

Negotiation Ethics for Lawyers (Introduction)

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The Case of Teddy Roosevelt



© Moffett Studios - Chicago

The Case of Teddy Roosevelt



We are planning to distribute many pamphlets with Roosevelt's picture on the cover.

It will be great publicity for the studio whose photograph we use.

How much will you pay us to use yours?

Respond immediately.

Ethics Rules: Attorney Negotiators

Is there a legal duty to negotiate in good faith?

UCC 1-203 and Restatement 2nd Contracts Sec. 205 impose a duty of good faith and fair dealing in the performance and enforcement (but not negotiation) of a contract.

Two caveats: U.S. law only (not EU or China law); and California State Bar civility and professionalism guidelines (aspirational)

Hypothetical Fact Pattern

- **Ex-Santa Monica mafia kingpin Dominic Vitello wants the world to know his life story.**
- **He will sell a screenplay he has written tracing his story to the highest bidder.**

Hypothetical Fact Pattern

- **Potential deal between Vitello and Shady Studios.**
- **Vitello's agent, Ari Silver, is negotiating with Shady Studios' attorney, Mallory Hinton.**
- **Both Silver and Hinton are repeat players in the industry.**

Hypothetical No. 1

Silver: “Hi Mallory, Ari Silver, here. I wanted to see if you want in on the action for Dominic Vitello’s script. It’s a hell of a story. Now, my client is only interested in negotiating a deal if Shady Studios agrees that he has final say on which actor portrays him in the film.”

Hinton: “Ari, not a problem! Shady Studios will work with your client to make sure he’s completely satisfied.”

Ethical Issue: Hinton knows Shady Studios has no intention of making the requested concession.

Hypothetical No. 2

Silver: “Mallory, you realize we could sell this script to any studio in town? It’s got sex, violence and a true story. You might as well start the Oscar campaign now. Every major player in Hollywood has already expressed an interest in my client’s story. In fact, I’ve got three meetings today so is Shady Studios in the game or not?”

Ethical Issue: The few studios Silver has spoken with have expressed lukewarm interest at best.

(The meetings are with his child’s teacher, his stockbroker, and his manicurist.)

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 1.3

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

COMMENT: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.”

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 2.1

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 8.4

“It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 4.1

“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.”**

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 4.1

COMMENT: “Only applies to statements of fact.”

“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”

Such as: Estimates of price or value

**A party’s intentions as to an acceptable settlement
of a claim**

Existence of an undisclosed principal

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 4.1

Summary:

- **A lawyer has no affirmative duty to inform an opposing party of relevant facts.**
- **A misrepresentation can occur if the lawyer affirms a statement of another that the lawyer knows is false.**
- **A partially true but misleading statement or omission can be the equivalent of an affirmative false statement.**

Hypothetical No. 1

Silver: “Hi Mallory, Ari Silver, here. I wanted to see if you want in on the action for Dominic Vitello’s script. It’s a hell of a story. Now, my client is only interested in negotiating a deal if Shady Studios agrees that he has final say on which actor portrays him in the film.”

Hinton: “Ari, not a problem! Shady Studios will work your client to make sure he’s completely satisfied.”

Ethical Issue: Hinton knows Shady Studios has no intention of making the requested concession.

Hypothetical No. 2

Silver: “Mallory, you realize we could sell this script to any studio in town? It’s got sex, violence and a true story. You might as well start the Oscar campaign now. Every major player in Hollywood has already expressed an interest in my client’s story. In fact, I’ve got three meetings today so is Shady Studios in the game or not?”

Ethical Issue: The few studios Silver has spoken with have expressed lukewarm interest at best.

(The meetings are with his child’s teacher, his stockbroker, and his manicurist.)

Hypothetical No. 3

Silver: “Mallory, we’re both busy people. Let’s cut to the chase. Unless Shady Studios ponies up \$4 million, which is my client’s bottom line, we might as well end this conversation.”

Ethical Issue: Vitello’s true bottom line, as expressed to Silver, is \$2 million.

Ethics Rules: Attorney Negotiators

ABA Ethics Opinion 06-439 (2006)

“A party’s actual bottom line or the settlement authority given to a lawyer is a material fact” that a lawyer may not misrepresent in a negotiation.

But a lawyer can “downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s ‘bottom line’ position, in an effort to reach a more favorable resolution.”

Ethics Rules: Attorney Negotiators

ABA Ethics Opinion 06-439 (2006)

“It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming....”

Ethics Rules: Attorney Negotiators

ABA Ethics Opinion 06-439 (2006)

According to the ABA, you can:

- **Misrepresent your current position and understate willingness to make concessions or compromise**
- **Deceive as to ultimate goals and objectives**
- **Exaggerate strengths, minimize weaknesses of factual or legal position, or value of subject matter; and**
- **Overstate confidence in the availability of alternatives**

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 4.1

COMMENT: “Only applies to statements of fact.”

“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”

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Ethics Rules: Attorney Negotiators

ABA Ethics Opinion 06-439 (2006)

COMMENT:

“Such remarks are often characterized as ‘posturing’ or ‘puffing,’ and are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.”

Hypothetical No. 4

Hinton: “Ari, hi. So sorry for the phone tag. I do want to get back to you on the Vitello deal but we’re so backlogged here with the Thirsty Games sequel as you could imagine. Let me call you after the holidays.”

Ethical Issue: Hinton says this to delay negotiations so that Shady Studios can develop a competing script. Twelve months later when the script is done, Hinton ends negotiations. Interest in Vitello’s script dries up after word is out that Shady Studios has its own script.

Ethics Rules: Attorney Negotiators

ABA Model Rule of Professional Conduct 4.4

“a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

Ethics Rules: Attorney Negotiators

California State Bar Civility & Professionalism Guidelines 18(c) (2007)

“An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client’s wishes or previous oral agreements.”

Ethics Rules: Attorney Negotiators

California Business & Professions Code Section 6068

“It is the duty of an attorney to . . .

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

Ethics Rules: Attorney Negotiators

California Business & Professions Code Section 6106

“The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”

Ethics Rules: Attorney Negotiators

California Business & Professions Code Section 6128(a)

**“Every attorney is guilty of a misdemeanor who either:
(a) Is guilty of any deceit or collusion, or consents to any
deceit or collusion, with intent to deceive the court or any
party.”**

Hypothetical No. 5

Silver: “Both Universal and Paramount Pictures have offered us \$3 million. Can Shady Studios top that?”

Ethical Issue: Universal has made an offer of \$1 million and Paramount hasn’t made any offer at all.

Hypothetical No. 6

Silver: “I’ve spoken with both Universal and Paramount and I’m very confident each will offer us \$3 million. Can Shady Studios top that?”

Ethical Issue: Universal has made an offer of \$1 million and Paramount hasn’t made any offer at all.

Hypothetical No. 7

Hinton: “Ari, let’s be real here. Visionary Pictures - the only bidder offering more than us - is on the verge of bankruptcy. Trust me, I have a friend there who gives me the real scoop. So that really leaves you with no interest for Vitello’s script.”

Ethical Issue: Hinton doesn’t have any inside information about the financial condition of Visionary Pictures.

Hypothetical No. 8

Hinton: “Ari, you’re a no-name agent and I represent one of the biggest media conglomerates in the world. It’s time to accept our offer and stop trying to play with the big boys. If not, I’ll make sure everyone in this town knows what a joke you are. Plus, I’m sure your former mob boss client would enjoy hearing how you screwed up this deal.”

Ethical Issue: Is threatening or bullying the other side ever permissible in a negotiation?

Summary

- **General rules require lawyers to be candid in their dealings with others (e.g., ABA Model Rule 8.4).**
- **General rules require lawyers to be zealous advocates (e.g., ABA Model Rule 1.3).**
- **Be zealous, while still meeting your duty of candor.**

Summary

- **You cannot misrepresent material facts or law, including statements of your bottom line or settlement authority.**
- **You may be able to misrepresent:**
 - **Immaterial facts or law;**
 - **Your opinion or state of mind (non-facts);**
 - **Your current position and understate willingness to make concessions or compromise; and**
 - **Anything else if you did not know at the time it was false (unknowing misrepresentations).**

Summary

- **You also may be able to:**
 - **Deceive as to your ultimate goals and objectives;**
 - **Exaggerate strengths, minimize weaknesses of your factual or legal position, or value of subject matter; and**
 - **Overstate confidence in the availability of alternatives (i.e., fake BATNA).**

The End

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