Ethics: Pitfalls in Settlement Negotiations

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Settlement Ethics

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SETTLEMENTS

A. Who controls the settlement?
   1. Rule 1.2(a)
      a. Client has the final say in deciding whether to accept or reject a settlement.

B. Can you speak directly with the other side?
   1. Model Rule 4.2
      a. A lawyer may not communicate with a person the lawyer knows to be represented by counsel, unless that person's counsel has consented to the communication or the communication is authorized by law or court order.
      b. A lawyer also may not use an intermediary to communicate directly with a represented person in violation of the "no contact" rule. See Rule 8.4(a); ABA Formal Ethics Opinion 95-395.
   2. ABA Formal Ethics Opinion 92-362
      a. Even if a lawyer suspects a settlement offer was not communicated by the opposing counsel to the opposing party, the lawyer may not ask the opposing party whether the settlement offer was communicated.
   3. ABA Formal Ethics Opinion 11-461
      a. Parties have the right, even if they are represented, to communicate directly with one another.
      b. A lawyer may advise the client to communicate directly with the other party. The lawyer can do this either at the client's request or on his or her own initiative.
      c. A lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary.
      d. But, the lawyer must be careful not to overreach. E.g., the lawyer cannot assist the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel.

THE LIMITS OF DISHONESTY

A. False Statements of Material Fact or Law
   1. Rule 4.1(a) prohibits a lawyer, in the course of representing a client, from knowingly making a false statement of material fact or law to a third person.
   2. Comment 2 to Rule 4.1 states that "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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud."
   3. Neither Rule 4.1 nor its commentary clearly defines "material fact."

B. Puffery and Posturing
   1. ABA Formal Ethics Opinion 06-439
      a. A party in a negotiation often understates his or her willingness to make concessions to compromise a dispute.
      b. A party in a negotiation also might exaggerate or understate the strengths and weaknesses of its factual or legal position.
      c. Such remarks, often called "posturing" or "puffing," are statements on which the other party to the negotiation ordinarily would not be expected justifiably to rely.
      d. Puffery is distinguishable from false

statements of material fact.

e. Privately mediated negotiations are subject to the same standard as a direct negotiation.

2. ABA Formal Ethics Opinion 93-370

a. A party's actual bottom line or the settlement authority given to a lawyer is a material fact.

3. ABA Formal Ethics Opinion 93-370

a. In contrast, statements regarding negotiating goals or willingness to compromise ordinarily are not considered statements of material fact.

b. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution.

c. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

4. Williams v. Texaco Refining and Marketing Inc., 1995 WL 253124 (4th Cir. 1995) (where plaintiff alleged that Texaco misrepresented that it would not pay more than $143,000 for settlement of any property damage claims, but in fact had paid up to $650,000 in settlement to other persons affected by the contamination, the alleged statement "was mere puffery made by opposing counsel during the course of settlement negotiations. As such, the statement simply was not a misrepresentation of material fact.").

5. Statewide Grievance Committee v. Gillis, 2004 WL 423905 (Conn. Super. 2004) (dismissing grievance complaint where the plaintiff's attorney stated during settlement negotiations that the plaintiff could not "participate in any activity which requires the slightest bit of physical exertion"; "The Respondent is guilty of imprecision and exaggeration, traits that are not directly addressed by any of the Rules whose violation the petitioner alleges. . . . The insurers did not rely, nor could they have reasonably been expected to rely, on the information and representations provided by the Respondent in his correspondence to the adjusters. The Petitioner has not shown by clear and convincing evidence that the conduct of the Respondent amounted to fraud, deceit, misrepresentation or dishonesty.").

C. Weaknesses in a Case

1. ABA Formal Ethics Opinion 94-387

a. As a general rule, lawyer has no duty to disclose weaknesses in the client's case to an opposing party.

b. To do so would without client consent would violate Rules 1.3 (diligence) and 1.6 (confidentiality of information).

c. E.g., lawyer has no duty to inform opposing party that the statute of limitations has run on the client's claim.

d. But, the lawyer may not make any affirmative misrepresentations about the facts, or suggest that he or she plans to do something (e.g., file suit) that the lawyer has no intention of doing.

2. ABA Ethics Opinion 95-397

a. A plaintiff's lawyer engaged in negotiations to settle a personal injury lawsuit cannot conceal the client's death, but must promptly notify opposing counsel of that fact.

3. Cedar Island Imp. Ass'n., Inc. v. Drake Associates, Inc., 2009 WL 415991 (Conn. Super. 2009) (a lawyer's failure to disclose an ongoing dispute between his client and another party did not violate the Rules of Professional Conduct).

D. Insurance Coverage

1. New York County Lawyers' Association Ethics Opinion 731 (A lawyer may not affirmatively misrepresent the existence or extent of insurance coverage, but may refrain from confirming or denying the information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation).

E. What if the judge is the mediator?

1. ABA Formal Ethics Opinion 93-370

a. A lawyer shall not, without the client's consent, reveal to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement.

b. Although the judge may inquire regarding these matters, the judge may not require the lawyer to make such disclosures absent authority from the client.

c. Lawyer may not misrepresent the client's bottom line or the limits of the lawyer's authority; the proper response is to decline to answer.

SETTLEMENT TERMS LIMITING THE OPPOSING

LAWYER

A. Can you prohibit the opposing lawyer from representing other clients?

1. Rule 5.6(b) prohibits lawyers from offering or making a settlement agreement that includes a restriction on a lawyer's right to practice law.

2. "The most obvious example of an ethically impermissible settlement provision [restricting a lawyer's right to practice law] is one that expressly prohibits a plaintiff's lawyer from subsequently representing other plaintiffs in litigation against the defendant." ABA Ethical Guidelines for Settlement Negotiations (Aug. 2002).

3. ABA Formal Ethics Opinion 93-371

a. A lawyer may not offer, nor may opposing counsel accept, a settlement term that would obligate the latter to refrain from representing either present or future clients who might opt out of a class action or mass tort settlement.

4. However, it is "close, but permissible" for a lawyer defending a class action lawsuit to ask the plaintiffs' lawyer for settlement purposes to state that he or she has no present intention of filing suit against the defendant in similar cases. Colorado Ethics Opinion 92.

B. Can you accomplish the same result by agreeing to retain the opposing lawyer?

1. You cannot do indirectly what Rule 5.6 prohibits you from doing directly. ABA Ethical Guidelines for Settlement Negotiations (Aug. 2002).

a. For example, a lawyer may not negotiate or agree upon a settlement provision whereby the defendant will retain the plaintiff's lawyer in the future as a consultant or attorney, so that conflict rules will preclude the plaintiff's lawyer from representing future plaintiffs against that defendant without the defendant's consent.

C. Can you prohibit the opposing lawyer from revealing information learned in connection with the representation of the settling client? From using that information in representing other clients?

1. ABA Formal Ethics Opinion 00-417

a. Lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client. This is no more than what is required by Rule 1.6 in any event, absent client consent.

b. Lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party or a related party, except in limited circumstances.Agreement not to use information learned during the representation effectively would restrict his right to practice, in violation of Rule 5.6(b).

D. Can you require the opposing lawyer to divulge the identity of the lawyer's other clients?

1. Arizona Ethics Opinion 90-06 (opposing attorney could not be required as part of settlement to disclose other clients' names absent those clients' consent).

2. Colo. Ethics Opinion 92 ("[T]he test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation.")

E. Can you require the opposing party to return or destroy documents?

1. In general, there is no prohibition against agreeing that documents will be returned or disposed of. ABA Ethical Guidelines for Settlement Negotiations (Aug. 2002).

2. The only exception is where there is a legal obligation to retain or preserve evidence, e.g., the documents are required to be preserved in connection with a different lawsuit. Id.

F. Can you require an affidavit from the opposing party?

1. Texas Ethics Opinion 614

a. Requiring the opposing party to provide an "acceptable affidavit" would violate the ethics rule that prohibits lawyers from offering any benefit to a witness based on the content of testimony.

b. However, it is permissible to propose a settlement requiring the other party to give a truthful affidavit.

c. The opposing party can also be required to make himself or herself available for deposition or trial in another case, so long as no conditions are placed on the testimony.

G. Can you ask the plaintiff's lawyer to forego an attorney fee?

1. The U.S. Supreme Court held that a defendant in a civil rights action governed by the fee shifting provisions of 42 U.S.C. § 1988 may condition a settlement offer on the plaintiff's waiver of his claim for attorney fees. Evans v. Jeff D., 101 S. Ct. 1531 (1986). The Court reasoned that any attorney fees under the statute belonged to the plaintiff, and not the

plaintiff's attorney.

2. State ethics opinions vary on whether a lawyer may ethically forbid a client from waiving an attorney fee. See, e.g., Utah Ethics Advisory Opinion 98-05 (it is not unethical for a defense attorney to present an offer of settlement conditioned on waiver of attorney fees).

H. Can you ask the plaintiff's lawyer to provide indemnity?

1. Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client.

2. Virginia Legal Ethics Opinion 1858 (it is unethical for plaintiffs' lawyers to agree to indemnify defendants against third party liens); Florida Bar Staff Opinion 30310 (it is unethical for an attorney to personally indemnify an opposing party, or to require another attorney to enter into an agreement to personally indemnify another party).

AGGREGATE SETTLEMENTS

A. What is an aggregate settlement?

1. Not defined by the Model Rules.

2. Generally considered to arise when two or more clients represented by the same lawyer together resolve some or all of their claims or defenses.

3. It is not necessary for all of the lawyer's clients to participate in the settlement for it to be considered an "aggregate settlement."

4. Nor is it necessary for the settling parties to have the same claims or defenses.

B. Rule 1.8(g)

1. Supplements Rule 1.7

2. Under Rule 1.8(g), a lawyer must advise each client of:

a. The total amount or result of the settlement;

b. The amount and nature of each client's participation in the settlement;

c. The fees and costs to be paid to the lawyer from the proceeds or by an opposing party; and

d. The method by which costs are to be apportioned to each client.

3. Each client must consent to the settlement in writing.

a. This standard is stricter than that in Rule 1.7.

b. Several courts have concluded that fee agreements that allow for a settlement based on a "majority vote" of the clients violate Rule 1.8(g).

About Carolyn Fairless

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Carolyn has practiced extensively in the federal and state courts in Colorado, and has also been admitted pro hac vice in several other states. Her practice areas include professional liability, product liability, intellectual property, and commercial litigation.

In recent years, Carolyn has:

- Obtained dismissal on behalf of a law firm at the Rule 12(b) stage in a multimillion dollar RICO action in the Western District of Missouri.
- Led the trial team retained in the last few months before trial to defend against a real estate company's claims that WTO's client caused the loss of a $2MM investment when it prevented the sale of a real estate before the real estate market crashed. Despite rulings made before WTO's retention that the basis for interfering lacked merit as a matter of law, following trial the court ruled for WTO's client on all issues of liability, causation, and damages.
- Obtained complete summary judgment and an award of attorney's fees against the plaintiff and the plaintiff's attorneys in a legal malpractice case where the plaintiff sought $7 million in damages.
- Obtained complete summary judgment and an award of attorney's fees in a legal malpractice case where the plaintiff claimed $4 million in damages.
- Successfully obtained a Rule 12 dismissal on behalf of five attorneys sued for extreme and outrageous conduct, civil conspiracy, defamation, and abuse of process.
- Represented the Vancouver Canucks organization in a lawsuit brought by Colorado Avalanche player Steven Moore as a result of injuries sustained by Mr. Moore during a hockey game, successfully obtained a dismissal of the lawsuit on the grounds of lack of personal jurisdiction and forum non conveniens, and also obtained an award of attorney's fees and costs in favor of the Canucks organization and against Mr. Moore.
- Obtained partial summary judgment on behalf of a large national law firm that had been sued for malpractice, aiding and abetting, conspiracy and violations of RICO, reducing the damage claim from over $150 million to less than $2 million, and paving the way for a favorable settlement of the case.
- Won complete summary judgment in a $5 million legal malpractice case one week before a two-week trial was scheduled to begin.

Education

- University of Colorado School of Law, J.D., 1998
- Research Assistant to Professor Dale A. Oesterle
- Tulane University, B.S., Computer Science, cum laude, 1992