

UT Law School M&A 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

Robert R. Kibby
Munsch Hardt Kopf & Harr, P.C.
Dallas, Texas

SLIDES

University of Texas Law School Mergers and Acquisitions Institute

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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.

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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.

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Puffery (cont.)

- Rule 4.1 Truthfulness in Statements to Others

In 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 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.

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Puffery (cont.)

- Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) 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;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
- (d) engage in conduct that is prejudicial to the administration of justice...

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