

ETHICS

The Ethics of Exchange: What ethical duties, if any, attach in bargaining?
What is the required in terms of honesty and fairness?



The Ethics of Exchange

Can I lie in negotiations?
When should I feel badly if I don't disclose something?
When am I legally liable, or subject to discipline?



Analyzing the Ethics of Exchange

Model Rules of Professional Conduct
and Louisiana Rules
Legal standards (especially fraud)
Norms of general morality



General Morality

Utilitarian reasons: What if everyone did it?

Theological reasons: Golden Rule

Kantian reasons: Respect for others as ends,
not means

Contratarian reasons: Could people reasonably
agree to a world in
which people acted this
way?

Moral Intuition: It just feels wrong



General Common Sense

If I lie in this negotiation, maybe it will harm
this negotiation.

If I lie, maybe it will hurt my reputation, and
thus my chances in my next negotiation.

The NYT Test: What if my actions were
featured on the front page of tomorrow's
New York Times?





Judge Rubin's simplification of the Rules:

“Surely if its practitioners are principled, a profession that dominates the legal process in our law oriented society would not expect too much if it required its members to adhere to two simple principles when they negotiate as professionals: Negotiate honestly and in good faith; and do not take unfair advantage of another—regardless of his relative expertise or sophistication”

Alvin B. Rubin, “A Causerie on Lawyers’ Ethics in Negotiation,” 35 La. Law Rev. 577, 593 (1975)

Rule 1, 2(c) Scope of Representation

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- What is meant by the term conduct?
- Is a negotiation conduct?



Rule 8.4 (c) Misconduct

It is professional misconduct for a lawyer to:
(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.



Rule 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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6



Rule 4.1

Comment

Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category...



PROFESSIONALISM

“The following standards are designed to encourage us, the judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of professionalism and civility, both of which are the hallmarks of a learned profession dedicated to public service.”

Rules of the Supreme Court of Louisiana Part G, Section 11.



PROFESSIONALISM

22 Tips for Courtroom Conduct!

- 1 Be on time. Better yet, be early and turn your cell phone and pagers off!
- 2 Stand and state your appearance for the record.
- 3 Address the court, not your opponent.
- 4 Properly address the court.
- 5 Argue to the court, not with the court.
- 6 Don't interrupt.
- 7 Stop arguing after the court's ruling.
- 8 Be prepared and show it.
- 9 Be properly attired.



- 10) Be candid.
- 11) Don't attack opposing counsel.
- 12) Meet and confer...honestly.
- 13) Don't seek sanctions for an improper purpose; don't seek disqualification for an improper purpose.
- 14) Even if you've just been hammered, conclude your remarks with a "thank you" because you aren't thanking the court for its ruling, but for its considered attention.
- 15) No ex parte communications with the court about opposing counsel.
- 16) No letter to the court talking about opposing counsel.
- 17) Don't let the client's feelings override professional duties.
- 18) Honor your commitments.



- 19) Consider reasonable requests for accommodation.
- 20) Do not object just to irritate opposing counsel.
- 21) Do not schedule a deposition without consulting counsel.
- 22) Everything must meet the "handshake test".


