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Ethics of Negotiation

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What We Will Cover

- Key ethics rules
- What you cannot say
- What must you disclose
- What you can say
- What you can conceal
- Ethics in mediation
- Special ethics issues
- Consequences of ethic's breach

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The Challenge of Negotiation

Mislead, conceal, dupe and trick the opposition - but don't lie

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Key Ethics Rules: Rule 3-501.2(a)

§ 3-501.2(a)

Scope of representation and allocation of authority between client and lawyer.

A lawyer shall abide by a client's decision whether to settle a matter.

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Key Ethics Rules: Rule 3.3

§ 3-503.3. Candor toward the tribunal.

(a) a lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

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Key Ethics Rules: Rule 3.3

§ 3-501.0.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

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Key Ethics Rules: Rule 4.1

§ 3-504.1. 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.

Key Ethics Rule 4.1

- Rule 4.1 precludes false statements to your adversary

	Forbidden False Statements	Permissible False Statements
A	Knowing	Unknowing
B	Material	Immaterial
C	"Related" to Law or Fact	Not related to law or fact

What You Cannot Do: False Statements

- Knowingly false statement of material fact
- Examples:
 - I have a witness who will testify your client said he knows he was not hurt and just wants money
 - Your competitor offered to do this deal for 20% less if you don't sign it
 - The decision maker has forbid me to settle for less than \$1 million

What You Cannot Do: Failure to Disclose

- Must disclose material facts in certain circumstances
- The duty to disclose material facts to your adversary is very narrow

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What You Cannot Do: Failure to Disclose

- How do you know what you must disclose?

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What You Cannot Do: Failure to Disclose

- Failure to disclose a material fact if it amounts to a false statement
- Rule 4.1: Disclosure is necessary to avoid helping a client commit a crime or fraud – but still cannot disclose if would reveal client confidence (Rule 1.6)

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What You Cannot Do: Failure to Disclose

- ABA Op. 95-397: Failing to disclose that the lawyer's client had died in settlement negotiations amounts to a false statement of material fact within the meaning of Rule 4.1

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What You Cannot Do: Failure to Disclose

- Rationale: the attorney-client relationship ends upon the death of the client
- Continuing to negotiate the settlement where you had no client is itself a false representation of your authority

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What You Cannot Do: Failure to Disclose

- What else might be similar to not telling your opponent your client died
 - No Authority to represent client
 - client has not yet hired you
 - client has fired you
 - Did not answer or supplement response to Interrogatory
 - Need to amend answer (?)
 - Have misrepresented a fact in a submission to court

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What Can You Do in Negotiations

- What can you say
- What need not disclose

What Can You Do: Statements

- Puffing
- Opinion
- Posturing
- ABA reasoned adversary would not be expected to justifiably rely on these
- Test: if adversary could not justifiably rely, can say it

What Can You Do: Statements

- ABA Op.06-439 approved:
 - statements of settlement intentions that are “less than forthcoming”
 - Example I will not settle for less than \$1,000,000 (but will in fact take less)

What Can You Do: Statements

- ABA Opinion 06-439 approved:
 - Exaggerate or denigrate the strengths or weaknesses of your position or your adversary's position
 - Example: I am sure I can find several other vendors that would love to take this deal if you will not (when you really do not know)
 - Cannot say: "I have another vendor who will accept the job at 20% less than your bid (but not true)"

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What Can You Do: Conceal Facts

- ABA Op. 94-387 "Rules do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the context of settlement negotiations or otherwise."
- Doing so would likely violate Rule 1.3 ethical obligation to diligently represent client or not disclose confidences in violation of Rule 1.6

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What Can You Do: Conceal Facts

- ABA Op. 94-387 claimant's counsel had no duty to disclose to defendant's counsel that the statute of limitations had run on the claim.
- Rationale:
 - Expiration of limitation does not affect merits of underlying claim
 - Does not restrict entitlement of client to persuade defendant to settle without going to court

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What Can You Do: Conceal Facts

- WARNING:
 - Cannot lie about the facts showing the claim is time-barred
 - Example: (a) you discovered the breach later than you did, (b) injury occurred later than it did, or (c) threaten that you will file suit when you do not plan to do so

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What Can You Do: Conceal Facts

- What else need not disclose?
 - Fact that does not affect merits of the underlying claim – probably procedural issue or defect
 - Example, (a) defendant removed a case to federal court that it could not remove, or (b) plaintiff improperly served suit
 - However, lack of standing or assignment of claim – probably have to disclose
 - What about a prior release of the claim?

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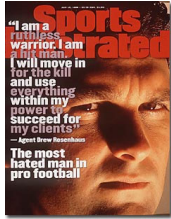
What Can You Do: Non-Verbal

- Ethics rules cover statements and disclosures
- Remember your latitude in:
 - Creating perceptions
 - Nonverbal communication
 - Settlement strategy

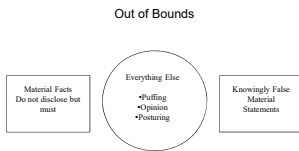
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An Unethical Negotiator?



Negotiation Ethics Illustrated



Special Consideration: Mediations

Type of Negotiation	Ethics Rule
Lawyer to Lawyer	4.1
Lawyer to Mediator	4.1
Lawyer to Magistrate Judge Mediator	3.3

Special Issues in Judge Mediated Cases

- Rule 3.3 significantly limits the lawyer's ability to make false statements to tribunals
- Comments specifically note "there are circumstances where failure to make disclosure is the equivalent of an affirmative representation"
- Obligation to disclose under Rule 4.1

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Special Issues in Judge Mediated Cases

- What do you do if the judge in mediation asks a question you don't want to answer?
- E.g., what is your top settlement authority or do you have authority over \$100,000?
- ABA says: Don't answer

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Scared Straight: Consequences of Ethics Breach

- **Council for Discipline v. Bouda**, (Neb. 2009) (3 month suspension where Defendant's counsel settled case without authority)
- **In re Herbst**, (D.C. 2007) (9 month suspension, 2 years probation – lawyer allowed non-lawyer employee to negotiate settlement and did not consult clients)
- **In re Siferl**, (Ind. 1990) (Public reprimand – contacted opposing party about settlement directly, circumventing lawyer)

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Scared Straight: Consequences of Ethics Breach

- **Hayes v. Equine Equities, Inc.**, 239 Neb. 964, 480 N.W.2d 178 (1992) (voided contract because of fraud in inducement - general contract case).
- **Spaulding v. Zimmerman**, (Minn. 1962) (Settlement set aside due to misrepresentations by attorney in settlement negotiations)

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Scared Straight: Consequences of Ethics Breach

- **Virzi v. Grand Truck Warehouse and Cold Storage Co.**, (E.D. Mich. 1983) (Settlement set aside where Plaintiff did not inform court and parties of client's death prior to settlement)
- **Siegel v. Williams**, (Ind. Ct. App. 2004) (Set aside settlement because lawyer lied)
- **Berry v. Javitch, Block & Rathbone, L.L.P.**, 127 Ohio St.3d 480 (2010) (client who settled case based on lie could not both affirm settlement and seek damages for fraud; however, dissent cited Siegel for opposite result).

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Scared Straight: Consequences of Ethics Breach

- **Iowa Disciplinary Board v. Sotak**, (Iowa 2005) (Two year suspension from the practice of law with no possibility of reinstatement for failure to remit settlement to client promptly)
- **Iowa Supreme Court Board of Ethics v. Murphy**, (Iowa, 2003) (Lawyer who settled case on appeal without authority of client and then failed to communicate settlement or receipt of check suspended for 60 days)
- **Stern v. Fisher**, (Iowa 1993) (Attorney sanctioned for violating local rule for attendance at settlement conference must use writ of certiorari 30 days from sanction order rather than appeal at end of case)

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Scared Straight: Consequences of Ethics Breach

- **City of Ottumwa v. Poole**, (Iowa 2004) (Supreme court reversed district court order rescinding worker's compensation settlement. Held claims adjuster did not represent claimant's functional impairment rating or entitlement to future medical benefits, each of which would have been grounds for rescission)
- **Kirk v. Farm and City Ins. Co.**, (Iowa, 1990) (Supreme court reversed court of appeals. Held evidence insufficient to support trial court's finding that insurer made false statements or that insured's parents relied on the statements in settlement negotiations. Vacated punitive damage award of \$50,000)

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Special Settlement Ethics Issues

- ABA Op. 06-439, **Mediation**. No special obligation of truthfulness or disclosure in caucused mediation (unless judge is mediator)
- ABA Op. 00-417, **Settlement Restricting Use of Information**. Lawyer may not enter settlement agreement that would prevent her from using information gained during representation in later representation against an opposing party
 - **EXCEPTION**: may agree to confidentiality of settlement and facts of particular matter settled

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Special Settlement Ethics Issues

- ABA Op. 95-394, **Agreement Not to Represent Parties Against Defendant**. Lawyer may not agree in a settlement to not represent other parties against the Defendant in future matters
- ABA Informal Op. C-C689, **Appeal Filed to Increase Settlement**. Lawyer may initiate appeal of case that will improve settlement prospects, but not if the sole reason for filing the appeal was to improve settlement prospects

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Special Settlement Ethics Issues

- ABA Op. 92-362, **Contacting Represented Party With Offer.** Lawyer may not contact represented party directly in settlement negotiations, even if lawyer believes settlement offers have not been communicated to opposing party
- **EXCEPTION:** lawyer may not advise client to contact represented adversary directly
- Lawyer **MUST** advise his client of above, but also must advise client that there is no restriction on client contacting adversary directly

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Nebraska Settlement Ethics Opinions

- **Mistaken Settlement Payment:** Plaintiff's attorney who received excessive settlement payments from insurance carrier, was obligated to retain in trust account. May not be released to the client despite his request and should be returned to the insurance company. ID409-410

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Nebraska Settlement Ethics Opinions

- **Missing Client:** Attorney holding settlement in trust account for missing client must use reasonable diligence to locate client, and if unable to, disburse funds under Nebraska Uniform Disposition of Unclaimed Property Act. Nebraska Ethics Op. 09-02

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Nebraska Settlement Ethics Opinions

- **Limitation on Client Right to Settle.** Attorney may not include clause that prohibits client from settling case without the lawyer's approval or requires a greater fee than would be customary for the suit. Nebraska Ethics Op. 95-1

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Iowa Settlement Ethics Opinions

- Iowa Ethics Op. No. 90-07 – **Waiving Costs in Settlement**
- Iowa lawyer engaged as local counsel for out of state Plaintiff's law firm must report out of state firm and withdraw for ethics breach in settlement.

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Iowa Settlement Ethics Opinions

- Iowa Ethics Op. No. 80-45 **Settlements disavowed by client**
- Lawyer negotiated and settled case with client's approval. Client thereafter disavowed settlement and would not execute documents. Lawyer must withdraw from further representation by motion and order of court.

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Iowa Settlement Ethics Opinions

- Iowa Ethics Op. No. 81-15: **Settlement Offer Where Client Missing**
- Lawyer received settlement offer for personal injury action brought by alcoholic client who disappeared. Lawyer should undertake proceedings by application for conservatorship, guardian *ad litem* or some other application requesting court to make appropriate determination to continue case until locate client or appoint conservator or guardian to make appropriate decision. Improper to settle or dismiss action.

Without lawyers, this is the option.



"This is not the kind of 'out of court settlement' I had in mind."

Questions?

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