

**A LAWYER'S ETHICAL OBLIGATIONS
ARISING IN THE CONTEXT OF NEGOTIATIONS**

Daniel Joseph
Akin Gump Strauss Hauer & Feld LLP

- 1) Confidentiality of negotiations.
 - a) There is no doctrine or rule of confidentiality of what is said during negotiations with an adverse party. There is no rule of ethics on this subject.
 - i) Negotiating parties legally can reveal to others what they have said and what has been said to them.
 - ii) Revealing the substance of negotiations may be unwise but it is not forbidden.
 - b) There is a federal rule of evidence limiting the admissibility of statements made in negotiations to compromise a claim.
 - i) With respect to a claim that is contested as to validity or amount, Federal Rule of Evidence 408(a) renders inadmissible:
 - (1) Evidence of offering or promising or offering to accept or accepting a valuable consideration for compromising the claim, or
 - (2) Conduct or statements made in compromise negotiations
 - (3) When offered to prove or negative a claim of liability or to impeach by prior inconsistent statements or through contradiction.
 - ii) Rule 408(b) expressly says that subsection (a) does not bar that evidence if offered for other purposes.
 - iii) Note that the exclusion only applies with respect to a claim that is contested in validity or amount.
 - c) A related issue – in negotiations, a participant is sometimes tempted to reveal legal advice or statements that have been made to or by counsel.
 - i) This is attempted as a way of affirming the reliability of those statements or showing true motivation of actions.
 - ii) Being non-privileged themselves, however, such negotiating statements will waive the attorney-client privilege.
- 2) Lawyers speaking for the client in negotiations.

- a) Often in negotiations, representations are made about such things as:
 - i) The client's intentions;
 - ii) The client's normal practices;
 - iii) Actions or activities peripheral to the subject of the negotiations but bearing on the good faith of the negotiations, comprehension of the offer or expectations with respect to it.
 - b) In the conduct of negotiations, lawyers often take the leading role.
 - c) Lawyers should be careful about making factual representations to opponents about any matter that is potentially significant and of which the lawyer does not have personal knowledge.
 - d) In general there is a tendency for lawyers to accept factual statements made by clients, but it is a different matter to repeat those as representations to be relied on by third parties.
 - e) In negotiations, it can be difficult for a lawyer to follow this caution because of a natural wish to be consistent in who speaks and to appear knowledgeable.
 - f) A possible course is for the spokesperson-lawyer to attribute to the client the source of the lawyer's information that supports a representation.
- 3) Statements contrary to fact in negotiations.
- a) Introduction – brief reminder of the roles of the Model Rules of Professional Conduct, the Rules of individual jurisdictions, and the Restatement of the Law Governing Lawyers (1999).
 - b) Surprisingly, this is not a well defined or well understood subject.
 - c) In negotiations it is common to make statements that the speaker knows are contrary to fact. Examples:
 - i) Our bottom line position is so and so.
 - ii) Here are three good reasons why you should take our offer.
 - iii) If you don't accept, our client is going to be forced to sue you / close part of its business / consider other suppliers, etc.
 - d) Although such statements are widely thought to be natural and necessary parts of negotiation, a lawyer's ability to make such statements under the Rules of Professional Conduct is not completely clear.

- e) Rule 4.1 of the ABA Model Rules of Professional conduct, and the District of Columbia, New York, and Texas Rules all require that in the course of representing a client, a lawyer cannot “make a false statement of material fact or law to a third person . . .”
- f) The comments to the rule discuss negotiations. Because the rule text is unequivocal, the comments concentrate on defining the term “statement of material fact” so that it does not include common negotiating claims or arguments.
 - i) The comments (ABA Model Rule 4.1, Comment [2]) state that there are “generally accepted conventions” in negotiation under which “certain types of statements ordinarily are not taken as statements of material fact.”
 - ii) The three stated in the comment as “ordinarily in this category” are:
 - (1) “Estimates of price or value placed on the subject of the transaction”,
 - (2) “[A] party’s intentions as to an acceptable settlement of a claim”, and
 - (3) “[T]he existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.”
 - iii) The first two of these appear to cover at least the majority of statements made as negotiating tactics. Their identification as non-assertions of material fact essentially means that both sides recognize that such statements are tactical only and do not constitute factual statements.
 - iv) However, also note that the comment appears directed at a standard negotiation of a lawsuit for damages or a sale transaction, where the dollar amount of damages or price is the primary issue.
 - (1) The comments do not directly cover more complex situations in which such questions as engineering feasibility, operational practices, or compliance with technical standards are being covered when discussing not a damage remedy but a complex consent decree or other form of settlement.
 - v) In addition, note that the comment language is repeatedly conditioned by the words “generally accepted” and “ordinarily” (used twice). This hedging clearly allows for the assertion to be made that particular circumstances that may be present justify going outside of the protection of the comment.
 - vi) The comment then warns that lawyers should be “mindful of their obligation under applicable law to avoid criminal and tortious misrepresentation.”
 - (1) Note that this warning is not logically consistent with the preceding passage. If statements of the kinds described fall within generally accepted conventions of negotiation under which such statements are not taken by one’s opponents as statements of material fact, then there need be no caution in making them.

- (2) This is typical Rule-speak warning of undefined areas, vague prescriptions, and countervailing policies.
 - (3) The real warning is of the dangers of coming close to crossing an ill-defined line.
- g) The Restatement is similar in substance and similarly vague.
- i) Section 98 of the Restatement says that a lawyer communicating on behalf of a client may not “knowingly make a false statement of material fact or law to [a] nonclient . . .”
 - ii) Comment c. says that “[c]ertain statements, such as some statements relating to price or value . . . are considered nonactionable hyperbole . . . and not misstatements of fact or law . . .” “Nonactionable hyperbole” is a way of saying “mere puffing”, the kind of exaggerated sales talk that has long been allowed.
 - iii) Then, to determine whether particular statements fall in this category, the comment proceeds to a “factors” analysis: past relationship of the parties, their apparent sophistication, the plausibility of the statement on its face, the phrasing, other communication between the parties, and “the known negotiating practices of the community in which both are negotiating”.
 - iv) It continues: “In general, a lawyer who is representing a person in negotiation will be understood by non-clients to be making non-impartial statements, in the same manner as would the lawyer’s client.” It then warns that “Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this section.”
 - v) The Reporter’s Note to Comment c then says that the ABA Model Rule comment is wrong to suggest that statements in negotiations are not assertions of “fact” and that it would be more accurate to say that they are not statements that would be relied on by their listeners as “material.”
 - vi) Both the ABA and the Restatement agree that in negotiations the listener should know whether a statement made is of a class to be relied on or not.
- h) To summarize a difficult situation:
- i) The black letter rule is unequivocal in saying that material false statements of fact or law are unethical.
 - ii) The only suggestions as to what statements made in the form of factual assertions may or may not be understood as non-factual or non-material are in comments – a sign that should raise some concerns.
 - iii) Even in the comments, statements of what is non-factual or non-material are always qualified by words like “ordinarily”, so that one may be subject to the assertion that particular circumstances are extraordinary and the comments offer no protection.

- iv) What seems to be permitted?
 - (1) “Puffing” – but this must be limited to standard assertions concerning the attractiveness of the offer.
 - (2) Statements about the negotiating position or process – e.g. “this is our bottom line”; “you have one week to consider”; etc.
 - (a) Note that this is a rule of necessity.
 - (b) True negotiation would likely be impossible if it were not allowed to say or imply that a stated position was a solid position.
 - (3) Both the ethics rules and the Restatement refer to negotiating practices accepted in the community of the negotiators.
 - (a) There are really two concepts mixed here.
 - (b) The first is the comparative sophistication of the parties (including counsel). Sophisticated opponents will find it harder to claim to have been misled.
 - (c) Beyond sophistication, are there really communities of negotiators with understood or accepted practices?
 - (i) In truly limited and specialized areas, there are.
 - (ii) But in general, this concept may be left over from days when legal practice was relatively isolated in communities. With nationwide firms and extraterritorial practices, little of that sense is left.
 - (iii) Even in the 10 years since the Restatement appeared, this trend away from practice in “communities” has markedly advanced.
 - (4) Existence of an undisclosed principal.
- v) Outside of these areas, an attempt to sway the negotiation by factual or legal assertions that are not correct is very risky. Examples:
 - (1) Statements not about the thing being negotiated but about important background or surrounding circumstances that may affect the attractiveness of particular terms of a settlement.
 - (2) Statements by a party with superior knowledge of a subject of importance.
 - (3) Statements by a party that has a relationship with the other where the other has over time justifiably come to trust the first party. (For example, a large and sophisticated supplier of equipment dealing with a limited, local consumer.)

- 4) Diligence and Zeal.
 - a) Rule 1.3 of the ABA Model Rules requires a lawyer to pursue a client's goals with reasonable diligence.
 - b) This is watered down from what some state rules provide on this subject.
 - i) DC Rule 1.3 requires lawyers to represent clients "zealously and diligently". New York and Texas formulations closer to the ABA Model.
 - ii) But in any jurisdiction the lawyer is required to pursue the client's goals.
 - c) In negotiations it may well be possible to soft pedal client goals that the lawyer thinks are unattainable or unreasonable.
 - i) This tendency should be resisted.
 - ii) The way to address client goals that a lawyer thinks are unreasonable is by discussion with the client.
- 5) Communication. If a lawyer is conducting negotiations, the lawyer must be diligent about keeping the client informed about any development that might affect the outcome of the matter. Lack of communication is a frequent complaint by clients. Rule 1.4.
- 6) Rule 4.2 bars communications by a lawyer representing a party with the opposing party if the lawyer knows that the opposing party has counsel.
 - a) This is waivable, but only by opposing counsel, not by the opposing client.
 - b) In negotiations it often happens that there are teams negotiating for each side, each team including lawyers and non-lawyers.
 - c) Practices grow up in each negotiation about who the lead is, both in general and on particular issues.
 - d) Avoid circumstances where a lawyer on one team communicates with nonlawyers on the other unless the point is specifically discussed and both sides agree. Best to confirm this in writing.
 - e) Also note that most rules prohibit a lawyer not only from directly communicating with an opposing nonlawyer but also from "causing another" to do so.
 - i) The purpose of the rule is to prevent the lawyer using superior knowledge of legal issues and consequences to trick opponents when they are not protected by the presence of their counsel.
 - ii) DC, New York, and Texas all have this prohibition even though the ABA Model Rules do not.

- iii) Extremely tricky and ill-defined issues presented where a lawyer participates in conversations preparatory to a discussion between the client and the opposition.
 - (1) In some jurisdictions there are opinions saying that a lawyer can discuss approaches suggested by others but not suggest approaches himself or herself.
 - (2) Ludicrous formulation.
 - (3) In such circumstances a lawyer should avoid helping the client take legal advantage of the other side in such a communication.
 - (4) An area of ever-present danger.
- 7) Rule 5.6 prevents a lawyer from “participat[ing] in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”
 - a) From time to time a party in negotiations may demand, or consider demanding, as a condition of settlement that the opposing lawyer agree not to represent any other client in making a similar claim against the party.
 - b) This is forbidden ethically, to both sides.
 - c) The purpose of the restriction is to make competent legal representation as widely available as possible.