



NEGOTIATION ETHICS:

“I’m sorry but we have a better offer than that; you’ll have to improve your offer to stay in the running.”

ACC July MCLE CA Program (1 hour Legal Ethics credit)

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“I have no authority to settle below
\$10,000,000”

[Actually, the client will be
happy with \$1,000,000.]

“ There is no question that your client infringes and our client’s patents are valid and well respected in the industry”

[That is, not taking into account
the prior art we just received.]

“Protection against third party claims
is critical for my client”.

[The client in fact thinks the risks are miniscule. This is just a diversion.]

One commentator has stated:

“Deception is inherent in the negotiation process”.

Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations Should There Be a Silent Safe Harbor?*, 18 Geo. J. Legal Ethics 179, 181 (2004).

Another says:

“The fundamental question is not whether legal negotiators may use misrepresentations to further client interests, but when and about what they may permissibly dissemble”.

Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest / How to Be Assertive Without Being Offensive*, 38 S. Tex. L. Rev. 713, 715 (1997).

See also, *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435 (D. Md. 2002) for a summary and a discussion of the “truthfulness spectrum.”

So what are the ethical rules we all must follow?

It is the duty of an attorney to do all of the following:

- d) to employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth....

Transactions With Persons Other Than Clients

Rule 4.1 Truthfulness In Statements To Others

http://www.abanet.org/cpr/mrpc/rule_4_1.html

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

- a) make a false statement of material fact or law to a third person....

The Oregon standard is exemplified by *In re Conduct of Fitzhenry*, 343 Ore. 86 (Or. 2007) which held that a misrepresentation is material if it could or would significantly influence the hearer's decision-making process.

ABA Model Rules of Professional Conduct

Transactions With Persons Other Than Clients

Rule 4.1 Truthfulness In Statements To Others - Comment

http://www.abanet.org/cpr/mrpc/rule_4_1_comm.html

MISREPRESENTATION

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

Transactions With Persons Other Than Clients

Rule 4.1 Truthfulness In Statements To Others - Comment

http://www.abanet.org/cpr/mrpc/rule_4_1_comm.html

STATEMENTS OF FACT

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category....

“Posturing” or “Puffing”?

- “This will cost us \$100 per employee”?

This is a false statement of material fact - American Bar Association Formal Ethics Opinion 06-439 p. 1.

- “We will submit evidence on this issue at trial”?

This is a false statement of material fact - American Bar Association Formal Ethics Opinion 06-439 p. 1.

- “My client is hardly likely to accept that amount”

- “To the best of my knowledge, my client’s insurance is limited to \$200,000.”

Slotkin v. Citizens Casualty of New York, 614 F.2d 301 (2d Cir. 1979) held that attorney was liable to plaintiff for fraud for exhibiting “reckless indifference to error” because documents in attorney’s possession showed that there was an additional policy of \$1M.

- The other defendant agreed to a release in return for \$50,000.

See *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1 (1st Cir. N.H. 2005)

- **The Statute of Limitations has run**

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-387 - no duty to disclose to opposing party that statute of limitations has run.

- **The client in a PI suit has died**

Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F.Supp. 507 (E.D. Mich. 1983) held that the attorney's failure to disclose his client's death amounted to a material misrepresentation by omission and a failure to comply with the duty of truthfulness to others.

- **The settlement amount has been wrongly calculated**

In re Gallagher, 332 Ore. 173 (Or. 2001) held that attorney who was aware of opposing counsel's mistake regarding settlement checks had a duty to correct such mistake.

Good ethics make for good deals

- Building trust with an adversary
- Avoiding negotiation strategies that unravel at a late stage
- Avoiding absolute positions that are later reversed
- Dealing with factual and legal mistakes
 - Duty of confidentiality
 - Duty of zealous representation

To Avoid a Dispute

- Will a manifestly unfair or mistaken deal stick?
 - Errors of Fact
 - Errors of Law
- Protect yourself and your client
 - Recitals
 - Representations and Warranties
 - Disclaimers
 - Complete agreement
 - Special “troll” issues
 - Identity of party

Contacting The Other Side

California Rules of Professional Conduct - Rule 2-100

http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Current_Rules.gif&sCategoryPath=/Home/Attorney%20Resources/Rules%20of%20Professional%20Conduct&sFileType=HTML&sCatHtmlPath=html/RPC_Current-Rules-2-100.html

- A. While representing a client, a member [of the California Bar] shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
- B. For purposes of this rule, a “party” includes:
- 1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
 - 2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

- Purpose of Rule:

- Preserve attorney-client relationship of other party, including confidentiality

See California Rules of Professional Conduct - Rule 2-100 Discussion

For a discussion of the definition of “client” under California case law relating to litigation situations, there are two MCLE materials on this topic found at: <http://www.calbar.ca.gov/calbar/pdfs/certification/self-study/mcle44.pdf> and <http://www.calbar.ca.gov/calbar/pdfs/certification/self-study/mcle45.pdf>

- Limitations

- Communications about the subject matter of the representation

California Rules of Professional Conduct - Rule 2-100(A)

- A party[known] to be represented by another lawyer

California Rules of Professional Conduct - Rule 2-100(A)

- Actual knowledge not constructive knowledge

Koo v. Rubio's Rest., Inc., 109 Cal. App. 4th 719 (Cal. Ct. App. 2003)

Questions?

- The opposing party uses a non-lawyer to negotiate (a contract manager, a licensing professional)?
- The opposing party has outside counsel but won't involve them yet?

Additional Sources

- Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiations*, 35 La. L. Rev. 577 (1975).
- *Davin, L.L.C. v. Daham*, 746 A.2d 1034 (N.J. Supp. Ct. App. Div. 2000) - holding that the attorney had a duty to a third party of not including a covenant of quiet enjoyment in a lease for a property that the attorney knew was involved in foreclosure proceedings.
- *In re A.*, 276 Ore. 225 (Or. 1976) - lawyer's client testified that the client's mother was "in Salem" even though the mother was no longer alive and instead was buried in Salem. In the absence of clear evidence of the attorney's duty at the time of the client's testimony, the court dismissed the complaint against the attorney, but the court warned that lawyers faced with similar situations should withdraw from representation if their clients refused to give truthful testimony.
- James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. B. Found. Res. J. 930 (1980) - misleading the other side is part of the game of negotiations.
- Robert Fitzpatrick, *Attorneys' Ethical Responsibilities During Settlement Negotiations*, SG047 A.L.I.-A.B.A. 1153, 1157 (1999) - an attorney may employ evasive tactics, however, deliberate misrepresentations will amount to violations of the duty of truthfulness to others.
- *Carpenito's Case*, 139 N.H. 168 (N.H. 1994) - attorney was disciplined for failing to correct a material statement relating to the funds of an escrow account even though at the time the statement was made the lawyer believed it to be true but later found out it was erroneous.
- Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 65.5 at 65-11 (3d ed. 2001) - in regards to misrepresentations, the lawyer's state of mind and the significance of the misrepresented issue are critical; otherwise, the duty of truthfulness to others would become superfluous.
- Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 Geo. J. Legal Ethics 45, 93-102 (1994) - principles of morality should steer lawyers away from the idea that deception is inherent and appropriate in negotiations.

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Note: The outline set forth above does not purport to offer specific legal advice. Any situation will be fact specific and specific legal advice should be sought.