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Session One: Limits on Misleading Conduct

Thomas Zlaket

William Reece Smith Jr.

Nathan Crystal

Amy R. Mashburn
*University of Florida Levin College of Law*, mashburn@law.ufl.edu

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DEAN DESSEM: Welcome. I'm Larry Dessem, the Dean here at the Walter F. George School of Law. On behalf of all of us at the Law School at Mercer University, I want to welcome you to the first annual Georgia Symposium on Legal Ethics and Professionalism.

As I believe you know, these symposia are funded by a settlement directed to the four ABA-approved Georgia law schools by Judge Hugh Lawson of the United States District Court for the Middle District of Georgia. As recipients of these settlement proceeds, we consider ourselves to be stewards of these funds and will continue to use them for the benefit of all lawyers, judges, law students, and citizens of Georgia. Through the Mercer Center for Legal Ethics and Professionalism, we hope in future years to sponsor many other programs, presentations, and
projects to advance the ethics and professionalism of judges and lawyers both in Georgia and across the country.

In addition to funding these annual symposia, the proceeds from the United States District Court have endowed chairs of ethics and professionalism at all four Georgia law schools. We have with us today two of those endowed chairs: The A. Gus Cleveland Professor of Legal Ethics and Professionalism at the University of Georgia, Ron Ellington. And Ron, in addition to serving as Chair, will produce next year's symposium at the University of Georgia. And our own William Augustus Bootle Chair of Professionalism and Ethics in the Practice of Law, Professor Patrick Longan.

This Symposium promises to be an outstanding two days of presentations, discussions, and debate. We want to thank all of our distinguished participants and the many other individuals who have contributed to make this symposium such a success. We especially thank the Mercer Law Review, which will publish in its next issue a transcript of the proceedings of these two days. We thank all of you for honoring us with your presence here today, participants and attendees alike. I now present the William Augustus Bootle Professor of Ethics and Professionalism in the practice of law, Professor Patrick Longan. Join me in thanking him for creating today's Symposium.

PROFESSOR LONGAN: When I was first hired by Larry a year ago, he told me my first duty would be to put this Symposium together. As it happened, within a week I was at an Inn of Court meeting with Ed Waller. Ed, who is a lawyer in Tampa, will be moderating one of our panels. Ed told me that he had been asked by the Chairman of Section of Litigation of the ABA to help draft a set of guidelines for lawyers in settlement negotiations, which I found very interesting and very timely. We got to talking and started thinking about using this Symposium as a vehicle to talk about and critique the guidelines that were then, and remain today, a work in progress.

We have selected four parts of the guidelines to discuss. We will have panels, two this afternoon and two tomorrow morning, to address these four parts. Each of the panels will have three members, and that's no accident. We will have a practicing lawyer, an academic and a member of the judiciary on each panel, because they bring different perspectives to each of these questions.

The first panel is on limits on misleading conduct, in particular misrepresentations and non-disclosures in settlement negotiations. To moderate this first panel this afternoon, we have Professor Amy Mashburn, from the University of Florida. On our panel we have my good friend, Reece Smith, a practitioner in Tampa for many years and
distinguished professorial lecturer at Stetson University College of Law. We have Professor Nathan Crystal, from the University of South Carolina. And we have the Honorable Thomas Zlaket, Chief Justice of the Supreme Court of Arizona.

Their topic is limits on misleading conduct. Amy, with that we'll turn it over to you.

PROFESSOR MASHBURN: Thank you. I want to thank the College of Law and Professor Longan for giving us this opportunity to discuss the guidelines, which as he indicated, are a work in progress, but a work with an eye towards being helpful to practitioners. And any suggestions you have you should give them to one of the members of the task force.

The section we're going to talk about today is an interesting one because it raises some of the more difficult issues in professional responsibility. You should turn to the guidelines we are going to be working with are located in Section 4.1.1 in your materials. I'm just going to give you some information on what the guidelines provide and some information on the substance in the notes and commentaries and then we're going to consider some hypotheticals.

The first guideline, at 4.1.1, deals with false statements of material fact and provides that in the course of negotiating or concluding a settlement a lawyer may not knowingly make a false statement of material fact or law to a third person. Many of you will recognize this is as being taken from Model Rule 4.1, which provides as much in very similar words.

The second guideline is found at 4.1.2, entitled silence, omission and the duty to disclose material facts. It states: "In the course of negotiating or concluding a settlement, a lawyer must disclose a material fact to a third person when doing so is necessary to avoid assisting a criminal or fraudulent act by a client unless such disclosure is prohibited by the ethical duty of confidentiality."

There is a subsequent guideline concerning when lawyers must withdraw from representation in situations involving the statements of material fact, but we're not going to be talking about that one so much today.

Very briefly, I would remind you that these hypotheticals we're going to discuss implicate not only 4.1, which is the one I just mentioned, but also the duty of confidentiality which in the Model Rules is found at Rule 1.6. Most of you I hope will recall, or know from practice, that Model Rule 1.6 is to be distinguished from the attorney/client privilege. Of course, Model Rule 1.6 is not a rule that is uniformly adopted in the states. There is great variation, including variation here in Georgia.
In addition, you should recall Model Rule 1.2(d), which is the provision that says you may not assist your client in a crime or a fraud. Although we won't get there, you should be contrasting the situations we're going to be talking about to those described in Rule 3.3, which is the rule that deals with candor towards the tribunal, because a lawyer's duty to be forthcoming and to make disclosures are different when the lawyer is in front of a tribunal.

The last thing I'll say is that, generally speaking, the comments describe three situations when false statements become unethical. The first of these is when a lawyer affirmatively states a falsehood. Under the Model Rules that falsehood must be a material fact or law. Also, when a lawyer incorporates or affirms the statement of another which the lawyer knows to be false. Or in certain limited circumstances when a lawyer remains silent or fails to disclose a material fact to a third person.

Now, as to non-disclosure situations, generally speaking this duty arises when a lawyer has previously made a false statement of material fact, then the duty to disclose would arise, or the obligation not to remain silent; a lawyer learns of a client's prior misrepresentation of a material fact; or, a lawyer learns that his services or her services have been used in the commission of a criminal or fraudulent act by the client and disclosure is necessary to avoid the appearance of the lawyer's concurrence in the client's fraudulent or criminal behavior.

With those sort of general provisos in mind, let's look at the first hypothetical. This hypothetical is meant to raise issues surrounding what you may say as opposed to whether it's ethically permissible to remain silent. Professor Crystal, on the first hypothetical, you are representing the plaintiff in a breach of contract action. You're seeking lost profits. What can you say in negotiation about the lost profits if, and then the hypothetical gives some factual variations that essentially raise issues concerning your knowledge of the amount or the support for lost profits. What do you think about the first one? Your expert has come to no conclusion about their cost?

PROFESSOR CRYSTAL: I wouldn't draw a distinction among any of these situations involving the expert. An expert is generally offering opinions based upon facts that are given to the expert. The expert is not testifying based upon facts that the expert knows. As long as the lawyer does not misrepresent the opinion of the expert, the lawyer's conduct is proper. In other words, it would be improper for a lawyer to say we have retained an expert, and our expert will testify as follows, if that was false, if that was not the opinion truly held by the expert, that would be misrepresentation by the lawyer.
But if your expert has said that in my opinion the amount of profits that I would be willing to testify to in this case would be $2,000,000, let's say, and if the lawyer has other evidence that the lawyer can use to establish a greater amount of lost profits, it would not be improper for the lawyer to try and argue to the other side or seek a settlement from the other side far in excess of the amount of the expert's testimony. In fact, the lawyer may not even use the expert as a witness. He may simply be a consulting as opposed to a testifying expert. So my analysis of this situation is so long as you don't misrepresent the opinion held by the expert, the lawyer acts properly.

PROFESSOR MASHBURN: Mr. Smith, under circumstance where your expert has come to no conclusion about the cause of lost profits, or your expert has told you that the breach did not cause the lost profits, would it still be appropriate for that lawyer to seek lost profits in negotiations?

MR. SMITH: Let me clarify my credentials here in the first instance. I was on a program at the University of Florida Law School a while back, and the Dean asked me in public what was the most difficult thing I had encountered in the practice of law over 50 years. I said, "Telling the truth." As far as I can figure out, I'm on this program today, with this particular panel anyway, to be the liar for the group. You've got the distinguished Chief Justice, who looks like an affidavit, and is one himself; and the man who wrote the book on this particular problem. I study him all the time when I try to teach it. And I am a practicing lawyer.

Under 4.1, even though my expert says there's no conclusion, I might say to the other side that we will pursue the matter. I don't say there's no conclusion. I just say we are pursuing whether or not we're going to seek lost profits or not. If I was told the breach did not cause lost profits, I won't tell them that that's what the expert said, but I might go get another expert, as the professor suggested. But I might well say, truthfully, we do have a claim for lost profits. I would say we are continuing to pursue that claim and stop there.

PROFESSOR MASHBURN: Would you make a distinction between a false statement about a factual matter or a false statement about a matter of opinion?

MR. SMITH: Yes. The rules permit me to make that distinction. As you know, 4.1 says we can't make a false statement of material facts. However, the comments to that particular rule say that in any kind of
negotiations, statements of value, are, as a matter of negotiating
convention, recognized to be puffing and nothing more. So, accordingly,
I can puff a little bit there and not be inconsistent with what the rule
says.

PROFESSOR MASHBURN: All right.

MR. SMITH: I think it would also be consistent with what practicing
lawyers do, and I don't think they're going to change any time soon.

PROFESSOR MASHBURN: Justice Zlaket, do you think that it's a
fair statement to say that lawyers should expect one another under, and
I don't take Mr. Smith to be saying this, but I'm taking it one step
further, that we should expect in settlement negotiations that the other
lawyer is lying?

JUDGE ZLAKET: Well, first of all let me say that Mr. Smith is not
our designated liar. I have great regard for him. He is a distinguished
lawyer and I am sure that he does tell the truth. I think that most of
us here are in agreement, but I must tell you that the literature alarms
me a bit. There is a huge body of literature that comes out of the
practicing bar and the academic world, suggesting that deception is an
integral part of settlement negotiations. And in the eyes of many it is
decCEPTION by consent. In other words, we all know that we're going to
lie to one another. And so there is an understanding and agreement
that there's nothing wrong with a lawyer lying in settlement negotia-
tions. That is what I find troubling.

Ethics 2000, which is the ABA's most recent effort to re-examine the
Code of Professional Conduct, has made a proposal that would change
the rule governing candor to the court to take out the word "material,"
but proposes to leave it in with respect to candor to one another or to
other people, candor to third parties. Now, what does that mean? Does
that mean that you can't lie to me as the judge but you can lie a little
bit to one another? You can't lie to any judge, whether material or not,
but you can lie to others just a little bit, you can deceive just a little bit,
so long as it's not material?

I'm very simple. I think the rule should be that a lawyer must tell the
truth at all times, period. And for that I am considered in some quarters
a heretic. I think adopting a rule like that across the board for this
profession would go along way toward improving public trust and
confidence in us and in the justice system as a whole. Simple rule. No
lying, period. You tell the truth. That's just the way it is.
SYMPOSIUM: SESSION ONE

PROFESSOR MASHBURN: Professor Crystal, do you see any problems with a rule along those lines that would say that a lawyer in settlement negotiations cannot lie?

PROFESSOR CRYSTAL: Well, I would say it depends somewhat on what you mean by lie. And I hesitate to get into this area because it brings back memories of the "recent unpleasantness," as it's sometimes put. Let me give an example just to show you what troubles me about that broad a proposition.

When a lawyer is in settlement negotiations, or when a lawyer is arguing a matter to a court, a lawyer may advocate a position and try to convince the other side or the court about that position, even though the lawyer may be skeptical of that position. He may not truly believe that it is the position that should be adopted by the court. And the lawyer may not truly believe the arguments that are being made to the other side.

Now I don't think anyone would say that lawyers cannot advocate positions that they do not fully endorse or believe in. And, so, I think we have to be careful to say that's not a lie. That's part of the normal role of being an advocate.

Now, if we're talking about misrepresentations of facts or misrepresentations of law in a somewhat narrower sense, then I would agree with the broad proposition that lawyers should never lie. And I'm sympathetic with the viewpoint that Justice Zlaket is expressing, and I tend to go in that direction, but I think that we have to be careful because there are some things that lawyers do that do involve misrepresentation about their views of the case and those cannot be lies.

PROFESSOR MASHBURN: Mr. Smith, do you see a problem with an approach that would simply say a lawyer cannot lie in negotiations? Couldn't an advocate say, "Well, everyone's on notice that lawyers choose their words very carefully." This is a matter where good lawyering can make a lot of the ethical difficulties go away because rather than making a misstatement of material fact, a lawyer should just know when to be silent or how to choose his or her words carefully?

MR. SMITH: Well, I think some education in that regard is desirable. I fully embrace the Chief Justice's position that lawyers simply should not lie. I'll buy that, and I'll try to practice it if you will. I will practice it if you will. But my problem has been, and continues to be, how do we get on the same page so that we're really doing it?

I've spent a long time in the activities of the organized Bar, and we've spent an awful lot of time on lawyer discipline and the imposition of
sanctions and so forth. We're having enough trouble handling the
problems as they arise currently with the rules that exist. How we are
going to import the principles that Chief Justice touted, and with which
I fully agree, is something that I don't have the answer to. I regret I
don't. I wish I did. I'm proud to be a lawyer. I think that, like you, I
ought to be an honest lawyer.

PROFESSOR MASHBURN: Yes.

JUDGE ZLAKET: I need to say I couldn't agree more. Enforcement
is going to be the hard part of this. And I don't want anyone here to
think that I'm holding myself out as "holier than thou." I was a
practicing lawyer for 27 years before I went on the bench. I'm kind of
a rookie judge. I've only been here nine and a half years, and probably
will go back to the practice of law someday because I like it and because
I am proud to be a lawyer.

I have done all of these things. I have negotiated a lot of cases. I
know exactly how the ball is hidden. I know the kinds of puffing that
we all do. I understand what Reece is saying when he talks about "I
will if you will." And that is the dilemma. How do you enforce a
standard that says "lawyers are the truth-tellers in this society?"
Because I always get that skeptical look. "Zlaket, everybody lies. I
mean a lot of people lie. It's human nature. What are you going to do,
change human nature?"

My answer is that everybody might lie, but lawyers, because of the
very special nature of who they are and what they do, should not. And
if we could ever get to the point where we established ourselves as the
truth-telling profession in this society, think of it. Think of what we
would accomplish. But we'll only get there if we refuse to tolerate those
among us who will not follow the standard, and do whatever is necessary
to suggest that they find another line of work.

PROFESSOR MASHBURN: Why don't we look at the next hypotheti-
cal. Let's assume that we've got the existing rules in place, or that we
would have a rule similar to the one that you're suggesting. Should a
lawyer be forthcoming about everything? In other words, would it be
appropriate if you know that you have authority to settle for $2,000,000,
if you are asked a direct question by opposing counsel in settlement
negotiations to answer that question honestly? What do you think, Professor Crystal?

PROFESSOR CRYSTAL: Let me give two answers. One is that what
the current rules say and the other is what my view of this issue is. The
current rules say in a comment to Rule 4.1 that normally misstatements about your settlement authority are not treated as misrepresentations of material fact, and accordingly should not be improper under Rule 4.1. So right now the current rule seems to allow some degree of misrepresentation, some degree of puffing, and even direct misrepresentation with regard to settlement authority.

Here I would agree with Justice Zlaket completely. I think in this situation a lawyer should never lie about settlement authority. You should not say to the other side I only have settlement authority of $2,000,000 when, in fact, you have a higher or a lower settlement authority, depending on what side you're on. Similarly, if the other side asks you what your settlement authority is, you don't have to lie about it. You simply can refuse to answer or deflect the answer.

So I think there are a number of situations where lawyers currently do lie, where it's unnecessary for them to lie, and where the current rules tolerate that conduct. If I were king, I would delete that comment, and I would say that lawyers should not misrepresent their settlement authority.

On the other hand, I think there are other situations where it's going to be inherent in the lawyer's role that there will be some degree of misrepresentation. I don't agree with what Justice Zlaket said that the lawyers are the truth tellers in our society. We aren't the truth tellers in our society. There are other people in our society who are the truth tellers. It may be the journalists or it maybe be philosophers, but lawyers are not truth tellers. We are representatives of clients. Sometimes in our role as representative of a client, in advocating a client's case, we are going to be advocating a position that we don't truly believe in. Obviously we can't advocate the frivolous. If a position that we're called upon to take is distasteful to us for moral, political or religious reasons, we may not want to take that kind of case. But inherent in the lawyer's role is going to be some degree of misrepresentation. I think the question may be defined more precisely: What misrepresentation is inherent in the lawyer's role and what is impermissible or improper?

PROFESSOR MASHBURN: I was thinking as you were describing the type of lawyering that you would view as ideal that certainly in a world where the rules of ethics require less than that, as they're currently written, that this might be the type of thing that you would want to tell a client so that a client could make a choice about whether you're the right lawyer for them or not. Or is that the type of thing that you believe lawyers ought to have authority to decide? In other words, is this part and parcel of lawyering, or is it so basic, the idea that you
are going to refuse to go right up to the limits of what the ethical rules allow, that it's something you should disclose to your client? Does anyone have a thought about that?

MR. SMITH: I don't see any problem with disclosing that to your client. As a matter of fact, I think perhaps one should do so. And I think most of us try to do that in our own way. It's just that we try to explain attorney/client privilege and confidentiality and a variety of other things. And I think with reference to this particular problem here, I may have authority to settle for $2,000,000 but there's no harm in me trying to get three and a half million. It just depends on how I say it to begin with. I don't have to say I will not settle for less than three and a half million. I am lying then. That's not the way to come at it. But we can all think of ways where we can get the message across that we're going to start the negotiations at the three and a half million dollar level and see. That's my position right now. What's your thought?

JUDGE ZLAKET: I see nothing wrong with that. I don't consider those to be the kinds of deceptive statements that a lawyer ought not advance. I also don't disagree with Nathan. I mean, I think a lawyer can legitimately advocate a position that, to use his words, he or she does not fully endorse or believe in. I have no trouble with that. That's what lawyers do. But that's a long way from standing up and deliberately misleading, by act or omission, what the true facts are or what the law really is, either to a judge or to a jury or to my opponent or to my own client or to a member of the public.

You know, I happen to think that a very effective negotiating tool is simply to not answer those kinds of questions. Rather than to answer them falsely, rather than to distort the truth, I have found silence to be a very effective negotiating tactic at times. Now, some of what you read about negotiations suggests that you're effectively gutting the negotiations if you say, “I'm not going to tell any falsehoods and I'm not going to twist the truth at all.” I don't agree with that.

One example is when you get the reputation among your colleagues as somebody who does not pull any punches, who plays no games, and when the time comes, “If we can't settle this case then let's go into the courtroom, and we'll just see who's the best lawyer.” You gain that reputation with your colleagues and you'll see a lot of cases settled with very few words. But that's something that you earn by being able to show that if this case won't settle at a reasonable level, you are fully prepared to take it where it ought to be taken to have it resolved.

I'm not sure we're talking different things. I do rebel and push back a little bit when I read some suggestions that all negotiations are really
an exercise in deception by consent. I don’t accept that and I don’t like it.

PROFESSOR MASHBURN: Well, this next hypothetical concerns telling opposing counsel that five major buyers stopped buying from your client after the breach, knowing that they stopped buying for other reasons. Now, this one I would presume for most of you would be an easy one. Am I right, Professor Crystal?

PROFESSOR CRYSTAL: It’s easy for me posed that way. This would clearly be a misrepresentation of fact and it would be improper for the lawyer to do. Now, in the real world, of course, in a situation like this there would probably not be a single cause as to why these buyers ceased their relationship. There could be multiple causes. So if the lawyer were, for example, to say that this breach was a factor, or something to that effect, so long as it was an accurate statement, the lawyer could do that. So the question is the accuracy of what the lawyer says.

Now, what troubles me a little bit about that position is that it then leads to the proposition that the ethics of lawyer conduct turns on how careful the lawyer is in using words, and I don’t mean to suggest that. That’s just part of a lawyer’s ethical obligations. You have to make sure the words you use are accurate. If the words turn out to be inaccurate, you have to correct those inaccuracies. But that’s not all there is to being an honest lawyer in negotiations. It requires more than that.

To pick up on the point that Reece made, I think it’s exactly right that a lawyer can make certain tactical decisions in negotiations. The rules now recognize a distinction between the objectives of representation and the means used to carry out the representation. As a general proposition, lawyers have the authority to make decisions about the means used to carry out the representation. A lawyer doesn’t have to get the client’s consent as to whether to make an objection at trial. Similarly, lawyers can make decisions about what standards to have in negotiations. So, in part, you have personal decisions to make about what kind of a negotiator you’re going to be.

I would like to disabuse everyone of the notion that the only way to be an effective negotiator is to be a tricky, dishonest negotiator. I believe just the opposite. The way to effective negotiation is to be able to convey to the other side that you’re an honest negotiator, that what you say is accurate, that what you say can be believed and that you can use that to gain for your client in negotiations. You can be both truthful and successful in negotiations.
PROFESSOR MASHBURN: Mr. Smith, I know that you've both taught and obviously practiced law for a long time. One of the things I've noticed when I give students a hypothetical like this is that they will try to change the hypothetical. They will say, well, what does the lawyer really know, and how do we really know anything? How do we know there was one cause. There could have been many causes. I wonder if in your experience you have seen that lawyers have avoided ethical consequences of making a false statement by simply claiming that they didn't really know what the true state of affairs was, or they kept themselves from knowing.

MR. SMITH: Yes, I guess all of us who have practiced law have encountered a few bad apples who have done that. The students are, generally speaking, far more imaginative than the lawyers are in that regard sometimes. It worries me when I have a student who seems to be trying to find a way around what the rule or course of conduct ought to be. I try to see if we can get that straight as quickly as possible, in the classroom or otherwise. Most of the time they are simply bright young people who are trying to test the professor, I think, on certain issues.

PROFESSOR MASHBURN: If anyone in the audience has a question or would like to make a comment after each of these hypotheticals just put your hand up. Any comments or questions? Yes, sir.

AUDIENCE: The rules we've looked at seem conspicuously silent about omissions on questions of law. I wonder particularly on dispositive law on controlling the jurisdiction the sort of disclosures that are required of us in our dealings with the court. And I'm wondering if the panel has any views about silence in negotiations about controlling precedents on the legal issues.

PROFESSOR MASHBURN: I think we have a hypothetical that raises that point. In addition, you should note that the model version of Rule 4.1 does make it clear that you cannot make a misstatement of law, but it doesn't impose the same affirmative disclosure obligation about controlling precedents that Rule 3.3 does when you're in front of a tribunal. I think the ethical issues surrounding misunderstandings about law are every bit as difficult and legitimate as those surrounding factual matters. We'll get to it in connection with the third hypothetical. Other questions?

Why don't we move then to the second hypothetical. Now, here we're switching from what the permissible boundaries are of what statements
you may make in negotiating to whether it is appropriate for you to remain silent in a situation given the following facts.

You represent the husband in a divorce action. You receive from opposing counsel a proposed property settlement with the following errors. The first of these is a transcription error that undervalues an asset. The second is an error of arithmetic that undervalues an asset. The third is a valuation by purchase price of an asset when the market value is much higher. All of these errors work to your client's advantage. What, if anything, should you do about them. Now, Judge Zlaket, you have stated that you don't believe lawyers should lie. What would you say in a situation like this? Should the lawyer inform opposing counsel of the problem?

JUDGE ZLAKET: The first two are easy for me, and I would say, yes. I have no trouble saying that a lawyer ought to point out to the other side the transcription error or the error in addition or subtraction, whatever it happens to be. The third one is a little more difficult. When I say lawyers ought to be the truth tellers, I'm not suggesting that I have to be the lawyer for both my client and the opposing side. I still think that I have an obligation to represent my client. It is the concept of zealous advocacy that I think has been bastardized by the legal profession in the last several decades, to the point where it's almost unrecognizable. And the idea that you have to go right to the line, that's what I disagree with.

But I've never suggested that I have to be the lawyer for both my client and the other side, too. And it seems to me that that's what number three requires me to be. I may believe that they've undervalued the asset, but I don't think that I have an obligation to say anything about that to the other side, unless there is some fact that I know has caused them to err, a relevant fact that needs to be disclosed and that would call to their attention the mistake that's been made in the valuation.

PROFESSOR MASHBURN: Professor Crystal, would it make a difference to you if this was an initial overture from the opposing party or if this was an effort to reflect an agreed-upon settlement between the parties?

PROFESSOR CRYSTAL: Some people might draw that distinction, but it wouldn't make a difference to me in either case if it's a known mathematical mistake whether it was in an offer submitted by the other side, or whether it was in reducing an agreement to writing. In either case I would say that there's a duty of disclosure.
Let me make a general point. When you look at the standards, and also if you look at the ABA model rules, they seem to say that there is a very limited duty on a lawyer to disclose information. The rules say that a lawyer shall not disclose information unless necessary to avoid assisting the client in a criminal or a fraudulent act. And even then not when protected by the duty of confidentiality. That leads to the belief among many lawyers that the duty to disclose is very very limited and almost non-existent. That's simply not correct based upon the case law.

There is a comment in these standards and in Rule 4.1 that says in some circumstances the failure to act or the failure to disclose may be the equivalent of a misrepresentation. That statement has a lot more power behind it than many lawyers realize. There are quite a number of cases in which lawyers have been disciplined or in which settlement agreements have been set aside because lawyers failed to disclose information.

So a first proposition is that it's very important to recognize that there is a much broader duty to disclose than many lawyers understand. One of the situations in which the courts have found there's a duty to disclose is when there's a scrivener's error or some failure to reduce to writing the agreement the parties have reached. I think that's an absolute clear case of disclosure.

Now, if you take this back a step and say the mathematical error is in an offer as opposed to a settlement agreement that has been reached, then it becomes a little less clear as to whether or not there should be disclosure. But if it's a purely mathematical error, it seems to me there would be a duty of disclosure in that situation as well.

In the third of these situations, where the purchase price was used rather than the market value of the property, there could be a legitimate reason as to why a proposal uses the purchase price rather than the market value of the property. Tax considerations are one factor that comes to mind. If the property will be given away, there might be a desire to reduce the valuation of that property. Now, that, of course, raises some additional questions about whether there may be some fraud being committed on the IRS. But I'm putting that aside. There could be some reason why the lawyer for the other side could legitimately want to use the purchase price rather than fair market value of the asset.

But that possibility doesn't fully answer the question for me, because under the circumstances it might still be clearly a mistake as opposed to a lawyering tactic. That then raises a question in my mind as to whether a lawyer would have a duty of inquiry to determine whether or not this was truly a mistake or truly a strategic decision being made by the other lawyer.
My analysis of that issue is that’s really putting too much of a burden on lawyers. That goes far beyond what we would expect of lawyers in terms of honesty and fair dealings in negotiations. So in the third situation, I would say there would be no duty of disclosure and duty of inquiry.

In the first two situations, whether it’s a settlement agreement or a settlement proposal, I think that the lawyer has an absolute duty of disclosure. That duty would apply regardless of whether the client agreed or not. I don’t believe the lawyer would even have an obligation to go to the client and get the client’s consent, or even discuss it with the client. I think the lawyer would have an inherent authority under the rules of professional conduct to correct a mistake being made by the other side.

PROFESSOR MASHBURN: That raises a very important issue.

MR. SMITH: The rules say that the client, and only the client, can make the decision to settle the case. That suggests to me, therefore, that I should be reporting to my client during the course of work that we have a settlement offer. We’re discussing settlement. Here’s what’s happening and where we’re going and so forth, keeping the client well-advised. But when I say to my client, “Hi, Client. You’ll be pleased with your lawyer today. We could have saved a lot of money because there was an error in the transcript that undervalued an asset and they couldn’t add, also. But I told them. I said, ‘Look here, you made a mistake.’ I want to straighten that out for you.” How do you think the client is going to react to that, gentlemen? What am I going to do with my client? You know, how do I explain to my client that I even have the right to correct that without telling him? Realistically speaking, it’s the client you have to be concerned about it. In Florida, at least, they don’t grow on trees.

PROFESSOR MASHBURN: Especially in a system where you really aren’t your brother’s keeper. It’s an adversarial system and the law presume equal adversaries. It raises this whole question of whether we should let a client suffer because of an attorney’s error of this type. The American Bar Association has issued an opinion interpreting its own model rules to require that you bring to the attention of an opponent a scrivener’s error. One question is what falls into that category and what doesn’t.

MR. SMITH: The ABA also points out that the client has no right to expect to take advantage of mistakes made by the other side.
PROFESSOR MASHBURN: Right.

MR. SMITH: They should expect appropriate conduct on our part including correcting errors of that sort.

JUDGE ZLAKET: Well, the answer to your question may be that you do have some duty of disclosure to the client, and to say, "I recommend that I pick up the phone right now and tell them about this error." And if the client says, "I don't want you to do that," then I think a lawyer ought to say, "Then why don't you go get another lawyer because I don't want to participate in this."

MR. SMITH: I agree.

JUDGE ZLAKET: It seems to me that we have created a generation of lawyers that carries zealous advocacy to the extreme; to the point that we have become trained monkeys for our clients. It seems to me that we need to restore lawyers to the position that we are the experts. "You are the client. You come to me presumably because you think I have some expertise. You come to me because I have some reputation. You expect me to represent you, and I will do that, but I will do it my way. And my way means that I will extend professional courtesy to my opponent. My way means that I will not be rude. I will not be a junkyard dog. And I'm not going to take advantage of every mistake that the other side makes. And if you don't want me as your lawyer, go hire a junkyard dog."

Instead we have created an expectation in the public, and in our clients, that the best lawyer is the meanest, must uncooperative S.O.B. on the block. And when we do that, we create a problem for ourselves. What then happens when you want to extend another sixty days to your opponent who calls you up and says, "Reece, I need sixty more days to answer those interrogatories. I'm up to my ears in alligators." Do you say, "Take the sixty days?" Or do you call your client up and say, "I'd like to give this fellow sixty days?" Good lawyers say, "Take the time you need," and then say to the client, "It's my decision how we practice law and how we manage this case."

Now, there are some decisions that the client has to have a say in. For example, settlement. But there are a whole bunch of decisions made by lawyers every day that ought to be made by lawyers, and clients ought to be told, "That's what I do. I make those decisions. And if you don't like it, go find another lawyer."
MR. SMITH: This is probably more important than a lot of things we'll talk about on this panel. I agree with you completely. In my view the nine percent of American lawyers who tend to serve corporate America and the Fortune 500 are mostly wrong for creating this attitude of you eat what you kill and all of the other things that go with it. It robs from us the tradition of saying to the client that we are professional persons and we are going to do this in a professional fashion. You selected us for that reason. Lawyers, the ninety percent of the Bar that serves individuals, small business, and so forth, I think still can recapture that. But for ten percent out there, and my firm can be called a "large firm," we seem to have lost our direction. Larry Fox, here, is trying to get us back on track in that regard but multi-disciplinary practices and other things like that are making it very, very aggressive out there.

PROFESSOR CRYSTAL: Let me offer a suggestion which can respond, I think, to both the economic concerns and the concerns about having greater professionalism in the practice. When a situation like this comes up, where there's a question about whether you have an obligation to disclose something to the other side or whether you have to get your client's consent, a lawyer in addressing that question is going to have to turn to the rules of professional conduct and he's going to have to seek expert opinion.

The rules of professional conduct have fairly minimal standards of what is expected of lawyers. They generally expect zealous representation. The rules put a lawyer who would like to adopt a professional standard that is higher than the model rules in a dilemma because you could be accused of sacrificing your client's interest and not being sufficiently zealous.

Drafters of standards could address that problem. Let's suppose you have a set of standards that deals with negotiation. Suppose they aren't just minimal standards that replicate the model rules of professional conduct. They are standards that are reasonably detailed but at the same time go to a higher level. What I have in mind is the standards adopted by the Seventh Circuit. Judge Aspen, who is going to be on one of the panels here, chaired the committee that drafted these standards.

His committee developed standards for lawyers in litigation matters, particularly with regard to discovery. They are very detailed standards that are at a very high level that rely on the fundamental principle of good faith. I can imagine a set of negotiation standards that go beyond the model rules that dealt with issues like whether you have to disclose a mathematical error to the other side and whether have to get client consent to disclose.
Let's suppose the Litigation Section has issued a set of standards like that. I could see lawyers in their engagement agreements with their clients stating that they adhere to the highest standards of professional conduct. A lawyer could state: "I adhere to the model rules of professional conduct. And I'm also guided by the negotiation standards of the Litigation Section of the American Bar Association." These standards are disclosed to the client for the client's information, and the client when signing the engagement agreement consents to the representation on those terms. The lawyer then has a set of standards to use that will answer a number of these difficult questions in a way that goes beyond the minimal standards of the model rules. So I offer that as a proposal.

Professor Mashburn: You had your hand up a while ago.

Audience: Yes, ma'am. I'd like to ask the panel, with reference to the feeling about the transcription error, let's assume that the same lawyer that drafted that property settlement agreement is your opponent in a case in the last live pleadings simply fails to plead the cause of action or the defense. Perhaps it's a sworn defense he's trying to plead and he just left the affidavit off. He made a transcription error in the pleadings. Is it your opinion that you would call that lawyer and tell him that he has on file a pleading that's not going to sustain his case? You just told me that you think that you should call him and tell him that he made a sloppy error in writing that property settlement agreement. And I'm just asking you if he makes the same sloppy error in filing his live pleadings if you're going to call him and tell him you sure are a sloppy pleader?

Judge Zlaket: Well, we've got a hypothetical coming up that kind of comes close to that. But that's a very good question.

Professor Crystal: I draw a distinction between an error in judgment versus a mathematical error. These first two hypotheticals deal with a known mathematical error. I think there's a clear duty of disclosure there. The third of these is closer to your situation, where the lawyer uses the purchase price rather than the fair market value.

Audience: I see.

Professor Crystal: And if it's more of an error of judgment, I don't believe there's a —
AUDIENCE: But you know that this is a good lawyer. It's just a secretary's mistake. He knows that he's got to swear to that —

JUDGE ZLAKET: So you're telling me I know all those things?

AUDIENCE: Yes. Absolutely.

JUDGE ZLAKET: You bet.

AUDIENCE: You've dealt with him many times.

JUDGE ZLAKET: You bet. I would.

AUDIENCE: You would?

JUDGE ZLAKET: You bet I would.

AUDIENCE: Would you talk to the client first, Judge?

JUDGE ZLAKET: Probably not. Have you ever set aside a default without talking to the client? I have.

AUDIENCE: No.

JUDGE ZLAKET: Well, I'll tell you something. Things have changed a lot, and some people can argue that we are a better profession for it. I argue that we are a worse profession for it. The first 15 years I practiced law I never confirmed a telephone conversation with another lawyer in writing. Never. And I never got burned once. And the two times somebody filed a default on me, I picked up the phone and said, "Don't you remember our conversation?" The instant response was, "Oh, my god, I forgot it. I'll set it aside before 5:00." None of this, "I have to check with my client," or "the devil made me do it," none of that. The last 10 years I practiced, before I went on the bench, I confirmed everything in writing. My mother would invite me to dinner and I'd confirm it in writing.

And that says something about us. We don't trust one another anymore. There's a question about how close to the line you have to go, and this goes to what Nathan just said. Do you really have an obligation as a lawyer, do you and I have an obligation to go right up to the line of the minimum ethical standard or is there room? Can I say to my client, "I'm not going that close. I'm not going to tread down that
line. I'm going to stay away from it a bit in representing you. And if that's not what you like, then you need another kind of lawyer.”

AUDIENCE: Judge, one line that's a pretty good line for some lawyers is the law. And I agree with you 100 percent. I've agreed with everything the panel has said so far until we get to a point where we're saying because we're going to be high-toned and moral we're going to sacrifice, were going to take away a client's legal right without even talking to him.

JUDGE ZLAKET: Wait a minute.

AUDIENCE: Default is a legal right.

JUDGE ZLAKET: Yeah, except you've told me in your hypothetical that you know this is a really good lawyer who has made an obvious mistake. Actually, you said it probably wasn't his mistake, it was a paralegal or a secretary that made the mistake. And you know all of this.

AUDIENCE: That's the hypo exactly.

JUDGE ZLAKET: Well, now, what are you going to do when he makes a motion to the court? Are you going to oppose it or are you going to stand up when he vows to the court that it was a clerical mistake in his office and he ought to have relief? What are you going to do then when your client says to you, “I want you to go in and fight tooth and nail. I want you to oppose it. I want you to do everything you can to stop the judge from granting this lawyer relief?”

AUDIENCE: As long as a non-critical mistake in that jurisdiction is that it doesn't make any difference and at 10 o'clock it's default time, I'm going to oppose it as vigorously as I can. And I agree with you that if I'm not going to do that, I ought to tell the client to go get another lawyer to enforce their legal rights.

MR. SMITH: There is case law to the effect that if you take advantage of an error like that in settlement that the court will set it aside. There's law out there for the kind of error you're talking about.

AUDIENCE: On the final draft?

MR. SMITH: It would be set aside.
AUDIENCE: On the final draft, I agree. But I don't, I'm not —

MR. SMITH: The model rules — are you talking about in the pleadings?

AUDIENCE: Oh, on the pleadings?

MR. SMITH: Isn't that what you said, on the pleadings?

AUDIENCE: Yes, the pleadings.

MR. SMITH: The final pleadings are what you're talking about, right?

AUDIENCE: Correct. Okay. I'm just not aware of those cases there because that solves my problem because that gives the client his legal rights.

MR. SMITH: Well, even if they're not, I join the Chief on this one. I think that that's right. When we know all of those things and it's just a mistake we can't do that. We've got to correct it in my view.

PROFESSOR MASHBURN: Well, I had said I was worried as the moderator that I might end up being the bad lawyer here, but I guess one response is this is not about us, and that our dedication or desire to make the profession better shouldn't go so far that it compromises, without their knowledge, the legal rights of clients. Remember, we are talking about settlement. As Mr. Smith has pointed out, and he's absolutely right, the rules and the case law are very protective of the client and the client's authority here. So it seems to me that to expand the area where we will allow lawyers to do things that compromise their client's rights without their knowledge is a little bit dangerous. Especially because the ethics rules require you to communicate fully with your client. So it seems to me it's the type of thing, I guess I wonder sometimes why we're so afraid of client autonomy if it is well informed, as the rules require. But, Ed, you had your hand up.

ED WALLER: Just a quick question. We may touch on this tomorrow, but under number three I'd like to ask the panel would it make any difference if the wife does not have a lawyer?

PROFESSOR MASHBURN: Yes, it would.
JUDGE ZLAKET: I think it does. That makes it clear to me. That's the old hypothetical about your client saying, "Look, I want you to go out there, there's a widow that's got a house and I want you to go buy it from her and pay this much for the house. But don't tell her what I know, which is that there's going to be a big project coming right through there, and it's worth about 25 times more. You're my lawyer. That's confidential. You go do what I tell you to do. Go offer that widow 50 grand for that house." But you know now that it's worth a bunch of money as soon as that freeway goes in, or as soon as that shopping center goes in. I don't think a lawyer should do that.

You know, a lawyer is supposed to be something pretty special in our society. I think a lawyer ought to say, "I'm not going to do that." And it does make a difference if that person is represented or not.

When you go to the other side's lawyer and say, "Tell your client we'll pay her 50 grand for the house," it seems to me that's a little bit different.

PROFESSOR MASHBURN: Why don't we go to the third hypothetical. You represent the defendant. This raises a number of these issues that I think that we've been working our way up to. You represent the defendant in a personal injury case. In negotiations with plaintiff's counsel, a young, relatively inexperienced lawyer, it becomes clear to you that this lawyer believes his client's potential recovery is limited by a tort reform statute. You know that this statute has been found unconstitutional by the State Supreme Court. May you, or should you, correct opposing counsel's mistake about the law?

This hypothetical was suggested to us by a member of a panel for corporate in-house counsel. This had happened to him in a case. The opposing lawyer made an initial offer or an initial statement which presumed that they were in an arena capped by a state statute, when, in fact, that statute had recently been declared unconstitutional. Anybody want to take a first shot at this one? Mr. Smith, I think it comes to you.

MR. SMITH: Well, the case law says that I do not have to correct the mistake of law that the other side has made. I cannot mislead as to statements of fact and sometimes I cannot remain silent, but the case law says in this instance I can remain silent. Now, whether that squares with some of the principles we've been talking about may trouble some of the members of the panel. It doesn't trouble me very much.

The presumption is that this young inexperienced lawyer went to the same law school and probably went a whole lot more recently than I did,
and knows much more law than I do. Almost anybody does these days. Accordingly I don’t think I have to educate this individual.

**PROFESSOR MASHBURN:** Rule 4.1 prohibits you from making an affirmative misstatement about the law. The lawyer here, if the situation were reversed, couldn’t say that the statute had been reversed if it had not been. But the question is your ability to be silent.

Ed, you can correct me, but apparently this was a fairly egregious case where an individual was badly injured and under traditional notions of assessing damages would have been entitled to much more than the capped amount. Would this just be a clear one for you, Professor Crystal?

**PROFESSOR CRYSTAL:** I think a lawyer could act either way in this situation and the lawyer’s conduct would be professionally proper, and I’ll explain that in just a second. So to me the answer to this question turns on your philosophy of what it means to be a lawyer and on what kind of lawyer you see yourself as being.

In terms of defending not disclosing in this situation, Geoff Hazard, one of the well-known authorities in professional responsibility in the country, wrote an article in the South Carolina Law Review a number of years ago on the question of disclosure in negotiation, and one of the points he made was that when the model rules were originally drafted, the Kutak Commission struggled with the issue of disclosure and finally concluded that it simply could not deal by rule with the disparities in knowledge, expertise and experience among lawyers. They simply could not regulate that by rule. Based on this proposition, a lawyer in this situation should not have a duty to disclose because to do so would be to attempt to deal with a disparity in knowledge.

On the other hand, I think there are several ways in which you could conclude there’s a duty of disclosure in this situation. One rationale would be it simply may be difficult, if not impossible, to conduct the negotiations when the other side has a fundamentally mistaken assumption about the law without incorporating that mistake to some extent in your statements to the other side, which, in essence, then becomes a misrepresentation by you. So a lawyer could reason that because it’s going to be impossible for me to go forward with these negotiations without explicitly or implicitly making a misrepresentation, to avoid making a misrepresentation I am going to have to disclose the other side’s legal mistake.

You could also reason there is a duty of disclosure in some situations. Both tort law and contract law say that there is a duty of disclosure when there’s a mistake about a basic assumption on which the contract
is being made, and the failure to disclose would violate standards of good faith and fair dealing. A lawyer in this situation could conclude that the existence of this statute is a basic assumption being made by the other side and my failure to disclose would violate a duty of good faith and fair dealing.

The second rationale is a more problematic defense of disclosing than the former, that is that there would be an implicit misrepresentation by continuing the negotiations. In either event, a professionally proper lawyer would have grounds for a concluding that there is a duty of disclosure here. Similarly, a professionally proper lawyer could conclude there's not a duty of disclosure. So it turns on what kind of lawyer do I want to be. Am I a hired gun? Do I go to the very edge? Or, on the other hand, am I the kind of lawyer who zealously represents my clients but also have a notion of personal integrity and personal judgment and personal independence that to me is the core of the legal profession. And if that's the kind of lawyer you want to be, then I think you should make disclose in this situation and your conduct would be ethically proper. And if you wanted an opinion from me that what you were doing was proper, I'd be happy to give you one.

LARRY FOX: Are you suggesting for a moment that the lawyer isn't on the high road who doesn't disclose this? It seems to me that the lawyer is exercising the highest honor of our profession by zealously, not even zealously, competently representing the client by saying, the other side is represented and the lawyer doesn't know whatever it is he doesn't know, that's not my problem. I'm going to say deal. Deal. I've done the best I can do as a lawyer. I'm not the judge. I'm not God. I'm not the truth seeker. I'm an effective advocate, and I'm proud to be an effective advocate. I'm not going to be ashamed to appear in front of you, Professor Crystal, and say, oh, my God, my life has fallen apart because I was a good lawyer. I think I was the best lawyer that way. The other way I feel like I've betrayed my client.

PROFESSOR CRYSTAL: I don't think you should be ashamed of that. I think lawyers should be zealous advocates. I think that's a perfectly respectable vision of what it means to be a lawyer. I also think there are perfectly respectable other visions of what it means to be a lawyer that lawyers can adopt and can be competitive in the marketplace by doing so.

LARRY FOX: I'm not talking about competitive in the marketplace. I'm talking about representing this client. One client.
PROFESSOR CRYSTAL: In this situation, I think you should disclose the mistake about the statute.

PROFESSOR MASHBURN: Now, you realize that if this occurred in a setting where the settlement agreement had to be approved by the court that you would be required to reveal controlling precedents to the court. In other words, opposing counsel would have the obligation to disclose the existence of the precedent to the court. But in settlement we're comfortable with a different outcome where essentially we're going to have an agreement that is premised on an erroneous conception of what the law requires.

LARRY FOX: In the real world you have to also consider the problem if you do disclose this to the other lawyer, and you don't tell your client you've done that, and later your client finds out, you're going to probably get sued for malpractice.

PROFESSOR MASHBURN: I agree. In the actual case what was interesting is that the lawyer did exactly what you suggested, Mr. Fox. He said, “Done. It's a deal.” The lawyer started out by saying the most I can get here is a million, or $250,000, whatever it was. However, someone else from the panel, corporate in-house counsel, said that she believed that if she had gone to her client and asked for permission to reveal that, her client would have allowed her to do it. I thought, I would really like to believe that.

JUDGE ZLAKET: Well, wait a minute. Wait a minute. That's not what I heard. You're a lawyer, you're an advocate. That means something more than just taking advantage of every mistake for your client. There is something to be said about the way this hypothetical has been phrased. And when we talked about it on the telephone it was an egregious discrepancy. Let's say a ten grand for a quadriplegic.

PROFESSOR MASHBURN: Right.

JUDGE ZLAKET: Now, how long do you think that settlement is going to hold up. And don't you have some obligation then to say to your client, “This is stupid. I mean we're going to go through all this and you're going to pay me, and this settlement is going to last about as long as dinner tonight because it is unfair, because it is wrong.” And what do you do when you see that kind of a case as a lawyer and your client says, “I don't care. I want you to do it anyway.” I'm not going to be part of that settlement because I am not some client's hired gun. Let him go
do it with somebody else — let him do it without a lawyer. I don't need him.

So the way this was raised, not here, but in our telephone conversation before we got here, was that there was an egregious discrepancy. This wasn't just a matter of where we're $15,000 apart and I'm calling the other side to say, "Boy, you're selling this case short."

But where this young kid, and I shouldn't pick on the young kids because I've met a lot of old lawyers that didn't know the law either, says to you, "Well, you know, my client's a quadriplegic but I know about the law that caps my damages at $50,000 so if you'll give me a check before nightfall I guess we're settled." Now what do you do, you lawyers, you officers of the court, you officers of the justice system? You are more than an advocate. I think I'm more than an advocate as a lawyer. That's why I agree with Nathan. I think you can argue this one either way.

But if you take the approach that my obligation is one hundred percent to my client, not to the justice system, not to anything else, and I'm going to take advantage of every mistake the other side makes; I'm not saying it's an indefensible approach, I'm not saying it's wrong. I'm not saying you're violating any ethical code; but I do say if you take that approach you really aren't what I think a lawyer ought to be.

**MR. SMITH:** The law is fact intensive. You have just changed the facts. If you change the facts, you may get a different kind of answer.

**PROFESSOR MASHBURN:** Right.

**MR. SMITH:** I'd go with Larry right off the bat on the first part. You change the facts the way you did, and I have trouble not going with you.

**AUDIENCE:** What's the neutral principle that informs when I suddenly switch from this one role to the other role. That's my problem. We decided the neutral principle, at least I would have said, you even tend to agree if it was a million versus two, well, that's okay, but if it's $10,000 versus $2,000,000, but I don't know what the neutral principle is that informs that.

**JUDGE ZLAKET:** Practicing law is an art as much as a science. I don't think you can just look at these rules. That's why we all dance around. Lawyers play games with all of this language and the ethical codes. And law professors teach all of these fine distinctions. But sooner or later, lawyers have to be true to themselves and what they think is right. And, you know what, you take a risk once in a while.
That's why you carry malpractice insurance. I'm so tired of hearing lawyers say, "Oh, it may be malpractice. I could be sued." Yeah, if you practice long enough, you are going to be sued. But part of the business of being a lawyer is to exercise some judgment and have some discretion about what is right in a system that professes to do justice.

**PROFESSOR MASHBURN:** One caveat: I have been researching the extent to which the law of setting aside settlement agreements has been evolving. While I think it's true that you might want to caution your client that an agreement could be set aside potentially, on the other hand, there's some pretty harsh case law out there that says that if it's a unilateral mistake there has to be some inequitable conduct. One of the fears is that we would be creating that inequitable conduct by establishing a standard that would require disclosure. You've had your hand up for a long time.

**AUDIENCE:** Thank you. Having practiced for about 27 years now after leaving Mercer Law School, I can understand why some younger lawyers may be confused about ethics. I'm still confused after 27 years and I expect to be more confused when we finish these two sessions. But I guess part of the, and not due to any of the panelists. But part —

**JUDGE ZLAKET:** It's too late.

**PROFESSOR MASHBURN:** We do understand.

**AUDIENCE:** But part of the concern that I think has been shared and expressed by the different speakers and the questions is when we have a dilemma between what seems an inherent conflict of interest that really may not be able to resolved when we are told on one hand, and maybe this is a problem with, again, the drafters of the ethical guidelines, but we're told we have an undivided duty of loyalty, I only understand that one way. There's no question in my mind about what an undivided duty of loyalty means. Now, if I'm told later that, well, it's not really undivided. That means you have a duty to your client, but you also have a duty to the profession, I don't know how to resolve that. And to me that is not a resolvable issue. Either that duty to my client is undivided or it's not undivided. And then I need to know what it is, is it undivided or is it not, so I that I can know how to represent my client.

If it's an undivided duty, then I don't see where ethics comes into it if the law would be something different. If it's a divided duty, then tell me
where the line is, and I'll be happy to stay within those guidelines so that I'm not doing something wrong.

**PROFESSOR MASHBURN:** Yes?

**PROFESSOR CRYSTAL:** In my view, it's a divided duty and you're not going to have clear guidelines because the way to draw those lines is going to be by the exercise of sound professional judgment and moral sensitivity. And it's always going to be that way. And to say that there is an undivided duty to the client simply misstates the lawyer's role.

**PROFESSOR MASHBURN:** Yes.

**MR. SMITH:** As our time runs out I would like to say that Rule 4.1, particularly 4.1(b) has confused me ever since I first read it. I've been trying to teach it for ten years and I still don't understand it. Many of the things that have come up here today help demonstrate why I don't. May I say for the benefit of the students who happen to be here that the best way to understand much of this and to get as much clarity as you can in a fairly short dose is to read Professor Crystal's casebook on this subject, where he deals with this with more clarity than anybody I've read anywhere.

**PROFESSOR MASHBURN:** Yes. Can you ask your question fairly quickly?

**PROFESSOR CLAXTON:** I guess I'm asking this question because I see a lot of students in this room. If they pursue a number of the approaches that various members of the panel have suggested in the first few years of their practice they would get fired. What would you say to them?

**JUDGE ZLAKET:** Oh, you don't want to hear what I'm going to say.

**MR. SMITH:** I wouldn't fire anybody for what I've said here today, and neither would my firm.

**PROFESSOR CRYSTAL:** I have two comments on that. One is there is an important rule with regard to young lawyers, and that's Rule 5.2, which says that, first of all, young lawyers are bound by the rules of professional conduct. There is no Nuremberg defense. You bear personal responsibility for everything you do. But that rule also says that in cases of uncertain questions of professional ethics you can rely
upon the reasonable judgment, reasonable resolution of an uncertain matter by a senior lawyer. So if you're in a law firm, you would go to a senior lawyer in that firm, and so long as the lawyer was making a reasoned judgment of an uncertain matter, you would be entitled to follow the decision of that lawyer.

There's a second point about that, and that is in terms of selecting the position that you go into. One of the most important points about selecting a job is to look at the organization, ask yourself what is the culture, what are the ethics of this organization? Is this the kind organization I want to be a part of? Are my ethics consistent with the ethics of this organization? What procedures does it have in place for dealing with ethical issues? Because you will be deeply affected by the culture and the mentors in those firms. Hopefully you'll have mentors like either one of these gentlemen on either side of me because that's the kind of organization you want to practice in.

JUDGE ZLAKET: You know, I still come back, I think we have to focus on the narrow issue that this panel was supposed to address, and we've really gone far afield. We're talking about truthfulness in negotiations and how far can a lawyer go. This panel could have been titled, "How far can a lawyer stray from the truth in negotiations without falling over the ethical line." Isn't that really what this has been about? Whether in terms of settlement negotiations, oral argument to a court, or statements to a jury, we are trying to decide how far lawyers can stray from the truth in doing the things that lawyers do. I have some conceptual difficulty with that.

And, so, returning to the first issue, I ask this question, and I ask it with all sincerity. Can you be a good lawyer, can you represent your client, and be a good advocate in negotiations, by simply telling the truth? That's the question I leave with you. If the answer is yes, then it seems to me that's what we ought to aspire to.

PROFESSOR MASHBURN: I think on that note —

PROFESSOR LONGAN: Please join me in thanking our panelists. We're going to take a 15-minute break, and we'll reconvene for the second session at 4:15.
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presents

A SYMPOSIUM:
ETHICAL ISSUES IN
SETTLEMENT NEGOTIATIONS

Session Two:
Conditional Settlement Agreements

Moderator:  Professor Bruce Green
Fordham University

Panel:  The Honorable Marvin Aspen
United States District Court
Chicago, Illinois

Evett Simmons, Esq.
President, National Bar Association

Professor Ronald Ellington
University of Georgia

on
March 9, 2001

at the
Walter F. George School of Law
Macon, Georgia