

2023 Real Property Law Health & Wellness Retreat



March 24-26, 2023
Fairmont Sonoma Mission Inn
Sonoma, CA

Negotiating Ethically: Yes, It Can Be Done

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Course Overview

- Ethical issues confronting the advocate in ADR
- Ethics limits on lawyers during negotiations
- Confidentiality in mediation and arbitration

Can You Lie In A Negotiation- Poll

Video - Golden Balls



Can You Lie In A Negotiation

- The CA Rules of Professional Conduct allows you to lie but ...
- No fraud.
- 6 Elements of Common Law Fraud:
 - false
 - material
 - fact
 - scienter- speaker knows its false
 - reliance, and
 - injury

Contrast Fraud with CRPC 4.1 - Higher standard for lawyers!

- Rule 4.1 - “In the course of representing a client a lawyer shall not knowingly:”
- (a) make a false statement of material fact or law to a third person;* or
- (b) 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
- Similar to fraud but what is missing?
 - Reliance and damages
- Bus. & Prof. Code
 - B&P Code, §6068(d) – Lawyer must employ “those means only as are consistent with truth” and not mislead any judicial officer.
 - B&P Code, §6128 – misdemeanor for lawyer to engage in any deceit of “the court or any party”

Lying during a Negotiation

- Three Schools:
 - the poker school
 - the idealist school
 - the pragmatist school

<https://www.thisamericanlife.org/552/need-to-know-basis>

Hypothetical 1

In the joint session, plaintiff's counsel asked defense counsel what the insurance policy limits are. Defense counsel says, "I believe we have \$500,000." In separate caucus, defense counsel says the primary and excess limits are really \$3M, but asks the mediator not to tell plaintiff. Is the request ethical?

Rule 3.10 – Threatening Criminal, Administrative or Disciplinary charges

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this rule, the term “administrative charges” means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

Hypothetical 2

Can your client take the opposing counsel aside and say either agree to our terms or they're going to report counsel to the State Bar for arguably unethical conduct?

Confidentiality in Negotiation

- Senate Bill 820:
 - Settlement agreements over sexual harassment/assault/discrimination claims may not be confidential as to underlying facts
 - But claimant's identity may still be confidential

Hypothetical 3

In the joint session, plaintiff's counsel asked defense counsel what the insurance policy limits are. Defense counsel says, "I believe we have \$500,000." In separate caucus, defense counsel says the primary and excess limits are really \$3M, but asks the mediator not to tell plaintiff. Is the request ethical?

Settlement Agreements

- Written Settlement Agreement binding and enforceable by a court (CCP §664.6)
 - Thomas Dee Engineering Co., Inc v. Khtikian, A150008, 2018 WL 258998 (Cal. Ct. App., January 2, 2018) (Note: Unpublished)
- Importance of making agreement admissible (Evid. Code §1123) *Fair v. Bakhtiari (2006)*, 40 Cal.4th 189; *Stewart v. Preston Pipeline Inc. (2005)* 134 Cal. App. 4th 1565

Hypothetical 4

- The parties to a mediation reach a settlement during the course of the mediation, which is reduced to a writing and signed by all the parties at the mediation. The agreement does not recite the fact that the parties intend the agreement to be enforceable or binding, nor does it reference CCP §664.6. However, the settlement agreement is very detailed in all other respects.

Video- The Breakup



Hypothetical 5

- Is it ethical for a lawyer to tell the mediator privately that his client is a knucklehead, and the lawyer wants the mediator to “get tough” to persuade the client to settle?
- What about this scenario? The client asks the mediator for his/her opinion of a final offer. Before answering, the mediator and counsel discuss the mediator’s opinion on the offer. The attorney thinks it is a very good offer while the mediator does not. The attorney then instructs the mediator to decline answering his client’s inquiry. Is it ok for the attorney to make this request? What should the mediator do?

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