

MCLE SELF-STUDY (PART 1)

THE FINE LINE BETWEEN POSTURING AND LYING IN NEGOTIATING A DEAL

By: Carol M. Langford

Whether you do transactional work or litigation, or handle civil, criminal or administrative matters, most lawyers find that they negotiate as a daily part of their professional lives. Negotiation by its very definition involves providing something less than the “truth, the whole truth, and nothing but the truth.” But is there a difference between a direct misstatement and one which is less direct but ultimately no less misleading? When does a misrepresentation become a lie, and when is it merely a legitimate negotiation tactic – “puffing” or “playing poker?” And is there ever a time when an attorney is obligated to share with the other side the hidden weaknesses of his or her position?

It all seems so simple: Business & Professions Code §6068 (d) states that it is the duty of an attorney to “employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth and never seek to mislead the judge, or any judicial officer by an artifice or false statement of fact or law.” And yet, even the strongest proponents of full and candid disclosure acknowledge that negotiation can involve concealing one’s true position and – to use the poker parlance often adopted to describe the process – running a bluff. In short, negotiation is not, and cannot be, a matter of “putting all our cards on the table.”

Indeed, paragraph 2 to the Comment section of ABA Rule 4.1 states that certain types of statements made in negotiation are not to be 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.” But this rule comes with a warning in later commentary; a lawyer is not allowed to counsel or assist a client in conduct the lawyer knows is criminal or fraudulent.

There are gender differences in the way and amount that people lie. Dory Hollander, Ph.D has done extensive research on this issue. She says that “Men lie. Women lie. Neither sex has any corner on shading the truth.

Lawyers find many ways to justify lies. Iowa law professor Gerald B. Wetlaufer thinks that lawyers should own up to the fact that they lie, and do so under his broad definition: any effort “to create in some audience a belief at variance with one’s own.” Citing the Random House Dictionary, which goes beyond direct falsehoods to define “lie” as “something intending or serving to convey a false impression,” Wetlaufer argues that concealments and omissions are also lies. He catalogues the ways in which lawyers lie and fool themselves into believing either that they don’t, or that the lies don’t “count.” His list is summarized:

"I didn't lie," which includes "My statement was literally true" (though misleading), "I was speaking on a subject about which there is no Truth," and "I was merely putting matters in the best light."

"I lied, if you insist on calling it that, but it was....": "ethically permissible" (and thus okay); "legal" (and thus okay); just an omission;" or ineffectual, because it was simply not believed.

"I lied, but it was justified by the special ethics of lawyering," especially the duties owed to clients: loyalty, confidentiality and of course the old favorite zealous representation.

"The lie belongs to someone else," usually the client, so that the lawyer is "just the messenger."

"I lied because my opponent acted badly." This includes "self-defense," or "having to lie" before the opponent does, lying to teach the opponent a lesson, or because bad behavior means the opponent has forfeited any right to candor.

According to Alvin Rubin, lawyers serve society's interests by participating in the process of achieving the just termination of disputes. He posits the following precept: *The lawyer may not accept a result (in negotiation) that is unconscionably unfair to the other party.*

Following is a hypothetical by Larry Lempert (*Inside Litigation*, March 1988, Volume 2, Number 5) for your review: *In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks the plaintiffs have gone out of business, although you did not say that. In fact, the business is continuing, and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression?* The answer should be no, but some lawyers would be in disagreement. Or, how about this one: *You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know he is out skiing?* Again, the answer should be no.

We may not agree on the right answer, so let's try to resolve the ethical dilemma. James C. Freund says that there are some "so-called blocking techniques" that can be used. The following examples apply to the sale of a house where the seller wants to sell quickly because of a commitment to buy another property, and does not have another firm offer to purchase:

Answer incompletely. Answer general questions specifically, specific questions generally. ("Obviously, I will have to live somewhere, I am not about to take to the streets.")

Answer another question. Give information on a related non-sensitive query. ("Funny you should ask. The broker was just saying that this would be a perfect house for a doctor with a home office..")

Over answer the question without making a commitment to any one response. (“I may have other buyers; I may have one buyer; I may have a prospective buyer...”)

Rule the question out of bounds. (“I think my financial needs are an inappropriate, irrelevant area of inquiry.”)

Ignore the question. This can be done either by silence or by changing the topic. (“How do you like the icemaker on the refrigerator?”)

Blocking can work up to a point, and is the ethical alternative to the outright lie. Know that there are significant liability risks to making misrepresentations in negotiations. Material misrepresentations can void a settlement and be the basis for tort liability for the lawyer. Do not let Abraham Lincoln say of you: “He doesn’t lie, but he’s awfully stingy with the truth.”

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MCLE SELF-STUDY TEST (PART 2)

THE STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE

BY: Howard R. Melamed

Whether you represent a disgruntled client who wants to sue his or her former attorney or you are defending an attorney who has been sued by his or her former client, immediate consideration should be given to the statute of limitations. For a plaintiff's attorney, failure to determine whether the client's claim is time-barred may result in a useless expenditure of time and money on a stale claim, or it may result in the attorney missing the deadline for filing the malpractice action. For a defense attorney, determining that the complaint is untimely can lead to its early dismissal by way of demurrer.

The statute of limitations for legal malpractice is one year from the time the client discovers, or should discover, the facts constituting the attorney's wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first [CCP §340.6]. Both the one and four-year limitation periods are tolled until the client suffers actual injury from the malpractice; so long as the attorney continues to represent the client regarding the specific subject matter in which the alleged wrongful act or omission occurred; and so long as the client is under a legal or physical disability which restricts his or her ability to commence a legal action. The four-year limitation period is tolled while the attorney willfully conceals the facts constituting the wrongful act or omission.¹

¹ Code of Civil Procedure section 340.6 reads in its entirety as follows:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: (1) The plaintiff has not sustained actual injury; (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action. (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall

Section 340.6 applies to every action against an attorney based on a wrongful act or omission arising in the performance of the attorney's professional services, with the single exception of an action for actual fraud.

DISCOVERY OF THE WRONGFUL ACT OR OMISSION

The one-year limitations period is triggered by the client's discovery of the facts constituting the wrongful act or omission and not by his or her discovery that such facts constitute professional negligence.² "The test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation."³ A plaintiff need not be aware of the specific facts necessary to establish the claim. Once the plaintiff has a suspicion of wrongdoing, he must find the facts; he cannot wait for the facts to find him.

In the following illustration, the attorney was successful at both the trial and appellate court level. The attorney represented the plaintiff in a personal injury action, and settled the case for \$15,000 on October 1, 2000. The plaintiff was unhappy with the settlement. After the case had been dismissed, the attorney sent the \$15,000 settlement check to the client, but did not inform him of the dismissal. The plaintiff did not cash the settlement check. In May of 2001, the client discovered that his case had been dismissed, and filed a complaint with the State Bar. On October 1, 2001, the carrier submitted a new settlement check to the plaintiff's new counsel, which the plaintiff cashed. The State Bar's investigation concluded on July 29, 2003, finding that the attorney had a duty to inform the client his case had been dismissed.

On July 28, 2004, the plaintiff sued the attorney alleging malpractice and breach of fiduciary duty. In sustaining the demurrer, the court found that the plaintiff discovered in May of 2001, attorney's wrongful act, the dismissal of plaintiff's case. The plaintiff had one year from May of 2001 to file his malpractice action. The court found effective October 1, 2001 plaintiff had new counsel, attorney ceased representing plaintiff not later than October 1, 2001, and plaintiff sustained actual injury when he cashed the \$15,000 settlement check. Since the plaintiff did not file his complaint until more than one year later, it was time-barred.

ACTUAL INJURY

The statute of limitations for legal malpractice is tolled so long as the client has not

commence to run upon the occurrence of such act or event.

²*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685.

³*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803.

sustained actual injury due to the attorney's wrongful conduct. The test for actual injury turns on whether the plaintiff has sustained any damages compensable in an action, other than for actual fraud, against the attorney for his wrongful conduct.⁴

Determining when actual injury occurred requires only a factual analysis of the claimed error and its consequences; it is the fact of damage, not the amount that is critical.⁴ Once the plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to the amount tolls the limitations period.⁵ Actual injury occurs on entry of an adverse judgment or final order of dismissal even if the matter is appealed.⁶

CONTINUOUS REPRESENTATION

The statute of limitations for legal malpractice is tolled while the attorney continues to represent the client regarding the *specific* subject matter in which the alleged wrongful act or omission occurred.

The continuous representation rule is not triggered by the mere existence of an attorney-client relationship.⁷ It assumes a relationship between the parties that is not sporadic, but which develops and continues from the professional services in which the alleged malpractice occurred. The inquiry is not whether an attorney-client relationship still exists, but when the representation of the "specific subject matter" terminated. The lack of contact between attorney and client for a prolonged period demonstrates the lack of continuous representation for purposes of the tolling provision.

Where no court or administrative tribunal retains jurisdiction over a matter, and nothing remains to be done with regard to the proceedings, the duty and authority of counsel comes to an end. No formal notice or motion of withdrawal is necessary to memorialize this termination.⁸

The scope of the attorney's representation is important in determining the completion of counsel's representation, and may be limited by the agreement between the attorney and the client.⁹

The downside of not having a precise fee agreement is apparent in the following fact scenario. An attorney negotiated the purchase of a partial interest in a shopping

⁴ *Fritz v. Ehrmann* (2006) 136 Cal.App.4th 1374, 1382-1383; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751.

⁵ *Davies v. Krasna* (1975) 14 Cal.3d 502, 514.

⁶ *Laird v. Blacker* (1992) 2 Cal.4th 606, 615.

⁷ *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 228.

⁸ *Panattoni v. Superior Court* (1988) 203 Cal.App.3d 1092, 1097.

⁹ *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940.

center under professional management for his client in 1990. At purchase, the client was informed it would generate \$5,000 in monthly revenue. Between 1990 and 1994, the shopping center generated virtually no revenue, and then generated \$1,000 a month between October 1994 and February 1997. In February of 1997, the attorney attended a meeting between the shopping center developer/manager and his client, where the manager urged the client to agree to a refinance, which the attorney also urged upon client. The client declined to follow the advice. In April of 1997, client complained to the State Bar that he had been cheated by his lawyer in the shopping center investment. In 1999, the attorney filed a quiet title action that benefited the shopping center and generated \$100,000 in revenue to the client. In 2001, the lender foreclosed on the shopping center, causing the client to lose his investment.

The client sued for legal malpractice in 2002, claiming the attorney was responsible for his losses from the shopping center investment. Attorney argued that the client discovered the shopping center was a lousy deal not later than 1994, when it generated no revenue, that for the next two-plus years, the attorney provided no services for the client in connection with the shopping center, and that negotiating a purchase was different in character from advice to refinance or filing a quiet title action. The court of appeal rejected both of these arguments and held that the client hired the attorney to invest and manage the property (despite the professional manager). The court reasoned that the quiet title action attempted to salvage the deal and to extricate the client and, thus, found continuous representation.

CONCLUSION

When evaluating a legal malpractice case, the first question should be, “On what date did your attorney last render legal services to you?” If the attorney performed services for the client in connection with the matter out of which the malpractice claim arises within a year, then the claim is not barred. If no such services were performed within a year, you must ascertain when the client discovered the attorney’s wrongful act or omission and when the client suffered actual injury from the attorney’s conduct.

Walnut Creek attorney Howard R. Melamed specializes in legal malpractice for plaintiffs and defense for uninsured attorneys.

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MCLE TEST – 1 hour Ethics credit

Part 1 - The Fine Line between Posturing and Lying in Negotiating a Deal

Part 2 - The Statute of Limitations for Legal Malpractice

1. One of James Freund's "blocking techniques" includes stating that the lawyer is only the messenger of a client's lie.
2. According to James Freund if a lawyer answers a question incompletely this can equate to an outright lie.
3. According to Gerald Wetlaufer, if an attorney excludes information regarding a client's situation so as to create a belief at variance with one's own, then he is lying.
4. Material misrepresentations can void a settlement but cannot be the basis for a tort liability.
5. James Freund's "blocking techniques" should be used up to a point because there are serious liability risks in making misrepresentations during negotiations.
6. Pursuant to ABA Rule 4.1, an estimated value placed on an item that is the subject of negotiations is not to be taken as a statement of material fact in the negotiations.
7. The statute of limitations for legal malpractice is one year from the date of the wrongful act or omission or four years from the time the client discovers the facts constituting the attorney's wrongful act.
8. CCP Section 340.6 applies to every action against an attorney, including "actual fraud."
9. The one-year limitation is triggered upon the client's discovery that his attorney's conduct amounted to professional negligence.
10. One requirement for both the one and four year limitations to toll includes the attorney continuing to represent the client regarding any subject matter.
11. If the attorney and client lack contact for a prolonged period of time, this could equate to a lack of continuous representation for tolling purposes.
12. The court in *Foxborough v. Van Atta* held that the continuous representation rule is usually triggered by the existence of an attorney-client relationship.
13. *Panattoni v. Superior Court* held that no formal notice or motion of withdrawal is necessary to memorialize a termination of representation.
14. The scope of the attorney's representation is usually unimportant in determining whether there is continuous representation.
15. When evaluating a legal malpractice case, the first thing an attorney should do is "on what date did your attorney begin rendering services to you."
16. The test for actual injury in a legal malpractice claim hinges on whether the plaintiff incurred any damages compensable in an action, without regard for actual fraud, against an attorney for his wrongful conduct. (
17. What is critical upon determining actual injury is the amount in damages.
18. In *Laird v. Blacker* the court held that actual injury could occur upon entry of final judgment but not on final order of dismissal if the matter is appealed.
19. The four-year limitation period is tolled while the attorney willfully conceals the facts constituting the wrongful act or omission.
20. In *McGee v. Weinberg*, the court held the test to determine when a client first discovers information of wrongful acts is whether the evidence is sufficient to put a reasonable person on inquiry.

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Part 1 - The Fine Line between Posturing and Lying in Negotiating a Deal

Part 2 - The Statute of Limitations for Legal Malpractice

MCLE TEST ANSWER SHEET

1. True False
2. True False
3. True False
4. True False
5. True False
6. True False
7. True False
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

Name _____

Law Firm _____

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City & Zip _____

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