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Creating and Claiming Value in Ethical Negotiations

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- Pertinent Sections of the ABA Model Rules of Professional Conduct in Negotiations
  - Communicating with Client - reasonable communication between lawyer and client necessary for client effectively to participate in representation (Rule 1.4)
  - Organization as Client (Rule 1.13)
  - Declining or Terminating Representation (Rule 1.16)
  - Duties to Prospective Client (Rule 1.18)
  - Truthfulness in Statements to Others (Rule 4.1)
  - Communication with Person Represented by Counsel (Rule 4.2)
  - Misconduct (Rule 8.4)
  - Disciplinary Authority; Choice of Law (Rule 8.5)

Negotiating Basics

- Positional, Distributive Negotiations vs. Collaborative, Interest-Based Negotiations
  - The Orange Negotiation
  - Distributive elements of interest-based negotiations, the importance of knowing whether you are in a positional or a collaborative negotiation, and how to shift the dialogue
  - When creative compromise is not an option: The King Solomon Negotiation

- Preparation, Preparation, Preparation

  - Anticipating the endgame from the beginning, and the path to get there
  - Determining the Best Alternative to a Negotiated Agreement (BATNA), or walkaway, for both your client and the other side
  - Calculating reservation value – the minimum you must obtain before your walkaway (BATNA) is the better option - for both your client and the other side

- What are your client's needs, and can you anticipate the other side's needs? More often than not, they are not purely economic (reputation, relationship, political, constituencies, saving face, new product/market access)

- Example: the board game Monopoly (short term cash flow vs. long term build strategy)

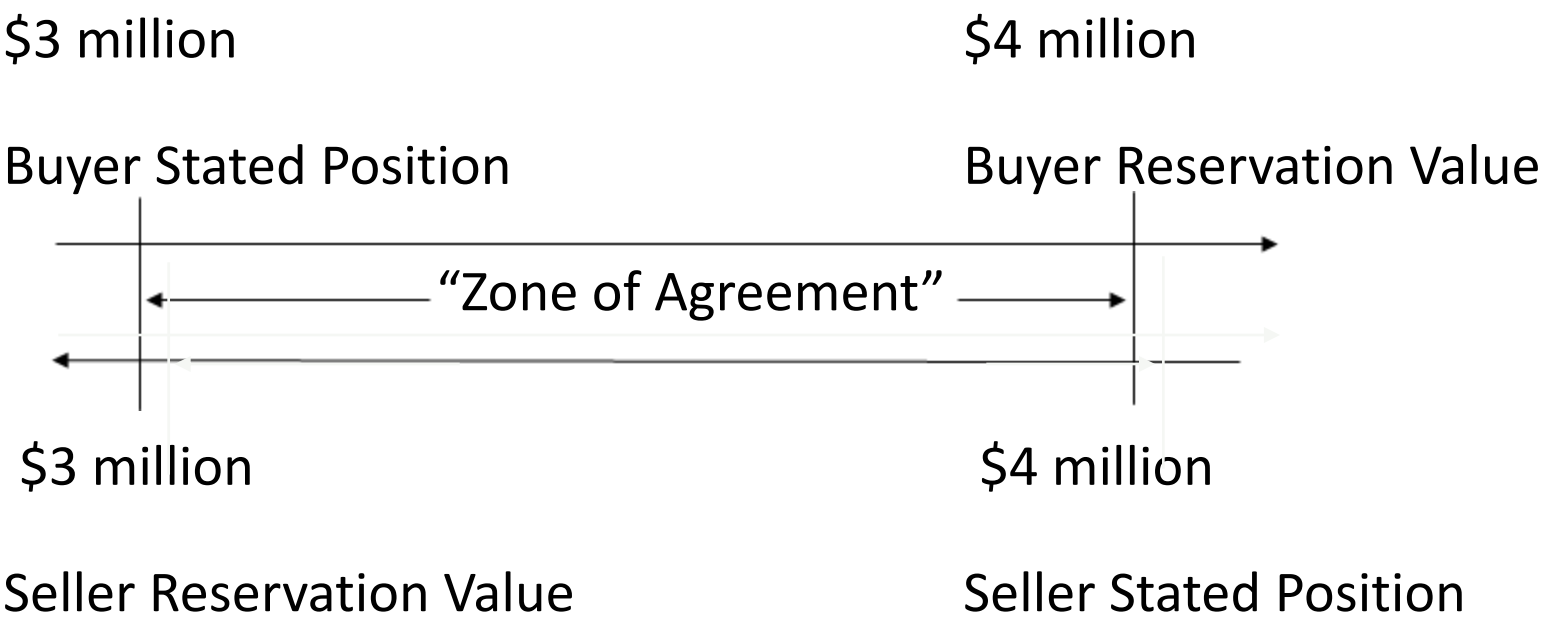
- Once you have identified the other side's needs, appeal to their rational self-interest

  - preparation here is critical: look 3 moves ahead on the chess board
  - prepare a flowchart if helpful
  - if you have not considered negotiation options for the other side's anticipated positions, potential scenarios, and potential lines of reasoning at each stage of the negotiation, you are unprepared

- Time to Negotiate!

  - When necessary, allow for catharsis (the other side may need to feel "heard" on their carefully crafted presentation of their position/side of the story)
  - Probing for interests/ needs (listen more than you speak)
  - Step to the balcony (removing, or at least controlling, emotional aspects from a highly charged situation)

- Finding the "Zone of Agreement“
  - Is "I won't pay a dime over $3 million" vs. "I won't take a dime less than $4 million" really a stalemate?



- Concession pattern
- Creating linkage
- Trading low-value items for high-value items (interest based negotiating)
- Avoid “reactive devaluation”: letting them have your way
- Creating and claiming value (risk inherent in creating value; importance of properly gauging level of trust and mutual commitment to creating value)

- Common Aggressive Tactics:
  - Threats ("This is a deal-breaker" or "We can talk about it in court...")
  - Personal attacks
  - Creating physical discomfort
  - Grabbing control of the agenda
  - Delays
  - Creating artificial time pressure ("If we don't conclude this negotiation by [date], we'll have to move on to our other options...")
  - Hostile acts

- Staging a "walk-out“
- Drawing artificial lines in the sand ("We cannot take any less than $___" or "This is our last and final offer")
- Stonewalling
- The “bait and switch”
- Using the "Empty Chair" - "My hands are tied…", "I would have to talk to Corporate" or "It's our form…“
- Bringing in "The Closer“
- Blatant retrading

“He’s a card player, gambler, scoundrel. You’d like him.”

“Yeah, I’m responsible these days. It’s the price you pay for being successful.”

“I've just made a deal that'll keep the Empire out of here forever.”

- Identifying and using leverage – know your client, research alternatives, and invent options

"This deal is getting worse all the time."

Darth Vader: “Calrissian. Take the princess and the Wookie to my ship.”

Lando: “You said they'd be left at the city under my supervision!”

Darth Vader: “I am altering the deal. Pray I don't alter it any further.”

- The Ethics of Retrades
- Defensive techniques when you lack leverage:
  - improving the perception of your BATNA (preparing and enhancing your BATNA; inventing new options and BATNAs altogether; appropriate role for bluffing)
  - unique aspects of particular relationship/deal that cannot be replicated elsewhere
  - broadening the negotiation to include issues and benefits seemingly outside of the four corners of the negotiation at hand
  - Beware of agreements with “out clauses”

- Potential Ethical Issues under ABA Model Rules of Professional Conduct

1. **Misleading vs. Lying: When does good old fashioned hard bargaining cross the line and become unethical?**

ABA Model Rules of Professional Conduct 4.1

The professional canons address lying and misrepresentation directly. Note that the American Bar Association's Model Rules of Professional Conduct. Model Rule 4.1 states that:

In the course of representing a client a lawyer shall not knowingly

(a) make 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, Rule 4.1 does not preclude all false statements of fact or law. It only prevents an attorney from lying about **material** facts or law. The Comment to Rule 4.1 states that "under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." The Comment notes two types of statements that are "ordinarily are not taken as statements of material fact":

- (1) "Estimates of price or value placed on the subject of a transaction." For instance, a litigator bluffing that they are very confident of prevailing at trial is permitted. Similarly, if a lawyer were negotiating a sale of his client's company, he or she could bluff about the company's value: "I believe this company is worth at least $11 million.“

- (2) "A party's intentions as to an acceptable settlement of a claim." Thus, the rules imply that an attorney could state "my client won't take a nickel less than $11 million" even if he or she knows she will.

- These exceptions to Model Rule 4.1 contemplate the reality of negotiations: while an adversary would or should be able to rely upon certain types of statements during the ordinary course of a negotiation, they should not rely upon the truth of statements about a party's estimates of price or value or the strength of their position.

- Because an attorney is only barred from misrepresenting facts or law, the reach of Model Rule 4.1 is limited.

- Consider that an attorney may misrepresent their opinion without misrepresenting material facts or law.
- The Rules create enough flexibility for parties to engage in conventional puffery or hard bargaining about the strength of their position and their opinions, but preclude misstatements or lies about facts or law.
- *What about fictitious competing offers?*

2. Voluntary disclosure of disadvantageous facts and or law

Model Rules of Professional Conduct 3.3

Model Rule 3.3(a) (3) obligates a lawyer to disclose controlling authorities when before a judge, even if they undermine the lawyer's legal position. With regard to nondisclosure of material facts, Rule 4.1(b) requires a lawyer to reveal 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, Rule 4.1(b) severely limits this duty to disclose by requiring that the lawyer first fulfill their duty under Rule 1.6 to keep client confidences.

Model Rule 1.6(a) states that 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."

Rule 1.6(b) creates an exception to Rule 1.6(a) by permitting a lawyer to reveal information to the extent that either "the lawyer reasonably believes it necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm", or the lawyer needs to reveal the information "to establish a claim or defense in a controversy between the lawyer and the client."

However, these two exceptions rarely apply in most legal negotiations.

3. The Attorney-Client Privilege and its Boundaries

Model Rules of Professional Conduct 1.6

The duty to keep client confidences pursuant to the attorney-client privilege is fundamental to the practice of law and serves as a key building block in the foundation of professional ethics. Model Rule 1.6(b) exceptions to Model Rule 1.6(a)'s duty of confidentiality are extremely limited in scope.

- Attorneys handle direct questions regarding privileged information with a variety of answers.

- Some attorneys flatly refuse to answer such probing questions, while others may simply remain silent.

- Attorneys may employ common phrases like "***No comment,***" "***I'd have to go back to my client on that***," "***I'm not at liberty to say***," or "***You'd have to ask my client***."

- A lawyer might state that he or she cannot answer a question because doing so would reveal confidential information in violation of the attorney-client privilege.

4. Does the duty of "zealous advocacy" require scorched earth tactics?

Model Rules of Professional Conduct 1.3

While defending a client's interests is paramount, attorneys are not required to utilize extreme hard bargaining or "scorched earth" negotiating tactics. Zealous advocacy does not require overzealous advocacy that would place attorneys in an uncomfortable position. Model Rule 1.3 requires "reasonable diligence" on behalf of a client. According to Comment 1 to Model Rule 1.3, "a lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

5. Organization as Client

- During the course of many negotiations, it can become clear that the personal interests of individual officers or founders are not aligned with the best interests of their companies.
- Even if their Boards have empowered them to negotiate on behalf of their companies, they owe a fiduciary duty to their companies to place the company's interests ahead of their own when the two are in conflict – or at least disclose the conflict to their boards.
- Personal compensation arrangements or ownership positions cannot cloud fiduciary duties to the organization.

6. Conflicts of Interest

Model Rules of Professional Conduct Rule 1.18

Whether or not interviewing a prospective client precludes attorneys or their firm from later opposing the prospective client in a substantially related matter depends on the nature of the information exchanged during the interview and whether that information could be "significantly harmful" to the prospect in the substantially related matter. Even then, representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee there from; and

(ii) written notice is promptly given to the prospective client.

7. Multijurisdictional Practice: trends and practice tips for avoiding the pitfalls

Model Rules of Professional Conduct 8.5

Note that attorneys frequently represent clients on matters involving jurisdictions other than those which they are licensed to practice law in. Corporate attorneys particularly encounter other jurisdictions as they negotiate transactions involving numerous subsidiaries and office locations.

8. Communications with opposing parties who are represented by counsel

Model Rules of Professional Conduct 4.2

Transactions often engender a collegial environment where all parties collaborate to complete the deal. Attorneys may often find themselves communicating directly with the business persons on the other side, particularly when time constraints create pressure to streamline the process. With respect to matters pertaining to the transaction, attorneys should only communicate with the business persons on the other side with their counsel present or, if their counsel cannot be present, with their counsel's consent.

9. Fielding background checks on former employees: Is there a duty to disclose negative information, and what's the risk if you do?

Firms interviewing prospective employees quite commonly call upon former employers for their input on the prospective employee. Attorneys who field such inquiries must consider their ethical obligation to not misrepresent facts or law, as well as additional considerations under relevant employment laws.

10. Code of Business Conduct

- Many of the difficult ethical quandaries faced in negotiations could be avoided had companies adopted and abided by a code of business conduct.

- Codes of business conduct or codes of ethics serve a number of purposes, including the communication of corporate values and the legal obligations of employees under such laws as the Foreign Corrupt Practices Act, government procurement rules and antitrust regulations.

- Codes of conduct may also assist companies in defending against alleged violations of laws by evidencing a pattern of concerted effort to comply with applicable law, and may even reduce criminal penalties under the Federal Sentencing Guidelines.

NEGOTIATION SELF-ASSESSMENT

Ask the Right Questions

How can lawyers accurately assess their ability to make, and guide clients toward, wise decisions on behalf of the organization rather than merely focusing on positions and short-term results? By answering questions such as the following before, during, and after each important negotiation, recommends Massachusetts Institute of Technology professor Lawrence Susskind:

- Did negotiators spend time thinking about not only the organizations' interests but also the other party's interests?
- Did they clarify their mandate to make commitments within their organization before negotiating?
- Did they identify options for mutual gain to present at the appropriate moment?
- What kind of relationships did they build while negotiating?
- How effective were they at creating value?
- What steps did they take to ensure smooth implementation of the agreement?

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Recommended Reading:

"Getting to Yes" (Roger Fisher, William Ury and Bruce Patton)

"Getting Past No" (William Ury)

"Getting Together: Building Relationships as We Negotiate" (Roger Fisher and Scott Brown)

"Getting Ready to Negotiate" (Roger Fisher and Danny Ertel)

"The Manager as Negotiator" (David A. Lax and James K. Sibelius)

"Difficult Conversations: How to Discuss What Matters Most" (Douglas Stone, Roger Fisher, Sheila Hen and Bruce Patton)

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Thank You!