

# The Ethical Negotiator: What May (or Must) I Say?

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# Objectives

- Discuss ethical limits and requirements in negotiations
- Suggest some strategies to lessen risks

# Caveats

- This is not intended to
  - Create an attorney-client relationship
  - State the standard of care of lawyers
- Please keep hypotheticals hypothetical
- Seek legal counsel for a particular issue

# Common points of concern

- What is “puffery”?
- Must I correct opposing counsel’s errors about:
  - The law?
  - The facts of the deal?
  - The meaning of vague terms?
- What may (and must) I say to a mediator?
- What information can I disclose?
- May I make an offer that is not authorized?
- When may I communicate *ex parte* with a represented party?

# What Value?

- Lawyer represents ABC Corp. in negotiation to buy commercial property from XYZ LLC
- ABC has conducted an independent evaluation of property value by analyzing recent sales of comparable properties

## What Value? (cont'd)

- The comparable sales were between \$2.9 million and \$3.3 million
- ABC makes an offer to buy for \$2.1 million
- ABC told Lawyer that it would be willing to go as high as \$3 million

## What Value? (cont'd)

- Stunned by the low offer, XYZ's Managing Member calls Lawyer to discuss the price
- Managing Member says
  - “We thought that ABC was serious about buying the property, but that price is a nonstarter”
  - “Is there any room to move or are we done?”

## What Value? (cont'd)

- What if Lawyer said
  - “No; that’s the highest that ABC will ever go”
  - “Yes; but we really can’t go much farther”
  - “This was a generous offer; ABC had an independent evaluation, and the comps were all between \$1.5 million and \$2 million”

# Truthfulness to others (RPC 4.1)

- 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; or
  - Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a crime or fraud by a client (unless prohibited by RPC 1.6)

# Misrepresentation (RPC 4.1 cmt. 1)

- In representing a client, a lawyer is required to be truthful
- No affirmative duty to inform an opposing party of relevant facts
- Misrepresentation can occur if lawyer incorporates or affirms another's statement known to be false
- Partially true but misleading statements/omissions can equal affirmative false statements

# Materiality (RPC 4.1 cmt. 2)

- “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”
  - Estimates of price
  - Estimates of value placed on the subject of the transaction
  - A party’s intentions as to an acceptable settlement of a claim
  - Existence of an undisclosed principal (except where nondisclosure would constitute fraud)

# ABA Formal Opinion 06-439

- “[A]lthough a lawyer may in some circumstances ethically decline to answer a judge’s questions concerning the limits of the lawyer’s settlement authority in a civil matter, the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry.”

## ABA Formal Op. 06-439 (cont'd)

- “A lawyer may downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s ‘bottom line’ position, in an effort to reach a more favorable resolution.”

## ABA Formal Op. 06-439 (cont'd)

- “Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.”

# More examples of prohibitions

- Settling a personal injury case without disclosing that the client had died
- Stating insurance coverage of \$200,000 when lawyer's file showed coverage of \$1 million

# Immaterial statements

- Downplaying a client's willingness to compromise
- Overstatements of understatement of strengths or weaknesses in a dispute
- Opinions of value or worth

# Judicial mediation

- “While as explained in the Comment, *supra*, a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party’s actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1.”  
– ABA Formal Op. 93-370

# Additional thoughts

- A reputation for honesty and candor
- Frequent flyer attorneys and contacts
- Materiality: how might someone view statements and conduct in hindsight?

# The Teleconference

- Bob represents DEF Inc.
- Irene represents GHI LLP
- After their lengthy negotiations over a license for intellectual property rights, a possible renewal term remains unresolved

## The Teleconference (cont'd)

- Bob and Irene schedule a 3:00 p.m. teleconference at which two principals from each company will attend and discuss renewal
- Bob's preceding meeting ran long
- Bob joins the call about 15 minutes late

# The Teleconference (cont'd)

- Bob asks for an update
- GHI's lead partner says, "we think that an automatic renewal term would work if we add a 10-day notice termination clause"
- DEF's president balks, saying that DEF would need more notice

## The Teleconference (cont'd)

- Not wanting the deal to fall apart over this clause, Bob suggests adding a 90-day termination clause with a substantial early termination fee
- Bob says, “this is obviously important to my client, and we wouldn’t want things to fall apart over this”

## Teleconference (cont'd)

- GHI's lead partner says, "I guess that's okay; it's not really that important to us"
- Bob then asks, "Irene, what are your thoughts on this?"
- Irene does not respond, because she is not on the call

## Teleconference (cont'd)

- What should Bob do?
- What should Bob have done?
- What are the potential ramifications from Bob's *ex parte* communications with GHI?

## Represented parties (RPC 4.2)

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person that the lawyer knows to be represented by another lawyer in the matter
- Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order

# Tips for teleconferences

- Ask all parties to identify themselves when you join the call, even if you're late
- Pay attention to join/leave chimes
- If *ex parte* contact is anticipated or desired, ask and get specific confirmation in writing

# Post-settlement dilemma

- Lawyer learned that, in connection with settling an insurance claim, Client prepared a possibly fraudulent document
- The document was used in connection with the settlement

## Post-settlement dilemma (cont'd)

- Lawyer advises Client to disclose to the insurance company and rectify the situation
- Client refuses

## Post-settlement dilemma (cont'd)

- Has Lawyer done what was necessary?
- Can Lawyer continue to represent Client in the matter?
  - Wash. Adv. Op. 1328 (1989)

# Leaving a Legacy

- Mike is the CEO of JKL Inc., a family-owned business
- Mike is ready to retire but wants his two daughters, Sarah and Laura, to be involved in the company and own the business

## Leaving a Legacy (cont'd)

- Sarah knows the business very well and is eager to run the company
- Laura has no desire to work in the company but likes the idea of having an ownership interest

## Leaving a Legacy (cont'd)

- Mike asks Lawyer, who has represented JKL on a number of transactions to
  - Draft the necessary documents,
  - Meet with Sarah and Laura to discuss the proposed documents, and
  - Have Sarah and Laura sign them

## Leaving a Legacy (cont'd)

- Lawyer meets with Sarah, who says, “I love my sister, but she has no place running any part of this company”
- Sarah proposes to pay Laura a lump sum so that Laura will have a minority share of the company and no job duties

## Leaving a Legacy (cont'd)

- Lawyer meets with Laura and tells her that she should accept Sarah's proposal because the lump sum is very reasonable
- Laura tells Lawyer, "I'll need a bigger payoff to walk away from a higher share in what I know will be a lucrative company"

## Leaving a Legacy (cont'd)

- Lawyer tells Sarah that even at Laura's higher amount, this is an excellent deal
- Lawyer also tells Sarah that Mike has negotiated a lucrative license agreement that Laura does not yet know about

## Leaving a Legacy (cont'd)

- Sarah agrees to pay the higher lump sum amount in order to leave Laura with a minority interest and no job duties
- Lawyer says that he'll circulate revised paperwork within 48 hours

## Leaving a Legacy (cont'd)

- When Mike learns of this, he is furious that Lawyer
  - Suggested different ownership shares for Sarah and Laura,
  - Proposed for Laura to have an ownership interest with no job duties, and
  - Disclosed the new license agreement to Sarah

# Issues?

- Scope of representation
- Scope of confidentiality
- Client identity
- Conflicts of interest

# Tips for new matters

- Identify (in writing) the client clearly
- Identify (in writing) the work to be done
- Remain consistent with these terms or update the scope writing
- Identify (in writing) what cannot be disclosed



# Discussion

# Adjournment