THE ETHICAL NEGOTIATOR

MEDIATION, CONFIDENTIALITY & SETTLEMENT RISKS

ADR SERVICES, INC.

&

Center for Negotiation & Dispute Resolution
UC Law San Francisco

HON. STEVEN **AUSTIN (RET.)**

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JOHN **DEAN, ESQ.**

MARCH 18, 2025

AGENDA

01 **Ethics in Mediation**

02 **Settlement Agreements**

03 Professional Responsibility

SPEAKERS

Hon. Steve Austin (Ret.)
ADR Services, Inc.

Debra Bogaards, Esq.
ADR Services, Inc.

John Dean, Esq.
UC Law

THE CENTER FOR NEGOTIATION AND DISPUTE RESOLUTION (CNDR)

UC LAW SAN FRANCISCO

The Center for Negotiation and Dispute Resolution (CNDR) offers superior education and cutting-edge scholarship in dispute resolution to law students, attorneys, judges, practitioners, and international visitors. In the heart of San Francisco, steps away from Federal and State Courts, CNDR collaborates on projects and events with non-profits, commercial ADR providers, and government agencies.

CNDR has been consistently recognized by US News & World Report as one of the Top ADR Programs in the country, was the winner of the Alternative Dispute Resolution (ADR) Education Award by the Ninth Circuit Court of Appeals in 2007 and 2018, and, was winner of the prestigious Louise Otis Award for Excellence in Mediation Education in 2011 and 2013 by the International Competition for Mediation Advocacy.

Lawyers from all over the world come to UC Law SF to study ADR, citing the wide selection of dispute resolution courses and its international reputation among practitioners.

ETHICS IN MEDIATION

PART 1

Hon. Steven Austin (Ret.)

THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Apply to attorneys admitted to the practice of law in California

While some of the Rules don’t apply by their own terms (i.e. those dealing with clients or representations), others explicitly apply to attorney-mediators and some may speak generally enough to encompass attorney-mediators.

RULE 1.1 – COMPETENCE

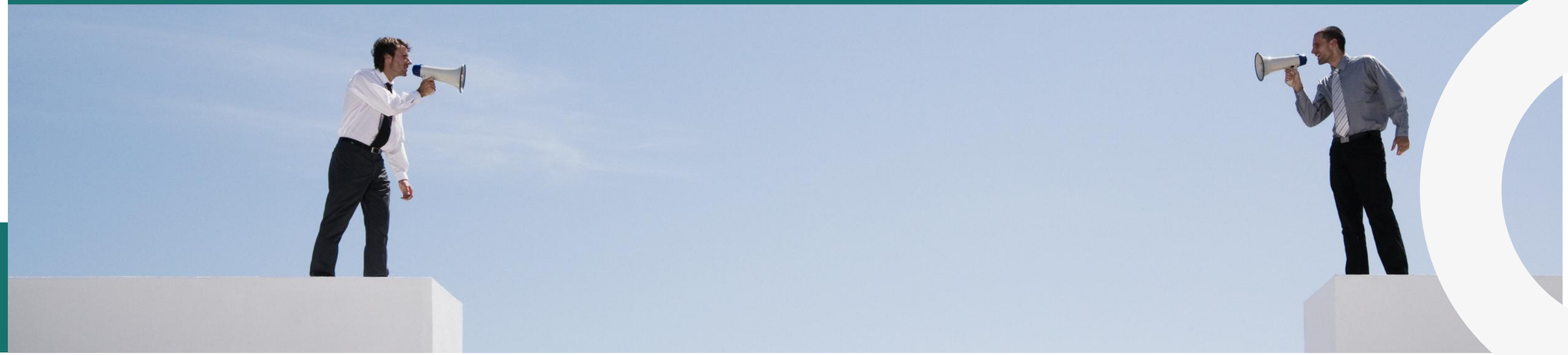
"A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence."

- "Competence in any legal service" means "to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service."

- "If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent."

RULE 2.4 – LAWYER AS THIRD-PARTY NEUTRAL

"A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."



CLARIFICATION OF THE ROLE OF THE THIRD-PARTY NEUTRAL

Case Name: Click here to enter case name

Neutral: Click here to enter name, Click here to select Mediator or Arbitrator

Clarification of The Role of Third-Party Neutral

A third-party neutral ("Neutral") is an impartial intermediary who assists two or more persons to resolve a dispute or other matter that has arisen between them. Two of the most common types of third-party neutrals are mediators and arbitrators.

A **mediator** is an independent and impartial third party selected by the parties to help them reach a mutually satisfactory resolution of their dispute through negotiation and compromise. The mediator does not decide who will prevail in the dispute and does not award damages, render a verdict, issue a judgment, or otherwise determine fault.

An **arbitrator** is an independent and impartial third party selected by the parties to decide the outcome of their dispute. An arbitrator reviews testimony and evidence presented by the parties at a hearing and resolves the dispute by issuing a binding decision called an award.

While the Neutral selected for your matter is a licensed attorney in the State of California, s/he is acting solely as an impartial, neutral third party in this matter. The Neutral is not representing or advocating for any party and will not provide any legal, tax or other professional advice to any of the parties in the case. No professional, client, or fiduciary relationship is or has been created between any party and the Neutral or ADR Services, Inc. and the attorney-client evidentiary privilege does not apply.

By signing this form, you understand and agree that: (1) neither the Neutral nor ADR Services, Inc. has or will be acting as your attorney in this case; (2) nothing has been communicated to you by the Neutral or ADR Services, Inc. that is considered legal advice; and (3) you have not and will not rely on any information provided by the Neutral and/or ADR Services, Inc. as legal advice.

BY MY SIGNATURE, I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THE ABOVE INFORMATION.

Date: _____ Signature: _____

Print Name: _____

(Cal. Rules of Prof. Conduct, Rule 2.4 [eff. 11.1.18] – Form v.1)

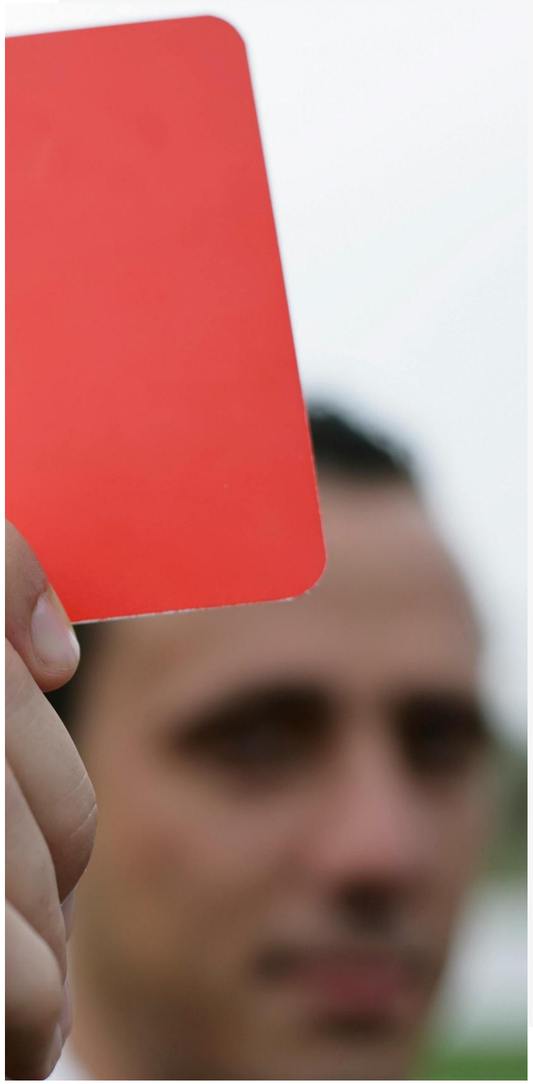
(THE NEW) RULE 8.3 – REPORTING PROFESSIONAL MISCONDUCT

THE NEW RULE 8.3 REQUIRES THAT A LAWYER "INFORM THE STATE BAR, OR A TRIBUNAL WITH JURISDICTION TO INVESTIGATE OR ACT UPON SUCH MISCONDUCT" WHEN:

01 **The lawyer knows of "credible evidence" that another lawyer has either:**

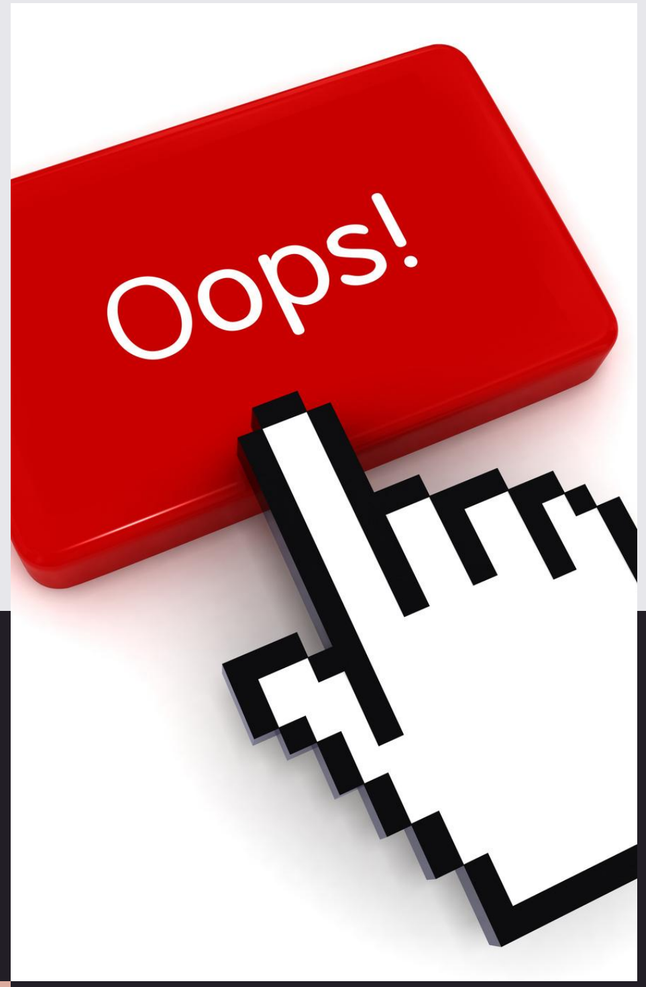
(a) "committed a criminal act," or
(b) has engaged in "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property," and

02 **The act or conduct "raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."**



THE RULE ITSELF EXPLICITLY EXEMPTS AND DOES NOT AUTHORIZE THE DISCLOSURE OF "INFORMATION PROTECTED BY MEDIATION CONFIDENTIALITY." (SEE RULE 8.3, SUBD. (D).)

BUT NOT EVERYTHING IS COVERED BY MEDIATION CONFIDENTIALITY (AS WE WILL DISCUSS), SO EVEN MEDIATORS SHOULD KEEP IN MIND THAT THEY MAY STILL HAVE DUTIES UNDER RULE 8.3



RULE 8.4 – MISCONDUCT

"It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation"

Comment 1: "A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity."

COURT-CONNECTED MEDIATION RULES

California Rules of Court 3.850 through 3.860 apply to court-connected mediations.

THESE RULES ONLY APPLY IF YOU WERE:

- (1) selected from “a superior court’s list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court's mediation program,” or

- (2) “agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by that court or will be compensated by that court to mediate a case within that court's mediation program” (See Cal. Rules of Court, Rule 3.851.)

SEVERAL IMPORTANT REQUIREMENTS OF THE RULES OF CONDUCT FOR MEDIATORS INCLUDE:

- Voluntary Mediation Warning. (Cal. Rules of Court, Rule 3.853)
- Explain Mediation Confidentiality. (Cal. Rules of Court, Rule 3.854, subd. (b).)
- Observe Caucus-Specific Confidentiality. (Cal. Rules of Court, Rule 3.854, subd. (c).)
- Remain Impartial & Make Any Reasonable Disclosures. (Cal. Rules of Court, Rule 3.855, subds. (a), (b).)
- Mediate With Honesty & Competence. (Cal. Rules of Court, Rule 3.856.)
- Maintain Procedural Fairness. (Cal. Rules of Court, Rule 3.857.)
- Disclose All Compensation & Avoid Gifts.(Cal. Rules of Court, Rule 3.859.)
- Record Attendance. (Cal. Rules of Court, Rule 3.860.)
- Agreement to Disclosure. (Cal. Rules of Court, Rules 3.869, 3.871.)

DISCLOSURE REQUIREMENTS

Currently, there are no conflict disclosure requirements for non-court connected private mediations in California. Nevertheless, it is still a good idea to make personal disclosures on a voluntary basis.

This includes disclosure of personal or professional relationships or prior representations that could be seen as potentially impacting a mediator’s neutrality

MEDIATION CONFIDENTIALITY /PRIVILEGE

WHAT IS MEDIATION CONFIDENTIALITY & HOW DOES IT APPLY?

"Mediation confidentiality" is a broad concept protected by several California statutes. This statutory scheme is "broadly construed" to protect confidentiality (see *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580; *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 142) and "unqualifiedly bars disclosure of specified communications and writings associated with a mediation absent an express statutory exception." (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416; *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 117-118.)

These statutes include Evidence Code sections 703.5 and 1115–1128.Several broad principals regarding mediation confidentiality come out of these section

MEDIATION CONFIDENTIALITY/ PRIVILEGE

WE WILL SOLVE THE PROBLEMS

01 **Mediators generally may not testify regarding anything which occurred at one of their mediations.**

02 **No evidence of anything said in for, during, or pursuant to mediation is admissible or discoverable (including writings & testimony). Such communications are confidential.**

03 **Mediators may not make reports to the court.**

04 **Per Evidence Code section 1125, a mediation ends and confidentiality ceases to attach when any of the below occurs:**

1. Parties execute a settlement agreement
2. Mediator informs the parties in a writing
3. A party terminates mediation in writing
4. "For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute"

EXCEPTIONS

THERE ARE EXCEPTIONS WHERE SUCH WRITINGS MAY BE ADMISSIBLE AND DISCOVERABLE (SEE EVID. CODE, § 1122), INCLUDING:

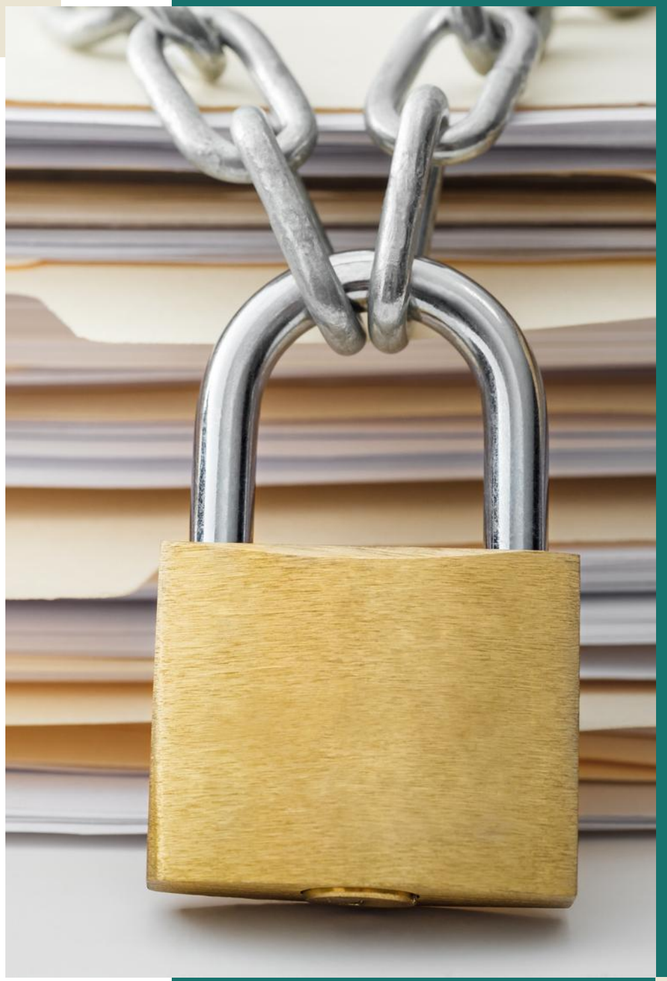
- By written agreement of all participants, including the mediator (see also *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 359);

- Where the writing "was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing . . . to its disclosure," and the writing "does not disclose anything said or done . . . in the course of the mediation";

- Where the writing is a settlement agreement which (1) provides that it is enforceable or binding, (2) provides that it is admissible or subject to disclosure, (3) all parties to the agreement agree to disclose, or (4) is used to show fraud, duress, or illegality. (Evid. Code, § 1123.)

- When non-disclosure would result in the violation of a person's right to due process. (See *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582; *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Calif., Inc.* (2001) 26 Cal.4th 1, 15-16.)

THE SUPREME COURT HAS RECOGNIZED AND ACCEPTED THAT THESE STATUTES WILL PREVENT THE PUNISHMENT OF SOME BAD BEHAVIOR IN MEDIATION.



"The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 588.)

IS THE MEDIATION PRIVILEGE IN DANGER?

AB 924	AB 924 requires a dispute resolution neutral, including a mediator and arbitrator, as well as an alternative dispute resolution provider to report to the State Bar of California the receipt of any complaint that the dispute resolution neutral violated a provision of any applicable rule of conduct, as provided in the American Bar Association's Model Standards of Conduct for Mediators, Family Mediation Standards, Code of Ethics for Commercial Arbitrators or Judicial Council Ethical Rules.
SB 42	SB 42, another bill currently making its way through the California Legislature, would establish a statutory duty for attorneys to report misconduct by other attorneys (similar to Rule 8.3.)

LEGAL ETHICS IN MEDIATION SETTLEMENT AGREEMENTS

PART 2

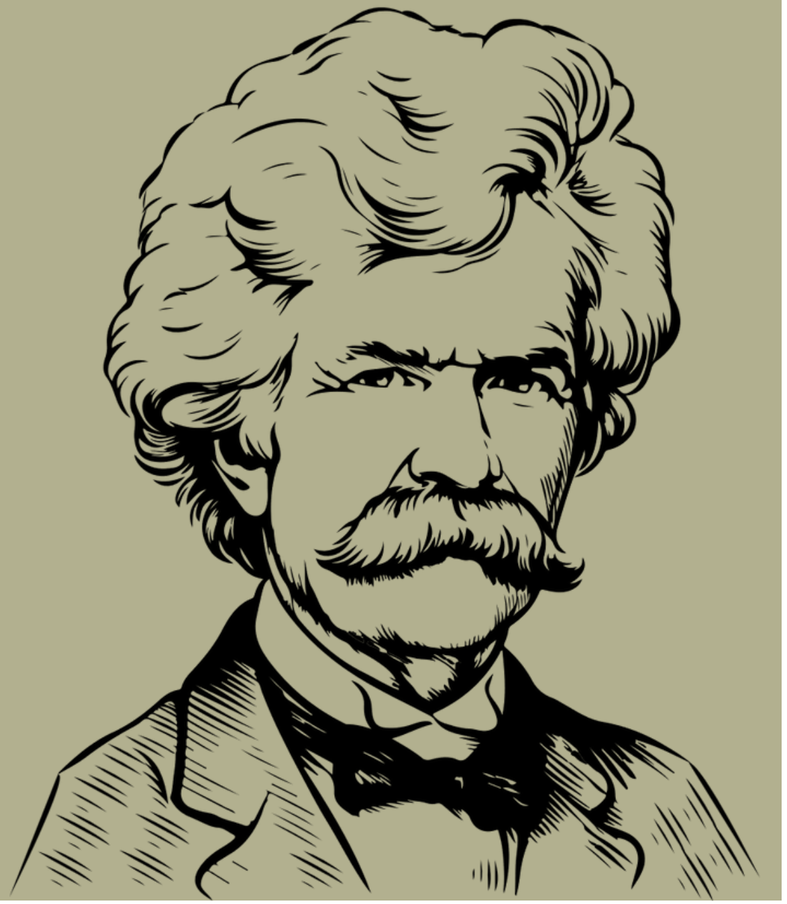
Debra Bogaards, Esq.

*EVIDENCE CODE SECTION 1123 MAKES SETTLEMENT AGREEMENTS INADMISSIBLE UNLESS ANY OF THE THESE CONDITIONS ARE MET–

1. Parties make it clear that the agreement is admissible or subject to disclosure;
2. The agreement provides that it is enforceable or binding (or words to that effect)
3. All parties to the agreement expressly agree to it's disclosure
4. The agreement is used to show fraud, duress or illegality

Tip: for clarity, make sure to waive Section 1123 and then add in some of the other language as well.

LYING IN MEDIATION



IS IT OK TO LIE TO THE MEDIATOR?

"A man is never more truthful than when he acknowledges himself a liar."

"There are three kinds of lies: Lies, Damned Lies, and Statistics"

-MARK TWAIN

CALIFORNIA RULES OF PROFESSIONAL CONDUCT: RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

(RULE APPROVED BY THE SUPREME COURT, 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.

COMMENT

[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. ...

[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...

SEE ALSO: AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

LIES!

- Bottom Line
- Authority to Settle
- Coverage
- Top Line
- Authority to settle at a certain amount?
- Solvency/ Bankruptcy Facts
- Desire to Settle
- Decision Makers Present
- Witnesses

NEUTRALITY

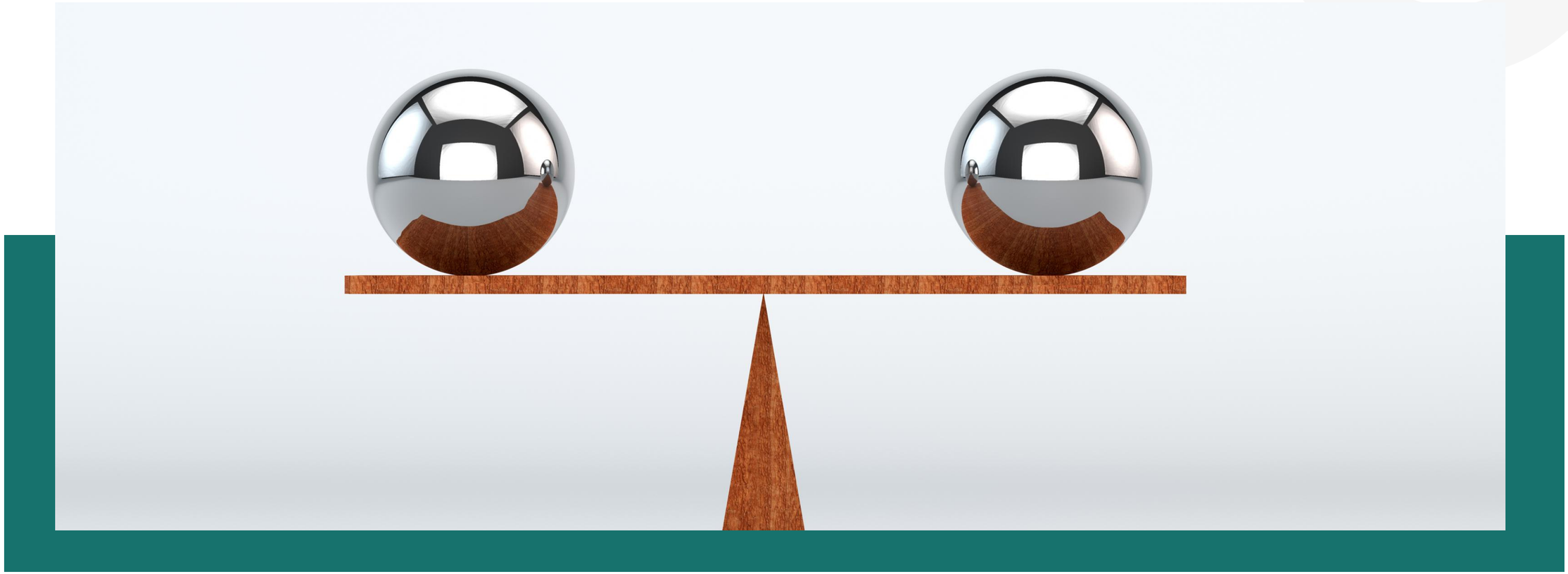
WHAT IS NEUTRALITY? HOW DOES IT DIFFER FROM IMPARTIALITY?

VOLUNTARY PARTICIPATION & SELF-DETERMINATION

MODEL STANDARDS OF CONDUCT

- *Standard 1. Self-Determination*
- American Bar Association
- American Arbitration Association
- Association for Conflict Resolution
- Ca. Court Rule 3.853

BALANCING CONFIDENTIALITY WITH TRANSPARENCY IN SETTLEMENT TERMS



MEDIATOR NEUTRALITY & IMPARTIALITY

INTERVENTION

Influence

When does influence cross neutrality line?

Evaluations

Do evaluations of a party's case affect the mediator's perceived impartiality?

THE MEDIATOR’S PROPOSAL

WHAT THE "EXPERTS" SAY!

"I define the mediator's proposal as the exact point in time where the mediator ran out of skills."

"Some mediators use it as a tool for self-importance in a way that says, 'Here, I'll resolve this for you.'"

"Could it be that if more mediators possessed a wider variety of skils and techniques, then the mediator's proposal might quietly slip away?"

"Unfortunately, I think many counsel looking for a mediator's proposal are more lazy than savvy."

INFORMED CONSENT IN SETTLEMENT AGREEMENTS

Key Ethical Principles:

- Attorneys must ensure parties provide informed consent to settlement terms
- CRPC 4.1
- Settlement Authority/ Policy Limits

Attorney Responsibilities:

- Providing clear explanation of terms (i.e. Confidentiality and non-disparagement)
- Avoiding undue influence

Case Law Examples:

- *Fair v. Bakhtiari*, 40 Cal. 4th 189 (2006) Clarification on enforceability of mediation agreements

ENFORCEABILITY OF MEDIATION SETTLEMENT AGREEMENTS

Statutory Requirements:

- California Code of Civil Procedure (CCP) § 664.6: Requirements for entering settlement terms into a judgment.

Best Practices :

- Ensuring agreements are in writing and signed by parties.
- Meeting statutory language for enforceability.
- Docusign/adobe sign acceptable

Case Law Examples:

- *Rael v. Davis*, 166 Cal. App. 4th 1608 (2008): Criteria for enforceability under CCP § 664.6.

ETHICAL CONCERNS AROUND COERCION

Avoiding Coercive Practices

Mediator neutrality and voluntary decision-making.

Best Practices

- Ensuring agreements are in writing and signed by parties.
- Meeting statutory language for enforceability.
- Docusign/adobe sign acceptable

OTHER RELEVANT CODE SECTIONS

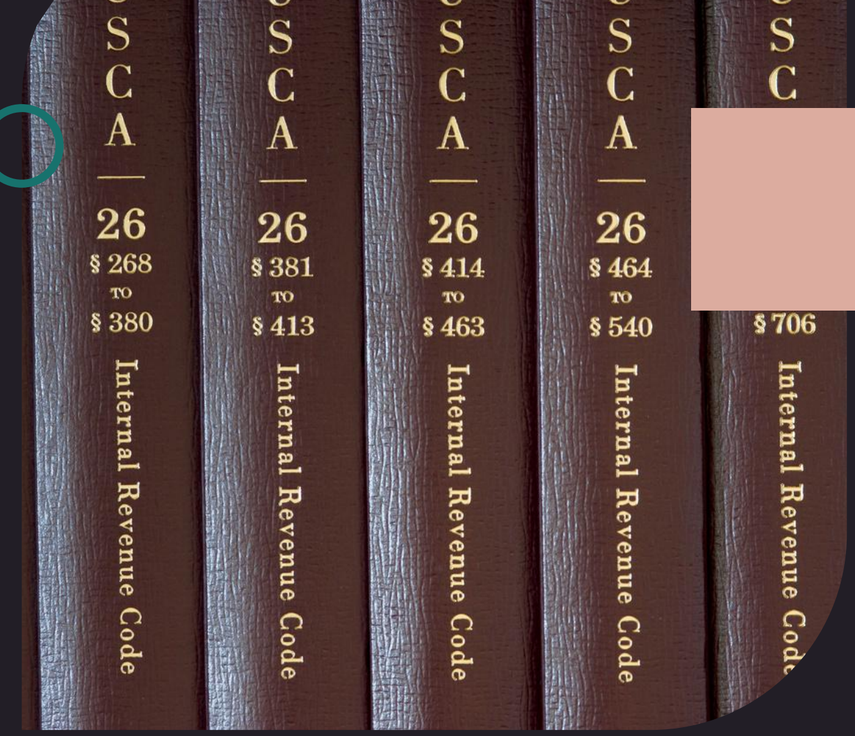
Pushing clients into settlement agreements

- Rule 1.2 Scope of Representation and Allocation of Authority (a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued.

Global settlements; multiple party actions; non-class claims – mediating multiple cases at once eg

- Rule 1.8.7 Aggregate Settlements
- (a) A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person* in the settlement.

(b) This rule does not apply to class action settlements subject to court approval.



Could impact authority to accept settlement proposals; extra layer of complication

- Rule 1.13 Organization as Client
- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement

ETHICS AND PROFESSIONAL RESPONSIBILITY IN NEGOTIATION AND MEDIATION

PART 3

John Dean, Esq.

PROFESSIONAL RESPONSIBILITY RULES

TENSION

Zealous advocacy and protection of client confidences[CRPC 1.3: “reasonable diligence”]

vs.

Honesty and duty of candor to others

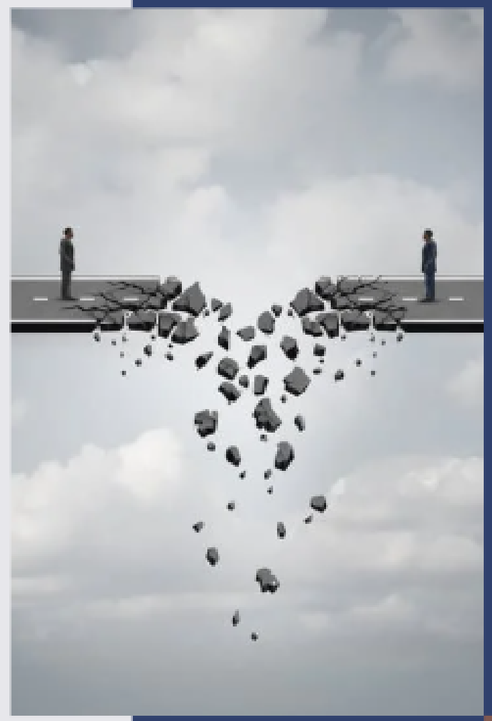
- CRPC 1.6/ABA Rule 1.6: Duties to client
- CRPC 3.3/ABA Rule 3.3: Duties to the tribunal
- CRPC 4.1/ABA Rule 4.1: Duties to third parties

RULE 1.1 – COMPETENCE

"A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence."

- "Competence in any legal service" means "to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service."

- "If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent."



Comment

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, **including the benefits and risks associated with relevant technology.** (Emphasis added.)

CONFIDENTIALITY OF INFORMATION

ABA RULE 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent….

(c) A lawyer shall make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, client information.”

CRPC 1.6:Lawyer shall not reveal information protected from disclosure by B & PC 6068…

CANDOR TOWARD THE TRIBUNAL

CRPC 3.3

(a) A lawyer shall not knowingly:

(1) 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....

ABA Model Rule 3.3: virtually identical

This is an on-going duty, through the conclusion of the proceeding.

DUTIES TO THIRD PARTIES

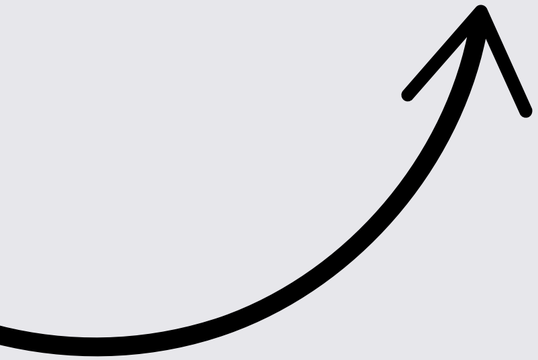
CRPC 4.1

4.1:Truthfulness in Statements to Others

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.... [Emphasis added.]

SO…WHAT IS “MATERIAL”?



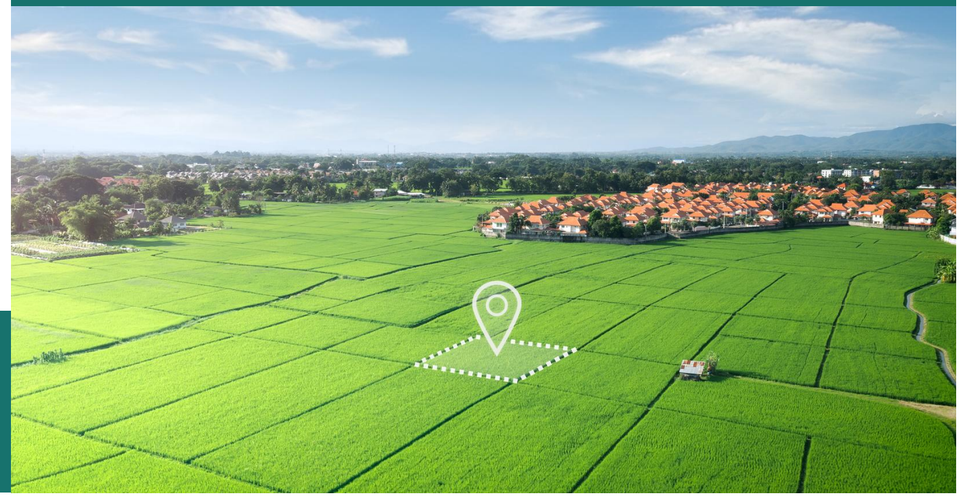
Case specific

Estimates and opinions as to value, quality, intentions to litigate, and alternatives to settlement are generally NOT “material”

“Bottom lines” are NOT “material”

“Puffing” and bluffing are generally OK…but are you bluffing about something “material”?

LAND SALE EXAMPLE



- You’re negotiating with a potential buyer to sell your land. You say: “This is a great piece of land. I think there’s oil on it.”
- Turns out that you obtained a Geotech report…and per the report, you KNOW that there is NO oil on the land.
- That’s a material fact.
- If you did NOT have the report, and were simply expressing your opinion: likely NOT a material fact

CALIFORNIA BUSINESS & PROFESSIONS CODE 6068

It is the duty of an attorney to do all of the following: ...
(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

WHAT NEGOTIATING ISSUES ARISE IN NEGOTIATING REPS AND WARRANTIES?

- See *Vega v. Jones, Day, Reavis, Pogue*, California Court of Appeal, Second District, Division 8 No. B170659 (Decided August 2, 2004).

- Lesson: affirmative misrepresentation of a material fact (toxic stock) when other party had no way to verify the representation

WHEN AN ATTORNEY IS ENGAGED IN NEGOTIATIONS ON BEHALF OF A CLIENT, WHAT CONDUCT CONSTITUTES PERMISSIBLE "PUFFING" AND WHAT CONDUCT CONSTITUTES IMPROPER FALSE STATEMENTS OF MATERIAL FACT?

See State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 12-0007

ABA FORMAL OPINION 06-439

Puffing, a party's willingness to compromise, and its goals are NOT considered "statements of a material fact."

Also permitted: Over-statements and understatements as to the strengths/weaknesses of a client's position in litigation, expressions of opinion as to the value of a case, estimates as to price/relative value/quality, alternative options, etc.

LISTEN FOR THE BELLS

- One-sided agreement: protect yourself
- Rejecting a proposal without consulting the client
- Affirmative misrepresentations of material fact by client
- “Fake it ‘til you make it”
- Difficult, demanding or dishonest client
- “Walk in the Woods”: can be problematic
- Ignoring a demanding or difficult client
- Client repeatedly seeks to re-negotiate deal terms: chronic “buyer’s remorse”
- Poor or no communication with client during negotiation
- Client is silent or evasive on a critical fact
- Client indicates intention not to comply with deal terms
- The “helpful” client: “would it help if I said…”
- Negotiating with an unrepresented (or under-represented) party

THE RULES OF PROFESSIONAL RESPONSIBILITY ARE NOT INTUITIVE

Being honest is not enough

Stay current on the PR rules and opinions in your jurisdiction

Technology is out-pacing the rules

It is not an “every third year one-hour video”

MODEL RULE 1.6 (C) AND CRPC 1.6 (C)

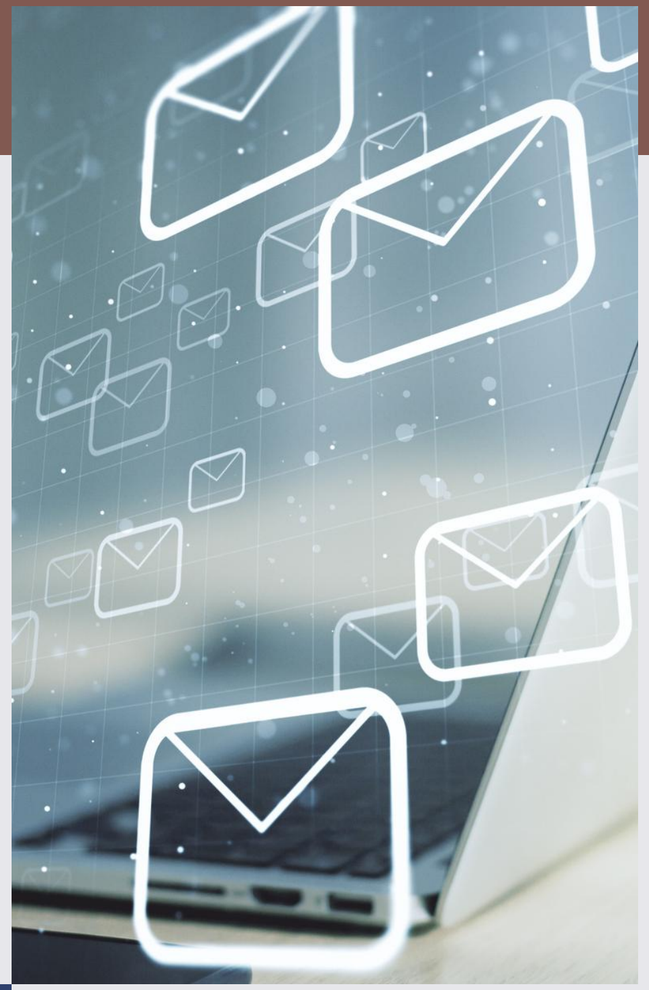
AN ETHICAL QUAGMIRE FOR THE MODERN ATTORNEY

An attorney SHALL make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to” client information.

SO…WHAT IS “REASONABLE”?

Official Comment to Rule 1.6 (c):

“Paragraph (c) requires a lawyer to act competently to safeguard information related to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the **lawyer…or (persons) who are subject to the lawyer’s supervision.”** [Emphasis added.]



PER THE OFFICIAL COMMENT, WHAT IS “REASONABLE” WILL BE CASE-SPECIFIC.

- Factors considered: sensitivity of the information; cost involved in protecting it; likelihood of disclosure if additional safeguards are not implemented; etc.

- Examples:built-in biometrics; cyber-security updates and upgrades

NOT JUST STATE-SPONSORED ACTORS IN FOREIGN COUNTRIES

- Dumpster-diving
- 65% of all data breach claims result from stolen laptops
- FBI:law firms are the number one target for data breaches
- If staff use personal devices for work: policies for disposal
- Remote “wipe and delete” policies
- “Bad stayers” and “bad leavers”
- Enterprise risk for lawyer, neutral and ADR provider

YOUR BEST PROTECTION

- Modern encrypted devices
- Current OS
- Apply all updates
- Use reputable security software w/updates
- Consider Meraki, Google Authenticator, Monster Iron, etc.: combo firewall intrusion detection and access control. Monitoring
- Retrofit or replace older devices
- Don’t use outdated software: Windows 7 linked to virtually all recent law firm data breaches

CLOUD STORAGE

- Loss of responsibility and control over client data
- Who OWNS the data?
- Cost savings vs. hard copy storage
- Law is a cost-sensitive enterprise: balancing
- BUT:not just a cost decision—also a professional responsibility decision

LAWYERS NOW MUST:

- Audit vendor regularly
- Verify best practices management by vendor
- Back-up power; physical security; power back-up
- Is vendor outsourcing storage?
- Exit protocols
- Financial viability

MORE OMINOUS FOR LAWYERS

The Opinion cited the need to properly train lawyers and non-lawyers under the attorney's supervision…and to conduct due diligence on technology vendors.

- Examples: experts; cloud storage vendors

Bottom-line: potential vicarious liability. Duty to train and monitor staff and vendors

PROTECT YOURSELF…YOUR CLIENTS…and yOUR REPUTATION

2FA

Single access points---Google Authenticator, Cisco Meraki, Monster Iron, others

Robust passwords: consider a password manager. Length beats complexity.

Check if you have been breached: Troy Hunt's site: [Strategic Brand Development]

Physical security of devices

Consider restricted access to client data: silos

RULE 1.6 (C): DUTY TO TRAIN AND MONITOR

- Implications are dramatic…and evolving
- No longer sufficient to be honest and virtuous

CALIFORNIA LAWYERS:

Effective May 2021: California has adopted the substance of Model Rule 1.6 (c) and the Comment as recently amended…including the admonition to train and monitor staff and vendors

WHY WORRY ABOUT A BREACH?

FOR A CLIENT

Disclosure can be catastrophic for a client involved in a negotiation

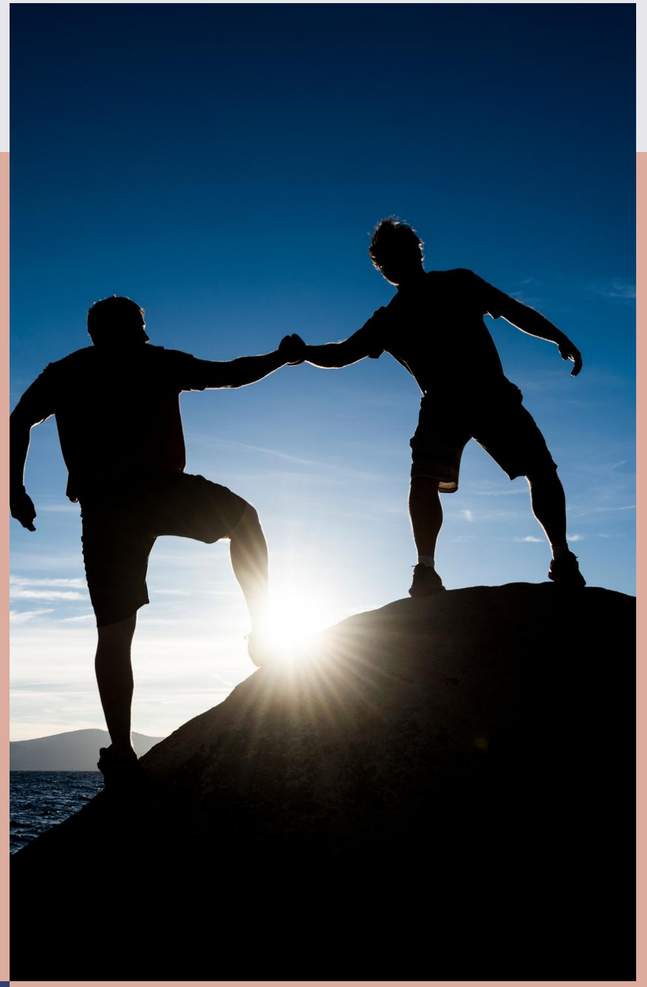
FOR A LAWYER

1. Undermine client's leverage
2. Potential for civil and state bar claims
3. Enterprise risk to law firm or ADR provider: loss of current & potential clients

“Lawyers cannot continue to be blissfully ignorant of the implications of technology.”

-PREET BHARARA

FORMER US ATTORNEY FOR THE SDNY



THE GOOD SAMARITAN EXPERIMENT

ETHICS RULES ARE EVOLVING QUICKLY, OFTEN DRIVEN BY TECHNOLOGY ADVANCES

THEY ARE NO LONGER INTUITIVE

ADR SERVICES, INC.

&

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THANK YOU

QUESTIONS? STAY IN TOUCH

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