Ethics in Negotiations

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About Me

- Teach Mediation, Arbitration, Negotiation, etc. at the University of Nebraska College of Law
- Mediator of Civil and Family Cases
- Board Member of Nebraska Mediation Association and The Mediation Center
- Appointed to the ODR Advisory Committee
- Write and Speak on Mediation and Arbitration Issues
- Worked in Private Practice as a Litigator in Complex Litigation

NEGOTIATION ETHICS: WHEN MUST WE BE TRUTHFUL?

Nebraska Rules of Professional Conduct Rule § 3-504.1

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact 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.

Nebraska Rules of Professional Conduct Rule § 3-501.6

(a) A lawyer shall not reveal information relating to the representation of a client unless . . . the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm

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Fraudulent Misrepresentation

(1) that a representation was made; (2) that the representation was false; (3) that, when made, the representation was known to be false, or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damages as a result.

Nielsen v. Adams, 388 N.W.2d 840, 846 (Neb. 1986)

What about Puffing?

[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.

NEGOTIATION ETHICS: LAWYER'S ROLE AS COUNSELOR

Nebraska Rules of Professional Conduct Rule § 3-502.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Consider non-legal factors that influence settlement options in your practice.

Nebraska Rules of Professional Conduct Rule § 3-501.2

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter.

Consider the last time you *disagreed* with a client's decision to settle or not settle?

ETHICS IN PRACTICE: DONS PRACTICE QUESTIONS

The Facts . . . .

- Ex-girlfriend has a deadly STD and does not tell ex-boyfriend that she is infected.
- After they break up, ex-girlfriend confesses and advises ex-boyfriend to get tested.
- Ex-boyfriend gets tested using an at-home test, and the test comes up positive.
- Assume that ex-boyfriend could not have gotten the STD from anyone other than ex-girlfriend.
- Ex-boyfriend confronts ex-girlfriend, and ex-girlfriend wants to negotiate a settlement.

Additional Facts . . . .

- Ex-girlfriend has roughly 2 years left to live.
- The life expectancy of someone diagnosed with this disease is 5 years.
- Ex-boyfriend and ex-girlfriend have agreed to negotiate.
- They both hire lawyers and prepare for the negotiation.

Negotiation Facts . . . .

- Ex-girlfriend has a child with significant medical needs and wants to ensure that the child is provided for following ex-girlfriend's passing.
- Ex-boyfriend fell into a deep depression about learning of the infection. He quit his job and sold many of his possessions so he could travel his remaining days.

During Client Counseling with Ex-Boyfriend . . . .

- Lawyer B learns that ex-boyfriend went to the doctor for testing and further diagnosis.
- Ex-boyfriend learns that he is actually *immune* from the disease and the home test was a false positive.
- Ex-boyfriend asks lawyer to keep his health status confidential.
- Lawyer B contemplates a lawsuit for intentional inflection of emotional distress and assault and battery.

During Client Counseling with Ex-Girlfriend . . . .

- Lawyer G learns that ex-girlfriend came into a large inheritance.
- Ex-girlfriend would like to settle the case and pay a settlement to ex-boyfriend because she feels guilty . . .
- But . . . Ex-girlfriend tells lawyer not to disclose the inheritance in the negotiations.

Questions for Ex-Girlfriend's Lawyer

- Can the lawyer follow the client's instruction and refuse to disclose the inheritance?
- Can you think of any situations were you might counsel the client to disclose the inheritance?

Questions for Ex-Boyfriend's Lawyer

- Can the lawyer follow the client's instruction and refuse to disclose the health status of the ex-boyfriend?
- Does the answer depend on what the lawyer is asked?
- What are the practical consequences of not disclosing for the client?
- What are the practical consequences of not disclosing for the lawyer?

Empirical Research Shows . . .

When asked to keep the heath issue secret . . .

19% of lawyers agreed

19% didn't know what to do

62% would disclose

On further probing of the "unsures" and "disclosers" .

13% could be convinced to only disclose on a direct question regarding health.

-Hinshaw & Albert, *Doing the Right Thing*, Harv. Negot. L.J. 2011

Why Would Lawyers Refuse to Disclose?

- Unclear Confidentiality Requirements.
- Unclear Privilege Requirements
- Zealous Commitment to Clients
- Worry that Other Lawyers Would Withhold Info to Us

Ultimately, Hinshaw recommends removing the 1.6 cross-reference from 4.1.

NEGOTIATION ETHICS: WHAT MUST WE TELL OUR CLIENT?

Nebraska Rules of Professional Conduct Rule § 3-501.4

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

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(3) keep the client reasonably informed about the status of the matter;

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(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

§ 3-501.4 Comment 2

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.

NEGOTIATION ETHICS: WHAT IF THE OTHER SIDE IS UNINFORMED?

Nebraska Rules of Professional Conduct Rule § 3-504.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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.

Can you "cc" the Opposing Client?

ABA Formal Opinion 92-362 says "No!"

Similar rulings in Illinois, Michigan, Pennsylvania, and NYC.

The form of communication shouldn't matter. Emails and letter should be treated the same.

Ethics Case Studies

CASE 1 - Consider These Facts

- Automobile accident involving 2 minors (20 years old).
- The passenger sued the driver of the vehicle and his parents for injuries sustained.
- During discovery, the plaintiff was examined by many medical experts for both sides.
- The defendant's medical professional discovered an aneurysm in plaintiff's brain that could have been caused by the accident.
- The plaintiff's own doc did not find the aneurysm.

Questions –

- *Must* defendant's counsel disclose the existence of the aneurysm?
- Reasons to *not* disclose?
- Reasons *to* disclose?
- Does the fact that this case involves a minor make any difference?

In the real case –

- Defendants settled the case and never disclosed. The court was required to approve the settlement because the plaintiff was a minor.
- Approximately 2 years later, plaintiff joined the Army, and a routine check-up for the service uncovered the aneurysm.
- The doctor recommended surgery immediately!

In the real case –

- Plaintiff petitioned the court to reopen the case and vacate the settlement.
- The court did, in fact, vacate the settlement under its broad discretion.
- The court found that the problem was a non-disclosure *to the court* (not to opposing counsel).
- *Spaulding v. Zimmerman*, 263 Minn. 346 (1962).

CASE 2 - Consider These Facts

- Automobile accident case.
- Plaintiff dies (unrelated to the accident) 2 days before “Michigan mediation”
- Mediation panel values case at $35k. At hearing, Plaintiff’s attorney does not know of Plaintiff’s death.
- Several days later, Plaintiff's attorney learns of the passing, but does not substitute a representative.
- Three weeks later, in chambers, the attorneys agreed to settle for $35k.

CASE 2 - Consider These Facts

- The Court approves the settlement.
- On the way to the elevator, Plaintiff's attorney discloses the death.
- Defendant allegedly settled because Plaintiff would have been a good witness.
- Defendant moved to vacate the settlement.

Questions

- How do you respond if someone asks you if the plaintiff is still alive?
- Do you have to disclose in the absence of such a question?
- What might be a compelling legal argument for non-disclosure?

In the real case –

- The court found non-disclosure to rise to the level of a material misstatement under R. 4.1.
- The court found that the lawyer had a duty to the court to disclose *and* a duty to disclose to opposing counsel.
- The court set aside the settlement.
- *Vizri v. Grand Trunk Warehouse & Cold Storage, Co.*, 571 F. Supp. 507 (E.D. Mich. 1983).

CASE 3 - Consider These Facts

- A RICO case dealing with a bad breakup of an agrabusiness partnership that involved former partners and a bank.
- The key piece of information is that many of the lawyers learned about a $5 mil. D&O insurance policy held by bank that the defense side never disclosed to the plaintiffs – in discovery or otherwise.
- During settlement discussions, the insurer agreed to pay the settlement, but the source of the settlement fund was undisclosed.

CASE 3 - Consider These Facts

- The parties agreed to a $2.5 million settlement.
- The plaintiffs first learned of the insurance policy during a judgment debtor examination.
- Plaintiffs moved for sanctions and eventually settled for another $4 million.
- The court, however, instituted sanctions on its own motion.

Questions

- When, if ever, can insurance policies be undisclosed?
- When can the source of a payment to settle a lawsuit be undisclosed?
- How would you rule in this case?

In the real case –

- The trial court issued $5+ million in sanctions to the court for failure to disclose + 3 atty suspension and 2 atty reprimands.
- The 5th Circuit reversed.
- The court found that the fines were criminal in nature, and the procedures utilized below did not meet due process standards for criminal contempt.
- As for the suspensions and reprimands, the court found no due process requirements. But the 5th Cir. did not find clear and convincing evidence to affirm for half the defendants.
- *Crowe v. Smith*, 151 F.3d 217 (5th Cir. 1998).

CASE 4 - Consider These Facts

- A plaintiff was involved in 3 car accidents in the span of about 10 months (one in March, 2 in December).
- The plaintiff saw a chiropractor recommended by the law firm after each of these accidents.
- Following the December accident, the Plaintiff's lawyer sought compensation for medical attention from the insurance carriers on the other side of both accidents and did not disclose the other accidents.
- The doctor billed the identical treatments alternatively to the two December accidents

CASE 4 - Consider These Facts

- At no time, did the physician discuss the March accident or the 5% permanent disability rating she gave the client.
- During the settlement discussions, the attorney did not disclose either the other accidents.
- To not duplicate recovery, Plaintiff sought recovery of certain injuries (upper body) from one insurer and other injuries (lower body) from the other insurer.
- The State sought sanctions under R. 4.1 for non-disclosure.

Questions

- Is the lawyer required to disclose the existence of the other accidents?
- Both of the accidents? Or just the other December accident?
- How should the doctor have done her billing?

In the real case –

- Because the lawyer did not *ultimately* ask for a double-recovery, no violation of the rules regarding amount of money actually recovered.
- No duty to disclose the other accidents.
- The accounting by the chiropractor was acceptable.
- *Statewide Grievance Comm. v. Gillis*, 2004 WL 423905 (Conn. 2004).

Thank you!

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