Session Three: Fairness Issues in Negotiation
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A Transcript Featuring The Honorable Mary Scriven, Nancy Degan, Esq., Professor James Moliterno, and Edward M. Waller, Jr., Esq. Moderator

PROFESSOR LONGAN: Our panel will be moderated this morning by Ed Waller, from the Fowler, White Law Firm in Tampa. Ed is the chairman of the task force that has been drafting these guidelines and told me yesterday after one of the sessions that this had been sort of a good news bad news session for him. The good news was he got a lot of very good ideas and input, but the bad news was he thought they might have to start all over again. But I hope it's mostly good news, Ed.

On our panel this morning we have the Honorable Mary S. Scriven, United States Magistrate Judge in Tampa, Middle District of Florida, and my former colleague on the faculty of Stetson University College of law. Why she ever left academia to become a judge, I don't know.
JUDGE SCRIVEN: Nor does she.

PROFESSOR LONGAN: Nor does she. We have Professor Jim Moliterno from the College of William and Mary, Marshall-Wythe College of Law, and we have Nancy Degan from the Phelps Dunbar law firm in New Orleans representing the practitioner's point of view, which we discovered yesterday was sometimes different from others. So, Ed, I turn it over to you.

MR. WALLER: Good morning. The first thing I want to do, and probably one of the most important things I want to do is thank Pat for organizing this symposium and organizing it really around the project that we have been working on. I alerted Pat to what we were doing over a year ago when he was still in Florida, and needless to say it was a great loss to us when he came up here. But congratulations to the people here. Anyway, he decided he wanted to use this symposium to help us with our project and we're absolutely delighted that he decided to do that. So I want to thank him on behalf of the project. I also want to thank him on behalf of the Litigation Section of the ABA, although our Chair, Ron Cohen, is here and will be on the next panel, and I'm sure Ron may do the same. Ron, by the way, was the one who came up with the idea of doing this whole project, recognizing there was a gap out there in practical materials for lawyers in giving them guidance on ethical issues they may face in the settlement context. So Ron put together our task force or our project to try and come up with the materials to be of practical use to lawyers all over the country. And so that's how we got here, and, again, I want to thank Pat and also thank Judge Lawson for making this possible for all of us.

Now what I want to do first is just spend a few minutes talking about the guidelines that are in the materials, just the ones that relate to the issues that we're going to be talking about on our panel. As Pat said, they deal with fairness issues and they are 4.3.1 through 4.3.7 and they're near the back of the materials you have.

And the first one I want to mention is the very first general one that's entitled bad faith in the settlement process. And one of the things I want to do to make this as useful as possible for our project is to get input back from you. And at any point during the morning, I invite you, and I'm serious, to raise your hand and contribute and participate in our discussions because it's very helpful to us to get your input. That's one of the main reasons this is so valuable to us.

But, anyway, the first one deals with bad faith in the settlement process, and it's very straightforward. It says that an attorney may not employ the settlement process in bad faith. And this raises an issue, the
first issue where I want to get some feedback from you. Yesterday, Professor Crystal talked about the fact that one of the legitimate valuable purposes of guidelines like this would be to set a better practice standard. A higher level than what the rules themselves require and that way give guidance to practitioners.

Another way of doing it, or another approach, and it may be just as legitimate, is to take into consideration that there are rules, and to be aware of the fact that if we publish guidelines that go beyond the rules —some lawyers have told us this and given us this feedback—that if we go beyond the rules we may be creating problems, and the lawyers won't really know what to do because they've got the rules telling them you can't do this, and then they have something else over here for them to look at and the guidelines might then be used by judges to impose a higher standard on lawyers than the rules actually provide. And that can be problematic for lawyers in practice.

What I want to do is get feedback from you, specifically whether you think our guidelines should take a best practices approach with respect to lawyers and the issues that we're dealing with, and the best practices should be in the guidelines themselves; that's the first alternative. The second alternative is whether or not the guidelines should be just a resource or collection of the rules that may apply so that if a lawyer is in a settlement negotiation and an issue comes up and he or she wants guidance, they can have this collection there for them of what model rules might be applicable and use it more as a resource. And then in the committee notes, have a section that says best practices.

So let me see by a show of hands, first whether you think the guidelines themselves ought to be this best practices level. How many think that the guidelines themselves ought to be at that level? Could I have a show of hands. Okay. How many think that the guidelines themselves ought to restate the model rule or the applicable model rule, and then have best practices down in the notes. Okay. A large majority favor the first approach. Thank you.

Going on to the other guidelines that present issues that we're going to be talking about today, 4.3.2 through 4.3.3 deal with threats, either a threat of pressing criminal charges in the context of a settlement negotiation or agreeing not to press criminal charges, or threat of disciplinary action, or agreeing not to report somebody for disciplinary action. Model Rule 4.3.4 deals with settlements and how you deal with represented parties on the other side and what you can do, as a lawyer, if the other side has counsel but you think that a settlement offer is not being conveyed. What you can do, or if you can do anything. There are issues there in the class-action context as well. Before a class is certified whether you can make contact with putative class members who are not
yet class members because their class hasn't been certified. What you can do as an attorney when the other side is represented, what you can do, if anything, as far as masterminding some contact between your client and the other client to get around the other lawyer, if there are circumstances where that can be done.

Then dealing with unrepresented parties is 4.3.5 and there you have questions about recognizing that Model Rule 4.1 deals with truthfulness in statements to third parties and Model Rule 4.3 relates to how you deal with unrepresented parties and certain requirements are spelled out in the rules under 4.3. Can you say what the law is? If you're talking with or dealing with somebody who is unrepresented, can you say what you think the law is, or does that cross the line of giving advice to them which you're not supposed to do if you're not their lawyer. So there are issues that come up like that when you're dealing with unrepresented parties.

Then 4.3.6 is the next guideline, which is the improper acquisition or use of opposing party information that you may acquire. And this is like the inadvertent e-mail you might receive, or inadvertent fax, or other kinds of information from the other side that you may get and what your obligation is, what the best practice is as to how to deal with that eventuality or that circumstance.

The final one is 4.3.7, which is exploiting an opponent's mistake. But we're not going to spend much time on that today because that was covered yesterday in the first panel. That was 4.3.7.

So with that real rough idea of issues that we're dealing with and the rules that we're dealing with, I'm going to go to the first hypothetical. You represent the defendant in a product liability class-action. The plaintiff is seeking class action certification but has not yet received it. The first question is may you make settlement offers directly to those putative class members prior to class certification? I'll turn to my panel, then, and seek input.

**PROFESSOR MOLITERNO:** Well, let me start by saying I am thrown completely off stride by Pat starting us off by saying that the practitioner's view is the one that's different. I've been going to these panels for a long time, and I always thought it was the academic's view that was the different one. So now, all of a sudden I've got to take the center road somehow. I'm not sure I'm going to be able to do that, but I'll take a shot at it.

The first part of this question, of course, has to do with whether the potential class members before class certification are parties, are opposing individuals, at that stage. Once the class is certified, of course,
those individuals have to be treated as Model Rule 4.2 would have a lawyer treat them, as if they were represented at that point by the class lawyers. But there's a good split of authority on this question before the class is certified. My own take on it is that the better rule is probably that before class certification they're not represented. They would wind up in the group of the whole world of individuals out there that lawyers deal with, here a defendant's lawyer, as if they were unrepresented parties, so that's where I would come out on that first question.

MR. WALLER: Nancy, do you have a comment?

MS. DEGAN: Yes. The whole idea behind 4.3.4 is to protect the integrity of the lawyer/client relationship, and in my view, before the class is certified a putative class member probably has never even heard of the name of the lawyer who is trying to get a class certified. But I do think that in connection with attempting to settle a claim it would probably be wise to advise the putative class member that there is a class action, tell them who the lawyer is, let them go ahead and talk to the lawyer, if they want to talk to the lawyer, just to avoid any kind of appearance of any impropriety.

And there is another way that I have seen these matters handled when, for instance, in an action in Louisiana a number of gas royalty owners sued some producing oil companies and were threatening a class action and the oil company, the production company, looked at the set of circumstances and decided to go ahead and adjust the royalties and issue checks to everybody in this particular field. And so that is client to client. Now, the scenario here presupposes a products liability case and I guess, a recall of the product. A client to client communication in that instance might involve a letter by the manufacturer to the putative class members with a check, if that's appropriate. Now, you're not going to get a release for that, but at least you can potentially ward off that potential class action.

MR. WALLER: Do you know whether the recipients of the letter were actually advised that there was a class action pending? Do you know one way or the other?

MS. DEGAN: In the case that I was thinking about, there was not yet a class action but the lawyer for several royalty owners who had sued was threatening to get a class together. So, that issue didn't arise.

MR. WALLER: Okay. A question maybe for the panel, or maybe for the professor, do you think under the rules, particularly under rule 4.3,
that talks about dealing with unrepresented parties, and the thrust of the rule is you have to make absolutely clear to them that you don't represent them, that you represent the other party, and the other thrust of the rule, I guess, is you have to be very careful not to give advice to them and not to mislead. Given that background, do you think you would have to tell them under the rule, you'd have to tell them that there is a class action pending?

PROFESSOR MOLITERTNO: No, I don't think there's a rule that requires it. I don't think the lawyer who failed to advise the individual, the unrepresented individual, that there was a class action pending would be subject to discipline under 4.3. It might be good practice to do it, but nonetheless, I don't think that a lawyer would be required to do that under 4.3. The rule is more complicated if you go back to the model code.

The predecessor to 4.3 indicates fairly clearly that you have to refrain from giving any legal advice. That's in itself a pretty delicate sort of balance to try to strike. I mean what is "giving legal advice"? I mean to even tell the other party that there's a class action pending, to even tell the other party, as this hypothetical indicates, about the nature of class actions, how they work, who winds up with most of the money and all the rest of those kind of things. Those sorts of things sound to me, once you get much beyond just saying that there's a class forming, once you get much beyond that, you're dangerously close to starting to give legal advice to somebody.

And you can, of course, engage to some extent in settlement negotiations with an unrepresented opposing party. Otherwise there could never be a settlement with somebody who doesn't ever get a lawyer. So there must be some opportunity to engage in negotiations with individuals who are not represented. And it's awfully hard to even have a conversation if you were too strict with the rule that says no legal advice. How do you have a conversation in which you don't even express your view about the quality of your client's case? It's very difficult to do.

JUDGE SCRIVEN: Well, I have a different perspective on it because I think when we sit in these types of conferences with lawyers and it sounds like we're preaching to the choir pretty much based upon the number of hands raised about whether this really is a heightened level of practice sort of standard or a rules-based standard. But the reality is that this is not usually played out in a symposium like this. This is usually played out in a courtroom with a judge who is called upon to consider whether or not to enforce a settlement agreement that the parties have reached with unrepresented parties. And what's going to
happen there is your unrepresented party is going to say I didn't understand what I was doing. The lawyer was talking too fast. The lawyer didn't explain all the details to me. The lawyer told me this about what my risks and benefits were, and I didn't understand that. And, so, in the absence of any witness or any documentation of what occurred in those conversations, the judge is left in a precarious circumstance trying to decide what to do with this settlement the lawyer has obtained in this context.

And, so, I think it is permissible under the rules, generally, for you to make contact with unrepresented parties, but it has to be very carefully done. There has to be a writing, I think, memorializing what was said, what was told to the unrepresented party about his or her rights associated with this proposed settlement. And if you don't disclose the existence of a putative class, or a threat of a class, I think you do your client a disservice in recommending to someone that they engage in settlement with unrepresented parties, because I think ultimately it would, it could be rendered null by the court and you will have obtained nothing for your efforts. So I think you really need to consider not whether the rules permit or whether the heightened practice standards would say that's better practice, but you should consider to what end are you having these negotiations with unrepresented people.

**MR. WALLER:** The panel has indicated that at the putative stage you can make contact but you have to be careful. Let me also throw out at this point another varied hypothetical on this issue. And that is what if you're in a position to exert implied pressure, let's say, on the unrepresented party? For example, if you're the employer and the putative class is a class of your employees, under that context, would your answers differ if you have this position or ability to exert this implied pressure against your employee? Can you still settle with them without worrying about the fact that they're not represented or there's a class action pending?

**MS. DEGAN:** I think it gets back to disclosure again. As long as you tell those employees that there is a putative class and you're not giving legal advice, and you encourage them to make contact with the lawyer for the putative class, that's the way to go.

**PROFESSOR MOLITERNO:** I think disclosure is an important part of a lot of these questions that we'll come across, but for me what really happens when you add in another relationship, whether it happens to be employer/employee or whatever else it happens to be, an important thing happens: You have to take account of other areas of law. Those of us
who write and teach about ethics issues have done a lot better job of this in the last eight, ten, twelve years than we used to.

All of a sudden now if you've got another relationship that you're talking about between those two parties, you have to now broaden the field. And you have to not just think about Model Rule 4.3 and what happens, but now you've got labor acts and you've got employment law and you've got all sorts of other law governing relationships. If it's another kind of relationship, some sort of fiduciary relationship between the parties, there again, you've got other relationships that need to be taken into account and may trump seven times over whatever it is that Model Rule 4.3 would have to say about it, so you'd really have to do the analysis based on those other relationships, it seems to me, once you get out of that ordinary sort of lawyer/client/opposing party triangle.

**JUDGE SCRIVEN:** In fact, it's done all the time in RIF's when you lay-off people en masse, clients always negotiate settlements and releases, even, with their employees. And they say here's the deal, this is what you're going to get, and if you take it you must release us, and there's full disclosure given and clients, I mean employees take those offers often. Sometimes they go home and rethink it, and if their time for reconsideration hasn't lapsed they undo it; and, if the time has lapsed, they call a lawyer and you're in litigation with them. And, so, really, the key is being very careful to give full disclosure to people about what they're doing and then operating above board.

**MR. WALLER:** Let me just alert you, although it may not be necessary, except for maybe Reece Smith who is in the audience and me and Judge Scriven, who are all from the Middle District of Florida, but there is a local rule that we have that whenever a class-action is filed, you cannot contact a putative member of the class under our local rules without first getting court approval if the contact relates to or concerns the class-action. I don't think that local rule exists anywhere else in the country at this point because other places have had it and it was determined to be unconstitutional in most places, so they've gotten rid of it.

**PROFESSOR MOLITERNO:** That means that you don't really have it either.

**MR. WALLER:** Well, we still have it. And our courts still abide by it and we have to be concerned with it. But I don't think it applies anywhere else.
AUDIENCE: I think it applies in the Northern District of Georgia.

MR. WALLER: Okay. It's two places then. Going to the next question, and Professor Moliterno alluded to it earlier, the next question is may you emphasize to these putative class members that the cost of litigating their individual claims would be far greater than what they could hope to recover? Does that approach giving legal advice, or is that okay if you word it carefully? Panel?

MS. DEGAN: Well, I think you have to look at the substantive law first because I know in Louisiana in certain instances in class-actions the costs are awarded as part of the class fund, and it really doesn't count against the individual class members. So that's really an important issue, to look at your class-action laws, because if it's not going to impact the class members, it's not truthful to say that the costs, I mean it may be literally truthful that the costs will exceed the recovery, but it's not going to impact the individual class members, and that would be very misleading.

Additionally, as I view these guidelines, the lawyer is allowed to give his view as to the law and the facts, but again, I think encouraging the unrepresented party to contact the class counsel is the key, full disclosure is the key, and being truthful is very important.

MR. WALLER: So that would implicate Rule 4.1, which deals with not misleading or misrepresenting to a third party material facts or law that applies to the case. And, then, also we have 4.3, which Professor Moliterno alluded to earlier.

PROFESSOR MOLITERNO: This is an area where policing untruthful statements in negotiations can be extremely difficult. It's an area where the law of professional ethics might have taken a kind of prophylactic approach and said, no, you can't negotiate, you can have a conversation only about getting a lawyer and you have to stop. You can't do anything else. You can't talk further because it's tricky and difficult to police this sort of relationship. Kind of like solicitation of clients as opposed to advertising and things like that.

But the law didn't do that, and lawyers are allowed to engage in a certain measure of negotiation with unrepresented parties. And once you say you are allowed to engage in some negotiation, you aren't allowed to give legal advice and this hypothetical gets perilously close to legal advice, but how does one negotiate without commenting on one's best argument, which is, "This is going to cost you more if you go the other way. You're better off to settle under these circumstances." So I
think this puts the lawyer in a very very awkward and difficult spot with this sounding very much like legal advice, no question about it, but so long as it is truthful, so long as it is not a misrepresentation of the reality, again something that I think is extremely difficult to police in this particular setting, I think that's probably permissible under the rules.

MR. WALLER: Any comments from the audience? Yes, sir.

AUDIENCE: That particular statement, the last question in the hypo seems fairly easily, fairly easy that it could be misleading because it's based on a premise that seems highly unlikely. It's assuming that the plaintiff will have to litigate the claim individually rather than as a member of a class. And as Nancy Degan said, even if that's not true, even if they had to litigate it individually, it assumes that the plaintiff would have to bear, would ultimately have to bear the costs of the individual litigation which may or may not be true depending on the local rules for recovery of costs and arrangements with counsel.

MR. WALLER: Well, if the lawyer making the statement assumes in his or her mind facts that would make it true, do you think then —

JUDGE SCRIVEN: I'd like to hear that on the witness stand.

PROFESSOR MOLITERNO: And I don't mean that it only has to be a figment of the lawyer's imagination that it's a truthful statement. I was operating under the assumption that it could be a truthful statement. If it is, then it's allowed to be made, it seems to me. If it's misleading, if it is a misrepresentation, then it can't be. It's a 4.1 violation in that case.

JUDGE SCRIVEN: I think the reality is that most lawyers who engage in these discussions will say, “In lots of class-actions it turns out that the only people who get the money are the lawyers, and the clients walk away with coupons.” And that is not necessarily a misleading statement as a matter of fact. And if, I think, the lawyer engages in that kind of discussion with the non-client, and makes full disclosure and says, “Go and get a lawyer to evaluate what I'm telling you; you don't have to take this today; you can take this and let somebody look at it; think about it, call a friend who's a lawyer; call a lawyer; whatever you want to do,” I think the lawyer goes a long way toward discharging his or her obligations under the rules, under the heightened practice
standards, and under their obligations to the court. And, so, I think that's just what you have to do.

**PROFESSOR MOLITERNIO:** And since I've gotten only coupons myself so far in the many things that I've gotten in the mail, I assume that this could be a truthful statement under some circumstances.

**AUDIENCE:** It certainly seems a lot less misleading to me than the one in the hypothetical.

**JUDGE SCRIVEN:** Not costs but fees, attorney's fees.

**MR. WALLER:** Since we all seem to be going down the same path and agreeing, it's probably appropriate now for me to turn to Larry Fox in the audience.

**MR. FOX:** No. I just want to raise the question whether you don't worry that everything you say, no matter how truthful it is, will be deemed to have been advice, and, so, you're in a total trap. The more you say, the more likely it is somebody else is going to come along later to challenge and is going to say, well, that was advice.

**MS. DEGAN:** That's why you memorialize everything you said in a letter.

**AUDIENCE:** This is not advice, but I told you the following things.

**MS. DEGAN:** This is to confirm that. That's how I handle that.

**PROFESSOR MOLITERNIO:** Well, that's exactly right. This rule puts the lawyer who represents somebody and is dealing with an unrepresented opposing party in a very awkward, difficult situation. You're not supposed to give legal advice and at the same time you are permitted to negotiate. And I guess you have to be permitted to negotiate at some stage. Otherwise, you know, you would have a rule that said we have to leave the private parties to their own devices, and whether you're represented by counsel or not, counsel can't be involved in a negotiation. And as long as that's not going to be the rule, you have to get to say something, unless you're just going to have a poker face for the entire negotiation and just sit on the other side of the table and see what transpires. And once you start to talk, it's not very long before you make statements that sound like law stuff.
MR. WALLER: All right. Any other comments? Let's go to the next hypothetical. Following along in the same fact scenario, suppose the court now certifies the class. During discovery you receive an unsolicited letter from a former paralegal for the plaintiff's law firm. The letter encloses a standard set of instructions for the plaintiff's witnesses. The instructions arguably advise the witnesses to lie under oath about their exposure to defendant's product. The first question: May you use the instructions in settlement negotiations, these instructions that you got in the mail from this former paralegal?

JUDGE SCRIVEN: I'm going to step out on this and say, yes, you may use them in settlement negotiations because the ABA requires you to look at them, see if you have a plausible basis to argue that there is no privilege attached to them, and that argument, even if you seal them and send them back or keep a copy and seal it, is something that will be litigated in the case. And as a part of settlement negotiations you will tell the other side this is an issue that's going to be litigated. And every one of your witnesses who received this will be impeached, potentially, if the court allows me to have the use of this. And you don't know how it's going to come out. And if it comes out that it is proper impeachment, where are your witnesses going to stand and how is that going to affect your settlement. And, so, I think you may have the opportunity to use this document as a settlement tool to try to encourage the parties to reach resolution.

MS. DEGAN: I think there's another issue here that's potentially problematic, and that is you know the lawyer on the other side didn't want you to have that document, and the minute you look at the document with the lawyer's letterhead and the addressee as someone you recognize to be a party to the case, bells should be going off that you've gotten a letter that was intended to be privileged.

JUDGE SCRIVEN: These are witnesses.

PROFESSOR MOLITTERNO: These are witnesses so —

MR. WALLER: Does it make a difference whether it's a party or a witness?

MS. DEGAN: Oh, I think it makes a big difference because if it's to a party, you should have stopped right there and not read it and you'd never know that this was a potential problem.
PROFESSOR MOLITERNO: Well, okay. And, yes, there is a difference if it's to a client as opposed to a witness. At the same time, "arguably advised the party to lie under oath," if we want to put client in place of witness here for a moment, I'm not so sure that's privileged. To me it's pretty close to the lawyer with the murder client putting in writing the instructions to make sure the gun gets thrown into the deep part of the river. And that's not privileged. When you plan a fraud with your client, it's not privileged.

MS. DEGAN: But if you were following the rules, you'd never read the part that lets you know it's not privileged. You'd have stopped right there.

PROFESSOR MOLITERNO: Exactly. And for that reason, and a couple others in this fact pattern, I want to ask that everybody in this room agree with me now. We had a conversation yesterday about confidentiality of settlement agreements and things like that, please don't tell my students that I think this is a great test hypothetical. It's wonderful. And one of the reasons it's wonderful is that, yes, if you get the document and it bears the marks of a privileged document, what you're supposed to do is not look at it.

Send it back or communicate with the other side, what do you want me to do with this? I've received this inadvertently and so forth. Well, in this particular case, if that's what you do, you unwittingly, and you're not implicated in it by any means of course, allow this opposing party to perpetrate a huge fraud on the court. You basically sent the letter back to them without reading it even though it wouldn't have been privileged. This letter that documents their plan to defraud the court would not have been privileged.

And the client would get up there, lie, not be impeached by material that would have been very effective impeachment, and would have produced some justice. And then if that's not enough to make this a good hypothetical and a hard question to answer, how did you get this document again? You got it from a disgruntled former employee of the — Oh, my gosh, how about receiving stolen property?

That sounds far-fetched, maybe, but I've actually had somebody talk with the U.S. Attorney after receiving a pile of materials from a secretary or somebody from the other side who was trying to help out their side of the case. They were reviewing all this stuff, and the U.S. Attorney said, "Well, I've got to look at this and consider whether if you keep this stuff, if you use it and keep it, whether you have received stolen property. It's clearly stolen property. And you received it and you're going to make use of it." So, again, other areas of law that affect
lawyer conduct can sometimes come up and turn out to be as important, or more important, as the rules of ethics.

**MR. WALLER:** Let me ask, do you think it makes any difference at all, assume that the settlement negotiations, for whatever reason, are confidential. Does it make any difference that in your using this in settlement negotiations, which are going to be confidential, as opposed to using it in the litigation to impeach a witness or to advance your cause in the context of the litigation? Does that matter at all?

**JUDGE SCRIVEN:** Well, I think it doesn't matter at all because settlement is part of advancing your position in the case. And, so, if you can't use it — Well, there are a lot of what ifs in this case, and the primary what if is what if the court says this is improper material for any use, then obviously you can't use it at trial. But if at the settlement stage it were still a disputed issue, that's something that's going to be used in settlement negotiations. We don't know how we're going to resolve this. If the court resolves it my way, this is where the case is going to stand. And if the court resolves it your way, this is where the case is going to stand. And that is, that's classic settlement posture.

And what are we going to do about this? Can we get out of this case before we know the answer insofar as the case strategy and strength goes. And in that context, I think it's permissible, assuming this stuff is not blatantly privileged, and it doesn't look like it is if these are statements that the lawyers sent out to witnesses who are not his client. I don't think it's stolen. I think it belongs in the public domain.

**AUDIENCE:** But how do you know, this is a former paralegal with the plaintiff's law firm. How do you know that this is a true document? Don't you have a duty to find out if this document is from a former paralegal, why is it a former paralegal?

**JUDGE SCRIVEN:** Well, I think you do have an obligation. That's part of the settlement. You don't know anything, enough about this document to know whether it ultimately will have the benefit you would like for it to have. The lawyer doesn't know how the court is going to resolve that issue, and that is the unknown factor in the litigation.

Now, there is a difference between professionalism and ethics in this context. I have had the unfortunate experience of having my secretary switch letters, one to the client and one to the opposing party, and sent the client's letter to the opposing party and the other one to the client. And, of course, the opposing party called me the next morning and said, "Mary, I don't think you meant to send me this. I will send it back."
And that's the height of practice that we would all like to get to. And in that context it was clearly privileged. But in this context, it's not.

And I think the ABA 94-382 Opinion suggests that you may have an obligation as an advocate to review it and then consider whether some motion should be made about its disclosure. And if those motions are pending, or going to be pending, it's a settlement issue.

PROFESSOR MOLITERNO: Okay, now, I would say that under those circumstances the right thing to do is to send the letter back. But I don't think it's because that particular lawyer was going beyond the rules or the height of professionalism or anything like that. The law requires it. That's what the law says. The law says you send it back under those circumstances, so you send it back. That's what you're supposed to do. You follow the law and you go on and send it back.

You know, we've heard at different times about higher standards, higher than the minimum, things of that nature, and I'm dubious a lot of times about that notion. There are times when you can think in terms of a higher standard or more restrictive rules, things of that nature, but most of the ethics rules that we have to work with are a balance. They're a balance between two duties and often among three or four duties, and the rule has drawn a line where your duty to your client stops in favor of some other duty, and here's the line. And once you decide that you've picked up the line and you moved it over here, you didn't raise the standards, you changed them. It's not necessarily higher. You just decided that the responsibility to your client is going to yield sooner than it would otherwise yield. And, so, to me, higher standards, I want to wait and see. Because when you talk about higher standards, often what we really mean is we have just changed the balance between two responsibilities that we have under the governing rules.

MR. WALLER: Okay. Let's go to the next question. May you use the threat of criminal prosecution for obstruction of justice in this case in the context of your settlement negotiations? Panel?

MS. DEGAN: Well, I think that the guidelines are pretty clear. The appropriate conduct here is to report the lawyer to the bar association, and you can't use that in connection with settlement negotiations.

MR. WALLER: Okay. That's as far as reporting. But what about using the threat of criminal prosecution, can you do that in your settlement negotiations?
MS. DEGAN: I think that the guidelines indicate that you can agree not to pursue criminal prosecution in connection with settlement negotiations.

JUDGE SCRIVEN: I think it speaks to the client and not to the lawyer and what you might pursue against a lawyer. I think, first of all, the question about whether this must be reported has to go to how arguably the lawyer tried to convince people to lie. It says, arguably plainly here and it’s not entirely clear from these facts that this lawyer was telling people to lie. And, so, you’re going to have to grapple with that before you go off and call the bar association. But assuming you know a lawyer is telling people to lie, then you may have that obligation. But I think when you start negotiating with lawyers for benefits personal to themselves in a context of settlement negotiations it’s time for the lawyer to call another lawyer in to represent the client’s interests, because the lawyer may take a lower number to avoid a bar grievance than he or she might take in the absence of that threat. And then the client’s interests may be impaired improperly in those settlement negotiations when that enters the picture.

PROFESSOR MOLITERNO: This is a close one for me, and I’m not sure because I frankly don’t know the law of extortion well enough to answer the kind of criminal side question. And often you have an act that occurs, an occasion that occurs, and it gives rise to both civil and criminal liability and they get lumped together, and it’s clear that when they are closely related in that way, the guidelines indicate, the law indicates that you certainly can negotiate an agreement not to report the criminal action, or pursue the criminal action in one way or another in exchange for the civil side settlement.

This one is a little bit different because it certainly is conduct within the litigation that we’re talking about. It is an instruction to these witnesses, and I don’t know about the “arguably advised to lie,” yes, you have to get over that hurdle and everything before you even begin to think about this reporting or criminal violations or anything of that nature. But assuming you’ve gotten over that hurdle, you’ve decided that this was a criminal act, it is conduct within the litigation and not really conduct that is the same as the conduct that gave rise to the civil claim in the first place. And I’m less sure about whether you can permissibly trade-off the reporting of the criminal violation, or the bar complaint for that matter, under these kind of circumstances without running afoul of the law.
JUDGE SCRIVEN: You must tread lightly in Florida because there is an extortion statute that doesn’t allow you to trade criminal prosecution for financial gain. The extent to which that law would apply, we don’t know because we don’t know enough of the facts. But I think you have to look carefully at your law, and you have to look at what the supreme court in your state has said about selling your ethics obligations for benefits because some courts would say you can’t do that.

MR. WALLER: Let me refer you at this point, you might want to look at 4.3.2.1 in your materials. There’s a typo in it. The way it reads now it says a lawyer may not threaten, just ignore the “to report.” A lawyer may not threaten an opposing party with criminal prosecution in connection with settlement negotiations, but then it adds the exception, except in limited circumstances where the criminal and civil matters are related, the criminal charge is warranted by the law and the facts, the lawyer does not try to influence the criminal process, and such threat is not otherwise prohibited by applicable substantive law, like the extortion statute in Florida, for example.

Frankly, when we were working on this, as the project was working on this, we were surprised when we found there’s an ABA opinion which is the exception here. There’s an ABA opinion which says you can do this under these limited circumstances. And we were actually even surprised that there was an opinion that authorized it. Now, Larry probably wrote it.

MR. FOX: I did. We wrote the opinion because the Model Code had a prohibition on this, and when they passed the Model Rules, it was eliminated. So, we took from that maybe the incorrect learning that it was no longer prohibited. And, so, therefore, we wrote the opinion to kind of carefully circumscribe the appropriateness. And I think Jim correctly picks out the problem, which is this, does the criminal claim sit on top of the civil claim. Because if it does it’s perfectly appropriate, apparently, to do it. And if it doesn’t because it involves the lawyer’s conduct, not the client’s conduct, then not. And I mean I think that’s the subtlety here that’s just delicious in this hypo. I mean another perfect exam question. I mean these are all perfect exam questions.

PROFESSOR MOLITERNO: And the word in the standard right now “related,” it seems to me, is that if there is a problematic word there it’s that word because these two are related. They are related. It happened in the context of the litigation. So if you only looked at that word and said what’s the plain English meaning of that word, you’d say these are
related. But they aren't, I don't think, related in the way that Larry Fox talked about. They don't rise out of the same conduct.

**MR. WALLER:** For purposes of the standard, or the guidelines, do you think we ought to use another word there?

**PROFESSOR MOLITERNO:** I think it's a whole bunch more words, but I'm not sure what they are off the top of my head.

**MR. WALLER:** Okay. We'll talk to you later.

**PROFESSOR MOLITERNO:** Okay.

**MR. WALLER:** In the back, please.

**AUDIENCE:** I have a question. If your hypothetical occurred while everyone was together at a meeting and you had the two lawyers face-to-face, you have the parties sitting there, and throw in, you know, when you get everybody together, you know how hard it is to make it work, to get everybody to get together on their schedule, and sometimes parties have gone to California or to another state, and you've got long distances and a lot of expense, and you're there and something comes up that you find unethical, and whether it's discovery or settlement negotiations or depositions, do you have to stop your meeting or can you just say we're going to come back to this, I've found something wrong here and do you continue the meeting? You've got all these people, you've got court reporters, it's a big thing. What do you do?

**MR. WALLER:** That's a practical question so I'll give it to our practitioner.

**MS. DEGAN:** Well, I think that it would be impractical to stop the meeting, and the guidelines don't say anything about timing. What it says is if opposing counsel's misconduct raises a substantial question about that lawyer's honesty, trustworthiness, et cetera, a lawyer cannot agree to forebear to report such misconduct to appropriate disciplinary authorities and it's improper to use the threat of reporting as a bargaining chip. But it doesn't say when. Now, you know, in that context, if you don't stop it's going to be a lot harder —

**AUDIENCE:** To get everybody back together.
MS. DEGAN: Well, not only to get everybody back together but it’s going to be a lot harder to make sure that it is clear that that is not on the table, that you’re not using the threat of reporting as a bargaining chip. And that might especially create a problem vis-a-vis the lawyer with the obligation now to report and his client, because the client may not understand that that has to be off the table. So it makes it a lot more difficult, but since the guidelines themselves say nothing about timing, I don’t think that there’s an obligation to just stop everything. That would be my construction on that.

JUDGE SCRIVEN: I think that’s a good time to have an available magistrate judge to contact and explain what the problem is, and at least attempt to establish a record that there is this looming problem out there. And even if she says, well, go ahead with your meeting, we’ll deal with that on a motion, at least you have established a record that that is an issue and sort of protected the integrity of the process. And you could try that depending on how available your judges are in your jurisdiction.

MR. WALLER: And if your judges are not available, you can call Judge Scriven.

AUDIENCE: It seems to me that 4.3.2.2 says you can agree to refrain, that’s been very well discussed by the panel, doesn’t do lawyers any favors. I think it’s a trap. Because almost in every case if a lawyer does that it’s going to be either misprision of a felony or obstruction of justice. And I don’t think a lot of lawyers are going to think about that, particularly if the ABA comes out with a rule that says if you can — you can agree to refrain from pressing criminal charges if you’re paid enough, which is kind of what it’s saying. I think some lawyers are going to get in trouble.

My other comment about that is I guess I’m too sensitive, but it does not make me proud to be a lawyer for the ABA to say that you can agree to refrain from reporting a criminal case against a party if it’s part of your settlement, which means you’re paid enough, and then say in 4.3.2.3, the next paragraph, however, you cannot agree to forebear from reporting another crooked lawyer. So under no circumstances can you ever, as a lawyer, be paid enough to forebear reporting another crooked lawyer, but you can be paid enough to forebear reporting a citizen to the proper prosecution so that the public can get its just due. Again, maybe that’s just me, but that doesn’t make me feel good.
MR. WALLER: Okay, those are the kind of comments that we want to hear. We want input, and we appreciate that. Any other comments? Yes, sir.

AUDIENCE: Before you leave this hypo, for the benefit of the students, for litigators this whole area of instructing witnesses on how to testify is one that's not pretty. And very few of us would really be proud of having our opposing counsel sit in on the wood shedding session with our clients. And what you have here is somebody being stupid enough to put the instructions in writing. But the whole area is quite ambiguous. It's a different ethics issue, not an ethics in negotiation issue, but I don't want the students here to think that this is not a very difficult one. It's not, when it says, arguably, that's a big deal because, in fact, what you would think would be particularly legitimate advice if your opponent was sitting there would take you to the D.A. in a minute.

JUDGE SCRIVEN: But if you can't record your statements that you tell your client witnesses, or your witnesses, and have somebody else read it, the court read it, for example, then they are things you ought not to be saying to your witnesses about how to form their testimony. For example, "You know, the statute of limitations runs on March the 5th. Now, when is it that you first knew or should have known about it?" You know, you've got to be careful about how you direct your clients and your witnesses to testify because they will explode on the witness stand, and they'll say, "Well, my lawyer told me to say that." And then you're left with that impression that you have informed the witnesses improperly. I taught over at Nottingham and the barristers and solicitors are just appalled that we even have these conversations with witnesses prior to their giving testimony because you can suborn perjury if you aren't careful about what you say to a witness.

MR. WALLER: Judge Higginbotham?

JUDGE HIGGINBOTHAM: Yes. I was taken by Professor Steele's comments. It seems to me that you extend permission for use and then qualify it with a general qualification not otherwise provided by law. When that exception is part of the rule you really are I think leading lawyers into difficulty. This is a treacherous area. And, Larry, while this may sound stupid, I thought that hypothetical was drawn from a case —

MR. FOX: It was a Dallas, Texas case.
JUDGE HIGGINBOTHAM: — involving a very able law firm that had such a letter floating out here to their great embarrassment.

MR. FOX: They're not doing it anymore.

JUDGE HIGGINBOTHAM: It is a real life situation. I do think you're dealing with reality.

MR. WALLER: Any other comments? Let's go to the next hypothetical. So you choose not to use the plaintiff's 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 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?

MS. DEGAN: I'll start off with that one, Ed. Clearly, Guideline 4.3.1 bars a lawyer from negotiating in bad faith. And a lawyer definitely should not use the settlement process to delay proceedings. But as a practical matter, lots of clients say I will never settle this case. Some clients say that to negotiate is a sign of weakness, so don't even talk about it. Then you get them into a settlement conference and facts come out, or a mediation, and they see what the other side is going to do to them at trial, and bingo, the case is settled at the mediation or conference.

So I think this is a very real life situation we're dealing with here. And I think it's incumbent on the lawyer to counsel that client about that possibility. It is important to keep an open mind and see if you can counsel your client into considering engaging in negotiations. But, even if the client maintains that he will never ever settle and negotiating is a sign of weakness, I think that it would not necessarily be a prohibited tactic for a lawyer to have his client engage in negotiations just because so often people who say that wind up settling anyway.

JUDGE SCRIVEN: I would like to ask a question about the irritated magistrate judge. In the Middle District mediation is mandatory, or some form of alternate dispute resolution is mandatory, and it's usually mediation. And the district judges order it, and I'm one of the magistrate judges who does a lot of mediation. And I have clients come in
after they have had two unsuccessful mediations with outside mediators and the district judge ordered them to come and ordered them to bring someone with settlement authority to the mediation, someone higher up with settlement authority.

So they bring down the president of this major corporation who is sitting there, and he is not happy that he is there, and he says to me, “I brought this money. I’m prepared to pay it. I don’t think I should have to pay it, but I think if I don’t bring it you’re going to tell the district judge that I am not negotiating in good faith. And I don’t care what you tell me about confidentiality, I don’t believe it. So here’s the money. If you’ll take it and settle it, take it and settle it and be done with it. But I don’t want to do it but you’re making me do it.” What am I supposed to do with that?

I mean do you think your client should be forced to come and settle cases when they’ve said they don’t want to settle the cases? Do you think the court should be permitted to order them to come to settle their case?

MS. DEGAN: Well, I do because sometimes, like I said, the client who says, “I will never settle a case,” settles the case because they learn things during negotiation. Although you try to keep the client advised throughout the litigation, when he hears from the opposing counsel or the magistrate judge that an opposing view is a good legal argument that needs to be considered, a lot can be accomplished. But what’s curious about your particular circumstance is that this client, this party, obviously felt some sort of duress. And I haven’t experienced that, and I think that’s kind of curious.

PROFESSOR MOLITERNIO: I agree with all of that, that the lawyer in this situation needs to do a lot of counseling with his or her client that there are perfectly good reasons to sit down and have conversations with the opposing side even if the client doesn’t think that they’re going to be able to settle, even if the client is opposed to trying to settle. At the same time, I don’t think that we can wind up in the business of requiring parties to settle, or certainly not to settle if we’re having courts requiring parties to settle, or to settle on particular terms.

I mean that’s what settlement is. It’s an alternative to going through the litigation process. And if the parties wind up choosing to go through the litigation process, they get to do that it seems to me. Judges often get active, of course, in settlement negotiations and try to help and push and give guidance and so forth at times, and I think that’s all fine. Most of that turns out to affect the parties because they see the predictive value. They know who the judge is. They understand some of the
feelings that the judge might have in the process. And they take the predictive value of those meetings and turn it into data that they will process and decide to settle, because as you said they will wind up usually settling and all the rest.

This particular hypothetical, poses three different, what seem to be ulterior, motives for settling even though you're not having negotiations, even though your client says, "I won't settle." One of them is to keep the judge from getting irritated at you. I think that's perfectly appropriate to do things to try and keep the judge from being irritated.

**MS. DEGAN:** It's in your client's best interest not to have the judge irritated.

**PROFESSOR MOLITERNO:** Sure. The second one is you might learn things about how they're going to prove damages. And, you know, my sense of negotiation conversations is that some portion is actually settling the matter and some portion is an informal discovery device. That's what they're there for. And, so, sitting down with a motive to try to learn things about the other side's strategies, cases, that they're willing to disclose to you in negotiations seems to me perfectly appropriate. It's only the third one here, where the only reason you're sitting down to negotiate is to cause delay, and that's really the only reason, that I think you run afoul of the guidelines.

**JUDGE SCRIVEN:** If you come to mediation with $1 to settle and you know ahead of time that's never going to settle the case, and you don't intend to put another penny on the table at that mediation, is that a proper use of settlement for the purpose of attaining other additional information? You don't have any intention to settle. You bring $1 and no one with any higher authority than that, you sit through the entire mediation, hear all of the scoop, and then say, here's my dollar, we're walking, and that's all you ever intended to do, is that a proper use of settlement?

**PROFESSOR MOLITERNO:** You know, you can be required to negotiate in good faith, or at least to be —

**MS. DEGAN:** Yeah, I don't think so.

**PROFESSOR MOLITERNO:** — in a mediation in good faith, and that may not be good faith. But, you know, at the same time you can't really require them to settle at a particular amount or level.
MR. WALLER: From an ethical standpoint it probably would not be precluded by Rule 4.4 because that's not one of the purposes that's proscribed by the rule, if you want to get information.

AUDIENCE: Two things I think that maybe I'm misunderstanding but that I don't think we've talked about yet in this context is the issue of whether or not you're letting your client have the absolute right to control the conduct of the litigation and whether you at some point may be required to, if you can't counsel your client appropriately and get him to agree to sit down in this mediation, whether the attorney might even be required to withdraw if he continues to flat say, "I'm not going to settle." Don't go in the conference at all. But then I think we've got some of the other issues that we may be getting to at another time that may require him to say I'm going to need to withdraw from the case because my client and I differ on how I feel it should be conducted under the rules.

And the other thing we get into is a whole separate issue of judicial ethics. I've heard judges tell two lawyers go out in the hall and settle this case. To me, I think that's impermissible judicial conduct. But that's not being talked about here necessarily today. But when we have courts bringing to bear something that shouldn't maybe be happening, as you said litigants do have an absolute right, if you will, to go to court on the issue if they can't get together on it. Then I think maybe the judiciary is starting to overstep boundaries perhaps just to clear its own caseload. "I don't want to hear this case. Go out and settle it." That obviously is a different issue from what we're talking about. But I have seen it happen too many times to not be aware.

MR. WALLER: Let me make a couple of comments and then maybe the panel has a response as well. The Model Rules seem to be fairly clear that the client determines the objective of the litigation. That's the client's authority, the client's role, and the client has the ultimate authority on whether or not to settle. The lawyer can determine the means of reaching that objective within the bounds of the rules of conduct.

MR. FOX: In consultation with the client.

MR. WALLER: That's correct. Does anybody from the panel have a comment? Let me take off a little bit on your second point about the role of the judge. What if in this context the client has said, "No settlement. I don't want to settle. It's a sign of weakness. I don't want to negotiate. I don't want to settle this case." What if you have this court ordered
mediation and you get there and the judge is the mediator and the lawyer says to the judge privately, "Well, Your Honor, this may be one where it would be helpful for you to talk to my client and maybe explain the advantages of settlement and how this case could go wrong. Your Honor, if you don't mind, if you could maybe talk to my client." Do you think that would be appropriate for the lawyer to do that without telling his or her client ahead of time that he or she in effect is eliciting the assistance of the judge?

**MS. DEGAN:** I think that's a big problem because if you have that conversation with the judge, basically you're telling the judge I'm having a client relations problem here. I, as the lawyer, really think you need to strong arm this client a little bit. And that's a real problem.

I think there's a more delicate way you can handle it. In the client's presence, say, "Judge, why don't we discuss blah-blah." But as far as talking to the judge without your client knowing—basically suggesting that you're having a client relations problem—I think causes some real difficulties insofar as the client/attorney relationship. I would not do it.

**JUDGE SCRIVEN:** I think that's true. And I think it also can affect the judge's view of the client's position, because you're telling the judge you don't necessarily agree with the client's position that you're offering as his or her advocate, and I think that's a problem. I think the better way to do it is to just do that. And I do that in all of my mediation. I just go over this litany of reasons people ought to settle cases, and then the client is aware of that. And then the lawyer has an obligation to go back and wood shed the client in private session about whether that thing that the judge said makes sense in their case.

**MR. WALLER:** Does it matter whether the judge whose help you're eliciting is the judge in the case or is a settlement judge?

**JUDGE SCRIVEN:** It's more important if it's the judge who is going to hear, ultimately hear the case not to do that, and probably a little less important if it's not the trial judge. You've got to remember if you're a lawyer and you're appearing before judges all the time then that judge may later be a judge in one of your cases and how you treat your clients and your level of advocacy with respect to your clients can carry over to your other cases. I think it's important to be your client's lawyer in every context, settlement or as an advocate.

**PROFESSOR MOLITERNO:** I agree with all that. I think what Nancy is really talking about is the subject of another symposium, which
is that, we're talking about the ethics of negotiation here, and we're talking, of course, about the negotiation that occurs between parties and so forth to some dispute or some matter. And now we're almost talking about the negotiation that occurs between a lawyer and a client in a sense. And Nancy is talking about it in a certain sense where that negotiation has failed, that that has not worked out well, and now that failure is being shown to the world.

JUDGE SCRIVEN: And withdrawal is not always an opportunity, an option. The court may not allow the lawyer to withdraw just because they don't agree on the amount the case ought to settle at, depending on where the case is in the course of litigation.

MS. DEGAN: And the flip side of your additional hypothetical is the judge who basically asks the lawyer, "What is the problem here?" Now that puts you in a very difficult position. It's like, "I don't agree with your legal theory. I think the facts are against you. Now why isn't this case settled?" So then you really have to do some tap dancing and advocacy on behalf of your client because otherwise it's the same scenario as talking to the judge without your client's knowledge.

MR. WALLER: Let me go just very quickly to the next hypothetical because we're short on time.

AUDIENCE: If the court is going to mandate negotiation, but you had, like the first two, really good reasons to want to go into negotiations, and I'm sorry if this question is a little bit uninformed, but if your client is not persuaded by the first two very good reasons, how permissible is it to bring up the third not so good reason in order to sway your client to agree to negotiations, which would be to protract. I mean just to say, "Listen, the judge is getting irritated at us. I really want to get this information out. It's going to be in your best interests." If the client says, "No," can you say, and this isn't a good reason for it but it's going to delay the proceedings a little bit, if you know it's going to sway your client. Is that completely impermissible?

MS. DEGAN: Well, I think if the only reason that you agree to mediate is to delay, that is not permissible. But in a practical sense, I can foresee a conversation between a lawyer and his client, look, I really think we ought to do this because we're going to learn something about the other party's case. You may see things that make you feel differently about this. And, gee, it just so happens that if we do this, the trial
will have to be continued another two months. I mean I can see that. But that's the way you get around all that as a practical matter.

PROFESSOR MOLITerno: A couple things. The model rule on this point, 4.4, says that you're prohibited from engaging in means and tactics that have no substantial purpose other than to delay, et cetera, and so forth, and here you have substantial purposes other than that one. I wouldn't feel very happy about having that conversation, having that be the reason that I was able to finally persuade my client to do something the client ought to be willing to do, ought to want to do, ought to be the right thing to do under the circumstances. It does turn out, though, and this may be an example of it, that lawyers do wind up having to give their clients sometimes pragmatic reasons to do the right thing. And sometimes they wind up making moral arguments to their clients to get them to do the pragmatic thing. And it's kind of a strange circumstance where you wind up sometimes using arguments that are not really very appealing to you when you're talking with your client to try to get them to do the thing that they ought to want to do and is in their interest to do.

JUDGE SCRIVEN: But filing a motion for continuance to get a delay is not improper under the rules, and if essentially you need more time to prepare your case, then telling your client you have a proper reason for needing more time, and mediation will assist us in all of these things and give us the additional two weeks I need to get these depositions analyzed, then I think that's appropriate. But not just, "Oh, we've got to go to trial and all my documents are sitting here. Let's just delay this thing for a couple more months, get off the trial docket and move to the next one."

MS. DEGAN: Make the other lawyer spend more money.

MR. WALLER: Let's put up that last hypothetical just for a second, and I'm not going to read it. I just want to throw out a question because I know we're running out of time. The last one deals with the issue of the opposing party has counsel, you think a settlement offer is not being delivered to the opposing party. What can you do, if anything, as the lawyer, to see that your settlement offer is being conveyed to the opposing party? Anybody have a quick response to that?

JUDGE SCRIVEN: Set a status hearing, ask the judge for a mediation, and then at the mediation convey the offer in front of them.
But I don't propose that you ever write a letter to an opposing client who is represented to give them a settlement offer.

**MS. DEGAN:** And the clients can talk, too, between themselves.

**MR. WALLER:** But can you mastermind, can you suggest to your client, well, call the other guy because I don't think the settlement offer is being conveyed? Can you tell your client to contact the other party under that circumstance?

**JUDGE SCRIVEN:** If you sit down and think of a way to circumvent the rules, you've got a problem. And, so, that's what you're trying to do. You're trying to go around the rules. And you should rethink that strategy and come up with another more direct way to deal with your problem.

**MR. WALLER:** This is a real problem that comes up in real practice. I at least wanted us to address it. I want to thank the panel very much.
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A SYMPOSIUM:
ETHICAL ISSUES IN
SETTLEMENT NEGOTIATIONS

Session Four:
Special Issues in Assisted Settlement

Moderator: Associate Dean James Elliott
Emory University Law School

Panel: The Honorable S. Philip Brown
Superior Court Judge, Macon, Ga.

Ronald Jay Cohen, Esq.
Phoenix, Arizona

Professor Ellen Yaroshefsky
Cardozo Law School

on
March 10, 2001

at the
Walter F. George School of Law
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