

THE TRUTH ABOUT HONESTY AND CANDOUR IN MEDIATION: WHAT THE TRIBUNAL LEFT UNSAID IN *MULLINS*' CASE

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[Some commentators have suggested that, as a result of the decision in Legal Services Commissioner v Mullins, legal representatives owe different standards of honesty and candour in mediation from that which they owe in litigation. This article challenges that proposition. The author argues that legal representatives owe exactly the same standards irrespective of whether they are acting in mediation or in litigation. The decision in Mullins did not change the law in this respect. In fact, the Tribunal did no more than iterate the existing law governing relations between legal representatives and their opponents. As to the duties owed by legal representatives to mediators, the case provides no insight at all. There is also a dearth of literature on the topic. The purpose of this article is to provide some insights on the duties of honesty and candour owed by legal representatives for parties in mediation.]

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I INTRODUCTION

The case of *Legal Services Commissioner v Mullins* ('*Mullins*')¹ has been discussed in numerous articles, commentaries, case notes and texts.² The facts of the case are reasonably well-known, at least in mediation circles: in the mediation of a claim for damages for personal injuries, the plaintiff's barrister (*Mullins*) failed to disclose to the defendant and its insurer that the plaintiff had been diagnosed with terminal cancer subsequent to the preparation and exchange of expert reports detailing the plaintiff's assumed life expectancy. Estimates of losses and future care needs were based on that assumption. The defendant settled in ignorance of the plaintiff's cancer diagnosis and on the basis of the inaccurate reports. *Mullins* was found to have intentionally and

¹ [2006] LPT 012 (23 November 2006).

² See, eg, R J Douglas and K McMillan, 'Ethical Issues for Counsel Appearing in Mediations' (2012) 54 *Hearsay: Journal of the Bar Association of Queensland* <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1313&Itemid=48>; Peter Heerey, 'An Innocent Abroad in Mediationland' (Paper presented at the Australian Bar Association Conference, Dresden, 28 June 2011) 15; Campbell Bridge, 'Effective and Ethical Negotiations' (Paper for the New South Wales Bar Association, 12 February 2011) 6–7 [18]–[22]; Laurence Boule, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 308 [8.58]; Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (CCH Australia, 2010) 223 [7.4.3]; Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis Butterworths, 5th ed, 2010) 511 [13.23]; Steve Mark, 'Ethics in Litigation and Court Proceedings' (Paper presented at the 36th Australian Legal Convention, Perth, 18 September 2009) 10; David Higgs, 'Ethical Settlement Negotiation' [2009] (Winter) *Bar News* 60–1; Albert Monichino, 'Mediation: An Honesty Free Zone?' (2007) 5 *Australian ADR Reporter* 13; Kay Lauchland, 'Secrets, Half-Truths and Deceit in Mediation and Negotiation — Lawyers Beware!' (2007) 9 *ADR Bulletin* 97; Reid Mortensen, 'Ethics in Negotiations and ADR: *Legal Services Commissioner v Mullins*' (2007) 27(1) *Proctor* 10; Gino Dal Pont, 'To Disclose or Not to Disclose: Do the Same Ethical Standards Apply to Lawyers as Negotiators as to Lawyers in Court?' (2007) 45(3) *Law Society Journal* 28; David Spencer, 'Misconduct by a Barrister at Mediation and whether Evidence of an Offer Made at Mediation is Admissible' (2007) 18 *Australasian Dispute Resolution Journal* 135, 135–7; Andrew Stewart and Leanne McClurg, 'Playing Your Cards Right: Obligations of Disclosure in Commercial Negotiations' [2007] *AMPLA Yearbook* 36, 41–3.

fraudulently deceived his opponent and was fined for professional misconduct. It is less well-known that the instructing solicitor in the matter, Mr Garrett, was similarly dealt with by the Legal Practice Tribunal several years later.³ Following from the decision in *Mullins*, it has been suggested that '[t]he obligation of truthfulness in a mediation context is different from that required in litigation and negotiation';⁴ that legal representatives have a positive obligation to disclose the relevant facts during a mediation;⁵ and that they have a duty 'to be *forthright* and honest'⁶ when mediating. In the author's opinion, *Mullins* is not authority for these propositions. Currently, legal representatives in Australia owe exactly the same obligations of honesty and candour in mediation⁷ as they owe in litigation; in neither context do they owe a general duty to be candid, open or forthright.

This article seeks to answer the following related questions:

- 1 Are legal representatives in Australia required to be honest and candid in mediation and, if so, what are the appropriate standards of honesty and candour required of them?
- 2 If these duties exist, to whom are they owed?
- 3 When should these duties, if they exist, supersede or conversely give way to the duties owed to a client?

These questions highlight three preliminary points that are central to an understanding of the disclosure obligations of legal representatives in mediation (and in any other context). First, the issue of disclosure of information itself raises two issues: those of honesty as against misrepresentation (an issue that concerns the accuracy of information conveyed), and openness or

³ See *Legal Services Commissioner v Garrett* [2009] LPT 12 (1 May 2009).

⁴ Hardy and Rundle, above n 2, 222 [7.4.3].

⁵ Monichino, above n 2, 14, who contends that this is one view of the Tribunal's decision in *Mullins*.

⁶ Spencer, 'Misconduct by a Barrister', above n 2, 137 (emphasis added).

⁷ There is no single definition of 'mediation' that would be met with universal acceptance. For the purpose of the article, mediation is defined in broad terms as a process in which an acceptable third party, the mediator, undertakes a range of activities to assist the parties involved in a dispute to negotiate an agreement. For a range of definitions, see National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (September 2003) 9 <<http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/Dispute%20Resolution%20Terms.pdf>>; Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 3rd rev ed, 2003) 15; Boule, above n 2, 13 [2.2].

candour as against non-disclosure (an issue that concerns the sharing of information or, conversely, the withholding of it).⁸ While these issues may intersect (as misrepresentation can occur because of non-disclosure of information), they involve separate obligations on the part of lawyers. Second, legal representatives may owe different standards of honesty and candour to the different entities involved in mediation. Third, legal representatives are subject to a range of duties that can, at times, come into conflict.

The article is divided into seven parts. In Part II, the general duties owed by legal representatives in mediation in Australia and the sources of those duties are examined. Part III focuses on a lawyer's obligations to be honest and candid in his or her dealings with the court, mediators and other parties. Part IV examines the impact of other duties owed by lawyers, such as the duty to act in good faith and the duty to act 'fairly' to an opponent, on the issue of disclosure. Part V addresses the question of lawyer independence as against client authority when lawyers are faced with conflicting duties. In each part, the analysis proceeds by examining the rules of professional conduct, followed by other components of the law of lawyering. The focus of the discussion is on the professional conduct rules. The article does not examine additional obligations that may be agreed to by the parties and their lawyers by virtue of an agreement to mediate or some other dispute resolution clause.

The cases of *Mullins* and *Legal Services Commissioner v Garrett* ('Garrett')⁹ are revisited in Part VI. On the topic of the disclosure obligations owed by lawyers, the Tribunal left much unsaid — it relied on the existing law governing relations between legal representatives and their opponents and provided no insight into the duties owed by legal representatives to mediators. Aside from the publications generated in the wake of *Mullins*, the literature in Australia is also largely silent on the nature of the ethical duties owed by legal representatives in mediation (with the focus to date being on the ethical position of mediators). More attention has been given to the topic in the United States of America, and for that reason the analysis undertaken in the article relies to some extent on cases and commentaries from the United States. The article concludes by suggesting some directions for further research and analysis with respect to the legal profession's rules of conduct and mediation.

⁸ For a variety of definitions of 'misrepresentation' and associated terms, see Michelle Wills, 'The Use of Deception in Negotiations: Is It "Strategic Misrepresentation" or Is It a Lie?' (2000) 11 *Australasian Dispute Resolution Journal* 220.

⁹ [2009] LPT 12 (1 May 2009).

Throughout the article, the terms ‘legal representative’, ‘legal practitioner’ and ‘lawyer’ are used interchangeably.

II THE GENERAL DUTIES OWED BY LEGAL REPRESENTATIVES IN MEDIATION

While there has been some debate about whether or not mediators are engaged in the practice of the law,¹⁰ there is no doubt that a lawyer enters into a lawyer–client relationship and practises law when he or she represents a client in mediation.¹¹ Consequently, the conduct of legal representatives in mediation is governed by the law of lawyering, that is, relevant portions of the law of contract, torts and equity, procedural law, general legislation,¹² the legal profession legislation,¹³ specific statutory directives to mediate, together with the rules of conduct promulgated by state and territory law societies and bar

¹⁰ Carrie Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibility’ (1997) 38 *South Texas Law Review* 407, 423–4. See generally American Bar Association Section of Dispute Resolution, *Resolution on Mediation and the Unauthorized Practice of Law* (2 February 2002) <http://www.americanbar.org/groups/dispute_resolution/policy_standards.html>. The debate may have been enlivened with the new *Barristers’ Rules* removing the terms ‘acting as a referee, arbitrator or mediator’ from the scope of ‘barristers’ work’: see Australian Bar Association, *Barristers’ Conduct Rules* (1 February 2010) r 15 <<http://www.nswbar.asn.au/circulars/2010/feb/rules.pdf>> (*Barristers’ Rules*). Cf Australian Bar Association, *Model Rules* (2002) r 74(g).

¹¹ See *Barristers’ Rules* r 15(d), which explicitly provides that representation of a client in mediation falls within the scope of the work of a barrister. See generally Mark Richardson, ‘Defining Legal Work’ (2004) 42(5) *Law Society Journal* 63.

¹² Regard must be paid to legislation such as the *Australian Consumer Law: Competition and Consumer Act 2010* (Cth) sch 2 (formerly the *Trade Practices Act 1974* (Cth)).

¹³ At the time of writing, legal practice in Australia is regulated by different state and territory legislation. Much of the legislation is modelled on the *Model Provisions* of the National Legal Profession Model Laws Project: see Standing Committee of Attorneys-General, *Legal Profession — Model Laws Project: Model Bill (Model Provisions)* (2nd ed, August 2006) <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/lpr_background_info>; Standing Committee of Attorneys-General, *Legal Profession — Model Laws Project: Model Provisions* (28 June 2004) <<http://www.pcc.gov.au/uniform/b02-268g-d08A.pdf>>; Standing Committee of Attorneys-General, *Legal Profession — Model Laws Project: Model Regulations* (February 2006) <<http://www.pcc.gov.au/uniform/b02-268h-d19.pdf>>. See Law Council of Australia, *The Model Legal Profession Bill: Status of Implementation* <http://www.lawcouncil.asn.au/programs/national_profession/model-bill.cfm>. It is anticipated that this regulatory framework will soon be replaced. Draft legislation has been released as a result of the National Legal Profession Reform Project: Council of Australian Governments, *Legal Profession National Rules (Consultation Draft)* (14 May 2010) <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/lpr_documentlibrary>; Council of Australian Governments, *Legal Professional National Law* (31 May 2011) <http://www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/pages/lpr_index>.

associations.¹⁴ In most jurisdictions in Australia, relevant professional bodies have adopted (or are in the process of adopting) the new *National Conduct Rules* that were recently approved by the Law Council of Australia (LCA) and the Australian Bar Association as a result of the National Legal Profession Reform Project.¹⁵

Law societies and bar associations in Australia have not promulgated additional or supplementary rules to govern their members' conduct when they are acting as legal representatives in mediation. However, one accommodation for mediation has been made in the professional conduct rules in Australia: 'court' has been defined to include 'mediations'.¹⁶ As will be discussed later in the article, the exact meaning of this reference is unclear.

Some non-binding 'guidelines' for legal representatives in mediation have emerged. For example, the LCA published *Guidelines for Lawyers in Mediation* in March 2007¹⁷ and the Law Society of New South Wales published its *Professional Standards for Legal Representatives in a Mediation* in January 2008.¹⁸ These guidelines may have some influence on legal practitioners (and on disciplinary bodies charged with assessing complaints about unprofessional conduct).¹⁹

¹⁴ Other regulatory bodies are also involved in the rule-making process. For a description of the process, which differs between jurisdictions: see Gino Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 4th ed, 2010) 17 [1.100].

¹⁵ See LCA, *Australian Solicitors' Conduct Rules* (June 2011) <http://www.lawcouncil.asn.au/programs/national_profession/conduct-rules.cfm> ('ASCR'); *Barristers' Rules*. These are not the first sets of uniform rules to be promulgated by these bodies: see also LCA, *Model Rules of Professional Conduct and Practice* (March 2002); Australian Bar Association, *Model Rules* (2002).

¹⁶ See ASCR Glossary of Terms (definition (h) of 'court'); *Barristers' Rules* r 116 (definition of 'court'). The ASCR and the *Barristers' Rules* define 'court' to mean any body described as such, a range of judicial and statutory tribunals, investigations and inquiries established by statute or by a Parliament, Royal Commissions and arbitrations and mediations. These definitions have been retained from the earlier model rules.

¹⁷ The Law Council of Australia has also released a document titled *Guidelines for Parties in Mediations* (August 2011) <<http://www.lawcouncil.asn.au/programs/national-policy/alternative-dispute-resolution/documents.cfm>>.

¹⁸ See Law Society of New South Wales, *Mediation and Evaluation Information Kit* (1 January 2008) 16 <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf>>. The Law Society of New South Wales first promulgated its *Professional Standards for Legal Representatives in a Mediation* in 1988: at 10; Law Society of New South Wales, 'Guidelines for Solicitors Who Act as Mediators' (1988) 26(6) *Law Society Journal* 29.

¹⁹ Boule, above n 2, 466–9 [12.14]–[12.17].

From these various sources, a range of duties — which are not necessarily of equal weight — are imposed on legal practitioners.²⁰ Of paramount importance is the practitioner's duty to the court and the administration of justice.²¹ As an aspect of the duty to the administration of justice, legal practitioners must respect, obey and uphold the law.²² They must not engage in, or assist, conduct that is dishonest or otherwise discreditable to a practitioner or prejudicial to the administration of justice or which might otherwise bring the legal profession into disrepute.²³

Legal practitioners owe a range of duties to their clients such as those of honesty,²⁴ competence and diligence,²⁵ loyalty,²⁶ and confidentiality.²⁷ The scope of the duty of confidentiality depends on the source to which it is traced²⁸ but it is generally 'very broad'.²⁹ Under the rules for solicitors, it extends to 'any information which is confidential to a client and acquired by the solicitor during the client's engagement',³⁰ while the rules for barristers refer to 'confidential information obtained by the barrister in the course of practice concerning' the person to whom the duty is owed.³¹ However, the duty is not absolute. It is subject to a number of exceptions, for example, disclosure is permitted when the client authorises it, when the practitioner 'is permitted or is compelled by law to disclose' the information,³² and when the

²⁰ For the most part, the references that follow are to the professional conduct rules, but these duties are also founded in contract, torts and equity. See generally Dal Pont, above n 14, 73–80 [4.05]–[4.75].

²¹ ASCR r 3.1; *Barristers' Rules* r 5.

²² ASCR r 4.1.5.

²³ ASCR r 5; *Barristers' Rules* r 12.

²⁴ ASCR r 4.1.2; *Barristers' Rules* r 5(c).

²⁵ ASCR r 4.1.3; *Barristers' Rules* r 5(c).

²⁶ ASCR rr 4.1.1, 10–12; *Barristers' Rules* rr 112–14.

²⁷ ASCR r 9.1; *Barristers' Rules* rr 108–11.

²⁸ For a discussion about the scope of the duty of confidentiality, see Dal Pont, above n 14, 232–4 [10.20]–[10.40].

²⁹ Douglas R Richmond, 'Lawyers' Professional Responsibilities and Liabilities in Negotiations' (2009) 22 *Georgetown Journal of Legal Ethics* 249, 260.

³⁰ ASCR r 9.1.

³¹ *Barristers' Rules* r 108.

³² ASCR r 9.2.2; *Barristers' Rules* r 109. For an example of circumstances in which lawyers might be compelled by law to disclose information, see *Proceeds of Crime Act 2002* (Cth) s 270.

practitioner 'discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence'.³³

Legal practitioners also owe their opponents and other third parties a duty to act with honesty, fairness and courtesy.³⁴ There are a number of more specific rules dealing with the need for honesty. For example, practitioners must honour their undertakings³⁵ and, as will be discussed in Part III, they are prohibited from knowingly making false statements to an opponent in relation to the compromise of a case.³⁶

It is not uncommon for conflicts to occur between the duties owed by lawyers (or more precisely, for there to arise a conflict between the values embedded in these duties) such that a lawyer faces a 'choice of competing values (ideas of goodness)³⁷ (such as loyalty to a client, as against honesty to an opponent), which suggests 'a variety of alternative and contradictory courses of action'³⁸ (such as keeping a client's confidence or disclosing critical information to an opponent). The cases of *Mullins* and *Garrett* involved just such a conflict. As such, they provide a useful setting for an analysis of the rules of disclosure governing legal representatives in mediation.

The next part of the article will examine the law governing disclosure of information by lawyers, beginning with the rules of professional conduct. For the purpose of the discussion, unless stated otherwise, it is assumed that disclosure of the information in question cannot be compelled by operation of the law and that it does not fall within the scope of any of the other generally accepted exceptions to confidentiality, including those mentioned above.

³³ ASCR r 9.2.4. This is not an exhaustive account of the exceptions to confidentiality. For a general discussion on the limits of, and exceptions to, lawyer-client confidentiality, see Dal Pont, above n 14, 234-41 [10.45]-[10.140]; Ross, above n 2, 363-67 [11.5]-[11.9]. See generally ASCR r 9.2; *Barristers' Rules* rr 108-9.

³⁴ ASCR r 4.1.2; *Barristers' Rules* r 5.

³⁵ ASCR r 6.1.

³⁶ ASCR r 22.1.

³⁷ Joseph Fletcher, 'Situation Ethics, Law and Watergate' (1975) 6 *Cumberland Law Review* 35, 55.

³⁸ Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007) 10.

III CURRENT REQUIREMENTS IN RELATION TO HONESTY AND CANDOUR

A *Professional Conduct Rules*

Under the rules of professional conduct, legal representatives owe different duties of disclosure depending on whether they are dealing with the court or with an opponent (or other third party).³⁹ As will become apparent from the discussion which follows, the rules emphasise honesty, not candour, with few exceptions.

Legal practitioners in Australia must not 'deceive or knowingly or recklessly mislead' the court⁴⁰ and they are obliged to correct any misleading statement as soon as possible after becoming aware that it is misleading.⁴¹ Using the terminology adopted in this article, legal practitioners must always be honest in their dealings with the court; they should never provide the court with inaccurate information about any matter. As for openness or candour to the court, a distinction is made in the rules between matters of law and matters of fact. A practitioner must inform the court of any relevant binding authorities and legislative provisions of which he or she is aware⁴² but as a general rule, at least when one's opponent is also present before the court,⁴³ there is no obligation to disclose adverse facts, nor is there any obligation to disclose information about a client's interests, the value of a case, the client's settlement goals or willingness to settle, or the extent of the practitioner's settlement authority. There is also no obligation to 'correct an error in a statement made to the court by the opponent or any other person'.⁴⁴ This is not to say that adverse facts (or information about a client's interests and so

³⁹ There may be other levels or standards of disclosure required when a practitioner is dealing with a professional body investigating complaints made against the practitioner, for example, but discussion of these points is outside the scope of this article.

⁴⁰ ASCR r 19.1; *Barristers' Rules* r 26.

⁴¹ ASCR r 19.2; *Barristers' Rules* r 27.

⁴² ASCR r 19.6; *Barristers' Rules* r 31.

⁴³ Legal practitioners owe the court higher standards of candour when seeking any interlocutory relief in an ex parte application: ASCR r 19.4; *Barristers' Rules* r 29. For discussion of the standard of candour owed by practitioners in these circumstances, see *Satz v ACN 069 808 957 Pty Ltd* [2010] NSWSC 365 (30 April 2010) [55]–[68] (Barrett J).

⁴⁴ ASCR r 19.3.

on) should never be revealed to the court but that such disclosures should not be made without client consent.⁴⁵

These rules apply in a relatively straightforward way in litigation for the 'court' to whom legal practitioners owe duties is personified by the judge or tribunal member before whom they appear. It is less clear how the rules apply in the context of mediation. As mentioned above, the rules define 'court' to include 'mediations'.⁴⁶ By this reference, the drafters of the rules might have meant mediators, the other parties to the mediation, or the mediation process. The most obvious interpretation of the definition section is that 'mediations' should be taken to mean 'mediators'. This is the most obvious meaning because:

- 1 there are already rules in place governing relations with opponents and other third parties;⁴⁷
- 2 it is difficult to conceive of practitioners owing duties to a process (although clearly, they may owe duties to certain persons, entities or even 'the public' involved in, or implicated by, a process);⁴⁸
- 3 such an interpretation would protect the community's interest in the administration of justice in the same manner as does a legal practitioner's duty to the court; and
- 4 to the extent that we might look to provisions in other jurisdictions for insights, the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada defines 'tribunal' to include 'mediator'.⁴⁹ It is more

⁴⁵ In this instance, the public interest in maintaining legal professional privilege outweighs the public interest in discovering the truth. For a discussion about legal professional privilege, see below n 92.

⁴⁶ See above n 16.

⁴⁷ See *ASCR* rr 22 (communications with opponents), 30–3 (relations with other solicitors), 34–5 (relations with other persons); *Barristers' Rules* rr 48–55 (duty to opponent).

⁴⁸ Properly conceived, even the duty owed to the court is owed not to any particular judge, it is owed 'to the larger community which has a vital public interest in the proper administration of justice': Justice D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 63.

⁴⁹ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (13 December 2011) 12 (definition of 'tribunal') <http://www.flsc.ca/_documents/ModelCode-June2012.pdf>.

common for the definition of court or tribunal to be confined to adjudicative bodies.⁵⁰

If the reference to ‘mediations’ is taken to mean ‘mediators’, then legal representatives in Australia owe mediators the same duties as they owe to judges and masters in courts and tribunals. They are prohibited from providing mediators with inaccurate information about any matter. This prohibition seems to extend to statements concerning a client’s position, interests, settlement priorities, settlement goals and the extent of the lawyer’s settlement authority.⁵¹ Legal representatives are also subject to a duty to inform mediators of any relevant binding authorities and legislative provisions of which they are aware. The rules are silent on whether or not disclosure has to be made in a joint session in the presence of the other party, as opposed to being made in a separate session in their absence. Disclosure made in a separate session appears to satisfy the rules, for this is a duty owed to mediators, not opponents. In other respects, the duty of candour vis-a-vis mediators is limited. Legal representatives are not obliged to disclose adverse facts to a mediator (nor are they obliged to disclose their client’s position, interests, settlement priorities or settlement goals or the extent of their authority to settle) and they have no obligation to correct inaccurate statements made to the mediator by the other side.

As to the duties of disclosure owed by lawyers to their opponents, relevant rules and their application are discussed below:

- 1 A legal practitioner ‘must not knowingly make a false statement to an opponent in relation to the case (including its compromise)’.⁵² A statement might be false because, in the circumstances, it requires some qualification

⁵⁰ See, eg, American Bar Association, *Model Rules of Professional Conduct* (2009) r 1.0 <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html>; Solicitors Regulation Authority, *Solicitors’ Code of Conduct 2011* (UK) r 14 <<http://www.sra.org.uk/solicitors/handbook/code/content.page>>; Solicitors Regulation Authority, *SRA Handbook Glossary* (2012) (definition of ‘court’) <<http://www.sra.org.uk/solicitors/handbook/glossary>>; Canadian Bar Association, *Code of Professional Conduct* (2009) xiii (definition of ‘court’).

⁵¹ There is some evidence that practitioners understand the prohibition to have this effect. See, eg, the discussion by Bridge who observes that, to avoid misleading mediators, he deliberately refrains from asking his clients what they want and from answering mediator questions about client goals: Bridge, above n 2, 12 [34].

⁵² *ASCR* r 22.1; *Barristers’ Rules* r 48. The term ‘compromise’ is defined in the *ASCR* to include ‘any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise’.

or the addition of omitted information (that is, the prohibition extends to partial truths).⁵³

- 2 The rule mentioned in the last paragraph appears to prohibit all misrepresentations about any matter. However, relevant case law and commentary suggests that the prohibition applies only to statements of material fact and law that the lawyer knows to be false.⁵⁴ Some matters are not caught by the rule either because they are considered to be immaterial, or because they do not relate to fact or law. Statements that exaggerate the client's position, values, bottom line and alternatives to settlement may be tolerated. In the case of solicitors, exaggeration is permitted by the *Australian Solicitors' Conduct Rules* ('ASCR') as long as statements do not 'grossly' exceed 'the legitimate assertion of the rights or entitlements of the solicitor's client'⁵⁵ and by the LCA's *Guidelines for Lawyers in Mediations*, which warns practitioners to 'be careful of puffing' but, noticeably, does not prohibit it.⁵⁶ Ultimately, the question as to whether or not there has been a false statement about a 'material fact' will turn on the facts of the case. As one author opines, 'made-up' alternative offers might be treated as a misrepresentation of material fact when the opponent is unsophisticated; the offers are specific, are coupled with ultimatums, and are impossible to investigate.⁵⁷ Practitioners must take care not to communicate information in such a way as to convert it into a false misrepresentation of fact. They might contravene the relevant rule if they make and characterise an offer as a client's 'final' offer when it is being used as a negotiation ploy and does not represent the client's true position.⁵⁸

⁵³ *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352 (7 December 2006) [73] (Judge Chaney) ('*Fleming*'), concerning the position under the legal profession legislation and rules in Western Australia.

⁵⁴ See, eg, *ibid* [87], where a legal practitioner implied the existence of a valid will and concealed from a third party the status of the will (which was informal) to procure a covenant from that third party; *Williams v Commonwealth Bank of Australia* [1999] NSWCA 345 (27 September 1999), where the solicitor for the bank sent to the solicitor for the other party and the mediator a statement purporting to be a record of the 'evidence' that a potential witness would give at trial when the person to whom the statement was attributed had refused to sign the statement because it did not represent a full account of his 'evidence'.

⁵⁵ ASCR r 34.1.1 (emphasis added).

⁵⁶ LCA, *Guidelines for Lawyers in Mediation* (March 2007) cl 6.2(a) <<http://www.lawcouncil.asn.au/programs/national-policy/alternative-dispute-resolution/documents.cfm>>.

⁵⁷ G Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (Penguin Books, 2nd ed, 2006) 204–6.

⁵⁸ Douglas and McMillan, above n 2.

- 3 For the most part, the rules speak to actions, not omissions. While they prohibit certain misrepresentations, they generally require no affirmative disclosure. Put another way, a legal practitioner does not owe his or her opponent a duty of candour or openness. There is no obligation to inform an opposing party of relevant facts or law.⁵⁹ Of particular relevance in the context of mediation, there is no obligation to present a client's case or to make an offer to settle. Nor is there any obligation to correct the other side's misunderstandings, misconceptions or false assumptions⁶⁰ provided that the practitioner is not 'the moving force ... in the other side's misconception',⁶¹ and that he or she is scrupulous about not endorsing any misunderstanding. There are two exceptions to the general rule. First, as already mentioned, there is a positive duty to disclose information when it is required to qualify a statement or to avoid a partial truth. Second, disclosure is required when it is necessary to correct a statement previously made by the practitioner about a client's case where the practitioner now knows the statement to be false.⁶²
- 4 Provision is made to protect against so-called scrivener errors. For example, r 30.1 of the ASCR provides that '[a] solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.'

Lawyers also owe duties of disclosure by virtue of other components of the law of lawyering. As will be evident from the discussion that follows, the distinction between duties owed to the court and those owed to third parties (including opponents) is maintained in the general law. The distinction between honesty and candour is also maintained.

⁵⁹ Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (Lawbook, 2008) 148–9 [4.120]; Geoffrey C Hazard Jr, 'The Lawyer's Obligation to Be Trustworthy when Dealing with Opposing Parties' (1982) 33 *South Carolina Law Review* 181, 189; Richmond, above n 29, 276. See also *Beach Petroleum NL v Johnson* (1993) 43 FCR 1, 40 [22.60] (von Doussa J).

⁶⁰ See ASCR r 22.3; *Barristers' Rules* r 50.

⁶¹ *Fleming* [2006] WASAT 352 (7 December 2006) [66] (Judge Chaney). See also *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148 where the practitioner deliberately took advantage of an obvious error (a misplaced decimal point) in a writ issued against him by the Deputy Commissioner of Taxation and 'set in train the events and documents which ... led to the entry of the [erroneous] consent judgment': at 166 (Lockhart J).

⁶² ASCR r 22.2; *Barristers' Rules* r 49.

B Other Components of the Law of Lawyering

The disclosure obligations of lawyers under the general law are similar to those imposed by the professional conduct rules. A lawyer cannot mislead the court directly, nor knowingly permit a client to do so (for example, by allowing a client to make affidavits which the lawyer knows to be false).⁶³ A lawyer also breaches his or her obligation to the court by putting before the court for its approval a draft consent order when he or she knows that the draft does not accurately reflect the agreement of the parties.⁶⁴ As for candour, legal practitioners must disclose to the court all relevant law but 'a passive withholding' of factual material is generally permissible.⁶⁵

As regards one's opponent, while lawyers must refrain from making false statements, they generally have no obligation to reveal relevant information. One of the most often cited formulations of the law on this point is found in the judgment of Gleeson CJ in *Lam v Ausintel Investments Australia Pty Ltd*.⁶⁶ His Honour noted:

Where parties are dealing at arms' length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice.⁶⁷

Gleeson CJ went on to suggest that an obligation of disclosure might arise 'for example, by reason of some feature of the relationship between the parties, or because previous communications between them gave rise to a duty to add to or correct earlier information.'⁶⁸ In other words, an affirmative duty of disclosure might arise:

⁶³ See *Myers v Elman* [1940] AC 282, 292 (Viscount Maugham). See also *Barristers' Rules* r 36. See generally Dal Pont, above n 14, 481–2 [21.130]–[21.135].

⁶⁴ As Mark notes, in these circumstances, one is 'saying to the court that there was a signed, written agreement in circumstances where he or [she] should have known there was no agreement': Mark, above n 2, 14.

⁶⁵ Ross, above n 2, 562 [14.77]. For a discussion of relevant case law, see Ross, above n 2, 562–4 [14.79]–[14.82]; Ipp, above n 48, 67–9.

⁶⁶ (1989) 97 FLR 458.

⁶⁷ *Ibid* 475. See also Stewart and McClurg, above n 2, 36–8; Higgs, above n 2, 60.

⁶⁸ *Lam v Ausintel Investments Australia Pty Ltd and Others* (1989) 97 FLR 458, 475 (Gleeson CJ).

- 1 by virtue of a special relationship between the parties;
- 2 when one omits to mention a qualification 'in the absence of which some absolute statement made is rendered misleading';⁶⁹ and
- 3 when a statement which was true at the time it was made, has subsequently become false.

Some of these circumstances are also contemplated by the law of fraud, the law with respect to unconscionability, and the provisions of general legislation such as the *Australian Consumer Law* dealing with misleading and deceptive conduct.⁷⁰ Each of these areas of law is examined briefly below.

A statement 'is fraudulent when the speaker makes a knowing misrepresentation of a material fact on which the victim reasonably relies' and which causes the victim damage.⁷¹ Under the law of fraud, honesty is generally not required in statements about demands, bottom lines, values and settlement intentions either because they are not considered to be material representations of fact or because 'no reasonable negotiator would rely upon them'.⁷² However, care must be taken in the way in which information is conveyed. A practitioner might inadvertently convert communications regarding, for example, a client's position, which ordinarily would not be considered a statement of fact, into a false factual representation.⁷³ For example, where a client has authorised a settlement figure in excess of \$X, it would be permissible for a lawyer to state that the client does not wish to settle for more than

⁶⁹ *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477, 490 (Bowen CJ).

⁷⁰ A party who suffers loss or damage might have other causes of action available, eg, negligent misstatement, the tort of deceit or equitable estoppel. For an excellent discussion on developments in the law, as at 2007, relating to misleading and deceptive conduct, negligent misstatement, equitable estoppel, and unconscionable conduct, see generally Stewart and McClurg, above n 2, 49–66.

⁷¹ Shell, above n 57, 201.

⁷² Russell Korobkin, Michael L Moffitt and Nancy A Welsh, 'The Law of Bargaining' in Andrea Kupfer Schneider and Christopher Honeyman (eds), *The Negotiator's Fieldbook* (American Bar Association Section of Dispute Resolution, 2006) 183, 184. See also Scott R Peppet, 'Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining' (2002) 7 *Harvard Negotiation Law Review* 83, 91.

⁷³ For circumstances in which statements of intention and opinion have been held to be implied statements of fact, see Peter Gillies and Niloufer Selvadurai, *Law of Contract* (Federation Press, 2009) 125–6.

\$X; it would not be permissible for the lawyer to state that the client had disapproved any settlement in excess of \$X.⁷⁴

According to Norton:

Unconscionability occurs when there is a belief that there is no reasonable probability that one of the contracting parties will fully perform; when there is knowledge that one of the parties will not substantially benefit from the transaction or is unable to protect his or her own interests because of physical or mental infirmity or other disability; or when there is gross overpricing relative to ready availability elsewhere.⁷⁵

As Norton notes, the doctrine of unconscionability 'seeks extreme situations, not everyday bargaining unfairness between people who are roughly equal.'⁷⁶

While silence is generally not caught by the professional conduct rules, it is caught by s 18 of the *Australian Consumer Law*, which is in substantially the same terms as s 52 of the *Trade Practices Act 1974* (Cth) ('TPA') and its state and territory Fair Trading Act equivalents.⁷⁷ This section prohibits a person, in trade or commerce, from engaging in conduct that is misleading or deceptive or likely to be so. In relation to s 52 of the TPA, Corones asserts that where silence is accompanied by other conduct, courts will look at the surrounding circumstances to 'determine whether they give rise to a "reasonable expectation" of disclosure'.⁷⁸ He argues 'that in settlement negotiations no reasonable expectation would arise on the part of the other party that the

⁷⁴ This is a variation of an example provided by the Standing Committee on Ethics and Professional Responsibility, 'Lawyer's Obligation of Truthfulness when Representing a Client in Negotiation: Application to Caucused Mediation' (Formal Opinion 06-439, American Bar Association, 12 April 2006) 8 ('ABA Formal Opinion').

⁷⁵ Eleanor Holmes Norton, 'Bargaining and the Ethic of Process' (1989) 64 *New York University Law Review* 493, 552-3.

⁷⁶ *Ibid* 557.

⁷⁷ *Fair Trading Act 1992* (ACT) s 12; *Fair Trading Act 1987* (NSW) s 42; *Consumer Affairs and Fair Trading Act 1990* (NT) s 42; *Fair Trading Act 1989* (Qld) s 38; *Fair Trading Act 1987* (SA) s 56; *Fair Trading Act 1990* (Tas) s 14; *Fair Trading Act 1999* (Vic) s 9; *Fair Trading Act 2010* (WA) s 10. The term 'conduct' was defined expansively in s 4(2) of the TPA and similar provisions in the state and territory Fair Trading Acts in such a way as could include silence and half-truths: S G Corones, 'Solicitors' Liability for Misleading Conduct' (1998) 72 *Australian Law Journal* 775, 776. Although the new legislation does not define 'conduct', the Federal Court has found that the ambit of 'conduct' is not limited to a positive action or representation, and that silence can be considered misleading or deceptive in certain circumstances: *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, approved by the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 369 [17]-[18] (French CJ and Kiefel J).

⁷⁸ Corones, above n 77, 776.

solicitor will reveal the maximum amount for which the client is prepared to settle.⁷⁹

Stewart and McClurg conclude their analysis of developments in the law relating to disclosure with the following observations:

For all that the courts have stressed that a business may breach s 52 of the *TPA* by remaining silent even in the absence of a legal duty to disclose, the reality is that a 'reasonable expectation' of disclosure is most likely to be identified in the two situations already treated by the common law as involving actionable misrepresentations: where a combination of what is said and what is left unsaid creates a 'half-truth'; or where a statement that may have been true at the time ceases to be true. The same point is apparent from the cases on negligent misstatement and equitable estoppel.⁸⁰

Save for in these two situations, and when an obligation to disclose arises by virtue of a special relationship between the parties, lawyers do not owe their opponent a duty of candour under the common law or general legislation.

In addition to obligations imposed by substantive law, various disclosure obligations may arise by virtue of procedural law and under specific statutory schemes.⁸¹ Perhaps the most well-known examples are the obligations imposed by civil procedure rules. The rules of court compel parties to litigation to disclose and provide for inspection copies of documents which are, or have been, in their possession or control and are relevant to an allegation in issue.⁸² There are also mechanisms available via which one party to litigation can compulsorily acquire information from other parties through interrogatories requiring sworn written answers.⁸³ The obligation to disclose documents and answer interrogatories generally rests on the parties.⁸⁴ However, lawyers are subject to a number of obligations in respect of these procedures, for example, they must explain the duty of disclosure of docu-

⁷⁹ Ibid 784.

⁸⁰ Stewart and McClurg, above n 2, 67.

⁸¹ See, eg, the provisions involved in *Mullins*, namely, the *Motor Accident Insurance Act 1994* (Qld) ss 45, 51A, 51B.

⁸² The procedure for initiating discovery and the exact scope of the duty of discovery varies between jurisdictions. See, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 29; *Uniform Civil Procedure Rules 1999* (Qld) ch 7 pt 1 div 1; *Uniform Civil Procedure Rules 2005* (NSW) pt 21 div 1; *Federal Court Rules 1979* (Cth) O 15 div 1.

⁸³ See, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 30; *Uniform Civil Procedure Rules 1999* (Qld) ch 7 pt 1 div 2; *Uniform Civil Procedure Rules 2005* (NSW) pt 22; *Federal Court Rules 1979* (Cth) O 16.

⁸⁴ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) rr 209, 211.

ments to clients, advise clients not to destroy relevant documents,⁸⁵ 'make an independent determination about whether full and proper discovery has been made',⁸⁶ and, in some jurisdictions, certify before or at trial that their client has been fully appraised of its obligations and that the practitioner is not aware of any documents which have not been disclosed as required.⁸⁷

This is not to say that all information held by one party is available to the other parties to litigation. The duty of disclosure does not apply to documents or information in relation to which there is a valid claim to privilege.⁸⁸ A number of common law privileges protect information from disclosure.⁸⁹ The common law recognises legal professional privilege (or client legal privilege), settlement privilege, the privilege against self-incrimination and public interest privilege.⁹⁰ Many of these privileges have been codified, although the scope of some of the privileges has been narrowed.⁹¹ Most communications that take place between a lawyer and his or her client in preparation for mediation will be protected from disclosure by legal professional privilege (either the advice limb or the litigation limb)⁹² and would thus not be the

⁸⁵ See, eg, *Legal Profession Regulation 2005* (NSW) reg 177.

⁸⁶ David Bamford, Alan Leaver and Mark J Rankin, *Principles of Civil Litigation* (Lawbook, 2010) 180 [8.190].

⁸⁷ See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 21.4(3); *Uniform Civil Procedure Rules 1999* (Qld) r 226. For discussion about the obligations of lawyers in discovery, see generally Ross, above n 2, 558–9 [14.70]–[14.73]; *ibid* 180–5 [8.190]–[8.240]. See also *Civil Procedure Act 2010* (Vic) ss 13, 26.

⁸⁸ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) rr 212(1) (in relation to documents), 233 (in relation to questions posed in interrogatories). See also *Uniform Civil Procedure Rules 2005* (NSW) r 22.2.

⁸⁹ For a general discussion, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 77–9 [3.1]–[3.9] ('ALRC Report').

⁹⁰ *Ibid* 77 [3.1].

⁹¹ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) rr 212(2), 429, which remove the privilege from expert reports and make their disclosure a precondition of their admissibility at trial. See also *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 44.03; *Uniform Civil Procedure Rules 2005* (NSW) rr 31.21, 31.28.

⁹² Legal professional privilege protects confidential communications made between lawyers and clients for the dominant purpose of seeking or providing legal advice and communications made between lawyers, clients and third parties for the dominant purpose of use in, or in relation to, existing or reasonably anticipated legal proceedings: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49. For discussion of the two limbs of legal professional privilege, see *ALRC Report*, above n 89, 85–6 [3.29]–[3.33]. The privilege is itself subject to exceptions. For example, it does not attach to communications 'relating to advice sought or given in furtherance of, or to facilitate, criminal, fraudulent or other unlawful purposes': Dal Pont, above n 14, 258 [11.55].

subject of compulsory disclosure unless the privilege has been ousted by statute (as is common now for expert reports and factual information that underpins them) or is waived by the client.⁹³

When mediation takes place as a result of a legislative directive, additional disclosure obligations may be imposed upon the parties and their advisers.⁹⁴ However, the scope of disclosure required by these provisions is unlikely to be greater than that required under procedural rules in civil litigation or under the general law. Parties are not required to disclose privileged information. They are not required to reveal interests, BATNAs,⁹⁵ bottom lines and negotiation strategies.

Some commentators suggest that legal representatives owe a duty to participate in good faith, and to cooperate, in mediation. The next part of this article will discuss the possible impact of these duties, if indeed they exist, on the disclosure obligations of legal representatives. The impact of the duty to treat others 'fairly' will also be discussed.

IV THE IMPACT OF OTHER OBLIGATIONS OWED BY LAWYERS

A *The Question of Good Faith Participation*

1 *Professional Conduct Rules*

The professional conduct rules do not impose on legal representatives duties to participate in mediation in good faith.⁹⁶ However, the guidelines provided by some professional associations do seek to impose such an obligation on the parties and their lawyers. For example, the LCA *Guidelines for Lawyers in Mediations* provide that '[l]awyers and clients should act, at all times, in good faith to attempt to achieve settlement of the dispute.'⁹⁷ It further provides that '[a] lawyer should not continue to represent clients who act in bad faith or

⁹³ Bamford, Leaver and Rankin, above n 86, 172, 190.

⁹⁴ Some of these provisions are wide but also vague. An example of such a provision is *Uniform Civil Procedure Rules 1999* (Qld) r 326, which provides that the mediator may 'gather information about the nature and facts of the dispute in any way the mediator decides.'

⁹⁵ This term is used by Fisher and Ury as an acronym for 'Best Alternative to a Negotiated Agreement': Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement without Giving In* (Houghton Mifflin, 2nd ed, 1991) ch 6.

⁹⁶ As Lamb and Littrich note, in Australia, 'there is no duty to assist one's opponent': Ainslie Lamb and John Littrich, *Lawyers in Australia* (Federation Press, 2nd ed, 2010) 339.

⁹⁷ Law Council of Australia, *Guidelines for Lawyers in Mediations* (March 2007) cl 2.2 <<http://www.lawcouncil.asn.au/programs/national-policy/alternative-dispute-resolution/documents.cfm>>.

give instructions which are inconsistent with good faith.⁹⁸ No definitions of the terms 'good faith' and 'bad faith' are provided. However, as will be discussed shortly, some common threads of what it means to act in good faith (or conversely, in bad faith) have been discerned from cases and commentaries concerning 'good faith' obligations in agreements to mediate and dispute resolution clauses.

2 Other Components of the Law of Lawyering

It is not uncommon for legislation to make provision for referral of cases to mediation to impose on the parties an obligation to participate in 'good faith' or to act 'genuinely' in the mediation.⁹⁹ However, the legislation tends not to define what it means by these terms and judicial opinion on the meaning of 'good faith' (and the issue of enforceability of contractual clauses containing 'good faith' provisions) has been divided.¹⁰⁰ Nonetheless, some common threads of what it means to act in good faith have been discerned. They include: some preparation, attendance at the mediation, having someone in attendance with authority to settle, acting cooperatively and demonstrating an unwillingness to mislead.¹⁰¹

⁹⁸ Ibid. Similar provision is made by the Law Society of New South Wales' *Professional Standards for Legal Representatives in a Mediation*: Law Society of New South Wales, *Mediation and Evaluation Information Kit* (1 January 2008) 17 cl 5.5 <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf>>. See also Law Council of Australia, *Guidelines for Parties in Mediations* (August 2011) cl 10 <<http://www.lawcouncil.asn.au/programs/national-policy/alternative-dispute-resolution/documents.cfm>>, which requires the parties to approach the mediation in good faith but, again, does not provide a definition of operative terms.

⁹⁹ See, eg, *Civil Procedure Act 2005* (NSW) s 27 (parties are required to participate in good faith in mediation); *Family Law Act 1975* (Cth) s 60I(1) (parties are required to 'make a genuine effort to resolve' a dispute before commencing court proceedings); *Civil Dispute Resolution Act 2011* (Cth) ss 6–7 (prospective litigants are required to lodge a 'genuine steps statement' with the court when commencing certain civil proceedings in the Federal Court of Australia or in the Federal Magistrates Court). While 'genuine steps' is defined in the *Civil Dispute Resolution Act*: at s 4, the operative terms are generally not defined in the legislation.

¹⁰⁰ See the discussion of relevant cases by Einstein J in *Aiton v Transfield* (1999) 153 FLR 236, 254–8 [87]–[98]. See also *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618, 637 [70] (Allsop P); National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009) 145–6 ('NADRAC Report').

¹⁰¹ A well-known judicial interpretation of 'good faith' in Australia can be found in the case of *Western Australia v Taylor* (1996) 134 FLR 211, 224–5, heard by the National Native Title Tribunal. Member Sumner set out a list of 18 indicia which pointed to good faith negotiation under the *Native Title Act 1993* (Cth). See also Maureen A Weston, 'Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Parti-

Other judges and commentators define good faith not by what it constitutes but by what it is not, that is, by identifying bad faith.¹⁰² Bad faith behaviour is said to include some combination of: failing to attend to pre-mediation activities (such as preparation and exchange of agreed documents); failing to attend the mediation; repeatedly cancelling or delaying the mediation; coming to the mediation without authority to settle; failing to bring experts as ordered; failing to explain positions or to listen or respond to the other party; withholding information or repeatedly refusing reasonable requests for information; unilaterally withdrawing from the mediation; and failing to sign a mediated agreement.¹⁰³ However, as with the concept of good faith, there is no universal agreement on what constitutes 'bad faith' behaviour. Some commentators dismiss these proposals for subjectivity, for failing to provide objective grounds for sanctions, and for failing to provide reliable guidelines for what is and what is not appropriate behaviour.¹⁰⁴

There does appear to be wide agreement that some behaviour is not inconsistent with good faith. Good faith does not require parties to make any, or any particular, settlement offer.¹⁰⁵ It does not preclude a party from refusing to accept a settlement offer or from failing to give reasons for refusing an offer.¹⁰⁶ Good faith does not preclude a party from having regard to self-interest¹⁰⁷ and it does not require a party to take 'any step to advance the interests of the other party'.¹⁰⁸ Good faith does not require the parties to reach

pation, Autonomy, and Confidentiality' (2001) 76 *Indiana Law Journal* 591, 628; David Spencer, 'Drafting Good Faith Negotiation into Contracts' (2001) 4 *ADR Bulletin* 29, 33.

¹⁰² Ulrich Boettger, 'Efficiency versus Party Empowerment — Against a Good-Faith Requirement in Mandatory Mediation' (2004) 23 *Review of Litigation* 1, 17–18. Also see Hilary Astor, 'Making a "Genuine Effort" in Family Dispute Resolution: What Does it Mean?' (2008) 22 *Australian Journal of Family Law* 102.

¹⁰³ Weston, above n 101, 605, 630; Boettger, above n 102, 17; John Lande, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002) 50 *UCLA Law Review* 69, 82–3.

¹⁰⁴ Boettger, above n 102, 20, 22, 25; Lande, above n 103, 86–92.

¹⁰⁵ Roger L Carter, 'Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations' [2002] *Journal of Dispute Resolution* 367, 395; see also at 384, quoting *Avril v Civilmar*, 605 So 2d 988, 989–90 (Farmer J for Farmer, Letts and Hersey JJ) (Fla Ct App, 1992).

¹⁰⁶ Weston, above n 101, 626–7; Boettger, above n 102, 18.

¹⁰⁷ For a discussion of relevant authorities, see David Spencer, 'Requiring Good Faith Negotiation' (1998) 1 *ADR Bulletin* 37.

¹⁰⁸ *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618, 639 [76] (Allsop P).

an agreement¹⁰⁹ or even to possess a sincere desire to settle.¹¹⁰ Nor need the parties engage in total disclosure.¹¹¹ The duty to participate in good faith does not by itself increase the standards of honesty and candour owed by legal practitioners. Of course, a practitioner who misleads a mediator or an opponent about a material fact might be held to have acted in bad faith (the distinction between misleading which is prohibited, and non-disclosure which is generally permitted, still holds).

B *Requirements in Relation to Cooperation*

1 *Professional Conduct Rules*

Although some non-binding guidelines issued by lawyers' professional associations provide that legal representatives should cooperate with mediators,¹¹² the professional conduct rules do not require practitioners to cooperate with mediators or with opponents in mediation.

2 *Other Components of the Law of Lawyering*

Some statutory mandates to mediate also impose obligations in relation to cooperation. For example, r 325 of the *Uniform Civil Procedure Rules 1999* (Qld) requires the parties to 'act reasonably and genuinely in the mediation and help the mediator to start and finish the mediation within the time estimated or set in the referring order.' However, the rules do not define the terms 'reasonably' and 'genuinely', nor do they elaborate on what is required by way of 'help'. More general mandates to cooperate also appear in relevant legislation. For example, the *Civil Procedure Act 2010* (Vic) provides that '[a] person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of

¹⁰⁹ Charles J McPheeters, 'Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?' [1992] *Journal of Dispute Resolution* 377, 385, 391; Anne M Burr, 'Ethics in Negotiation: Does Getting to Yes Require Candor?' [2001] (May/July) *Dispute Resolution Journal* 8, 13; Boettger, above n 102, 18.

¹¹⁰ Boettger, above n 102, 18.

¹¹¹ Burr, above n 109, 13.

¹¹² See, eg, the Law Society of New South Wales' *Professional Standards for Legal Representatives in a Mediation*, which provides that '[a] legal representative should: cooperate with the mediator': Law Society of New South Wales, *Mediation and Evaluation Information Kit* (1 January 2008) 17 cl 5.1 <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf>>. No definition of 'cooperation' is provided.

that proceeding'.¹¹³ It is coupled with an overarching obligation to 'use reasonable endeavours to resolve a dispute by agreement ... by appropriate dispute resolution'.¹¹⁴ The term 'cooperate' is not defined in the legislation. The absence of definitions is not surprising. The National Alternative Dispute Resolution Advisory Council ('NADRAC') notes that 'the duty to "cooperate" may be subject to some of the same difficulties of definition as the duty to participate in good faith or to make a genuine effort'.¹¹⁵ It is submitted that provisions such as these do not increase the standards of honesty and candour owed by the parties or their legal representatives. Such provisions do not override the protection given to privileged documents and information.

C Requirements in Relation to Fairness

1 Professional Conduct Rules

Until recently, the professional conduct rules imposed an obligation on solicitors to act with honesty, fairness and courtesy towards other practitioners and third parties.¹¹⁶ The reference to 'fairness' has been omitted from the *ASCR*,¹¹⁷ it remains in the *Barristers' Rules*.¹¹⁸ Given that solicitors continue to be subject to a number of general prohibitions such as the prohibition against engaging in conduct that is likely to bring the legal profession into disrepute, it is doubtful that absence of the word 'fairness' gives them any licence to be unfair. General mandates to act with 'fairness' have not, historically, been defined and there are few specific rules stipulating what is required to discharge the general obligation.¹¹⁹ Nonetheless, courts in Australia have

¹¹³ *Civil Procedure Act 2010* (Vic) s 20.

¹¹⁴ *Ibid* s 22.

¹¹⁵ *NADRAC Report*, above n 100, 148.

¹¹⁶ The reference to 'fairness' appears in statements of general principle preceding 'relations with other practitioners' and 'relations with third parties': LCA, *Model Rules of Professional Conduct and Practice* (March 2002) 26, 29.

¹¹⁷ See *ASCR* r 4.1.2.

¹¹⁸ *Barristers' Rules* r 5(c).

¹¹⁹ Some definitions are available in the literature. For example, White notes that the concept of fairness 'speaks to a variety of acts in addition to truthfulness and also different from it': James J White, 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) 5 *American Bar Foundation Research Journal* 926, 928. It speaks, eg, to the threats a negotiator may use, the favours he or she may offer, and extraneous factors that may be used in negotiation: at 928. See also Hazard, above n 59, 182–3.

affirmed that the concept will be applied and given meaning.¹²⁰ The courts have also indicated that the term takes its meaning from the context in which specific behaviour occurs.¹²¹

It is suggested that legal representatives discharge their duty of fairness with respect to process matters by complying with 'reasonable' procedural guidelines set by mediators. Lawyers act contrary to the requirements of process fairness in mediation when they make threats, attempt to cross-examine or interrogate the other party or do not allow the other party to speak freely. The concept of courtesy overlaps with 'fairness' and includes matters such as not interrupting when someone else is speaking and not denigrating a party. Most mediators will intervene to 'correct' the types of inappropriate behaviour mentioned here. Process fairness might also involve matters such as preparedness, willingness to put a client's case and to respond to the other side and so on. It will be apparent from the discussion thus far that legal representatives are not obliged to do all of these things under the law governing disclosure.

As to outcome fairness, legal representatives have no specific obligation under the professional conduct rules to ensure that a mediated outcome is fair to other parties to the mediation or other affected third parties except where special obligations are imposed by legislation.¹²² In fact, there is no obligation on legal representatives to ensure a fair outcome for their own clients in mediation, although they must ensure that their clients understand their legal rights and obligations and the significance and consequences of any agreement reached.¹²³ That said, lawyers must keep in mind their duty to the administration of justice. As mentioned in Part II, they are subject to a general duty to refrain from conduct that is discreditable to a practitioner or prejudicial to the administration of justice, or might otherwise bring the legal profession into disrepute. As the discussion in the next part illustrates, in some circumstances, non-disclosure of information will constitute a breach of one's duty to the administration of justice.

¹²⁰ *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 168 ACTR 32, 52 [43] (Higgins CJ, Gray and Refshauge JJ).

¹²¹ *Ibid.*

¹²² See, eg, the obligations imposed on advisers of people negotiating the terms of a parenting plan with respect to children: *Family Law Act 1975* (Cth) s 63DA(2).

¹²³ *ASCR* r 7.1; *Barristers' Rules* r 39.

2 Other Components of the Law of Lawyering

In some cases the court has held that a lawyer's actions in securing an agreement and in failing to disclose information to an opponent were so unfair that the agreement in question should be set aside. The grounds relied on by the court in setting aside these agreements have varied — ranging from breach of principles of contract law,¹²⁴ to breach of the practitioner's common law obligations to the administration of justice and to the court.¹²⁵ Some of the most well-known cases have occurred in the United States of America. In *Virzi v Grand Trunk Warehouse and Cold Storage Co*¹²⁶ the plaintiff's lawyer failed to advise the defendant that the plaintiff in a personal injuries action had died from unrelated factors prior to completion of settlement discussions. The defendant entered into a settlement agreement in ignorance of this fact. The Court held that the plaintiff's lawyer was under a duty to disclose the death of his client to opposing counsel prior to negotiating the final settlement agreement.¹²⁷ The case analysis was based on principles of contract law (the executor of the plaintiff's estate should have been substituted for the deceased plaintiff as party to the agreement) rather than principles of ethics.¹²⁸

In *Spaulding v Zimmerman*,¹²⁹ another personal injuries case, the plaintiff's own doctors concluded that the plaintiff's injuries had healed completely. However, the doctor who examined the plaintiff on behalf of the defendant discovered a life-threatening aneurysm on the plaintiff's aorta, a condition which may have been caused by the accident. The plaintiff's lawyer never asked about the results of the examination and the defendant's lawyer did not volunteer the information. The Supreme Court of Minnesota determined that the defendant's lawyer was not required under the relevant professional

¹²⁴ See, eg, *Virzi v Grand Trunk Warehouse and Cold Storage Co*, 571 F Supp 507, 511–12 (Judge Gilmore) (ED Mich, 1983). See also Charles B Craver, 'Negotiation Ethics: How to Be Deceptive without Being Dishonest/How to Be Assertive without Being Offensive' (1997) 38 *South Texas Law Review* 713, 721; Barry R Temkin, 'Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?' (2004) 18 *Georgetown Journal of Legal Ethics* 179, 202.

¹²⁵ *Spaulding v Zimmerman*, 116 NW 2d 704 (Minn Sup Ct, 1962). See also Craver, above n 124, 722.

¹²⁶ 571 F Supp 507 (ED Mich, 1983). For another discussion of this case, see Patrick McDermott, 'Lying by Omission? A Suggestion for the Model Rules' (2009) 22 *Georgetown Journal of Legal Ethics* 1015, 1019–20.

¹²⁷ 571 F Supp 507, 512 (Judge Gilmore) (ED Mich, 1983).

¹²⁸ *Ibid* 511–12.

¹²⁹ 116 NW 2d 704 (Minn Sup Ct, 1962).

conduct rules to volunteer the new medical information to the plaintiff's lawyer.¹³⁰ However, the court held that, as an officer of the court, defence counsel had an affirmative duty to disclose the existence of the plaintiff's medical condition to the court prior to its approval of the settlement agreement (court approval was required because the plaintiff was a minor).¹³¹ Commentators suggest that the facts in the case were such that 'it seems to be fundamentally inhumane not to disclose to a 20-year-old youth the existence of his life-threatening aneurysm, which presumably required prompt medical attention.'¹³²

In light of these cases, Temkin argues that there may be circumstances in which a practitioner has 'a duty to correct a misapprehension on the part of an adversary which did not emanate from any statement by the attorney or anyone acting on the attorney's behalf.'¹³³

In rare cases, failure to disclose information might amount to a breach of the practitioner's obligations to the court and the administration of justice. An agreement reached in these circumstances might also be contrary to the principles of contract law and the law dealing with unconscionability.

V LAWYER INDEPENDENCE AS AGAINST CLIENT AUTHORITY: RESOLUTION OF CONFLICTING DUTIES

Conflict between the various duties owed by a legal practitioner might arise in mediation when he or she:¹³⁴

- 1 is instructed to mislead a mediator and/or an opponent about material facts or law;
- 2 is instructed to mislead a mediator and/or an opponent about matters such as bottom lines and negotiation strategies;
- 3 knows of relevant binding legal authorities or legislation which is adverse to the client's interests;

¹³⁰ Ibid 710 (Gallagher J), discussed in Craver, above n 124, 721–3.

¹³¹ *Spaulding v Zimmerman*, 116 NW 2d 704, 710 (Gallagher J) (Minn Sup Ct, 1962).

¹³² Temkin, above n 124, 200.

¹³³ Ibid 181; *Fleming* [2006] WASAT 352 (7 December 2006) [73] (Judge Chaney).

¹³⁴ This is not a comprehensive list of the conflicts that may occur between lawyers and clients in mediation. They may also disagree over, eg, the negotiation approach to be adopted and the goals to be achieved. Consideration of these situations is outside the scope of the article.

- 4 has made a statement to the mediator and/or an opponent which the practitioner now knows to be false (or when a partial disclosure has been made which is misleading); or
- 5 has information of similar import to that involved in *Spaulding v Zimmerman* where failure to disclose it seems fundamentally unfair or even inhumane.

In each of these situations, there is potential for conflict between the duties of loyalty and confidentiality owed to the client and the duties owed to the administration of justice and an opponent. How should these conflicts be resolved? Put another way, which duty should prevail in the event of conflict? The following principles for resolution of such a conflict are recognised under the rules of professional conduct and the general law:

- 1 A legal practitioner is an officer of the court¹³⁵ and as a consequence, he or she owes an ‘overriding’ or ‘paramount’ duty to the court and the administration of justice rather than to the client;¹³⁶
- 2 Duties owed to clients will normally take precedence over those owed to third parties except where action (or inaction) taken on the client’s behalf also impinges on duties owed to the administration of justice;¹³⁷ and
- 3 Whenever there is a conflict between the duties owed by lawyers, they should exercise an independent judgment in the conduct and management of a case.¹³⁸ Lawyers do not have to do everything asked of them by clients.

¹³⁵ This status is now given a statutory foundation. See, eg, *Legal Profession Act 2004* (Vic) ss 2.3.9, 2.4.6, 2.4.36; *Legal Profession Act 2004* (NSW) ss 33, 44, 103; *Legal Profession Act 2007* (Qld) s 38, 48, 78.

¹³⁶ On the primacy of the duty to the court, see *Giannarelli v Wraith* (1988) 162 CLR 543, 556 (Mason CJ), 572–3 (Wilson J); *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid); ASCR r 3.1; *Barristers’ Rules* r 5(a). For a general discussion on the position in Australia, see Corones, Stobbs and Thomas, above n 59, 88 [2.120]; Dal Pont, above n 14, ch 17.

¹³⁷ For a statement of this principle, see, for instance, the observations by Street CJ: ‘There cannot be any doubt that the duty of a solicitor to his client is paramount, and that he must not prefer his or the interest of another to that of his client’: *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170.

¹³⁸ See *Barristers’ Rules* r 41 and, for solicitor advocates, ASCR r 17.1 which require practitioners to exercise the judgments called for during a case independently, after appropriate consideration of the client’s and instructing solicitor’s wishes, and prohibits a barrister from acting as ‘the mere mouthpiece of the client’. See also *Barristers’ Rules* r 5(e). As to the application of the principle to solicitors, see *Fleming* [2006] WASAT 352 (7 December 2006). See generally Dal Pont, above n 14, 372–3 [17.40].

The principle of lawyer independence is not confined to litigation. As the Tribunal observed in *Legal Practitioners Complaints Committee v Fleming*:

Both in respect of litigation and in providing legal advice and assistance generally, a practitioner is not a mere agent and mouthpiece for his client, but a professional exercising independent judgment (exclusively in many forensic areas) and providing independent advice.¹³⁹

Using these principles, the first conflict situation listed above is easily resolved, in theory at least. Legal practitioners are clearly prohibited from making false statements about material facts or law to mediators and to their opponents (with the decision as to whether or not a statement pertains to material facts being dependent on the facts of the case). They should not follow their client's instructions in this situation. As to the second situation, there is some room for puffing under the rules and the general law so long as statements do not 'grossly' exceed the legitimate rights or entitlement of the client and so long as such statements are not framed as factual misrepresentations. Assuming the reference to 'court' in the definition section of the professional conduct rules means mediators, the third situation is also easily resolved — a legal representative has a duty to disclose relevant binding legal authorities or legislation to the mediator (but not to her or his opponent). In the fourth situation described above, the practitioner is under a duty to correct the statement (or to disclose the missing information). The fifth situation involves a closer call and will depend on the nature of the information involved and other case-specific factors.

This is not to say that a practitioner should actually reveal the information in the last three situations described above, for he or she still owes the client duties of loyalty and confidence. Disclosure of adverse legal authorities to mediators may involve a breach of the duty of loyalty owed to clients. In the last two situations, disclosure of the information by the practitioner will involve a breach of the duties of loyalty and of confidence owed to the client, unless the client waives the benefit of confidentiality. A practitioner's first course of action should be to seek to obtain the client's instructions to reveal the information.¹⁴⁰ If the client does not consent to disclosure, the practitioner

¹³⁹ [2006] WASAT 352 (7 December 2006) [70] (Judge Chaney).

¹⁴⁰ As to what a practitioner might say to his or her client in order to obtain appropriate instructions, see *ibid* [68].

has good cause to refuse to continue to act for the client. This course of action is supported by the LCA *Guidelines for Lawyers in Mediations*.¹⁴¹

In rare circumstances, a practitioner might disclose the information contrary to the client's instructions and in any claim brought in relation to the breach of duties owed to the client argue that it was necessary to do so in order to discharge the higher duty to the administration of justice.¹⁴²

These arguments take on more meaning in the context of a real fact scenario. In the discussion which follows, the principles identified above are applied in the context of the facts which gave rise to the decisions in *Mullins*¹⁴³ and *Garrett*.¹⁴⁴

VI MULLINS AND GARRETT REVISITED

The most notable recent cases in Australia involving lack of appropriate disclosure by legal representatives in mediation are those of *Mullins* and *Garrett*. The focus of discussion to date has been almost exclusively on *Mullins*. Mullins (a barrister) was briefed by Garrett (a solicitor) to represent the plaintiff in a claim for damages for personal injuries caused as a result of a motor vehicle accident. Legislation mandated the exchange of specified information and a compulsory settlement conference, which could be mediated with the agreement of the parties.¹⁴⁵ The parties exchanged information (including, from the plaintiff, expert reports detailing assumptions about life expectancy and estimates of losses and future care needs based on those assumptions) and the matter was scheduled for mediation. Just days before the mediation was due to commence, the plaintiff advised his lawyers that he had been diagnosed with cancer unrelated to the incident that gave rise to the claim. It was likely that the cancer would further reduce his life expectancy. Mr Mullins advised the plaintiff that, in his preliminary view, the cancer facts should be disclosed to the defendant before the mediation. The

¹⁴¹ LCA, *Guidelines for Lawyers in Mediation* (March 2007) cl 2.2 <<http://www.lawcouncil.asn.au/programs/national-policy/alternative-dispute-resolution/documents.cfm>>. Similar provision is made by the Law Society of New South Wales' *Professional Standards for Legal Representatives in a Mediation*: Law Society of New South Wales, *Mediation and Evaluation Information Kit* (1 January 2008) 17 cl 5.4 <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf>>.

¹⁴² Corones, Stobbs and Thomas, above n 59, 151 [4.120]; Dal Pont, above n 14, 234 [10.45]; Ross, above n 2, 366-7 [11.9].

¹⁴³ [2006] LPT 012 (23 November 2006).

¹⁴⁴ [2009] LPT 12 (1 May 2009).

¹⁴⁵ *Motor Accident Insurance Act 1994* (Qld) ss 45, 51A, 51B.

plaintiff instructed Mr Mullins and Mr Garrett that he did not wish to reveal the cancer facts unless he was legally obliged to do so and that he wished the mediation to proceed as scheduled. Mullins undertook some research and consulted senior counsel about the matter. He concluded that the plaintiff was not obliged to disclose the cancer diagnosis provided no positive assertions were made during the mediation. The information concerning the plaintiff's cancer diagnosis was not revealed at the mediation and the insurer settled in ignorance of it. The insurer commenced action to recover the sum paid to the plaintiff after the plaintiff died. The insurer's claim was settled without trial but disciplinary proceedings were brought against both practitioners (in separate proceedings) for knowingly misleading the insurer and its lawyers about the plaintiff's life expectancy. Had the mediation been postponed or delayed for more than two weeks, the information would have had to have been disclosed in accordance with the legislative scheme; the legislation required that the insurer be informed of any significant change in the claimant's medical condition within one month of the claimant becoming aware of the change.¹⁴⁶ The mediation took place before the expiration of this period. Consequently, the claimant was not in breach of the relevant provision of the legislation. Nonetheless both legal practitioners were found to have intentionally and fraudulently deceived the insurer and its lawyers about the accuracy of fundamental assumptions made in respect of life expectancy, and were fined for professional misconduct.

With the benefit of hindsight, it seems clear where the practitioners went wrong. A distinguishing fact in both cases is that the practitioners had made representations to the opponent prior to the mediation and that those representations, which were 'critical to important parts of the claim'¹⁴⁷ and relied upon by the defendant, had become false by the time the mediation was conducted, a fact known to both Mullins and Garrett. They were obliged, under the professional conduct rules and at common law, to correct the false statements. They certainly could not continue to rely upon the statements, which is exactly what they did. At the mediation, Mullins made statements such as '[t]he claim for future care set out in the [document] was very reasonable; and [t]he claim for economic loss was based upon the [report]'.¹⁴⁸ He continued to rely on, and refer to, the reports although the information

¹⁴⁶ *Ibid* s 45.

¹⁴⁷ *Mullins* [2006] LPT 012 (23 November 2006) [17] (Byrne J).

¹⁴⁸ *Ibid* [14].

they contained was no longer accurate.¹⁴⁹ The case against Garrett was slightly different in that he remained silent at the mediation. The Tribunal held that he had independent responsibility throughout the mediation and that in remaining silent, he practised a fraudulent deception (analogous to that committed by Mullins) on the insurer and its lawyers.¹⁵⁰

Unfortunately, neither case gives a detailed account of the rules of disclosure governing legal representatives in mediation. In each case, the Tribunal was directly concerned with the duty of disclosure owed by a legal representative to an opponent.¹⁵¹ At the proceedings against Mullins, Byrne J (who together with two lay members, constituted the Legal Practice Tribunal) pointed to the existence of rr 51 and 52 of the *Queensland Bar Rules*,¹⁵² which contained the prohibition against misleading an opponent, and concluded that Mullins could not have approached the mediation on the basis that he was entering an ‘honesty-free zone’.¹⁵³ Justice Byrne expressed the view that parties to a negotiation — even one ‘tinged with a commercial aspect’ — should be afforded ‘a measure of *honesty* from each other.’¹⁵⁴ He observed that Mullins posed the wrong questions when conducting his research. His Honour continued:

Supposing that no more *candour* was to be expected of him at this mediation than of an advocate in court, the respondent inquired of a senior colleague whether, at a trial, a plaintiff’s barrister had to lead evidence of contingencies that adversely affect the client’s claim — missing the significance of his continuing reliance on the life expectancy assumption.¹⁵⁵

On the basis of these comments from Byrne J, some authors assert that legal representatives owe different standards of honesty and candour in mediation from that which they owe in litigation.¹⁵⁶ In particular, it is argued

¹⁴⁹ Ibid [34].

¹⁵⁰ [2009] LPT 12 (1 May 2009) [25], [34] (Mullins J).

¹⁵¹ Ibid [22]; *Mullins* [2006] LPT 012 (23 November 2006) [27]–[29] (Byrne J).

¹⁵² *Mullins* [2006] LPT 012 (23 November 2006) [29]. These rules were in the same terms as rr 48–9 of the *Barristers’ Rules*, prohibiting barristers from knowingly making a false statement to the opponent in relation to the case (including its compromise) and requiring them to take all necessary steps to correct any false statement as soon as possible after becoming aware that the statement was false.

¹⁵³ *Mullins* [2006] LPT 012 (23 November 2006) [29].

¹⁵⁴ Ibid [27] (emphasis added).

¹⁵⁵ Ibid [34] (emphasis added).

¹⁵⁶ Hardy and Rundle, above n 2, 222–3. See also Spencer, ‘Misconduct by a Barrister’, above n 2, 137.

that legal representatives owe an affirmative duty to disclose relevant facts in mediation.¹⁵⁷ These authors overstate the significance and effect of the decision in *Mullins*.

To begin with, these authors (and indeed, even Byrne J appears to have fallen into this trap) blur the distinction between honesty and candour. Although Byrne J uses the word 'candour' on one occasion, the rules to which he refers (rr 51 and 52 of the *Queensland Bar Rules*) do not require candour between opponents. Rather, the rules forbid the making of 'false statements'.¹⁵⁸ There is no affirmative duty of disclosure imposed under the rules *unless* disclosure is required to qualify a partial truth or, as was the case in *Mullins*, to correct a statement which has become false.

Some commentators fail to make a distinction between the duties owed to mediators and the duties owed to opponents. Legal representatives owe different duties depending on whether they are dealing with the court (and possibly, a mediator) or with an opponent. As has already been noted, *Mullins* and *Garrett* were decided on the basis of duties owed to opponents. As to duties owed to mediators, the cases are silent.

Justice Byrne did allude to a distinction between duties owed in mediation and duties owed in litigation — which is perhaps unfortunate. He did not elaborate upon what he meant. He mentions the obligations owed to the court (and the fact that the definition of court includes mediations) only in passing in a footnote.¹⁵⁹ There was no need for the Tribunal to distinguish between litigation and mediation. *Mullins* ought not to have continued to rely on the by now inaccurate reports whether he was appearing in litigation or in mediation. Litigation is not an honesty-free zone any more than is mediation.

Nothing about the cases turned on whether or not it was a commercial matter. *Mullins* and *Garrett* were obliged, under the professional conduct rules and at common law, to correct the statements they knew to be false. This is not to say that they ought to have revealed the information. They ought to have sought their client's permission to reveal the new information and, if that permission was not forthcoming, they ought to have withdrawn, a course of action that would have raised a 'red flag' to the defendant with the desired effect. Had *Mullins* or *Garrett* disclosed the information without the client's

¹⁵⁷ Monichino, above n 2, 14 (who asserts that this is one view of Byrne J's decision).

¹⁵⁸ *Mullins* [2006] LPT 012 (23 November 2006) [29]. This observation is also made by Higgs, above n 2, 60.

¹⁵⁹ *Mullins* [2006] LPT 012 (23 November 2006) [29] n 18. His Honour notes that the definition of 'court' in the rules includes 'mediations' but he does not elaborate on the meaning to be given to the term 'mediations'.

consent, they would have breached their duties to the client and possibly laid themselves open to a claim by the client for breach of duty — a claim they might have defended on the grounds that disclosure was necessary to further the administration of justice. They might also have argued that disclosure was necessary to avoid assisting the client in the commission of a fraud.¹⁶⁰ Had the information been disclosed, the mediation would likely have been adjourned pending preparation and production to the defendant of amended reports. At least one commentator maintains that Mullins should have expressly withdrawn the initial reports.¹⁶¹ Had that occurred, fresh reports would have had to have been furnished not only because their disclosure was required under the legislation but also because without them, the plaintiff had no case.

Here, finally, is the real point to be taken from these cases. They lead one to the conclusion that the existing law governing disclosure between a legal representative and his or her opponent is adequate. The law essentially provides that if a party chooses to make representations to an opponent about material facts and law, those representations must not be false. A party has no choice but to make some representations of fact or law, or he or she cannot make or respond to a claim. If statements are made and they are later discovered to be false, the statements must be corrected.

VII CONCLUSION AND DIRECTIONS FOR FURTHER RESEARCH AND ANALYSIS

This article has challenged the view that legal representatives owe different standards of honesty and candour in mediation from that which they owe in litigation (a proposition that is often sourced to the decision in *Mullins*). At present, under the professional conduct rules in Australia, it seems that legal representatives owe mediators the same duties of honesty and candour as they owe to the court. As a consequence, they must not mislead or knowingly or recklessly deceive mediators (at least with respect to matters of law and fact), and they are obliged to correct a misleading statement as soon as they become aware that it is misleading. They may even be prohibited from misleading mediators about matters such as a client's interests, BATNAs, bottom line and negotiation strategies. As to candour, legal representatives are obliged to

¹⁶⁰ In this instance, they might have argued that the duty of confidentiality and the protection afforded by legal professional privilege did not extend to communications made in furtherance of a crime (or for fraudulent purposes): see discussion above nn 33, 92. As to what amounts to fraud for these purposes, see Dal Pont, above n 14, 252–3 [11.60].

¹⁶¹ Higgs, above n 2, 61.

inform mediators of relevant binding authorities and legislative provisions of which they are aware. But there is no obligation to disclose to a mediator facts which are adverse to a client's interests. There are many reasons why it might be better for a client to be fully candid with a mediator (for example, it might lead to the formation of a mutually satisfactory outcome, one which is not susceptible to later attack); and it might be appropriate for legal representatives to counsel a client to reveal the information. What a legal representative should not do, except perhaps in the rarest of circumstances, is reveal the information without the client's consent.

Legal representatives owe their opponents in mediation the same standards of honesty and candour as they owe to them in court (or in any other context). They cannot mislead their opponent about material facts or law. However, some allowance is made under the law for puffery. As a general rule, there is no obligation of candour owed to one's opponent in mediation. The rules of professional conduct do not prohibit 'silence', unwillingness to present a client's case and refusal to make a settlement offer. Nor is there any duty to assist the opponent in any way. There currently exists a silent safe harbour — absent specific statutory requirement, procedural rule, principle of substantive law, or prior factual representation that requires either qualification or correction, a legal representative is not subject to a duty to make affirmative factual representations in mediation. However, it is worth bearing in mind that it is practically impossible for a person to put, or respond to, a claim without making some statements — when made, those statements must not be false.

The professional conduct rules do not impose on legal representatives duties to participate in mediation in good faith or to cooperate with a mediator or an opponent in mediation. Nor does it appear that these duties exist in general law (at least, the law in this regard is not settled). The absence of defined parameters for a duty of good faith does not, however, give a legal practitioner a licence to mislead others. A practitioner who misleads a mediator or an opponent about a material fact might be held to have acted in bad faith.

The professional conduct rules and the general law require practitioners to act fairly, but in the context of mediation, it is suggested that practitioners discharge their duty of fairness with respect to process matters by complying with 'reasonable' guidelines set by the mediator. There is no general duty to ensure fair outcomes or to protect the interests of third parties, although some areas of substantive law impose specific obligations in this regard. However, in rare cases a lawyer's actions in securing an agreement might be considered so unfair as to amount to a breach of his or her obligations to the administration

of justice and to the court. Such an agreement might also be contrary to the principles of contract law and the law dealing with unconscionability.

Some commentators argue that legal representatives ought to be subject to higher standards of honesty and candour in mediation than those to which they are subject in litigation.¹⁶² These proposals cannot be explored here, but some preliminary observations which might assist in future research efforts can be made.

It is not necessary to amend the professional conduct rules to enable full candour, good faith participation, cooperation and outcome fairness in mediation. The current rules enable legal representatives to cooperate with a mediator and the other parties to mediation. They encourage legal representatives to act in good faith and to work towards 'fair' outcomes. The rules also allow legal representatives, subject always to obtaining a client's permission, to:

- 1 present the client's case;
- 2 be candid and to reveal information such as the client's interests; and
- 3 make offers, and give reasons for refusing offers.

Such an approach is perfectly consistent with the discharge of duties owed to a client for it will sometimes be in the best interests of the client for a lawyer to be candid and cooperative.

However, the current rules could be improved. Rule drafters should clarify whether the reference to 'mediations' means mediators, other parties to the mediation or the mediation process. They should clarify whether required disclosures should be made in a joint session or whether disclosure in a separate session will suffice.

Consideration should be given to deleting the reference to 'mediations' from the definition of 'court'. If this amendment were to be made, legal practitioners would owe mediators the same duties of honesty and candour as

¹⁶² See, eg, Robert C Bordone, 'Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes' (2005) 21 *Ohio State Journal on Dispute Resolution* 1; Carrie Menkel-Meadow, 'Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve' (2004) 57 *Current Legal Problems* 84, 106; Christopher M Fairman, 'Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?' (2002) 18 *Ohio State Journal on Dispute Resolution* 505; Kimberlee K Kovach, 'Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards' (2003) 39 *Idaho Law Review* 399. A number of authors also call for new rules to govern lawyers' conduct in negotiations: see, eg, Ross, above n 2, 523 [14.9]; Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' (1993) 4 *Australian Dispute Resolution Journal* 216.

they owe to their opponents. There is some ground for arguing that the current rules governing relations between a legal representative and his or her opponents are adequate to protect against dishonesty in mediation. If Mullins and Garrett had followed the rules, a revised report would have been provided to the defendant (or one or both of them would have withdrawn the report, alerting the defendant to the fact that all was not well and leading to an adjournment of the mediation).

Amongst the questions that need to be considered in the future are the following:

- 1 What are the values and goals of mediation and are they different from, or similar to, those of litigation? What difference does the answer make?
- 2 What are the roles and functions of mediators and are they different from, or similar to, those of judges and other adjudicators? What impact ought the answer to this question have on the standards of honesty and candour owed by legal representatives? One of the issues which needs to be considered is whether or not legal practitioners ought to be obliged to disclose relevant legal authority and legislative provisions to mediators when mediators do not make decisions about substantive law matters.
- 3 What type of information exchange is likely to take place in mediation, as compared to that which takes place in litigation? If there is a difference, how should it be accommodated in the rules? Is it problematic that in mediation, the truth of information about matters such as a client's interests, BATNAs, and negotiation goals may change constantly in the course of a single meeting? Is it realistic to subject legal representatives to a prohibition against 'misleading' mediators on all matters?
- 4 What allowances need to be made to accommodate the fact that mediation, unlike litigation, may be conducted in whole or in part, via separate sessions? Some commentators argue that higher standards of honesty and candour are required in mediation because of the holding of separate sessions.¹⁶³ They argue that separate sessions create a deception synergy¹⁶⁴ leading to greater inaccuracy of information in a context in which the opponent is not present to test it.¹⁶⁵ Are any of these arguments valid and on the basis of what evidence?

¹⁶³ *ABA Formal Opinion*, above n 74, 7; Douglas and McMillan, above n 2.

¹⁶⁴ *ABA Formal Opinion*, above n 74, 7.

¹⁶⁵ Douglas and McMillan, above n 2.

- 5 Does the answer to any of these questions differ for court-ordered, statutory and private mediations?
- 6 Should higher duties of honesty and candour be owed to judicial mediators, and if so, why and what are the appropriate standards?
- 7 Does the answer to any of these questions depend on the nature of the mediation (for example, for mediation involving a personal injuries claim as opposed to a family law matter)?
- 8 Are there different questions that need to be asked and answered depending on the nature of the mediation and if so, what are they?

These aspects of the law governing disclosure of information in mediation in Australia require thoughtful analysis. The aim of this article has been a modest one: to ascertain the current state of the law governing disclosure in mediation. Currently in Australia, legal representatives owe exactly the same duties of honesty and candour in mediation as they owe in litigation before a court of law. *Mullins* did not alter the law, or even make its application any clearer, but it has heightened our awareness of the need to know the law governing these important issues.