

Association of Corporate Counsel

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Legal Ethics in Negotiations

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- Competence & Integrity
- Zealous Representation
- Caveats and Limitations
 - Do No Physical Harm
 - Do Not Lie
 - “Little White Lies”
- Civil Liability for Fraud
- Employee Attorneys

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I. Competence & Integrity

A lawyer shall provide competent representation to the client.

(Rule 1.1)



- Knowledge
 - Training
 - Experience
 - Specialization
 - Consultation
- Skill
- Thoroughness
- Preparation

Professional misconduct: criminal acts that reflect adversely on the lawyer's:

- honesty,
 - trustworthiness or
 - fitness as a lawyer in other respects
- (Rule 8.4(b))



A lawyer shall act with reasonable diligence and promptness in representing a client.

(Rule 1.3)

To quote the Model Code of Professional Conduct (superseded by the Model Rules):

“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.”



- Inform the client of circumstances where the client's informed consent is required;
- Consult with the client about the means by which the client's objectives are to be accomplished;
- Consult with the client about limits on lawyer's conduct when the client wants assistance not permitted by law; and
- Explain a matter so the client can make informed decisions regarding the representation.

(Rule 1.4)





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TOWNSEND**

ATTORNEYS AT LAW



A. Do No Physical Harm

- Do not represent a client using means that have no substantial purpose other than to:
 - embarrass,
 - delay, or
 - burden a third person.
- (Rule 4.4)



B. Do Not Lie

In representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

(Rule 4.1)

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(Rule 8.4(c))

You may reveal information relating to a representation to prevent your client from committing a criminal act likely to result in imminent death or substantial bodily harm.

(Rule 1.6(b))

A lawyer shall not knowingly:

- make a false statement of material fact or law to a tribunal;
- Assist a client's crime or fraud by failing to disclose a material fact to a tribunal.

(Rule 3.3)



Settling a personal injury case without disclosing that her client had died.

Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997)

Understating the amount of insurance coverage client was known to have.

In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

Seeking to protect a document from discovery after misrepresenting its contents in a settlement negotiation.

Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005)

Lying to defendant during settlement negotiations about the existence of documents that would support plaintiff's claim.

Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002)



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- Landlord-tenant dispute
- Tenant's attorney received funds from his client, told landlord (truthfully) that he was holding client's money
- Tenant's attorney later returned tenant's money without telling landlord

In re Williams, 840 P.2d 1280 (Or. 1992).

Court's holding:

- attorney's conduct involved dishonesty, fraud, deceit or misrepresentation;
- attorney should have expected statement to landlord to induce forbearance; and
- failure to notify landlord of the return of the money was a violation of ethical rules.

In re Williams, 840 P.2d 1280 (Or. 1992).

C. “Little White Lies”

- Exaggerating strengths, or deemphasizing weaknesses, of your client’s position
- Stating that your client will not settle for less than \$X, or cannot pay more than \$Y
- Omitting mention of future business plans that would impact or moot elements of a settlement negotiation

ABA Formal Opinion 06-439 (April 12, 2006).

- Estimates of price or value placed on the subject of a transaction
- That the lawyer is negotiating on behalf of an undisclosed principal
- Statements of negotiating goals or willingness to compromise



- Negotiating settlement of a commercial arbitration, plaintiff's lawyer learned from third party that defendant was near insolvency.
- Plaintiff's counsel offered to accept a settlement of less than plaintiff's likely arbitration award.
- Defense counsel knew of insurance policy that would more than satisfy the claim.
- Is defense counsel obligated to disclose the existence of the insurance?

- No—not necessary to disclose insurance coverage
- Attorney has duty not to mislead intentionally, but attorney is not obligated to prevent adversary from relying on incorrect third party information
- Attorney may refrain from confirming or denying as long as she does not intentionally adopt or promote a misrepresentation

New York County Lawyer's Association Ethics Opinion 731 (2003).

- But what if the adversary asks whether defendant has insurance coverage?
- Attorney would be obliged to answer, or persuade client to answer, truthfully.

New York County Lawyer's Association Ethics Opinion 731 (2003).

- At the end of a long day of settlement negotiations, the parties are at loggerheads.
- Plaintiff's demand is \$1.25 million and defendants' offer is \$750,000.
- You are counsel for defendants, and have been given settlement authority up to \$1 million.

Example drawn from Douglas R. Richmond, *Lawyers' Professional Responsibility and Liabilities in Negotiation*, Georgetown Journal of Legal Ethics, Vol. 22, 2009.

- The frustrated judge pulls you aside and asks why you won't meet in the middle at \$1 million.
- What response can you give?



Consider These Possible Answers:

- “The claim isn’t worth more than \$750,000, and that’s as much as my client is willing to pay.”
- “The case does not merit \$1,000,000 and I believe I can settle the case for less than that.”
- “I think we can settle this case for less than a million. My client and I would like to get this done now for \$750,000. Please reiterate that offer to the plaintiff.”
- “Respectfully judge, my client does not want to pay more than \$750,000 to settle, and shouldn’t have to pay more than \$750,000.”

IV. Civil Liability for Fraud

- Jones Day represented Transmedia in a merger with MonsterBook.com (“Buyer”)
- Buyer’s shareholders to be paid in part with restricted Transmedia stock
- Before closing, Transmedia received third party financing subject to “toxic stock” provisions
- Investment would seriously dilute shares of all other Transmedia stock

Vega v. Jones Day, Reavis & Pogue, 121 Cal. App. 4th 282 (Cal. App. 2d dist. 2004).

- At its client's request, Jones Day did not disclose toxic stock provisions to Buyer
- In fact, Jones Day told Buyer's counsel that financing was "standard", "nothing unusual"
- Jones Day gave Buyer's counsel a terms summary that failed to mention toxic stock provisions

Vega v. Jones Day, Reavis & Pogue, 121 Cal. App. 4th 282 (Cal. App. 2d dist. 2004).

- Shortly before closing, Jones Day filed certificate of designation with Delaware Secretary of State
- Filing contained all of terms of the financing
- Buyer's shareholders' attorneys failed to review the filing before closing
- Truth came out after closing, and Buyer's shareholders sued Jones Day for fraud

Vega v. Jones Day, Reavis & Pogue, 121 Cal. App. 4th 282 (Cal. App. 2d dist. 2004).

- Did Jones Day violate ethical rules by providing a “sanitized” summary of financing terms?
- Does fact that toxic stock was described in a public filing absolve Jones Day?

- Before the case against Jones Day was settled, the California Court of Appeals ruled that:
- in cases of misrepresentations of fact, nonclients may recover against an attorney under negligent misrepresentation theory;
 - Jones Day had duty not to defraud even when negotiating at arm's length with counsel; and
 - the mere fact that information exists in the public domain is by no means conclusive.

Vega v. Jones Day, Reavis & Pogue, 121 Cal. App. 4th 282 (Cal. App. 2d dist. 2004).

Hansen v. Anderson

- The seller in a stock purchase did not, in fact, own the stock of the company being sold.
- At seller's request, seller's attorney prepared documents showing seller as the sole owner and sole director of the target company.
- Seller's attorney presented those documents to buyers' attorney.
- When the fraud was discovered, buyers sued their attorney, who sued seller's attorney for indemnity.

Hansen v. Anderson, Wilmarth & Van der Maaten, 630 N.W.2d 818 (Iowa 2001).

Hansen v. Anderson

- Buyers' attorney: "seller's attorney knew documents were false, and that we would rely on them"
- Seller's attorney: "I owed no duty to buyers' attorney"
- Court: "attorney who makes fraudulent misrepresentations to a nonclient is subject to liability when other elements of fraud are satisfied"
- Seller's attorney did not have to provide documents, but when he undertook to do so, he should have done so truthfully.

Hansen v. Anderson, Wilmarth & Van der Maaten, 630 N.W.2d 818 (Iowa 2001).

“Speaking as your attorney,…”

- In-house counsel negotiated aspects of a deal.
- When the deal collapsed, the other company sued to compel disclosure of internal communications involving the attorney.
- The attorney and his employer defended that the communications were protected by attorney-client privilege.

Georgia-Pacific Corporation v. GAF Roofing Manufacturing Corporation, 1996 WL 29392 (S.D.N.Y. 1996)

“Speaking as your attorney,…”

- The court ruled that some of the communications were not protected by attorney-client privilege.
- “Courts will not recognize the privilege when the attorney is acting as a business advisor.”
- Attorney was acting in business capacity when negotiating an agreement and discussing it with management before execution and outside the litigation context.

Georgia-Pacific Corporation v. GAF Roofing Manufacturing Corporation,
1996 WL 29392 (S.D.N.Y. 1996)

“Speaking as your attorney,…”

- Courts may suspect that corporations use legal departments to shield corporate records
- Result: extra scrutiny when the privilege is claimed by in-house counsel.
- It is not sufficient that “some measure” of legal advice is exchanged.
U.S. v. Chevron, 1996 WL 264769 (N.D. Cal. Mar. 13, 1996)
- Privilege attaches to advice that is primarily legal.
U.S. v. Davis, 132 F.R.D. 12 (S.D.N.Y. 1990)