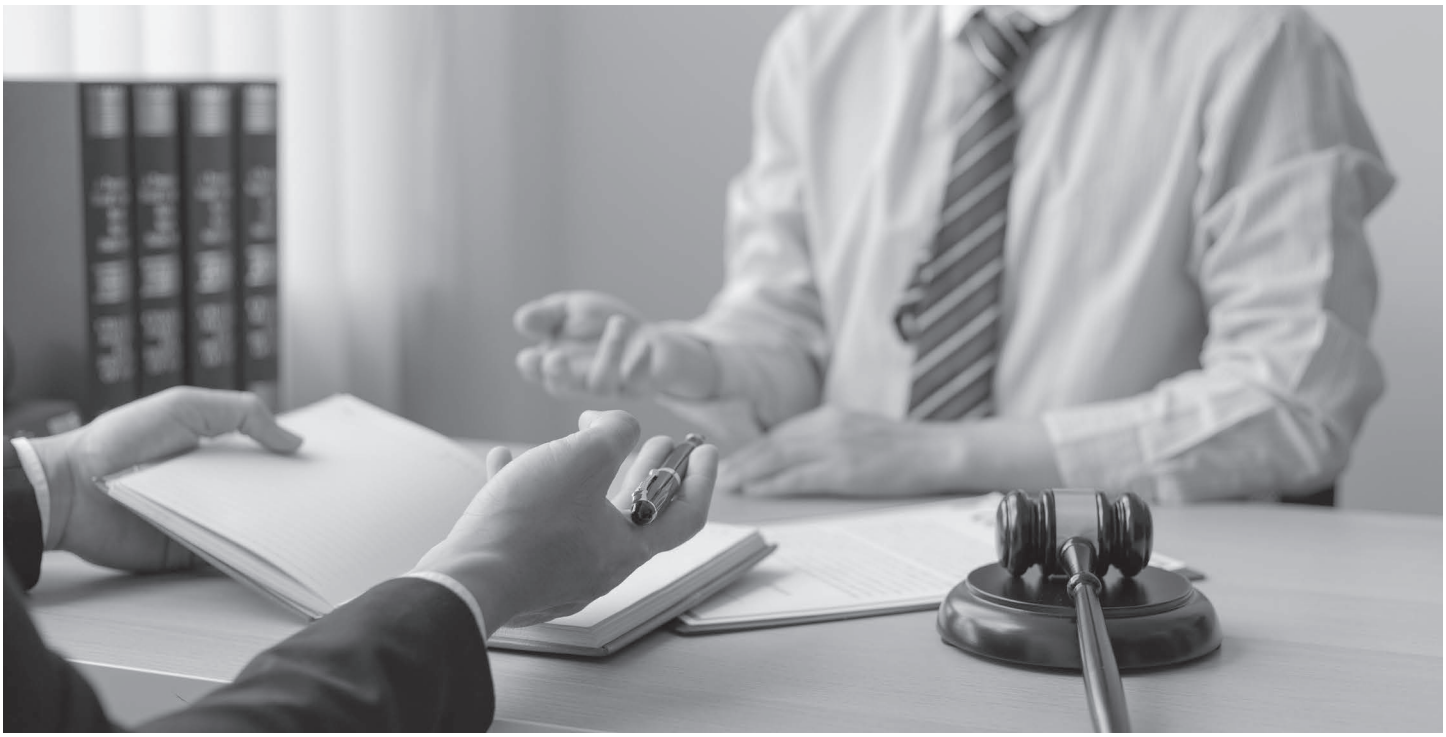
Resolution Alley

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

A Reminder About Ethics in Negotiation

By Theo Cheng



Negotiation is a fundamental life and legal skill. To "negotiate" means "[t]o confer with another or others in order to come to terms or reach an agreement," and "negotiating" means "[t]he act or process of negotiating."[1] We negotiate on any number of everyday matters, ranging from family and home-related issues and concerns, to haggling when buying a new car or engaging a contractor for a renovation project. We also engage in negotiations in pursuit of our professional endeavors as lawyers when we interact with adversaries to consummate a transaction or seek a resolution on a disputed legal issue, claim, or matter. However, we are oftentimes faced with an ethical quandary: How to remain fair and truthful, while, at the same time, in some ways, be misleading. As Professor James White of the University of Michigan Law School has written, "the negotiator's role is at least passively to mislead his opponent about his settling point while at the same time to engage in ethical behavior."[2]

One might think that the applicable professional responsibility rules would help alleviate this quandary, especially for newer practitioners. Yet those rules are surprisingly laconic and unhelpful. In fact, the New York Rules of Professional Conduct only contain a single, seemingly relevant rule – Rule 4.1 – which is titled "Truthfulness in Statements to Others" and simply states that, "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."[3] What exactly does this rule proscribe?

- Does the lawyer have to ensure that the adversary has all the relevant facts or knows the relevant law?
- What if it was not the lawyer herself who made the false statement in the first instance?
- Can the lawyer avoid making a false statement by omission?
- What if the lawyer's statements are really opinions? Does he have to warn his adversary that they are opinions?

The New York rule is also accompanied by official commentary, which provides some helpful contours. For example, comment [1] addresses the concept of "misrepresentation" and advises that "[a] lawyer is required to be truthful

when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." This comment answers part of the first question above, namely, that a lawyer has no obligation to apprise an adversary of the relevant facts. However, notwithstanding that Rule 4.1 expressly refers to false statements of material fact or law, the comment is silent as to any affirmative duty on the part of the lawyer to apprise an adversary of the relevant law.

In any event, in eschewing any such obligation (presumably with respect to both relevant facts and law), the lawyer nonetheless needs to ensure that they are being truthful in interacting with their adversary on their client's behalf. On that score, comment [1] goes on to say that "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false," and that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." This comment answers the next two questions insofar as being truthful means ensuring that a lawyer is not blindly repeating false statements made by someone else or omitting information such that the resulting utterance could be deemed a false statement.[4]

As to what exactly are "statements of fact," comment [2] purports to address that issue, but leaves much to be desired. This comment begins by stating that Rule 4.1 "refers to statements of fact," but then provides that "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances." It attempts to offer some context by noting that, "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact." However, the comment does not then provide any other information as to what these so-called "generally accepted conventions in negotiation" are, where a practitioner is supposed to find them, or if it matters whether all counterparties to a negotiation are operating under the same generally accepted conventions.

Lest the lawyer be left without any guidance at all, comment [2] then sets forth some examples, specifically, that "[e]stimates 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; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud." Although the examples of "estimates of price or value" hint at a lawyer's opinion regarding those two subjects, nowhere in comment [2] is the distinction between fact and opinion explicitly discussed. Nor is there any guidance provided as to how a lawyer is to distinguish between them, or even whether an affirmative duty arises to apprise an adversary that certain statements may actually be statements of opinion, and not statements of fact – the subject of the fourth question above. More importantly, the examples provided in this comment – which, presumably, are part of the "generally accepted conventions in negotiation" – are hardly exhaustive of the "circumstances" a lawyer might find herself in during any particular negotiation setting. They merely beg the question of what else falls within those conventions.

Comment [2] concludes with the reminder that "[l]awyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation."[5] To that end, comment [3] addresses illegal or fraudulent conduct by the lawyer's client and also reminds that "a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent," and that "a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation," sometimes having "to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like."[6] While the guidance provided in this comment is relatively clear, it sheds little additional light on the parameters for engaging in the core conduct that renders negotiations ethical and in compliance with Rule 4.1.

Therefore, in the end, what does Rule 4.1 teach us? As Professor Art Hinshaw of Arizona State University Sandra Day O'Connor College of Law has written, on some level, the rule teaches that deceit, misdirection, dissembling, and lying can be "ethical" under certain circumstances. For example, if a lawyer persuades herself that all she is doing is communicating statements of opinion, and not statements of fact, then deceitful conduct is arguably permissible. Yet if puffing or bluffing about price or value is part of the "generally accepted conventions in negotiation," the lawyer is left rudderless as to the limits of such puffing and bluffing. To be blunt, where does a practitioner cross the line from acceptable puffery to outright misrepresentation?

Many practitioners also easily fall into the gray areas surrounding ethical negotiations because they often lack an understanding that personal relationships and reputations are an important aspect of the legal profession. Many lawyers are willing, particularly early in their careers, to sacrifice both for the sake of "winning" the negotiation. All of the foregoing is likely compounded by an insufficient focus on fraud in the law school curriculum and the hypercompetitive environment of law school and legal practice in general. These phenomena leave many practitioners woefully unprepared to conduct negotiations ethically when they are faced with real-world situations in private practice. Thus, it is conceivable that many practitioners engage in what might be construed as patently fraudulent conduct and yet have very little conception that what they are doing is wrong in the least.

Take, for example, a client who has told his lawyer that she is authorized to pay $750,000 to settle a pre-litigation accusation from a record company of copyright infringement. During the settlement negotiations, after the lawyer offers $650,000, the record company's lawyer asks the defendant's lawyer, "Are you authorized to settle for $750,000?" Can the lawyer say, "No, I am not"? Although the clever response here is to have the lawyer avoid saying something so stark in the first instance, it seems likely that simply saying "no" is a misrepresentation of a relevant fact told by the client to his lawyer. Yet a crafty lawyer might also answer "no" while taking refuge in the fact that her client's prior authorization may arguably not still be valid in the light of the communications exchange that just took place between the lawyers, and, thus, a re-authorization would be needed before a more "truthful" answer to the record company lawyer's question can be delivered.

Any number of other tricky situations could arise. For example, can lawyers representing a baseball player who claims to have suffered a serious knee injury say in settlement negotiations that their client is "disabled" when they know that their client is out skiing? Or, in settlement talks over a dispute concerning the leasehold held by an art gallery, the landlord's lawyers make it clear that they think the gallery has gone out of business, although the gallery's lawyers did not say that; in fact, the gallery is an ongoing concern and several important sales are imminent. Can the gallery's lawyers go ahead and settle without correcting the other side's misimpression?

Ethical issues in negotiations undoubtedly do arise. While Rule 4.1 provides little in the way of robust guidance, it still serves as a reminder that truthfulness in making statements to others is a value we uphold in our legal system. It also reinforces the notion that the bedrock of durable agreements reached through the negotiation process rests on lawyers not knowingly making false statements of material fact or law.

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, Resolute Systems, the American Intellectual Property Law Association's List of Arbitrators and Mediators, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He is a former chair of the New York State Bar Association Dispute Resolution Section, a Fellow of the College of Commercial Arbitrators, and a member of the National Academy of Distinguished Neutrals. Mr. Cheng also has nearly 25 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at theo@theocheng.com.

Endnotes

1. Am. Heritage Dictionary of the English Language https://www.ahdictionary.com/word/search.html?q=negotiate, https://www.ahdictionary.com/ word/search.html?q=negotiation; *accord* Cambridge Dictionary ("negotiation" means "the process of discussing something with someone in order to reach an agreement with them or the discussions themselves"), https://dictionary.cambridge.org/us/dictionary/english/ negotiation; Merriam-Webster Dictionary ("negotiate" means "to confer with another so as to arrive at the settlement of some matter"), https://www.merriam-webster.com/dictionary/negotiate.
2. James J. White, "The Pros and Cons of Getting to YES," 34 J. Legal Educ. 115, 118 (1984), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj5lI74xJz8AhXjnnIEHSdECP0QFnoECAwQAQ&url=https%3A%2F%2Fcore.ac.uk%2Fdownload%2Fpdf%2F232683734.pdf&usg=AOvVaw1dALbjQB0jMa89CklT0mUn.
3. *Cf.* ABA Model Rules of Professional Conduct, 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 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.").
4. Comment [1] concludes with a passing reference to Rule 8.4, to wit, "As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4." Comment [1] to Rule 4.1 of the ABA Model Rules of Professional Conduct is verbatim to the N.Y. comment.
5. Comment [2] to Rule 4.1 of the ABA Model Rules of Professional Conduct is verbatim to the N.Y. comment.
6. Comment [3] to Rule 4.1 of the ABA Model Rules of Professional Conduct is substantively similar in scope and guidance.