

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 12-0007**

ISSUE: When an attorney is engaged in negotiations on behalf of a client, what conduct constitutes permissible “puffing” and what conduct constitutes improper false statements of material fact?

DIGEST: Statements made by counsel during the course of negotiations are, generally, subject to those rules prohibiting an attorney from engaging in deceit or collusion. (See Business and Professions Code sections 6068(d) and 6128(a)). Thus, it is improper for an attorney to make false statements of material fact during the course of a negotiation. However, statements about a party’s negotiating goals or willingness to compromise may include allowable “puffery” provided those statements do not contain false statements of material fact.

**AUTHORITIES
INTERPRETED:**

Rules 3-100 and 3-700(B)(2) of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code section 6068(b), (c), (d) and (e).

Business and Professions Code section 6106.

Business and Professions Code section 6128.

STATEMENT OF FACTS

Plaintiff is injured in an automobile accident and retains Attorney to sue the other driver (Defendant). As a result of the accident, Plaintiff incurs \$50,000 in medical expenses and Plaintiff is no longer able to work. Prior to the accident Plaintiff was earning \$50,000 per year.

Attorney files a lawsuit on Plaintiff’s behalf. The parties agree to participate in a court-sponsored settlement conference that will be presided over by a local attorney volunteer. Leading up to and during the settlement conference, the following occurs:

1. In the settlement conference brief submitted on Plaintiff’s behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness’s account is undisputed, asserts that the eyewitness specifically saw the driver texting while driving immediately prior to the accident, and asserts that the eyewitnesses’ credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident.
2. While the attorney presiding over the settlement conference (settlement officer) is talking privately with Attorney and Plaintiff, the settlement officer asks Attorney and Plaintiff about Plaintiff’s wage loss claim. Attorney tells the settlement officer that Plaintiff was earning \$75,000 per year, which is \$25,000 more than Plaintiff was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which the settlement officer does.

^{1/} Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

3. While talking privately outside the presence of the settlement officer, Attorney and Plaintiff discuss Plaintiff's "bottom line" settlement number. Plaintiff advises Attorney that Plaintiff's "bottom line" settlement number is \$175,000. When the settlement officer asks Attorney for Plaintiff's demand, Attorney tells the settlement officer, "Plaintiff will never settle for less than \$375,000. Our demand is \$1 million."
4. In response to Plaintiff's \$1 million demand, Defendant's lawyer informs the settlement officer that Defendant's insurance policy limit is \$50,000.
5. Defendant's lawyer also states that Defendant is prepared to litigate the matter and might simply file for bankruptcy if Defendant does not get a defense verdict. In fact, Defendant has a \$500,000 insurance policy. Further, Defendant has no plans to file for bankruptcy and has never discussed doing so with his lawyer.
6. The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and wage-loss claim. During that month, Attorney learns that Plaintiff has accepted an offer of employment in a new field and that Plaintiff's starting salary will be \$75,000.00. Recognizing that accepting this position negatively impacts her wage loss claim, Plaintiff instructs Attorney to conceal Plaintiff's new employment at the upcoming mediation. Attorney pushes to have the follow-up settlement conference occur the day before Plaintiff starts her new job so that, "technically," Plaintiff is not working at the time of the follow-up settlement conference.

DISCUSSION

Although attorneys must advocate zealously for their clients (See *Davis v. State Bar* (1983) 33 Cal.3d 231, 238 [188 Cal.Rptr. 441]), there are limits to an attorney's conduct, as set forth in the Rules of Professional Conduct and the Business and Professions Code. With respect to the limits on an attorney's conduct while negotiating on behalf of a client, Business and Professions Code section 6068 requires, among other things, that an attorney "maintain the respect due to the courts of justice and judicial officers," "counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense," and "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Business and Professions Code sections 6068(b), (c), and (d).

Furthermore, Business and Professions Code section 6128 provides that "[e]very attorney is guilty of a misdemeanor who...[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." Business and Professions Code section 6128(a).

In addition to the Business and Professions Code, the State Bar's *California Attorney Guidelines of Civility and Professionalism*^{2/} specifically address an attorney's conduct when negotiating a written agreement on behalf of a client. Specifically, section 18, "Negotiation of Written Agreements" provides:

An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

^{2/} The State Bar of California's *Attorney Guidelines of Civility and Professionalism* <<http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mPBEL3nGaFs%3d&tabid=455>> are non-binding. "[T]he Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, [and] they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence."

For example:

...

- c. An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.
- d. An attorney should not participate in an action or the preparation of a document that is intended to circumvent or violate applicable laws or rules.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

For example:

- a. Attorneys should be mindful that their primary goals are to negotiate in a manner that accurately represents their client and the purpose for which they were retained.
- b. Attorneys should successfully and timely conclude a transaction in a manner that accurately represents the parties' intentions and has the least likely potential for litigation.

See also *Coviello v. State Bar* (1955) 45 Cal.2d 57 [286 P.2d 357] (upholding a six-month suspension based on lawyer's intentional deceit of opposing counsel); *Stare v. Tate* (1971) 21 Cal.App.3d 432 [98 Cal.Rptr. 264] (the appellate court "granted reformation of the agreement to plaintiff ex-wife in conformance with her understanding of the agreement. Defendant ex-husband's attorney was aware of the mistake made by plaintiff's attorney and attempted to prevent him from discovering the mistake; therefore, under statute plaintiff was entitled to reformation"); *Monroe v. State Bar* (1961) 55 Cal.2d 145, 152 [10 Cal.Rptr. 257] (upholding a nine-month suspension because "intentionally deceiving opposing counsel is ground for disciplinary action"); *Hallinan v. State Bar* (1948) 33 Cal.2d 246 (attorney suspended for three months after "attorney admitted that he simulated a client's name on a settlement release even though he knew that the opposing counsel wanted the attorney's client to personally sign the settlement papers"). But see *Estate of Falco v. Decker* (1987) 188 Cal.App.3d 1004, 1015, fn. 11 [233 Cal.Rptr. 807] ("We refrain from determining the corollary issue of whether an attorney who is ethically prohibited from proceeding to trial in a case the attorney believes lacks merit is similarly prohibited from settling the case.").

Finally, Standard 2.7 of Title IV of the Rules of Procedure of the State Bar of California (under Title 5 Discipline of the Rules of the State Bar), relating to Standards for Attorney Sanctions for Professional Misconduct, provides that "[d]isbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty, fraud, corruption or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member's practice of law."

In addition to the applicable California authority, in 2006, the American Bar Association published ABA Formal Opn. No. 06-439, specifically addressing this issue. According to ABA Formal Opn. No. 06-439:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules.

ABA Formal Opn. No. 06-439 is based largely on ABA Model Rules of Professional Conduct, Rule 4.1,^{3/} which prohibits an attorney from making “a false statement of material fact or law to a third person” and failing to “disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

The California Rules of Professional Conduct do not contain a corresponding rule. However, various California courts have addressed the issue in the context of intentional torts rather than attorney ethics. For example, see Cal. State Bar Formal Opn. No. 2013-189:

^[10] “Active concealment or suppression of facts by a nonfiduciary ‘is the equivalent of a false representation, i.e., actual fraud. [Citation.]’” *Vega v. Jones Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26]. See *Fox [v. Pollack]* 181 Cal.App.3d [954] at p. 962 and 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, 678, p.136.

^[11] If a person commits actual fraud, the fact that such person does so in the capacity of attorney does not relieve the person of liability. See: *Goodman [v. Kennedy]* (1976) 18 Cal.3d [335] at p. 346; *Vega, supra*, 121 Cal.App.4th at p. 291 (“A fraud claim against a lawyer is no different from a fraud claim against anyone else.”). Also, the fact that the other person is also an attorney makes no difference. *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202 [227 Cal.Rptr. 887] (“the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm’s length.”).

^[12] See also *Vega, supra*, 121 Cal.App.4th at p. 294 (“it is established by statute ‘that intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation’ [citations omitted] In some but not all circumstances, an independent duty to disclose is required; active concealment may exist where a party ‘[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated.’” [Fn. Omitted.]); *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 97 [111 Cal.Rptr.2d 711]; *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608 [225 Cal.Rptr. 624].

In our scenario, Attorney makes two types of representations worthy of discussion here: (1) statements that constitute impermissible misrepresentations of material fact, i.e. conduct constituting fraud and deceit, upon which Attorney intends for the listener to rely; and (2) statements that constitute acceptable exaggeration or “puffing” in negotiations.

Specific Examples

Consider the following examples of Attorney’s conduct during negotiations:

Example 1: Attorney’s misrepresentations about the existence of a favorable eyewitness.

Attorney’s misrepresentations about the existence of a favorable eyewitness is an improper false statement of material fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the express purpose of having Defendant rely on it.

^{3/} The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771]. Thus, in the absence of related California authority, we may look to the ABA Model Rules, and the ABA Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) (“Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.”); *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [70 Cal.App.4th 644]).

Attorney's misrepresentation is not an expression of opinion, but a material representation that "a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question" (*Charpentier v. Los Angeles Rams Football Co., Inc.* (1999) 75 Cal.App.4th 301, 312-13 [89 Cal.Rptr.2d 115], quoting section 538 of the Restatement Second of Torts).

This is consistent with Business and Professions Code section 6128(a) and Business and Professions Code section 6106, which makes any act involving moral turpitude, dishonesty or corruption a cause for disbarment or suspension.

Thus, Attorney's misrepresentations regarding the existence of a favorable eyewitness constitutes an improper false statement of a material fact and is not permissible.

Example 2: Attorney's inaccurate representations to the settlement officer (which Attorney intended be conveyed to Defendant and Defendant's lawyer) regarding Plaintiff's wage-loss claim.

Attorney's statement that the Plaintiff was earning \$75,000 per year, when Plaintiff was actually earning \$50,000, is an intentional misstatement of a verifiable fact. Attorney is not expressing his opinion, nor his state of mind, but rather a fact that is material to the negotiations. As with Example 1, Attorney's statement constitutes an improper false statement of a material fact and is not permissible.

Example 3: Attorney's inaccurate representation regarding Plaintiff's "bottom line" settlement number.

As explained in ABA Formal Opn. No. 06-439, statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere "puffery," are not false statements of material fact and thus, do not constitute an ethical violation and are not fraudulent or deceitful. In fact, a party negotiating at arm's length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise.

Here, Attorney's inaccurate representation regarding the Plaintiff's "bottom line" settlement number is allowable "puffery" rather than a misrepresentation of a material fact. Attorney has not committed an ethical violation by overstating Plaintiff's "bottom line" settlement number. Moreover, Attorney revealing actual "bottom line" could be a violation of Business and Professions code section 6068(e).

Example 4: Defendant's lawyer's representation that Defendant's insurance policy is for \$50,000 although it is really \$500,000.

Defendant's lawyer's inaccurate representations regarding Defendant's policy limits is an intentional misrepresentation of a material fact intended to mislead Plaintiff and Attorney. See *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] (holding that the plaintiffs "reasonably relied on the coverage representations made by counsel for an insurance company"). As with Example 1, Defendant's lawyer's intentional misrepresentation about the available policy limits is improper.

Example 5: Defendant's lawyer's representation that Defendant will litigate the matter and file for bankruptcy if there is not a defense verdict.

Whether Defendant's lawyer's representation regarding Defendant's plans to file for bankruptcy constitutes a permissible negotiating tactic will depend on the specific facts at hand. For example, if Defendant's lawyer knows that Defendant does not qualify for bankruptcy protection, threatening that Defendant intends to file in order to gain a negotiating advantage would constitute an impermissible intentional misrepresentation of a material fact intended to mislead Plaintiff and Attorney regarding Defendant's financial ability to pay. However, if Defendant's lawyer believes in good faith that bankruptcy is an available option for Defendant, even if unlikely, a statement by Defendant's lawyer that Defendant could or might consider filing for bankruptcy protection would likely be a permissible negotiating tactic, rather than a false statement of material fact.

Example 6: Plaintiff's instruction to Attorney to conceal material facts from Defendant and Defendant's lawyer prior to the follow-up settlement conference.

This example raises two issues - the failure to disclose the new employment, and Plaintiff's instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, the failure to disclose the new employment would be a suppression of material fact that is the equivalent of a material misrepresentation, and would be improper. (*Vega v. Jones* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26].) The parties specifically agreed to participate in a follow-up settlement conference pending exchange of specific information, including that involving the wage-loss claim. Unquestionably, the wage loss claim is at the heart of the follow up negotiations, and is therefore material. Even if Plaintiff is technically not employed on the date of the mediation, the wage-loss claim is one that assumes wage losses going forward, and any representation of such a loss that does not disclose the \$75,000 new employment would be a false representation regarding the extent of the losses.

Second, Attorney was specifically instructed by Plaintiff, his client, not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under rule 3-100 and Business and Professions Code section 6068(e). See also Cal. Evidence Code sections 952, 954, 955. While Attorney is generally required to follow his client's instructions, Attorney must counsel his client that Attorney cannot take part in a misrepresentation and/or suppression of evidence. (Cal. State Bar Formal Opn. No. 2013-189,^{4/} see also Los Angeles County Bar Assn. Formal Opn. 520).

CONCLUSION

Attorneys are prohibited from making false statements of material fact, including during the course of negotiating with a third-party. However, attorneys may engage in permissible "puffery" during negotiations; "puffery" may include statements regarding a client's negotiation goals or willingness to compromise. Engaging in "puffery" during negotiations does not constitute making a false statement of material fact.

[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on February 14, 2014. A copy of these resources are on file with the State Bar's Office of Professional Competence.]

^{4/} Cal. State Bar Formal Opn. No. 2013-189 contains a full discussion regarding an attorney's ethical obligations when a client instructs his or her attorney to conceal material facts from the opposing party and/or opposing counsel. As addressed more fully in that opinion, an attorney should first counsel his or her client regarding the client's request and, if the client refuses to reconsider, the attorney may be obligated to withdraw his or her representation, pursuant to rule 3-700(B)(2).