Session Two: Conditional Settlement Agreements
PROFESSOR LONGAN: Our second panel today deals with questions of conditions in settlement agreements, such as what kinds of conditions are permissible and which ones are not. To moderate this panel, we have Professor Bruce Green from Fordham University Law School. Bruce is a member of the ABA Litigation Section Task Force that is working on these guidelines, and thus is very familiar with them, as was Professor Mashburn. Professor Mashburn is the reporter for the task force.

Our panel includes Judge Marvin Aspen, the Chief Judge of the United States District Court for the Northern District of Illinois in Chicago. We have Ron Ellington, who is the A. Gus Cleveland Professor of Ethics and Professionalism at the University of Georgia. We also
have with us Evett Simmons, who practices law in Florida. Today at Law Day, for those of you who were not there, Ms. Simmons received the Distinguished Alumnae Award. Ms. Simmons is joining us as our practitioner for this panel.

PROFESSOR GREEN: This panel focuses on ethics issues raised by settlement agreements that are different from those raised by the previous panel. The last discussion, of course, was largely about the relationship between lawyers and each other and their clients and the courts. It examined procedural issues. This panel will be focusing on the terms of the settlement agreement itself. We'll explore ethical limitations on what the parties can agree to or, at least, what the attorneys may assist the parties in agreeing to. Are there some things that a lawyer just can't put in a settlement agreement?

This may seem like a strange subject for ethical guidelines. After all, don't settling parties have freedom of contract? How do ethics rules come in to the question of what a plaintiff and defendant can agree on?

To be sure, one could imagine some obvious limitations on what the parties can agree on. Suppose the agreement would be illegal—for example, a settlement agreement providing that the parties will engage in illegal price-fixing. Certainly a lawyer can't assist in that agreement. This is true not so much because of ethics rules independently, but because of criminal law. A lawyer can't aid and abet a crime.

Beyond the question of what kinds of legal restrictions there might be on the terms of a settlement agreement, we're going to look at the question of independent ethical or professional limitations. Are there just some things that a lawyer can't do as a matter of ethics? To help us, we have three hypotheticals that Professor Longan drafted.

The first one deals with two types of settlement provisions. One type of provision limits what the lawyer may do after the case is over. For example, may the lawyer use information learned in the representation, or is there a restriction on who the lawyer may later represent? The second type involves the lawyer's fee.

Right away, you can imagine issues of lawyer ethics kicking in. What's unique about these settlement provisions is that they govern the lawyer and not just the parties. This settlement agreement in the hypothetical has three provisions that we'll deal with.

The first provision in this settlement of an antitrust case says that the negotiations and the amount of the settlement will remain confidential and neither the lawyer nor the client may use this information in any way in the future. So the first part is an agreement that the lawyer will keep certain information confidential. The second part is that the plaintiff's firm waives any claim for attorney's fees under the antitrust
statute. And the last provision, which I dare say is not a terribly common one, says that 30 days after the settlement the plaintiff’s firm will receive a general retainer of $1,000,000 from the defendant and thereafter act as the defendant’s litigation prevention counsel.

Let’s take them one at a time starting with the confidentiality provision. And let me begin by directing your attention to the two draft guidelines that bear on this. First, 4.2.6. It’s called “agreement to keep settlement terms and other information confidential.” It says, “in general”—and the “in general” is the interesting phrase—“a lawyer may ethically negotiate and agree to be bound by an agreement that the lawyer and the client will keep settlement terms and other information relating to the litigation confidential.” In other words, the general principle is you can have a confidentiality provision in the settlement agreement.

The other guideline to which I direct your attention is 4.2.1, called “conditioning settlement on restricting opposing lawyer’s right to practice or consult.” It says, “a lawyer may not offer or accept a settlement conditioned on an agreement that directly or indirectly.”—and that’s the interesting phrase here—“directly or indirectly”—“precludes the lawyer for one party from representing clients in future litigation against the opposing party.”

Let’s start with the first provision in the hypothetical. Why would the parties want to have a provision that says that the negotiations and the amount of the settlement will be kept confidential? What’s the motivation here, Ms. Simmons?

MS. SIMMONS: The motivation is to keep future plaintiffs from going after the same client. Often, the defendant is a corporation. When the issue involves product liability, such as in the case of Firestone, there are multiple potential plaintiffs. If the amount that one plaintiff receives is publicized and substantial, other potential plaintiffs may want the same or more.

PROFESSOR GREEN: So, if future plaintiffs know what the defendant is willing to settle for, they’re going to all line up to begin suing the defendant?

MS. SIMMONS: I think so because potential plaintiffs are going to also think that perhaps the defendant is admitting that liability is a concern so I do have a case. I mean defendants are settling these actions, and they’re not settling them in a manner that would suggest that they are frivolous. This could encourage additional litigation.
PROFESSOR GREEN: Is that a legitimate consideration? Once parties file a lawsuit, they begin taxing the resources of the courts, for which we as taxpayers pay. At that point, should they be able to keep settlement terms confidential or is there some public interest in knowing how these publicly filed lawsuits are settled?

JUDGE ASPEN: Well, it depends upon what terms you are talking about. I do not think there is any public interest in knowing the amount of the settlement. The defendant takes a perfectly legitimate and ethical position in saying, “I do not want to publish the amount of the settlement because that means that other people are going to think there is a big fat cat here and we are going to get a whole lot of lawsuits.”

However, it is different if you are talking about keeping confidential information that was part of the negotiations that really relates to the public interest, as when a tire is horribly defective and we are going to keep that quiet as part of the settlement agreement, but the tire is going to continue to be manufactured and will still be on the market. Or even if it goes off the market, other people who have been damaged by this tire are not going to have information that is available as to some of the defects. So you really have to talk about what terms you are keeping confidential.

PROFESSOR GREEN: You’ve invited me to change the facts a bit. Let’s suppose it’s a products-liability, personal-injury case, and all kinds of material is exchanged during the case. The plaintiff learns information that suggests that there really is a defect, which of course was the subject of the lawsuit in the first place. Precisely for that reason, the defendant is willing to make a favorable settlement on the condition that all that discovery material be returned and all the information learned in the course of the settlement negotiations, and learned in the course of discovery and learned in the course of the lawsuit will not be disclosed or used by the plaintiff’s lawyer. Do you see that as different?

JUDGE ASPEN: Well, I do not see any black letter law or black letter medical principle that covers that, but I can tell you that 20 years ago nobody would even think that there was any problem at all with keeping that information quiet as part of the settlement agreement. I think there is a trend among courts in situations where the court has to approve the settlement, to look at that type of information and see whether it is proper for the court to agree to that type of settlement.

PROFESSOR GREEN: So you, as a Judge, might think twice about approving the terms of the settlement. But what about from the
lawyer's perspective? Is there any reason why the lawyers shouldn't negotiate that term? Presumably, the settlement amount is much higher if this plaintiff is willing to effectively gag the lawyer. Is there any reason why the plaintiff's lawyer or the defendant's lawyer should hesitate?

MS. SIMMONS: I was struggling with that concept because if you look at the misconduct it's not really the lawyer's misconduct it's the client's misconduct, if you want to even call it misconduct. I think that there is an attorney/client privilege because all of the information was elicited by the lawyer in the process of representing his client. I would have difficulty with revealing that information unless I first obtained the consent of my client.

PROFESSOR GREEN: Professor Ellington, you've been silent.

PROFESSOR ELLINGTON: Yes, I have. There are several things going on here it seems to me. You asked about why parties may want confidentiality about the terms and the amount of the settlement. And we talked about some bad reasons: to protect the defendant from facing liability from future suits involving the same dangerous product. And I think we'll talk about that more with a later hypothetical.

Let me suggest perhaps a very salutary and good reason, that is that the settlement may come off if the parties are able to publicly present it as a win-win situation for both sides. It reminds me of a case where the patient sued the hospital after an infant was stolen from the hospital, and it resulted both in the payment of money to the plaintiff, but also the announcement that the hospital was putting into place new protocols and guidelines to protect against that in the future. The hospital, I think, very much wanted to have the public response be that we're being proactive and we're doing these things to prevent this in the future rather than, and by the way, we also have paid the plaintiff a great deal of money on the side. Sometimes settlements can have a very salutary role in trying to achieve a win-win situation for both of the parties. There's nothing wrong with that if it helps in the process of resolving the dispute.

One of the other things it seems to me that this hypothetical raises for us is the constraint from the confidentiality agreement that goes so far that it runs afoul of Model Rule 5.6 and the provisions of the draft guidelines that say that lawyers cannot directly or indirectly restrict their practice, their ability to take future cases. And, in fact, the commentary to the guidelines specifically recognizes that a settlement agreement that so restricts the ability of the lawyer to take future cases,
that even though they don't directly agree not to bring future cases they indirectly achieve the same result through the settlement agreement's terms on confidentiality. So that would be a concern.

PROFESSOR GREEN: All of you seem to think the confidentiality term in this hypothetical is mother, country, apple pie. But, let's suppose that the next antitrust plaintiff comes in the door and says, "I don't know what the result was but I know you represented plaintiff number one. I know you're a great antitrust lawyer. I want you to represent me against that same defendant." Suppose, you're a party to the confidentiality provision that says you may not use—it doesn't say you may not disclose—it says you may not use this information in the future. Can you take on that next client against the same defendant in a similar antitrust case? Or is there such a risk that you would use that settlement information, which Ms. Simmons says you'd want to use if you knew it?

PROFESSOR ELLINGTON: I think that is a risk, and that's why agreeing to this in the settlement poses that risk.

JUDGE ASPEN: Yes, I think that is exactly the problem when the confidentiality part of the settlement agreement includes the substance of what was going on rather than the amount of the settlement. The win-win situation really only comes about when you are talking about the amount. If I sue a tabloid publication for slander because they said something about my sex life, there would be a lot of publicity. Assume we get a settlement and it is announced, but the amount is not announced. I am portrayed as a winner; I "won" the lawsuit, the magazine will pay me $100, and it is terrific because they got all that free publicity and they could care less whether they win or lose. All they care about is the bottom line. You see those kinds of settlements with confidentiality agreements often. I do not know whether it is the win-win or the lose-lose, but that is not the troublesome type of agreement.

The troublesome type of agreement is the one where the subject matter is not disclosed and it will cause one of two problems, which we have discussed: (1) the problem of creating a danger that affects the public interest, or (2) the one that you suggest, the problem that affects the practice of law. The second problem arises when I, in effect, by agreeing to the settlement agreement, have taken myself out of all these cases in the future and I have taken myself out as a resource person for other people that might be filing these lawsuits.
PROFESSOR GREEN: This seemingly innocuous provision would seem to come within the language of one of the guidelines, which says that generally you can have a settlement provision requiring that you keep confidential the settlement terms. But the ABA would say this is an unethical provision, wouldn't it? There's an ABA opinion on point, Opinion 00-417 from April of 2000. It says that under the ABA Model Rules, a lawyer may not disclose a former client’s information, but there's no bar on using the information as long as you're not using it against the former client. If you purport to have a settlement provision that forbids any use of information concerning the settled lawsuit, as opposed to the disclosure of information, that goes too far because it indirectly forecloses that lawyer from taking on future cases. There's a clash, I think, between the intuition of these two approaches. Where would you come out on this, Professor Ellington?

PROFESSOR ELLINGTON: Well, I think I tend to prefer upholding prohibitions that restrict directly or indirectly the lawyer’s ability to take future cases.

PROFESSOR GREEN: In New York, we have an appellate court opinion that enforced a settlement agreement that barred the plaintiff’s lawyer from taking on future clients against the defendant. It relied on an article by Professor Stephen Gillers of NYU who said that the ethical rule forbidding this type of settlement agreement is anachronistic and illogical. But you seem to like the ethical rule. Why?

PROFESSOR ELLINGTON: Well, I like the rule, but not for the reasons that are traditionally given for it. And we can talk about that right now I suppose. It seems to me the reasons traditionally given for 5.6, at least what the commentary to 5.6 says, is that this rule is necessary to ensure that the public or client will have a choice of counsel. A client will have access to a lawyer.

And as an empirical matter, one might wonder if today, given the number of lawyers out there, it's necessary to have a rule that in sort of a paternalistic way says that a lawyer, unlike, the other, you know, other skilled people, be they baseball players or someone else, can't agree to restrict the sale of their services if they choose to.

Now, I think if you take a subset of all possible cases and imagine the sort of toxic tort case made famous by the movie A Civil Action or an antitrust suit or a complex product liability suit or a suit involving breast implants where there’s a great deal of science and a great deal of expense for experts that will have to be put up front in order to successfully bring such an action, you are limiting the number of lawyers
who can, and have the wherewithal to bring those sorts of cases. So there may be something to that notion that by restricting the available market for legal services in this way the public is being harmed.

My own supposition about this is that the unarticulated reason for this rule is concern about the wedge that it drives between the client and the lawyer, raising a conflict of interest. When the lawyer is separately bargaining to sell or not sell in the future his legal services in turn for payment by the opposing party it's a very risky situation created for the lawyer's duty of loyalty and trustworthiness to his or her present client.

PROFESSOR GREEN: That raises a question. You point out rightly that part of what the rule is about is the conflict of interest. So let's suppose the defendant says to the plaintiff, "I'll give you $1,000,000 if you have this confidentiality provision and $750,000 if you don't." And let's suppose the lawyer is getting paid by the hour. Does the lawyer have a right to say to the client, "You may not enter into this agreement because it binds me also, and I don't want to be a party to it?"

MS. SIMMONS: I think that would depend upon what arrangement that the lawyer and the client have in the first place. Because, as I understand it, the right to attorney's fees belongs to the client and not to the lawyer unless there was some written agreement at the outset transferring that right from the lawyer to the client. But I think that the lawyer would hopefully have a good relationship with the client. However, ultimately it's usually the client's decision.

PROFESSOR GREEN: Well, you've now gotten us to provision number two of the hypothetical, which is the waiver of the attorney's fee.

MS. SIMMONS: Let me finish on that one first. I had something else about the other issue with regard to ways that, I don't know if we can even say getting around it, my reason was not to get around the, putting the attorney on retainer, and this is where he comes up with the $1,000,000 retainer afterwards as a part of the settlement agreement if the settlement agreement did not include anything about the attorney agreeing to represent the defendant. But it just so happens after the case is resolved then there is an agreement that the attorney enters into that represents that the attorney is pretty good, I'm aware of that type situation, would that then get around the rules because it was not necessarily a part of the settlement?

PROFESSOR GREEN: Now I think that the whole thing is on the table. So, Judge Aspen?
JUDGE ASPEN: We are certainly into number two.

PROFESSOR GREEN: I think two and three.

JUDGE ASPEN: Okay. Number two is probably the most frequent one that any judge is aware of, and it comes up constantly—the conflict between the attorney's fees and the settlement for the plaintiff. Particularly where you have a statutory fee, and the defense attorney and the defendant quite properly want to get rid of the whole case, it does not do them any good if they just satisfy the plaintiff and then have a big question mark as to attorney's fees because there is an insurance company with X amount of dollars in reserve to get rid of the whole package. That conflicts with the notion that the plaintiff's attorney has the prime obligation to represent the plaintiff first, in my view, even at the sacrifice of fee considerations.

Very often I will get a situation not dissimilar to this where the parties will come to me and say, Judge, we can settle this case only if we can resolve the attorney's fees to such-and-such amount of dollars. My response to them always is, settle the case as far as the plaintiff is concerned. After you have done that, and only after you have done that, are we going to consider the attorney's fees, whether a separate settlement negotiation or whether you bring it to me and we determine the attorney's fees as a contested matter.

This factual situation is comparable to a common scenario in which there are statutory attorney's fees and, because the case is being settled (let us assume) very early on in the proceedings, the attorneys are going to get very few dollars. The defendant has a lot of dollars and is ready to pay the plaintiff. The attorney has an obligation at that point, in my view, to settle the case in the best interests of the plaintiff and sacrifice that attorney's fee. As a practical matter, you do not see that sacrifice in many, many cases, and there is nothing a judge can do about it. The attorneys say, "No, we are not ready to settle," so the case goes on and litigation continues for a year or two or three years. Then the attorney's fees have accumulated, and then the case is in a posture to settle—clearly, in my view, something that is unethical.

The other problem with Number 2 is, even if you talk to your client and your client agrees to waive any claim for attorney's fees and you are willing to do that and take it as a contingent fee, that, again, is a conflict of interest. You have this lump sum, you have worked only X amount of hours, you are going to get a fee that is worth $10,000 or $100,000, but you say quite magnanimously, "I am going to waive my attorney's fee. Let us enter into a contingency fee agreement." Then you
get a fee that is three or four times the amount of the settlement that you would have gotten under the statutory scheme at that point.

You cannot even talk to your client about it as far as I am concerned. The conflict is so great that I am not sure that your client does not need separate representation in order to determine whether or not that is a bargain that the client ought to enter into at that point.

PROFESSOR GREEN: Just for my benefit and the benefit of the first-year students here, I take it we're presupposing that the attorney would be entitled to pocket the attorney's fee award in an anti-trust case or a civil rights case. Is that true, or does it really depend on the terms of the initial retainer agreement? I would have thought —

JUDGE ASPEN: It should have been within the statute.

PROFESSOR GREEN: The statute might provide for payment of attorney's fees, but it doesn't provide that the money goes to the attorney. It provides that the money goes to the client, the claimant.

JUDGE ASPEN: Right.

MS. SIMMONS: Right.

JUDGE ASPEN: Sure.

PROFESSOR GREEN: So none of this creates a conflict unless there's some understanding initially between the plaintiff and the plaintiff's counsel, is that right, that the counsel pockets the fee?

JUDGE ASPEN: The fact of the matter is the plaintiff and the plaintiff's counsel would not be married together in this lawsuit if there were no agreement up front.

PROFESSOR GREEN: If there's an agreement up front that the attorney for the plaintiff gets to keep whatever attorney's fee is awarded, can there also be an agreement up front that the plaintiff may not waive the attorney's fee award? Can you deal with the issue through the initial retainer agreement?

MS. SIMMONS: Yes. I think California is an example of a state that suggests that as long as there is full disclosure, it's a part of the contract and the client had an opportunity to seek other counsel, that you should be able to. The client should be able to waive this right and permit the
attorney to have that privilege. Because you have to remember that attorneys take risks, too. And, so, when one is talking about contingency fees, it may be a significant fee for Case A, but the lawyer may have spent thousands of dollars on B, C, and D and recovered nothing. So included in all of those risks is the possibility that at least one case, maybe two cases, may result in a large settlement. So I don't see any problem with these type of agreements and the recommended fee percentages. Judge, I was listening to you talk.

JUDGE ASPEN: Well your hypothetical makes it easy because the attorney is magnanimously waiving the traditional attorney's fee because the attorney is getting a $1,000,000 contract as prevention counsel. So in that case, it is probably a win-win situation, both for the plaintiff and the plaintiff's attorney, and the losing party, of course, is the public interest.

PROFESSOR GREEN: Ms. Simmons is right, there is a California opinion saying that you can deal with this issue by providing a retainer agreement that the plaintiff won't waive the fees. But there are also opinions of the District of Columbia Bar Association, the Association Bar of the City of New York, and others which take the opposite perspective. They say that the decision whether to settle or not, and the decision of what terms to settle on, is the client's decision. The client can't make an informed decision at the beginning of the case, when entering into the retainer agreement, about whether to waive or not to waive attorney's fees, because the client just doesn't have enough information. And, so, any provision in the retainer agreement that ties the client's hands with respect to the terms of the settlement is impermissible. What do you think, Professor Ellington? Another conflict between the Bar Associations?

PROFESSOR ELLINGTON: I think there is, and I think that's right, and I was going to say that I think this is a situation that really calls into play Model Rule 1.8 which deals with conflicts of interest and prohibited transactions. If a lawyer has a business or financial interest that may conflict with the client, it generally requires that the resolution of that be fair and reasonable to the client, there be full disclosure transmitted in writing to the client, that the client consent in writing, that the client have a reasonable opportunity to seek the advice of independent counsel in the transaction. The lawyer really in those circumstances is engaged in a financial transaction with his client over the division of that fee. And I think it ought to be approached in that way.
MS. SIMMONS: And that's really all you can do is disclose, because being realistic, if I'm hearing you correctly, when the client walks in the door and the attorney has to advance all the cost, sometimes he may not. And then a year later the attorney has assisted the client in reaching a resolution for $2,000,000, even if there is a waiver of fee provision, the client can still decide whether or not to waive the fee. At that point the client appears to be in the "win-win" position. I mean you're saying the client does not have to honor whatever they agreed to at the outset of the representation. The client can now say that I want it all. That doesn't work in the real world.

PROFESSOR GREEN: A proposal of win-win. Let's turn to the third part of this hypothetical. This looks great to me. The defendant wins because it gets a great lawyer that's going to prevent it from committing other anti-trust violations. The plaintiff has a good settlement, presumably. And I guess the plaintiff's counsel wins a little bit. He gets a reasonable fee for his services. Any problem with the last part?

PROFESSOR ELLINGTON: I would have thought no one would have tried this until a couple of weeks ago when, if what I read in the local legal newspaper is accurate, someone, indeed, in Florida did try it. The story in the newspaper was that in an effort to bring about settlement of a client's action, the defendant agreed to settle for more than the highest offer that the plaintiff's class had made, and then retained the counsel for the class as a consultant to the company going into the future for a side payment of some several million dollars that was not disclosed to the class. Who would have dreamt that such a thing could be done? The rules say you can't do that, or you shouldn't do that. I wouldn't have thought there would have been any question.

JUDGE ASPEN: I would not think so either. Number one, this is a great asset that is part of the settlement negotiations, and that asset belongs to the client, not to the attorney. Secondly, again going back to the public interest component, in the ethics settlement you have taken a very talented successful attorney out of the market to represent others in similar situations, and to help other attorneys who would represent those clients. But I agree —

PROFESSOR GREEN: I'm not sure I understand why the asset is the client's asset. What is being sold here? What the defendant is buying is, this lawyer won't sue this defendant again. The right of the lawyer to take on future cases surely is the lawyer's asset. Now, you might say that's something you're not allowed to peddle, but —
JUDGE ASPEN: I am not sure it is that simple. There's $1,000,000 being put on the table, and no matter how you label it, whether it is a retainer or prevention counseling or what have you, $1,000,000 is being put in a pot and given to the attorney, not the client.

PROFESSOR GREEN: Okay. So let's change this a little bit. Let's suppose the defendant says I'm prepared to enter into this settlement, and I'll throw in an additional million dollars if the plaintiff's lawyer will come work for me at his or her hourly rate as litigation prevention counsel after this is over. The plaintiff's lawyer says, "Hell, no. I want to represent more plaintiffs." The plaintiff says, "Wait a second. You know, I'd like that other million dollars." Whose decision is it?

JUDGE ASPEN: I do not think that is a hard case at all. As I said, there were two evils in this, and you have only satisfied one evil by giving the money to the plaintiff. The other evil is taking the attorney out of the market, and the attorney cannot agree to do that.

PROFESSOR ELLINGTON: And more than that, I mean you are taking the attorney out of the market, and how much we should be concerned about that we may debate. But I think you're going to create a conflict and it raises a question about an attorney's loyalty and trustworthiness with that client if separate money is being paid to the attorney as a part of that settlement.

PROFESSOR GREEN: Let me try one more variation which was suggested by Ms. Simmons a while back. The settlement is over. Unfortunately for the defendant, it forgot to get a nifty confidentiality agreement, the effect of which would be to bar the plaintiff's lawyer from ever suing it again. So it goes to the plaintiff's lawyer and says I'd like to retain you as litigation prevention counsel. Now there is no problem, right?

MS. SIMMONS: I don't think so. Another way that it happens is when there is a judgment against a defendant. And then after the judgment the defendant retains that lawyer. And, again, I don't see a problem. The Judge may see one.

JUDGE ASPEN: No, I see no problem unless it is a sham, in which you are going through with the settlement but everybody knows that as soon as we get the settlement done, we have got this other deal that we are going to cook up. If it happens just by happenstance, which is so unlikely that it only happens when professors do hypotheticals, then I
have no problem. But if it happens the way you said it happened, I would suspect that it really was a sham.

PROFESSOR GREEN: Before we move to the next hypothetical, let me pause here and see if anybody here has a question or a comment? Okay, we've silenced the crowd.

PROFESSOR ELLINGTON: Well, let me add a footnote before we move on just for the law students here, and Georgia lawyers. Georgia is one of the few states that prior to the adoption of the new rules of professional conduct that became effective as of January 1 of this year allowed this sort of golden handcuff to occur. The rule in Georgia, unlike the rule in the Model Code states and unlike Model Rule 5.6, said that in connection with the settlement of a controversy or suit a lawyer shall not enter into an agreement that restricts his right to practice law but may enter into an agreement not to accept any other representation arising out of the transactional event embracing the subject matter of the controversy. So for Georgia lawyers the new rule of professional conduct in Georgia makes a dramatic difference in the position of the Bar and the Supreme Court on this issue.

PROFESSOR GREEN: I think that's important. Not only don't we want any of you to be fired, we don't want any of you to be disbarred as a result of today's program. So it's good to have a little reference to the Georgia rules.

MS. SIMMONS: Can I just make one quick note, too?

PROFESSOR GREEN: Sure.

MS. SIMMONS: When we're talking about disclosures of settlement agreements, to add just a human touch, because I serve as guardian ad litem on a number of significant personal injury and medical malpractice cases, particularly involving children, and there have been very significant settlements with the understanding not to divulge because of the human factor. Everybody was so upset about what happened that they were willing to add additional monies with the understanding that nobody would reveal any of this information.

PROFESSOR GREEN: Let's move on to the second hypothetical which raises an issue that we touched on but backed off of at an earlier time. 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 the 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.

So there's a dangerous product, a smoking gun document, and a proposal that the defendant will up the ante if you'll give back the document. And there's a draft guideline here, I'm not sure how well it addresses it, 4.2.3. "Unless otherwise unlawful"—so that's a qualification—"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."

Would it be unlawful here? And, if not, is the guideline right that the results should be that the lawyer can, and presumably would, if the client insisted, enter into this agreement? What do you think?

**MS. SIMMONS:** I think that the plaintiff's attorney has to enter into the agreement. I looked at it and I could not figure out. It didn't seem illegal. I didn't see any significant misconduct on the part of the other attorney. It's the other attorney's client, so it would seem to me that the confidentiality clause would have to be in the agreement.

**JUDGE ASPEN:** First of all, forget about the title privileged and confidential; that means nothing. If this material is so important in terms of the bona fides of litigation, and if this confidentiality clause will keep this material out of the judicial arena, it seems to me that you have a problem. The problem is the one that we alluded to before: that this attorney, because of the confidentiality agreement, will not be able to represent similarly situated plaintiffs, will not be able to serve as good counsel or as a resource to other lawyers or law firms who represent those plaintiffs, and also will be an accessory, perhaps, to keeping a dangerous product on the market when that product in the normal course of the legal and judicial process would be off the market. So I find it very problematic.

**PROFESSOR ELLINGTON:** I think if the rules of ethics allow confidentiality about products that pose a risk to public safety, we should expect that the legislature, which actually got there a little faster, that the legislature is going to step in and do something about this. It's going to no longer be —
JUDGE ASPEN: Or after this course.

PROFESSOR ELLINGTON: — or after this course it’s no longer going to be a matter of the rules of ethics. You see around the country legislatures and courts saying that parties may not use confidentiality to restrict knowledge about products that represent a public hazard and that threaten to harm other people. And I, I mean were I the czar of these rules, and I’m not, I don’t think the position taken on this is really strong enough. I think the ABA draft statement should take the position that a lawyer may not agree to negotiate a confidentiality agreement if it involves keeping secret a product that threatens public safety or health, and that that ought to be the black letter rule, and then you can write commentary about that. But to start from the proposition that you could do this unless there is some legal restriction that prevents it, I think maybe puts the cart on the wrong side of the horse.

MS. SIMMONS: So then you’re bringing this, which may be how it should be, to the same level as a client being prohibited from committing a crime. I mean, because, an attorney can be struggling with the client confidentiality and if what the client is telling the attorney to do cannot be revealed and if the rules do not give it the same weight as the commission of a crime, then there is a struggle with the lawyer as to what to do.

PROFESSOR GREEN: Larry?

LARRY FOX: I just thought that buried in this hypo was the question of what do you do in a negotiation when the lawyer on the other side tells you he’s going to do something unethical in the future. Forget the agreement. He just says, you know, he just says this document is never going to see the light of day in any litigation I’m going to handle unless you’re on the other side.

PROFESSOR GREEN: I assume the lawyer will say it was inadvertently produced, it’s a privileged document, I have a good faith basis to believe it’s privileged and I intend to assert the privilege for here and evermore. What about that? He’s not saying I’m going to obstruct justice and destroy evidence. Does that trouble you, Judge Aspen?

JUDGE ASPEN: Say it again.

PROFESSOR GREEN: Larry raises the question of what do you do when the lawyer on the other side says, in effet, that he is going to
destroy evidence. I assume the lawyer is not going to announce that intention when he asks for the documents back. The lawyer is going to say, "I'm going to assert the privilege from now on."

**JUDGE ASPEN**: Well, if the lawyer tells you that he or she is going to destroy evidence, it seems to me that you do have a problem that I think Larry was leading up to. You have a duty to report that lawyer, at least in Illinois to the appropriate disciplinary authority. That is a duty independent of your obligations to your client.

**MS. SIMMONS**: But I thought that duty was, while the case was still going on. If the case has been settled and there is no pending case with regard to you and that other lawyer, then why can't that evidence be destroyed, or those documents be destroyed? There is no case. You can destroy your own documents.

**PROFESSOR GREEN**: I think the next problem raises the reporting rule more squarely, so maybe we should wait on that. I didn't want to leave this hypothetical yet because so far what I'm hearing is everyone on the panel, well, maybe not Ms. Simmons, but the other two members of the panel are saying this term is one you can't agree on. But, let's suppose, the client says, "Look, the defendant has brought this wheelbarrow full of money and is going to give me all this money if I only agree to the settlement. I don't plan to bring anymore lawsuits so I don't care about the fate of this document." Part of the provision is returning the document. I don't want it anyway. And the other part of the provision is confidentiality.

There's an ethics rule in every jurisdiction saying that you can't have an agreement that restricts a lawyer from taking on future cases. That's all it says. This agreement doesn't do that. It's an agreement about confidentiality. Sure, there are some bar associations that interpret it broadly, but who cares. I want the money. You're going to tell me I can't enter into a settlement that's manifestly in my interests, because of your fidelity to what a few lawyers in a bar association say?

**PROFESSOR ELLINGTON**: Well, this again is a product still on the market that is dangerous and can harm other people. And at the end of the day I think that is the principle that ought to control what's done. And I think a lawyer should start early in the representation of this client talking about the possibility that somewhere down the road this sort of thing may come about. And many clients say, at least, they're not just in it for the money. It's a matter of principle. We want, you know, the loss of Jane to mean something. We want a safer car. We
want fuel tanks that don't explode. We want, you know, people to take medicine that doesn't harm them. We feel that we want to accomplish something more than just being paid. And I think lawyers need to talk with their clients about what they are going to accomplish in this case.

MS. SIMMONS: If I entered into this agreement on behalf of a client, I don't see where it prohibits me from coming up with another client and suing the same company. Maybe I can't use this document he says is privileged, but I should be able to find some kind of way to defend my new client as well because it doesn't prohibit me from doing that. So I don't see — and then I have not breached my confidentiality with my first client.

JUDGE ASPEN: The problem, Bruce, with the way you phrased the question is that there is going to be a great gain for the client, so what does it matter if we slide by an ethical consideration. It seems to me that the lawyer's duty to the client to represent that client zealously is always conditioned on compliance with ethical rules. We can agree or disagree about whether this is a valid ethical requirement, but we cannot avoid it out of expediency or out of the notion that somehow we are not representing a client zealously because we are adhering to an ethical requirement imposed on us, as lawyers, that is independent of the client. I am not really concerned at all, and I think what you have to do is what the client's expectation is: that you are going to represent that client zealously, you are going to do everything you can for that client, but you are going to play by the rules, or whatever we agree the rules ought to be.

AUDIENCE: I've got to ask about as a practical matter what the rules should be? I mean do we ask lawyers in these situations with these kind of pressures to police themselves, or do we do it as a proposal to amend Rule 26(c), placing duties on the courts to scrutinize settlements? Is that a more practical way to achieve what I think we might agree to in principle?

JUDGE ASPEN: Well, I do not think you want a lot of satellite litigation. Obviously, in certain litigation situations the judge must approve the settlement agreement in certain statutory proceedings. But to say that every settlement must have the approval of the court is not a very practical solution and one that would involve a lot of satellite litigation.
PROFESSOR GREEN: Let's turn to the last hypothetical, number three. 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. I want to leave aside the whole issue about the mediator here because that's the subject of a panel tomorrow. 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. What do you think?

JUDGE ASPEN: Easy. It is the lawyer's duty to report the conflict of interest. The mediator, as a lawyer, has a duty to report the conflict of interest.

PROFESSOR GREEN: Let's suppose we're not in Illinois. My understanding —

JUDGE ASPEN: This time of year it is a good supposition.

PROFESSOR GREEN: I don't know what the rule is in Georgia. Why don't you tell us the rule.

PROFESSOR ELLINGTON: There's an interesting note to this. We're talking about Model Rule 8.3 that says a lawyer who has non-privileged information about attorney misconduct that goes to an attorney's honesty, trustworthiness or fitness as a lawyer has a duty to report that to the Bar authorities. When Georgia adopted Rule 8.3, again effective January 1, they did something very interesting. They adopted the rule, but they set no punishment for the failure to obey it.

Now, I've heard of weak rules. I'm not sure that it's still a rule if it has no sanctions whatsoever. It's truly just sort of an aspiration in that regard. So I would say in Georgia, since Rule 8.3 has no sanction for its violation the question may not be as easy as it is in Illinois. I think the intent here was to tie this restriction to 8.3, which envisioned a duty to report.

PROFESSOR GREEN: Let me ask you about Georgia's 8.3. The Model Rule provision, at least, provides that the reporting obligation is trumped by the confidentiality obligation. So if the source of your information, say in this case about the lawyer's conflict of interest, is information learned in the course of the professional relationship, which
would be governed by the confidentiality rule, 1.6, then you may not disclose without client consent.

If it's the same in Georgia, then it seems pretty unlikely here that you have a reporting obligation, even assuming for the sake of argument that the conflict of interest raises a substantial question about the lawyer's fitness to practice, which I think is a big assumption. Assume I'm right that the lawyer here does not have a reporting obligation in Georgia, and in most states other than Illinois where the court in *In re Himmell* [523 N.E.2d 790 (Ill. 1988)], said that the confidentiality rule does not trump the reporting obligation. Why should you not be able to enter into an agreement not to report misconduct that we don't have to report anyway?

**JUDGE ASPEN:** Well, the plaintiff's attorney agrees that as part of the settlement his own conflict of interest will not be reported, right?

**PROFESSOR GREEN:** Right.

**JUDGE ASPEN:** Do you think the plaintiff is getting a little fewer dollars because of that?

**PROFESSOR GREEN:** The plaintiff is getting fewer dollars? Why do you think fewer?

**JUDGE ASPEN:** The defendant is getting X amount of dollars to settle this case, all right?

**PROFESSOR GREEN:** Right.

**JUDGE ASPEN:** However, don't you think those dollars are discounted?

**PROFESSOR GREEN:** Right. So, in other words, the lawyer's self-interest in avoiding being reported is in conflict with the client's interest in getting the bigger settlement?

**JUDGE ASPEN:** I would think so, wouldn't you?

**PROFESSOR GREEN:** So you think the problem is not that you're getting —

**JUDGE ASPEN:** I think it has a lot of problems. I think that is just an additional one.
**PROFESSOR GREEN:** What if the lawyer says, "I'll pay the difference out of my pocket?" Less of a problem?

**JUDGE ASPEN:** It is probably concealing a crime of some type.

**AUDIENCE:** If the defendant, your client, is telling you to accept the settlement, isn't the defendant waiving the conflict?

**PROFESSOR ELLINGTON:** I understood the conflict to be on the other side.

**PROFESSOR GREEN:** The plaintiff's lawyer had the conflict.

**PROFESSOR ELLINGTON:** The plaintiff's lawyer had the conflict. And if, I suppose if the conflict were of the sort that the plaintiff's lawyer formerly represented the defendant and is bringing an action against a former client, then the lawyer for the defendant has something she could do, that is she could move to recuse the attorney for the other side. On the other hand, if the conflict is, say, that the plaintiff's attorney is representing in litigation multiple clients with potentially differing interests then in Georgia, at least, the opposing party can't move to recuse the attorney for the other side because that attorney may have a conflict among that attorney's clients. And I think that's the sort of hypothetical that we're dealing with here.

**PROFESSOR GREEN:** You could imagine a situation that raises the reporting rule where the plaintiff and the plaintiff's lawyer both engaged in misconduct. Then it's in their mutual interest to have this provision. And then you don't have the conflict that Judge Aspen talked about between the client and the plaintiff and the plaintiff's lawyer.

The draft guidelines are a work in progress, obviously, and we had two versions before us which were diametrically different. One, which is the one that you all have, says an attorney may not condition settlement on an agreement not to report opposing counsel's misconduct. You just can't do it. The other version that was considered would have said you can have that agreement except in the situation where the reporting rules would require the lawyer to report, which, except in Illinois, is a very small number of cases.

I'm not sure that the ABA Model Rules speak clearly to the question of what you can agree on or not agree on. I think it would be helpful for the committee to know, what do you think the better rule would be? You can have the provision or you can't have the provision in a settlement agreement?
PROFESSOR ELLINGTON: Let me mention another Georgia rule in this connection, having pointed out that Georgia in adopting 8.3 imposed no sanctions.

PROFESSOR GREEN: Okay.

PROFESSOR ELLINGTON: Let me add that in the Georgia rules there's Rule 9.2 entitled settlement of claims that provides in the connection with the settlement of a controversy or a suit involving misuse of funds held in a fiduciary capacity, a lawyer shall not enter into an agreement that the person bringing the claim will be prohibited or restricted from filing a disciplinary complaint or be required to request the dismissal of a pending disciplinary complaint concerning that conduct. I think that's a very good rule, and I think there may be some areas where the position ought to be that the need to report these abuses by the attorney is simply so important that an agreement of confidentiality should not be entered into.

PROFESSOR GREEN: Because it's really against public policy.

PROFESSOR ELLINGTON: That's right.

PROFESSOR GREEN: Maybe before ABA Ethics 2000 finishes its work, you ought to send it that provision. I do think it's an interesting idea. Any questions or comments? Yes, sir.

AUDIENCE: This particular one, the plaintiff comes in and says, "I will pay you $100,000." Your client thinks that it is a wonderful settlement, and he says, "Yes, take it." And you say, "No, I'm prohibited from doing that." The mediation fails, it goes to trial and your client has to pay $2,000,000 instead of $100,000. Is your client going to be happy if you can explain that you did it for ethical reasons?

PROFESSOR GREEN: Any thoughts? As Judge Zlaket said the last time, that's why you have malpractice insurance.

JUDGE ASPEN: You know, if the litmus test is a happy client, let us close the book on ethics.

JUDGE ZLAKET: That's right. I mean are you going to buy my silence? Because I'm your lawyer does that mean that I've got to sell my silence? I'm selling my silence. Let's make it a little worse. Let's say you know that client is a thief and has stolen a bunch of money, and
part of the deal is, look, if you won't turn me in I'll settle this case with your client. I'll give your client $1,000,000 in settlement of this case. Now, what are we? I mean sooner or later do we reach a breaking point where we say, I'm a lawyer. I'm an officer of the court and I'm not for sale. My silence is not for sale. This is not my lawsuit. This isn't about my silence.

And from the way you phrased it up there, it is about my silence and it's about my, the lawyer's silence, not settling the client's lawsuit. When you attempt to put them together, really it makes the — I understand how you put the hypothetical together but it's pretty fuzzy, but it's a real dilemma. But I think sooner or later you have to stand up and say, what's being sold here.

PROFESSOR GREEN: Larry?

LARRY FOX: It's interesting because this hypothetical in a way raises a slightly different question from the typical question, which is that you're engaged in litigation and you see unethical conduct on the other side. And the rules are intended, at least except in Illinois, to let the lawyer help talk to the client and make a judgment. Is it really going to be helpful to my client to set up a second front? Are we really going to advance the ball in this litigation getting this client what the client wants. And so we've said, at least so far in the rules, that we're going to say that if the client's judgment is that this is a 1.6 and the client is told by the lawyer, you know, you can stop us, stop me from having to report if you tell me you do not want me to report.

When you get to the end game, the balance might be slightly different. I'm not sure at this point. You know, I want to think about it a little bit more. But it seems to me that the arguments for refusing to report are different from the way they were while we were still litigating. But, of course, you're going to keep on litigating if you don't get this settlement, so maybe it's a —

JUDGE ASPEN: Well, I am not sure that the ethical obligations of the attorney should be arena driven as opposed to professionalism. It seems to me that you cannot say that an attorney has a different standard, in terms of any obligations we impose on that attorney, in dealing with other attorneys or in dealing with clients in a mediation session that has been mandated by the court, as in this hypo, than he would have in the court setting itself. I just do not think that is very practical.
**MS. SIMMONS:** And I would think favorable terms necessarily means over-generous. I mean favorable terms, because I know when I used to do litigation and mediation, favorable terms might be just what the case is worth. So you have to weigh more than just whether or not there's a conflict. You have to weigh the interests of your client, the value of the case, and whether or not, what purpose would be served, particularly when this is not a privilege, what purpose would be served in taking that chance and saying, hey, I'm going to destroy the whole settlement by virtue of making that revelation, assuming that you have everything right and there really is a conflict.

**PROFESSOR GREEN:** I do have to say that Pat Longan helped us come up with some really vexing hypotheticals, which are fascinating. But I know we are the only thing standing between you and the Georgia Sports Hall of Fame; and, therefore, let me bring our panel to a close by thanking our panelists. Thank you all.
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presents

A SYMPOSIUM:
ETHICAL ISSUES IN
SETTLEMENT NEGOTIATIONS

Session Three:
Fairness Issues in Negotiation

**Moderator:** Edward M. Waller, Jr., Esq.
Tampa, Florida

**Panel:**
The Honorable Mary Scriven
United States Magistrate Judge
Tampa, Florida

Nancy Degan, Esq.
New Orleans, Louisiana

Professor James Moliterno
College of William and Mary

on

March 10, 2001

at the

Walter F. George School of Law
Macon, Georgia