Is Honesty the Required Policy?

Ethical Settlement Negotiations

BY DANIEL McAULIFFE

One of the more controversial topics in the field of legal ethics has historically been the question of the extent to which a lawyer is ethically required to be candid in conducting settlement negotiations on behalf of a client. The Standing Committee on Ethics and Professional Responsibility ("the Committee") of the American Bar Association recently summarized the competing schools of thought on the subject:

> It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client. Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law. Still others have suggested that lawyers should strive to balance the apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.[1]

Types of Statements

Formal Opinion No. 06-439, the Committee's most recent attempt to provide lawyers with guidance in this area, addresses the issue of a lawyer's obligation to be truthful in affirmative statements made during the course of conducting settlement negotiations. The Committee approached this issue by assigning to three very broad categories the types of statements that it believed would typically be made during settlement negotiations.

- The first category contains statements made concerning a client's settlement intentions or objectives that, as the Committee characterizes them, are "less than forthcoming."
- The Committee places in the second category statements that exaggerate or denigrate the strengths or weaknesses of the speaker's legal position or that of the speaker's adversary.
- The third and final category includes statements of fact, such as the costs of an alternative method of settlement or whether a witness is available to testify concerning the events at issue and what that witness will say.

The ethical constraint applicable to all three categories is Rule 4.1(a) of the Model Rules of Professional Conduct, which provides that a lawyer may not "knowingly" make "a false statement of material fact or law to a third person." The Committee points out that the Rule by its very terms "applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law."

Consequently, the Rule only brings within its reach, and prohibits, statements that fall into the third category—false statements of material fact. As for the other two categories of statements, in the Committee's view, they are generally viewed as expressions of partisan opinion or "puffing," rather than statements of material fact,

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and thus fall outside the coverage of the Rule.

Perhaps because it was not part of the inquiry submitted to it, the Committee does not address in Opinion No. 06-439 what is a far knottier issue: whether the lawyer conducting settlement negotiations has a duty to disclose facts that might affect the settlement value of the case. The Opinion would clearly prohibit knowingly false statements concerning the future costs of medical care for the lawyer's injured client. What is not clear, however, is whether the lawyer would have an obligation to disclose that a recent prognosis indicated that those types of costs would not be incurred or could simply remain silent, even though it was apparent that the lawyer representing the adversary was operating under a mistaken impression on the subject.

Truthfulness to Tribunals and Parties

Where the issue is disclosure to avoid being misleading, tribunals fare far better under the ethical rules than do adverse parties. Rule 3.3(a) of the Model Rules provides that a lawyer may not make a false statement of material fact to a tribunal or fail to correct such a false statement previously made. The Comment to that Rule quite pointedly notes that, "There are circumstances where failure to make a disclosure is the equivalent of an affirmative representation."

However, the corresponding provision in the rule governing communications with third parties, Rule 4.1(b), provides that a lawyer cannot knowingly fail to disclose a material fact, but only when disclosure is necessary to avoid assisting the client's criminal or fraudulent act. In addition, the obligation evaporates if the disclosure would be of material learned from or about the client in confidence.

Addressing the Facts

The Committee has addressed the "disclosure" issue in the context of conducting settlement negotiations on two occasions.

In Formal Opinion No. 95-397, the Committee concluded that a lawyer representing the plaintiff in a case had a duty to inform both the court and opposing counsel that the plaintiff has died. Without benefit of much explanation, the Committee concluded that failing to disclose the death of a plaintiff client would be tantamount to making a false statement of material fact within the meaning of Rule 4.1.

In Formal Opinion No. 94-387, the Committee concluded that a lawyer did not have an ethical duty to inform an opposing party that the statute of limitations had run on a claim that they were in the process of negotiating. The Committee was reluctant to find an ethical obligation to disclose weaknesses in a client's case, but it cautioned that the lawyer had to exercise care not to make any affirmative misrepresentations concerning the facts that would show the claim was time-barred.

These two opinions simply do not establish with any precision the boundaries of the territory in which a lawyer will have an ethical obligation to disclose adverse facts during the course of conducting settlement negotiations. We know that there are circumstances in which failure to disclose a fact will be tantamount to making an affirmative misrepresentation, and that the death of a plaintiff client is one such situation. But we have no guidelines to help identify other situations where that will be the case.

On the other hand, we need not disclose a weakness in our client's case that represents in part our own conclusion on an issue, such as the running of the statute of limitations. In that situation, we know that we cannot affirmatively misrepresent the facts that lead to that conclusion, but we have very little guidance on the circumstances, if any, in which we might have an obligation to make sure those facts are known to opposing counsel.

Fixing an Ambiguity

To attempt to articulate a rule that would provide definitive guidance on this question in the varied universe of situations in which it might arise is far too ambitious for the present article, if it is even possible to do so. This article simply seeks to point out one avenue of analysis that appears to be given very short shrift in the ethics opinions that have addressed the subject.

Those opinions, possibly because of the context in which they are issued, appear to be primarily concerned with what has to be done to protect the lawyer engaged in settlement discussions from running afoul of the ethics rules and potentially becoming subject to disciplinary action. They spend very little time focusing on what the lawyer's obligations may be to the client in such situations.

In conducting settlement negotiations, the lawyer is after all acting on behalf of a client, and the settlement eventually reached should be one that is, all things considered, in that client's best interests. The client's interests are not well served by negotiating and concluding a settlement of a claim that may be subsequently set aside because material facts were not disclosed. Where settlement negotiations are undertaken, and there is an issue whether there are material facts bearing on the value of the claim being settled, the lawyer must discuss candidly with the client that issue and the risks associated with alternative courses of action.

Conclusion

Quite obviously, if the client is in the process of perpetrating a fraud, or desires that the lawyer pursue a course of conduct that would be fraudulent, the lawyer must refuse to do so, and may even be required to withdraw or resign.

It is not always that simple, however. It will far more frequently be the case that the facts are only known to the lawyer, who has been conducting discovery and/or investigations in the case, rather than to the client. There may be issues concerning the significance of the facts that the client may not fully appreciate. There may also be questions concerning whether the facts have been adequately disclosed and/or whether it is the adversary's obligation to discover and assess them. These are risk assessment decisions concerning the viability of any eventual settlement that the lawyer should not make without consultation with the client.

endnote

1. ABA Formal Op. No. 06-439 (April 12, 2006), pp. 3-4 (citations omitted). A recent *Eye on Ethics* column discussed this opinion. *See* David D. Dodge, *Misstatements in Negotiations,* ARIZ. ATT'Y, Nov. 2006, at 8.