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Ethical Issues in Negotiation and Mediation

Moderator:

Viane Lopez Braun
Buck Keenan LLP

Panelists:

Karan Cummings Ciotti
Ogden Gibson Broocks Longoria & Hall LLP

Melissa Ann Moore
Moore & Associates

Article provided by:

Jason S. Boulette
Boulette & Golden LLP

**THE ETHICS OF NEGOTIATION:
ARE THERE ANY?**

JASON S. BOULETTE

**BOULETTE & GOLDEN L.L.P.
2801 VIA FORTUNA, SUITE 530
AUSTIN, TEXAS 78746**

(512) 732-8901 | WWW.BOULETTEGOLDEN.COM

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I. INTRODUCTION

The question of ethics in business dealings is not a new one:

[S]uppose, for example, a time of dearth and famine at Rhodes, with provisions at fabulous prices; and suppose that an honest man has imported a large cargo of grain from Alexandria and that to his certain knowledge also several other importers have set sail from Alexandria, and that on the voyage he has sighted their vessels laden with grain and bound for Rhodes; is he to report the fact to the Rhodians or is he to keep his own counsel and sell his own stock at the highest market price? I am assuming the case of a virtuous, upright man, and I am raising the question how a man would think and reason who would not conceal the facts from the Rhodians if he thought that it was immoral to do so, but who might be in doubt whether such silence would really be immoral.

The Famine at Rhodes, Cicero, De OFFICIIS, BOOK III. xi.-xii.

The question raised by Cicero is as relevant today as it was when he first posed it more than 2,000 years ago. While Cicero tells us what he believes the merchant should do in this situation, we are left to wonder what he would say with respect to the merchant's lawyer. Is the merchant's lawyer obligated to insist that the merchant disclose the true facts of the transaction? Should the merchant's lawyer be permitted to disclose the true facts over the merchant's objection? If not, should the merchant's lawyer be permitted to withdraw from representing the merchant? Although they may not have had Cicero in mind, these questions are actually answered squarely by the Texas Disciplinary Rules of Professional Conduct.

II. THE RULES OF "ETHICS"

The common understanding of the term "ethics" is not, perhaps, what it should be. In some arenas, such as philosophy, "ethics" are closely tied to "morals":

"[Ethics is] the philosophical study of morality. The word is also commonly used interchangeably with 'morality' to mean the subject matter of this study; and sometimes it is used more narrowly to mean the moral principles of a particular tradition, group, or individual. Christian ethics and Albert Schweitzer's ethics are examples."

John Deigh, "Ethics," in *The Cambridge Dictionary of Philosophy*, Robert Audi (ed.), 1995.

The fragment quoted above focuses specifically on the relation of ethics, as a branch of philosophy, to morals, not the general relationship between the two. Email from John Deigh to Jason Boulette, March 9, 2011. ("That is, morality is what philosophers who are working in ethics study. "). With respect to the question of legal ethics, Professor Deigh suggested the more useful distinction may be the difference between prohibitions and aspirational ideals.¹

¹ This same distinction was suggested to me first by Phil Durst, one of the great thinkers of Austin, Texas, and subsequently by Michael Rubin, a wonderful speaker and writer on the issue of ethics in negotiations.

A. The Aspirational Preamble

The Preamble to the Texas Disciplinary Rules note that the Rules represent “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 7 (1989) (describing the rules as “stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action.”). Stated differently, the Rules do not even hold themselves out as being an aspirational standard for “right” or “moral” behavior. *See id.* Indeed, Texas lawyers are governed by the “Texas Disciplinary Rules of Professional Conduct,” not the “Texas Ethical Rules of Professional Conduct” or the “Texas Moral Rules of Professional Conduct,” and these disciplinary rules are better understood as a penal code than a moral code or statement of aspirational ideals.

That said, the Rules do invoke notions of “moral judgment” and a lawyer’s “conscience” when encouraging attorneys to hold themselves to a higher standard than the Rules do:

7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

9. Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 7, 9. (1989).

In the context of negotiations, the Preamble goes on to state that lawyers should pursue “advantageous” results for their clients in a manner that is consistent with the “requirements of honest dealing with others.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 2. (1989).

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