

Mediation Advocacy: Duty to Disclose

Video clip: https://open.mitchellhamline.edu/dri_mclvideo/51/

Overview of the Scenario

This is an employment discrimination claim involving sexual harassment. The claimant is seeking back wages, medical expenses, and future earnings. After an initial unsuccessful mediation, the parties agree to reconvene after receiving more information about the claimant's job search efforts. Shortly before the resumed mediation, the respondent increases its settlement offer by \$20,000, citing future wages as the basis. However, between the sessions, the claimant accepts a new higher-paying job but instructs her attorney not to disclose this fact. **NOTE:** The scenario is based on a hypothetical outlined by Art Hinshaw in *On Professional Practice: Ethics and Negotiation*, 25 DISPUTE RESOLUTION MAGAZINE 32 (2019) (which parallels issues discussed in The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194).

Classroom/Training Objectives

- Practice negotiation skills in a mediation context
- Experience ethical dilemmas related to disclosure
- Apply ABA Model Rule of Professional Conduct 4.1(b) and related professional conduct rules
- Engage in attorney-client counseling when faced with potential client fraud
- Reflect on the boundaries between permissible negotiation tactics and unethical conduct in mediation

Key Teaching Points

- ABA Model Rule of Professional Conduct 4.1(b) prohibits lawyers from failing to disclose material facts if nondisclosure assists client fraud.
- The claimant's new job materially affects her claim for future wage loss.
- Negotiation allows some degree of posturing, but not the concealment of material facts that enable fraud.
- Lawyers have dual obligations: loyalty to clients and duties of candor to third parties.
- Lawyers must counsel clients on the risks and ethics of withholding material information.
- Mediation is a negotiation context, but ethical obligations of truthfulness still apply.

Ethics Analysis Under ABA Model Rule of Professional Conduct 4.1(b)

Rule 4.1(b) states that:

In the course of representing a client a lawyer shall not knowingly:

(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 Rule 1.6 prohibits disclosure.

The rule comment further provides that “[o]rdinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like.”

1. Materiality of the New Employment

The claimant's new job, which pays \$15,000 more annually, directly affects the valuation of her claim for future earnings. Future earnings were specifically cited by the defendant's counsel as a factor in increasing the offer. Thus, her new job is a material fact under Rule 4.1(b).

2. Risk of Assisting Client Fraud

The claimant's instruction to withhold this information could result in the opposing party making a settlement decision based on outdated or false assumptions. This could constitute fraud if it leads to an unjustified settlement amount. The *State Bar of California Formal Opinion 2015-194* addresses a similar scenario where attorneys make or fail to correct material misstatements during settlement negotiations. According to that opinion, attorneys who knowingly allow the other side to rely on outdated or misleading information about wage loss or damages violate ethical rules.

3. Duty to Disclose vs. Confidentiality

Under Rule 4.1(b), the duty to disclose may override client confidentiality (except where disclosure is prohibited by Rule 1.6). If disclosure is necessary to avoid assisting fraud, the attorney may be required to reveal the new employment even against the client's wishes.

4. Attorney's Conduct

The attorney's failure to disclose the claimant's new employment potentially:

- Misleads the opposing party about damages.
- Assists the client in potentially fraudulent conduct.
- Violates ethical duties under Rule 4.1(b).

Discussion Questions

- Is the client's new employment a material fact?
- How should the lawyer balance confidentiality with her duty of candor?
- Could the lawyer ethically accept the settlement offer without disclosing the new job?
- What could happen if the former employer/defendant learns about the new job after settlement?
- What client counseling approaches might help the client make a good decision?

Resources

- Download PowerPoint Slides from Mitchell Hamline Open Access: [PowerPoint Slides for Classroom Use](#) (with embedded video clip).
- [Art Hinshaw in *On Professional Practice: Ethics and Negotiation*, 25 DISPUTE RESOLUTION MAGAZINE 32 \(2019\)](#)
- [The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-194\)](#)