

Ethical Negotiations

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Main Points

1. Rules allow significant latitude with respect to negotiations
2. Other factors are likely more limiting on negotiation behavior

Context

1. Complexities of negotiation
 - ✓ No express process
 - ✓ Clients
2. Spirit of the Professional Rules

Spirit of the Rules

Preamble:

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen **having special responsibility for the quality of justice.**

Spirit of the Rules

Preamble:

[2] . . . As negotiator, a lawyer seeks a result advantageous to the client but **consistent with requirements of honest dealings with others.**

Spirit of the Rules

Preamble:

[7] . . . a lawyer is also guided by personal conscience and the approbation of professional peers.

Spirit of the Rules

Preamble:

[9] . . . must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

Major Issues

1. Clients
2. Telling the Truth
3. Disclosure
4. Other Considerations

Clients – Roles in Negotiation

Clients: **goals** and **terms**

- ✓ MRPC Rule 1.2(a), Rule 1.4, cmt 5

Lawyers: **means** and **strategy**

- ✓ Must reasonably consult with client about means, but not bound to follow directions
- ✓ Must review all important terms with client before proceeding in a negotiation
- ✓ MRPC Rule 1.4(a)(2) and cmt. 5

Clients – Example

1. Client directs attorney to make settlement offer. At settlement conference, attorney tells opposing counsel that “any discussions in the near term concerning settlement . . . would be premature and inadvisable.”
2. Attorney found to have violated Rule 1.2(a) In re Panel File No. 99-5, 607 N.W.2d 429, 430 (Minn. 2000)

Telling the Truth

RULE 4.1:

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.

Telling the Truth

RULE 4.1 (Comment)

Statements of Fact

[2] . . . 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.

Telling the Truth

“The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind.”

Section 4.1.1, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002)

Telling the Truth

“[C]ertain aspects of the process unavoidably involve statements that are less than completely accurate, such as posturing or puffery, intentional vagueness regarding a negotiating party's ‘bottom line,’ estimates of price or value, and the party's ultimate intentions regarding what an acceptable settlement [are not considered] ‘material.’”

Ausherman v. Bank of Am. Corp., 212 F.Supp.2d 435,446 (D.Md. 2002)

Telling the Truth (Crossing the Line)

1. Misrepresenting amount of insurance

Slotkin v. Citizens Casualty of New York, 614 F.2d 301 (2d Cir. 1979)

2. Falsifying who would be using leased equipment

The Florida Bar v. Cramer, 678 So.2d 1278 (Fla. 1996)

3. Misleading through Track Changes (and lack of flagging changes in exchanged drafts)

TCS Holdings, Inc. v. Envoy, Inc., 2008 WL 4151805 (D.Minn. 2008)

Disclosure

RULE 4.1 (Comment)

Misrepresentation

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

Disclosure (Failure to Inform)

1. Existence of other legal claims

Pendleton v. Central New Mexico Correctional Facility, 184 F.R.D. 637 (D.N.M.1999)

2. Death of the client

Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F.Supp. 507 (E.D.Mich.1983)

3. True extent of damages (injury)

Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962)

(vacated settlement where defendant knew and failed to disclose true damages caused by accident)

Other Potential Considerations

1. Practical / Strategic
2. Professional Relationships and Reputation
3. Individual Morality