

Negotiation Ethics

From the Committee on Professional Responsibility, William Freivogel, Chair

Note on rules: all references to rules here will be to the ABA Model Rules of Professional Conduct. Where states' rules vary with the Model Rules, we will say so.

Lawyer Conduct – Keeping Client Informed. Rule 1.4 and its sub-parts basically provide that a lawyer must keep her client informed about what the client needs to know to make decisions about the subject of the representation. In the negotiation context that means that when the other side makes an offer, the lawyer must convey the offer to the client. Obviously, when the lawyer makes an offer on behalf of the client, or intends to make such an offer, the lawyer must tell the client what she's done or what she intends to do.

Lawyer Conduct – Maintaining Client Confidences. The lawyer's duty to maintain client confidences is found at Rule 1.6. In most states the protected information is "information relating to the representation." The lawyer may reveal client information with the client's "informed consent," or where the disclosure is "impliedly authorized." Thus, where it is clear that the lawyer must make certain disclosures in order to keep the negotiation moving, but not unduly harm her client, she may be able to do so. Rule 1.6 also has exceptions for client misconduct, including client fraud. We will touch on those exceptions below.

Lawyer Conduct – Contacting other Side. Suppose that, during a negotiation, you strongly suspect that the opposing lawyer is not conveying your offers to his client. May you call the other party directly to find out? No. The Rule is 4.2, which prohibits lawyer contacts with represented parties. May you prompt your client to do so? There is no rule prohibiting clients from contacting one another directly. Older wisdom was that lawyers could not discuss with their clients the possibility of such communications. That has softened. For example, in Formal Opinion 92-362 (2002) the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") held that a lawyer could ethically discuss with her client the possibility of talking to the other party in just such a circumstance. More recently, the Committee held that a lawyer could communicate with an in-house lawyer for a party, even though the party was represented by an outside lawyer, Formal Opinion 06-443 (2006). These opinions do not have the force of law, so you should consult with the rules and opinions in your jurisdiction before conducting either type of communication.

Lawyer Conduct – Truthfulness. Obviously, a lawyer may never lie to her client. As to third parties, the most important rule on truthfulness is Model Rule 4.1(a), which says a lawyer may not lie to a third person. The rule contains no exception for negotiations. Model Rule 8.4(c) overlaps with Rule 4.1(a) in providing that a lawyer may not engage in "dishonesty, fraud, deceit or misrepresentation."

In April 2006 the ABA Ethics Committee issued its Formal Opinion 06-439, entitled, "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation." It repeats the obvious that a lawyer may not lie. The opinion does recognize that lawyers may be expected to "puff" as to certain issues.

Let's use a negotiation to sell a business asset as an example. The lawyer for the seller may not say that the seller already has a firm offer from another buyer for X dollars, when no one has made an offer at all. The lawyer may, however, say that she believes the asset is worth at least X dollars, or that she expects the asset to sell quickly.

Client Conduct. The situation gets trickier when, during negotiations, it is the client who is lying. Rule 1.2(d) provides that a lawyer may not assist the client in committing a crime or fraud. All states have such a rule. Moreover, Rule 1.16(a)(1) provides that the lawyer must withdraw from the representation where to continue would cause a violation of a rule.

Suppose a lawyer is aware that her client is lying to the other side in a negotiation. We have just seen that the lawyer cannot continue if the client persists. Under what circumstances may, or must, a lawyer warn others of a client's intention to commit a fraud? Rule 1.6, the confidentiality rule, plays a role. Rule 1.6(b)(2) & (3) now allows a lawyer to "blow the whistle" (our phrase) to prevent the client from committing a fraud on another or to rectify a fraud that has already occurred. Most states have comparable exceptions to their versions of Rule 1.6. A few states provide in their rule that a lawyer *must* report client fraud.

Now, return to Rule 4.1. Recall that Rule 4.1(a) says that a lawyer may not lie. Rule 4.1(b), however, says a lawyer must disclose a *client's* lie when it is "necessary to avoid assisting a criminal or fraudulent act by a client." That sentence ends with "unless disclosure is prohibited by Rule 1.6." Recall, though, that most states have provisions in their versions of Rule 1.6 that permit disclosure. Thus, in many states, the lawyer may have the obligation to blow the whistle on a client.

Conduct within an Organization. Where the client is an organization, Rule 1.13 ("Organization as Client") is implicated. Assume that the lawyer and an officer of the client are negotiating a transaction with another party. Assume further that the officer is making claims that the lawyer knows (or strongly suspects) are not true. The lawyer should first attempt to ascertain the truth and, if necessary, straighten out the officer. Failing that, Rule 1.13(b) provides that the lawyer must, under some circumstances, go over the officer's head ("climb the ladder"), to the officer's boss, to the general counsel, even to the board of directors, if necessary. Prior to 2003, Rule 1.13 did not make climbing the ladder mandatory, nor did the rules of most states. Subsequent to the ABA changes in 2003, many states have amended their versions of Rule 1.13 to make climbing the ladder mandatory.

As to public companies, the SEC has adopted 17 C.F.R Part 205, which, among other things, requires the lawyer, under certain circumstances, to climb the organizational ladder. To illustrate the complexity of the SEC requirements, many well-run law firms have committees of lawyers devoted to seeing that the regulation is followed and providing training to securities lawyers on the regulation.

A final caution: the interplay of the rules on confidentiality and client fraud is extraordinarily complex, and the consequences of acting under them can be enormous.

The average good lawyer needs to consult with an ethics expert before deciding on a strategy to deal with suspected client fraud.
