Ethics & Values: What Is the Extent of the Duty We Owe to the Other Party?

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Abstract

This is an impactful exercise for any level of management to administer. It can lead to productive discussions about personal ethics/values decisions. It can be as simple or complex as the moderator chooses. It is disguised as a negotiation, so the ethical issues are completely camouflaged by the parties' negotiation tactics. The fact sheet, the employee's facts, and the employer's facts are attached. The user is encouraged to copy them (or modify them) for the user's specific needs.

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Ethics & Values: What Is the Extent of the Duty We Owe to the Other Party?

"Ethics" and "values" are boutique words of the day. Many organizations hold themselves out as "highly ethical" and conforming to the "highest standards." They usually align themselves with a vision statement, a code of conduct, or a code of ethics. However, as events unfolded over the past decade, we saw a dissonance between perception and reality of corporate ethics/values.

We saw several corporate implosions traceable to egregious ethical violations. One of the most popularly cited is Enron. It is also one of the most ironic. The company had a voluminous code of ethics. However, the people who were ostensibly in charge of enforcing the code intentionally waived it to allow obvious violations.[1]

Ethics/values certainly encompasses "thou shall not steal" and "thou shall not fudge the

1. This is from a conversation between Andy Fastow and Jim Timmins of Enron. Fastow told Timmins that Enron's board of directors gave Fastow, as CFO of Enron, a code-of-ethics waiver to set up the LJM partnerships. The conversation is recounted in Kurt Eichenwald's *Conspiracy of Fools* (261).

books." These violations are so obvious that, if you have to reiterate the lessons, the problem might be systemic, not isolated incidents. If a pattern of mischief persists, the organization may face Sarbanes-Oxley (SOX) violations and/or criminal sanctions. An entity's regular analysis of ethical behavior is crucial and often entails daily judgmental decisions made at all levels of an organization.

This exercise gives an entity the opportunity to interact and work with its employees and/or members as they role-play a situation fraught with negotiation and ethical challenges. Afterwards, during the analysis, the administrator has wide latitude to explore the ostensible negotiation and the less obvious ethics/values issues.

Can You Teach Ethics?

There is a long-held conflict between the faction that says you can teach ethics and the faction that says you cannot. The purpose of this paper is not to resolve this age-old conundrum, but to provide an organization a means by which it can have a robust conversation about ethics, values, and the attendant decision-making process. This exercise is really an ethical dilemma in the guise of a negotiation.

The Underlying Case

The actual lawsuit underlying this exercise is *Spaulding v. Zimmerman*,[2] which involved an injured minor. During the discovery phase of the lawsuit, the plaintiff minor was examined by his two physicians. These two doctors rendered comprehensive reports, which were given to the plaintiff, his attorney, and the defense attorneys. In Minnesota, the law allowed the defense to require the plaintiff to be examined by a third doctor, whom the defense firm hired. This doctor prepared a third report, which was given only to the defense.

At the pretrial settlement conference, the only reports the plaintiff's counsel had to analyze were the two given them by their client's physicians. Neither of these reports indicated that the plaintiff had a potentially fatal aortic aneurysm, which might have resulted from the at-issue accident. Because the defense had this third report, they were aware of the potentially fatal aneurysm. They did not disclose the fact to the plaintiff, his attorney, or the court. The case was settled on the basis of the two reports known to the plaintiff and his counsel.

When the plaintiff went to his armed-forces induction examination, the military physician discovered the aneurysm and denied him admission into the armed forces. The plaintiff and his attorney returned to court to ask the judge to undo the settlement. The court granted the motion.

The Actual Reports

The plaintiff was first examined by his family physician. This doctor's salient diagnosis noted the following:

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2. 263 Minn. 346, 116 N.W.2d 704 (1962). It is always a good idea to tie a teaching exercise to an actual event or case. Thus, the participants have a known, quantifiable, and somewhat objective reference point by which they can measure their analysis.

> a severe crushing injury of the chest with multiple rib fractures; a severe cerebral concussion, probably with petechial hemorrhages of the brain; and bilateral fractures of the clavicles

The doctor referred the plaintiff to an orthopedic specialist, who took x-rays of the plaintiff's chest. This doctor reported the following:

> The lung fields are clear. The heart and aorta are normal.

The defense medical examination was conducted by a neurologist. For the most part, this physician concurred with the plaintiff's doctors. However, this third physician's report included further observations:

> Whether this [aneurysm] came out of this accident I cannot say with any degree of certainty and I have discussed it with the Roentgenologist and a couple of interns. . . . Of course an aneurysm or dilation of the aorta in a boy of this age is a serious matter as far as his life. The aneurysm may dilate further and may rupture with further dilation and this would cause his death.[3]

In this jurisdiction, the defense doctor's report was not required to be given to the plaintiff.

The Arguments for and against Setting Aside the Settlement

The plaintiff evaluated the case and settled it predicated on the reports from his two doctors. When the aneurysm was discovered by the military physician, the plaintiff and his counsel understood that they negotiated the deal without all of the facts. This omission precipitated the plaintiff's counsel to motion the court to set aside the settlement on the grounds that the defense had knowledge of this serious problem but "hid" it. Consequently, the defense negotiated the settlement in bad faith.

In response to the motion, the defense contended that the court did not have the jurisdiction to vacate the settlement solely because the defense counsel possessed information unknown to the plaintiff.[4] The defendants also argued that this was not a mutual mistake of fact.

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3. Each of the quoted medical comments are taken, verbatim, from the *Spaulding v. Zimmerman* case cited above.

4. One of the earliest, in-depth conversations about the extent of the duty of one party to the other is found in the United States Supreme Court case *Laidlaw et al. v. Organ* 15 U.S. 178; 4 L.Ed. 214, 2 Wheat. 178 (1817). In a decision written by Justice Marshall, the court wrestled with the question of whether knowledge of extrinsic information, which might influence the price of the commodity and which was exclusively the knowledge of the buyer, ought to have been communicated by him to the seller?

   On February 18, 1815, the buyer purchased a significant amount of tobacco at wartime

They believed that they had no duty to disclose the information to the plaintiff. They also argued that it was reasonable to assume the information was given to the plaintiff by his own physicians. Finally, they argued that the motion was barred by the statute of limitations. The court ruled against them and vacated the settlement.

These are the facts of the case and how it was ultimately resolved. It provides an excellent exercise to analyze the nuances of ethics/values and the basis for certain action in difficult negotiations.

The Setup

The balance of the paper is in the first person pronoun as if I were presenting it to my Maser of Business Administration (MBA) class. This is for simplicity sake. One of the beauties of this exercise is how simple it is and how easily it can be adapted to a time slot or to the specific goals of the administrator.

In the initial presentation to the class, I emphasis that the exercise is a negotiation. I never mention ethics. Although it is not a prerequisite, I usually use this exercise after two other quick negotiations that deal with a didactic, two-party sale of a vehicle and a sales transaction conducted by agents. As such, this exercise is a natural follow-up negotiation.

The Execution

I have the participants count off by two's and then separate to opposite sides of the room. Next, I give them the facts (Appendix A). It is important to emphasize the bolded, 72-point font note, which appears inside French brackets midway down the page and states, "**{Please Note}**."

I hold up the packet of fact sheets and ask someone, preferably a person toward the rear of the room, if that person can read this note. Without fail, someone will say, "Yes." I may ask that person why I made the note so obvious. That usually elicits a few chuckles. Having made my point, I hand out the facts to all participants.

When all participants have the facts sheet entitled "The Problem," I ask them to read along with me. I read it, verbatim, emphasizing special punctuation as well as bolded and/or italicized words. This is an important step. I need to control the process, especially the questions, as you will see below. Also, by reading it with them, I am setting the stage to eliminate any excuses

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prices. Known to the buyer but unbeknownst to the seller, within days the war would be terminated by treaty. The price of tobacco skyrocketed. The seller felt duped.

The court opined the buyer was not bound to communicate honestly procured intelligence to the seller. The court found it would be difficult to create a different doctrine within proper limits, where the means of intelligence are equally accessible to both parties.

about "not knowing" or "not understanding."

When I get to the word "***fair,***" which is bolded and italicized, I say "***fair***" more loudly and hesitate after the word. I may even ask the general audience if they heard me. All participants must clearly understand that this is about a fair resolution and that both parties will be working together for some time in the future. After reading the facts flyer, I reread "**{Please Note}**" loudly before I ask a participant to read the following note:

> **Do not discuss the facts *after* you reach a final result. We will discuss this in class.**

This is of crucial importance. It is imperative that the participants do not talk about anything they said or about what went on during the negotiation process until the debriefing discussion. The importance of strict adherence to this point will manifest during that discussion.

After reading the facts, I ask if there are any questions. Generally, there are none. If someone does ask a question, I do my best to shunt it aside without giving out any information. This is not out of disrespect. The participants need to experience the process without input, overt or inadvertent, from me. However, if I can use the question to emphasize that the negotiation's goal is to preserve the relationship between the employer and the valued employee, I may give a carefully crafted response.

The Exercise

The participants are already on opposite sides of the room, equally divided into "employees" and "employers." Each group is handed its "secret facts" (Appendix B and Appendix C, respectively) and given time to read the facts. At this point, I do not entertain any questions. When everyone is finished reading, I suggest that the "employees" choose an "employer," someone with whom they have not worked in the past. This self-choosing works well.

I release the participants for fifteen to twenty minutes to work out a solution. This is generally a sufficient period of time. I let them choose where they want to negotiate. It may be inside or outside of the classroom. The location is normally not an issue because I stroll around and casually listen to the various negotiations.

The Employee's Facts

The employees facts (Appendix B) discuss the injuries and quote the physician's reports. The medical quotes are taken, verbatim, from the *Spaulding v. Zimmerman* case. The facts indicate that Dr. Smith, the employee's physician, referred the employee to a second doctor, Dr. Brown. The salient parts of those two doctors' reports are quoted in the facts. The employee's secret facts end as follows:

> Given what you believe is the extent of your injuries, you believe $15,000 is a reasonable amount of a settlement. Do your best to get a good settlement.

This last section is crucial to the negotiation. This paragraph sets a proposed goal, which

is usually a factor in where the employee sets the "anchor point." In addition, it plays an important role in the debriefing. It also serves as a misdirection predominantly aimed at the negotiation facet of the exercise.

The Employer's Facts

The employer's "secret facts" (Appendix C) emphasize the need to maintain a good relationship with the employee and the need to preserve and protect this important situation. The employer's facts include all three physicians' reports. The important one is Dr. Jones' report, which states the following:

> The one feature of the case which bothers me more than any other part of the case is the fact that this [person] . . . has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty and I have discussed it with the Roentgenologist and a couple of interns. **. . .** Of course an aneurysm or dilatation of the aorta in a [person] . . . is a serious matter as far as his life. The aneurysm may dilate further and may rupture with further dilatation and this would cause his death.

The physician's statement—"Whether this [aneurysm] came out of this accident I cannot say with any degree of certainty"—is a critical fact and becomes very relevant during the debriefing discussion. During the debriefing, it is very important to emphasize that the doctor is not making a judgment about the origin of the aneurysm. However, at this point in time, I let them struggle through the facts by themselves. Note, the fact sheet also bolds and italicizes the section wherein the doctor says the aneurysm a serious matter. This highlighting precedes and directs the reader's attention to the next sentence where the doctor states that the aneurysm "may" rupture and "cause his [the plaintiff's] death."

The next section of the employer's facts is critical. It is the crux of the ethics/values facet, and it frames the issue regarding standard operating procedure (SOP) and independent medical examinations (IME) as follows:

> It is SOP for the employee to ***not*** be given the IME report. You believe that SOP was followed and that the employee ***has not*** seen this report. In fact, this report could make the settlement value of this case $100,000 or more. Clearly, your doctor is concerned that the employee could die from this injury. Consequently, the company might really be on the hook.

The section presents a number of quandaries. First, how should Human Resources (HR) proceed to balance the employee's interest, the companies interest, and HR's own ethics/values standards. Although the company's SOP does not allow the report to be given to the employee, nothing is said about hiding the information from the employee. Nothing is stopping HR from telling the employee about the information. HR could also make any resolution contingent upon

the defense doctor conferring with the employee or his/her physicians. The ethics/values dilemma is whether HR puts the employee on notice of a grave, potentially fatal condition.

Second, the section emphasizes the threat to the employee. There should be no doubt that this is a real threat to the employee and that the employer is on notice of the threat and its severity. This is another test of the ability of HR to balance its ethics/values against how it perceives its duty to the entity.

The employer's facts also guide HR toward a settlement value around $100,000. This is intentional. I list the results during the debriefing, and the opening gambit usually gives a strong indication of which side will set an anchor point and who will ultimately divide the surplus between the two extremes. With the employee and the employer having goals so far apart, how they handle that disparity can lead to a very interesting discussion of the negotiation.

The Negotiation Analysis

During the time the parties are negotiating, I walk around, and as unobtrusively as possible, I listen in on the negotiations. Some of this conversation will come in handy during the debriefing. If there is an odd number of participants in the class (or someone is absent), I will also have a student walk around and listen. Before the debriefing, I ask that student what information or comments he/she may have overheard.

When all participants have completed the exercise, my assistant or I put a grid on the wall. It has a column for each "team" and, on the horizontal line, four boxes on each line. The first box is for the team designator. The second box is for the employee's first offer/demand. The third box is for the employer's first offer/response. The fourth box is for the settlement point. Experience shows that the numbers in this box will range from $10,000 to $5,000,000. It is interesting to see the participants responses to the spread. Their feelings about the disparate results is a great place to begin the discussion. I may say, "It looks like Team A got 'X' and Team D got 'X++.' How do you feel about that?" After posing my simple question, I let the participants drive the conversation. There are a number of issues to discuss about why negotiation results differ. It is not unusual for some "negotiators" to get a little upset with their ostensible "failure" in comparison to other results. You need to address their feelings because they may have to be placated before you move on.

Next, I usually ask, "What does each settlement point mean and how did you arrive at the figures?" Frequently, the participants have come up with some nebulous formula involving compensation time, future promises, and the like. I push the participants for a specific number. The more disparate the results, the more detailed questions I ask.

If the employee settles for the equivalent of "chump change," I ask the employer how getting such a "good" deal played into fostering a good relationship. The employer frequently responds, "I was watching out for my company." It is interesting how the employer so closely identifies with a fictional company. I also ask the employer, "How will the company's reputation be affected by this agreement, especially if the other employees learn the whole story of how this employee was treated?"

The next step in the negotiation facet is to concentrate on the offer/response process. The employee's facts say that he/she would be happy with $15,000. The employer's facts indicate that the case has a value of $100,000. This is a significant difference.

If the employer made a first offer of $50,000, predicated on saving 50 percent of the estimated value of the case, that offer is more than three times what the employee was expecting. I ask the employee, "Was that offer disconcerting?" Usually, the employee replies, "Yes." Admittedly, the side receiving the first offer simply allowed the first figure to serve as an anchoring figure and played off it with no real consideration of what it meant and why it is so much different than expected.

I ask the employee, "When you got a figure three times what your facts indicate was a good result, what went through your mind? Did you stop and ask why? Did you ask the employer how he/she arrived at that figure? Did you realize, when they said $50,000, which was more than three times your estimated "best figure," that meant the employer had more money? Why didn't you counter with, say, $300,000?"

The opposite discussion occurs when the employee is first to open and gives a figure so much lower than the employer is expecting. I say, "What does that figure tell you? It should tell you that the employee may not have all of the important information, such as the report on the aneurysm. Second, what do you do with that figure? If you accept it, do you put the employee on notice that something is fishy? Will the employee wonder and ultimately find out that you knew of the employee's plight. If this comes to pass, will the employee still hold the company or you in high esteem?

We discuss some possible ways of inquiring how the other side constructed its opening gambit. We discuss ways of making this inquiry without tipping your hand as to your position. We discuss what to do when you get information that is contrary to your information and preparation. This is a valuable learning moment in the context of negotiation expertise.

A "wild card" is when the employee, on a lark, gives a figure of hundreds of thousands of dollars or millions of dollars as the first figure. The employer has no means of knowing that the employee does not have the additional information. This can also happen if the employer, on a lark, gives a figure that is ridiculously low. Just as the employee's high number emphasizes the employer's fact valuation, the employer's low number reaffirms the employee's valuation of $15,000 as reasonable. These two moves are really just "luck" and can be briefly analyzed and dismissed.

The Ethics Question

After I am satisfied that we have discussed most of the salient negotiation issues, I casually ask the employees, "How many of the employers told you that you had a potentially fatal aneurysm?" The silence is palpable. With this simple question, we get to the essence of this exercise. Frequently, there are some very hurt employee glances cast around the room. Although I have facilitated this exercise in many classes, I can count on no more than one or two disclosures per class of twenty to thirty students. Quite often, there are no disclosures.

After calming down the group, I pick the pair with the highest settlement and ask the employee, "What are you going to do with all of that money when you are lying in a coffin?" The question is rhetorical, but it makes an important point.

I also pick the lowest settlement figure and ask the employer, "What were you thinking in offering such a paltry amount?" Frequently, the employer answers, "I was protecting my company." I respond, "When the heirs find out that you knew of this problem and said nothing,

what do you think they will do?" I add, "It is possible that you could be personally named as a defendant."

Over the years, the reasons for the employers not disclosing the aneurysm are legion:

- "It is not my job."
- "I am not a doctor."
- "I do not know the aneurysm was caused by this incident."

Whatever the reasons, I ask questions about each reason so that the employers become firmly entrenched in their positions. We discuss as many resolutions and their rationales as time permits. "I am not a doctor" and "I do not know the aneurysm was caused by this incident" are easily put aside by looking at the employer's facts sheet. Passing on the doctor's information does not make HR physicians nor is the information a "medical opinion." The doctor specifically states that he/she is not making a factual conclusion regarding the cause or the origin of the aneurysm. The doctor simply states that it exists and, if it is not addressed, a deadly outcome may occur. The moderator can handle as many or as few of the "excuses" and he/she chooses.

Next, I usually pick the most vociferous person on the employer's side and ask him/her, "If the employee was your wife, son, daughter, or best friend, would you still refuse to tell them about the aneurysm?" At first they give a panoply of reasons why that situation would never arise. However, simply asking the question forces them to face a difficult question, a question raised by Bowen McCoy in his paper, *The Parable of the Sadhu* (*Harvard Business Review* reprint 97307). What is our ethical duty to the other person in a negotiation—are we our brothers keeper—and what do we do when our duty conflicts with our negotiation position? More importantly, when our negotiation position conflicts with our ethics/values standards, how do we balance the two. After some discussion, the employer reluctantly says, "Of course, I would tell them." I ask, "Why would you tell a family member and not an employee with whom you want to enter into a fair and durable agreement?"

At this point, the discussion can go off in many directions. Some may involve legal issues. However, these are easily dispensed with, leaving the many ethics/values issues to be explored. I try not give any answers, but simply ask strategic questions. That is usually all it takes to have an engaging and profound discussion. Quite often, I get my student biweekly journals after this negotiation. Over the years, those journals have made it abundantly clear that this exercise makes a big impression.

Anomalies

There are two things that bear mentioning to enhance the meaningfulness of the debriefing. I remind the participants that the employer's facts say HR cannot give the employee the report. Some employers summarize the information, and/or they make any final settlement contingent on the employees taking this information to their doctors and getting reexamined. In the debriefing, I spend time talking to these partners. I ask the employer, "What caused you to disclose the information? How did the employee receive the disclosure? How did you resolve the balance between ethics/values and duty to the company?"

When the partners take the disclosure approach, the employer usually justifies it as a way of protecting the company and the employee. When the employee realizes this was the employer's unique strategic move, the employee usually feels very respected and cannot imagine working for any other company. Sometimes, I have to remind the participants that they were role-playing and that no company exists. The participants generally respond, "That's too bad. We need companies like this." Whenever I hear this, I find it curious coming from fully employed MBA students. It is as if they do not believe such a company does exist.

A second scenario is much more disconcerting. In this rendition, the employer adamantly sticks to the position of no disclosure throughout the debriefing. In one exercise, the student was so ensconced in the position that the student became a little hostile and made the class uncomfortable. I was a little surprised by the strength of the student's emotion, but I let the matter pass. The student said, "I am just following orders. I am acting in conformance with my real-world employer's SOP."

Ironically, during the semester, one of this student's colleagues died. The student was distraught. In the course of our private conversations, the student made an interesting comment to the effect that the company was cold and lacked empathy for the deceased and his family. Without saying anything else, the student made it patently clear that the company was solely out for itself and, perhaps, undeserving of its employees' blind loyalty. It would have been inappropriate to ask if this student would modify the previous position of no disclosure in light of this personal experience. It would have been very interesting to hear the response.

Conclusion

This is a simple, fact-based exercise, which can be used to illustrate a number of lessons in negotiation and ethics/values. The moderator guides the participants to engage in insightful conversation. Hopefully, after the exercise and the subsequent discussion, the participants will glimpse the complexity of ethical issues and resultant decisions in real-world scenarios. Perhaps the experience will heighten their sensitivity and increase their awareness of how to approach and to implement their own solutions.

Appendix 1

The Problem

The Human Resources (HR) person is charged with taking care of resolving employee claims. In this scenario, the HR is negotiating with their employee for a ***fair*** resolution and payment for an injury the employee sustained at work, within his/her course and scope of their employment.

The purpose of this negotiation is to insure everyone walks away with a sense they have been treated fairly. After all, you will be working together for a long while. However, each ***should*** get the best deal they can.

{Please Note}

Do not discuss the facts *after* you reach a final result. We will discuss this in class.

Appendix 2

The Employee

You were an up an coming employee. Unfortunately, you were severely injured while in the course and scope of your employment. Your injuries were diagnosed by your doctor, Dr. Smith. Your injuries are listed as;

> "...a severe crushing injury of the chest with multiple rib fractures; a severe cerebral concussion, probably with petechial hemorrhages of the brain; and bilateral fractures of the clavicles."

At Dr. Smith's suggestion, you were examined by Dr. Brown, an orthopedic specialist, who made X-ray studies of your chest. Dr. Brown's detailed report of this examination included the following:

> "...The lung fields are clear. The heart and aorta are normal.'

Your employer demanded you go to their doctor for an independent medical examination (IME). This examination was extensive however you were not given a report.

After the IME you and your employer agreed to talk about a settlement. In the course of the discussions, your employer gave you a Release in which the document described your injuries as including, but not limited to:

> "....severe crushing of the chest, with multiple rib fractures, severe cerebral concussion, with petechial hemorrhages of the brain, bilateral fractures of the clavicles."

This was a standard Release form. Attached to this Release were affidavits of your physicians, Drs. Smith and Brown.

Given what you believe are your injuries, you believe $15,000 is a reasonable amount of a settlement. Do your best to get a good settlement.

Appendix 3

The Employer

Employee is a very valuable asset to the company. Unfortunately, s/he was severely hurt while in the course and scope of employment. His/her doctor, Smith, indicated the injuries were;

> "...a severe crushing injury of the chest with multiple rib fractures; a severe cerebral concussion, probably with petechial hemorrhages of the brain; and bilateral fractures of the clavicles."

A second doctor, Brown, found the following;

> "...The lung fields are clear. The heart and aorta are normal."

As standard operating procedure (SOP) the company sent employee to your company doctor, Dr. Jones, a neurologist for an Independent Medical Examination (IMD). Dr. Jones reported as follows:

> "The one feature of the case which bothers me more than any other part of the case is the fact that this young man has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty and I have discussed it with the Roentgenologist and a couple of Internists. ....***Of course an aneurysm or dilatation of the aorta in a [person like] is a serious matter as far as his/her life***. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death."

It is SOP for the employee to ***not*** be given the IME report. You believe SOP was followed the employee ***has not*** seen this report. In fact, this report could make the settlement value of this case $100,000 or more. It is clear your doctor is concerned that the employee could die from this injury. Then the company might really be on the hook.

Your job is to get the best deal you can. Good luck.