

**Practicing Before the Occupational Safety and Health Review Commission:
Issues of Ethics, Professionalism and Civility**

**American Bar Association
Occupational Safety and Health Law Committee
2016 Mid-Winter Meeting**

Presented by Chief Administrative Law Judge Covette Rooney

Part I: Unpersuasive and Unhelpful Language

Counsel for the Complainant, Secretary of Labor, files a Motion to Dismiss Respondent's Late Notice of Contest. Counsel for the Respondent files a Response in Opposition to the Secretary's Motion to Dismiss accusing OSHA and the Solicitor's office of lying and acting dishonestly, using inappropriate, sarcastic and bombastic language like "dumbfounded," "petty," and "vindictive," and also claims that counsel for the Complainant has "impiously" pursued this legal proceeding. Counsel for the Complainant files a Reply to Respondent's Opposition and accuses counsel for the Respondent of violating rules of professional conduct behind-the-scenes, alleging scandalous scenarios irrelevant to the issues at hand, and refers to Respondent's arguments as "nonsensical," "contrived nonsense," and "dishonorable." Respondent bears the burden that it is entitled relief. Neither pleading addresses Respondent's burden of proof.

Consider the following:

[U]sing such degrading and disparaging rhetoric appears to cross [] the line from acceptable forceful advocacy into unethical conduct.... Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone.

Civil behavior towards the tribunal and opposing counsel does not compromise an attorney's efforts to diligently and zealously represent his or her clients. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process.

Martin v. Essrig, 277 P.3d 857, 860-61 (Colo. App. 2011) (internal quotations omitted).

Discuss how the language and arguments described above might affect the direction and outcome of the case for **(1) Respondent**, and **(2) Complainant**. *See also* OSHRC Rule of Procedure 104 (Standards of Conduct); Model Rules of Prof'l Conduct R. 3.1 (Meritorious Claims and Contentions) and 3.2 (Expediting Litigation) (all attached).

Part II: Stretching Truthfulness

OSHA inspects Respondent's worksite and issues Respondent a citation. Counsel for Respondent and the OSHA representative meet to discuss the citation. During this meeting, Counsel for Respondent tells the OSHA representative that she will be filing a notice of contest to the citation. The OSHA representative reminds Counsel for the Respondent to file it in writing by Friday, September 30th, the last day within the statute of limitations to file the notice of contest. On Friday the 30th, Counsel for the Respondent drafts the notice of contest and signs it, but she neglects to drop it in the mail. On Monday, October 3rd, Counsel for Respondent mails the notice of contest, thinking, "Maybe OSHA won't notice that this is late." In the meantime, the government has shut down effective October 1st. Upon his return to the office, Counsel for the Complainant receives the notice of contest mailed on October 3rd. Counsel for Complainant contacts counsel for the Respondent and they discuss potential settlement.

(1) Does Counsel for Respondent have an obligation to disclose to Counsel for the Complainant that she knows that she filed a late notice of contest? Consider the following:

[W]e conclude that a lawyer has no ethical duty to inform an opposing party that her client's claim is time-barred; to the contrary, it may well be unethical to disclose such information without the client's consent. It follows that a lawyer may be constrained from discontinuing negotiations over a claim simply because the limitations period for its judicial enforcement has run, in the absence of directions from her client that she do so.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-387 (1994) (discussing disclosure to opposing party and court that statute of limitations has run); *see also* OSHRC Rule of Procedure 104 (Standards of Conduct); Model Rules of Prof'l Conduct R. 1.3 (Diligence), 3.1 (Meritorious Claims and Contentions), 3.2 (Expediting Litigation), 4.1 (Truthfulness in Statements to Others) (all attached).

(2) The counsels discuss how the notice of contest was late. Both agree that it is not in the best interests of their clients to end this proceeding at this stage. They agree to proceed to file pleadings in the case as if they miscalculated the statutory deadline due to the confusion surrounding the government shutdown. “Let’s see how long it takes the judge to figure it out!” they laugh. Both parties file pleadings without making any affirmative misrepresentations about the facts that the case is time-barred. **At what point does Counsel for Complainant have an obligation to disclose to the judge that he knows that Respondent’s notice of contest is late?**

Consider the following:

The government lawyer has no less a duty zealously to represent her client within the bounds of the law than does a lawyer representing a private litigant. See generally Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 So. Cal. L. Rev. 951 (1991).

ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-387 (1994) (discussing disclosure to opposing party and court that statute of limitations has run”); *see also* OSHRC Rule of Procedure 104 (Standards of Conduct); Model Rules of Prof’l Conduct R. 1.3 (Diligence), 3.1 (Meritorious Claims and Contentions), 3.2 (Expediting Litigation), 3.3 (Candor Toward the Tribunal)(all attached).

Part III: Questionable Negotiations

The parties are to participate in a mandatory settlement conference with the judge, who will serve as the mediator during the caucuses. The judge had previously issued an order that only those with settlement authority were to attend the conference. Right before the conference begins, counsel for Respondent meets with his client. Client informs his counsel that he will agree to settle the case if the penalties are reduced to \$1,000. Client also tells his counsel that neither of them have signature authority for any settlement agreement reached today. “Don’t worry, we’re not going to agree to anything today anyway,” the client tells his counsel.

Meanwhile, counsel for the Complainant has received her marching orders from her supervisor regarding her goals of the settlement conference. She is authorized to sign a settlement agreement if Respondent agrees to a \$1,000 penalty. Counsel for Complainant received some troubling news, however, regarding the evidence in her case: the material sample

sent to the testing lab for analysis was destroyed in a fire *en route* to Utah, and so there is no analysis of physical evidence to introduce at hearing to support her case.

At the beginning of the settlement conference, the judge first asks everyone whether they are able to sign a settlement agreement today. Avoiding the question, Client Respondent says, “Let’s get this party started!” and side-eyes his counsel, who looks down at the table. Counsel for Complainant answers, “Yes.”

(1) Did Counsel for Respondent violate the Model Rules by his actions (or inactions) in response to the judge’s question at the beginning of the settlement conference?

During caucus with Respondent, Counsel for Respondent tells the judge that they will not settle for anything more than a complete withdrawal of the citation. During caucus with Complainant, the judge communicates this to Counsel for the Complainant. She responds with, “They will once they find out what kind of analysis I have of the material sample taken from the Client’s worksite.” The judge communicates this information to Respondent.

(2) Did Counsel for the Complainant violate the Model Rules by her statement to the judge regarding the material sample?

Consider:

Except for Rule 3.3, which is applicable only to statements before a ‘tribunal,’ the ethical prohibitions against lawyer misrepresentations apply equally in all environments... Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.

ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-439 (2006) (discussing lawyer’s obligation of truthfulness during negotiation) (attached), and:

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty

of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Comment 5 to Model Rule of Prof'l Conduct 2.4 (lawyer serving as third party neutral); *see also* OSHRC Rule of Procedure 104 (Standards of Conduct); Model Rules of Prof'l Conduct R. 1.0(m) (Terminology: Tribunal); 3.3 (Candor Toward the Tribunal) and 4.1 (Truthfulness in Statements to Others) (attached).

Part IV: Lord Buckmaster's Cautionary Tale

[I]n the reign of the Stuarts there was one counsel who had offended the court by preparing a needlessly long and prolix pleading on parchment. He was ordered to have his pleadings taken, a large hole to be cut in the middle, he was to have his head pushed through it, and he was to attend the first day of the term of every court with his head through the pleadings.

Lord Buckmaster, *The Romance of the Law*, 11 A.B.A.J. 579, 581 (Sept. 1925).



Select Occupational Safety and Health Review Commission Rule of Procedure

29 C.F.R. § 2200 *et seq.*

Rule 104 Standards of conduct.

- (a) *General.* All representatives appearing before the Commission and its Judges shall comply with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association.

Select ABA Model Rules of Professional Conduct

7th edition, 2011

Rule 1.0 Terminology

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

...

(6) to comply with other law or a court order;

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law....

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3 Candor to the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; ...
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person;

(b) fail 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.

COURTROOM ETIQUETTE

Civility is the foundation of Chief Judge Rooney's courtroom procedures. The proceeding shall at all times be conducted in a dignified and formal manner. Counsel shall not raise their voices any louder than is necessary to be clearly heard by the Court and witnesses. All remarks should be addressed to the Court and counsel will rise when addressing the Court. Counsel's demeanor should be one of courtesy and professionalism to both the Court and each other. The rule on civility is absolute in addressing witnesses whether on direct or cross examination. Do not approach a witness without leave of the Court. Do not exhibit an opinion concerning any witness in any manner, including facial expression or other conduct. Counsel should avoid argumentative questions when questioning an opposing party.

Please Take Notice:

General Procedures

All in the gallery, whether media, public, family, members of the bar, interns or other staff related to the parties observing the proceedings must be seated before the Court is in session. Those in the gallery must remain in the courtroom (except for emergencies) until the next recess is called. Observers will not routinely be admitted while the court is in session.

Courtroom Demeanor

As in all cases, the atmosphere in the courtroom must be quiet, calm and deliberative. Evidence in the case may be complex, graphic, emotional, and sometimes very tedious. All persons participating in or observing the proceedings must be willing to acknowledge the importance of it, and comport themselves appropriately.

Participants and observers in the courtroom must remain silent during all proceedings, except as the proceedings warrant. There will be no talking, shaking of heads of approval or disapproval of any statements, actions, rulings, testimony or proceedings, or any other signals or signs of approval or disapproval.

There will be no reading of newspapers, magazines, books, or other materials while court is in session.

There will be no drinks, snacks or chewing gum. Counsel may provide water to the witnesses. Other exceptions may be granted by the Court on a case-by-case basis.

All cellphones and pagers must be turned off while proceedings are in progress. Computers, cameras, web cams, recorders or other similar equipment may not be brought into the courtroom except with the prior approval of the Court.

No member of the media, family, public, members of the bar or other staff will be allowed beyond the bar of the court at any time except as permitted by the Court.

277 P.3d 857
Colorado Court of Appeals,
Div. III.

Bernie MARTIN, Plaintiff–Appellee,
v.
Paul ESSRIG, Defendant–Appellant,
and
Concerning David S. Carroll, Attorney–Appellant.

No. 09CA2182.
|
Aug. 4, 2011.

Synopsis

Background: Former tenant filed motion for relief from judgment, asserting that judgment awarding landlord damages for breach of residential lease was void. The District Court, City and County of Denver, [Shelley I. Gilman, J.](#), denied motion and awarded landlord attorney fees and costs. Tenant appealed.

Holdings: The Court of Appeals, [J. Jones, J.](#), held that:

[1] tenant’s failure to comply with briefing rules warranted striking his opening and reply briefs and dismissing appeal, and

[2] tenant’s attorney, not tenant, was responsible to pay attorney fees and double costs.

Appeal dismissed, and case remanded.

West Headnotes (8)

[1] **Appeal and Error**
🔑 Grounds for Dismissal

Conduct in prosecuting an appeal may so contrary to court rules and so disrespectful of the judicial process and the participants therein that the right to appellate review is forfeited.

[Cases that cite this headnote](#)

[2] **Appeal and Error**
🔑 Defects, objections, and amendments
Appeal and Error
🔑 Striking Out

Attorney’s failure to comply with briefing rules in representing his client, which was not the first time, warranted striking attorney’s opening and reply briefs and dismissing appeal from trial court’s denial of motion for relief from judgment; briefs failed to set forth a cogent argument explaining why district court erred, used inflammatory language relating to alleged discussion that had nothing to do with issue in appeal, accused other attorney of lying, violating the rules of professional conduct, defying court orders, and litigating the case for improper motives, and similarly accused other party of acting dishonestly and for base purposes. Rules App.Proc., Rules 28, 32.

[1 Cases that cite this headnote](#)

[3] **Appeal and Error**
🔑 Defects, objections, and amendments

The use of any language failing to rise to the level of civil discourse in an appellate brief is inappropriate, and may, depending on the circumstances, justify sanctions.

[Cases that cite this headnote](#)

[4] **Appeal and Error**
🔑 Reply briefs
Appeal and Error
🔑 Defects, objections, and amendments

Statements in opening and reply briefs that

contain statements which, viewed in context, could be regarded as attacking, without any articulated foundation, the district court's integrity, are inappropriate.

[Cases that cite this headnote](#)

[5]

Costs

🔑 [Right and Grounds](#)

An appeal may be frivolous in two distinct ways: (1) it may be frivolous as filed; or (2) it may be frivolous as argued.

[2 Cases that cite this headnote](#)

[6]

Costs

🔑 [What constitutes frivolous appeal or delay](#)

An appeal is frivolous as filed when the district court's judgment is so plainly correct and the legal authority so clearly against the appellant's position that there is really no appealable issue.

[3 Cases that cite this headnote](#)

[7]

Costs

🔑 [What constitutes frivolous appeal or delay](#)

An appeal is frivolous as argued where the appellant commits misconduct in arguing the appeal.

[1 Cases that cite this headnote](#)

[8]

Attorney and Client

🔑 [Liability for costs; sanctions](#)

Costs

🔑 [Persons entitled or liable](#)

Attorney at law, not his client, was responsible to pay attorney fees and double costs under statute allowing attorney fees when action in court lacked substantial justification and under rule of appellate procedure allowing for double costs when appeal is frivolous, for client's appellate brief which failed to set forth a cogent argument explaining why district court erred, and used inflammatory language relating to other party and his counsel. [West's C.R.S.A. § 13-17-102\(2\)](#); [Rules App.Proc., Rule 38\(d\)](#).

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

***858** [Hall & Evans, L.L.C.](#), [David E. Leavenworth, Jr.](#), [Brian Molzahn](#), Denver, Colorado, for Plaintiff–Appellee.

[David S. Carroll](#), Denver, Colorado, for Defendant–Appellant and Attorney–Appellant.

Opinion by Judge [J. JONES](#).

Paul Essrig (tenant), a former tenant of a residence owned by Bernie Martin (owner), appeals the district court's denial of his [C.R.C.P. 60\(b\)\(3\)](#) motion challenging as void a judgment in owner's favor on a claim that tenant had breached the parties' lease. He and his counsel, [David S. Carroll, Esq.](#), also challenge the district court's award of attorney fees incurred by owner in responding to the motion.

Mr. Carroll has filed briefs supporting this appeal which largely fail to advance a coherent argument in support of the contention of error. Most troubling, however, is the tenor of the opening and reply briefs. They are suffused with uncivil language, directed primarily against owner's attorneys, and sarcastic and bombastic rhetoric. This is not merely bad advocacy; it is, at least in large part, inconsistent with Mr. Carroll's professional obligation to represent his client in a civil manner. We therefore strike the opening and reply briefs, dismiss the appeal, assess attorney fees and double costs against Mr. Carroll, and remand the case to the district court for a determination of the reasonable attorney fees owner has incurred on appeal.

I. Background

Owner filed a complaint in county court for possession of the premises and damages for breach of the lease. Tenant asserted a counterclaim, and, as a result, the case was transferred to district court. Tenant ceded possession and confessed judgment for two months rent. Owner maintained, however, that tenant had not confessed judgment for all the damages sought.

Shortly before trial, owner sought to amend his complaint to claim additional damages. The district court denied the motion.

The case was tried to the court. During trial, Mr. Carroll objected several times that *859 owner was putting on evidence of damages beyond those claimed in the complaint. The district court overruled the objections, reasoning that the evidence was relevant to the issues raised by the pleadings. The court found for owner on his claim and tenant's counterclaim, and awarded owner damages totaling \$16,876.

Owner moved for an award of attorney fees under a prevailing party provision in the lease and [section 13-17-102](#), [C.R.S.2010](#) (providing for an award of attorney fees where a party's claim or defense "lacked substantial justification"). He also moved for an award of costs. The district court granted both motions.

Tenant filed a [C.R.C.P. 59](#) motion to amend the judgment. He argued, as he had at trial, that the court had awarded damages beyond those encompassed by the factual allegations in the complaint. He made the same argument in two post-trial motions challenging the court's award of attorney fees and costs.

Following a hearing, the court again ruled that the damages awarded did not go beyond those contemplated by the pleadings, and denied tenant's post-trial motions.¹ The court sanctioned tenant under [section 13-17-102](#) for filing the post-trial motions pertaining to the awards of attorney fees and costs.

¹ The court ruled that tenant's [Rule 59](#) motion challenging the merits judgment was untimely.

Tenant appealed, challenging the district court's denial of

his post-trial motions. A division of this court dismissed that portion of the appeal challenging the denial of the post-trial motion pertaining to the merits judgment, agreeing with the district court that the motion was untimely. The division affirmed the denial of tenant's motions challenging the award of attorney fees, and awarded owner his appellate attorney fees under the prevailing party provision and [section 13-17-102](#). The division explained that tenant's appeal was substantially frivolous and groundless because: (1) his briefs failed to comply with [C.A.R. 28](#) in several ways; (2) the reply brief consisted of "little more than ... a series of rhetorical questions and statements regarding the intemperance of opposing counsel"; and (3) "[t]he arguments actually made [in the briefs] either were not made to the trial court, assert errors in orders not appealed, or lack any support in the law." *Martin v. Essrig*, (Colo.App. No. 07CA0994, 2008 WL 2612365, July 3, 2008) (not published pursuant to [C.A.R. 35\(f\)](#)) (*Martin I*). The division assessed attorney fees against both tenant and Mr. Carroll.

Almost one year later, tenant filed the [Rule 60\(b\)\(3\)](#) motion at issue in this appeal. He contended that the judgment was void because, as he had unsuccessfully asserted several times earlier in the litigation, the damages awarded exceeded those implicated by the complaint's factual allegations. Concluding that tenant was merely attempting to relitigate an issue that had already been decided "on several occasions," the district court denied the motion. The court awarded owner his attorney fees and costs incurred in defending against tenant's motion under [section 13-17-102](#), finding that the motion was "substantially frivolous, substantially groundless, and substantially vexatious." The order directed both tenant and Mr. Carroll to pay attorney fees and costs.

II. Discussion

On appeal, tenant again maintains that the damages awarded by the district court go beyond those supported by the allegations in the complaint. He contends that this renders the judgment void because the district court entered it without subject matter jurisdiction.

Owner responds initially that we should strike tenant's briefs, dismiss the appeal, and impose other appropriate sanctions because tenant fails to comply with the appellate rules governing the form and content of briefs and because tenant's opening brief contains "inappropriate and unprofessional commentary." Owner

contends such sanctions are appropriate under C.A.R. 38(d) and (e) and section 13–17–102.

^[1] Owner’s request is well-taken. In rare cases, conduct in prosecuting an appeal is so contrary to court rules and so disrespectful of the judicial process and the participants therein that the right to appellate *860 review is forfeited. We conclude that this is such a case.

A. Deficiencies and Improper Language in Tenant’s Briefs

In *Castillo v. Koppes–Conway*, 148 P.3d 289 (Colo.App.2006), a division of this court held that an appellant’s brief did not comply with C.A.R. 28(a)(4), in part because, rather than setting forth a “coherent argument,” it presented “tortured rhetoric.” *Id.* at 291. The division refused to review the order at issue and summarily affirmed. *Id.*

^[2] Tenant’s briefs in this appeal likewise fail to set forth a cogent argument. Though we believe we understand what tenant contends the error is, his briefs do not coherently explain why the district court erred: the analysis is obscured by irrelevant digressions, lack of structure, and use of a rhetorical style that is verbose, derogatory, and sarcastic.

For example, the opening and reply briefs repeatedly address—using inflammatory language—an alleged discussion between owner’s counsel and tenant, which Mr. Carroll characterizes as a violation of ethical rules. That matter, however, does not have anything to do with the issue in this appeal.² The opening brief also contains a two-page discussion of an inapposite hypothetical involving the use of official review in a National Football League game.³

² Tenant’s briefs fail to offer any detail as to the alleged prohibited contact. We do not condone prohibited contact between attorneys and represented parties. And a party’s attorney may bring such contact to the court’s attention when appropriate. But counsel must do so in a professional and respectful manner.

³ The opening and reply briefs also violate C.A.R. 28 and 32 in several other respects. See C.A.R. 28(a)(3), (e), 32(b)(2). In *Martin I*, the division admonished and sanctioned Mr. Carroll for filing briefs that were “virtually devoid of citations to the record, a standard

of review, or legal authority supporting his position.” *Martin I*, slip op. at 7–8. Though the briefs Mr. Carroll has filed in this appeal do not suffer from all the same deficiencies noted in *Martin I*, they repeat some and contain new ones. The unmistakable impression conveyed by the briefs is that Mr. Carroll does not take seriously his obligation to comply with the appellate rules.

^[3] The opening and reply briefs accuse owner’s attorneys—again, using inflammatory language—of lying, acting illegally, violating the rules of professional conduct, defying court orders, and litigating the case for improper motives. They similarly accuse owner of acting dishonestly and for base purposes. The vast majority of these accusations have nothing to do with the issues raised in this appeal, even tangentially. The opening and reply briefs also include numerous other inappropriate statements.⁴

⁴ Examples of improper language in the opening and reply briefs are noted in the Appendix to this opinion. In noting these examples, we do not intend to imply that language of like kind, though perhaps not as extreme or frequent, may be acceptable. The use of any language failing to rise to the level of civil discourse is inappropriate, and may, depending on the circumstances, justify sanctions.

Such rhetoric hinders the court in deciding the merits of the appeal; we must waste judicial resources hacking through the verbal brush to uncover the substance (if any) of the arguments. It also disrespects parties and debases both the legal profession and the judicial system. See *In re Abbott*, 925 A.2d 482, 485 (Del.2007); see also *Snyder v. Secretary of Health & Human Services*, 117 F.3d 545, 549 (Fed.Cir.1997) (condemning the use of language similar to that employed here); *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 161–62 (D.N.J.1999) (making the same point in the context of motions practice in the trial court); *Gregoire v. Nat’l Bank of Alaska*, 413 P.2d 27, 42–43 (Alaska 1966).

^[4] Further, using such degrading and disparaging rhetoric appears to “cross [] the line from acceptable forceful advocacy into unethical conduct.... ‘Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone.’ ” *In re Abbott*, 925 A.2d at 489 (quoting in part *Cannon*, 190 F.R.D. at 162); see Colo. RPC Preamble: A Lawyer’s Responsibilities Preamble 5 (“A lawyer should use the

law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system *861 and for those who serve it, including judges, other lawyers and public officials.”), Preamble 9 (“Zealousness [in pursuing a client’s legitimate interests] does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system.”); Colo. RPC 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...”); Colo. RPC 3.5 cmt. 4 (a lawyer must “[r]efrain[] from abusive or obstreperous conduct”; “patient firmness” is appropriate but “belligerence or theatrics” is not); Colo. RPC 8.4(d) (it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice”).⁵

⁵ Tenant’s opening and reply briefs also contain statements which, viewed in context, could be regarded as attacking (without any articulated foundation) the district court’s integrity. We caution litigants that such attacks are inappropriate. See *Big Dipper Entertainment, L.L.C. v. City of Warren*, 641 F.3d 715, 719 (6th Cir.2011); *Cruz v. Commissioner of Social Security*, 244 Fed.Appx. 475, 482–84 (3d Cir.2007); *Preemption Devices, Inc. v. Minnesota Mining & Mfg. Co.*, 732 F.2d 903, 907 (Fed.Cir.1984); *Gregoire*, 413 P.2d at 42–43; *Wilburn v. Reitman*, 54 Ariz. 31, 91 P.2d 865, 866–67 (1939); *In re Abbott*, 925 A.2d at 486–88; *In re Wilkins*, 777 N.E.2d 714, 715, 718 (Ind.2002), modified, 782 N.E.2d 985 (Ind.2003); *Peters v. Pine Meadow Ranch Home Ass’n*, 151 P.3d 962, 963–67 (Utah 2007); see also *In re Foster*, 253 P.3d 1244, 1258–59 (Colo.2011) (approving discipline of an attorney for making objectively baseless and improperly motivated allegations of bias against a judge; such allegations are not protected by the First Amendment); *In re Green*, 11 P.3d 1078 (Colo.2000) (discussing First Amendment limits on disciplining an attorney for criticizing a judge).

Caustic rhetoric is never necessary to protect a client’s interests.

Civil behavior towards the tribunal and opposing counsel does not compromise an attorney’s efforts to diligently and zealously represent his or her clients. “Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client’s legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process.”

In re Abbott, 925 A.2d at 488 (footnote omitted) (quoting in part *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 54 (Del.1994)); see also Colo. RPC Preamble: A Lawyer’s Responsibilities Preambles 5, 9; Colo. RPC 3.5 cmt. 4.

Without a hint of irony, the opening brief states: “[t]here is a point at which zealous representation does harm to the judicial system....” We could not agree more.

B. Disposition

Having concluded that the opening and reply briefs persistently run afoul of this court’s rules and counsel’s obligation to represent tenant in a civil manner, we must decide what, if any, sanction to impose. We consider the degree of the briefs’ noncompliance, as well as the fact that this is not the first time Mr. Carroll has abused the privilege of representing parties before this court. See *Martin I*, slip op. at 7–8; *Barnwater Cats Rescue Organization, Inc. v. Gardea*, (Colo.App. No. 08CA1947, 2009 WL 4857375, Dec. 17, 2009) (not published pursuant to C.A.R. 35(f)) (noting language in briefs filed by Mr. Carroll similar to that here); *Salazar v. Clancy Systems Int’l, Inc.*, (Colo.App. No. 08CA2210, 2009 WL 1816275, June 25, 2009) (not published pursuant to C.A.R. 35(f)) (concluding that the appeal pursued by Mr. Carroll was frivolous); *Parks v. Pizza Hut of America, Inc.*, (Colo.App. No. 88CA1390, Apr. 12, 1990) (not published pursuant to C.A.R. 35(f)) (concluding that the appeal pursued by Mr. Carroll was frivolous); see also *People v. Carroll*, (Colo. O.P.D.J. No. 09PDJ020, 2009 WL 2152341, June 26, 2009) (imposing discipline against Mr. Carroll for, in part, filing “meritless post-trial and appellate pleadings”).

In light of these considerations, we strike the opening and reply briefs and dismiss the appeal. *Tatham v. First Nat’l Bank*, 137 Colo. 499, 501, 326 P.2d 983, 985 (1958) (striking statement in the appellant’s brief that the appellee’s counsel had “flagrantly violated all of the ethics of an honorable profession”); *Knapp v. Fleming*, 127 Colo. 414, 415, 258 P.2d 489, 490 (1953) (striking brief containing “scurrilous” statements, *862 “frequent invectives and vituperations,” and “derogatory remarks concerning the trial judge”; appeal dismissed, at least in part, because of language in the brief); *Diamond Tunnel Gold & Silver Mining Co. v. Falkner*, 17 Colo. 9, 10, 28 P. 472, 473 (1891) (striking brief that used improper language in referring to the trial judge); see *Bruce v. City of Colorado Springs*, 252 P.3d 30, 32 (Colo.App.2010)

(recognizing that striking a brief and dismissing an appeal may be appropriate remedies for failing to comply with appellate rules); *see also* C.A.R. 38(e) (“The appellate court may apply such sanction as it deems appropriate, including dismissal, for the failure to comply with any of its orders or with these appellate rules.”); *Mauldin v. Lowery*, 127 Colo. 234, 235–36, 255 P.2d 976, 977 (1953) (summarily affirming the judgment where the appellant’s brief failed to comply with appellate rules); *Castillo*, 148 P.3d at 291 (same).⁶

⁶ To be clear, we view the intemperate language in the briefs as alone sufficient to justify the sanctions we impose.

In addition, we order Mr. Carroll to pay attorney fees and double costs associated with this appeal.

C.A.R. 38(d) provides that an appellate court “may award just damages and single or double costs to the appellee” if the appeal is frivolous. Such damages may include attorney fees. *Artes–Roy v. City of Aspen*, 856 P.2d 823, 828 (Colo.1993).

Section 13–17–102(2), C.R.S.2010, provides that a court may award attorney fees where a party brought an action that “lacks substantial justification.” An action lacks substantial justification if it is “substantially frivolous, substantially groundless, or substantially vexatious.” § 13–17–102(4), C.R.S.2010.

[⁶] [⁷] As the division noted in *Castillo*, 148 P.3d at 292, an appeal may be frivolous in two distinct ways: (1) it may be frivolous as filed; or (2) it may be frivolous as argued. An appeal is frivolous as filed when the district court’s judgment is so plainly correct and the legal authority so clearly against the appellant’s position that there is really no appealable issue. An appeal is frivolous as argued where the appellant commits misconduct in arguing the appeal. *Id.*

[⁸] Tenant’s appeal may well be frivolous as filed. (An award of allegedly excessive damages has nothing to do with a court’s subject matter jurisdiction. *See Wood v. People*, 255 P.3d 1136, 1139 (2011) (discussing distinction between subject matter jurisdiction and a court’s general authority to act.) The appeal is certainly frivolous as argued. *See Castillo*, 148 P.3d at 292–93 (appeal was frivolous as argued where the appellant failed to set forth a coherent assertion of error, with supporting legal authority, as required by C.A.R. 28); *cf. Peters*, 151 P.3d at 967–68 (imposing sanctions, including striking of

briefs and awarding of attorney fees, where briefs contained unfounded attacks on judges).

Therefore, we order Mr. Carroll to pay the reasonable attorney fees incurred by owner in this appeal and double costs.⁷ In the circumstances here, Mr. Carroll, not his client, should pay the costs. *See Castillo*, 148 P.3d at 293 (where an appeal is frivolous for reasons solely within counsel’s control, the appellate court may direct an award of costs and attorney fees be paid by counsel alone).⁸

⁷ Owner is also entitled to his appellate attorney fees from tenant under the prevailing party provision of the lease. *See Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1217, 1223 (Colo.App.2008). However, owner is entitled to only one recovery of his appellate attorney fees.

⁸ Though C.A.R. 38(d) does not expressly indicate whether counsel, as opposed to a party, may be ordered to pay costs and attorney fees, such a result is permissible. *Castillo*, 148 P.3d at 293; *see also Romala Corp. v. United States*, 927 F.2d 1219, 1225 (Fed.Cir.1991) (applying Fed. R.App. P. 38); *Avery v. Steele*, 414 Mass. 450, 608 N.E.2d 1014, 1017 (1993) (applying Mass. R.App. P. 25).

We exercise our discretion under C.A.R. 39.5 to remand the case to the district court for a determination of owner’s reasonable attorney fees incurred on appeal.

The opening and reply briefs are stricken. The appeal is dismissed. We order Mr. Carroll to pay reasonable attorney fees and double *863 costs, and the case is remanded to the district court for a determination of owner’s reasonable attorney fees incurred on appeal.

Judge ROY and Judge LOEB concur.

APPENDIX

Examples of inappropriate language in the opening and reply briefs:

1. Characterizing owner’s position that the issue of whether the damages were proper had previously been decided as “desperately contrived.”
2. Accusing owner of expanding the litigation “in reprisal

to Essrig's counterclaim."

3. Accusing owner's counsel of pursuing a judgment "that they *knew* would be illicit" and proceeding "impiously" to obtain such a judgment. (Emphasis in the brief.)

4. Accusing owner's counsel of having "doggedly sought [the judgment] in purposeful defiance of elementary procedural due process precepts and in disobedience of the court's fresh order ...".

5. "Martin's attorneys' [sic] have repeatedly engaged in a disturbing pattern of conduct, attempting to deftly tread the line demarcating overt violation of the Rules of Professional Conduct (at times crossing the line)...."

6. "Time and again [owner's attorneys] cite inapposite case law and misrepresent the holdings...."

7. Saying that tenant believes the litigation "has been driven by pettiness and vindictiveness, exacerbated at the trial with what he considers perjured testimony by Martin."

8. "Incredibly—*incredibly*—Martin's lawyers brazenly used this illicitly obtained remark, ... obtained in direct violation of the code of professional conduct and cunningly removed from proper context...." (Emphasis in the brief.)

9. "Talk about the kettle calling the pot black! Maybe Martin's attorneys should be in politics, where the slinging of mud, the distortions of facts, and general evasiveness [sic] of issues are so rife that the electorate has seemingly become inured to it all."

10. "The trial court evidently was not at all disturbed by Martin's attorneys' cunning use of this illicitly obtained, manipulated remark."

11. Owner's attorneys' advocacy "entails deliberate misrepresentations of case law," "deliberate falsification of the case history (mendaciously maintaining that there is finality on the issue of the judgment being void ...)," and "uncountenanced defiance of the dictate to abstain from communicating with Essrig about the litigation."

12. The allegations in the amended complaint were "a superficial means of retaliating for Essrig's counterclaim."

13. "Martin instead falls upon the canard that there is finality upon whether the judgment may be decreed void."

14. "Martin has hitched his cart to the ruse that there is finality upon the issue presented in the C.R.C.P. 60(b)(3) motion to void the judgment."

15. "Martin's ludicrous statement, incorrect at best (*at best!*), falsely attributes to the appellants a contention they never expressed, and thus borders on intellectual mendacity." (Emphasis in the brief.)

16. "The abstention by Martin in pinpointing any of those features effectively belies Martin's false statement, exposing that he finds the appellants' motion to be terribly disquieting, threatening a judgment that is of tremendous importance purely for the psychological dimension, it being a representation to Martin of dominance, providing the impetus to desperately rummage for an argument to resist the motion to void."

17. "Martin's contrived thesis, despite all logic, is that" seeking to vacate the judgment is the same as seeking to void it.

18. "Even before this case reached the courtroom for trial, Martin's stance and conduct had been ignoble, if not downright pathetic, entailing utilization of the legal system as a petty means of advancing a psychological agenda. Martin sought this judgment purely as some sort of bizarre personal triumph over Essrig. It has been theater—*864 litigation run amok, with no practical utility...."

19. "Martin's position ... is a sham. This could occur only by some metaphysical marvel...."

20. "Martin has been desperately trying to find a way to thwart ultimate resolution of [the appeal] upon its actual merit. Now, this latest maneuver, contending that the manner in which the record is presented will require the court to 'comb the record for evidence,' is of course hyperbolic nonsense."

21. "Martin continues to fall upon the canard that there is finality...."

22. "Foisting the contention that there is finality is disrespectful of the truth"

23. "That statement is disrespectful of the truth."

24. "If this line of reasoning seems hard to follow, that's because it is, because Martin's view is contrived nonsense."

25. “This is a ridiculous and dishonorable contention....”

26. “That’s an incredible comment, as though Martin feigns being obtuse about the reason the judgment is incipiently void—feigns it as a ploy to divert scrutiny from the essence of the motion. ...”

27. “Martin insultingly persists in mischaracterizing the issue”

28. “Martin is feigning obtuseness as a digression.”

29. “But of course Marin yearned to expand the litigation in reprisal to Essrig’s counterclaim.”

30. Owner pursued “a judgment that his attorney knew was illicit....”

31. “Martin concludes the brief with the hackneyed shibboleth that the appeal is groundless, frivolous, etc.”

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ABA Formal Op. 94-387

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-387

American Bar Association

DISCLOSURE TO OPPOSING PARTY AND COURT THAT STATUTE OF LIMITATIONS HAS RUN

September 26, 1994

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A lawyer has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run on her client's claim; to the contrary, it would violate Rules 1.3 and 1.6 to reveal such information without the client's consent. It follows that where the opposing party and his counsel appear to be unaware that the limitations period has expired, the lawyer may not discontinue negotiations over the claim simply on this ground, in the absence of agreement by her client that she do so. Nor is the lawyer constrained by the rules of ethics from filing suit to enforce a time-barred claim, unless the rules of the jurisdiction preclude it. There is no basis in the ethics rules for holding a lawyer representing a government agency to a different standard in these circumstances than that applicable to a lawyer representing a private client.

The Committee has been asked to address the following questions:

1. Is it unethical for a lawyer to negotiate with an opposing party about a civil claim that may not be susceptible of judicial enforcement because the statute of limitations has run?
2. Does a lawyer have an ethical duty to inform an opposing party that the statute of limitations has run on the claim over which they are negotiating?
3. Is it unethical for a lawyer to file a civil action knowing that it is time-barred?
4. Do the ethics rules require a different analysis or lead to a different conclusion on any of these questions because the lawyer represents a government agency?

For the reasons stated below, the Committee believes that all four of the above questions should be answered in the negative.

I. The Duty of Candor in the Context of Negotiations.

As a general matter, the Model Rules of Professional Conduct (1983, amended 1994) do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the context of settlement negotiations or otherwise. Indeed, the lawyer who volunteers such information without her client's consent would likely be violating her ethical obligation to

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represent her client diligently, and possibly her obligation to keep client confidences. See Rules 1.3 ^[FN1] (“Diligence”) and 1.6 (“Confidentiality of Information”). See Formal Opinion 93-375 (“The Lawyer’s Obligation to Disclose Information Adverse to a Client in the Context of a Bank Examination”). By the same token, a lawyer may not ethically break off negotiations with an opposing party simply because she has doubts about the viability of her client’s case, unless of course the client directs her to do so. At the same time, a lawyer may not make a false statement to, or intentionally mislead, a third party. See Rule 4.1 ^[FN3] (“Truthfulness in Statements to Others”). Rules 3.1 ^[FN4] (“Meritorious Claims and Contentions”) and 3.3 ^[FN5] (“Candor Toward the Tribunal”) impose additional obligations on a lawyer if she seeks to enforce her client’s claim in court. See Formal Opinion 93-376 (1993) (“The Lawyer’s Obligation Where a Client Lies in Response to Discovery Requests”).

Applying these general principles where the lawyer knows that her client’s claim may not be susceptible of judicial enforcement because the statute of limitations has run, we conclude that the ethics rules do not preclude a lawyer’s nonetheless negotiating over the claim without informing the opposing party of this potentially fatal defect. Indeed, the lawyer may not, consistent with her responsibilities to her client, refuse to negotiate or break off negotiations merely because the claim is or becomes time-barred.

The lawyer in this situation must, of course, be careful not to make any affirmative misrepresentations about the facts showing that the claim is time-barred, or suggest that she plans to do something to enforce the claim (e.g., file suit) that she has no intention of doing. See Rule 4.1. However, we see no reason why a lawyer should be ethically constrained in negotiating over a claim solely because the opposing party has available to him an argument that would defeat it, but fails either through lack of knowledge or by design to use it.

This is not a situation that brings into play a lawyer’s duty to disclose a material fact to a third person in order to avoid assisting a fraudulent act by the client, see Rule 1.2(d), ^[FN6] since the expiration of the limitations period for filing a lawsuit does not affect the validity of the underlying claim or raise any question about the client’s entitlement to try to persuade the other party to settle the matter without recourse to a court proceeding.

While the lawyer is not ethically obligated to reveal to opposing counsel the fact that her client’s claim is time-barred in the context of negotiations, she does have an obligation to inform her own client of this fact, and of the likelihood that the action will be defeated if the defendant realizes that the statute has run and asserts this defense. See Rule 1.4 ^[FN7] (“Communication”). See also Rule 2.1 ^[FN8] (“Advisor”). The facts that the client’s claim is time-barred, and that the opposing party appears to be unaware of this circumstance, are obviously both substantial and relevant to the representation, and the client is entitled to be advised of them so as to be able to make an informed choice about whether to continue to negotiate, and whether to file suit if negotiations fail.

II. The Duty of Candor in the Context of Filing a Lawsuit

We turn next to the question whether it is unethical for a lawyer to file a time-barred claim in court. This scenario brings into play the lawyer’s duty not to file a “frivolous” claim under Rule 3.1, and the lawyer’s duty of candor toward the tribunal set forth in Rule 3.3. See notes 4 and 5, *supra*. We conclude that it is generally not a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction.

The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court’s jurisdiction over the matter. A time-barred claim may still be enforced by a

court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim. In such circumstances, a failure by plaintiff's counsel to call attention to the expiration of the limitations period cannot be characterized either as the filing of a frivolous claim in violation of Rule 3.1, or a failure of candor toward the tribunal in violation of Rule 3.3. As long as the lawyer makes no misrepresentations in pleadings or orally to the court or opposing counsel, she has breached no ethical duty towards either. A mere failure to disclose that her client's claim is time-barred does not constitute "an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement." See Formal Opinion 93-376, *supra*. This Committee reached the same conclusion under the Canons of Professional Ethics in Informal Opinion 694 (1963) ("Instituting Suit Barred by Statute of Limitations"), relying on the statement in Canon 15 that "in the judicial forum the client is entitled to the benefit of any and every remedy or defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense." See also Hazard & Hodes *The Law of Lawyering*, 1992 Supplement § 3.1:204-2 ("the whole point of the adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponent").

The result under Rules 3.1 and 3.3 might well be different if the limitations defect in the claim were jurisdictional, and thus affected the court's power to adjudicate the suit; if it constituted the sort of substantive insufficiency in the claim that would result in its being dismissed without any action on the part of the opposing party;^[FN9] or if the circumstances surrounding the time-barred filing indicated bad faith on the part of the filing party.^[FN10] Short of such additional defects, however, and in the absence of any affirmative misstatements or misleading concealment of facts, we do not believe it is unethical for a lawyer to file suit on a time-barred claim.

III. The Government Lawyer's Duty of Candor to Opposing Parties and to the Tribunal

The Committee sees no reason to reach a different conclusion respecting the lawyer's ethical obligations simply because she represents a governmental agency as opposed to a private party. While some courts have held that ethical codes impose different requirements of advocacy on government litigators,^[FN11] we find no basis in the Model Rules for doing so,^[FN12] at least in the context of a noncriminal matter.^[FN13] The government lawyer has no less a duty zealously to represent her client within the bounds of the law than does a lawyer representing a private litigant. See generally Lancot, "The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions," 64 *So. Cal. L. Rev.* 951 (1991). By the same token, the lawyer's ethical duties under Rules 3.3 and 4.1 to be candid with the court and fair to third parties apply to private lawyers with the same force as they do to government lawyers. And the government lawyer operating within the adversarial system has no greater or lesser right or duty than the private lawyer to sit in presumptive judgment of the client's cause.^[FN14]

It may be that the government client itself has duties to members of the public and to the justice system generally that courts will enforce in the context of particular cases. See, e.g., *Young v. United States*, 315 U.S. 257, 258 (1942) ("[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent"). Such duties could reasonably be thought to include forbearance from filing a time-barred suit in the interest of justice. But any such duty would not derive from the ethical rules applicable generally to lawyers, and should not be viewed or enforced as such. "Requiring government lawyers to substitute their own judgments of 'fairness' and 'justice' for those made by the officials they represent would be incompatible with the idealized model of the adversary system ... [and] with fundamental principles of representative government." Lancot, *supra*, at 958.^[FN15]

Of course the government lawyer retains the right and may have a duty, like any other lawyer, to advise her client respecting obligations the client may have towards the court and opposing parties, and may discuss with the client whether its goals are “fair” or “just.” ^[FN16] Indeed, the lawyer representing a government agency may determine that she herself has obligations derived from her oath of office that would compel a course of action contrary to her duties to the client under the rules of legal ethics. In the rare case where a lawyer believes that her own obligations as a government official conflict with her ethical duties to her government client, she should consult with the client to determine whether to continue the representation. ^[FN17] See Model Rule 1.16(b)(3). ^[FN18]

Conclusion

In sum, we conclude that a lawyer has no ethical duty to inform an opposing party that her client’s claim is time-barred; to the contrary, it may well be unethical to disclose such information without the client’s consent. It follows that a lawyer may be constrained from discontinuing negotiations over a claim simply because the limitations period for its judicial enforcement has run, in the absence of directions from her client that she do so. Nor is a lawyer constrained by the rules of ethics from filing a time-barred claim, assuming no affirmative misrepresentations have been made, unless the rules of the jurisdiction preclude it. Finally, we find no basis in the ethics rules for reaching a different result where a lawyer represents a government agency in a civil matter, since a lawyer in these circumstances has the same ethical obligations to her government client and to the court and as does a lawyer representing a private client.

DISSENT

I dissent.

I look upon this opinion as Julia Child would regard a fly in her soup. It is unneeded, unwanted, and too much to swallow. In short, a practice note for the lawyer interested in developing a “sharp” practice.

In my view, Model Rule 8.4(c) ^[FN19] dealing with deceit covers the facts described in the opinion and requires a different answer. Looked at in any light, these facts show a sly and deceitful lawyer.

The American Bar Association is presently implementing another of its periodic and expensive campaigns to improve the image of lawyers. The effort focuses, in part, on how lawyers abuse the process and one another. The opinion here serves as a real counterpoint to that effort.

Even if the perceived deceit may be put aside under the theory that one person’s deceit is another’s brilliant litigation technique, that does not end the matter. The worst part of the opinion is its theory that government lawyers do not owe a greater duty to the public than other lawyers, particularly the pettifogger described in the opinion. This is so because there is not a Model Rule that states specifically that government lawyers owe a higher duty.

A Rule on that point was suggested at the culmination of the Watergate investigations twenty years ago. The lawyers involved were giving and following orders. They were the government. Since then, the American Bar Association has changed from the Model Code of Professional Responsibility to the Model Rules of Professional Conduct and changed the Model Rules several times. The need is still there. This is the Committee that promulgates Model Rules. It has not

promulgated one and instead now unleashes a hoard of government lawyers upon the public who, in turn, get to pay for this benefit.

It is my view that government lawyers owe a higher duty to the public. This duty transcends those found in the Model Rules. Frequently government lawyers are, in fact, the government. They have great power. Their position in the scheme of things far transcends the day-to-day market place ethical problems the Model Rules deal with and reaches into political and constitutional areas. They cannot be allowed to hide behind the old excuse: "I was only following orders."

The Model Code of Professional Responsibility Ethical Consideration 7-14 (1980) provided that government lawyers have "the responsibility to seek justice," and "should refrain from instituting or continuing litigation that is obviously unfair." For whatever reason, this language was not carried over to the Model Rules.

Some courts agree that government lawyers should be held to a higher standard. In *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45 (D.C.Cor.1992) the court stated: "We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission." Even this Committee in Formal Opinion 342 (1975) recognized "the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by the client."

If the Committee needs a Model Rule to operate within its mission, and it does, it should write one. Following the inner logic of the opinion leads to the conclusion that the government is free to abuse its citizens through its lawyers with the imprimatur of the American Bar Association Committee on Ethics and Professional Responsibility. I would not issue the opinion.

Richard C. McFarlain

^[FN1]. Rule 1.3 Diligence

^[FN3]. Rule 4.1 Truthfulness in Statements to Others

^[FN4]. Rule 3.1 Meritorious Claims and Contentions

^[FN5]. Rule 3.3 Candor Toward the Tribunal

^[FN6]. Rule 1.2 Scope of Representation

* * *

^[FN7]. Rule 1.4 Communication

^[FN8]. Rule 2.1 Advisor

^[FN9]. See, e.g., *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, 571 F.Supp. 507, 509 (E.D.Mich.1983) (fact that client had died should have been disclosed to opposing counsel in pretrial settlement negotiations).

[FN10]. In several cases Rule 11 sanctions have been imposed on a lawyer who had filed a time-barred claim. However, in these cases the default was aggravated by other circumstances. See *Brubaker v. Richmond*, 943 F.2d 1363 (4th Cir.1991) (plaintiff's assertion of a defamation claim, after being informed that it was time-barred and at a time when the plaintiffs did not intend to seek reversal of existing precedent, constituted the making of a claim "groundless in law" in violation of Rule 11); *Dreis & Krump Manufacturing Co. v. International Association of Machinists and Aerospace Workers*, 802 F.2d 247 (7th Cir.1986) (Rule 11 sanctions imposed where employer had "no ground" for challenging arbitrator's decision in court, and time for filing suit had passed); *Baker v. Citizens State Bank*, 661 F.Supp.1996 (D.Minn.1987) (Rule 11 sanctions imposed where multiple claims against bank "clearly barred" by applicable statute of limitations; court upheld several other grounds for dismissal, including failure to state a claim, lack of standing, and *res judicata*).

[FN11]. The authority most often cited for holding government lawyers to a higher ethical standard is Ethical Consideration 7-14 of the Model Code of Professional Responsibility (1980), which provides:

[FN12]. There is no counterpart in the Model Rules to EC 7-14, and no mention of this provision in their legislative history. Indeed, EC 7-14 had no corresponding disciplinary rule, and was not mentioned in the legislative history of the Model Code. The Preliminary Statement to the Model Code stated that "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." The Model Rules contain several provisions applicable specifically to government lawyers, most notably Model Rules 1.11 ("Successive Government and Private Employment") and 3.8 ("Special Responsibilities of a Prosecutor"), but no suggestion that rules otherwise generally applicable to all lawyers should be interpreted to impose different requirements of advocacy on government lawyers.

[FN13]. The role of the prosecutor in a criminal case raises problems peculiar to the criminal justice system, including a defendant's constitutional right to a fair trial. Since we are here concerned only with civil matters, we do not address the special ethical duties of a prosecutor under Rule 3.8.

[FN14]. Professor Lanctot has written:

[FN15]. Lanctot goes so far as to suggest that "imposing on government lawyers a greater duty to the courts than on their private counterparts could present a serious interference with the separation of powers between the judicial and executive branches. Lanctot, *supra*, at 994.

[FN16]. See Model Code of Professional Responsibility, EC 7-8 (1980) ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.").

[FN17]. The question of client identification is an important one for the government lawyer, and has been the subject of some discussion by the organized bar. See, e.g., Report by the District of Columbia Bar Special Commission on Government Lawyers and the Model Rules of Professional Conduct (1985).

[FN18]. Rule 1.16 Declining or Terminating Representation

* * *

[FN19]. "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"

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ABA Formal Op. 06-439

American Bar Association Formal Ethics Opinion 06-439

American Bar Association

LAWYER'S OBLIGATION OF TRUTHFULNESS WHEN REPRESENTING A CLIENT IN NEGOTIATION:
APPLICATION TO CAUCUSED MEDIATION

April 12, 2006

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Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules ^[FN1].

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than \$200, when, in reality, it is willing to accept as little as \$150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional \$100 per employee, when the lawyer knows that it actually will cost only \$20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell

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the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a).^[FN2] That rule prohibits a lawyer, “[i]n the course of representing a client,” from knowingly making “a false statement of material fact or law to a third person.” As to what constitutes a “statement of fact,” Comment [2] to Rule 4.1 provides additional explanation:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. 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. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.^[FN3]

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer’s own client.^[FN4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.^[FN5] Still others have suggested that lawyers should strive to balance the apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.^[FN6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.^[FN7]

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370^[FN8] that, although a lawyer may in some circumstances ethically decline to answer a judge’s questions concerning the limits of the lawyer’s settlement authority in a civil matter,^[FN9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

[w]hile ... a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party’s actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,^[FN10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client’s claim, but cannot make any

affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397 ^[FN11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect. ^[FN12]

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died. ^[FN13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to \$200,000, when documents in his files showed that the client had \$1,000,000 in coverage. ^[FN14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions, ^[FN15] and the setting aside of settlement agreements, ^[FN16] as well as civil lawsuits against the lawyers themselves. ^[FN17]

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1. ^[FN18]

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation. ^[FN19]

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is

required in face-to-face negotiations. ^[FN20]

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation - particularly in a caucused mediation - precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes. ^[FN21]

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation. ^[FN22]

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than \$50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of \$50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

^[FN1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

^[FN2] Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

[FN3]. The [RESTATEMENT \(THIRD\) OF THE LAW GOVERNING LAWYERS § 98](#), cmt. c (2000) (hereinafter "RESTATEMENT") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

[FN4]. *See, e.g.*, Reed Elizabeth Loder, "[Moral Truthseeking and the Virtuous Negotiator](#)," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "[The Ethics of Negotiation: Are There Any?](#)," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

[FN5]. *See, e.g.*, Barry R. Temkin, "[Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?](#)," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

[FN6]. *See, e.g.*, 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, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "[Promoting Truthfulness in Negotiation: A Mindful Approach](#)," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

[FN7]. *See, e.g.*, James J. Alfini, "[Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1](#)," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from 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" and would expressly apply Rule 3.3 to mediation); 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, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "[The Lawyer as Consensus Builder: Ethics for a New Practice](#)," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

[FN8]. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 160-61.

[FN9]. The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

[FN10]. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* at 253.

[FN11]. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988* at 362.

^[FN12]. See *New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731* (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); *Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44* (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); *Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40* (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

^[FN13]. *Kentucky Bar Ass'n v. Geisler*, 938 S.W.2d 578, 579-80 (Ky. 1997); see also *In re Warner*, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); *Toldeo Bar Ass'n v. Fell*, 364 N.E.2d 872, 874 (1977) (same).

^[FN14]. *In re McGrath*, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

^[FN15]. See *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 11 (1st Cir. 2005); *Aushman v. Bank of America Corp.*, 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

^[FN16]. See, e.g., *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); *Spaulding v. Zimmerman*, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

^[FN17]. See, e.g., *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); *Jeska v. Mulhall*, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

^[FN18]. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person" Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

^[FN19]. This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (see note 2 above). Cf. *ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433* (2004) (*Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law*). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

^[FN20]. See generally John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); see also

Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

[FN21]. Mediators are "the conductors - the orchestrators - of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential information, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 35-43 (1986)).

[FN22]. There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1. ABA Formal Op. 06-439