Ethics: Throwing in the Kitchen Sink—How Far Can You Go in Presenting Damages in Litigation, Mediation, and Negotiation?

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I. **Introduction**

A lawyer has a duty to diligently and competently prosecute or defend a client’s interests in a legal dispute\(^1\) and an equal duty of candor as an officer of the court.\(^2\) These competing responsibilities sometimes make it difficult for the lawyer to determine the difference between acceptable zeal and vexatious or unethical conduct in advocacy.

As a consequence, the American Bar Association’s Model Rules of Professional Conduct, upon which many state ethics rules are based,\(^3\) attempt to define a proper balance between lawyers’ overlapping roles and responsibilities. These rules are equally applicable to the construction lawyer and general practitioner alike, making it incumbent upon lawyers to familiarize themselves with the rules and follow them when advocating on behalf of a client.

Evaluating the relationship between zeal and misconduct is important in construction law practice. At the outset of any given construction dispute involving a claim for damages, the claimant seeks to maximize its potential recovery while the defendant seeks to avoid or minimize its potential exposure. At the time of client intake, the claimant’s lawyer has many things to consider including the availability and merit of claimant’s potential claims or causes of action; the proper measure of damages; the availability of lien rights, bond rights and insurance coverage; the availability of witnesses and the need for experts; the need to preserve evidence; the availability of dispute resolution options; and the ability to collect a judgment, just to name a few. Likewise, the defendant’s lawyer must analyze considerations including an insured defense or insurance coverage availability; indemnification rights; substantive and procedural defenses, compulsory counterclaims, and third party or cross-claims; and other end-game considerations such as the client’s corporate or personal asset exposure to a judgment or bankruptcy.

These considerations are continuously assessed and reassessed by counsel as discovery
progresses through the various dispute stages and are communicated and argued to others—
during pre-suit correspondence and phone calls, during negotiations and mediation, and through
formal adjudicative proceedings such as binding arbitration and litigation. In each
communication, the lawyer makes decisions that implicate the lawyer’s ethical and legal
obligations to the client, the opposing party, and the court. As a consequence, knowing the
ethical and legal duties of candor expected of attorneys during the various litigation stages is an
essential ingredient of a professional lawyer’s diligent, competent, and zealous advocacy of the
client.

Construction lawyers who are assessing, advocating, and defending claims for damages
should know what it means at each stage of a representation for the lawyer to “tell the truth”
about those damages. Key to this understanding is knowing how “truth telling” is defined in the
relevant jurisdiction and how its definition may differ based on whether the lawyer is
communicating in court, before an arbitrator in binding arbitration, before an arbitrator in non-
binding arbitration, before a mediator, or to an opposing counsel or other third-parties outside of
formal litigation contexts. In addition, beyond the ethical considerations, a lawyer should know
when a lawyer’s representations in pursing or defending a claim for damages can result in court-
imposed sanctions for vexatious litigation or, for example, when an overzealous attempt to
perfect or impose a construction lien may render the lien unenforceable, fraudulent or perhaps
expose both attorney and client to punitive damages or other sanctions. In addition, a lawyer
should know what steps a lawyer must take to correct a discovered candor violation and stay
within ethical and legal boundaries.

This paper provides an overview of the American Bar Association’s Model Rules of
Professional Conduct, bar ethics opinions, and court opinions that will assist the construction
practitioner in addressing the foregoing issues. It begins by reminding practitioners of their candor obligations to tribunals and then turns to address the ethical duty of candor outside tribunals in situations like mediation and negotiation. It then discusses a lawyer’s ethical duty to avoid assisting a client in committing a fraud, giving attention to the construction lien and/or claims context. The paper then proceeds to remind the lawyer of the catch-all ethical duty of honesty and ends by reviewing the lawyer’s duty under the rules of civil procedure to be forthright when presenting and defending damages claims and engaging in discovery.

While the authors have attempted to provide a thorough overview of the ethics and legal ramifications of truth telling, this overview is not meant to be jurisdiction-specific; practitioners are reminded to consult the rules of professional conduct, court rules, case law, and statutes in their own jurisdictions to understand how those laws intersect with the information discussed in this paper.

II. Candor Toward the Tribunal

Before courts or arbitrators in binding arbitrations, the lawyer’s duty of candor is at its highest. Although lawyers have a duty to present their cases persuasively to a tribunal and are not expected to give an “impartial exposition” of their cases or vouch for the evidence they present, they have a countervailing duty to maintain the “integrity of the adjudicative process” by being candid with the court, even if that candor requires that the lawyer disclose information that might otherwise be protected by the lawyer’s duty of confidentiality. Model Rules of Professional Conduct 3.1, 3.3 and 3.4 extend this duty of candor to all claims and contentions, lawyer statements, proffers of evidence, statements made by clients and witnesses, lawyer discovery conduct, and disclosures of legal authority.
A. Lawyers’ Duties in Making Claims and Contentions

Model Rule 3.1 requires a lawyer to make only claims, defenses, and assertions that have a “basis in law or fact [] that is not frivolous.” The rule prohibits an abuse of legal procedure while at the same time recognizing that a lawyer has a duty to use legal procedure to the fullest benefit of the client’s cause.

With respect to the legal basis of claims, the rule notes that any claim that is based on “a good faith argument for an extension, modification or reversal of existing law” is not frivolous. With respect to the factual basis of claims, the comment to the rule explains that lawyers must inform themselves about the veracity of client allegations set forth in pleadings that provide the basis of claims and contentions, noting that while

the filing of an action or defense . . . for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery[, lawyers must] inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.

The comments note that an action usually will not be deemed frivolous “even though the lawyer believes that the client's position ultimately will not prevail.” Instead, an action will likely be deemed frivolous where a lawyer is unable “either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument [on the law].” The question of good faith filing of documents often comes up in the civil sanctions context, rather than the ethics context, and cases addressing civil sanctions can be informative of the kinds of conduct that might fall below the ethical floor. For instance, the court in Edward Yavitz Eye Center, LTD v. Allen, concluded that sanctions were proper where plaintiff filed a complaint for damages in a state court action for breach of contract even though a cursory examination of the contract documents revealed that plaintiff’s claims were subject to an
The court stated that, even though the complaint’s allegations may have had merit, “plaintiff and its counsel failed to make objectively reasonable inquiries before filing the original complaint.” Had they done so, said the court, the “complaint as written would never have come before the trial court.”

By extension, the court in *Malone v. Papesh* imposed sanctions against a defense attorney who, in the face of overwhelming evidence as to liability, nevertheless signed generic answers denying the allegations of the complaint without first having consulting with the client. In doing so, the court concluded the lawyer had not acted in “good faith.” In contrast, the court in *Mendelson v. Ben A. Borenstein & Co.* refused to impose sanctions in an owner’s action against a building contractor for damages flowing from alleged construction defects at a strip shopping center where no authority was cited to support owner’s theory of recovery and the facts weighed heavily against owner. Although plaintiff’s theory of recovery was defective from the start, the court concluded that case was not brought in bad faith, as owner’s building “apparently [had] and [would] continue to suffer unnatural settling.”

For construction lawyers, special ethical considerations in making claims and contentions can arise in the context of insured or bonded claims, both as to the characterization of damages and as to conflicts flowing from the defense obligations. For instance, under the terms of the standard ISO commercial general liability (CGL) policy, an insurer owes two distinct duties to an insured: (1) the “duty to defend” and (2) the “duty to indemnify.” In many jurisdictions, an insurer’s duty to defend is determined solely by the factual allegations set forth in the plaintiff’s complaint. Accordingly, construction lawyers drafting an initial pleading for construction defect damages must know what factual allegations are necessary to trigger an insured defense and, by extension, understand how the characterization of those damages impact potential
coverage. Construction lawyers must tread carefully to ensure that facts are not mischaracterized for the purpose of triggering an insured defense or coverage or are otherwise asserted without a good faith basis. Although the filing of an action will not be deemed frivolous merely because the facts have not first been fully substantiated, Model Rule 3.1 obligates lawyers to inform themselves about the facts and determine that they support a good faith argument.

Once an insured defense obligation is triggered, the carrier typically chooses a lawyer to defend its insured. The defense lawyer’s paramount duty and ethical responsibility is to the insured who is the lawyer’s client, even though the lawyer is both retained and paid by the insurance carrier. This relationship between the defense lawyer, the insured, and the insurer is often referred to as a “tripartite” relationship and can be the source of various conflicts between insurer and insured. These conflicts raise ethical dilemmas for the lawyer including, among other things, conflicts arising from an insurance carrier refusing a settlement offer within the policy limits and exposing the insured to personal liability in excess of those limits.

Similar ethical conflicts arise in joint defense scenarios in the surety context. For instance, the North Carolina State Bar considered whether a lawyer must withdraw from jointly representing a general contractor and a surety when the lawyer determined that a defense advanced by the general contractor was frivolous and asserted for the purposes of delay to avoid payment. The opinion advised that a lawyer has a duty to “assert only valid defenses to the claims asserted,” and that if the general contractor persisted in the frivolous defense, the lawyer would need to withdraw from the representation of both the contractor and the surety.

B. Lawyers’ Duties in Making Statements of Fact and Law

According to Model Rule 3.3(a)(1), lawyers (1) must not knowingly “make a false statement of fact or law [and (2)] must correct [the lawyer’s previous] false statement of material
fact or law” when before a “tribunal.” “Knowingly” is also defined by the rule as “having an awareness of” something, and knowledge can be inferred from the circumstances. In other words, when a lawyer makes a statement to a tribunal, whether orally or in a written pleading, affidavit, or other document, the lawyer must know or believe the assertion to be true. As one judge has noted, under Rule 3.3, “Forgetfulness is okay. Spin is okay. False statements of facts, material or not, are not okay.”

A “tribunal” includes courts, binding arbitration panels, and any “other body acting in an adjudicative capacity.” Acting in an adjudicative capacity means “render[ing] a binding legal judgment directly affecting a party’s interests in a particular matter.” A tribunal’s reach does not merely extend to the courtroom or hearing room doors; according to the Model Rules, the tribunal extends to “proceedings conducted pursuant to the tribunal’s ancillary authority, such as a deposition.” For example, in Florida Bar v. Forrester, the court disciplined a lawyer under Florida’s version of Model Rule 3.4 who, during the course of a deposition, made an intentional misrepresentation concerning the location of an exhibit when initially asked whether she had it.

The “present tense” part of the rule—avoiding making a false statement—requires lawyers to avoid making any false statement of law or fact whereas the “past tense” part of the rule requires lawyers to correct only false statements of material law or fact. In other words, the duty to make a truthful statement extends to all statements, but the duty to correct a misstatement extends only to ones that are material in nature. This duty of candor, along with the duty to correct false evidence under Model Rule 3.3(a)(3) discussed below, continues “until the conclusion of the proceeding”; that is, the duty to correct the lawyer’s material false statements does not end until a final judgment is issued and the time for appeal has passed, and “applies even if compliance” would require disclosure of confidential information related to the
representation.\textsuperscript{39}

In the construction law context, at a minimum, a lawyer’s statement in an affidavit, or, by extension, in a claim of lien executed by a lawyer and submitted to the tribunal on behalf of a client, must be reasonably believed to be true after a reasonably diligent inquiry. In \textit{The Florida Bar v. T. Charnock},\textsuperscript{40} the court imposed a thirty-day suspension from practice against a lawyer after concluding that the lawyer had procured a tenant for the sole purpose of delaying a lien foreclosure proceeding against client’s property and had knowingly submitted an untruthful affidavit to the tribunal misrepresenting facts about these acts.\textsuperscript{41} The court, applying its rules of ethics that preceded the current version of the Model Rules, concluded that the lawyer’s actions and false statements to the tribunal “went beyond the boundaries of zealous advocacy . . . and inhibited the proper administration of justice.”\textsuperscript{42}

Likewise, in \textit{CMC Steel Fabricators, Inc. v. RK Construction, Inc.},\textsuperscript{43} a lawyer was disciplined under the federal district court’s inherent disciplinary power because the lawyer had made a “reckless and knowing misrepresentation” to the court at a status hearing concerning the content of deposition testimony in violation of state’s equivalent of Model Rule 3.3(1).\textsuperscript{44} In determining the proper sanctions, the court relied upon the ABA’s Standards for Imposing Lawyer Sanctions and considered the duty violated, the attorney’s mental state, the actual or potential injury caused, and the existence of aggravating factors.\textsuperscript{45} The court concluded that there had been no actual injury caused by the misconduct and sanctioned the lawyer by public admonishment.\textsuperscript{46}

The comments to Model Rule 3.3 note that “there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”\textsuperscript{47} In addition, misleading statements are generally considered to be false statements under Model Rule 3.3.\textsuperscript{48}
When statements or omissions that mislead amount to an unethical misrepresentation, however, is not always clear. Consider the conflicting opinions that follow. In a case from South Dakota, a lawyer did not tell the court that he had in his possession a videotape relevant to the proceedings; the lawyer was disciplined when he moved to dismiss his client’s criminal charges because the prosecution failed to produce the very same videotape. Thus, the lawyer was disciplined for his misleading omission. Conversely, in a matter considered by the ABA Committee on Ethics and Professional Responsibility, the Committee addressed the issue of whether a lawyer would violate the duty of candor if the lawyer filed a claim that was time-barred but did not affirmatively address the procedural bar upon filing. The Committee concluded that because it is the responsibility of the opponent to raise the procedural objection, it would be ethical for the lawyer to file the time-barred claim, so long as the lawyer “made no misrepresentations in pleadings or orally to the court or opposing counsel.” In other words, the attorney did not need to call the procedural defect to the attention of the opposing party or the court. The Committee noted, however, that this conclusion might not apply if the limitations to the claim were jurisdictional, if the suit was so deficient that it could be dismissed without action by the opposing party, or if the filing lawyer was acting in bad faith.

C. Lawyers’ Duties In Offering Evidence and Witnesses

In addition to the duty to avoid misstatements of fact or law, a lawyer must not falsify evidence, counsel a witness to testify falsely, or “allude to any matter [at trial] that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.” Moreover, Model Rule 3.3(a)(3) mandates that lawyers must not knowingly offer false evidence and must take steps to correct any false evidence offered by them, their clients, or their witnesses. Steps to correct the submission of false evidence include “reasonable remedial
measures, including, if necessary, disclosure to the tribunal.” Thus, where the lawyer knows that a client has testified falsely, for example, the candor rules of Model Rule 3.3 trump the duty of confidentiality to the client even where there is no specific exception in state’s ethic rules that allows “information related to the representation” to be disclosed. For example, when a lawyer in Michigan discovered that his client had inadvertently lost possession of a repossessed piece of construction equipment that was subject to claim for its return, he asked the Michigan bar to advise him on whether he had to disclose to the tribunal that his client no longer possessed the repossessed piece of equipment even though that issue had not been raised specifically in the matter. Although the Michigan Bar interpreted the Model Code of Professional Responsibility in deciding this question and not the Model Rules, the bar required the lawyer to disclose the loss of the equipment because he knew about it. The bar noted that even though the information about the location of the equipment was gained through privileged communication with the client, the rules still mandated correction and disclosure to the court, noting that the very purpose underlying the claim (i.e. recovery of the equipment) could not be accomplished.

The duty imposed in Model Rule 3.3(a)(3) follows the same pattern as the duty the lawyer has with respect to her own statements; a lawyer cannot offer any false evidence but has a duty to correct false evidence offered to the court and under the lawyer’s control only when it is material. Importantly, lawyers must “know” that the evidence is false before the prohibition applies; a “reasonable belief” that the evidence is false does not preclude the lawyer’s representation of it, but a lawyer should consider whether offering questionable proof limits his competence and effectiveness. Beware, however: a lawyer’s knowledge of false evidence can be “inferred from the circumstances.” Thus, while “a lawyer should resolve doubts about the
veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood\textsuperscript{62} or stand by while the lawyer knows the client is telling a lie to a tribunal.\textsuperscript{63}

In addition to being subject to the ethical requirements of Model Rule 3.1, discussed above, all documents filed with the court are also covered by the higher candor standards of Rule 3.3.\textsuperscript{64} While lawyers are not generally required to have “personal knowledge of matters asserted” in pleadings or other documents because litigation documents ordinarily are not assertions by the lawyer but rather are assertions of the client or someone on the client’s behalf,\textsuperscript{65} lawyers are “responsible for pleadings and other documents prepared for litigation.”\textsuperscript{66} And if the document has assertions purporting to be based upon the lawyer’s own knowledge, the lawyer must “know[] the assertion is true or believe[] it to be true on the basis of a reasonably diligent inquiry.”\textsuperscript{67} Notably, pleadings and affidavits have been held to be statements to a tribunal even where the case is dismissed before the pleadings go to a judge or jury because the court found that Model Rule 3.3 encompasses any false statement that might be able to corrupt the tribunal’s proceedings.\textsuperscript{68} Likewise, the ABA has opined that Model Rule 3.3(a)(2) applies to documents and discovery in the pretrial phase, “even before the documents are filed.”\textsuperscript{69}

\textit{D. Lawyers’ Duty to Disclose Controlling Legal Authority}

Under Model Rule 3.3(a)(2), a lawyer has a duty to disclose directly adverse authority in the controlling jurisdiction when it is not otherwise disclosed by the opposing party.\textsuperscript{70} The rule comment states that the rule does not require the lawyer “to make a disinterested exposition of the law” but rather merely to “recognize the existence of pertinent legal authorities” before the tribunal.\textsuperscript{71} While the adverse authority must be from the controlling jurisdiction, it need not be itself controlling or indisputable in its adverse effect.\textsuperscript{72}
The failure to disclose adverse legal authority can also result in admonishments from the court in the absence of disciplinary proceedings. For example, in *Krull v. Celotex Corp.*, an asbestos insulator sued the asbestos manufacturer for damages, including punitive damages, resulting from his injuries following exposure to insulating materials. A successor manufacturing corporation moved for partial summary judgment on issue of its liability for punitive damages and submitted various cases in support. The District Court ultimately held that undisclosed controlling law bound the successor corporation to unconditionally assume all duties and liabilities, including punitive damages for insulator's injuries and denied the manufacturer’s motion. Citing the Model Rules, the court found Celotex’s failure to disclose adverse decisions “especially disturbing” since its indiscretion was “not simply the nondisclosure of a case arguably on point—it [was] a case squarely on point in which the same litigant was the loser.”

**E. Lawyers’ Duties of Honesty in Discovery**

Under Model Rule 3.4, lawyers are not permitted to “falsify evidence, counsel or assist a witness to testify falsely,” “make a frivolous discovery request,” or “fail to make a reasonably diligent effort to comply with a legally proper discovery request.” In addition, a lawyer may not allude at trial to any evidence that will not be supported by admissible evidence and may not unlawfully alter, destroy, conceal or obstruct another party’s access to evidence. While the procedure of the adversary system “contemplates that the evidence in a case is to be marshaled competitively by the contending parties[,] [f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.” Model Rule 3.4(a) applies to evidentiary material generally, including computerized information. The comments to the
rule note that “[f]alsifying evidence is also generally considered a criminal offense,” but that “applicable law may permit a lawyer to take temporary possession of physical evidence . . . for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence.”

In prosecuting or defending a claim for damages, obtaining, reviewing, and analyzing all available evidence and expert reports relating to said damages is essential. The discovery of and access to such evidence is indeed a critical procedural right that can be frustrated by the misconduct of an opposing party. Thus, construction lawyers should be mindful of how their actions can frustrate the discovery process and create disciplinary consequences, particularly when directing clients to take particular actions. For example, consider how Model Rule 3.4 might apply to the facts at issue in In re Heilgeist, where the court dealt with a lawyer who had falsified evidence. In Heilgeist, a lawyer represented an owner in a dispute against a building contractor. In “an effort to prepare for trial and obtain probative, competence evidence [of damages],” the lawyer had his clients deliver three cashier’s checks payable to the completion builder. The lawyer knew, however, that the checks would in fact never be tendered to the builder. The lawyer instead deposited the checks into his business account to pay completion vendors. In subsequent litigation against the builder, the lawyer prepared answers to interrogatories and attached copies of two of the three falsified checks to the interrogatories. After a dispute arose between the lawyer and client, a disciplinary proceeding was initiated against the lawyer for various violations of the rules of conduct. The lawyer was ultimately suspended from practice for three months for participating in the creation of false evidence in violation of Illinois’ ethics rules.
F. Lawyer’s Duty Not to Assist in Criminal or Fraudulent Conduct Before a Tribunal

Under Model Rule 3.3(b), a lawyer must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal,” if he knows that any person, including his client, “intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.” Model Rule 1.0(d) provides that “‘fraud’ or ‘fraudulent’ denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” The terms "fraud" or "fraudulent" do not include "merely negligent misrepresentation or negligent failure to apprise another of relevant information." According to the rule’s comments, this duty under Model Rule 3.3(b) protects courts against conduct such as “bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by the law to do so.”

With respect to clients in particular, Model Rule 3.3(b) is one of the more clear examples of the balancing act between a lawyer’s duties and responsibilities as a client advocate and duties as an officer of the court. A lawyer usually learns of a client’s criminal or fraudulent act or intent only by way of an attorney-client communication. Indeed, the comments to Model Rule 3.3 recognize that the disclosure of attorney-client communications can have “grave consequences to the client,” but note that the alternative is that the “lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.” The comment further explains that if it were not otherwise clearly understood that a lawyer must act upon the duty to disclose criminal or fraudulent conduct related to the proceeding, a client could simply “reject the lawyer's advice to reveal” the conduct
or fraud and insist that the lawyer keep silent, thereby coercing the lawyer into becoming a party to fraud perpetrated on the tribunal.\(^97\)

### III. Truthfulness in Statements to Others Outside Tribunals

Model Rule 4.1 prescribes a different standard of candor for a lawyer when that lawyer is dealing with opposing counsel or others outside the bounds of a tribunal or prior to the commencement of tribunal proceedings. Absent the duties of candor to a tribunal that can trump the lawyer’s duty of confidentiality to a client,\(^98\) a lawyer is generally held to a less restrictive standard of truth telling under Model Rule 4.1, which governs lawyer conduct when not appearing before a tribunal but while involved in representing a client.\(^99\) Model Rule 4.1(a) provides that “[i]n the course of representing a client a lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a third person.”\(^100\) “Third person” is not defined in the Model Rules, but the term likely includes those who are not included in the rules’ definition of a tribunal; these non-tribunal actors likely include opposing counsel, arbitrators in non-binding arbitration, mediators, architects, dispute review boards, and similar persons not sitting in an adjudicatory capacity capable of rendering a binding legal judgment.

Model Rule 4.1’s standard is less exacting than the standard that applies to statements made to tribunals—lawyers are limited only to avoiding material fact or law misstatements rather than all misstatements of fact or law. Moreover, under Model Rule 4.1, while there is a duty not to misstate facts and to avoid “incorporat[ing] or affirm[ing] a statement of [material fact or law made by] another person that the lawyer knows is false,”\(^101\) lawyers generally have no duty to inform an opposing party of facts relevant to the matter and of which the opposing party is unaware.\(^102\)
For the purposes of Model Rule 4.1, “material statements of fact” do not include “generally accepted conventions of negotiation.” The conventions “ordinarily in this category” include: “estimates of price or value placed on the subject” and “parties’ intentions as to an acceptable settlement of a claim.” The Restatement of the Law Governing Lawyers further explains that
certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. 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.

The ABA adds that “statements regarding negotiating goals or willingness to compromise” and “overstatements or understatements of the strengths and weaknesses of a client’s position” are not generally considered statements of material fact for the purposes of Model Rule 4.1.

While Model Rule 4.1 does not specifically address partially true but misleading statements or omissions to third parties, the comments to the rule note that these can be deemed the “equivalent of affirmative false statements.” However, the rule requires that the lawyer’s act be a “knowing” one, not just an accidental or unintentional one. Thus, to be liable for discipline, a lawyer must know, for example, that a partially true statement is misleading. In addition, the Model Rules mention fact and law as categories of misrepresentation but do not mention “opinions”; consistent with the rule’s comments, this suggests that the evaluation of the truthfulness of a lawyer’s opinion alone about some facet of a matter at issue is not covered by Model Rule 4.1.

In addition to avoiding misstatements of material law or fact, Model Rule 4.1(b) provides that lawyer is expected to make disclosures of material fact when nondisclosure would
assist “a criminal or fraudulent act by a client” unless disclosure is prohibited by the attorney’s duty of confidentiality. 109 In this context, a lawyer cannot be silent—even if the lawyer has not affirmatively made a misstatement of material fact—when an omission assists a client in a criminal or fraudulent act. Importantly, however, this obligation to disclose is limited by Model Rule 1.6—the duty to avoid disclosing “information related to the representation.” 110 By the black-letter of Model Rule 1.6, virtually all information a lawyer learns in a representation is confidential and protected from disclosure. 111 There are, however, some exceptions to the confidentiality rule. Important in this context are the Model Rules that permit, but do not require, a lawyer to disclose information when a client has committed, is committing, or will commit in a crime or fraud that has caused or is reasonably certain to cause substantial financial injury to another and the client has used the lawyer’s services to commit the crime or fraud. 112 Thus, in states that have adopted this exception to the nondisclosure requirements of Model Rule 1.6, lawyers may find themselves more frequently in the position of being required to disclose information to correct a third party’s misapprehension of material fact.

Construction lawyers must carefully consider whether situations in which they assist clients in preparing, executing, or filing construction liens, claims for equitable adjustment, bid documents, and other such documents could be construed as assisting in fraudulent or criminal conduct. When a client’s fraudulent or criminal conduct is discovered, a lawyer can ordinarily avoid assisting in the client’s crime or fraud by withdrawing from the representation. 113 In other circumstances, however, withdrawal may not be enough, and it may be necessary for the lawyer to “give notice of the fact of withdrawal and to disaffirm an opinion, document, [or] affirmation,” or if the lawyer cannot otherwise avoid it, disclose information relating to the representation to avoid being deemed to have assisted in the client’s crime or fraud. 114
The truth telling standards of Model Rule 4.1 discussed above are generally applicable in the context of negotiation and mediation. There are two exceptions, however; when lawyers communicate with a judge who is directly participating in the mediation and when a settlement is presented to the court for approval; in these situations, the higher standard of Model Rule 3.3 is more likely to apply.

A. Negotiation

In the 1980s, the ABA’s Kutak Commission proposed that the Model Rules be amended to require that, during negotiation, lawyers be required to make disclosures to correct misapprehensions, to engage in negotiation according to basic standards of fairness, and to have an affirmative duty to avoid unconscionable agreements. This proposal was rejected in favor of the current “caveat emptor” approach that privileges lawyer zealousness in protecting the interests of clients. Even in this “caveat emptor” environment, however, Model Rule 4.1 demands that lawyers not make misrepresentations of material fact or law in settlement negotiations. One court has defined “‘material’ in this context: “While the term ’material’ is not defined in Rule 4.1 or its commentary, it is not a difficult concept to comprehend. A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement.”

Commonly accepted negotiating behaviors, however, such as puffing, are not “material facts” under Model Rule 4.1. The ABA has confirmed that negotiating goals, willingness to compromise, and puffing statements are not subject to Model Rule 4.1. Commentators have noted that “the categories of Comment 2 encompass a wide array of information frequently exchanged during negotiations including inflated or deflated offers, counteroffers, and concessions; representations regarding clients’ settlement intentions; false estimates of value and
worth concerning bargaining subjects; and lies about target points, reservation plans, and bottom lines.” 121 Model Rule 4.1’s comment warns, however, that, even if certain statements are protected from disclosure as immaterial, lawyers should be “mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.”122 In other words, even if some of the lawyer’s negotiation statements are not unethical, depending on the laws of the relevant jurisdiction, they might still be criminal or fraudulent.123

Although some commentators have placed “bottom lines” in the nonmaterial category of Model Rule 4.1, there is some tension in whether misrepresenting a bottom line in a negotiation is a misrepresentation of material fact. The ABA has said that “a party’s actual or bottom line or the settlement authority given to a lawyer is a material fact” that would be subject to the prohibitions against misrepresentation contained in Model Rule 4.1, at least in some circumstances, such as when dealing with a judge as a mediator or settlement conference facilitator. 124 In a later ethics opinion, however, the ABA seemed to suggest that, with respect to bottom lines in negotiation, there is a difference between a stating a fact and expressing a “state of mind,” and a lawyer must carefully choose her words to navigate the boundary between permissible puffing and impermissible fact misrepresentation:

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements “of fact,” are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client’s Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.125
In further explaining the reach of Model Rule 4.1, one court has described four questions to ask to determine whether a lawyer has violated Model Rule 4.1 in negotiations:

(1) what is the statement or omission in dispute? (2) is it untrue or deceptively incomplete in any significant respect? (3) reasonably viewed, is it important to the subject that is being negotiated? and (4) at the time it was made, did the attorney know or should have known under the circumstances that the statement was untrue?\textsuperscript{126}

Further, the \textit{Restatement of Law Governing Lawyers} describes a number of factors that can be considered in determining whether, in negotiations, a statement is one of fact or one opinion including “the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, [and] the known negotiating practices of the community in which both are negotiating.”\textsuperscript{127}

When an opponent relies on false information in negotiations, some dispute exists about what affirmative steps a lawyer must take to correct the misapprehension. On one hand, lawyers in negotiations are under no duty to come forward with unfavorable facts or law that could arguably “help” the opponent. Comment 2 to Model Rule 4.1 states that a lawyer “generally has no affirmative duty to inform an opposing party of relevant facts.”\textsuperscript{128} In addition, Model Rule 1.6 protects many client confidences in the context of settlement negotiations.\textsuperscript{129} Thus, to the extent a misapprehension arises for a reason other than because of the client’s crime or fraud (as discussed above), the lawyer may be precluded from correcting others’ misapprehensions in negotiations. The ABA has said, for example, that revealing certain information in the context of negotiations might violate the lawyer’s duty of confidentiality and diligence, even where the lack of that information resulted in a misapprehension by the opposing party.\textsuperscript{130} In a case presented to the ABA for an ethics opinion, the ABA stated that a lawyer did not need to inform opposing
counsel of an expired statute of limitations when settlement was offered and other lawyer did not ask.\textsuperscript{131} The ABA Committee on Ethics and Professional Responsibility stated that to do so might violate the lawyer’s duties of confidentiality and diligence to the client.\textsuperscript{132}

On the other hand, the comment to Model Rule 4.1 notes that “a misrepresentation can occur if the lawyers incorporates or affirms a statement of another person that the lawyer knows is false.”\textsuperscript{133} And one commentator has warned against placing too much reliance on the exceptions for truth telling under Model Rule 4.1 when the lawyer knows that the opposing party is operating under a misapprehension: “[b]oth case law and ethics opinions now make it clear that negotiators cannot take advantage of incorrect assumptions or mistakes of the other side when they know such mistakes are being made.”\textsuperscript{134} For example, the ABA has warned of “implicit misrepresentation” that violates Model Rule 4.1 that results from the lawyer failing to make truthful statements.\textsuperscript{135} And where the client or the lawyer has provided false information or where objective facts are sought by the opposing party, the lawyer may engage in unethical misrepresentation if the lawyer remains silent in the face of an opponent’s misunderstanding.\textsuperscript{136}

Courts have sometimes made the duty to disclose contingent upon who provided the erroneous information or upon its importance. For example, one court, applying its procedural rules, found no general duty to tell an opponent of a factual error where the error was not caused or contributed to by the person with knowledge of the error.\textsuperscript{137} Likewise, another court, applying a version of the ethical rules slightly different from the Model Rules, held that a lawyer had a duty to correct false information if the lawyer or the client provided it, but the lawyer would not be required to correct misapprehensions that resulted from outside sources.\textsuperscript{138}

Other courts, however, do not necessarily require the lawyer or the client to be the source of the misapprehension in order to have a duty to disclose or correct. One court required a
lawyer to disclose a “non-confidential, material, and objective fact” in response to the opposing lawyer’s inquiry when finalizing a settlement. Another held that failing to disclose the existence of an insurance policy that covered a hospital lien was discipline worthy even when opponent already knew of two other hospital liens when negotiating a release. In another case, the court reformed a divorce agreement where the lawyer knew of the other lawyer’s mathematical errors in reaching the settlement, suggesting that the lawyer had a duty to point out the error even when it was not his own. The reasoning of these cases that impose a disclosure duty to keep one’s opponent from relying upon fact errors arguably would extend to a construction attorney’s representations concerning the existence of commercial general liability, builder’s risk, and similar policies. Moreover, this reasoning arguably could be extended to material misstatements or non-disclosures concerning the availability of payment or performance bonds.

Although negotiations have primarily been treated as outside the scope of the tribunal and are thus subject to less exacting truth telling standards of Model Rule 4.1, when a settlement that results from a negotiation must be approved by a court or when information about the facts underlying that negotiation are presented to the court, the court may impose an affirmative obligation on the lawyer to disclose facts not otherwise discovered by or previously disclosed the opposing party. In a well-known case, the court revoked approval of a minor plaintiff’s settlement agreement due to defense counsel’s failure to disclose facts and correct misapprehensions about the plaintiff’s health condition. In another famous case, the court set aside settlement when the parties negotiated a settlement at a pretrial conference before the judge but the plaintiff’s lawyer did not disclose prior to settlement that the plaintiff had died. The court said it was not necessary for opposing counsel to ask about whether the plaintiff was
alive during the negotiations; rather, the plaintiff’s lawyer had the responsibility to share this essential fact:

There is no question that plaintiff’s attorney owed a duty of candor to this Court, and such duty required a disclosure of the fact of the death of a client. Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel, even though counsel did not ask whether the client was still alive.\textsuperscript{146}

Typically, lawyers do not have a separate “good faith” requirement for voluntary negotiation and settlement communication, although some courts have suggested a good faith standard.\textsuperscript{147} The ABA, however, has suggested that “negotiating a settlement should be characterized by honor and fair dealing.”\textsuperscript{148}

B. Mediation

If mediation is done outside the purview of court-ordered mediation, a lawyer’s duty to the mediator and opposing counsel is likely governed by the standard of truth telling described in Model Rule 4.1. Even if mediation is court-ordered, annexed, or supervised, the proceeding has likewise generally been treated as not part of the proceedings before a tribunal and thus subject to Model Rule 4.1’s more relaxed truth telling standard. But, when judges participate in the mediation directly, then, in the ABA’s opinion, the higher standard will apply. In addition, courts may have specific truth telling standards in their mediation rules and procedures.

The ABA has addressed the question of whether court-ordered or court-annexed mediation is considered part of a “tribunal” under Model Rule 3.3 and is subject to its higher standard of candor. First, comments to Model Rule 2.4 state that “lawyers who represent clients in alternative dispute-resolution processes . . . before a tribunal, as in binding arbitration (see Rule 1.0(m)), [are] governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.”\textsuperscript{149} In addition, the ABA has
specifically interpreted court-ordered mediation as outside the bounds of a tribunal and, therefore, applies the lower standard of Model Rule 4.1 to misrepresentations of fact and law.\textsuperscript{150} Thus, typically, lawyers are to treat mediators as third parties under Rule 4.1 rather than under Model Rule 3.3.\textsuperscript{151} The ABA points out, however, that when a judge is participating in settlement negotiations, including court-sponsored mediation, Model Rule 3.3 applies to statements the lawyer makes to the judge.\textsuperscript{152}

So, for example, while a lawyer might overvalue his client’s damages to an opponent in a mediation context, the lawyer cannot do so when the mediator is the judge in the case. In fact, it may be that in the face of a judge-mediator’s question about bottom lines, case values, and the like, it may be that the lawyer should decline to answer. The ABA advises that lawyers may not disclose to the judge the lawyer’s settlement authority or advice to the client about settlement without the client’s consent; the lawyer, in the face of a question from the judge on these topics, is to “decline to answer, not lie or misrepresent.”\textsuperscript{153}

It is important for counsel to check a court’s local rules for mediation standards of conduct; a court could have specific rules that would apply a good faith or a higher truth telling standard. Moreover, if candor is important in winning the trust of the mediator, failing to adhere to the higher standard of candor might run afoul of the ethical rules on competence in client representation, even if the lawyer did not violate Model Rule 4.1.\textsuperscript{154}

A final practice note about reporting lawyer misconduct that occurs during mediation is worth mentioning. Typically, under Model Rule of Professional Conduct 8.3, lawyers have a duty to report the unethical conduct of their peers. But some states are exempting information about ethical breaches learned in the context of mediation from that reporting requirement. For example, recently adopted Florida Rule of Professional Conduct 4-8.3 says that the reporting rule
“does not require the disclosure of information . . . gained by a lawyer while serving as a . . . mediation participant if the information is privileged or confidential under applicable law.”

The comment to the rule says that, in Florida, “information gained through a ‘mediation communication’ is privileged and confidential, including information which discloses professional misconduct occurring outside the mediation. However, professional misconduct occurring during the mediation is not privileged or confidential under the Florida statutes.” In other words, if a lawyer, engaged in mediation communications, learns of another lawyer’s unethical behavior that occurred outside of the mediation, the first lawyer is not obligated to report that misconduct. If, however, the lawyer observes another’s misconduct during the mediation, it must be reported.

**IV. Lawyers’ Duty to Avoid Assisting Client in Crime or Fraud**

Beyond the duties a lawyer owes to the court in litigating and defending claims and to third parties in making representations, construction law practitioners should be mindful of their duty to avoid assisting a client committing a crime or fraud even before litigation begins. Under Model Rule 1.2(d), a lawyer cannot knowingly counsel or assist a client to commit a crime or fraud. That said, the prohibition does not preclude the lawyer from “giving an honest opinion about the actual consequences” of a client's conduct. The lawyer must, in fact, “consult with the client regarding the limitations on the lawyer's conduct.” The mere fact that a client may use a lawyer’s advice in a course of action that is criminal or fraudulent will not alone make the lawyer a party to the course of action: “There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”
In instances where a client's fraudulent course of action has already begun or is continuing, “the lawyer's responsibility is especially delicate.”\textsuperscript{163} In such instance, the rule comments direct the lawyer to “avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.”\textsuperscript{164} The lawyer is further directed to withdraw from the representation and, in some cases, “give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.”\textsuperscript{165}

Issues under Model Rule 1.2(d) can arise for the construction lawyer when representing clients outside of the litigation context. For example, the State Bar of California Standing Committee on Professional Responsibility and Conduct considered a matter where a contractor/developer asked its lawyer to include in its residential purchase agreements a provision warranting the quality of the piping to be used in the plumbing.\textsuperscript{166} During construction, the lawyer learned that substandard piping had in fact been used giving rise a homeowner’s attempt to rescind its contract.\textsuperscript{167} To avoid further complaints, the contractor asked the lawyer to draft a letter to be delivered to all other homeowners representing that the piping installed in their respective residences was the quality promised.\textsuperscript{168} The lawyer sought a formal opinion as to a lawyer’s ethical obligations when she knew or should have known that her client was committing a fraud upon third persons.\textsuperscript{169} In applying state rules of conduct similar those set forth in Model Rules 1.2(d), 1.6 and 4.1(a),\textsuperscript{170} the standing committee held that (1) the lawyer could not assist in any way and that drafting a letter to include a false material fact would constitute the commission of a fraud and an ethical violation; (2) the lawyer should advise the client that its actions were fraudulent; (3) the lawyer may advise the client to refrain from...
engaging in the misrepresentation and assist the client in rectifying previous misrepresentations; and (4) if the client failed to refrain from the fraudulent conduct, the lawyer must limit its representation to unrelated matters or withdraw.¹⁷¹

Moreover, Model Rule 1.2(d) applies to construction lien practice both inside and outside of the litigation context. Although lien laws differ from state to state, it is nevertheless generally recognized that only damages deemed “lienable” under the lien law can be properly included within the claim of lien. This is true even if such non-lienable damages are otherwise compensable under other legal theories. Accordingly, the willful inclusion in the claim of lien of a non-lienable item of damage could render the lien “fraudulent’ and unenforceable and expose both lawyer and client to damages, including punitive damages, notwithstanding the otherwise compensable nature of the claim,¹⁷² and subject the lawyer to discipline under the state’s equivalent of Model Rule 1.2(d). In addition, if the executed claim of lien is considered to be before the tribunal, the rules governing duty of candor to the court under Model Rule 3.3, discussed above, would apply.

Moreover, while liens prepared and executed upon advice of counsel often carry a presumption of good faith even though they may contain non-lienable items,¹⁷³ a lien will indeed be deemed “fraudulent” even if prepared and executed by client upon advice of counsel, if there is evidence it was done so knowingly or in bad faith.¹⁷⁴ If fraudulent, then the lawyer may be subject to discipline under Model Rule 1.2.(d). In addition, the duty to avoid advising a client to commit a crime or fraud may apply to situations where a lawyer advises a client in a way that results in misapplication of construction funds. Because the misapplication of construction funds can constitutes a felony in certain jurisdictions,¹⁷⁵ a lawyer may also be found in violation of 1.2(d) as a result of his advice to a client.
A construction lawyer who assists a contractor in the preparation of various claims, such as those for equitable adjustment, which are later determined to be false may run afoul of the Model Rules, including 1.2(d), and also discovery rules. In addition, where the fraudulent claims involve a federal agency, the lawyer may be accused of being an accessory to the client’s Contract Disputes Act (CDA) or False Claims Act (FCA) violations. Consider the case of *Daewoo Engineering and Construction Co., Ltd., v. United States*, where the fraudulent claims involve a federal agency, the lawyer may be accused of being an accessory to the client’s Contract Disputes Act (CDA) or False Claims Act (FCA) violations. Consider the case of *Daewoo Engineering and Construction Co., Ltd., v. United States*, in which a contractor on a road project brought suit against the United States seeking damages based on claims of defective specifications, superior knowledge, and impossibility of performance. The government filed counterclaims alleging that contractor’s claim against the government was fraudulent in violation of the False Claims Act, the Special Plea in Fraud, and the Contract Disputes Act, among others. The federal court held that contractor’s certified claim for damages was fraudulent and awarded the government $50 million under fraud provision of the CDA. The court also awarded an additional $10,000 for contractor’s violation of the FCA. The Court concluded that the contractor had submitted an extraordinarily low bid with the intent of obtaining the contract and then profiting from submitting a $64 million dollar claim for equitable adjustment to both the contract price and the time to perform the contract and alleging that the contract used defective specifications, which the contractor knew to be false.

Although the court in *Daewoo* did not discuss ethical violations or sanctions, the court did take the extraordinary step to address Daewoo’s lawyers directly:

The response of plaintiff’s legal team to the Government’s fraud counterclaims was to claim surprise and incompetence. Apparently they had not been listening carefully to their own witnesses. Witnesses admitted that Daewoo filed a certified claim as a negotiating ploy. They were evasive and contrary on the stand, and they offered testimony that they must have known was not true. Plaintiff’s counsel could not explain adequately the various amounts of the claim or how it was calculated. They dismissed potentially serious Rule 11 problems as being “inartfully drawn.” Their experts failed utterly in their duty to assist the court with
a reliable, professional report. We could not rely on their reports or their testimony.182

V. Lawyers’ General Duty of Honesty

Practitioners should keep in mind the catch-all obligations contained in Model Rule 8.4 governing misconduct and maintaining the integrity of the legal profession, which provide, in relevant part, that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer,” “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” or engage in behavior that is “prejudicial to the administration of justice.”183 Even if other ethical rules do not apply to a construction practitioner’s conduct in representing damages claims and defenses, Model Rule 8.4 is likely to govern. Note, however, that the ABA has said that Model Rule 8.4 should not be interpreted to be superfluous, stating that Model Rule 8.4, in the context of negotiation, “does not require a greater degree of truthfulness on the party of lawyers representing parties . . . than does rule 4.1.”184

VI. Lawyers’ Duties of Candor Under Civil Procedure Rules

Federal, state and local rules such as Federal Rule of Civil Procedure 11185 operate independently of the rules of ethical conduct. As such, one act of misconduct can expose a lawyer not only to professional disciplinary proceedings but also both lawyer and client to court imposed sanctions for procedural rule violations.186 It is well known that Federal Rule of Civil Procedure 11 requires that factual assertions “have evidentiary support, or, if specifically so identified, [be] likely to have evidentiary support after a reasonable opportunity for further investigation.”187 In addition, Rule 11 prohibits filings that are designed to “harass, cause unnecessary delay, or needlessly increase the cost of litigation” as well as contentions that are frivolous.188 Lawyers that fail to follow Rule 11 and make misrepresentations to the court are
subject to sanctions. In one case, for example, the court imposed Rule 11 sanctions on a lawyer who said it was his practice to “accept what [his clients] tell him; incorporate the allegations into the complaint, and let the crucible of cross-examination and discovery lead to the truth.” In that case, the lawyer’s client had falsified e-mails, and the court said that lawyer should have recognized that the e-mails were fakes and should have “subjected his client to rigorous questioning” and insisted on seeing the original documents.

Even more recently, the federal district court in *U.S. ex rel. Leveski v. ITT Educational Services, Inc.*, having previously dismissed a *qui tam* relator’s case under the Federal Claims Act, applied Federal Rule of Civil Procedure 11 and imposed nearly $400,000 in sanctions against plaintiff’s lawyers for their “unethical” conduct in “pluck[ing] a prospective plaintiff out of thin air and tr[y]ing to manufacture a lucrative case” by “trolling public dockets and using a private investigator.” Declaring the tactics “as unethical as [they are] unseemly,” the court took the relator and her lawyers to task for filing the suit, which reportedly cost defendant over $13 million to litigate. The court found that the suit was “an opportunistic and attorney-driven lawsuit” brought for the improper purpose of extracting a large settlement from the defendant, who would otherwise have been forced to incur massive legal fees. In the end, the court sanctioned one lawyer, individually, and three law firms making them jointly and severally liable for payment of the sanctions.

Perhaps even more relevant to construction practitioners is the case of *Aviation Constructors v. Federal Express*, where a property owner and its lawyer were sanctioned for failing to disclose exculpatory reports in construction litigation. In that case, a construction contractor sued an owner for payment for improvements to the owner’s real property. The owner’s lawyer responded by drafting and filing a counterclaim for damages allegedly arising
The contractor sought sanctions arguing that the owner and owner’s counsel had within their possession at the time of filing a project status reports exculpating the contractor from liability for the alleged delay claim. In determining whether to apply Federal Rule of Civil Procedure 11 sanctions, the federal district court sought to determine whether counsel and the owner knew of the exculpatory report at the time they filed the counterclaim. While there was no direct evidence that counsel or client knew of or intentionally concealed the status reports, the court found “significant circumstantial proof” that the owner and defense counsel knew about the reports and intentionally concealed them when they failed to initially produce them in response to discovery. The court imposed sanctions jointly on owner and counsel and awarded fees and costs.

VII. Conclusion

Lawyers should be mindful that both ethical and procedural rules preclude them from “throwing in the kitchen sink” for construction damages claims and defenses. They should know that their duty of candor extends from pre-litigation to post-litigation and to every document, statement, pleading and conversation, whether in or out of court. Lawyers should understand well the applicable rules of candor and conduct in their respective jurisdictions, strive to balance their obligations to client and to the court, and consider that conduct falling below the professional standards can subject both the lawyer and the client to substantial adverse consequences including, but not limited to, discipline, sanctions and, in some instances, civil and criminal charges of fraud.

Competent and diligent lawyers will know the differing standards of candor applicable to representations made before a tribunal as opposed to third-parties. They will understand that what may be considered “puffing” and permissible in negotiation or mediation may be deemed
unethical before a tribunal.

Finally, lawyers must be mindful of their duties to correct and/or to take remedial measures when violations occur. They must know their obligations to the client, the court and to opposing counsel and which corrective and/or remedial measures must be taken in which contexts. In sum, the duty to be an ethical lawyer requires effort and may require leaving the kitchen sink, and its array of dirty dishes, at home.
33 MODEL RULES OF PROF’L CONDUCT R. 1.1 & 1.3 (2012).

2 See, e.g., id. R. 3.3, 3.4 & 4.1.


4 MODEL RULES OF PROF’L CONDUCT 3.3 cmt. 2 (2012); see also ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 94-387 (1994) (noting that the general rule is that a lawyer is not required to “disclose weaknesses in her client’s case to an opposing party”).

5 MODEL RULES OF PROF’L CONDUCT R. 3.3 & 3.4 (2012).

6 Id. R. 3.1.

7 Id. R. 3.1 cmt. 1.

8 Id. R. 3.1.

9 Id. R. 3.1 cmt 2.

10 Id.

11 Id.


13 Id. at 1240.

14 Id.

15 Id.


17 Id. at 1215.

18 Id.


20 Id. at 197.

21 Id.

22 CONSTRUCTION INSURANCE: A GUIDE FOR ATTORNEYS AND OTHER PROFESSIONALS 102 (Stephen D. Palley et. al. eds., 2011).

23 “Some jurisdictions limit the duty-to-defend analysis to a comparison of the four corners of the pleading with the four corners of the insurance policy. This is known as the eight-corners rule or the complaint-allegation rule.” Id. at 103.

24 Id. at 387; see also MODEL RULES OF PROF’L CONDUCT R. 1.8(f) (2012) (lawyer cannot accept payment for representation of a client by a third party unless, among other things, there is no interference with the lawyer’s independent professional judgment on behalf of a client).

25 Id. Some jurisdictions characterize both the insured and the insurer as clients of defense counsel, while others regard only the insured as the client. Id.

26 Id. For a good discussion of the various conflicts arising in this situation and a list of cases, see id. at pp. 387-89.


28 Id. at *1.

29 MODEL RULES OF PROF’L CONDUCT R. 3.3 (2012).

30 Id. R. 1.0(f).

31 Id.

32 AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 311 (6th ed. 2007) [hereinafter ABA ANNOTATED RULES] (annotation to Model Rule 3.3(a)(1)).


34 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 2 and 1.0(m) (2012); see also ABA ANNOTATED RULES, supra note 32, at 309 (annotation to Model Rule 3.3 noting that “[i]f the tribunal’s judgment will not be binding, Rule 3.3 is not implicated.”).

35 MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2012).

36 Id. R. 3.3 cmt. 1; see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-376 (1993) (finding that

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the duty of candor to a tribunal under Model rule 3.3 extends to pretrial proceedings). In one case, however, a state bar’s grievance committee was not deemed to be a “tribunal” for purposes of the duty of candor. See The Florida Bar v. Rotstein, 835 So. 2d 241 (Fla. 2003).
37 Florida Bar v. Forrester, 818 So. 2d 477 (Fla. 2002).
38 Id. at 481.
39 MODEL RULES OF PROF’L CONDUCT R. 3.3(c) (2012).
40 Florida Bar v. Charnock, 661 So. 2d 1207 (Fla. 1995).
41 Id. at 1209.
42 CMc Steel Fabricators, Inc. v. RK Constr., Inc., 2010 WL 3843596 at *2 (W.D. La. Sept. 27, 2010).
43 Id.
44 Id.
45 See ABA ANNOTATED RULES, supra note 32, at 313 (annotation to Model Rule 3.3 discussing silence, misleading statements, and false statements).
46 In re Eicher, 661 N.W.2d at 354, 365 (S.D. 2003) (quoting In re Discipline of Wilka, 638 N.W.2d 245, 249 (S.D. 2001 and noting that “‘the requirement of candor towards the tribunal goes beyond simply telling a portion of the truth’”).
48 Id.
49 Id.
50 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 3 (2012).
51 See id. R. 3.3 cmt. 10 & 1.6 (prohibiting lawyer from revealing information related to the representation and providing exceptions to the prohibition).
53 Id.; see also In re Scahill, 767 N.E.2d 976 (Ind. 2002) (lawyer disciplined where the continued to offer IRA as marital asset to be divided even though he knew client had dissipated it).
54 Id.
55 MODEL RULES OF PROF’L CONDUCT R. 3.3 & cmt. 8 (2012).
56 Id. R. 3.3 cmt. 8 & 1.0(f).
57 Id. R. 3.3 cmt. 8.
59 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 3 (2012).
60 Id.
61 Id.
62 Id.
64ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-376 (1993) (stating that “we think that even before . . . documents are filed there is potential ongoing reliance upon their content . . . resulting in an inevitable deception upon the other side and a subversion of the truth finding process”).
66 Id. R. 3.3 cmt. 4.
67 ABA ANNOTATED RULES, supra note 32, at 315 (annotation to Model Rule 3.3).
69 Id. at 147.
70 Id. R. 149.
71 Id.
72 Id. at 149 n.6.
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75 MODEL RULES OF PROF’L CONDUCT R. 3.4(b) & (d) (2012).
76 Id. R. 3.4(a) & (e).
77 Id. R. 3.4 cmt. 1.
78 Id.; see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-422 (recognizing that scrubbing embedded information in an electronic document before producing it might violate Rule 3.4(a)).
80 Id. R. 3.4 cmt 2.
81 In re Heilgeist, 469 N.E.2d 1109 (Ill. 1984).
82 Id. at 1110.
83 Id. at 1113 (quoting lawyer’s contentions).
84 Id. at 1114.
85 Id. at 1111.
86 Id. at 1112.
87 Id. at 1114.
88 Id. R. 3.3 (2012).
89 Id. R. 3.3 cmt. 11.
90 Id.
92 With respect to candor in lawyers’ other pursuits, Model Rule 8.4’s directives on honesty will control. MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (2012).
93 Id. R. 4.1.
94 Id. R. 4.1 cmt. 1.
95 Id. R. 1.0(d) cmt. 5.
96 Id. R. 1.0(d) cmt. 5.
97 Id. R. 3.3 cmt. 12.
98 Id. R. 3.3 cmt. 11.
99 Id.
102 Id. R. 4.1.
103 Id. R. 4.1(b).
104 Id. R. 1.6(a).
105 Id. R. 1.6(b)(2) & (b)(3).
106 Id. R. 4.1 cmt. 3.
107 Id.
108 Id.
109 Id. R. 4.1(b).
110 Id. R. 4.1 cmt. 1.
111 Id. R. 4.1 cmt. 1.
112 Id. R. 3.4(b) & (b)(3).
113 Id. R. 4.1 cmt. 3.
114 Id.
115 Id.
117 Id. R. 4.1 cmt. 1 (2012).
118 Id.
119 Id. 3.3(b) & (d) (2012).
120 Don Peters, WHEN LAWYERS MOVE THEIR LIPS: ATTORNEY TRUTHFULNESS IN MEDIATION AND A MODEST PROPOSAL, 207 J. DISP. RESOL. 119, 129 (2007); but see ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-370 (1993) (stating that while “a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party’s actual bottom line or settlement authority given to a lawyer is a material fact”).
“Mediation communication” is defined as “an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant during the course of a mediation, or prior to a mediation if made in furtherance of a mediation.” FLA. STAT. § 44.403(1) (2012).


FL. R. PROF’L CONDUCT 4.8.3(c)(3) (2012).


Id.


125 Id.


127 See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-387 (1994) (finding that lawyer would violate Rule 1.6 if lawyer revealed information without client’s consent that statute of limitations had run).

128 Id.

129 Id. R. 1.6(a).

130 See also ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 94-387 (1994) (finding that lawyer would violate Rule 1.6 if lawyer revealed information without client’s consent that statute of limitations had run).

131 Id.

132 Id.


134 Menkel-Meadow, supra note 116, at 144.


136 See e.g., Kentucky Bar Assn. v. Geisler, 938 S.W.2d 578 (Ky. 1997) (failing to disclose client’s death was an affirmative misrepresentation under state’s version of Model Rule 3.3.).

137 Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989).

138 NY County Ethics Opinion 731, 2003 WL 25229453 (2003) (noting that “attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source”).


140 Nebraska State Bar Assn. v. Addison, 412 N.W.2d 855 (Neb. 1987) (applying the Model Code rather than the Model Rules); see also In re Glickman, 246 S.E.2d 174 (1978) (failure to disclose liens known to exist in property sale was misrepresentation under rules of professional conduct).


142 Settlement correspondence is also likely governed by MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2012). For example, where counsel lied in settlement letter, the court held that the letter was governed by Rule 4.1.


143 Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962).


145 Id. at 512-13.

146 Id. at 512.

147 See, e.g., id. at 512 (citing commentator that suggests that a lawyer has a duty to act in good faith).

148 American Bar Association Section of Litigation Ethical Guidelines for Settlement Negotiations 2.3 (2002). The guidelines state that they do not replace existing law or rule, do not interpret the Model rules, and are not a basis for liability or sanctions. Id.


150 Id.


152 Id.


155 FL. R. PROF’L CONDUCT 4.8.3(c)(3) (2012).

156 “Mediation communication” is defined as “an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant during the course of a mediation, or prior to a mediation if made in furtherance of a mediation.” FLA. STAT. § 44.403(1) (2012).


158 MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2012).

159 Id. R. 1.2 cmt. 9.

160 Id. R. 1.2 cmt. 13.

Id.

Id.

Id.

Id.


Id.

Id.

Id.

Id.

Id. (applying California Rules of Professional Conduct 3-210, 3-500, and 3-700). Note that Model Rule 4.1 comment 3 states that 4.1 is a “specific application of the principle set forth in 1.2(d).”

See Fla. Stat. § 713.31(2)(b) (2012) (remedies in fraud or collusion for liens); see also Delta Painting, Inc. v. Baumann, 710 So. 2d 663 (Fla. Dist. Ct. App. 1998) (The finding that a construction lien was fraudulent was supported by evidence that the painter’s claim of lien included amounts for additional work unauthorized by the homeowners and that the painter had knowingly included a claim for work not performed or materials not furnished).

See Stevens v. Site Developers, Inc., 584 So. 2d 1064 (Fla. Dist. Ct. App. 1991) (lien that included improper items but prepared upon advice of counsel was not a fraudulent but deemed filed in good faith).


See, e.g., Fla. Stat. § 713.345(1)(b) (2012) (stating that any person who knowingly and intentionally fails to apply any payment received on account of improving real property “to the amount then due and owing for services or labor performed on, or materials furnished for, such improvement” is guilty of misapplication of construction funds.) The level of the offense, whether a felony of the first degree, second degree, or third degree, depends upon the aggregate value of the payments misapplied. Fla. Stat. § 713.345(1)(b) (2012); see also Netherly v. State, 804 So. 2d 433 (Fla. Dist. Ct. App. 2001).


28 U.S.C. § 2514 (2012) (“A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.”).

The Contract Disputes Act includes a fraud provision:

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing such part of his claim.

41 U.S.C. § 7103 (2012). “Misrepresentation of fact” is defined in the Act as “a false statement of substantive fact, or conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.” 41 U.S.C. § 7101(7) (2012).

Daewoo, 73 Fed. Cl. at 597.

Id. at 550.

Id. at 588.


Fed. R. Civ. P. 11; see also Fla. Stat. § 57.105 (2012), which provides in relevant part:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil
proceeding or action in which the court finds that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
(a) Was not supported by the material facts necessary to establish the claim or defense; or
(b) Would not be supported by the application of then-existing law to those material facts.

Such sanctions could include monetary penalties as well as stricken pleadings. See Figgie Int’l, Inc. v. Alderman, 698 So. 2d 563 (Fla. Dist. Ct. App. 1997) (imposing extreme sanction of striking a scaffold manufacturer’s pleadings and entering a default judgment against it for its willful destruction of evidence, presentation of false testimony, and other deliberate obstruction of discovery).

FED. R. CIV. P. 11.


FED. R. CIV. P. 11.

The court also noted that MODEL RULES OF PROF’L CONDUCT R. 7.3 prohibits lawyers from soliciting employment from a prospective client when a significant motive for lawyer’s doing so is its own pecuniary gain. Id. at *2. 