

Out of Bounds – Negotiations Ethics

Professor Carrie Menkel-Meadow

- Negotiation ethics in brief
 - Duty to tell the truth, avoid deception, disclose certain information
 - Permissible tactics and gray areas
 - Duties to clients
 - Negotiation process itself

- Duty to advocate diligently
 - ABA Model Rules of Professional Conduct, Rule 1: duty to act with “reasonable diligence and promptness in representing a client.”¹
 - Model Rule, Comment 1: duty to act with “zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.”²

- Client-lawyer relationshipscope of representation
 - Model Rule 1.2(a): lawyer required to consult with client as to the means of representation. Lawyer may take action “as is impliedly authorized to carry out the representation.”³
 - Model Rule 1.4(a): lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”⁴

- Truthfulness in negotiations
 - Truthfulness in statements to others
 - Model Rule 4.1(a): lawyer may not “knowingly make a false statement of material fact or law.”⁵
 - Material facts
 - Rule 4.1, comment 2⁶: “Under generally accepted conventions in negotiations,” statements regarding the following are not ordinarily statements of material facts:
 - Price or value in a transaction
 - Party’s intentions as to an acceptable settlement
 - Existence of undisclosed principal except when nondisclosure would constitute fraud
 - Duty to disclose and misrepresentation
 - Model Rule 4.1(b): lawyer may not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a

¹ [Model Rules of Prof'l Conduct R. 1.3.](#)

² [Model Rules of Prof'l Conduct R. 1.3, cmt.1.](#) ⁵ [Model Rules of Prof'l Conduct R. 1.2\(a\).](#)

⁴ [Model Rules of Prof'l Conduct R. 1.4\(a\).](#)

⁵ [Model Rules of Prof'l Conduct R. 4.1\(a\).](#)

⁶ [Model Rules of Prof'l Conduct R. 4.1, cmt 2.](#)

criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”⁷

- Comment 1: lawyer “has no affirmative duty to inform an opposing party of relevant facts.” Is misrepresentation if lawyer “incorporates or affirms a statement... that the lawyer knows is false.”⁸
- Comment 3: lawyer prohibited from assisting in client crime or fraud. Lawyer may withdraw, or, “in extreme cases, substantive law may require a lawyer to disclose information related to the representation.”⁹
- Substantive law requiring disclosures
 - Common law fraud and misrepresentation
 - Tort and contract rules
 - Certain disclosures required in particular matters by statute, e.g.:
 - Home sales
 - Taxes
 - Securities
- Fraud, deceit, dishonesty, misrepresentation
 - Model Rule 8.4(c): professional misconduct for lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹⁰
- Duty to correct misunderstandings or misconceptions
 - Model Rule 3.3: lawyer may not:
 - (a) make a false statement of fact or law or fail to correct a false statement of material fact or law to the tribunal
 - (b) fail to disclose to the tribunal legal authority known to be directly adverse to the client and not disclosed by the opposing counsel.¹¹
 - What does this mean for negotiations?
- *Stare v. Tate*¹²
 - As part of a divorce, Stare and Tate entered into a property settlement agreement. Community property value was disputed, with Stare’s valuation higher than Tate’s. Stare’s attorney prepared the distribution offer but a mathematical error resulted in a valuation less than Stare’s actual valuation. Tate’s attorney

⁷ [Model Rules of Prof'l Conduct R. 4.1\(b\).](#)

⁸ [Model Rules of Prof'l Conduct R. 4.1, cmt 1.](#) ⁹ [Model Rules of Prof'l Conduct R. 4.1, cmt 3.](#) ¹⁰ [Model Rules of Prof'l Conduct R. 8.4.](#)

¹¹ [Model Rules of Prof'l Conduct R. 3.3.](#)

¹² 98 Cal. Rptr. 264 (Cal. Ct. App. 1971).

- New York Rule of Professional Conduct 3.4(e): prohibits lawyer from threatening to present criminal charges solely to gain an advantage in a civil matter.¹⁷ Does not explicitly prohibit threatening disciplinary action.
- Fairness in negotiations
 - Should fairness be a consideration in negotiations?
 - Collaborative lawyering
 - Originated in divorce law. Parties commit to good-faith, honest negotiations without court intervention and focus on settlement.
 - Colorado Bar Association Ethics Opinion 115 (Feb. 24, 2007)¹⁸
 - The Ethics Committee found that the practice violates Rule 1.7(b) of the Colorado Rules of Professional Conduct because collaborative lawyering requires lawyers to withdraw from representation in the event the process breaks down. Pursuant to Rule 1.7(c), client cannot waive this conflict.
 - ABA Ethics Opinion 07-447 (August 9, 2007)¹⁹
 - ABA Standing Committee on Ethics and Professional Responsibility approved the process. Opined that the process is a permissible limited scope representation under Model Rule 1.2..
 - Conflict of interest between lawyer's obligation to the client, and lawyer's interest in behaving honorably toward parties in the negotiation and in maintaining self-reputation?
- Negotiation
 - Negotiation and representation of unsavory clients
 - Process of negotiation – consider what the aims of negotiation are.

¹⁷ [N.Y. Rules of Prof'l Conduct R. 3.4\(e\)](#).

¹⁸ [Col. Bar Ass'n Ethics Comm., Op. 115 \(2007\)](#).

¹⁹ [ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 \(2007\)](#).