Outside Counsel

Ethics and Negotiating: Truth or Consequences?

When negotiating on behalf of a client, an attorney must be less than truthful, and so, about what and about whom. Many Rules of Professional Conduct do not specifically address the duty of truthfulness in negotiations. Rule 4.1, however, states, “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.” As a lawyer, you are not required to act in a manner that is entirely consistent with the rules of professional conduct. This is especially true in matters of representation that involve commercial activities. Commercial activities include, but are not limited to, the negotiation of contracts. Over 25 years of litigation experience litigating aviation or airline cases.

The New York Rules are clear that a lawyer may not make a false statement of fact in a negotiation.

Another unprofessional act is “defamation.” Rule 8.4(c) states, “A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” The applicable language of the New York Rules is even more clear. Rule 4.1A states, “In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law.” This latter rule specifically incorporates the applicable language of the New York Rules into the context of representation. Thus, as a lawyer, you are not required to act in a manner that is entirely consistent with the rules of professional conduct. This is especially true in matters of representation that involve commercial activities. Commercial activities include, but are not limited to, the negotiation of contracts.

General Considerations

While there may not be a need to take a position in negotiations that is not supported by any admissible evidence, a litigator, however, may not take a position in settlement negotiations that is not supported by any admissible evidence. While there may not be a need to take a position in settlement negotiations that is not supported by any admissible evidence, a litigator, however, may not take a position in settlement negotiations that is not supported by any admissible evidence.

A. Kirby Bartley, Jr.

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In weighing the material probative value of the statement, one must determine whether the defendant was disciplined for the statement.

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