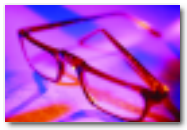

Misstatements in Negotiations

ER 4.1(a)[1] states that, when representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person. This would include opposing counsel, witnesses and neutral mediators.

What is "material" in a given case is not always clear, but a recent ABA Formal Ethics Opinion gives some examples of what is allowed in the specific contexts of the settlement negotiations and "caucused" mediations.[2] After acknowledging at the outset of the opinion that it is not unusual for lawyers to be "less than entirely forthcoming" with opposing counsel during settlement negotiations, the opinion gives examples of what are *not* false statements of material fact or law:

- "puffing," posturing and other statements upon which parties to negotiations are ordinarily not expected to rely
- exaggerating the client's negotiation goals
- downplaying the client's willingness to compromise

As lawyers, we all know these very general categories of what could be called "modest deviations from gospel truth" to be the norm in settlement negotiations. Because we expect them from opposing counsel, we are not necessarily misled when they occur.

But the opinion also discusses the kinds of misstatements that *are* violations of ER 4.1:

- When a lawyer representing an employer in labor negotiations states to union lawyers that adding a particular employee benefit would cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20
- When defense counsel declares that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist
- When a prosecutor tells the other side during a plea negotiation that he knows of an eyewitness to the alleged crime when he knows that is not the case. This sort of statement would not be allowed to be made by defense counsel, either.

This topic has been the subject of previous ABA Formal Ethics Opinions, so it has been a matter of concern since ER 4.1 was adopted in 1983.[3] And lawyers have been disciplined and had the settlements they negotiated set aside for ER 4.1 violations.

A Kentucky lawyer was disciplined for settling a personal injury case without disclosing that her client had died.[4] A New York lawyer was disciplined for stating to opposing counsel that his client's insurance coverage was only $200,000 when he knew that the limits were actually $1 million.[5] In other cases, a Minnesota court threw out a settlement because of defense counsel's failure to disclose material facts, adverse to his client's position, relating to the plaintiff's medical condition.[6] An Iowa court allowed a third-party equitable indemnity claim for malpractice against opposing counsel who had engaged in misrepresentations during negotiations.[7] Finally, in an Oregon case, the vendor's lawyer was allowed to be sued for fraud after he made statements that "it was a lot of property for the money," implying his client had the power to transfer real property to the plaintiff/buyers when he knew his client did not.[8]

The opinion discusses a suggestion that negotiating lawyers be held to a stricter standard of truthfulness when participating in a "caucused" mediation.[9] This has been the subject of several law review articles[10] but has not gotten much attention in "real-world" situations. The opinion concludes that a different standard need not be applied in this context, and that the ethical rules dealing with truthfulness before "tribunals"[11] and misrepresentations[12] do not apply or impose greater obligations upon the negotiating lawyer than those already provided for in ER 4.1.

New: "Bar Counsel Insider," insights from the State Bar's own Lawyer Regulation Department attorneys, on p. 48.

Ethics Opinions can be found on p. 48. Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics

David D. Dodge is a partner in the Phoenix law firm Dodge, Anderson, Mableson, Steiner, Jones & Horowitz, Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. ABA Formal Ethics Op. 06-439 (April 12, 2006).
3. *See* ABA Formal Op. 93-370 (1993) (a deliberate misrepresentation to a judge of a lawyer's settlement authority is a statement of a material fact and a violation of ER 4.1); ABA Formal Op. 94-387 (1994) (lawyer has no duty to inform the other party that the statute of limitations has run on client's claim); and ABA Formal Op. 95-397 (1995) (lawyer engaged in settlement negotiations in personal injury case must notify opposing counsel and court if the client dies).
4. *Kentucky Bar Ass'n v. Geisler,* 938 S.W.2d 578 (Ky. 1997); *see also In re Warner,* 851 So. 2d 1029 (La. 2003) (same), and *Toledo Bar Ass'n v. Fell,* 364 N.E.2d 872 (Ohio 1977) (same).
5. *In re McGrath,* 468 N.Y.S.2d 349 (N.Y. App. Div. 1983).
6. *Spaulding v. Zimmerman,* 116 N.W.2d 704 (Minn. 1962).
7. *Hansen v. Anderson, Wilmarth & Van Der Maaten,* 630 N.W.2d 818 (Iowa 2001).
8. *Jeska v. Mulhall,* 693 P.2d 1335 (Or. Ct. App. 1985); *cf. Matter of Duckworth,* 914 P.2d 900 (Ariz. 1996).
9. A "caucused" mediation is one in which the mediator meets privately with the parties and what the parties say to the mediator is confidential, subject to disclosure by the mediator only with the agreement of the parties.
10. *See, e.g.,* Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation,* 28 FORDHAM URB. L.J. 935, 953-59 (2001); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice,* 70 TENN. L. REV. 63, 67-87 (2002); John W. Cooley, *Mediation Magic: Its Use and Abuse,* 29 LOYOLA U. CHI. L.J. 1, 101 (1997).
11. *See* ER 3.3 (Candor Toward the Tribunal): note that mediators are not considered to be "tribunals" under Arizona's Rules of Professional Conduct. ER 1.0 (Terminology).
12. ER 8.4.c (proscription against conduct involving dishonesty, fraud, deceit or misrepresentation).