Ethical Considerations in Negotiations: Practical Strategies and Tips

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Who is the Organizational “Client” – the Entity or the Corporate Officers?

- Rule 1.13 of the Colorado Rules of Professional Conduct ("R.P.C.") provides, in part:
  - A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  - Does the lawyer also personally represent the corporation’s:
    - executives?
    - managers?
    - directors?
    - other constituents?
Who is the Organizational “Client”?  

- A lawyer employed by or retained by an organization represents the organization and owes duties to the organization itself.
  
  • Although the organization acts through its authorized constituents such as stockholders, directors, officers, agents and employees, the lawyer representing the organization does not automatically represent these individual constituents merely by representing the organization. See Colo. Ethics Opinion 120 (2008).
Is the Lawyer Required to Disclose Relevant Facts to an Opposing Party During Settlement Negotiations?

- CO RPC Rule 4.1 provides as follows:
  - In the course of representing a client, a lawyer shall not knowingly:
    - make a false statement of material fact or law to a third person; or
    - 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.
Is the Lawyer Required to Disclose Relevant Facts to an Opposing Party During Settlement Negotiations?

• The comments to Rule 4.1 make clear:
  
  – “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.*”
  
  – The rule requires the lawyer to have knowledge of truth or falsity, as opposed to uncertainty or even suspicion of possible falsity.
What Statements to an Opposing Party During Settlement Negotiations do not Constitute a Statement of a Material Fact?

▪ Estimates of a party’s intentions as to acceptable settlement of a claim;
▪ Statements regarding negotiation goals or willingness to compromise;
▪ Over or understatements of strengths and/or weaknesses of a client’s litigation position;
▪ Expressions of opinion as to the value of the subject matter of litigation; and
▪ Estimates of price or value placed on the subject of a transaction.
Is the Lawyer Required to Disclose Relevant Facts to an Opposing Party During Settlement Negotiations?

- **Examples:**
  
  - “Your client needs to act quickly in agreeing to a contract. We have multiple offers on the table for this business.” This would be a violation, if in fact, there were no actual offers received.
  
  - A lawyer states in negotiations that, “to the best of his knowledge,” his client’s insurance potentially covered only $200,000. But the lawyer had documents in his possession that showed the existence of a policy covering an additional $1 million. Is this a problem?
    - This would likely constitute a false statement of a material fact under Rule 4.1.
Is a Lawyer Required to Disclose the Existence of Another Lawsuit to an Opposing Party During Settlement Negotiations?

- Omission of material information is a false statement.

  - *Chavez v. New Mexico*, 397 F.3d 826, 831 (10th Cir. 2005):
    - In a Title VII action, employees’ counsel failed to disclose to employer’s counsel the existence of a similar lawsuit filed by the plaintiff against the defendant; the parties subsequently entered into a settlement agreement.
    - The Court rescinded the agreement because the undisclosed lawsuit was a material fact; it was irrelevant if counsel acted “fraudulently, negligently, or innocently by withholding that fact.”
Are Statements of Opinion or a Lawyer’s State of Mind Required to be Disclosed to the Opposing Party?

- CO RPC 4.1 applies only to statements of law or fact; not statements of opinion or of the lawyer’s state of mind.
  - The rules do not prohibit hard bargaining, which includes expressing one’s opinion.
Does “Posturing” or “Puffing” Constitute a False Statement of a Material Fact?

- Exaggeration of or emphasis on the strengths of your factual or legal position and/or minimize the weaknesses, typically does not constitute a false statement of a material fact, unless the “posturing” or “puffing” is false.
  - Intentions as to an acceptable settlement of a claim – the amount demanded usually is not the actual amount that the client would settle for.
Are Statements of Opinion or Lawyer’s State of Mind Required to be Disclosed to the Opposing Party?

- Why is “puffing” not material?
  - Subjectivity – puffing constitutes statements that parties to a negotiation would not be expected to justifiably rely on.
    - Example: “No reasonable person would value my client’s loss at that amount.”
Is a Lawyer Required to Disclose Adverse Information to the Opposing Party?

- While some level of puffery and posturing is expected during settlement negotiations, the material representations made during the discussions must be truthful and lawful.
  
  • As a general rule, a lawyer is not obligated to disclose adverse information during settlement negotiations.
  
  • But a lawyer has an affirmative obligation to correct a misrepresentation where a prior representation has become false.
Does Counsel Have an Affirmative Duty of Disclosure During Settlement Negotiations?

- An affirmative duty of disclosure has also been found to arise in the case of a contract or settlement agreement:
  - where [the] lawyer makes a partial disclosure that is or becomes misleading in light of all facts;
  - when a lawyer voluntarily, or in response to inquiries, speaks on a matter, then ‘full and fair’ disclosure is required;
  - when a lawyer has ‘superior information’ vital to the transaction that is not accessible to the other side;
  - when special transactions are at issue, such as insurance contracts; or
  - when there are special statutory requirements such as when a lawyer negotiates under the umbrella of security regulations or collective bargaining statutes.
Does Counsel Have an Affirmative Duty of Disclosure During Settlement Negotiations if it would invade the Attorney Client Communication Privilege?

According to the American Bar Association’s Ethical Guidelines for Settlement Negotiations “During settlement negotiations and in concluding a settlement, a lawyer is the client’s representative and fiduciary, and should act in the client’s best interest and in furtherance of the client’s lawful goals.”

Separately noted in the ABA Guidelines is that the “ethical duty of confidentiality under Model Rule 1.6 . . . trumps the ethical duty of disclosure under Model Rule 4.1(b).”
May Counsel Advise the Client to Communicate Directly with the Opposing Party?

- ABA Model Rule 4.2 cmt. 4
  - “Parties may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.”

  - A lawyer may give client advice for communication with a represented adversary, including: subjects to discuss; issues to raise; strategies.
Can a Settlement be Conditioned on an Attorney’s Agreement to Refrain from Future Lawsuits or Claims Against the Same Defendant?

- Both the ABA Model Code and the ABA Model Rules specifically prohibit settlements conditioned on agreeing to refrain from representing other parties in the future.

  - ABA MODEL RULES R. 5.6; ABA MODEL CODE DR 2-108(B); ABA Formal Ethics Op. No. 95-394 (1995) (a lawyer may not offer, nor may opposing counsel accept, a settlement agreement which would obligate the latter to limit the representation of future claimants; rule applies not only where the controversy is between private parties, but also where the party is a government entity); ABA Formal Ethics Op. No. 93-371 (1997).
Can a Settlement be Conditioned on an Attorney’s Agreement to Refrain from Future Lawsuits or Claims Against the Same Defendant?

- *Florida Bar v. St. Louis*, 967 So.2d 108 (Fla. 2007):
  
  - Lawyer entered into secret agreement with defendant corporation to settle multiple product liability cases involving the corporation’s product by which the lawyer agreed not to bring future cases involving that product against the corporation and did not disclose the details of the arrangement with the court or disclose the arrangement to his clients;

  - Court disbarred the lawyer and required disgorgement of the fees earned plus interest; lesser sanctions of reprimand, suspension and restitution were granted against the lawyer’s partners, who were less involved in the details of the settlement.
Can a Settlement be Conditioned on an Attorney’s Agreement Not to Subpoena or Use Documents that were Disclosed in the Present Dispute in Future Lawsuits or to Assert Claims Against the Same Defendant?

- Colo. Ethics Op. No. 92 (1992) (improper restrictions include conditioning settlement on agreement by claimant’s counsel not to subpoena specified documents or persons in the court of representing non-settling claims, barring counsel from using certain expert witnesses in cases, imposing forum or venue restrictions in future cases brought by counsel, and prohibits his referral of potential clients to other control).
If My Company Settles a Sexual Harassment Case in California, Can I Keep the Settlement Confidential?

- No! As of Jan. 1, 2020, California Code of Civil Procedure Section 1001 prohibits public and private employers of any size from settling lawsuits or administrative claims using information that prevents the disclosure of factual information regarding:
  - sexual assault;
  - sexual harassment;
  - workplace harassment or discrimination based on sex;
  - the failure to prevent acts of workplace harassment or sex discrimination; or
  - retaliation against workers who report sexual harassment or sex discrimination.
If My Company Settles a Sexual Harassment Case in California, Can I Keep the Settlement Confidential?

- Section 1001 was enacted to eliminate secret settlement agreements.
  - Proponents of the law cited Harvey Weinstein’s alleged behavior, which was kept secret over many years because of confidential settlement agreements.

- Including a confidentiality clause in a sexual harassment settlement agreement can void the entire agreement under California law.
Can my Company Keep any Information About a Sexual Harassment Settlement in California Confidential?

- Some nondisclosure provisions are still allowed. For example:
  - The amount a company pays to resolve a claim can be kept confidential.
  - If the claimant requests to keep their identity confidential and no public officials or government agencies are parties to the settlement agreement this is also permissible.
What if there is a Prelitigation/Pre-charge Settlement, Can I Keep the Settlement Confidential?

- Importantly, Section 1001 only applies to claims raised in a lawsuit or administrative charge.
  - Thus, a severance agreement or settlement agreement based on a demand letter from a plaintiff’s employment attorney would not be covered by the new law.

- It is likely that several other jurisdictions will adopt similar legislation concerning sexual harassment settlement agreements.
Questions?
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