THE ETHICS OF NEGOTIATION: ARE THERE ANY?

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CHAPTER 9
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THE ETHICS OF NEGOTIATION: ARE THERE ANY?

I. INTRODUCTION

The question of ethics in business dealings is not a new one:

[S]uppose, for example, a time of dearth and famine at Rhodes, with provisions at fabulous prices; and suppose that an honest man has imported a large cargo of grain from Alexandria and that to his certain knowledge also several other importers have set sail from Alexandria, and that on the voyage he has sighted their vessels laden with grain and bound for Rhodes; is he to report the fact to the Rhodians or is he to keep his own counsel and sell his own stock at the highest market price? I am assuming the case of a virtuous, upright man, and I am raising the question how a man would think and reason who would not conceal the facts from the Rhodians if he thought that it was immoral to do so, but who might be in doubt whether such silence would really be immoral.

The Famine at Rhodes, Cicero, De OFFICIIS, BOOK III. xi.-xii.

The question raised by Cicero is as relevant today as it was when he first posed it more than 2,000 years ago. While Cicero tells us what he believes the merchant should do in this situation, we are left to wonder what he would say with respect to the merchant’s lawyer. Is the merchant’s lawyer obligated to insist that the merchant disclose the true facts of the transaction? Should the merchant’s lawyer be permitted to disclose the true facts over the merchant’s objection? If not, should the merchant’s lawyer be permitted to withdraw from representing the merchant? Although they may not have had Cicero in mind, these questions are actually answered squarely by the Texas Disciplinary Rules of Professional Conduct.

II. THE RULES OF “ETHICS”

The common understanding of the term “ethics” is not, perhaps, what it should be. In some arenas, such as philosophy, “ethics” are closely tied to “morals”:

“[Ethics is] the philosophical study of morality. The word is also commonly used interchangeably with ‘morality’ to mean the subject matter of this study; and sometimes it is used more narrowly to mean the moral principles of a particular tradition, group, or individual. Christian ethics and Albert Schweitzer’s ethics are examples.”


The fragment quoted above focuses specifically on the relation of ethics, as a branch of philosophy, to morals, not the general relationship between the two. Email from John Deigh to Jason Boulette, March 9, 2011. (“That is, morality is what philosophers who are working in ethics study.”). With respect to the question of legal ethics, Professor Deigh suggested the more useful distinction may be the difference between prohibitions and aspirational ideals.¹

A. The Aspirational Preamble

The Preamble to the Texas Disciplinary Rules note that the Rules represent “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 7 (1989) (describing the rules as “stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action.”). Stated differently, the Rules do not even hold themselves out as being an aspirational standard for “right” or “moral” behavior. See id. Indeed, Texas lawyers are governed by the “Texas Disciplinary Rules of Professional Conduct,” not the “Texas Ethical Rules of Professional Conduct” or the “Texas Moral Rules of Professional Conduct,” and these disciplinary rules are better understood as a penal code than a moral code or statement of aspirational ideals.

That said, the Rules do invoke notions of “moral judgment” and a lawyer’s “conscience” when encouraging attorneys to hold themselves to a higher standard than the Rules do:

7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving

1 This same distinction was suggested to the author first by Phil Durst, one of the great thinkers of Austin, Texas, and subsequently by Michael Rubin, a wonderful speaker and writer on the issue of ethics in negotiations.
such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

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9. Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.


In the context of negotiations, the Preamble goes on to state that lawyers should pursue “advantageous” results for their clients in a manner that is consistent with the “requirements of honest dealing with others.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 2. (1989).

B. The Disciplinary Rules

1. Rule 4.1, Truthfulness in Statements to Others

The Rules themselves, however, do not actually require “honest dealing” with others.2 Rather, Rule 4.01 only prohibits a lawyer from making a false statement of “material” fact or law to a third party.3

2 The Rules impose heightened obligations on lawyers dealing with a tribunal, however. See TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 3.01 et. seq.

3 Lawyers involved in negotiations should be cautious, however, about speaking with any principal who has engaged counsel. Under Rule 4.02, a lawyer may not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization, or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 4.02(a). As the comments explain, Rule 4.02 does not prohibit communication between a lawyer’s client and persons, organizations, or entities of government represented by counsel, provided the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Id. at Rule 4.02,

TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 4.01(a) (1989). As the comments to Rule 4.01 make plain, the “material” modifier contained in this prohibition is significant, particularly in the context of negotiation:

1. Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.


Furthermore, Rule 4.01 draws an explicit distinction between affirmative misrepresentations of material fact or law and the mere withholding of material information. See id. at Rule 4.01 (1989). Although a lawyer is prohibited from making a false statement of material fact or law to a third party, the lawyer is not obligated to disclose material information to the third party, unless such disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client. Id.

cmt. 2. In the event a lawyer finds him or herself dealing with an unrepresented party to a negotiation, the lawyer should remain mindful of Rule 4.03, which prohibits a lawyer from stating or implying to an unrepresented party that the lawyer is disinterested. Id. at Rule 4.03. In fact, if the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, Rule 4.03 requires the lawyer to make reasonable efforts to correct the misunderstanding. Id. As the comments explain, an unrepresented party may misunderstand the lawyer’s role in the process, such that the lawyer should not give any advice to the unrepresented party, other than the advice to obtain counsel. Id. at Rule 4.03, cmt. 1.
2. **Rule 1.05, Confidentiality of Information**

To the contrary, the Texas Rules generally prohibit a lawyer from disclosing or using any “confidential information”—an extremely broad concept, encompassing all information privileged under Rule 503 of the Texas Rules of Evidence, as well as “all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client—to the disadvantage of the client.” *Id.* at Rule 1.05(b)(1).

There are exceptions, of course. For example, Rule 1.05(c) would permit (but not require) a lawyer to reveal confidential information without the client’s consent (1) when the lawyer has reason to believe the revelation is necessary to prevent the client from committing a criminal or fraudulent act, or (2) to the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used. *Id.* at Rule 1.05(c)(7), (8). Any such disclosure adverse to the client’s interest should, however, be no greater than the lawyer believes necessary to the purpose. *Id.* at Rule 1.05, cmt. 14.

Likewise, Rule 1.05(d) would permit (but not require) a lawyer to disclose unprivileged confidential information when the lawyer has been impliedly authorized to do so to carry out the representation or has reason to believe it is necessary to do so to carry out the representation effectively. *Id.* at Rule 1.05(d). As with the discretionary disclosure of privileged confidential information, however, any such disclosure of unprivileged confidential information adverse to the client’s interest should be no greater than the lawyer believes necessary to the purpose. *Id.* at Rule 1.05, cmt. 14.

All of this said, apart from situations involving tribunals and Rule 4.01’s limited disclosure requirements discussed above, a lawyer is only required to reveal confidential information if the lawyer has confidential information “clearly establishing” that a client is likely to commit a criminal or fraudulent act that is likely to result in “death or substantial bodily harm to a person,” and even then the lawyer is only required to reveal confidential information to the extent “revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.” *Id.* at Rule 1.05(e).

Indeed, lest there be any doubt, the Texas Disciplinary Rules explicitly note that a lawyer must preserve client confidential information, even if it means exposing others to serious and potentially irreparable harm:

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client’s information-usually unprivileged information— even though the client’s purpose is wrongful. On the other hand

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4 Rule 1.05(c) provides:

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client’s representatives, or the members, associates, and employees of the lawyer’s firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer’s associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.

5 Rule 1.05(d) provides:

(d) A lawyer may also reveal unprivileged confidential information.

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer’s employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyers representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.
hand, a client who knows or believes that a lawyer is required or permitted to disclose a client’s wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. …

Id. at Rule 1.05, cmt. 9.

3. Rule 1.02, Scope and Objectives of Representation

Even if a lawyer chooses not to reveal client confidential information to prevent a client from committing a criminal or fraudulent act, the lawyer is still prohibited from assisting or counseling a client in conduct that the lawyer knows is criminal or fraudulent. Id. at Rule 1.02(c). To be clear, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning, or application of the law. Id.

In fact, according to the comments, a lawyer is required to give his or her client an honest opinion about the actual consequences that appear likely to result from the client’s conduct.6 Id. at Rule 1.02, cmt. 7. Fortunately, the fact that a client uses a lawyer’s advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. Id. As the comments explain, there is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. Id.

Interestingly, if a lawyer has confidential information “clearly” establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in “substantial” injury to the financial interests or property of another, the lawyer must promptly make reasonable efforts to dissuade the client from committing the crime or fraud, even if the lawyer is not required to disclose confidential information to prevent the crime or fraud under Rule 1.05(e) and has chosen not to disclose confidential information to prevent the crime or fraud under Rule 1.05(c)(7). Compare id. at Rule 1.02(d) with Rule 1.05(c)(7), (e).

Likewise, if a lawyer has confidential information “clearly” establishing the lawyer’s client has already committed a criminal or fraudulent act, the lawyer must make reasonable efforts to persuade the client to take corrective action, if the lawyer’s services were used in the commission of the criminal or fraudulent act, even if the lawyer is not required to disclose client confidential information under Rule 1.05(e) and has chosen not to disclose such information under Rule 1.05(c)(8). Compare id. at Rule 1.02(e) with Rule 1.05(c)(8), (e).

The comments to Rule 1.02 recognize the tension created by the lawyer’s sometimes competing obligations to avoid furthering a client’s criminal or fraudulent act, dissuade a client from committing a criminal or fraudulent act, correct a criminal or fraudulent act that was previously committed using the lawyer’s services, and maintain client confidences:

When a client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer may not reveal the client’s wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client’s unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. See Rule 1.15(a)(1).

Id. at Rule 1.02, cmt. 8.

4. Rule 1.15, Declining or Terminating Representation

Rule 1.15 is very narrowly tailored and shows a strong bias against the termination of representation without a client’s consent. In accordance with Rule 1.15, a lawyer must decline or withdraw from representation, if the representation will result in the lawyer violating the rules or applicable law, the lawyer’s physical, mental, or psychological condition renders the lawyer unfit, or the client fires the lawyer.7 Id. at Rule 1.15(a). Otherwise, a lawyer may not withdraw unless:

6 “The Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 10 (1989).

7 However, “[t]he lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may have made such a suggestion in the ill-founded hope that a lawyer will not be constrained by a professional obligation.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 1.15, cmt. 2 (1989).
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes may be criminal or fraudulent;
(3) the client has used the lawyer’s services to perpetrate a crime or fraud;
(4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services, including an obligation to pay the lawyer’s fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

_Id._ at Rule 1.15(b).

Moreover, regardless of the basis for termination, a lawyer must take steps to the extent reasonably practicable to protect a client’s interests upon termination, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payments of fee that has not been earned. _Id._ at Rule 1.15(d).

Notwithstanding the obligation to protect a client’s interests upon termination, the comments to Rule 1.05 suggest a lawyer may be permitted to effect a “noisy” withdrawal from representation. _See id._ at Rule 1.05, cmt. 21 (“Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.”).

### III. CONCLUSION

Far from aspirational, the Texas Disciplinary Rules of Professional Conduct represent a bare minimum standard of conduct below which no lawyer should ever fall. Moreover, the Rules actually restrain a lawyer’s ability to act in the way the lawyer may personally feel is “right,” absent client consent. Accordingly, a lawyer is well advised to understand a potential client’s objectives before accepting or undertaking representation.

*This paper is not intended as legal advice.*