ATTORNEYS' ETHICAL RESPONSIBILITIES DURING SETTLEMENT NEGOTIATIONS

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In the absence of a claim of substantial misrepresentation amounting to fraud, judges and courts rarely get involved in regulating the behavior of negotiators. Because of this, lawyers involved in settlement negotiations often do not have a clear understanding of what behavior is appropriate. Additionally, the American Bar Association (“ABA”) and state disciplinary rules provide only minimal guidance concerning the parameters of settlement negotiations. Ethical dilemmas are prevalent in this area since the negotiation process inherently involves some level of misrepresentation, particularly concerning each side's minimum settlement points. See 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, 714 (1997). Although some level of "puffery" is expected and accepted, it is far from clear where the line is drawn between uncontrolled advocacy and candor. The Preamble to the Model Rules of Professional Conduct recognizes the tenuous nature of negotiations, stating "[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others." Model Rules of Professional Conduct, Preamble (1995).

ABA Model Rule and State Disciplinary Rules

Rule 4.1 of the Model Rules of Professional Conduct applies to both the litigation and negotiation contexts and states that:

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 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.

Model Rule 4.1. Additionally, an explanatory comment states that lawyers are "required to be truthful when dealing with others on a client's behalf." See id. cmt. 1. However, the Rule does recognize the uniqueness of settlement negotiations. Comment two states that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." Id. cmt. 2. Specifically, the Rule excepts estimates of price or value placed on the subject of a transaction and intentions as to an acceptable settlement of a claim.

Lawyers will generally only be disciplined when they know that a statement is false, not when they should have known of its falsity or merely suspected that it may be false. See ABA/BNA Lawyer's Manual on Professional Conduct, Practice Guide, Truthfulness in Statements to Others (1998). The statement must also concern fact or law that is material to the case. Although Rule 4.1 does not define materiality, generally a matter is material if important enough to the parties or the
merits as to influence the party to whom it is made. See id. For example, one ethics committee found that the fact that a workers' compensation plaintiff was in jail for three months and not entitled to benefits totaling less than $1,000 was not material when the settlement negotiations ranged between $75,000 and $95,000. See Penn. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 26 (1997).

There are additional commonly recognized exceptions to the Rule's mandate of truthfulness. Lawyer statements concerning their own opinions are not covered by the rule because they are not considered statements of fact or law. See Craver, supra, at 727. Similarly, a lawyer's non-frivolous assertion concerning the correct interpretation of the law or of a statute is viewed as falling outside the rule. See ABA/BNA, supra. Many attorneys also believe that statements to opposing counsel concerning their authorization for settlement limits are akin to settlement intentions and valuations and therefore fall outside of the rule, although there is no definitive interpretation of this question. See Craver, supra, at 727-28.

When material facts or law are involved, Rule 4.1 applies and attorneys may not lie or deliberately misrepresent the circumstances. False answers can not be justified even if the information requested is confidential. A lawyer may refuse to answer a question or employ evasion tactics, but deliberate misrepresentation will violate Rule 4.1. For example, one lawyer was reprimanded for denying that he was taping a telephone conversation, even though he reasonably believed that his client was being persecuted and that it was absolutely necessary to tape the conversation in order to prove his client's innocence. See Miss. Bar v. Attorney St., 621 So.2d 229 (Miss. 1993). Another attorney's license was suspended for six months for negligently misrepresenting the amount of available insurance coverage to the plaintiff's attorney. See In re McGrath, 96 A.D.2d 267 (N.Y. App. Div. 1983). Rule 4.1 additionally forbids an attorney from repeating lies or misrepresentations made by the client.

While lawyers are required to be truthful when communicating with third parties, a comment to Rule 4.1 states that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." Model Rule 4.1 cmt. 1. This is qualified by section (b), discussed below, but is based upon the premise that representatives have a duty to conduct their own legal research and factual investigations. See Craver, supra, at 720. Additionally, the duty of zealous representation generally prohibits a lawyer in negotiation from voluntarily disclosing weaknesses in her client's case. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 375 (1993). Although, for example, Model Rule 3.3 requires candor to the tribunal concerning relevant legal authority, no such obligation is placed on lawyers involved in settlement negotiations. Provided the lawyer does not lie or misrepresent the circumstances, there is generally no obligation to inform the opposing side of relevant facts or legal authority. In fact, even if opposing counsel is clearly making an erroneous assumption, the lawyer has no duty to correct it unless she somehow has contributed to the misunderstanding. See Craver, supra, at 724. One exception to this rule has been recognized. Most ethics committees have found an affirmative obligation to tell opposing counsel that a client died during settlement negotiations. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 397 (1995). However, the obligation is not founded on a duty of disclosure, but is based on the fact that death terminates the lawyer-client relationship and continued representation is therefore not possible. See id.
The line between overt misrepresentation and mere lack of disclosure is not always clear. Lawyers are obligated to correct statements they make that are subsequently discovered to be false since remaining silent is considered equivalent to misrepresentation. See, e.g., In re Carpenito, 651 A.2d 1 (N.H. 1994). Additionally, in some instances, partial disclosures that mislead and omissions can be tantamount to a false statement of material fact. For example, the Supreme Court of Nebraska suspended an attorney's license for six months for failing to disclose the existence of a third insurance policy during settlement negotiations after it became clear that the other side was under the impression that only two policies existed. See Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855, 856 (Neb. 1987). The court found that this omission was equivalent to knowingly making a false statement of fact. See id. However, in that case the court had previously reprimanded the attorney and relied on that fact in its decision. Id. It appears that other jurisdictions rarely require such disclosure. For example, the South Carolina Bar concluded that a lawyer was not required to disclose information relating to payments his client made to a general contractor after receiving notice of a subcontractor's lien. See S.C. Bar Ethics Advisory Comm., Advisory Op. 18 (1998). Exactly when disciplinary action will be taken in omission situations is not altogether apparent and will vary by jurisdiction. See ABA/BNA, supra (comparing Florida, Mississippi, Nebraska and Minnesota).

Rule 4.1(b) additionally mandates disclosure in certain situations when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client in the future. Although this mandate is potentially significant, it is subject to the attorney-client privilege and therefore often viewed as inconsequential. See ABA/BNA, supra. For example, the ABA concluded that a lawyer could not reveal information relating to the defrauding of a government bank examiner because the information was confidential. See ABA Formal Op. 375, supra. Lawyers thus have difficulty knowing how to proceed when clients engage in continuing or subsequent acts of fraud. The lawyer is required to counsel the client concerning his or her legal obligations. If the client is intent on continuing with the fraud, the attorney will generally be forced to withdraw from representation since future contact with opposing counsel will likely involve misrepresentation or unethical omission. Attorneys are nevertheless required to disclose information not subject to the attorney-client privilege, such as information contained in a public record. See e.g., In re Sellers, 669 So.2d 1204 (La. 1996).

There are additional considerations for lawyers who are engaged in settlement negotiations. First of all, lawyers are potentially liable for civil damages if their settlement behavior amounts to fraud, libel or slander. See, e.g., Ill. St. Bar Ass'n, Advisory Op. 16 (1994). Settlements may also be set aside if fraudulently induced. Secondly, lawyers should be concerned about their reputations in the legal community. Although certainly a lawyer must zealously and diligently represent a current client's interests during negotiations, the potential effect on future negotiations counsels against overtly aggressive or unethical behavior. See Craver, supra, at 719-20. Finally, attorneys are responsible for providing capable representation and should be careful to keep all appropriate questions in order to avoid situations where opposing counsel succeed in misrepresenting relevant facts or law. See id., at 724.

Most states that have adopted the Model Rules have made little change to Rule 4.1 and, in general, jurisdictions bar false statements of material fact and law while excepting certain recognized negotiation strategies. See ABA/BNA, supra. Even jurisdictions that have not specifically adopted