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Settlement Ethics

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It's a fact of our practice lives that most cases settle. That's been true for a long time. The dynamics of settlement negotiations, however, 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 ethics rules in these areas can result in court-imposed sanctions on lawyers and their clients, bar discipline and potentially undoing the very settlements the parties involved were trying to achieve. With all three areas, we'll focus primarily on the American Bar Association's influential Model Rules of Professional Conduct that form the template for the ethics rules in most states and the ABA's equally influential formal ethics opinions. Both are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

Opinions vs. Misstatements

In settlement negotiations, ABA Model Rule 4.1 sets the marker for our dealings with opponents:

“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 at the outset 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 (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.”

(*Id.* at 1.)

It is also important to stress that hard bargaining that includes expressions of opinion is not prohibited either. ABA Formal Ethics Opinion 06-439 (2006), drawing on Comment 2 to ABA Model Rule 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.” (*Id.* at 3; footnote omitted.)

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. In some instances, a claimant’s death may increase the amount of a claim. In others, however, a claimant’s death may actually work a dramatic

reduction in the value of a claim due to state substantive law. My home state of Oregon falls into the latter category: when a plaintiff dies, the case is converted to a statutory action for wrongful death and is subject to a \$500,000 “cap” on noneconomic damages. See *Hughes v. PeaceHealth*, 344 Or. 142, 178 P.3d 225 (2008). Where, as in my example, the death of the claimant would be material, the failure to disclose it would not only be a violation of Model Rule 4.1 (and thereby subject the lawyers involved to court-imposed sanctions and bar discipline), but might also serve as a basis for rescission of any settlement reached under that mistaken assumption.

Restrictions on Future Representation

ABA Model Rule 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, 331 Or. 113, 10 P.3d 906 (2000), for example, involved two claimants’ lawyers handling multiple business tort cases that were being mediated on a national basis with the corporate defendant’s principal

outside and inside litigation counsel. The two claimants' lawyers had rejected an earlier proposal that would have contained a direct restriction of the kind prohibited by RPC 5.6(b). Later, as a way to break an impasse in the overall negotiations, the mediator suggested that the two agree to be retained by the corporate defendant at the conclusion of the litigation to provide the corporate defendant with legal advice on how to structure its operations to avoid similar problems in the future. This arrangement had the indirect effect of preventing the lawyers from handling future claims by effectively "conflicting them out" of matters adverse to the corporate defendant. After obtaining an opinion from the general counsel of their state bar that such an indirect restriction was permissible, they reluctantly agreed to it. One of their clients later complained and their state bar's disciplinary counsel (a different arm of the bar from the general counsel) prosecuted the lawyers for violating this rule. The Oregon Supreme Court found that such an indirect restriction was also prohibited and disciplined the lawyers.

Companion cases from the other side of the country, *Florida Bar v. St. Louis*, 967 So.2d 108 (Fla. 2007), and *Florida Bar v. Rodriguez*, 959 So.2d 150 (Fla. 2007), involve both strikingly similar facts and discipline as a result. Again, in the context of a mediation of multiple tort cases, the corporate defendant offered to retain the claimants' law firm at the conclusion of the litigation involved. Again, the lawyers were told (this time by the mediator) that this sort of

arrangement was permitted. Again, one of the claimants raised the issue later. And again, the lawyers were disciplined.

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" also violated Model Rule 5.6(b). 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, it is important to note from the defense perspective that ABA Model Rule 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 discussed above and were also ordered to forward copies of the decision to their state licensing authorities. Further, although state substantive law will control the enforceability of such provisions in a contractual sense, the Restatement (Third) of the Law Governing Lawyers (2000) (in section 13, comment c) finds that they are "void and unenforceable." Depending on the

relationship of a provision of this kind to the overall deal struck, that also suggests that at least in some instances provisions violating Model Rule 5.6(b) could put a settlement itself at risk.

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 ABA Model Rule 1.8(g) within specified limits and ABA Formal Ethics Opinion 06-438 (2006) discusses them comprehensively. (As an aside, under Comment 13 to Model Rule 1.8(g), class actions are governed by their own procedural rules.)

Model Rule 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 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, ABA Model Rule 1.8(g) requires both that the claimants’ consent be confirmed in writing and that they actually countersign the consent document.

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.

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