

A Day-in-the-Life of a Transactional Lawyer: Negotiation, Ethics, and Professionalism

Susan M. Chesler

Associate Clinical Professor of Law
Arizona State University
Sandra Day O'Connor College of Law

Patrick Longan

William Augustus Bootle Chair in Ethics and Professionalism in the Practice of Law
Mercer Law School

Karen J. Sneddon

Associate Professor of Law
Mercer Law School

Introduction

This presentation is aimed at demonstrating an effective technique of generating student engagement in the issues of professionalism and ethics, particularly in a transactional setting. The Carnegie Report emphasized that “professional education aims to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals.” The Carnegie Report and CLEA’S *Best Practices* have also inspired law schools to add courses, simulation experiences, and clinics that bring transactional practice into law schools. In order to engage students in a robust discussion about these issues, the presenters have scripted and produced a series of professional quality vignettes that feature realistic interactions in the day-in-the-life of a transactional lawyer. The vignettes featured in this presentation focus on the role of the transactional lawyer in negotiations, and provide an opportunity to engage students in a discussion of a variety of issues relating to drafting, counseling, professionalism, and ethics.

One of the many roles of a lawyer is that of negotiator. The Preamble to the Model Rules of Professional Conduct states:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. **As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.** As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client and to others.

These scenes allow for the consideration of the various functions that the lawyer performs during the negotiation process, particularly in a transactional setting. Rule 4.1(a) states that “a lawyer shall not knowingly make a false statement of material fact or law to a third party” and it is intended to

apply to both litigation and negotiation settings. Yet Comment 2 acknowledges the difficulty of defining truthfulness in the context of negotiation because generally accepted negotiation techniques suggest that certain types of statements made by lawyers are not intended as, nor ordinarily viewed as, statements of material fact. These scenes are intended to explore issues of truthfulness, dishonesty, and professionalism in the context of transactional negotiations.

Scene One

Scene Summary

Catherine is a senior associate at a mid-sized law firm. She is in her office with her client, Chloe, the owner of a small internet business. They are discussing the sale of Chloe's business and the meeting with the potential buyer and his lawyer that is scheduled to take place in 30 minutes.

The scene begins at the start of the meeting between the lawyer and her client. Chloe is excited about the potential buyer who has expressed an interest in buying her business because she wants to enter into another (hopefully more lucrative) business venture as soon as possible. Catherine is an experienced lawyer and has conducted numerous negotiations in the past, but she needs to get a better sense of Chloe's underlying factual, legal, and economic interests and to explain to her how the negotiations will likely progress. This conversation raises issues about the client's role in the negotiations and how the lawyer's ethical obligations may affect her negotiating strategies.

In particular, Chloe is insistent that Catherine "high-ball" the buyer with respect to the sales price. This provides Catherine with the opportunity to discuss some non-economic implications of potentially turning away the buyer with an unreasonably high offer. Chloe also would like Catherine to inform the buyer's lawyer that there are other pending offers in order to provide an incentive for the buyer to act quickly and to accept her initial offer. This necessitates a discussion between Catherine and Chloe about Catherine's ethical obligations during the negotiations.

Selected Discussion Questions

1. What is the lawyer's role when negotiating on behalf of a client? How does the lawyer's role as negotiator differ from that of advocate or advisor? How might the role of a transactional lawyer in negotiations differ from more-litigation focused lawyers?
2. Should a lawyer always follow the client's instructions with regard to the specific terms of the negotiation? What if the client wants to take a position that is unreasonable such as wanting to use an asking price that is much higher than the value of the property to be sold? What should or must the lawyer do?

3. How candid and honest must a lawyer be when negotiating on behalf of his client? Can a lawyer ethically engage in any “puffing” or “bluffing” in order to best represent her client’s interests? When does “puffing” or “bluffing” become dishonest?
4. Is it appropriate for the lawyer to determine what may be in the client’s best interests? Should a lawyer counsel her client on moral and ethical considerations?

Scene Two

Scene Summary

The scene opens in a conference room. Two experienced lawyers, Catherine and Harry, are seated around the conference room table. The conversation begins with a reference to Catherine’s reputation. The conversation then ranges over a variety of topics. Catherine attempts to facilitate a conversation about the objectives of the parties, both long-term and short-term, raising specific consideration of economic, social, moral, and legal issues. Harry pushes for the initial offer, and Catherine supplies the offer as approved by the client. Harry raises the issue of the existence of other buyers, which Catherine neither confirms nor denies. Harry then raises the issue of pending litigation. Based on client supplied information, Catherine asserts the absence of pending litigation. Harry reveals the presence of potential litigation based on an internet search. Harry then supplies a counteroffer. After gathering additional information about the counteroffer, Catherine leaves to convey this information to her client, Chloe.

Selected Discussion Questions

1. What are the advantages and disadvantages of using a competitive/adversarial model of negotiation? What are the advantages and disadvantages of using a cooperative/problem-solving model of negotiation? Which approach do you think is generally more effective for transactional lawyers seeking to negotiate a contract? Is one more “ethical” or “professional” than the other?
2. What role do the reputations of the lawyers play in the negotiation process? How could a desire to create or protect a particular reputation affect a lawyer’s representation of a client? How can the personalities of the lawyers, or the other side’s perception of those personalities, affect the negotiations?
3. Is the failure of a lawyer to respond to an inaccurate comment “we know there are other bidders” considered a misrepresentation?
4. In the course of the negotiation process, how should a lawyer handle a claim that the lawyer’s client has been untruthful?
5. When should and when must the client be updated as to the terms discussed in the negotiation?

Scene Three

Scene Summary

Catherine and Chloe return to Catherine's office during a break in the negotiations. Catherine immediately confronts Chloe about her apparent lack of candor concerning the existence of any pending litigation. The buyer's lawyer discovered that there is evidence of a lawsuit that will imminently be filed. This also raises the issue of whether a lawyer should rely on her client's statements without performing any research of her own.

Catherine and Chloe then discuss the buyer's counteroffer. Chloe states that she would like to outright reject that offer and maybe even "walk away from the table" as a negotiating strategy. Catherine then counsels Chloe on the possible negative repercussions of such a tactic. She also reiterates her advice that since both parties would benefit from entering into this sales agreement, they should try to reach a compromise that enables both Chloe and the buyer to maximize their underlying interests.

Selected Discussion Questions

1. Should a lawyer rely on statements made by a client or does she have an obligation to research and verify?
2. The lawyer wants to make a counter-offer and the client wants to walk away "as a strategy." Who has the authority, between the lawyer and the client, to decide such tactics?

Scene 3 Continued with Alternate Endings:

Alternate A Scene Summary

After continued negotiations between Catherine and Harry, the parties walk away with a verbal agreement to enter into a contract for the sale of Chloe's internet business pending execution of a written sales contract. This scene begins approximately one week later when Catherine receives a written draft of the sales contract from Harry. The draft contains the following representation: "Seller represents that there are no pending lawsuits against the subject business and that Seller has no knowledge of any potential legal claims against the subject business." The scene begins as Catherine reads an email from Harry. Catherine notices that Harry has included the above representation in his draft sales contract. This representation was not discussed during the negotiations and was not agreed to by Catherine. However, once Catherine advises her client, Chloe does not want to jeopardize the deal and wants to sign the contract, including the representation. Catherine, however, knows that there is a potential legal claim and thus feels that she cannot recommend that Chloe sign the contract.

Selected Discussion Questions

1. What does the representation in the contract regarding the absence of any potential legal claims mean? How does a representation differ from a promise or a warranty? What are the legal implications of signing such a contractual provision?
2. Even though the parties did not specifically discuss the inclusion of a representation as to the absence of any potential legal claims during their initial negotiations, the lawyer included it in his draft written sales contract. Was the lawyer acting ethically and professionally?
3. Did the buyer's lawyer have an ethical obligation to point out to seller's lawyer that he included additional language in the representation he included in the contract, even though the lawyers did generally discuss the issue during their negotiations?
4. The client informs her lawyer that she wants to agree to the representation even though it is not factually accurate. What is the lawyer's obligation under these circumstances?

Alternative B Scene Summary

When Catherine receives the draft sales contract from Harry, she skims through the contract and telephones Chloe to tell her that the contract is almost finalized. Catherine has noticed that Harry included a choice of law provision stating that California law will apply. Catherine would like to change that to Arizona law, a change that Catherine predicts will likely be accepted. A closing date is scheduled and the sales contract is finalized and executed by the parties. Several weeks later, the buyer is served with a complaint arising from the claim that Chloe and Catherine were made aware of before the sales contract was signed. Harry, the buyer's lawyer, immediately notifies Catherine of a breach of contract claim that he plans to file against Chloe based on the representation contained in the sales contract, which states: "Seller represents that there are no pending lawsuits against the subject business and that Seller has no knowledge of any potential legal claims against the subject business." The scene begins when Catherine opens the "notice of breach of contract claim" sent to her by Harry. At this point, Catherine notices the inclusion of the representation. Catherine then calls her law partner Brett to discuss the inclusion of the representation. Catherine admits that she failed to notice the inclusion of the representation when she first reviewed the contract and recommended that her client, Chloe, sign it. Brett recommends that Catherine inform Chloe that Catherine had not noticed the inclusion of the representation.

Selected Discussion Questions

1. What does the representation in the contract regarding the absence of any potential legal claims mean? How does a representation differ from a promise or a warranty? What are the legal implications of signing such a contractual provision?
2. Even though the parties did not specifically discuss the inclusion of a representation as to the absence of any potential legal claims during their initial negotiations, the lawyer

included it in his draft written sales contract. Was the lawyer acting ethically and professionally?

3. The lawyer failed to critically review the draft contract that she received from buyer's lawyer before recommending that her client sign it. Now her client is subject to legal liability as a result of a term in the contract that she failed to notice. What are the lawyer's ethical obligations? Is she obligated to inform her client of her malpractice?
4. Since the lawyers discussed the potential claim against the seller's business during the negotiations, even though they did not agree to specific contractual language, should the seller's lawyer have anticipated its inclusion in the draft contract? Should the transactional lawyer take on the role of planner and try to anticipate how to draft the contract in order to avoid potential litigation?