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A Lesson From Dogs That Bite

In negotiations it is common for counsel to refrain from revealing certain information to each other. While some omissions may be acceptable negotiation tactics, others may be misleading, and an ethics violation. A classic example of less than full disclosure is found in the movie *“The Pink Panther Strikes Again.”* Peter Sellers, as Inspector Clouseau, checks into a hotel and sees a dog sitting in the lobby. He asks the hotel clerk, “Does your dog bite?” The man shakes his head and answers “No.” Sellers bends down to pet the dog, and the dog viciously lunges and bites his hand. A confused Sellers asks the man, “I thought you said your dog did not bite?” The man responds: “That is not my dog.”

If we apply lawyer ethics rules to this dialogue, was the clerk’s “No” response a violation? American Bar Association Model Rules of Professional Conduct, Rule 4.1 states that a lawyer shall not knowingly (a) make a false statement of material fact or law; or (b) fail to disclose a material fact. The comments to Rule 4.1 provide that “[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.*”

The ethics analysis does not stop there. The comment to Rule 4.1 also states: “Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” Arguably, the clerk’s misleading answer is tantamount to a false statement, and an ethics violation.

However, statements made as negotiation tactics are not statements of material fact. The comment to Rule 4.1 provides: “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.*” Thus, demands and opening offers that disguise how each side values the case, and concessions that mask the true range where each side may be willing to settle do not run afoul of ethical obligations. This is simply part of the bargaining process.

Be aware of whether your statements are negotiation tactics or actual statements of fact. And don’t pet the dog.