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Class 6

Alternative Dispute Resolution

Truthfulness to Others – Model Rule 4.1

- **A legal professional may not:**
 1. **Make a false statement of fact to any third party.**
 2. **Make a false representation of law to any third party.**
 3. **Fail to disclose something to a third party when the disclosure is necessary to prevent a crime or fraud by the client (unless the disclosure is outlawed by the attorney-client confidentiality rules).**
- **This also includes the responsibility to remedy a past false statement made by the attorney, even if it was made unintentionally (again, unless the statement is prohibited by confidentiality rules).**
- **Assisting the client in committing a crime or fraud is, of course, unethical and illegal.**

Truthfulness during Negotiation – Lying

- **"Puffing"**
 - In spite of Rule 4.1, it is generally accepted that "puffing" during negotiations is allowed. This is because parties are not generally expected to RELY on these statements. These include:
 - Misrepresenting what your clients are willing to settle for.
 - Misrepresenting what aspects of a settlement are important to your client.
 - Making claims that are unverifiable and maybe slightly exaggerated, if they are basically true.
- **Affirmative Representations**
 - Outright lies regarding materials facts are not allowed
- **Partially True Statements**
 - A partially true statement (or a statement that makes a false implication) is an unethical lie if it is intended to cause misinterpretation or if it is obviously likely to do so.

Truthfulness during Negotiation – Failing to Disclose

- The general principal at work in negotiation is *caveat emptor* ("let the buyer beware"): Not requiring the disclosure of any fact.
However:
Failing to disclose a fact central to a case can be considered an implicit misrepresentation in some cases.
- Disclosure of information may (but not must) be disclosed to prevent death or serious bodily injury, even if the information is protected by attorney-client confidentiality rules.
- Affirmative duties to disclose exist in many areas, such as real estate, stocks and bonds, etc., but such rules generally do not apply to negotiations.
- In spite of the *caveat emptor* rule, some courts have set aside settlements based on egregious cases of failure to disclose.

QUIZ TIME!

No Contact Rule – Model Rule 4.2

- This rule disallows any personal contact with any opposing party who is already represented by counsel without the counsel present.
- All negotiations should be done between counsel for one side and counsel for the other.
- The rule applies no matter how sophisticated the opposing party is - it even applies if the other party is an attorney (unless she is representing herself...).
- This rule cannot be waived by a party unless consented to by the opposing attorney.
- The rule does not apply to communication directly between the parties (though that might not be advisable)
- The rule applies even if the other party initiates the contact!
- The rule applies to employees of corporations represented by counsel regarding a corporate matter.

Contact with Unrepresented Parties – Model Rule 4.3

- **Contacting parties not represented by counsel regarding a particular matter is not proscribed under Rule 4.2. However, certain precautions must be taken so that the party will not misunderstand or misinterpret the attorney's role in the pending matter:**
 1. The attorney must clearly identify himself, his role in the controversy at hand and not state that he is disinterested.
 2. If the attorney senses the third party is confused or misunderstands the attorney's involvement, the attorney must correct the mistake.
 3. The attorney must clearly state whom she is representing and NOT lead the interviewee to think that the attorney is looking out for her interests or representing her.
 4. The attorney must not give legal advice to the third party.
 5. The attorney must not talk about duties of loyalty and confidentiality as though those apply to this conversation. (because they do NOT).
 6. The attorney must be very careful not to create conflicts of interest by giving legal advice.