

## ETHICS, MORALITY, AND TRUTH-TELLING

James D. Gordon III  
Brigham Young University Law School

Your client, Byer, signed a contract with Zeller under which Byer would buy and Zeller would sell a piece of real property for \$1 million. Before the closing date, Zeller changed his mind and told Byer that he would not sell the property. Byer has told you confidentially that she was unable to obtain the necessary financing and could not have performed her part of the contract on the closing date. You are negotiating with Zeller's lawyer to settle the case.

1. Can you assert in negotiations that your client was ready, willing, and able to perform her part of the contract on the closing date?

### Model Rule of Professional Conduct 4.1. Truthfulness in Statements to Others.

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; . . . .

### Model Rule of Professional Conduct Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

2. Must you disclose that your client could not obtain the financing to purchase the property?

### Model Rule of Professional Conduct 4.1. Truthfulness in Statements to Others.

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.

Comment [1].

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of

affirmative false statements.

3. Can you assert in negotiations that the property is worth \$1.5 million?

Model Rule of Professional Conduct 4.1, Comment [2]:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. 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 . . . . Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

- A. Can you make the statement if you have no basis for it? Are you impliedly saying that you have a reasonable basis for the statement?
- B. Can you make the statement if you personally don't believe that the property is worth \$1.5 million? Are you impliedly saying that you personally believe that the property is worth \$1.5 million? Are you misrepresenting your state of mind?
- C. Can you make the statement if an appraisal, which you have no reason to doubt, says that the property is worth \$1 million?
- D. Are statements about value statements of material fact, or merely opinions?
- E. Is a statement about value not material because reliance on the statement is unreasonable? Does the law place the responsibility on each party to form its own opinion about value?
- F. W. Page Keeton et al., *Prosser and Keeton on Torts* 758, 760 (5<sup>th</sup> ed. 1984) (footnotes omitted):

The value, or financial worth, of property is regarded as a matter of opinion, on which each party must form his own judgment, without trusting to his adversary, and as to which "puffing" and exaggeration are normally to be expected. Very little, however, is required to transform a statement of opinion into one of fact. Thus a representation as to the price paid for the property by the defendant himself is regarded as one of fact, as is also a statement as to the price at which similar property is selling, the amount of an offer made by a third person, the state of the market, or even the lowest price at which a purchase can be made from another. There is a very noticeable tendency to find such additional elements wherever possible, and to give relief by treating statements of value as covering something more than mere opinion.

. . . .

The courts have developed numerous exceptions to the rule that misrepresentations of opinion are not a basis for relief. Apparently, all of these may be summed up by saying that they involve situations where special circumstances make it very reasonable or probable that the plaintiff should accept the defendant's opinion and act upon it, and so justify a relaxation of the distrust which is considered admirable between bargaining opponents. Thus where the parties stand in a relation of trust and confidence, . . . it is held that reliance upon an opinion, whether it be as to a fact or a matter of law, is justifiable, and relief is granted.

Further than this, it has been recognized very often that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it. There is quite general agreement that such an assertion is to be implied where the defendant holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff, so that his opinion becomes in effect an assertion summarizing his knowledge.

- G. Whether or not you would be disciplined for violating Rule 4.1 or 8.4(c), is the statement honest?
- 4. Can you say, "My client won't settle for less than \$200,000," if your client has told you that she will settle for \$100,000?

Model Rule of Professional Conduct 4.1, Comment [2]:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. 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 . . . Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

- A. Is this a "false statement of material fact" under Rule 4.1? Are you misrepresenting your client's state of mind, or intentions? Is the statement not material because reliance on the statement is unreasonable?

W. Page Keeton et al., *Prosser and Keeton on Torts* 762-63 (5<sup>th</sup> ed. 1984) (footnotes omitted):

[S]tatements of intention, whether of the speaker himself or of another, usually are regarded as statements of fact. "The state of a man's mind," said Lord Bowen in 1882, "is as much a fact as the state of his digestion;" and this catch

phrase has been repeated ever since in explanation of the distinction between prediction and intention. But any statement of an opinion is at least as much an assertion of the fact of the present state of mind; and the justification of the distinction must be that the intention is regarded as a material fact, by which the adverse party may reasonably be expected to govern his conduct.

- B. Can you make the statement if you already have authority from your client to settle the case for \$100,000?
- C. Whether or not you would be disciplined for violating Rule 4.1 or 8.4(c), is the statement honest? Is there a “settlement negotiations exception” to honesty?
- D. Charles W. Wolfram, *Modern Legal Ethics* 726-27 (1986) (footnote omitted):

A lawyer who understands those general statements [in Comment [2] to Rule 4.1] as a green light for aggressively untruthful negotiation strategies could incur disaster for a client. The adverb “ordinarily” in the comment must be heavily emphasized. Decisions have held, for example, that misstatements about value can indeed create liability.

Also included as permissible puffing are some statements about the strengths and weaknesses of a client’s legal position. That is supportable in part by the doctrine that a lawyer’s appraisal of such matters is hard-core work product protected from discovery in litigation in all circumstances. Yet that rationale applies only to revelations someone attempts to force from a lawyer and not at all to volunteered statements that are false. Here, as in other examples of puffing, a careful lawyer, intent on negotiating a legally protectable bargain, would be very circumspect in making or implying false and misleading statements about intention.

- 5. Alvin B. Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 La. L. Rev. 577, 585-86 (1975) (footnote omitted):

Most lawyers say it would be improper to prepare a false document to deceive an adversary or to make a factual statement known to be untrue with the intention of deceiving him. . . .

Interesting answers are obtained if lawyers are asked whether it is proper to make false statements that concern negotiating strategy rather than the facts in litigation. Counsel for a plaintiff appears quite comfortable in stating, when representing a plaintiff, “My client won’t take a penny less than \$25,000,” when in fact he knows that the client will happily settle for less; counsel for the defendant appears to have no qualms in representing that he has no authority to settle, or that a given figure exceeds his authority, when these are untrue statements. Many say that, as a matter of strategy, when they attend a pre-trial

conference with a judge known to press settlements, they disclaim any settlement authority both to the judge and adversary although in fact they have settlement instructions; estimable members of the bar support the thesis that a lawyer may not misrepresent a fact in controversy but may misrepresent matters that pertain to his authority or negotiating strategy because that is expected by the adversary.

To most practitioners it appears that anything sanctioned by the rules of the game is appropriate. From this point of view, negotiations are merely, as the social scientists have viewed it, a form of game; observance of the expected rules, not professional ethics, is the guiding precept. But gamesmanship is not ethics.

6. ABA Section of Litigation, *Ethical Guidelines for Settlement Negotiations* § 4.1.1. Committee notes (2002):

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. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances. *Model Rule 4.1*, comment 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. . ." *Model Rule 4.1*, comment 2. (This comment was amended in February 2002 to make clear that even these types of statements may be statements of material fact.) "Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. *Restatement [of the Law, Third, Governing Lawyers]*, § 98, comment c. Factors to be considered include the past relationship among the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement (for example, whether the statement is presented as a statement of fact), related communications, the known negotiating practices of the community in which both are negotiating and similar circumstances. *Restatement*, § 98, comment c. In making any such statements during negotiation, a lawyer should consider the effect on his/her credibility and the possibility that misstatements in negotiation can lead not only to discipline under ethical rules, but also to vacatur of settlements and civil and criminal liability for fraud. *Model Rule 4.1.*, comment 2.

7. If an error arises in drafting the settlement agreement, must you disclose it to opposing counsel? What if you did not cause the error?

ABA Section of Litigation, *Ethical Guidelines for Settlement Negotiations* § 4.3.5.

## Exploiting Opponent's Mistake (2002):

In the settlement context, a lawyer should not exploit an opposing party's material mistake of fact that was induced by the lawyer or the lawyer's client and, in such circumstances, should disclose information to the extent necessary to prevent the opposing party's reliance on the material mistake of fact.

Committee notes:

In some limited circumstances, even where neither counsel nor counsel's client caused the other party's error, there may be a professional duty to correct the error. . . . Further, some may conclude that, as a matter of professionalism, the other party's misconception must be corrected in certain circumstances.

In the context of drafting a settlement agreement, in particular, a lawyer should endeavor in good faith to state the understanding of the parties accurately and completely, and should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention. *See ABA Guidelines for Litigation Conduct*. It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement. See N.Y. City Eth. Op. 477 (1939) (when opposing lawyer recognizes inadvertent mistake in settlement agreement, lawyer should urge client to reveal the mistake and, if the client refuses, the lawyer should do so); *cf.* ABA Informal Op. 86-1518 (1986) ("Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.").

8. Possible consequences of dishonesty:
  - A. Professional discipline.
  - B. Rescission of a contract or settlement agreement.
  - C. Civil liability for damages.
  - D. Criminal conviction for fraud (*e.g.*, general fraud, wire and mail fraud, securities fraud).
  - E. Damage to credibility and reputation.
  - F. Loss of employment.
  - G. Loss of self-respect.