

SCHEDULE "A"



SECTION OF LITIGATION
American Bar Association

**ETHICAL GUIDELINES FOR
SETTLEMENT NEGOTIATIONS**

August 2002

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ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS

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ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION SPECIAL PROJECT¹

Barry S. Alberts
Hon. Nancy Friedman Atlas
Prof. W. Burlette Carter
Prof. Bruce A. Green
Nancy McCreedy Higgins

John S. Kiernan
Louise A. LaMothe
Carol A. Mager
Gary C. Robb
Nicholas J. Wittner

Edward M. Waller, Jr., Chair

Prof. Amy Mashburn
University of Florida Law School
Reporter

Lawrence M. Watson, Jr.
Liaison, American Bar Association
Dispute Resolution Section

¹ This project was initiated in the Fall of 1999 by Ronald Jay Cohen, then Chair-Elect of the Litigation Section.

ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS

Section 1 Preface

Settlement negotiations are an essential part of litigation. In light of the courts' encouragement of alternative dispute resolution and in light of the ever increasing cost of litigation, the majority of cases are resolved through settlement. The settlement process necessarily implicates many ethical issues. Resolving these issues and determining a lawyer's professional responsibilities are important aspects of the settlement process and justify special attention to lawyers' ethical duties as they relate to negotiation of settlements.

These Guidelines are written for lawyers who represent private parties in settlement negotiations in civil cases. In certain situations, the Guidelines may not be applicable to lawyers representing governmental entities. The Guidelines should apply to settlement discussions whether or not a third party neutral is involved. To the extent there may be ethical issues specific to mediation and non-binding arbitration proceedings, the Guidelines or Committee Notes may provide guidance, but these specific issues deserve particularized treatment and are beyond the scope of these Guidelines. As a general rule, however, the involvement of a third party neutral in the settlement process does not change the attorneys' ethical obligations.

The Guidelines are intended to be a practical, user-friendly guide for lawyers who seek advice on ethical issues arising in settlement negotiations. Generally, the Guidelines set forth existing ABA policy as stated in the *Model Rules of Professional Conduct* ("the *Model Rules*") and ABA Opinions and should be interpreted accordingly. The Guidelines also identify some of the significant conflicts between ABA policy and other rules or law. In circumstances identified in the Committee Notes, the Guidelines suggest best practices and aspirational goals. Counsel should consult not only these Guidelines, but also the applicable rules, codes, ethics opinions, and governing law in the jurisdiction of concern and should be alert for amendments to the *Model Rules* in connection with the work of the ABA Ethics 2000 Commission.

References in this work are to the *Model Rules* and comments as amended by the ABA in February 2002. Such amendments may be found at the ABA website.

This compendium is limited to the negotiations phase of settlements (which includes client counseling). These Guidelines do not address the enforcement of settlement agreements or requests for sanctions for conduct in settlement negotiations.

These Guidelines are designed to assist counsel in ensuring that conduct in the settlement context is ethical. They are *not* intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules, and should not serve as a basis for civil liability, sanctions, or disciplinary action.

Section 4 Issues Relating To A Lawyer's Negotiations With Opposing Parties

4.1 Representations and Omissions

4.1.1 False Statements of Material Fact

In the course of negotiating or concluding a settlement, a lawyer must not knowingly make a false statement of material fact (or law) to a third person.

Committee Notes: A lawyer is required to be truthful when dealing with others on a client's behalf. *Model Rule 4.1*, comment 1. False or misleading statements are unethical when they are knowing misstatements of material fact (or law). The *Model Rules* define "knowledge" as "actual knowledge of the fact in question," but such knowledge "may be inferred from circumstances." *Model Rules*, Preamble, Scope and Terminology. The ethical requirement of truthfulness when speaking to others includes not only false statements to those who have interests adverse to one's client, but also misrepresentations to government officials, opposing counsel, and mediators or other third party neutrals. See generally *ABA Annotation to Model Rule 4.1*. See also *Model Rule 1.2(d)*, prohibiting a lawyer from counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal or fraudulent.

Unethical false statements of fact or law may occur in at least three ways: (1) a lawyer knowingly and affirmatively stating a falsehood or making a partially true but misleading statement that is equivalent to an affirmative false statement; (2) a lawyer incorporating or affirming the statement of another that the lawyer knows to be false; and (3) in certain limited circumstances, a lawyer remaining silent or failing to disclose a material fact to a third person. This section addresses the first two of these situations; the next section deals with silence and nondisclosure.

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker's state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances. *Model Rule 4.1*, comment 2. "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category. . ." *Model Rule 4.1*, comment 2. (This comment was amended in February 2002 to make clear that even these types of

statements may be statements of material fact.) “Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker’s knowledge of facts reasonably implied by the statement or as merely an expression of the speaker’s state of mind.” *Restatement*, § 98, comment c. Factors to be considered include the past relationship among the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement (for example, whether the statement is presented as a statement of fact), related communications, the known negotiating practices of the community in which both are negotiating and similar circumstances. *Restatement*, § 98, comment c. In making any such statements during negotiation, a lawyer should consider the effect on his/her credibility and the possibility that misstatements in negotiation can lead not only to discipline under ethical rules, but also to vacatur of settlements and civil and criminal liability for fraud. *Model Rule 4.1.*, comment 2.

Reliance by and injury to another person from misrepresentations ordinarily is not required for purposes of professional discipline. See *Restatement*, § 98, comment c. Moreover, some jurisdictions do not include the “materiality” limitation that is contained in *Model Rule 4.1*. Even if materiality is required for disciplinary purposes, as a matter of professional practice in settlement negotiations, counsel should not knowingly make *any* false statement of fact or law. See Section 2.3, *supra*, and see also *Model Rule 8.4(c)*, which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation.” Some jurisdictions may interpret *Model Rule 8.4(c)* not to require the falsity, scienter, and materiality requirements of *Model Rule 4.1*, thus creating textual and analytical tensions with respect to the interplay between *Model Rules 4.1* and *8.4(c)*. See, e.g., *Restatement*, § 98, comment c.

4.1.2 Silence, Omission, and the Duty to Disclose Material Facts

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

Committee Notes: A lawyer generally has no ethical duty to make affirmative disclosures of fact when dealing with a non-client. Under certain circumstances, however, a lawyer's silence or failure to speak may be unethical. *Model Rule 4.1(b)* and *Model Rule 4.1*, comment 3.

The duty to disclose may arise in at least three situations: (1) a lawyer has previously made a false statement of material fact or a partially true statement that is misleading by reason of omission; (2) a lawyer learns of a client's prior misrepresentation of a material fact; and (3) a lawyer learns that his or her services have been used in the commission of a criminal or fraudulent act by the client, "unless such disclosure is prohibited by the ethical duty of confidentiality." Thus, the disclosure duty under *Model Rule 4.1(b)* is severely limited by the prohibition against revealing without client consent information covered by *Model Rule 1.6*. For example, under *Model Rule 1.6*, a lawyer may (but is not required to) reveal information a lawyer has learned during representation of a client (including knowledge of the falsity of representations), but only "to the extent the lawyer reasonably believes necessary" to prevent "reasonably certain death or substantial bodily harm.") *Model Rule 1.6*.

The ethical duty of confidentiality under *Model Rule 1.6*, as noted above, trumps the ethical duty of disclosure under *Model Rule 4.1(b)*; however, states have adopted different versions of these rules and there is considerable variation in the rules' application by the states. Some

states either allow or require disclosure in situations where the *Model Rules* do not. Accordingly, particularly in this area of the law and the ethics governing lawyers, a lawyer should be careful to check the controlling ethical rules in the relevant jurisdiction. Moreover, even if a lawyer is not subject to discipline for failure to disclose, such failure may be inconsistent with professional practice and may possibly jeopardize the settlement or even expose the lawyer to liability. See Section 2.3, *supra*.

Additionally, the ethical duty of confidentiality under *Model Rule* 1.6, which, as noted above, trumps the ethical duty of disclosure under *Model Rule* 4.1(b), is itself trumped by the lawyer's disclosure obligations under *Model Rule* 3.3 concerning candor before tribunals, regardless of whether the client consents to revelation. And, even where a lawyer's disclosure duties to a tribunal are not triggered directly under *Model Rule* 3.3, the ABA Standing Committee on Ethics and Professional Responsibility and ethics committees in some jurisdictions have held that lawyers must disclose certain types of information under *Model Rule* 4.1, even though the revelation arguably would violate *Model Rule* 1.6. One example is the death of a client during negotiations to settle personal injury claims. ABA Formal Op. 95-397 (1995) (lawyer for personal injury client who dies before accepting pending settlement offer must inform court and opposing counsel of client's death); *Kentucky Bar Ass'n v. Geisler*, 938 S.W. 2d 578 (Ky. 1997) (lawyer who settled personal injury case without disclosing that her client died violated the state's version of *Model Rule* 4.1, because failure to disclose equals affirmative misrepresentation of material fact). Another example is the notion that a lawyer should notify opposing counsel of an advantageous scrivener's error in a document, notwithstanding that the lawyer's knowledge of the error is "information relating to the representation" within the meaning of *Model Rule* 1.6's prohibition against disclosures without client consent. See ABA Informal Op. 86-1518 (1986). See also *infra* Section 4.3.5, regarding exploiting an opponent's mistake.

4.1.3 Withdrawal in Situations Involving Misrepresentations of Material Fact

If a lawyer discovers that a client will use the lawyer's services or work product to further a course of criminal or fraudulent conduct, the lawyer must withdraw from representing the client and in certain circumstances may do so "noisily" by disaffirming any opinion, document or other prior affirmation by the lawyer. If a lawyer discovers that a client has used a lawyer's services in the past to perpetuate a fraud, now ceased, the lawyer may, but is not required to, withdraw, but a "noisy withdrawal" is not permitted in such circumstances.

Committee Notes: In the context of settlements, as generally, "a lawyer *shall* . . . withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law." *Model Rule* 1.16(a)(1) (emphasis added). "A lawyer *may* withdraw from representing a client . . . if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or "the client has used the lawyer's services to perpetrate a crime or fraud." *Model Rule* 1.16(b)(2) and 1.16(b)(3), (emphasis added). See also *Model Rule* 1.6, comments 15 and 16, and *Restatement* Section 32(3)(e). (In any case, however, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Model Rule* 1.16(c).)

The text of the *Model Rules* does not explicitly authorize a "noisy withdrawal." The ABA, however, has interpreted the comments and rules to allow a "noisy withdrawal," *i.e.*, notice of withdrawal and disaffirmance of the lawyer's work product, when (but only when): (i) the lawyer knows that the client will engage in criminal or fraudulent conduct that will implicate the lawyer's past services; (ii) the lawyer's withdrawal from further representation as mandated by *Model Rule* 1.16(a)(1) in silence

will be ineffective to prevent the client from using the lawyer's work product to accomplish its unlawful purpose; and (iii) disaffirmance of the lawyer's work product is appropriate to avoid violating *Model Rule 1.2(d)*, which prohibits assisting a client in conduct that the lawyer knows is criminal or fraudulent. See ABA Formal Op. 92-366 (1992).

4.2 Agreements with Opposing Parties Relating to Settlement

4.2.1 Provisions Restricting Lawyer's Right To Practice Law

A lawyer may not propose, negotiate or agree upon a provision of a settlement agreement that precludes one party's lawyer from representing clients in future litigation against another party.

Committee Notes: Ethics rules expressly prohibit lawyers for private parties from offering or making a settlement agreement that includes a restriction on a lawyer's right to practice law. See *Model Rule 5.6(b)*; *Model Code DR 2-108*. The principal rationales are that a settlement provision that "buys off" a party's lawyer unjustifiably deprives future litigants of the opportunity to employ that lawyer and that the possibility of such a provision creates a conflict between the interests of the lawyer and the client. See, e.g., ABA Formal Op. 93-371 (1993).

The most obvious example of an ethically impermissible settlement provision of this nature is one that expressly prohibits a plaintiff's lawyer from subsequently representing other plaintiffs in litigation against the defendant. Arrangements calculated to achieve this same result indirectly are also impermissible when they serve as partial consideration for a settlement, notwithstanding that the same arrangement might be permissible if it were made independently of a settlement. For example, a lawyer may not negotiate or agree upon a settlement provision whereby the defendant will retain the plaintiff's lawyer in the future as a consultant or attorney, so that conflict of interest rules will prevent the

plaintiff's lawyer from representing future plaintiffs against the defendant without the defendant's consent. Although provisions of this nature may be legally enforceable in some jurisdictions, they are nevertheless unethical if they are designed to "buy off" the lawyer and thereby restrict a lawyer's right to practice law.

4.2.2 Provisions Relating to the Lawyer's Fee

When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee.

Committee Notes: There are various contexts in which lawyers negotiate over the amount that one party will pay to the other to compensate for the other party's attorneys' fees. Although the conventional American rule is that each party must bear its own legal expenses, statutes and common law sometimes require the losing party to pay the prevailing party's attorney's fee. Examples include the *Civil Rights Act* (42 U.S.C. § 1988), the patent and copyright laws (35 U.S.C. § 285; 17 U.S.C. § 505) and state deceptive trade practice acts (see *Uniform Deceptive Trade Practices Act*, § 313). Similarly, when a class action settlement is designed to result in a common fund for the benefit of class members, courts routinely permit an award of fees from that fund to plaintiffs' counsel. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In these circumstances, the parties often negotiate a fee acceptable to both sides to be presented to the court for its approval.

If the lawyer's fee arrangement with the client entitles the lawyer to whatever attorney's fee is awarded, then the lawyer has a financial interest in negotiating the highest possible fee. This poses a risk that trade-offs will be made between the amount of the fee and other settlement provisions, such as those relating to the amount of compensation to be paid to the plaintiff or, in an injunctive proceeding, the terms of the injunction. These trade-offs will not necessarily be explicit.

Although lawyers are certainly permitted to seek compensation for their work, they must resolve tensions between the client's interest in an optimal recovery and their own interest in optimal compensation in favor of the client's interests. A lawyer may not forego other favorable settlement terms in exchange for a favorable fee. Even when the court ultimately must approve any negotiated fee, the lawyer has an independent obligation not to enter arrangements that sacrifice client interests for a larger fee.

The tension between the interests of the plaintiff and the plaintiff's counsel are manifest in cases where the plaintiff is asked to forego an attorney's fee altogether in exchange for other favorable terms. The United States Supreme Court's decision in *Evans v. Jeff D.*, 101 S.Ct. 1531 (1986), addressed this scenario. The Court held that a defendant in a civil rights action governed by the fee-shifting provisions of 42 U.S.C. § 1988 may condition a settlement offer on the plaintiff's waiver of his claim for attorneys' fees. The court resolved the apparent tension between the interests of the plaintiff and his attorney by concluding that, under the statute, any attorney's fees recovered belong to the plaintiff, not to the plaintiff's attorney.

A lawyer's retainer agreement may address the possibility that the defendant will ask the plaintiff to forego payment of an attorney's fee. The lawyer may enter into a conditional contingent fee arrangement, entitling the lawyer to a percentage of the client's recovery if the client surrenders the right to attorneys' fees as part of a settlement. It is uncertain, however, whether a lawyer may enter into a retainer agreement that forbids the client from waiving an attorney's fee. Some ethics opinions have concluded that a lawyer may not do so, because the decision of whether to settle a case and on what terms belongs exclusively to the client; other opinions reach the opposite conclusion depending on the circumstances. See N.Y. City Eth. Op. 1987-4 (not *per se* unethical for defense counsel to propose settlement conditioned on plaintiff's waiver of a statutory fee award: case by case analysis is required); Conn. Eth. Op. 97-31 (lawyers may negotiate a settlement premised on a fee waiver, but should be mindful of potential conflicts); Tenn. Eth. Op. 85-F-96 (negotiating fee waivers is not inherently

unethical provided certain conditions are met); Cal. Eth. Op. 1989-114 (“prudent attorney is well-advised to discuss the possibility of a fee waiver settlement with client at the onset of representation;” failure to do so might be a violation of attorney’s duty to provide competent representation); Utah Eth. Op. 98-05 (while it is not unethical for a defense lawyer to make a settlement offer proposing a fee waiver, potential conflicts present other ethical concerns). *See generally supra* Sections 3.1.3 and 3.2.1. However, one opinion has concluded that the initial retainer agreement may include a provision in which the client commits not to waive any statutory entitlement to fees. *See State Bar of Cal., Standing Committee on Prof’l. Resp. and Conduct*, Op. 94-136 (1994) (retainer agreement can preclude fee waiver by plaintiff if (i) the agreement is fair and reasonable, (ii) the client agrees in writing after having been advised to seek independent counsel on the issue, (iii) the lawyer keeps the client abreast of settlement offers, and (iv) the client is informed of the opportunity to consult with other counsel about whether to accept a settlement); *see also Restatement*, § 125. Two commentators have suggested, as an alternative, that the retainer agreement may contain an assignment to the lawyer of the client’s right to recover fees. Yelinosky & Silver, *A Model Retainer Agreement for Legal Services Provisions: Mandatory Attorney Fee Provisions*, 28 Clearinghouse Rev. 114 (1994).

When the amount of the attorney’s fee is a subject of negotiation, a lawyer should take any available procedural steps to reduce the possibility that the lawyer’s professional judgment, in negotiating other settlement terms, will be adversely influenced by the lawyer’s interest in the fee. One way to do this is to postpone fee discussions until an agreement on other terms has been achieved or nearly achieved. Other possibilities include enlisting the assistance of a mediator to oversee the discussions, or agreeing that the request for fees will be presented to the court without prior agreement on a proposed figure.

In a class action, the attorneys’ fees recovery will often be drawn from a common fund of cash paid by the defendant to the class. In that event, lawyers for the class should negotiate settlement terms – and, in particular, the amount of the common fund – without regard to attorneys’ fees. The plaintiff class and the defendant can agree on the amount of

the common fund, but not how the fund is divided between the class and class counsel. In some class actions, however, the defendant may have to provide additional funds to cover the attorneys' fees. In that event, it may be appropriate to negotiate the attorneys' fees at the same time as other terms; however, class counsel must not agree to reduce the class's recovery in order to obtain a higher fee award.

4.2.3 Agreements Not To Report Opposing Counsel's Misconduct

A lawyer must not agree to refrain from reporting opposing counsel's misconduct as a condition of a settlement in contravention of the lawyer's reporting obligation under the applicable ethics rules.

Committee Notes: Settlement is conventionally designed to end all disputes related to a matter, including any existing or potential claims directed at opposing parties' attorneys, and parties often include opposing counsel in the releases they enter as part of a settlement. However, ethics rules limit the extent to which an attorney may properly agree to forego reporting opposing counsel's misconduct to applicable disciplinary authorities.

Subject to confidentiality requirements, in most jurisdictions a lawyer has an ethical obligation to report another lawyer's serious disciplinary misconduct to the appropriate professional authority, See *Model Rule 8.3(a)*; *Model Code DR 1-103(A)*. The reporting obligations are mandatory and cannot be vitiated by private agreement, including by settlement agreement. Consequently, a settlement agreement may be conditioned on a lawyer's undertaking not to report opposing counsel's misconduct only if the information in issue falls outside the mandatory reporting obligation.

Similarly, a lawyer may not enter into an agreement that disables the lawyer from fulfilling a future reporting obligation. Although a lawyer may not have a reporting obligation at the time of the settlement, a reporting obligation may later arise. For example, the lawyer may initially

have merely a suspicion, and not reportable knowledge, of another lawyer's serious disciplinary misconduct; the lawyer may not enter an agreement that would preclude the lawyer from filing the requisite report in the event that the lawyer acquires enough additional information to clearly establish that serious misconduct in fact occurred. Likewise, the lawyer's initial knowledge of misconduct may not be reportable because the jurisdiction's reporting obligation is limited by the lawyer's duty of confidentiality and the lawyer's information is confidential; the lawyer may not enter an agreement that would prevent reporting the misconduct in the event that the client later consents to disclosure. In general, a lawyer should encourage a client to permit the lawyer to report another lawyer's misconduct when disclosure of client confidences would not substantially prejudice the client's interests. *Model Rule 8.3*, comment 2.

A lawyer may, however, agree not to report possible misconduct that is and will be outside the reporting obligation. In many jurisdictions, this would include information about misconduct by opposing counsel that does not raise a substantial question about the opposing counsel's honesty, trustworthiness or fitness as a lawyer. Further, the lawyer's reporting obligation would not prevent a lawyer from negotiating an agreement that the client, as opposed to the lawyer, will not report opposing counsel's misconduct.

An agreement not to report another lawyer's possible misconduct, where such an agreement is otherwise permissible, must not be negotiated in such a manner as to run afoul of restrictions against impermissible threats. The *Model Code* expressly prohibited a lawyer from threatening to present criminal charges solely to obtain an advantage in a civil matter, DR 7-105, and it might have been read to forbid threats to present disciplinary charges as well. Criminal laws that forbid blackmail and extortion may be to like effect. Lawyers should therefore avoid negotiating, in a threatening or extortionate manner, terms relating to the reporting of criminal or disciplinary misconduct. See *infra* Section 4.3.2 and accompanying Committee Note; ABA Formal Ops. 92-363 (1992) and 94-383 (1994).

4.2.4 Agreements on Return or Destruction of Tangible Evidence

Unless otherwise unlawful, a lawyer may agree, as part of a settlement, to return or dispose of documents and other items produced in discovery.

Committee Notes: In general, there is no prohibition against returning or disposing of documents produced in discovery once a lawsuit is over. Parties may have a legitimate interest in securing the return or destruction of documents that contain embarrassing or proprietary information. Parties may therefore agree on the disposition of such material as a term of the settlement. The only exception is where there is a legal obligation to retain or preserve evidence. Ethics rules generally would not impose an additional obligation. See, e.g., *Model Rule 3.4* (providing that “a lawyer shall not . . . *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value”) (emphasis added).

Such a legal obligation may exist by statute or under tort law governing spoliation of evidence. For example, applicable law may forbid destroying material obtained in a settled lawsuit if the material has evidentiary value in a pending lawsuit, or a reasonably anticipated potential future lawsuit, or if it is known to be relevant to a pending criminal investigation. Likewise, if the material has been subpoenaed by another party, it may not be destroyed.

Further, in some cases a party may be seeking to destroy evidence for a legally improper purpose. For example, the party may be seeking to obstruct justice or perpetrate a fraud. If a lawyer knows that to be the case, the lawyer may not agree to the return or disposition of the evidence or otherwise assist in the unlawful enterprise. See *Model Rule 1.2(d)*.

4.2.5 Agreements Containing Illegal or Unconscionable Terms

A lawyer should not negotiate a settlement provision that the

lawyer knows to be illegal.

Committee Notes: The *Model Rules* forbid a lawyer from assisting a client in conduct that is criminal or fraudulent. *Model Rule* 1.2(d). The earlier *Model Code* contained a broader prohibition. It additionally prohibited assisting the client in conduct the lawyer knew to be illegal, even if not fraudulent or criminal. DR 7-102(A)(7). After debate, the *Model Rules* drafters decided not to retain the broader prohibition. Thus, a lawyer is not subject to discipline under the *Model Rules* for assisting a client in pursuing settlement terms the lawyer knows to be illegal or unconscionable, although not fraudulent or criminal. Nonetheless, as a matter of sound professional practice, a lawyer should discourage a client from pursuing such terms and should decline to pursue them on the client's behalf.

4.2.6 Agreement to Keep Settlement Terms and Other Information Confidential

Except where forbidden by law or disciplinary rule, a lawyer may negotiate and be bound by an agreement to keep settlement terms and other information relating to the litigation confidential.

Committee Notes: In general, as a condition of settlement, a party may agree not to disclose the settlement terms and certain other information relating to the lawsuit, such as information produced by the opposing party in discovery. As the party's agent, the lawyer will ordinarily be bound by such an agreement, since settlement terms and other matters concerning a lawsuit will ordinarily be confidential information that may not be disclosed without the client's consent after consultation. *Model Rule* 1.6. (A lawyer's duty of confidentiality applies not only to attorney/client privileged information but also to other information learned in the course of the representation.) Therefore, in connection with a settlement, the general rule is that a lawyer may agree not to reveal the settlement terms and other specified information that is subject to the lawyer's confidentiality duty.

In some jurisdictions, however, there may be statutes or rules restricting agreements to keep certain information confidential. For examples, see Richard Zitrin, 2 J Inst. for Study of Legal Ethics 115 n1 (1999), *citing* Del. Code Ann., Title 17, § 5(9); Fla. Stat. § 69.081; La. Code Civ. Proc., Art. 1426 (1998); Mich. Ct. Rule 8:105; N.J. Ct. Rules §§ 1:2-1 and 4:10-3; N.C. Gen. Stat. § 13.2; Ore. Stat. § 30.4, Tx. Rules Civ. Proc. Ann. § 76(a); and Va. Code Ann. § 8.01.

There may also be ethical restrictions on the scope of confidentiality agreements. For example, a lawyer may not agree to preserve the confidentiality of information that the lawyer has an ethical duty to report, such as information establishing the opposing lawyer's serious disciplinary misconduct. *See supra* Section 4.2.3. Nor may the lawyer agree to keep information confidential where, in doing so, the lawyer knowingly engages in a fraud, deceit or misrepresentation. *Cf. In re Fee*, 898 P.2d 975 (Ariz. 1995) (disciplining lawyer for failure to disclose secret side agreement concerning payment of attorney's fees).

Further, as discussed in the *Committee Notes* to Section 4.2.1, *supra*, many jurisdictions have a disciplinary rule modeled on *Model Rule* 5.6, which provides that “[a] lawyer shall not participate in offering or making. . . [a]n agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.” If a confidentiality term of a settlement agreement restricts a lawyer from using, as distinguished from revealing, confidential information, it may be forbidden as an indirect restriction on the lawyer’s right to practice. *See, e.g.*, ABA Formal Op. 00-417 (2000). Likewise, the agreement may be impermissible on this ground if it restricts the lawyer from revealing information (for example, publicly available information) that is not subject to the lawyer’s duty of confidentiality. *See, e.g.*, N.Y. Eth. Op. 730 (2000).

4.3 Fairness Issues

4.3.1 Bad Faith in the Settlement Process

An attorney may not employ the settlement process in bad faith.

Committee Notes: It is axiomatic that lawyers may not use the settlement process in bad faith. Ethics rules, procedural rules and statutes forbid the bad faith use of the litigation process. See, e.g., *Model Rules* 3.2 and 4.4. The ordinary prohibition is applicable to settlement negotiations as to other phases of litigation. Therefore, the settlement process should not be used solely to delay the litigation or to embarrass, delay, or burden an opposing party or other third person. For example, a lawyer would be acting in bad faith if he were to schedule a mediation for the purpose of disrupting the opposing counsel's trial preparation.

It is not bad faith for a party to refuse to engage in settlement discussions or to refuse to settle. Settlement is not an obligation, but an alternative to litigation. The choice to pursue it to fruition should be that of the client. However, it may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, when the client actually has no interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceedings or securing discovery. See *supra*, Section 2.3.

4.3.2 Extortionate Tactics in Negotiations

A lawyer may not attempt to obtain a settlement by extortionate means, such as by making extortionate or otherwise unlawful threats.

Committee Notes: Not all threats are impermissible in the context of settlement negotiations. Most obviously, it is proper to threaten to file a civil lawsuit if the opposing party does not settle a dispute, if there is a

good faith basis for a civil claim. It is also proper to remind the opposing party of the ordinary costs of proceeding to trial and to suggest that it may be in the opposing party's interest to avoid these costs by agreeing to a settlement. For example, it is obviously permissible to point out that, if the case proceeds to trial, evidence that is embarrassing to the opposing party will be offered in evidence, if the evidence is legally admissible. While this may be characterized as a "threat," it would not be an improper one.

Lawyers must avoid threats that are extortionate or otherwise unlawful or unethical, however. See, e.g., *Robertson's Case*, 626 A.2d 397 (N.H. 1993) (plaintiff's civil rights lawyer violated disciplinary rules by persistently threatening city lawyers with serious criminal and disciplinary charges and publicly maligning them in an aggressive effort to settle case). Threats that would be illegal if made to convince a party to pay money outside the context of a lawsuit may also be illegal if made to pressure a party to agree to a settlement. Examples would include threats to publicly reveal embarrassing or proprietary information other than through the introduction of admissible evidence in a legal proceeding.

While lawyers have obligations to report certain unethical conduct (see *Model Rule 8.3*), authorities have held that it is unethical for a lawyer to threaten to report another lawyer to the disciplinary authorities to gain an advantage in a civil lawsuit. See ABA Formal Op. 94-383 (1994); Ill. Eth. Op. 87-7 (1988) (although threatening client's former lawyer, whom client is now suing, with disciplinary action to influence civil suit does not violate Code provision barring threats of criminal charges it violates ban on action that serves merely to injure another); L.A. County Eth. Op. 469 (1992) (lawyer in fee dispute may not use threat of disciplinary charges against other side to gain advantage in fee dispute).

Threats to report a party to the criminal authorities are also unlawful or unethical in some, although not all, situations. The act of making the threat of criminal prosecution sometimes violates criminal law. See, e.g., Fla. Stat. § 836.05 (proscribing a threat to accuse another of a crime with the intent of extorting money). Ethics rules based on DR 7-105 of the Model Code expressly prohibit a lawyer from

threatening to present criminal charges solely to obtain an advantage in a civil matter. Although ethics codes based on the *ABA Model Rules* do not have this express provision, it has been held that a lawyer may use the possibility of presenting criminal charges against an opposing party in a private civil matter to gain relief for the client, only if the criminal and civil matters are related, the report would be warranted by the law and facts, and the lawyer does not try to influence the criminal process. ABA Formal Op. 92-363 (1992); *accord Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720 (W.Va. 1992) (finding that it was permissible for a lawyer to threaten to press criminal charges against his client's former employee unless the former employee made restitution of embezzled funds).

Lawyers should take care in employing threats as a means of obtaining favorable settlement terms, because the line between legally permissible and impermissible threats is sometimes a fine one. See, e.g., *In re Finkelstein*, 901 F.2d 1560 (11th Cir. 1990) (reversing order suspending plaintiff's lawyer from practice where, to pressure the defendant into settling employment discrimination lawsuit, plaintiff's lawyer wrote to the defendant's general counsel threatening (a) a report to the NAACP and the SCLC, (b) submission of a story to an ABC News producer, and (c) widespread boycott of defendant's products, among other things).

4.3.3 Dealing With Represented Persons

A lawyer must not attempt to negotiate a settlement or otherwise communicate about a settlement with a person the lawyer knows to be represented in the lawsuit, except with the permission of the represented person's counsel or where authorized by law or a court order.

Committee Notes: Communications with a represented person, including a represented entity, are restricted by *Model Rule 4.2*, sometimes called the anti-contact rule, and by equivalent provisions in the ethics codes of every state. The rule restricts a lawyer's communication concerning settlement, as it restricts communication of

other matters that are the subject of the representation, except where such communications are authorized by the represented person's lawyer or by law or by court order. See, e.g., *Waller v. Kotzen*, 567 F. Supp. 424 (E.D. Pa.1983), appeal dismissed, 734 F.2d 9 (3d Cir.1984); *Estate of Vafiades v. Sheppard Bus Serv., Inc.*, 469 A.2d 971 (N.J. Super. Ct. Law Div.1983). The purpose of the restriction is to prevent lawyers from taking advantage of lay persons and to preserve the integrity of the lawyer-client relationship. See *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990).

In addition to restricting person-to-person communications between a lawyer and the opposing party, the rule restricts communications in writing. For example, the rule would forbid a lawyer from sending proposed settlement terms directly to the opposing party or sending the opposing party a copy of a letter sent to opposing counsel discussing a possible settlement. Pa. Eth. Op. 91-116 (direct written communication with insurer against wishes of its counsel inconsistent with *Model Rule* 4.2); S.C. Eth. Adv. Op. 93-16 (copying defendant with a written settlement proposal directed to defendant's counsel violates *Model Rule* 4.2). This problem arises when a lawyer believes that opposing counsel has not communicated a settlement offer to the client (notwithstanding the professional obligation to do so). ABA Formal Op. 92-362 (1992) (lawyer who doubts whether opposing counsel has communicated settlement offer to offeree may not communicate directly with offeree, but may advise client that client is free to do so). A professionally proper way to address this problem may be to raise it at mediation or with the court, including a setting in which the opposing party is present.

The anti-contact rule does not by its terms prohibit a lawyer's client from communicating directly with the opposing party. Notwithstanding some early ethics opinions to the contrary, it is now generally agreed that, if the lawyer's client decides to discuss a settlement directly with the opposing party, the lawyer has no obligation to discourage the client from doing so. Ethics opinions of different jurisdictions take different views, however, on whether the lawyer may encourage the client to do so or counsel and assist the client by suggesting how to approach client-to-client discussions. Some opinions authorize the lawyer to lend assistance; other opinions forbid such assistance. ABA Formal Op. 92-

362 (1992) (lawyer may advise client that client may communicate with opposing party); Cal. Eth. Op. 1993-131 (lawyer may confer with client regarding strategy of client contacting opposing party directly, but may not discuss the content of client's communication with opposing party). In 1999, New York State became the first jurisdiction to address this question in its anti-contact rule, which now authorizes the lawyer to counsel the client concerning client-to-client discussions as long as the lawyer gives opposing counsel notice of the client's intent to speak personally with the opposing party. *N.Y. Lawyer's Code of Professional Responsibility*, DR 7-104(B). Even outside New York, providing notice to opposing counsel would be prudent.

There is also considerable variation nationally concerning how the anti-contact rule applies when the represented person is a corporation or other entity. In all jurisdictions, the rule would preclude a lawyer's communications with at least some officers and employees of the opposing entity – in particular, those who are in the “control group,” that is, those who are communicating directly with counsel and implementing counsel's advice. ABA Formal Op. 95-396 (1995) (impermissible for corporate counsel to claim that all corporate employees are “represented persons” for purposes of *Model Rule 4.2*). In many jurisdictions, a broader restriction would apply. See *Annotation to Model Rule 4.2* and cases cited therein. This variation is not of significance with regard to settlement discussions: In every jurisdiction, the anti-contact rule would apply to the representative of an entity (other than a lawyer representing the entity in that matter) who is authorized to settle the case on the entity's behalf. Therefore, a lawyer may not negotiate a settlement with the business officer of an opposing corporation without consent of the lawyer representing the corporation in the litigation.

Finally, it is unclear whether and to what extent settlement discussions with an opposing party that would otherwise be forbidden may be “authorized by law.” This exception may conceivably apply in certain contexts where the opposing party is a government entity; for example, there may be situations in tax litigation where the taxpayer's lawyer is permitted to negotiate directly with an agent for the Internal Revenue Service, rather than with a lawyer assigned to the matter. ABA Formal Op. 97-408 (1997) (discussing communications with individuals

within governmental agency represented by counsel). Unless it is clear that the law authorizes such communications, however, the prudent practice would be to deal directly with the lawyer assigned to the case or to obtain that lawyer's permission to speak with the non-lawyer official.

4.3.4 Dealing with Unrepresented Persons

A lawyer who negotiates a settlement with an unrepresented person must (a) clarify whom the lawyer represents and that the lawyer is not disinterested, (b) make reasonable efforts to correct any misunderstanding about the lawyer's role in the matter, (c) avoid giving advice to an unrepresented person whose interests are in conflict with those of the lawyer's client, other than advice to obtain counsel, and (d) avoid making inaccurate or misleading statements of law or material fact.

Committee Notes: Ethics rules recognize that, when the opposing party to a litigation is unrepresented, counsel will have to deal directly with the opposing party, including in the context of settlement discussions. Even so, the ethics rules impose some restrictions designed to prevent overreaching and misleading conduct. *See Model Rules 4.3 and 4.1.*

A particular danger is that an unrepresented person, particularly one who is not sophisticated about legal matters, might assume that a lawyer, even one representing the other party, would be a disinterested authority on the law. *See Model Rule 4.3, comment 1.* Therefore, it is important for the lawyer to make his or her role clear and to explain clearly that he or she is not disinterested. Similarly, to the extent the party's interests may be adverse to those of the lawyer's client, the lawyer may not ethically give advice to the unrepresented person with respect to a proposed settlement. *Model Rule 4.3, comment 2.* The lawyer may advise the other party to obtain counsel, *see id.*, and may give his or her view on what the law is or what the facts show. In doing so, however, the lawyer may not make a false statement of material fact or law, must make clear that the lawyer is not acting on behalf of the

unrepresented person, and must explain that the lawyer is not taking steps to advance the interests of the unrepresented person. See *Model Rule 4.1*; N.C. Eth. Op. 15 (1986).

A lawyer may document the terms of a settlement reached with an unrepresented party and may submit the document to that party for execution. However, in preparing and submitting such documentation, the lawyer should not, directly or indirectly, give the opposing party legal advice, except as to the lawyer's view of the meaning of the documents or underlying legal obligations, and should again make clear that the lawyer does not represent the opposing party. *Model Rule 4.3*, comment 2. Further, in the context of obtaining a court order approving a settlement or dismissing a case after settlement, the lawyer should give notice to the court that the opposing party is unrepresented. In negotiating with an unrepresented person, a lawyer may not mislead or otherwise overreach. Impermissible tactics may include suggesting that an immediate decision is necessary when that is not the case.

A distinction is difficult to discern in many cases between what is and is not permissible when submitting papers to an unrepresented person. See, e.g., *In re Estate of Lutz*, 563 N.W.2d 90 (N.D. 1997) (reversing summary judgment and remanding for trial on issue of voluntary nature of prenuptial agreement when evidence conflicted about whether husband's lawyer advised wife, whose will he also prepared, to seek independent counsel before signing prenuptial agreement; court advises that lawyer should document independent counsel offer and obtain written waiver); *Bd. of Comm'rs on Grievances and Discipline of Ohio Sup. Ct.*, Op. 96-2 (1996) (lawyer hired by defendant's insurer may prepare application for guardianship appointment and approval of settlement for unrepresented minor plaintiff to sign; must make sure parents, court, and guardian know he is hired by insurer, and that lawyer has prepared documents and other counsel may be obtained to review them, "[p]reparation of these statutorily required documents does not constitute legal advice"); *Dolan v. Hickey*, 431 N.E.2d 229 (Mass.1982) ("drafting documents and presenting them for execution, without more, do[es] not amount to advice, and [is] proper as long as the attorney does not engage in misrepresentation or overreaching"); *ABA Comm. on Ethics and Professional Responsibility*, Informal Op. 1269 (1973)

(plaintiff's counsel in domestic relations case may submit to unrepresented defendant, for signature, a waiver of issuance and service of summons and entry of appearance, provided lawyer does not advise defendant regarding the law); *ABA Comm. on Professional Ethics and Grievances*, Formal Op. 102 (1933) (lawyer may prepare settlement papers in workers' compensation suit and submit them to unrepresented employee on behalf of client-employer, provided papers are not misleading and court is notified that employee is unrepresented); *The Florida Bar v. Belleville*, 591 So. 2d 170 (Fla. 1991) (when transaction in which attorney represents one party and other party is unrepresented is one-sided, counsel preparing documents for transaction is under ethical duty to make sure that unrepresented party understands possible detrimental effect of transaction and fact that attorney's loyalty lies with his client alone); *cf. Disciplinary Counsel v. Rich*, 633 N.E.2d 1114 (Ohio 1994) (violation of *Model Code* DR 7-104(a)(2) for lawyer to meet with mother of child allegedly fathered by client, arrange for guardian *ad litem* to be appointed for child, and prepare consent judgment dismissing paternity action for signature by guardian). Professor Wolfram recommends that the lawyer presenting documents to an unrepresented person for signing clarify in writing that the lawyer represents only his or her client. Charles W. Wolfram, *Modern Legal Ethics*, § 11.6.3, at 617 (1986) (citing *In re Bauer*, 581 P.2d 511 (Ore.1978)).

4.3.5 Exploiting Opponent's Mistake

In the settlement context, a lawyer should not exploit an opposing party's material mistake of fact that was induced by the lawyer or the lawyer's client and, in such circumstances, may need to disclose information to the extent necessary to prevent the opposing party's reliance on the material mistake of fact.

Committee Notes: Ethics rules forbid a lawyer from making misstatements or engaging in misleading or deceitful conduct. See, e.g., *Model Rule* 4.1. Although there is no general ethics obligation, in the settlement context or elsewhere, to correct the erroneous assumptions of the opposing party or opposing counsel, the duty to avoid

misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer's client and not to exploit such mistakes. See, e.g., *Crowe v. Smith*, 151 F.3d 217 (5th Cir. 1998) (upholding sanction where attorney falsely responded to a discovery request that no indemnity agreements were known, then offered to settle on behalf of his clients, emphasizing that his clients were not insured and did not have access to substantial funds for settlement purposes). Additionally, applicable principles of contract law may allow rescission of a settlement agreement that resulted from a party's exploitation of the opposing party's mistake.

In some limited circumstances, even where neither counsel nor counsel's client caused the other party's error, there may be a professional duty to correct the error. See Pa. Eth. Op. 97-107 (1997) (lawyer who learns that mutual release negotiated for client is premised on client's inability to transfer her interest in real estate, which lawyer knows is not necessarily correct premise, must disclose this to opposing counsel); See also ABA Formal Op. 95-397 (1995) (lawyer of client who dies before accepting pending settlement offer must inform opposing counsel of client's death). Further, some may conclude that, as a matter of professionalism, the other party's misconception must be corrected in certain circumstances.

In the context of drafting a settlement agreement, in particular, a lawyer should endeavor in good faith to state the understanding of the parties accurately and completely, and should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention. See *ABA Guidelines for Litigation Conduct*. It would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement. See N.Y. City Eth. Op. 477 (1939) (when opposing lawyer recognizes inadvertent mistake in settlement agreement, lawyer should urge client to reveal the mistake and, if the client refuses, the lawyer should do so); cf. ABA Informal Op. 86-1518 (1986) ("Where the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.").