

# ETHICAL AND UNETHICAL THREATS IN NEGOTIATIONS

Mediation & Arbitration Section

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**M**ediators and lawyers looking for guidance on ethical and unethical threats in negotiations should look to the American Bar Association (ABA) *Ethical Guidelines for Settlement Negotiations*. These guidelines, which explain that the “purpose of settlement negotiations is to arrive at agreements satisfactory to those whom a lawyer represents and consistent with law and relevant rules of professional responsibility,” was intended as a resource to facilitate and promote ethical conduct in settlement negotiations.<sup>1</sup>

## Impermissible Threats

Lawyers may not attempt to negotiate a settlement by extortionate means or by otherwise unlawful or unethical threats. An example of this is a threat “to publicly reveal embarrassing or proprietary information other than through the introduction of admissible evidence in a legal proceeding.”<sup>2</sup> For instance, a “lawyer’s threat to publicize embarrassing photographs of a defendant’s marital infidelities unless the defendant settled an unrelated personal injury action would be a classic instance of criminal extortion.”<sup>3</sup> But whether a lawyer would be permitted to make the same threat in negotiating a

settlement in a dissolution of marriage case involving adultery is an issue.<sup>4</sup>

Knowing what constitutes an impermissible threat is important because Florida Rule of Professional Conduct 4-8.3 requires lawyers to inform The Florida Bar if they know that another lawyer has committed an ethical “violation of the Florida Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer.”<sup>5</sup> Even though a lawyer has a duty to report certain unethical conduct, however, “authorities have held that it is unethical for a lawyer to threaten to report another lawyer” to the Bar in order to gain an advantage in a civil lawsuit.<sup>6</sup> Interestingly, with some exceptions, a lawyer is also not allowed to promise not to report “opposing counsel’s misconduct as a condition of a settlement in contravention of the lawyers reporting obligation.”<sup>7</sup>

In addition to being a violation of Rule 4-8.4, threats to report a party because of criminal violations may be unlawful. Threatening criminal prosecution sometimes violates criminal law. In particular, section 836.05, Florida Statutes, provides that a



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person using extortionate threats shall be guilty of a felony.<sup>8</sup> This would include threats made by a wife’s lawyer to the husband during mediation that he would face problems with the Internal Revenue Service for certain past indiscretions if a settlement could not be reached. Furthermore, such conduct would subject a lawyer to

discipline under the Florida Rules of Professional Conduct.

## Permissible Threats

Not all threats, however, are prohibited in settlement negotiations. It is permissible, for instance, to threaten to file suit if the opposing party does not settle. A lawyer can also threaten to tax costs that will be incurred in going to trial if the opposing party does not settle. Finally, a party may threaten to introduce into evidence information that is embarrassing to the opposing party, if legally admissible.<sup>9</sup>

The *Ethical Guidelines for Settlement Negotiations* can also provide guidance to lawyers and mediators as they resolve other concerns in applying legal ethical principles in their practice.

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<sup>1</sup> *Ethical Guidelines for Settlement Negotiations*, at 2 (Am. Bar Ass'n 2002).

<sup>2</sup> *Id.* at 49-50.

<sup>3</sup> Charles W. Wolfram, *Modern Legal Ethics* 715 (West 1986).

<sup>4</sup> William H. Stolberg & David L. Hirschberg, *Extortion: What Your Client*

*Wants*, Stolberg & Hershberg, 83 Fla. B.J. 109 (June 2009).

<sup>5</sup> R. Regulating Fla. Bar. 4-8.3(a).

<sup>6</sup> *Ethical Guidelines for Settlement Negotiations*, at 50 (Am. Bar Ass'n 2002).

<sup>7</sup> *Id.* at 44.

<sup>8</sup> *Id.* at 50.

<sup>9</sup> *Ethical Guidelines for Settlement*

*Negotiations*, at 50 (Am. Bar Ass'n 2002).



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## CONSTRUCTION LAW LUNCHEON

The Construction Law Section hosted a luncheon on September 17 featuring speakers Kevin Salvagni and Jack MacGiffert from Hill International Inc. Both speakers drew from their many years of experience in the construction industry to discuss the use of a joint defense among multiple subcontractors and the various elements of construction defects. Thanks to all who attended and to NorthStar Bank for sponsoring this insightful event.

