

## TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

### **Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS**

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.—Amended June 17, 2009, eff. Sept. 1, 2009.

#### **Comment**

##### *Misrepresentation*

[1] A lawyer is required to be truthful when dealing with others on a client's behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

##### *Statements of Fact*

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

#### **Reporter's Notes — 2009 Amendment**

V.R.P.C. 4.1 is amended to conform to the changes in Model Rule 4.1(a). The substance of Model Rule 4.1(b), requiring disclosure of a material fact necessary to avoid assisting a criminal or fraudulent act by a client unless prohibited by Rule 1.6, was originally incorporated in V.R.P.C. 1.6(b)(2), where disclosure was made mandatory. See Reporter's Notes to V.R.P.C. 4.1 (1999). The substance of that provision remains in amended V.R.P.C. 1.6(b)(2) and is thus not included in amended V.R.P.C. 4.1.

The ABA Reporter's Explanation of the amendments of the Comments to Model Rule 4.1(a) is as follows:

[1] This Comment is presently quite brief, and the Commission is recommending additional guidance in the form of 1) a reference to "partially true but misleading statements"; 2) substituting "omissions that are the equivalent of affirmative false statements" for the vague "failure to act"; and 3) a cross-reference to Rule 8.4.

[2] The Commission received several requests to clarify the lawyer's obligation of candor in negotiations. The Commission is recommending the addition of the word "ordinarily" to clarify that, under some circumstances, an estimate of price or value could constitute a false statement of fact under this Rule. In addition, the Commission recommends a reference to the lawyer's obligations under the jurisdiction's criminal and tort law of misrepresentation.

#### **Reporter's Notes**

Model Rule 4.1(b) has been severely criticized for imposing a professional obligation of confidentiality in a situation where nondisclosure might impose criminal or tort liability upon the lawyer. See G. Hazard and W. Hodes, *The Law of Lawyering* §§ 4.1:301-03 (2d ed. 1990, supp. 1993). A few states have departed from the Model Rules and require disclosure. See e.g., N.J.R. Prof. Conduct, Rule 4.1; Md. Lawyer's R. Prof. Conduct Rule 4.1. Additionally, the placement of the issue here is confusing because Rule 1.6 now imposes a disclosure obligation in certain circumstances. To avoid confusion, the subject of Model Rule 4.1(b) has been moved to Rule 1.6(b)(2). The content has been changed to make the disclosure requirement absolute and not subject to the prohibition of Rule 1.6(a) or the discretion of Rule 1.6(c). See Rule 1.6(b)(2).

## ANNOTATIONS

**1. Particular cases.** When two attorneys believed that a potential witness would have terminated a telephone call if he had found out that he was being taped, the recording of the call was a material fact. Furthermore, the attorneys knowingly made a false statement about the recording when one stated that she was not recording the conversation, when in fact she was, and the other tried to distract the witness from the issue of recording entirely. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

**2. Relation to other rules.** Not all misrepresentations made by an attorney raise questions about her moral character, calling into question her fitness to practice law. If the subsection prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation is interpreted to automatically prohibit “misrepresentations” in all circumstances, the rule prohibiting an attorney from knowingly making a false statement of material fact or law to a third person would be entirely superfluous. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

**3. Sanctions.** Private reprimand was appropriate for attorneys who falsely denied that they were recording a telephone conversation with a potential witness. The attorneys, who represented a defendant in a serious criminal matter, acted in the best interests of their client, not for any personal gain; they cooperated with disciplinary counsel and were motivated by a desire to help their client rather than advance their own selfish ends; there was no injury to the client and little damage to the public trust, the legal system, or the profession; and nothing in the record suggested a likelihood of repetition. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.