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.”

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?