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Ethics of Negotiation: The True Cost of Representation

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THE ETHICS OF NEGOTIATION: THE TRUE COST OF REPRESENTATION

I. INTRODUCTION

A. A Very Old Question

The question of ethics in negotiations 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.

B. With Continuing Application

1. *Spaulding v. Zimmerman*

On August 24, 1956, David Spaulding was injured when the car in which he was riding collided with another car. *Spaulding v. Zimmerman*, 116 N.W.2d 704, 706 (Minn. 1962). Theodore Spaulding, David's father, filed suit against John Zimmerman, the driver of the car in which David was riding, as well as John Ledermann and Florian Ledermann, the driver and owner (respectively) of the other car involved. David was, at the time, a minor.¹ *Id.*

Following the accident, David was examined by his family physician, Dr. James H. Cain, who diagnosed David as having suffered a severe crushing injury of the chest with multiple rib fractures, a severe cerebral concussion with likely petechial hemorrhages of the brain, and bilateral fractures of the clavicles. *Id.* at 707.

On January 3, 1957, at the suggestion of Dr. Cain, David was examined by Dr. John F. Pohl, an orthopedic specialist. *Id.* Dr. Pohl's examination included an x-ray study of David's chest and his detailed report included the following conclusion, "The lung fields are clear. The heart and aorta are normal." *Id.* Nevertheless, on March 1, 1957, at the suggestion of Dr. Pohl, David was examined again, this time by Dr. Paul S. Blake, a neurologist. *Id.* Consistent with Dr. Pohl's report,

¹ The age of majority was, apparently, 21, and David was only 19 or 20 at the time of the accident. *Id.*

nothing in Dr. Blake's report indicated anything out of the unusual with respect to David's heart or aorta.

In the interim, on February 22, 1957, at the request of the defendants, David was examined by Dr. Hewitt Hannah, also a neurologist. *Id.* On February 26, 1957, Dr. Hannah issued his report to Zimmerman's attorneys. *Id.* Unlike the plaintiff's physicians, Dr. Hannah found a problem with David's aorta:

The one feature of the case which bothers me more than any other part of the case is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty and I have discussed it with the Roentgenologist and a couple of Internists. ... Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would case his death.

It would be interesting also to know whether the X-ray of his lungs, taken immediately following the accident, shows this dilatation or not. If it was not present immediately following the accident and is now present, then we could be sure that it came out of the accident.

Id.

On March 4, 1957, David's case was called for trial. By that time, the content of Dr. Hannah's report had been provided to counsel for the Ledermanns but not to David, his father, or their attorneys. *Id.* at 706-07. On March 5, 1957, the parties informed the court that they had reached an agreement to resolve the claims of David and his father for \$6,500. *Id.* at 707. David's counsel subsequently presented the court with a petition for approval of the settlement, which described David's injuries as "severe crushing of the chest, with multiple rib fractures, severe cerebral concussion, with petechial hemorrhages of the brain, bilateral fractures of the clavicles." The petition was supported by the affidavits of Drs. Cain and Blake, which included their findings. *Id.* Neither the petition nor its supporting affidavits made any mention of the aneurysm. *Id.* On May 8, 1957, the court approved the settlement. *Id.*

In early 1959, David was required to undergo a physical checkup by the army reserve, of which he was a member. *Id.* David used Dr. Cain for the physical, and this time Dr. Cain noticed the beginnings of the aneurysm in the x-rays taken by Dr. Pohl shortly after the accident. *Id.* Dr. Cain promptly sent David to Dr. Jerome Grismer, who confirmed the presence of the aorta aneurysm and recommended immediate surgery. *Id.* On March 10, 1959, corrective surgery was performed on David successfully at Mount Sinai Hospital in Minneapolis. *Id.*

David had turned 21 and brought suit to set aside the settlement and to seek additional damages. *Id.* The court vacated its prior order approving the settlement, largely based on its view that the defendants had concealed information from the court, as opposed to the plaintiff:

The mistake concerning the existence of the aneurysm was not mutual. For reasons which do not appear, plaintiff's doctor failed to ascertain its existence. By reason of the failure of plaintiff's counsel to use available rules of discovery, plaintiff's doctor and all his

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