



Federal Bar Association

Seventh Annual Ethics, Competence, and Elimination of Bias All-Day MCLE Event

**January 26, 2021
9:00 a.m. to 3:35 p.m.**

10:05am-11:05am

*Honesty to Others
in Private and Public (Ethics)*

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San Diego County Bar Association Ethics Committee



ALL LIES ARE NOT CREATED EQUAL: RULE 4.1 IN CONTEXT

Federal Bar Association

January 26, 2021

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California Rule of Professional Conduct 4.1

(effective November 1, 2018)

- 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, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

California Rule of Professional Conduct

1.0.1(f): Knowledge

- “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s* knowledge may be inferred from circumstances.

California Rule of Professional Conduct

1.0.1(g): Person

- "Person" has the meaning stated in Evidence Code section 175.
- Evidence Code section 175

California Rule of Professional Conduct

1.0.1(d): Fraud

- “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

California Business and Professions Code section 6106

- The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.
- If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

Context 1: Political Speech



Hypothetical 1

- Lawyer X represents Candidate A, who has narrowly lost an election. Lawyer X appears at a press conference and recites a statement alleging that the election was subject to fraud committed by the maker of the software used in the election, which was programmed to switch votes from Candidate A to Candidate B. Lawyer X makes this statement based on statements made on social media by commentators and conducted no investigation into the truth of the allegations.
- Is Lawyer X subject to discipline for making this statement?
- Lawyer X then filed a lawsuit in Federal Court against a number of parties including state election officials and the software manufacturer, alleging that the opposing parties engaged in a conspiracy to commit election fraud against Candidate A.
- Is Lawyer X subject to discipline for filing this lawsuit?

Rule 4.1 Comment 2

- [2] This rule refers to statements of fact. **Whether a particular statement should be regarded as one of fact can depend on the circumstances.** For example, 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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud

First Amendment Protection for Political Speech

- Political speech is “ ‘at the core of what the First Amendment is designed to protect.’ ” (Morse v. Frederick (2007) 551 U.S. 393)
- San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified Sch. Dist., (2009) 46 Cal. 4th 822, 845,

Broad Scope of Protection for Political Speech

- The right to criticize involves not only the right to criticize responsibly but to do so irresponsibly. Thus, those engaged in political debate are entitled not only to speak responsibly but to “. . . speak foolishly and without moderation.” (Baumgartner v. United States, 322 U.S. 665, 674.)...
- That which might be a statement of fact under other circumstances may become a statement of opinion when uttered in the political context. “An allegedly defamatory statement may constitute a fact in one context but an opinion in another, depending upon the nature and content of the communication taken as a whole.”
- Desert Sun Pub. Co. v. Superior Court, (1979) 97 Cal. App. 3d 49, 52

First Amendment Protection Limited for Statements About Judges

- No First Amendment protection for false statements about judges
 - *Standing Committee v. Yagman (Ninth Cir. 1995) 55 F.3d 1430*
 - *In the Matter of Anderson (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775*
- Rule 8.2 Judicial Officials (Rule Approved by the Supreme Court, Effective November 1, 2018)
 - *(a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.*
 - *b) A lawyer who is a candidate for judicial office in California shall comply with canon 5 of the California Code of Judicial Ethics. For purposes of this rule, “candidate for judicial office” means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer’s duty to comply with this rule shall end when the lawyer announces withdrawal of the lawyer’s candidacy or when the results of the election are final, whichever occurs first.*

Contrast: Factual Statements Made in Court

- Rule 3.3 Candor Toward the Tribunal* (Rule Approved by the Supreme Court, Effective November 1, 2018) (a) A lawyer shall not: (1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;
- FRCP Rule 11:(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
 - (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
 - (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
 - (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
 - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Context 2: Contract Negotiations



Rule 4.1 Comment 1

- [1] 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. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.

Hypothetical 2.1

- Attorneys for two parties are bargaining over the purchase/sale of a small business. The Seller is willing to accept \$500,000, while the Buyer is willing to pay \$575,000. The Seller's attorney initially indicates that the Seller must obtain \$600,000, with the Buyer's lawyer suggesting that the Buyer cannot go above \$450,000. Have they behaved unethically?

Hypothetical 2.2

- Rosemary Abel is an attorney who is representing the seller of an apartment complex. The client instructs Rosemary to tell the buyer's lawyer that "the complex is easily worth \$2.5 million." In fact, the seller's latest appraisal indicates that the property is worth substantially less than that. Which of the following statements most accurately describes Rosemary's responsibilities under the Rules of Professional Conduct?
- (A) Rosemary may not make the statement because it is a false statement of material fact.
- (B) Rosemary may make the statement because she does not owe the other lawyer a duty of candor in an out-of-court negotiation.
- (C) Rosemary may make the statement because it is not a statement of material fact.
- (D) Rosemary may make the statement but must disclose the appraisal.

Hypothetical 2.3

- Brian Hubbard is an attorney who is eager to resolve a claim that is pending against his client in bankruptcy. Brian knows that the claim will not be dischargeable in bankruptcy as long as the claimant files a claim by the deadline. His opposing counsel is a young, inexperienced lawyer who knows little about the intricacies of bankruptcy law. Brian tells this young lawyer that if she files a claim it will just be discharged under bankruptcy law. Which of the following statements most accurately describes the propriety of this statement under the Rules of Professional Conduct?
- (A) The statement is not misconduct because no reasonable lawyer would rely upon opposing counsel to accurately state the law that will apply to a dispute.
- (B) The statement is not misconduct because it is not a false statement of material fact.
- (C) The statement is misconduct because of the disparity in knowledge and experience between the two lawyers.
- (D) The statement is misconduct because it is a false statement of law.

Hypothetical 2.4

- Jane Ridley is an attorney who is in the midst of trying to negotiate the settlement of a civil claim with the assistance of a mediator. The mediator, who is not a judge, is conducting the settlement negotiations in a "caucus" format, and is shuttling back and forth between the parties. Ordinarily, Jane would feel free in a negotiation to bluff about her settlement authority by telling the plaintiff's counsel that she cannot exceed a certain payment, even if her authority is actually for a greater amount. May Jane engage in this tactic in a caucused mediation?

Hypothetical 2.5

- May a lawyer representing an employer in labor negotiations state to union lawyers that adding a particular employee benefit will cost the company an additional \$100 per employee when the lawyer knows that it actually will cost only \$20 per employee? What if the lawyer did not know the actual cost?

Hypothetical 2.6

- Prior to any discovery, parties agree to participate in a court-sponsored settlement conference presided over by a non-judge attorney volunteer. May Defendant's lawyer ethically represent to the settlement officer that Defendant's insurance policy limit is \$50,000 even though it is really \$500,000?

Hypothetical 2.7

- May the lawyer representing a defendant manufacturer in patent infringement litigation ethically repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete?

Hypothetical 2.8

- In a settlement conference brief submitted on plaintiff's behalf, Lawyer asserts she will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Lawyer references the existence of an eyewitness, asserts the eyewitness's account is undisputed, and that the eyewitness's credibility is excellent. In fact Attorney has been unable to locate any eyewitness to the accident. May an attorney stating that there is an eyewitness to an accident when, in fact, no such witness exists? ?

Hypothetical 2.9

- May a plaintiff's attorney knowingly accept a settlement offer without disclosing to opposing counsel that the plaintiff has died?

THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT (COPRAC) 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.

Context 3: Criminal Plea Negotiations



Hypothetical 3.1

- Assistant U.S. Attorney (AUSA) is prosecuting Jane Doe for conspiracy to import and distribute cocaine (21 U.S.C. § 963, 846) and substantive offenses of distribution (21 U.S.C. § 841) and importation (21 U.S.C. § 952). Doe is represented by Federal Public Defender (FPD).
- AUSA had made a so-called “Fast Track” offer to FPD with every sentence “discount,” but the Doe rejected the offer. As these pre-trial proceedings were occurring, the DEA case agent, Elliott Ness, acquired additional incriminating information/evidence against Doe and provided it to AUSA.
- Although she did not seek it, the AUSA’s supervisor, who was keen to move cases along short of trial, told AUSA she could settle the case with a plea to an alternate charge that carried a statutory maximum sentence of 5 years in federal custody. Doe was facing a mandatory minimum of 10 years in prison if convicted of the charges in the Indictment.

Hypothetical 3.2

- AUSA knew that Special Agent Ness, who would be her principal witness at trial, had adverse, possibly impeaching, information in his personnel file. If the case were to go to trial, AUSA planned to file a motion under seal with the judge pursuant to the Henthorn decision for a ruling as to whether she would have to disclose this information to the defense.
- AUSA also knew from her work in the Narcotics Section of the U.S. Attorney's Office that DEA had lost track of or destroyed seized drugs in some cases because the agency had run out of storage capacity in the district. She had not inquired of Ness whether the drug evidence connected to the case against Doe had been tested, and she was waiting for that report, which Ness kept promising to provide.
- AUSA told FPD that Doe would have to plead to all charges in the Indictment ("plead to the face") and would be liable for a minimum 10 year prison term, but that the plea might give her "safety valve" relief from the mandatory minimum sentence. AUSA claimed that she had an overwhelming case for guilt and had never lost a trial

Hypothetical 3.3

- FPD asked what was AUSA's settlement authority. AUSA replied that she would not share her settlement authority, as it was privileged or confidential. AUSA did not tell FPD about the adverse information in Ness' personnel file or the possibility that the drug test evidence in the case might not be available at trial. AUSA did tell FPD about the new incriminating evidence Ness had acquired since the Indictment was filed.
- Seeking to minimize her client's role and culpability in the drug smuggling conspiracy, FPD told AUSA that Doe was the victim of the real drug smuggler; that Doe had been approached in a bar by the smuggler and by and by was asked to bring a package across the border; that the two had a brief and violent relationship and Doe was afraid to resist the smuggler's demand and didn't really know what was contained in the package.
- AUSA asked FPD if Doe planned to testify to all this and be subjected to AUSA's withering cross-examination. FPD said that Doe did not have to testify, that FPD had a witness who would testify to all of this. FPD had no such witness, only a claim from Doe that there was such a witness.

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