ETHICS AND SETTLEMENT:

SUCCESSFUL NEGOTIATONS AND MEDIATION IN YOUR PRACTICE

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"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough." – **Abraham Lincoln**

President Lincoln advised lawyers of his time to negotiate, save time and money, and act in good faith. Attorneys have the unique position to empower clients to reach agreement and be released from the pain and cost of protracted legal disputes. In 1984, then Retired Chief Justice of the U.S Supreme Court, Warren Burger shared his own observation of the state of our profession when he explained; *"Lawyers, judges, law teachers – the entire profession has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that* ***we ought to be healers—healers of conflict."***

Litigation does not heal conflict –although it may end the battle. Negotiation and mediation heal conflict because the parties themselves fashion a mutually acceptable agreement to resolve the dispute. – However, too often consensual dispute resolution comes very late in litigation, after clients have exhausted their energy and their funds. According to a study by the Department of Justice, 97% of cases settle before trial through some form of negotiation or mediation. Many times settlement occurs just before trial. With the tremendous budget cuts in our judicial system, and the long wait time for trial, there is a greater need to settle cases as early as possible to give disputants the opportunity to end their conflicts and move on peacefully in their lives.

Most of what we do as a lawyers involves negotiation from the outset of our representation of clients, our communications with other attorneys, staff, experts, court clerks, mediators, judges and others. Our ability and *credibility* in the process is critical to a successful law practice whether engaging in lawyer-to-lawyer negotiations or representing your clients in mediation, attorneys have a duty to explain and consider options for settlement with clients early in their cases. It is our fiduciary duty to advise clients as to consider settlement negotiations, and/or consensual or alternative dispute resolution to resolve the case without a costly court battle.

The **California Attorney General Guidelines of Civility and Professionalism** indicate that there is an affirmative ethical duty to encourage clients to settle, to not delay resolution or try to game the system, but to act in good faith as to negotiations as stated below in **Section 13 Alternative Dispute Resolution:**

An attorney should raise and explore with the client and, if the client consents, with opposing

Counsel, the possibility of settlement and alternative dispute resolution in every matter as soon as possible and, when appropriate, during the course of litigation.

Ethical Negotiators are Successful Negotiators

You have probably negotiated with many types of people in your practice. Recall the congenial attorney relationships in cases that ended in mutually satisfying settlements. They are often described as courteous, civil, confident, very well prepared, astute, knowledgeable about the facts, the law and their clients desires, cooperative in discovery, straight forward, good listeners, focused problem solvers, and ethical people. When attorneys in settlement negotiations are cordial, professional, and act in good faith, they create a *trusting* relationship with others so that mutually acceptable agreements are achievable. When disputes end by consensual accord, clients are satisfied and appreciate their lawyers' work. Content clients pay their bills and are valuable referral sources.

Have you ever had an unpleasant experiences dealing with negative, adversarial, high conflict attorney personalities? They may have been uncooperative in discovery, ill prepared for negotiations, refused to listen, and perhaps used deceptive or bullying strategies, falsification of material facts, misrepresentations, game playing, and other unethical tactics. Bad faith behaviors don't lead to successful mutually satisfying results. If there is a settlement, it's often just before trial after the conflict has escalated, the stress level is high, and the fees and costs have skyrocketed.

Although attorneys have a duty to advocate zealously for clients (See *Davis v. State Bar* (1983) 33 Cal.3d 231, 238 [188 Cal.Rptr. 441]), effective attorneys can pursue all legal avenues cooperatively and ethically to protect and promote their clients' best interests.

The Business and Professions Code sections 6068(b), (c), and (d). states that an attorney should "maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense," and "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 (arbitrator or mediator) by an artifice or false statement of fact or law."

If an attorney knowingly misrepresents facts in negotiations it may be considered an act of moral turpitude that could result in suspension or disbarment. The Business and professions code addresses the issue of honesty and moral turpitude in representing clients whether in court, negotiations, mediation or even in our non-professional lives. An

attorney who deliberately misrepresents or lies about a material fact in negotiations may be suspended or disbarred as stated in Business **and Professions Section 6106 below:**

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.

If an attorney acts with the intention to deceive by deliberately giving false information such as saying that his/her client has no insurance in a personal injury case; or that a client only earns $60,000 a year when in fact he earns $160, 000 a year, those statements would be violations of the code. Business and Professions Code section 6128 provides that, *"every attorney is guilty of a misdemeanor who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."*

Although it's improper for an attorney to make false statements of material facts during the course of a negotiation, it's not unethical to make statements about clients' negotiating goals or willingness to compromise. The rules seem to allow "puffery" statements such as, "My client won't settle for less than $85,000." Even if the settle for $65, 000, there would be no violation as to a material fact since the above statement only referred to settlement goals or an opinion.

In addition to the Business and Professions Code, the State Bar's California Attorney Guidelines of Civility and Professionalism addresses an attorney's conduct when negotiating a written agreement on behalf of a client. Specifically, Section 18, "Negotiation of Written Agreements" provides:

An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

The guidelines state that attorneys should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.

Written agreements in settlement must be signed by all the parties, including those who have authority to settle, and their attorneys. This is especially critical in a mediated

settlement agreement where all stakeholders must be present to sign or sign by fax and the agreement is only enforceable when the written settlement states that the parties intend for the mediated agreement to be *enforceable in a court of law.*

In addition to the Business and Professions Code, the **California State Bar Rules of Professional Conduct** apply to settlement negotiations and negotiations in mediation the following are some of the most relevant:

Rule 2-100 Communication with a Represented Party

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the their lawyer.

There are times in a negotiation when all parties and their attorneys are present, or in mediation when all are present (at least by phone), that opposing counsel will communicate in front of or even to the client represented by counsel. When all agree to be there for the purpose of settlement discussions, consent to communicate may be inferred and there would be no violation. Never the less, the representing counsel may intervene at any time to stop the communications if he/she deems it inappropriate. For pro-per clients in mediation who are represented by consulting counsel, the parties may speak with each other and consulting counsel without violation subject to the mediation agreement.

Rule 3-100 Confidential Information of a Client

A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

In settlement negotiations, lawyers may only divulge to opposing counsel what is authorized by the client, yet the attorney has a duty to act in good faith to exchange information which is required by discovery. If a client confides to the attorney that he is lying about an issue of material fact and specifically warns the attorney to also lie, or not to reveal such confidence, the lawyer should persuade the client not to lie, or in the alternative, the attorney should consider removing himself from the case, so as not to make a false representation.

Rule 3-500 Communication

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Attorneys should provide copies of all correspondence regarding the client's case and all written and oral demands and offers. In the event that an attorney does not think an offer is fair or viable, he/she must nevertheless communicate it to his/her client and provide copies of correspondence from opposing counsel and others.

Rule 3-510 Communication of Settlement Offer
A member shall promptly communicate to the member's client:

(a) All terms and conditions of any offer made to the client in a criminal matter; and

(b) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

The California Evidence Code Applies to Negotiations
The California Evidence Code also is relevant to negotiations and mediatio**n.** For example Mediation Confidentiality is explained in Evidence Code 1119: In mediation, all parties must keep anything said or created in the mediation confidential or produced ***except*** what would be discoverable in court. Nothing said by any party in open session or in the course of mediation may be introduced into court unless agreed upon by all parties. Evidence code Section 1119 specifically states:

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of mediation or a mediation consultation shall remain confidential.

If mediation fails to resolve all issues and the parties proceed to court, neither the parties nor their counsel are to be permitted to present any correspondence, unsigned agreements, or evidence of any oral statements or agreements, to the subsequent proceeding without the written agreement of all the parties.

Mediation Authority to Settle: California Rules of Court Rule 3.894.

Ethical, effective negotiators will make sure that when they enter into settlement negotiations, they must bring the persons with authority and the financial means to settle to the table. In court affiliated mediation, the California Rule of Court Rule 3.894 it is clear as to who must be in attendance at a mediation conference as stated below:

California Rules of Court Rule 3.894.

(a) Attendance

(1) All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone as provided in (3). If a party is not a natural person, a representative of that party with authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement, must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).

(2) If any party is insured under a policy of insurance that provides or may provide coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).

(3) The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session under (1) or (2) or permit attendance by telephone.

Mediation can only be successful if all stakeholders and all persons with financial authority participate in the negotiations. It is a violation of the California Rules of Court for an attorney to agree to mediation and then not bring the persons who have the authority to settle to participate in the mediation. It is a waste of time for the other parties and an example of bad faith. The mediator may allow a person to appear by video conferencing or at least by phone if all agree, but it is crucial that the people with the financial authority to settle be present for the entire hearing in order to listen and problem solve cooperatively. All stakeholders must sign a mediated settlement agreement, and assert that the document is enforceable in a court of law.

FIVE KEYS TO POWERFUL, ETHICAL, SUCCESSFUL SETTLEMENT NEGOTIATIONS

Most attorneys are ethical people who advocate fairly for their clients. When preparing for any negotiation it remind yourself of what gives you ***power*** to influence opposing counsel

to settle positively for your clients. The acronym **POWER** may remind you of the five keys to an ethical, successful negotiation.

P – Preparation.

Prepare for your negotiation or mediation as you would for trial. Know your facts, the parties, the law and your "opponent". Prepare yourself and your client mentally, emotionally, and physically. Discuss expectations with your opposing counsel before you plan for the meeting.

"Before everything else, getting ready is the secret to success."

– Henry Ford

O – Options.

Brainstorm with your client various options which would be acceptable and meet your client's interests. Then consider how you can present options that will also be acceptable to the other parties.

"*If we manage conflict constructively, we harness its energy for creativity and development."*

– Kenneth Kaye

W –Worthiness.

Be trustworthy. Discuss with your client how important it is to be cooperative, courteous, polite, calm, and truthful in the negotiation or mediation. Don't be deceptive in any way and ask lots of questions to make sure that your negotiation opponent is not deceptive .If the other side appears to be playing unethical games. Discuss your concerns in a calm manner, talk to your mediator about this issue, and if need be end the negotiation and offer to reconvene later.

"Relationships of trust depend on our willingness to look not only to our own interests, but also the interests of others."

- Peter Farquharson

E – ENTHUSIASM, ETHICS.

Come to the table confident and enthusiastic with positive energy. Your expectation of a mutually satisfying settlement will help you to achieve better results. Positive, collaborative energy is contagious, so you may influence the other parties and their attorneys to also enthusiastically problem solve and reach a settlement.

"Am I not destroying my enemies when I make friends of them?"

– Abraham Lincoln

R – RELATIONSHIP.

Establish a friendly, courteous relationship with opposing counsel and his/her client(s). Be collaborative and recognize that each party thinks he/she is right and that the attorneys are there to be advocates for their clients just as you are an advocate too. If there were prior negative interchanges, start again and apologize if you or your client was snarky in the past And remember, "S*peak when you are angry and you will say the best speech you ever regret!"* –Ambrose Bierce

"Conflict is inevitable, but combat is optional." — Max Lucade

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