Post-Conference Special Session

ETHICS IN SETTLEMENT DISCUSSIONS, COLLECTIVE BARGAINING, AND OTHER NEGOTIATIONS

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I. INTRODUCTION

Lawyers routinely negotiate on clients’ behalf. Ninety-five percent or more of all civil litigation settles. Those settlements are typically the product of negotiations between the parties’ lawyers, whether conducted directly or facilitated by third-party neutrals. Countless disputes are resolved through negotiation before suit is ever filed.

Despite the fact that most lawyers negotiate in their practices, many are unaware of their related professional responsibilities and liabilities, especially with respect to truthfulness. There are several possible reasons for this confusion. First, the negotiation process varies by place and subject, and thus calls either for different rules in different contexts or for rules stated only at a very high level of generality. Second, negotiation is paradoxical in the sense that lawyers must be honest even as they are attempting to mislead or distract their adversaries. Third, and consistent with the second point, most lawyers understand that some dissembling and misdirection is expected in negotiation. As a result, ethics rules relating to honesty are easily discounted or disregarded. Fourth, lawyers are naturally influenced by personal beliefs, opinions and perceptions about lawyers’ roles in negotiations in general, and theirs in particular. Trouble potentially lurks if lawyers’ personal frameworks accommodate only partisan views of issues, treat negotiation as a zero-sum game, or place the lawyer’s desires or interests ahead of the client’s.

Honesty is not the only professional responsibility issue in negotiations, but, regardless, framing lawyers’ negotiation obligations by reference to ethics rules can be difficult. Consider Model Rules 1.1 and 1.3, which mandate lawyers’ competent and diligent representation of clients. It goes without saying that lawyers must represent clients competently and diligently in negotiations, yet it requires no insight for lawyers to understand that refusing to negotiate, negotiating indifferently, or allowing an opponent’s settlement deadlines to pass may in some cases reflect incompetence or neglect. It is equally plain that lawyers who are not competent to practice in an area of law are unlikely to negotiate effectively on behalf of clients whose fortunes depend on substantive expertise in that area.

Some ethics rules bearing on negotiations are clear. For example, Rule 1.2(a) states that the decision to settle a matter is exclusively the client’s call. A lawyer cannot usurp a client’s right to control settlement even if the lawyer believes the client’s position is unreasonable, nor can lawyers demand that clients relinquish the right to control of settlement as a condition of their representations. It is unethical for lawyers to impair clients’ right to settle through fee agreements that economically penalize the client for settling on terms that the lawyer deems unsatisfactory. Similarly, in criminal cases, Rule 1.2(a) establishes that the decision to enter a guilty plea rests with the client. Accordingly, a lawyer cannot refuse a client’s request to enter a guilty plea.

It is equally clear that the Model Rule 4.2 prohibition on ex parte communications with a represented party applies in negotiations. As a result, settlement obtained in violation of Rule 4.2 may be unenforceable.

In other situations, a particular rule is triggered by a lawyer’s extraordinary misconduct. Consider Rule 4.4(a), which states that in representing a client, “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”
II. NEGOTIATION AND AUTHORITY TO SETTLE

The attorney-client relationship is an agency relationship, with the client cast as principal and the lawyer as agent. Generally, an agent’s acts on behalf of a principal will bind the principal if the acts are expressly authorized or the agent has apparent authority. The mere fact that a client is represented by a lawyer, however, does not imply the lawyer’s authority to settle the client’s claim. Further, the fact that a client has authorized a lawyer to enter into settlement negotiations does not mean that the lawyer is authorized to accept a settlement; there is, after all, a difference between the power to conduct negotiations and the power to conclude a dispute. Lawyers’ agency with respect to agreeing to settlement is limited by Model Rule 1.2(a), which requires a lawyer to obtain a client’s express authority to settle a matter.

In most cases, however, an opposing party does not know whether a client has expressly authorized her lawyer to settle and cannot ethically inquire of the client concerning the lawyer’s actual authority. Certainly, a lawyer’s statement that she will “recommend” a settlement to her client rather than simply accepting an offer should signal to opposing counsel that the lawyer lacks authority to settle on the stated terms, but limitations are not always so plain. To fill this knowledge or informational void, some courts indulge the presumption that a lawyer who is representing a client in litigation has apparent authority to settle on the client’s behalf. It is the client’s burden to rebut this presumption and prove the lawyer’s lack of authority. Other courts simply hold that the lawyer has apparent authority to settle on the client’s behalf without mention of a presumption. Where a lawsuit has not been filed at the time of settlement negotiations, however, a client’s mere engagement of a lawyer does not, in some courts’ eyes, cloak the lawyer with apparent authority to settle a dispute. Other courts will not presume a lawyer’s authority to settle, but will instead require the party moving to enforce the settlement to establish the lawyer’s authority, or require the party seeking to set aside a settlement to prove the lawyer’s lack of authority. As most lawyers would expect, disputes typically pivot on whether the lawyer had apparent authority to settle.

Lawyers must always remember that the decision to settle is vested in the client. Lawyers may counsel clients on settlement and explain the desirability or drawbacks of certain approaches or options, and may even attempt to persuade clients to decide in particular ways, but they may not usurp clients’ authority. Lawyers who are negotiating on clients’ behalf should seek clear instructions from their clients as to the scope and limits of their authority to compromise matters. Lawyers can, of course, seek those instructions well in advance of any efforts at settlement. Lawyers are wise to document those instructions.

On the other side of the coin, lawyers seeking to make certain that opposing counsel has authority to bind the opposing party to a settlement should make reasonable efforts to confirm that opposing counsel have authority to settle, to agree to particular terms, and the like. When settlement discussions are occurring in connection with court-ordered or court-annexed mediation, lawyers can seek to have language included in a court order regarding the opposing party to attend the mediation along with opposing counsel or that the opposing party otherwise represent that its counsel participating in the mediation has full settlement authority. Further, when settlement discussions occur through mediation of any kind, lawyers can insist that prior to adjourning the mediation, the parties come together in the presence of the mediator and their respective counsel to confirm that they have expressly authorized the settlement on the agreed terms.
III. JOINT REPRESENTATION

Commonly in litigation, an attorney is asked to represent two clients regarding one matter. Typically, the two potential clients are the employer and an accused employee (either current or former), or, sometimes two corporate entities being named as “joint employers.”

While there are tactical advantages for joint representation, attorneys must evaluate each case to determine whether joint representation presents a conflict of interest, using the Model Rules of Professional Conduct as a guide. Inappropriate representation of multiple clients can result in sanctions or discipline from the Bar, and could even result in a new trial. A lawyer cannot represent a client with whom a concurrent conflict of interest exists. It further defines a conflict of interest as situations where “the representation of one client will be directly adverse to another client, or…there is a significant risk that representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” However, 1.7(b) provides four conditions under which a lawyer may represent multiple clients:

1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. There is no law against the representation;
3. One client does not assert a claim against another; and
4. Each client gives written, informed consent.

To determine whether there is a potential conflict of interest, the attorney must conduct an initial factual investigation. The goal of this is to determine whether either party could assert a defense that would be adverse to the other or whether there are any potential cross claims between the parties. Additionally, during the investigation, the attorney should take care to assess both “the asserted claims and the potential defenses to those claims.” If it is obvious that the employer and employee have adverse positions at the outset, the attorney cannot engage in joint representation.

In many situations, the employer and employee may not initially appear to be adverse to each other but during the course of representation, one client may reveal new information that “works against the interests of the other, but [aids] the discloser’s defense.” Here, it is necessary to examine Model Rule of Professional Conduct 1.6, which states that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” If the disclosing client will not consent to sharing the information, the lawyer may have to withdraw representation if the information would “materially interfere with the attorney’s independent professional judgment for each client” meaning the lawyer cannot advocate for both clients’ positions because they are adverse to each other.
IV. LAWYERS’ DUTY TO COMMUNICATE WITH CLIENTS

Returning now to the rules of professional conduct, lawyers’ duty to communicate with clients is essential to the attorney-client relationship in negotiations as elsewhere. This duty is primarily enforced through Model Rule 1.4, which provides:

(a) A lawyer shall:

1. promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these Rules;

2. reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

3. keep the client reasonably informed about the status of the matter;

4. promptly comply with reasonable requests for information;

5. consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4(a) imposes several specific requirements, but some general observations about lawyers’ duty to communicate should be made at the outset. First, lawyers’ duties under Rule 1.4 are mandatory, not aspirational. Second, lawyers’ duty to communicate is an affirmative obligation in the sense that they must initiate communications when needed; they generally cannot rely on clients to do so. Third, the duty to communicate necessarily requires honest communication. It is impossible for clients who receive untruthful communications from their lawyers to be reasonably informed about the status of their representations. Fourth, the duty to keep a client informed about the status of a matter is tempered by reason. Lawyers need not apprise clients of all details of their representations. A lawyer is not required to communicate with a client as often as the client desires, so long as the lawyer’s conduct is “reasonable under the circumstances.” This rule of reason applies to the lawyer’s duty to initiate communications or volunteer information and to the duty to respond to a client’s inquiries. Fifth, in attempting to communicate with clients, lawyers should use means that are reasonably calculated to succeed. If clients do not return telephone calls, for example, lawyers should try letters or e-mail. Sixth, if a lawyer has multiple clients in a matter, the lawyer’s duty extends to each of them. Seventh, whether a lawyer may be said to have reasonably consulted with or informed a client about a matter is always a case-specific inquiry.

Turning now to Model Rule 1.4(b), explaining matters to clients is an essential aspect of lawyers’ work. Clients are entitled to determine the objectives of their representations. They are also entitled to be consulted with respect to the means by which those objectives are to be
accomplished.\textsuperscript{42} Rule 1.4(b) animates these important principles, recognizing that clients must have sufficient information to “participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.”\textsuperscript{43}

The adequacy of a communication for Rule 1.4(b) purposes may depend on a range of factors, including the subject of the representation, the scope of the representation, the nature of the matter or task at hand, time constraints, the lawyer’s relationship with the client, the client’s unique characteristics, and non-legal considerations. Lawyers clearly must discuss “key strategic decisions” with clients.\textsuperscript{44} In most cases, a lawyer should be expected to explain the advantages and disadvantages of reasonably available alternatives. In litigation, a lawyer should explain the relative risks of trial versus settlement and, where necessary, the possible effects of either beyond the courtroom.\textsuperscript{45}

**The Potential Insurance Defense Trap**

As a client, an insured is still owed a duty of communication by the defense lawyer. The fact that the lawyer is hired and paid by an insurer in no way diminishes her attorney-client relationship with the insured.\textsuperscript{46} Unfortunately, because in most cases an insurer controls its insured’s defense, has the contractual right to settle as it deems expedient, and pays any settlement, a defense lawyer may feel obligated to keep only the insurer informed during settlement negotiations. Such neglect violates Rule 1.4 and may expose the lawyer to potential tort liability to the insured.\textsuperscript{47}

*Teague* demonstrates one reason why insurance defense lawyers must remember that the insured is always a client. Even if the insurer controls settlement, a defense lawyer must inform the insured of all settlement offers absent some contrary agreement with the insured. An insured might have concerns about the effect of a settlement even though the insurer has the right to settle as it deems expedient, and the insured’s ability to raise questions or satisfy such concerns may depend on timely knowledge of the settlement. The fact that the insurer can settle without the insured’s consent, such that the insured cannot attribute damages to a defense lawyer’s failure to convey a settlement offer, is immaterial from a professional responsibility perspective.

**V. LAWYERS’ DUTY OF CONFIDENTIALITY**

Among the most important duties that lawyers owe clients is the duty to maintain the confidentiality of client information. Maintaining confidentiality is a key aspect of negotiations in terms of shielding clients’ goals or strategies from discovery, and, in a worst case scenario, exposing lawyers to misconduct claims if they wrongly conceal material facts that should have been disclosed to an opponent. In any event, the duty of confidentiality is an agency principle that has long been incorporated in ethics rules.

Model Rule 1.6 establishes confidentiality as a professional responsibility principle. Rule 1.6 is intended to encourage clients to trust their lawyers and to be candid with them.\textsuperscript{48} Lawyers’ duty of confidentiality is very broad. The duty attaches to initial consultations even if no attorney-client relationship results, and continues after a representation concludes.\textsuperscript{49} A lawyer’s duty of confidentiality exists regardless of a request to that effect by a client.\textsuperscript{50} It also exists where the client has shared the same information with others.\textsuperscript{51} A lawyer may breach the duty through mere inadvertence.\textsuperscript{52}
Ethics rules prevent the disclosure of information that is neither privileged nor work product. “Confidential” is not synonymous with “privileged” or “immune.” Thus, a lawyer’s duty of confidentiality prevents her from revealing a client’s identity or facts that a client communicates to her, even in situations where the attorney-client privilege and work product doctrine do not protect them.

It is apparent that a lawyer’s duty of confidentiality is important in negotiations and, in the right situation, that the revelation of confidential client information might impair a client’s ability to advantageously settle a contested matter. Lawyers should therefore tightly guard client information. But Rule 1.6 does not exist in a vacuum, and other ethics rules may operate in ways that strain lawyers’ duty of confidentiality. Lawyers’ duty of confidentiality does not immunize them against claims of dishonesty, deceit, fraud or the like, nor does it necessarily excuse their obligations under other rules.

VI. “POSTURING” DURING SETTLEMENT

Honesty in negotiations is a sensitive subject. Posturing during settlement negotiations has ethical considerations that lawyers must be aware of. Some mediators assert that lawyers lie in negotiations nearly all the time. Scholars studying alternative dispute resolution lament that lawyers seem unable to recognize that dishonesty in negotiation is unhelpful, because the most effective negotiators are perceived by opponents as honest and trustworthy. Other scholars contend that the central issue is the type or level of deception that may be ethically employed to enhance bargaining positions. To them, lawyers who believe that no prevarication is ever proper during negotiations place their clients at a disadvantage, since they permit less candid opponents to achieve results that exceed the terms to which those opponents are objectively entitled. In short, the trickiest ethics and liability issues arising out of negotiations involve lawyers’ broad duty of honesty.

Honesty in negotiations may be enforced under several rules of professional conduct. There is, of course, Model Rule 1.2(d), which provides in pertinent part that a lawyer cannot “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Chief among the applicable rules, however, is Model Rule 4.1, which states that in the course of representing a client, “a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”

Although Model Rule 4.1(a) clearly refers to false statements by a lawyer, it is a bit broader than it appears, in that a lawyer may violate Rule 4.1(a) by knowingly affirming or ratifying another person’s false statement, or by failing to correct it. As for the audience, the reference to “a third person” in Model Rule 4.1(a) makes clear that the rule relates to lawyers’ communications with non-clients. Rule 4.1(a) certainly applies to lawyers’ statements to opposing counsel.

In addition, a lawyer’s false statement must be material for there to be a violation. A statement of fact or law is “material” if it is significant or essential, if it could have influenced the hearer, or if it “reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained” in the agreement. Courts evaluate materiality on a case-by-case basis. Rule 4.1(a) does not include a causation or reliance element. In other words, a lawyer violates the rule simply by making a prohibited statement. Most Rule 4.1(a) disputes pivot on whether a statement expresses “fact.” A comment to the rule provides some guidance on this subject related to negotiations:
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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Various other forms of disingenuousness are also ethically permissible. For professional responsibility purposes, lawyers’ statements about a party’s willingness to compromise or resolve a dispute, willingness to concede something or a value placed on a concession, the strength or weakness of a party’s factual or legal positions, the strengths or weaknesses of a party’s case, the value or worth of the subject of the parties’ negotiation, and a party’s goals or objectives all qualify as puffery or posturing rather than as statements of fact.

Lawyers’ duty of honesty may also be enforced under Rule 8.4(c), which makes it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The standard by which a lawyer’s alleged dishonesty is to be judged varies. Many courts hold that a lawyer’s false statement must be knowingly made to violate Rule 8.4(c). Other jurisdictions hold that lawyers may violate Rule 8.4(c) through statements made with reckless disregard for their truth or falsity, or, similarly, through grossly negligent misstatements. A very few courts hold that a lawyer may negligently violate Rule 8.4(c). Whether either of the first two possibilities represents the majority rule is a close call, but the view that a lawyer may violate Rule 8.4(c) through simple negligence is a distinctly minority position.

Rule 8.4(c) is exceedingly broad; it applies to lawyers’ dealings with anyone, including adverse parties, clients, courts and other tribunals, opposing counsel, members of the public, government agencies, and lawyers’ own firms. Rule 8.4(c) does not require a statement; deceit and dishonesty can also be based on the concealment or omission of facts or information. Conduct that may not legally be characterized as deceit or fraud, or which would not count as a misrepresentation as a matter of criminal or tort law, may still evince dishonesty for purposes of discipline under Rule 8.4(c). The cases considering lawyers’ duty of honesty in negotiations generally fall into two categories. The first involves lawyers lying in negotiations. The second involves lawyers failing to disclose material facts or failed to correct another party’s misimpressions.

Although lawyers must be truthful in negotiations, and must be careful to avoid making misrepresentations especially when they are relying on or incorporating the statements of others in expressing positions, they generally have no duty to inform opposing parties of relevant facts. An opposing lawyer’s lack of diligence in discovering or identifying facts that will enhance her client’s bargaining position should not have professional responsibility or liability consequences for counsel for the other party.

Lawyers certainly have no duty to inform opponents about limits on their negotiating or settlement authority, their “top dollar” or “bottom line,” or anything of the like. Nor does a lawyer generally have a duty to inform an opponent of perceived weaknesses in a client’s case. Information of that sort is confidential and should be revealed only with client consent. The general rule that a lawyer has no duty to inform an opponent of relevant facts is of course subject to exceptions. For example, a lawyer unquestionably has a duty to disclose a client’s death.
In addition ethical concerns lawyers may face with respect to statements or omissions of current events, there are also ethical concerns with respect to future promises or threats. A lawyer may not include as a provision in a settlement a restriction that bars one party’s lawyer from representing clients in future litigation against another party.\textsuperscript{76} However, the ABA Committee on Ethics and Professional Responsibility has concluded that the Model Rules do not prohibit a lawyer from agreeing, or having the client agree, that in return for a satisfactory civil claim settlement, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, as long as the agreement itself is legal.\textsuperscript{79} Additionally, the Model Rules do not prohibit a lawyer from threatening the possibility of pursuing criminal charges against the opposing party to gain relief during settlement discussions in a civil matter, so long as the criminal matter is related to the civil claim, there is a well-founded belief that both the civil and criminal claims are warranted by the facts and the law and the lawyer does not attempt to exert an improper influence over any criminal proceedings.\textsuperscript{80}

A lawyer may not use even a well-founded threat of criminal charges if he does so merely to harass another person.\textsuperscript{81} Threatening criminal prosecution without any actual intention to proceed violates Model Rule 4.1 and violates Rule 3.1 by threatening prosecution that is not well-founded in fact or law. The ABA’s formal opinion also states that it is a violation of the Model Rules if the criminal wrongdoing being threatened during a civil claim’s settlement negotiations is unrelated to the civil claim.\textsuperscript{82} Although the rules do not prohibit an agreement to refrain from pressing criminal charges in return for favors in a civil matter, a lawyer must be careful to avoid the criminal offense of compounding a crime, which would be a violation of Model Rule 8.4(b).

VII. NEGOTIATIONS INVOLVING TRIBUNALS AND LAWYERS’ ASSOCIATED DUTY OF CANDOR

Lawyers negotiating the settlement of litigation must mind their duty of candor to the tribunal. This duty is principally enforced under Model Rule 3.3, which states in Rule 3.3(a)(1) that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal."\textsuperscript{83} Before the 2002 amendments to the Model Rules, this rule provided that a lawyer was prohibited from making false statements of "material" fact or law.\textsuperscript{84} Some states have so far opted to retain the materiality requirement.\textsuperscript{85}

When addressing a court on a matter before it, a lawyer’s statements are essentially made under oath.\textsuperscript{86} The duty of candor imposed under Model Rule 3.3(a)(1) is rigorous. “Candor” in this context “means to treat a subject with fairness, impartiality, and to be outspoken, frank, and veracious, and is synonymous with other terms describing morality.”\textsuperscript{87} The prohibitions of Model Rule 3.3 are not limited to court proceedings, as the term “tribunal” establishes. For example, the rule applies to administrative and regulatory proceedings,\textsuperscript{88} and to statements to private arbitrators.\textsuperscript{89}

To violate Rule 3.3(a)(1), a lawyer’s false statement must be knowingly made. Here, as elsewhere, a lawyer’s knowledge may be inferred from the circumstances.\textsuperscript{90} Actual knowledge does not include information that the lawyer could have discovered through reasonable inquiry but did not, although a lawyer may breach her duty of candor to a tribunal if she recklessly makes a false statement.\textsuperscript{91} Misleading statements also breach a lawyer’s duty of candor.\textsuperscript{92} A lawyer’s failure to reveal information to a tribunal may in some circumstances equate to an affirmative misrepresentation.\textsuperscript{93}
Finally, Rule 3.3(a)(1) overlaps with Rule 8.4(c). A lawyer who violates Rule 3.3(a) necessarily violates Rule 8.4(c) as well. A Rule 3.3(a) violation also implicates Rule 8.4(d), which prohibits conduct “prejudicial to the administration of justice.”

It should also be noted that the ABA's Standing Committee on Ethics and Professional Responsibility determined that Model Rule 3.3 does not apply in mediations because a mediator is not a “tribunal” as defined in Model Rule 1.0(m). The Committee's analysis was abbreviated, however, and its conclusion is therefore debatable. Of course, even if Rule 3.3(a)(1) does not apply in such circumstances, lawyers must still mind their duties under Rules 4.1(a) and 8.4(c).

VIII. CIVIL LIABILITY FOR FRAUD OR MISREPRESENTATION

Lawyers’ dishonesty in negotiations also exposes them to potential civil liability for fraud, negligent misrepresentation, or aiding and abetting a client’s fraud or breach of fiduciary duty. Indeed, the risk of a lawyer incurring civil liability for misrepresentations in negotiations is well-established. In 1940, the Seventh Circuit affirmed a fraud verdict against a lawyer who lied about his client’s finances in negotiations with the client’s ex-wife for the purpose of reducing the client’s child support obligations. Though lawyers may understandably believe that the robust litigation privilege that normally shields their litigation-related activities from tort liability will protect them against liability arising out of their conduct in negotiations, that is not necessarily true. It is generally accepted that lawyers’ litigation privilege is no defense to allegations of fraud.

As a general principle, it is difficult for lawyers to avoid or defeat fraudulent or negligent misrepresentation claims on reasonable reliance grounds in light of their Model Rule 4.1(a) duty of truthfulness. The same is true with respect to lawyers’ duty of honesty under Model Rule 8.4(c). A jury could understandably conclude that because lawyers owe a duty of truthfulness even to adversaries and are broadly prohibited from engaging in misrepresentation, an opposing party’s reliance on a lawyer’s statements in negotiations was reasonable. This assumes, of course, that a party who claims to have reasonably relied on a lawyer’s statements by virtue of the lawyer’s duties under Rules 4.1(a) and 8.4(c) must have in fact known of lawyers’ duty of honesty to third-parties at the time of the challenged representation. If the claimant was not then aware of the lawyer’s Rule 4.1(a) and Rule 8.4(c) obligations, the rules are plainly irrelevant and the reasonableness of the claimant’s alleged reliance must be judged according to a standard that is detached from the rules.

Finally, lawyers’ duty of truthfulness under Rule 4.1(a) is not perfectly congruent with civil liability for misrepresentation. Many statements that are not treated as statements of material fact as a matter of professional responsibility, but which are instead considered to be “puffery” or “posturing,” are not similarly exempted under contract and tort law. As a matter of tort and contract law, the central question with respect to such statements is more commonly one of reasonable reliance. In the civil liability realm, defending misstatements in negotiations on the basis of puffery is of limited utility, because whether a statement is or is not actionable depends on its context, the lawyer’s actual knowledge, and the person to whom it is made. In the right circumstances, a lawyer’s seeming puffery may be actionable fraud. That same statement would be unlikely to expose a lawyer to professional discipline under Rule 4.1(a), although a comment to Rule 4.1 prudently cautions lawyers to “be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.”

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
IX. ETHICS DURING COLLECTIVE BARGAINING NEGOTIATIONS

Collective bargaining presents a very unique form of negotiations – indeed, a form that is more regulated than virtually any other. The NLRB, of course, places a duty on both parties to furnish relevant, requested information necessary for purposes of collective bargaining. Such information includes presumptively relevant information of “wages, hours, terms and conditions” of employment such as seniority lists, wage rates, insurance policies, and other benefit information.\textsuperscript{104} It may also include other information upon a showing of specific relevance to the actual bargaining.\textsuperscript{105} There is no suggestion in any decision or literature (nor in this white paper) that the information that must be provided need not be accurate to the best of the providing parties’ ability.

Yet, beyond the statutory duty to furnish (accurate) information, what are the ethical parameters as to the “truthfulness” of other statements made in negotiations? Are the obligations of lawyers at the bargaining table different from non-lawyers? And what can the parties expect in collective bargaining where the dialogue and even the relationship may be (at least stereotypically) adversarial and sometimes even hostile?

As former Chairman Gould explained 20 years ago, “tough and sometimes distasteful tactics engaged in by employers and unions throughout the collective-bargaining process are frequently not unlawful under the National Labor Relations Act.”\textsuperscript{106} Further, except at the extremes, the substantive terms of any agreement and the bargaining tactics employed by the parties are left largely unregulated by the Board. As explained by Chairman Gould:

[T]he statutory tests for what constitutes good-faith bargaining under the National Labor Relations Act cannot be based on what is distasteful [or] unacceptable, or [require] a “constructive approach” which eschews ultimata or threats. As I noted in White Cap, “collective bargaining is wide open and rough and tumble where both parties use their resources and economic strength as best they can.” ... Unless the tactics are designed to or do affect the existence of the union and the collective-bargaining process and the ability of the union to function effectively, the Board's role is to leave the parties to their devices.\textsuperscript{107}

These principles are, of course, fully consistent with the Act which, although compelling the parties “to meet at reasonable times and confer in good faith with respect to … the negotiation of an agreement,” also “does not compel either party to agree to a proposal or require the making of a concession.”\textsuperscript{108}

In this “rough and tumble” environment, employer and union representatives (both lawyers and non-lawyers alike) frequently engage in a number of tactical “deceptions” that are far removed from the aspirational paradigm of the “full, open, and truthful” exchange of information advocated by some academics. These tactics parallel those of lawyer counterparts in other practice areas negotiating everything from commercial transactions valued in the millions or billions of dollars to small personal injury settlements to family law resolutions. Thus, even where the NLRB has placed legal rules on collective bargaining negotiations, lawyers participating in said collective bargaining negotiations are likewise subject to the ethical rules detailed above.
X. CONCLUSION

Negotiating presents lawyers with a number of professional responsibility and liability challenges. Lawyers must reasonably communicate with their clients under penalty of professional discipline and malpractice liability if they do not. Their nearly airtight duty of confidentiality is no shield against professional discipline if a client is dishonest. Lawyers’ duty of honesty to third persons has both disciplinary and liability consequences if breached, and it can sometimes be breached through silence. The honesty bar is set especially high when a court is involved in negotiations, as is often the case in litigation.

The overwhelming majority of lawyers are ethical. Even so, the paradoxical nature of negotiation may lead good lawyers astray. The general perception that deception is permissible in negotiations fails to account for the situations in which it is not. Furthermore, because the process of negotiation varies by place and subject, it seems to be governed by shifting rules.

Suggested Reading

ENDNOTES

1 **Model Rules of Prof’l Conduct** R. 1.1 (2009) (requiring lawyers to provide competent representation to clients); *id*. R. 1.3 (requiring lawyers to act with “reasonable diligence and promptness” in representing clients).

2 *Id*. R. 1.2(a) (“A lawyer shall abide by a client’s decision whether to settle a matter.”).


4 *Compton v. Kittleson*, 171 P.3d 172, 176 (Alaska 2007); *In re Lansky*, 678 N.E.2d 1114, 1116-17 (Ind. 1997). See also *In re Coleman*, 295 S.W.3d 857, 865 (Mo. 2009) (invoking Rule 1.7 to discipline a lawyer for such a requirement).

5 See, *e.g.*, *Compton*, 171 P.3d at 176-80 (involving hybrid contingent fee/hourly billing agreement that effectively penalized clients if they declined to settle and fared worse at trial).

6 **Model Rules of Prof’l Conduct** R. 1.2(a) (2009) (providing that “[i]n a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered”).

7 *In re Garnett*, 603 S.E.2d 281, 283 (Ga. 2004).

8 **Model Rules of Prof’l Conduct** R. 4.2 (2009) (prohibiting a lawyer who is representing a client from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter absent the consent of the other lawyer or authorization by law or court order).


10 Compare *Sandstrom v. Sandstrom*, 884 P.2d 968, 971 (Wyo. 1994) (refusing to enforce settlement agreement obtained in violation of Rule 4.2), *with In re Estate of Netzorg*, 15 P.3d 926, 331-34 (Mont. 2000) (finding that otherwise enforceable settlement agreement was not voidable by virtue of Rule 4.2 violation).


14 *State ex rel. Okla. Bar Ass’n v. Hummel*, 89 P.3d 1105, 1111 (Okl. 2004); **Model Rules of Prof’l Conduct** R. 1.2(a) (2009) (“A lawyer shall abide by a client’s decision whether to settle a matter.”).

15 See **Model Rules of Prof’l Conduct** R. 4.2 (2009) (prohibiting ex parte communications with represented parties absent the other lawyer’s consent, authorization by law, or court order).


18 See, *e.g.*, *Kloian v. Domino’s Pizza, L.L.C.*, 733 N.W.2d 766, 770 (Mich. Ct. App. 2006) (“An attorney has apparent authority to settle a lawsuit on behalf of his or her client.”).
Koval, 693 N.E.2d at 1304.


See, e.g., Yale Univ. v. Out of the Box, LLC, 990 A.2d 869, 873-76 (Conn. App. Ct. 2010) (discussing lawyer’s apparent authority to settle as determined from the totality of the circumstances).

See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 27 (2000) (“A lawyer’s act is considered to be that of the client in proceedings before a tribunal or in dealings with a third person if the tribunal or third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client’s (and not the lawyer’s) manifestations of such authorization.”).

MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 3 (2009) (“At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation.”).


MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2018).

Id.


Id.


It is possible for clients to waive certain conflicts, but a judge may still find joint representation is inappropriate. See, e.g., Coaker v. Geon Co., 890 F. Supp. 693, 695 (N.D. Ohio 1995).

Dominick, supra, at 20.

Some jurisdictions follow the “joint confidences rule,” under which there is no confidence between clients jointly represented regarding that matter. In such jurisdictions, this would not pose a conflict of interest.

Miletich & Dowdy, supra, at 68.


See, e.g., People v. Podoll, 855 P.2d 1389, 1391-93 (Colo. 1993) (involving client who did not respond to lawyer’s faxed letters and did not return telephone calls, and who thus lost favorable settlement opportunity; disciplinary board and court faulted lawyer for attempting to communicate by means that continually failed).

In re Ukwu, 926 A.2d 1106, 1139 (D.C. 2007).
41 Model Rules of Prof’l Conduct R. 1.2(a) (2009).

42 Id.

43 Id. R. 1.4 cmt. 5.


48 In re Disciplinary Proceeding Against Schafer, 66 P.3d 1036, 1041 (Wash. 2003).


50 Hurley v. Hurley, 923 A.2d 908, 911 (Me. 2007).

51 In re Anonymous, 932 N.E.2d 671, 674 (Ind. 2010) (stating that “the fact that a client may choose to confide to others information relating to a representation does not waive or negate the confidentiality protections of the Rules [of Professional Conduct]”).

52 See, e.g., In re Boyce, 613 S.E.2d 538, 540 (S.C. 2007) (sending client’s information to his employer in the mistaken belief that employer was involved in transaction).


54 In re Potts, 158 P.3d 418 (Mont. 2007).


57 See, e.g., In re Winkler, 834 N.E.2d 85, 89 (Ind. 2005).

58 See, e.g., In re PRB Docket No. 2007-046, 989 A.2d 523, 526 (Vt. 2009).


60 Attorney Grievance Comm’n of Md. v. Pak, 929 A.2d 546, 567 (Md. 2007).

61 In re Fisher, 202 P.3d 1186, 1202 (Colo. 2009); In re Smith, 236 P.3d 137, 145 (Or. 2010) (quoting In re Kluge, 27 P.3d 102 (Or. 2001)).

63 Id.

64 Model Rules of Prof’l Conduct R. 4.1 cmt. 2 (2009).


70 See, e.g., In re Doughty, 832 A.2d 724, 734-35 (Del. 2003).

71 Attorney Grievance Comm’n of Md. v. Floyd, 929 A.2d 61, 70 (Md. 2007); In re Disciplinary Proceedings Against Knickmeier, 683 N.W.2d 445, 464 (Wis. 2004).

72 In re Shorter, 570 A.2d 760, 768 (D.C. 1990).


74 State ex rel. Nebraska Bar Ass’n v. Addison, 412 N.W.2d 855 (Neb. 1987).


76 See, e.g., Brown v. County of Genesee, 872 F.2d 169, 175 (6th Cir. 1989) (refusing to void settlement based on mutual mistake and stating that absent some misrepresentation or fraud, the appellant had no duty to advise the appellee of any factual error on which the appellee premised settlement, whether unknown or suspected).


79 Id.


83 **Model Rules of Prof’l Conduct R. 3.3(a)(1)** (2009).


91 *In re Cardwell*, 50 P.3d 897, 901 n.5 (Colo. 2002) (noting recklessness standard).


93 See, e.g., *Miss. Bar v. Mathis*, 620 S0. 2d 1213, 1220-21 (Miss. 1993) (failing to reveal autopsy of client’s deceased husband in case where cause of death was important).

94 See, e.g., ABA Formal Op. 06-439, supra note 128, at 2 n.2.

95 *McVeigh v. McGurren*, 117 F.2d 366, 367 (7th Cir. 1940).


98 See, e.g., **Model Rules of Prof’l Conduct R. 8.4(c)** (2009) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

99 *Hoyt Props., Inc.*, 716 N.W.2d at 375.


101 Id. at 1337-38 (stating that a parcel of land was “a lot of property for the money”).

102 **Model Rules of Prof’l Conduct R. 4.1 cmt. 2** (2009).
See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 76 S. Ct. 753 (1956); *R.E.C. Corp.*, 307 NLRB 330, 332-33 (1992). Notably, there is no entitlement to information simply because a party believes it may be “helpful.” *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). Rather, beyond presumptively relevant information, the determination must follow a fact sensitive approach to the particular issues in question. *NLRB v. Truitt Mfg. Co.*, 351 U.S. at 149; see *Disneyland Park*, 350 NLRB 1256 (2007) (subcontracting information is not relevant absent a claim that a specific provision of the contract is being violated); *E.W. Buschmann & Co. v. NLRB*, 820 F.2d 206, 209 (6th Cir. 1987) (no duty to provide productivity records of individual employees where company was not relying on lack of productivity to justify refusal to provide bonus); *Nielsen Lithographing Co.*, 305 NLRB 697 (1991) (no duty to provide financial information absent a claimed inability to pay); *Rice Growers Ass’n of Calif.*, 312 NLRB 837 (1993) (no duty to provide sales/distribution contract between employer and its parent corporation).

*Telescope Casual Furniture, Inc.*, 326 NLRB 588, 589 (1998) (alternative proposals do not violate the Act if not intended to undermine reaching agreement).

*Id.* at 592; see also *White Cap*, 325 NLRB 1166, 1172 (1998) (regressive proposals do not violate the Act if not intended to undermine reaching agreement); *NLRB v. Insurance Agents*, 361 U.S. 477 (1960) (“collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics”); *NLRB v. American Insurance Co.*, 343 U.S. 395, 404 (1952) (the Board may not “sit in judgment upon the substantive terms of collective bargaining agreements”).

Ethics in Settlement Discussions, Collective Bargaining, and Other Negotiations

Presenters
Anthony B. Byergo (Seattle), Janice G. Dubler (Philadelphia), and Michael L. Matula (Kansas City)

Moderator
Daniel O. Canales (Chicago)

Also Known As
Olga, Chris, and Mike try to collectively bargain and settle lawsuits without getting sanctioned, disbarred, or disqualified
Reasonablefee & Deakins—Olga

- Per Olga's bio she:
  - Is a shareholder at Reasonablefee & Deakins, a national employment law firm
  - Did well in law school, received some awards, etc.
  - Experienced in both labor and employment law

Corporate Counsel—Chris

- Per Chris’s bio he:
  - Is Associate General Counsel-Labor and Employment Law at Widget World, Inc.
  - Did well in law school
  - Prior to going in-house, practiced with a couple big law firms, etc.
Mike Mavis

- Per Mike’s bio he:
  - Represents people wronged by big companies
  - Member of the “Gazillion Dollar’s Advocate Forum”
  - Also dabbles in representing unions

Local 6666

- Represents most Widget World employees outside corporate offices
- About to negotiate new CBA
**Paula Plaintiff**

- Formerly worked at Widget World’s corporate office
- Now suing Widget World for harassment and wrongful discharge

**Union Caucus Meeting**

- Local 666 bargaining committee members’ demands for the new contract:
  - Higher Wages
  - Better Pension
  - No Concessions
  - Prepared to Strike
Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

... [A] lawyer shall abide by a client’s decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued.

What if the Mavis disagrees with the Union’s strategy to insist upon no concessions?

- The Union should defer to the Mavis’s special knowledge and skill.
- Mavis should just listen to the Union.
- Mavis should attempt to craft a mutually acceptable objective, and if not feasible, the lawyer should defer to the client.
- Mavis should throw a tantrum until he gets what he wants.
Rule 1.2, Comment 2
Client and Attorney Disagreements

- Clients generally defer to lawyer for strategy
- Lawyers generally defer to client for questions of expense and effect on third parties
- If lawyer and client disagree, lawyer should seek mutually acceptable solution
- If there is fundamental disagreement, lawyer may withdraw

Chapter 2

Local 6666’s negotiations with Widget World – What Donation?
Company Prep Meeting

**Widget World prepares for negotiations.**

**The Employer’s concerns:**

- Terrible Finances
- Work Rule Changes
- Upcoming $10 Million Donation

---

**Will Widget World be required to disclose the $10 million donation?**

Yes, Widget World has a duty to tell Local 6666.

No, Widget World does not a duty to tell Local 6666.

No, but Widget World may be held liable if Local 6666 finds out about the donation.
What do the Ethics Rules Say?

Rule 4.1 Truthfulness in Statements to Others
A lawyer shall not knowingly:
   (a) Make a false statement of material fact or law to a third person

Comment 1: Generally, a lawyer has no affirmative duty to inform an opposing party of relevant facts.
Misrepresentation = if the lawyer incorporates or affirms false statement of another person. Misrepresentation = misleading statements or omissions that are the equivalent of affirmative false statements.

What if the Union asks whether Widget World is expecting future donations?

a) Yes, Widget World must disclose the donation.
b) No, Widget World still has no duty to disclose the donation.
Chapter 3

Opening Across the Table

LYING v. "PUFFERY"!
Rule 4.1; Comment 2

Generally, certain types of statements ordinarily are not taken as statements of material fact.

- Estimates of price
- Value placed on the subject of a transaction
- A party’s intention as to an acceptable settlement of claim

Which Statement is NOT Puffery?

The Union will not accept any wage increase less than 5 percent per year.

Widget World’s finances are horrible.

If we give a wage increase we will be forced to require Sunday performances because we do not have any extra money to pay.

Widget World will offer a wage increase if there are 20 changes to work rules.
Sidebar Between Union and Management Lawyers

- Union’s “Bottom Line”:
  - Wage Increase
  - Pension Bump

- Executive Board will not let them settle for less than a $1 per hour wage increase.

- Formal request for any documentation regarding upcoming donations

If the Union attorney misrepresents the "bottom line" is this a statement of material fact in violation of Rule 4.1?

Yes, and the lawyer may be disciplined for engaging in dishonest conduct.

Yes, but the lawyer will not be disciplined for engaging in dishonest conduct.

No, any misrepresentation of a bottom line is considered puffery.
### Statements Regarding Authority to Settle

Client authorizes settlement figure above $50.

<table>
<thead>
<tr>
<th>Permissive Factual Representation</th>
<th>False Factual Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td>“My client does not wish to settle for more than $50.”</td>
<td>“My client has formally disapproved any settlement in excess of $50.”</td>
</tr>
</tbody>
</table>

### Chapter 4

Who Needs The Lawyers
Paula Calls Chris

Paula Leave Message For Chris

“Chris – I have fired Mavis because of his unconscionable contingent fee contract. If we settle today I will take a big discount. Call me. Paula.”
Paula Calls Chris

What should Chris do?

Call Paula ASAP to get best deal for Widget World before Paula changes her mind, as he is ethically required to do.

Call Paula ASAP and have her confirm again that she has fired Mavis – then try and get the best deal.

Contact Mavis to confirm that he no longer represents Paula.
To: MikeM@Liketosue.com

Confirming our call, I have authority to settle for $XX in exchange for dismissal, release, confidentiality, and no-rehire provisions. I assume you have updated your client. I also hope your unconscionable contingency fee is not a barrier to settlement.

Sincerely, Olga

cc: Paula Plaintiff (via e-mail)
Is Olga in trouble?

Yes. This is a Rule 4.2 ex parte Communication with a represented party.

No. Paula was only cc’d and the communication was sent simultaneously to her attorney.
Chapter 5

Off To Mediation

Chris’s Settlement Strategy – Part I
Chris’s Settlement Strategy – Part I

- Instructs Ogla to tell Paula/Mavis that if the case does not settle at mediation, Widget World will go to the DA to press theft charges for expense account irregularities.

- Tells Olga that is what he might do (if CEO will let him).

Can/Must Ogla Convey Chris's Message to Mavis?

Yes.

Maybe.

Only if she makes the threat in a polite manner.

No way. This is an automatic ethical violation.
What do the Ethics Rules Say?

ABA Formal Op. 92-363

- Threat to report criminal conduct not per se violation, **BUT**
  - Must have “reasonable belief” that both civil and criminal action are “well founded”
  - Cannot suggest improper influence over criminal process
  - Must actually intend to press criminal charges if civil action not resolved

Chris’s Settlement Strategy – Part II
Chris’s Settlement Strategy
Part II

- We will settle, but only if Mavis agrees not to bring other lawsuits against us.

- Or maybe just have Mavis agree to not advertise that he has sued us.

- Or maybe we will “throw Mavis a bone” and hire him as a consultant so he can’t sue us.

What do the Ethics Rules Say?

**Model Rule 5.6**

- A lawyer shall not participate in offering or making:

  . . . (b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.
Assuming Paula and Mavis agree, which of Chris's ideas are permissible as part of the settlement?

- Mavis agrees to keep settlement terms confidential
- Mavis agrees to not tell anyone he has experience suing Widget World
- Mavis will become a Widget World consultant
- All of the above
- None of the above

Chapter 6

A Deal’s A Deal
Olga – A Deal’s A Deal

- Parties specifically agreed to mutual confidentiality
- Mavis sends back a draft of agreement that imposes confidentiality only on Paula

Olga - A Deal's A Deal - Is Paula required to bring this to Mavis's attention?

Yes

No
Mavis – A Deal's A Deal

- Prior to mediation, Widget World make a final pre-mediation offer
- Mavis calls to discuss with Paula
- Paula has died in kiln explosion
Mavis - A Deal's A Deal - Mavis is required to:

Accept the pending offer before Widget World learns Paula is dead to protect her estate.

Inform Widget World that Paula is dead.

Attend Paula’s memorial services.

Final Notes

✓ **Awesome - cool venue, informative**

✓ **Worth the $$**

✓ **Register for next year now**
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