

2007

## When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal

Don Peters

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### Recommended Citation

Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. Disp. Resol. (2007)

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# When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal

*Don Peters\**

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This article examines whether the punch line that you can tell when lawyers are lying by confirming that their lips are moving applies to their conduct when negotiating in mediations. General surveys of lawyer honesty suggest that this perception probably does apply to the way lawyers negotiate in mediations. Only 20% of people surveyed in a 1993 American Bar Association poll described the legal profession as honest, and that number fell to 14% in a 1998 Gallup poll.<sup>1</sup> A more recent poll revealed that one-third of the American public believes that lawyers are less truthful than most people.<sup>2</sup>

A lawyer friend who mediates circuit court cases and other substantial matters in Florida told me that his professional life is lived in a “fog of lies and spin” emanating from lawyers with whom he works.<sup>3</sup> Another mediator commented that “the spinning that goes on in mediation is truly enough to make one dizzy.”<sup>4</sup>

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1. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 528 n.3 (2002).

2. E. Cliff Martin & Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 1.4 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 779 (2002).

3. J. Joaquin Fraxedas, discussion with author (March 26, 2004).

4. Ed Ahrens Jr., *There Are Lies and There Are Lies*, <http://www.floridamediationgroup.com/> (last visited Feb. 27, 2006).

When I asked another friend who mediates in Florida how frequently lawyers lie during his mediations, he said, "Practically all the time."<sup>5</sup> An Arizona mediator who often teaches others studying to become mediators tells them not to believe "anything a lawyer tells you during a mediation."<sup>6</sup>

## I. INTRODUCTION

These findings and comments piqued this author's interest in investigating how lawyers are handling a core ethical choice to act honestly when negotiating on behalf of clients during mediations. Little published empirical work exists on how honestly lawyers negotiate generally and none this author could find describes attorney behaviors when they negotiate in voluntary, contractually-required, or court-ordered mediations. The topic of lawyer honesty in mediations also has received little focused attention from scholars. This article approaches both gaps by integrating data derived from questionnaires answered at a continuing legal education workshop for lawyers and mediators<sup>7</sup> with analysis of information categories commonly disclosed during third-party assisted negotiations.

This article analyzes survey information using the categories the legal profession employs to regulate negotiating honesty: material facts, non-material facts, and opinions. It then examines other important groupings of information essential to negotiating and mediating not mentioned directly in ethics regulations including agreement alternatives, interests, and priorities. This article concludes by making and defending a claim that regulatory reform is needed to encourage more truth-telling about interests, the core component of value-creation and problem-solving in negotiation and mediation.

Adopting the definition of lying proposed by Professor Gerald Wetlaufer, the questionnaire investigated the frequency of intentional statements by which speakers attempt to create in others understandings different from the speakers' actual views<sup>8</sup> regarding the above information categories. Designed to avoid concerns and debates about what truth is and whether knowable truth exists, this definition focuses on speakers' intentions to create beliefs in listeners that diverge from negotiators' own understandings. Because communication recipients seldom have direct knowledge of speakers' intentions and understandings, the questionnaire focused on observations and defined them as personal witnessing of remarks produced by others or themselves, including both actual knowledge and strong suspicions.<sup>9</sup> This broad definition allowed respondents to self-disclose any-

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5. Chester Chance, discussion with author (February 9, 2006).

6. Bruce E. Myerson, *Telling the Truth in Mediation: Mediator Owed Duty of Candor*, DISP. RESOL. MAG., Winter 1997, at 17.

7. This Conference was the annual workshop sponsored by the ADR Committee of the Litigation Section of the Florida Bar, held on March 26, 2004, in Orlando, Florida. It was attended by forty lawyers and mediators and this essay reports data from twenty-three completed questionnaires. This essay reports averages of the estimates respondents shared on each inquiry and their occasional written comments. Ranges and medians for each mean are provided in these notes.

8. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1223 (1990).

9. Of course, this definition does not establish that lies actually were told, often a very difficult event to establish. As one respondent noted, "if the negotiator/lawyer is lying, it is rare that I would know. My percentages are based more on suspicion than fact." Survey response (March 26, 2004) (on file with author).

mously the frequency with which they engaged in deceptive statements about these information categories<sup>10</sup> and to estimate how often they suspected others lied about these categories of information in negotiations and mediations. Responses came from twenty-three lawyers, five of whom were practicing mediators.<sup>11</sup> Although far from rigorous empirical investigation, this survey employed methods similar to those used in much of the limited research regarding attorney truthfulness in negotiation.<sup>12</sup>

## II. LYING ABOUT MATERIAL FACTS

Communications regarding material facts constitute the category of information most directly regulated by existing ethical rules and substantive doctrines. Nothing in the American Bar Association's Model Rules of Professional Conduct (Model Rules), as enacted by the forty-four states which pattern their ethical governance substantially on these guidelines, directly addresses lawyers' obligations to be truthful when negotiating during mediations. Despite arguments to do so, the Ethics 2000 Commission charged with making necessary amendments to the Model Rules, chose not to recommend for mediation the more stringent standard of honesty which applies to trials and forbids false statements regarding all facts regardless of materiality.<sup>13</sup> This makes it safe to assume that the regulations regarding truthfulness in negotiation apply to mediations.

Model Rule 4.1 applies to lawyers' statements to others, and it prohibits attorneys from knowingly making false statements of material fact or law to third

10. My questionnaire did not attempt to discern whether responses came from personal or suspicion-based experiences. Lawyers responding to questions about caucuses, however, had only their behavior to evaluate. This may partially explain the higher average estimates for lies in joint sessions than caucuses. See *infra* notes 33, 34, 81, 82, 98, 99.

11. Respondents included sixteen males and seven females and averaged nineteen years of experience, ranging from a high of forty to a low of three. The five mediators were men and averaged twenty-eight years of experience.

12. Virtually all of the published articles describing negotiation honesty involve similar approaches collecting information based on questionnaires or interviews. See, e.g., Terry Carter, *Ethics by the Numbers*, 83 A.B.A. J. 97 (Oct. 1997) (survey of nearly 100 lawyers attending an ABA Annual Meeting); Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173 (1989) (interviews presenting 10 scenarios to 14 attorneys); Larry Lempert, *In Settlement Talks, Does Telling The Truth Have Its Limits*, 1 INSIDE LITIG. 1 (1988) (interviews presenting four hypothetical situations to nine law professors who have written on ethics, five experienced litigators, and one judge). One of this survey's respondents accurately commented: "I do not believe that this survey nor the way in which it was given constitutes empirical data." Survey response (March 26, 2004) (on file with author). My questionnaire was an explorative study of a group that can hardly be called a sample of anything other than lawyers and mediators who were willing to share their observations. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, n.4 (1990). The group surveyed was small and its members may easily represent a biased collection. *Id.*

13. Model Rule of Professional Conduct R. 3.3 prohibits knowingly making false statements of fact to tribunals regardless of their materiality. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2004). Despite urgings to do so, the ABA did not include mediation in its definition of tribunal as part of the Ethics 2000 Commission's revision of the Model Rules of Professional Conduct. Focusing on the non-adjudicative nature of mediation rather than its frequent direct connection to judicial proceedings when mandated by courts, the Model Rules define tribunal as "a court, an arbitrator in a binding arbitration proceeding, or other body acting in an adjudicative capacity." MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2004).

parties when representing clients. This Rule prohibits lawyers from lying about material facts when negotiating inside and outside of mediation. Although Model Rule 8.4 generally prohibits lawyers from engaging in dishonest, deceitful, and fraudulent conduct, many scholars and commentators conclude that the more specific provisions of Model Rule 4.1 govern lawyer truthfulness when negotiating.<sup>14</sup>

The prohibition of Model Rule 4.1 against lying about material facts largely replicates substantive doctrines of fraud which can make agreements vulnerable to invalidation.<sup>15</sup> American fraud law touches many negotiation behavioral decisions and seems to be expanding its reach.<sup>16</sup> Reflecting these substantive trends, the Ethics 2000 Commission amended the Comments to Model Rule 4.1 to announce that material fact lies can occur if lawyers “incorporate or affirm” statements of others they know are false. Material fact lies also occur when lawyers use “partially true but misleading” assertions in contexts that make them the “equivalent of affirmative false” communications.<sup>17</sup> Courts are likely to find this equivalence when other facts are vital and not easily accessible to the persons who receive selective, partial communications.<sup>18</sup>

Lawyers who lie about material facts when negotiating inside or outside of mediation risk ethical discipline by the legal profession for violating Rule 4.1<sup>19</sup> and for assisting their clients in committing fraud.<sup>20</sup> They also risk civil liability for fraud,<sup>21</sup> deceit,<sup>22</sup> and legal malpractice.<sup>23</sup> Although instances where lawyers

14. Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937, 939-40 (2002) (Model Rule 8.4(c) intended to be broad and cover conduct that otherwise might slip through the cracks and not be banned by more specific rules provisions). Model Rule 8.4 (c) “can and has been invoked” to ensure lawyers comply with their duties “to be honest and fair in negotiation.” Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation*, in DISPUTE RESOLUTION ETHICS, A COMPREHENSIVE GUIDE 119, 137-38 (Phyllis Bernard & Bryant Garth eds., 2002) [hereinafter ETHICS IN NEGOTIATION].

15. Courts have always imposed liability on those who knowingly misrepresent facts in negotiation. Gary Tobias Lowenthal, *The Bar’s Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 416 (1988). A contract theory of fraudulent misrepresentation allows parties induced into contracts by another’s lies to rescind and a tort theory of deceit permits recovery for resulting economic harm. *Id.* Professor Geoffrey C. Hazard, Jr., a principal drafter of the comments to the Model Rules of Professional Conduct, concluded that “legal regulation of lawyer trustworthiness cannot go much further than to proscribe fraud.” Geoffrey C. Hazard, *The Lawyer’s Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 196 (1981).

16. G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 206 (1999). State legislatures, courts, and other regulatory organizations such as the American Law Institute and National Commissioners on Uniform State Laws have been broadening the meaning and scope of American fraud law. Menkel-Meadow, *supra* note 14, at 141.

17. MODEL RULES OF PROF’L CONDUCT R. 4.1 CMT. 1 (2004).

18. See SHELL, *supra* note 16, at 208-09.

19. See, e.g., Fla. Bar v. Varner, 780 So. 2d 1 (Fla. 2001) (lying about filing suit); Fla. Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996) (lying about who would be using leased office equipment); Fla. Bar v. McLawhorn, 505 So. 2d 1338 (Fla. 1987) (falsely told health care providers with unpaid bills that his client’s verdict was not sufficient to satisfy outstanding financial obligations); *In re Eliassen*, 913 P.2d 1163 (Idaho 1996) (falsely told debtor he would lose his driver’s license if he did not pay a loan); *Ausherman v. Bank of Am. Corp.*, 216 F. Supp. 2d 530 (D. Md. 2002) (lawyer lied about making confidential arrangements to learn identity of employee allegedly engaging in misconduct to obtain a dollar settlement); *In re Hendricks*, 462 S.E.2d 286 (S.C.1995) (lying to title insurer).

20. Model Rule of Professional Conduct 1.2(d) prohibits lawyers from assisting clients “in conduct the lawyer knows is . . . fraudulent.” MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2004).

21. See, e.g., *Slotkin v. Citizen’s Casualty Co.*, 614 F.2d 301 (2d Cir. 1979) (lawyer who misrepresented amount of insurance coverage available in settlement negotiations of an infant’s medical malpractice claim held liable for fraud); *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 657 N.W. 2d

are disciplined for lying about material facts and assisting client frauds seem to be increasing,<sup>24</sup> most actual regulation of lawyer honesty regarding this information category occurs when parties later seek to challenge agreements they negotiated inside or outside of mediation.<sup>25</sup> While aggrieved participants have the ability to challenge agreements based on lies about other negotiation topics, they typically have greater motivation to discover that important external facts, independent of lawyers' negotiation strategies, were not as represented.

Despite these prohibitions and risks, and despite concerns about reputation in repeat encounters, empirical research suggests that lawyers lie about material facts when negotiating. A survey of a national sample of lawyers showed that 51% believe that "unfair and inadequate disclosure of material information during pre-trial negotiation is a regular or frequent problem."<sup>26</sup> Another survey of civil litigators in Illinois, Indiana, and Michigan showed that 20% believed that opposing lawyers routinely lied about material facts during non-mediated negotiations.<sup>27</sup> Mirroring that research, the average of estimates from respondents answering the questionnaire regarding lying about material facts was that such lying occurred in 23% of the non-mediated negotiations in which they participated.<sup>28</sup>

Many facets of mediation constrain opportunities to lie about material facts successfully. Concerns for reputation and effectiveness in future encounters with mediators encourage truth-telling. The presence of clients typically required for

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711 (Iowa 2003) (lawyer who lied about client owning a business in negotiation to sell that business held liable for fraud); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60 (2d Cir. 1990) (lawyer who denied regulatory investigation of client could be sued for fraud). Negotiator-agents are not relieved of liability for their torts simply because they acted on behalf of clients. Rex Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ L. REV. 75, 87 (1985).

22. *E.g.*, *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990) (lawyer's deliberately misleading answers to IRS agent constituted deceit); *McVeigh v. McGurren*, 117 F.2d 672 (7th Cir. 1940) (attorney who lied about his client's ability to pay a large child support debt when client had just received a substantial inheritance held liable for deceit).

23. Perschbacher, *supra* note 21, at 107-12.

24. *Supra* note 19. Other cases disciplining lawyers for lying during non-mediated negotiations include: *Fla. Bar v. Varner*, 780 So. 2d 1 (Fla. 2001) (lying about filing suit and submitting a fictitious notice of voluntary dismissal); *Fla. Bar v. Adams*, 641 So. 2d 399 (Fla. 1994) (letter falsely accusing another attorney of suborning perjury); *In re Skinner*, 214 N.W. 652 (Minn. 1927) (willfully making false statement to a third person warrants disciplinary proceeding). Cases disciplining lawyers for assisting client fraud involving negotiating outside of mediation include: *Fla. Bar v. Beaver*, 248 So. 2d 477 (Fla. 1977) (counseling client to conceal assets during divorce and helping client disperse money in trust account warrants suspension); *In re Mussman's Case*, 286 A.2d 614 (N.H. 1971) (helping client create fraudulent transfer unethical).

25. Menkel-Meadow, *supra* note 14, at 139. Litigating the enforceability of mediation agreements supplies one of two most common components of the rapidly growing law about mediation as it becomes more institutionalized and more widely used. James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of Emerging Case Law*, 54 ARK. L. REV. 171, 172 (2001). Most issues surrounding confidentiality of statements made in civil mediations deal with claims of misconduct by parties such as fraud or capacity to contract issues. James M. Bowie, *Ethical Issues in Construction Mediation: Are There Any Rules*, 24 CONSTR. LAW. 33, 37 (2004).

26. Steven D. Pepe, *Standards of Legal Negotiations: Interim Report and Preliminary Findings* (1983) (unpublished manuscript, on file with New York University Law Review).

27. *Id.* See generally Robert B. Gordon, Note, *Private Settlement as Alternative Adjudication: A Rationale For Negotiation Ethics*, 18 U. MICH. J.L. REFORM 503, 508 n.29 (1985).

28. Survey responses (March 26, 2004) (on file with author). The range for the 21 responses to this question ranged from a high of 89% to a low of 0% and the median was 20%. *Id.* The questionnaire defined material facts as "event, subject, and other specifics affecting deals or dispute resolutions that fraud law would consider actionable as going beyond puffing or acceptable exaggeration." *Id.*

court-connected mediations often means that material fact lies require party complicity. Caucuses give mediators opportunities to converse directly about and indirectly around suspected misrepresentations. With capable attorney representation, effective use of broad civil discovery provisions also limits opportunities to lie about material facts.

Nevertheless, reported decisions<sup>29</sup> and anecdotal evidence suggest that lawyers lie about material facts when negotiating during mediations. One mediation scholar reported that “some attorneys, operating under the assumption that . . . [mediations are] entirely confidential, have bragged about resolving the case by misrepresentation.”<sup>30</sup> Another noted the reports of several Texas mediators that lawyers regularly lie during mediations.<sup>31</sup> Survey respondents were asked to indicate how often they believed they observed lies about material facts in joint sessions versus caucuses. The average of survey respondents’ estimates was that lies occurred in 25% of the joint sessions in which they participated.<sup>32</sup> The average of respondents’ estimates of lies about material facts in caucuses was that they occurred in 17% of the mediations in which they participated.<sup>33</sup>

Respondents’ estimates that more material fact lying occurred in joint sessions than in caucuses probably reflect the questionnaires’ option only to self-disclose when lawyers evaluate caucus behaviors.<sup>34</sup> This difference may suggest that lawyers occasionally choose to communicate deception directly in joint sessions to avoid how mediators translate, embellish, diminish, reframe, and ignore lawyer statements when carrying messages between caucuses. In addition, predic-

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29. *E.g.*, *In re Waller*, 573 A.2d 780 (D.C. 1990) (lawyer’s lie to mediator about representing an apparently liable but non-named defendant held not material).

30. KIMBERLEE KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 142 (1994). Attorneys typically lead negotiations and talk more during mediations. An empirical study showed that lawyers talked more than clients in 63% of the matters and talked an equal amount of time in 31% of the sessions. Rosselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 658 (2002).

31. Lynne H. Rambo, *Impeaching Lying Parties With Their Statements During Negotiation: Demystifying the Public Policy Rationale Behind Evidence Rule 408 and the Mediation Privilege Statutes*, 75 WASH. L. REV. 1037, 1091 n.210 (2000).

32. Survey responses (March 26, 2004) (on file with author). The range for the twenty responses on this question was from a high of 80% to a low of 0% with a median of 20%. *Id.*

33. *Id.* The range for the eighteen responses was from a high of 80% to a low of 0% with a median of 10%. *Id.*

34. Most of this discrepancy probably results from the fact that respondents who were not mediators would have to answer this question by estimating their own lies about material facts because they presumably did not observe other lawyers in caucuses except in multi-party contexts. Respondents who were mediators, however, also estimated observing more lying about material facts in joint sessions than in caucuses. The average of the estimates from the four mediators who shared them regarding these categories was that material fact lies occurred in 30% of joint sessions and 15% of caucuses on the mediations in which they participated. *Id.* The likelihood that lawyers may not have negotiated substantially before court-ordered mediations, which presumably supplied the bulk of these respondents’ experiences, may explain these estimate averages regarding material fact lying occurring more in joint sessions than in caucuses. Whatever the explanation, this response does not confirm predictions that the mere presence of a mediator will produce positive changes in negotiating behavior in the amount of truth-telling regarding material facts that occurs. See Daniel Bowling & David A. Hoffman, *The Personal Qualities of the Mediator and Their Impact on the Mediation*, in BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 19-21 (Daniel Bowling & David Hoffman eds., 2003) (arguing the presence of mediators produces positive changes in negotiating behavior).

tions that lawyers will exploit the confidentiality that attaches to caucuses to lie about material facts more than in private sessions may not be accurate.

On the other hand, some lawyers might choose to lie about material facts in caucuses to take advantage of opportunities to influence mediations within these confidential sessions. They also may hope that mediators will communicate these falsehoods in ways that participants deem more legitimate and persuasive.

Mediators may not know when lawyers lie about material facts during mediations, particularly when misrepresentations relate to information that is not readily available to and beyond the reach of other participants. Studies show most humans are not particularly adept at detecting lies.<sup>35</sup> If the limited research and respondents' estimates accurately predict that lawyers lie about material facts in 17% to 23% of all mediations, it follows that undetected lies occasionally influence mediated outcomes and resulting agreements.

Sometimes contexts, prior communications, caucus conversations with clients, or earlier experiences with attorneys raise legitimate concerns about the truthfulness of important fact representations made in joint sessions or caucuses. When this happens, mediators may use the common advocacy technique of asking questions to which they already know the answers as a way to check attorney truthfulness.<sup>36</sup> Mediators also may pursue several options if they suspect the truthfulness of material fact statements.

One option includes encouraging parties to include representation or warranty provisions in mediated agreements for fact statements that are essential to inducing acceptance of proposals. Representations are detailed statements about important facts, and warranties are promises that these assertions are true. Both of these provisions lessen the need to base agreements solely on trust. Both supply standard tools transactional lawyers use to deal with the strategic opportunism presented by the ability to deceive about material components of deals. This option can be raised by parties or mediators and, because agreements are usually readily admissible in evidence, these provisions can avoid many later controversies about the content of key representations and can focus disputes directly on the truth of these statements.

Lawyers who reject using representations and warranties naturally increase mediators' concerns about the truthfulness of the material fact statements they make. Mediators confronting this challenge may privately discuss the risks of discovery through pretrial procedures and subsequent challenges to encourage lawyers and their clients to reframe these situations and reconsider their refusals to change or warrant their representations. Mediators also may encourage negotiators to make suspected misstatements confidential communications to avoid confronting dilemmas regarding whether and how to share them. Finally, mediators can choose not to transmit material information that they suspect is false.

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35. Robin Marantz Henig, *Looking for the Lie*, N.Y. TIMES, Feb. 5, 2006, at 47. Research suggests that although most people think they are skilled at spotting liars, fewer than 5% of people have innate abilities to detect lies with accuracy. Most humans, when tested, spot liars at a level not much better than chance. *Id.*; see Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913 (1991).

36. Menkel-Meadow, *supra* note 14, at 149; Jan Frankel Schau, *Secrets and Lies: The Ethics of Mediation Advocacy*, <http://www.mediate.com/articles/frankelschauJ1.cfm> (last visited April 7, 2007) (lies about undiscovered material facts can confound and impede the progress of negotiations).



Assuming that none of these approaches resolves concerns, mediators may need to terminate mediations to avoid helping create agreements that involve fraud.<sup>37</sup> Discussing their ethical obligation to avoid fraudulent agreements at appropriate moments in caucuses may generate modifications of earlier statements and decisions not to use or make additional false representations.

Current legal trends exempt challenges to mediated agreements based on claims of material fact misrepresentations from the confidentiality rules that ordinarily apply to mediation proceedings.<sup>38</sup> Mediators also may be compelled to testify regarding the existence of subsequently challenged material fact statements during the mediation.<sup>39</sup>

### III. FAILURES TO DISCLOSE MATERIAL FACTS

Analysis of truthful negotiating in and out of mediation typically focuses on affirmative misstatements, which generally must exist before fraud or ethical scrutiny occurs. Circumstances, however, may make the failure to disclose facts or other information fraudulent and unethical. Explicitly linking ethical regulation to the American law of fraud, Model Rule 4.1(b) prohibits lawyers from knowingly failing to disclose a material fact when disclosure is necessary to avoid "assisting" fraudulent acts by clients unless disclosure is barred by the confidentiality rule. Comment 1 to Model Rule 4.1 notes that although American lawyers generally have "no affirmative duty to inform" opposing parties of relevant facts, omitting facts or other information may be "the equivalent of affirmative false statements." Section 98(3) of the Restatement (Third) of the Law Governing Lawyers also provides that attorneys negotiating may not fail to make disclosures required by law.

American fraud law generally recognizes disclosure duties when making partial statements that are or become misleading in light of all facts, parties stand in a fiduciary relationship to each other, non-disclosing parties have vital information

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37. *E.g.*, Florida's Standards of Professional Conduct for Mediators provide that mediators shall terminate mediations entailing fraud. FLA. R. CERT. & CT.-APP'T MEDIATORS 10.420(b)(4) (2003).

38. *E.g.*, UNIF. MED. ACT § 6(b)(2) (2006). The act, adopted in eight states as of March 2006, exempts from confidentiality mediation communications offered in claims "to rescind or reform . . . contracts arising out of mediation" if proponents can show at an in camera hearing that the evidence is not otherwise obtainable and the need for the evidence substantially outweighs the interests in protecting it. *Id.* Florida's confidentiality statute exempts mediation communications "offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation." FLA. STAT. § 44.405(4)(a)(5) (2005). See *F.D.I.C. v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999) (Federal ADRA does not create a privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation.).

39. Several opinions allow mediators to disclose the existence of allegedly fraudulent statements. *E.g.*, *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (permitting mediator to testify regarding allegations of duress); *White*, 76 F. Supp. 2d at 738 (alleged duress charge justified disclosure of mediation communications from all parties); *McKinlay v. McKinlay*, 648 So. 2d 806, 809-10 (Fla. Dist. Ct. App. 1995) (holding confidentiality privilege was waived when wife testified so that husband could rebut and authorize mediator to testify regarding alleged duress and intimidation during mediation). UNIF. MED. ACT § 6(c) (2006) (provides that mediators may not be compelled to testify regarding post-mediation fraud claims based on material fact lies).

not accessible to others, or special statutory obligations apply.<sup>40</sup> Negotiated agreements have been set aside for attorneys' failures to disclose the death of the plaintiff,<sup>41</sup> a life-threatening injury about which the plaintiff was ignorant,<sup>42</sup> major procedural developments affecting a case,<sup>43</sup> existence of insurance coverage,<sup>44</sup> an autopsy,<sup>45</sup> and changed testimony.<sup>46</sup>

This author's research found no empirical studies regarding the frequency with which attorneys' failures to disclose material facts in these situations occur in negotiations inside or outside of mediation. The questionnaire did not investigate this issue. The broad reach of civil discovery and the presence of skilled lawyers lessen risks of this happening in high stakes, court-connected mediations. This seems particularly likely when duties exist to correct representations that lawyers learn were false when made or have become false because of changed circumstances.<sup>47</sup> Although the ABA's House of Delegates deleted a draft recommendation generally establishing this duty when enacting the Model Rules in 1983, such obligations are created by discovery provisions<sup>48</sup> or common law.<sup>49</sup> Mediators

40. SHELL, *supra* note 16, at 208-09; Barry R. Tempkin, *Misrepresentation by Omission in Settlement Negotiations, Should There Be A Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 181 (2004) (current trend in ethical analysis suggests that lawyers in some circumstances must correct misapprehensions that did not emanate from them or anyone acting on their behalf).

41. *Virzi v. Grand Trunk Warehouse & Cold Storage*, 571 F. Supp. 507 (E.D. Mich. 1983); *see also* *Ky. Bar Ass'n v. Geisler*, 938 S.W. 2d 578 (Ky. 1977) (attorney's failure to disclose the death of her client to opposing counsel amounted to an unethical affirmative misrepresentation); *Kingsdorf v. Kingsdorf*, 797 A.2d 206 (N.J. Super. 2002) (court refused to enforce a settlement agreement where a lawyer failed to disclose husband had died rendering property wife had given to husband hers by joint tenancy). The American Bar Association has opined that personal injury lawyers must disclose the death of their clients before accepting settlement offers. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 95-397 (1995). Although the court's rationale in *Virzi* was that the plaintiff's lawyer needed to correct the material misimpression of the other side, the ABA Comm. on Prof'l. Ethics and Grievances, Formal Op 94-387 (1994), approved settling a claim the lawyer knows was barred by the statute of limitation without disclosing the adversary's apparent misimpression to the contrary. *Menkel-Meadow, supra* note 14, at 140 n.68.

42. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). This Court held that the failure to disclose the additional injury was a fraud upon the court because the plaintiff was a minor and settlement required court confirmation rather than an omission tantamount to an affirmative misrepresentation. *Menkel-Meadow, supra* note 14, at 140.

43. *Hamilton v. Harper*, 404 S.E.2d 540 (W.Va. 1991) (lawyer failed to disclose that summary judgment had just been granted to insurer deciding no coverage when accepting pre-existing offer from it).

44. *State ex rel. Neb. State Bar Ass'n v. Addison*, 412 N.W.2d 855 (Neb. 1987) (lawyer disciplined after failing to reveal existence of insurance coverage to hospital administrator when negotiating release of hospital's lien).

45. *Miss. Bar v. Mathis*, 620 So. 2d 1213 (Miss. 1983) (lawyer sanctioned for failing to disclose that an autopsy had been performed in an action for bad faith denial of insurance coverage).

46. *Kath v. W. Media, Inc.*, 684 P.2d 98 (Wyo. 1984) (settlement invalidated because attorney failed to disclose letter from witness contradicting previous deposition testimony).

47. *Nathan M. Crystal, The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1076-82 (1999) (arguing lawyers have an ethical duty to disclose in these situations). *See In re Williams*, 840 P.2d 1280 (Or. 1992) (lawyer disciplined for failing to tell landlord that earlier representation that he would hold tenant's payments in escrow was no longer correct); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. d (2000) (recognizing duty of corrective disclosure).

48. FED. R. CIV. P. 26(e) (imposes a duty on parties to amend and supplement discovery responses if material information is incomplete or incorrect and the new or changed information is not known to other parties whether ordered by the court or not).

traveling between private sessions with participants also may discern what material facts really matter to them and thereby identify when significant failures to disclose occur.

Mediators encounter challenges if lawyers confidentially disclose material facts that create serious fraud concerns and then instruct mediators not to reveal them. This disclosure puts in conflict mediators' duties to maintain the confidentiality of caucus disclosures and to not produce fraudulent agreements. When this situation happens, mediators typically explore the risks run by going forward without disclosure in terms of successful challenges to resulting agreements and personal exposure to fraud, intentional or negligent misrepresentation, and malpractice claims. They also may mention their ethical duties to terminate rather than go forward with deals they believe may be later determined to be fraudulent. Oregon has decided that mediators must terminate mediations in this situation.<sup>50</sup> Mediators who go forward after discovering lawyers or participants are fraudulently withholding material information from others participate in the perpetration of fraud.<sup>51</sup>

#### IV. LIES ABOUT NON-MATERIAL FACTS AND OPINIONS

Even though it added materiality to ethical analysis of negotiating, the Model Rules do not define the term "material" directly. Definitions of material fact statements under the law of contracts and torts vary. Statements about facts have been deemed material to rescind contracts if they would induce reasonable persons to enter into agreements.<sup>52</sup> Similarly, statements have been deemed material in tort deceit actions if they would induce reasonable persons to act on them,<sup>53</sup> or if speakers' had reason to know that respondents would rely on them even if reasonable persons would not.<sup>54</sup>

In assessing materiality, the Comments to Model Rule 4.1 make clear that whether statements should be regarded as material facts depends on the circumstances. Comment 2 suggests that "under generally accepted negotiation conventions certain types of statements ordinarily are not taken as statements of material fact."<sup>55</sup> This Comment then lists three examples of statements generally not

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49. Tempkin, *supra* note 40, at 195-207; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. d (2000).

50. ABA/BNA Lawyers Manual on Professional Conduct, Ethics Opinion No. 2002-167 (2001-2005) (mediator may not mediate a matter to conclusion when lawyer representing a party in a domestic relations matter confidentially disclosed the existence of marital assets unknown to other party, refused to permit the mediator to share this information, and mediator knew that the assertions were important to the other party's decision-making).

51. *Id.*; Rebecca H. Hiers, *Navigating Mediation's Uncharted Waters*, 57 RUTGERS. L. REV. 531, 574 (2005); see Michael Moffat, *Suing Mediators*, 83 B.U. L. REV. 147, 159 (2003) (potential mediator liability for tort-based actions).

52. RESTATEMENT OF CONTRACTS § 470(2) (1932).

53. RESTATEMENT (SECOND) OF TORTS § 538(2) (1965).

54. *Id.*

55. The Model Rules provide no substantiation or examples of this empirical claim causing scholars to wonder who generally accepts these conventions. Menkel-Meadow, *supra* note 14, at 132. Research showing large and consistent differences among lawyers, judges, and academics, regarding the ethical appropriateness of common negotiation statements also undermine regulatory reliance on the actual existence of such conventions. *E.g.*, Dahl, *supra* note 12; Lempert, *supra* note 12.

deemed material facts by negotiation conventions, including “estimates of price or value placed on” transaction subjects, “party’s intentions as to acceptable settlement” of claims, and the “existence of undisclosed” principals except when non-disclosure constitutes fraud.

In addition, Comment 2 declares that Rule 4.1 applies only to “statements of fact.” This decision to follow old commercial law doctrine that buyers cannot justifiably rely on a seller’s “puffing” about the value of items sold,<sup>56</sup> together with the inclusion in Comment 2 as examples estimates of price and value regarding negotiation subjects, creates ambiguities regarding whether all lawyer lies about their opinions are ethically permitted. Although not exclusive, the examples of Comment 2 declare neither factual nor material many communications commonly used by negotiating lawyers seeking to claim the value involved in bargained-for items. The categories of Comment 2 encompass a wide array of information frequently exchanged during negotiations including inflated or deflated offers, counteroffers, and concessions; representations regarding clients’ settlement intentions; false estimates of value and worth concerning bargaining subjects; and lies about target points, reservation plans, and bottom lines. All of this information is unquestionably important to negotiations, yet is defined as non-material or non-factual by Comment 2.

Comment 2 promotes a vision that negotiating is either exclusively or predominantly a process for claiming value in the issues involved. It encourages many common value-claiming negotiating behaviors designed to maximize client gain that are premised on assumptions that doing this inherently requires deception and misrepresentation. It invites actions that conceal, mislead, and deceive by purposefully sequenced disclosures, partial disclosures, non-disclosures, and overstated and understated disclosures. It opens a door for lawyers to lie when negotiating.<sup>57</sup>

Available evidence suggests that lawyers routinely use this rule-encouraged pass from truth-telling in negotiation and make false statements regarding these information categories seeking to create beliefs in others that differ from their own.<sup>58</sup> A study of one hundred lawyers surveyed at the 1997 American Bar Association Annual Meeting showed 73% admitting they engaged in these types of statements when they negotiated.<sup>59</sup> Lawyers commonly exaggerate both the value of their claims and the strength of their arguments and positions.<sup>60</sup> Sixty-one percent of the lawyers responding to this 1997 survey indicated a belief that it was ethically permissible to engage in negotiation puffing by stating false value esti-

56. *E.g.* *Kimball v. Bangs*, 11 N.E. 113, 114 (Mass. 1887). The court noted: “The law recognizes the fact that men will naturally overstate the value and qualities of articles which they have to sell. All men know this, and a buyer has no right to rely upon such statements.” *Id.*

57. James J. Alfani, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 267 (1999).

58. Tempkin, *supra* note 40, at 182 (negotiating lawyers often mislead others by half-truths, partial truths, and misdirection). For example, a leading dispute resolution scholar admits to his students that he has “rarely participated in legal negotiations in which both participants did not use some misstatements to further client interests.” Charles B. Craver, *Negotiation Ethics: How To Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 715 (1997).

59. Carter, *supra* note 12, at 97.

60. ROGER HAYDOCK, *NEGOTIATION PRACTICE* 211 (1984); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. BAR. FOUND. RES. J. 926, 931-32, 934.

mates and price opinions.<sup>61</sup> Attorneys often view abilities to mislead adversaries as a virtue.<sup>62</sup>

Questionnaire respondents confirmed that lawyers frequently lie about settlement intentions and value and price estimates. The average of respondents' estimates was that they observed lawyers lying about the value of negotiation subjects, defined as "the items, claims, and objectives" involved in bargaining interactions, in 35% of negotiations in which they participated.<sup>63</sup>

Negotiators' resistance levels, or bottom lines, are intimately connected to their clients' intentions regarding claim settlement. They describe the points beyond which negotiators would rather do something else than agree and, in monetized exchanges, they connote the amount beyond which clients will not pay or accept. The average of respondents' estimates was that they observed lawyers lie about their resistance levels in 43% of the negotiations in which they were involved.<sup>64</sup>

Not surprisingly, this evidence coincides with data suggesting that a majority of American lawyers prefer to use value-claiming negotiation approaches.<sup>65</sup> A survey of 5,000 Denver and Phoenix lawyers showed pervasive use of value-claiming approaches.<sup>66</sup> Another study of 515 lawyers and 55 judges in New Jersey revealed that about 70% of the cases in which they participated were settled using predominantly value-claiming actions.<sup>67</sup>

Although the survey here did not seek frequency estimates for these types of lies in mediations, mediators report that lawyers make false statements about these topics in both joint sessions and caucuses. Lawyer mediators understand that truth-telling on these topics is not ethically required and, consequently, do not expect candor when attorneys initiate disclosures regarding them in either joint sessions or caucuses. Mediators also know that lawyers often use the phrases "in my opinion" and "I believe," and that the information linked to these opinion-framing remarks is frequently less than candid.

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61. Carter, *supra* note 12, at 97.

62. Tempkin, *supra* note 40, at 183.

63. Survey responses (March 26, 2004) (on file with author). The range for the twenty-two responses on this question was from a high of 100% to a low of 0% and the median was 30%. *Id.*

64. *Id.* The range for the 21 responses on this question was from a high of 100% to a low of 0% and the median was 50%. *Id.* The questionnaire defined resistance level as "the point beyond which a negotiator would rather pursue an agreement alternative than reach a negotiated agreement." *Id.*

65. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING SKILLS 374 (1990); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 764-65 (1984); Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 914 (1996).

66. DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 29, n.6 (1989); Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1, 28 n.113 (1993). This study was done by Professor Gerald Williams and it showed that 67% of these lawyers reported that they primarily used adversarial, competitive, value-claiming strategies when they negotiated. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-40 (1983).

67. Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*, 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997). Sixty percent of the respondents in this survey indicated their belief that value-creating methods should be used more often. *Id.*

In addition, discussing value and price estimates supplies a significant component of most court-connected mediations. Extensive conversations about likely trial outcomes, including projections regarding recoverable damage items, predictions of how decision makers will value claims, and estimates concerning the effects of evidential strengths and weaknesses, usually occur in caucuses. Mediators understand that virtually everything lawyers say on these topics is influenced by partisan perception and gain-maximizing objectives, highly malleable, and generally susceptible to revision as conversations continue. The frequency with which these kinds of deceptive statements occur in negotiating in mediations largely explains the mediators' comments that began this article.

Little harmful deception generally occurs when mediation negotiations are led by skilled and prepared lawyers for all participants. Regrettably, lawyers do not always bring comparable levels of skill, experience, and preparation to mediated negotiations. Consequently, some of these ethically permitted lies probably accomplish gain-maximizing objectives.

Knowing that statements regarding settlement intentions need not be truthful, effective mediators seldom inquire about resistance points. They rarely assign much credence to statements lawyers make about their resistance points during early and mid-points of mediations. Skilled mediators also remain alert to the persuasive value of resistance level lies late in mediations when negotiating has reached appropriate bargaining ranges. It is at this point where lawyer lies about resistance levels often exert significant anchoring and persuasive influences on other participants. Although mediators seek to narrow remaining gaps and find other ways to reach agreement after receiving these statements, these lies may also subtly influence how mediators behave in subsequent caucuses.

Some mediations present particular challenges caused by the potential impact ethically permissible lies can have on unrepresented participants unsophisticated in value-claiming negotiation practices.<sup>68</sup> Opportunities to face these challenges increase as court-connected mediation expands in small claims and in low- and middle-income family matters. Reliance on the assumption contained in Comment 2 of Model Rule 4.1—that general understanding of non-truth telling conventions regarding these matters exists—does not work in these circumstances. Neither does depending upon frequently offered justifications offered for this debatable approach to regulating truth-telling, including that allowing lies about these information categories is necessitated by either the adversarial system or the inherent nature of negotiation.<sup>69</sup>

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68. Most lawyers possess legal knowledge, negotiating experience (if not ability), and familiarity with court procedures and judges, which typically gives them advantages when interacting with inexperienced participants representing themselves. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenant's Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 556-57 (1992); Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 92-93 (1996); Marc Galanter, *Why the 'Haves' Come Out Ahead, Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974); Beatrice A. Mouton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1662 (1969). One commentator asserted that attorney misconduct permeates negotiation interactions between lawyers and unrepresented parties with "misleading presentation of facts and law and over-reaching common." Note, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles*, 67 FORDHAM L. REV. 1987, 2006 (1999).

69. Lowenthal, *supra* note 15, at 430-41.

Unrepresented and unsophisticated participants may believe these lies and make decisions accordingly. Dealing with this challenge puts mediators in a difficult conflict between their obligations to remain impartial and to promote a level of informed consent essential to self-determination.<sup>70</sup> Mediators may respond to this challenge by using caucuses to coach unrepresented clients regarding standard value-claiming negotiation practices and to explore with lawyers who make these misrepresentations the risks of subsequent actions invalidating these agreements. With lawyers, mediators can discuss how fraud law is expanding to reach false opinion statements that use specific language, imply knowledge of facts supporting the opinion, invite reliance on a lawyer's greater expertise, conceal contrary facts, and are directed at vulnerable negotiators.<sup>71</sup> Many mediations, however, will predictably not include these conversations because (1) mediators rarely know with accuracy when lawyers lie about rule-defined non-material facts, (2) the ultimate fairness of outcomes is not a mediator's responsibility,<sup>72</sup> and (3) the bureaucratic and time pressures found in many of these mediation contexts discourage spending time using these options.<sup>73</sup>

## V. LIES ABOUT NEGOTIATION AUTHORITY

Lawyers negotiate on behalf of clients. This reality makes the extent of their authority to commit to agreement terms an important issue and creates opportunities to generate bargaining leverage by misrepresenting settlement authority. Misrepresentations regarding authority include direct falsehoods, such as asserting no authority to settle for \$100,000 when clients have authorized paying precisely that sum. They also encompass arguably true but deceptive statements, such as claiming no authority to pay \$80,000 when clients have authorized giving up to \$100,000, so long as the precise dollar limit is not claimed.

Lawyers disagree about whether these statements are ethically permissible lies regarding claim settlement intentions falling within the safe harbor of Comment 2. Some lawyers contend that settlement authority lies are permissible negotiation tactics,<sup>74</sup> while others assert that the specific, declarative nature of many of

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70. This is one of the more frequent and difficult dilemmas mediators encounter. Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Practices and Policy Implications*, 1994 J. DISP. RESOL. 1, 17-28.

71. See SHELL, *supra* note 16, at 209-12; Lowenthal, *supra* note 15, at 421.

72. For example, Florida's mediation ethics standards provide that mediators must honor parties' right of self-determination, and parties must make decisions. Fla. R. for Cert. and Ct.-App't Mediators 10.300, 10.310(a) (2000), available at <http://www.mediate.com/articles/floridarules.cfm>.

73. See Don Peters, *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 FLA. L. REV. 761, 830-31 n.139 (1998).

74. Lempert, *supra* note 12 (presented the first example to fifteen legal ethics scholars, lawyers, judges, and magistrates and reported that seven said yes you can do this but they personally would not, while six said no, this was unethical); JETHRO LIEBERMAN, CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 31-32 (1978) (quoting a leading lawyer approving this tactic); MICHAEL MELTSNER & PHILIP SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 232, 237 (1974) (describing this tactic as commonly used by lawyers while not personally endorsing it).

these statements makes them unethical.<sup>75</sup> The average of survey respondents' estimates was that bargaining authority lies occurred in 36% of the negotiations in which they participated.<sup>76</sup>

Participation by parties with authority to settle is usually critical to successful mediation. The presence of human clients typically required in mediations usually prevents the effective use of authority lies by lawyers because mediators can question and clarify these assertions in caucuses.

## VI. LIES ABOUT AGREEMENT ALTERNATIVES

The existence and value of options away from negotiating tables supplies a key factor in most negotiations and mediations. Comparing BATNAs (best alternatives to a negotiated agreement), or BATMAs (best alternatives to a mediated agreement), to proposals developed during negotiations and mediations supplies a central method for measuring whether negotiators have found solutions that exceed what they could obtain elsewhere.

Communications about agreement alternatives take place when parties make disclosures or respond to questions about them. Whether lies about agreement alternatives concern material or non-material facts revisits ambiguities created by Comment 2. These lies also prompt debate regarding whether they should be considered claim settlement intentions.

Negotiators occasionally lie about available alternatives.<sup>77</sup> The average of survey respondents' estimates regarding lies about agreement alternatives was that they occurred in 22% of the matters in which they have participated.<sup>78</sup> Like non-material fact and opinion falsehoods, these lies are likely to have little impact when received by lawyers and other sophisticated negotiators who do not expect truth-telling on these topics. As discussed earlier, lawyers run risks using these lies with unrepresented and unsophisticated negotiators. Courts have found lies about agreement alternatives fraudulent when professionals were negotiating with small business owners<sup>79</sup> and consumers.<sup>80</sup>

Survey responses suggest that lawyers often lie about alternatives when negotiating in mediations. The average of respondents' estimates of lies about agreement alternatives was that they occurred in 25% of joint sessions in which they

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75. Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 NEGOT. J. 105, 106 (1985); Lempert, *supra* note 12, at 1. Professor Gary Luban argues that "people have to be able to rely on flat-out declarations . . . or the process breaks down or, at best, becomes incredibly time-consuming." *Id.*

76. Survey responses (March 26, 2004) (on file with author). The range for the twenty-one responses to this question was from a high of 100% to a low of 0% and the median was 20%. *Id.*

77. SHELL, *supra* note 16, at 210. A well known and successful lawyer argued that it was ethically permissible to lie about another offer's existence because "other offers are ancillary" to the intrinsic value of the item being bargained for." Menkel-Meadow, *supra* note 14, at 142 n.75 (strongly disagreeing with this perspective).

78. Survey responses (March 26, 2004) (on file with author). The range for the twenty responses on this question was from a high of 75% to a low of 0% and the median was 10%. *Id.*

79. *E.g.*, *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 103 N.E.2d 692 (Mass. 1952) (landlord's lie that another tenant was waiting to pay asking price held fraudulent).

80. *E.g.*, *Beavers v. Lamplighter Realty, Inc.*, 556 P.2d 1328 (Okla. Civ. App. 1976) (realtor's lie that rival buyer was willing to pay asking price that same day held fraudulent).



participated.<sup>81</sup> In caucus, mediators will typically analyze agreement alternatives as they help parties explore their predictions regarding likely non-agreement options and their economic, social, and psychological costs. Survey respondents suggested that lawyers may act slightly more truthfully in caucuses as the average of their estimates was that lies about agreement alternatives in caucuses occurred in 20% of the mediations in which they participated.<sup>82</sup>

## VII. LIES ABOUT INTERESTS AND PRIORITIES

Accepting a premise that all negotiations present opportunities to create as well as claim and distribute value,<sup>83</sup> mediators typically encourage negotiators to minimize costs and explore other ways to generate gain for all participants. When doing this, mediators often direct conversations to additional information categories beyond than those regulated by current ethical rules. These information categories emphasize interests and priorities.

Mediation participants inevitably define their interests as maximizing gain regarding the issues they present to negotiate. However, mediators usually pursue a vision of interests broader than the negotiating subjects presented with their claims and defenses—issues that are always monetized in court-connected mediations. Honest disclosures and responses to questions posed about non-monetized interests and priorities facilitate value-creating negotiation by helping parties identify solutions that can generate mutual benefit.

Disclosures and responses to questions about non-monetized interests permits one to get to the heart of a situation by uncovering what claims and issues are really about. Often conducted in caucuses, these conversations explore the core of what participants seek as well as what motivates them most strongly. Non-monetized interests and needs lie underneath the divergent and conflicting positions, justifications, and supporting and attacking argumentation that supply the bulk of value-claiming negotiation discourse. Explaining why money is needed, and discovering other ways negotiators can satisfy their interests, supplies different directions mediators can pursue to explore non-monetized interests.

Non-monetized interests and needs also exist on several levels beyond substantive issues including procedural, process, and emotional dimensions. Developing specific information about participants' underlying interests on all of these levels often reveals that negotiators possess shared and independent, as well as directly conflicting, needs. This realization frequently helps negotiators discover options and proposals that create value.

Linked to interest discussions are conversations about priorities, in which participants assess their needs in terms of which needs are most and least important. Research and human experience shows that negotiation participants rarely value

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81. Survey responses (March 26, 2004) (on file with author). The range for eighteen responses to this question was from a high of 75% to a low of 0% and the median was 25%. *Id.*

82. Survey responses (March 26, 2004) (on file with author). The range for the eighteen responses to this question was from a high of 50% to a low of 0% with a median of 15%. *Id.*

83. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 4 (2000) (arguing that all negotiations, while inevitably involving distributive issues regarding who gets how much, also present opportunities to create joint value and find joint gain).

all aspects of issues subject to negotiation identically.<sup>84</sup> Honest disclosures and responses to questions about priorities often generates trading, the most common form of value creation, where negotiators exchange items they value slightly less in return for things they value more. Confidential communication made possible by caucusing increases chances that mediators can gather and use this type of data.<sup>85</sup> This enables mediators to enhance negotiations by moving them from the win-lose approach of value-claiming to more individualized and contextualized conversations and outcomes that create value.

Lawyers also lie about their client's interests and priorities when negotiating outside mediations.<sup>86</sup> These lies usually occur when lawyers use a negotiating tactic variously labeled as phony issues, false demands, red herrings, or decoys. This tactic involves falsely asserting interests in and priorities concerning specific issues or claims to gain bargaining chips that can be exchanged for issues negotiators really care about. A common example in family law involves asserting a false interest and priority in gaining custody of children solely to create leverage for economic issues in divorce negotiations. Although the American Academy of Matrimonial Lawyers strongly disapproves of using this lie in divorce negotiations,<sup>87</sup> in a 1994 survey of California lawyers, 61% reported that they or their clients received at least one of these threats.<sup>88</sup>

Lawyers justify lies about interests and priorities by arguing that they are value estimates or settlement intentions.<sup>89</sup> Some assert that these lies comprise standard behavior for negotiators in certain contexts.<sup>90</sup> The average of respondents' estimates of lies about interests, defined as "the needs, objectives, and issues of importance to negotiators' clients," was that they happened in 17% of the negotiations in which they participated.<sup>91</sup> Their average estimate of observed lies about priorities was that they occurred in 18% of the negotiations in which they participated.<sup>92</sup>

Research shows that misrepresenting interests and priorities often leads to favorable value-claiming outcomes in non-mediated negotiations.<sup>93</sup> Unless detected, these lies also are likely to lead to favorable outcomes in mediated negotiations. Limited evidence suggests that lawyers lie about both interests and priorities in mediations. For example, an Indiana lawyer maintained a website suggest-

84. BASTRESS & HARBAUGH, *supra* note 65, at 377, 379-84.

85. See Robert A. Baruch Bush, "What Do We Need Mediation For?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DIS. RES. 1, 13 (1996).

86. Lawyers frequently assert phony demands, lie about their clients' needs, and deceive about their interest in agreement when their real objective is delay. HAYDOCK, *supra* note 60, at 212.

87. Rule 6.2, American Academy of Matrimonial Lawyers' Goals for Family Lawyers provides that lawyers should not permit clients to contest custody for financial leverage.

88. Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 499 (1994).

89. Lowenthal, *supra* note 15, at 423.

90. White, *supra* note 60, at 934-35.

91. Survey responses (March 26, 2004) (on file with author). The range of the twenty responses to this question was from a high of 70% to a low of 0% and the median was 15%. *Id.*

92. *Id.* The range of the twenty-one responses to this question was from a high of 50% to a low of 0% and the median was 10%. *Id.*

93. Kathleen M. O'Connor & Peter J. Carnevale, *A Nasty but Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 23 PERSONALITY AND SOC. PSYCHOL. BULL. 504 (May 1997).

ing that clients lie and create “throw away” demands to achieve successful mediation results.<sup>94</sup>

Survey responses verified the concern expressed by several scholars that lawyers will transfer their adversarial negotiating tactics to mediations in ways that undermine its potential to develop value-creating outcomes.<sup>95</sup> The average of respondents’ estimates of lies about interests in joint sessions of mediations was that they occurred in 19% of the mediations in which they participated.<sup>96</sup> Their average estimate of lies about priorities in joint sessions was that they occurred in 16% of the matters in which they participated.<sup>97</sup> In caucus, respondents reported only slightly less frequency. Their average estimate of lies about interests in caucuses was that they occurred in 15% of the mediations in which they participated.<sup>98</sup> The average of respondents’ estimates of lies about priorities in caucuses was that they also occurred 15% of the time.<sup>99</sup>

In light of these estimates, the common practice of effective mediators to maintain an optimistic skepticism regarding how lawyers and their clients describe their interests and priorities, particularly during initial conversations, seems warranted. This skepticism probably diminishes the effectiveness of lies about interests and priorities in early mediation stages when mediators expect descriptions to be tentative and dependent upon information and ideas that emerge as the process unfolds.

Many characteristics of contemporary mediation constrain lawyers’ abilities to lie successfully about interests and priorities. Opportunities for expanded private conversations allow mediators to explore and assess the genuineness of assertions about interests and priorities. The presence and participation of clients also provide frequent clues about candor when these topics are discussed. Effective mediators observe and listen actively to the emotional dimensions of communications when participants share them. These emotional components often provide insights about what really matters and clues regarding truthfulness when conversations turn later to potential solutions that include non-monetized interests.

On the other hand, common aspects of mediation practice may increase opportunities for lawyers to lie about interests and priorities later in mediated negotiations. Mediators frequently seek to expand negotiation agendas by asking ques-

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94. *In re* Philpot, 820 N.E. 2d 141 (Ind. 2005) (attorney stipulated to discipline for engaging in false, fraudulent, and misleading public communication).

95. Kimberlee K. Kovach, *Ethics for Whom: The Recognition of Diversity in Lawyering Calls for Plurality in Ethical Considerations and Rules of Representational Work*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 57, 62-63 (Phyllis Bernard & Byrant Garth eds., 2002). See *infra* note 106.

96. Survey responses (March 26, 2004) (on file with author). The range for the eighteen responses to this question was from a high of 50% to a low of 0% and the median was 23%. *Id.*

97. *Id.* The range for the twenty responses to this question was from a high of 50% to a low of 10% and the median was 10%. *Id.* The questionnaire defined priorities as “how clients comparatively rank their interests, needs, objectives and includes resources, relative valuations, future forecasts, willingness to take risks, and time preferences.” *Id.*

98. *Id.* The range for the eighteen responses to this question was from a high of 50% to a low of 0% and the median was 10%. *Id.* The average of estimates from mediator respondents was that slightly more lying occurred about interests in caucuses, 15%, than in joint sessions, 14%. *Id.*

99. *Id.* The range for the eighteen responses to this question was from a high of 50% to a low of 0% and the median was 10%. *Id.* The average of estimates from mediator respondents was that more lying about priorities occurred in caucuses, 15%, than in joint sessions, 10%. *Id.*

tions regarding other, typically non-monetized, issues that may be of value to participants. These questions target things that, while measurable in money, exist apart from negotiators' interests in maximizing their gain regarding initially identified bargaining items and claims. Doing this late in mediated negotiations often helps participants bridge remaining monetary gaps between their articulated bargaining positions.

Mediators explore non-monetized interests and priorities seeking low-cost, high-value trades and other ways to move past the narrow ways disputing parties usually frame negotiations and the limited remedies courts can provide. These efforts often help lawyers and clients realize that agreements can include "things other than money, such as structured annuities, future work, letters of apology, product discount programs, bartered services, use of equipment, joint undertakings to raise settlement dollars, and bid invitations."<sup>100</sup> However, information generated about these and other agenda-expanding possibilities provides opportunities for alert negotiators to learn that their counterparts value something highly that their clients do not desire. This may encourage some negotiators to lie about their clients' interests and priorities regarding these items in order to extract significant concessions.

Mediation practice also facilitates successful lying about interests and priorities by providing confidential caucuses where lawyers can skillfully integrate their deceptions into relative value trades. This permits lawyers using such lies to avoid the risk of winning on phony issues and ending up with things not really valued.<sup>101</sup> Although skillful questioning and listening by mediators in caucus may unmask clumsy lies about interests and priorities,<sup>102</sup> and although contexts and clients may provide additional clues regarding unreliability, it seems likely that lawyers can integrate strategically timed lies about interests and priorities into discussions about potential value-creating trades.

This leaves mediators vulnerable to skillful interest and priority lies, particularly late in mediations when they seek to shift participants from apparent impasse to more flexible, need-based options. Mediators may then use these lies to present trades to other participants that promote false value-creation proposals. Believing they are promoting joint gain, mediators may unwittingly help substitute deception-based outcomes for agreements based on genuine interest and priority accommodations. Mediators may reduce this risk by asking lawyers and their clients to stipulate to making only honest disclosures about non-monetized interests and priorities.

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100. Lawrence M. Watson, *Initiating the Settlement Process-Ethical Considerations*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 7, 16 (Phyllis Bernard & Bryant Garth eds., 2005); see also Steven Schwartz, *The Mediated Settlement: Is It Always Just About The Money? Rarely!*, 4 PEPP. DISP. RESOL. L.J. 309, 314 (2004) (Most mediations include some non-monetized interests.).

101. See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 284 (5th ed. 2005).

102. See O'Connor & Carnevale, *supra* note 93, at 505; see also Ken Kressel et al., *The Settlement Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994) (Lies about interests and priorities in custody were detected in one case where the negotiator made no attempt to accomplish his false demands.).

### VIII. A PROPOSED REFORM TO ENCOURAGE TRUTHFULNESS IN VALUE-CREATION

It is not surprising that many lawyers use their win-lose negotiation habits featuring extensive lying in ways that undermine mediation's potential to reach different outcomes.<sup>103</sup> These behaviors flow from a frame of reference most lawyers use resulting from their immersion in an adversary system. This frame then supplies the action orientation with which many lawyers are most familiar and comfortable. Our current regulatory approach in Model Rule 4.1 and its Comments accommodates and promotes this orientation. It creates an ambiguous regulatory approach based on a categorical structure that is "patch work and intuitive,"<sup>104</sup> "primitive and obtuse,"<sup>105</sup> and "very nebulous."<sup>106</sup>

Changing these behavior habits will not be easy. Lies about interests and priorities, particularly with respect to non-monetized issues, do the most harm to mediation's potential to help parties find solutions that differ from the win-lose outcomes adjudication supplies. Lies about non-monetized interests and priorities help deceivers claim value, but do nothing to create value. They help negotiators divide a pie favorably in their self-interests, but do nothing to expand a pie to benefit all. Lies about non-monetized interests and priorities often obscure efforts to identify other possibilities beyond the win-lose, gain-maximizing solutions that benefit some, but not all, negotiators.

Lawyers who lie about this information leave behind opportunities to find joint gain that benefits them as well as other participants. Lawyers victimized by these lies may needlessly sacrifice value that could be retained if genuine value-creating occurred. If done successfully in mediations, lies about non-monetized interests and priorities transform efforts to create joint gain into disguised, but ultimately the same, gain-maximizing outcomes that value claiming produces.

The disappearance of non-monetized interest and priority lies, when they are exchanged for items genuinely valued, does not diminish the harm they do to the mediation process. Effective mediators can help participants diminish the outcome influence of deception condoned by the legal profession's approval of lies about value estimates and settlement claim intentions. They do this by encouraging conversations to move from value-claiming discussions toward potentially value-creating options involving non-monetized interests and priorities.

Mediators, however, have no reframing options when lawyers lie about their non-monetized interests and priorities. They can do nothing beyond what they already do in distributional bargaining: help negotiators manage the tensions gen-

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103. Menkel-Meadow, *supra* note 14, at 148 n.89 (mediators report encountering, especially in caucuses, the same dissembling and deceptive negotiating behaviors that occur in non-mediated negotiation); see also Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. L. REV. 1 (1991) (fearing that adversarial actions will co-opt mediation rather than predicting that ADR ideology will transform litigation influenced, win-lose practices).

104. Tempkin, *supra* note 40, at 180.

105. Walter M. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986).

106. Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 951 (2001).

erated by value-claiming, and find objective standards and other ways to reach midpoints within largely preset exchange parameters. Although important, this work does not accomplish mediation's potential to create value.

Lying begets more deception and lessens our expectations of each other and the systems in which misrepresentations occur.<sup>107</sup> The expectations created by the approach of Rule 4.1 is that lawyers will lie about certain things when negotiating so attorneys and mediators do not anticipate truth-telling about these topics. These assumptions and actions that they inspire easily become self-fulfilling prophecies.<sup>108</sup> This may be tolerable for value-claiming negotiating because we have experienced it so long that it has become engrained in lawyers' attitudes and behavioral habits. The legal community may also accept this situation because mediators have ways of moving beyond these actions to pursue value-creating.

When lies about non-monetized interests and priorities become expectations, however, lawyers will soon experience them as requirements and then start deceiving others about these topics to avoid exploitation.<sup>109</sup> This defeats lawyers' inclinations to share information about non-monetized interests and priorities honestly in mediations. It lessens mediators' abilities to explore genuine needs accurately in order to develop complimentary outcomes and joint gain.<sup>110</sup>

The proposed regulatory reform is to amend state versions of Rule 4.1 and its Comments to clarify current ambiguities by prohibiting false statements about interests and priorities. Putting this in the text of Rule 4.1 as a separate subsection gives it the most binding effect, but adding it to comments will also accomplish important objectives. Defining interests to include all aspects of clients' needs and concerns that do not directly involve efforts to maximize gain regarding original claims or transaction subjects will help clarify ambiguities. This definition also helps distinguish interests from value estimates and settlement intentions concerning presented claims and negotiation subjects where lies are now permitted by Comment 2.

The need to preserve mediation's potential as a viable forum for interest-based negotiating provides the primary justification for this proposal. Legislative and administrative bodies that create or encourage mediation schemes frequently endorse the interest-based negotiating that these approaches allow.<sup>111</sup> Many lawyers and participants use mediation to help them determine whether sharing important information privately can help them obtain outcomes that exceed what they can negotiate on their own.<sup>112</sup> Mediators cannot foster joint, interest-based negotiating and use privately shared information effectively to create value if lawyers are ethically permitted to lie about non-monetized interests and priorities.

Enacting this reform now makes sense because many American lawyers are either not familiar with mediation or do not know how to represent clients effectively before and during it. Perhaps respondents' estimates suggesting that interest and priority lies were observed in only 15% to 19% of mediation joint sessions

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107. See generally SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

108. Menkel-Meadow, *supra* note 14, at 147.

109. *Id.*

110. *Id.*

111. *E.g.*, FLA. STAT. § 44-1011(2) (2005) (defining the role of a mediator as in part "fostering joint problem-solving").

112. Menkel-Meadow, *supra* note 14, at 147.

and caucuses reflect lawyers' unfamiliarity with the value of discussing non-monetized interests in mediations. This proposal provides guidance and helps lawyers better balance their advocacy roles with an appreciation for and behaviors consistent with mediation's potential to achieve different, and often better, outcomes than adjudication and value-claiming negotiation typically produce. When complying with this standard lawyers will not have to make statements about their non-monetized interests and priorities if they do not want to. If they do make statements about their clients' non-monetized interests and priorities, however, they must communicate truthfully.

The difficulty, if not impossibility, of enforcing violations of this proposed rule supplies a strong argument against adopting this proposal. Interests and priorities, like value estimates and claim settlement intentions, are malleable and reside primarily within the minds of lawyers and their clients. Like value estimates and claim settlement intentions, interests and priorities evolve and shift during mediations as relationships among participants and mediators develop. Mediations are usually dynamic experiences that continually develop new information which often causes participants to re-evaluate risks and reframe objectives.<sup>113</sup> These re-evaluations and reframes are typically strongly influenced by participants' emerging sense of what is important to themselves and others and what is possible in the negotiation.<sup>114</sup> These dynamic events influence perceptions of interests and priorities so earlier expressions can give way to later revisions without conscious attempts to lie. This fluid environment makes it even more difficult to discern and prove lies regarding non-monetized interests and priorities.

Unlike concerns that mandating an ambiguous standard like good faith participation in mediation will generate more adversarial struggle,<sup>115</sup> this proposed reform will not produce many claims of violations. One negotiator seldom knows with certainty what another's claim settlement intentions are, and genuine interests and priorities similarly reside so strongly in the minds of lawyers and their clients that lies about them can rarely be detected. So while the proposed reform is admittedly difficult to enforce, it also is not likely to generate unintended and negative consequences.

This proposal's prohibition may influence the beliefs and actions of lawyers even if it is difficult to enforce.<sup>116</sup> The relatively low estimates of interest and priority lies suggests that the rule will not be undercut by an overwhelming tendency on the part of lawyers to violate it, a justification often offered for the approach of Rule 4.1.<sup>117</sup> Lawyers know when efforts to broaden negotiating agendas beyond original claims and negotiation subjects inject non-monetized interests into discussions. This proposal will let lawyers know that when this happens, they must make an ethical choice to speak honestly or falsely about these different topics.

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113. John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 275 (2004).

114. David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, 2 NEG. J. 73, 88 (1986).

115. E.g., John Lande, *Using Dispute Resolution Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 86-108 (2002).

116. Lowenthal, *supra* note 15, at 443.

117. *Id.* at 441-44.

Creating an objective rule may help lawyers change their behavior because lawyers are generally familiar with rules and comfortable measuring their actions against regulations. Simplifying this ethical choice also may encourage compliance with the admittedly imperfect guideline and increase ethical behavior.<sup>118</sup> Finally, just as many believe that Rule 4.1 and Comment 2 were adopted to preserve adversarial, value-claiming bargaining, so should this proposal be adopted to preserve problem solving, value-creating negotiating, particularly in mediations.

## IX. CONCLUSION

Questionnaire respondents shared average estimates confirming, as many mediators have noted, that lawyers are lying in mediated negotiations. This data reflected the level of lying discovered by research concerning prohibited lies about material facts. This limited information suggests that deception concerning interests and priorities, the core ingredients of value-creating negotiation, occurs at about the same 20% rate. Estimated averages regarding information categories of negotiation authority and alternatives reflected the ambiguities inherent in the legal profession's current regulatory approach. Greater estimated averages were shared regarding information categories where the legal profession's ethical regulation posits debatable general conventions and allows lying about common value-claiming negotiating actions.

This data adds to an emerging general sense that relying on lawyer truth-telling in mediated negotiations is risky. It also supports often expressed concerns that lawyer behaviors suited for win-lose adjudicative environments threaten mediation's potential to generate different outcomes. Why lawyers who often participate in imposing and enforcing strict standards of truth-telling on other professionals when they bargain should be less subject to candor requirements when they negotiate remains a puzzling and questionable premise. Although no direct linkages have been established, little doubt exists that the latitude given to lawyers to lie while negotiating contributes to the public's generally low impression of attorney honesty.

Effective lawyers know that they do not need to lie to negotiate effectively.<sup>119</sup> They refrain from making false statements about value estimates and settlement intentions and deflect or reframe questions they receive about these topics. Lawyers who frame negotiations on these categories often display lesser skills levels, lack of comprehensive preparation,<sup>120</sup> and greater willingness to lie to claim value.

Research demonstrates a connection between honest negotiating and perceived effectiveness. The study of 5,000 Denver and Phoenix lawyers mentioned earlier found that honest, ethical, and trustworthy behavior were among the important traits of effective negotiators.<sup>121</sup> A more recent study of 727 Chicago and Milwaukee attorneys showed that when asked to describe the characteristics of

118. Tempkin, *supra* note 40, at 227.

119. Scott R. Peppet, *Can Saints Negotiate: A Brief Introduction to Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 94 (2002).

120. One questionnaire respondent noted that "some lawyers come to mediation so poorly prepared that they don't know that they don't know what they are talking about." Survey response (March 26, 2004) (on file with author).

121. WILLIAMS, *supra* note 66, at 20-30.



effective problem-solving negotiators, “ethical” was the most common adjective used while trustworthy was the fifth most frequent descriptor.<sup>122</sup> Reforming the approach of Rule 4.1 as suggested encourages effective negotiation through truth-telling when it is needed most to let mediation actually pursue outcomes other than compromised win-lose results.

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122. Andrea Kupfer Schneider, *Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 179-80 (2002).