Negotiation Ethics at Mediation

CONTRA COSTA COUNTY BAR ASSOCIATION

FEBRUARY 24, 2021

12:00 NOON TO 1:30 P.M.

VIA ZOOM

ROBERT JACOBS MEDIATOR | ARBITRATOR

MARY GRACE GUZMAN

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Mary Grace Guzmán graduated from the University of California, Berkeley with a Bachelor's degree in Anthropology and a minor in Chicano/a Studies in 1996. After working as a teacher, Mary Grace returned to law school and obtained her Juris Doctorate from Santa Clara Law with a certificate in Social Justice in 2008. Mary Grace represents lawyers and law students before the State Bar of California. She also advises lawyers and law firms regarding legal ethic issues such as conflict of interest issues, fee disputes, and advises lawyers and law firms as outside ethics counsel. Mary Grace provides MCLE courses on Legal Ethics, Competency, and the Elimination of Bias. Mary Grace has been named to the Northern California Super Lawyers Rising Star for Professional Liability through 2015 -2020.

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Robert Jacobs is a mediator and arbitrator in the San Francisco Bay Area with over 30 years of litigation experience. He serves as a settlement mentor and mediator for several Bay Area county superior courts, the Bar Association of San Francisco and California Lawyers for the Arts. In 2020 he was the chair of the ADR section of the Contra Costa County Bar Association and the co-chair of the ADR section of the Alameda County Bar Association. He is a designated SuperLawyer and holds an AV rating with Martindale Hubbell. He mediates cases involving business, real estate, construction, personal injury, and trust and probate law

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Resources:

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CA State Rules of Court

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Ethics – Rules of Conduct

The hypothetical examples on the following pages are largely (but not entirely) drawn from formal ethics opinions taken from the website of the State Bar of California. However, the hypotheticals and conclusions have in some instances been modified and may not be complete. The questions posed, the authorities cited and the conclusions drawn should not be considered as being those of the State Bar or any committee of the State Bar. None of the materials in the following pages should be relied on in any specific situation, issue or problem, and users are referred to original sources of authority in all cases. Competent, experienced ethics counsel should be consulted in all cases that involved any of the questions, scenarios or issues discussed in the following pages.

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Hypothetical One

Carrie Client was involved in an automobile accident and sustained significant personal injuries. She consulted Larry Lawyer, who agreed to represent her on a contingency basis which provided that Larry would receive 33 percent of any recovery prior to filing suit, 40 percent of any recovery thereafter and 55 percent of any settlement reached 30 days prior to the first scheduled trial date or thereafter.

Two months before trial Larry proposed mediation and the defense agreed. The defense proposed two mediation dates more than 30 days prior to trial, and two dates less than 30 days prior to trial. Larry, Carrie and the proposed mediator are all available on each of those dates. All depositions in the case have been taken, including all expert depositions and all of the case workup has been done.

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Pursuant to his engagement letter and fee agreement, Larry's fee will be 40 percent if settlement is reached at a mediation which is scheduled more than 30 days before trial, but it will be 55 percent if settlement is reached at a mediation scheduled less than 30 days before trial. (Original fact pattern; not based on any formal ethics opinion.)

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Question: Can Larry ethically choose a mediation date less than 30 days before trial because doing so will entitle him to receive a larger percentage fee if the mediation is successful? Why or why not?

Authority: "Every attorney is guilty of a misdemeanor who . . . [w]illfully delays his client's suit with a view to his own gain." *Business and Professions Code §6128(b*)

"A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited . . . by the lawyer's own interests." *Rule of Professional Conduct 1.7(b)*

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Question: Even if a good reason exists for Larry to delay the mediation date, would his fee of 55% potentially run afoul of his ethical obligations under the Rules of Professional Conduct?

Authority: "A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee." *Rule of Professional Conduct 1.5(a)*

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"(b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into . . . . The factors to be considered in determining the unconscionability of a fee include . . . the following:

(1) whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee

. . .

(3) the amount of the fee in proportion to the value of the services performed. *Rule of Professional Conduct 1.5(b) (1), (3)*

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Hypothetical Two

Same facts as previous hypothetical, but with the following additional facts. Prior to the mediation, Larry Lawyer met with his client and discussed the mediation process. Larry told Carrie that generally everything said at mediation is confidential – so that nothing said could later be used in any kind of noncriminal legal proceeding. Larry said this included not only communications between plaintiff and the defense, but also prevents any discussions between Larry and Carrie from later being used, even if there were later some kind of a disagreement between them. However, Larry didn't provide Carrie any kind of written disclosure, and he didn't get Carrie's signature on any written disclosure to this effect. (Original fact pattern; not based on any formal ethics opinion.)

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Question: Has Larry committed some sort of violation by failing to provide Carrie with a written disclosure about mediation confidentiality?

Authority: Evidence Code §1129

Question: Does failure to comply with provisions of the Evidence Code constitute an ethical violation?

Authority: "A lawyer shall not . . . repeatedly fail to perform legal services with competence." *Rule of Professional Conduct 1.1(a)*

"A lawyer shall . . . (3) keep the client reasonably informed about significant developments relating to the representation. . . ." *Rule of Professional Conduct 1.4(a)(3)*

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Hypothetical Three

Same facts as previous hypothetical, but with the following additional facts. In the mediation brief submitted on Carrie's behalf, Larry asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Larry 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, Larry has been unable to locate any eyewitness to the accident. (Based on Formal Opinion No. 2015-194, example 1)

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Question: Is Larry's fictitious representations about the existence of a key eyewitness mere "puffery" such that it is ethically permissible?

Authority: "It is the duty of an attorney to . . . 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 §6068(d)*

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"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." *Business and Professions Code §6106*

"Every attorney is guilty of a misdemeanor who . . . (a) [i]s guilty of any deceit or collusion, or consent to any deceit or collusion, with intent to deceive the court or any party." *Business and Professions Code §6128(a)*

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"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

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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' . . . [and are thus] misrepresentations regarding the existence of a favorable eyewitness [which] constitute improper false statements and are not ethically permissible." *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 6, example 1)*

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Question: Is the applicable truthfulness standard relaxed at mediation because the parties and counsel are negotiating at arm's length?

Authority: "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'. . . . On the other hand, the ABA has recognized that 'puffing' or posturing may be permissible based on the generally understood norms of negotiation. (continued on next slide)

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The ABA defines 'puffing' or posturing as 'statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely.'" *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 4)*

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Question: What kinds of incorrect, inaccurate or incomplete statements qualify as "puffery" such that their assertion does not rise to the level of dishonest representation?

Authority: "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. . . ." *State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 4, citing Model Rule 4.1)*

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"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.'" *State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 5; also see example number 1 on page 6)*

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Example: *Coviello v. State Bar (1955) 45* Cal. 2d 57 (counsel filled in the names of grantees in two deeds without authority to do so and showed them to opposing counsel, thereby deceiving opposing counsel, in order to gain a benefit for himself and his client. Discipline of six months suspension imposed.)

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Hypothetical Four

While the mediator is talking privately with Larry and Carrie, he asks Larry and Carrie about Carrie's wage loss claim. Larry tells the mediator that Carrie was earning $75,000 per year, which is $25,000 more than Carrie was actually earning; Larry is aware that the mediator will convey this figure to Defendant, which he does. (Based on *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194, example 2)*

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Question: Is Larry's fictitious representations about Carrie's wage loss mere "puffery" such that it is ethically permissible in settlement negotiations?

Authority: *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 6, example 2)*

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Hypothetical Five

While talking privately outside the presence of the mediator, Larry and Carrie discuss Carrie's "bottom line" settlement number. Carrie advises Larry that Carrie's "bottom line" settlement number is $175,000. When the mediator asks Larry for Carrie's demand, Larry says, "Carrie needs $375,000 if you want to settle this case."
(Based on *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 page 6, example 3)*

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Question: Is Larry's representation that a settlement figure of $375,000 will be required to settle the case ethically permissible when Carrie has specifically stated she will settle for $175,000?

Authority: "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." *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 6, example 3)*

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Hypothetical Six

In response to Carrie's settlement demand, Defendant's lawyer informs the mediator that Defendant's insurance policy limit is $50,000. In fact, Defendant has a $500,000 insurance policy.
(Based on *State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194, example 4)*

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Question: Is the defense counsel's misstatement of the amount of the policy limits mere "puffery" such that it is ethically permissible?

Authority: "Defendant Lawyer's inaccurate representations regarding Defendant's policy limits is an intentional misrepresentation of fact intended to mislead Plaintiff and her lawyer . . . . [and] is improper." *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 6, example number 4)*

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Hypothetical Seven

At the mediation, defense counsel Lucas Lawyer states that Daryl Defendant intends to file for bankruptcy if Daryl does not get a defense verdict. In fact, two weeks prior to the mediation Daryl consulted with a bankruptcy lawyer and was advised that Daryl does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Daryl has informed Lucas Lawyer of the results of his consultation with bankruptcy counsel and that Daryl does not intend to file for bankruptcy. (Based on *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194, example 5)*

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Question: Is defense counsel's statement that the defendant will file a petition in bankruptcy ethically permissible under these circumstances as mere puffery?

Authority: "Defendant's lawyer knows that Defendant does not intend to file for bankruptcy and 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 . . . if Defendant's lawyer does not (continued on next slide)

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know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge." *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194 (page 7, example 5)*

Question: Is the answer different if the client had not expressly consulted bankruptcy counsel?

Question: Is the answer different if the client at this point is only considering filing a petition in bankruptcy?

Question: Is the answer different if the client is eligible for a chapter 7 discharge but is "dead set" against filing a petition in bankruptcy?

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Hypothetical Eight

The matter does not resolve at the mediation, but the parties agree to participate in a follow-up mediation one month later, pending the exchange of additional information regarding Carrie's medical expenses and future earnings claim. In particular, Larry agrees to provide additional information showing Carrie's efforts to obtain other employment in mitigation of her damages and the results of those efforts. During that month, Larry learns that Carrie has accepted an offer of employment and that Carrie's starting salary will be $75,000. Recognizing that accepting this position may negatively impact her (continued on next slide)

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future earnings claim, Carrie instructs Larry not to mention Carrie's new employment at the upcoming mediation 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 mediation, Larry makes a settlement demand that lists lost future earnings as a component of Carrie's damages and attributes a specific dollar amount to that component. (Based on *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194, example 6)*

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Question: At the second mediation can Larry properly include future wage loss as a part of Carrie's damages claim (without taking into account Carrie's new employment at $75,000 per year)?

Authority: "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 (continued on next slide)

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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 (continued on next slide)

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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)].)" *The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-194 (page 7, example 6)*

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Question: What are Larry's ethical obligations in connection with Carrie's instruction that he not disclose this information?

Authority: "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 any attorney's representation would result in a violation of the ethical (continued on next slide)

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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; see also Los Angeles County Bar Association Opn. 520)." *The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-194 (page 7, example 6)*

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Hypothetical Nine

At mediation Larry tells the defense that the defense offer is unacceptable because the offer amount leaves his client with too little after Larry's attorneys fees are paid. Defense counsel balks at this claim. Larry discloses that his fees will be 55 percent of the total recovery; defense counsel doesn't believe him. Larry has with him a copy of his fee agreement with Carrie Client. (Original fact pattern; not based on any formal ethics opinion.)

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Question: Can Larry ethically disclose to defense counsel his percentage of the recovery without first getting permission to do so from Carrie Client?

Question: Can Larry ethically show the fee agreement to defense counsel without getting advance permission from Carrie?

Authority: "A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and Section 952 of the Evidence Code." *Business and Professions Code §6149 (State Bar Act)*

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Hypothetical Ten

After several hours of hard negotiations at mediation, Carrie's personal injury case still hasn't settled. However, the parties are close. Defense counsel meets directly with Larry out in the hall, tells him that he just can't get any more money from the plaintiff, and says that the case will settle if Larry will just discount his fees by $20,000.00 (there is no written offer of settlement). (Original fact pattern; not based on any formal ethics opinion.)

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Question: Is Larry obligated to communicate this oral offer to his client?

Authority: "A lawyer shall promptly communicate to the lawyer's client . . . (2) all amounts, terms and conditions of any written offer or settlement made to the client . . ." *Rule of Professional Conduct 1.4.1.*

"An oral offer of settlement made to the client in a civil matter must also be communicated if it is a 'significant development' under rule 1.4." *Official Comment to Rule of Professional Conduct 1.4.1*

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Question: Does this offer create a conflict of interest between Larry and his client?

Question: If so, what are Larry's ethical duties with respect to such conflict?

Authority: "A lawyer shall not, without informed written consent . . . represent a client if there is a significant risk the lawyer's representation of the client will be materially limited . . . by the lawyer's own interests." *Rule of Professional Conduct 1.7(b)*

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"A lawyer shall . . . (3) keep the client reasonably informed about significant developments relating to the representation . . . ." *Rule of Professional Conduct 1.4(a)(3)*

Question: Can Larry ethically reject this offer without first disclosing it to his client?

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Hypothetical Eleven

In addition to doing personal injury plaintiff work, Larry does a lot of collection work. Defense counsel knows this. At mediation defense counsel proposes a settlement that provides for an all cash payment that is acceptable to Carrie Client but which would leave nothing for Larry's fee. However, defense counsel tells Larry that the defendant will assign to Larry a large collection matter against a financially secure defendant so that Larry will become the owner of the claim and Larry can then collect in his own name. Collection of even 30% of the amount due would be triple the amount of fees Larry expects to receive on Carrie Client's claim. (Original fact pattern; not based on any formal ethics opinion.)

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Question: Can Larry ethically accept an assignment of this collection fee in exchange for waiving his fee in Carrie Client's personal injury matter?

Authority: "Every Attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor." *Business and Professions Code §6129*

Note: an exception exists for transfers of such cases to counsel where the transferor owes money to the attorney and the claim is transferred in consideration of such money owed. Martin v. Freeman (1963) 216 Cal. App 2d 639.

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