Northwest Chapter
Labor and Employment Relations Association

2010 LERA Collective Bargaining and Arbitration Conference

Washington State Convention Center in Seattle, Washington
April 29 and 30, 2010

Presented by:

Henry E. Farber
Davis Wright Tremaine LLP
777 108th Ave. NE, Ste. 2300
Bellevue, WA 98004
(425) 646-6100
henryfarber@dwt.com

James G. McGuinness
Attorney At Law
4423 Pt. Fosdick Drive NW, #208
Gig Harbor, WA 98335
(253) 509-0033
unionlawyers@yahoo.com

Based on your personal convictions:

Question No. 1: As part of a comprehensive renegotiation of the collective bargaining agreement between Bob's Builders and the United Workers Union, you are negotiating a wage increase on behalf of Bob. Bob has told you that his priority is to keep his contribution to employee health care as minimal as possible. To that end, he is willing to be more generous about wages, if it'll get him a more favorable deal on health care. Bob has authorized you to raise wages as much as 60 cents/hour.

Instead of submitting proposals dealing with several subjects, you and the union's attorney have decided to discuss the issues separately. You wouldn't want to give too much away about Bob's bottom line after all! After several hours of negotiation about the wage increase, the union's attorney asks you "Will Bob accept a 60 cent increase?" At this point, you are certain that the union would accept less. Is it ethical to say, "No, there will be no agreement over 40 cents?"

Answer: Yes or No

Why?

Question No. 2: What if the union lawyer asks, "Are you authorized to accept a .60 cent increase?" Is it ethical to say, "No?"

Answer: Yes or No

Why?

I. WHAT ARE ETHICS?

A. First Definition: "a system of moral principles or values; the rules or standards governing the conduct of the members of a profession; accepted principles of right or wrong" → a set of rules that apply to specific activities

1. Why have ethical rules?

a. They govern, direct and limit the conduct of the members of a profession

b. They set a floor or minimum of acceptable behavior

c. But they sometimes contain concessions even as they establish minimum standards (*see* Comments to the Rules of Professional Conduct)

(1) For example, while Rule 4.1 establishes 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, the comments limit what is considered a material fact "under generally accepted conventions in negotiation."

B. Second definition: in a philosophical sense, the term "ethics" is used to describe discussions about morality, or issues involving judgments about right and wrong, fairness, justice, and what is right

C. Third definition: "imperatives regarding the welfare of others that are recognized as binding upon a person's conduct in some more immediate and binding sense than law and in some more general sense than morals" (Professor Geoffrey Hazard)

D. What ethical considerations govern a lawyer's conduct?

1. Rules of Professional Conduct: A lawyer is expected to be forthcoming in his or her dealings with others

2. Client: A lawyer is faced with the expectation that he or she act as the advocate and protector of her client's interests

3. Personal: A lawyer may have his or her own ethical beliefs

4. Societal: A lawyer has an obligation to promote and preserve the public good

a. Lawyers are "officers of the legal system" and "public citizen[s] having special responsibility for the quality of justice." Preamble to the Model Rules of Professional Conduct.

b. The lawyer's responsibility is our society is that he stands "as a shield … in defense of right and to ward off wrong. From a professional charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, or granite direction, of the strictest observance of fiduciary responsibility, that have, through the centuries, been compendiously described as "moral character."" *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring)

II. WHAT PROFESSIONAL RULES GOVERN CONDUCT DURING COLLECTIVE BARGAINING AND NEGOTIATIONS?

A. Preamble to the Model Rules of Professional Conduct: "[a]s a negotiator a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealings with others"

B. RPC Rule 4.1: In the course of representing a client a lawyer shall not knowingly:

1. Make a false statement of material fact or law to a third person; or

2. 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, unless disclosure is prohibited by Rule 1.6

a. Comments to Rule 4.1:

(1) Misrepresentation: A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. 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.

(2) Statements of Fact: 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 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.

3. Thus, Rule 4.1 does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

C. Rule 8.4: Misconduct

1. 8.4(c) – It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation

2. This rule "does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even rule afoul of Rule 4.1. Suffice it to say, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a)." ABA's Standing Committee on Ethics and Professional Responsibility, Formal Opinion

Based on the Rules of Professional Conduct:

Question No. 1: Bob's Builder's lawyer has just told the union that there would be no agreement over 40 cents. As the lawyer for United Workers Union, you think this is great! The union's priority in this negotiation is to get an increase in employer contributions to health care and they aren't as interested in wages. The union has authorized you to make a deal at 30/cents an hour, if there is some increase in health care. The question you asked earlier was just a trial balloon. But you're not sure Bob's lawyer is being entirely forthcoming and you think you can get more for the union. Is it ethical for you to say, "There won't be an agreement at less than 50 cents?"

Answer: Yes or No

Why?

Question No. 2: What if Bob's lawyer asks, "Are you authorized to accept a .40 cent increase?" Is it ethical to say, "No?"

Answer: Yes or No

Why?

III. WHAT IS ETHICAL CONDUCT IN THE CONTEXT OF NEGOTIATIONS?

A. "The distance between practices that are commonly used and acceptable ethical standards is particularly great in negotiation" (Eleanor Holmes Norton)

B. Ethical considerations may conflict in negotiation and, when they conflict, "truth is frequently the casualty" (Pounds 182)

1. (1983) University of Michigan Study on Disclosure in Negotiation

a. 75% reported that incomplete information was a regular or frequent problem

b. 51% said that "unfair or inadequate disclosure of material information" was a regular or frequent problem

c. Only 49% felt that answering a question during negotiation about deposition testimony they knew to be false without informing the opposing party of the truth of the matter would violate Rule 4.1

C. What is Bluffing?

1. Term can refer to anything from exaggerated claims to cases where the negotiator tries to convince the other party falsely that no further concessions can be made. In the latter situation, it may be said that bluffing involves deception (Provis 148)

2. An act in which one attempts to misrepresent one's intentions or to overstate the strength of one's position in the bargaining process (Carson 14)

D. What could attorneys "bluff" about during negotiations?

1. the current or future value of whatever is being discussed

2. the client's goals, priorities or interests in the negotiation

3. the client's bottom line

4. the client's best alternative option if a deal is not agreed upon

5. the client's willingness, ability, or authority to negotiate

6. the existence of objective standards (outside, independent, third party information sources that can help determine the value or worth of a deal component within the negotiation)

E. Dominant scholarly position had been that it is permissible to "bluff" in negotiations, as is indicated by the Comment to the RPC

1. Survey conducted at the 1997 annual meeting of the ABA, 100 lawyers were asked "Is it ethically permissible to engage in settlement 'puffery' that involves misrepresentation?"

a. 61% responded Yes

b. 73% confirmed that they personally engaged in negotiation puffery

2. Albert Carr, "Is Business Bluffing Ethical?" (1968)

a. Bluffing in business is analogous to poker and therefore should not be thought to be impermissible insofar as it is part of the way that the game is played

(1) Business and poker are similar in the following ways: elements of chance; winner is the one who plays with a steady skills; ultimate victory requires knowledge of the rules, insight into the psychology of the other players, self-discipline, a bold front, and the ability to respond quickly and effectively to opportunities presented by chance

3. Thomas Carson

a. Defines a lie as "a false statement which the speaker does not believe to be true made in a context in which the speaker warrants the truth or what he says."

b. The warrantability of truth is largely absent in negotiations, therefore, bluffing is not lying

c. "Falsehood ceases to be falsehood when it is understood on all sides that the truth is not expected to be spoken" (Henry Taylor, British statesman)

d. "Deception may be trial balloon that you expect to have shot down" (Provis 151)

e. Immanuel Kant: “a deliberate false statement does not constitute a lie unless the speaker has “expressly given” to other(s) to believe that he/she intends to speak the truth”

4. Fritz Allhoff

a. Bluffing is a business practice that should be embraced by all rational negotiators

b. Conventional ethics wisdom holds that ethical rules are universal but there are really role-differentiated moralities

c. Bluffing is permissible in business because the participants endorse the practice and it is necessary

(1) Imagine a transaction where you tell a seller you would pay $12,000 for her product and she tells you she would accept $10,000. What is the next step? It makes more sense for the buyer to start low and the seller to start high.

(2) When a party “anchors” with a generous initial offer, the other side if unlikely to appreciate the largess and respond in kind.

(3) Instead, the other party will think that it can do better than expected and begin with a less generous opening offer of its own

d. Example: National Hockey League negotiations (2005)

(1) Owner’s were concerned about rising labor costs and demanded a specific division of revenues between the players and themselves

(2) Hoped to give the players no more than 54%

(3) Instead of initially offering the players union 48-50% and allowing the other side to talk them up to 53-54%, they began with an offer of 53%

(4) Union then felt that it could get something in the 58-60 percent range and the parties reached a stalemate that could not be resolved until after the season was already lost.

5. More stringent ethical rules which disallowed "puffery" completely would create a new weapon, with each side threatening to bring ethics violation charges against the other (Robert Mnookin)

F. Minority Scholarly Position

1. Rules allowing puffery are inappropriate because the public's trust and confidence in lawyers will diminish and because allowing such conduct is inconsistent with a lawyer's obligation of integrity as an "officer of the legal system"

2. Charles Fried: lying in negotiations is an offense to both the integrity of the victim of the lie (as a rational and moral being) and to the lawyer's own moral status

3. An ethic is morally binding and not just a rule of the game (Judge Alvin B. Rubin)

4. Bluffing, belligerence and threats often prove counterproductive—especially where long-term relationships are involved—in negotiations.

a. These tactics decrease the likelihood of an agreement. Even when an agreement is reached, resentments and suspicions generated sour and cloud future negotiations

5. The "poker game" model of bargaining is inefficient, excessively competitive, insensitive to third-party interests and improperly devoid of noneconomic values such as individual self-respect and fairness (Adler 355)

Question No. 1: Bob's Builders and the UWU are at a bit of a standstill. So far two wage proposals have been made. The union's attorney has suggested 60 cents, although the union would accept 30 cents, if made in conjunction with an offer for increase health care contributions. Bob's attorney has suggested 40 cents, although he would be willing to go as high as 60 cents if health care is taken off the table. Bob's attorney decides it's time to make a move. Is it ethical for him to say "Bob is really good friends with Kurt over at Kurt Konstruction. Kurt just negotiated his contract and he's only increasing wages by 35 cents/hour. Bob was trying to be generous but if you're going to be so unreasonable, he'll have to take back his offer of 40/cents." While technically true that Kurt only increase wages .35 cents/hour, the attorney knows that the wage increase was combined with a 5% increase in employer health care contributions. Is it ethical for the attorney to "bluff" is this manner?

Based on person convictions: Yes or No

Based on the Rules of Processional Conduct: Yes or No

Based on the scholarly views of bluffing: Yes or No

Why?

If it is unethical, is there a way for the attorney to convey the same information ethically? How?

IV. THE PROHIBITION ON BAD FAITH BARGAINING

A. The NLRA imposes on employers the obligation to bargain in "good faith." This is an "obligation … to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement …." *Montgomery Ward*, 133 F.2d 676, 686 (9th Cir. 1943). This implies both "an open mind and a sincere desire to reach an agreement" as well as "a sincere effort to reach a common ground."

1. "Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims …. If …an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

2. The validity of a claim is not at issue until it is actually made. Thus, an employer is not obligated to demonstrate that it is unable to perform in a certain manner, such as raise wages, unless it first claims such an inability. Once it claims an inability to pay, an employer is obligated, upon request, to provide information justifying the claim.

a. An employer's repeated statements that it is "fighting for its life" and that the union's demands are "pie in the sky" does not meet the *Truitt* standard because the employer "neither claimed insufficient assets nor stated that acquiescence to the Union's demands would cause it to go out of business." *AMF Trucking & Warehouse, Inc.*, 342 NLRB No. 116 (2004).

b. An employer that simply expresses an unwillingness to pay rather than an inability to pay is not required to make disclosure. That an employer does not want to continue paying the same level of wages does not mean that it cannot afford to do so. *See, e.g.*, *Richmond Recording Corp.*, 280 NLRB 615 (1986); *Gilberton Coal Co.*, 291 NLRB 344 (1988)

c. The Board may even overlook certain "misconduct" in an effort to preserve the bargaining process. In *Logemann Brothers Co.*, the Board refused to consider statements by the employer's negotiators to the effect that it would be "their agreement" or none at all and "is it this contract or none," as evidencing a refusal to bargain in good faith. Although some statements by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-

take atmosphere of collective bargaining." 298 NLRB 1018 (2002).

Question No. 1: After receiving the information about Kurt's Konstruction, the UWU attorney is a little uncertain about his strategy but doesn't want to give up yet. He decides to ask Bob's attorney "Is Bob claiming that he can't pay a .50/cent increase?"

Based on the "good faith" bargaining standard established in *Truitt*, would Bob's attorney trigger his client's obligation to provide information backing up its position if he answered:

No. 1: "No, Bob just doesn't want to pay more than .40 cents:

Answer: Yes or No

No. 2: "More than .40 would "kill" Bob's Builders?"

Answer: Yes or No

No. 3: "Yes, Bob's Builders can't afford more than a .40 cent increase."

Answer: Yes or No

Do you think that the *Truitt* standard encourages or discourages bluffing? Does it encourage or discourage ethical behavior in general?

V. WHAT RESULTS CAN YOU GET FROM ETHICAL CONDUCT?

A. A successful long term collective bargaining relationship

B. Fewer personal qualms about your professional behavior

C. Professional Respect

D. Client referrals

E. Increase the pie

1. When parties are forthcoming about their desires, they can create win-win situations. Take for example, Mary and Sally, two sisters fighting over the last orange in the house. Sick of hearing them bickering, their parents split the orange into two halves and gave each child half. But Mary was hungry and wanted the fruit of the orange and Sally was baking, and wanted the zest. Neither girl was happy with the result and they could have come to a better compromise for everyone if they had been more reasonable (Fisher 42).

VI. WHAT RESULTS CAN YOU GET FROM UNETHICAL CONDUCT?

A. Concessions for your client

1. Could be short term and lead to more problems in the long run

2. Take Mary and Sally again. If Mary has asked Sally what she wanted, she would have found out that Susie was only interested in the zest. Mary could have bluffed and told Susie that was the part she was interested in as well and made Susie an offer. What if Mary had offered to take the fruit of the orange in exchange for Susie giving her 50 cents? Then Mary would get what she wants, plus a bonus, and Susie would get what she wanted as well. This would likely work out well for both in the short term, until Susie caught on to Mary's trick, at which point, she probably wouldn't be inclined to negotiate with Mary again. (Reilly 14-15)

B. Can be reported to the Bar

1. But the Committee will always have a difficult time determining who is telling the truth about the underlying facts and what was said in the negotiation, since they are usually conducted in private.

2. Given the leeway written into the Rules, which some have called "the lowest common denominator of conduct that a highly self-interested group will tolerate," (Rhode 730), attorneys are not frequently sanctioned for negotiation related conduct. A review of the disciplinary actions under Rule 4.1 of the past seven years revealed 0 cases where an attorney was sanctioned for negotiation related behavior.

C. Have your career "regulated by the market"

1. If you behave in a questionable manner, your professional reputation will reflect that. Any benefit you may achieve may be negated by (1) inefficiencies imposed by distrust and (2) opportunity costs of foregone future transactions

a. Study indicated 65% of negotiators are considered cooperative/problem-solvers, 24% are viewed as competitive/adversarial and 11% fit neither category. When asked to indicate which attorneys were "effective," "average," and "ineffective," 59% of the cooperative lawyers were rated "effective," while only 25% of the adversarial lawyers were rated effective. 3% of the cooperative lawyers were rated ineffective, as opposed to 33% of the adversarial bargainers. (Gerald D. Williams, Legal Negotiation and Settlement 19 (1983))

2. Will have more difficulty in your negotiations because people will not trust you and will want to independently verify the information you use, and reduce all agreements to writing. Negotiations become more cumbersome and inefficient.

D. Create a voidable contract (contracts procured through fraudulent acts of commission and omission are voidable), which could create a personal liability on the part of the attorney. *See Jeska v. Mulhall*, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentation made during negotiations)

E. Create litigation issues for your client. In 1994, a company called Textron withheld information from the union about its intention to subcontract work. The union agreed to a contract that they later regretted, when it was revealed that the company had already completed a plan to subcontract before the contract was executed. The union sued and the issue went up to the Supreme Court (US). Although the employer ultimately won, litigation took four years and was doubtlessly expensive, perhaps more

expensive than the contract they could have achieved after giving the union notice that they intended to subcontract would have been.

F. Lose your job

1. American Airlines

a. Don Carty, former CEO, was forced to resign over what the unions considered his lapse in ethics. He asked rank-and-file employees to take a deep pay cut to save the company from bankruptcy while putting together a package that included $41 million in pension funding for 45 executives. Union got the facts from the press and demanded his resignation.

VII. BEST PRACTICES FOR CREATING AN ATMOSPHERE FOR ETHICAL COLLECTIVE BARGAINING

A. Pre-negotiation Preparation

1. Sit down with people on your side to decide what items need to be addressed and determine priorities

a. What items are essential?

b. What items are important?

c. What items are desirable?

(1) What lower value issues are you prepared to trade for preferred terms?

d. What topics should we raise first and which later?

(1) May commence interactions with less significant subjects to reach tentative agreements on those topics before moving to more important issues

(2) Can focus on areas subject to joint gains and begin a psychological commitment to final accords. When the negotiation moves to more controversial topics, they don't seem as difficult as if the negotiation had commenced with those subjects

(3) Neither side will want the prior tentative agreements to be thrown away and both may become more accommodating

2. Conduct thorough background research on your opposing party and speak with groups or individuals who have negotiated with this party.

3. Brainstorm and list specific questions that will likely be asked by the other party. Practice answering the questions aloud to come to work and phrase choices that limit the revelation of strategic information in an ethical manner.

4. Brainstorm a list of questions that you and your client need answered. During negotiations, listen carefully to the responses provided to determine whether they actually answer the question or whether they are evasions. Continue asking the question and any necessary follow up questions until you feel the question has been answered in a reasonably forthcoming manner or the opposing party has indicated they will not speak to the issue.

B. Enter into the negotiations in good faith, expecting ethical behavior from your counterpart.

1. "By acting deceptively in anticipation of deceptive behavior by others, we tend to elicit the sort of deceptive behavior we anticipate" (Provis 149)

C. Maintain a friendly rapport. A cordial and supportive environment can lead to individuals relaxing their defenses and providing information that may be used to secure the truth in the future.

1. Can include (a) exclamations of encouragement such as, "Yes?" or "I hear you"; (b) requests for immediate elaboration such as, "Could you tell me more about that?"

a. Research suggests that people are more inclined to lie by *omission* (not revealing the whole truth) than by *commission* (falsely answering a question when asked), so when people are asked to elaborate and make direct statements that are lies, some people may back away from their earlier statements

2. Can also include phrases that neutralize the harshness of asking a negative question, such as "If I may play devil's advocate for a moment…" to blunt the harshness of a request for information

D. Have multiple options: Going into a negotiation with multiple options will help both you and your counterpart achieve your goals. If someone proposes an option you feel is unethical, you will be ready with another, ethical option for accomplishing the same goal.

E. Counsel your clients that honesty is the best policy. Don't have to argue for ethics based on it being a better moral position to your clients. Can suggest that it be adopted on a strictly pragmatic basis—it is more effective than alternative bargaining techniques (Adler 355)

F. Develop principles of negotiation

1. Separate the people from the problem

2. Focus on interests, not positions

3. Invent options for mutual gain

4. Insist on using objective criteria

VIII. WHAT SHOULD YOU DO IF YOUR COUNTERPART BEHAVES UNETHICALLY?

A. 3 steps in negotiating the rules of the game where the other side seems to be using a tricky tactic (Fisher & Ury)

1. Recognize the tactic

2. Raise the issue explicitly

a. This can be accomplished by using a "come clean" question: "Is there something important known to you, but not to me, that should be, or that need to be, revealed at this point?"

3. Question the tactic's legitimate and desirability

B. Sometimes you may encounter negotiators who are unilateral thinkers who have only one option. With them, it's their way or the highway. If their way is unethical in your opinion, you have only one option—walk away from the deal.

Bob's Builders and the United Workers Union have gotten nowhere in their negotiation. Neither side has revealed what they are actually interested in yet and no one has even mentioned health care! Based on the best practices discussed above, how should the attorneys have approached the negotiation? Is there a way for both Bob's Builders and the United Workers Union to get what they are actually looking for? If not, how could they come to a reasonable compromise?

Discuss.