

Ethics in the Negotiation of Settlements

The Rules of Professional Conduct (RPC) prescribe high ethical standards for lawyers in negotiations. Or do they? The answer, it seems, is, "It depends." Colorado's current version of RPC 4.1, Truthfulness in Statements to Others, arguably requires even greater honesty in negotiations than is required in addressing a tribunal under RPC 3.3. RPC 4.1(a) provides:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false or misleading statement of fact or law to a third person;

This language is clear and unambiguous—no lying in negotiations, or even shading the truth. When compared with RPC 3.3, Candor Toward the Tribunal, it appears to be even more demanding. Colorado's RPC 3.3(a) reads:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

The difference is that, in addressing a court or tribunal, a lawyer shall not lie about *material* facts, whereas in negotiations with an opposing party, the lawyer cannot even tell little lies or give misleading information about immaterial facts. When Colorado adopted RPC 4.1(a), the word "material" was intentionally dropped from the Model Rules version. Apparently, the idea was to impose an even higher standard in negotiations than was required by the Model Rules, and an even higher standard in negotiations than is required of lawyers in addressing a court.¹

But this difference based upon the absence of the word "material" in RPC 4.1(a) is not the end of the story. The Comment to RPC 4.1 taketh away what the Rule seems to give. That is, the official Comment indicates that RPC 4.1 does not really mean what it says:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value ... and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal ...

Lying about value, lying about your bottom line, and even lying about whom you really represent in the negotiations may be acceptable. Indeed, anything that falls under the umbrella of "accepted conventions in negotiation" may be acceptable. So, you may ask, what are the parameters of accepted negotiation conventions? They may be quite different in, say, rural western Colorado from those on 17th Street in Denver. They may also be different from one attorney to the next. *Caveat emptor*, *caveat venditor*, and *caveat negotiator*—everyone may be lying and everyone should beware.²

by O. Russel Murray © 2006

¹ Colorado is currently considering revising and updating its Rules of Professional Conduct, based upon revised Model Rules of Professional Conduct adopted by the ABA in its latest Rules update. In the revised version currently being considered, Colorado would re-insert the word "material" into its RPC 4.1(a) and take out "or misleading."

² Portions of this paper are derived from O. RUSSEL MURRAY, *The Mediation Handbook: Effective Strategies for Litigators*, chapter 7 (Bradford Publishing 2006).