

PRESENTED AT
30th Annual Health Law Conference
Royal Sonesta Hotel Houston

April 6, 2018
Houston, TX

Ethics in Contracting Issues
Hypotheticals and Analyses

Thomas E. Spahn

McGuireWoods LLP
Tysons, VA
tspahn@mcguirewoods.com
703.712.5417

Negotiation/Transactional Adversaries' Misunderstanding of Clients' Intent

Hypothetical 1

You are preparing for settlement negotiations in a malpractice claim against your client.

- (a) May you (in representing your client) advise the plaintiff that you think its case is worth no more than \$200,000, although you really believe the plaintiff's case could be worth \$400,000?

(A) YES

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

(A) YES (MAYBE)

- (c) Your client (the defendant) has instructed you to accept any settlement offer that is less than \$300,000. If the plaintiff's lawyer asks "will your client give \$200,000?," may you answer "no"?

MAYBE

Analysis

In some situations, lawyers must assess whether the lawyer must or may disclose protected client information to correct a negotiation or transactional adversary's misunderstanding. Such negotiations or transactions can occur in a purely commercial setting or in connection with settling litigation.

The analysis frequently involves characterized statements that the lawyer or lawyer's client has made -- which might have induced the adversary's misunderstanding. This in turn sometimes involves distinguishing between harmless

statements of intent and wrongful statements of fact. Most authorities label the former "puffery" -- as if giving it a special name will immunize such statements from common law or ethics criticism. The latter type of statement can run afoul of both common law and ethics principles significantly. The ethics rules prohibit misrepresentation regardless of the adversary's reliance or lack of reliance, and regardless of any causation.

Under ABA Model Rule 4.1 and its state counterparts,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1

The first comment confirms that lawyers do not have an obligation to volunteer unfavorable facts to the adversary.

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.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

Comment [2] addresses the distinction between factual statements and what many call "puffing."

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Ethics in Contracting Issues: Hypotheticals and Analyses

Also available as part of the eCourse

[Answer Bar: Oil, Gas and Energy Agreements and Contracting Essentials](#)

First appeared as part of the conference materials for the
30th Annual Health Law Conference session
"Ethics in Contracting Issues"