

Ethical Considerations In Negotiation



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When does Puff the Magic Dragon go lower than a snake's navel?

FOR OVER 20 years, Model Rule of Prof'l Conduct 4.1 (hereinafter "Model Rule" or "Rule") has governed the ethical conduct of attorneys in dealing with third parties. During this period, the American Bar Association has only made limited modifications to the Rule's comments to clarify the attorney's obligation of truthfulness. Van Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 Willamette L. Rev. 181, 195-96 (2004). Model Rule 4.1 states:

"In the course of representing a client a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Generally, Rule 4.1 defers to the parties and the circumstances of the transaction to determine what is factual, what is ethical, and what is legal. Michael Rubin, *Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?* SH062 ALI-ABA 1205 at 1215 (2003). The Rule requires the same level of honesty, whether the negotiation is a caucused mediation or a contract negotiation. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

Legal commentators have expended a rain forest worth of paper writing articles discussing what an attorney may or may not say in negotiations. These articles generally fall into two categories. On one hand, a lawyer must show honesty and good faith; and not accept a result that is unconscionably unfair to the adverse party. Rubin, *supra*, at 1225. On the other hand, the attorney is obligated to obtain a result that is in the client's best interest and must do everything, short of fraud or deceit, to do so. *Id.* As the legal world is not black and white, most lawyers find themselves struggling with these two positions. For better or worse, attorneys typically favor obtaining a result in the client's best interest without giving a great deal of thought to fairness to the other side. This has caused a whole other set of problems for the profession. *See* Philip K. Lyon, *20 Reasons Why People Don't Respect Lawyers The Way They Used To*, Vol. 54 No.2 Prac. Law. 19 (Apr. 2008).

Many commentators have advocated changes to Rule 4.1 that elevate attorneys' obligation for truthfulness. One such change would remove the distinction of "material fact" from Rule 4.1(a) and add a subparagraph that prohibits the attorney "from assisting the client in reaching a settlement agreement that is based on reliance upon a false statement of fact made by the client." Pounds, *supra*, at 194. However, this change has its own share of shortcomings. Negotiations are used to reach settlement agreements, enter into partnerships, purchase goods and services, and can be in the form of mediation, arbitration or some other type of alternative dispute resolution, and may be subject to a court order, contract provision, or simply conducted in an attorney's office or in a phone conversation. The proposed change would either have to be stated differently for each context or written in a high level of generality in order for a workable system to be in place. *Id.* Rule 4.1 has this generality and requires the attorney's disclosure if the client perpetrates fraud, therefore making a change

unnecessary in my opinion. Model Rule 4.1(b) requires disclosure of a material fact if necessary to prevent fraud. (While this rule is tempered by Model Rule 1.6, even Model Rule 1.6 allows a lawyer to disclose confidential information if the client is attempting to use the lawyer's services in furtherance of fraud that will result in substantial injury to another party's financial or property interests.) Another problem with this suggested rule change is the disadvantage an honest lawyer would have in the nonpublic nature of negotiation, while the dishonest lawyer would be unlikely to be caught. Pounds, *supra*, at 194.

Like it or not, Rule 4.1 is here to stay. The purpose of this article is to explain the key elements of complying with the Rule so that an attorney will know the ethical boundaries in a particular negotiation. The first of these elements is determining if a statement is of a material fact, therefore requiring the attorney's complete honesty. The second element concerns half-truths, omissions, and whether disclosure is necessary. The third element is the lawyer's choices when a client demands something less than honesty.

Is The Statement One Of Material Fact?

Neither Rule 4.1 nor its commentary provides a clear definition of "material fact." Comment 2 simply states that circumstances determine whether a statement pertains to a material fact. Model Rule 4.1 cmt [2]. The Comment goes on to say, "[U]nder the generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." *Id.* Price and value estimates, acceptable settlement offers, and undisclosed principals are the only examples the Comment provides. *Id.* This language thus allows attorneys to use puffery and silence when trying to get the best deal for their clients. But when does "puffing" become "lying"? This is the real crux and the one which requires both judgment

and a certain pride in the duties/responsibilities as a member of a profession.

Comment 2 to Rule 4.1 and a minimal amount of experience are all that an attorney needs to realize that some amount of puffery and non-disclosure will exist in and may even be needed for successful negotiations. The struggle for attorneys is knowing where to draw the line between uncontrolled advocacy and absolute candor. Debra Katz & Julie Chambers, *Attorney's Ethical Responsibilities During Settlement Negotiations*, SG047 ALI-ABA 1153, 1155 (2001). For example, a record company executive telling an artist that the company has the best promotion staff, a top-notch A&R department, and that its VP of marketing is a genius are all examples of acceptable puffery. *See* Rubin, *supra*, at 1218 (similar statement in an employer/employee context). One may presume this is because the statements are either an opinion, or a fact that the applicant cannot quantify. An example of a non-material fact in the context of settlement negotiation is where a plaintiff is in jail and entitled to benefits totaling less than \$1,000 but the settlement negotiations range between \$75,000 and \$95,000. Katz & Chambers, *supra*, at 1156. The plaintiff's attorney will not be subject to discipline for failing to disclose the client's situation in the latter scenario unless the lawyer misstates the amount of expenses, such as amounts of doctor's bills or lost wages. The reason such a statement regarding the client's situation is immaterial is that it is not important enough to influence the parties' decisions and if a settlement is reached, the plaintiff would be entitled to the benefits whether they are at the top or bottom of the range of negotiations. *Id.*

A material statement, on the other hand, could involve whether a defendant publisher in a copyright infringement settlement negotiation accepts unsolicited material. If the allegedly infringed song is unpublished, such a statement goes to whether the defendant had access. Defendant's counsel must disclose defendant's song solicitation policy

to the other side, which will likely base its decision to settle or litigate on this information. However, a statement regarding access is immaterial if the song is a classic. In such a case, access would be presumed and the defendant's acceptance of unsolicited material would be irrelevant. This is just an example of how circumstances dictate what is actually material.

Many commentators believe that Rule 4.1 does not limit statements concerning a lawyer's own opinion because such statements are not statements of fact. *Id.* These same commentators also generally view non-frivolous statements regarding an interpretation of law as being outside the Rule. *Id.* Their beliefs are bolstered by the fact that courts generally will not discipline an attorney under Rule 4.1 unless the attorney knew a statement was false, as opposed to whether they should have known or suspected it was false. *Id.*

An attorney must not take the generality of Rule 4.1 to an extreme, however. If a party may reasonably view a statement as important to its fair understanding of a bargain, a court may find the statement material. "While the legal journals engage in some hand-wringing about the vagueness of...Rule 4.1, in reality, it seldom is a difficult task to determine whether a fact is material to a particular negotiation." *Ausherman v. Bank of America*, 212 F. Supp. 2d 435, 449 (D. Md. 2002). For example, an attorney's authorization to settle for a certain amount may not be material but a statement regarding the amount of the client's loss is material. *Id.* at 450. The latter will most likely affect the party's determination of a reasonable offer.

Perhaps the best course of action for a negotiating attorney is to ask the same questions a court or disciplinary committee would ask. These questions are:

- What is the statement or omission in dispute?
- Is it untrue or deceptively incomplete in any significant respect?

- Reasonably viewed, is it important to the subject that is being negotiated? and
- At the time it is being made, does the attorney know or should that attorney have known under the circumstances that the statement was untrue?

Id. at 451. Otherwise, when in doubt, the attorney should be truthful, generalize, quibble, or decline to give an answer, but under no circumstances lie. *Id.* at 450.

HALF TRUTHS, OMISSIONS, AND DISCLOSURE

• Comment 1 to Rule 4.1 states that “partially true but misleading statements or omissions that are the equivalent of affirmative false statements” are misrepresentations for the purposes of Rule 4.1. Model Rule 4.1 cmt. [1]. This principle encompasses statements that were true when originally made but subsequently become false. Peter Jarvis & Bradley Tellam, *The Dishonesty Rule: A Rule With A Future*, 74 Or. L. Rev. 665, 683 (1995). For example, if a lawyer of a songwriter selling a catalog states that Miley Cyrus has just recorded one of the available songs but later learns that it will not make Cyrus’ record before the deal is concluded, a failure to disclose the new information would constitute a misrepresentation under Rule 4.1. The lawyer cannot continue to represent that the catalog will have a Miley Cyrus release and should affirmatively disclose this fact, in my opinion, because you should know that the other party is relying upon it.

How a court or disciplinary committee will discipline an attorney in such situations varies among jurisdictions. Katz & Chambers, *supra*, at 1158. The Supreme Court of Nebraska disciplined an attorney who failed to disclose a third insurance policy when it became apparent that the other party believed there were only two policies. *Neb. State Bar Ass’n v. Addison*, 412 N.W.2d 855 (Neb. 1987). The South Carolina Bar gave an advisory opinion

stating that a lawyer was not required to disclose information regarding payments a client made to a general contractor after receiving notice of a subcontractor’s lien. S.C. Bar Ethics Advisory Comm., Advisory Op. 18 (1998). Attorneys may also be found to have committed fraud by omission if the element of scienter is “satisfied by the lawyer’s reckless indifference to error.” *Ausherman v. Bank of America*, 212 F. Supp. 2d 435, 447 (D. Md. 2002).

While Comment 1 to Rule 4.1 prohibits an attorney from incorporating or affirming another’s statement that the attorney knows is false, the Comment specifically does not require the attorney “to inform the opposing party of relevant facts. Model Rule 4.1 cmt. [1]. All attorneys have a duty to their own clients to conduct their own legal research and investigation of the facts. Katz & Chambers, *supra*, at 1157. Otherwise, opposing attorneys would be forced to divulge their client’s weaknesses, thereby violating Rule 1.6 and do the legal work for both parties. Unless an attorney contributes to a misunderstanding, he or she is under no obligation to correct an erroneous assumption by an opponent. *Id.*

DISHONEST CLIENTS DO NOT EQUATE TO DISHONEST ATTORNEYS

• Human nature being what it is, virtually all attorneys represent dishonest clients at some point in their careers. According to the Rule 4.1, there appears to be three types of dishonesty. The type that the Rule allows, which does not pertain to material facts or statements of law and generally includes statements of value or puffery (Model Rule 4.1 cmt. [2]); the type the Rule does not allow, which involves material facts and law (Model Rule 4.1(a)); and the type that involves crime or fraud and not only requires the attorney to terminate representation, but may also require the attorney to disclose the client’s intentions (Model Rule 4.1(b)). An attorney faced with the third type of dishonesty must adhere to Rule 4.1(b) along with Rule 1.16 and Rule 1.6.

Rule 4.1(b) requires disclosure of a material fact to prevent criminal or fraudulent behavior unless Rule 1.6 prohibits such disclosure. Rule 1.6(b) allows reasonably necessary disclosure in potential criminal or fraudulent situations. Model Rule 1.6(b). If the client is using the attorney's services in furtherance of committing a crime or fraud and such crime or fraud will result in substantial financial harm or property damage to another, the attorney *may* disclose information to the extent necessary to prevent such harm. Model Rule 1.6(b)(2). In addition, the lawyer may be risking penalties beyond mere disciplinary sanctions—such as jail time and the loss of his or her license.

Regardless of whether the attorney chooses to disclose confidential information, Rule 1.16 requires the attorney to terminate representation if such representation will result in the violation of the Rules of Professional Conduct. Model Rule 1.16(a)(1). Rule 1.2(d) states that a lawyer shall not assist a client in conduct the lawyer knows to be criminal or fraudulent. Model Rule 1.2(d). Therefore, if a client demands that the attorney make statements or omissions that amount to fraud or criminal behavior, or to assist the client in such behavior, the lawyer must withdraw. If circumstances dictate, the withdrawal can be “noisy,” with the lawyer giving notice of withdrawal to the opposing party and disaffirming an opinion, document, or statement. Model Rule 4.1 cmt. [3]. If the client's conduct does not require the lawyer to violate the Rules of Professional Conduct, the lawyer may still withdraw in certain circumstances, such as: (1) the client persists in trying to use the lawyer's services in conduct “that the lawyer reasonably believes to be criminal or fraudulent”; (2) “if the client has used the lawyer's services to perpetrate a crime or fraud”; or (3) “the client insists upon taking action the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” Model Rule 1.16(b). The latter involves tough decisions but are necessary if we are to retain the honor of

our profession. In other words “I will represent you to the best of my ability, but will not allow you to tarnish my reputation or violate my principles.”

CONCLUSION • While lawyers have the utmost duty to represent their clients to the best of their ability, clients do not have the right to force lawyers to ignore ethical rules and courtesy. Nor should lawyers do so on their own in order to obtain an unfair advantage or result. A lawyer should “be liberal to the slips and oversights of their opponent wherever he/she can do so, and in plain cases not shelter themselves behind the instructions of their client. The client has no right to require him to be illiberal—and he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety.” Jarvis & Telam, *supra*, at 667.

A lawyer can display such proper conduct and still be effective for the client. To do so, the lawyer must protect the client's confidential information while negotiating. This does not require dishonesty but it does require the lawyer to say only as much as necessary to carry out the representation. Model Rule 1.6(a). The lawyer must be aware of how his or her conduct during a particular negotiation will affect future dealings. Even if a misrepresentation is not material, it may still sour the relationship between the parties if one feels the other used trickery. The lawyer must ask appropriate questions to ascertain the material facts. Katz & Chambers, *supra*, at 1157. The other side is not required to make the party aware of those facts. Model Rule 4.1 cmt [1]. Finally, even though the client is willing to cross the line into material dishonesty and fraud, the lawyer must never follow. Model Rule 1.16.

Attorneys do not need a thorough study of the countless pages of articles that experts have written about Rule 4.1 in order to conform. The Rule codifies a simple idea: We lawyers are to be zealous advocates of our clients but we must draw the line at dishonesty and misrepresentation. *Ausher-*

man v. Bank of America, 212 F. Supp. 2d 435, 446 (D. Md. 2002) (quoting 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* §37.2 (3d ed. 2000)). The codes of conduct have always been clear that we may not lie to the court, to clients, or to third parties. *Id.* Rule 4.1(a) simply codifies the traditional notion that as a lawyer “my word is my

bond.” *Id.* Violate this notion at your peril. It is fine for the dragon to puff but not to spew fiery lies.

Let me conclude by referencing the phrase attributed to Benjamin Disraeli and made famous by Mark Twain: “There are three kinds of lies: lies, damned lies and statistics” It seems that lies and statistics may be appropriately used by lawyers during negotiations—but not “damned lies.”

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