Lies, Puffery & Silence: The Ethics of Negotiation

Michael Kennedy
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DONS (Deficiency of the Nervous System) Virus
Would you agree to your client’s request not to disclose his true DONS status?

No    Yes    Not Sure
Would you agree to your client’s request not to disclose his true DONS status?

No  Yes  Not Sure

Would you agree to your client’s request to disclose his true DONS status *only if* directly asked about it?

No  Yes  Not Sure
Would you agree to your client’s request not to disclose his true DONS status?

<table>
<thead>
<tr>
<th></th>
<th>No</th>
<th>Yes</th>
<th>Not Sure</th>
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<td></td>
<td>62%</td>
<td>19%</td>
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Would you agree to your client’s request to disclose his true DONS status *only if* directly asked about it?

<table>
<thead>
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<th>No</th>
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<tr>
<td></td>
<td>64%</td>
<td>13%</td>
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**TOTAL:** 50% 30% 20%

Rule 4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS)

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Model 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.
Rule 1.6 (CONFIDENTIALITY OF INFORMATION)

(a) A lawyer shall not reveal information relating to the representation of a client...

(b) A lawyer *must* reveal information...(2) to prevent the client from committing a crime or fraud... in furtherance of which the client has used or is using the lawyer’s services.
Rule 4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS)

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

[1] A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Rule 1.2 (SCOPE OF REPRESENTATION)

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...
Can you lie?
Rule 4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS)

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.
Rule 8.4 (MISCONDUCT)

It is professional misconduct for a lawyer to ...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...
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But see In re PRB Docket No. 2007-046, 187 Vt. 35 (2009)
Rule 8.4 (MISCONDUCT)

It is professional misconduct for a lawyer to...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation... or (h) engage in any other conduct which adversely reflects on the lawyer’s fitness to practice law.

But see In re PRB Docket No. 2007-046, 187 Vt. 35 (2009)
Can you mislead as to your client’s “bottom line”?
Rule 4.1 (TRUTHFULNESS IN STATEMENTS TO OTHERS)

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

[2] Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact...[A] party's intentions as to an acceptable settlement of a claim are ordinarily in this category....
Can you engage in “puffery”? 
ABA FORMAL OPINION 06-439 ("TRUTHFULNESS")

“A buyer of products or services... might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as 'posturing' or 'puffing,' are statements upon which parties to a negotiation ordinarily would not be expected to justifiably rely, and must be distinguished from false statements of material fact.”
Bottom line "puffery"?
Bottom line “puffery”?

- “This is a million dollar case.”
Bottom line “puffery”?  

- “This is a million dollar case.” OK
Bottom line “puffery”?

- “This is a million dollar case.” OK
- “My client needs $100k to settle this.”
Bottom line “puffery”? 

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- “The Board rejected settling over $150k.”
Bottom line “puffery”? 

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- “My client needs $100k to settle this.”  OK
- “The Board rejected settling over $150k.”  NOT OK
Bottom line “puffery”?  

- “This is a million dollar case.” **OK**  
- “My client needs $100k to settle this.” **OK**  
- “The Board rejected settling over $150k.” **NOT OK**  
- “My client’s actual bottom line is $45k.”
Bottom line “puffery”?

- “This is a million dollar case.” OK
- “My client needs $100k to settle this.” OK
- “The Board rejected settling over $150k.” NOT OK
- “My client’s actual bottom line is $45k.” NOT OK

Basic Facts for Scenarios
(California Comm. on Prof. Resp. and Conduct, Formal Opinion 2015-194)

Plaintiff is injured in an automobile accident and retains Attorney to sue the other driver (Defendant).

As a result of the accident, Plaintiff incurs $50,000 in medical expenses and Plaintiff tells Attorney she is no longer able to work. Prior to the accident Plaintiff was earning $50,000 per year.

Attorney files a lawsuit on Plaintiff’s behalf.

The parties agree to participate in a court-sponsored settlement conference that will be presided over by a local attorney volunteer. Leading up to and during the settlement conference, the following occurs:
Scenario 1

- In the mediation statement submitted on Plaintiff’s behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that statement, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness’s account is undisputed, asserts that the eyewitness specifically saw Defendant texting while driving immediately prior the accident, and asserts that the eyewitness’s credibility is excellent.

- In fact, Attorney has been unable to locate any eyewitness to the accident.
Answer: NOT OK!

- Attorney is making representations regarding the existence of favorable evidence for the purpose of having those representations relied upon.
- Attorney has no factual basis for the statements made.
- Further, Attorney’s misrepresentation is not an expression of opinion, but a material representation that “a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question . . . .”
Scenario 2

- While the mediator is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff’s wage loss claim.

- Attorney tells the mediator that Plaintiff was earning $75,000 per year, which is $25,000 more than Client was actually earning.

- Attorney is aware that the mediator will convey this figure to Defendant, which he does.
Scenario 2: Not ok!!

- Attorney’s inaccurate representations to the mediator were intended be conveyed to Defendant and Defendant’s lawyer regarding Plaintiff’s wage loss claim.

- Attorney’s statement that Plaintiff was earning $75,000 per year, when Plaintiff was actually earning $50,000, is an intentional misstatement of a fact.

- Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery.

- As with Example Number 1, above, Attorney’s statement constitutes an improper false statement and is not permissible.
Scenario 3

- While talking privately outside the presence of the mediator, Attorney and Plaintiff discuss Plaintiff’s “bottom line” settlement number. Plaintiff advises Attorney that Plaintiff’s “bottom line” settlement number is $175,000.

- When the mediator asks Attorney for Plaintiff’s demand, Attorney says, “Plaintiff needs $375,000 if you want to settle this case.”
Scenario 3: Ok.

- Statements regarding a party’s negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or “puffery,” are among those that are not considered verifiable statements of fact.

- A party negotiating at arm’s length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise.

- Here, Attorney’s statement of what Plaintiff will need to settle the matter is allowable “puffery” rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Plaintiff’s “bottom line” settlement number.
Scenario 4

- In response to Plaintiff’s settlement demand, Defendant’s lawyer informs the mediator that Defendant’s insurance policy limit is $50,000.

- In fact, Defendant has a $500,000 insurance policy.
Scenario 4: Not ok!

- Defendant’s lawyer’s representation that Defendant’s insurance policy is for $50,000 although it is really $500,000.

- Defendant’s lawyer’s inaccurate representations regarding Defendant’s policy limits is an intentional misrepresentation of fact intended to mislead mediator, Plaintiff, and Plaintiff’s lawyer.
Scenario 5

- Defendant rejects all current offers. Defendant’s lawyer tells mediator, Plaintiff, and Plaintiff’s attorney that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict.

- In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him.

- Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy.
Scenario 5: Not ok, but . . .

- Defendant’s lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy counsel before the mediation and was informed that Defendant is not legally eligible to file for bankruptcy.

- A statement by Defendant’s lawyer that expresses or implies that Defendant’s financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact.

- The conclusion may be different; however, if Defendant’s lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge.
Scenario 6: Additional Facts

- The matter does not resolve at the mediation, but the parties agree to participate in a follow-up mediation one month later, pending the exchange of additional information regarding Plaintiff’s medical expenses and future earnings claim.

- In particular, Attorney agrees to provide additional information showing Plaintiff’s efforts to obtain other employment in mitigation of her damages and the results of those efforts.

- Before mediation, Plaintiff gets a job offer. Accepts. Starting salary will be $100,000. Instructs Attorney not to tell mediator or Plaintiff.
Scenario 6: Not ok!

- Can’t stay silent, future earnings are relevant.

- Also, when faced with Plaintiff’s instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If Plaintiff refuses, Attorney must withdraw.
Different rules in court?
Rule 3.3 (CANDOR TOWARD THE TRIBUNAL)

A lawyer shall not knowingly 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.

“Tribunal” denotes a court and all ancillary court proceedings...or other body acting in an adjudicative capacity. Rule 1.0(m).
In re Forrest, 158 N.J. 428 (1999)
“Misrepresentation of a material fact to an adversary or a tribunal in the name of ‘zealous representation’ never has been nor ever will be a permissible litigation tactic.”

ABA FORMAL OPINION 95-397 (DUTY TO DISCLOSE DEATH OF A CLIENT)

When a lawyer’s client dies in the midst of settlement negotiations of a pending lawsuit in which the client was the claimant, the lawyer has a duty to inform opposing counsel and the court in the lawyer’s first communication with either after the lawyer has learned of that fact.
Different rules in mediation?
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Depositions? YES
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Depositions? YES
Binding arbitration? YES
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Depositions? YES
Binding arbitration? YES
Mediation?
Mediation

It’s a game of “telephone” and mediator reframing, so HIGHER standard
Mediation

It’s a game of “telephone” and mediator reframing, so HIGHER standard vs.

“Consensual deception” is part of the process and helps the mediator, so LOWER standard
Mediation

ABA FORMAL OPINION 06-439

“Rule 3.3 applies only to statements made to a ‘tribunal.’ It does not apply in mediation because a mediator is not a ‘tribunal’ as defined in Model Rule 1.0(m). ...[T]he [general] ethical prohibitions against lawyer misrepresentations apply equally in all environments.” ABA Formal Opinion 06-439 (April 12, 2006).

"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.
Rule 1.1 (COMPETENCE)

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
Mediation

TIPS FOR MEDIATION
Mediation

TIPS FOR MEDIATION

1. Know the process
Mediation

TIPS FOR MEDIATION

1. Know the process
2. Prepare your client for the process
Mediation

TIPS FOR MEDIATION

1. Know the process
2. Prepare your client for the process
3. Value the transformative aspect
Mediation

TIPS FOR MEDIATION

1. Know the process
2. Prepare your client for the process
3. Value the transformative aspect
4. Don’t blow up an entire agreement over one small part
Mediation

TIPS FOR MEDIATION

1. Know the process
2. Prepare your client for the process
3. Value the transformative aspect
4. Don’t blow up an entire agreement over one small part
5. Don’t wait until the last minute to... (file stuff, ask questions)
Mediation

TIPS FOR MEDIATION

1. Know the process
2. Prepare your client for the process
3. Value the transformative aspect
4. Don’t blow up an entire agreement over one small part
5. Don’t wait until the last minute to...(file stuff, ask questions)
6. Don’t ratchet up tensions with nasty letters
Mediation Scenarios

- motor vehicle accident
- plaintiff claims several witnesses will support
- defense counsel asks to adjourn to contact witnesses
- mediation is reconvened
- defense counsel plays surveillance videos
Mediation Scenarios
Mediation Scenarios

- land-use permit appeal
- neighbors oppose project
- time/money not a factor
- will never settle
Can you engage in “paltering”?
What is paltering?
What is paltering?

“Paltering is the active use of truthful statements to convey a misleading impression.”

Jim Lehrer: “You had no sexual relationship with this young woman?”

President Bill Clinton: “There is not a sexual relationship. That is accurate.”
A business acquisition. You represent the seller. Sales have increased for the past 10 years, but next year, your client expects sales to be flat.
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Buyer’s attorney: “How does your client expect sales to be next year?”
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[1] ...Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.
Why palter?
Why palter?

• almost as effective as lying
Why palter?

• almost as effective as lying
• maintain positive self-image
Why palter?

• almost as effective as lying
• maintain positive self-image

Why *not* palter?
Why palter?

- almost as effective as lying
- maintain positive self-image

Why not palter?

- almost as bad as lying (to other side)
Why palter?

- almost as effective as lying
- maintain positive self-image

Why not palter?

- almost as bad as lying (to other side)
- increases likelihood of an impasse

Lies, Puffery & Silence: The Ethics of Negotiation

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