigation, that is, the strategic pursuit of a settlement through mobilizing the court process.

Galanter, supra note 61, at 268 (emphasis in original).

68. See G. Williams, supra note 1, at 101 (discussing the various ways in which
Rules of Civil Procedure. Rule 16 explicitly gives courts the discretion to arrange pretrial conferences in the interest of “facilitating the settlement of the case.” More than an implicit encouragement to lawyers to settle claims out of court, Rule 16 is clear in its recognition of private settlement as a worthwhile form of legal dispute resolution. Rule 68 likewise incorporates an important aspect of private settlement negotiation into the adjudicatory process. It encourages the defendant to extend a timely offer of settlement, and further encourages the plaintiff to accept a reasonable offer, threatening him with liability for the costs incurred after the offer's making should such offer turn out to be more favorable than the ultimate judgment of the court. The conclusion compelled, therefore, is that if the law already recognizes private settlement as a substantive component of the adjudicatory process, the profession should regulate the negotiations producing such settlements in a manner consistent with its regulation of other areas of the legal system.

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69. FED. R. CIV. P. 16(a)(5); see also FED. R. CIV. P. 16(a)(7).


71. FED. R. CIV. P. 68 provides in relevant part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . . .


72. The 1970 amendments to the Federal Rules of Civil Procedure introduced what are essentially duties of truthfulness to the pretrial discovery context. See FED. R. CIV. P. 26(e)(2), 26(g). Through these amendments, courts have imposed duties once owed exclusively to the tribunal on lawyers in particular out-of-court contexts. Although discovery rules can be distinguished from negotiation rules in that they essentially protect the trial process, a reasonable interpretation of the amended Federal Rules is that the drafters recognized that an important part of the adjudicatory process takes place outside the
D. Rebutting the Waiver Argument

Acknowledging private settlement as part of the adjudicatory process, rather than something distinct from it, defuses what would otherwise be a compelling argument against imposing duties of truthfulness on negotiating attorneys. The argument concerns the freedom of nonlitigating parties to waive certain legal rights, and the ethical protections that safeguard these rights, when negotiating settlement out of court.

In choosing whether to negotiate a settlement or proceed to trial, parties make a judgment about which tactic will ultimately yield the most satisfying results. Part of the attraction to settlement, of course, is the relative saving in cost and time, and the minimization of risk in avoiding jury judgment. Another attraction, however, may simply be the desire of clients to see disputes resolved in a forum where their lawyers exert more control over the outcome. In the judicial system, the argument goes, cost saving and expeditiousness are values subordinated to an overriding concern with justice. But in the nonjudicial realm of which private settlement is a part, these values compete more equally with the aim of reaching a legally correct result. Parties to a negotiation often concede advantages and forego opportunities that would be theirs at trial, merely to facilitate settlement of the case. Although justice does not compel negotiators to compromise in the ways they invariably do, competing concerns of time, money, and long-term relations with their adversary may. In other words, although strictly just decisions are the paramount objective of the trial court, they may not be as important to the parties themselves.

This point might appear to imperil the entire rationale for imposing duties of truthfulness on lawyers in the negotiation context. One could reasonably argue that in electing to negotiate rather than litigate, parties waive the “correct” resolution of their legal rights in consideration of certain concerns they regard as more significant. This accepted, one must then ask why the law should impose rules of conduct that reflect its primary purposes on nonlitigating parties who may not fully share these same purposes.

One answer is that negotiation by lawyer is a part of the adju-
dicatory process, not an alternative to it. When parties involve lawyers in the settlement of their disputes, they *invoke* the legal system and its overriding concern with justice; they do not waive it. Lawyers are officers of the court and thus owe a duty to promote justice in their professional conduct. In this regard, it is important to note that a rule of negotiation ethics to regulate private settlement behavior would be imposed on lawyers, not clients. Thus, parties who retain attorneys to negotiate settlement of their civil lawsuits waive only the freedom to engage in behavior that is inconsistent with the goals and concerns of the legal system, as reflected in the professional obligations imposed on lawyers. The decision to forego trial by enlisting lawyers as their bargaining agents does not place them beyond the purview of the law.

Furthermore, the so-called waiver argument suffers from internal inconsistency. The argument's basic assumption is that negotiating parties *knowingly sacrifice* the "legally correct" resolution of their disputes in consideration of other nonlegal concerns they hold to be more important. But for such sacrifices to constitute voluntary waiver, they must be meaningfully made through *informed* decision. Because the absence of ethical protections in negotiation can obscure what would be the legally correct resolution of the dispute to either or both of the participants, parties who elect to negotiate cannot be sure of what they are giving up and thus cannot be said to waive with knowledge. Paradoxically, meaningful waiver can be achieved only if the parties are reasonably confident of the objectively correct judicial resolution of the case. As has been previously noted, this requires ethical protections to safeguard the reliability of information that will produce such mutually confident understanding.

74. See *Model Code of Professional Responsibility* EC 7-1 (1980) ("The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits.").

75. The waiver argument is more convincing in the case of private parties who elect to resolve their disputes without the assistance of lawyers.

76. Waiver is defined as:

The intentional or voluntary relinquishment of a *known* right, . . . or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, *with full knowledge of the material facts*, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it.


77. See, e.g., *supra* notes 28-36 and accompanying text.
E. Faster, Fairer, and More Final Justice

A stated purpose of the Federal Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination"78 of civil cases. Code of Professional Responsibility EC 7-25 likewise states: "Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law."79 It is universally accepted that truthfulness at trial promotes faster and fairer justice. The same, however, can be said for private settlement negotiation.80 Candor in negotiation promotes settlement81 by assuring early disclosure of the facts and thereby developing understanding. Bargaining is inefficient when parties

78. FED. R. CIV. P. 1.
79. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25 (1980).
80. A recent study of the negotiation process ranked ethical conduct as the highest-rated characteristic of "effective/cooperative negotiators," citing forthrightness, willingness to share information, trustfulness, objectivity, and fair-mindedness among the best strategies of negotiators of this type. See G. Williams, supra note 1, at 20-22. The study also notes:

[C]ooperative effectives seek to facilitate agreement, they avoid use of threats, they accurately estimate the value of cases they are working on... and they are willing to share information with their opponent. It appears from these items that their strategy is to approach negotiation in an objective, fair, trustworthy way, and to seek agreement by the open exchange of information. They are apparently as concerned with getting a settlement that is fair to both sides as they are with maximizing the outcome for their own client. Id. at 22. It should be noted, however, that these traits are no guarantee of negotiation success, as the study indicates that they are shared by effective and ineffective cooperatives alike. Id. at 34-36.

The study classified 65% of the negotiators surveyed as "cooperatives" and 24% as "competitives". Eleven percent of the classified attorneys fell outside these two categories. A highly significant conclusion of the study was that both effective/cooperatives and effective/competitives share the traits of ethicality, trustworthiness, and honesty:

Given the current interest and concern about professional responsibility in the Bar, the high ratings on ethical[ity] and trustworth[iness] for both effective groups are worthy of notice. Although literature on professional responsibility generally argues that high ethical standards are a precondition to success in practice, many law students and some practicing attorneys continue to believe or suspect that they must compromise their ethical standards in order to effectively represent their clients and attain success in practice. The findings of this survey suggest such compromises may be not only unnecessary, but actually counterproductive to one's effectiveness in negotiation situations.

Id. at 27.
81. "That candor as to the facts does facilitate negotiations is too plain to be disputed." L. Patterson & E. Cheatham, supra note 49, at 124; see also G. Williams, supra note 1, at 22:

The attitude of effective/cooperatives is reflected in attorney comments. For example, one attorney wrote: "The vital item in negotiation for me is trust in the other attorney. If an attorney has a good reputation and/or I have dealt with him before and found him honest, I can and will negotiate pragmatic settlements, hopefully to the long term benefit of both parties."
cannot trust each other, because the route to agreement is likely to be circuitous when lawyers must guard against the unscrupulousness of their adversaries. Professor Hazard makes this point forcefully when he states that trustworthiness among lawyers in negotiation reduces transaction costs. The ability to rely on the representations of an adversary as "firm, factual components of [the] transaction" obviates the need for conducting independent factual investigations that are time-consuming and costly. Indeed, the ultimate expression of parties' mutual lack of confidence is the decision to litigate in court, where disputants are presumably protected by rules of court and standards of professional ethics. Needless to say, investigations, discovery proceedings, and of course trials, raise the cost of dispute resolution considerably. By contrast, the cost of truthfulness in negotiation is likely to be negligible, if such truthfulness is reciprocal and reliable.

This suggests another dimension to the comparison drawn between litigation and negotiation. A litigated result only resolves a dispute with finality to the extent parties have confidence in the judicial decision. If the award seems unjust under the cir-

82. Cf. Voorhees, supra note 2, at 64 ("Candor and sincerity are the most powerful weapons of a good advocate. As soon as the adversary understands that he is dealing with a man of integrity, the discussions can proceed with directness, and the time wasted in beating around the bush may be eliminated.").
83. Hazard, supra note 3, at 183-85 (citing Williamson, Transaction Cost Economics: The Governance of Contractual Relations, 22 J.L. & Econ. 233 (1979)).
84. Id.
85. This is undoubtedly the thinking which underlies the full disclosure approach advocated in M. Beli, supra note 54, at § 106: The trial of the modern lawsuit is a 'race of disclosure' and not a 'series of surprises'. . . . Defendants will have all the facts, good and bad, by the time of trial anyhow. . . . A hopeful reliance upon defendant's inability to discover weaknesses in plaintiff's case is a dependency upon a false premise in modern trial preparation. If, at the time of trial, defendant has not discovered certain facts, plaintiff will have to disclose them upon a full opening statement, anyhow.
86. Hazard, supra note 3, at 184. This is not, however, a universally accepted proposition. See, e.g., White, supra note 3.

Commentators have also noted that lawyers have an additional self-interest in conducting truthful negotiations. See, e.g., Drinker, Some Remarks on Mr. Curtis' "The Ethics of Advocacy," 4 Stan. L. Rev. 349 (1952):

A lawyer does not acquire valuable clients by getting a reputation for being willing to practice any kind of chicanery on their behalf. It is too apt to occur to the good client that the lawyer who, when 'in a corner' or 'on the spot' will lie for him, may, in a similar corner, lie to him for the lawyer's own advantage.
Id. at 349 (emphasis in original). Moreover, if a lawyer gets the reputation in his professional community for being a hard bargainer, he may be prejudicing the interests of future clients on whose behalf he may wish to negotiate. Lawyers are less likely to bargain with an attorney they believe is not trustworthy. More dramatically, the lawyer swindled in last week's negotiation may be in a position to return the swindle this week.
circumstances, or if the court's interpretation of the law is contested, a litigant may appeal the decision to a higher court. By analogy, a negotiated agreement stands on similar ground. To the extent that one or more of the parties perceives that the facts have not been adequately adduced, or that doubt remains with respect to a court's likely resolution of a particular question of law, they may pursue the matter in formal litigation. In other words, in both litigation and negotiation, the decision of whether to take a dispute to the next level of the adjudicatory process will depend largely on the extent to which uncertainty remains with regard to issues of fact or law.\textsuperscript{87} Because truthfulness reduces uncertainty, and uncertainty perpetuates conflict, it can be fairly said that truthfulness promotes conflict resolution and thereby lowers costs.\textsuperscript{88}

III. PROPOSALS FOR REFORM AND THEIR CRITICS

The call for higher levels of ethics in private settlement negotiation has early origins.\textsuperscript{89} Yet, the perceived need for more stringent duties of truthfulness in this context continues to draw considerable commentary.\textsuperscript{90} Although many academics agree in principle, however, with the idea of requiring lawyers to assume greater obligations of truthfulness when negotiating settlements,

\begin{footnotesize}
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\item \textsuperscript{87} See Note, supra note 2, at 88 (stating that "[i]f the parties to a dispute are reasonably certain of what the outcome in court will be, they will be more likely to avoid litigation costs by settling immediately").
\item \textsuperscript{88} Hazard, supra note 3, at 184-85; see also Cooter & Marks, Bargaining In The Shadow Of The Law: A Testable Model Of Strategic Behavior, 11 J. LEGAL STUD. 225 (1982).
\item \textsuperscript{89} See, e.g., Herrington, Compromise and Contest in Legal Controversies, 16 A.B.A. J. 795, 798 (1930) (stating that "one should go into a conference realizing that he is an instrument for the furtherance of justice and is under no obligation to aid his client in obtaining unconscionable advantage"); cf. King & Sears, supra note 3:
\begin{itemize}
\item If . . . the general public remains suspicious and distrustful of the profession, its members will never fulfill the obligations to the public and to their country which they rightfully should assume. Only the lawyers, by their actions and attitudes, individually and in concert, can make themselves worthy of public respect . . . Our thesis is this: If our profession is to deserve respect, if we are to be officers of the court in fact, and if we are to obey the mandates of our professional oath and our canons of ethics, we must find an approach in which less emphasis is placed on success measured in dollars, and much more emphasis is directed toward our responsibilities as public servants and ministers of justice.
\end{itemize}
\item Id. at 462.
\item Id. For a contemporary commentary suggesting that lawyers should accept greater responsibility for doing justice in negotiation, see Shaffer, supra note 51.
\item \textsuperscript{90} See, e.g., Guernsey, supra note 3; Hazard, supra note 3; White, supra note 3; Rubin, supra note 3.
\end{itemize}
\end{footnotesize}
few are optimistic about the prospects of achieving any substantive improvement through rules of ethics. 91

A. Ineffectual Reform

Only two writers have attempted actual reform of the “rules” governing negotiation ethics through concrete proposals, 92 and neither effort is satisfying. Professor Guernsey points out that truthfulness in negotiation is an issue governed largely by unarticulated conventions that vary according to both geography and “professional strata,” and that reliance on these conventions has produced troubling results. 93 The author’s first recommendation is that the professional bar generate discussion of ethical problems in negotiation from which acceptable conventions of tactics and truthfulness could emerge in articulated form. 94 Alternatively, the author suggests that the profession accept the fact that no guidance for this area of the law is available and endorse the notion of “caveat lawyer.” 95 As justification for this principle, the author cites the following: (1) ease of administration; (2) elimination of the hypocrisy which attends unenforceable rules that are routinely violated; (3) consistency with the standards of negotiation conduct currently in place in the profession; and (4) clarification of guidelines that are presently

91. See, e.g., Hazard, supra note 3, at 181 (“It is desirable that lawyers be trustworthy in dealing with opposing parties. It is impractical, however, to go very far in formulating rules of professional conduct that require lawyers to be trustworthy.”). See generally White, supra note 3. But see Rubin, supra note 3.

92. The American Bar Association, however, has on numerous occasions considered proposed rules of professional responsibility that would apply directly to the negotiation process. In 1980, for example, the A.B.A. proposed the following rule in a discussion draft of the Model Rules of Professional Conduct ultimately rejected by the A.B.A. House of Delegates:

Fairness To Other Participants
(a) In conducting negotiations a lawyer shall be fair in dealing with other participants.
(b) A lawyer shall not make a knowing misrepresentation of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is:
(1) Required by law or the rules of professional conduct; or
(2) Necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client . . . .


93. Guernsey, supra note 3, at 100-02.
94. Id. at 103-25.
95. Id. at 125-26. The rule is stated, “[I]n negotiations, absent a clearly expressed specific duty to the contrary—such as to a court—caveat lawyer.”
The proposal and its four-part rationale amount to an admission of defeat, an abandonment of the task of reform. Each justification for this rule of nonregulation collapses under the weight of the rule’s presumed purpose—reform. A rule rationalized by the ease of its administration is merely a line of least resistance. Additionally, a rule that simply codifies existing conventions of practice quite clearly produces no change in the area it is designed to regulate. Because change is the objective of a rule of negotiation ethics, this proposal is conceptually flawed in that it reinforces the very negotiation tactics that inspire reform.97 Furthermore, legislating standardlessness to resolve uncertainty in existing standards is patently inappropriate to the whole idea of reform. Not only does such a rule fail to realize its purpose, it abdicates the purpose altogether. The answer is not to abandon guidelines, but instead to promulgate good ones in the form of rules. Finally, the notion that ‘no rule’ is better than an unenforceable one is simply not a proposition supported by evidence or reason.98

An earlier writer advocating the imposition of higher standards of truthfulness on lawyers in the negotiation context came much closer to the mark.99 In his thoughtful essay on negotiation ethics, Judge Rubin proposes a two-part affirmative ethical standard for lawyers in negotiation:100

(1) The lawyer must act honestly and in good faith;101 and
(2) The lawyer may not accept a result that is unconscionably unfair to the other party.102

Judge Rubin concludes that such duties of good faith and truthfulness would reduce inequalities in bargaining power and tend to produce negotiation results that are basically fair.103
Although fine in principle, Judge Rubin's homiletic standard that a lawyer "act honestly and in good faith" is clearly insufficient as a benchmark for professional ethics in negotiation. It is at once overinclusive and underspecific. Although few would disagree with it as a vague proposition, still fewer would adhere to it if as a rule it commanded categorical candor.\textsuperscript{104} Sounding out an adversary through puffery is a commonly accepted negotiation device.\textsuperscript{105} No rule of ethics should prohibit a lawyer from denying authority to settle even if in fact he possesses such authority, or from estimating a case's settlement value in excess of what he truly believes it to be.\textsuperscript{106} A rule of absolute, unqualified truthfulness runs counter to time-honored tactical conventions of negotiation, and would reach conduct that no one deems worthy of censure. Incompatibility with the most basic standards of the legal community would invite wholesale noncompliance and render the rule ineffective.

On the other hand, the language of Judge Rubin's rule affords too little guidance to the practicing attorney. "Good faith" is a term of art that has long defied satisfactory definition. For some, it no doubt means pursuing a client's advantage as vigorously as the letter of the law will permit. For others, it means absolute truthfulness. The duty to act "honestly" must likewise be defined with more precision. For some, misleading bluffs and exaggerations involve no breach of honesty; they are part of the game

\textsuperscript{104} Cf. Guernsey, \textit{supra} note 3, at 125:

The profession . . . could justify adoption of a rule requiring absolute truthfulness. In other words, we could require a strict reading of DR 7-102(A)(5). Absolute truth, however, is not an acceptable approach. If the rules we have are difficult to enforce, adding such a rule would only increase violations without any corresponding increase in the ability to regulate.

\textsuperscript{105} White, \textit{supra} note 3, at 927 n.4; see also id. at 934:

Everyone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of his opponent. No one is surprised by that, and the system accepts and expects that behavior. . . . By tolerating exaggeration and puffing in the sales transaction, but refusing to make misstatement of one's intention actionable, the law may simply have recognized the bounds of its control over human behavior.

\textsuperscript{106} The Comment to \textit{Model Rules of Professional Conduct} Rule 4.1 (1983) clearly endorses this principle:

This Rule [Truthfulness in Statements to Others] refers to statements of fact. . . . Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category . . . .

\textit{But see} Rubin, \textit{supra} note 3, at 586 (noting that technical observance of expected rules may not always constitute ethical behavior).
both sides presumably play. For others, even the slightest deviation from the truth encroaches upon the realm of dishonesty. Without further explanation of what does and does not violate the notion of "honesty," and of what does and does not breach "good faith," the rule rings hollow and is unhelpful.

The second part of Judge Rubin's ethical standard—that prohibiting a lawyer from accepting a result unconscionable to the other party—accomplishes little more than the first. Although an unconscionability rule reflects the proper spirit of negotiation ethics, without a body of supporting case law such a rule is too vague to be of practical value to negotiating attorneys. Furthermore, the imposition on negotiators of a duty to avoid unconscionable results would eliminate only a small number of the most shocking cases. The profession can and should do more to advance the cause of ethics in negotiation.

B. Critics of Reform

Despite the basic merit of Judge Rubin's position, most legal commentators find themselves on Professor Guernsey's side of the argument. Criticism of efforts to reform negotiation ethics with rules of professional responsibility has been varied, but can be summarized briefly. First, some contend that negotiation truthfulness is a culturally relative notion, a concept eluding clear definition and thus ill-suited to regulation. Second, others argue that no rule of negotiation ethics could adequately account for the variations in skill and sophistication that inhere in a heterogeneous bar. As a result, the rule would burden some lawyers more than others. Finally, still others speculate that a rule requiring truthfulness in private negotiations might meet

107. See supra note 105 and accompanying text.
108. To many, the concept of truth poses a profound philosophical problem. See, e.g., S. Bok, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978). A definition of "truth" is, of course, beyond the scope of the present inquiry.
109. Cf., e.g., Rubin supra note 3, at 581.
110. It may be argued that a duty to avoid unconscionable results already exists by implication. The law treats settlement agreements as contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); see also Havighurst, Problems Concerning Settlement Agreements, 53 NW. U.L. REV. 283, 295-308 (1958) (discussing how various contract doctrines relate to settlement releases). Therefore, the common law contract doctrine of unconscionability, see Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), could already be said to safeguard settlement agreements against intolerable unfairness.
111. White, supra note 3, at 929-31.
112. Hazard, supra note 3, at 193-95.
with widespread opposition and violation in the practicing bar. Such hypocrisy, it is argued, would serve no purpose but to discredit the value of the other rules and promote cynicism among those who adhere to them.113 These arguments are addressed in order.

1. The relativity of “truth”—Professor White has argued that truth in the negotiation context admits no absolute definition, and that drafting rules to demand what cannot be defined is folly.114 But conceding that truth in the negotiation context is a relative concept does not lead to the conclusion that fashioning standards for lawyers negotiating private settlements is either inappropriate or impossible. A code of ethics must establish some threshold level of truthfulness below which its members may not fall in their professional conduct. Indeed, law in general furthers order by transforming the relative into the normative.116 Further, struggling with diverse notions of right and wrong to establish normative standards that everyone can respect is precisely what rules of ethics, and laws generally, aim to do.116

2. Unequal skill, unequal disclosure—Professor Hazard explains his resistance to formulating rules of negotiation ethics in similar terms. Professor Hazard, too, recognizes the heterogeneity, particularly with respect to skill and sophistication, that characterizes the American bar.117 He concludes that formulating general rules that account for variations in professional sophistication is impossible.118 Lawyers of high technical sophistication, possessing greater sensitivity to the obligations imposed by the rules, would bear heavier burdens than the less sophisticated opposing counsel with whom they deal. The sophisticated lawyer would face the dilemma of having to give more than he gets in the way of truthful information, whereas the less sophisticated lawyer would risk jeopardizing a client’s cause through misguided openness or unnecessary disclosure.119 This analysis, however, presumes that any rule of negotiation ethics must necessarily allow wide variation in interpretation of its scope and meaning. To the contrary, a clear, concise, and unambiguous

113. White, supra note 3, at 937.
114. See supra note 111 and accompanying text.
115. See generally I. Jenkins, Social Order and the Limits of Law (1980).
116. For an informative empirical study of the many factors that affect lawyers’ ethical conduct, see J. Carlin, Lawyers’ Ethics (1966).
117. See supra note 112 and accompanying text.
118. “[I]n a situation where the opposing lawyers differ substantially in technical sophistication, a rule requiring reciprocal disclosure could not yield genuine reciprocity.” Hazard, supra note 3, at 195.
119. Id. at 194-96.
rule announcing what the profession expects of lawyers in private settlement negotiation could establish a normative standard that virtually all lawyers could understand and maintain.\textsuperscript{120} An understandable rule would provide real guidance to those who want to conform to professional standards, regardless of their technical sophistication.\textsuperscript{121} Moreover, if a rule of private settlement negotiation ethics results in even a slight increase in the number of lawyers unwilling to conceal the fact of a critical witness's recanted testimony,\textsuperscript{122} or a change in law that would have dramatic impact on the outcome of the case were it litigated,\textsuperscript{123} then the rule would be fulfilling its intended purpose.\textsuperscript{124}

3. Unenforceability and opposition from the bar—Finally, the conjecture that an unenforceable rule of ethics governing private negotiation would meet with routine violation in the practicing bar\textsuperscript{125} offers scant justification for having no rule at all. Professor White's hypothesis is that a rule of truthfulness in negotiation would require lawyers educated in an adversary system to place abstract values above both instinctive self-interest and important psychological associations with client and cause.\textsuperscript{126} From this he surmises that disobedience to the rule would result. This conclusion, however, gives little credit to the fact that rules of ethics are both norm-enforcing and norm-creating.\textsuperscript{127} They function not only as referents for discipline, but as actual guidelines for conduct.\textsuperscript{128} If drafted with clarity and

\textsuperscript{120} Granted, those who are inclined to violate the rules will not be deterred by any directive in a code of ethics. But this is true in all areas of law, including those areas, such as criminal law, where enforcement apparatuses are much more elaborate and the risks of apprehension much greater.

\textsuperscript{121} Cf. McCracken, Report on Observance by the Bar of Stated Professional Standards, 37 Va. L. Rev. 399, 425 (1951) ("Those who have been so fortunate as to serve on the Committee on Professional Ethics and Grievances of the American Bar Association realize how eager, often pathetically eager, lawyers are to have perplexing ethical problems resolved for them."). This national survey of the profession, conducted in 1951, concluded that with few exceptions American lawyers maintain a strict observance to the ethical standards set forth in the then operative Canons.

\textsuperscript{122} See supra notes 34-41 and accompanying text.

\textsuperscript{123} Id.

\textsuperscript{124} This argument presumes the relative costlessness of the rule. See supra notes 81-88 and accompanying text.

\textsuperscript{125} See supra note 113 and accompanying text.

\textsuperscript{126} White, supra note 3, at 937.

\textsuperscript{127} Professor White appears to concede this when he suggests that "it is conceivable that lawyers would change their attitude if [an explicit and straightforward rule] were enacted and if there were an effective means to inform the bar at large about such a rule." Id. at 938.

\textsuperscript{128} As Justice Harlan observed in an unrelated context, "[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." United States v. White, 401 U.S. 745, 786 (1970)
with consideration for the basic values shared in the profession and the society it represents, a rule of truthfulness to guide private settlement negotiation should win approval by a majority of the bar.129

Finally, it should be noted that the apparent unenforceability of a standard of negotiation ethics does not justify having no standard at all.130 The Code of Professional Responsibility's rules rarely result in the application of discipline.131 Yet the rules exist as vital indicia of what the profession expects from its members.132 Only by having such rules of ethics can the profession expect to inculcate values of truthfulness and fair play in its ranks. It is in the service of this goal that the following proposal is offered.

(Harlan, J., dissenting).


The conformity of the members of a defined group to standards defining proper behavior . . . depends on the clarity of the standards, the homogeneity of the group, the communications network within it, and the extent to which the standards are consonant with commonly shared values and are positively and negatively reinforced.

See generally I. JENKINS, supra note 115, at 118-25.

In the 1983 Study on the Standards of Legal Negotiations, supra note 27, 42% of the national sample of litigators felt that revising and clarifying the Code would be an effective way to improve ethical behavior in settlement negotiation. See also M. FRANKEL, PARTISAN JUSTICE 86 (1980) (stating that there is "good reason to expect that changed rules will significantly affect behavior—that professed commitments to the truth and to fairer advocacy will have substantial meaning"). But see Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639, 641-52 (1981) (arguing that the A.B.A.'s rules of conduct do not promote ethical behavior); see also J. CARLIN, supra note 116, at 150-64 (study of New York metropolitan bar concluding that formal disciplinary controls do little to affect the ethical behavior of lawyers).

130. It is not at all clear, however, that a rule for which no enforcement is available will invariably result in disobedience. Legal history records many instances where less than universally endorsed reforms and proscriptions met with compliance, despite the absence of enforcement mechanisms. See, e.g., R. KAGAN, REGULATORY JUSTICE (1978) (discussing the implementation of a noncoercive national wage-price freeze in 1971).

131. See, e.g., J. CARLIN, supra note 116, at 170 ("Very few violators are caught and punished by the formal disciplinary machinery of the bar. We estimate that only about 2 per cent of the lawyers who violate generally accepted ethical norms are processed, and fewer than 0.2 per cent are officially sanctioned.").

132. "Realists . . . know that stringent enforcement has not always characterized the administration of the existing Code or any predecessor's prescriptions. But this, like everything else, is a challenge to the law reformers, not a recipe for paralysis." Frankel, Why Does Professor Abel Work at a Useless Task?, 59 TEX. L. REV. 723, 730 (1981).
IV. A MODEL RULE OF SETTLEMENT NEGOTIATION ETHICS

FAIRNESS TO OTHER PARTICIPANTS133

In conducting settlement negotiations,

(A) A lawyer shall at all times act in good faith and with the primary objective of resolving the dispute without court proceedings;

(B) A lawyer shall not

(1) Knowingly make any statement that contains a misrepresentation of material fact or law or that omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Knowingly fail to

(a) Disclose to opposing counsel such material facts or law as may be necessary to correct manifest misapprehensions thereof; or, alternatively,

(b) Give reasonable indication to opposing counsel of the possible inaccuracy of a given material fact or law upon which opposing counsel appears to rely. Such indication may take the form of statements of unwillingness to discuss a particular matter raised by opposing counsel.

133. Portions of this model rule borrow liberally from the language of other rules drafted by the American Bar Association. Subsection (B)(1) is a near verbatim adaptation of Rule 7.1(A) (Communications Concerning a Lawyer’s Services) of the Model Rules of Professional Conduct. Subsection (B)(2)(a) may be traced, in part, to Rule 4.2(b)(2) of the 1980 Discussion Draft of the Model Rules of Professional Conduct. See supra note 92.
This Rule is designed to promote basic truthfulness in private settlement negotiations. Its precise objective is to make a lawyer's duty of truthfulness in the negotiation setting coextensive with his duty of candor toward a tribunal. Accordingly, the following interpretive guidelines are suggested.

1. **Good Faith**— The good faith commanded by subsection (A) requires that a lawyer in negotiation conduct himself in such a way as will maximize the potential for reaching a fair and expeditious settlement. This includes, but is not limited to, a duty to reciprocate the candor of opposing counsel with like candor, but in no instance with less truthfulness than that prescribed in subsection (B), and a duty to use information obtained in the course of the negotiation in a way constructive to fair settlement.

2. **Materiality**— One objective of this Rule is to foster a high correlation between the pattern of outcomes resulting from negotiation and those that could reasonably be expected to result from trial. The rationale for a duty of truthfulness that is coextensive in each setting is that this correlation will occur if both sides in a negotiation have all the information that is likely to be adduced during litigation. With this in mind, statements of fact or law are to be construed as “material” when they would meet the test of “relevancy” in the trial context. This stan-

134. This is to be distinguished from the “good faith” principle in general contract law. See Summers, ‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968).

135. The goal of this rule is to achieve “high correlation” between outcomes, rather than virtual identity of results. This goal recognizes the fact that compromise is often the very essence of private settlement. In a negotiation, each disputant typically gives up something he knows he may have gotten at trial, in the hope of showing good faith and furthering the out-of-court disposition of the case. Because bargaining with concessions has little to do with trial, but is by contrast a critical facet of negotiation, some variance between the outcomes of litigation and private settlement must be tolerated. Moreover, to require negotiating attorneys to anticipate the results of trial with absolute precision would unduly strain the settlement process with unrealistic expectations.

136. Fed. R. Evid. 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” (emphasis added). At common law, “materiality” was the test for evidentiary relevancy. See Fed. R. Evid. 402 advisory committee note. Although the Federal Rules of Evidence have replaced the term “material” with a more precisely defined concept of relevancy, the Model Rules of Professional Conduct continue to use materiality as a standard by which to distinguish impermissibly false statements. See, e.g., Model Rules of Professional Conduct Rules 3.3(a), 7.1(a) (1983). Because this Rule is drafted for inclusion in the profession's code of ethics, it adopts the term “material” for its test.
standard of materiality has the effect of preserving generally accepted conventions of negotiation, while proscribing forms of misrepresentation that would cause substantial injustice.

Example 1—Lawyer (L) and Opposing Counsel (OC) are negotiating the settlement of a product liability claim. L states to OC, “My client is eager to get this case before a jury and have the dangerousness of Company X’s products aired in open court. He won’t accept a settlement under $100,000.” In fact, L’s client dreads the thought of going to court and has told L he would gladly accept any offer of settlement over $10,000. The above misrepresentation would not violate the Rule, because statements of a party’s intentions as to an acceptable settlement would not constitute relevant evidence at trial. Likewise, the Rule would permit L to deny having any settlement authority at all, because the fact of a lawyer’s possession or non-possession of such authority would not constitute relevant evidence at trial.

Example 2—Lawyer (L) and Opposing Counsel (OC) are negotiating the settlement of personal injury claims arising out of an automobile accident. L states to OC, “I have an eye-witness who swears she saw your client driving at excessive speed at the time of the collision.” In fact, L knows of no such witness and is merely bluffing. This misrepresentation would violate the Rule, because an eye-witness’s account of the circumstances giving rise to a civil dispute would undoubtedly constitute relevant evidence at trial.

Example 3—Lawyer (L) and Opposing Counsel (OC) are negotiating the claims of Mrs. M, who witnessed her only child killed by a reckless driver. Mrs. M’s claims are for wrongful death and emotional injury. Just two days prior to the negotia-

137. Under the liberal theory of relevancy endorsed by the Federal Rules of Evidence, one could reasonably argue, though, that offers to compromise, and related statements, constitute relevant evidence within the meaning of Rule 401. However, a comment to Rule 408, Compromise and Offers to Compromise, explicitly cites irrelevance as a rationale for the non-admissibility of this kind of evidence:

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position . . . .

FED. R. EVID. 408 advisory committee note (emphasis added). But see Waltz & Huston, The Rules of Evidence in Settlement, 5 LITIGATION, Fall 1978, at 11 (arguing that public policy rationale, not relevancy, underlie the drafters’ intent in Rule 408). The proposed Rule explicitly approves the Advisory Committee’s suggested interpretation, and thus regards as irrelevant offers to compromise and statements of intent as to acceptable settlement.
tion, the state supreme court handed down a decision changing the jurisdiction’s rule with respect to the recoverability of damages for emotional injury. Previously, the court applied the so-called “zone of danger” test, making damages for emotional distress recoverable only if the person witnessing the injury was an immediate family member and within the zone of danger. Now the court has held that it will only require the family member-claimant to have actually witnessed the injury to recover such damages. L is aware of this recent change in the law, and has reason to believe that OC is not. In the course of the negotiation, L states, “Your wrongful death claim is questionable. And as far as emotional injury, your client admitted she witnessed the accident from her front porch. Since she wasn’t within the zone of danger, she won’t recover.” The implicit misrepresentation contained in L’s comment would violate the Rule, as the jurisdiction’s law with respect to recoverability of damages for emotional distress would be relevant at trial.\textsuperscript{138}

3. Statements of fact— The Rule is intended to apply to statements of law or fact, and does not reach statements of conjecture, theory, or opinion. No duty of truthfulness extends to expressions of this kind.\textsuperscript{139}

Example 4— Lawyer (L) and Opposing Counsel (OC) are negotiating a claim of medical malpractice. L states to OC, “I'm convinced your clients were negligent in the performance of their surgery on my client.” In fact, L has conferred with an expert witness, both concluding that the operation was probably conducted with due care. Because the statement refers to the personal belief of L, rather than to any material fact, the misrepresentation does not violate the Rule.

4. Duty to disclose or give reasonable indication of inaccuracy— Subsection (B)(2) gives the lawyer an option when faced during negotiation with an adversary laboring under a manifest misapprehension of material fact or law. He may either: (a) dis-
close such information as is necessary to disabuse the adversary of his misconception, or (b) give some reasonable indication of the possible inaccuracy of material information upon which opposing counsel appears to rely.\textsuperscript{140}

\textsuperscript{140} This duty might appear to impose a heavier burden of truthfulness on the negotiator than that currently imposed on the courtroom advocate. For although a lawyer must inform the tribunal of an adversary's misapprehension of law, he owes no such duty when it comes to correcting an opponent's mistake of fact. For an illustrative anecdote, see S. WILLISTON, LIFE AND LAW 271 (1940). With respect to factual material, a trial lawyer's only duties are not to use perjured testimony, not to make false statements, and not to participate in the creation or preservation of evidence known to be false. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1980). These duties clearly refer to a lawyer's affirmative conduct in court, and create no obligation of factual disclosure when confronted with an adversary's misapprehensions.

The apparent imbalance in the level of ethics required in each setting, however, is misleading. The basic congruence of a trial advocate's duties of truthfulness under DR 7-102(A) and a negotiator's duty of disclosure under subsection (B)(2) is best understood by contrasting the normative structure of trial and negotiation. In negotiation, legal arguments and factual information are exchanged in an essentially ad hoc process. Although this process acts as a kind of shadow-trial, see supra notes 59-67 and accompanying text, the only rules that govern it are those of conversational discourse and civility. In the ordinary conversation, for example, a statement by A invites, indeed demands, a response from B. Typically, the response will take the form of either a return statement, a question, or some otherwise meaningful gesture. But it need not, for silence itself is a type of response. It may mean anything from assent to an idea, to concurrence with an opinion, to affirmation of a statement. Rarely, if ever, though, does silence signify nothing. In conversation, the decision to keep silent represents a form of affirmative behavior; it is as much a part of the discussion as speech, and thus directly implicated in the overall understanding that emerges therefrom.

Trial, by contrast, is thoroughly controlled by norms of process, and is in almost no sense conversational. Lawyer A presents evidence, after which Lawyer B may either cross-examine or present rebuttal evidence. Lawyer A asserts a conclusion based on the evidence; Lawyer B argues an alternative view. And so the case proceeds to judgment. This structure of courtroom advocacy allows for no direct exchanges between the lawyers themselves. Rather, it is designed to facilitate information flow between the lawyers and the tribunal. Rules of court do not even permit, much less require, lawyers to respond in any direct way to the statements of their adversary. Even evidentiary and procedural objections are made to a judge, and such objections are not used to affirm or deny the substantive assertions of opposing counsel. It is not surprising to observe, therefore, that no canons of ethics command courtroom disclosure of factual material. Quite appropriately, the applicable rules relate to a lawyer's duty to be truthful in terms of the evidence he presents and the statements he makes to the tribunal. Because direct response to statements of opposing counsel is not a part of the trial process, silence does in this setting signify nothing. It neither affirms nor refutes, but is merely appropriate courtroom conduct. A lawyer's silence in the face of an adversary's misstatement at trial, therefore, does not implicate him in the statement itself in the way it would during a bilateral negotiation.

In sum, the normative structure of settlement negotiation distinguishes itself from that of trial in at least one important respect. In negotiation, owing to its conversational format, a lawyer's silence typically conveys meaning and thus constitutes affirmative conduct. At trial, conversely, an attorney's silence in the face of an adversary's statements represents neutral behavior rather than any kind of affirmative response. For this reason, a duty of disclosure in the negotiation context is analogous to existing duties of truthfulness with respect to affirmative behavior at trial. Given the difference in the normative
Example 5—Lawyer (L) represents a prominent golf pro (G) who suffered a disabling back injury when he slipped on a ball negligently left in a dark clubhouse corridor. Although the newspapers reported G’s injury as permanent, G has spent the past month abroad receiving medical treatment with positive results. He now works out, practices daily, and doctors have given assurances that he will be back on the playing circuit within a year. G informs L of these developments prior to the commencement of settlement talks. During negotiation, however, it is clear that Opposing Counsel (OC) still believes that the damage to G’s back is irreversible. He states, “What has happened to your client is a terrible thing, and we want to do right by him. Suffering as he is now, his career gone forever, we want to do all we can to ease the pain.”

In this situation, subsection (B)(2) of the Rule gives L an option. Since G’s physical condition is a matter of material fact, and OC’s misapprehension as to the true status of this condition is manifest, L must either: (a) tell OC about the treatment G has been receiving and the likelihood of his being able to return to the pro circuit; or (b) give OC such reasonable indication as to put him on notice of the possible inaccuracy of his perception of G’s health. Although L need not inform OC of the exact prognosis for G’s recovery, he may not permit OC’s misperception of this critical fact to go completely unchecked. His second option, therefore, would be to make some statement to indicate nonassent to the misapprehended fact. He may say, for example: “I’m not willing to discuss either the extent of my client’s suffering or his future career prospects.” Or, he might say, “If you want to depose my client or his doctors to find out the extent of the injuries, you may. We’re only here to discuss settlement.”

Statements such as these satisfy the dictates of subsection (B)(2)(b), as they put OC on notice that information upon which he appears to rely may be inaccurate. Although such statements amount to at least partial disclosure, it is important that a lawyer be able to keep some cards close to the chest without violating his duty of truthful negotiation behavior. No rule of negotiation ethics should oblige a lawyer to submit to cross-examination by his adversary. Yet neither should rules of professional conduct permit one attorney to profit unfairly from the manifest structure of the two processes, comparing a negotiator’s obligation in terms of what he chooses to say and not say, with a trial lawyer’s ethical responsibility of truthful evidentiary presentation, is the appropriate inquiry when fashioning duties that are in essence coextensive.
misapprehensions of opposing counsel. Subsection (B)(2)(b) strikes a compromise. The notice it ensures prevents a settlement from being negotiated on the basis of misinformation. Yet the form this notice takes allows a lawyer to remain in the negotiation without giving up facts he would rather force his adversary to discover independently. Given that candor toward opposing counsel will be reciprocated with like candor, the wisdom of making statements like the foregoing is questionable. But the Rule takes account of the varying tactical predilections of legal negotiators, and allows lawyers to conduct truthful settlement without having to research for their adversaries. Such a compromise affords lawyers a certain amount of strategic freedom when negotiating, yet at the same time safeguards the integrity of information that will ultimately produce settlement.

CONCLUSION

Private settlement negotiation is a largely unregulated area of law in terms of the ethical duties imposed on attorneys. The absence of professional controls on this increasingly important process permits abuse and injustice. This is particularly disturbing when one considers lawyer-negotiated settlement not as an alternative to legal adjudication, but as itself an alternative form of adjudication.

The Model Rule presented in this Note is not a talismanic solution to every type of ethical problem in the negotiation behavior of practicing attorneys. It is vulnerable to avoidance by the artful and, like all rules of professional responsibility, disobedience by the unethical. The Rule would, however, be a commendable statement from the bar to its members about what kind of conduct is expected in this critical area of the profession. As such, it would strengthen the public’s currently uncertain trust of the law and its practitioners, and more importantly, advance the cause of legal ethics among lawyers.

—Robert B. Gordon