Ethical Issues in Settlement Negotiations

Marin County Bar Association

CLE Fair

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Your Presenter

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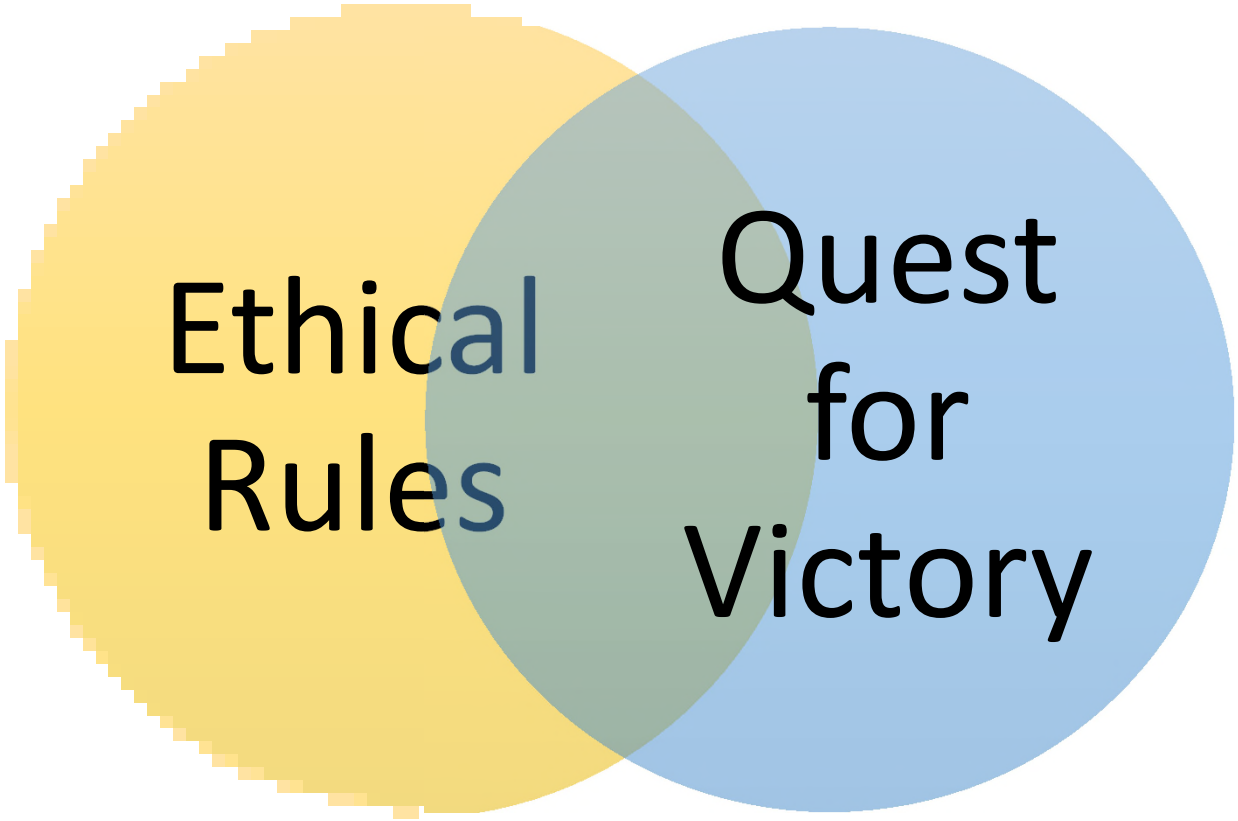
Why “Ethics” is such a fun topic

As an attorney, you have two primary obligations:

1. To your client, to advocate diligently and forcefully (to win).

2. To the courts and to your adversary, to be honest and upright: to comply with the law and with rules of professional conduct.

Primitive Venn Diagram



Our Focus Is on the Grey Areas

Most of the time, the rules are obvious:

Don’t steal money from your client’s trust account, even if you intend to pay it back.

Don’t instruct your client to commit perjury.

Don’t falsify records used in court or for negotiations.

Clean Catch?

Rule of Thumb: If you have to ask…

Why skate so close to the edge?

You don't want to "win" a state bar complaint or a lawsuit against you.

Your reputation matters, in court and in your community.

Word gets around, even in large communities--thanks to listservs, review sites (such as Yelp), and social media.

Primary Sources of Ethical Rules

The ABA Model Rules of Professional Conduct, which have been adopted by nearly all states.

In CA, the State Bar Rules of Professional Conduct.

State law and local court rules (generally beyond scope of this presentation).

Your conscience.

Focus today on ABA Model Rules and CA Rules of Professional Conduct (RPC)

Cal Rules of Professional Conduct: Revised

Effective November 1, 2018

Numbering adjusted to conform (generally) with ABA Rules

Most rules renumbered, some new and exciting

Attempted to incorporate new rules into this presentation

Rule Number One: No Lying Allowed

ABA Model Rule 4.1(a):

In the course of representing a client a lawyer shall not knowingly… make a false statement of material fact or law to a third person.

Examples of prohibited lies during negotiation (no close calls here):

My client underwent surgery yesterday for rotator cuff repair (if she didn't).

My client paid $10,000 to plaintiff for the materials (if he didn't).

The statute of limitations for breach of an oral contract in this state is three years (if it isn't).

My client will simply file for bankruptcy if she loses at trial (if you know she wouldn't qualify for bankruptcy protection).

What about “puffing” or exaggerating?
“This car is in perfect condition – like new!”

Puff Away!" (ABA Rule 4.1, Comm. 2)

"Generally accepted conventions in negotiating" are ethical.

Estimates of price or value

"The business is worth at least $100,000." (Even if you believe it's worth half that.)

Party's intentions as to the litigation

"If we don't get $100,000 I will go to trial without further negotiation." (Even though you know your client has no intention of going to trial on this case.)

Party's intentions as to settlement

"I won't take less than $100,000." (Even if you will take far less.)

Party's intentions as to the negotiation process

"If we don't get an offer of $100,000 by noon, this mediation of over and we're out of here." (Even if you are just bluffing and will stay as long as it takes to settle the case.)

Basically, a false statement during negotiations is not unethical if you don't expect your adversary to rely on the statement.

Or, in other words, if:

1. You know what you are saying is a lie

2. They know what you are saying is a lie; and

3. You know they know what you are saying is a lie, then

You are not lying, and there is no ethical violation.

No equivalent to ABA Rule 4.1 in CA, but:

CA Business & Professions Code §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**.

CA Business & Professions Code §6128:

Every attorney is guilty of a **misdemeanor** who either:

(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court **or any party…**

While we are on the subject of CA Business & Professions Code §6128, note subsection (b):

Every attorney is guilty of a misdemeanor who… (b) Willfully delays his client's suit with a view to his own gain.

What might be covered by §6128(b)?

Waiting until client turns 18 to earn a higher contingent fee.

(In CA, for personal injury claims, typical to charge less for minor than for an adult).

Discouraging settlement to generate more fees.

(Either hourly or higher contingency fee for litigated matters)

Penalty for violating B & P §6128

Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

CA RPC 4.1: Be Truthful (Really?)

"In the course of representing a client a lawyer shall not knowingly…make a false statement of material fact or law to a third person."

(What's a third person in this context?"

CA Evidence Code §175 (referenced)

"Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.

Being truthful: Not just a moral issue

Fire Insurance Exchange v. Bell, 643.N.E.2d 310 (Ind. 1994)

During negotiations, lawyer represents that policy limits are $100,000. Plaintiff accepts settlement in that amount, then learns the limits were actually $300,000.

Plaintiff sues the opposing lawyer for fraud and wins!

Appellate court: Plaintiff entitled to rely on opposing counsel's material (mis)representations during negotiations.

Or...

Defense counsel recklessly asserts there is only $200,000 in coverage. Plaintiffs sue for fraud when they find out it was really $1 million… and win.

Slotkin v. Citizens Casualty of New York (614 F.2d 301 (2d Cir. 1980) , cert. denied, 449 U.S. 981 (1980)

Your Results May Vary

These cases are complicated by a variety of factors governed by state law, including litigation privilege.

See, e.g., *Home Ins. Co. v. Zurich Ins. Co*. (2002) 96 Cal.App.4th 17.

Okay, no affirmative misrepresentations. What about nondisclosure?

Good news: Generally, you have no obligation to *volunteer* info during negotiations.

Do I have to volunteer the following?

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Client is moving to Taiwan and will not be in the country on the trial date.

Nope.

Do I have to volunteer the following?

Client has obtained an estimate showing the work can be done for only $50,000.

Nope.

Do I have to volunteer the following?

Next year, a newly enacted statute will cap damages in this case.

Nope.

Do I have to volunteer the following?

Client has found a new job so he has no future wage loss.

Nope.

Of course, there are exceptions… ABA Formal Opinion 95-397 (1995):

Death of litigation client must be disclosed

- Could affect damages, e.g., in personal injury cases in most states
- You no longer represent decedent; you might represent **estate** or personal **representative**

Must inform opposing counsel of client's death at *first communication*.

Of course, there are exceptions… ABA Formal Opinion 95-397 (1995):

Don’t be too clever. Not okay to say:

“He’s out of pain” or

“He’s resting now.”

Another exception to nondisclosure: assisting fraud or crime.

ABA Model Rule 4.1(2):

"Lawyer shall not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure prevented by attorney-client communications privilege."

Note: "Shall not fail to disclose" means "must disclose."

(Now part of CA RPC 4.1 as well)

Communicating Settlement Offers: Three Hypos

Under which of these circumstances is an attorney *ethically required* to communicate the settlement offer?

Communicating Settlement Offers: Hypo #1

At the settlement conference, personal injury plaintiff's final demand was $100,000. Defendant insurer's highest offer was $4,000. The case did not settle.

Two days later, defense attorney emails plaintiff's counsel, and says: "I've got authority to settle this case for $4,500. Let me know if this will work."

Communicating Settlement Offers: Hypo #2

At the settlement conference, personal injury plaintiff's final demand was $100,000. Defendant insurer's highest offer was $4,000. The case did not settle.

Two days later, defense attorney telephones plaintiff's counsel, and says: "I've got authority to settle this case for $4,500. Let me know if this will work."

[Note: same as Hypo #1, except this is an oral communication.]

Communicating Settlement Offer: Hypo #3

Prosecutor sees criminal defense attorney in courthouse cafeteria, and says:

"I've been thinking about the *Garcon* case. If your client pleads guilty to the assault charge, we'll drop the possession count, and we'll recommend that she be sentenced to time served."

Answer: All of Them

ABA: No specific rule requiring that lawyer share settlement offers with clients.

But it is implicit in a lawyer's obligation to keep client informed about the case (ABA Model Rule 1.4)

And is explicitly observed in ABA Model Rule 1.4, comment 2: ".. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance…."

CA Rules of Professional Conduct, Rule 1.4.1:

CIVIL CASES: All **written** settlement offers MUST be communicated to your client, even if you know the offer will be rejected.

CRIMINAL CASES: **All** offers, oral and written, must be shared with your client.

EVEN IF YOU KNOW THE OFFER WILL BE REJECTED!

But wait… there's more

CA RPC 1.4:

A member shall keep the client reasonably informed about significant developments …

And isn't a settlement offer a "significant development" in the case?

And besides—again--why skate so close to the edge? It’s not much of a burden to send your client an email.

Ugly Scenario

You represent a personal injury plaintiff in California. At the mediation, plaintiff's final demand was $100,000. The insurer's highest offer was $4,000. The case did not settle.

Two days later, defense attorney telephones you (oral communication): "I've got authority to settle this case for $4,500." You do not share this offer with your client because the offer was not in writing, because you do not believe the $500 increase was a "significant development," and because you know the client will not accept it.

Ugly Scenario (continued)

Case goes to trial. Your key witness does not appear, and the jury returns a defense verdict. Client gets nothing, owes $25,000 for defendant's costs of suit.

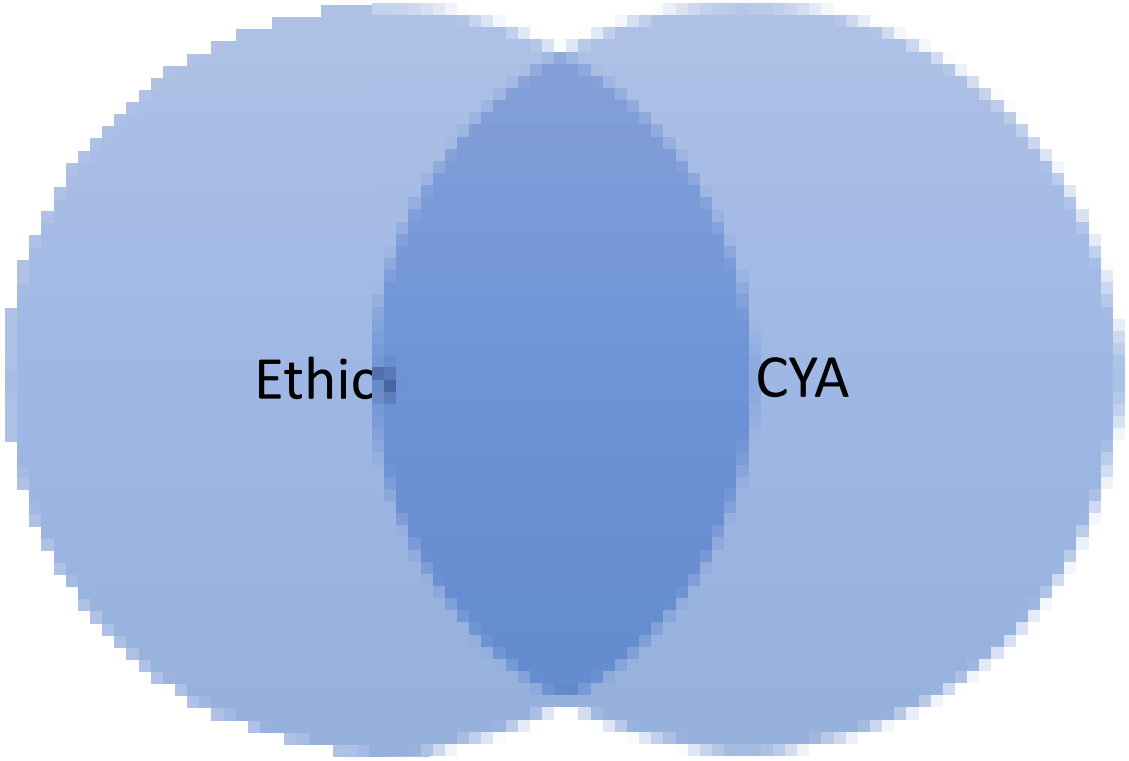
Client now claims he would have settled for $4,500--if only he had known of the offer.

What now?

What now?

(Hint: www.callyourmalpracticecarrier.com)

Presenter Having Too Much Fun with Venn Diagrams



Another Ethical Issue: Initiating Settlement Discussions

You are a civil defense attorney. A new file arrives on your desk. You review it carefully, then call to introduce yourself to plaintiff's counsel. After pleasantries are exchanged, you say:

"This case looks pretty simple. I would think we should be able to settle this without a lot of discovery. I haven't talked to my client yet but I imagine she would be willing to pay something in the $10,000 range to resolve this claim. Shall I see if I can get that authority?"

Another Ethical Issue: Initiating Settlement Discussions

Any problem with this approach?

Maybe…

No specific rule against it, but check this out:

"The decision whether to pursue settlement discussions belongs to the client. A lawyer should not initiate settlement discussions without authorization from the client."

ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations, §3.1.2

New Issue: Restriction on lawyer's practice.

Hypo: Attorney represents consumer injured by defective appliance manufactured by defendant . Attorney has over the past few years represented nine other consumers injured by the same product.

During settlement negotiations, Attorney demands $100,000. This would be a very good settlement for this plaintiff.

Defendant agrees to pay the $100,000, but only if Attorney agrees not to take on any more cases against defendant involving the same product. Otherwise, defendant will not make an offer because it does not want to encourage Attorney to take on more of these suits.

Dilemma!

- Client would be well-served by this settlement, BUT
- Attorney will lose out by being unable to take on similar cases against the same defendant.
- What's the ethical lawyer to do?

No problem!

"Gosh, Ms. Defendant, we'd love to accept your generous offer, but…

it would be **unethical**!"

Restriction of Law Practice rules

A lawyer shall not participate in offering or making: … an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. (ABA Model Rule 5.6)

A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law.… (CA RPC 5.6)

New Ethical Hypo: Bargaining Away Your Fees

You represent plaintiff in a righteous employment case. Per your agreement, you take 20% of any settlement or verdict, plus all attorney's fees awarded or paid.

At the settlement conference, plaintiff's claimed damages are $50,000, and your fees are up to $250,000 (so far).

Defendant Makes an Offer

Defendant offers plaintiff the full $50,000, but only if plaintiff waives her claim for attorney's fees.

Outrageous!

Client likes the idea. She gets everything she would get if she won at trial.

You do NOT like the idea. You are giving up a a $250,000 fee award (more if the case goes to trial).

Seems wrong; an unethical effort to put a lever between you and your client.

Bummer for you: Settlement offers premised on a fee waiver are proper.

California State Bar Formal Opinion no. 2009-176:

"A lawyer must inform the client of a fee-waiver settlement and consummate the settlement in accordance with the client's wishes even if it reduces the likelihood of recovering some or all of his or her fees."

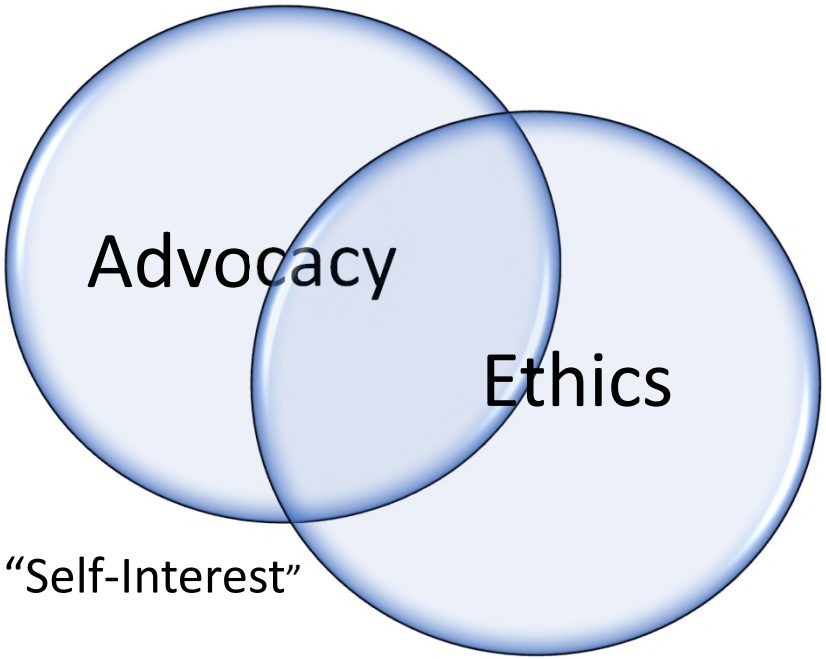
American Bar Association Section of Litigation: Ethical Guidelines for Settlement Negotiations, §4.2.2:

"When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interests in a more favorable settlement to the lawyer's interest in the fee."

Can this be right?

What the Dilemma Feels Like

What the Dilemma Should Look Like



No circle for "Self-Interest"

True story from the annals of your presenter's mediation practice

At mediation, plaintiff's counsel tells the mediator that plaintiff demands $2 million, and won't consider any opening offer under $1 million.

After speaking with defendants, the mediator gets the authority to make an opening offer of $1 million to start. Mediator shares the good news with plaintiff's counsel.

Plaintiff's counsel packs his bags and leaves, expressing anger at the defendants for their offer, saying it's obvious the negotiations are going nowhere, they aren't dealing in good faith, etc.

Clever bargaining or unethical practice?

An attorney may not employ the settlement process in bad faith.

No ethical obligation to engage in settlement negotiations or mediations.

No ethical obligation to make a demand or offer. You have a Constitutional right to a jury trial.

BUT:

American Bar Association Section of Litigation: Ethical Guidelines for Settlement Negotiations, §4.2.2

"…It may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, **when the client actually has no interest in settling the case and is interested in employing settlement discussions...solely as a means of delaying proceedings or securing discovery**."

Separate Problem: Enforceability (What can you do about it?)

Statements of plaintiff's counsel were made in mediation and are therefore confidential.

Probably no remedy available.

But lawyer threw away his trust and credibility with mediator and defense counsel. This may have long-term effects. (Including, one would hope, the person-in-the-mirror challenge.)

Taking Advantage of Adversary's Error: All's fair?

Following lengthy negotiations, the parties reach a detailed agreement. Opposing counsel agrees to draft the agreement.

A week later, opposing counsel sends you the proposed settlement, signed by her and her client.

You review the agreement carefully. An element of the deal, unfavorable to your client, has been omitted.

Must you call this to the attention of opposing counsel, or may you sign and return it--as is?

Might not be a disciplinary offense… but it's close.

Probably no rule prohibiting you from signing the agreement "as is."

But American Bar Association Section of Litigation: Ethical Guidelines for Settlement Negotiations, §4.3.5: "It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of a settlement agreement."

Might not be a disciplinary offense… but it's close.

Probably no rule prohibiting you from signing the agreement "as is."

But American Bar Association Section of Litigation: Ethical Guidelines for Settlement Negotiations, §4.3.5: "It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of a settlement agreement."

Presenter's comment: Do you really want to sign an "agreement" that does not reflect the true terms of the deal? You may win the battle in this case, but lose the war of trust and credibility. Good luck negotiating a favorable deal with opposing counsel --or with any of her colleagues-- in the next case.

And what about Confidentiality Agreements?

P sues D Corporation, alleging injury from defective product.

D offers $100,000 to settle, conditioned on confidentiality agreement:

P may only say, “We settled, all is good.”

Ethical?

Of course it is! I think.

2008

Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics

Jon Bauer

University of Connecticut School of Law

(citation at end of presentation)

Argument Against It

Lawyers frequently draft settlements that impede other parties' access to relevant evidence through clauses that prohibit the plaintiff from disclosing information to anyone with a claim against the defendant or forbid all discussion of the facts underlying the dispute.

This Article argues that lawyers who negotiate these "noncooperation" agreements violate Rule 3.4(f) of the Model Rules of Professional Conduct, which prohibits requesting someone other than the lawyer's own client to withhold relevant information from another party, and Model Rule 8.4(d), which prohibits conduct "prejudicial to the administration of justice."

Competence to Negotiate for Client

ABA Model Rule 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness **and preparation** reasonably necessary for the representation.

CA RPC Rule 1.1:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) **mental, emotional, and physical ability** reasonably necessary for the performance of such service.

Technical Competence (obvious examples)

Tax consequences of settlement

Liens against settlement proceeds

Familiarity with law and facts of the case

Emotional Competency: Impediments

- Substance abuse
- Stress
- Overwork
- Distraction
- Family or social distress
- Political angst
- All of the above

THE END

(Except for Resources, which follow)

Resources

American Bar Association Model Rules of Professional Conduct

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

American Bar Association Section of Litigation: Ethical Guidelines for Settlement Negotiations

https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf

State Bar of California Rules of Professional Conduct

http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules

State Bar of California Committee on Professional Responsibility, Formal Opinion no. 2015-194: Ethical limits on "puffing" in negotiations

http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2015-194%20(12-0007)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf

State Bar of California, The Ethics of Settlement in Civil Cases (Hodel & Merlo 2017)

https://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=118

Ethics of Confidentiality Agreements

2008

Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics

Jon Bauer

University of Connecticut School of Law

http://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1336&context=law_papers