The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic

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NOTE

THE ABA ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS: EXCEEDING THE LIMITS OF THE ADVERSARIAL ETHIC

Brian C. Haussmann†

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INTRODUCTION

Over forty years ago, on August 3, 1962, the Minnesota Supreme Court affirmed a trial court order that vacated a $6,500 settlement in an action for personal injuries resulting from an automobile accident.1 The defendant's attorneys in the case failed to disclose a medical report in their possession that indicated the plaintiff, sixteen-year-

1 Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962).
old David Spaulding, had suffered a life-threatening aortic aneurysm as a result of the accident. The defendant’s attorneys withheld this information for approximately two years, until a routine Army physical given to David in early 1959 revealed the aneurysm. David’s doctors performed immediate surgery to correct the life-threatening condition.

One might expect the Minnesota Supreme Court to have admonished a member or members of its own bar who had chosen to forsake a human life for fear that their client (or their client’s insurance company) might have to reimburse the plaintiff for the actual consequences of an automobile accident that the defendant caused. Instead, however, the court asserted that “[t]here is no doubt that during the course of the negotiations, when the parties were in an adversary relationship, no rule required or duty rested upon defendants or their representatives to disclose this knowledge.” The Minnesota Supreme Court noted further that “no canon of ethics or legal obligation may have required them to inform plaintiff or his counsel with respect [to the aneurysm] . . . .” The court ultimately affirmed the trial court’s order to vacate the settlement, not because the defendant’s attorneys failed to warn David Spaulding of his life-threatening medical condition, but rather because David was a minor whose settlement had to be approved by the trial court, and that court had based its approval on a mistake of fact. Had David been two years older at the time of the accident, the Court would have justified the otherwise reprehensible conduct of the defendant’s lawyers on the grounds of the “adversary relationship” existing between the parties.

The layperson might assume that this decision is a relic of times past—that the legal community has acted in the forty years since this decision to reconcile the ethics of lawyers with fundamental societal mores, such as belief in the supremacy of human life. While this person would be right in supposing that Spaulding, and similar cases,

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2 Id.
3 Id. at 708.
4 Id.
5 Id. at 709.
6 Id. at 710. The Minnesota Supreme Court’s statement may not be entirely true. See, e.g., Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering 18 (3d ed. 1999) (noting that Minnesota adhered at that time to the American Bar Association (ABA) Canons of Professional Ethics and suggesting that the Canons may have counseled disclosure). For example, Canon 15, in effect at the time of the Spaulding decision, warns that “[t]he office of attorney does not permit, much less does it demand of [the attorney] for any client, violation of law or any manner of fraud or chicane” and counsels the attorney to “obey his own conscience and not that of his client.” Canons of Prof’l and Judicial Ethics Canon 15 (1957).
7 See Spaulding, 116 N.W.2d at 709-11.
8 See id. at 709.
brought about certain doctrinal changes, he or she would be wrong to assume that these changes altered the fundamental notion, expressed by the court in *Spaulding* that an ethical attorney acts at all times in conformity with the model of adversarial justice so fundamental to our legal system.

No other situation tests the flexibility of this model, which this Note will refer to as the "adversarial ethic," more than that of a settlement negotiation. Perhaps one need only consider *Spaulding* to reach that conclusion, but the ethical concerns in *Spaulding* are not unique. Today, litigants settle nearly 95 percent of civil cases out of court, or, in other words, without the procedural, and perhaps even ethical, safeguards that came with the intervention of the tribunal in *Spaulding*.

Therefore, despite the fact that lawyers as a whole find themselves in the role of the negotiator far more frequently than they find themselves before a tribunal, the ethical implications of settlement negotiations had until recently never been formally treated as distinct from other ethical rules and standards.

The American Bar Association (ABA) responded to increasing concern over the ethical implications of a lawyer's role in settlement negotiations by drafting the Ethical Guidelines for Settlement Negoti-
The Litigation Section of the ABA drafted the Guidelines as part of a special project created for that purpose. The drafters finished the Guidelines in May of 2002, and the ABA’s House of Delegates made them official ABA policy in August of that year.

The Guidelines represent both the first formal attempt to recognize an ethical distinction between the lawyer’s role as litigator and negotiator and the first opportunity for a formal body to distinguish the attorney’s ethical duties in the courtroom from those in the settlement context. This Note will devote itself largely to demonstrating that the Guidelines have failed to take advantage of just this opportunity. As a result of this failure, attorneys involved in settlement negotiations will, if they follow the Guidelines’ advice, continue to adhere to an outmoded and misplaced caveat of professional responsibility, namely that it is appropriate for an attorney to act in an adversarial manner regardless of context.

Part I briefly examines the adversarial ethic that has been the cornerstone of professional ethics, both in its original context, the

14 Id.
16 This same report notes that, while its proponents asked the House of Delegates (hereinafter House) to adopt wholesale the “‘black letter’” of the Guidelines, the House chose only to “recommend” the Guidelines. See also Recommendation, A.B.A. Sec. of Lit., at http://www.abanet.org/leadership/recommendations02/105_1.pdf. While as a practical matter, both actions are likely to have substantially the same or similar effect on normative legal ethics, the fact that the House was reluctant to adopt the Guidelines outright lends weight to the view expressed in the “disclaimer” that the American Bar Association (ABA) neither intends for the Guidelines to be viewed as a new set of Model Rules, nor as an addendum thereto or interpretation thereof.
17 Unless otherwise mentioned, this Note uses the term “negotiator” to represent an attorney engaged in settlement negotiations. The attorney negotiating a transaction or some other benefit for a client will often encounter similar ethical dilemmas, but the two roles also diverge in some respects. Most significantly, the goals and products of settlements in our system of justice closely parallel those same goals and products in the litigation context, which itself has important consequences for the adversarial ethic.
18 See Mary Jo Eyster, Clinical Teaching Ethical Negotiation, and Moral Judgment, 75 Neb. L. Rev. 752, 762–63 (1996) (noting that “structural features of negotiation that make it particularly susceptible to ethical dilemmas” are that “negotiation is a largely, . . . undocumented and unreviewable process”; it is a “wholly informal process governed by any codified procedural rules”; and neither the ABA Model Rules of Professional Conduct nor the ABA Model Code of Professional Responsibility specifically address negotiation practices (footnotes omitted)).
19 See David Luban, The Adversary System Excuse, in The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics 83, 87 (David Luban ed., 1983) [hereinafter The Good Lawyer]. But note that according to one scholar, the adversary ethic is a “recent” historical phenomenon brought about by four events: the need to justify lawyers who represented the “‘robber barons’ of the railroad, manufacturing, and financial industries,” the growth of large law
courtroom, and in the context of settlement negotiations. Part II dis-
cusses the Guidelines' own adherence to the adversarial ethic, which
this Note argues is best revealed by the Guidelines provisions dealing
with disclosure and omission of material facts. Part III argues that the
Guidelines' adherence to the adversarial ethic merely reinforces the
mistaken notion, already pervasive in the substantive law of lawyering,
that the only way for an attorney to conduct herself ethically is to com-
ply with this adversarial model. Furthermore, this Part argues that the
Guidelines' failure to explicitly recognize the conditional nature of
adversarial ethics renders the Guidelines useless as a tool for the prac-
ticing lawyer, an effect which is only exacerbated by the Guidelines' format and relationship to the Model Rules. Part IV suggests that the
ABA should restructure the Guidelines to explicitly state that the ad-
versarial ethic is conditional, and to urge the attorney to take a casuis-
tic approach to the ethics of settlement negotiations would more
effectively accomplish their goal of ethical "guidance." In so doing,
section IV argues that casuistry—a method of moral reasoning by
which the decisionmaker compares fact-specific paradigm cases with
the circumstances at hand in order to arrive at the proper moral deci-
sion—is superior to the rule- or principle-based approach that, this
Note argues, is inherent in the Guidelines. This Note concludes that
the Guidelines entrench an ethical system of reasoning that is wholly
inappropriate for a set of guidelines designed to assist an attorney in
making his own ethical decision, and ignores the benefits of a case-
specific casuistic analysis.

20 See ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988). This Note considers casuistry in a secular sense, away from its historical religious antecedents. For a comprehensive discussion of those antecedents, see id. at 47–74. This Note will define casuistry substantially as Jonsen and Toulmin have, namely as a method of formulating moral obligations (and perhaps even guidelines) by inferring them from the contextually complex cases or situations that constitute real-life ethical dilemmas. See id. at 257. That is, unlike the principlist, the casuist does not deduce ethical obligations from some higher principle. See id. at 12–13, 250–65. Rather, the casuist forms a set of general moral obligations only after extensive study of cases of ethical dilemmas, and even then with the caveat that those ethical obligations derive meaning only in the context of those cases. See id. at 257. For a discussion of how this relates to professional ethics, particularly in the context of settlement negotiations, see infra Part IV.A & B.

21 See JONSEN & TOULMIN, supra note 20, at 257.
THE ADVERSARIAL ETHIC: SOME BASIC THEORY

If there is any workhorse of legitimating rhetoric in the realm of lawyering, it is the argument from the adversary system.

—W. Bradley Wendel\(^{22}\)

This Part briefly explores the foundational justification for our adversary system and the ethics that this system necessitates, first in the courtroom setting and then in the context of settlement negotiations. Above all, this Part questions the traditional justification for the legitimacy of the adversarial ethic as it applies outside the confines of the litigation process, and in so doing sets the stage for the pointed survey of the Guidelines provided in Part II.

A. The Courtroom Model

Perhaps no other profession exists today in which its practitioners, like Roman gladiators, battle one another in the presence of an impartial arbiter who in the end will determine their ultimate fate. While this may seem like an overly-dramatized version of the legal profession, it contains the requisite structural elements of a litigation system characterized by two partisan advocates and an impartial judge and/or jury.\(^{23}\) The American legal profession is defined by an appeal to those legal battles that take place in our tribunals, and attorneys are perceived as the gladiators of this system.\(^{24}\) Thus, just as the ethics of a gladiator were, and should have been, different from those of a typical Roman citizen,\(^{25}\) so too should the ethics of an advocate differ


\(^{23}\) These are the structural elements fundamental to our notion of the adversary ethic. See Luban, *supra* note 19, at 90 (defining the adversary system in what he terms the "narrow sense" as "a method of adjudication characterized by three things: an impartial tribunal of defined jurisdiction, formal procedural rules, and most importantly... assignment to the parties of the responsibility to present their own cases and challenge their opponents" (footnote omitted)).

\(^{24}\) See Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. Rev. 833, 834–35 (1990). McMunigal notes: Images of lawyers in trial dominate popular media such as novels, films, and television. American legal theorists, though not focusing exclusively on trial, have tended to place adjudication at the center of our concept of law and legal process. Traditional legal education, with its emphasis on the case method, and traditional legal scholarship have reflected a similar preoccupation with the impact of legal rules on cases adjudicated in court. Adjudication also dominates the legal profession's self-image as reflected in the ethical codes drafted by the profession, which adopt the courtroom lawyer as the principal paradigm.

\(^{25}\) Id. (footnotes omitted); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. Rev. 669, 672 (1978) ("The adversary system looms large in our thinking about lawyers. . . . Thus, even though most lawyers spend the bulk of their time acting in a representative capacity as negotiators and counselors outside the formal adversary
from those of non-advocates. The salient difference between gladiators and attorneys, however, is that while all gladiators did battle, not all lawyers advocate before tribunals. Nevertheless, the adversary model continues to form the basis of our legal ethics. This section will briefly discuss this model and its ethical implications, and the subsequent section will compare the adversary model to those that should be present in the context of settlement negotiations.

This Note uses the term "adversarial ethic" to denote the means of ethically justifying action taken in conformity with the rules of the adversary system. Unless otherwise mentioned, this meaning coincides with what has elsewhere been termed the "argument from the adversary system" or the "adversary system excuse." Because the ethic derives from the system which sustains it, an understanding of the basic premises of the system is critical to a discussion of the ethic.

The adversary system is at once a structure and a process. There are three critical structural components: an impartial arbiter, system, these functions are treated almost as exceptions to the primary role of lawyers as advocates.

This Note asserts that a gladitor's ethics should be different from that of a typical Roman citizen based on the widely accepted view that gladiators were, in a manner of speaking, engaged only in self-defense. That is to say, the gladiators were slaves who were forced to fight and, as such, were ethically justified in killing in a way that a free Roman would not be. See Roland Auguet, Cruelty and Civilization: The Roman Games 153–54 (1972). The difference between the two lies ultimately in a difference in what is at stake. Cf. Richard Wasserstrom, Roles and Morality, in The Good Lawyer, supra note 19, at 25 (exploring the notion that the acceptability of one's behavior turns on one's place in society as well as what society expects of one).

This Note is not the first work to suggest the ethical distinction between advocates and nonadvocates. See Schwartz, supra note 25, at 671 ("[I]t is necessary to distinguish between the lawyer acting as an advocate within the adversary system and the lawyer acting as nonadvocate (e.g., as negotiator or counselor) outside that system." (footnote omitted)). Schwartz likewise points out that he was not the first to recognize the distinction, as the ABA itself was concerned with this distinction as far back as 1958. See id. at 671 n.3 (citing Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159 (1958)). For a discussion of the manner in which the ABA has incorporated this distinction into its subsequent ethics rules and codes, see infra Part II.A.

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procedural rules, and, most importantly, partisan advocates. This structural foundation is the basis for a process by which partisan advocates present two mutually exclusive stories to an impartial third-party, who will then use these stories to arrive at the truth. If this characterization of the American justice system sounds naive or quaint to the reader, he is not alone. Many scholars criticize the empirical assertion that the adversary system results in truth, as well as the theoretical basis for the adversary system. See generally David Luban, Lawyers and Justice: An Ethical Study (1988) (critiquing both the empirical assertions that justify the adversary system as well as the normative implications of the adversarial ethic); John S. Dzienkowski, Lawyering in a Hybrid Adversary System, 38 WM. & MARY L. REV. 45 (1996) (discussing Professor Menkel-Meadow’s critique of the functioning of the adversary system in criminal defense cases); Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern, Multicultural World, 38 WM. & MARY L. REV. 5 (1996) (arguing that those who support the continued use of the adversary system should be required, in the face of overwhelming evidence that the system does not function properly, to carry the burden of demonstrating its efficacy and justifying its ethical mandate); Ellen E. Sward, Values, Ideology, and the Evolution of the Adversary System, 64 IND. L.J. 301, 301–02 (1989) (noting that legal scholars have increasingly criticized the adversary system in recent times). See e.g., Luban, supra note 35, at 68–74, 92–104 (arguing that there is little, if any, empirical support for the proposition that the adversary system always, or even routinely, leads to the truth); See also W. Bradley Wendel, Lawyers and Butlers: The Remains of Amoral Ethics, 9 GEO. J. LEGAL ETHICS 161, 168 (1995) (“[T]here is no empirical evidence to suggest that the adversary system is superior to other systems in its ability to find the truth.”). Wendel also suggests that the metaphysical nature of “truth” may preclude helpful comparisons between the truth-seeking functions of different legal systems because the “truth” cannot be ascertained without reference to the system. See id. at 168–69 & n.32. Thus, the most reliable empirical information of the relevant truth-seeking functions of various systems may be that, in many centuries of legal systems, no one system has emerged as the dominant system. See id. at 168. This proposition itself tends to justify the assumption that the adversary system’s truth-seeking function operates as its primary justification, because it assumes that if one system’s ability to procure the truth were vastly superior to any other, that system would be adopted worldwide. See infra note 38–39 and accompanying text. Of course, this may prove too much. After all, the fact that our best evidence of truth-function is a failure of any one system to become accepted globally may indicate that the fundamental justification for any legal system is its truth-seeking function.
cal assertion that the adversary system, operating ideally as designed, is capable of consistently arriving at anything as pure as truth or justice.\(^3\) Nevertheless, this Note assumes \textit{arguendo} that the adversary system is capable of producing the truth.\(^3\) Moreover, this Note assumes that this truth-seeking function of the system is its primary justification.\(^3\)

The adversary system has traditionally been justified by appeal to an equilibrium argument.\(^4\) According to the argument, the struc-

\(^3\) See Alan H. Goldman, \textit{The Moral Foundations of Professional Ethics} 113–116 (1980). Goldman analogizes the truth-finding function of the adversary system to the accepted processes of scientific discovery in an attempt to show that the adversary system’s truth-finding function is, at minimum, an imperfect method of arriving at the truth. \textit{See id.} at 114. Indeed, he goes so far as to assert that “in \textit{all} other areas in which we attempt to discover the truth or formulate theories we prefer a body of impartial and disinterested inquirers to the formation of opposing advocates . . . .” \textit{Id.} (emphasis added). This statement may be an overgeneralization, however, considering that the truth-seeking-function arguments that justify the adversary system are employed to justify, \textit{inter alia}, economic markets and free speech. \textit{See infra} text accompanying notes 42–44. Nevertheless, it does not diminish Goldman’s ultimate criticism that a system whose actors are “systematically involved in thwarting \[truthful\] outcomes” cannot be successful in arriving at the truth. Goldman, \textit{supra}, at 116. Regardless, Goldman’s argument does not change the fact that the core of legal ethics rests upon the laurels of the adversary system, which is in turn justified by its truth function.

\(^3\) One need not assume that the adversary system yields truth or justice in every instance. Indeed, most defenders of the adversary system argue that the system is effective in producing truth or justice in the majority of cases, and would likely not dispute that there are exceptions. \textit{See} William H. Simon, \textit{The Practice of Justice: A Theory of Lawyers’ Ethics} 55 (1998) (“Defenders of [the truth-seeking function] concede that [the adversary system] occasionally leads to injustice[, but they nonetheless] assert that it produces a higher level of justice in the aggregate and the long run.”). Even under this assumption, however, the truth-function of the adversary system remains a powerful justification for its existence. Nevertheless, there remains a subtle distinction between the notion that the system always produces the truth, and the possibility that the system will produce the truth on each individual occasion. That distinction may have implications for the scope of the adversarial ethic. \textit{See infra} Part I.B.

\(^3\) This assertion is probably historically accurate. Nevertheless, the argument that the truth-seeking function of the adversary system justifies its structure (including partisan advocacy) is not the only justification for the system. \textit{See} Charles Fried, \textit{The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation}, 85 Yale L.J. 1060, 1073 (1976) (arguing that partisan advocacy is necessary to protect an individual claimant’s autonomy and ability to tell his story). Despite the existence of this and other justifications for the adversary system, however, this Note assumes that the truth-seeking function is the system’s primary justification, not because of its soundness, but because it forms the basis for the adversarial ethic. In other words, if the system were not designed to produce truth and justice, a role-based ethic that shields advocates from ethical responsibility for deceitful conduct would be ethically unfounded, regardless of its effects on individual autonomy or other external considerations. \textit{See} Luban, \textit{supra} note 19, at 89 (“Unless zealous advocacy could be justified by relating it to some larger social good, the lawyer’s role would be morally impossible. That larger social good, we are told, is justice, and the adversary system is supposed to be the best way of attaining it.”). This line of reasoning tacitly assumes, as do most, that dishonesty is unethical under most ethical systems. \textit{See infra} Part II.B. However, this Note argues that there also remains a procedural component to the truth-seeking function that becomes critical to the adversarial ethic. \textit{See infra} Part I.B.

\(^3\) \textit{See} Wendel, \textit{supra} note 22, at 698–99.
tural elements of the system discussed above combine to form a coherent truth, despite the self-interest of the two sides (and therefore incompleteness and/or falsity of their stories), by operating as a market to launder the information provided. Professor Wendel explains:

Equilibrium arguments, whether based on Adam Smith's invisible hand of the market, the "marketplace of ideas" in First Amendment law, or the adversary system of litigation, trade on the imagery of some kind of apparatus that converts inputs (the self-interest of the butcher and baker, the competing claims of participants in the marketplace of ideas, or the arguments and evidence presented by counsel in a lawsuit) into outputs (an efficient distribution of resources, truth, or a determination of legal merit). Thus, the truth-seeking function of the adversary system is dependent upon the efficacy of the apparatus, which is, in turn, dependent upon the proper functioning of its various parts. But what are those proper functions? Does the judge who allows his own political or moral opinions to factor into a decision operate within his prescribed role in the adversary system? What about an attorney who does the same? The short answer to both questions is no. Just as the proper function of the system depends on the judge to remain impartial, "to defer to the legally correct decision, even when he recognizes that the moral consequences of doing so in the particular case before him are not optimal," so too must the attorney set aside his own moral reservations if he is to act properly in his role as advocate.

To be an effective cog in the adversary machine, the advocate must "represent his client zealously within the bounds of the law," and in so doing must seek every tactically desirable legal advantage for his client without regard to his own moral compunctions. This obli-

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41 See supra notes 32-34 and accompanying text.
42 See supra note 22, at 690.
43 See Wendel, supra note 22, at 698-99 (footnotes omitted). See also Applbaum, supra note 30, at 188 (explaining the lesson of Adam Smith's invisible hand: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").
44 We might think of the apparatus as "self-correcting" in those instances where its parts function within their proper range. See Applbaum, supra note 30, at 188.
45 Goldman, supra note 37, at 91.
46 See Applbaum, supra note 30, at 197-200.
47 Goldman, supra note 37, at 92-101 (referring to a lawyer's zealous advocacy through any arguably legal course of action as "the Principle of Full Advocacy"); Simon,
igation may require that the advocate engage in deceptive practices, withhold vital information, and present a knowingly false story to a tribunal.\footnote{50}{But these actions, too, are ultimately justified to the extent that they are within the bounds of advocacy required by the adversary system\footnote{51} and its truth-seeking function.\footnote{52} In other words, "the lawyer can act as a zealous partisan for her client, without regard to the injustice of a potential outcome, because the system ensures that all evasions, half-truths, and dirty tricks by lawyers on both sides eventually come out in the wash."\footnote{53} Thus, the legal profession rebuts charges that it ignores the otherwise unethical practices of its advocates by reference to what Professor Schwartz has termed the "Principle of Nonaccountability."\footnote{54} The Principle of Nonaccountability, in its original formulation, provides: "When acting as an advocate for a client . . ., a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."\footnote{55} This proposition forms the heart of what this Note terms the adversarial ethic. According to the ethic, it is by virtue of the attorney's role within the system that he is cleansed of personal ethical responsibility for his actions.\footnote{56}

Much like the truth-seeking function of the system itself, the notion that an actor within the system is free from ethical responsibility for his actions merely by virtue of this institutional fiat has been highly

\footnote{50}{See Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962); \textit{supra} notes 1-8 and accompanying text.}
\footnote{51}{This qualification is important because if the attorney acts outside the established bounds of the adversary system, he can no longer rely on the truth-seeking function of that system to justify his actions. See Schwartz, \textit{supra} note 25, at 672-75. However, it is also equally important that the attorney, when acting within the system's rules and procedures, take advantage of adversarial tactics. Otherwise, the truth-seeking function of the system may be jeopardized. See \textit{Applbaum}, \textit{supra} note 30, at 193 ("[A]s long as the rules of the game fall within some range of tolerably decent design, players still produce better consequences by competing as vigorously as possible, using any advantageous adversary tactic permitted by the existing rules, than by attempting to compensate for imperfections in the rules by refraining from adversary action.").}
\footnote{52}{See Schwartz, \textit{supra} note 25, at 672-75.}
\footnote{53}{Wendel, \textit{supra} note 22, at 699.}
\footnote{54}{Schwartz, \textit{supra} note 25, at 672-75.}
\footnote{55}{Id. at 673.}
\footnote{56}{See \textit{id.} at 671-75. Much has been written about the role-based ethics of attorneys. See generally Rob Atkinson, \textit{Beyond the New Role Morality for Lawyers}, 51 Md. L. REV. 853 (1992) (discussing some of the preeminent theories on role-based ethics in the legal profession); Wasserstrom, \textit{supra} note 25, at 25 (providing a philosophical context to the problem of role morality for lawyers); Wendel, \textit{supra} note 22, at 698-99. See also Shannan E. Higgins, Note, \textit{Ethical Rules of Lawyering: An Analysis of Role-based Reasoning from Zealous Advocacy to Purposivism}, 12 GEO. J. LEGAL ETHICS 639 (1999) (discussing how practitioners make ethical decisions based on notions of role-based or conditional ethics).}
criticized. This Note will not pursue this debate, but rather it will assume that the system’s truth-seeking function justifies an attorney’s ethical nonaccountability just as this Note assumes the empirical efficacy of the adversary system. Nevertheless, there are limits to this justification, even if it is accepted. Most importantly, the adversarial ethic is limited by its dependence upon lawyers as advocates—gladiators—within a system of adjudication. The following section will explore the implications of this latter limitation in the context of settlement negotiations.

B. The Adversarial Ethic in Settlement Negotiations: An Institutional Critique

Within legal practice itself, lawyers who engage in adversary tactics as deal makers . . . mistakenly help themselves to equipoise justifications that work, if at all, only in the highly structured arena of the courtroom.

—Arthur Isak Applbaum

Recall that it is the systemic structure—the equilibrium apparatus of the adversary system—that forms the foundation for the adversarial ethic in general and the Principle of Nonaccountability in particular. But this model may be limited to the courtroom, where the structural components of the system—including partisan advocates, procedural rules, and a neutral arbiter—are present, and where the components can interact to perform the truth-seeking function of the system. Even assuming the absolute empirical function and the validity of its ethical mandate in the courtroom context, it does not necessarily follow that the gladiator’s ethic will be justified outside that

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58 The reasoning for this assumption is not to escape fundamental questions about the nature of legal ethics, but rather to pose such questions. Assuming the ethical and empirical efficacy of this truth-seeking justification for the adversarial ethic in one context (the courtroom) allows this Note to explore the systemic boundaries of the justification, particularly as those boundaries border the realm of settlement negotiations. The remainder of the Note thus takes the form of an “even if x, it does not hold that y” argument, a structure that permits the focus to remain on the ethics of settlement negotiations.

59 See Schwartz, supra note 25, at 671.

60 See id.

61 Applbaum, supra note 30, at 201.

62 See id. at 200–01; supra note 40 and accompanying text.

63 See supra notes 54–57.

64 See Schwartz, supra note 25, at 674 (“[W]hatever the validity of the Principle of Nonaccountability for advocates, its legitimacy rests on the particular structures and functions of the adversary system, and that the circumstances of nonadvocate lawyers require a different predicate for analysis of their professionalism and accountability.”); see also Applbaum, supra note 30, at 201 (stating that the “ends-based justification of a lawyer’s adversary practices” derives from the lawyer’s role in the system).
In actuality, many, if not most, settlement negotiations take place in the absence of one or more of the structural components that justify the adversarial ethic. The most notable structural difference between the adversary system discussed above and most settlement negotiations is the absence of a third-party neutral, a judge and/or jury. This fact alone may render the adversarial ethic useless as a justification for attorneys' otherwise immoral or unethical conduct in settlement negotiations. This element may also indicate a complete disjunction between the adversarial ethic and the lawyer acting as settlement negotiator because it is the role of the third-party arbiter to turn less-than-truthful inputs into truthful outputs. Without that apparatus, the predicate to the ethical justification for partisan advocacy is removed.

To understand this fundamental difference, consider the following two scenarios. First, a courtroom attorney who believes the story of a truthful adverse witness nevertheless cross-examines her in a hostile manner and uses highly personal and unrelated information from the witness' past to attack her credibility. Second, an attorney operating under the same belief and speaking at a pre-arranged settlement meeting interrogates the same witness in similar fashion. The result in either instance is likely to be great embarrassment for the third party, but the courtroom attorney in the first scenario is ethically justified in his actions because the impartial arbiter will "launder" this partisan input and ultimately arrive at the truth. In the absence of the impartial arbiter, however, the second attorney does not have the benefit of this justification because his partisan actions are not likely to lead to the truth in the same manner as if he were arguing before a court.

In fact, there are a number of possibilities concerning the truth-seeking function of the settlement scenario, none of which suggest that the second attorney was ethically justified in his actions. For example, opposing counsel may have known of the past improprieties of

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65 See Applbaum, supra note 30, at 201; Menkel-Meadow, supra note 35, at 6–8 (declaring that "the 'adversary model' employed in the courtroom has bled inappropriately into and infected other aspects of lawyering, including negotiations carried on both 'in the shadow of the court' and outside of it" (footnotes omitted)); Schwartz, supra note 25, at 674.
66 See Schwartz, supra note 25, at 675–78.
67 See id. at 677.
68 See id. at 677–78 (exploring the significance of the absence of the third-party "impartial arbiter").
69 See supra notes 33–34, 44 and accompanying text.
70 See Schwartz, supra note 25, at 677–81.
71 See supra notes 42–44 and accompanying text.
72 See Schwartz, supra note 25, at 677–81. There may also be a second consideration, namely that of process. The defendant in the second scenario has been robbed of a certain amount of due process. See infra notes 98–99 and accompanying text.
the witness, and may thus discount the interrogation entirely, or she may not have known and may understand the attorney's questions as casting serious doubt on his client's case. In the former case, the attorney has attempted to alter the truth-seeking function of the settlement negotiation, but has failed, because opposing counsel still believes the truthful witness. Even though he has failed, however, his partisan actions may be understood as unethical if described in terms of a system that understands actions intended to distort the truth as ethical only if they are likely to lead to the truth.\footnote{In other words, because the second attorney is acting without the supervision of an impartial arbiter, his attempt to distort the truth is unethical, regardless of whether or not he succeeds.\footnote{This argument does not suggest that an attorney acting in this manner during a settlement negotiation would never be justified in doing so. Rather, it suggests that the ethical justification for her actions must derive from the presence of structural safeguards similar to those found in the adversary system.\footnote{In the extreme, this would require exactly those structures present in the adversary context, namely the same partisan advocates, procedural rules, and impartial arbiter. Thus, an attorney acting at a court-ordered settlement conference to negotiate an agreement that will require court approval may be justified in acting in a partisan manner because the negotiation is itself part of an adversary system proceeding.\footnote{Nonetheless, even a settlement that requires court approval can be characterized a number of ways. Professor Schwartz describes such a settlement in two stages.\footnote{In the first stage, before the intervention of the tribunal, the attorneys act as partisan advocates for their clients' position.\footnote{In the second stage, after the parties have reached an agreement, the attorneys act as "advocate[s] for the consensus," convincing the impartial arbiter to accept the terms of their agreement.\footnote{Professor Schwartz argues that only settlements that require court approval\footnote{meet the structural requirements of the adversarial ethic, and by so arguing he focuses on the presence of an impartial arbiter.\footnote{If this two-stage description of a court-approved settlement is accurate, however, the simple presence of an impartial arbiter may not satisfy}}}}}}}}}
the adversarial ethic in this context because the arbiter's role has been fundamentally changed.

In the courtroom, the arbiter functions both as a sieve, sifting misinformation and partisan claims, and as a builder, constructing truth and justice out of the remains. That is, in the courtroom, the arbiter both chooses the material and constructs the end-product. However, Professor Schwartz's characterization of the arbiter's function in court-approved settlements—buying a product that the plaintiff and defendant market together, as if they were partners in a business—eliminates that first function of the arbiter. From Professor Schwartz's view, the arbiter does not get to pick through the materials—a key function of the arbiter in an adversary system designed to produce the truth.

Thus, if Professor Schwartz's understanding of the nature of court-approved settlements is correct, it is difficult to understand how reference to the adversary system's truth-seeking function justifies an attorney's partisan actions even when that attorney speaks before an impartial arbiter, because those actions are not in conformity with the established machinery of that system. An arbiter acting under these circumstances may reach the same result, but not as a result of the adversary system's proper function.

Nevertheless, Professor Schwartz's characterization of the two-stage settlement process may not be the correct one. Consider, for example, an alternative characterization which reverses the stages. In the first stage, the attorneys actively seek compromise, not by resort to partisan tactics, but in an effort to arrive at the truth and to put a price on that truth which reflects the economic realities of our litigation system. In the second stage, the advocates adopt partisan roles once more and attempt to convince the arbiter of the substantive truth of the information they provided opposing counsel during the first stage. Note that if both sides perform admirably and honestly in the first stage, the second stage will be very similar to Schwartz's second stage because both advocates will attempt to convince the arbiter of the same facts. But the arbiter's role has nonetheless changed somewhat, because he is now presented with two partisan stories describing the information that has become the basis for the settle-

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81 See Schwartz, supra note 25, at 676 ("At [this second stage of the settlement], the lawyers cease to be adversaries and take a common position in seeking the judge's approval of the bargain, in effect vouchsafing the fairness or correctness of the outcome." (footnote omitted)).

82 See id. at 677-78 (noting that lawyers in a courtroom settling have faith "in the ability of the arbiter to reach a correct decision").

83 This Note uses the term "economic realities" to mean the costs associated with a settlement. Trial costs affect many decisions about whether and how to pursue settlement. See, e.g., Russell Korobkin, Aspirations and Settlement, 88 CORNELL. L. REV. 1, 5-9 (2002).
ment. If one attorney withheld vital information or provided misin-
formation during the first stage, the two partisan stories should reveal
that impropriety, regardless of whether the advocates ask for the same
settlement price.

On its face, this structure seems to justify the advocates’ partisan
practices in the second stage in the same manner the truth-seeking
function justifies the same behavior in any adversarial proceeding.
Here, however, the procedure is significantly altered. Regardless of
whether the attorneys were honest with one another in the first stage,
the means of obtaining information was fundamentally different in
that stage. This is because during the course of trial preparation, an
attorney typically relies on discovery procedures to both obtain and
withhold information from his adversary. The attorneys here, how-
ever, have not taken advantage of such procedural tools. As such, the
type of information that reaches the arbiter, regardless of whether or
not it is true, is different from the type of information that would
reach the arbiter in a truly adversarial proceeding. It draws from one
pool of information rather than two. In some instances, the informa-
tion may be the same. But if one is to accept the proposition, as this
Note does, that the truth-seeking function of the adversary system, as
represented by trial, is the prime justification for the adversarial ethic,
then one is forced to view any structural or procedural shift from that
model as potentially upsetting that justification.

One might argue, however, that this level of structural similarity
between the adversary system and the negotiation process may not be
necessary to achieve the desired truth-seeking function and, there-
fore, to justify an attorney’s partisan conduct. Perhaps the presence
of an impartial arbiter, for example, is not essential to the truth-seek-
ing function of a market-type negotiation system in which self-inter-
est alone operates to regulate the exchange of misinformation. On
this view, an attorney would be no less justified in acting in a partisan

84 The logistics of this hypothetical are unimportant, as it is not necessary that this be
the correct understanding of all court-approved settlements. Rather, it is only necessary
that the reader understand that this scenario is possible.
85 Price may be based on considerations external to the truth-seeking function of the
claim, such as the cost of litigating the matter. See Korokhin, supra note 83, at 5–9.
86 See, e.g., Wendel, supra note 22, at 668–70.
87 The shift from structures that justify the adversarial ethic to those that do not is
best understood as a sliding scale. See Schwartz, supra note 25, at 695 n.52 (“[T]he further
from the adversary system and its structural elements the lawyer’s situation is, the heavier is
the burden of supporting the morality of that lawyer’s behavior.”).
88 See supra notes 40–44 and accompanying text.
89 This is one formulation of an economic argument taken from Adam Smith’s no-
Arthur Isak Applbaum formulates the argument as follows: “under certain forms of eco-
nomic organization, the unintended consequence of many actors seeking their own advan-
tag is to the advantage of others.” Applbaum, supra note 90, at 188.
manner during negotiations than before a tribunal because, in the aggregate, the market for information in negotiations would itself regulate misinformation and deceptive practices, leading ultimately to the truth.\(^9\)

The typical response to this argument is that markets are particularly poor regulators of deception and misinformation.\(^{91}\) It would seem, however, that if this Note is to assume that the truth-seeking function of the adversary system were justified by an equilibrium argument nearly identical to that used above,\(^{92}\) then this Note would also have to accept the potential efficacy of such a self-regulating market-type negotiation system. There are, however, a number of critical differences between the two systems.

The first important difference between the adversary system and self-regulating negotiation is the presence or absence of an impartial decision-maker and his role in legitimizing the actions of a partisan advocate. Professor Schwartz characterizes the arbiter's role as follows:

In the adversary system, the presence of the impartial arbiter has two important effects. First, it assures that there is one—and only one—part of the system charged with the responsibility of reaching the correct decision under the law (here the impartiality is non-partisanship and freedom from bias). Second, it makes it possible to entrust the parties with the presentation of issues, evidence, and arguments and with the challenges to them (here the impartiality is non-participation). The arbiter sees to it that the rules of the contest are followed, and then decides who has prevailed.\(^{93}\)

Attorneys look to the impartial decisionmaker to arrive at the truth. Without the decisionmaker, "there is no longer [anyone] to point to for ultimate resolution of disputes; the only point of contact is the other party . . . ."\(^{94}\) Professor Schwartz likens the difference between the two systems to the difference between a refereed basketball game and a pick-up game.\(^{95}\) In a refereed game, coaches and players are justified in arguing for falsehoods that are in their interest because the referee, an impartial decision-maker, will make the ultimate determination. But the players in the pick-up game do not have the same justification, because their peers expect them to be honest about their conduct.\(^{96}\) While Professor Schwartz's metaphor captures and demonstrates the legal system's uneasiness about the prospect of lawyers

\(^{90}\) See Applbaum, supra note 30, at 188.

\(^{91}\) See id. at 189.

\(^{92}\) See supra note 40–44 and accompanying text.

\(^{93}\) Schwartz, supra note 25, at 677.

\(^{94}\) Id. at 678.

\(^{95}\) Id.

\(^{96}\) See id.
self-regulating their ethical behavior,\textsuperscript{97} it does not communicate clear reasons why lawyers, unlike basketball players in a pick-up game, should not be allowed to justify their conduct by reference to a self-regulating system, even in a situation in which the outcome—the score or the truth, respectively—is identical.

Even if it is possible to obtain the same truth in a self-regulating system, such a system will still not support the adversarial ethic because the presence of an impartial arbiter ensures the fairness of the truth-seeking process. The justification of the adversary system by means of the truth-seeking function contains in it a notion of truth that can only be satisfied by a certain procedural justice.\textsuperscript{98} This procedural justice is reflected in the notion of due process, and is critical to an ethical justification for partisan tactics that would otherwise remain unjustified.\textsuperscript{99}

The truth-seeking function justification for the adversarial ethic is a fastidious one—it demands not only the output, but also a fair means of acquiring it. Thus, if a professional basketball team were to cheat in a pick-up game against a group of Cornell Law students, they would not likely rob the students of a victory, because they are a better basketball team with or without cheating. But they would take some-


Critics fault the project of regulating lawyers through legalistic rules for being predominantly motivated by the organized bar’s protectionism or other self-interested reasons; for fostering a minimalist or “Holmesian bad man” interpretive stance toward moral questions; for slighting the importance of non-legal considerations, such as religious commitments, in professional morality; for overlooking the importance of dispositions, character, or other internalized aspects of ethical norms; or for failing to account for ethical pluralism, justified disagreement, or the complexity of moral life.

\textsuperscript{98} See Eyster, supra note 18, at 773–74. Professor Eyster concludes:

The litigation model contains formal rules of evidence and procedure, a fact finder whose decision will be imposed on the litigants, a referee to monitor compliance with the rules, and a complete record of what factors influenced the decision resolving the dispute. The lawyer as advocate is held in check by these structural features designed to guarantee procedural and outcome fairness. . . . [T]hese structural guarantees are totally absent in the negotiation process.

\textsuperscript{99} Professor Schwartz notes that the effect of removing the impartial arbiter from the system "bas to do with the social implications of removing the coercive impartiality of the state from the decisionmaking processes." Schwartz, supra note 25, at 678. He goes on to explain that "[t]he absence of the arbiter moves the proceedings away from the theoretical conception of evenhanded justice." Id. What Schwartz terms "social implications" is better deemed the ethical implications of removing a fair procedure—the means of ensuring a fair process. That is, an attorney acting in accord with the adversary system is justified in acting in a partisan manner as an advocate because he plays a necessary role in a system that ensures both substantive truth and procedural fairness.
thing from the students. They would take the students' "day in
court"—their chance to appeal to an impartial authority and thereby
to obtain the chance at a fair game.

This difference between outcome and procedure is the differ-
ence between justifying the attorneys' partisan actions by reference to
the probability that, over time, more truth will come from the system
than not, and justifying his actions by reference to the probability
that, over time, more litigants will get a chance at a fair game. This
proposition holds true so long as each time a litigant steps into the
courtroom there is greater than zero percent chance he will get a fair
game.\textsuperscript{100} The adversarial ethic requires that considerations of both
outcome and procedure be present before the adversary system's
truth-seeking function justifies the partisan actions of attorneys.

This section has demonstrated that there are few settlement ne-
egotiations where the strict application of the adversarial ethic, as
presented in this Note, will be justified.\textsuperscript{101} At the same time, this sec-
tion has raised a fundamental question concerning our notion of the
adversarial ethic: how can an attorney's conduct outside of the court-
room, especially in the course of settlement negotiations, be recon-
ciled with an ethic that justifies an attorney's conduct on the basis of
its conformity with the structures and processes mandated by our sys-
tem of litigation? Scholars like Professor Schwartz have suggested an-
ders,\textsuperscript{102} but this Note is not concerned with a sweeping answer to this
broad question. Rather, it is concerned with recognizing the question
in the first place. The following Parts discuss the ways in which the
Guidelines' drafters incorporated the adversarial ethic into the Guide-
lines themselves, and stress the failure of the drafters to pose this fun-
damental question.

\textsuperscript{100} The player must have a greater than zero percent chance to participate in a fair
game each time, or the adversarial ethic could never be justified by reference to notions of
procedure or due process.

\textsuperscript{101} This does not preclude theorists or even the Guidelines' drafters from finding ways
to alter this strict adversarial ethic to fit the context of various types of settlement negotia-
tions. To the contrary, this is precisely the task that the Guidelines' drafters have failed to
undertake. In addition, this Note continues to recognize the possibility that there are po-
tential ways to justify the adversarial ethic other than by reference to the truth-seeking
function of the adversary system. This Note has considered only the most fundamental
justification for the adversarial ethic.

\textsuperscript{102} See Schwartz, supra note 25, at 685–86. Professor Schwartz proposes a rule that
would not allow an attorney to represent a client in a settlement negotiation where that
representation would lead to the client obtaining an "unconscionable" end or one "which
the law would regard as illegitimate in that it would render an agreement unenforceable."
\textit{Id.} at 686. This Note neither endorses nor condemns this view. To the extent that it is a
rule based on substantive law, i.e. the law of contracts and torts, however, its adoption as an
ethical guideline is inappropriate for the same reason that the adoption of the Model
Rules format is inappropriate for a set of guidelines—because it reinforces the notion that
the rule of law and the law of lawyering are the only sources for a lawyer's ethic. See infra
Part III.B.
II
THE GUIDELINES' ADHERENCE TO THE ADVISARIAL ETHIC

The Guidelines are permeated with ethical notions ultimately derived from a belief in the adversarial ethic. This Note, however, limits the discussion to what is arguably the most prominent example of adherence to the adversarial ethic—namely, those sections of the Guidelines that deal with disclosure and omission of material facts in a settlement negotiation.103 The debate over disclosure and omission of material facts has been substantial,104 and its prominence in the ethics literature lends a certain degree of legitimacy to a discussion of the adversarial ethic in the context of settlement negotiations. This is largely because the debates over disclosure and the adversarial ethic both find their roots in a discussion of the flow of information in our system of justice.105 In addition, this Part responds to the potential argument that section 2.3 of the Guidelines, which addresses honesty and fair-dealing, allows an attorney to escape the adversarial ethic in settlement negotiations.


In formal litigation, attorneys can rely heavily on rules of discovery to obtain needed information from opposing counsel.106 In addi-

105 The adversarial ethic is concerned with equalizing the flow of partisan input or information on both sides of the equation in order to preserve the truth function of the adversary system. See supra notes 40–45 and accompanying text.
106 Of course, other ethical issues arise when attorneys fail to take advantage of discovery devices. See Spaulding v. Zimmerman, 116 N.W.2d 704, 709 (Minn. 1962) (“By reason of the failure of plaintiff's counsel to use available rules of discovery, plaintiff's doctor and all his representatives did not learn that defendants and their agents knew of its existence and possible serious consequences.”).
tion, attorneys engaged in litigation are ethically constrained by the duty of candor toward the reviewing tribunal. As such, these rules and duties can require attorneys to disclose information to the court—and therefore opposing counsel—that will be harmful to their client's case. But this duty of candor is not generally present in the context of settlement negotiations. Furthermore, some settlement negotiations will not involve discovery practice. Thus, the attorney in such a settlement negotiation must sometimes rely on opposing counsel to provide the information necessary to complete the negotiation. Moreover, there will be times when, as in Spaulding, an attorney possesses information that will have an effect on more than just the litigation or settlement at hand.

This tension between the free flow of information and the structural requirements of the adversarial ethic is thus highly relevant to a discussion of disclosure and omission of material facts. The question becomes whether an attorney is ever ethically bound to disclose information to opposing counsel in the absence of a procedural command to do so.

This Part demonstrates that the contemporary understanding of an attorney's ethical obligations to disclose material information in the absence of a court-reviewed procedural mechanism requiring disclosure, as represented by Model Rule 4.1, adheres to the adversarial ethic. Moreover, this Part reveals that the Guidelines follow the same ethical schema. Such an assertion necessitates, of course, a survey of the substantive content of Model Rule 4.1 and its counterpart in the Guidelines.

Current Model Rule 4.1 provides:

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

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

(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.

The Comments to Model Rule 4.1 best explain the Rule. Comment 1 represents perhaps the most well-known caveat of legal ethics. It provides that a "lawyer is required to be truthful when dealing with others

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107 Note that these same constraints arise in the context of settlement negotiations that begin by filing a lawsuit and pursuing the initial stages of disclosure and discovery. See Schwartz, supra note 25, at 675–76.
109 See Spaulding, 16 N.W.2d at 707, 710.
110 Id.
111 Model Rules of Prof'L Conduct R. 4.1.
on a client's behalf, but generally has no affirmative duty to inform an
opposing party of relevant facts.112

The endorsement of the adversarial ethic in Rule 4.1 lies in the
ABA's attempt to shelter partisan advocates from any duty to inform
each other of material facts, because such cooperation amongst parti-
san advocates would act to sift information before it reaches the im-
partial arbiter. Indeed, this would take place on two levels. On the
first level, the attorney would, in order to comply with the Rule, sepa-
rate for herself "material" and "non-material" information.113 On the
second level, the adversaries would trade this information freely
amongst themselves, thus combining their pools of knowledge. To
some extent, this would create a single spokesperson rather than two
partisan advocates. In other words, the court would now be hearing
two versions of the same story rather than two distinct stories.114

Model Rule 4.1's refusal to impose a duty of disclosure amongst
adversaries avoids just this appropriation of the judicial function. This
is, in effect, the greatest endorsement of the adversarial ethic that the
Model Rules could give115 because it ensures the purity of partisan
informational inputs by protecting an advocate's ability to keep infor-
mation from his adversary.116 Nevertheless, at first glance the current

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112 Model Rules of Prof'l Conduct R. 4.1, cmt. 1.
113 This Note recognizes that courtroom attorneys do frequently engage in a certain
amount of factual selection because they have great influence over what evidence to pre-

114 In some ways this is becoming an actual characteristic of our system of justice, espe-
115 This is true despite language in the Preamble to the Model Rules that states that
"[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adver-
system," primarily because the Preamble imposes no duty upon an attorney. Model
Rules of Prof'l Conduct pmbl. (1983). Thus, while the ABA intends the state bar as-

116 Again, liberal rules of discovery may, nevertheless, make this information available,
but there is a critical difference: rules of discovery are creatures of the court, and, as such,
are enforced by an impartial arbiter. As such, they will, in theory at least, operate with
equal force upon both parties, thereby ensuring the procedural fairness of the adversarial
process. See supra notes 98–100 and accompanying text. Courts, however, only sporadically
enforce the Model Rules. And when the courts do enforce the Rules, they are usually
enforced after the adversarial process has run its course.
formulation of Rule 4.1 may not strike the reader as an endorsement of the adversarial ethic. After all, Model Rule 4.1(b) does allow disclosure in certain limited circumstances,\(^\text{117}\) and if disclosure would operate to shift some of the impartial arbiter’s function to the advocates, Model Rule 4.1 appears to ultimately intrude upon the adversarial ethic.

Upon closer inspection, however, Model Rule 4.1’s disclosure provision operates in no way to force the advocate to provide information to opposing counsel.\(^\text{118}\) To the contrary, the disclosure provision is discretionary, and only in the limited circumstances where the attorney’s failure to disclose would assist a client’s criminal or fraudulent act is the provision mandatory.\(^\text{119}\) Even then, the attorney is not allowed to disclose the information if disclosure would violate client confidentiality as defined in Model Rule 1.6.\(^\text{120}\) Given Rule 1.6’s sweeping protection of confidentiality, the attorney may disclose so-called “material” facts to his opponent only in the rarest instance.\(^\text{121}\) Moreover, the history of Model Rules 1.6 and 4.1 reinforces the pro-

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\(^{117}\) See, e.g., Model Rules of Prof’l Conduct R. 4.1(b) (1983) (allowing disclosure to avoid assisting a client in a criminal or fraudulent act).

\(^{118}\) Model Rule 4.1 generally imposes no disclosure duty to either legal or factual information. See Charles B. Craver, Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive, 38 S. Tex. L. Rev. 713, 720–21 (1997). Craver notes:

In the absence of special relationships or express contractual or statutory duties, practitioners are normally not obliged to divulge relevant legal or factual information to their adversaries. This doctrine is premised upon the duty of representatives to conduct their own legal research and factual investigations. Under our adversary system, attorneys do not have the right to expect their opponents to assist them in this regard. It is only when cases reach tribunals that Model Rule 3.3(a)(3) imposes an affirmative obligation on advocates “to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”

No such duty is imposed, however, with respect to pertinent factual circumstances that are not discovered by opposing counsel.

\(^{119}\) Model Rules of Prof’l Conduct R. 4.1 & cmt. See also Hazard, supra note 6, at 303 (discussing the complicated interplay between Model Rules 4.1 and 1.6).

\(^{120}\) Model Rules of Prof’l Conduct R. 1.6. Model Rule 1.6 requires confidentiality with regard to nearly any information that the attorney could potentially disclose. Model Rule 1.6(a) provides in relevant part: “A lawyer shall not reveal information relating to representation of a client . . . .” (emphasis added). This prohibition includes any information learned during the course of the representation, regardless of when the attorney learns it, and regardless of its source. See Hazard, supra note 6, at 270; Nicole Kroetsch & Samantha Petrich, Task Force on Corporate Responsibility: Should the American Bar Association Adopt New Ethics Rules?, 16 Geo. J. Legal Ethics 727, 731 (2003).

\(^{121}\) See Hazard, supra note 6, at 286 (“Model Rule 1.6(b) as adopted is a comprehensive and unqualified prohibition of disclosure of any client information, subject only to the homicide/bodily injury exception, the ‘self-defense’ exception and the uncontroversial exception regarding disclosures ‘impliedly authorized’ to carry out the representation.” (footnote omitted)).
position that the ABA formulated its approach to regulating the disclosure of a client's material facts out of a concern—whether direct or indirect—that the adversarial ethic be preserved. The Model Rules, as originally drafted, contained a much broader disclosure provision that allowed disclosure "when necessary to prevent even an implicit misrepresentation."129

B. Honesty and Fair-Dealing: A Solution Aborted

The Preamble to the Model Rules provides that "[a]s [an] advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."124 Regarding negotiation, however, the Preamble states that the lawyer as negotiator "seeks a result advantageous to the client but consistent with requirements of honest dealing with others."125 The Guidelines adopt this notion of honest dealing in section 2.3, entitled "Duty of Fair-Dealing." Section 2.3 provides that "[a] lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing."127 At first glance, this section appears to alleviate some of the pressure of the adversarial ethic because it suggests that an attorney may step out of her role as partisan advocate in settlement negotiations where acting in a partisan manner would be unfair or even dishonest.128 However, close examination of section 2.3 reveals that this so-called "duty" lacks meaning and does not support a shift from the adversarial ethic in the context of settlement negotiations.

First of all, it is important to note that the Guidelines' duty of fair-dealing is not the duty of "good faith."129 This is true regardless of whether one thinks of the term "good faith" as having independent

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123 See Eyster, supra note 18, at 777. Eyster further states that the reasons for this exclusion were largely out of a concern for the adversarial ethic: "Among the criticisms of the proposals was the objection that these requirements would be inconsistent with the lawyer's role as an advocate." Id. at 778 (footnote omitted).
125 Id.
126 Guidelines, supra note 13, § 2.3, at 3-4.
127 Id.
128 Recall that whether or not we consider an action or failure to act dishonest may depend upon the circumstances in which the actor finds herself. See supra notes 48-53 and accompanying text.
129 But see John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69, 71 n.3 (2002) (arguing that
meaning or whether one takes it to be an “excluder” of bad-faith activity, as Professor Summers did in his landmark article.\textsuperscript{130} Of course, the duty of good faith takes its meaning most predominately from the law of contracts,\textsuperscript{131} and in that context is not helpful to a discussion of negotiation ethics.\textsuperscript{132} More importantly, courts in all jurisdictions have given meaning to the duty of “good faith.”\textsuperscript{133} Neither the Model Rules’ mention of honest dealing\textsuperscript{134} nor the Guidelines’ duty of fair-dealing\textsuperscript{135} have attracted similar attention from courts or disciplinary committees. Nor do the terms “honest dealing” and “fair-dealing” derive meaning from the Model Rules or the Guidelines themselves. As such, the Guidelines’ “duty” is neither identical nor analogous to the duty of good faith.

It is not surprising that courts and disciplinary committees have not seized upon the Model Rules’ and Guidelines’ mention of honesty and fair-dealing, given the further content of those works. The Model Rules mention the notion of honest dealing only in the preamble, and do not codify such a duty in any rule.\textsuperscript{136} The Guidelines, while making express provision in section 2.3 for a duty of fair-dealing, begin the Committee Notes by stating: “While there is no Model Rule that expressly and specifically controls a lawyer’s general conduct in the context of settlement negotiations, lawyers should aspire to be honorable and fair in their conduct and in their counseling of their clients with respect to settlement.”\textsuperscript{137} This statement signals to the reader


\textsuperscript{131} See id.

\textsuperscript{132} Courts frequently use the phrase “good faith settlement negotiations” when they instruct parties to engage in settlement negotiations before continuing further with the litigation process. See, e.g., Bandhan v. Lab. Corp. of Am., 234 F. Supp. 2d. 313, 320 (S.D.N.Y. 2002) (“The parties are directed to engage in good faith settlement negotiations prior to the [settlement] conference.”). Here, however, the court uses the term “good faith” to mean that the parties make a valid attempt to engage in settlement negotiations in the first place, and not to indicate how attorneys should act towards their “adversaries” during true settlement negotiations.

\textsuperscript{133} See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

\textsuperscript{134} MODEL RULES OF PROF’L CONDUCT pmbl. (1983).

\textsuperscript{135} Guidelines, supra note 13, § 2.3, at 3–4.

\textsuperscript{136} MODEL RULES OF PROF’L CONDUCT pmbl.; see Nathan M. Crystal, The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations, 87 KY. L.J. 1055, 1085–84 (1999) (discussing a 1980 draft of the Model Rules, which included Rules concerning “Fairness to Other Participants” and “Illegal, Fraudulent, or Unconscionable Transactions” which were ultimately rejected as “unworkable” (footnotes and internal quotation marks omitted)); Eyster, supra note 18, at 777–78 n.76 (noting that “[i]n a draft version of the Model Rules, Rule 4.2(a) required that ‘a lawyer . . . be fair in dealing with other participants’ in conducting negotiations.”). This provision was ultimately not adopted as part of the Model Rules. Id.

\textsuperscript{137} Guidelines, supra note 13, § 2.3 advisory committee’s note, at 3–4.
not only that there is no Model Rule that imposes the duty of fair-dealing upon the practicing attorney, but also that this duty must be less important than those provided for explicitly in the Model Rules. Consequently, an attorney who subjugates any of the Model Rules out of concern for the duty of fair-dealing will be out of line.\textsuperscript{138} The first sentence in the Committee Notes also mentions that the drafters' previous title—the "Duty of Fair-Dealing"—is really just an aspiration, similar to those previously found in the Model Code.\textsuperscript{139}

Further reference to the Model Rules in section 2.3's Committee Notes only weakens and confuses this already muddled message. For example, the Committee Notes indicate that "Model Rule 2.1 recognizes the propriety of considering moral factors in rendering legal advice . . . ."\textsuperscript{140} However, this section does not indicate whether the reader is supposed to understand the duty of fair-dealing as a duty of the negotiator vis-à-vis opposing counsel or as a duty of the counselor vis-à-vis his client.

Even if the Guidelines' duty of fair-dealing contains some ethical content, it does not offset the attorney's duties to the adversary system. This reality becomes most evident when one compares the Guidelines' duty of fair-dealing with the duty that Professor Schwartz would impose upon settlement negotiators: prohibiting the use of "unfair, unjust, or unconscionable" means to achieve "unfair, unjust, or unconscionable" ends.\textsuperscript{141} On its face, this language seems to be just as benign as that of the Guidelines. The difference lies in the way in which Professor Schwartz understands his own rule,\textsuperscript{142} as opposed to the way in which the Guidelines' drafters appear to understand section 2.3 of the Guidelines. Unlike the equivocal language of the Guidelines, Professor Schwartz's proposed rule takes meaning from substantive law in much the same way that the term "good faith" does.\textsuperscript{143}

\begin{footnotes}
\item[138] The notion that the Model Rules do not support this "duty" is made even more explicit by the Committee Notes' later language that states "[w]hether or not a lawyer may be disciplined, sanctioned, or sued for failure to act with honor and fairness based on specific legal or ethical rules, best practices dictate honor and fair dealing." Guidelines, supra note 13, § 2.3 advisory committee's note, at 5–4.
\item[139] Id.; See infra notes 160–63 and accompanying text.
\item[140] Guidelines, supra note 13, § 2.3 advisory committee's note, at 3–4.
\item[141] Schwartz, supra note 25, at 680. See also supra note 113 and accompanying text.
\item[142] Professor Schwartz uses the term "rule" here to denote a specific, as opposed to a general, requirement. See Schwartz, supra note 25, at 680 n.19.
\item[143] See id. at 681 ("One immediate objection [to a modified set of rules in the nonadversarial setting] is that terms like 'unfair,' 'unconscionable,' or 'unjust' are too vague to be used in a rule of professional responsibility. . . . Such terms, however, are familiar both to the substantive law and to the various professional codes, including the ABA Code of Professional Responsibility.").
\end{footnotes}
This Note argues that although this type of rule may be inappropriate for a set of guidelines, Professor Schwartz’s approach to the problem of settlement negotiation ethics is nevertheless a helpful contrast to the muddled approach of the Guidelines. Perhaps most importantly, Professor Schwartz characterizes his rule as a means of resolving the problem of adherence to the adversarial ethic in inappropriate circumstances:

[I]f we grant that in the absence of the adversary system no overriding policy is advanced by a lawyer’s use of unfair, unjust, or unconscionable means or by a client’s obtaining such ends, it is worth considering why lawyers as a professional matter should not be prohibited from using their skills for these purposes even though their clients might wish them to do so. Moreover, Professor Schwartz’s rule is specific, clear, and would be useful to practicing lawyers. Finally, despite its perhaps inappropriate ties to the “substantive law of reformation, rescission, torts, and unconscionability,” the rule recognizes the need to involve individual lawyers in the decision about what constitutes ethical conduct in settlement negotiations.

Unfortunately, section 2.3 of the Guidelines fails in this last regard as well. Because the language of section 2.3 quickly brings the duty of fair-dealing under the shadow of potential disciplinary action for violating the Model Rules, it gives the attorney little room to make meaningful decisions about the significance of “fair-dealing.” Rather, section 2.3 suggests that an attorney involved in settlement negotiations should aspire to be honest and fair as long as this aspiration does not cause him to violate the Model Rules, which bind him to the definition of “fairness” implicit in that body of law. Finally, because the Model Rules themselves borrow much of their meaning...

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144 See infra Part IV.B. Most importantly, this appeal to substantive law shifts the focus away from the attorney as ethical decisionmaker and places it back upon the courts and rule-drafting committees. See id. However, Professor Schwartz tempers this objection by resisting the temptation to make violation of his proposed rule sanctionable. See Schwartz, supra note 25, at 676 (“This [rule] ... imposes no substantive or professional liability if the nonadvocate proceeds to assist the client, even though the lawyer believes that the behavior is immoral or unjust.”). Of course, this in itself raises the question of whether courts and disciplinary committees would actually utilize Professor Schwartz’s formulation if, for example, the ABA decided to adopt it. See id.

145 Id. at 680–81.

146 See id. at 696 (arguing that lawyers involved in settlement negotiations should be accountable for moral and ethical violations).

147 Id.

148 See id. at 681 (noting that the aspirations of the Model Code deserve to be taken seriously and require in some instances that the attorney evaluate the ethics of a client’s means and/or ends).

149 See infra notes 160–64 and accompanying text.

150 See MODEL RULES OF PROF’L CONDUCT R. 2.1, 3.3 (1983).
from the adversarial ethic, section 2.3's lasting message is that attorneys should act honestly and fairly in settlement negotiations as long as that honesty and fairness does not require them to step outside their role as a partisan advocate in the adversary system. Consequently, the Guidelines' inclusion of a duty of fair-dealing does not counteract its otherwise adversarial approach to the ethics of settlement negotiations.

III
THE GUIDELINES' ADHERENCE TO THE ADVERSARIAL ETHIC SENDS THE WRONG MESSAGE

Having discussed the problems inherent in utilizing the adversarial ethic in the context of settlement negotiations generally, and having determined that the Guidelines do just that, this Part will identify the negative effects that this situation is likely to have on our contemporary understanding of professional ethics. The second section of this Part discusses ways in which the Guidelines' structure contributes both to this general understanding of professional ethics and to the overall failure of the Guidelines to distinguish between courtroom and negotiation ethics, and thus to effectively guide an attorney through the ethical pitfalls of settlement negotiations.

A. Reinforcing Mistaken Notions of Adversarial Uniformity

The Guidelines' subservience to the demands of the adversarial ethic has a number of significant negative effects, foremost among which is that the Guidelines in their present form fail to meaningfully distinguish the ethics of settlement negotiation from the ethics of trial advocacy. The ABA drafted the Guidelines in an atmosphere of uncertainty about the proper role of the attorney in settlement negotiations, and the Guidelines certainly did not clarify the substantive content of the Model Rules on the issue. But the greater confusion came in the form of questions about the propriety of the fundamental ethical justification for partisan advocacy and whether it was being stretched beyond its appropriate limits. It is this core dilemma that the Guidelines not only ignore, but in fact compound by adding an

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151 See supra Part II.A.
152 See supra Part I.A-B.
153 See supra Part II.A.
154 See John Gibeaut, I A.B.A. J. E-REPORT 25, In the News: Skills of Negotiation, at 1 (June 28, 2002) (noting that the "ABA Litigation Section is trying to fill a void" by drafting the Guidelines).
155 See supra Part II.A. Of course, it was never the intention of the Guidelines' drafters that the Guidelines be used as a clarification of the Model Rules. See infra Section III.B.
156 See generally Schwartz, supra note 25 (exploring the ethical issues involved in the adversary system as opposed to those implicated in a nonadversarial setting).
additional set of adversarial mandates to an already growing body of arguably inapplicable ethical rules.

The effect of the Guidelines' failure to answer Professor Schwartz's and others' questions about the limits of the adversarial ethic thus becomes a tacit approval of attorneys using partisan tactics in settlement negotiations that may only be ethically justified in the courtroom.\(^{157}\) Even worse, the substantive adherence to the adversarial ethic lends an extra degree of apparent legitimacy to the claim that the attorney is, in all contexts, a partisan advocate with the same ethical allowances and obligations. This is especially true when the message comes from a section of the ABA that produced a detailed set of guidelines designed to aid attorneys in overcoming ethical dilemmas in settlement negotiations.\(^ {158}\)

If courts and disciplinary committees widely utilize the Guidelines, the effect will be to entrench the already pervasive notion that the ethical attorney acts always in conformity with the adversarial ethic.\(^ {159}\) In addition, attorneys focusing on the Guidelines' format will either read the Guidelines as a substantive addendum to the Model Rules, or, in the alternative, as an interpretation of the Model Rules. Attorneys in the first group will understand the Guidelines to have independent legal and normative significance. Nevertheless, the substance of the Guidelines so closely mirrors the Model Rules that these attorneys are ultimately likely to be left with the Model Rules' answer to their ethical dilemmas. Attorneys in the second group will arrive at the same point by simply assigning the Guidelines no legal or normative significance in and of themselves. But, because the Model Rules are representative of the adversarial ethic, either group of attorneys may feel justified in bringing courtroom practices into a settlement negotiation even if they use the Guidelines to make their decision.

This interpretive problem is further aggravated by the Guidelines' choice of format, its relationship to the Model Rules, and the Guidelines' own statement of its normative and legal significance. The following section explores these structural problems more fully.

**B. Rules as Guidelines: Structural Duplication of the Model Rules of Professional Conduct**

From the outset, the Guidelines' drafters make clear that they drafted the Guidelines solely as a resource for the practicing attorney, a tool useful only for suggesting possible solutions to ethical dilemmas

\(^{157}\) See infra Part IV.C.

\(^{158}\) See Guidelines, supra note 13, § 1, at 2 (noting that the "Guidelines are designed to assist counsel in ensuring that conduct in the settlement context is ethical")

\(^{159}\) Cf. Schwartz, supra note 25, at 694–97.
that may arise in the course of settlement negotiations.\footnote{160} Indeed, wary of the Guidelines’ potential normative effect, the drafters state plainly in the Preface:

These Guidelines are designed to assist counsel in ensuring that conduct in the settlement context is ethical. They are \textit{not} intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules, and should not serve as a basis for civil liability, sanctions, or disciplinary action.\footnote{161}

Two questions emerge from this initial disclaimer: First, do they mean what they say? Second, even if they do, are the Guidelines likely to have so little normative effect? Both questions bear on the ultimate justification for the Guidelines themselves. After all, if the Guidelines are to have no effect on rules of professional conduct, common law, or disciplinary actions, it seems unlikely that the ABA would have drafted them in the first place.\footnote{162}

Despite the disclaimer, the Guidelines’ language itself calls into question whether the drafters truly intended to dilute the normative impact of the Guidelines to the extent the Preface suggests. For example, section 2.2, which is preceded only by the Preface and a statement regarding the “Purpose of Settlement Negotiations,”\footnote{163} employs the word “must” in conveying the lawyer’s duty to competent\footnote{164} representation.\footnote{165} Other sections employ liberally the normative terms...

\footnotetext[160]{See Guidelines, supra note 13, § 1, at 1–2. In addition to this caveat, the drafters limit the scope of the Guidelines to lawyers representing parties in settlement negotiations in civil cases. \textit{Id.} The drafters further warn against their use in the context of mediation or other forms of formal alternative dispute resolution. \textit{Id.}}

\footnotetext[161]{\textit{Id.}}

\footnotetext[162]{The House of Delegates’ decision to “recommend” rather than “adopt” the Guidelines only exacerbates this tension. See supra note 16.}

\footnotetext[163]{Guidelines, supra note 13, § 2.1 at 2–3.}

\footnotetext[164]{Even the phrase “competent representation” implies one of the most fundamental obligations of the attorney, because it is the first attorney duty prominently addressed in the Model Rules. See \textit{Model Rules of Prof’l Conduct} R. 1.1 (1983) (“A lawyer shall provide competent representation to a client.”).}

\footnotetext[165]{Guidelines, supra note 13, § 2.2, at 3 (“A lawyer must provide a client with competent representation in negotiating a settlement.”). See also id. § 3.1.3, at 9 (“A lawyer must reasonably consult with the client respecting the means of negotiation of settlement . . . .”), id. § 4.1.1, at 34 (“[A] lawyer must not knowingly make a false statement of material fact (or law) to a third person.”), id. § 4.2.2, at 41 (“[A] lawyer may not subordinate the client’s interest in a favorable settlement to the lawyer’s interest in the fee.”). Perhaps more than any other term, the Guidelines use the word “must” to impose both affirmative and negative duties upon the attorney.}
“shall,” and “may.”

In addition to the general language of the Guidelines themselves, the Committee Notes indicate that the Guidelines’ drafters intended the Guidelines to be, in at least some regards, an addendum to the Model Rules. This intent suggests that the Guidelines’ drafters believed that at least some of the guidelines would clarify the Model Rules in the context of settlement negotiations. Indeed, it would be naïve to expect that such a clarification would not carry with it the same normative influence as the Model Rule that the Committee Note

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166 See id. §§ 2.5 at 5, 3.5 at 25. “Shall” is the preferred term of the ABA’s Model Rules of Professional Conduct. The fact that only two sections of the Guidelines employ the term “shall” may indicate that the drafters attempted to keep the Guidelines normatively and pedagogically distinct from the Model Rules. Furthermore, these particular sections are so closely related to Model Rules 3.3 (requiring candor toward the tribunal) and 1.7 (regarding conflicts of interest) respectively, that they are almost redundant. See MODEL RULES OF PROF’L CONDUCT R. 3.3, 1.7. While this alone may suggest, at least in part, that the Guidelines drafters sought to prevent these sections from becoming the basis for disciplinary actions and other claims, the language chosen to replace “shall” connotes a rules-oriented approach similar to that of the Model Rules.

167 See, e.g., Guidelines, supra note 13, §§ 3.1.1 at 7, 3.2.2 at 14, 4.2.5 at 46 (providing examples of the usage of “should”). “Should” is a somewhat ambiguous term because it allows the reader to interpret it in one of two ways. The Preface suggests that the “should” provisions offer recommendations for a course of action. A more likely reading, given the context in which it is presented, is that “should” provisions strongly urge that course of action. See, e.g., id. § 3.6 (“An attorney should not represent class members whose interests have become adverse in connection with settlement of class actions.” (emphasis added)).

168 See, e.g., id. §§ 2.4 at 4, 3.3.3 at 21, and 4.3.2 at 49 (providing examples of usage of “may”). The word “may” has a similar effect as “must” or “should,” especially when used in conjunction with “not.” For example, Guidelines section 4.2.1 provides: “A lawyer may not propose, negotiate, or agree upon a provision of a settlement agreement that precludes one party’s lawyer from representing clients in future litigation against another party.” Guidelines, supra note 13, § 4.2.1, at 40. Certainly the term “may” has the same normative force in this context as “shall.” See supra note 166.

169 Compare Guidelines, supra note 13, § 4.2.1, at 40 (“A lawyer may not propose, negotiate or agree upon a provision of a settlement agreement that precludes one party’s lawyer from representing clients in future litigation against another party.”) with MODEL RULES OF PROF’L CONDUCT R. 5.6(b) (1983) (“A lawyer shall not participate in offering or making: . . . (b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.”). Section 4.2.1 of the Guidelines embodies a principle explicitly expressed in Model Rule 5.6(b). The main difference between the two provisions is that that the Committee Notes to section 4.2.1 are considerably longer and more detailed than those for Model Rule 5.6. See id.; Guidelines, supra note 13, § 4.2.1 advisory committee’s note, at 40–41.

170 The Model Rules are, however, different from the Guidelines in one respect: the ABA intended, and it has come to pass in many jurisdictions, that individual jurisdictions adopt the Model Rules as law. See Nathan M. Crystal, The Incompleteness of the Model Rules and the Development of Professional Standards, 52 MERCER L. REV. 839, 849 (2001) (“There is one striking contrast between the Model Rules and all of the other standards issued by professional organizations. The Model Rules are intended to be adopted as law by state supreme courts and to regulate the practice of law by providing a basis for professional discipline.”). In contrast, the Guidelines will become law only through judicial interpretation of their relationship to the Model Rules and other bodies of law concerning professional responsibility.
interprets. Thus, despite the disclaimer, it is unlikely that the drafters intended the Guidelines to have no normative effect. Even if the disclaimer is genuine, however, the Guidelines may still operate to effect an "interpretation . . . of the Model Rules" and may even "serve as the basis for civil liability, sanctions, or disciplinary action." The process of adopting the Model Rules by both the ABA itself and the individual states suggests that at least some jurisdictions will give the Guidelines normative effect in much the same manner as the Model Rules themselves. The Model Rules "improved upon its predecessor," the Model Code of Professional Responsibility ("Model Code"), and the ABA adopted them in part to respond to the confusion that the Model Code generated in its attempt to simultaneously regulate lawyer conduct and suggest possible courses of action. The source of the confusion lay in the Model Code's format, which "consisted of Canons, described as general maxims, Ethical Considerations, described as aspirations, and Disciplinary Rules, described as minimum standards." This format led some courts to misread the Canons and Ethical Considerations as imposing ethical duties when the Code's drafters intended them to be only aspirational guidelines. This inconsistent judicial treatment of the Model Code caused the ABA to adopt the Restatement approach, which incorporates instead a single rule and committee notes. Under this scheme, the Model Rules themselves impose duties, while the Comments to the Model Rules work to provide guidance to the practicing attorney. In practice, however, courts and practitioners frequently understand the Comments to interpret the rules, and thereby give

171 To do so would ignore the way in which American courts and disciplinary boards evaluate any statute or ethical rule. In interpreting statutes, courts generally look to the intent of the legislative body that enacted the statute. Such intent is frequently found in committee notes or floor debates concerning the adoption of the statute. See, e.g., Antonin Scalia, Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 34 (Amy Gutmann ed., 1997) ("Nowadays . . . it is universally known and expected that judges will resort to floor debates and (especially) committee reports as authoritative expressions of 'legislative intent,' . . . "). Thus, there is no reason to believe that the judiciary and disciplinary boards will not receive the Guidelines in similar fashion.

172 The cited language comes directly from the Guidelines' disclaimer. Guidelines, supra note 13, § 1, at 2.


175 See LEGISLATIVE HISTORY OF THE MODEL RULES, supra note 122, at 3.

176 Id.

177 See id.

178 See id. at 3–4. The committee notes in the Model Rules are labeled "Comments," but their design is the same as the committee notes found in various Restatements.

179 Id.
them the same normative status as the rules themselves.\textsuperscript{180} Indeed, a number of courts have already interpreted the Committee Notes to the Guidelines in just this manner.\textsuperscript{181}

Moreover, the non-uniform manner in which the states adopted the Model Rules further suggests that the Guidelines will have a normative effect in at least some jurisdictions.\textsuperscript{182} Consider the various approaches states take with regard to exceptions to client confidentiality,\textsuperscript{183} a subject that heavily influenced the Guidelines.\textsuperscript{184} For example, approaches to the crime-fraud exception to client confidentiality vary, with bar officials prohibiting disclosure under the Model Rules in Alabama and Vermont, permitting disclosure at the discretion of the attorney in South Carolina and Nevada, and requiring disclosure in New Jersey and Wisconsin.\textsuperscript{185} If diverse jurisdictions have accepted the Model Rules in such a wide variety of forms, there is no reason to expect that the states will either universally accept or reject the Guidelines. There is, however, reason to expect that the Guidelines will have some effect on the law of some jurisdictions.\textsuperscript{186}

This normative effect is largely undesirable for two reasons. First, the Guidelines' replication of the Model Rules undermines its com-


\textsuperscript{181} See Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435, 446 n.12 (D. Md. 2002) ("The committee notes to the proposed guideline restate many of the same principles that are contained in the commentary to Model Rule 4.1 and offer further evidence of the near universal acceptance that lying about a material fact in the course of settlement negotiations is unethical." (citing \textit{Ethical Guidelines for Settlement Negotiations}, 2002 A.B.A. SEC. LITIG. § 4.1.1 (draft)). The court expressly noted that the ABA had not yet approved the Guidelines at the time of the decision, but nevertheless chose to utilize the proposed Guidelines to supplement an affirmative duty found in Model Rule 4.1. \textit{See id.; see also In re Hager, 812 A.2d 904, 919 n.19 (D.C. Cr. 2002) (finding it "noteworthy that respondent's conduct touched upon several of the [Guidelines]" and suggesting that, had they been published earlier, they may have controlled the court's decision).}

\textsuperscript{182} See RONALD D. ROTUNDA, \textit{LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY} § 1-1.5.4 (2002) (finding that in 1999, "over 80% of the states (and also the District of Columbia) had adopted the Model Rules, subject to various non-uniform amendments"); see also HAZARD, supra note 6, at 15 (reporting that while as of 1999, forty-one states had adopted the Model Rules in some form, states such as California had decided to include elements of both the Model Rules and the Model Code in their state's code).


\textsuperscript{184} The Guidelines discuss Model Rule 1.6 in various sections including §§ 2.4, 2.5, 3.3.1, 4.1.2, 4.1.3, and 4.2.6. \textit{See Guidelines, supra note 13, tbl. A, at 58.}

\textsuperscript{185} \textit{See supra note 183.}

\textsuperscript{186} This Note intends this expectation to be a minimum threshold only, as its author fully expects that the Guidelines' normative impact will be substantial.
mitment—stated explicitly in the disclaimer—to guide attorneys' conduct in settlement negotiations without imposing affirmative ethical or legal duties. Second, to the extent that the Guidelines do impose affirmative duties, those duties are often misplaced, because the Guidelines fail to deviate in any significant way from the adversarial ethic.

The Guidelines' adoption of the Model Rules' format will also lead courts and disciplinary committees to view the Guidelines as an interpretation of the Model Rules despite its disclaimer. This tendency will work to extinguish any substantive changes that the Guidelines sought to introduce into the realm of settlement negotiations. Consider, for example, section 2.3 of the Guidelines (''Duty of Fair-Dealing''), discussed above. Even if the Guidelines' drafters sought to give the duty of fair-dealing in settlement negotiations a meaning not expressed in the Comments and Preamble to the Model Rules, their choice of format prohibits them from doing so, both because of the likely effect of the Guidelines' disclaimer on a court's or disciplinary committee's interpretations of the Guidelines, and because the Guidelines' format places the core of the duty of fair-dealing—to the extent that such a duty exists—in the Committee Notes. If courts and disciplinary committees are to interpret the Model Rules in accordance with the wishes of the Restatement drafters, they will place greatest emphasis on the Rules themselves and use the Comments only when necessary to interpret those Rules. Further, if courts and disciplinary committees interpret the Guidelines as their drafters supposedly intended, they will either ignore the Guidelines altogether or take the "rules" portion of the Guidelines to be interpretations of the Model Rules, and will consider the Committee Notes only as a last resort. Regardless, the court or disciplinary committee is likely to produce an interpretation entirely consistent with its own understanding of the Model Rules, which, if one believes the disclaimer discussed above, is entirely improper.

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187 See, e.g., Guidelines, supra note 13, § 2.3, at 5-4 (enumerating affirmative duties).
188 See supra Part II.
189 See supra notes 169-71 and accompanying text.
190 See supra Part II.B.
191 Since not all jurisdictions have fully adopted the Model Rules, see supra note 182 and accompanying text, this may not be true in individual jurisdictions.
192 This Note argues that the duty of fair-dealing, as expressed in the Guidelines, is a toothless duty, no more compelling than the "duty" expressed in the preamble to the Model Rules to "seek a result [in negotiations] consistent with requirements of honest dealing with others." Model Rules of Prof'L Conduct pmbl. (1983); see supra Part II.B.
193 This would be in accord with the disclaimer, which admonishes courts and disciplinary committees not to use the Guidelines as a "basis for civil liability, sanctions, or disciplinary action." Guidelines, supra note 13, § 1 at 2.
194 Of course, this does not guarantee their correctness. That is to say, courts and disciplinary committees could substantially alter the meaning of the Model Rules by using
Unfortunately, this structure allows the courts and disciplinary committees to single out those portions of the Guidelines that they deem consistent with their own interpretation of the Model Rules, and to appeal to the disclaimer to avoid discussing those parts of the Guidelines they find to be inconsistent with that interpretation. As such, while the Guidelines are likely to have substantial normative effect in some jurisdictions in the sense that they will be used to interpret the Model Rules, most jurisdictions are unlikely to derive the normative meaning from the Guidelines themselves, but rather from particular tribunals' own interpretations of the Model Rules. Thus, courts or disciplinary committees will neither adopt nor enforce any affirmative duties that the Guidelines appear to impose upon the attorney, such as section 2.3's duty of fair-dealing.\(^{195}\)

The Guidelines' failure to impose legal or sanctionable ethical duties on the attorney does not by itself, however, render the Guidelines useless as a tool for the practicing attorney. Indeed, the notion of ethical guidance expressed in the preface to the Guidelines is important\(^ {196}\) because it communicates to the legal profession that the most important decisions regarding attorney ethics are made by attorneys.\(^ {197}\) The mere existence of a set of ethical guidelines that are separate from formal enforcement mechanisms shifts an attorney's focus from the rules-based ethical imperatives enforced by his colleagues through state bar associations to the everyday decisions made by

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\(^{195}\) *Guidelines*, supra note 13, § 2.3, at 3-4.

\(^{196}\) *See id.* § 1, at 2 (“These Guidelines are designed to assist counsel in ensuring that conduct in the settlement context is ethical.”).

\(^{197}\) This notion is important in a number of ways. Pedagogically, the Guidelines could be an important tool because they signal to the law student or attorney that they are responsible not only to their State Bar Association, but also to themselves, for ethical conduct. *See Paul R. Tremblay, Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. Rev. 659, 708-09 (2002) [hereinafter Tremblay, Shared Norms] (differentiating between teaching students "to add to the students' repertoire as moral deliberators" and "to persuade or encourage them not to act badly in practice"). In addition, because the Model Rules do not answer all of the practitioner's questions, the Guidelines are useful "at the margins" of the Model Rules. *See, e.g., Paul R. Tremblay, The Role of Casuistry in Legal Ethics: A Tentative Inquiry*, 1 CLINICAL L. REV. 493, 493 (1994) [hereinafter Tremblay, Role of Casuistry]. Professor Tremblay calls for ethical guidance similar to the Guidelines:

> While lawyering is unique among professions in its elaborate designation of particular rules and mandates to be applied to questions normally considered "ethical," it at the same time leaves a substantial chunk of ethical decisionmaking up to the discretion of individual practitioners. The language, the methods, and the guidance to lawyers about how to make such calls, however, are impoverished and relatively unexplored.

*Id.*
him. The positive result is that the attorney is forced to look outside the formal body of law governing lawyers and reach her own decision. This is important not only as a means of escaping disciplinary action imposed by state bar associations, or of solving problems unresolved by formal ethics codes, but also because individual attorneys should play a part both in making ethical decisions and in determining to a certain extent the framework from which those decisions will be made. Thus, the Guidelines' promise of ethical guidance and its disclaimer in the preface assure a valuable return on the drafters' time and effort: they promise that the ABA will recognize not only the adversarial ethic's failure in the context of most settlement negotiations, but also that the Model Rules and Guidelines do not resolve all ethical dilemmas.

Unfortunately, the reluctance of the Guidelines' drafters to abandon the structure of the Model Rules overshadows their promise to create a body of guidelines independent of those rules. Because courts and disciplinary committees will likely interpret the Guidelines as an extension of the Model Rules, their function is limited almost exclusively to interpreting that particular body of law.

The Guidelines' structure renders them useless to the ethically concerned attorney in two different ways. First, the Guidelines are useless to the attorney as a tool for interpreting the Model Rules because the Guidelines disclaim any legal or disciplinary significance to the Rules. While this may not be the reality, the attorney will not be interpreting the Guidelines, and so a lawyer who attempts to use them in this manner will be operating blindly until courts and disciplinary committees in her jurisdiction begin to utilize the Guidelines and give the lawyer guidance. More importantly, however, the Guidelines' structure once again removes the lawyer from the decisionmaking process even though the very word "guidelines" suggests that the ultimate decision will be the lawyer's. Because of the Guidelines' structural conformity to the Model Rules, the courts and disciplinary

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198 See Daniel S. Kleinberger, Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers, 21 Conn. L. Rev. 365, 370–73 (1989) (arguing that the notion of non-accountability inherent in the adversarial ethic and embodied in the legal profession's codes of ethics too often shields lawyers from personal accountability, and that as a result lawyers do not consider ethical problems in reference to their own feelings or personal morality, but rather they refer only to a formal body of rules); Christine Mary Venter, Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics, Law & Contemp. Probs., Summer/Autumn 1995, at 287, 287-88 (distinguishing between "legal ethics" and the "law of lawyering" and criticizing legal ethics professors and courses for focusing on the latter to the exclusion of the former, thereby teaching law students that legal ethics is only about rules and leaving them with the notion that there is no place for personal moral and ethical evaluation of professional problems).

199 See supra Part I.B.

200 See supra notes 169–74 and accompanying text.

201 See supra notes 160–61 and accompanying text.
committees will likely determine what constitutes ethical conduct. Removing the lawyer from the decisionmaking process creates a body of lawyers concerned not with their own moral scruples, but rather with mere compliance with the ethics of the Rules—or Guidelines—drafters.

This section has argued that the Guidelines in their current form will likely have a substantial effect on the laws and ethical rules governing lawyer conduct in some jurisdictions, but that this effect will likely be limited to interpretation of the Model Rules. In addition, this section has argued that duplicating the Model Rules' structure undermines any changes the Guidelines might have made to our contemporary understanding of a lawyer's ethical duties in the context of settlement negotiations. Finally, this section has noted that the Guidelines' structure works to exclude the lawyer from taking part in defining ethical conduct in settlement negotiations. This last part necessitates a brief examination of the process of reasoning by which the Guidelines' drafters intended its readers to reach solutions to ethical dilemmas in the context of settlement negotiations. The following Part takes up this examination and attempts to provide a partial solution to the problem of lawyer exclusion, as well as to the problem of the Guidelines' substantive identification with the Model Rules and the adversarial ethic.

IV
A CASUIST'S SOLUTION: REWRITING THE GUIDELINES AS GUIDELINES

This Part not only explores the mental process by which the Guidelines' drafters likely intended its readers to determine the morality or immorality of a given situation in the context of a settlement negotiation, but also further argues that the Guidelines exhibit a principlist, as opposed to a casuistic, view of ethical decision making that is inappropriate for a set of ethical guidelines. This Part offers a limited solution designed to sever the Guidelines' reliance on the adversarial ethic and principlist reasoning. The last section of this Part argues that if the drafters had employed casuist methodology in drafting the Guidelines, they would have communicated that the adversarial ethic does not apply generally in all situations, and that it fails particularly with regard to many settlement negotiations.
A. The Guidelines Drafter: Principlist or Casuist?

For Aristotle, the difference between principlism and casuistry was the difference between *episteme* (general theory) and *phronesis* (practical wisdom). Having borrowed certain notions of ethical relativity from the Sophists, including the notion that ethical decisions derive meaning from their time and place, Aristotle advanced a concept of morality that was diametrically opposed to that of his former master, Plato. Whereas Plato put stock in absolute and universal principles such as justice, Aristotle recognized the difficulty in applying such universal principles to factually diverse ethical situations. This recognition ultimately led to the development of casuistry.

Casuistry is perhaps best defined in contrast to principlism. Principlist reasoning is, historically, a direct result of Plato's and others' argument that there exist in our world absolute principles such as "the good." Casuistry, on the other hand, is a process that seeks to realize the potential of our intuitions about everyday ethical dilemmas. This realization is accomplished by reversing the process of deduction characteristic of principlist ethical systems. Whereas the principlist deduces his notion of ethical behavior in a given circumstance from some overarching principle, the casuist finds ethical meaning in particular, fact-specific ethical dilemmas. Only after exhaustive factual description of various ethical dilemmas does the casuist purport to generalize. That is, after having investigated the factual circumstances of many cases, the casuist is able to develop a taxonomy of cases, and from these develop a set of "paradigm cases." Paradigm cases are ethical problems about which everyone can agree that a given action is or is not ethical. For example, most would agree

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202 This Note uses the term "principlism" to denote a simple adherence to universal principles in decision making. See JONSEN & TOULMIN, supra note 20, at 5-11.
203 See id. at 59.
204 The Sophists took this view too far, however, arguing ultimately that no parallels or similarities could be drawn from factually and chronologically varied ethical dilemmas. See id. at 61 ("Rightly or wrongly, the Sophists' teaching—like cultural relativism and the extreme forms of 'situation ethics' today—suggested that moral issues must be judged afresh on every occasion, from scratch . . . .").
205 See id. at 58-74.
206 See id.
207 The term "casuistry" has historically fallen into some disrepute, especially during periods in which the majority of philosophers adhered to the often popular notion that moral judgments can only be secured by reference to universal principles. See id. at 11-16. As Jonsen and Toulmin point out, however, this criticism does not detract from the usefulness of this method of ethical reasoning, and, ultimately, is unwarranted. See id.
208 See id. at 62-63.
209 See id. at 66 ("In ethics as in mathematics we have an 'eye' for paradigmatic or type cases.").
210 See id. at 251-52.
211 See id. at 252.
that killing is morally wrong if by "killing" one means a "direct unprovoked attack resulting in the death of another." The casuist then reasons by analogy from the paradigm case(s) to the particular case at hand, and makes her ultimate determination on the basis of the particular facts of that case.

This notion of reasoning by analogy from cases is certainly not foreign to the legal profession. In fact, the differences between casuistry and principlism can be captured in some respects by the differences between the case-by-case analysis performed by our judiciary and the sweeping rule-making authority exercised by the legislature. Of course, this is an overly simplistic generalization. This Note draws this analogy here, however, merely to point out another advantage to a casuist's approach to legal ethics: its intended practitioners are already familiar with the method.

The question then remains whether the Guidelines themselves endorse a principlist or casuistic approach to ethical decision making. In answering this question, one must be concerned to some degree with the method by which the drafters themselves gave content to individual guidelines. More important, however, is the method of reasoning by which the Guidelines' users will have to make ethical decisions. In order to determine this, it is necessary to briefly recall the Guidelines' structure.

There are three structural features of the Guidelines that deserve consideration when determining which approach the drafters intended the "guided" attorney to use in reaching a decision about an ethical dilemma. These features are the disclaimer, the use of the Model Rules' format, and the consistent internal references to the Model Rules themselves. All three features ultimately suggest that

212 Id.
213 The casuist reasons by analogy by searching for both similarities and differences between a paradigm case and the fact pattern at hand. See id. at 14 ("[A]nyone who has occasion to consider moral issues in actual detail knows that morally significant differences between cases can be as vital as their likenesses.").
214 See Paul R. Tremblay, The New Casuistry, 12 Geo. J. Legal Ethics 489, 492 (1999) ("Casuistry starts with paradigm cases, examples upon which most observers will readily agree, and reasons [analogically] from those agreed-upon cases to more complex cases representing ethical conflict.").
215 See Jonsen & Toulmin, supra note 20, at 101 (suggesting that the process of casuistry actually developed out of the need for its use by legal professionals).
216 See id. at 330 ("[T]he locus of judgment [is in] the specific case, the concrete problem, the particular set of circumstances. These are the elements that constitute a given 'moral' issue, just as, within the traditions of the common law, the corresponding elements constitute a 'legal' issue.").
217 See supra notes 160–62 and accompanying text.
218 See supra Part III.B.
219 See, e.g., Guidelines, supra note 13, §§ 3.3.2, at 20; 3.4, at 22 (referring to the Model Rules in the committee notes).
the Guidelines are, structurally as well as substantively, little more than an addendum to the Model Rules.\textsuperscript{220} This, in turn, suggests that the Guidelines support a principlist approach to ethical reasoning because rules are generally the product of principlism.\textsuperscript{221}

Furthermore, it is this rules-based approach\textsuperscript{222} that suggests that the Guidelines are both the product and the tool of the principlist.\textsuperscript{223} Codes of law and professional ethics typically contain, inherent in their legislative or other mandate, implicit instructions to the effect that the user deduce the proper—meaning the legal or ethical—action from the rule or law itself.\textsuperscript{224} The Guidelines are no different from any statute in this respect. Indeed, the Guidelines can best be understood as a set of rules derived from a broader set of rules, namely the Model Rules, which themselves are derivative of a set of overarching principles that the ABA considers to be paramount to the legal profession.

The Guidelines themselves also demand from the reader principlist reasoning about specific ethical dilemmas. This is apparent in the Guidelines’ normative language,\textsuperscript{225} rules-based format,\textsuperscript{226} and lack of fact-specific examples that could serve as paradigm cases for a casuist analysis.\textsuperscript{227} On this last point, the Guidelines are particularly lean. The examples that are given are ones that have little content and fail to get to the heart of the issue at hand. For example, while the Committee Notes to Guidelines’ section 4.1.2\textsuperscript{228} provide a number of examples, they fail to address the section’s core issue. The Committee Notes to this section point out that some jurisdictions require an attorney to reveal the death of his client during settlement negotiations.\textsuperscript{229} While this could, indeed, be a paradigm case in the sense that most attorneys would agree that revelation of this particular client confidentiality is justifiable, this particular case is of little use

\textsuperscript{220} See supra notes 169–81 and accompanying text.
\textsuperscript{221} See JONSEN & TOULMIN, supra note 20, at 5–11.
\textsuperscript{222} See Carlile, supra note 15, at 346 (“Guidance comes in the form of black-letter rules and accompanying notes drafted by a committee as a ‘Special Project’ within the Litigation Section.”).
\textsuperscript{223} In addition, most attorneys and attorney organizations have traditionally adhered to a principlist approach in the realm of legal ethics. See Susan G. Kupfer, Authentic Legal Practices, 10 GEO. J. LEGAL ETHICS 33, 36 (1996) (“The traditional approach to professional ethics mandated a search for norms of professional behavior, which were reduced to general principles and applied to solve ethical problems.” (footnote omitted)).
\textsuperscript{224} See JONSEN & TOULMIN, supra note 20, at 6.
\textsuperscript{225} See supra notes 163–70 and accompanying text.
\textsuperscript{226} See supra notes 169–83 and accompanying text.
\textsuperscript{227} See generally JONSEN & TOULMIN, supra note 20, at 75 (discussing the role of examples in a casuistic analysis).
\textsuperscript{228} Guidelines, supra note 13, § 4.1.2 advisory committee’s note, at 37–38.
\textsuperscript{229} Guidelines, supra note 13, § 4.1.2 advisory committee’s note, at 38 (citing Kentucky Bar Ass’n v. Geister, 958 S.W.2d 578 (Ky. 1997)).
because it is so extraordinary. In addition, the examples that the Guidelines’ drafters provide are typically tethered to one jurisdiction or another,\textsuperscript{230} which has the effect of forcing the attorney to focus not on the value of considering paradigm cases, but rather on the value of running a Lexis search in his jurisdiction. In the end, this lack of examples or paradigm cases points to a method of reasoning from principles, such as the principle that a lawyer should keep confidential client information learned during the course of representation.\textsuperscript{231}

B. From Rules to Guidelines

In the prologue to their foundational work, Albert R. Jonsen and Stephen Toulmin pose two particularly important questions: “Why is the zealot’s\textsuperscript{232} concentration on universal and invariable principles so damaging?” and “[H]ow can we escape from the practical deadlock to which that emphasis condemns us?”\textsuperscript{233} Jonsen and Toulmin suggest that they pose these questions in large part because of contemporary moral thinkers’ invariable reliance on rules.\textsuperscript{234} The legal profession places great emphasis on rules, both within and outside of the realm of legal ethics.\textsuperscript{235} The Guidelines are undoubtedly guilty of furthering the mistaken notion that “[j]ustice . . . is ensured only by establishing an adequate system of rules; and injustice in the administration of those rules can be prevented only by adding more rules.”\textsuperscript{236}

The main problem with relying upon such moral principles is that those principles and rules are not self-interpreting.\textsuperscript{237} This requires that the ethical decisionmaker reach a decision regarding a very fact-specific moral dilemma with very little guidance.\textsuperscript{238} It is impossible to understand principles and rules in a vacuum; understand-

\textsuperscript{230} See, e.g., id (citing a violation of Kentucky’s Model Rules).
\textsuperscript{231} See MODEL RULES OF PROF’L CONDUCT R. 1.6 (1983).
\textsuperscript{232} The word “zealot” may strike some as a reference to religious zealots, which is not without its support in this particular work. See JONSEN & TOULMIN, supra note 20, at 111–12. However, the term is used here because it raises an interesting parallel to the legal notion of “zealousness” embodied in legal ethics. In many respects, the lawyer is very much a zealot. See MODEL CODE OF PROF’L CONDUCT R. 1.3 cmt. 1 (1981) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).
\textsuperscript{233} JONSEN & TOULMIN, supra note 20, at 5.\textsuperscript{234} Id. at 6 (“These questions are particularly worth posing because of the underlying assumption that an ethical position always consists in a code of general rules and principles.”).
\textsuperscript{236} JONSEN & TOULMIN, supra note 20, at 9.
\textsuperscript{237} See id. at 8.
\textsuperscript{238} See id. at 9–11.
ing requires the context of particular cases. But this, in turn, raises the question of why we started with principles in the first place. The essence of casuistry provides the following answer—in addressing ethical dilemmas, we should not start with principles. This recognition suggests a further question: if principles or rules can only derive meaning from fact-specific cases, then what would a set of casuistic “guidelines” look like?

If the Guidelines’ drafters had employed casuist methodology in creating that body of “rules,” their format and substance would be considerably different. As for the format, there would be no rules. At best, the Guidelines would hope to convey a set of paradigm cases that, together with a host of more factually rich cases, would suggest common themes in the ethics of settlement negotiations. These paradigm cases would ideally be the result of an open discussion amongst the drafters about the nature and import of various types of settlement negotiations. Structurally, the drafters would have to abandon the Model Rules format for a number of reasons. First, the black-letter rules embody a principlist approach to moral reasoning that detracts from the cases. Second, the Model Rules themselves embody a principlist approach, and any structural similarity between the Guidelines and Model Rules would convey the message that this casuistic set of guidelines derives meaning only in conjunction with the Model Rules. This would bring the reader full circle from reliance on her intuitions about fact-specific ethical dilemmas to reliance on the principles contained in the Model Rules.

Structurally, this Note suggests that the best approach for a set of guidelines would be a set of paradigm cases, together with corresponding cases that are factually more difficult. The cases should be grouped according to a categorical taxonomy and the proposed guidelines should note that any single ethical dilemma might span numerous categories of cases. In the end, the proposed guidelines would note themes that recur in many of the paradigm and other cases. Such themes would likely address issues such as concerns for confidentiality, procedural and substantive fairness, duties to the client, duties to opposing counsel, duties to the court, and the like. The important lesson is not that the Guidelines differ considerably from our current understanding of professional ethics as embodied in the Model Rules and other ethical codes, but that our understanding is derived from the cases that make up the legal practice, such as from

239 See id.

240 The important part of the casuistic approach is that its moral reasoning must work from the ground up. See Tremblay, Role of Casuistry, supra note 197, at 692 (“[Casuistry] works from the ground up, and in that way is anti-theoretical.”).

241 See supra notes 217–26 and accompanying text.

242 See Jonson & Toulmin, supra note 20, at 251–52.
the settlement negotiations in which attorneys actually find themselves. When this is established, the shift to a casuist system of moral reasoning would necessarily effectuate certain changes in the substance of the Guidelines. The most important change, communicating the conditionality of the adversarial ethic, is discussed in the following section of this Note.

C. Communicating the Conditionality of the Adversarial Ethic

This Note has argued that the adversarial ethic is not justified in settlement negotiations where the truth function of the adversary system is altered or the justification for an attorney's partisan conduct is otherwise removed. The Guidelines fail to articulate this fundamental disjunction between the ethical realm of the courtroom and the realm of settlement negotiations due in part to the Guidelines' principlist approach to moral reasoning.

If the Guidelines took a casuistic approach to ethics, they would have to communicate to its users that the adversarial ethic does not apply in all situations. The drafters would be forced to break down the factual circumstances of individual cases, identify their collective intuitions about those cases, and formulate a set of general concerns based on those cases. Those general concerns will, however, have no independent meaning. As such, when the concern for courtroom partisanship or zealous advocacy is removed from a particular case, either because the drafters sense that it is not proper in that situation or because there is some overriding concern, the attorney will be forced to abandon that conduct in that particular setting. Moreover, even if the adversarial ethic is taken as a given, the legal profession's collective intuitions about the applicability of adversarial tactics in certain settlement negotiations may reveal a lack of one or more of the adversary system's structural elements that ultimately justify such conduct.

243 See supra Part I.B.  
244 See supra Part IV.A.  
245 See JONSON & TOLMIN, supra note 20, at 251-52.  
246 Jonsen and Toulmin make this distinction as well, albeit under different circumstances. Their examples illustrate the ineffectiveness of reasoning from general principles. They examine the principle that "borrowed objects should be returned after use." Id. at 324. The authors note, however, that if you were to borrow a match, it would be useless to return it, because no one would likely want a used match back. Id. This demonstrates the first scenario: the moral decision maker senses that applicability of the principle is not proper in that situation. The second scenario involves the same principle, except that the individual borrows a gun, knowing that if he returns it, the owner will likely shoot his neighbor with it. Id. This demonstrates the second point: that our rules or principles will sometimes be overridden by competing moral concerns.  
247 See supra Part I.A.
Recall, for example, the situation described earlier in which the attorney cross-examines a witness during a settlement conference.\textsuperscript{248} Intuition tells us that this behavior is improper. Further investigation reveals the reason: we are uncomfortable with cross-examination occurring outside the courtroom. The in-your-face zealousness of cross-examination is only appropriate where a judge and jury can temper that partisan conduct by evaluating the conduct and information it elicits. This demonstrates the impropriety of applying the adversarial ethic in this circumstance.

There will also be situations where the ethic is arguably structurally applicable, but is overridden by competing moral concerns. Returning to \textit{Spaulding} should illustrate this point.\textsuperscript{249} Most lay people are appalled by the decision in \textit{Spaulding}, because intuition tells them that the concern for a human life outweighs the concern that the insurance company pay out less money, that premiums go up, and so on. Even if adversarial tactics were appropriate under the circumstances, the casuist would likely be forced to abandon strict adherence to that ethic in the face of the imminent death of a party.\textsuperscript{250}

\textit{Spaulding} itself, or a derivation thereof, may have become a paradigm case had the drafters written the Guidelines from a casuistic perspective. If the drafters had asked themselves, for example, whether it would be appropriate for an attorney to reveal a secret if it were certain that withholding the information would result in the death of another litigant, then, if they answered affirmatively, the drafters would have revealed a paradigm case. The drafters would then ask themselves a series of related questions. For example, they would ask whether it would be appropriate for an attorney to reveal a client’s secret if it were certain that not revealing the secret would cause another litigant considerable financial loss. If the answer were no, which it is likely to be,\textsuperscript{251} then the drafters have revealed another paradigm case. Through a series of such questions and answers, a group of casuist drafters could begin to reveal the interests that these paradigm cases expressed, such as the supremacy of human life over monetary gain.

The effect of the casuist’s dissecting the relevant moral and ethical dilemmas in the context of settlement negotiations with regard to both internal consistency and competing moral concerns would be a positive one. It would create a more morally aware bar by involving

\textsuperscript{248} \textit{See supra} Part I.B.
\textsuperscript{249} \textit{See} \textit{Spaulding v. Zimmerman}, 116 N.W.2d 704 (Minn. 1962).
\textsuperscript{250} \textit{See id.} at 710–11.
\textsuperscript{251} \textit{Cf. Model Rules of Prof’l Conduct} R 1.6 (1983) (not providing a disclosure exception for financial losses).
attorneys in the decisionmaking process, it would allow ethical distinction between the courtroom and settlement contexts, and would guide the practicing settlement negotiator by supplying her with a set of themes and concerns derived from factually diverse settlement negotiations.

**CONCLUSION**

It has been roughly twenty-five years since Professor Schwartz cautioned against the overly broad application of the adversarial ethic in the context of settlement negotiations. At that time, no body of lawyers had come together to address that problem. And now, even after the ABA has promulgated the Guidelines, that problem remains unaddressed. This unspoken dilemma in the adversarial ethic overshadows the Guidelines, and their failure to address the inconsistency threatens to create an ethical system in which the ethical value of any act or omission is measured in direct proportion to its adversarial nature.

Moreover, the Guidelines entrench an ethical system of reasoning that is wholly inappropriate for a set of guidelines designed to assist an attorney in making his own ethical decision, and ignore the benefits of a case-specific casuistic analysis. In the end, this Note calls for just that: it pleads for a meaningful discussion of the limits of the adversarial ethic among those who act under its mandate, and for a set of guidelines that will, in taking ethical meaning from our intuitions about factually specific cases, provide that very discussion.

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