

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2015-194**

ISSUE: When an attorney is engaged in negotiations on behalf of a client, are there ethical limitations on the statements the attorney may make to third parties, including statements that may be considered “puffing” or posturing?

DIGEST: Statements made by counsel during negotiations are subject to those rules prohibiting an attorney from engaging in dishonesty, deceit or collusion. Thus, it is improper for an attorney to make false statements of fact or implicit misrepresentations of material fact during negotiations. However, puffery and posturing, such as statements about a party’s negotiating goals or willingness to compromise, are generally permissible because they are not considered statements of fact.

**AUTHORITIES
INTERPRETED:**

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

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

Business and Professions Code section 6106.

Business and Professions Code section 6128(a).

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 tells Attorney she 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. Prior to any discovery, 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 Defendant texting while driving immediately prior the accident, and asserts that the eyewitness’s credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident.
2. While the settlement officer is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff’s wage loss claim. Attorney tells the settlement officer that Plaintiff was

^{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.

earning \$75,000 per year, which is \$25,000 more than Client was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which he does.

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 says, "Plaintiff needs \$375,000 if you want to settle this case."
4. In response to Plaintiff's settlement demand, Defendant's lawyer informs the settlement officer that Defendant's insurance policy limit is \$50,000. In fact, Defendant has a \$500,000 insurance policy.
5. Defendant's lawyer also states that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict. In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy.
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 future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff's efforts to obtain other employment in mitigation of her damages and the results of those efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff's starting salary will be \$75,000. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff's new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney makes a settlement demand that lists lost future earnings as a component of Plaintiff's damages and attributes a specific dollar amount to that component.

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. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126 [116 Cal.Rptr. 713] ["The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law* . . .".]) Business and Professions Code section 6068 requires, among other things, that an attorney "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth." (Business and Professions Code section 6068(d).)^{2/}

^{2/} Attorneys further must "maintain the respect due to the courts of justice and judicial officers," and cannot "seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Business and Professions Code section 6068(b) and (d); see also Rule 5-200(B).) If a judicial officer was presiding over the settlement conference, these rules would prohibit the attorney from making a false statement of fact or law. Whether a lawyer who serves as a settlement officer is a "judicial officer" for purposes of these provisions is beyond the scope of this opinion.

Under Business and Professions Code section 6106, an attorney who commits any act of moral turpitude or dishonesty, whether or not in the course of the attorney's conduct as an attorney, is subject to disbarment or suspension. (Business and Professions Code section 6106.)^{3/}

Furthermore, Business and Professions Code section 6128(a) 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"

Finally, the State Bar's non-binding *California Attorney Guidelines of Civility and Professionalism*^{4/} 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 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.

In addition to the applicable California authority, in 2006, the American Bar Association published ABA Formal Opinion No. 06-439, specifically addressing this issue. According to ABA Formal Opinion 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.^{5/}

^{3/} The Standards for Attorney Sanctions for Professional Misconduct ("Standards") are based on the State Bar Act and "are adopted by the Board of Trustees to set forth a means for determining the appropriate disciplinary sanction in a particular case." With respect to acts of dishonesty, Standard 2.11 states:

Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law.

Moreover, "misrepresentation" is an aggravating circumstance in determining the appropriate sanction for attorney misconduct. (Standards, Section 1.5(e).)

^{4/} California State Bar's *California Attorney Guidelines of Civility and Professionalism* are non-binding, but do provide some general guidance to California lawyers. "[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."

^{5/} 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 [82 Cal.Rptr.2d 799].)

“Of the same nature are overstatements or understatement of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation.” (ABA Form. Opn. 06-439, p. 6.) False statements of material fact, in addition to “implicit misrepresentations created by a lawyer’s failure to make truthful statements,” may result in ethical violations. An attorney may not, for example, settle a pending personal injury lawsuit filed on behalf of a client without disclosing that the client had died. This conclusion is based on “the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive.” (ABA Form. Opn. 06-439, p. 5; discussing ABA Form. Opn. 95-397.)

The ABA cautions that a lower standard of lawyer truthfulness is not warranted because of the consensual nature of mediation or because the parties somehow waive protection from lawyer misrepresentation “by agreeing to engage in a process in which it is somehow ‘understood’ that false statements will be made.” (ABA Form. Opn. 06-439, p. 8.) On the other hand, the ABA has recognized that “puffing” or posturing may be permissible based on the generally understood norms of negotiation. The ABA defines “puffing” or posturing as “statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely.” (ABA Form. Opn. 06-439, p. 2.)

ABA Formal Opinion No. 06-439 relies on Rule 4.1 of the ABA Model Rules of Professional Conduct, 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.”

Comment [2] to Model Rule 4.1 clarifies that the Rule applies 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 Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The California Rules of Professional Conduct do not contain a rule that corresponds to Model Rule 4.1. Under California’s statutes and case law governing attorney honesty; however, California lawyers are not permitted to intentionally deceive opposing counsel. (See Business and Professions Code sections 6106, 6128(a), and 6068(d); *Coviello v. State Bar* (1955) 45 Cal.2d 57, 66 [286 P.2d 357] [upholding a six-month suspension based on lawyer’s intentional deceit of opposing counsel because “[s]uch conduct falls short of the honesty and integrity required of an attorney at law in the performance of his professional duties.”]; *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 [200 P.2d 787] [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]; *Scofield v. State Bar* (1965) 62 Cal.2d 624, 628 [43 Cal.Rptr. 825] [“Affirmative representations made with intent to deceive are grounds for discipline, even though no harm results.”].^{6/}

^{6/} For purposes of imposing discipline, an attorney’s representations may be characterized as “moral turpitude,” “dishonesty” or “corruption” under Business and Professions Code section 6106 only if the representations were made with an intent to mislead. (See *Wallis v. State Bar* (1942) 21 Cal.2d 322, 328 [131 P.2d 531].)

Acts of moral turpitude, which are prohibited by Business and Professions Code section 6106, “include concealment as well as affirmative misrepresentations “[N]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact.”” (*In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 86, citations omitted, quoting *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808.) In *Loftus*, an attorney who obtained a recorded statement from a putative defendant by creating the false impression that she was not an adverse party and the conversation was not being recorded was disciplined for violating Business and Professions Code section 6106. In *Dale*, an attorney was found culpable of moral turpitude for making misleading statements in order to induce an unrepresented party to sign a declaration confessing to arson.

“A member of the bar should not under any circumstances attempt to deceive another. [Citations.] ‘An attorney’s practice of deceit involves moral turpitude.’” (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888 [126 Cal.Rptr. 793], quoting *Cutler v. State Bar* (1969) 71 Cal.2d 241, 252–53 [78 Cal.Rptr. 172].)

In addition, various California courts have found attorneys liable in tort for making, during the course of their representation of a client, false statements of material fact to third parties.⁷¹ In *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 [17 Cal.Rptr.3d 26], for example, that court held: “a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made during business negotiations.” That court also stated: “A fraud claim against a lawyer is no different from a fraud claim against anyone else.” (*Id.*; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346 [134 Cal.Rptr. 375]; *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”]; see also California State Bar Formal Opn. No. 2013-189, fn. 11, 12.)

When considering what types of statements may give rise to civil liability under a variety of legal theories, such as false advertising or fraud, California courts consider the type of statement and whether the statement is likely to induce reliance. A statement of opinion is not actionable, nor is a statement of “puffery.” A statement of puffery is one that is “extremely unlikely” to induce reliance. “Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim.” (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 311 [175 Cal.Rptr.3d 131], *reh’g denied* (Aug. 20, 2014), *review denied* (Nov. 12, 2014), quoting *Newcal Industries, Inc. v. Ikon Office Solution* (9th Cir. 2008) 513 F.3d 1038, 1053.) A statement that is quantifiable, specific or absolute will generally be actionable, whereas a statement that is general or subjective will not. (*Id.*)

The standards for determining whether there is civil liability for fraud are different than those for determining an attorney’s ethical obligations of honesty. However, the factors considered in civil cases to determine whether a statement is one of verifiable fact are instructive in determining whether an attorney’s statements may fairly be characterized as deceitful, not “consistent with truth,” collusive or dishonest in violation of an attorney’s ethical duties.

In our scenario, the attorneys make two types of representations worthy of discussion here: (1) statements that constitute impermissible misrepresentations of material fact upon which the opposing party is

⁷¹ The intentional tort of fraud has various elements that go beyond making a false statement of material fact. Whether or not all of the elements of fraud exist, however, is a separate inquiry. Even if not satisfying all of the elements of the intentional tort, an attorney may violate ethical rules by making a false statement of fact to the opposing party in settlement negotiations because such statements could constitute deceit, employment of means not “consistent with truth” and dishonest conduct, all of which are ethically prohibited by Business and Professions Code sections 6106, 6128(a), and 6068(d).

intended to rely; and (2) statements that constitute acceptable exaggeration, posturing or “puffing” in negotiations.

Specific Examples

We will consider the examples set forth in the hypotheticals:

Example Number 1: Attorney’s misrepresentations about the existence of a favorable eyewitness and the substance of his expected testimony.

Attorney’s misrepresentations about the existence of a favorable eyewitness and the substance of the testimony the attorney purportedly expects the witness to give are improper false statements of fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the purpose of having Defendant rely on them. Attorney has no factual basis for the statements made. Further, 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, 313 [89 Cal.Rptr.2d 115] quoting Rest.2d Torts, § 538).

Thus, Attorney’s misrepresentations regarding the existence of a favorable eyewitness constitute improper false statements and are not ethically permissible. This is consistent with Business and Professions Code section 6128(a), *supra*, and Business and Professions Code section 6106, *supra*, which make any act involving deceit, moral turpitude, dishonesty or corruption a cause for disbarment or suspension.

Example Number 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 Plaintiff was earning \$75,000 per year, when Plaintiff was actually earning \$50,000, is an intentional misstatement of a fact. Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery. As with Example Number 1, above, Attorney’s statement constitutes an improper false statement and is not permissible.

Example Number 3: Attorney’s inaccurate representation regarding Client’s “bottom line” settlement number.

Statements regarding a party’s negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or “puffery,” are among those that are not considered verifiable statements of 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 statement of what Plaintiff will need to settle the matter is allowable “puffery” rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Plaintiff’s “bottom line” settlement number.

Example Number 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 fact intended to mislead Plaintiff and her lawyer. (See *Shafer v. Berger, Kahn,*

Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] [plaintiffs “reasonably relied on the coverage representations made by counsel for an insurance company”].) As with Example Number 1, above, Defendant’s lawyer’s intentional misrepresentation about the available policy limits is improper.

Example Number 5: Defendant’s lawyer’s representation that Defendant will file for bankruptcy if there is not a defense verdict.

Whether Defendant’s lawyer’s representations regarding Defendant’s plans to file for bankruptcy in the event that Defendant does not win a defense verdict constitute a permissible negotiating tactic will hinge on the specific representations made and the facts known. Here, Defendant’s lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy counsel before the mediation and was informed that Defendant is not legally eligible to file for bankruptcy. A statement by Defendant’s lawyer that expresses or implies that Defendant’s financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact. The conclusion may be different; however, if Defendant’s lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge.

Example Number 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, it is assumed that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job. As such, including in the list of Plaintiff’s damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. (See, e.g., *Scofield v. State Bar*, supra, 62 Cal.2d at 629 [attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant disciplined for making affirmative misrepresentations with the intent to deceive]; *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144 [148 P.2d 1] [attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)].)

Second, Attorney was specifically instructed by Plaintiff 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). While an attorney is generally required to follow his client’s instructions, Rule 3-700(B)(2) requires withdrawal if an attorney’s representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff’s instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If Plaintiff refuses, Attorney must withdraw under Rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Form. Opn. No. 2013-189;^{8/} see also Los Angeles County Bar Association Opn. 520).

^{8/} California State Bar Form. 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).

CONCLUSION

Attorneys are prohibited from making false statements intended to be relied upon, including during the course of negotiating with a third party and even where those negotiations occur through a third party neutral. Such prohibited communications include an attorney's implicit misrepresentations. However, attorneys may engage in permissible posturing or "puffery" during negotiations and may generally make statements regarding a client's negotiation goals or willingness to compromise because such statements are not the type of statements upon which parties to a negotiation ordinarily would justifiably be expected to rely.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.