Bar Counsel
Ethical Negotiations
An Oxymoron?
By Helen Hierschbiel

You are representing plaintiff in settlement negotiations on a personal injury lawsuit. The mediator asks what your settlement authority is. How do you answer? Can you answer?

The parties ultimately reach an agreement and place a settlement on the record. You and the opposing lawyer are still working out the details of a stipulated judgment for submission to the court when you receive news that your client has died. What do you do? Do you tell the opposing party?

These scenarios present the all too common dilemma for lawyers involved in settlement negotiations: sometimes the lawyer's duties to pursue client objectives and protect client confidentiality seem to conflict with the lawyer's duty of candor to the court and to others. In an effort to address this dilemma, competing schools of thought have developed about whether some level of dishonesty should be tolerated in negotiations. The Standing Committee on Ethics and Professional Responsibility of the ABA summarized these theories as follows:

> 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.

ABA Formal Op No 06-439, pp 3-4 (citations omitted).[1] Where does Oregon stand on this issue? Our rules provide a pathway to the answer.

Misstatements

Oregon RPC 1.2(a) requires lawyers to abide by the client's decisions concerning the objectives of representation and consult with the client regarding the means used to pursue those objectives. This directive is limited, however, by subparagraph (c), which prohibits a lawyer from counseling or assisting a client to engage in illegal or fraudulent conduct. Lawyers' responsibilities to advance their clients' objectives are further constrained by their duties of candor. For example, RPC 4.1(a) provides that, when representing a client, a lawyer shall not

knowingly make a false statement of material fact or law to a third person. Further, RPC 8.4(a)(3) prohibits lawyers from otherwise engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Notably, RPC 4.1(a) prohibits only *material* misstatements. Similarly, a misrepresentation under RPC 8.4(a)(3) must be "knowing, false and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process." *In re Summer*, 338 Or 29, 38(2005)(citing *In re Eadie*, 333 Or 42, 53 (2001)). In *Summer*, the accused lawyer represented a client who was involved in two accidents, but was only injured in the first accident. The lawyer settled the claim for the first accident, and then attempted to recover from the tortfeasor in the second accident by providing medical records for the injuries sustained in the first accident. In finding violations of *former* DR 1-102(a)(3) and 7-102(a)(5) (precursors to RPC 8.4(a)(3) and 4.1), the court determined that statements lawyer made to the second tortfeasor about his client's injuries were material, regardless of the fact that the tortfeasor ultimately discovered the inaccuracy of the information and denied the claim. "[M]ateriality is not limited to circumstances in which a misrepresentation successfully misleads." 338 Or at 38.

Determining what constitutes a material misstatement is not always easy. ABA Formal Op No 06-439 identifies two categories of statements that are *not* false statements of material fact or law: understating the willingness to compromise; and posturing or puffing by, say, exaggerating the strengths of a case and minimizing weaknesses. Saying "my client has a great case" is clearly posturing. By contrast, claiming that documentary evidence will be submitted at trial when no such evidence exists would be an affirmative misrepresentation of fact. As to the first category, care must be taken in exactly how a client's position is conveyed:

> For example, even though a client's board of directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

ABA Formal Op. No. 06-439 at 8.

So, what do you say to the mediator in our first scenario? A knowing misstatement of a client's settlement authority would likely be a misrepresentation of a material fact in violation of RPC 4.1. *See, e.g.,* ABA Formal Op No 93-370 (reaching that conclusion). However, RPC 1.6 prohibits a lawyer from disclosing the limits of settlement authority without the client's consent. Getting client consent may not be possible or strategically wise. One recommendation would be that the lawyer decline to answer, rather than provide an untruthful answer. *See id*. Others have suggested asking the client for a settlement range rather than a bottom line, or simply no specific settlement authority whatsoever.[2] In any event, you must be cautious in exactly how you convey your client's position.

Nondisclosure

Nondisclosure of a material fact can also be considered a misrepresentation under RPC 8.4(a)(3). In addition, RPC 4.1(b) prohibits a lawyer from failing to disclose a material fact when

disclosure is necessary to avoid assisting the client with an illegal or fraudulent act. Neither rule requires disclosure when doing so would conflict with lawyer's duties to maintain client confidences under RPC 1.6. RPC 1.6(b) allows (i.e. does not prohibit, but does not require) a lawyer to disclose a client's intent to commit a crime and the information necessary to prevent a crime. In *Eadie*, *supra*, the court found that the lawyer had intentionally failed to disclose material information — that is, his intent to seek costs — in order to obtain an agreement from the opposing party to settle with his client. 333 Or at 54.

Lawyers in other jurisdictions have been disciplined for failing to disclose that their clients died. *See Kentucky Bar Ass'n v. Geisler*, 938 SW2d 578 (Ky 1997); *In re Warner*, 851 So2d 1029 (La 2003); *Toledo Bar Ass'n v. Fell*, 364 NE2d 872 (Ohio 1977). ABA Formal Op No 95-397 also concludes that a lawyer representing a plaintiff in a case has a duty to inform both the court and the opposing counsel that the client has died. In each of these cases, however, the client died prior to settlement being reached. In our second scenario, a settlement was reached and placed on the record, but the stipulated judgment had yet to be finalized or submitted to the court for signature. Arguably, the client's death should no longer be material since an agreement has already been placed on the record. The stipulated judgment does not need to be signed by the parties and the details are just pro forma, right? Why complicate matters with the inconvenience of your client's death?

The reason is that without a principal, the lawyer no longer has authority to act as an agent. To the extent that the lawyer may be required to take some additional action, the lawyer cannot do so without a client. Thus, not having a principal would clearly be a material fact that should be disclosed to the opposing counsel and the court.

Our second scenario also highlights the need for lawyers to consider whether nondisclosure of information will truly advance the client's objectives under the circumstances. A client's goals are not met by negotiating a settlement that may subsequently be set aside because the lawyer did not have authority to act or because material facts were not disclosed. Failure to disclose a material fact has been the basis for throwing out settlements in several jurisdictions, including Oregon. *See Jeska v. Mulhall*, 71 Or App 819 (1985)(claim for fraud upheld against seller's lawyer who told buyers "it was a lot of property for the money," implying his client had the power to transfer real property when lawyer knew his client did not). *See also Spaulding v. Zimmerman*, 116 NW2d 704 (Minn 1962)(court threw out settlement because defense counsel failed to disclose that its expert had discovered plaintiff had suffered an aortic aneurysm from the accident, which was unknown to the plaintiff).

Conclusion

Put simply, lawyers may only use lawful means to accomplish their clients' objectives. Material misrepresentations, fraud and nondisclosure of material information are not lawful means to achieve clients' goals. Disclosure is not required when the information is protected under RPC 1.6, but withdrawal may be if the client refuses to give consent. Negotiating ethically without giving away the client's "bottom line" is certainly possible, but requires care in choosing one's words and avoiding deceit or dishonesty. If those limits are observed, clever and creative puffing and posturing are perfectly okay.

Endnotes:

1. The ABA formal opinions are not binding authority in Oregon. However, because the Oregon Rules of Professional Conduct mirror many of the ABA Model Rules, the ABA formal opinions provide some guidance in interpretation of Oregon's rules where no Oregon authority exists.

2. Some court-annexed settlements may require that the lawyer have settlement authority or be accompanied by a client or client representative with such authority. Even then, a legitimate answer to "What is your client's settlement position?" might be "My client would prefer not to pay more than $50" even though the client has indicated it will go higher if necessary. At some point, however, court-annexed mediations might require disclosure of the client's "bottom line."

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