The Thin Line Between Puffery and Lies

By Phyllis Pollack and Caroline Vincent

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Until the last decade or so, one of the biggest parts of being a lawyer was not even taught in law school: negotiation and negotiation ethics. Think about it — lawyers negotiate everything, every single day. What lawyer will answer a question with a simple "yes" or "no"? Rather, the answer is always a negotiation. Not surprisingly, this topic has been on the minds of both the American Bar Association and the State Bar of California.

In 2006, the American Bar Association issued its Formal Opinion 06-439 discussing the difference between "puffing " and misrepresentation. As one might expect, the ABA noted that understating a willingness to resolve the dispute, or emphasizing the strengths of a case while minimizing its weaknesses is permissible posturing. The opinion then delves into what is not permissible, using ABA model Rule 4.1 which prohibits a lawyer from making a false statement of material fact. In sum, the opinion concludes that if the statement being made is an expression of opinion and not one of material fact upon which one can expect to rely, the statement is permissible posturing. Above all, parties should negotiate honestly, in good faith, truthfully and with candor.

Since 2007, "negotiation" and "negotiation ethics" have been on the mind of the State Bar of California Standing Committee on Professional Responsibility and Conduct when it issued an interim opinion on the topic. It finally issued its Formal Opinion 2015-194 in December 2015, on the subject of truthfulness in negotiation. The opinion states the issue as follows:

"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?"

The opinion then summarizes:

"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."

While in the abstract this rule may sound easy to follow, in reality it often is not. To elucidate, the opinion provides some examples in the context of a simple automobile accident in which the plaintiff has incurred $50,000 in medical expenses, and lost earnings at the rate of $50,000 per year due to the inability to continue employment.

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Suppose plaintiff's counsel tells defense counsel that she has a very credible eyewitness who saw the whole accident and will testify that defendant was totally at fault. In truth, counsel has no witness. Is this "puffery" or misrepresentation? The State Bar concludes the latter, as it constitutes an improper and unethical false statement under Business and Profession Code Sections 6128(a) and 6106 which make acts involving deceit, moral turpitude, or dishonesty a cause for disbarment or suspension.

Or, suppose defense counsel states that the policy limit of his client's insurance policy is $50,000 when in truth it is $500,000. Again, the opinion condemns this as a material and intentional misrepresentation intended to mislead the plaintiff that crosses the line from "posturing" to a cause for discipline.

But, if plaintiff's counsel should tell defense counsel that the least acceptable compromise amount is $100,000 when, in truth, it is $75,000, this is permissible "posturing." Such statements setting out "negotiating goals or willingness to compromise" are not to be considered "verifiable statements of fact." To the contrary, the opinion notes that each negotiator should realistically expect this lack of candor from her adversary.

The opinion also includes an example that as mediators we often hear from the defense — the threat of filing bankruptcy if plaintiff will not accept the terms being offered. Here, the opinion states that it depends on the specific representations made and the facts known to defense counsel. If the lawyer makes this statement knowing full well that bankruptcy is not an option, then it constitutes a material misrepresentation and is not permissible. But, if the lawyer makes such a statement, not knowing whether bankruptcy is indeed a possibility, "the conclusion may be different."

Are there any bright line conclusions that can be drawn from this opinion? In the abstract, yes. If one is providing a statement of fact, make sure it is accurate. Be sure not to omit any material fact. Or, to paraphrase California Civil Code Section 1710 (Elements of Actionable Fraud), do not suggest as a true fact that which you know not to be true and do not suppress a fact without which you know the other party will rely to her detriment.

While in reality, this bright line may seem blurry at times, a simple test is to think about the consequences. Civil Code Section 1709 defines deceit: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for damages which he thereby suffers."

The opinion adds this comment:

"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."

Before making or omitting the statement in a negotiation, ask yourself - is the statement being made (or omitted) so material that it would constitute grounds to set aside the agreement on the grounds of fraud? Did the opposing party rely on it to her detriment? Was that reliance reasonable or justifiable? If so, then the statement is not “puffery” or “posturing” but a material misrepresentation.

And more than simply leading to setting aside the agreement you have worked so hard to achieve, it could lead to further communications with the State Bar, or an independent action in tort against the lawyer and/or the client.

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