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Legal Lying?

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LEGAL LYING?

Comparatively analyzing US and Australian lawyers' obligations of truthfulness in mediation

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INTRODUCTION

Mediation has become very common in the USA and Australia—at least partly because of court-mandated mediation initiatives.[1] Lawyers often represent clients at mediations, so the increased use of mediation makes it important to understand how both jurisdictions regulate lawyers' advocacy on behalf of their clients during mediation.

This article comparatively analyzes how professional standards regulate the truthfulness of lawyers' advocacy during mediation in Australia and the United States. It focuses on uniform regulation in those jurisdictions.

Part One will comparatively analyze the relevant regulations in Australia and the United States, and the types of obligations contained in those regulations—for example, obligations of truthfulness and good faith. Part Two will examine the impact of these standards in shaping lawyers' conduct during mediation in Australia and the United States and suggest some measures that might be taken by regulators to more effectively control lawyers' advocacy in mediation.

It is beyond the scope of this article to examine how truthfulness of advocacy in mediation is affected by the threat of common law actions (such as negligent misstatement or misrepresentation). Such common law actions differ across the fifty states of the United States and

[1] *See* The Honourable Thomas Bathurst AC, Chief Justice of New South Wales, Off with the Wig: Issues that Arise for Advocates When Switching from the Courtroom to the Negotiating Table, Speech at the Australian Disputes Centre 1-2 (March 30, 2017) (http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20170330.pdf); Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-mandated Mediation Program,* 11 CARDOZO J. OF CONFLICT RESOLUTION 479, 479–80 (2010).

the seven Australian states. They are too unwieldy to even summarize in this article.

It is also beyond the scope of this article to examine how remedies under consumer protection statutes regulate truthfulness in mediation advocacy (such as the Australian Consumer Law in the Competition and Consumer Act 2010 (Cth) ("ACL"), and the United States Federal Trade Commission Act of 1914 ("FTC Act")).[2] However, given that there are only two primary statutes across both jurisdictions, their impact on lawyers' conduct will be briefly noted. In Australia, section 18 of the ACL prohibits conduct in trade or commerce that is misleading or deceptive, or likely to mislead or deceive.[3] It was initially introduced as section 52 of the Trade Practices Act 1974 (Cth). In its present form, section 18 applies to lawyers representing clients at mediations,[4] and it cannot be excluded by a contract or agreement.[5] It has generated thousands of relevant decisions which have led to a general upgrading of corporate and legal mores surrounding mediation and negotiation in Australia.[6]

In the United States, section 5(1) of the FTC Act prohibits unfair and deceptive acts and practices in or affecting commerce.[7] As the provision requires proof of

[2] *Australian Consumer Law 2010* (Cth) s 4(1) (Austrl.); 63 Cong. Ch. 311 (1917).
[3] Note that section 4(1) of the ACL also prohibits representations made by lawyers about future matters which are not based on reasonable grounds (e.g. where a lawyer says "my client won't be making any further settlement offers" without firm instructions to that effect from the client). *Australian Consumer Law 2010* (Cth) s 4(1) (Austrl.).
[4] *See Australian Consumer Law 2010* (Cth) s 2 (Austrl.) (defining "trade and commerce" and "services").
[5] *See Australian Consumer Law 2010* (Cth) s 96 (Austrl.) (providing that it "has effect despite any stipulation in any contract or agreement to the contrary").
[6] This is exemplified by the expansion of Australia's leading annotated version of the ACL, Miller's Australian Competition and Consumer Law Annotated, from 246 pages in 1979 (1st edition) to approximately 2,406 pages in 2020 (42d edition).
[7] 15 U.S.C.A. § 45.

unfairness in addition to deception (because of the word "and") and does not prohibit conduct which is "likely to" have the prohibited effect, it less stringently regulates lawyers' truthfulness than the ACL.[8] For example, a lawyers' statement that is "likely to deceive" would not be prohibited under the FTC Act but would be prohibited by the ACL.

Neither the FTC Act nor ACL impose penalties for breach like the relevant ethical rules. However, they may expose lawyers and their clients in mediation to a suite of possible remedies such as damages and the revocation of any agreement induced by unlawful conduct.

1) RELEVANT STANDARDS OF CONDUCT

This part analyzes the primary regulation of the truthfulness of lawyers' advocacy during mediation in each jurisdiction. In the United States, this regulation is the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). In Australia, it is the Legal Profession Uniform Conduct (Solicitors) Rules 2015 ("Solicitors Rules") and Legal Profession Uniform Conduct (Barristers) Rules 2015 ("Barristers Rules").[9] Given the length of this article, there will be little attention given to specific statutes in Australia and the United States (such as the ACL and FTC – as above), rules of civil procedure, and court rules regulating conduct during mediation. However, they are noted for completeness.

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[8] *See generally* 15 U.S.C.A. § 45.

[9] *See generally Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Cth), https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2015-0244#statusinformation [hereinafter *Australian Solicitors' Conduct Rules 2015]*; *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Cth), https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2015-0243 [hereinafter *Australian Barristers' Conduct Rules 2015*].

By way of background, the Model Rules were adopted by the American Bar Association's House of Delegates in 1983 and have been adopted by all states except California.[10] Adoption by a state renders them binding on lawyers in that state. Some states have slightly amended the Model Rules in adopting them. It is beyond the scope of this article to assess each state's version of the Model Rules—particularly because this task has already been completed by the ABA which provides comparative tables on its website explaining the differences between the Model Rules and the equivalent rule in each state.[11] In addition to the states, many federal district courts have *indirectly* adopted the Model Rules by holding that the state rules are binding in the federal district in which they sit, and some federal district courts have *directly* adopted them where state law is silent on certain issues.[12]

In Australia, the profession consists of both solicitors and barristers (the specialist court-room advocates). There are separate but similar rules for barristers and solicitors. For solicitors, a model regime was developed by the Law Council of Australia and promulgated in June 2011.[13] Each state except Tasmania and Western Australia has adopted the model rules for solicitors, and each state bar association has separate rules for their barristers. As with

[10] MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 1983), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/.

[11] *See generally Additional Legal Ethics and Professional Responsibility Resources*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest/.

[12] Tonia Lucio, *Standards and Regulation of Professional Conduct in Federal Practice,* THE FEDERAL LAWYER, July 2017, at 50, 51–52.

[13] LAW COUNCIL OF AUSTRALIA, *Guidelines For Lawyers in Mediation* (August 2011) https://www.lawcouncil.asn.au/docs/74c9c71f-0641-e711-93fb-005056be13b5/1108-Policy-Guideline-Guidelines-for-Lawyers-in-Mediations.pdf.

the Model Rules, adoption of the Solicitors Rules and Barristers Rules by a state renders them binding.

Neither the Model Rules, Solicitors Rules, nor the Barristers Rules expressly apply to mediation advocacy.[14] Perhaps because advocacy by lawyers at mediations has become common only recently, there are also no binding additional or supplementary rules of conduct governing lawyers acting as legal representatives during mediation in Australia or the United States.[15] As a result, the ethical obligations of mediation advocates are derived solely from the generally applicable professional conduct rules (i.e. the Model Rules, Solicitors Rules and Barristers Rules).

In the United States, there has been some attempt at expressly regulating conduct during mediations via the Uniform Mediation Act.[16] However, this does not purport to regulate the conduct of parties beyond issues of confidentiality and enforcement of mediation agreements,[17] and does not address ethical issues relating to truthfulness. In Australia, there are non-binding standards for lawyers in mediation released by the Law Society of New South Wales and Law Council of Australia,[18] which set out expectations of lawyers' conduct during mediation. While they are non-binding (so a breach cannot lead to disciplinary action), they remain helpful because they are the only mediation-specific

[14] Bobette Wolski, The Evaluation of the Current Rules of Professional Conduct Governing Legal Representatives in Mediation in Australia and the Unites States and a Range of Proposed Alternative 'Non-Adversarial' Ethics Systems for Lawyers (August 2011) (Ph.D. thesis, Bond University) (on file with Bond University) at 25.
[15] *See generally* Wolski, *supra* note 14.
[16] *E.g.,* Uniform Mediation Act., 2004 Bill Text NJ S.B. 679; Uniform Mediation Act., 2007 Bill Text NV S.B. 292.
[17] Wolski, *supra* note 14, at 26.
[18] LAW SOCIETY OF NEW SOUTH WALES, *Professional Standards for Legal Practitioners in Mediation* (contained in the Law Society of New South Wales Dispute Resolution Kit) (December 2012); LAW COUNCIL OF AUSTRALIA, *supra* note 13.

standards in Australia. They aspire to influence practitioners' conduct by identifying best practices in situations of uncertainty and provide guidelines for professional bodies and courts to consider during disciplinary proceedings.[19]

The analysis below will focus on the principal obligations imposed by the Model Rules, Solicitors Rules, and Barristers Rules. It will begin with a grand summary of lawyers' ethical obligations under the rules and significant statutes in Australia and the United States.

There may be other rules or sections in these statutes and ethical rules which also relate to truthfulness in mediation but assessing each such obligation is not possible in an article of this length.

[19] Bobette Wolski, *On Mediation, Legal Representatives and Advocates,* 38(1) UNI. OF NEW SOUTH WALES L. J. 5, 12 (2015) [hereinafter Wolski, *On Mediation*].

1a) Grand Summaries of Lawyers' Obligations

AUSTRALIA To whom is the obligation owed?	What is the nature of the obligation?	What is the relevant rule or law?
Mediator	1. Paramount duty to the mediator and administration of justice 2. Not deceive, or knowingly or recklessly mislead, the mediator 3. Take all necessary steps to correct a misleading statement 4. Not engage in conduct which is prejudicial to the administration of justice or profession	1. Solicitors Rule (SR) 3.1; Barristers Rules (BR) 4 and 24 2. SR 19.1; BR 24 3. SR 19.2; BR 25 4. SR 5.1; BRs 4 and 23
Opposing lawyer	5. [Solicitors only] Not knowingly make a false statement in relation to the case 6. [Barristers only] Not knowingly make a false *or misleading* statement in relation to the case 7. Take all necessary steps to correct any misleading statement made o [Barristers] No need to correct an opponent's error o [Solicitors] No need to correct an opponent's *or other person's* error	5. SR 22.1 6. BR 49 7. SRs 19.3, 22.2 and 22.3; BRs 50 and 51
Opposing lawyer and opposing client	8. Participate in mediation in good faith	8. Federal and state statutes such as § 27 of NSW Civil Procedure Act, and Court Rules
Any person	9. [Solicitors] Not make any statement which grossly exceeds the legitimate assertion of their client's rights or entitlements AND also misleads or intimidates the other person 10. [Solicitors] Not use tactics that go beyond legitimate advocacy and are primarily designed to embarrass or frustrate another 11. [Solicitors] Be honest and courteous in all dealings	9. SR 34.1.1 (also note § 18 of ACL) 10. SR 34.1.3 11. SR 4.1.2 12. BR 4(c) 13. BR 8(a) 14. § 18 of ACL 15. § 4(1) of ACL

	12. [Barristers] Act honestly and fairly 13. [Barristers] Not engage in conduct which is dishonest or otherwise discreditable 14. Not engage in conduct that is misleading or deceptive, or likely to mislead or deceive 15. Not make a representation about a future matter that is not based on reasonable grounds	
Client	16. Act in client's best interests (note the potential of this obligation to conflict with the above)	16. SR 4.1; BR 35

UNITED STATES OF AMERICA To whom is the obligation owed?	What is the nature of the obligation?	What is the relevant rule or law?
Everyone except the lawyer's client	1. Not make a false statement of material fact or law 2. Not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client (unless prohibited by MR 1.6) 3. Engage in an act or practice that is unfair and deceptive	1. Model Rule (MR) 4.1 2. MR 4.1 3. 15 U.S.C.A. § 45(a)(1) (West 2006)
Mediator	4. Not engage in conduct which is prejudicial to the administration of justice 5. Demonstrate respect for the legal system 6. Seek improvement of the law, administration of justice and the quality of service rendered by the profession 7. Improve the law and the legal profession 8. Exemplify the profession's ideals of public service	4. MR 8.4 5. MR Preamble [5] 6. MR Preamble [6] 7. MR Preamble [7] 8. MR Preamble [7]
Opposing lawyer and opposing client	9. Participate in mediation in good faith	9. Federal and state statutes, such as Fed. R. Civ. P. 16, and Court Rules
Client	10. Act in client's best interests–such as by providing competent representation and using reasonable diligence and promptness (note the potential to conflict with the above)	10. MRs 1.1 to 1.4

1b) Obligations relating to truthfulness

i. Australia

Before examining the six types of Australian duties relevant to truthfulness below, it is important to note that the Australian Rules draw a distinction between duties owed to the mediator and duties owed to opponents and others. In other words, the duties depend on whom the lawyer is addressing. This distinction will be evident in the analysis of the rules below. Also, while it has been suggested by the Chief Justice of the Supreme Court of New South Wales that there is a single "duty of honesty owed to opponents,"[20] as the analysis below will show, it is more appropriate to state that, in the context of a mediation, lawyers may owe multiple obligations to their opponents which relate to truthfulness.

First, the paramount and highest duty is owed to the "court." The court is defined in both the Solicitors and Barristers Rules to include a mediation.[21] The relevant duties are therefore owed to the mediator as they would be owed to the court in litigation.[22] Rule 19.1 of the Solicitors Rules states that "[a] solicitor must not deceive or knowingly or recklessly mislead the court."[23] The principal obligation—not to deceive the mediator—is unqualified. Rule 19.2 adds to this by stating that a "solicitor must take

[20] Bathurst, *supra* note 1, at ¶ 21.
[21] *Australian Solicitors' Conduct Rules 2015*, Glossary of Terms (Austl.); *Australian Barristers' Conduct Rules 2015* (Cth) r. 125 (Austl.).
[22] *See generally Australian Solicitors' Conduct Rules 2015*; *Australian Barristers' Conduct Rules 2015*. The duty is owed to the mediator because a lawyer cannot owe a duty to an abstract noun or a process and already owes different duties to their opposing lawyer and opposing client. So, the only entity to whom the lawyer could owe the relevant duty is the mediator. *See* Wolski, *supra* note 14, at 31–32.
[23] *Australian Solicitors' Conduct Rules 2015*, r. 19.1 (Austl.)

all necessary steps to correct a misleading statement."[24] There are equivalent obligations to the mediator in Rules 24 and 25 of the Barristers Rules.[25]

Because these duties of solicitors and barristers apply to any statement made to the mediator, the other persons present in mediation (namely, the opposing lawyer and opposing client) also presumably receive the benefit of the duties while the mediator is in the room. However, perplexingly, this must mean that if the mediator leaves the room, those remaining are only protected by the different, less stringent rules outlined in this part of the article (i.e. duties owed to the opposing lawyer, opposing client and third parties). Such shifting ethical sands make it more difficult for lawyers to manage their conduct during mediation than when subject to the static ethical rules applicable to litigation.

In the United States, the Model Rules do not contain any similar differentiated obligations. They simply, through Model Rule 4.1, impose a duty on a lawyer representing a client at a mediation that is applicable to all persons except the lawyer's client.[26]

Second, Rule 22.1 of the Solicitors Rules provides that "[a] solicitor must not knowingly make a false statement to an opponent in relation to the case."[27] Rule 22.2 builds on this, obliging solicitors to "take all necessary steps to correct any false statement made . . . to an opponent as soon as possible" after becoming aware of its falsity.[28] Rule 22.3 further informs the obligations above, by providing that "[a] solicitor will not have made a false statement to the opponent simply by failing to correct" an opponent's error.[29] These provisions are mirrored by Rules 49 to 51 of the

[24] *Australian Solicitors' Conduct Rules 2015,* r. 19.2 (Austl.).
[25] *Australian Barristers' Conduct Rules 2015*, r. 24–25 (Austl.).
[26] MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 1983).
[27] *Australian Solicitors' Conduct Rules 2015*, r. 22.1 (Austl).
[28] *Australian Solicitors' Conduct Rules 2015*, r. 22.2 (Austl.).
[29] *Australian Solicitors' Conduct Rules 2015*, r. 22.3 (Austl.).

Barristers Rules–although Rule 49 extends to any false *or misleading* statement, so it is broader than Solicitors Rule 22.1.[30]

It is noted that the Solicitors Rules contain the unique Rule 19.3, which states that a solicitor will not mislead by simply failing to correct an opponent's *or other person's* error.[31] This is broader than Rule 22.3 above and Barristers Rule 51 because it applies to statements of "other persons," not just an opponent.

Third, there are more specific obligations dealing with truthfulness to the mediator contained in Rules 19.4 to 19.12 of the Solicitors Rules.[32] Similar provisions are contained in 26 to 29 of the Barristers Rules; however, they do not apply to mediation (they only apply to civil trials).[33] Therefore, it is clear that lawyers have different obligations in litigation than in mediation, despite contrary assertions.[34] In any case, such specific obligations relating to truthfulness to the mediator are not contained in the US Model Rules (as above, because "tribunal" is not defined to include mediation).[35]

Fourth, Rule 34.1.3 prevents solicitors from using tactics that go beyond legitimate advocacy *and* are primarily designed to embarrass or frustrate another person.[36] Although cast in broad terms, this rule establishes some restrictions on the tactics solicitors may employ in mediation. There is no equivalent restriction on barristers' tactics in Australia nor on lawyers' tactics in the United States.

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[30] *Australian Barristers' Conduct Rules 2015*, r. 49–51 (Austl.).
[31] *Australian Barristers' Conduct Rules 2015*, r. 19.3 (Austl.).
[32] *Australian Solicitors' Conduct Rules 2015*, r. 19.4–19.12 (Austl.).
[33] *Australian Barristers' Conduct Rules 2015*, r. 26–29 (Austl.).
[34] Bathurst, *supra* note 1, at 25.
[35] MODEL RULES OF PRO. CONDUCT r. 1.0(m) (AM. BAR ASS'N 1983).
[36] *Australian Solicitors' Conduct Rules 2015*, r. 34.1.3 (Austl.).

Fifth, Rule 34.1.1 prohibits a solicitor from making any statement which grossly exceeds the legitimate assertion of their client's rights or entitlements and which misleads or intimidates another person.[37] This is relevant to overstatement and puffing and is largely directed at how statements are phrased—ensuring advocates employ careful language when speaking during mediation. Unlike Australian consumer-protection statutes, namely section 18 of the ACL, breach of Rule 34.1.1 requires the statement to *actually* mislead the other person, rather than merely be "likely to" mislead.[38] As solicitors are subject to *both* the Solicitors Rules and ACL, this distinction only relates to liability—as a breach of the Solicitors Rules may lead to professional misconduct findings, while breach of the ACL may lead to civil liability. Nevertheless, it should be acknowledged. Again, there is no equivalent restriction on barristers' tactics, nor on lawyers' tactics in the United States.

Sixth, there is a broad obligation in Rule 4.1.2 of the Solicitors Rules that compels solicitors to be honest and courteous in all dealings with their clients, other solicitors and third parties.[39] Rule 5(c) of the Barristers Rules similarly requires barristers to act honestly and fairly.[40] There is a more limited duty in Rule 8(a) of the Barristers Rules which prevents barristers from engaging in conduct which is dishonest or otherwise discreditable to barristers.[41] These obligations may be argued to require some degree of truthfulness during mediation—although they have yet to be considered in that context. This is yet another example of the difficulty that arises from the rules not specifically dealing with the obligations of mediation advocates.

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[37] *Australian Solicitors' Conduct Rules 2015*, r. 34.1.1 (Austl.).
[38] *Australian Consumer Law 2010* (Cth) s 18 (Austrl.); *Australian Solicitors' Conduct Rules 2015*, r. 34.1.1 (Austl.).
[39] *Australian Solicitors' Conduct Rules 2015*, r. 4.1.2 (Austl.).
[40] *Australian Barristers' Conduct Rules 2015*, r. 5(c) (Austl.).
[41] *Australian Barristers' Conduct Rules 2015*, r. 8(a) (Austl.).

ii. The United States – Model Rule 4.1

Unlike the Australian rules, the Model Rules do not impose *separate* obligations relating to the court and third persons. Rather, they contain a *single* obligation which only relates to third persons. A "third person" includes the mediator of a dispute in which a lawyer is representing a party.[42] It also includes the lawyer's opponent and the opponent's client, but it does not include a lawyer's own client,[43] nor does it include a judge.[44]

Model Rule 4.1 provides that:

> In the course of representing a client, a lawyer must not knowingly:
>
> a) Make a false statement of material fact or law to a third person; nor
>
> 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.[45]

The single obligation referred to above is contained in Model Rule 4.1(a). The focus of this paper will be on 4.1(a) because it squarely deals with truthfulness. While 4.1(b) also deals with truthfulness, it is only applicable in very limited circumstances (i.e. to avoid assisting a client's

[42] MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 1983).
[43] State *ex rel.* Okla. Bar Ass'n v. Bolusky, 2001 OK 26, ¶ 18 n. 5, 23 P.3d 268, 275 n. 5 (citing MODEL RULES OF PRO. CONDUCT Ch. 1, App. 3-A. (OKLA. BAR ASS'N 1991)).
[44] Attorney Grievance Comm'n of Md. v. Rohrback, 591 A.2d 488, 495–97 n. 8 (Md. 1991) (citing MARYLAND LAWYERS' RULES OF PRO. CONDUCT r. 4.1(a)(2) (MD. STATE BAR ASS'N 1990)) (holding attorney Rohrback's failure to disclose the client's use of a false name to the Commissioner overseeing the criminal case fails to meet the clear and convincing evidence standard requirement to find a Rule 4.1 violation).
[45] MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 1983).

criminal or fraudulent act and where it is not trumped by Rule 1.6). It is therefore less commonly invoked than 4.1(a) and unlikely to arise in the context of mediation.

iii. The United States – The History of Model Rule 4.1(a)

The predecessor to Model Rule 4.1(a) was contained in Disciplinary Rule 7-102(A)(5) of the ABA's 1969 Model Code of Professional Conduct, which provided that "[i]n his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact."[46] Commenting on this rule, the reporter to the ABA's Commission on Evaluation of Professional Standards (which drafted the Model Rules) and eminent expert on legal ethics,[47] Geoffrey C. Hazard, Jr., said:

> This provision might be characterized as a minimalist formulation of the law of disclosure. It prohibits only misrepresentation and requires no affirmative disclosure. It is limited to statements of "fact" as distinguished from evidence, indications, portents, opinions, possibilities, or even probabilities of which the lawyer may be aware. It is limited to matters that are false as distinguished from those of which the lawyer is skeptical or even suspicious.[48]

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[46] MODEL CODE OF PRO. RESP. DR 7-102(A)(5) (1969) (AM. BAR ASS'N, amended 1980).

[47] Sam Roberts, *Geoffrey Hazard, Influential Arbiter of Legal Ethics, Dies at 88*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/obituaries/geoffrey-hazard-influential-arbiter-of-legal-ethics-dies-at-88.html; A.L.I., In Memoriam, *In Memoriam: Geoffrey C. Hazard, Jr.*, (Jan. 11, 2018), https://www.ali.org/news/articles/memoriam-geoffrey-c-hazard-jr/.

[48] Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 189 (1981).

In 1981, the ABA's Commission on Evaluation of Professional Standards proposed a final draft of its new model ethical rules, which contained Model Rule 4.1(a).[49] That rule provided that "[i]n the course of representing a client a lawyer shall not: (a) Knowingly make a false statement of fact or law to a third person."[50] In Hazard's view, the proposed final draft of Model Rule 4.1(a) corresponded to the existing disciplinary rule (i.e. DR 7-102(A)(5)).[51]

But this modest proposal did not survive. The rule that emerged from the ABA's 1983 Annual Meeting was qualified by the term "material" (a term that was defined in an early draft of the Model Rules but not in the final version).[52] The rule provided that "[i]n representing a client a lawyer shall not knowingly: (a) make a false statement of *material* fact or law to a third person."[53] In relation to that rule, the Commission commented that it was "substantially similar" to DR 7-102(A)(5),[54] despite the earlier rule being

[49] Hazard, *supra* note 48*,* at 191.
[50] MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR ASS'N, Proposed Final Draft May 30, 1981), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.pdf.
[51] Hazard, *supra* note 48*,* at 191.
[52] It provided that "'[m]aterial' when used in reference to degree or extent denotes a matter of practical importance as distinct from one that is formal or nominal." MODEL RULES OF PRO. CONDUCT Terminology (AM. BAR ASS'N, Proposed Final Draft May 30, 1981), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.pdf.
[53] L. STANLEY CHAUVIN, JR., AM. BAR ASS'N HOUSE OF DELEGATES, REPORT 401 TO THE HOUSE OF DELEGATES ON PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT, at 111 (July 11, 1983), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-83.pdf (emphasis added).
[54] ROBERT J. KUTAK, AM. BAR ASS'N HOUSE OF DELEGATES, REPORT 400 TO THE HOUSE OF DELEGATES, APPENDIX B, COMPARISON OF PROPOSED MODEL RULES, AS REVISED, WITH PROVISIONS OF 1969 MODEL CODE OF

unqualified by the word "material," and the new rule being qualified to an undefined extent, as the word "material" was included but not defined.

iv. The United States – The Effect of Model Rule 4.1(a)

Since its adoption, Model Rule 4.1(a) has created "a floor below which lawyer-negotiators may not go."[55] However, there is a "wide chasm dividing expert opinion on the applicable standard of truthfulness" under the Rule.[56]

The terms of Model Rule 4.1(a) prohibit a lawyer from knowingly making false statements of material fact or law.[57] "Knowingly" is defined as denoting "actual knowledge of the fact in question."[58] A person's knowledge "may also be inferred from circumstances."[59] Neither "material" nor "false" are defined in the rule. While the meaning of false is quite straightforward, the meaning of material is subject to great doubt and will be explored below.

Essentially, unlike the Australian rules, Model Rule 4.1(a) permits a U.S. lawyer representing a client at a mediation to knowingly make false statements about non-material facts. It also permits a U.S. lawyer to knowingly make false statements about non-factual matters.

In other words, its effect is that small lies are legal, while large lies are not. It is not clear whether the basis for

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PROFESSIONAL RESPONSIBILITY, at 16 (June 30, 1982), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-82.pdf (comparing the revised proposed model rules with provisions of the model code of professional responsibility from 1969).

[55] Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435, 450 (D. Md. 2002); Alexsam, Inc. v. WildCard Sys., No. 15-CV61736-BLOOM/VALLE, 2019 U.S. Dist. LEXIS 24347, at 26–29 (S.D. Fla. Feb. 13, 2019).

[56] John W. Cooley, *Mediation Magic: Its Use and Abuse,* 29 LOY. U. CHI. L. J. 1, 95 (1997).

[57] MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 1983).

[58] *See In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999) (quoting Ariz. R. Sup. Ct. 42); Brown v. Cnty. of Genesee, 872 F.2d 169 (6th Cir. 1989).

[59] *Tocco*, 984 P.2d at 543.

this position is that small lies are of no consequence, or alternatively, that everyone expects negotiators to lie so the ethical regulators' focus should be on preventing large lies that might affect the outcome of the mediation. But a series of small but legal lies could have more impact than one big illegal lie.

Further, whatever the basis of the Model Rule, its impact and operation entirely depend on distinguishing material facts from nonmaterial ones and factual statements from nonfactual ones. As the below analysis shows, those responsible for regulating lawyers' truthfulness have not been successful in drawing these distinctions.

v. The United States – Distinguishing Statements for the Purposes of Model Rule 4.1(a)

i) *Comment to Model Rule 4.1*

A Comment accompanies Model Rule 4.1. Like all Comments to the Model Rules, it is not binding. Its presence acknowledges that the Rule's scope is not immediately obvious. Under the heading "Statements of Fact," the Comment relevantly provides that:

> 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.[60]

The Comment therefore establishes a circumstance-dependent test for determining whether a statement is one of fact. Presumably, the relevant "circumstances" mean the circumstances in which the statement is made.

Despite starting off by providing guidance about distinguishing between factual and non-factual statements, confusingly, the Comment fails to deal with that distinction and instead discusses the distinction between material and nonmaterial facts. It does so by stating that the following are "ordinarily" not "material fact[s]": first, estimates of price or value placed on the subject of a transaction—which seemingly permits lies about all estimates or opinions of value[61]— and second, a party's intentions about the acceptable settlement of a claim.

These two categories cover a variety of statements which are often made in mediation, such as inflated or deflated offers, counteroffers, and concessions; representations regarding clients' settlement intentions; false estimates of value concerning bargaining subjects; and lies about target points.[62]

The breadth of these categories is problematic. For example, one could interpret the first category to allow a lawyer to lie to the mediator, the opponent, and the opponent's client about the value of a property or transaction—even if that is the central issue in the mediation—because such an estimate is not regarded as material. However, if a statement's materiality depends on

[60] MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 1983).
[61] Don Peters, *When Lawyers Move Their Lips: Truthfulness in Mediation and a Modest Proposal,* J. DISP. RESOL. 119, 129 (2007). By contrast, Australian lawyers would likely regard such statements as containing all the elements of the common law cause of action for fraudulent misrepresentation: first, a false statement; second, knowingly made; third, for the purposes of inducing the representee to rely on the false statement and gaining a material advantage for the representor.
[62] Peters, *supra* note 61, at 129.

the context in which it is made, and the central issue is that property or transaction, one might think that such a statement would be highly material.

As this example shows, regardless of the importance of such information in the unique circumstances of each mediation, these categories suggest that it is non-material—therefore opening "a door for lawyers to lie when negotiating."[63] These exceptions to materiality accept that disingenuous behavior is indigenous to most legal negotiations.

The Comment's use of "ordinarily" suggests that statements falling within these categories may, in some circumstances, concern material facts. However, the Comment fails to explain what circumstances make a difference and why. It therefore exacerbates the confusion.

ii) *Case Law Dealing with Model Rule 4.1*

Several courts have grappled with the meaning of Model Rule 4.1(a). The Federal District Court for the District of Maryland has explained: "[w]hile the legal journals engage in some hand-wringing about the vagueness of this aspect of Rule 4.1, in reality, it seldom is a difficult task to determine whether a fact is material to a particular negotiation.[64] In cases of real doubt, disciplinary committees and ultimately the courts will decide."[65]

Courts provide guidance for these "cases of real doubt." Courts have held that a fact is material if it "reasonably may be viewed as important to a fair understanding of what is being given up and, in return,

[63] Peters, *supra* note 61, at 129 (quoting James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 267 (1999)).
[64] Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 449 (D. Md. 2002).
[65] *Ausherman*, 212 F. Supp. 2d at 449.

gained by the settlement."[66] Similarly, courts have concluded that a fact is material if it could or would influence the hearer's decision-making process.[67] For example, it has been held to be material for a lawyer to tell third parties to comply with an invalid subpoena,[68] and for a lawyer to incorrectly tell the opposing birth father that the relevant child would not be adopted without the birth father's consent during adoption proceedings.[69] However, courts have determined that it is not necessary to prove the statement actually influenced the hearer under Model Rule 4.1.[70] Courts have also suggested that the overriding consideration when assessing the materiality of a fact is achieving "justice;" this being "a fairly negotiated resolution based on candor and integrity with respect to all material representations."[71]

In applying the above principles to determine the materiality of a statement of fact or omission, the Federal District Court for the District of Maryland proposed a four-step approach. First, to identify the impugned statement of fact or omission; second, determine if it is untrue or deceptively incomplete in any significant respect; third, determine, if reasonably viewed, it is important to the subject being negotiated; and fourth, determine if the attorney knew or should have known that the statement was untrue at the time it was made.[72]

These decisions do little to assist in practice because they are limited to their specific circumstances. They do not assist a lawyer–negotiator in determining, in the heat of a

[66] *Ausherman*, 212 F. Supp. 2d at 449.
[67] *See In re* Merkel, 138 P.3d 847 (Or. 2006).
[68] Attorney Grievance Comm'n of Maryland v. Cocco, 109 A.3d 1176 (Md. 2015).
[69] *In re* Krigel, 480 S.W.3d 294 (Mo. 2016).
[70] *In re* Winthrop, 848 N.E.2d 961 (Ill. 2006); *In re* Pizur, 84 N.E.3d 627 (Ind. 2017).
[71] Ausherman, 212 F. Supp. 2d at 449; U.S. v. Shaffer Equipment Company, 11 F.3d 450, 457-58 (4th Cir. 1993).
[72] Ausherman, 212 F. Supp. 2d at 451.

mediation, whether Model Rule 4.1(a) permits a false statement.

iii) *ABA Formal Ethics Opinion 06-439*

Apart from the Comment and case law, ABA's Formal Ethics Opinion 06-439 also deals with Model Rule 4.1(a)—which is a 2006, five-page formal opinion with twenty-two footnotes.[73] The Opinion intends to explain the meaning of Model Rule 4.1. Again, the perceived need for such a detailed document dealing with the meaning of a one-sentence rule is an acknowledgement of the difficulty of interpreting it.

The Opinion specifically addresses the lawyer's obligation to be truthful when making statements on behalf of a client at a mediation.[74] It repeats the Comment's circumstance-dependent test.[75] But the Opinion otherwise makes no reference to circumstances. Instead, it relies on the proposition that statements departing from the truth by exaggeration of strengths or deemphasis of weaknesses are posturing or puffing—namely they "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."[76] It therefore shifts the focus from the circumstances in which the statement is made to the likelihood of the recipient relying on it.

The Opinion does not explain why a party to whom a false statement is made would not be expected to rely on it, nor how to distinguish such false statements from ones on which reliance will be placed.[77] Nor does the Opinion explain why a lawyer‑negotiator would bother to make a

[73] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[74] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[75] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[76] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[77] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).

statement which her or his opponent and client were not expected to rely on.[78]

Additionally, the Opinion says that statements about a party's bottom line, a lawyer's settlement authority, and the death of a client are "material," but that statements about negotiating goals, willingness to compromise, or a client's bargaining position are not.[79] It seems extremely difficult to distinguish between these sets of statements—for example, between statements about a party's bottom line and statements about its negotiating goals.

The Opinion also claims that Comment C to section 98 of The Restatement (Third) of The Law Governing Lawyers "echoes the principles underlying Comment [2] to Rule 4.1."[80] However, the Opinion then misquotes Comment C to the Restatement, leaving the reader with no coherent statement of principle.[81]

Considering all of the above, the Opinion leaves the reader no wiser about the meaning of Rule 4.1(a).

iv) *The Restatement (Third) of The Law Governing Lawyers*

Model Rule 4.1(a) is also dealt with by the Restatement.[82] Section 98 of the Restatement and the comments attached to it provide a test for determining whether Rule 4.1(a) prohibits a lawyer from making a statement that is false.[83] But the test appears completely unworkable in practice, for reasons explained below.

According to Comment C, whether a statement should be characterized as a false statement of fact or law

[78] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[79] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[80] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[81] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[82] Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000).
[83] Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000).

depends on whether it is "reasonably apparent"[84] that the listener-to-be would regard the statement as one of three possible alternatives: (1) one of fact, (2) based on the speaker's knowledge of facts reasonably implied by the statement, or (3) merely an expression of the speaker's state of mind.[85]

While the Comment does not make this explicit, it seems clear that the first two types of statements are statements of fact, and the third type is not a statement of fact. The Comment thus suggests that the first two types might (if they are false and about something "material") be forbidden by Model Rule 4.1(a) while the third type seems to be the only permissible form of false statement.

The Restatement says that assessing which type of statement is involved requires the speaker-to-be (i.e., the lawyer) to weigh "the circumstances in which the statement is made"—particularly seven factors—before making the statement.[86] These factors are:

1. The past relationship of the negotiating persons;
2. Their apparent sophistication;
3. The plausibility of the statement on its face;
4. The phrasing of the statement;
5. Related communication between the persons involved;
6. The known negotiating practices of the community in which both are negotiating; and

[84] Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000).
[85] Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000).
[86] Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000).

7. Similar circumstances.[87]

Neither the meaning nor the relevance of these factors is explained, and some are obscure. For example, what are "similar circumstances*"*? Whatever they are, do they tend to make the statement more or less likely to be perceived as a statement of fact? The latter question also arises in relation to the "sophistication" of the listener-to-be.

These are serious problems. But what makes the test propounded by Comment C unworkable in practice is that, before making a false statement in the heat of negotiations, the speaker-to-be must rapidly use what Australian courts call a "multi-factorial approach" to determine whether the recipient-to-be of the statement is likely to treat it as a statement of fact (in which case the speaker-to-be must be truthful if it is a "material" fact) or not (in which case the speaker-to-be is free to lie). [88]

The task imposed by the Comment C test is even more burdensome than it first appears. For example, it is common to have twenty people in a mediation room during construction disputes in which defendants have counterclaimed, which joins other parties and their legal representatives. The test set out in Comment C would require a lawyer for a party to perform the multi‑factorial analysis in relation to *every* person present before making a statement—because the statement is not permitted unless it falls into the third category with respect to every person present.

Given these problems, the explanation in section 98 of the Restatement of how Model Rule 4.1(a) is to be applied adds further confusion to an already confusing topic.

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[87] Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000).

[88] *See, e.g.*, Caltex Refineries (Qld) Pty Ltd. v Stavar (2009) 259 ALR 616 [100] (Allsop P), [174] (Basten JA), [241] (Simpson J) (Austl.) (using a multi-factorial analysis to determine whether a refinery that employed Mr. Stavar to lag pipes with asbestos owed a novel duty of care to his wife, who developed malignant mesothelioma from washing his work clothes laden with asbestos).

Even if the Restatement test were workable, the writers ask the obvious question: if the speaker-to-be is free to lie only when it is reasonably apparent that the recipient-to-be will not treat their statement seriously, regarding it as hyperbole or a reflection of the speaker's state of mind, why bother?[89] In particular, why take the risk of breaching Model Rule 4.1(a) by inadvertently telling a lie about a material fact, given that the best outcome for the lawyer is using their freedom to lie to a person who will not take the lie seriously? The writers suggest that it would take much less effort, and certainly be less risky, to tell the truth.

The writers also suggest that the Restatement test negatively impacts the value and integrity of mediation as a dispute resolution process. Its practical effect is that a prudent listener who is aware of the test is likely to assume that everything they are told by the opposing lawyer is a lie. This is not only detrimental to lawyers' reputations, but it also makes mediation—a structured negotiation—much less efficient than if everyone present could assume that they were being told the truth.

The writers suggest that further attempts by the ABA or the Restatement to delineate the circumstances in which lawyers can make false statements during negotiations would be futile. This is because the exercise is inherently self-contradictory. False statements are justified by saying that they "are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely"[90] and by saying that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."[91] Thus, the making of false statements is justified by asserting

[89] Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000).
[90] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[91] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).

that the recipient of the statements will not be harmed by them because they will not rely on them and/or will not regard them as communicating factual material.

The obvious problem with this defense of false statements is that, if they are trivialized to this extent, there is little if any point in making them. But, to the extent that more substantive false statements are permitted, the damage caused by them will increase and the ABA's position will be seen to be morally wrong.

In short, there is an inescapable dilemma resulting from allowing some false statements: The more trivial the permitted false statements are, the less point there is in making them. And the more substantive the permitted false statements are, the greater the damage they will cause to the recipients and to the moral authority of U.S. lawyers.

This explains why neither Model Rule 4.1(a) nor the relevant commentary brighten the line between what is impermissible lying and permissible puffing or posturing and why.[92] There is only one escape from the dilemma: the simple stratagem of prohibiting false statements by lawyers.

Further, any possible advantage accruing to a lawyer from the ability to tell lies during a mediation can easily be nullified by a well-advised opponent who says to them, preferably in writing, before the start of the mediation something to the following effect:

> First, I understand that Model Rule 4.1(a) permits you to lie during our negotiations about non-material facts. We are putting you on notice that, throughout our negotiations, we will assume that all statements you make to us concern material facts and, therefore, that you are obliged to be truthful in making them. Second, if you wish to make any statements of non-material facts, we require you to state in advance that you are about to do this, and

[92] JOHN W. COOLEY, MEDIATION ADVOCACY 150 (National Institute for Trial Advocacy ed., 1st ed. 1996) [hereinafter COOLEY, MEDIATION ADVOCACY].

> we are informing you now that we will not believe those statements because you are permitted to lie when making them. Third, if you disagree with these rules of engagement, please let us know before we start negotiating. In the absence of any articulated disagreement, we will assume that you have agreed to be bound by these rules. If you are not prepared to agree to these rules of engagement, we will assume that you are lying throughout the mediation and will not believe anything you say.

vi.) Further Comparative Analysis Of The Australian Rules And Model Rule 4.1(a)

First, both sets of rules use a largely subjective frame of analysis—focusing on *knowing* conduct (although knowledge may be inferred from the circumstances). The terms of the relevant rules focus on the state of mind of the relevant lawyer (except for the suggestion in The Restatement to focus on the recipient's mind).[93] For example, the rules therefore do not prohibit innocent misrepresentation or the making of a false or misleading statement which the lawyer did not know to be such at the time of making nor after it.[94]

This frame of analysis can be quite problematic in determining any breach of the relevant rules, because it allows lawyers to plead their lack of knowledge prior to making any false or misleading statements, and it forces

[93] *E.g.,* Restatement (Third) of the Law Governing Lawyers § 98 cmt. c (Am. Law Inst. 2000) ("Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind.").

[94] *See*, *e.g.*, *Australian Barristers' Conduct Rules 2015*, *r.* 24 (Austl.) (stating when misrepresentation or a misleading statement is made to the mediator, the obligation not to deceive is absolute).

prosecuting authorities to produce objective evidence to prove the impugned lawyer's knowledge. This may also encourage lawyer negligence, as lawyers may be encouraged to refrain from undertaking due diligence (that a reasonable lawyer in their position would have taken) to confirm the truthfulness of a statement they make in mediation.

However, extending the rule to negligent falsity or misleading statements would appear to significantly broaden the reach of the rule, precipitate disciplinary litigation and complicate the relevant tribunals' and courts' inquiries in such litigation. So, the current approach would seem to strike an appropriate balance between these two competing interests.

Second, an issue, which is not squarely addressed in Model Rule 4.1 or the relevant Australian rules, is whether lawyers are obliged to correct false or misleading statements made by their clients during mediation, or by mediators. In relation to their client, given that the lawyer is essentially a unified party with their client, it would appear that the relevant rules require correction under Solicitors Rules 19.2 and 22.2, and Model Rule 4.1.[95] Otherwise, it would allow a lawyer to instruct their client to disseminate false or misleading statements with impunity under the ethical rules. But, for Australian solicitors, this interpretation is complicated by Solicitors Rule 19.3 which provides that a solicitor will not make a misleading statement to a mediator simply by failing to correct an error in a statement by "any other person"—including the lawyer's client.[96] While this seemingly leaves it open for a solicitor to make such an instruction to their client, other obligations, such as in section 18 of the ACL, are likely to prevent the relevant solicitor from doing so.[97]

[95] *Australian Solicitors' Conduct Rules 2015*, r. 19.2, 22.2 (Austl.); MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 1983).
[96] *Australian Solicitors' Conduct Rules 2015*, r. 19.3 (Austl.).
[97] *Australian Consumer Law 2010* (Cth) s 18 (Austrl.).

The situation is a little different for the mediator. In Australia, Solicitors Rule 19.2 would apply to require the lawyer to "take all necessary steps" to correct a misleading statement made by the lawyer to the mediator after becoming aware of its misleading nature.[98] There is no equivalent rule in the United States, so a lawyer who unknowingly made a false statement of material fact to the mediator has no obligation to correct the statement after finding out that it was false. As a result, the mediator could continue to conduct the mediation on the basis of the false statement. This is obviously problematic.

Third, it is clear from above that the Australian obligations are more comprehensive than their U.S. equivalents. The Australian obligations relating to truthfulness are not limited to *material* facts—providing a broader obligation by covering all types of facts. They also extend to expressly prohibiting deception and reckless misleading of the mediator—again holding lawyers to a higher standard of truthfulness.

While there are other textual differences between the jurisdictions' rules, there is likely to be little difference in their practical application. For example, while the Australian obligations clarify that failure to correct an opponent or other person in mediation is not misleading conduct and the Model Rules are silent on this issue, the lack of express provisions preventing such silence suggests that it would be allowed in the United States. Additionally, a Solicitors Rule 34.1.1 statement which grossly exceeds the legitimate assertion of a client's rights and which misleads the other person may be considered to also be a false *material* statement to a third person under Model Rule 4.1.[99]

[98] *Australian Solicitors' Conduct Rules 2015*, r. 19.2 (Austl.).
[99] *Australian Solicitors' Conduct Rules 2015*, r. 34.1.1 (Austl.); MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 1983).

So, there may be some overlap, despite the Model Rules not being couched in the same terms, nor as comprehensively.

However, as explained below, the practical application and understanding of these sets of rules in Australia and the United States fundamentally differ. While the Law Council of Australia guidelines do not *prohibit* puffing, in the commentary to section 6.2, the Guidelines warn lawyers to "never mislead and be careful of puffing".[100] Similarly, the Solicitors Rules limit the extent and topics of puffing or overstatement by providing in Rule 34.1.1 that lawyers cannot make a statement which "grossly exceeds the legitimate assertion" of their client's rights or entitlements.[101] Despite being conducive to a limited scope of puffing, these regulations appear hostile to lying and active misleading. So, while "some puffing, overstatement and deception are normal in negotiation",[102] there is uncertainty about how far a lawyer can go in doing so.[103] Unsurprisingly, it appears that lawyers take advantage of this uncertainty, as it has been stated that in Australia there remains "anecdotal evidence that many lawyers lie routinely in their negotiation practice."[104] Lankhani has even suggested that lying and deception are inherent to mediation, being an instinctive human behavior.[105]

The U.S. position treats puffing as acceptable mediation practice and goes much further than the Australian position by accepting lying and active misleading as legitimate tactics. U.S. scholar Cooley has suggested that

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[100] LAW COUNCIL OF AUSTRALIA, supra note 13, at r. 6.2(a).
[101] *Australian Solicitors' Conduct Rules 2015*, r. 34.1.1 (Austl.).
[102] BOBETTE WOLSKI ET AL., SKILLS, ETHICS, AND VALUES FOR LEGAL PRACTICE 530 (Lawbook Co. ed., 2d ed. 2009) [hereinafter WOLSKI ET AL., SKILLS, ETHICS, AND VALUES].
[103] SAMANTHA HARDY & OLIVIA RUNDLE, MEDIATION FOR LAWYERS 221 (CCH Australia Ltd. ed., 2010).
[104] HARDY & RUNDLE, *supra* note 103, at 221.
[105] Avnita Lakhani, *The Truth about Lying as a Negotiation Tactic: Where Business, Ethics, and Law Collide ... or Do They?: Part 2*, 9 ADR BULL. 133 (2007).

under the ethical rules "lawyers may not lie for clients . . . when to do so would be civilly actionable".[106] This commentary reflects the common position in the United States that Model Rule 4.1 goes little further (if at all) than the applicable statutory and common law (such as relating to fraud and misrepresentation), in contrast to the Australian rules which seem to hold lawyers to a higher standard of truthfulness than the generally applicable Australian statutory and common law.

Reflecting this common position, the ABA's Formal Ethics Opinion 06-439 explains that it is not unusual in a negotiation for a party, directly or through counsel, to make a statement about its position that is less than entirely forthcoming, and to exaggerate the strength of its factual or legal position.[107] Burns concluded that it is permissible under the Model Rules to actively mislead an opponent as to one's bottom line and use false statements of immaterial facts.[108] Albeit writing in 1980, White similarly explained that the "critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled" and that "a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively

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[106] COOLEY, MEDIATION ADVOCACY, *supra* note 92, at 42.

[107] *See* Resolution Systems Institute, *Formal Opinion 06-439: Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation, Institute*, https://www.aboutrsi.org/library/formal-opinion-06-439-lawyers-obligation-of-truthfulness-when-representing-a-client-in-negotiation-application-to-caucused-mediation ("ABA Formal Opinion 06-439 discusses '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.' The opinion allows for 'posturing' or 'puffing' by parties to the negotiation. This includes understating their willingness to make concessions and exaggerating their strengths. These are not considered false statements of material fact under Model Rule 3.3 or 4.1.")

[108] Robert P. Burns, *Some Ethical Issues Surrounding Mediation,* 70 FORDHAM L. REV. 691, 694 (2001–2002).

engaged in misleading their opponents."[109] He even goes on to state that misleading "is the essence of negotiation."[110]

Prominent scholar Menkel-Meadow posited that oppositional presentation in mediation inevitably leads to distortion of the truth by encouraging parties to make extreme claims, avoid any potentially harmful facts, and manipulate information.[111] Riley took this further by stating that lying is "not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law."[112] Analogously, Wetlaufer stated that "lying can be highly effective" as it "offers significant distributive advantages to the liar," describing it as a "coherent and often effective strategy" which if never used "may place a negotiator at a systematic and sometimes overwhelming disadvantage."[113] He even posited that "any number of lies, including those involving reservation prices and opinions that are both useful and virtually undiscoverable."[114]

Abramson asserts the most interesting proposition.[115] He seems to regard the use of "tricks"—including lying about material facts, arriving at mediation without sufficient settlement authority, and misleading through intentional ambiguity—as a choice open to U.S. lawyers in fashioning an effective negotiation style for

[109] James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation,* AM. BAR FOUND. RSCH. J. 926, 927 (1980).
[110] White, *supra* note 109, at 928.
[111] Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 21–22 (1996).
[112] Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help,* 24 OHIO STATE. J. ON DISP. RESOL. 481, 483–484 (2008).
[113] Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1230 (1990).
[114] Wetlaufer, *supra* note 113, at 1230.
[115] Hal Abramson, *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks,* 23 HARV. NEGOT. L. REV. 319 (2018).

themselves at mediation.[116] Such a position appears to conflict with some of the Model Rules identified above, and starkly contrasts with the Australian Rules and the Australian commentators' views set out above.

An analysis of relevant case law further illustrates the gulf between Australia and the United States. Three leading cases in Australia are *Legal Services Commissioner v Mullins*,[117] *Legal Services Commissioner v Garrett*,[118] and *Legal Practitioners Complaints Committee v Fleming*.[119] *Mullins* and *Garrett* were two cases involving a mediation where Mullins and Garrett, as legal representatives (respectively, as a barrister and solicitor), represented a client rendered paraplegic in an automobile accident.[120] Before the mediation, they gave the driver of the other car's insurer detailed schedules of damages based on the normal life expectancy of a paraplegic of their client's age.[121] However, the day before the mediation, their client revealed that he had just been diagnosed with advanced cancer.[122] Their client also instructed them not to reveal this diagnosis unless the law required them to.[123] At the mediation, Mullins and Garrett continued to rely on the schedules of damages served earlier, therefore in effect representing that they were not aware of any material change in their client's life expectancy.[124] Both parties faced disciplinary action, where

[116] Abramson, *supra* note 115, at 327–29.
[117] [2006] LPT 012, https://applications.lsc.qld.gov.au/document/download/10784.
[118] [2009] LPT 12.
[119] [2006] WASAT 352. *See* Campbell Bridge SC, *Effective and Ethical Negotiations*, NSW Bar Assoc., https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Effective_and_Ethical_Settlement_Negotiations_-_Bridge_SC_updated_2016.pdf.
[120] Mullins [2006] LPT 012 at ¶2.
[121] Mullins [2006] LPT 012 at ¶1–6.
[122] Mullins [2006] LPT 012 at ¶9.
[123] Mullins [2006] LPT 012 at ¶10.
[124] Mullins [2006] LPT 012 at ¶12–15.

Mullins was held to have committed "intentional deception" and "fraudulent deception" under the Queensland State Barristers Rules 51 and 52 (almost identical to Solicitors Rules 22.1 and 22.2), and Garrett was held similarly responsible under the relevant Queensland state solicitors rules.[125] *Fleming* was a solicitor acting for an estate who was held to have breached Rule 3.1 of the Western Australian State Professional Conduct Rules by attempting to further his client's case by unfair or dishonest means—after representing that the a will was enforceable when in fact it was an informal will (unenforceable without a court order regularizing it)—despite this course of action according with his client's instructions.[126] The Tribunal suggested that honesty, fairness and integrity were even more important in negotiations between practitioners than in court because:

> they are conducted outside the Court and are beyond the control which a judge hearing the matter might otherwise exercise over the practitioners involved. Outside the trial process, there is no impartial adjudicator to 'find the truth' between the opposing assertions . . . A level of trust between the advisers involved is therefore essential.[127]

Three U.S. examples paint a very different picture. The first case, *Otto v. Hearst Communications*,[128] involved the settlement conference of a copyright claim relating to a photo taken of President Trump at a wedding in 2017. At the conference, the plaintiff's lawyers allegedly violated their ethical obligations by producing misleading documents about the licensing of the photo and by giving misleading

[125] Mullins [2006] LPT 012 at ¶30–31.
[126] Bridge, *supra* note 119, at ¶23–24.
[127] [2006] WASAT 352 [76].
[128] No. 17-CV-4712 (GHW) (JLC), U.S. Dist. LEXIS 35051 (S.D.N.Y Feb. 21, 2019).

answers to questions about their client's settlement of related claims to allegedly inflate the settlement amount.[129] However, in contrast to the results of *Mullins* and *Fleming*, the Federal District Court for the Southern District of New York refused to impose sanctions on the relevant lawyers, finding on the evidence presented that their conduct amounted to posturing and did not constitute misrepresentation nor acting in bad faith.[130] Interestingly, the court held that while advocates "may not lie to opposing counsel about a fact that is material to the resolution of the case . . . recognizing where the line is to be drawn between ethical and unethical behavior during the negotiation process can be difficult to discern."[131] The court then "strongly" cautioned the plaintiff's lawyers "to be mindful of overplaying their hands (or worse) during settlement negotiations." [132]

Second, in *Alexsam Incorporated v. WildCard Systems Incorporated*[133] the Federal District Court for the Southern District of Florida held that an attorney did not breach Model Rule 4.1, nor act in bad faith, by failing to disclose to the other party at mediation that his client had filed a separate complaint in state court that was unknown to that other party at the time of the mediation. This is similar to the lawyers' silence about their client's life expectancy in *Mullins*. However, the federal district court reached a completely different result by not finding a breach of the ethical rules.[134]

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[129] *Otto,* LEXIS 35051 at *12.
[130] Bridge, *supra* note 119, at ¶23–24; *Otto,* LEXIS 35051 at *23.
[131] *Otto,* LEXIS 35051 at *25, (quoting Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443–444, 446 (D. Md. 2002)).
[132] *Otto,* LEXIS 35051 at *36.
[133] 2019 U.S. Dist. LEXIS 24347 (S.D.Fla. 2019).
[134] Alexsam, Inc. v. WildCard Sys., Inc., 2019 U.S. Dist. LEXIS 24347, at 28–29 (2019).

Third, in a hypothetical Pennsylvanian case similar to *Mullins* and *Fleming*, a client knew and told their lawyer that they only had one year to live because of a non-work related illness but sought to accept an offer for payment of an amount equivalent to three years of workers' compensation.[135] In an ethics opinion, the Pennsylvania Bar Association's Committee on Ethics determined that the lawyer did not need to disclose this, mainly because Model Rule 4.1 was not engaged as no representation had been made to the opposing side and the information provided by the client was protected by confidentiality.[136] This contrasts with the results in the Australian cases above. [137]

Some U.S. cases, however, have reached similar conclusions to the Australian cases.[138] For example, a district court held a lawyer to have breached Model Rule 4.1 by serving and relying on an expert's damages report that he knew was misleading.[139] In *In Re Rosen*, a lawyer breached Model Rule 4.1 by making misrepresentations which led an insurance company to believe his deceased client was still alive.[140] In another case, an attorney was suspended for breaching the predecessor to Model Rule 4.1 by failing to disclose the existence of a $1 million umbrella policy while negotiating the reduction of a hospital's lien against the proceeds of personal injury recovery by his plaintiff client.[141]

These cases illustrate that findings differ depending on the circumstances in which a statement is made, and the

[135] Pa. Bar. Ass'n. Comm. on Legal Ethics & Pro. Resp., Informal Op. 2001-26 (April 26, 2001).
[136] Pa. Bar. Ass'n. Comm. on Legal Ethics & Pro. Resp., Informal Op. 2001-26 (April 26, 2001).
[137] Pa. Bar. Ass'n. Comm. on Legal Ethics & Pro. Resp., Informal Op. 2001-26 (April 26, 2001).
[138] *In re* Rosen, 198 P.3d 116, 121 (Colo. 2008); *see* Nebraska State Bar Association v. Addison, 412 N.W.2d 855, 856 (Neb. 1987).
[139] *In re* Filosa, 976 F. Supp. 2d 460, 465–66 (S.D.N.Y. 2013).
[140] *Rosen*, 198 P.3d at 121.
[141] *Nebraska State Bar Association*, 412 N.W.2d at 856.

perception of the relevant adjudicative body. They also illustrate the contrasting perceptions of Australian and U.S. adjudicative bodies about what constitutes misconduct for making false or misleading statements, or for remaining silent where such silence would be misleading. The judicial perceptions are largely reflected in the relevant academic commentary set out above.

The U.S. judicial and academic acceptance of lying and active misleading in mediation and negotiation is not a feature of Australian jurisprudence.[142] Australian academics recognize that various deceptive tactics, such as settlement point deception and puffing, are legitimate and often necessary in mediation but fall short of condoning tactics such as lying.[143] Most Australian attorneys do not consider lying a legitimate form of advocacy largely because of Rules reviewed in this article, the precedent set by the cases above, and the operation of consumer protection statutes such as the ACL which are likely to prohibit lying.[144]

The Australian approach is more appropriate largely because it maintains the integrity of the process of mediation and the reputation of the legal profession involved in mediation policies which will be explained further below in Part Two. Although some commentators have argued that lawyers should be obliged to be candid at mediations and fully disclose every matter within their knowledge (in terms of "maintaining 'total candor,'"[145] "forbidding all

[142] Wolski, *supra* note 14. *See also* Bobette Wolski, *The Truth About Honesty and Candour in Mediation: What the Tribunal Left Unsaid in the Mullins Case*, 36 MELB. U. L. REV. 706, 714 (2012) [hereinafter Wolski, *The Truth*].
[143] Wolski, *The Truth*, *supra* note 142, at 717.
[144] Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495, 537–538 (2006).
[145] Cooley, *supra* note 56, at 96 (quoting Waiter W. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1403 (1986)).

deception,"[146] and "minimizing 'an unreasonable risk of harm'"),[147] the writers do not agree with such propositions because they consider them to be unrealistic, rid mediation of its adversarial nature, and go beyond the requirements set by the relevant regulations.[148] They would also likely be against lawyers' duties to serve their clients' interests and provide the opposing party with comparative advantage.

Rather, the writers' view is simply that lawyers should be obliged to be truthful when representing a client at mediation. While some amendments to the regulations of truthfulness may be necessary (see Part Two), lawyers should simultaneously focus on becoming more cognizant of the ethical boundaries set by the relevant regulations in respect to truth and behave accordingly. There will be outliers who still take advantage of the blurry line between when a lawyer must tell the truth and when they can lie. But one can hope that lawyers will take heed of their expected conduct and roles as administrators of justice and err on the side of caution in relation to these boundaries.

From a practical perspective, the Australian approach to lying and active misleading as negotiation tactics better serves the interests of lawyers themselves. Especially in smaller or specialized legal communities, lawyers quickly develop a reputation based on previous negotiation behavior.[149] Such a reputation is particularly important to lawyers' practice and how they are perceived by their peers.[150] Toeing the line of truth in mediation is likely to detrimentally affect the image of the lawyers and participants involved. A speaker's overstatement,

[146] Cooley, *supra* note 56, at 96 (citing *See* Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO STATE L.J. 1, 50 (1987))
[147] Cooley, *supra* note 56, at 96 (quoting Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75, 133-34 (1985)).
[148] HOWARD RAIFFA, LECTURES ON NEGOTIATION ANALYSIS 11 (PON Books, 1996); *see also* Reed E. Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45 (1994).
[149] Reilly, *supra* note 57, at 526.
[150] HARDY & RUNDLE, *supra* note 49, at 224.

embellishment, or exaggeration of the truth usually inspires listeners to be apprehensive and cautious about accepting the speaker's message.[151] If a speaker misrepresents an important fact, even innocently, listeners may lose confidence in the speaker's ability to be truthful, may refuse to communicate with the speaker, or may become vindictive.[152] Peters states, "[e]ffective lawyers know that they do not need to lie to negotiate effectively," referencing a connection in the relevant research between honest negotiating and perceived effectiveness.[153]

Considering one of Aristotle's three artistic means of persuasion, "pathos" (i.e., emotions aroused in a speaker's audience), a speaker's character is judged according to their personal qualities and the stereotypes, which relate to them.[154] Lawyers should be constantly aware of the cultural impact untrustworthiness has on their ability to persuade their audience and, therefore, to effectively represent their clients. As Cooley explains, mediation advocates "need to have an intimate understanding of the affective component of persuasion, pathos."[155] While a lawyer might get away with lying once or twice, in the long term, their reputation is likely to precede them and result in utter distrust of everything said unless it can be independently verified. That is scarcely conducive to effective and efficient negotiations or to the development and maintenance of a thriving legal practice. As the Court perfectly encapsulated in *Otto,* "[l]awyers have one treasured possession above all else, and that is their reputation . . . [i]f it is squandered and lawyers become known for being untrustworthy, both their clients and the

[151] COOLEY, MEDIATION ADVOCACY, *supra* note 92, at 93.
[152] COOLEY, MEDIATION ADVOCACY, *supra* note 92, at 93.
[153] Peters, *supra* note 61, at 141.
[154] COOLEY, MEDIATION ADVOCACY, *supra* note 92, at 124–25.
[155] COOLEY, MEDIATION ADVOCACY, *supra* note 92, at 125.

Court are ill–served,"[156] and their legal practices often are irreversibly damaged.

1c) Obligations to the courts, justice, and profession

Broad, overarching duties to the relevant court system, administration of justice, and the legal profession are imposed on lawyers in both jurisdictions.[157]

i) Australia

Rule 3.1 of the Solicitors Rules provides that a "solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty."[158] As discussed above, "court" is defined as including a mediation.[159] There is an additional obligation under Rule 5.1, which prohibits solicitors from engaging in conduct, in the course of practice *or otherwise*, which is likely to a material degree to "be prejudicial to . . . the administration of justice; or bring the profession into disrepute."[160] This is an extremely broad obligation, which applies beyond the course of a lawyer's practice because of the word "otherwise" in Rule 5.1.[161]

Similarly, Rule 4 of the Barristers Rules provides that "barristers owe their paramount duty to the administration of justice," "owe duties to the courts, to their clients and to their barrister and solicitor colleagues," and "must maintain high standards of professional conduct."[162] This is supplemented by Rule 23, which states that barristers owe "an overriding duty to the court to act with

[156] *Otto,* LEXIS 35051 at *36.
[157] *See*, *Australian Solicitors' Conduct Rules 2015*, r. 5.1 (Austl.); *Australian Barristers' Conduct Rules 2015* (Austl.); MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[158] *Australian Solicitors' Conduct Rules 2015*, r. 3.1 (Austl.).
[159] *See generally Australian Solicitors' Conduct Rules 2015* (Austl.).
[160] *Australian Solicitors' Conduct Rules 2015*, r. 5.1 (Austl.).
[161] *Australian Solicitors' Conduct Rules 2015*, r. 5.1 (Austl.).
[162] *Australian Barristers' Conduct Rules 2015*, r. 4 (Austl.).

independence in the interests of the administration of justice."[163] Again, "court" is defined as including a mediation. [164]

Because both the Solicitors and Barristers Rules render the duty to the administration of justice paramount over any inconsistent duty, an Australian lawyer cannot take refuge in their duties to their client or their duty to maintain confidentiality.[165] Further, as stated above, it seems that such paramount duties are only binding while the mediator is present, with the different and less stringent duties outlined above (i.e., duties owed to the opposing lawyer, opposing client, and third parties) applying to the remaining parties after the mediator leaves the room.[166]

ii) The United States

There is no equivalent paramount or overarching duty in the Model Rules.[167] The Preamble to the Model Rules uses broad language to reiterate the duties of lawyers to: demonstrate respect for the legal system and for those who serve it (in paragraph 5); seek improvement of the law, administration of justice, and the quality of service rendered by the legal profession (in paragraph 6); improve the law and the legal profession (in paragraph 7); and exemplify the legal profession's ideals of public service (in paragraph 7).[168] The other relevant rule is Model Rule 8.4, which defines professional misconduct as engaging in "conduct that is prejudicial to the administration of justice" in 8.4(d).[169]

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[163] *Australian Barristers' Conduct Rules 2015*, r. 23 (Austl.).
[164] *See generally Australian Barristers' Conduct Rules 2015* (Austl.).
[165] *See*, *Australian Solicitors' Conduct Rules 2015*, r. 5.1 (Austl.); *Australian Barristers' Conduct Rules 2015* (Austl.).
[166] *Australian Solicitors' Conduct Rules 2015*, r. 5.1 (Austl.); *Australian Barristers' Conduct Rules 2015* (Austl.).
[167] *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[168] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[169] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).

However, there is no separate, paramount obligation relating to the administration of justice akin to those in the Australian rules.[170]

It should also be noted that common law duties developed through case law also impose certain obligations on lawyers to the relevant courts and administration of justice in both the USA and Australia, but a detailed analysis of case law establishing these obligations is beyond the scope of this article.

iii) Further Comparative Analysis

In Australia and the USA there is no specific guidance which suggests that the above duties compel lawyers to make truthful statements at all times during mediation.[171] There are also no cases directly dealing with the point.

Nevertheless, it is submitted that in both jurisdictions, the above duties are broad enough to cover conduct during mediation, including the truthfulness of lawyers' advocacy.[172] This is because mediation is a process involving the administration of justice and one which affects the public perception of participating lawyers and their profession.[173] This is especially so for court-mandated mediation because the process of mediation is associated

[170] *See*, *Australian Solicitors' Conduct Rules 2015*, r. 5.1 (Austl.); *Australian Barristers' Conduct Rules* (Austl.).
[171] *See* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983); *Australian Solicitors' Conduct Rules 2015* r. 5.1 (Austl.); *Australian Barristers' Conduct Rules 2015* (Austl.).
[172] *See*, *Australian Solicitors' Conduct Rules 2015*, r. 5.1 (Austl.); *Australian Barristers' Conduct Rules* (Austl.); MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[173] *See* MODEL RULES OF PRO. CONDUCT r. 2.4 cmt 5, r.1.12 (AM. BAR ASS'N 1983).

with the court. [174] In reality, most mediations are conducted in the "shadow" of the courthouse.[175]

For example, allowing a lawyer to lie during mediation would seem inconsistent with the proper administration of justice. Similarly, permitting lawyers to lie during mediation would seem averse to the integrity of the legal profession. However, without clarification from rule makers or judges, the impact of these duties on truthfulness in mediation cannot be definitively stated. Again, this highlights the need for further guidance about how such general rules apply to mediation, or for the enactment of similar rules tailored to mediation.

1d) Obligations of good faith in mediation

Regulatory schemes in both Australia and the United States impose "good faith" obligations on lawyers during mediation which "dance along the periphery" of truthfulness in mediation.[176] They are described below.

It is important to note that mediation agreements also often contain good faith terms.[177] For example, the Law Society of New South Wales' Model Mediation Clause contains a subclause 3.5.2 which provides that the parties must mediate "with a genuine commitment to participate."[178] Similarly, in New York, the Center for

[174] LAURENCE BOULLE, MEDIATION - PRINCIPLES PROCESS PRACTICE 143 (3d ed. 2005).
[175] LAURENCE BOULLE, MEDIATION - PRINCIPLES PROCESS PRACTICE 143 (3d ed. 2005).
[176] James K. L. Lawrence, *Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates*, 29 OHIO STATE. J. ON DISP. RESOL. 35, 55 (2014).
[177] Jon Lang, *Good faith in mediation – pillar or platitude?* Mediation in Practice (June 2019), https://jonlang.com/good-faith-in-mediation-pillar-or-platitude/.
[178] LAW SOCIETY OF NEW SOUTH WALES, https://www.lawsociety.com.au/sites/default/files/2018-03/Model%20Clause.pdf, (last visited Sept. 20, 2020).

Creative Conflict Resolution's Agreement to Mediate includes a clause stating that "I agree to make a good faith effort to resolve the above-referenced case."[179] These terms operate by force of contract, bolstering existing regulatory good faith obligations or filling the void where there are no such obligations in applicable regulation.

i) Australia

The Barristers and Solicitors Rules do not impose an explicit obligation on legal representatives to mediate in good faith.[180] However, Section 27 of the Civil Procedure Act in New South Wales places a duty on each party in court-referred mediation to participate in good faith.[181] There are similar obligations in subject matter specific legislation such as the Farm Debt Mediation Act (in ss 11(1)(c)(iii), 11 (2)(a)) and Dust Diseases Tribunal Regulation (in ss 27(1), 31(2)).[182] Further, nonbinding standards support such obligations. For example, the Law Council of Australia's Guidelines provide in clause 2.2 that "Lawyers and clients should act, at all times, in good faith to attempt to achieve settlement of the dispute."[183] Where not explicitly stated, it is likely that obligations on the parties in mediation extend to their lawyers because the parties participate in the mediation wholly or partly through their lawyers.[184]

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[179] NEW YORK CITY, https://www1.nyc.gov/assets/oath/downloads/pdf/CCCR_Agreement_to_Mediate_Online_MEND_Ca ses.pdf, (last visited Sept. 20, 2020).
[180] Wolski, *On Mediation*, *supra* note 19, at 21.
[181] NSW LEGISLATION, https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2005-028, (last visited Sept. 20, 2020).
[182] CAN LII, https://www.canlii.org/en/ca/laws/stat/sc-1997-c-21/latest/sc-1997-c-21.html; NSW, *Dust Diseases Tribunal Regulation 2019*, https://www.justice.nsw.gov.au/justicepolicy/Documents/dust-diseases-tribunal-regulation-2019/dust-diseases-tribunal-regulation-2019.pdf.
[183] LAW COUNCIL OF AUSTRALIA, *supra* note 13.
[184] ROBERT ANGYAL SC, ADVOCACY AT MEDIATION, IN RESOLVING CIVIL DISPUTES 49 (Michael Legg ed., 2016).

However, there is no clear definition of good faith nor consideration of whether it regulates the truthfulness of lawyers' advocacy in mediation.[185] Undoubtedly, what good faith means varies amongst individuals, and as the cases show, judges too.[186] Some commentators examined it through a narrow prism, labelling it as a "participation duty"—although there is nothing to suggest it is so limited in every case, particularly where regulation set out above, such as the Law Council of Australia's guidelines, extends the obligation to "all times" in the process of settling a dispute.[187] Others suggested that there is general agreement that good faith entails participating in mediation, ensuring someone with authority to settle is present, and not immediately rejecting what the other party says.[188]

However, it is widely accepted that good faith obligations do not compel parties to act against their interests, nor require them to fully disclose all information relating to their interests, negotiation goals, and bargaining positions.[189] Wolski also explains that in Australia and the United States, there is wide agreement that good faith does not preclude use of positional negotiation, nor require parties to make settlement offers.[190] Further, she states that good faith does not require parties to possess a sincere desire to settle, and ultimately does not require forfeiture of a person's self-interest during mediation.[191] Unfortunately, there has been no explicit consideration of how such good faith provisions apply to the truthfulness of lawyers'

[185] *See generally* Lang, *supra* note 177.
[186] *See generally* Lang, *supra* note 177.
[187] LAW COUNCIL OF AUSTRALIA, *supra* note 13.
[188] Wolski, *On Mediation*, *supra* note 19, at 22.
[189] *United Group Rail Services Limited v Rail Corporation New South Wales* (2009) 74 NSWLR 618 ¶ 76 (NSW); *Masters Home Improvement Australia Pty Ltd v North East Solutions Pty Ltd* (2017) 372 ALR 440 ¶ 99 (Vic).
[190] Wolski, *supra,* note 14, at 49.
[191] Wolski, *supra* note 14, at 50.

advocacy in mediation in Australia—particularly in relation to lying, puffing, active misleading, and misrepresentation.

ii) The United States

In the United States, twenty-two states and Guam have statutory requirements relating to good faith in mediation,[192] and twenty-one Federal district courts and seventeen state courts have good faith requirements in their rules.[193] Also, several federal district courts have relied on Rule 16 of the Federal Rules of Civil Procedure as the basis for a good faith requirement in mediation.[194] U.S. cases have also dealt with good faith mediation requirements, with Lande analyzing twenty-seven relevant cases as falling into five categories.[195] Lande found that decisions were consistent—as courts always found breaches of good faith obligations where a party failed to attend or provide a required pre-mediation document, an almost even split where there was a failure to provide an authorized representative, and no breaches for all other cases.[196] However, like in Australia, there remains no direct consideration of how good faith obligations apply to regulate the truthfulness of lawyers' advocacy in mediation.

iii) Further Comparative Analysis

Little to no attention has been given to whether the obligations of good faith set out above affect the truthfulness of lawyers' advocacy during mediation. It is suggested that such obligations actually do regulate truthfulness based on

[192] John Lande, *Why a Good-Faith Requirement is a Bad Idea for Mediation*, 23 ALTERNATIVES TO HIGH COST LITIG. 1 (2005).
[193] Lande, *supra* note 192.
[194] ABA Section of Dispute Resolution, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, 2004 A.B.A SEC. OF DISP. RESOL.
[195] John Lande, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).
[196] *See generally* Lande, *supra* note 195.

the premise that lying or actively misleading in mediation would constitute a party failing to participate in that mediation in good faith.[197] The term "good faith" is broad enough to encompass such a reading. Unfortunately, there is little judicial or academic guidance to confirm this interpretation.

One of the issues in assessing good faith in mediation is confidentiality. Confidentiality has prevented courts from scrutinizing advocates' conduct in mediation, including their truthfulness, and therefore from considering or holding whether duties of good faith apply to advocates' truthfulness during mediation.[198] As the Federal District Court for the Southern District of New York has explained, "confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation, i.e., the extent to which a party discusses the issues, listens to opposing viewpoints and analyzes its liability."[199] Courts have therefore been left to the very narrow "general pattern of interpretation" of good faith "to require compliance with orders to attend mediation, provide pre-mediation memoranda, and, in some cases, produce organizational representatives with sufficient settlement authority."[200]

However, the lack of a definition of the term good faith is the main issue precluding any definitive statement that good faith duties regulate advocates' truthfulness in mediation. Most commentators agree that there is no clear

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[197] *See generally* David C. Singer and Cecilie Howard, *The Duty of Good Faith in Mediation Proceedings*, 244 NEW YORK L. J. (Aug. 25, 2010), http://files.dorsey.com/files/upload/The%20Duty%20of%20Good%20Faith.pdf.

[198] Jeff D. Rifleman, *Mediation Confidentiality, Bad Faith, Enforceability,* Rifleman Law & Mediation (Apr. 2008), http://www.riflemanlaw.com/practice-areas/mediation/mediation-confidentiality-bad-faith-enforceability.

[199] *In re* A.T. Reynolds & Sons Inc., 452 B.R. 374, 383–384 (S.D.N.Y. 2011).

[200] *A.T. Reynolds & Sons Inc*., 452 B.R. at 384.

definition, and that the relevant cases in Australia and the USA are difficult to reconcile.[201] Some even posit that good faith, especially substantive, as opposed to procedural, is a concept that cannot ever be completely or accurately defined.[202] Consistently with those commentators, the New York courts have gone so far to hold that good faith is an "intangible and abstract quality with no technical meaning."[203]

The regulation examined above avoids providing any guidance about the meaning of good faith. Apart from the Australian and U.S. commentary and the U.S. cases above, the meaning of good faith remains illusory.[204] This issue is compounded in Australia where there remains uncertainty about whether the test under such regulation is objective or subjective—as recent authority suggests an objective test, while older authorities mandate a subjective test.[205]

This definitional issue is a double-edged sword. On one hand, it is problematic because it fails to impose a uniform standard which lawyers can seek to adhere to and by which they can be held accountable. It also promulgates confusion about its proper meaning, evident in the paragraph above. On the other hand, it creates a flexible standard which may be interpreted as covering all sorts of mediator conduct. In this way, it may also be considered a prophylactic obligation—deterring improper lawyer conduct while providing a tool for holding lawyers to account for their actions during mediation.

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[201] Wolski, *supra* note 14, at 49 (and the sources there cited).
[202] ABA SECTION OF DISPUTE RESOLUTION, Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs Opinion (August 7, 2004).
[203] Martin v. Columbia Pictures Co., 133 N.Y.S.2d 469 (N.Y. Sup. Ct. 1953), 473, *aff'd*, 283 A.D. 924 (N.Y. App. Div. 1954), *aff'd*, 307 N.Y. 911 (1954).
[204] Tania Sourdin, *Good Faith, Bad Faith? Making an Effort in Dispute Resolution*, 2(1) DICTUM – VICT. L. SCH. J. (2012).
[205] Angyal SC, *supra* note 184, at 51–55.

For the purposes of this article, it is critical to note that the courts have not yet extended the good faith obligation to cover truthfulness in mediation.[206] It is submitted that this is not only because the question has not arisen, but also because of the likely pushback from the profession towards the courts extending good faith obligations in the absence of rule makers doing so out of respect for the separation of powers. The focus of lawyers and academics on the specific rules relating to truthfulness set out above—rather than good faith—has also taken attention away from the possible application of good faith obligations to regulating truthfulness. Despite this, there is no reason to believe that such an extension is impossible, or undesirable.

1e) Conflicting obligations

Regulation in Australia and the USA contains other obligations which may conflict with those relating to the truthfulness of lawyers' advocacy in mediation. These are supplemented by lawyers' fiduciary and general law duties—such as their general law duty of loyalty towards their clients—which may contrast with their obligations under relevant regulation. [207]

The primary source of conflict is the duty owed to the client. Solicitors' Rule 4.1 provides that solicitors' fundamental ethical duty is to act in their clients' best interests while Barristers Rule 37 provides that barristers must promote and protect fearlessly the client's best interests by all proper and lawful means. While cast in different and more comprehensive terms, similar obligations of lawyers to their clients are evident in Model Rules 1.1–

[206] *See generally* Lang, *supra* note 177.
[207] *See, e.g.*, *Australian Solicitors' Conduct Rules 2015*, r. 4.1.1, 10, 11, 12 (Austl.); *Australian Barristers' Conduct Rules 2015*, *r.* 122–114 (Austl.).

1.4.[208] The potential for conflict is apparent from the text of these rules, especially when clients instruct their lawyers to act for them in a manner which is contrary to their legal obligations, as occurred in the *Mullins* case mentioned above.[209]

Model Rule 1.2 compels lawyers to abide by their clients' decisions concerning the objectives of representation.[210] If a client's objective is to mislead or withhold critical information from the other party during mediation, this Rule would require the lawyer to abide. An obvious clash emerges. The Comment to Rule 1.2 provides guidance by reiterating that lawyers should only use "lawful and ethical measures" to serve their clients' objectives, are not "bound to press for every advantage that might be realized for a client," and must "exercise professional discretion."[211] Most relevant to truthfulness, it further states that Rule 1.2 "does not require the use of offensive tactics" – which likely covers the tactic of lying in mediation. [212] While this Rule is left to professional discretion, the text of the Model Rules resolves other conflicts amongst the Rules. For example, the obligation of confidentiality in Rule 1.6 is expressly stated to trump Rule 4.1(b), through the words "unless disclosure is prohibited by 1.6."[213]

In Australia, it is well established that if there is a conflict between the duties owed to a client and those owed to the administration of justice, the latter prevails.[214] In other words, the duty to the court (i.e. to the mediator), trumps every other conflicting duty (like under Solicitors Rule 3.1). However, outside this type of conflict, there is

[208] MODEL RULES OF PRO. CONDUCT r. 1.1–1.4 (AM. BAR ASS'N 1983).
[209] [2006] LPT 012.
[210] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983).
[211] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983).
[212] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983).
[213] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983).
[214] *Giannarelli v. Wraith* (1988) 165 CLR 543, 556–57; *Rondel v. Worsley* (1969) 1 AC 191, 227–28; Solicitors Rule 3.1; Barristers Rule 5.

little guidance. NSW has held that where there is a conflict between duties owed to a client and duties owed to a third party, those owed to the client prevail.[215] Yet, it is unclear how extensible this principle is—and to what types of duties it applies. In the USA, the only guidance is in the Preamble to the Model Rules, which states that conflicts "must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[216]

As such, methods for resolving conflicts concerning lawyer's truthfulness obligations remain largely unresolved in each jurisdiction. This is apt to cause confusion for some practitioners, allowing them to bend the truth during mediation and hide behind the veil of acting in the interests of their clients. While a bright-line rule about resolving all types of conflicts between lawyers' obligations may be undesirable (because it would be rigid and difficult to apply to all rules and in all factual contexts), it would be helpful to provide more explicit guidance about how to resolve conflicts between the rules. For example, Model Rule 4.1 and the equivalents in Australia might be amended to make it clear that where lawyers perceive their clients' instructions to potentially contravene such rules, they are to inform their clients that they cannot act in accordance with that instruction because of the operation of the relevant rules, and should refuse to act in accordance with that instruction despite the client's insistence. Attention should also be given to expand the grounds for voluntary lawyer withdrawal in such situations.

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[215] *Law Society of New South Wales v. Harvey* (1976) 2 NSWLR 154, 170.
[216] AMERICAN BAR, *Ethics 2020 Commission Preamble*, https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_preamble/, (April 2, 2020).

2) HOW THE RULES SHAPE CONDUCT, AND HOW THEY CAN BE IMPROVED

After reading the above, one might ask: If all lawyers lie and actively mislead during mediation, then why does it matter? There is a level—albeit potentially unethical—playing field. Norton takes this view, positing that so long as deception does not endanger the validity of an agreement, then it should be permissible because participants can use the process to produce a balance between truth and a fair result.[217]

This Part argues that the regulation of untruthfulness in mediation is important and proposes that the rules be clarified to more effectively achieve their purposes.

2a) Desirability of clarifying the rules relating to truthfulness

Noting the ambiguity and gaps in the coverage of the rules in relation to truthfulness in mediation assessed above, the relevant rules in each jurisdiction should be amended so that their meaning and the scope of their application is clearer. In the case of Model Rule 4.1, for the reasons set out above it is likely that the most desirable approach would be to prohibit lies altogether.

In any case, amendments will not automatically change behavior and norms in mediation, as these depend on the lawyers involved. However, amendment is likely to incrementally alter conduct, clarify the expectations of lawyers in mediation, and at least make lawyers second-guess whether their conduct accords with the relevant rules.[218] It will also temper the often-substantial distance

[217] Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. Rev. 493, 532, 545 (1989).
[218] *See generally* Norton, *supra* note 217, at 532, 541–551.

between common practice and ethical standards in negotiation.[219]

i) Lies And Puffing

If lawyers are permitted to lie in the manner now allowed by Model Rule 4.1, then clarity is particularly important in relation to the types of facts lawyers may lie about during mediation in the USA. Clarity will also help in ascertaining how the good faith obligations apply in both Australia and the USA in relation to advocates' truthfulness in mediation. Clarity in these two areas is likely to reduce current debate and uncertainty, and provide lawyers with a useful, practical guide of conduct during mediation.[220]

Clarification in relation to lying, puffing, and good faith may be achieved by providing further examples of what type of conduct is acceptable or not under the relevant rules—to complement the existing case law and guidance—which is not helpful for the reasons set out above. This may be achieved by the relevant Australian and U.S. rules identifying, akin to the ABA Section for Dispute Resolution's proposal for addressing good faith requirements in mediation, "objectively-determinable conduct"[221] that is permissible and impermissible. For example, in relation to lying, it might be identified that where the central issue of a dispute being mediated is the value of certain property, then it is impermissible for a lawyer to lie about the value of that property.

Such identification of impermissible, objectively-determinable conduct will provide participants with a clearer understanding of the behavior that can lead to

[219] Norton, *supra* note 217, at 502–03.
[220] *See generally* Norton, *supra* note 217, at 532, 541–551.
[221] *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, 2004 A.B.A. SEC. DISP. RESOL. 2, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/draftres2.pdf.

sanctions; promote certainty in conduct during mediation; and therefore stimulate appropriate conduct by lawyers.[222] This development would be especially desirable because of the existence of the discretionary, circumstance-dependent tests for determining the status of statements and the lack of a definition of "good faith."[223] Clarification in each area would provide lawyers with important guidance about what is an acceptable statement under the relevant rules, and about how to act in "good faith" during mediations.

In relation to Model Rule 4.1, Peters has also suggested its extension to prohibit all false statements about "interests and priorities."[224] This would make Model Rule 4.1 more akin to the Australian rules (which are not limited to statements about "material facts"). The writers take this further, suggesting that for reasons explained above, a blanket prohibition on lies is appropriate.[225]

As Peters explains, such a step is justified in circumstances where reported decisions and anecdotal evidence suggests that lawyers even lie about material facts in mediation (despite the current Model Rule 4.1prohibiting this).[226] Empirical evidence also supports this change as it suggests that lawyers lie about material facts regularly when negotiating.[227] For example, a survey of a national sample of lawyers in the USA found 51% believed that inadequate disclosure of material information is a regular problem,[228] and another survey of civil litigators in Illinois, Indiana, and

[222] *Resolution on Good Faith, supra* note 221.
[223] MODEL RULES OF PRO. CONDUCT r. 4.1 cmt 2 (AM. BAR ASS'N 1983).
[224] Peters, *supra* note 61, at 134, 139, and the sources there cited.
[225] Peters, *supra* note 61, at 139.
[226] Peters, *supra* note 61, at 124 and the sources there cited.
[227] Art Henshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOTIATION L. REV. 95, 114 (2011).
[228] Steven D. Pepe, *Standards of Legal Negotiations: Interim Report and Preliminary Findings* (1983) (unpublished manuscript) (on file with New York University Law Review).

Michigan found 20% believed that their opposing lawyers routinely lied about material facts.[229]

ii) Mediation-Specific Rules

In both the USA and Australia, it is desirable to adopt enforceable rules which are specific to mediation advocacy, or to clarify how rules of general application apply to mediation. The various difficulties in relying on rules of general application have been identified in the analysis above. Further, the current general rules are drafted for a court context in which lawyers are considered partial, zealous advocates,[230] whereas mediation-specific rules will enable more appropriate and specialized regulation of conduct in the less adversarial context of mediation. As Wolski posits, it will prevent lawyers in mediation from being reduced to amoral gladiators, amoral technicians, and hired guns,[231] and it will protect the reputation of mediation as a collaborative and efficient process for resolving disputes. Further reasons for such clarification of the rules will be provided in the analysis below.

2b) Lawyers' attitudes and conduct

iii. Why The Imperfection Of Enforcement Warrants Clarification Of The Rules

The enforcement of the relevant rules in Australia and the U.S. gives them practical significance and establishes their ability to regulate lawyers' conduct during mediation.

In Australia, both the Solicitors and Barristers Rules have significant force. They are enforceable through

[229] Ibid; Robert B. Gordon, Note, *Private Settlement as Alternative Adjudication: A Rationale For Negotiation Ethics*, 18 U. MICH. J.L. REFORM 503, 508 n.29 (1985).
[230] Wolski, *supra* note 14, at 31.
[231] Wolski, *supra* note 14, at 31.

state statutes.[232] For example, in New South Wales, section 298(b) of the Legal Profession Uniform Law 2014 provides that "conduct consisting of a contravention of the Uniform Rules" can constitute unsatisfactory professional conduct or the more serious professional misconduct.[233] In circumstances of such a finding, section 302 of that Act also empowers the designated disciplinary tribunal to make orders including for removal from the professional roll, imposing conditions on practicing certificates, and suspending or cancelling practicing certificates.[234] These are serious sanctions that may be imposed for a breach of the above rules. It is also worth noting that the damage to reputation caused by an allegation of a breach of the Solicitors or Barristers Rules has a significant impact in deterring improper conduct in mediation.[235] This is also true in the U.S. in relation to the Model Rules.[236]

In the U.S., there are many methods for enforcing compliance with the Model Rules. Model Rules 8.4 and 8.5 provide a basis for the relevant disciplinary authority to bring an action against a lawyer for misconduct—with broad grounds set out in 8.4 for a finding of "professional misconduct."[237] This is similar to section 298 of the Legal Profession Uniform Law 2014.[238] Significant consequences arise from a breach of the Model Rules.[239] The ABA's Formal Ethics Opinion 06-439 cites numerous cases where disciplinary action has been successfully brought against lawyers for breaching Model Rule 4.1 resulting in sanctions against lawyers such as striking off or suspension, the setting

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[232] NEW SOUTH WALES BAR ASSOCIATION, *Barrister Rules*, https://nswbar.asn.au/bar-standards/barristers-rules, (last visited Sept. 20, 2020).
[233] *Legal Profession Uniform Law 2014* (N.S.W.) s 298 (Austl.).
[234] *Legal Profession Uniform Law 2014* (N.S.W.) s 302 (Austl.).
[235] Lawrence, *supra* note 176, at 36.
[236] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[237] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).
[238] *Legal Profession Uniform Law 2014* (N.S.W.) s 298 (Austl.).
[239] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).

aside of settlement agreements, and civil malpractice lawsuits against the lawyers themselves.[240] For example, in one case, a lawyer was suspended from practice for three years for repeated, abusive behavior during mediations.[241] Lawyers have also been subject to costs sanctions for their client's failure to appear at a mediation.[242]

Outside the Model Rules, similarly to Australian courts, courts in each U.S. state have an inherent power to regulate the conduct of admitted lawyers in and out of court.[243] Actions may also be brought for lawyer malpractice and negligence and for breaches of contracts between lawyers and clients.[244] These are rare in Australia, but more common in the U.S. because of the potential for punitive damages to be awarded in some U.S. states.[245]

U.S. Federal Rule of Civil Procedure 16, particularly 16(f), provides another basis for which disciplinary action may be brought against a lawyer for their conduct during mediation—namely for failing to appear, being substantially unprepared to participate, not participating in good faith, or failing to obey pretrial orders.[246] This action may result in personal or costs

[240] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[241] *In re* Fletcher, 424 F.3d 783, 785, 795 (8th Cir. 2005).
[242] Doorstop Beverages of Longwood, Inc. v. Collier, 928 So. 2d 482, 483 (Fla. Dist. Ct. App. 2006).
[243] SUP. CT. OF THE STATE OF N.Y., APP. DIV., SECOND JUD. DEP'T, *Attorney Matters, Regulation of Legal Profession*, https://www.nycourts.gov/courts/ad2/attorneymatters_ComplaintAboutaLawyer.shtml#:~:text=Lawyers%20are%20admitted%20to%20practice,the%20course%20of%20their%20career.&text=To%20guide%20and%20regulate%20the,(22%20NYCRR%20part%201200). (last visited Sep. 11, 2020).; Ariz. R. Sup. Ct. 3.
[244] *E.g., Can I Sue My Lawyer for Negligence*, Stanfer Stanfield Law*, (*Jul. 12, 2020) https://www.stangerlaw.com/blog/sue-lawyer-negligence/.
[245] Metcalfe v. Waters, 970 S.W.2d 448, 449 (Tenn. 1998); Clauson v. Kirshenbaum, C.A. No. 92-3410, 1996 R.I. Super. LEXIS 23, at 13-14 (Super. Ct. Jan. 19, 1996).
[246] FED. R. CIV. P. 16(f) (2020).

sanctions against the relevant lawyer under Rule 16(f), as federal courts have used the rule to sanction bad faith in mediation.[247] 28 U.S.C. § 1927 provides an additional basis for costs sanctions against a lawyer who commits misconduct.[248]

The enforceability of the above provisions in both Australia and the U.S. ensures that they play a key role in deterring improper conduct and incentivizing lawyers to act truthfully in mediation. However, difficulties in enforcing the obligations justify the clarification of lawyers' existing obligations. These difficulties include the nature of mediation as a non-public forum, where it is difficult for opposing parties and the mediator to discover lies or mistruths—as without discovery processes and the presentation of objective evidence, the parties are susceptible to the information provided to them by the other parties, and have no opportunity to test the truthfulness of assertions made during mediation. More than in other contexts, rules can therefore be violated with confidence that there will be no enforcement nor punishment for breaches.[249]

This is particularly so in circumstances where no agreement is reached at mediation and therefore no reliance or loss as well as no transcript or record of the mediation, which makes it hard to prove misconduct. As the Court explained in *Otto,* courts struggle to find breaches of ethical rules because there is no record and the parties' memories are often "hazy at best," so the relevant court or tribunal "cannot verify what statements were actually made and what documents were presented" during mediations.[250] All of the above makes clarity of the Federal Rules of Civil Procedures

[247] Lawrence, *supra* note 176, at 55; FED. R. CIV. P. 16(f) (2020).
[248] 28 U.S.C. § 1927 (LexisNexis, Lexis Advance 2020).
[249] White, *supra* note 109, at 926.
[250] *Otto v. Hearst Commc'ns*, No. 17-CV-4712, 2019 U.S. Dist. LEXIS 35051, at *21 (S.D.N.Y. Feb. 21, 2019).

essential to assist enforcement efforts by establishing clear expectations and to prevent lawyers hiding behind the unlikelihood of enforcement, often bred by ambiguity in the rules, to advocate untruthfully in mediation.

iv. Why The Incentive For Lawyers To Lie Warrants Clarification Of The Rules

As humans, lawyers' behavior is affected by innumerable factors. In the context of mediation, there are certain factors which consistently shape lawyers' conduct and advocacy. Some of these factors provide lawyers with an incentive to lie during mediation and, therefore, support the clarification of the rules to counter these incentives.

First, mediation has become increasingly adversarial, and the approaches lawyers have employed during mediation have become increasingly similar to those in court proceedings.[251] Relis' research in the USA revealed that lawyers viewed mediation as a tactical, adversarial process which could be used strategically to convey certain information and confidentially communicate directly with the other side.[252] Lawyers have therefore been injected with a motive to win at all costs, which can often lead to sacrificing the truth.[253] This is particularly so in the USA, where it is submitted there is a starker culture of distrust amongst practitioners—so evident that states such as New York have adopted Standards of Civility applicable to lawyers, which is a development not fathomed in Australia

[251] Carrie Menkel-Meadow, *Ethics in ADR Representation: A Roadmap of Critical Issues*, 4 DISP. RESOL. MAG. 3, 3–4 (1997).
[252] TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 194 (2009).
[253] Donald E. Campbell, *Raise Your Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility,* 47 GONZ. L. REV. 99, 106–07 (2011) (discussing how lawyers will lie in order to "get a leg up over opposing counsel.")

largely because it is assumed that lawyers would inherently display such civility.[254]

Second, there is often an inequality of resources and bargaining power between the parties to a mediation.[255] This inequality may lead the lawyer representing the less powerful side to employ tactics, such as lying and active misrepresentation, to equalize this inequality.[256] This is problematic in circumstances where there is ambiguity in the applicable rules, because combined with the inequality, it provides fuel for a lawyer to lie.[257] The same may also be said for an inequality in the experience or expertise of counsel, because less experienced counsel may flaunt with the ambiguity in the relevant rules and tell lies to compensate for their inexperience.[258] Peters similarly explains that lawyers who lie during mediations often display lesser skill levels and lack comprehensive preparation.[259]

An imbalance of power may also arise in a different context—where one party is represented by a lawyer but the other is not.[260] Such inequality may render telling lies particularly influential in the mediation. A serious question emerges about whether the lawyer should be subject to a heightened duty of disclosure in such circumstances to

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[254] Paula Baron & Lillian Corbin, *The Unprofessional Professional: Do Lawyers Need Rules?* (2017). [source needed—based on abstract of article; discusses Australia's lawyer-civility standard]; *see also* Campbell, *supra* note 253, at 106–107.

[255] *See* Elaine Smith, *Danger-Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer*, 1996 J. DISP. RESOL. 379, 381 (1996).

[256] Campbell, *supra* note 253, at 106–107.

[257] Campbell, *supra* note 253, at 106 (2011) ("[T]he stated purpose of civility codes is to 'clarify and to articulate important values held by many members of the bench and the bar' by placing expected standards of civility in one document.").

[258] Relis, *supra* note 124, at 159.

[259] Peters, *supra* note 61, at 141.

[260] *See generally* Jacqueline Nolan-Haley, Mediation, *Self-Represented Parties, and Access to Justice: From There to Here*, 87 FORDHAM L. REV. 78 (2019).

counter the obvious imbalance of power arising from the unrepresented party's likely inability to identify mediation tactics, or the nuances of the law.[261] The potential for unrepresented parties to unwittingly believe and rely on lies, or to be actively misled, also puts mediators "in a difficult conflict between their obligations to remain impartial and to promote a level of informed consent essential to self-determination."[262] However, in the same sense it might be argued that the unrepresented party is also able to freely lie or tell mistruths, and often being a non-lawyer, is more likely to do so. So, while this may be an area for future reform, it is likely to be subject to debate.

Third, lawyers' personalities and the dynamics of relationships between lawyers may urge some to push the line where there is lenient regulation of truth.[263] Lawyers' characters and interactions have "material effects on all actors' mediation experiences and results," and on truth in mediation.[264] Related to this, tensions between lawyers' conceptions as representatives of a profession subject to specific rules of conduct and as businesspeople seeking the best outcome for their client impacts adherence to the rules relating to truthfulness.[265] The impact of lawyers' relationships on truthfulness is especially prevalent where there is distrust engendered through past practice, because lawyers are then more likely to lie because they believe the other side will do the same to obtain advantage.[266]

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[261] *Cf.* Nix v. Whiteside, 475 U.S. 157 (1986); MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 1983).
[262] Peters, *supra* note 61, at 132.
[263] *See generally* Peters, *supra* note 61, at 141–42.
[264] Relis, *supra* note 124, at 158.
[265] Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolution* 360 (2003).
[266] William Wan & Sarah Kaplan, *Why Liars Lie: What science tells us about deception*, WASH. POST (Aug. 24, 2018, 8:46 A.M. CDT), https://www.washingtonpost.com/news/speaking-of-

These factors heighten the importance of clarifying the requirements of the rules relating to truth in mediation so that lawyers do not take advantage of ambiguity or a lack of coverage in the rules for ulterior motives such as those above.

2c) The perception of mediation and its utility in resolving disputes

The way truth is regulated during mediation affects the integrity and public perception of mediation as a process for resolving disputes.[267] Loose regulation is likely to lead to a race to the bottom for truth and transform mediation into an even more adversarial forum in which both sides expect the other to lie or misrepresent matters for their gain. This provides an environment in which lawyers may believe they have greater opportunity and perhaps even impunity for mistruths, leading to the proliferation of falsity in mediation.[268] This impacts the integrity of the mediation process and urges parties to prefer court litigation because it is viewed as the only true forum of truth. It is also likely to diminish the collaborative spirit of mediation and one of mediation's primary advantages—to preserve relationships between the parties while resolving a dispute.[269]

Loosely regulating truth also undermines mediation's potential to explore and reach alternative outcomes for the parties beyond the win-lose outcomes of adjudication.[270] Lies prevent parties from discovering joint gains and inhibit mediators' abilities to explore interests and

science/wp/2018/08/24/why-liars-lie-what-science-tells-us-about-false-statements/ (referencing a study that found people lie more when others are being dishonest).

[267] Wan & Kaplan, *supra* note 266.

[268] Wan & Kaplan, *supra* note 266.

[269] The Liberty Group, *8 Benefits of Mediation*, The Liberty Group (June 8, 2017), http://thelibertygroup.com.au/8-benefits-of-mediation/.

[270] *See* Peters, *supra* note 61, at 138.

help the parties develop complimentary outcomes.[271] Lies also undesirably assist parties to divide the outcome pie favorably in their interest but do not help expand that pie for the benefit of all.[272]

Additionally, loosely regulating truth will likely inhibit the efficiency of mediation as an ADR process. For example, if lying about facts is condoned, it will require lawyers to expend resources in checking and verifying all factual representations of their opposition.[273] It is apt to undermine the purposes of the mediation in the court-context, such as reducing docket congestion, aiding effective judicial administration, and promoting productive negotiation outside of court.[274] Like the Queensland Court of Appeal said in *Mullins*: "[p]robity is essential to the utility of mediation as a form of alternative dispute resolution."[275]

At a personal level, lawyers and parties are unlikely to take mediation seriously if they know the other side is allowed to regularly lie about significant matters because of the ambiguity of the applicable rules.[276] As is explained in the ABA's Formal Ethics Opinion 06-439, this is especially because a neutral mediator is involved, and communication deteriorates as mediators loop statements made by the parties.[277] Further, ambiguity in the rules is likely to deter parties from settling a matter at mediation because they

[271] Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation,* Dispute Resolution Ethics: A Comprehensive Guide 147 (Phyllis Bernard & Bryant Garth eds., 2002).
[272] Peters, *supra* note 61, at 139.
[273] *See* David R. Hague, *Fraud on the Court and Abusive Discovery*, 16 NEV. L. J. 707, 711–12 (2016) (providing examples of attorney trickery during discovery).
[274] Keepoutofcourt.com, *Benefits of Mediation*, Keep Out of Court, https://www.keepoutofcourt.com/benefits-of-mediation/.
[275] *Legal Services Commissioner v Voll* [2008] QCA 293 [67] (Wilson J), [1] and [70] (Keane JA and Dutney J agreeing) (Austl.).
[276] Wan & Kaplan, *supra* note 266.
[277] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).

suspect that any settlement will be based on mistruths and misrepresentations made during mediation.[278] Instead, parties will likely wait until a court trial where there are more comprehensive methods for uncovering the truth.[279]

While some commentators argue that deception is inherent in all negotiation and that the parties accept the loose regulation of truth as intrinsic to mediation,[280] for the reasons stated above, more comprehensive and clearer regulation of truthfulness will likely preserve mediation's long-term legitimacy as a dispute resolution process.

We can, and should, do better. Appropriate amendments will help ensure mediation consistently produces fair and just outcomes and improve the durability of agreements reached. It will also enable mediators to more effectively foster joint, interest-based negotiating and use privately shared information to create value for the parties, ultimately preserving mediation's potential as a viable forum for interest-based negotiating.[281]

CONCLUSION

The comparative analysis undertaken above shows that the Australian rules more comprehensively and strictly regulate truth in mediation. Yet, like their U.S. counterparts, there remain gaps and ambiguities within the rules, such as in relation to the application of good faith requirements, which should be addressed.

The Australian experience shows that crafting rules relating to the truthfulness of lawyers' advocacy during

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[278] Robert J. Burns, Jr., *Mediation Techniques and Why Honesty Is Always the Best Policy*, Perry Dampf Dispute Solutions, 5, https://www.perrydampf.com/docs/Mediation-Techniques-Honesty-Always-Best-Policy.pdf.
[279] *See* FED. R. CIV. P. 60(d)(3) (2020); Hague, *supra* note 273, 709–10 (mentioning the Federal Rules of Civil Procedure have a process for determining fraud on the court).
[280] ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).
[281] Peters, *supra* note 61, at 139.

mediation is not difficult if lawyers are required always to be truthful. On the other hand, the U.S. experience with Model Rule 4.1(a) shows that, if lawyers are allowed to lie when negotiating, it is not possible to draft a morally and intellectually justifiable rule that draws a bright line between permissible and impermissible lying. This is because, as explained above, the drafting exercise is inherently self-contradictory.

Model Rule 4.1(a) was a retrograde step in 1983 in the regulation of the truthfulness of lawyers.[282] In the writers' view, it should be amended to require lawyers always to be truthful. If there is no appetite to amend Model Rule 4.1(a), it is suggested that the U.S. will benefit from greater clarity in the rules relating to truthfulness in mediation, particularly through the changes suggested in Part Two of this article.

The changes advocated in this article will address the difficulties in enforcing the rules, counter lawyers' incentives to lie, provide lawyers with practical guidance about what is permissible and impermissible behavior during mediation, prophylactically deter lawyer misconduct, help achieve the fundamental purposes of mediation, and enhance its legitimacy as a dispute resolution process.

[282] MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR ASS'N 1983).