

# FINN DIXON & HERLING LLP

UT Institute Ethics Program

ETHICAL ISSUES IN  
M&A TRANSACTIONS

David I. Albin

Finn Dixon & Herling LLP  
Stamford, Connecticut  
Nathaniel L. Doliner  
Carlton Fields  
Tampa, Florida

University of Texas Mergers and  
Acquisitions Institute  
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ATTORNEYS AT LAW

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## Negotiations

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# Puffery

## **PREAMBLE: A LAWYER'S RESPONSIBILITIES**

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

# Puffery (cont.)

## ■ Scenario:

- Buyer and Seller are negotiating the consideration to be paid by Buyer for the equity of Seller.
- The Seller executives are certain Buyer is willing to increase its offer, and requests that Nat give Buyer a little push toward a higher offer in order to speed up the negotiating process.

## Puffery (cont.)

### ■ Rule 4.1 Truthfulness in Statements to Others

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.

## Puffery (cont.)

### ■ Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- **engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**  
**[or]**
- engage in conduct that is prejudicial to the administration of justice...

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