

Mercer Law Review

Volume 52
Number 3 *Articles Edition - A Symposium:*
Ethical Issues in Settlement Negotiations

Article 2

5-2001

Symposium Introduction - Ethics in Settlement Negotiations: Foreward

Patrick Emery Longan
Mercer University School of Law, LONGAN_P@law.mercer.edu

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Longan, Patrick Emery (2001) "Symposium Introduction - Ethics in Settlement Negotiations: Foreward,"
Mercer Law Review: Vol. 52 : No. 3 , Article 2.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol52/iss3/2

This Front Matter is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Symposium Introduction

Ethics in Settlement Negotiations: Foreword

by Patrick Emery Longan*

I. INTRODUCTION

On March 9 and 10, 2001, Mercer University's Walter F. George School of Law and its Mercer Center for Legal Ethics and Professionalism held a Symposium on ethical issues in settlement negotiations. Funding for the Symposium came from a consent order, signed by United States District Judge Hugh Lawson, in which the DuPont Corporation settled claims of litigation misconduct in exchange for a payment of \$11 million. Each of the four accredited law schools in Georgia received \$2.5 million to endow a faculty chair in ethics and

* William Augustus Bootle Professor of Ethics and Professionalism in the Practice of Law and Director of the Mercer Center for Legal Ethics and Professionalism, Walter F. George School of Law, Mercer University. Washington University (A.B., 1979); University of Sussex (M.A., 1980); University of Chicago (J.D., 1983).

professionalism, and the other \$1 million was set aside to endow an annual Symposium on issues of ethics and professionalism. The Symposium will rotate among Mercer University, the University of Georgia, Emory University, and Georgia State University. The Mercer Symposium was the first to be held pursuant to the court's order.

The Symposium examined a draft set of Ethical Guidelines for Settlement Negotiations being drafted by a task force of the American Bar Association Section of Litigation.¹ In recent years, the ABA Litigation Section has promulgated similar guidelines for litigation conduct, civil discovery, and trial procedures.² The success of those projects led the ABA Litigation Section to undertake the negotiation project. The task force began studying the issues and drafting the guidelines in the Spring and Summer of 2000. The ABA Litigation Section agreed that the Mercer Symposium would provide a type of "public hearing" for the guidelines in their draft form, as they stood in March 2001.

The Symposium consisted of panel discussions of the parts of the guidelines dealing with limits on misleading conduct, conditions in settlement agreements, and fairness in settlement negotiations.³ The Symposium concluded with a panel discussion about special issues in assisted settlement. That topic originally had been part of the draft guidelines but by March 2001 had been deleted because the task force decided that the multiple issues that arise in the context of judicial settlement conferences and mediation deserve separate treatment.

1. Edward M. Waller, Jr. chairs this task force. The reporter for the task force is Professor Amy Mashburn of the University of Florida, Levin College of Law. The other task force members are Professor Bruce Green, Professor Burlette Carter, Carol A. Mager, John Kiernan, Louise LaMothe, Gary Robb, Lorna G. Schofield, Barry S. Alberts, Nicholas J. Wittner, and Nancy Higgins. United States District Judge Nancy Atlas has also participated actively in the task force's activities. I wish to express my thanks to all the members of the task force for their cooperation in connection with the symposium. I particularly wish to thank Ed Waller and Ronald Jay Cohen, chair of the Section of Litigation for 2000-2001, without whom the symposium would have been impossible.

2. These standards are all available on the World Wide Web. See <<http://www.abanet.org/litigation/litnews/practice/home.html>>.

3. The Guidelines cover other topics as well. These other issues include the purpose of settlement negotiations, ethical restrictions on disclosure of settlement negotiations, the division of authority between attorney and client in settlement, the duty to communicate and advise of settlement offers, and clients with diminished capacity or other special needs. The Guidelines also cover issues lawyers face with multiple or organizational clients and with clients holding insured claims. Other issues include special issues in settling class actions, issues regarding attorney fees, the handling of settlement funds, settlement of disputes with clients, and court approval of settlement agreements. The symposium eliminated these topics because of the limited time available.

Given the number of cases that are settled in these ways, however, the Symposium would not have been complete without some discussion of the ethical issues they raise. Each panel included a practicing lawyer, an academic, and a judge, to ensure that the three, sometimes different, perspectives of each of these branches of the profession were heard. With a single exception, the moderators of the panels were members of the task force. Each panel discussed the issues in the context of hypothetical situations confronting lawyers or mediators in a negotiation. This Foreword will describe the Guidelines and the hypotheticals used and will give some background and commentary on the issues they raise.

One of the preliminary issues with which the task force continues to wrestle is what form the Guidelines should take. In particular, the task force has considered whether the Guidelines should describe “best practices” that suggest lawyers should behave “more ethically” than the Model Rules of Professional Conduct require or whether the Guidelines should serve more simply as a handy resource for lawyers who find themselves with ethical questions in the context of settlement. Another approach would be to attempt to synthesize what the law is on a particular subject, taking into account the relevant rules, ethics opinions, court cases, and other law. This would be the “Restatement” approach. As you will see, the participants in the Symposium sometimes took differing views of what the appropriate role for the guidelines might be. Professor Crystal outlines his thoughts on this subject in his essay in this volume.⁴

In the context of settlement negotiations, the question of form is perhaps a more difficult one than it was when the ABA Litigation Section produced its guidelines for trial procedure and for discovery. In each of these cases the rules of procedure failed to give lawyers detailed guidance with respect to numerous topics. Those earlier guidelines quite properly attempted to fill those gaps with uniform standards, most of which were gleaned from case law, local rules, standing orders, and local customs that were not readily available in one place. With respect to settlement negotiations, in many respects the Model Rules of Professional Conduct do not so much leave gaping holes as they do strike a delicate and uncomfortable balance among various roles the lawyer must play. Some fear that guidelines that do anything more than describe that balance and help attorneys understand what the Model Rules require

4. Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839 (2001).

would, in effect, be an inconsistent and confusing "re-write" of the Model Rules. The Guidelines are still a work in progress as this Article is written. The final form they will take remains the subject of vigorous and understandable debate.

II. LIMITS ON MISLEADING CONDUCT

At the Symposium, the first panel dealt with two issues of truthfulness: misleading statements and the duty to disclose. Model Rule of Professional Conduct 4.1 covers these topics:

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.

There are two issues lurking within and behind this rule. First, as to misrepresentations, comment two to Rule 4.1 contains a special qualification for statements in the context of settlement negotiations.⁵ It exempts from the requirements of Rule 4.1(a) certain statements that "[u]nder generally accepted conventions in negotiation" are not taken as statements of fact, such as the acceptability of a particular amount in settlement.⁶ In other words, there is room in negotiations for puffing and bluffing because those practices are what everyone involved expects. Second, the last phrase of Rule 4.1(b) appears to prohibit disclosure, even to prevent fraud, if Rule 1.6 would prohibit the disclosure. Rule 1.6 forbids disclosure of "information related to the representation of a

5.

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 in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. 2 (1999).

6. *Id.*

client," absent client consent and with some very limited exceptions.⁷ The exception, therefore, threatens to swallow the rule about disclosure.

Another relevant Model Rule is Rule 1.16(b), which permits a lawyer to withdraw from representation if the client "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." For example, a client who lies to his or her lawyer and has the lawyer unwittingly repeat the lie to an opposing party may forbid the lawyer to reveal the falsity of the representation already made. The result might be fraud, perpetrated by the client through the lawyer. The attorney ethically may withdraw from the representation under these circumstances.

Part 4.1 of the draft Guidelines reiterates the duties that arise under Rule 4.1 and adds a section that points out the lawyer's duty to withdraw if the lawyer discovers that the client will use the lawyer's services to perpetrate a crime of fraud. Guideline 4.3.7 is also relevant:

4.1.1. **False Statements of Material Fact.** In the course of negotiating or concluding a settlement, a lawyer may not knowingly make a false statement of material fact (or law) to a third person.

4.1.2. **Silence, Omission, and the Duty to Disclose Material Facts.** In the course of negotiating or concluding a settlement, a lawyer must disclose a material fact to a third person when doing so is necessary to avoid assisting a criminal or fraudulent act by a client, unless such disclosure is prohibited by the ethical duty of confidentiality.

4.1.3. **Withdrawal in Situations Involving Misrepresentations of Material Fact.** If a lawyer discovers that a client will use the lawyer's services or work product to materially further a course of criminal or fraudulent conduct, the lawyer must withdraw from representing the client and may disaffirm any opinion, document or other affirmation. If a lawyer discovers that a client has used a lawyer's services in the past to perpetuate a fraud, now ceased, the lawyer may, but is not

7. Rule 1.6 states in its entirety:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

required to, withdraw, but disaffirming his/her prior opinion and work product is not permitted.

4.3.7. *Exploiting Opponent's Mistake.* In the settlement context, a lawyer should not attempt knowingly to obtain benefit or advantage for himself or herself or his or her client as a result of an opponent's mistake which has been induced by the lawyer or which is obviously unintentional. Further, a lawyer may have an affirmative duty to disclose information in settlement negotiations if he or she knows that the other side is operating on the basis of a mistaken impression of material fact.⁸

Other than Guideline 4.3.7, the relevant Guidelines track the requirements of the Model Rules and provide some commentary and background in the Reporter's Notes. Guideline 4.3.7 takes other views of the purpose of the Guidelines. It attempts both to synthesize the lawyer's obligations from a variety of sources and to describe a "best practices" standard that may go beyond what is legally required.⁹

A. *The Limits of Representations*

The first panel¹⁰ dealt with these and other issues in the context of three hypotheticals. The first concerned a case in which the plaintiff sought lost profits and the lawyer was trying to decide what he or she could say about the lost profits in negotiation in a variety of factual situations:

You represent the plaintiff in a breach of contract action. You are seeking lost profits. What can you say in negotiations about the lost profits if:

- (a) Your expert has come to no conclusion about their cause.
- (b) Your expert has told you the breach did not cause the lost profits.
- (c) Your expert has given you a range between \$2,000,000 and \$5,000,000 for the lost profits.

8. ABA Litigation Section, *Ethical Guidelines for Civil Settlement Negotiations* (Draft 2001).

9. The Reporter's Notes to Guideline 4.3.7 cite to ethics opinions and refer to state contract law as part of this "synthesis" approach. They also, however, refer to professionalism guidelines that contain aspirational guidance for lawyers.

10. The moderator for the first panel was Professor Amy Mashburn from the University of Florida, Levin College of Law. Professor Mashburn is the Reporter to the Task Force drafting the Guidelines and teaches Professional Responsibility, among other courses. The practitioner panelist was William Reece Smith, Jr. from Tampa, former president of the American Bar Association and the International Bar Association and a long-time teacher of Professional Responsibility at Stetson University College of Law. The judicial panelist was the Honorable Thomas Zlaket, Chief Justice of the Supreme Court of Arizona. The academic panelist was Nathan M. Crystal, Class of 1969 Professor of Professional Responsibility and Contract Law at the University of South Carolina School of Law.

(d) Your expert says the maximum lost profit is \$2,000,000.

(e) You do not have an expert; your client says the loss was \$5,000,000.

It is common in negotiation for each side to emphasize the strength and persuasiveness of its evidence. On the other hand, each side in discovery has the opportunity to explore the other side's evidence. In this scenario, each side would be entitled to a report and a deposition of the other's testifying expert.¹¹ Any statement about the expert would be a statement of fact. Because of the importance of expert testimony to this case, any statement of this sort would be material. The lawyer must be careful to tell only the truth to avoid violating Rule 4.1. Good lawyers, however, will test the assertions in discovery, consistent with the now-famous Russian proverb, "Trust, but verify."¹²

Beyond the rules of ethics, however, it is proper to ask what the best strategy is for a lawyer in this negotiation. Here, any statement about the expert's conclusions probably will be the subject of discovery. If the statement is found to be false, the lawyer who made it will lose some credibility. That loss, which will likely survive the conclusion of this particular case and affect negotiations with the other lawyer in future cases, will cause these future negotiations to be more strained, more lengthy, and probably less fruitful. To the extent that the lawyer gains a reputation for untruthfulness as a result of statements about the expert, the lawyer may be impeding all his or her future negotiations. In other words, this hypothetical involves a happy situation in which it is both the right strategy and the smart strategy to tell the truth.

In a continuation of that same hypothetical, the panel discussed questions of representations about settlement authority and statements of fact that are literally true but, in context, potentially misleading:

In this breach of contract action, can you:

(a) tell opposing counsel that you will not settle for less than \$3.5 million when you have authority to settle for \$ 2 million?

(b) tell opposing counsel that five major buyers stopped buying from your client after the breach, knowing that they stopped buying for other reasons?

As discussed, comment 2 to Model Rule 1.4 defines statements about settlement authority not to be material. Technically, therefore, the lawyer should feel free to lie about his or her authority. Another

11. See FED. R. CIV. P. 26(a)(2)(B) (expert report) and 26(b)(4)(A) (expert deposition).

12. President Reagan made this proverb famous in connection with his negotiations with Mikhail Gorbachev. President Gorbachev once told him at a press conference, "You repeat that at every meeting." President Reagan replied, "I like it." Ronald Reagan, *The Many Lives* (A & E Biography) (videotape).

strategy, however, and one that may be more effective in the long run, is simply to deflect any questions of authority with statements such as, "You know neither one of us can discuss our authority—let's talk about a fair settlement of this case."¹³ The reason a deflection may be more effective in the long run is the same reason exaggerations about the expert's conclusions may cause long term harm. You may be ethically permitted to lie about your authority, but if you do it, and the other lawyer catches you at it, he or she will not trust you again.

The misleading statement about the lost customers raises a persistent and subtle issue for lawyers about the use of language. The statement is literally true. These customers have left, and they did so at a time after the defendant's breach. The only reason the statement is made, however, is in the hope that the defendant will make the leap and conclude that the customers left *because* of the breach or, at least, that the plaintiff will attempt to prove that they did. The statement is, therefore, an intentionally misleading, sly use of language. It is reminiscent of former President Clinton's response to a question before the grand jury about his deposition testimony: "It depends on what the meaning of *is* is."¹⁴ The lawyer who engages in this type of deception is more clever, perhaps, than a straightforward liar, but the lawyer is no less worthy of condemnation. Once again, however, we can rely on the power of reputation to deter lawyers (at least those who care about their reputations) from engaging in these tactics. Word gets around.

B. *Disclosure of Factual Errors*

The second hypothetical concerned a duty to disclose facts when the other lawyer has made a settlement offer containing obvious mistakes:

You represent the husband in a divorce action. You receive from opposing counsel a proposed property settlement with the following errors: (1) a transcription error that undervalues an asset; (2) an arithmetical error that undervalues an asset; (3) a valuation by purchase price of an asset when market value is much higher. All the errors work to your client's advantage. What, if anything, should you do about them?

To the extent that the first two errors are "scrivener's errors" (the other lawyer missed a typographical error or failed to add the numbers

13. See NATHAN CRYSTAL, PROFESSIONAL RESPONSIBILITY, PROBLEMS OF PRACTICE AND THE PROFESSION 412 (2000) ("such questions can easily be deflected").

14. See SUSAN SCHMIDT & MICHAEL WEISSKOPF, TRUTH AT ANY COST: KEN STARR AND THE UNMAKING OF BILL CLINTON 238-39 (2001) (discussing the context of the former President's testimony).

correctly), the lawyer has the duty to correct the mistakes.¹⁵ The third problem may raise more difficult issues because the error may come from opposing counsel's conscious but erroneous judgment about what valuation is best for his or her client. Can the lawyer in the hypothetical take advantage of his or her adversary's error in judgment?

The question is a species of a fundamental, recurring question in an adversarial system.¹⁶ The lawyer owes a primary duty of loyalty to the client. In most respects, the lawyer is not expected to be his or her brother's keeper. One answer to the particular ethical question presented is to say that it is not the interesting or important question. The client is not perpetrating a fraud or a crime by taking advantage of a bad lawyer on the other side. There is no duty to disclose under Rule 4.1.

Abiding by the rules of ethics, however, is necessary but not always sufficient for good lawyering. Ethically, the lawyer need not correct every misstep of opposing counsel. But sometimes correcting the mistake would be the wise thing to do. For example, if the mistakes involved in the proposal were fundamental mistakes, ones that under the law of contract the opposing party would provide grounds later to void the transaction,¹⁷ then the lawyer may best serve his or her client by alerting opposing counsel to the mistakes now. If the parties to the transaction will have a continuing relationship, such as shared responsibility for minor children, the best strategy might be to correct the mistakes and buy some trust, which may be sorely needed later. Here, as in many situations, ethics tells you the options available, but the lawyer must still exercise good judgment among the options.

C. Disclosure of Legal Errors

The final hypothetical for the first panel highlighted the fact that Model Rule 4.1 forbids a lawyer from making a material misrepresentation about the law. The hypothetical does so in the context of an interaction with a young lawyer who is operating under a mistake about the state of the law:

You represent the defendant in a personal injury case. In negotiation with plaintiff's counsel (a young, relatively inexperienced lawyer), it becomes clear to you that this lawyer believes his or her client's

15. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1518 (1986).

16. The welcoming address to my law school class in 1980 at the University of Chicago was given by Floyd Abrams. The one thing I remember from that speech was, "You will be surprised in your practice the number of times you will rely upon the incompetence of opposing counsel."

17. See JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 306-08 (2d ed. 1977).

potential recovery is limited by a tort reform statute. You know that this statute has been found unconstitutional by the state supreme court. May you, and should you, correct opposing counsel's mistake about the law?

Most practicing lawyers would not think twice about taking advantage of this younger lawyer. Again, the client is not perpetrating a fraud or a crime, and the client might be very happy to save some money because his or her adversary's lawyer is clueless. No rule of legal ethics requires the lawyer to be the opposing party's lawyer also. No rule requires that lawyers settle cases only on "fair" terms.

Again, however, the strictly ethical inquiry cannot end the discussion. For example, lawyers might find that taking advantage of the mistake in particular circumstances, such as a horrific injury to a young child, would be morally wrong although ethically permissible. The lawyer is free to counsel the client about nonlegal matters, such as the morality of leaving the injured child unable to obtain the life-long care the child needs.¹⁸ The lawyer is even free to seek to withdraw if assisting in a settlement under these circumstances would be repugnant to the lawyer.¹⁹ Here, as in the prior examples, the best lawyers consider all the circumstances and determine first whether the rules of ethics require a particular course of action and, if they do not, what under all the circumstances is the wisest choice.

III. CONDITIONS IN SETTLEMENT AGREEMENTS

The second session of the Symposium concerned limits on what attorneys can include in their settlement agreements. The Symposium dealt with four types of conditions parties can attempt to impose: (1) a restriction on one attorney's right to practice law; (2) an agreement to waive an attorney's claim for fees; (3) an agreement to destroy or return evidence obtained in discovery; and (4) an agreement not to report professional misconduct in exchange for a civil settlement.

The Model Rules of Professional Conduct deal directly or indirectly with each of these issues. Model Rule of Professional Conduct 5.6(b) forbids "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." With respect to attorney fees and settlement, a proposal that

18. Model Rule of Professional Conduct 2.1 states in relevant part, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

19. Model Rule of Professional Conduct 1.16(b) states in relevant part, "[A] lawyer may withdraw from representing a client if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."

asks the lawyer to waive a claim for attorney fees to facilitate a client's settlement raises a potential conflict of interest. Rule 1.7 imposes limits on a lawyer's ability to represent a client if the representation might be affected by the lawyer's own interests.²⁰ Agreements about evidence fall under Rule 3.4, under which an advocate is not permitted to "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value," or to counsel or to assist another in doing so. Finally, the Model Rules require lawyers to report another lawyer's professional misconduct if it "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."²¹

The Guidelines reinforce counsel's duties under the Model Rules. They also add some detail that is missing from the Rules and official comments:

4.2.1. **Conditioning Settlement on Restricting Opposing Lawyer's Right to Practice or Consult.** A lawyer may not offer or accept a settlement conditioned on an agreement that directly or indirectly precludes the lawyer for one party from representing clients in future litigation against the opposing party.

4.2.2. **Conditioning Settlement on Agreement Respecting Attorney's Fees.** In any circumstance where the negotiation of a settlement may include negotiation of a proposed fee for the attorney for the prevailing party, the lawyer seeking payment of a fee may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the case.

4.2.3. **Conditioning Settlement On Agreement Not to Report Opposing Counsel's Misconduct.** An attorney may not condition settlement on an agreement not to report opposing counsel's misconduct.

4.2.4. **Conditioning Settlement on Return or Destruction of Tangible Evidence.** Unless otherwise unlawful, a lawyer may ethically solicit and enter into an agreement, as part of a settlement, that counsel will return or dispose of all documents produced in discovery.

4.2.6. **Agreement to Keep Settlement Terms and Other Information Confidential.** In general, a lawyer may ethically negotiate and agree to be bound by an agreement that lawyer and the client will keep settlement terms and other information relating to the litigation confidential.

20. Model Rule 1.7(b) states in relevant part, "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."

21. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1999).

The Guidelines in 4.2 are a mixture of reminders of the Model Rules and interpretations of the Rules for the particular context of settlement. Guideline 4.2.1 reiterates Rule 5.6's prohibition on settlement agreements that restrict a lawyer's right to practice, while 4.2.6 interprets that rule usually to permit confidentiality clauses. Guideline 4.2.2 interprets the conflict of interest rules to require an attorney to subordinate his or her interest in a fee to the client's interest in settlement. Guideline 4.2.4 interprets Rule 3.4 usually to permit settlements that require the return or destruction of evidence. Guideline 4.2.3 sets forth the way in which the ABA has interpreted Model Rule 8.3(a)'s requirements on reporting professional misconduct in the context of settlement negotiations.

A. Agreements Restricting a Lawyer's Right to Practice and Concerning Attorney Fees

The second panel²² discussed these issues in the context of three hypotheticals. The first raised issues of both restrictions to practice and attorney fees:

You represent the plaintiff in an antitrust case. The defendant offers to settle the case on three conditions: (1) the negotiations and the amount of the settlement will remain confidential and neither you nor your client may use this information in any way in the future; (2) your firm will waive any claim for attorney fees under the antitrust statutes; (3) thirty days after the settlement, your firm will receive a general retainer of one million dollars from the defendant and thereafter act as the defendant's "litigation prevention counsel." May you, and should you, accept any of these conditions?

The first two of these issues require some analysis, while the third presents a clear violation of the Model Rules.

An agreement to keep settlement terms confidential is common. It promotes settlement because the defendant can avoid the publicity surrounding a large settlement and can hope thereby to avoid provoking more plaintiffs to sue. The self-interested plaintiff probably cares about little but the amount of the check and will gladly sell his or her silence.

22. The moderator for this panel was Bruce Green, the Louis Stein Professor of Law at Fordham Law School and Director of the Louis Stein Center for Law and Ethics. The practitioner panelist was Evett Simmons, the current President of the National Bar Association. The Honorable Marvin Aspen, Chief Judge of the United States District Court for the Northern District of Illinois, was the judicial panelist. The designated academic was C. Ronald Ellington, the A. Gus Cleveland Professor of Legal Ethics and Professionalism at the University of Georgia School of Law.

The subtlety here is the effect of this agreement on the lawyer. The lawyer may not indirectly agree as part of a settlement not to represent others against this same defendant. Yet this proposed settlement agreement purports to forbid the lawyer from using the amount of the settlement, or information about the negotiations themselves, for any future clients. The lawyer presumably cannot forget what just happened and presumably could not help but use the experience in future litigation against this defendant.²³ Note that Guideline 4.2.5 uses the introductory phrase "in general." The Reporter's Notes quite properly make clear that this qualification means restrictions on the use of information are not permissible if they go so far as to constitute a restriction on the right to practice law, in violation of Model Rule 5.6.

The second issue is the proposal to settle the case if the claim for attorney fees is waived. Clients and their lawyers are in conflict if more money for one means less money for the other. Here, the lawyer is asked to sacrifice for the client's recovery. Sometimes, especially in class actions, lawyers may sacrifice their clients in order to obtain a higher fee.²⁴ The Guidelines require the lawyer to subordinate his or her interest. That conclusion is not in the text of Model Rule 1.7(b) but flows logically from it. The lawyer can only continue as lawyer if the lawyer reasonably believes that the representation will not be adversely affected by the lawyer's own interests. The client comes first. One suggestion from the Reporter's Notes to the Guidelines is to try to deal with this problem when the lawyer is first retained, such as by assignment to the lawyer of the client's right to collect statutory attorney fees. If the lawyer chooses this route, he or she must also consider Rule 1.8(a), which imposes limits on an attorney's transactions with a client.²⁵

23. It is only in the movies that immediate and narrowly defined memory loss can be induced. In *Men In Black*, Tommy Lee Jones and Will Smith used a device known as the "flashy thing" to erase memories of alien sitings from those who were not supposed to see them. Until the flashy thing becomes a reality, we cannot expect lawyers to erase their memories of their experience with aliens, or defendants.

24. This criticism was a common reaction to the settlement of one of the class actions against General Motors involving "side-saddle" gas tanks on trucks. In one famous settlement, the lawyers were to receive from GM \$9.5 million in fees while members of the class received coupons worth a discount off the purchase of their next GM truck. The United States Court of Appeals for the Third Circuit invalidated the settlement. *In re General Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir.), *cert. denied sub nom.* GMC v. French, 516 U.S. 824 (1995).

25. Model Rule 1.8(a) states in relevant part,

A lawyer shall not enter into a business transaction with a client . . . unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the

The final part of this hypothetical should be the easiest. Model Rule 5.6 and Guideline 4.2.1 forbid agreements that restrict the lawyer's right to represent future clients against the settling party. The rule both protects the supply of lawyers available for those future parties and keeps the lawyer from selling out the current client by negotiating a lucrative "consulting agreement" with the client's adversary. This problem seems simple enough. The reason it is worth discussion is that lawyers in high profile cases continue to violate the rule. It was recently reported that lawyers in Florida settled a case against the DuPont Corporation in part by accepting a secret \$6.4 million "consultation" contract with DuPont.²⁶ The lesson, perhaps, is that temptation and sin never go out of style, nor does the need to preach against them.

B. Agreements That Suppress Evidence

The second hypothetical on conditions in settlement agreements concerned the return of documents produced in litigation:

You represent the plaintiff in a product liability action. In discovery, you receive a document marked "privileged and confidential" detailing a study by the defendant of the product in question. The study concludes that the product is dangerous. No privilege appears to apply to this document. When the defendant realizes that you have the document, the defense lawyer offers to settle the case conditioned on the return of the study and a confidentiality clause. The lawyer claims the study was produced "inadvertently" and makes it clear that the document will not be produced in any similar litigation. The product is still on the market. May you, and should you, settle on this basis?

Parties, especially defendants, frequently settle because damaging and perhaps embarrassing evidence has emerged in discovery. Agreements to return or destroy discovery material as part of a settlement are commonplace. The Guidelines provide that they are permissible, unless they are "otherwise unlawful." When would it be unlawful?

One possibility comes from Model Rule of Professional Conduct 3.4(a), which states that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value," or counsel or assist another in doing so. In this hypothetical, similar litigation is at least a possibility and might already have been filed. As

client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.

26. Ann Woolner, *Dealing With DuPont*, BROWARD DAILY BUS. REV., Feb. 22, 2001.

described, the document has evidentiary value to those cases, and the defense lawyer has made the plaintiff's lawyer aware that the document "will not be produced" in any similar litigation. That statement could mean that the defendant will inform other plaintiffs about the existence of the document but resist production.²⁷ Returning the document would be innocent enough in that case. However, if the defense lawyer makes it clear that the document will be destroyed, the plaintiff's lawyer has a problem. To return the document with that knowledge might be to "assist" another to conceal or destroy evidence. The plaintiff's lawyer perhaps should insist on a written representation from the defense lawyer that the document will not be concealed from future plaintiffs or destroyed. Another risk is that the destruction will violate state law. In Texas, some discovery material is a "public record" unless the court specifically exempts it, so to destroy the document might land the plaintiff's lawyer in serious trouble.²⁸

Another concern is that the product is still on the market. The lawyer has just seen evidence that the product is dangerous, and it seems clear that the defendant does not intend to do anything about the danger. The ABA Ethics 2000 Commission considered but rejected a proposed rule that would have forbidden lawyers to enter into secret settlements that jeopardize public health or safety.²⁹ Even if the return of the documents is lawful and even though the attorney's action may be "ethical" under the Model Rules, the lawyer may have to ask whether it is the right thing to do. Is the service to your client here the highest duty? Or should the lawyer consider the harm to others that could be prevented if the evidence came to light? At least, the lawyer can and should counsel the client about this aspect of the settlement decision.³⁰ The lawyer may even have to consider withdrawal if the product is so dangerous that the lawyer finds participating in the settlement to be repugnant.³¹

27. See FED. R. CIV. P. 26(b)(5) (stating documents withheld on the basis of privilege must be identified and described).

28. TEX. R. CIV. P. 76a. The definition of public record includes "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights."

29. See Mark Hansen, *And Now the Feedback*, 87 A.B.A. J. 88 (April 2001).

30. Recall that Model Rule of Professional Conduct 2.1 states in relevant part, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

31. Model Rule 1.16(b) ("[A] lawyer may withdraw from representing a client if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or

C. Agreements Not to Report Misconduct

Finally, this panel discussed whether a lawyer can settle a case in exchange for not reporting professional misconduct:

You represent the defendant in an employment discrimination action. The judge sends the case to mediation. In mediation, it becomes clear that the plaintiff's lawyer is handling the case despite a conflict of interest. The mediator threatens to reveal the conflict to the court. The plaintiff's lawyer offers to settle the case on favorable terms, provided that the conflict of interest will not be reported to anyone. Your client instructs you to accept the offer. May you, and should you, settle on this basis?

The Guidelines state flatly that the lawyer may not condition a settlement on an agreement not to report opposing counsel's misconduct.

Model Rule 8.3(a) requires a lawyer with knowledge of another lawyer's serious misconduct (misconduct that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects") to report that misconduct to disciplinary authorities. For the other lawyer to continue to represent a client despite a conflict of interest at least reflects on the lawyer's fitness to practice and appears also to be dishonest because the lawyer wants to keep the conflict a secret. However, the conclusion that the settlement cannot proceed on this basis is not inevitable under the text of the Rules and the official comments. Model Rule 8.3(c) states that subsection (a) "does not require disclosure of information otherwise protected by Rule 1.6." Comment 2 to the Rule reiterates this limitation but states that "a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interest." But what if the client refuses to permit the lawyer to report? It is within the client's rights, apparently, to do so, and under those facts perhaps the lawyer could decide the settlement should go forward.

The ABA has interpreted the Rule differently, however. In Formal Opinion 94-383, the ABA concluded that a lawyer could not use a threat of reporting a disciplinary violation in a negotiation.³² As a corollary, the ABA found that an agreement not to report as part of a settlement would violate Rule 8.3(a)'s mandatory reporting requirement.³³ The irony of this conclusion is that the agreement cannot be made on the basis that the report will be withheld, but unless the client consents to

imprudent.").

32. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 383 (1994).

33. *Id.*

the report, the lawyer cannot make it anyway. The ABA's interpretation, however, at least removes a major incentive for the client to withhold consent, and to that extent the interpretation promotes the purposes behind Rule 8.3(a).

There is another reason why the lawyer in this hypothetical would not want to agree to keep the conflict a secret. A more direct interest is at stake in this case than the abstract protection of the public. The plaintiff's lawyer has a client who is being kept in the dark and who almost certainly is being sold out by a lawyer who wants to keep his or her violation of the Rules of Professional Conduct from becoming known. The lawyer who agrees to this condition in settlement may be making himself or herself and his or her client a party to a fraud on the other lawyer's client. Under Rule 1.2(d), the lawyer cannot assist his or her client in the fraud, even in exchange for a handsome settlement.

IV. FAIRNESS IN SETTLEMENT NEGOTIATIONS

The third discussion of the Guidelines focused on issues that are loosely described as "fairness" issues. Grouped under this heading are concerns about misusing the settlement process, overreaching with other lawyers' clients or an unrepresented party, making improper threats, and using confidential information that has been obtained improperly. The Model Rules deal with most of these issues, although sometimes only indirectly. Model Rule 4.4 forbids a lawyer from using means (not just in settlement, but generally) that "have no substantial purpose other than to embarrass, delay, or burden a third person." Rule 4.2 prohibits lawyers from contacting another lawyer's client without permission.³⁴ Rule 4.3 contains protections for unrepresented persons and requires lawyers to correct any misunderstanding with these persons about their role. Rule 4.3 also forbids lawyers from stating or implying in this situation that they are disinterested.³⁵ Comment one to that rule states that lawyers should not give advice to unrepresented persons except the advice to obtain counsel.³⁶ The Model Rules do not contain

34. Model Rule of Professional Conduct 4.2 states in its entirety: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

35. Model Rule of Professional Conduct 4.3 states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 cmt. 1 (1999).

a provision about improper threats although ABA Formal Opinions have been issued about threats of criminal prosecution and disciplinary action in civil matters.³⁷ Finally, the use of improperly acquired information is addressed by both a Model Rule and a formal opinion. Rule 4.4 forbids a lawyer from using methods to obtain evidence that violate the rights of third persons.³⁸ ABA Formal Opinion 94-383 instructs lawyers to notify opposing counsel if they receive confidential information.³⁹

The Guidelines in Part 4.3 are a mixture of reiterations of the Model Rules and limits taken from the comments and ABA Formal Opinions:

4.3.1. **Bad Faith in the Settlement Process.** An attorney may not employ the settlement process in bad faith.

4.3.2. **Duress and Extortionate Tactics in Negotiations.** A lawyer may not employ pressure tactics in negotiating a settlement that have no substantial purpose other than to embarrass or burden the opposing party.

4.3.2.1. A lawyer may not threaten to report an opposing party with criminal prosecution in connection with settlement negotiations except in limited circumstances where the criminal and civil matters are related, the criminal charge is warranted by the law and facts, the lawyer does not try to influence the criminal process, and such threat is not otherwise prohibited by applicable substantive law.

4.3.2.2. A lawyer may agree to refrain from pressing criminal charges as part of a settlement of a client's civil claim unless prohibited by applicable substantive law.

4.3.2.3. If opposing counsel's misconduct raises a substantial question of that lawyer's honesty, trustworthiness or fitness as a lawyer, a lawyer cannot agree to forbear to report such misconduct to appropriate disciplinary authorities, and it is improper to use the threat of reporting such misconduct as a bargaining chip in settlement negotiations.

4.3.3. A lawyer shall not communicate about a settlement with a person the lawyer knows to be represented by a lawyer in the lawsuit.

4.3.4. In negotiating a settlement with an opposing party who is not represented by counsel, a lawyer should clearly identify himself or herself as the lawyer for the other party, cannot state or imply that he or she is disinterested, and must make reasonable efforts to correct any misunderstanding about his or her role in the matter; cannot give

37. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 363 (1992) (threats of criminal prosecution); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 383 (1994) (threats of disciplinary action).

38. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4.

39. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 383 (1994).

advice other than advice to obtain counsel; and cannot make inaccurate or misleading statements of law or material fact.

In the context of a series of hypotheticals involving a class action, the third panel⁴⁰ discussed these Guidelines, and the Rules, comments, and opinions from which they come.

A. Dealing With an Unrepresented Party

The first part of this hypothetical raised questions about dealing with members of a putative class:

You represent the defendant in a product liability class action. The plaintiff is seeking class action certification but has not yet received it. You believe that you can settle the claims of many potential members of the class if you can negotiate with them directly. May you make settlement offers directly to them? May you emphasize to them that the cost of litigating their individual claims would be far greater than what they could hope to recover?

The issues are whether any contact is appropriate and, if it is, what the lawyer can and cannot say.

The lawyer must first ensure that the court has not restricted direct contact. The Supreme Court of the United States has held that district courts can restrict communications with members of a putative class if the order is based upon a clear record and specific findings that the restrictions are necessary.⁴¹ If the court has not restricted communications, the defense lawyer faces another issue. If the class counsel represents the members of the putative class for purposes of Rule 4.2, then the defense lawyer may not contact them directly. There is no consensus whether Rule 4.2 bars this sort of contact.⁴² At least one federal court prohibits contact with class members without court

40. The moderator for this panel was Edward M. Waller, chairman of the Business Litigation Department of the Fowler White firm in Tampa, Florida and chairman of the ABA Litigation Section special committee on ethics in settlement negotiations. The practitioner panelist was Nancy Scott Degan, a partner in the Phelps Dunbar firm in New Orleans and Co-Director of Division V of the ABA Litigation Section. The judge was the Honorable Mary Scriven, United States Magistrate Judge for the Middle District of Florida. The academic representative was Professor James Moliterno, Professor of Law, Director of the Legal Skills Program, and Director of the Center for the Teaching of Legal Ethics at the College of William and Mary, Marshall-Wythe School of Law.

41. *Gulf Oil v. Bernard*, 452 U.S. 89, 101-02 (1981).

42. See, e.g., ROBERT H. KLONOFF & EDWARD K. M. BILICH, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 416-17 (1999).

permission while a class certification motion is pending.⁴³ The wise lawyer will check his or her local listings before picking up the phone.

If the contact is permitted, the lawyer must be wary of Model Rule 4.3's limits on what should be said and of Rule 4.1's prohibition on misleading statements of law or fact. Guideline 4.3.4 synthesizes these Rules and the Comment to Rule 4.3. The lawyer first must make it clear to this unrepresented person that he or she represents another party and is not disinterested. Second, the lawyer must tell the truth. In the hypothetical, the lawyer wants to tell the putative class members that the cost of litigating their individual claims would be far greater than litigating their claims alone. That statement in many small-stakes class actions would be true while it might be untrue in a mass tort class action. The statement also slyly implies that an individual action is the alternative to a settlement even though the lawyer knows a class action is pending. A person who settled and then learned of the class action might justifiably feel deceived. Third, the statement comes close to the rendering of legal advice. The unstated conclusion is that, because of the small stakes, the person *ought* to settle now. The lawyer may be better off simply extending an offer and suggesting that the person seek the advice of a disinterested lawyer. Only in this way can the lawyer avoid the traps of making a statement that looks later to a judge like a misrepresentation or inappropriate legal advice.

B. Threats in Negotiations

The second hypothetical raises issues about documents that are sent to a lawyer improperly and the use the lawyer can or should make of them:

Suppose the court certifies a class. During discovery, you receive an unsolicited letter from a former paralegal for the plaintiffs' law firm. The letter encloses a standard set of instructions for the plaintiffs' witnesses. The instructions arguably advise the witnesses to lie under oath about their exposure to the defendant's product. May you use the instructions in settlement negotiations? May you use the threat of a bar disciplinary proceeding or a criminal prosecution for obstruction of justice? In exchange for a favorable settlement, may you agree not to report the instructions the plaintiffs' lawyers had been giving?

This hypothetical is based, loosely, on a case involving plaintiffs in a set of asbestos cases in Texas. The law firm of Baron & Budd was accused

43. Local Rule 4.04(e), United States District Court for the Middle District of Florida.

of improperly coaching witnesses about the sources of their exposure to asbestos.⁴⁴

The lawyer who receives these instructions faces three issues. The first is what to do with the materials given that they are obviously confidential documents from opposing counsel's office. The ABA has stated in a Formal Opinion that the lawyer first should refrain from viewing them or review them enough to decide how to proceed.⁴⁵ Here the lawyer will not know they are confidential unless he or she reads them, so these documents at least will be reviewed. The ABA Formal Opinion then requires the lawyer to notify the other lawyer and await instructions on what to do.⁴⁶ The ABA task force on ethics in settlement negotiations currently plans to track this language.⁴⁷

The receiving lawyer in this case, therefore, is supposed to notify the plaintiff's lawyer and await the inevitable instruction to return the documents. But then the second issue arises. The documents have revealed conduct in violation of the Rules of Professional Conduct. May the lawyer threaten to report the misconduct in order to induce a settlement? The answer appears to be no. As discussed above, in Formal Opinion 94-383, the ABA concluded that the lawyer is "constrained" from using this sort of threat by the mandatory obligation to report the other lawyer's professional misconduct. The ABA Guidelines on Settlement Negotiations incorporate this conclusion into Guideline 4.3.2.3.

The final issue is whether the lawyer can use the threat of a criminal referral in the settlement negotiations. The confidential witness instructions may be evidence of obstruction of justice. The Model Rules of Professional Conduct do not contain a prohibition on using a threat of criminal prosecution to settle a civil claim. However, the ABA has issued a formal opinion in which the lawyer's ability to use these threats is limited to situations in which the criminal and civil matters are

44. See Bob Van Noris, *Client Memo Embarrasses Dallas Firm*, NAT'L L.J., Oct. 13, 1997.

45. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

46. *Id.* The opinion also gives the receiving lawyer the option to hold the documents pending a court resolution of what should be done with them. That option is available, however, only when there is a legitimate dispute about the receiving lawyer's entitlement to the documents, such as when the documents in question perhaps should have been produced in discovery. That route would not be available to the receiving lawyer in this case.

47. Draft Guideline 4.3.6, *Improper Acquisition or Use of Opposing Parties' Information*, currently reads: "If the lawyer knows or should know that info was inadvertently sent . . . [the rest of this guideline will track the language of the proposed model rule or ABA opinion]."

related, the criminal charge is warranted on the facts and the law, the lawyer does not try to influence the criminal process, and the threat is not otherwise unlawful.⁴⁸ In this situation, one issue would be whether the civil and criminal matters are "related" because the criminal activity arose in connection with the litigation and not the underlying facts of the case. The ABA Formal Opinion requires a relationship between the "facts or transaction" of the underlying civil claim and the criminal activity before a threat of criminal prosecution is permissible.⁴⁹ A threat that concerns other activity, such as the way in which the lawyer conducts the litigation, would be improper. Furthermore, the Formal Opinion states that it does not intend to override the lawyer's affirmative duty to report professional misconduct.⁵⁰ Where, as here, the professional misconduct and the criminal activity are the same, the duty to report apparently trumps any otherwise proper agreement not to pursue the matter. For both of these reasons, in this case the lawyer should not use the threat of criminal prosecution for obstruction of justice as a way of settling the civil case.

C. *Good Faith in Negotiations*

The next hypothetical raises a basic question about when and why the lawyer can engage in negotiations:

You choose not to use the plaintiffs' lawyer's instructions in an attempt to settle. In fact, your client has instructed you not to settle this case at all, ever, or even to negotiate. Your client believes any negotiation would be seen as a sign of weakness. You recognize, however, that a complete refusal to negotiate would irritate the magistrate judge assigned to the case. You also realize that you might be able to learn something about how the plaintiffs intend to prove damages if you engage them in negotiations. Your client would also be pleased if negotiations protracted the proceedings. What advice would you give your client about its current settlement posture?

Guideline 4.3.1 states that an attorney "may not employ the settlement process in bad faith." Model Rule 4.4 prohibits a lawyer from using means that only "embarrass, delay, or burden" a third person. What advice should the lawyer give when the client wants to use negotiation to curry favor with the judge, to conduct some informal discovery, and to delay the case?

48. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 363 (1992).

49. *Id.*

50. *Id.*

One part of the advice would have to be that the lawyer will not negotiate just as a delaying tactic. That means of delay would be a straightforward violation of Rule 4.4. The lawyer should also give the practical advice that the magistrate judge likely will be even more irritated by sham negotiations than by an open refusal to settle. The best advice in this situation, however, would be to advise the client that it should authorize the lawyer to engage in negotiations for the purpose of finding out if an acceptable settlement can be reached. No matter how firmly the client believes that it should not settle, it is short-sighted to act on that belief until the lawyer finds out what the other side may have in mind. With authority to engage in real negotiations, the lawyer can proceed without fear of any allegation of bad faith.

D. Dealing With a Represented Party

Finally, our defense lawyer faces some issues regarding a client who is represented by a lawyer:

Your client is sued by one plaintiff who opted out of the class action. You have made a settlement offer to the plaintiff's counsel, but based upon your prior experience with this lawyer you have reason to believe that his or her client has not been informed about the offer. What should you do? In particular, should you send the client a proposed settlement agreement with a copy to the lawyer? Should you have your client contact the plaintiff directly and communicate the offer? What should you do if the plaintiff calls to ask questions about the agreement? What if the plaintiff says he has fired his or her lawyer and wants to accept the offer?

Model Rule 4.2 and Guideline 4.3.4 prohibit the lawyer from contacting a represented party. The offer should go to the opposing lawyer, who is obligated to convey it to his or her client.⁵¹ But what if the lawyer, through incompetence or a mistaken view of his or her authority, is refusing to pass the offer along?

The ABA has concluded that the lawyer has only one option in this situation: to have his or her client communicate directly with the other client and convey the offer.⁵² The purpose of the prohibition on contacting another lawyer's client is to prevent overreaching. By having the client rather than the lawyer make the contact, the hope is that the information can be conveyed without the risk of the lawyer taking advantage of the other party. Once the offer is conveyed, the lawyer

51. Under Rule 1.4, comment 1, the lawyer is obligated to convey any settlement offer unless the client has made it clear beforehand that the offer is unacceptable.

52. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 362 (1992).

must be careful not to respond to inquiries from the represented party about the proposal, but the lawyer should refer all questions to the other lawyer. If the other party states that the lawyer has been fired, that fact should be confirmed, preferably in writing from the lawyer concerned. Without that assurance, the lawyer must proceed as if the other lawyer's representation is continuing.

V. SPECIAL ISSUES OF ASSISTED SETTLEMENT

Many settlement negotiations occur in the contexts of judicial settlement conferences and mediation. Special ethical issues arise when lawyers negotiate with this sort of assistance, and additional issues confront the judge and the mediator. Numerous organizations have undertaken to provide rules or at least guidance concerning these issues.⁵³ The ABA Litigation Section Task Force on ethical issues in settlement negotiations originally included a section in the guidelines on assisted settlement. The task force decided to eliminate that section. Nevertheless, the issues are sufficiently important that a portion of this Symposium was dedicated to them. The panel⁵⁴ discussed five issues: (1) what the lawyer should do in a mediation when a client reveals privately that some evidence has been destroyed; (2) whether a lawyer should enlist a judge's assistance with a difficult client; (3) whether a mediator should give legal advice to one party; (4) whether it is proper for a mediator to give different evaluations of a case in caucus sessions in an attempt to reach a settlement; and (5) whether a mediator should report professional misconduct of a lawyer that is discovered in a mediation session.

A. *Destruction of Evidence*

The first hypothetical dealt with the lawyer's duties toward the mediator. In this hypothetical, assume that there is an outstanding disclosure or discovery obligation that would cover the evidence at issue:

53. For the most recent example, see the February 2001 draft of the Uniform Mediation Act, available on the Internet at <http://www.law.upenn.edu/bl/ulc/ulc_frame.htm>.

54. The moderator for the final panel of the Symposium was James Elliott, Associate Dean for External Affairs at Emory University School of Law and a former President of the State Bar of Georgia. The panelists were the Honorable S. Phillip Brown, Judge of the Superior Court for the Macon Circuit (Georgia), Professor Ellen Yaroshefsky, Clinical Professor of Law and the Executive Director of the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law in New York, and Ronald Jay Cohen, the founding partner of the Cohen Kennedy Dowd & Quigley firm in Phoenix and current chair of the ABA Litigation Section.

You have spent the morning mediating an age discrimination case. Over lunch, your client tells you, for the first time, that he “deleted” several e-mails from the company’s system. These e-mails described the plaintiff as a “geezer” who “had to go.” Your client forbids you to disclose the existence of this evidence to the mediator or the opposing party. May you return to the negotiations and settle the case without disclosing the e-mails?

The lawyer’s options appear to be to return to the negotiation and try to settle the case, to try to adjourn the mediation long enough to decide what to do, or to disclose the evidence to the opposing party before consummating a settlement.

The lawyer has at least two ethical problems. First, the lawyer is not complying with his or her obligation to provide appropriate discovery under Rule 3.4(d), which states, “A lawyer shall not . . . in pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” Second, the lawyer who completes the settlement without disclosing the evidence is participating in a fraud on the other party, who has every right to rely upon the completeness of discovery responses in negotiating a settlement.⁵⁵ The client may exacerbate the lawyer’s problems by invoking Rule 1.6 and refusing to permit him or her to reveal the evidence or disclose anything about it to the opposing party. The lawyer’s only option at that point is to seek to withdraw to avoid assisting in the fraud. The lawyer’s problem can become worse. The mediator is not a judge but is acting in a neutral capacity, usually by appointment from the court. If the mediator is a “tribunal” within the meaning of Rule 3.3, the lawyer has a duty to disclose the missing evidence to the mediator, and this obligation supercedes any duty of confidentiality under Rule 1.6.⁵⁶ The ABA Ethics 2000 Commission has adopted the view that a mediator is not a tribunal under Rule 3.3.⁵⁷

55. Cf. FED. R. CIV. P. 26(e) (duty to supplement disclosures “at appropriate intervals” and discovery “seasonably”).

56. Model Rule of Professional Conduct 3.3(a)(2) states: “A lawyer shall not . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client” Rule 3.3(b) states that the “duties stated in paragraph (a) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

57. Comment 5 to new proposed Rule 2.4 states,

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer’s duty of candor is governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by

The ideal result would be to convince the client to reveal the evidence that was "deleted." It is possible that the evidence is not, in context, as bad as it sounds. Even if it is, a settlement that is driven by the truth, and the finality that comes with this sort of settlement, is preferable to the alternatives. A settlement negotiated under the status quo would be a fraud, and the fraud would give rise not only to a right to rescind the settlement but also could be a basis for independent liability. Starting over with a new lawyer, if the current one withdraws, would be expensive and suspicious. The lawyer and the client are both better off if the client can be convinced to do the right thing.

B. *The Recalcitrant Client*

The next issue concerns a special type of assisted settlement, the judicial settlement conference.⁵⁸ One common reason why assistance in settlement is necessary is that a party may have unrealistic expectations about the possible outcome of the case. Sometimes the lawyer cannot reason with the client. Indeed, sometimes it is the lawyer who creates those expectations at the beginning of a case. This creates a problem for the lawyer:

You represent a plaintiff in a breach of contract case. Your client has rejected your advice to accept the defendant's settlement offer. You believe the client is being unreasonable. May you enlist the assistance of the judge in an upcoming settlement conference to "talk some sense" to your client?

The propriety of this step has provoked vigorous disagreement.⁵⁹ No one can doubt that the technique is likely to be effective.⁶⁰ The judge in a settlement conference has enormous prestige and, if the judge will also be the trial judge, a vast reservoir of discretionary power. The technique also is commonly used.⁶¹ Opponents of this strategy object on two bases. First, the lawyer in some sense is selling out the client. The judge learns from the person who is supposed to be the client's

Rule 4.1.

58. For a classic discussion of this topic, see Hubert L. Will et al., *The Role of the Judge in the Settlement Process* (1983).

59. When this hypothetical was presented at the 2001 Winter Meeting of the ABA Litigation Section leadership, it sparked the most heated discussion of the day.

60. See Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 734 (1994).

61. Judge Brown in the symposium commented that he has had many of these conversations. Several lawyers in the discussion at the ABA Litigation Section Winter Leadership meeting stated that they routinely go to the court when they are having trouble with a client.

champion that the client really is an unreasonable fool. This is a disloyal act. Second, the lawyer inevitably reveals information gathered in the course of the representation, namely that the client is an unreasonable fool. It is hard to imagine that the client gives permission for this communication. Without permission, talking to the judge violates Rule 1.6.

The need to enlist the judge usually reflects a failure by the lawyer. The lawyer, by word and deed, should inspire the client's trust and loyalty from the beginning of the relationship. A lawyer who does so will be able to persuade most clients to accept reasonable settlements without having to use the judge to reason with them. Sometimes, however, someone in addition to the lawyer will need to "talk some sense" to the client. Some clients really are unreasonable fools. That other person could be a family member, a friend, another lawyer, or a mediator. Before asking the judge to do it, however, the lawyer needs to seek the client's permission to avoid the appearance of disloyalty and the reality of a breach of confidentiality.

C. *Legal Advice and the Mediator*

The third hypothetical raised a fundamental issues about the role of the mediator:⁶²

You are the mediator in a personal injury case. You realize after talking with the plaintiff's lawyer that the lawyer has negligently failed to include a cause of action. The value of the case would change dramatically if this claim was added. May you, and should you, advise the plaintiff's lawyer of your observation?

The mediator above all else is supposed to be neutral.⁶³ The Ethics 2000 Commission has proposed a new rule about the conduct of lawyers acting as third-party *neutrals*.⁶⁴ A mediator may not be seen as neutral

62. For a useful discussion of the issues raised by this hypothetical, see Diane K. Vescovo, Allen S. Blair, and Hayden D. Lait, *Ethical Issues in Mediation*, 31 *Memphis L. Rev.* 59, 73-77 (2000).

63. Consider the following from the influential set of standards jointly adopted by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution [hereinafter the ABA/AAA/SPIDR Standards]:

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw. ABA/AAA/SPIDR Standard II, available on the Internet at <<http://www.to-agree.com/spidrstd.htm>>.

64. Ethics 2000 Commission, proposed new rule 2.4 (emphasis added).

if he or she is giving legal assistance to one party at the expense of another. He or she may be seen as an advocate. For this reason, giving legal advice to one side is strongly discouraged.⁶⁵ However, some mediators believe that, as a neutral, they have a duty to help the parties reach a fair settlement, not just to assist in reaching any settlement. An agreement in which the plaintiff receives less in settlement than he or she would receive if the lawyer was doing a good job is not a fair settlement.

In the end, the point may be largely academic. The setting and the phrasing of the conversation with the plaintiff's lawyer may insulate the mediator from criticism. This conversation will almost certainly happen in a caucus with the plaintiff and the plaintiff's lawyer, out of the hearing of the defense. Unless the applicable mediation standards forbid doing so, the mediator can put the information in play with a question, such as "why did you choose not to assert this cause of action?"⁶⁶ When the plaintiff's lawyer recovers his or her senses enough to say that he or she may seek to amend to add the claim, the mediator can go to the defense and, with permission, relate the plaintiff's intention to expand the case. The missing cause of action will then be factored into the settlement, without the mediator having to advise the plaintiff's lawyer to add it and without the defense knowing, at least with certainty, the origin of the threat to amend.

In this hypothetical, the problem arises because the mediator is concerned so much with fairness that he or she might overstep his or her role as a neutral. In the next Section, the problem arises because the mediator becomes so concerned with achieving any settlement, even an unjust one, that he or she manipulates the parties and their lawyers.

65. The ABA/AAA/SPIDR comments to Standards VI state:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes.

ABA/AAA/SPIDR Standards, *supra* note 63.

66. ABA/AAA/SPIDR comments to Standard I permit the mediator to "provide information about the process, raise issues, and help parties explore options." In Florida, raising issues in this way is not permitted. See Vescovo, et al., *supra* note 62, at 77.

D. The Manipulative Mediator

Good mediators can promote settlement by suggesting alternatives the parties have not considered, by providing a neutral forum where parties can tell their stories, and by helping lawyers overcome communication problems with each other or their clients. The hypothetical before the panel, however, dealt with a different situation, one in which the mediator evaluates the case, but evaluates it differently for each side in private caucus sessions:

You are the mediator in a personal injury case in which the plaintiff will make a sympathetic witness but will face significant, but not necessarily insurmountable, legal barriers to recovery. In the caucus sessions, may you emphasize the legal obstacles to the plaintiff and the sympathies to the defendant?

Few doubt that some mediators use this technique. But is it legitimate?

It depends. The mediator might truthfully explain to each side the strengths and weaknesses of its case. By doing so, the experienced mediator helps the lawyers predict the likely outcome of trial and thereby come to a better assessment of the settlement value of a case. There is a substantial risk, however, especially in caucus sessions when the behavior could go undetected, that a mediator who is determined to settle a case could manipulate the weaker or less experienced lawyer at the expense of that lawyer's client.⁶⁷ It is one thing for an adversary to affect the result by better lawyering. That is an inescapable part of an adversarial system. It is another for a court-appointed intermediary to exploit the ineptitude or inexperience of one counsel. We would not praise a judge who detected weakness on one side of a case and rammed through a settlement, indifferent to the fairness of the outcome. The mediator acts as an adjunct to the court. We should expect the mediator to have enough scruples not to seek a settlement, any settlement, just because he or she can. Mediators are not supposed to concern themselves with their "batting averages."⁶⁸

E. Reporting Misconduct

Finally, the lawyer mediator may have to deal with the same difficulties about reporting professional misconduct as advocates do:

67. See generally Longan, *supra* note 60, at 726-30.

68. Under ABA/AAA/SPIDR Standard VI, "Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate."

As the mediator of a complex business case, you learn that one of the lawyers has a conflict of interest. The lawyer refuses to divulge the conflict to his or her client or the court. May you, and should you, report this conduct to the court?

The conflict for the mediator is one between his or her recognized duty as a lawyer to report professional misconduct⁶⁹ and the super-imposed duty as a mediator to keep confidential information learned in mediation.⁷⁰

The hypothetical is based on the case of *In re Waller*,⁷¹ in which a mediator reported to a court that a lawyer had revealed a conflict of interest during a mediation. The court was not troubled by the mediator's breach of confidentiality. That result is not inevitable, however. The situation is analogous to the conflict between Rule 8.3's duty to report misconduct and Rule 1.6's duty to keep information learned in the course of the representation confidential. In that more familiar context, the Rules make it clear that the lawyer may not report the other lawyer's misconduct if that information is covered by Rule 1.6, if the client objects.⁷² The duty of self-regulation of the profession gives way to the duty of confidentiality.

In the mediation context, a similar resolution is foreseeable. Successful mediation depends upon the parties' faith that the mediator will report nothing to the court except whether or not there has been a settlement. If the parties and lawyers begin to pull punches for fear of the mediator reporting them, a mediated settlement becomes less likely. Mediation has become an accepted and important part of disposing of civil litigation. Just as the principle of self-regulation gives way to the need to respect client confidentiality, the need for confidentiality in mediation may supercede the reporting requirement.

VI. CONCLUSION

The Symposium on ethics in settlement negotiations was intended to assist the ABA Litigation Section in the drafting of its Guidelines. As you will see in the pages that follow, the panelists and the audience

69. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a).

70. For example, a comment to ABA/AAA/SPIDR Standard V states that, "[i]n order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation."

71. 573 A.2d 780 (D.C. 1990).

72. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3, cmt. 2 (1999).

members engaged in a stimulating, and sometimes heated, discussion about what the lawyers in these hypothetical cases should do. They helped all those who were present to see the issues and understand better how they might be resolved by lawyers who aspire to represent their clients well and still obey the ethical limits of our profession. With the publication of this transcript and the other materials in this issue of the *Mercer Law Review*, we hope that the readers will benefit from the discussion just as the participants did. If so, then the spirit as well as the letter of Judge Lawson's order, which funded the Symposium, will have been fulfilled.

* * *