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## Settlement Ethics

By Mark J. Fucile  
Fucile & Reising LLP

Most cases settle. Although that's been true for a long time, the dynamics of settlement have changed significantly in recent years. These changes include the increasing "organization" of negotiations through court-annexed and private mediation, an attendant effort to find "new" ways to resolve cases and, especially in the mass tort context, "group" or other multiple case settlements. In this column, we'll look at three facets of settlement ethics. *First*, we'll discuss the sometimes not-so-bright line between opinions and material misstatements during negotiations. *Second*, we'll examine whether a litigation opponent can be prevented from handling future cases against a defendant as part of a current settlement. *Third*, we'll survey the rule governing aggregate settlements. Failure to follow the RPCs in these areas can result in court-imposed sanctions, bar discipline and potentially undoing the very settlements the parties involved were trying to achieve.

### ***Opinions vs. Misstatements***

RPC 4.1 sets the marker for our dealings with opponents during negotiations:

"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 Rule 1.6 [the confidentiality rule].”

It is important to emphasize what is *not* required under this rule: there is no affirmative obligation to disclose weaknesses in your client’s case to the other side. ABA Formal Ethics Opinion 94-387 (at 1-2) (1994) puts it this way:

“As a general matter, the Model Rules of Professional Conduct . . . do not require a lawyer to disclose weaknesses in her client’s case to an opposing party, in the context of settlement negotiations or otherwise. Indeed, the lawyer who volunteers such information without her client’s consent would likely be violating her ethical obligation to represent her client diligently, and possibly her obligation to keep client confidences.”

It is also important to stress that hard bargaining that includes expressions of opinion is not prohibited either. Comment 2 to RPC 4.1 attempts to delineate the sometimes imperfect line between opinions and misstatements:

“This Rule refers to statements of fact. 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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.”

What *is* prohibited are outright misrepresentations of material facts, through either knowing misstatement or nondisclosure. ABA Formal Ethics Opinion 95-397 (1995) offers a very real example that can come up when negotiating resolution of mass torts or other serious personal injury claims: the

claimant dies. Because this failure would be material in almost all circumstances, it would both violate RPC 4.1 (subjecting the lawyers involved to court-imposed sanctions and bar discipline) and might also open the door to rescission of any settlement reached under that mistaken assumption.

***Restrictions on Future Representation***

RPC 5.6(b) states the black-letter rule that a lawyer can neither offer nor accept a direct restriction on a lawyer's right to handle adverse claims as a condition of the settlement of a current case:

“A lawyer shall not participate in offering or making:

.....

“(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.”

Black can fade to gray, however, when the restriction is indirect.

*In re Brandt/Griffin*, 10 P.3d 906 (Or. 2000), *Florida Bar v. St. Louis*, 967 So.2d 108 (Fla. 2007), and *Florida Bar v. Rodriguez*, 959 So.2d 150 (Fla. 2007), for example, all involved claimants' lawyers disciplined for violating versions of RPC 5.6(b) by accepting offers of *future* retention by party opponents that “conflicted them out” of future adverse claims while negotiating mass torts settlements. WSBA Informal Ethics Opinion 1850 (1999) reaches the same conclusion under our rule. Along the same lines, the ABA in Formal Ethics Opinion 93-371 (1993) concluded that a global settlement of mass tort litigation with a law firm's clients that created a predetermined settlement rate for future claims while prohibiting

the law firm from representing clients who “opted out” violated ABA Model Rule 5.6(b) (upon which our rule is patterned). Similarly, the ABA in Formal Opinion 00-417 (2000) found that a settlement agreement that prevented a claimant’s counsel from using the information learned during the case being settled in any future case violated Model Rule 5.6(b).

Finally, from the defense side, RPC 5.6(b) is not just a “problem” for claimants’ counsel. The rule is framed to prohibit *offering* such restrictions as well as accepting them. In *Adams v. Bellsouth Telecommunications, Inc.*, No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001) (unpublished), for example, the defense lawyers were sanctioned for offering a “consulting” arrangement to claimants’ counsel reminiscent of those just noted. Depending on the relationship of a prohibition of this kind to the overall deal struck, provisions violating RPC 5.6(b) could also put a settlement itself at risk as unenforceable on public policy grounds.

### ***Aggregate Settlements***

Aggregate settlements of multiple claimant litigation are usually framed as: “My client will pay ‘x’ dollars to resolve all of these cases, but the offer is contingent on all of your clients agreeing to settle.” Aggregate settlements are permitted under RPC 1.8(g) within specified limits and accompanying Comment 13 and ABA Formal Ethics Opinion 06-438 (2006) discuss them

comprehensively. (Under Comment 13, class actions are governed by their own procedural rules.)

RPC 1.8(g) specifies that the claimants affected must be told “the existence and nature of all the claims . . . involved and the participation of each person in the settlement.” ABA Formal Ethics Opinion 06-438 (examining the ABA Model Rule upon which ours is based) counsels that the disclosure should also include:

- “▪ The total amount of the aggregate settlement or the result of the aggregated agreement. (Including whether the proposal is ‘all or nothing.’)
- “▪ The existence and nature of all of the claims, defenses . . . involved in the aggregated settlement[.]
- “▪ The details of every other client’s participation in the aggregate settlement . . ., whether it be their settlement contributions, their settlement receipts . . . or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).
- “▪ The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer’s fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.
- “▪ The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.” (*Id.* at 5; footnote omitted.)

ABA Formal Ethics Opinion 06-438 also notes that the disclosure “must be made in the context of a specific offer or demand . . . [and a]ccordingly, the

informed consent required by the rule generally cannot be obtained in advance of the formulation of such an offer or demand.” (*Id.* at 6; footnote omitted.) Due to the significant potential for conflicts, RPC 1.8(g) requires that the claimants’ consent be confirmed in writing.

From the defense side, aggregate settlements are “easy” in the sense that they are expressly permitted and often provide significant practical benefits to clients facing multiple claimants represented by the same law firm that are all based on the same basic facts. From the plaintiffs’ side, aggregate settlements can offer significant practical benefits as well but they also place equally significant disclosure obligations on plaintiffs’ counsel. For both sides, the ethical obligations need to be addressed to preclude opening a door to possible rescission of the settlement based on state substantive contract law.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB’s Ethical Oregon

Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and [Mark@frllp.com](mailto:Mark@frllp.com).