speaking of ethics

By Hope C. Todd

D.C. Rule 4.1: Is It Up for Negotiation?

Mick Wiggins

Viviola Viviatta, the famous mezzo-soprano, has retained attorney Macko Deal to negotiate a one-year contract with the Seville Opera House, to include a much-acclaimed reprisal of her lead role in Carmelo, scheduled to open within the next two months. She tells Macko that she wants $300,000, even though her contract for the same role overseas paid her the equivalent, after currency conversion, of a mere $75,000, and she has specifically directed him to accept no less than $175,000.

Barbara, the owner of the Seville Opera House, has instructed her lawyer, Larry Lawyer, not to offer Viviola more than $50,000 over "whatever she got paid for the same role last year." Two days before the negotiation, Larry receives a call from his friend Ricardo in the mayor's office, who advises that a developer has expressed an interest in purchasing the city-owned building, which leases to the Opera House, with plans to bulldoze the structure and to replace it with "tiny houses." (Barbara had once confided in Larry that were the building ever sold, she would close the Opera, file immediately for bankruptcy, and return to Italy to live off the vast fortune of her uncle, Bartolo.)

On the morning of the negotiation, a distraught Viviola tells Macko that she has been diagnosed with a progressive disease of the larynx and that while she may be able to continue singing for several months, it is almost certain that she will be unable to sing beyond six months. She insists that no one can know of her condition at this time and that nothing must stand in the way of her performing a final swan song. She directs Macko to go forward with the negotiation, explaining that, "When I am ready to share the news of this tragedy and my fans learn of my horrible fate, they will fill the seats at the highest prices—a boon for the Opera House."

At some point during the negotiations, having said nothing about Viviola's health, Macko announces, "Look, my client needs $200,000 to close this deal, and she will not accept one penny less." When Larry, who is careful to say nothing about the potential sale of the Opera House, pointedly asks Macko what his client was paid for her last gig as Carmelo, Macko responds that while he cannot remember exactly, "It was close to 150,000"—which is technically true before the foreign exchange conversion. The two lawyers come to a preliminary agreement pursuant to which the Opera will pay Viviola $200,000 (and also set her up in the dressing room with the outdoor balcony), and Barbara and Viviola, who are both pleased with the results of the negotiations, sign the contract.

* * *

Negotiating on behalf of clients is often, by its very nature, an exercise in posturing and positioning that involves some level of deception. Although lawyers are generally held to a high standard of truthfulness and honesty, as reflected in D.C. Rules 8.4(c)[1] and 3.3(a),[2] Rule 4.1 permits a degree of guile:

> 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.

However, as Comment [2] to Rule 4.1 explains,

> . . . [u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material 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 ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Thus, Rule 4.1 and its comments explicitly "legitimize[] some deceitful negotiation techniques."[3] Often characterized as exaggeration, posturing or "puffing," such statements are, at best, less than forthright and, at worst, simply false. Moreover, by prohibiting only misrepresentation of *material* matters, the Rule permits some misrepresentations or omissions of relevant facts or statements of opinion.

Lawyers' understanding of their ethical duties of truthfulness and honesty in negotiations under Rule 4.1 has proven to be challenging in practice. For example, in 2011, Arizona State University Professors Art Hinshaw and Jess K. Alberts conducted a study that involved surveying over 700 practicing lawyers to assess what they would do when a client asked them to participate in a fraudulent prelitigation settlement scheme. Pursuant to the scheme, the client first insisted that the lawyer not reveal a specific material fact under any circumstances, but in the alternative, the lawyer would only be permitted to disclose the fact if the opposing lawyer asked directly about it. Although half of the respondents indicated that they would refuse both the client's proposed overtures, nearly one-third indicated that they would agree to at least one of the client's restrictions, while the remaining 20 percent indicated that they were unsure how they would respond to one or both requests.[4]

Not surprisingly, one of the study's four conclusions was that "considerable confusion surrounds the elements of Rule 4.1."[5] Specifically, the data showed that many study respondents failed to properly identify "a material fact in a negotiation" and failed to recognize "an omission as a misrepresentation."[6]

Material Facts

Neither Rule 4.1 nor its comments define "statements of material fact." Comment [2] offers only that "[w]hether a particu-

lar statement should be regarded as material, and as one of fact, can depend on the circumstances," and then proceeds to give examples of what is *not* ordinarily taken as a statement of material fact.

The D.C. Bar Legal Ethics Committee also has not answered this question; in Formal Opinion 06-439, however, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility defines permissive "puffing" under Model Rule 4.1 as, "statements by which parties to a negotiation ordinarily would not be expected to justifiably rely"[7] and also concludes that statements regarding a party's negotiating goals or willingness to compromise are "ordinarily not statements of material fact."[8]

At least one court in interpreting Rule 4.1 has found that, "a fact *is material to a negotiation* if it reasonably may be viewed as important to a fair understanding of what is being given up and in return, gained by the agreement or settlement."[9] In other words, if the fact is a basic assumption of the bargain, it is material to the negotiation.

Moreover, misrepresentations or false statements about verifiable facts that are material to a negotiation have been found to violate Rule 4.1. Examples include knowingly understating the limits of defendant's insurance coverage;[10] stating that there is an eyewitness to an accident when, in fact, no such witness exists;[11] and falsely stating that a charging officer in a client's traffic case has agreed to terms of a plea bargain;[12] as these are all false statements of material fact under Rule 4.1.

Misrepresentation by Omission

Lawyers can also violate Rules 4.1(a) and (b) through their failure to affirmatively provide or disclose material facts to an opposing party in a negotiation. Indeed, Comment [1] clarifies that "[m]isrepresentations can also occur by partially true but misleading statements or *omissions that are the equivalent of affirmative false statements*." (Emphasis added).

For example, the death of a client is a material fact to a negotiation, and a lawyer's failure to notify an opposing party of a client's death has repeatedly been determined to violate Rule 4.1 as a "misrepresentation by omission."[13]

A recent California State Bar opinion discussed a hypothetical in which, prior to negotiating a claim for future lost earnings, a plaintiff's lawyer was asked by her client not to disclose that the client had recently secured a job earning $25,000 more than she had earned in her former employment.[14] The opinion concluded that were the lawyer to follow the client's confidentiality instruction, she would "be making an implicit misrepresentation that the Plaintiff had not yet found a job" (a fact material to the negotiation) and that, in the absence of convincing the client to disclose the job,[15] the lawyer could neither participate in such a scheme nor disclose the client's employment, and would thus be required to withdraw from the representation.[16]

Fraud

Over and above the requirements of Rule 4.1, negotiating lawyers are also cautioned to "avoid criminal and tortious misrepresentation."[17] Although the mandates of the ethics rule and substantive law are not perfectly aligned, lawyers should remain cognizant of their personal liability for fraud.[18]

Back to Carmelo

Viviola's progressive disease of the larynx (i.e., the fact that she will be unable to sing beyond six months) is a material fact in the negotiation of the opera singer's employment contract, and Macko's failure to disclose this material fact is a *misrepresentation by omission* in violation of Rule 4.1(a). Though Rule 1.6 prevents Macko's disclosure of his client's secret, he also

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may not assist Viviola in concealing this information in the negotiation. As such, pursuant to Rule 4.1(b) and 1.2(e), Macko would either need to convince his client to permit the disclosure, or withdraw from the representation pursuant to Rule 1.16. Similarly, Macko's statement that Viviola "received 150,000" for her role overseas when, in fact, she received $75,000, is a misrepresentation of a material fact.[19]

Indeed, the only ethically permissible statement Macko made, though not absolutely true, was that his "client needs $200,000 to close this deal, and not one penny less." This is precisely the type of dissemblance acceptable under Rule 4.1.

On the facts presented, Larry's failure to advise Macko about the mere possibility of the Opera House being sold to a developer is not a violation of the Rule. Lawyers generally have no affirmative duty to inform an opposing party of all relevant facts, and perhaps more importantly, a violation of the Rule would require Larry's *actual knowledge,* which is lacking here.[20] Indeed, it is unclear what effect, if any, such a possibility would have on the basic understanding of this particular negotiation. While the Opera House building conceivably could be sold and bulldozed within a year, nothing about the information Larry was told indicates that this is a likely or even reasonably likely outcome.

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Notes

1 "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." D.C. Rule 8.4(c).

2 "A lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal. . . ." D.C. Rule 3.3(a).

3 Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 Harv. Negot. L. Review 95 (Spring 2011).

4 *Id.* at 99.

5 The other three conclusions of the study: (1) an unacceptably high number of lawyers indicate a willingness to engage in a fraudulent scheme in violation of Rule 4.1 if asked by their clients to do so; (2) lawyers may believe other legal principles take precedence over Rule 4.1 and have difficulty reconciling competing values; and (3) lawyers believe violations of Rule 4.1 are widespread. *Id.* at 148–150.

6 *Id.* at 148–149.

7 ABA Standing Comm. on Ethics and Prof. Responsibility Formal Op. 06-439 (2006). Although not controlling, ABA opinions interpreting the Model Rules of Professional Conduct can constitute persuasive authority when a jurisdiction's rule at issue is substantially the same as the Model Rule and the jurisdiction has not issued a contrary opinion. Model Rule 4.1 is identical to D.C. Rule 4.1, with the exception that the Model Rule omits the "to a third person" language in Rule 4.1 (b).

8 The ABA Litigation Section's Ethics in Negotiations Guidelines (2002) take an approach which initially seeks to determine whether a lawyer's statement is one of fact rather than opinion or merely reflects the speaker's state of mind. "The test is whether it is reasonably apparent that the hearer would regard the statement as one of fact." *See* Section 4.1.1. Presumably, a statement "not of fact" or law would *not* violate Rule 4.1.

9 *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002), *aff'd* 352 F. 3d 896 (2003).

10 ABA Formal Legal Ethics Op. 06-439 *citing In re McGrath*, 468 NY S. 2d 349, 351 (NY App. Div. 1983);

11 *See generally* Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-194, agreeing with conclusions of ABA Formal Op. 06-439, *supra*, using similar examples. *See also In re Kennelly* (Conn. Super Ct. Feb. 2005)(unpublished) ("While a great deal of leeway is allowed during settlement discussions in enhancing a party's claim and denigrating an opponent's claim, misrepresentation by an attorney of an indisputable fact, especially a fact uniquely in his knowledge, is never countenanced.").

12 *Office of Disciplinary Counsel v. DiAngelus,* 907 A.2d. 452 (Pa 2006).

13 *See Toledo Bar Association V. Fell*, 51 Ohio St. 2d 33, 364, 364 N.E.2d. 872, 873 (1977); *Virzi v. Grnd Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507 (E.D. Michigan 1983); *Kentucky Bar Association v. Geisler*, 938 S.W. 2d. 578 (Ky. 1997) (lawyer's failure to disclose her client's death to opposing counsel amounted to affirmative misrepresentation); *In re Warner*, 851 So. 2d. 1029 (La. 2003).

14 *See* Cal. State Bar Op. 2015-194, *supra.*

15 Space limitations prevent a discussion of the tension inherent in Rules 4.1 and 1.6. As one commentator astutely notes: "It is apparent that a lawyer's duty of confidentiality may be critically important in negotiations and in the right situation that the revelation of confidential information might impair a client's ability to negotiate favorable terms in a deal or to advantageously settle a contested matter . . . But Rule 1.6 does not exist in a vacuum and . . . [a] lawyer's duty of confidentiality does not immunize her against claims of dishonesty, deceit, fraud or the like. . . . " Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations,* 22 Geo. J. Legal Ethics 249, 262 (Winter 2009); *see also* D.C. Rule 4.1(b) and Comment [3]; Rule 1.2(e); and Rule 3.3(d).

16 *See* State Bar of Cal. Op. 2015-194, *supra. See also* D.C. Rule 1.16(a)(1).

17 *See* Comment [2], Rule 4.1.

18 *See* Richmond, *Supra,* at 290–296. *See also* Hinshaw & Alberts, *Supra,* at 123. ("The basic elements of a fraudulent misrepresentation claim are: (1) intentional misrepresentation to induce an action or inaction; (2) reasonable reliance on the misrepresentation; and (3) resulting damages," *quoting*, Restatement of Torts sections 525, 526, 531 (1977)). A misrepresentation can include an omission. To be clear, a violation of Rule 4.1(a) does not require either reliance or damages; it is sufficient that the material misrepresentation be knowing.

19 Literal truths when spoken with the intention to mislead violate Rule 4.1. *See Florida Bar v. Joy,* 679 So. 2d 1165 (Fla. 1996).

20 *See* Comment [1], D.C. Rule 4.1. *See also* D.C. Rule 4.1 ("A lawyer shall not knowingly . . .").

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE IDUS J. DANIEL JR. Bar No. 405077. February 22, 2016. The D.C. Court of Appeals denied Daniel's petition for reinstatement.

IN RE CHARLES P. MURDTER. Bar No. 375905. February 4, 2016. The D.C. Court of Appeals suspended Murdter for a period of six months, with all but 60 days of the suspension stayed, and that he be placed on probation for a period of one year, subject to conditions. Murdter failed to file briefs in five separate appeals, following his appointment by the D.C. Court of Appeals to represent defendants under the Criminal Justice Act, and pleaded guilty to criminal contempt for failing to obey the court's orders in two of those five matters. Murdter violated Rules 1.1(a) (competent representation), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.3(b)(1) (intentional failure to seek client's lawful objectives), 1.3(c) (reasonable promptness), 3.4(c) (knowingly disobeying the obligations under the rules of a tribunal), and 8.4(d) (serious interference with the administration of justice).

Informal Admonitions Issued by the Office of Disciplinary Counsel

IN RE WILLIAM B. HASELTINE. Bar No. 472906. January 29, 2016. Disciplinary Counsel issued Haseltine an informal admonition. While retained to represent a client in a breach of contract matter, Haseltine left voice messages, sent an e-mail, and wrote a letter in which he threatened to contact a government organization if the opposing party (a corporation) did not respond to his and his client's demands. Rules 8.4(e) and 8.4(g).

IN RE DAJONA ROBINSON. Bar No. 980734. January 8, 2016. Disciplinary Counsel issued Robinson an informal admonition. While retained to represent a client with the filing of her chapter 13 bankruptcy petition, Robinson failed to provide competent representation, failed to serve the client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters, and engaged in conduct that seriously interfered with the administration of justice. Rules 1.1(a), 1.1(b), and 8.4(d).

The Office of Disciplinary Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Disciplinary Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*