

# DECEPTION IN NEGOTIATION & MEDIATION: WHERE'S THE LINE?



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By Jeff Merrick  
*OTLA Guardian*

Lawyers are supposed to tell the truth.<sup>1</sup> If we don't, we may be disbarred,<sup>2</sup> people may sue us<sup>3</sup> and we could go to jail.<sup>4</sup> If attorneys deceive impermissibly, the court may set aside judgments or settlements.<sup>5</sup> On the other hand, if an attorney is too trusting, the adverse party benefits.

Attorneys must know the line between acceptable advocacy and deception.

The primary rule prohibiting deception to an adversary is MRPC 4.1: "In the course of representing a client a lawyer shall not knowingly... make a false statement of material fact or law to a third person[.]"<sup>6</sup>

"Material information is information that... would or could have influenced

the decision-making process significantly."<sup>7</sup> "Material," then, considers how the other side perceives and uses the information.<sup>8</sup>

## The truth about settlement authority

Attorneys who subscribe to the Model Rules of Professional Conduct (MRPC) may believe they can misrepresent settlement authority. This belief would come from the American Bar Association (ABA) comments to the MRPC.

The ABA added comment 2 to MRPC 4.1. In effect, it allows certain misleading statements, including "a party's intentions as to an acceptable settlement of claim" because, ordinarily, they "are not taken as statements of material fact."<sup>9</sup>

Oregon did not adopt the ABA comments (Washington did). So, it is not clear whether Oregon's RPC 4.1 requires complete frankness about settlement authority. Also, other Oregon law may prohibit prevarication.<sup>10</sup>

*The takeaway:* Regard your adversary's representations about settlement authority with skepticism.

## Don't fudge to the judge

You can't fudge to a judge, not even using ABA-approved prevarications. RPC 3.3 requires candor toward a tribunal.<sup>11</sup> That includes representations regarding a party's bottom line in court-

mediated negotiations.<sup>12</sup>

## Insurance is a bright line

When attorneys ask, "What are the policy limits?" they have a right to rely on the answer. An attorney who misrepresents the policy limits may be sued for fraud.<sup>13</sup>

Courts discipline attorneys for misrepresenting insurance. For example, while negotiating the hospital's lien of \$113,000, a plaintiff's personal injury attorney knew the hospital believed there was \$150,000 of insurance. The plaintiff's attorney did not disclose the \$1 million umbrella policy, and the court suspended the plaintiff's attorney for six months.<sup>14</sup>

Qualified misrepresentations do not save attorneys. "To the best of his knowledge," an attorney said his client had \$200,000 insurance. The parties settled for \$185,000. Later, the plaintiff discovered a \$1 million excess policy. The plaintiff sued again, and a jury awarded an additional \$680,000 for fraud. The perpetrators of the fraud included the insurance company and its attorneys.<sup>15</sup> The defense counsel's claim of ignorance (despite a letter in the file) did not shield him from liability or discipline.<sup>16</sup>

## Ability to pay

Similarly, providing misleading information about your client's ability to pay crosses the line.



For example, the court disciplined a plaintiff's personal injury attorney who falsely told medical lien holders "the verdict was not sufficient to satisfy all outstanding financial obligations."<sup>17</sup>

Also, when the husband's attorney told the wife that her husband was "broke," despite knowing of the husband's recent inheritance, the wife could then sue the husband's attorney for fraud.<sup>18</sup>

*Practice tip:* If your adversary implies his or her client lacks the ability to pay, address the issue directly. Try this: "The Rules of Professional Conduct prohibit attorneys from misrepresenting a party's ability to pay. When I asked about ability to pay, I received no direct response. Consequently, I assume your clients do not lack the ability to pay a judgment."

#### Do not bury material facts

Some attorneys may mislead because they might think their adversary should perform due diligence to verify represen-

tations. However, the adversarial system does not excuse lies about material information. Examples:

- A client suffered two auto collisions within two weeks. In a demand letter, the plaintiff's personal injury lawyer misrepresented injuries from the first collision as injuries caused by the second collision.<sup>19</sup>
- You may not misrepresent business income / profits.<sup>20</sup>
- Buyers of real estate stated a claim for fraud against the seller's attorney for his statement that it was "a lot of property" for the price despite his knowledge that encumbrances made legal transfer of the property iffy and its value minimal. The buyers did not have equal access to the information.<sup>21</sup>

Wrongful deception includes burying relevant evidence.

For example, after a group of plaintiffs settled claims alleging a fungicide killed their crops, they learned the defense counsel withheld scientific data showing

the fungicide was contaminated. The plaintiffs could then sue the product manufacturer and its attorneys for the difference between actual settlement and a more fair value that they would have bargained for had they been aware of the data.<sup>22</sup>

#### Need not give away the farm

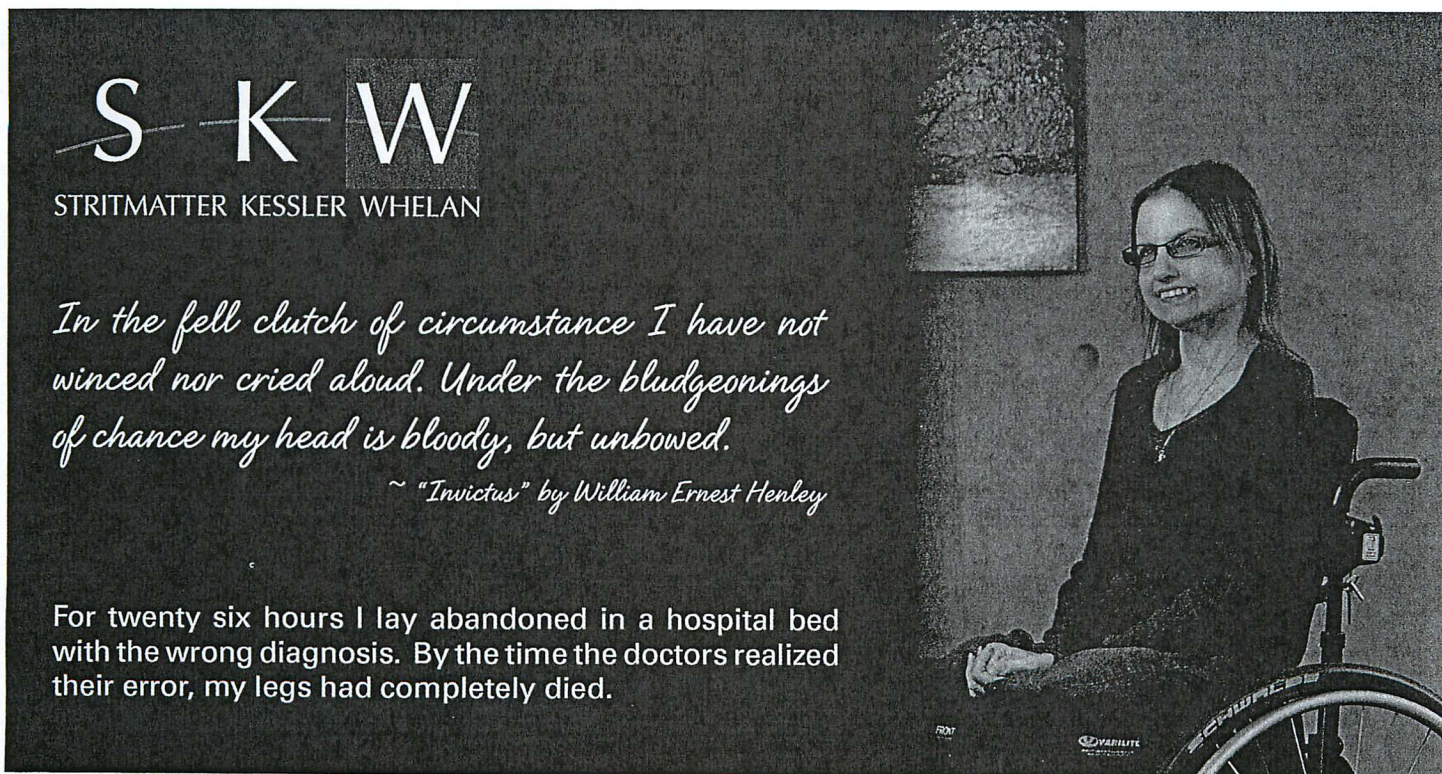
On the other hand, an attorney need not volunteer damning information unless there is an obligation to disclose or the attorney doled out a half-truth.

For example, in an employment law case, the employee settled based upon a mistake about the employer's wage rates. The employee could not rescind the settlement based on the unilateral mistake because the employer's attorney did nothing to induce the mistake.<sup>23</sup>

#### Well, I never said that to you

Lawyers may not circumvent honesty rules by incorporating someone else's

*See Where's The Line? p 18*



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*In the fell clutch of circumstance I have not  
winced nor cried aloud. Under the bludgeonings  
of chance my head is bloody, but unbowed.*

~ "Invictus" by William Ernest Henley

For twenty six hours I lay abandoned in a hospital bed  
with the wrong diagnosis. By the time the doctors realized  
their error, my legs had completely died.

Heather Spriggs v. Grays Harbor Community Hospital, et al.

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false statement. Although it may be truthful to say, "My client says he has no insurance." If the attorney knows there is insurance, he would violate, at least, the Rules of Professional Conduct.<sup>24</sup>

Might you launder deceptive statements through a mediator? "No," says the ABA. The same rules apply whether negotiations occur face-to-face or in separate rooms.<sup>25</sup>

### Stay honest

Consider these final suggestions:

- Explicitly confirm any material facts on which your client relies to settle.
- Don't fudge on material facts to induce settlement of claims or liens. You and your client may suffer significant consequences.
- Correct any misimpressions you cause.

If you want a long career in Oregon, honesty is the best policy. Over hundreds

of years, this maxim has appeared in many places, including a 17th century book on religion and George Washington's farewell address. In my view, honesty is both a moral good and a practical approach to improve long-term outcomes despite any short-term disadvantages.

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<sup>1</sup> ORS 9.460; MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3, 4.1, & 8.4.

<sup>2</sup> ORS 9.527(4).

<sup>3</sup> *Vega v. Jones, Day, Revis & Pogue*, 17 Cal Rptr 3d 26 (2004) (Shareholder in a company acquired by merger could sue the law firm that represented the acquiring company for

fraud based upon alleged concealment of toxic terms of a third party financing transaction.); *Slotkin v. Citizens Casualty Co.*, 614 F2d 301 (2d Cir 1979), reh. denied, (1980) (Attorney said, "to best of my knowledge" there was no excess insurance policy, when his firm had letters from excess carrier.); *Shafer v. Berger, et al.*, 131 Cal Rptr 777 (Cal App 2003); *McVeigh v. McGuren*, 117 F2d 672 (7th Cir 1941) (Wife sued husband's attorney who said that husband was "broke" despite attorney's knowledge of husband's recent inheritance.).

<sup>4</sup> *In re Summer*, 338 Or 29, 105 P3d 848 (2004) (Following auto collisions within two weeks, the attorney misrepresented injuries from the first as injuries caused by the second. Jury found attorney guilty of attempted grand theft by deception.); *People v. Petsas*, 262 Cal Rptr 467 (Ct App 1989) (lawyer accused of criminal offense for demand letter stating injuries were caused from single accident).

<sup>5</sup> ORCP 71B(1)(c), FRCP 60(b)(3); see, *Matter of Marriage of Elzroth*, 67 Or App 520, 679 P2d 1369 (1984) (Decree could be set aside because husband misrepresented value of his business. Court noted higher duty of husband to wife.); *In re Marriage of Conrad*, 191 Or App 749, 81 P3d 754 (2003) (reopened judgment because wife concealed ownership of assets); *Spaulding v. Zimmerman*, 116 NW2d 704 (Minn 1962) (vacated judgment because defendant did not disclose serious medical condition of injured child it discovered during defense medical exam); See, *Amort v. Tupper*, 204 Or 279, 282 P2d 660 (1955) (Plaintiff may rescind contract induces by fraud.).

<sup>6</sup> MODEL RULES OF PROFESSIONAL CONDUCT 4.1

<sup>7</sup> *In re Merkel*, 341 Or 142, 148, 138 P3d 847, 850 (2006), quoting, *In re Gustafson*, 327 Or 636, 649, 968 P2d 367 (1998); see, also, *Christofferson v. Church of Scientology*, 57 Or App, 203, 249, 644 P2d 577, rev. denied, 293 Or 456 (1982), cert. denied, 459 US 1206 (1983) (The court approved this jury instruction in fraud case: "A fact is material if a reasonably prudent person under the circumstances would attach importance to it in determining his course of action.").

<sup>8</sup> *But see, In re Summer*, 338 Or 29, 39, 105 P2d 848, 853, quoting, *In re Eadie*, 333 Or 42, 53, 36 P3d 468 (2001) ("[M]ateriality is not limited to circumstances in which a misrepresentation successfully misleads[.]"); *In re Smith*, 348 OR 535, 236 P3d 137 (2010) (Reliance not required to violate ORCP 4.1); *Korgan v. Walsleben*, 127 Or App 625, 874 P2d 1334, modified, 128 Or App 454 (1994) (Reliance is not required to violate ORS 9.460.). Oregon's Supreme Court cautioned, "A misrepresentation made with the best of intentions is nonetheless a misrepresentation." *In re McKee*, 316 Or 114, 125, 849 P2d 509, 515 (1993).

<sup>9</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. 2 states, in part: Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation,

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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. . . . (emphasis added).

<sup>10</sup> ORS 9.460; MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3 & 8.4.

<sup>11</sup> ORPC 3.3(a) states, in part: "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[.]"

<sup>12</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-370 (Feb. 5, 1993), compare, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 06-439 (April 12, 2006)(may fudge on bottom line to non-judicial mediators).

<sup>13</sup> *Fire Insurance Exchange v. Bell*, 643 NE2d 310 (Ind 1994). The court stated, "The reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice. A lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness." 643 NE2d at 312; see, also, *Shafer v. Berger, et al.*, 131 Cal Rptr 777 (Cal App 2003). In *Shafer*, plaintiff won a money award against defendant. Plaintiff spoke with the coverage

attorney for defendant's insurer, who misrepresented the insurance coverage to prevailing plaintiff. Prevailing plaintiff could sue the coverage attorney for fraud and conspiracy.

<sup>14</sup> *Nebraska State Bar Assoc. v. Addison*, 412 NW2d 855 (Neb 1987).

<sup>15</sup> *Slotkin v. Citizens Casualty Co.*, 614 F2d 301 (2d Cir 1979), cert. denied, 449 US 981 (1980).

<sup>16</sup> *In re McGrath* 468 NYS 2d 349 (NY App Div 1983).

<sup>17</sup> *Florida Bar v. McLawhorn*, 505 So2d 1338 (Fla 1987) (public reprimand and costs).

<sup>18</sup> *McVeigh v. McGurren*, 117 F2d 672 (7th Cir 1941).

<sup>19</sup> *In re Summer*, 338 Or 29, 105 P3d 848 (2004); see also, *People v. Petsas*, 262 Cal Rptr 467 (Ct App 1989) (lawyer accused of criminal offense for his letter misrepresenting that injuries were caused from a single accident).

<sup>20</sup> *Furtado v. Gemmell*, 242 Or 177, 408 P2d 733 (1965) (rescission of business sale); *Weiss et al. v. Gumbert et al.*, 191 Or 119, 227 P2d 812 (1951) (rescission of business sale); *Amort v. Tupper*, 204 Or 279, 282 P2d 660 (1955) (The court set aside divorce decree because husband misrepresented his business as failing and without value.).

<sup>21</sup> *Jeska v. Mulhall*, 71 Or App 819, 693 P2d 1335 (1985),

<sup>22</sup> *Matsuura v. Alston & Bird*, 166 F3d 1006 (9th Cir 1999) (interpreting Delaware law); but cf., *Amort v. Tupper*, 204 Or 279, 282 P2d 660

(1955) (Oregon requires election of remedies).

<sup>23</sup> *Brown v. County of Genesee*, 872 F2d 169 (6th Cir 1989).

<sup>24</sup> E.g., ORPC 1.2(c) ("A lawyer shall not assist a client in conduct that is illegal or fraudulent."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. 1: "A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

<sup>25</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 06-439 (April 12, 2006).

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Winter 2015