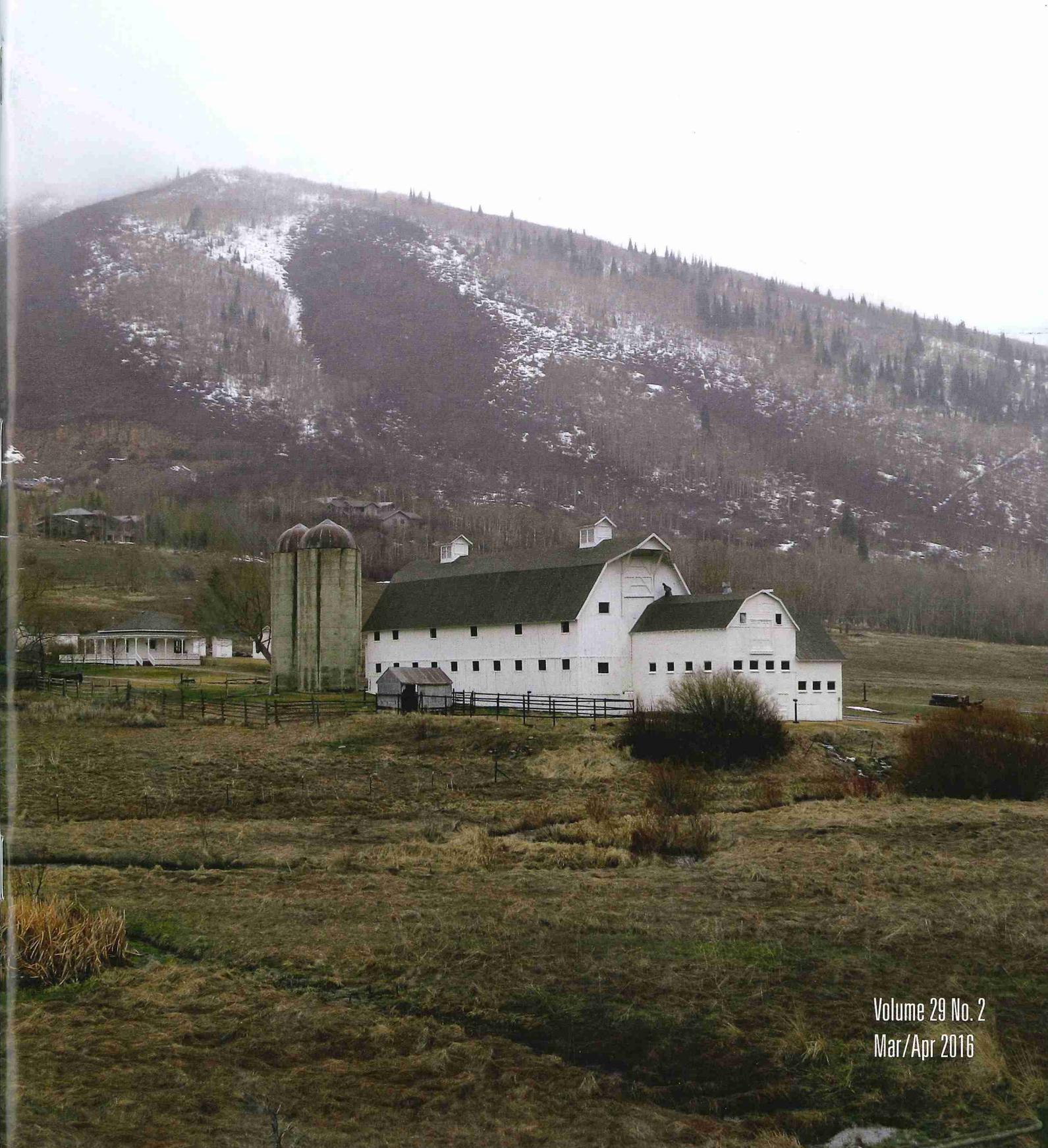


Utah Bar. JOURNAL



Volume 29 No. 2
Mar/Apr 2016

Is it Ethical to Be Dishonest in Negotiations?

by Keith A. Call

Plaintiff's Attorney: "My client is going to have to have at least three future surgeries. I need at least \$200,000 to settle this case."

Defense Attorney: "I have an eyewitness who says [he thinks, but is not sure] the light was green. My bottom line is \$50,000. My client will never pay a penny more."

Are these statements ethical? Some lawyers in negotiation may understate their willingness to make concessions in order to resolve a dispute. Some lawyers may also exaggerate or understate strengths and weaknesses of a factual position. Where is the ethical line between puffing and fraud?

The Rule

Rule 4.1 of the Utah Rules of Professional Conduct provides:

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, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Analysis

The question of puffery vs. dishonesty or fraud has spawned volumes of commentary and debate. Comment [2] to Rule 4.1 adds, somewhat obtusely:

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions 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. . .

Legal commentators are all over the map. Some have argued that *every* negotiation involves some level of deception, and that those who piously argue otherwise are simply wrong (or dishonest). "To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation." The argument continues that we must expect a negotiator to mislead, "but fairly." James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 921, 927-28 (1980). See also, Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 181 (2004) (current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far). These writers seem to accept that consensual deception is intrinsic to the negotiation process.

Others argue that principles of morality should drive lawyers to reject the concept that negotiation is inherently and appropriately deceptive. See Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 Geo. J. Legal Ethics 45, 93-102 (1994). And some have warned that the language of the comment to Rule 4.1 cannot repeal the meaning of the rule, and does not give license to lie. See 2 Geoffrey C. Hazard, Jr., W. William Hodes and Peter R. Jarvis, *The Law of Lawyering* § 37.3 (3d ed. 2014).

KEITH A. CALL is a shareholder at Snow Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

