**Should Lawyers Owe**

**a Duty of Candor in Mediation?**

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# Introduction

Over the past decades, mediation has become a central feature of civil dispute resolution. It is now widely accepted that mediation offers a number of advantages over adjudicative processes such as litigation and arbitration. In addition to being comparatively quick and cheap, mediation affords the parties the opportunity to maintain confidentiality and exert a far greater degree of control over both process and outcomes. The presence of an experienced and neutral mediator can also serve to mitigate power imbalances between the parties, and encourage the recognition and pursuit of mutually desirable solutions.

In the wake of the increasing popularity of mediation, commentators, practitioners and professional bodies have developed detailed rules and guidelines regarding the obligations owed by lawyers acting as mediators. Over time, this process has resulted in a largely coherent set of ethical standards for lawyer-mediators. Mediators are, for example, generally expected to maintain objectivity, avoid conflicts of interest, ensure procedural fairness and refrain from offering legal advice or pressuring parties to reach settlement.[[1]](#footnote-1)

In contrast, comparatively little attention has been directed to the ethical issues faced by the lawyers who represent parties in mediation. One issue in particular – the extent to which lawyers engaged in mediation should be honest and forthcoming with the opposing side and the mediator – remains the subject of considerable confusion and controversy.[[2]](#footnote-2) The issue of candor in mediation and settlement negotiations has been variously described as one of *“the most important ethical issues facing lawyers”*,[[3]](#footnote-3) as *“largely unchartered waters”*[[4]](#footnote-4)or *“open to interpretation”*,[[5]](#footnote-5) and as *“the ethical no-man’s land”* of legal practice.[[6]](#footnote-6) Moreover, the considerable body of cases concerning claims of dishonesty and sharp practice in mediation confirm that this issue is not merely theoretical. Yet as one commentator has observed, the resolution of such cases is *“more likely to reflect judicial viscera and intuitive notions of fairness than any coherent system of legal or ethical principles.”[[7]](#footnote-7)*

This paper explores the parameters of truthfulness in mediation from a legal and ethical perspective, with the aim of determining whether, and to what extent, a duty of candor should apply to lawyers engaged in mediation. The term *“candor”* in this context is used to connote a degree of full and forthright disclosure which extends beyond the mere obligation to tell the *“literal truth”*, and encompasses an ethical duty to ensure that the other parties to a mediation are suitably appraised of the facts and interests at play. The existence of other substantive legal duties of disclosure and fair dealing, such as those that may arise under the law of contract and tort, are beyond the scope of this enquiry.

Following this introduction, Part II examines the current ethical rules and guidelines concerning obligations of honesty and disclosure in mediation. Beginning with a review of the relevant *Model Rules of Professional Conduct*, I demonstrate that these obligations are extremely limited, and fall well short of the duties placed on lawyers engaged in other forms of dispute resolution. In light of this, in Part III I assess the ramifications of the current approach. I argue that the rules and guidelines governing lawyers in mediation are fundamentally flawed. First, they permit lawyers to engage in morally reprehensible conduct – conduct which has the potential to seriously erode the standing of the legal profession and entirely defeat the purpose of mediation. Second, they are in significant respects unclear, and fail to provide practitioners with sufficient guidance concerning the limits of acceptable behavior, particularly in the context of conflicting duties to the client and third parties. Finally, in Part IV, I consider how the current rules and guidelines should be amended. I argue that, in order to maintain an appropriate balance between the lawyer’s duties to his or her client and to the administration of justice, lawyers must, at a minimum, display the same degree of candor in mediation that is required of them before courts and other adjudicative tribunals. I conclude that this result can best be achieved by a modest amendment to the existing professional conduct rules, pursuant to which the lawyer’s duty of candor to tribunals would be expanded to include mediation.

# Obligations of Honesty and Disclosure in Mediation

The natural starting point for any examination of lawyers’ ethics in the United States is the American Bar Association’s *Model Rules of Professional Conduct*. While the superior courts of each state retain ultimate authority for the adoption of ethical standards in their respective jurisdictions, the *Model Rules* now form the basis for the applicable professional conduct rules in all states other than California.[[8]](#footnote-8) As such, the *Model Rules* have come to encapsulate the core tenants of ethical legal practice in the United States, including with respect to obligations of honesty and candor.

In light of their primacy as standards of professional conduct, it is perhaps surprising then that the *Model Rules* do not directly address mediation. Rather, the obligations of lawyers engaged in mediation fall under the general umbrella of Rule 4.1 concerning *“Statements to Others”*, and in particular Rule 4.1(a), which prohibits lawyers from knowingly making false statements of material fact or law to third parties. The comments to Rule 4.1 confirm that this obligation is not solely confined to positive misstatements. A lawyer may also make a misrepresentation by incorporating or affirming the statement of another, or by the use of a misleading partial truth or omission that is the equivalent of an affirmative false statement.[[9]](#footnote-9) In addition, Rule 8.4 imposes a general prohibition on lawyers engaging in dishonest, deceitful and fraudulent conduct.

While these rules would, at a minimum, appear to forbid lawyers from lying during mediation, there are two substantial caveats to that proposition that require further attention.

First, the obligation of truthfulness in Rule 4.1(a) is confined to statements of *material* fact and law. This is in contrast to the more onerous standard that applies in the context of other forms of dispute resolution, where lawyers are prohibited from making *any* false statements of fact or law to the adjudicative body.[[10]](#footnote-10) The term *“material”* is not defined in the Model Rules, and its meaning remains open for interpretation.[[11]](#footnote-11) What is clear, however, is that the standard of honesty expected of lawyers engaged in mediation is of a less stringent kind than that applied to other forms of dispute resolution. Consistently with his ethical duties as a member of the legal profession, a lawyer engaged in mediation may knowingly lie to both the mediator and opposing parties, so long as the lie does not include a false statement of fact or law that is *“material”.[[12]](#footnote-12)*

Second, it is apparent that different considerations apply where a statement (or misstatement) is made during settlement negotiations. The comments to Rule 4.1 include the observation that:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Pursuant to the *Model Rules*, a certain degree of dishonesty is therefor considered to be a natural and ethically sound aspect of settlement negotiations, including negotiations conducted through the medium of mediation.[[13]](#footnote-13) Moreover, this is so even where the dishonesty relates to a core aspect of the case such as the price or value of the thing in dispute, provided only that such dishonesty is consistent with *“generally accepted conventions in negotiation”.*[[14]](#footnote-14)As a number of commentators have observed, the use of lies and misleading statements during mediation is apparently endemic, and is largely accepted by practitioners as a natural and permissible aspect of the negotiation process.[[15]](#footnote-15) As such, the categories of permissible misdirection encompassed within *“generally accepted conventions in negotiation”* are likely to be considerably more extensive than the specific examples identified above.

In addition to dealing with false statements, Rule 4.1 also addresses obligations of affirmative disclosure. Pursuant to Rule 4.1(b), lawyers are required to disclose a material fact to a third person *“when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”* Rule 1.6 concerns the lawyer’s duty to maintain the confidentiality of information relating to the representation of a client. Somewhat circuitously, the obligation of confidentiality imposed by Rule 1.6 is also subject to an exception under Rule 1.6(b)(2) (among others) pursuant to which:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary… to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services… .

As one commentator has explained, the upshot of these various rules and exceptions is that lawyers in mediation and negotiation have *“an affirmative duty… to come forward with corrective non-confidential facts to prevent or avoid aiding a criminal or fraudulent act by a client.”*[[16]](#footnote-16) Where the facts are confidential, however, then the lawyer is under no such duty, although he or she *may* still elect to disclose confidential information in certain circumstances, including those set out in Rule 1.6(b)(2).[[17]](#footnote-17) Furthermore, as the comments to Rule 4.1 confirm, in the absence of a criminal or fraudulent act by the client, a lawyer *“generally has no affirmative duty to inform an opposing party of relevant facts.”*

The American Bar Association’s *Ethical Guidelines for Settlement Negotiations* provide further guidance on the ethics of disclosure. Unlike the *Model Rules,* the *Ethical Guidelines* do not serve as a basis for liability, sanctions or disciplinary action, but rather are *“designed to facilitate and promote ethical conduct in settlement negotiations.”*[[18]](#footnote-18) Consistently with the *Model Rules*, the Committee Notes to Section 4.3.5 of the *Ethical Guidelines* state that there is *“no general ethics obligation, in the settlement context or elsewhere, to correct the erroneous assumptions of the opposing party or opposing counsel”*. However, *“the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer’s client and not to exploit such mistakes.”[[19]](#footnote-19)*

The lawyer’s duty to behave honestly during mediation is thus doubly circumscribed. On the one hand, lawyers are expressly permitted to make false statements wherever those statements concern facts or law that are not *“material”*, including statements relating to apparently crucial information that is nevertheless deemed to be immaterial because it is information about which lawyers may lie according to *“generally accepted conventions in negotiation”*. On the other, they are not obliged to make any positive disclosures of law or fact – except in the unlikely event that a disclosure of fact (but not law) is *both* necessary to prevent a fraudulent or criminal act by the client *and* would not constitute the revealing of confidential client information. Furthermore, while lawyers may be obliged to correct an erroneous assumption that has been induced by their client’s own misleading conduct, they are otherwise under no duty to correct the mistakes of third parties, however arising.

The limited character of these constraints raises important questions concerning both the nature and purpose of mediation, and the rationale for ethical standards in legal practice. Are the goals of mediation different from other forms of dispute resolution and, if so, does that justify the adoption of less rigorous professional obligations? Do the current standards strike the right balance between the lawyer’s duties as a representative of clients and an officer of the legal system? Do lawyers have sufficient guidance to successfully navigate the ethical dilemmas of mediation, and maintain the integrity of the legal profession and the administration of justice? This paper now turns to address these questions, with a view to assessing the extent to which the exceptions and limitations described above are warranted in the context of mediation.

# Ramifications of the Current Approach

There are two principal problems with the current rules governing lawyer's misleading statements and omissions during mediation. First, as I have described above, they are extremely limited, so that lawyers are often permitted to engage in behavior during mediation which is both morally dubious and potentially productive of serious injustice. Second, the shifting and imprecise line between mere omissions and misrepresentations means that lawyers have no clear guidance as to whether, when and to what extent they must disclose information.

## Moral ambiguity and injustice

One of the clearest demonstrations of the moral ambiguity surrounding obligations of honesty in mediation is the now infamous case of *Spaulding v. Zimmerman*,[[20]](#footnote-20) in which lawyers for the defendant deliberately withheld from the plaintiff the fact that he was suffering from an aorta aneurism. The lawyers were fully aware of the potentially catastrophic ramifications of withholding such information. Their own medical expert had written to them stating:[[21]](#footnote-21)

The one feature of the case which bothers me more than any other part of the case is the fact that this boy of 20 years of age has an aneurysm… Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death.

Nevertheless, the lawyers elected not to disclose the plaintiff’s true medical condition in order to obtain a more advantageous settlement. Ultimately, that settlement was vacated on the basis that the defendant’s counsel had failed in his duty of candor to the court (court approval being required because the plaintiff was a minor). However, the Minnesota Supreme Court was unequivocal in concluding that no such duty of candor existed during the course of the negotiations.[[22]](#footnote-22)

From an ethical perspective, the facts of *Spaulding* are undoubtedly problematic.On the one hand, the defendant’s lawyers clearly had a professional duty to maintain the confidentiality of their client’s information, particularly in circumstances where disclosure would have been counter to the zealous promotion of their client’s interests. Yet, on the other, concealing the true state of the plaintiff’s condition may well have resulted in his death, and at the very least meant that he was denied the opportunity to seek compensation for the full extent of his injuries. The situation was further compounded by the fact that the plaintiff’s lawyer inexplicably failed to request a copy of the defendant’s medical report, so that any sanction of the defendant’s lawyer would have amounted to punishment for failure to correct the mistakes of opposing counsel.

Given this, it is not surprising that *Spaulding* has divided commentators. While at least one critic has argued that the *Spaulding* court should have recognized an ethical duty of good faith and fair dealing in negotiation,[[23]](#footnote-23) others point out that such an obligation would be inconsistent with the adversarial nature of settlement negotiations and the lawyer’s duties of confidentiality and zealous advocacy.[[24]](#footnote-24)

What is largely absent from these critiques, however, is any attempt to grapple with the underlying rationale for the various ethical duties place on lawyers. As the preamble to the *Model Rules* explains:

A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

The lawyer’s duties to the client are thereby premised on the more fundamental principle that lawyers, as officers of the legal system, must act in furtherance of the administration of justice. Ordinarily, justice will be best served through zealous advocacy and the maintenance of client confidences, but this does not always hold true. The lawyers in *Spaulding*, for example, were presumably under no illusion that justice was *“being done”* when they deliberately withheld crucial and potentially lifesaving information in order to force down the settlement price. Similarly, it would be difficult to argue that maintaining confidentiality serves the public interest if the consequences include an innocent party being knowingly exposed to the risk of death and denied the opportunity to seek due compensation.

In other areas of dispute resolution, the profession has dealt with these issues by recognizing that the lawyer’s duties of confidentiality and zealous advocacy are subject to the overriding demands of justice. A lawyer, for example, is forbidden from raising issues or prosecuting arguments that are frivolous or made in bad faith, notwithstanding that it may be in the client’s interests to do so.[[25]](#footnote-25) In a similar vein, lawyers are prohibited from making false statements of fact or law to adjudicative bodies, are bound to disclose any binding adverse legal authority, and may also be required to disclose criminal or fraudulent conduct by their client.[[26]](#footnote-26) Furthermore, the *Model Rules* expressly impose on lawyers engaged in adversarial proceedings a duty of fairness to the opposing party and counsel, pursuant to which lawyers are barred from (among other things) destroying or concealing evidence or making use of certain diversionary and misleading tactics during trial.[[27]](#footnote-27) As the commentary to Rule 3.3 explains (emphasis added):

[Lawyers owe] special duties… as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. **Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal**. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be mislead by false statements of law or fact or evidence that the lawyer knows to be false.

In light of the now central role that mediation plays in the justice system, it is difficult to find any basis in principle for distinguishing between the duties owed by lawyers engaged in mediation and those involved in adjudicative forms of dispute resolution. While it is true that mediation allows for a greater degree of flexibility and informality, the mediation process can nevertheless result in binding agreements that fundamentally alter the legal rights of the participants. Moreover, the need for lawyers to adhere to overriding principles of justice and fairness is, if anything, more acute in circumstances where the parties may lack access to other mechanisms by which to obtain crucial information. In the absence of meaningful duties of honesty and candor, there is a very real risk that mediation will be used by savvy practitioners to circumvent due process, and secure unjust advantages for their clients.[[28]](#footnote-28)

Despite this, the use of dishonest and misleading tactics during mediation appears to be regarded by many practitioners as inevitable and even desirable.[[29]](#footnote-29) If not checked, these practices will continue to erode the public standing of the legal profession, and permit mediation to become an instrument of injustice.

## The uncertain distinction between omissions and misrepresentations

In addition to permitting undesirable conduct, the current rules regarding honesty in mediation have also been productive of significant confusion and uncertainty. At the heart of this confusion is the difficult and sometimes illusory distinction between mere omissions (where the lawyer currently has no duty of disclosure) and omissions amounting to positive misstatements (for which the lawyer owes a duty to correct the misunderstanding). The absence of clear and consistent guidance on this issue can place lawyers engaged in mediation in an impossible position. Either they choose to correct a misunderstanding and risk breaching their professional duties to the client, or they elect not to do so and risk running foul of their obligations to third parties and potentially jeopardizing the enforceability of any resulting agreement.

The problems with applying the omission/ misstatement distinction in practice are well illustrated by the body of cases and ethics opinions concerning failure to disclose the death of a client during settlement negotiations. In the seminal case of *Virzi v. Grand Trunk Warehouse & Cold Storage Co*,*[[30]](#footnote-30)* the District Court for the Eastern District of Michigan set aside a settlement agreement because the plaintiff’s attorney had failed to inform the court and opposing counsel of the prior death of his client. The Court considered that the plaintiff’s lawyer had an *“absolute ethical duty”* to disclose the death to opposing counsel, and that this duty applied irrespective of the fact that the lawyer had not actually made any false statements.[[31]](#footnote-31) While the Court noted that, unlike *Spaulding*, the plaintiff’s death *“did not have any effect on the fairness of the … mediation award”*, it nevertheless had a *“significant bearing”* on the negotiations because the defendants’ willingness to settle was in large part due to their belief that the plaintiff would make an excellent witness on his own behalf if the case were to proceed to trial.

Although the Court in *Virzi* purported to base its decision partially on Model Rules 3.3 and 4.1, the Court’s language goes well beyond what is contemplated by those rules. In particular, the Court explicitly recognized an *“absolute”* and *“affirmative”* duty of candor and franknessto opposing counsel.[[32]](#footnote-32) Moreover, the Court held that this duty existed on the same footing as the duty of candor to the court, and that it prevailed over any conflicting demands of zealous advocacy.[[33]](#footnote-33) *Virzi* therefore represents a significant departure from the approach in *Spaulding*, in which the Courts drew a distinction between the duty of candor to the court and the far less rigorous obligations imposed on lawyers engaged in mediation and settlement negotiations.

Since *Virzi,* there have been numerous other attempts to explain whether, and when, a lawyer will be duty bound to disclose the death of a client to an opposing party. In a 1995 opinion, the American Bar Association Committee on Ethics and Professional Responsibility expressed the view that a lawyer representing the plaintiff in a personal injury claim *does* have a duty to promptly inform opposing counsel and the court of the client’s death.[[34]](#footnote-34) The Committee’s conclusion rested in part on the fact that the death of the client will generally terminate the lawyer’s authority to act – including with respect to negotiating or accepting settlement. Additionally, the Committee was of the view that, in the absence of disclosure, any further communication would implicitly represent that the client was alive, and would therefore contravene Model Rule 4.1(a) (the death of a client being a “material fact”).[[35]](#footnote-35) By contrast, the state bar association committees in both Virginia and Pennsylvania have concluded that, in the absence of a direct inquiry or prior false statement, a lawyer does not have a duty to disclose the death of his client.[[36]](#footnote-36) In a further variation, the Illinois State Bar Association considered that the death of a personal injury claimant must be promptly disclosed, but not the death of the sole remaining officer of a corporate client.[[37]](#footnote-37)

Judicial approaches to the issue have also varied widely. Whereas no other decision has gone as far as *Virzi* in recognizing an affirmative duty of candor to third parties, other courts have held that failure to disclose the death of a client violated the requirements of Rule 4.1 because the failure amounted to a positive misstatement, or constituted a deliberately misleading half truth.[[38]](#footnote-38) So, for example, in *Kentucky Bar Association v. Geisler*,[[39]](#footnote-39) the Kentucky Supreme Court held that a lawyer had breached the equivalent of Rule 4.1 where she contacted the defendant’s representatives shortly after her client’s death and invited them to engage in settlement negotiations. Although the Court purported to follow *Virzi*, the decision in *Geisler* was in fact premised on the rationale that the lawyer’s actions amounted to an affirmative misrepresentation. By writing to her opposing counsel, the plaintiff’s lawyer had impliedly represented that she had continuing authority to act on the plaintiff’s behalf, and had thereby violated the equivalent of Rule 4.1(a).[[40]](#footnote-40)

Although many observers would no doubt agree that something as fundamental as the death of a client should be disclosed, these conflicting decisions and opinions demonstrate the difficultly of identifying a convincing rationale for that obligation in the text of Model Rule 4.1.[[41]](#footnote-41) Despite the valiant efforts of the *Virzi* Court, there is quite simply nothing in the language of Rule 4.1 that amounts to a positive duty of candor to third parties. Instead, lawyers engaged in mediation must try to determine whether any misconception on the part of their opponent or the mediator derives from their own misstatement. It is only to that extent that the lawyer is obliged to be forthcoming. Beyond that, he is prohibited from making any disclosure that would jeopardize confidentiality or otherwise harm his client’s interests. This delicate calculation is further complicated by the fact that the relevant misstatement may not be express nor even deliberate. A declaration that is literally true, or a total omission, may nonetheless amount to a false statement if it implies, including inadvertently, that the facts are otherwise than the lawyer knows them to be.

In practice, of course, it is difficult to conceive of how a lawyer could continue to act for a dead client during settlement negotiations without implicitly or explicitly representing that his client was still alive. If, however, the facts were slightly different, so that the client had instead slipped into a coma (after giving sufficient instructions) then a careful lawyer could proceed to negotiate settlement without making any misrepresentations. Notwithstanding that the client’s ability to testify might well be the determining factor in the opposing party’s settlement calculation, Rule 4.1 would not require its disclosure.[[42]](#footnote-42)

The difficulties with the omission/ misstatement distinction are thus twofold. For individual practitioners, the impossibility of identifying with any certainty the point at which an omission becomes an implied misrepresentation means that even the most diligent lawyers can inadvertently fall foul of their ethical obligations, with potentially serious consequences for both their professional career and the client’s settlement.

For the profession as a whole, the distinction also raises a more fundamental set of concerns surrounding the role of mediation in the justice system. As I have stated above, mediation is now a central feature of dispute resolution. Many, if not the majority of civil cases settle without ever reaching the stage of formal adjudication. The imposition of ethical duties on lawyers engaged in mediation therefore has important ramifications for the overall fairness of the justice system. In the absence of clear and unambiguous criteria for disclosure, parties in mediation are denied two core safeguards of that system – the right to know the case against them, and the assurance that other parties are operating pursuant to the same rules and obligations.

This is by no means the first time a commentator has identified problems in this area. Writing more than 20 years ago, John Cooley concluded that the *Model Rules* offered no guidance regarding the acceptable limits of deception in mediation.[[43]](#footnote-43) In a similar vein, James Alfini has recognized *“a compelling need to articulate the ethical constraints on lawyers when they represent clients in ADR settings.”[[44]](#footnote-44)* Despite this, the relevant text of the *Model Rules* has remained largely static for decades. While the need for change is now impossible to deny, calls for reform inevitably raise further questions regarding both the extent of the obligations that should be imposed, and the form in which to impose them. To this end, this paper now turns to consider possible avenues for reform of the *Model Rules*.

# Avenues for Reform

Ostensibly, the *Model Rules* serve to define the relationship between lawyers and the legal system.[[45]](#footnote-45) Yet, as I have described above, in relation to a central aspect of that system – mediation – the rules are almost entirely silent. This state of affairs has the potential to be productive of serious injustice. As currently drafted, Rule 4.1 permits lawyers in mediation to engage in morally reprehensible conduct, requires them to draw difficult and sometimes impossible distinctions between omissions and implied misrepresentations, and denies parties engaged in mediation some of the most basic assurances of procedural fairness. The situation is all the more striking because it stems from an unjustified distinction between mediation and other forms of dispute resolution, pursuant to which mediation is omitted from the categories of *“tribunal”* to which lawyers owe a duty of candor.[[46]](#footnote-46)

In light of these manifold problems, it is imperative that the rules regarding lawyer conduct in mediation are amended so as to provide robust and unambiguous professional standards. At a minimum, the rules should ensure that parties who elect to settle their disputes via mediation rather than adjudication are not substantively or procedurally disadvantaged, and that the integrity of the civil justice system is not undermined. To this end, lawyers engaged in mediation should be held to the same obligations of honesty and candor that exist in adjudicative proceedings. Such a development would ensure that lawyers are duty-bound to disclose information (whether of fact or law) that is crucial to the just resolution of proceedings. Moreover, it would relieve practitioners engaged in mediation of the need to contend with the distinctions between “material” and “immaterial” facts, or “misstatements” and “omissions”, and appropriately recognize the central role that mediation plays in the justice system.

Against this, some commentators have argued that a duty of candor in mediation would be either incompatible with the adversarial nature of settlement negotiations, or overly subjective and impossible to police.[[47]](#footnote-47) At least one observer has gone so far as to suggest that lying is an inherent part of the negotiation process, such that lawyers engaged in negotiations (including through mediation) should be wholly exempt from duties of honesty or disclosure.[[48]](#footnote-48) Another has expressed the view that a duty of candor might well confer an unfair advantage on those least deserving of it – unscrupulous lawyers who would continue to lie and obfuscate irrespective of heightened professional standards.[[49]](#footnote-49)

These arguments are unconvincing. While it is true that mediation may be (although is not necessarily) adversarial, so too are court proceedings. Yet, as I have explained above, the *Model Rules* expressly recognize a duty of candor to courts and other adjudicative tribunals. In so doing, the rules reinforce the overarching duty of lawyers to the administration of justice. That duty does not cease to exist merely because a lawyer is engaged in adversarial proceedings. A lawyer’s role is not to “win at all costs” but to diligently defend his client’s interests within the parameters of his obligations to the justice system and the public at large.

Similarly, the fact that a duty of candor might be difficult to enforce does not provide any rationale for distinguishing in this regard between mediation and other forms of dispute resolution. More fundamentally, such arguments also misconceive the nature of professional standards, which are directed in the first instance to providing a framework for the ethical practice of law, rather than a set of punitive regulations. Public confidence in the legal profession requires that lawyers are – and are seen to be – held to high standards of ethical behavior. The mere fact that some unscrupulous individuals might choose to deliberately flout those standards does not mean they should not exist. On the contrary, the need to weed such persons out of the profession provides further justification for the adoption and enforcement (where possible) of robust professional rules and guidelines.

Given the clear need to improve the ethical standards for lawyers in mediation, it is apposite to consider what such a reform might look like in practice. One obvious option is to amend the text of Rule 4.1. Alfini, for example, has proposed removing the *“material”* qualifier to the prohibition on false statements of fact and law, and adding a prohibition against lawyers knowingly *“assisting the client in reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client”*.[[50]](#footnote-50) In addition, Alfini suggests amending the commentary to Rule 4.1 to include a statement to the effect that lawyers engaged in mediation should inform their clients of these obligations.[[51]](#footnote-51)

While removal of the “material” qualifier is a good start, the problem with this proposal is that it maintains the arbitrary distinction between mediation and other forms of dispute resolution. Under Alfini’s suggested amendments, lawyers would be obliged to refrain from making untruthful statements or taking advantage of the false statements of their clients. However, there would still not be any requirement to disclose material information to the opposing party or correct misunderstandings. The proposal therefore does nothing to resolve the problems discussed above concerning moral ambiguity and the uncertainty of the omission/misstatement distinction. Furthermore, such a reform would continue to promulgate the notion that mediation is a “lesser” form of dispute resolution in which lawyers are free to disregard the overarching demands of justice.

A better option would include amending the definition of *“tribunal”* for the purposes of Rule 3.3, so as to expand the existing duty of candor owed to tribunals and during adjudicative proceedings to include mediation.[[52]](#footnote-52) This seemingly modest reform would have significant implications. In addition to providing for more rigorous standards of truthfulness and disclosure in mediation, such an amendment would place mediation on an equal footing with other forms of dispute resolution, and ensure that parties engaged in mediation are afforded the same ethical protections as elsewhere in the justice system. The approach also has the advantage of utilizing a familiar form of words for which there is already substantial judicial and professional guidance, and that takes appropriate account of the subsisting duties of confidentiality and zealous advocacy.

# Conclusion

Mediation is now a central feature of our justice system. In order to ensure that mediation produces just results, lawyers must be held to the same ethical standards of honesty and candor that apply to adjudicative processes. To that end, this paper has proposed a modest amendment to the *Model Rules* that overcomes the problems of moral ambiguity and uncertainty which are inherent in Rule 4.1. Despite repeated calls for reform stretching over many decades, the legal profession has yet to address these issues. It is high time that it did so.

To paraphrase the *Virzi* court, mediation is not a game, or an exercise in free market economics. A lawyer who deals with another lawyer *“should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar.”*[[53]](#footnote-53)Ethics, and justice, demand more. So should the *Model Rules*.

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1. See, eg, the American Bar Association’s *Model Standards of Conduct for Mediators*. See, further, James Lawrence, “Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates” (2014) 29 *Ohio State Journal on Dispute Resolution* 35, 52-57. [↑](#footnote-ref-1)
2. See, eg, Bruce Meyerson, “Telling the Truth in Mediation: Mediator Owed Duty of Candor” (1997) 4 *Dispute Resolution Magazine* 17; John Cooley, “Defining the Ethical Limits of Acceptable Deception in Mediation” (2004) 4(2) *Pepperdine Dispute Resolution Law Journal* 263; Don Peters, “When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal” (2007) *Journal of Dispute Resolution* 119. [↑](#footnote-ref-2)
3. Robert Burns, “Some Ethical Issues Surrounding Mediation” (2001) 70(3) *Fordham Law Review* 691, 692. [↑](#footnote-ref-3)
4. Barry Temkin, “Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?” (2004) 18 *Georgetown Journal of Legal Ethics* 179, 181. [↑](#footnote-ref-4)
5. John Tarlow and Charles Sink, “In Defense of Lying: The Ethics of Deception in Mediation” (2015) *American Bar Association*, presented at the Fall Meeting of the Forum on Construction Law, October 8-9 2015, 3 [↑](#footnote-ref-5)
6. Temkin, above n 4, 182, paraphrasing Michael Rubin, “The Ethics of Negotiations: Are There Any?” (1995) 56 *Louisiana Law Review* 447. [↑](#footnote-ref-6)
7. Temkin, above n 4, 180. [↑](#footnote-ref-7)
8. See, further, American Bar Association, <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html>. [↑](#footnote-ref-8)
9. See also Annotations to Rule 4.1 in the American Bar Association, *Annotated Model Rules of Professional Conduct* (8th ed, 2015) (“Annotated Rules”). [↑](#footnote-ref-9)
10. Rule 3.3(a)(1) prohibits lawyers from knowingly making false statements of fact or law to tribunals. Rule 1.0(m) defines *“tribunal”* as *"a court, an arbitrator in a binding arbitration proceeding, or other body acting in an adjudicative capacity."* At least one commentator has suggested that the definition of tribunal may include a mediation conducted by a court appointed mediator, although this would appear to be in contradiction to the requirement for a tribunal to act in an “adjudicative capacity”: see Lawrence, above n 1, 55. Some jurisdictions that have adopted Model Rule 4.1 have omitted the requirement of materiality: see Robert Kaplan and Linda Lawson, “Ethical Considerations in Settlement Discussions and During Mediation” (2016) 58(3) *DRI For the Defense* 12, 19. [↑](#footnote-ref-10)
11. The Annotated Rules state that *“A statement is material for purposes of Rule 4.1(a) if it could or would influence the hearer.”*  [↑](#footnote-ref-11)
12. See also American Bar Association, *Ethical Guidelines for Settlement Negotiations* (August, 2002), section 4.1.1 (“Settlement Guidelines”). [↑](#footnote-ref-12)
13. See, further, American Bar Association Formal Opinion 06-439, *Lawyers Obligations of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation* (2006) [↑](#footnote-ref-13)
14. The word *“ordinarily”* was added to Rule 4.1(b) in 2002 to acknowledge that an estimate of price or value or a statement of intention regarding settlement could, under some circumstances, constitute a false statement of fact: Annotated Rules, annotations to Rule 4.1. See also American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, (2013) 552. [↑](#footnote-ref-14)
15. See, generally, Peters, above n 2. See also John Cooley, “Mediation Magic: Its Use and Abuse” (1997) 29 *Loyola University Chicago Law Journal* 1, analyzing the types of deception practiced in mediation. [↑](#footnote-ref-15)
16. Temkin, above n 4, 186. Rule 1.0(d) defines fraud as conduct that is fraudulent *“under the substantive or procedural law of the applicable* *jurisdiction and has a purpose to deceive”*. See, generally, Bruce Green, “Deceitful Silence” (2007) 33 *Litigation* 24. [↑](#footnote-ref-16)
17. See further Lawrence, above n 4, 49-50 explaining that, in certain circumstances, a lawyer must resign where continuing to act would be tantamount to assisting the client’s fraud. But see John Humbach, “Shifting Paradigms of Lawyer Honesty” (2009) 76 *Tennessee Law Review* 993, 1009, expressing the view that *“Since Rule 4.1(b) requires its disclosures when Rule 1.6 permits them, a new and wide-ranging ‘duty to warn’ has emerged.”* See also the annotations to paragraph (b) of Rule 4.1 of the Annotated Rules. [↑](#footnote-ref-17)
18. Preamble to the Settlement Guidelines. [↑](#footnote-ref-18)
19. Citing *Crowe v. Smith*, 151 F.3d 217 (5th Cir, 1998). See also section 4.3.5 [↑](#footnote-ref-19)
20. 116 N.W.2d 704 (1962). [↑](#footnote-ref-20)
21. *Id,* 707. [↑](#footnote-ref-21)
22. *Id*, 709. [↑](#footnote-ref-22)
23. Nathan Crystal, “The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations” (1999) 87 *Kentucky Law Journal* 1055, 1086, 1097. See generally Peter Thompson, “Good Faith Mediation in the Federal Courts” (2010) 26 *Ohio State Journal on Dispute Resolution* 363. [↑](#footnote-ref-23)
24. See, eg, Temkin, above n 4,199-200. [↑](#footnote-ref-24)
25. Rule 3.1 of the *Model Rules*. [↑](#footnote-ref-25)
26. Rule 3.3 of the *Model Rules*. [↑](#footnote-ref-26)
27. Rule 3.4 of the *Model Rules.*  [↑](#footnote-ref-27)
28. Section 4.3.1 of the *Settlement Guidelines* specifically states that *“[a]n attorney may not employ the settlement process in bad faith.”* However, *“bad faith”* does not include the sort of conduct contemplated here: see further Committee Notes to Section 4.3.1 providing examples of bad faith conduct. [↑](#footnote-ref-28)
29. See, eg, Lawrence, above n 1; Peters, above n 2; Temkin, above n 4; Tarlow and Sink, above n 5. [↑](#footnote-ref-29)
30. 571 F. Supp. 507 (E.D. Mich. 1983). [↑](#footnote-ref-30)
31. *Id.* 508, 511. [↑](#footnote-ref-31)
32. *Id.* 512. [↑](#footnote-ref-32)
33. *Id.*  [↑](#footnote-ref-33)
34. American Bar Association, Formal Ethics Opinion 94-397, Duty to Disclose Death of Client (1995). [↑](#footnote-ref-34)
35. See further Kaplan and Lawson, above n 10, 7-8. [↑](#footnote-ref-35)
36. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibly, Informal Opinion 93-51 (1993); Virginia Bar Association Standing Committee on Legal Ethics, Opinion 952 (1987). [↑](#footnote-ref-36)
37. Illinoi State Bar Association, Advisory Opinion on Professional Conduct, Opinion 96-03 (1996). [↑](#footnote-ref-37)
38. See, eg, *People v. Rosen*, 198 P.3d 116 (Colo. 2008); *In re Lyons*, 780 N.W.2d 629 (Minn. 2010); *In re Forrest*, 158 N.J. 428, 730 A.2d 340, 345–46 (1999). [↑](#footnote-ref-38)
39. 938 S.W.2d 578 (Ky. 1997). [↑](#footnote-ref-39)
40. *Id*, 580. [↑](#footnote-ref-40)
41. This issue is not confined to cases involving the death of a client. For example, Courts are also split regarding whether failure to disclose the existence of insurance coverage would constitute a false statement of material fact under Rule 4.1: See generally Kaplan and Lawson, above n 10, 7. [↑](#footnote-ref-41)
42. This conclusion is consistent with other opinions of the ABA Ethics Committee. See, eg, American Bar Association, Formal Opinion 94-387, *Disclosure to Opposing Party and Court That Stature of Limitations Has Run* (1994). [↑](#footnote-ref-42)
43. Cooley, above n 15, 101-103, 106-107. [↑](#footnote-ref-43)
44. James Alfini, “Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1” (1999) *19 Northern Illinois University Law Review* 255, p 266. [↑](#footnote-ref-44)
45. Preamble to the *Model Rules*. [↑](#footnote-ref-45)
46. See above n 10. [↑](#footnote-ref-46)
47. See, eg, James White, “Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation” (1980) *American Bar Foundation Research Journal* 926, 929.  [↑](#footnote-ref-47)
48. See, eg, Thomas Guernsey, “Truthfulness in Negotiation” (1982) 17 *University of Richmond Law Review* 99, 125, suggesting the use of a *“caveat lawyer”* rule. See also Temkin, above n 4. [↑](#footnote-ref-48)
49. See Burns, above n 3, 696-7. [↑](#footnote-ref-49)
50. Alfini, above n 44, 270-1. [↑](#footnote-ref-50)
51. *Id*. [↑](#footnote-ref-51)
52. There is precedent for this approach in other common law jurisdictions. In Australia, for example, lawyers engaged in mediation owe the same duties of honesty and candor that they owe in litigation. See, generally, Bobette Wolski, “The Truth About Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins’ Case” (2012) *Melbourne University Law Review* 706. See, also, Peters, above n 2, 121 noting that previous calls for such a reform have been ignored. [↑](#footnote-ref-52)
53. *Virzi v. Grand Trunk Warehouse & Cold Storage Co* 571 F. Supp. 507 (E.D. Mich. 1983), quoting with approval from Alvin Rubin, "A Causerie on Lawyers’ Ethics in Negotiations” (1975) 35(3) *Louisiana Law Review* 577. [↑](#footnote-ref-53)