What You Can Do and What Should You Do: Some Moral and Ethical Dilemmas in the Transactional Context

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In the transactional context, there are two important areas relating to ethical conduct of attorneys. First are the moral obligations imposed in the negotiation process—good faith and fair dealing. The second deals with rules applicable to attorneys as ethical standards, including rules dealing with conflicts of interest, self-dealing, confidentiality, and dealing with third persons. Various versions of Model Rules of Professional Conduct govern the ethical obligations of attorneys in most states, and such rules do vary state-to-state. These rules were drafted more with a view to the litigation process. Attorneys in a transactional practice must not only look to these rules mostly by analogy, but also to more general principles to govern the ethical conduct of their practice. Further, sometimes what is legal under the black letter of the law, however, may not be in some instances the "right" thing to do—or in the best interest of the client.

These dilemmas go back millennia. Marcus Tullius Cicero (maybe one of the best lawyers in history) wrote, in the first century B.C., about situations involving hard bargaining in business and sharp practices in the law. Among Cicero's examples was that of a merchant from Alexandria who brought a large stock of corn to Rhodes, which was suffering a food famine. He was aware that other traders were on their way from Alexandria with substantial cargoes of grain. The dilemma for the merchant farmer was whether he should tell the Rhodians this and get a lesser price or say nothing and get a higher price. Cicero points out, using Antipater and Diogenes as two poles of the argument, that one position is to take a moral view and reveal everything while the other is that one should do what is advantageous. Cicero's own view is that one should not conceal (or advise your client to conceal) any relevant facts:

> "I believe, then, that the corn-merchant ought not to have concealed the facts from the Rhodians; and the man who was selling the house should not have withheld its defects from the purchaser. Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know would be useful for them to know. Anyone can see the sort of concealment that this amounts to—and the sort of person who practices it. He is the reverse of open, straight forward, fair and honest: he is a shifty, deep, artful, treacherous, malevolent, underhand, sly, habitual rogue. Surely one does not derive advantage from earning all those names and many more besides." Cicero, *On Duties (De Officiis) – Book III*

ABA Model Rule 4.1 states that, in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person or 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. The most common ethical issues that arise during the negotiation of a transaction, include (a) failing to fully disclose the extent of negotiating authority; (b) deliberate lies as a tactic in negotiations; (c) failing to give complete answers to information and instead giving truthful but deliberately narrow answers; (d) failing to correct a misapprehension on the part of the opposing side of a fact or law; and (e) failing to speak or correct a lie or misstatement or misleading statement by your client or co-counsel. Statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

In addition, these sorts of moral dilemmas have made it into other provisions of the Model Rules dealing with the role of an attorney as a trusted advisor to a client. Model Rule 2.2 provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

A lawyer is not expected to give advice until asked by the client. However,

when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under ABA Model Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest. If a proposed course of action may be "legal," but may result in some business or reputational harm to the client, it may be the lawyer's duty to inform the client of the potential consequences of their actions, including as Cicero indicates, that it may label the client a "shifty, deep, artful, treacherous, malevolent, underhand, sly, habitual rogue" with whom no one may want to do business in the future.

Although lawyers have a duty to zealously advocate for their client, lawyers also have the duty to advise the client about the potential consequences of the client's proposed course of action. The latter duty means that not only should you advise your client of what they can do within bounds of the law, but also advise them of what they should do, as a moral proposition.