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# Done Deal:
# Settlement Ethics

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Most cases settle.[1] Although that's been true for a long time, the dynamics of settlement have changed significantly over the past generation. Today, settlement negotiations are often "organized" through court-annexed or private mediation. Many courts, for example, either encourage or require alternative dispute resolution before a case proceeds to trial.[2] Although negotiation of single cases remains the norm in many practice settings, mediating multiple cases at the same time has become increasingly common in areas such as mass torts and employment discrimination.[3]

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 misrepresentation 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 conflicts that can arise when handling settlements involving multiple clients.

Before we do, three qualifiers are in order.

First, although we will focus on settlements in the litigation context, many of the principles we will discuss apply with equal measure to negotiations beyond litigation.

Second, we will focus primarily on civil rather than criminal cases.[4]

Third, the topics selected are commonly recurring themes but are not intended to be an exhaustive list. For example, if a lawyer discovers during settlement negotiations that a client is committing fraud, that raises sensitive issues of potential disclosure and withdrawal.[5]

***Opinion vs. Misrepresentation***

RPC 4.1 sets the marker for dealings with counterparties 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.[6]

It is important to note three points that are *not* required under this rule.

First, there is no affirmative obligation to disclose weaknesses in your client's case to the other side. Under RPC 3.4(a), a lawyer cannot unlawfully obstruct another party's access to evidence. But, there is generally no duty to help opponents analyze evidence they have in front of them. ABA Formal Ethics

Opinion 94-387 (at 1-2) (1994) put it this way in discussing whether disclosure of the possible expiration of a statute of limitation was required:

> 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.

Second, there is also no affirmative obligation to disclose settlement strategy to a counterparty. The Washington Supreme Court in *In re Carmick*, 146 Wn.2d 582, 599, 48 P.3d 311 (2002), noted in this regard that "under generally accepted conventions in negotiations 'a party's intentions as to an acceptable settlement of a claim' are not taken as statements of material fact."[7]

Third, 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 tortuous misrepresentation.

What *is* prohibited are outright misrepresentations of material facts, through either knowing misstatements or nondisclosure. "Knowingly" is defined term under RPC 1.0A(f) as "actual knowledge of the fact in question[.]" *In re Summer*, 105 P.3d 848 (Or. 2005), for example, involved a lawyer who was convicted of fraud in Idaho for knowingly misrepresenting the material facts of a client's multiple auto accidents in separate negotiations with an insurer and a corporate defendant. ABA Formal Opinion 06-439 (2006) notes the prohibition also includes "implicit misrepresentations created by a lawyer's failure to make truthful statements[.]" ABA Formal Ethics Opinion 95-397 (1995) offers a very real example of the latter that can occur when negotiating resolution of mass torts or other serious personal injury claims: the claimant dies. Setting aside the substantive legal issue of whether the lawyer as an agent still has a principal when that occurs,[8] failing to disclose a client's death in the serious personal injury context would almost always be regarded as material due to its impact on settlement valuation (one way or the other depending on the circumstances).

Material misrepresentations in this context can also have significant repercussions beyond potential regulatory discipline. Rescission of any resulting agreement is not hard to imagine.[9] Although comparatively rare, law firms have

been sued along with their clients for asserted fraud when conducting settlement negotiations.[10] If the settlement is challenged, it is also not hard to imagine that the lawyer may be disqualified as a necessary witness under the "lawyer-witness" rule, RPC 3.7.

***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 future 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.[11]

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 adverse claims while negotiating mass tort settlements. WSBA Advisory 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) (on which the corresponding Washington 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).[12] WSBA Advisory Opinion 988 (1986), in turn, concluded that a time limitation would not exempt an agreement from the rule.

By contrast, statements in settlement agreements that plaintiffs' counsel "have no present intention" of representing claimants against the settling defendant in the future have withstood challenge in other jurisdictions under the circuitous logic that—assuming the statements are true—they don't actually create a legally-binding promise.[13]

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.*, 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. Similarly, WSBA Advisory Opinion 2125 (2006) observed "that neither plaintiff nor defendant should enter into such a settlement agreement[.]"

Provisions violating RPC 5.6(b) could also put a settlement itself—or at least the restriction—at risk of being held unenforceable on public policy grounds. The Washington Supreme Court in *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014), noted generally that "[c]ontracts formed in violation of the RPCs are unenforceable to the extent that they contravene public policy." The corresponding ABA Model Rule, in turn, has been explained on public policy grounds to preserve client choice in the selection of legal counsel.[14]

***Conflicts***

Conflicts can develop in many ways during settlement negotiations. In this column we'll look at two: "aggregate" settlements under RPC 1.8(g); and "limited fund" settlements under RPC 1.7(a)(1). These are not necessarily the most common conflicts, but, when they occur, they are among the most difficult to navigate. Both can occur when a lawyer or law firm is negotiating claims for multiple clients against a single defendant or a related set of defendants.

***Aggregate Settlements***. In many respects, the most difficult practical question for plaintiffs' counsel is whether a defendant's proposal triggers the aggregate settlement rule, RPC 1.8(g).[15] Neither the Washington rule nor its ABA Model Rule counterpart define what constitutes an "aggregate" settlement. Washington court decisions and ethics opinions have touched on RPC 1.8(g), but have not provided a comprehensive definition either.[16]

The ABA, the American Law Institute, courts nationally and much scholarly work have wrestled with a practical definition.[17] For the most part, these authorities agree that simply settling multiple cases at the same time on their own merits—even if they involve some common facts—does not constitute an aggregate settlement.[18] These authorities also generally agree that an "all or nothing" proposal framed along the lines of "my client will pay 'x' dollars to resolve all of these cases but the offer is contingent on all of your clients agreeing" constitutes an aggregate settlement.[19] The analytical dividing line is that the first scenario does not pose a conflict while the second does because the offer has made resolution the cases interdependent.[20] Because considerable uncertainty remains over the definition, plaintiffs' counsel should closely assess whether a settlement proposal makes resolution of one jointly represented client's case dependent in some way on the other clients' cases.

RPC 1.8(g) does not prohibit "aggregate" settlements. Rather, if the rule is triggered, it requires extensive disclosure to all of the clients involved of the facts of each client's claims and their respective share in the overall settlement. ABA Formal Opinion 06-438 (2006) contains a thorough discussion of the items that should be disclosed if the rule applies. Each client must give their informed consent and their consent must be confirmed in writing.[21]

***"Limited Fund" Settlements***. If the assets available for a potential settlement are insufficient to satisfy each jointly represented client's claim, the lawyer would have a multiple client conflict under RPC 1.7(a)(1) in attempting to negotiate between the clients. If not addressed, the conflict would be non-waivable because it arises in the same matter and, in the phraseology of Comment 29 to RPC 1.7, would "ordinarily" require the lawyer to withdraw.

The Court of Appeals in *Matter of Lauderdale's Guardianship*, 15 Wn. App. 321, 325, 549 P.2d 42 (1976), suggested a practical solution to this otherwise intractable problem. In *Lauderdale*, a lawyer represented two claimants to a limited settlement fund. The Court of Appeals recognized that there is no conflict when the lawyer simply assembles the largest possible fund for jointly represented clients. Rather, the conflict arises when jointly represented clients are then forced to compete over the division of a limited fund. The Court

of Appeals in *Lauderdale* suggested that, once the original lawyer assembles the largest possible fund, the competing clients should then be represented by separate counsel in the division of that fund. The logic underpinning *Lauderdale* suggests that the clients could also decide on their own how the fund should be divided. Although *Lauderdale* preceded the adoption of RPC 1.2(c), the Court of Appeals effectively recognized that the original lawyer can limit the scope of the representation to avoid the otherwise disqualifying conflict.

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[1] *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone*, Vol. 101, No. 4 Judicature 26, 28 (2017) (discussing resolution short of trial generally); Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?* 6 J. Empir. Leg. Studies 111 (2009) (surveying settlement data across practice areas).

[2] *See, e.g.,* Western District of Washington LCR 39.1 (alternative dispute resolution); King County Superior Court LCR 16(b) (same).

[3] *See, e.g.*, Kenneth R. Feinberg, *Reporting from the Front Line—One Mediator's Experience with Mass Torts*, 31 Loy. L.A. L. Rev. 359 (1998); Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 Pepp. Disp. Resol. L.J. 2 (2009).

[4] For thoughtful discussions of the ethics issues in the context of criminal plea negotiations, *see* Erica J. Hashimoto, *Toward Ethical Plea Bargaining*, 30 Cardozo L. Rev. 949 (2008), and Fred C. Zacharias, *Justice in Plea Bargaining*, 39 Wm. & Mary L. Rev. 1121 (1998).

[5] *See generally* RPCs 1.6 (confidentiality) and 1.16 (withdrawal). *See also* ABA Formal Op. 92-366 (1992) (surveying confidentiality and withdrawal when lawyer discovers client fraud); *Dewar v. Smith*, 185 Wn. App. 544, 563, 342 P.3d 328 (2015) (discussing "noisy withdrawal"—where a lawyer disavows representations made on behalf of a client); WSBA Advisory Op. 201701 (2017) (addressing confidential information when seeking court permission to withdraw).

[6] *See also* RPC 8.4(c) (broadly prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation").

[7] Quoting Comment 1 to ABA Model Rule 4.1 (on which Washington's corresponding rule is patterned).

[8] *See* RCW 2.44.010-.020 (authority of attorney); *see also* ABA Formal Op. 95-397, *supra*, at 4 ("The death of a client means that the lawyer, at least for the moment, no longer has a client and, if she does thereafter continue in the matter, it will be on behalf of a different client [*i.e.,* a personal representative of an estate].)"

[9] *See generally Hawkins v. Empres Healthcare Management, LLC*, 193 Wn. App. 84, 371 P.3d 84 (2016) (discussing recission of a settlement agreement for asserted fraud in the inducement).

[10] *See, e.g., Matsuura v. Alston & Bird*, 166 F.3d 1006 (9th Cir. 1999). These kinds of cases do not typically seek direct enforcement of RPC 4.1. *See Kwiatkowski v. Drews*, 142 Wn. App. 463, 482, 176 P.3d 510 (2008) (rejecting recission predicated on RPC 4.1 alone). Rather, as in *Matsuura*, the claim is typically predicated on common law fraud.

[11] Comment 3 to Washington RPC 5.6 notes that that the prohibition in RPC 5.6(b) does not extend to restrictions in a lawyer's plea agreement in a criminal case or a disciplinary stipulation.

[12] WSBA Advisory Opinion 1067 (1987) discusses the potential interplay between confidentiality provisions governing witness testimony and RPC 5.6(b).

[13] *See, e.g., Desantis v. Snap-On Tools, Co.*, 2006 WL 3068584 at *12 (D. N.J. Oct. 27, 2006) (unpublished); *see also La. Mun. Police Emps' Ret. Sys. v. Black*, 2016 WL 790898 at *5 n.37 (Del. Ch. Feb. 19, 2016) (citing *Desantis* approvingly); *see generally* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 Fordham L. Rev. 1943, 1959-60 (2017) (discussing the illusory nature of "no present intention" agreements).

[14] *See* ABA Formal Op. 93-371, *supra*, at 3. For an extended critique of ABA Model Rule 5.6(b)'s public policy rationale, *see* Stephen Gillers and Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 Georgetown J. Legal Ethics 291 (2005).

[15] Under Comment 13 to RPC 1.8, class actions are governed by the notification and approval procedures in applicable court rules and case management orders.

[16] *See, e.g., Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 310, 45 P.3d 1068 (2002) (noting the rule, but not defining "aggregate"); *Sullivan v. City of Marysville*, 2014 WL 2896003 at *6 n.3 (W.D. Wash. June 26, 2014) (unpublished) (same); WSBA Advisory Op. 202001 (2020) at 4 (same).

[17] *See* ABA Formal Op. 06-438 (2006); ALI, *Principles of Aggregate Litigation* § 3.16 (2010); *In re* Gatti, 333 P.3d 994 (Or. 2014); Peter R. Jarvis and Trisha M. Rich, *Defining Aggregate Settlements: The Road Not to Take*, 23 Prof. Law. 45 (2016).

[18] *Id*.

[19] *Id*.

[20] *See* Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* at 13-8 (rev. 4th ed. 2020) (noting that ABA Model Rule 1.8 generally and ABA Model Rule 1.8(g) in particular are specific applications of "material limitation" conflicts articulated generally under ABA Model Rule 1.7(a)(2)).

[21] *See* Washington RPCs 1.0A(e) (defining "informed consent"), 1.0A(b) (defining "confirmed in writing").