



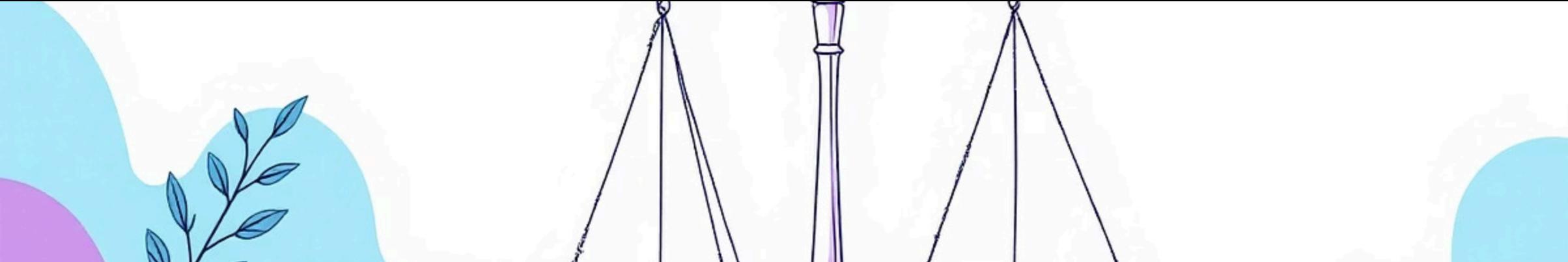
# Negotiator's Duties to Others

## Lecture 6

 by Roger Batchelor

MODEL RULES 4.1, 4.2, 4.3

Understanding ethical obligations when representing clients in negotiations is fundamental to legal practice. These Model Rules establish clear boundaries for attorney conduct, protecting both clients and opposing parties while ensuring the integrity of the legal system.



RULE 4.1

# Truthfulness in Statements to Others

Model Rule 4.1 prohibits lawyers from knowingly making false statements of material fact or law to third persons during client representation. Additionally, attorneys must disclose material facts when necessary to avoid assisting criminal or fraudulent acts by clients, unless Rule 1.6 confidentiality protections apply.

## No False Statements

Attorneys cannot knowingly make false statements of material fact or law to third parties

## Duty to Disclose

Must reveal material facts to prevent assisting client fraud, unless confidentiality rules prohibit disclosure

# The Overlap with Rule 8.4

Rule 8.4 serves as a catch-all provision prohibiting dishonesty, fraud, deceit, or misrepresentation. The Rule 4.1(a) prohibition against false statements of material fact overlaps with Rule 8.4's broader restrictions. However, Rule 4.1 specifically addresses statements made during negotiations on a client's behalf.

## Rule 8.4

Broad prohibition against dishonesty, fraud, deceit, or misrepresentation in professional conduct

## Rule 4.1

Specific focus on truthfulness in statements to third parties during client representation and negotiations

# The "Raphael's" Day Spa Case

## CASE STUDY

Sally and Jesse co-owned "Raphael's" day spa. When their partnership soured, Jesse sued for full ownership. Attorney Sarah represented Sally, who claimed the spa had \$100,000 in cash accounts. Jesse agreed to pay this amount for Sally's share. The day before signing, Sally revealed the books were "cooked" and the spa was actually broke.

01

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### Initial Statement

Sarah told opposing counsel the spa had \$100,000 cash based on Sally's information

02

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### Client Revelation

Sally confessed the books were fraudulent and the business was bankrupt

03

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### Ethical Dilemma

Sarah must balance truthfulness obligations against client confidentiality duties

## Did Sarah Violate Rule 4.1?

Initially, Sarah made no violation because she did not knowingly make a false statement—she believed Sally's information was accurate. The cash amount was material to negotiations, and the statement was false, but Sarah lacked knowledge of its falsity at the time.

- ❏ **Key Principle:** Rule 4.1 requires knowing misrepresentation. Attorneys who unknowingly relay false client information do not initially violate the rule.



# The Duty to Correct False Statements

According to the New Hampshire Supreme Court in *Carpentino's Case*, failing to correct a previously made statement that the attorney later discovers was false can be equivalent to making a false statement. When a negotiated settlement depends on the truth of a fact that proves false, the attorney may have an obligation to correct the mistake.

## Initial Statement

Attorney makes statement believed to be true at the time

## Discovery of Falsity

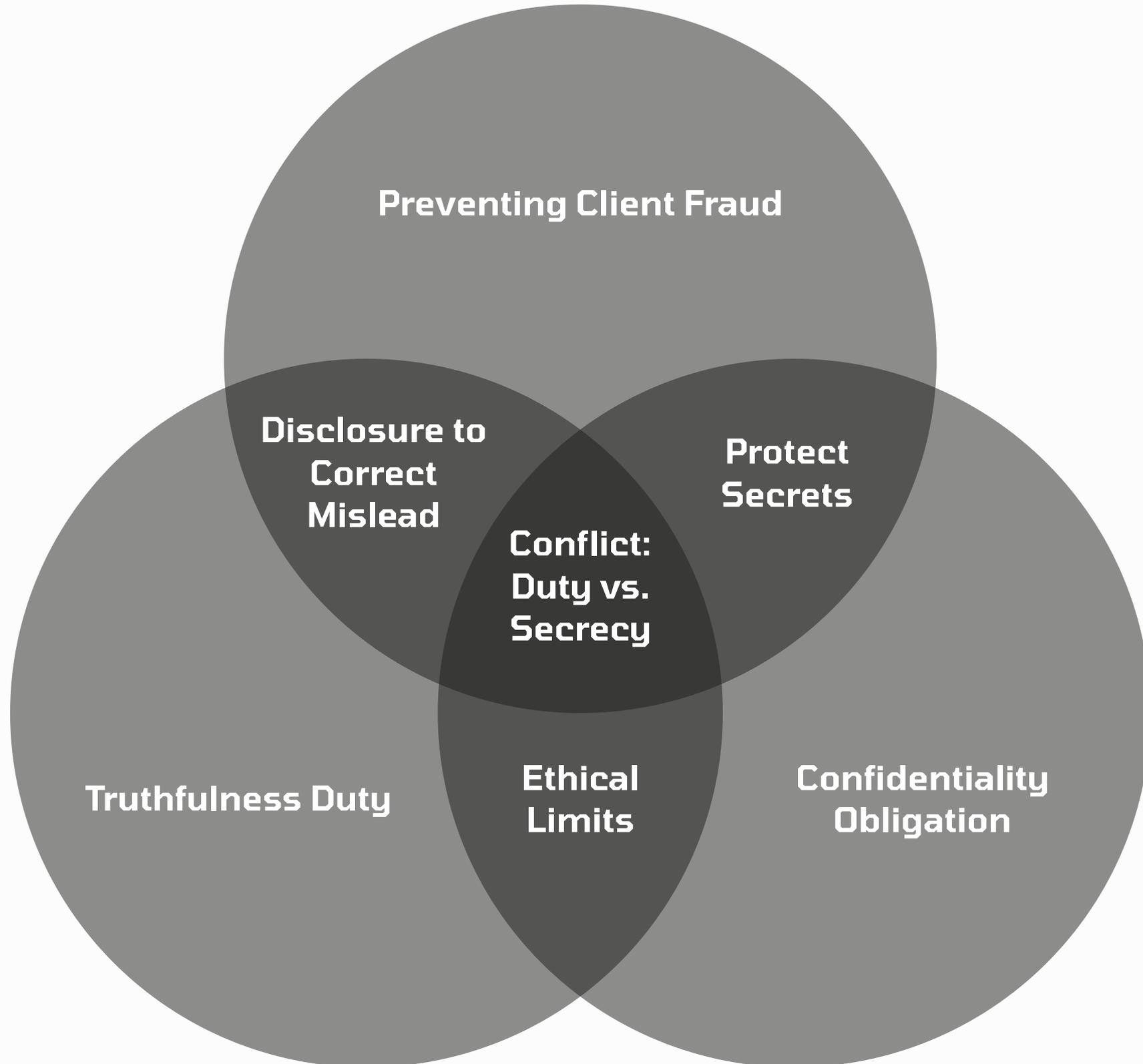
Attorney later learns the statement was actually false

## Obligation to Correct

Failure to correct may constitute making a false statement under Rule 4.1

# Competing Ethical Obligations

Sarah faces conflicting duties: Rule 4.1 requires truthfulness, while Rule 1.6 protects client confidentiality. Rule 4.1(b) prohibits assisting criminal or fraudulent client acts unless disclosure violates confidentiality rules. Whether the obligation to correct exists depends on specific circumstances, and competing obligations like confidentiality may outweigh Rule 4.1 requirements.



## RULE 4.2

# Communication with Represented Persons

Model Rule 4.2 prohibits attorneys from communicating about the representation subject with persons known to be represented by counsel, unless the other lawyer consents or law/court order authorizes it. This rule protects parties who have chosen legal representation from potential overreaching by opposing counsel.



## No Direct Contact

Cannot communicate with represented parties without their attorney's consent



## Protection Rationale

Prevents manipulation and ensures fair representation in legal matters



## Limited Exceptions

Only with counsel consent or court authorization



# The Grandpa Lou Example

Jack sued Grandpa Lou over a contract dispute. Attorney Eric represented Jack, while Joe represented Lou. When negotiations stalled, Eric called Lou directly and pitched a settlement Lou had previously rejected through Joe. Lou agreed and signed the papers.

## The Violation

Eric violated Rule 4.2 by contacting Lou directly without Joe's consent. This violation occurs regardless of Lou's mental capacity or sophistication—the rule protects all represented parties equally.

## Why It Matters

The rule ensures parties receive their attorney's counsel and protection during negotiations, preventing opposing counsel from exploiting direct access to secure unfavorable agreements.

# Client Waivers Are Ineffective

Frankie, a sophisticated paralegal injured in a car accident, hired local counsel. Defendant's attorney Johnnie called asking if she would waive her Rule 4.2 protection. Frankie, confident in her abilities, signed a waiver and agreed to the interview.

## Waiver Doesn't Work

According to Comment 3, Rule 4.2 applies even when the represented person initiates or consents to communication. Frankie's written waiver provides no protection for Johnnie.

## Attorney's Right

The right belongs to the party's attorney, not the party. Only the attorney can approve direct contact and waive the right to be present during communications.

- ❏ Minnesota courts have clarified that Rule 4.2 protects the attorney-client relationship, focusing on attorneys' obligations to respect opposing counsel's role.



## Rule 4.2 and Corporate Clients

Widget Waterers International (WWI) was involved in complex litigation with shareholders, corporate officers, and WWI itself as parties with opposing interests and separate counsel. Counsel for one shareholder received permission from each officer's attorney to interview the officers. WWI's counsel attempted to disqualify shareholder's counsel for a Rule 4.2 violation.

No violation occurred because the officers' attorneys consented to the communications. Comment 7 to Model Rule 4.2 clarifies that organizational counsel need not consent if the contacted party has their own counsel who gives consent.

RULE 4.3

# Dealing with Unrepresented Parties

Model Rule 4.3 governs attorney conduct when dealing with unrepresented persons. Attorneys must not state or imply they are disinterested, must correct misunderstandings about their role, and cannot give legal advice to unrepresented persons whose interests conflict with the client's interests.

1

## No False Neutrality

Cannot state or imply disinterest in the matter

2

## Correct Misunderstandings

Must clarify role when unrepresented person is confused

3

## Limited Advice

Only advise securing counsel when interests conflict

# The Landlord-Tenant Court Scenario

Landlord Nat sued tenant Lisa for nonpayment of rent in Landlord-Tenant Court, where self-representation is common. Nat hired attorney Arnie. Before the hearing, Arnie approached Lisa in the hallway saying he wanted "what's best for everyone" and suggested she settle to avoid losing and getting evicted.

## Wrong Approach

Arnie's statement "I just want what's best for everyone" could make Lisa believe he's disinterested, violating Rule 4.3. The threshold for violation is far below "intimidating"—any potential misinterpretation creates liability.

## Correct Approach

Arnie must identify himself as Nat's attorney, explain their interests are opposed, and strongly advise Lisa to get counsel before discussing settlement terms.

# Permissible Communication with Unrepresented Parties

Rule 4.3 does not prohibit negotiating with unrepresented persons. Comment 1 requires attorneys to identify their client and explain opposing interests. Comment 2 explicitly permits settlement negotiations if the attorney has explained they represent an adverse party.

**1**

## Identify Client

Clearly state who you represent

**2**

## Explain Opposition

Clarify that interests are adverse

**3**

## Advise Counsel

Recommend getting an attorney

**4**

## Negotiate Terms

Proceed with settlement discussions

- ❑ Even with proper disclaimers, attorneys must avoid inadvertently giving legal advice. Stating an unrepresented party's "best legal option" may violate Rule 4.3, as seen in *People v. Mascarenas*.

# Navigating Ethical Obligations in Negotiations

Attorneys and legal assistants must exercise extreme caution when conducting client negotiations. Multiple Model Rules govern negotiation conduct, creating complex intersections between truthfulness, confidentiality, and proper communication protocols.



## Know the Rules

Understanding Rules 4.1, 4.2, and 4.3 is essential for ethical practice



## Balance Competing Duties

Navigate tensions between truthfulness, confidentiality, and client advocacy



## Protect All Parties

Ensure represented and unrepresented parties receive appropriate protections

Reaching the best settlement is meaningless if the agreement is invalidated because legal professionals violated ethical rules in procuring the other side's agreement. Vigilance in following these Model Rules protects both clients and the integrity of the legal system.