Every lawyer’s negotiation style is probably as personal as the lawyer’s style in correspondence, litigation or favorite dessert. Most lawyers rely on their style, experience, and knowledge of the case in a negotiation. Few lawyers have formal training in negotiation. Such training typically focuses on maximizing the client’s outcome in the negotiation. Yet each lawyer instinctively knows there is an ethical component as well in every negotiation.

The ethical issues which may arise in negotiation are at times obvious; and at other times, subtle and a trap for the unwary. Problems may range from gray areas in the ethical rules to potentially criminal or tortious conduct. The following set of questions and resources seeks to focus a discussion of the ethical issues in negotiation, with reference to situations normally encountered by bankruptcy lawyers.

I hope the discussion will lead to understanding and guidance. I am particularly interested in each lawyer’s answer to the question whether an effective lawyer can avoid falsehood in negotiation.

1. The Bottom Line.

The parties are meeting to discuss settlement of a preference action. The trustee has lost her heart for the action and directed special counsel to accept any reasonable settlement. The trustee’s special counsel took the case on a contingent fee (the agreement having been approved by the bankruptcy court). The defendant, an insurance company, is willing to pay up to $750,000 to settle a claim with a face value up to $19 million.

Question – May the defendant’s lawyer communicate her client’s “unequivocal, final offer, bottom line” offer of $100,000?

Question -- May the trustee’s lawyer demand a “minimum” of $2 million or state that “the trustee has instructed me to take the case to trial as soon as possible”?

Question -- May either lawyer inject a “deal point” as to which the client is indifferent in order to have an issue to “give up” or “throw away” in the negotiation?

Discussion – It is unclear whether there is any authority for a lawyer to lie on behalf of a client in the Arizona Model Rules of Professional Responsibility. Nothing in the Model Rules requires a lawyer to lie.

**ER 1.2. Scope of representation.**
(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

* * *

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) 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.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Further, the Model Rules explicitly require lawyers to be truthful when dealing with others, without regard to whether the conduct is inside or outside a courtroom.

E.R. 1.3 Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

ER 4.1. Truthfulness in statements to others.

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 ER 1.6.

COMMENT [1985 Adoption]

Misrepresentation. 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. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact. This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under 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 in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client. Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by ER 1.6.

Code Comparison

ER 4.1(a) is substantially similar to DR 7-102(A)(5), which stated that "In his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact."

With regard to ER 4.1(b), DR 7-102(A)(3) provided that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."

ER 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;
COMMENT [1985 Adoption]

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even one of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of ER 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Code Comparison

With regard to ER 8.4(a) through (d), DR 1-102(A) provided that "A lawyer shall not:

"(1) Violate a Disciplinary Rule.

"(2) Circumvent a Disciplinary Rule through actions of another.

"(3) Engage in illegal conduct involving moral turpitude.

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice."
Under the former Code of Professional Responsibility, a lawyer was suspended from the practice of law for 9 months for assisting a corporation engaged in a scheme to defraud investors. In re Kersting, 151 Ariz. 171, 726 P.2d 587 (1986). The discipline was imposed even though the victims were not the lawyer’s clients.


“Fraud” or “Fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

No one believes that a lawyer is always being truthful when communicating a client’s “bottom line” or settlement demand in a negotiation. Nor is such conduct unethical. Official Comment to Model Rule 4.1; G. Hazard, The Lawyer’s Obligation to be Trustworthy When Dealing with Opposing Parties, 1981 So. Car. L. Rev. 181, 182-83 (1981). The difficulty is determining when misinformation in a negotiation is mere puffing, as opposed to improper misrepresentation.

As adopted, the Model Rules do not require complete truthfulness in all occasions. Rather, the lawyer is limited by Model Rule 1.6 with respect to disclosure of privileged information. Model Rule 4.1 does not require a lawyer to disclose information in the interests of truthfulness. Nothing in the Model Rules imposes a duty of fair dealing on a lawyer dealing with an opposing party, in contrast to the duty owed to a client.

2. Undisclosed Facts.

Jerry and John are meeting to negotiate terms of a plan of reorganization. On behalf of Big Bank, John has filed a two-year old appraisal of Happy Acres’ property showing the “fair value” of the collateral is about $200,000 less than the $2,000,000 debt.

**Question** -- Must John disclose to Jerry that the same appraiser’s updated appraisal shows the fair value is $75,000 more than the debt?

**Question** -- Only if Big Bank consents?

**Authorities**

*ER 1.6. Confidentiality of information.*

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b), (c) and (d) or ER 3.3(a)(2).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a
criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

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COMMENT  [1985 Adoption]

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Authorized Disclosure. A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

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The lawyer's exercise of discretion as provided in paragraph (c) requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practicable, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in ER 1.16(a)(1).

The ABA Standing Committee on Ethics and Professional Responsibility, in its Formal Opinion, 94-387 (1994), opined that a lawyer has no obligation to disclose to opposing counsel that the statute of limitations on the lawyer's claim had expired. The lawyer may do so only with client consent under E.R.s 1.3 and 1.6.

Question -- Only if Jerry asks him?

Question -- Only if the answers to Jerry’s interrogatories are overdue?

Authorities

ER 3.4. Fairness to opposing party and counsel.
A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by opposing party;

(e) in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

**Question** – What if John lies about the existence of the updated appraisal?

**Discussion** – A lawyer may not falsify evidence, or lie about false evidence. In *In re Zeiger*, 692 A.2d 1351 (D.C. App. 1997), the lawyer was suspended for 60 days after falsifying medical records in a personal injury case to remove references to the plaintiff’s blood alcohol results, and then lied about the falsified records to the insurance adjustor.

The law generally imposes an affirmative duty of disclosure under four circumstances:

[1.] One who speaks must say enough to prevent his words from misleading the other party.
[2.] One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party.

[3.] One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts.

[4.] One who has actual knowledge that its customer is committing fraud must disclose financial information.


The existence of duty is an issue of law for the court to decide, \textit{Markowitz v. Arizona Parks Board}, 146 Ariz. 352, 706 P.2d 364 (1985), not to be confused with details of conformance with a standard of conduct imposed by the relationship. \textit{Ibid}. 146 Ariz. at 355, 706 P.2d at 367; see also, \textit{Lasley v. Shrake’s Country Club Pharmacy, Inc.}, 179 Ariz. 583, 585, 880 P.2d 1129, 1131 (App. 1994). Whether a duty exists is a question of whether one of the parties to a relationship is under an obligation to use care to avoid or prevent injury to the other. "‘Duty’ is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff.” W. Page Keeton, et al., \textit{PROSSER AND KEETON ON THE LAW OF TORTS} § 53 at 356 (5th ed. 1984). If the court decides that no duty exists, then a trial is unnecessary.” Lankford & Blaze, \textit{THE LAW OF NEGLIGENCE IN ARIZONA} at 11 (1992).

\textit{Maurer v. Cerkvenik-Anderson Travel, Inc.}, 181 Ariz. 294, 890 P.2d 69 (App. 1994) (jury question on travel agent’s duty to disclose known dangers to customer). An alternative theory to impose a duty of disclosure is the doctrine of “constructive fraud.”

Constructive fraud is defined as a breach of a legal or equitable duty which, without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others, violates public or private confidences, or injures public interests. \textit{Morrison v. Acton}, 68 Ariz. 27, 35, 198 P.2d 590, 595 (1948); \textit{McAlister v. Citibank (Arizona)}, 171 Ariz. 207, 214, 829 P.2d 1253, 1260 (App. 1992). Neither intent to deceive nor dishonesty of purpose is an essential element of constructive fraud. \textit{Morrison}, 68 Ariz. at 35, 198 P.2d at 595; \textit{McAlister}, 171 Ariz. at 214-15, 829 P.2d at 1260-61. Constructive fraud also requires the existence of a fiduciary or confidential relationship. \textit{Morrison}, 68 Ariz. at 35, 198 P.2d at 595. The relationship between Helms as doctor and Lasley as patient was a confidential relationship, akin
to that between the dentist and patient in Acton v. Morrison, 62 Ariz. 139, 155 P.2d 782 (1945), and Morrison. As such, the relationship called for "frank and truthful information from [Helms] to [Lasley], and [Helms], in keeping from his patient knowledge of [his] true condition . . .," would have "violated a very sacred duty he owed him." Acton, 62 Ariz. at 143, 155 P.2d at 784.


**Question** – Must John disclose to Jerry that the bank has a buyer willing to pay $2,500,000 for the property after foreclosure? Only if asked?


The context for Jerry and John’s discussions is a judicial settlement conference before the bankruptcy judge.

**Question** – Must John disclose the updated appraisal to the settlement judge?

**Authorities**

E.R. 3.3, Candor toward the tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) except as required by applicable law, fail to disclosed a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) except as required by applicable law, offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

This obligation applies in a judicial settlement conference, as the Arizona Supreme Court recently noted:

We agree that respondents breached ER 3.3(a)(1), which states: "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal." Rule 42, Ariz. R. Sup. Ct. The comments to ER 3.3 state that "there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." See In re Ireland, 146 Ariz. 340, 342, 706 P.2d 352, 354 (1985). Respondents knowingly failed to disclose the separate agreement to the settlement judge in violation of this rule. At the same time, they engaged in "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of ER 8.4(c).

In re Fee, 182 Ariz. 597, ___, 898 P.2d 975, 978 (Ariz. 1995).

Question -- May John avoid the issue by punctiliously avoiding direct falsehood, even if he does not correct false impressions?

Authorities

In our judgment, respondents should have either disclosed the complete arrangement or politely declined any discussion of fees. Fear that this might have jeopardized the settlement, while understandable, does not excuse their lack of candor with the tribunal. The system cannot function as intended if attorneys, sworn officers of the court, can lie to or mislead judges in the guise of serving their clients. "Zealous advocacy" has limits. It clearly does not justify ethical breaches.

Fee, 898 P.2d at 979.

Question – Would relief be available if a settlement were entered into based on false information?

Authority

Rule 60(c), Arizona Rules of Civil Procedure, provides that relief from judgment is available due to . . . “fraud, . . ., misrepresentation or other misconduct of an adverse party . . .”

4. Overstated Claims.

Big Bank and Honest Debtor have settled their disputes. Big Bank’s claim will be allowed in full, except for pre-petition default interest and post-petition interest and
attorneys’ fees will be capped. The estate will realize the proceeds of a sale over the amount paid to the bank and sale costs. Susan, the bank’s lawyer, realizes that the bank’s claim includes an itemization of charges which are not properly chargeable under the loan documents, including charges for the time of the bank’s in-house counsel.

Question -- Must Susan disclose the issue to debtor’s counsel, the unsecured creditors’ committee or the trustee?

Question -- If the Bank has filed a proof of claim, do Susan or her client have an obligation to amend the proof of claim?

Authority

§ 152. Concealment of assets; false oaths and claims; bribery

A person who--

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the
provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.

Question -- If the erroneous debt is scheduled by the debtor in the erroneous amount, because the debtor’s bookkeeper called the bank to get the amount due, does the bank have an obligation to file a proof of claim in the lower amount?

Question -- What if the error is an arithmetic error involving excessive interest and late fees charged?

Question -- What if the arithmetic error is significant and occurred in claims filed in dozens of cases over the past several years?

Question -- What if Susan has repeatedly advised her client to change its practices and the client refuses to do so?

Authority

A.R.S. § 13-2310. Fraudulent schemes and artifices; classification; definition.

A. Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.

B. Reliance on the part of any person shall not be a necessary element of the offense described in subsection A of this section.

C. A person who is convicted of a violation of this section that involved a benefit with a value of one hundred thousand dollars or more is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except pursuant to section 31-233, subsection A
or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

D. The state shall apply the aggregation prescribed by section 13-1801, subsection B to violations of this section in determining the applicable punishment.

E. As used in this section, "scheme or artifice to defraud" includes a scheme or artifice to deprive a person of the intangible right of honest services.

A.R.S. § 13-2301(D)

4. "Racketeering" means any act, including any preparatory or completed offense, which is committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, which would be chargeable or indictable under the laws of this state had the act occurred in this state and which would be punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

* * * *

(t) A scheme or artifice to defraud.

See also 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud).

5. Securities Laws.

Multilevel Marketing, Inc., the debtor, is negotiating with the creditors’ and equity security holders’ committees and new investors over the terms of the plan of reorganization. The debtor’s chief financial officer states to debtor’s counsel that she believes that the pro forma projections upon which the plan is based are wholly unrealistic, and that without an immediate post-confirmation working capital infusion of $2 million more than is called for in the plan, the debtor will be insolvent within days after the effective date of the plan.

Question – May the debtor’s counsel disclose the CFO’s opinion without the consent of the client?

Question -- Must the debtor’s counsel disclose the CFO’s opinion?

Question -- Does it matter that the pro forma projections were prepared by the debtor’s chief operating officer and accountants, not the CFO? What if the debtor’s COO or accountants will testify that the projections are reasonable and achievable?
**Question** -- Does it matter if the committees have not insisted upon protections in the plan against post-confirmation borrowing?

**Question** -- Does your answer change if the plan calls for existing shareholders to receive warrants for plan stock in exchange for their existing equity, and that substantial proceeds are expected from the exercise of those warrants?

6. **Undisclosed Facts and the Confirmation Hearing.**

The debtor owns an office building. The bank’s appraisal indicates the bank’s claim is slightly undersecured. The debtor’s counsel is negotiating with the unsecured creditors to accept a plan providing pennies on the dollar dividend, and with the secured creditor for a reduction in the interest rate. If an undisclosed pending offer for the property is accepted and the sale closes, the bank can be paid in full at the closing as can the unsecured creditors.

**Question** -- Must the debtor’s counsel disclose the offer before balloting? Before or during the confirmation hearing? May the debtor’s counsel urge the court to find the plan is feasible?

**Discussion** -- In *Linder v. Brown & Herrick*, 189 Ariz. 398, 943 P.2d 758 (Ariz. App. 1997), the plaintiffs sued among numerous others, opposing counsel alleging fraud in making false statements in court papers. The court of appeals affirmed dismissal on the basis that, among other things, the opposing parties had no right to rely on the statements of opposing counsel. “[N]o authority exists in Arizona for a fraud claim against an adversary or an adversary’s attorney based on statements made during litigation.” As to acts in trial, the court indicated only a malicious prosecution action could lie. There is no other cause of action against opposing counsel for conduct in litigation. Would the answer have been different in a suit based upon allegations of false statements in negotiations?

**Question** -- Does the answer change if the interests of existing equity will be canceled on the effective date of the plan unless the member of the debtor contribute $2,500 per unit on the effective date?

**Discussion** -- Parties, including attorneys, may be liable for false statements or material omissions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and under state common law for fraud, negligent misrepresentation, and breach of fiduciary duty. *See Kline v. First Western Government Securities, Inc.*, 24 F.3d 480, 485-86 (3d Cir. 1994) (Summary judgment on securities fraud claims in favor of attorneys who

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1 In this case, the Linders sued (and personally served) all of the partners in Lewis and Roca LLP, including the author and spouse as well as other law firms. The plaintiffs’ claims were dismissed as frivolous and sanctions awarded against the plaintiffs and their counsel. The sanctions were affirmed on appeal.
issued opinion letters reversed for trial as to whether lawyers knew or recklessly disregarded the truth concerning the debtor’s business practices. “We conclude instead that attorneys may be liable for both misrepresentations and omissions where the result of either is to render an opinion letter materially inaccurate or incomplete.”), cert. denied, 513 U.S. 1032 (1994); Rose v. Arkansas Valley Envtl. & Util. Auth., 562 F. Supp. 1180, 1206-08 (W.D. Mo. 1983) (attorney liable for securities fraud due to nondisclosure in connection with opinion letter where the attorney either does not believe the facts being stated are true, or would be reckless in relying on the truthfulness of the statements).

The attorney may avoid liability if the representations are explicitly qualified, such as by a disclaimer that the attorney does not necessarily believe the representation is true and that there are material, undisclosed facts. See Kline, 24 F.3d at 489-90. The cases distinguish between the lawyer’s role as drafter of a document as opposed to a duty to “blow the whistle” on other client conduct. The latter is less likely to result in legal liability. Compare Fortson v. Winstead, McGuire, Sechrest & Minick, 961 F.2d 469 (4th Cir. 1992) (defendants not liable to investors for issuing tax opinions where plaintiffs alleged lawyers should have disclosed “true” facts of the transaction).

Finally, “Privileges and ethical rules cannot be relied on to perpetrate fraud.” Kline, 24 F.3d at 492.

7. Negotiating With the Government.

Counsel for the debtor is negotiating with the office of the county attorney concerning treatment of a tax claim under a plan of reorganization. The appraisal filed by the debtor’s counsel indicates the fair value of the property is $175,000. The debtor owes $250,000 in back taxes. May the debtor’s counsel negotiate for the taxing authority to accept a secured claim of $175,000 and an unsecured claim for $75,000 if the debtor has received an unsolicited offer for the property of $300,000 cash?

Authority

A.R.S. § 13-2311. Fraudulent schemes and practices; willful concealment; classification.

A. Notwithstanding any provision of the law to the contrary, in any matter related to the business conducted by any department or agency of this state or any political subdivision thereof, any person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a class 5 felony.

B. For the purposes of this section, "agency" includes a public agency as defined by § 38-502, paragraph 6.
8. **Negotiating with a Bank.**

18 U.S.C. § 1014 makes a felony the act of knowingly making “any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the …[bank regulators, federal banks] any institution the accounts of which are insured by the Federal Deposit Insurance Corporation … upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, …. 

9. **Fraud.**

Joseph Ponzi has obtained a $475,000 equity investment in the debtor from Jane Elderly Widow. The investment is Jane’s life savings. The investment is represented by a gold-filigreed document labeled “Priority Secured Debenture” which is neither entitled to priority nor does it serve to create a perfected security interest. Unknown to Jane, the debtor, a limited liability company, is obligated to pay Ponzi a “priority return” of $50,000 annually, on a cumulative basis. The amount of the priority return is $200,000 at present. Ponzi also had a golden parachute in his employment agreement with the debtor, negotiated one month before the bankruptcy filing, providing for a $100,000 payment in the event Ponzi’s employment is terminated.

**Question** -- May debtor’s counsel negotiate with Jane over the terms of a liquidating plan of reorganization that provides for full payment of the priority return and employment claim, and a $0.05 dividend to equity?

**Question** -- Must debtor’s counsel disclose the facts which would, in the judgment of Debtor’s counsel, be 75% likely to result in a judgment equitably subordinating Ponzi’s claims to equity, and which would increase the return to Jane to over 60%?

**Question** -- Does it matter if Jane is pro se or represented by counsel?

**Question** -- Does it matter if Ponzi tells debtor’s counsel that a bankruptcy filing and plan was all part of his scheme to obtain funds from Jane?

**Authority**

§ 157. **Bankruptcy fraud**

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so--

(1) files a petition under title 11;

(2) files a document in a proceeding under title 11; or
(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

10. Extortion.

Bill is counsel for an unsecured creditor in a chapter 11 bankruptcy case. In the course of reviewing the debtor’s schedules, discussing the matter with his client and doing some investigation, he concludes that the debtor made a number of fraudulent transfers before bankruptcy which have not been disclosed. May Bill offer to keep silent if the debtor stipulates to allow his client’s claim in full and to pay the claim in full, with interest, under the debtor’s plan of reorganization.

It is illegal to make certain threats during negotiations or otherwise. A.R.S. § 13-1804 provides in part:

13-1804. Theft by extortion; classification

A. A person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future any of the following:

* * *

5. Accuse anyone of a crime or bring criminal charges against anyone.

6. Expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair his credit or business.

* * *

8. Perform or cause to be performed any other act which would not in itself materially benefit the defendant but which is calculated to harm another person materially with respect to his wealth, safety, business calling, career, financial condition, reputation or personal relationships.

B. Theft by extortion, as defined in subsection A, paragraph 1 is a class 2 felony. Otherwise, theft by extortion is a class 4 felony.

State v. Weinstein, 182 Ariz. 564, 898 P.2d 513 (App. 1995) (Section 13-1804(A)(6) is unconstitutional as vague and a denial of free speech rights insofar as it makes criminal
not only protected political threats such as those described above but also threats common in everyday business and personal interactions.

11. **Guidelines for Ethical Negotiation?**

These issues are not easily resolved by rules from the doctrines of morality, philosophy or legal ethics. One legal scholar proposes five guiding principles:

   A. While representing or assisting a client in negotiations, a lawyer must obey, and advise clients to obey, all substantive rules of law applicable to the client’s activities or business.

   B. Even if no violations of law would result, a lawyer must not make material misrepresentations, conceal material facts or advise or assist a client in doing so.

   C. If a lawyer learns that something that the lawyer or the client previously said was in error or was misunderstood at a time when detrimental reliance can still be avoided, the lawyer must correct the error or misunderstanding, must cause the client to do so, or must resign.

   D. It is always proper for a lawyer to discuss the moral or ethical consequences of a proposed course of action with a client. In fact, lawyers should be encouraged to do so.

   E. If a client asks the lawyer to assist in a course of conduct that the lawyer personally believes to be unlawful or dishonest, the attorney need not comply and may, in fact, be subject to discipline for doing so.


Could a lawyer invoke these rules in the lawyer’s practice without first informing the client?
Further Reading


Geoffrey C. Hazard, Jr., The Lawyer's Obligation to be Trustworthy when Dealing with Opposing Parties, 33 S.C. L. Rev. 181 (1981)


Rex R. Perschbacher, Regulating Lawyers' Negotiations, 27 Ariz. L. Rev. 75 (1985)

Geoffrey M. Peters, The Use of Lies in Negotiation, 48 Ohio St. L.J. 1 (1987)

Alvin B. Rubin, A Causerie on Lawyers' Ethics in Negotiation, 35 La. L. Rev. 577 (1975)


Walter W. Steele, Jr., Deceptive Negotiating and High-Toned Morality, 39 Vand. L. Rev. 1387 (1986)

Gary L. Stuart, The Ethical Trial Lawyer 319-21 (1994)

Gerald B. Wetzlaufer, The Ethics of Lying in Negotiations, 76 Iowa L. Rev. 1219 (1990)