Ethics in Negotiation
Session # 11

Presented by:

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For:

CLE by the Hour - Session #11
10:20 p.m. – 11:20 p.m.
December 29, 2006
Cumberland School of Law

I. GOALS FOR THE SESSION

The purpose of this session is to explore existing guidelines and rules of professional conduct that establish the line between prohibited negotiating behavior and legitimate settlement advocacy. This aspect of the session is mainly covered in the handout. The power point presentation is designed to provide tools and techniques for assessing your opponent in negotiation, deciphering their strategy and motivations and countering them.

II. INTRODUCTION TO THE TOPIC

Although few will admit to it, there is no doubt that deception plays an active role in mediation and negotiation. Ask yourself if you have ever bluffed your opponent, protected sensitive information by changing the subject, overstated the strengths of your case, or been less than candid about its weaknesses during a conversation? If so, was it zealous advocacy, puffing or just the inherent nature of settlement discussions? Negotiators transitioning from litigation advocacy to settlement advocacy often struggle with the extent to which they can use "litigation" style tactics and whether certain commonly used tactics are ethical. Non-litigators are often dismayed or exasperated by the scorched earth tactics adversarial negotiators routinely use. Additionally, anyone practicing in areas of the law that require negotiated or mediated settlements should be aware of a growing body of case law, disciplinary actions and ethics opinions that says that a settlement agreement that has been obtained by a fraudulent misrepresentation of fact may be set aside and may also lead to tort liability and professional liability and may not be dischargeable in bankruptcy.

III. ALABAMA RULES OF PROFESSIONAL CONDUCT

The Preamble to the ARPC describes a lawyer's functions while representing a client as follows. "As **advisor**, a lawyer provides a client with an informed

understanding of the client's legal rights and obligations and explains their practical implications. As **advocate**, a lawyer zealously asserts the client's position under the rules of the adversary system. As **negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As **intermediary** between clients, a lawyer seeks to reconcile their divergent interests as an advisor to and, to a limited extent, as a spokesperson for each client. A lawyer acts as **evaluator** by examining a client's legal affairs and reporting about them to the client or to others.

Rule 4.1 <u>Truthfulness in Statements to Others</u> reads as follows:

> 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.

The <u>Comments</u> to Rule 4.1 discuss misrepresentation, statements of fact and fraud by a client:

> ***Misrepresentation*** - 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 failure to act.
>
> ***Statements of Fact*** - 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 in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

> ***Fraud by Client*** - Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Comparing Rule 4.1 to the former Alabama Code of Professional Responsibility Paragraph (a) is substantially similar to DR 7-102(A)(5), which stated that "[i]n his representation of a client, a lawyer shall not … [k]nowingly make a false statement of law or fact." With regard to paragraph (b), DR 7-102(A)(3) provided that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."

IV. PUFFING OR MISREPRESENTATION / SO WHAT?

The most frequently analyzed ethical issue in negotiation is that of truthfulness. Under Rule 4.1, when representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person. This would include opposing counsel, witnesses and mediators. What is "material" in a given case is not always clear, but a recent ABA Formal Ethics Opinion gives some examples of what is allowed in the specific contexts of the settlement negotiations and "caucused" mediations. *See* ABA Formal Ethics Op. 06-439 (April 12, 2006).

After acknowledging at the outset of the opinion that it is not unusual for lawyers to be "less than entirely forthcoming" with opposing counsel during settlement negotiations, the opinion gives examples of what are not false statements of material fact or law:

- puffing, posturing and other statements upon which parties to negotiations are ordinarily not expected to rely
- exaggerating the client's negotiation goals
- downplaying the client's willingness to compromise

We all know these very general categories of what is often called normal puffing in settlement negotiations. Because we expect them from opposing counsel, we are not necessarily misled when these statements are made. Opinion 06-439 discusses the kinds of misstatements that are violations of Rule 4.1:

- When a lawyer representing an employer in labor negotiations states to union lawyers that adding a particular employee benefit would cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20.
- When defense counsel declares that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist.
- When a prosecutor or defense attorney tells the other side during a plea negotiation that he knows of an eyewitness to the alleged crime when he knows that is not the case.

The topic of misrepresentation has been the subject of previous ABA Formal Ethics Opinions and disciplinary actions. *See* ABA Formal Op. 93-370 (1993) (a deliberate misrepresentation to a judge of a lawyer's settlement authority is a statement of a material fact and a violation of Rule 4.1, the lawyer should not lie or misrepresent the facts but should decline to answer the judge's improper inquiry); ABA Formal Op. 94-387 (1994) (lawyer has no duty to inform the other party that the statute of limitations has run on client's claim but cannot "make any affirmative misrepresentation about the facts); and ABA Formal Op. 95-397 (1995) (lawyer engaged in settlement negotiations in personal injury case must notify opposing counsel and court if the client dies).

Attorneys have been disciplined by many states for violations of Rule 4.1 In State ex rel. N.S.B.A.v. Addison, 226 Neb. 585, 412 N.W. 2d 855 (1987), an attorney was suspended for six months after he negotiated the release of a hospital lien knowing that the hospital was under the false impression that there were two rather than three applicable insurance policies. The attorney failed to disclose the third policy to the hospital and failed to correct the hospital's false impression. In Kentucky Bar Ass'n v.

Geisler, 938 S.W.2d 578 (Ky. 1997) lawyer was disciplined for settling a personal injury case without disclosing that her client had died. *See also* In re Warner, 851 So. 2d 1029 (La. 2003) (same), and Toledo Bar Ass'n v. Fell, 364 N.E.2d 872 (Ohio 1977) (same). A New York lawyer was disciplined for stating to opposing counsel that his client's insurance coverage was only $200,000 when he knew that the limits were actually $1 million. In re McGrath, 468 N.Y.S.2d 349 (N.Y. App. Div. 1983). Finally, in an Oregon case, the vendor's lawyer was allowed to be sued for fraud after he made statements that "it was a lot of property for the money," implying his client had the power to transfer real property to the plaintiff/buyers. Jeska v. Mulhall, 693 P.2d 1335 (Or. Ct. App. 1985); cf. Matter of Duckworth, 914 P.2d 900 (Ariz. 1996).

Settlements have been set aside for violations of Rule 4.1. In a non-attorney discipline case, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983), a lawyer failed to disclose the death of the client prior to settlement, resulting in the settlement being set aside. In another cases, a Minnesota court threw out a settlement because of defense counsel's failure to disclose to the Court during a settlement agreement approval hearing material facts adverse to his client's position relating to the plaintiff's medical condition. Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962). An Iowa court allowed a third-party equitable indemnity claim for malpractice against opposing counsel who had engaged in misrepresentations during negotiations. Hansen v. Anderson, Wilmarth & Van Der Maaten,630 N.W.2d 818 (Iowa 2001).

Fraudulently obtained settlements may not be dischargeable in bankruptcy. In Archer v. Warner (01-1418) 538 U.S. 314 (2003) 283 F.3d 230, the U.S. Supreme Court addressed the question of whether a promissory note given in settlement of pending litigation can constitute a non-dischargeable debt "for money, or an extension, renewal, or refinancing of credit, obtained by false pretenses, a false representation, or actual fraud," within the meaning of 11 U.S.C 523 (a)(2)(A), where the parties execute a settlement agreement and general release of all claims of fraud or misrepresentation

underlying the litigation and all future claims arising from the same facts, where the debtor has neither admitted nor been found to have engaged in fraud or misrepresentation underlying the litigation, and where the creditor has failed to allege fraud in connection with the procurement of the settlement.

The underlying facts of the case are as follows: On Feb. 5, 1996, Arlene and Leonard Warner sought federal bankruptcy protection under Chapter 13 of the Bankruptcy Code. In October of that year, the U.S. Bankruptcy Court for the Middle District of North Carolina converted the Warner's claim to Chapter 7 protection. According to the U.S. Bankruptcy Code, all of the Warner's debts were wiped out, or discharged. One of the debts the Warners believed bankruptcy had discharged was the $100,000 they owed Elliott and Carol Archer. In 1997, the Archers filed a complaint against the Warners in bankruptcy court, claiming the $100,000 debt was an exception to the debts the Warner's could discharge.

The debt was a portion of a settlement the Warners and Archers reached in 1995 to resolve a suit between the two families. In 1992 the Archers bought the Warner Manufacturing Company from Leonard Warner. After the sale, the Archers filed suit against the Warners in Superior Court of Guilford County, North Carolina, alleging misconduct, fraud and misrepresentation of the company during the sale. In the settlement with the Archers, the Warners agreed to pay a total of $300,000. The Warners paid the Archers $200,000 cash at the time of the settlement. The Archers also received a $100,000 promissory note and agreed to make two payments of $50,000 in the following year. The settlement also included two separate releases that relieved either party of an admission of fraud or misrepresentation. The Warners did not pay either of the $50,000 payments before they filed for bankruptcy.

In their claim before the bankruptcy court, the Archers argued the Warners could not be released from their debt because the debt was a result of misconduct and fraud on the part of the Warners. Section 523 of the federal bankruptcy code explains which debts cannot be discharged if a person or corporation files for protection under Chapter 13. The

debts that are obtained through "false pretenses, a false representation, or actual fraud" are exceptions to the dischargeable debts and are not allowed to be wiped out. After the Archers filed their complaint, Leonard Warner filed a "consent order" reaffirming his debt to the Archers. Arlene Warner did not and argued in her defense that the Archers could not claim misconduct because the case dealing with fraud had been settled and her debt to the Warners was a dischargeable contract debt.

In August 1999, the bankruptcy court agreed with Warner and did not force her to pay the remaining $100,000 to the Archers. In response to the ruling, the Archers claimed before the U.S. District Court for the Middle District of North Carolina in Greensboro, NC., that the bankruptcy court had misinterpreted the exceptions to dischargeability. The district court sided with the Warners and upheld the bankruptcy courts ruling. The court said the 1995 settlement agreement substituted a dischargeable contract debt, the $100,000, for a fraud-based tort debt that might not be dischargeable. The court added that the only way they could have ruled in favor of the Archers would have been if they could have proved that Warner intended to declare bankruptcy when she entered the 1995 settlement. The court said it could not find any evidence to support the fraud claim because the Warners had already paid the Archers $200,000 of the settlement and had given them deeds-of-trust on their home and business property to secure the payment of the remaining debt.

On March 8, 2002, a divided 4th U.S. Circuit Court of Appeals panel ruled 2-1 in favor of the Warners. Judge Hiram Widener wrote for the court that "parties willing to settle disputes over fraud, misrepresentation, or like tort claims may do so by way of settlement through contract, and such contractual claims are then dischargeable in bankruptcy. Otherwise, the incentive to settle is gone." The appeals court opinion also recognized a split among the federal circuits in deciding whether a tort settlement can become a dischargable debt. The 9th and 7th circuits agree with the 4th Circuit that when a settlement is reached in a fraud or any other tort case, the settlement becomes a contract, thus changing the bankruptcy status of the debt from non-dischargeable to

dischargeable. The D.C. and 11th circuits have a competing view and hold that a settlement could allow "a fraudulent debtor to transform into a non-fraudulent one" and escape the penalties of his or her fraud. In his dissent, Judge William Traxler argued that in addition to the D.C. and 11th circuit precedents, three unanimous Supreme Court decisions have adopted reasoning more consistent with those circuits than with the majority's. On June 24, 2002, the U.S. Supreme Court accepted the case for review, and on March 31, 2003, the Court reversed by a 7-2 vote, holding that the debt for money promised in a settlement agreement can amount to a debt for money obtained by fraud, within the terms of the Bankruptcy Code's non-dischargeability statute. Justice Stephen Breyer wrote the opinion for the Court. Justices Clarence Thomas and John Paul Stevens dissented.

ADDITIONAL RESOURCES:
The syllabus, opinion and dissent can be found at the following links:
http://supct.law.cornell.edu/supct/pdf/01-1418P.ZS
http://supct.law.cornell.edu/supct/pdf/01-1418P.ZO
http://supct.law.cornell.edu/supct/pdf/01-1418P.ZD

Finally, in 1994, a unanimous decision by the United States Supreme Court in the trademark infringement case of Digital Equipment Corp. v. Desktop Direct, Inc., 114 S.Ct. 1992, 31 USPQ2d 1010, (June 6, 1994), has a serious and important message for those settling litigation in Federal Court. In Digital the defendant had settled its trademark dispute with the plaintiff Desktop. The terms of the settlement agreement included a complete dismissal of the case. Nonetheless, shortly thereafter Digital found itself back in court for a full trial on the merits of the same dispute which it thought had been "settled".

The plaintiff Desktop applied to the court which had approved the settlement agreement to rescind that same agreement and to reopen the dismissed case. Desktop

claimed that Digital had failed to disclose material facts during settlement negotiations, which if disclosed, would have resulted in Desktop's rejection of Digital's settlement offer. The trial court granted Desktop's application to set aside the settlement agreement and to reopen the litigation and place the parties back in court awaiting trial. Specifically, Desktop alleged that during the settlement negotiations Digital misrepresented the date it had acquired knowledge of Desktop's trademark. Desktop Direct, Inc. v. Digital Equipment Corp., 993 F.2d 755, 757 (10th Cir. 1993). The District Court concluded, on unspecified grounds, that a fact finder "could" determine that if true this would be a material misrepresentation, warranting rescission.

Digital endeavored to avoid trial and protect and enforce its rights under the settlement agreement by attempting an immediate interlocutory appeal from the trial court's ruling. However, the Tenth Circuit Court of Appeals dismissed Digital's effort as involving an issue "insufficiently important" to warrant an immediate appeal as of right. Id. 993 F.2d 755, 758-760. This appellate ruling departs from those of several other Courts of Appeals: Forbus v. Sears, Roebuck & Co., 958 F.2d 1036, 1039-40 (11th Cir.), cert. denied, 113 S.Ct. 412 (1992); Grillet v. Sears, Roebuck & Co. , 927 F.2d 217, 219-20 (5th Cir. 1991); Janneh v. GAF Corp., 887 F.2d 432, 434-36 (2d Cir. 1989); cert. denied, 498 U.S. 865 (1990); but see Tramstech Industries, Inc. v. A & Z Septic Clean, 5 F.3d 51 (3d Cir. 1993), cert. pending No. 93-960. Those courts had recognized that a private settlement agreement provided a sufficiently final and important right which, in the interests of justice and judicial economy, ought to be decided at an early stage, as opposed to delaying vindication until after months and perhaps years of expensive and wholly unwarranted resumed litigation in the trial court.

Digital then sought review of the Tenth Circuit's ruling by certiorari to the U.S. Supreme Court, and that court accepted petition for review to resolve the evident differences of opinion among the several U.S. Courts of Appeals. The resulting Supreme Court decision is couched by the Supreme Court as a procedural one, concerning only the proper application of the federal statute which limits appeals as of right to "final"

decisions only. Speaking unanimously through Justice Souter, the Supreme Court firmly rejected Digital's contention that "the right not to stand trial" embodied in a private settlement agreement was sufficiently valuable and important to justify the availability of immediate appeal from the trial court's order which now jeopardizes the implementation of the agreement. Instead, Justice Souter states that "rights under private settlement agreements can be adequately vindicated on appeal from final judgment [i.e. only after a full trial on the merits]." 31 USPQ2d at 1013. The Court gave short shrift to Digital's argument that avoiding the expense and uncertainty of trial is usually a dominating motivation for any settlement of litigation. The Court at 1017 went on to point out that the public policy against piecemeal litigation (embodied in the finality requirement of the appeals statute, 28 U.S.C. §1291), cannot be "trumped routinely by the expectations or clever drafting of private parties." Id.

The Digital opinion did comment that an immediate appeal might still be available under another statute, 28 U.S.C. § 1292, which provides for permissive certification of an interlocutory appeal at the joint discretion of both the trial judge and the Court of Appeals. However, in Digital the trial judge either did not, or would not, certify that very question under the § 1292 procedure. Thus, the alternate discretionary route to the Court of Appeals was here, in fact, unavailable to Digital. Mr. Justice Souter does point out in a footnote an "important" right that can be privately contracted for in a settlement agreement and which the United States Courts will recognize as providing certain protection from trial. That right is embodied in the Federal Arbitration Act, 9 U.S.C. § 1, et. seq. specifically in a recently enacted amendment thereto, 9 U.S.C. § 16. These sections essentially do provide for an immediate appeal from any trial court order which rejects a party's assertion that resolution of a dispute belongs before a commercial arbitrator and not in a federal court.

After Digital it would seem that the clearest and most certain route to avoid post-settlement exposure to trial is to include a well-drafted arbitration clause in every settlement agreement which is designed to terminate with finality a litigation in the U. S.

Federal Court system. This still does not mean that an ongoing dispute cannot or will not materialize, but it does appear to ensure that any such dispute will be resolved by arbitration and not by federal trial. Moreover, concern that an action in U.S. federal court could still lie on grounds similar to those raised by Desktop (i.e. of "fraud and misrepresentation in the inducement of the [settlement] contract", thus claiming complete rescission of the entire contract, including the arbitration clause), appears to have been answered in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398, 403-406 (1967) (a federal court may consider "fraud in the inducement" as a defense to an agreement to arbitrate only if the fraud relates specifically to the arbitration clause itself and not to the contract generally). See Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1139-40 (9th Cir. 1991).

As a further precaution, a clear documentary record should be established of the informational exchanges between the negotiating parties and, if possible, a recitation in the agreement that the parties acknowledge they have satisfied themselves that they have sought and received with "due diligence" all information which they believe necessary to evaluate and enter into the terms of settlement. A propos of that, in California Torts by Levy, Golden & Sacks (Lexis Nexis—Matthew Bender) the authors make a recommendation that where in fact there is reliance upon a material representation, that it be expressed in the agreement. Thus at page 73-40 they state: “If a settlement agreement is entered into based on the representations of a party regarding certain facts and circumstances, it is prudent practice to include those representations in the written agreement to provide a basis for rescission if the material facts were misrepresented. Should the factual basis subsequently be discovered to be false, the factual statement may provide a basis for rescission of the contract on the grounds of fraud. For example, if a defendant represents that limited assets are available for settlement of a claim and the plaintiff relies on the representation in agreeing to the compromise of his claim, the plaintiff may later plead fraud as a basis for rescission of the settlement agreement if it is later discovered that the defendant had undisclosed assets.”

ADDITIONAL RESOURCES:

Listen to the recording of the oral arguments, review the full opinion and read the briefs at the following links:

http://www.oyez.org/cases/case/?case=1990-1999/1993/1993_93_405

http://supreme.justia.com/us/511/863/case.html

http://www.oyez.org/media/item?type=audio&id=argument&parent=cases/1990-1999/1993/1993_93_405

V. WHAT IS TRUTHFULNESS IN NEGOTIATION AND MEDIATION?

The most recent ABA Formal Opinion, 06-439, discusses a suggestion that negotiating lawyers be held to a stricter standard of truthfulness when participating in a "caucused" mediation. Several law review articles have been published discussing this very issue. See Kimberlee K. Kovach, New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation, 28 FORDHAM URB. L.J. 935, 953-59 (2001); Carrie Menkel-Meadow, The Lawyer as Consensus Builder: Ethics for a New Practice, 70 TENN. L. REV. 63, 67-87 (2002); John W. Cooley, Mediation Magic: Its Use and Abuse, 29 LOYOLA U. CHI. L.J. 1, 101 (1997). The opinion concludes that a different standard need not be applied in this context, and that the ethical rules dealing with truthfulness before "tribunals" and misrepresentations do not apply or impose greater obligations upon the negotiating lawyer than those already provided for in Rule 4.1.

In Charles Carver's article "Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive," 38 South Texas Law Review 713 (1997), he states:

> 'If one negotiator lies to another, only by happenstance will the other discover the lie. If the settlement is concluded by negotiation, there will be no trial, no public testimony by conflicting witnesses, and thus no

> opportunity to examine the truthfulness of assertions made during the negotiation. Consequently, in negotiation, more than in other contexts, ethical norms can probably be violated with greater confidence that there will be no discovery and punishment.'

James White commented, "More than almost any other form of lawyer behavior, the process of negotiation is varied; differs from place to place and from subject matter to subject matter. It calls, therefore, either for quite different rules in different contexts or for rules stated only at a very high level of generality . . ." He suggests, further, that the negotiator's paradoxical responsibility is to be truthful and fair on the one hand, but misleading on the other.

> 'Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled . . .'
>
> J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 American Bar Foundation Research Journal 921.

Charles Carver's survey of lawyers with regard to the duty to disclose reveals that many negotiators regularly use selective disclosures, divulging only legal authority and facts that will be beneficial to their clients' positions, while withholding damaging information. Carver maintains that such partial disclosure is an expected practice, and opposing attorneys should carefully listen and watch for clues to weaknesses in the opponent's presentation, ask probing questions, and conduct external research. Lawyers see no duty to correct legal or factual misunderstandings, especially if caused solely by the carelessness of opposing counsel. What if a lawyer knows that an opponent has misinterpreted an honest statement? For example, the plaintiff's attorney graphically describes the severe pain his or her client has suffered due to a severely sprained ankle, and the defense attorney replies, "Yes, I know how painful a broken ankle can be." Most respondents to Carver's study indicated they would feel no obligation to correct the

misunderstanding so long as they had not created it. With respect to correcting an opponent's misconception about legal doctrines in the course of negotiations, almost no respondents believed there is an affirmative duty to assist their adversaries in identifying and analyzing applicable statutes and case law.

Even Ury and Fisher, who consider misrepresentation about facts, authority, or intentions the most common "dirty trick" in negotiation, agree that less than full disclosure is not the same as deception. Deliberate deception as to facts or one's intentions is quite different from not fully disclosing one's present thinking. Good faith negotiation does not require total disclosure. They warn against, however, other unethical practices such as psychological warfare in the form of creating physically or emotionally stressful situations, personal attacks, threats and positional pressure tactics such as refusal to negotiate, "take it or leave it," extreme demands, escalating demands, lock-in tactics, and calculated delays. See, Fisher & Ury, Getting to YES: Negotiating Agreement Without Giving In (1981), 140-48.

Walter W. Steele, in his article "Deceptive Negotiating and High Toned-Morality," 39 Vanderbilt Law Review 1387, offers some interesting perspectives on the issue of truthfulness in negotiation. Lawyers, he observes receive extensive training in the art and sophisticated rules of procedure that govern litigation. As negotiators, however, they undergo limited formal training and operate under punitive and obtuse rules of professional responsibility and an amorphous set of professional customs common among lawyers. Negotiation rules are subject to debate and are highly dependent on value systems of judgment, while procedural rules for court are explicit, sophisticated, and persuasive as a means of preventing abuse and exploitation of one litigator by another, stronger litigator.

VI. NEGOTIATOR'S CHECKLIST

1. Know what the ethics rules say about negotiations and which rules bind you and which rules bind your opponent.
2. Know if your potential liability falls into the arena of primary liability or secondary liability—a distinction that turns on whether you are (i) a direct speaker or participant in the negotiation, or (ii) merely a private advisor to a direct speaker or participant.
3. Know the legal rules on fraudulent misrepresentations and statements of fact, statements of intent, statements of law, expressions of opinions, "puffing," and "half-truths"; and know the concept of materiality.
4. Know the baseline legal rule in your situation regarding the affirmative duty to disclose material information. Although the baseline common law rule in the United States is often said to be "buyer beware" (i.e., there is no general duty to disclose material information), the reverse is true in certain transactions, such as, for example, some securities sales, sales of real estate, transactions with a fiduciary, and settlements that the court must approve on the merits. Regardless of the type of transaction, there may be a duty to disclose particular facts, such as the death of a litigation party, so-called "scrivener's errors," and certain facts about environmental hazards. We have no precise delineation of when there is a duty to disclose. A court will analyze various factors and may weigh them in an infinite variety of ways.
5. Know whether by your words or actions you have assumed a higher duty to disclose than the baseline rule provides. If the legal rule is "buyer beware," but the lawyer undertakes to provide particular information to the other side, the lawyer must speak truthfully and probably loses the right to assert the "no duty to disclose" rule as to that information.

6. Know whether there is an agreement or a contract in place that regulates the duty to disclose. Language in ADR clauses or Mediation Agreements may address the required degree of candor.
7. Know that the thorniest issue is the non-disclosure of "juicy facts" when the baseline rule seems to be "no general duty of disclosure." If you or the client is attempting to take advantage of the opponent's ignorance of material information under a "no duty to disclose" rule, you should carefully analyze the situation.
8. Know your client's attitude about disclosure and negotiation tactics. Is it a no holds barred negotiation where your client will want to take every arguably lawful advantage? Or, perhaps, is the client bargaining for a long-term trust based relationship where upfront candor is an important aspect of success?
9. Know your personal attitude negotiation and your predisposition to use certain tactics.
10. Know where to turn for timely advice and guidance, formal and informal, if an issue arises.

Thank you!

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