

# THE RECORDER

## ETHICS

# Ethical Negotiations

*Establishing a relationship of trust with opposing counsel will be a greater benefit to the case than a game of 'hide the ball'*



Hon. Jamie Jacobs-May (Ret.)

### Ethics

Some believe that success at the negotiating table is heightened by the skillful use of deception. As J.J. White remarked, "The critical difference between those who are successful negotiators, and those who are not lies in this capacity both to mislead and not to be misled."

Others believe that not only is complete honesty in negotiation an ethical imperative, negotiators have a further ethical duty to make sure the deal is fair to both sides.

This article will summarize ethical guidelines, California law, and insights for successful negotiation strategies drawn from economics, psychology and neuroscience.

### ETHICAL GUIDELINES

ABA Model Rule 4 addresses an attorney's obligation to be truthful in negotiations. A lawyer "shall not knowingly make a false statement of material fact or law to a third person."

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What negotiation strategies are ethical under this Model Rule? Exaggerating one's strengths, minimizing or de-emphasizing weaknesses of your factual or legal position, indicating that a party will not agree to settle for less than a certain amount when in fact it will, and insisting on a certain term for strategic reasons when there is no interest in that term, are all considered acceptable "posturing" or "puffing." ABA Formal Opinion 06-439.

Examples of unacceptable false statements of material fact include a lawyer representing to the other side that a benefit will cost the company \$100 when it actually costs \$20, or declaring as a fact that your authority to settle is limited to a certain amount when it is not.

While there is no affirmative duty to inform an opposing party of relevant facts, a misrepresentation can occur if the lawyer incorporates a statement of another that the lawyer knows is false, or makes partially true but misleading statements or omissions.

Interestingly, the State Bar of California has rejected adoption of a counterpart to Model Rule 4.1 in its Professional Rules of Conduct.

### CALIFORNIA CASE LAW

When it comes to negotiating business transactions, California case law applies classic tort law to misrepresentations made by attorneys, consistent with Model Rule 4.1. Even if attorneys are dealing with one another at arm's length, one will be liable

for fraud if the elements are met.

By contrast, attorneys who make misrepresentations in the litigation context, which include settlement discussions, are generally immune from tort liability (except for claims of malicious prosecution) based on the litigation privilege. For example, an attorney who knows that insurance limits are \$500,000 but induces a settlement through a misrepresentation that the limits are only \$15,000 cannot be sued for fraud for this material misrepresentation. *Home Ins. v. Zurich Ins. Co.*, 96 Cal.App.4th 17 (2002).

### EFFECTIVE AND ETHICAL NEGOTIATIONS

Effective negotiation and ethical behavior go hand in hand. Take a moment and think about the qualities you admire in attorneys with whom you have negotiated. Now think about the qualities of attorneys who are ineffective negotiators.

If you are like the attorneys surveyed by Professor Andrea Schneider, you would agree that the myth of the effective negotiator should be shattered.

"[A]dversarial behavior was perceived as increasingly ineffective... Seventy-five percent of the unethical adversarial bargainers ... were considered ineffective. As these negotiators become more irritating, more stubborn, and more unethical, their effectiveness ratings drop... On the other hand, it is no surprise that lawyers who are pleasant, courteous, astute, and well prepared do well in negotiations. When lawyers are able to maximize their problem-solving skills balancing assertiveness and empathy, they

are more effective on behalf of their clients..." "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style," Andrea Kupfer Schneider, 7 Harv. L. Rev. 143, 196-97 (2002).

The efficiency of a negotiation, the maximization of value, and the likelihood of a mutually beneficial agreement are all products of positive working relationships that in turn rest on trust earned through behavior. Trust produces cooperation, sharing information, and seeking mutually satisfying solutions to problems. Trust has been called "social capital," facilitating positive interactions, collaboration and a sense of satisfaction.

Trust is hard to earn and easy to destroy. During the course of a negotiation, one can witness levels of trust increase or decrease depending upon the behavior of the other side. When positive overtures are reciprocated with cooperative behavior, mutual trust escalates. When reciprocity is lacking, trust evaporates. In the face of unfair and unethical conduct, we do not cooperate. We are prone to be punitive, and will even sacrifice personal gain to prevent another person from receiving an unfair outcome.

Studies by economists, psychologists and neuroscientists provide further evidence that fairness and cooperation are experienced as rewarding and that emotions play a significant role in decision-making, thereby challenging economic models based on rational choice theory. A concrete example comes from the Trust Game.

The Trust Game is a widely used experiment where two players are given \$10. Player 1 can either keep the \$10 or give some or all of it to Player 2 in which case the trusted money multiplies by a factor of 3 to \$30. If all the money is given to Player 2, Player 2 will have \$40, the original \$10 and \$30 more. At this point Player 2 can either keep it all, or return some to Player 1. Player 1's behavior is a measure of trust and cooperation, while Player 2's behavior is a measure of trustworthiness, reciprocity and fairness.

The economic model predicts no trust by Player 1 because a certain \$10 is better than the very real risk that Player 2 will keep all of the money given. It also predicts no trustworthiness by Player 2 because of the obvious self-interest in keeping all the money. Yet, the data shows that typically three-quarters of Player 1s will send some money to Player 2s, and almost all Player 2s return some money.

Neuroscientists marvel at these findings. Unlike other species, humans are trustful and cooperate with genetically unrelated strangers. They hypothesize that forming secure social bonds is a fundamental human need, and trust helps us to cooperate with others, a behavior necessary for survival.

Paul Zak, Director of Claremont Graduate University's Center for Neuroeconomic Studies, sought to understand the physiologic underpinnings of trust. He discovered that when Player 2s are entrusted with money, their oxytocin levels spike. The more money given to Player 2, the greater the spike in oxytocin and the more money that is sent back to Player 1.

Oxytocin is a neurotransmitter produced by the brain that evokes feelings of contentment, reductions in anxiety, and feelings of calmness and security. Similarly, functional magnetic resonance imaging (fMRI), allowing us to peer into the brain, confirms that fair treatment activates regions of the brain associated with reward.

To conclude, ethical behavior is rewarding. It supports cooperation, collaboration and potentially better negotiation outcomes. How can you increase trust with an adversary? What do you do if your adversary is untrustworthy? Here are some practical tips:

1. Establish a relationship with your adversary. All of us tend to see ourselves in the best possible light and can demonize opposing counsel and the other party. As we become better acquainted, we stop objectifying the other, find things we have in common, open up and start feeling comfortable and connected, and the seeds of trust are sown.

2. Obey the rules of the game. The quickest way to lose trust is to violate a set of rules, whether it is returning phone calls, being on time, or delivering on a promise. Generally, the rules of arms' length negotiations do involve a back and forth, non-disclosure of bottom lines, and some degree of bluffing and puffing. The rules may be different when parties have different expectations for cultural, business or social reasons. Know the rules that govern your negotiation and obey them.

3. Make low risk/high return concessions. A concession can work wonders for trust. By legitimately appreciating the other party's situation and making a move to meet its needs, you signal a desire to have a positive relationship, and establish a reputation as someone who is competent and easy to get along with, and who understands what the other side values.

4. Negotiating with the ethically challenged. Deception is the use of information to create a false belief. The more prepared and knowledgeable you are, the less likely you will be misled. Do not take information you receive at face value. Ask questions and ask for documentation. Know your bottom line. Be prepared to walk away. Information you share can be exploited. Caveat lawyer. But, do not engage in unethical behavior yourself. "A lie always leaves a drop of poison behind."

5. Impasse. If you are unsuccessful in negotiating with your counterpart, consider using a third-party neutral. A mediator can build trust and rapport, communicate concessions without making a party vulnerable, receive candid information without subjecting the party to exploitation, and filter information in a way that can lead to a successful outcome.