Negotiation Ethics

Any attorney will tell you that negotiating sessions are fraught with uncertainties, posturing, and various gambits to persuade the other side to yield. Who is and who isn't at the table, who's representing whom, and how the parties behave are all part of the complex dynamic, but all transpires in the framework of the Rules of Professional Conduct.

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Don't read this article if you want to learn "How to be Deceptive without Being Dishonest."[1] If you are curious about ethical distinctions between guile, "puffing," and damnable prevarication in the context of negotiations, however, read on.

Lawyers engaged in negotiations confront a variety of important ethical questions, many of which are, unfortunately, often ignored. Should lawyers always assume that seeking and taking advantage are part of their duty? When do professionalism and broad moral considerations enter into negotiations? Which parts of the negotiation process generally belong to the attorney and which to the client? When do negotiations involve conflicts of interest and what are the limits on conflict waiver? What special rules apply to settlements? These are among the issues in negotiation ethics this article seeks to address.

Goals and Morals

Attorneys may well assume that they have been retained as negotiators to obtain for clients the maximum advantage: "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others."[2] The assumption is often well-founded, as in negotiations with the IRS or negotiation of a criminal charge. Sometimes, however, the assumption is wrong.

Consider the famous case *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). Spaulding was a 20-year-old plaintiff suing Zimmerman for personal injuries in a car accident. Defense lawyers learned from their examining physician that Spaulding had a life-threatening, but remediable, aneurysm which was probably caused by the accident, and which Spaulding and his doctor had not discovered. Current Rule 1.6(b)(6) *allows* (but does not *require)* disclosure of such information with the client's consent, but there were no express rules in 1962. The defense lawyers apparently *assumed* that their client (whom they apparently identified, mistakenly, as the insurer, rather than the insured driver) would wish to take advantage, so they settled the case without disclosure to Spaulding. Using today's principles, defense lawyers should consult with, and indeed urge, the insured to authorize disclosure of Spaulding's condition.

The Rules of Professional Conduct acknowledge a broad moral context: "Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules."[3] The Rules remind lawyers as counselors that moral advice is appropriate in certain situations: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[4]

Roles and Relationships

The roles of lawyer and client, and their relationships to third parties, affect ethical duties in negotiations. In general, clients determine both the goals of negotiations and, absent special circumstances, such as the client's unavailability, also the terms on which settlement is reached.[5] Lawyers traditionally determine the means to be employed in a negotiation, but Rule 1.4(a)(2), as amended in 2005, requires the lawyer to "reasonably consult with the client about the means … ." A lawyer is not duty-bound to follow a client's direction to negotiate in a high-handed or offensive manner.[6] Minnesota's Professionalism Aspirations properly remind lawyers that they are not bound by clients' directives to take the low road, but do not seem to recognize that lawyers often wrongly assume that clients wish to take the low road.

Both the role in which the lawyer is acting and the lawyer's relationship to the client have bearing on the ethical issues involved. Consider, for example, the lawyer's role.

The Rules contemplate the lawyer acting in the roles of counselor, advocate, and officer of the court. Lawyers must be mindful of which role is being played. In *Spaulding*, the attorneys did not fully recognize their role as officers of the court. Because Spaulding was a minor, the lawyers should have disclosed his condition to the court, so that it could properly consider the settlement. The settlement was later vacated due to this nondisclosure. The lawyers also came up short as counselors. They did not counsel their client (Zimmerman) or the insurer regarding the moral aspect of nondisclosure, nor did they pose the issues for decision. Instead, they appear simply to have assumed that only maximum financial advantage was important.

The role of the client is also important to consider. When lawyers represent fiduciaries, they cannot negotiate for the personal benefit of the fiduciary to the detriment of beneficiaries. A lawyer was publicly reprimanded for negotiating with beneficiaries to settle their potential claims for small amounts on the alleged expectation that a will would be found in favor of the putative personal representative.[7] The identities of the persons for whom and with whom a lawyer negotiates also matter. If a client becomes disabled, or dies, or becomes a defunct company, the lawyer will ordinarily lose authority to act.[8] A lawyer who negotiates with an unrepresented party ordinarily must advise that party of the client's adverse interest, even where the negotiation may be friendly.[9] A negotiation with a party with whom the client expects to have an ongoing relationship may well suggest an approach different from that with a one-time adversary.

Conflicts of Interest

When do negotiations involve conflicts and when are conflicts too serious to waive? Conflicts arise under Rule 1.7(a)(1) when a law firm represents clients with "directly adverse" interests, even in unrelated matters.

Even friendly negotiations may be "directly adverse" due to the positions of the parties. "For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client."[10] Informed consent of both clients would cure the conflict.

What if a lawyer wishes to represent both buyer and seller in the same deal? Rule 1.7, Cmt. 28 states, "Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them." Comment 29 emphasizes that joint representation normally is unacceptable in "contentious" negotiations.

The comments, however, have not been adopted by the Minnesota Supreme Court and are subordinate to Minnesota case law holding, "[W]e have never held, nor are we prepared to do so now, that an attorney should never represent both parties seeking an antenuptial agreement."[11] Whether such joint representation, with waivers, is a good idea is another question.

Other types of conflicts can also affect negotiations. If, for example, a lawyer's

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willingness to negotiate for a particular result, or against a particular party, is materially limited by the lawyer's political or moral views, or by the lawyer's duties or loyalties to persons other than the client, the lawyer would have to decline the representation or, if the conflict related to a nonmaterial matter, obtain the client's informed consent. A lawyer who represents both a corporation and one of its two shareholders in negotiations that amount to a squeeze-out has a conflict and the conflict can vitiate the clients' attorney-client privilege.[12]

Settlement Negotiations

Several aspects of settlement negotiations are subject to specific Rules of Professional Conduct.

First, settlement must be authorized by the client.[13] Although the issue of when lawyers have settlement authority is a contract law matter beyond the scope of this article, lawyers should be aware of a recent case holding that in determining whether a settlement could be vacated for allegedly fraudulent statements, reasonable reliance on adverse counsel's statement could be found where the statement impliedly relies on special knowledge of facts.[14]

Second, Rule 5.6 provides, "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 controversy between private parties." ABA Formal Op. 00-417 concludes that a lawyer may be involved with a settlement agreement that restricts *disclosure* of confidential information, but an agreement that purports to restrict a lawyer's *use* of all information violates Rule 5.6.[15] The distinction between "use" and "disclosure" can, however, be elusive. Suppose lawyer L settles A's case against D for $500,000, subject to a confidentiality agreement. L will find it difficult to explain to client B, who has an identical case against D, why D's settlement offer of $400,000 is too low.

Third, "creative" gambits to enable a settling defendant to prevent plaintiff's counsel from further bedevilment are problem-laden. For example, a leading commentator proposes that defendant hire opposing plaintiff's lawyer P: "By operation of the conflict of interest rules, that arrangement would preclude the lawyer from representing any new plaintiffs in such cases."[16] The problem with this gambit is *timing*. If the retention is *after* settlement, P may have no incentive to be retained. If the retention is *before* settlement, the resulting conflict will result in discipline, where there was incomplete or nonexistent disclosure and consent.[17]

Threats

Lawyers representing clients in civil matters may wish to threaten an opponent with criminal prosecution, or disciplinary prosecution, to gain a settlement advantage. Before the adoption of the Rules in 1985, DR 7-105(A), Minn. Code Prof. Resp. provided, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The Rules have no counterpart to DR 7-105(A).[18] The drafters believed that improper threats were dealt with by more general rules, *e.g.*, Rules 4.4 and 8.4.

A threat of criminal prosecution may be proper in some circumstances, as where "the criminal matter is related to the client's civil claim, the lawyer has a well founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process."[19]

Consider the following scenarios. Fired Frank sues former employer E for $10,000 in unpaid commissions. To encourage settlement, Frank's attorney A threatens to disclose E's pollution violations to the EPA. Meanwhile, in emptying Frank's office, E discovers clear evidence that Frank forged $5,000 of company checks for his own benefit. E's lawyer L threatens to report Frank to the county attorney unless Frank repays within ten days. A's threat is impermissible because there is no nexus between Frank's claim for commissions and E's pollution violations. On the other hand, L's threat to report Frank's forgery is permissible. The amount sought does not exceed the restitution that would likely be ordered on conviction and the evidence of forgery satisfies the "well-founded belief" standard.

Is a threat to file an ethics complaint permissible? Suppose opposing counsel C has violated Rule 4.2. Can you threaten to report C to the OLPR if C does not recommend your settlement offer to his client? The two matters appear to be sufficiently related, the disciplinary charges are well-grounded, your settlement offer is reasonable, and you are not suggesting you have any influence over the disciplinary process. And, of course, your client stands to benefit.

So, what's the answer? Applying the ABA's "relatedness" factor, it is unethical for a lawyer to threaten disciplinary action against another lawyer in order to gain an advantage for a client in a civil matter. The critical nexus between the threatened criminal charges and the client's civil claims that spared Frank's attorney in Scenario 2 is not present when the threat is against the opposing party's lawyer rather than the opposing party. However, merely putting a lawyer on notice that conduct violates professional rules, and will not be tolerated, is not itself unethical.

A final word on threats. Lawyers should be aware of the coercion statute and of the possibility—beyond the scope of this article— that a threat may be a crime.[20]

Candor and Nondisclosure

Lawyers have engaged in all kinds of ploys to gain advantages for their clients in negotiations. But lawyers who lie in their personal dealings with others, including negotiations in the lawyer's own behalf, are subject to professional discipline.[21] While the line between permissible and impermissible conduct is not always bright and clear, the lawyer-negotiator may not lie, where to "lie" means to make a literally false statement meant to be taken at face value.

Rule 4.1 provides, "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law." Minnesota Rule 4.1 differs from the ABA Model Rule in two ways. Minnesota dropped the requirement of materiality, and declined to adopt MR 4.1(b), dealing with omissions.[22]

However, materiality is implicit in the rule. The rule does not preclude mere "puffing." The lawyer whose client would eagerly settle the case for $50,000 does not violate Rule 4.1 when he advises opposing counsel, "my client will not take a penny less than

$100,000." Similarly, it is permissible to say to opposing counsel, "my client wants his day in court, no matter how much it costs him," when the lawyer knows the client desperately wants to settle to avoid trial. Such ploys are not considered "false statements of fact or law," because no sensible lawyer regards them as truthful statements. Whether a lawyer believes that the more aggressive forms of puffing are consistent with professionalism is another question.

On the other hand, here are a few examples of negotiating conduct courts have found problematic.[23]

■ **Policy Limits**. *Fire Insurance Exchange v. Bell*, 643 N.E.2d 310 (Ind. 1994) arose when a boy was badly burned and the homeowner was sued. Settlement for $100,000 was agreed upon, and approved by the court, on defense counsel's representation that the policy limit was $100,000. Upon discovering the policy limit was actually $300,000, the boy sued the defense counsel for fraud. Ruling in the boy's favor, the court said: "The reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice."

■ **Unflagged Changes from Draft to Final Documents**. A and B agree to the language of a key clause. In reducing the agreement to writing, B's lawyer edits the clause to give advantage to B. B flags the change in internal communication with B's executive, and advises him to delete "highlighting" before forwarding a "final" draft to A for execution. A overlooks the revised language. Later, B invokes the clause against A, who cries foul, alleging fraudulent concealment of B's allegedly unilateral changes. B moves for summary judgment on the fraud claim, asserting it fails because B made no affirmative representation, the parties engaged in an arms-length transaction, and fraudulent concealment does not apply because B owed no duty to disclose the revisions to A.

United State District Court Judge Donovan Frank, ruling in *TCS Holdings, Inc. v. Onvoy, Inc.*, 2008 WL 4151805 (D. Minn., Sept. 4, 2008), held that this scenario presented a question of fact for the jury: "The issue of whether [B's] conduct, with respect to the insertion of the disputed contract language into the 2003 Agreement, constitutes fraud is an issue properly left for a fact-finder."

When Your Adversary Stumbles

Most authorities do not require a lawyer to correct an adversary's unilateral misunderstanding. Rule 4.1, Cmt. 1 states, "A lawyer … generally has no affirmative duty to inform an opposing party of relevant facts." Similarly, a leading commentary states, "[T]he whole point of the adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponent."[24]

Putting these principles to work, in the following scenarios a lawyer owes no duty to correct opposing counsel's unilateral error or misunderstanding:

■ **Miscalculated Damages.** Plaintiff's damages expert significantly miscalculates plaintiff's damages. Plaintiff's counsel fails to catch error, conveys settlement demand to defendant. Defendant's lawyer spots the error and, after conferring with defendant, immediately accepts plaintiff's settlement demand.

■ **Unknown Limitations Defense.** An arcane limitations statute bars plaintiff's claim. Nevertheless, plaintiff's attorney brings suit against defendant. Defendant's attorney, unaware of limitations defense, answers complaint. Plaintiff's attorney convinces client to make very reasonable settlement demand, hoping defendant will accept before his attorney tumbles to statute-of-limitations defense. Defendant accepts the offer and pays.[25]

While it is not a rule violation to capitalize on an adversary's mistakes and misunderstandings, there are a few caveats. Under Rule 1.4, the lawyer-negotiator often should discuss the ethical consequences of a proposed course of action with the client. If the client asks the lawyer to assist in conduct the lawyer believes to be unlawful or dishonest, the attorney need not comply (subject to 6th Amendment requirements in criminal defenses) and may, in fact, be subject to discipline for doing so.[26]

If a lawyer, at a time when detrimental reliance can still be avoided, learns that something the lawyer or the client previously said was in error or was reasonably misunderstood, the lawyer must make a correction, or cause the client to do so, or must resign. Settlement agreements are contracts that can be voided if a party reasonably relied on another's material misrepresentation (including that of the lawyer-agent) in entering into the settlement contract, even where the misrepresentation was unintentional.[27]

A lawyer may not take advantage when the lawyer's own client has unlawfully created the advantage. In *Schubot v Rochester Methodist Hospital et al.*, Civ. No. 3-941 (D. Minn. March 14, 1996), the court sanctioned plaintiff's counsel $105,159 for negotiating a settlement with a medical malpractice defendant

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without revealing that plaintiff had stolen defendant's records. Plaintiff's counsel actually threatened to urge the jury to draw adverse inferences from defendant's inability to produce the records. Plaintiff was suspended for three years.[28]

Even where there is no obligation to an adversary, there may be a disclosure obligation to the court or a court may perceive such an obligation. And even where the adversary has no claim against the lawyer for nondisclosure, the lawyer may be subject to disciplinary rules forbidding assistance in a fraud on the tribunal, *e.g.*, Rule 3.3(a)(2), MRPC.

Fraud and Related Liability

Except in rare circumstances, lawyers do not owe a duty of disclosure to their adversaries. An attorney is not subject to tort liability to his client's adversary for allegedly failing to provide information obtained from a client during the course of professional representation in contested proceedings.[29] However, "courts have recognized the legitimacy of aiding and abetting claims against both attorneys and accountants (citations omitted)."[30]

The relationship between settling parties can affect settlement enforceability and claims of fraud: "One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts (citation omitted)."[31] "Nondisclosure may constitute fraud where there is a duty … to disclose a certain fact …."[32]

The sometime elusive goal is to know when the duty to speak arises, and when a lawyer may safely remain mute. "The obligation to speak arises because the third party has been misled [by what the client has said], rather than merely left in ignorance."[33] A rule for lawyers in negotiations is: (1) Never utter a statement of material fact you expect your adversary to accept at face value unless you know it is truthful; (2) If you have spoken on a matter and have excluded material information, the absence of which you know the adverse party will detrimentally rely upon, make complete disclosure.

If you live by this variation of the Golden Rule when conducting negotiations, chances are good that you will never face professional discipline, civil liability, or worse: "Do not do unto opposing counsel that which you would not want opposing counsel to do unto you." ▲

Notes

[1] 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 (1997). Craver seems to think a lawyer can be "deceptive without being dishonest," but Rule 8.4(c) puts dishonesty and deceit in the same category.

[2] Preamble, Minnesota Rules of Professional Conduct (hereinafter "MRPC").

[3] *Id.*

[4] Rule 2.1, MRPC.

[5] Rule 1.2(a); Rule 1.4, Cmt. 5, MRPC.

[6] Rule 1.3, Cmt. 1, MRPC

[7] *In Re Nelson*, 470 N.W.2d 111 (Minn. 1991).

[8] *See* ABA Formal Opinion 95-397; *see also In re Disciplinary Action Against Krueger*, 686 N.W.2d 527 (Minn. 2004).

[9] Rule 4.3, MRPC.

[10] Rule 1.7, Cmt. 7, MRPC.

[11] *McKee Johnson v. Johnson*, 444 N.W.2d 259, 266 (Minn. 1989).

[12] *Evans v. Blesi*, 345 N.W.2d 775 (Minn. App. 1984). Although this case is often cited in legal briefs, it has not been cited with favor by Minnesota appellate courts.

[13] Rule 1.2(a).

[14] *Hoyt Properties, Inc. v. Production Resource Group, L.L.C.*, 736 N.W.2d 313, 319 (Minn. 2007).

[15] Jorgensen, "Settlements that restrict a lawyer's practice," *Minnesota Lawyer* (Nov. 13, 2000).

[16] Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §47.6 (Aspen: Aspen Law & Business, 2001).

[17] *See, e.g., In re Brandt*, 331 Or 113, 2000 WL 1292614 (Or. 2000); *The Florida Bar v. St. Louis*, 2007 WL 1285836 (FL. 2007); *Adams v. Bellsouth Telecomm., Inc.*, 2001 WL34032759 (S.D. Fla. Jan. 29, 2001).

[18] *See* Wernz, "Threatening to Present Criminal Charges," *Bench & Bar of Minnesota* (November 1987).

[19] ABA Formal Opinion 92-363; *see also* Jorgensen, "When Lawyers Threaten Criminal Prosecution in a Civil Case," *Minnesota Lawyer* (April 24, 1998).

[20] *See* Minn. Stat. §609.27, Subd. 1(5).

[21] Rule 8.4(c), MRPC.

[22] ABA Model Rule 4.1(b) provides, "[In the course of representing a client a lawyer shall not knowingly] fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

[23] *See also* ABA Formal Op. 06-439, "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation."

[24] Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §3.1:204-2 (Prentice-Hall 1992 Supp.) *See also Brown v. County of Genesee*, 872 F.2d 169 (6th Cir. 1989); ABA Formal Op. 94-387 (1994).

[25] *See* ABA Formal Op. 94-387 (1994).

[26] *See* Rule 1.2(d), MRPC.

[27] *See Restatement (2nd) Contracts* §§159-173, especially §171(1) and Comment A.

[28] *The Florida Bar v. Hmielewski*, 702 So.2d 218 (Fl. 1997).

[29] *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989).

[30] *Bonhiver v. Graff*, 248 N.W.2d 291, 298-99 (1976).

[31] *Klein v. First Edina Nat'l Bank*, 293 Min. 418, 421 196 N.W.2d 619, 622 (1972).

[32] *Matter of Boss*, 487 N.W.2d 256 (Minn. App. 1992).

[33] Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §4.1:300 (Prentice-Hall 1993 Supp.).