



ADR Choices

The newsletter of the
Alternative Dispute Resolution Committee

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Leadership Note

From the Immediate Past Chair

By Mary E. Sharp



The ADR Committee has been busy with some exciting projects in the last several months. We have just returned from a great time in San Francisco, where our program, “ADR Missteps—Avoiding Ethical Traps at Mediation,” was a great success. Speakers Hank Jones, Chrys Martin, and John Trimble provided a lively discussion about the rules that regulate lawyer ADR conduct, and our ethical obligations to the various parties at a mediation. (For those who were not able to attend our meeting in San Francisco, all is not lost. In this issue of *ADR Choices*, we are republishing the tremendous written scholarship, by Chrys Martin, that was prepared to accompany their presentation.) We also had a great group at our annual dinner with our friends from DRI International, at Town Hall on Friday night.

Earlier this year, we presented a program at the Young Lawyer Committee Seminar, in Portland, Oregon, titled “Why am I Headed to Mediation or Arbitration and How Do I Handle This Now?” Speakers included our newly appointed chair Hal Adkins and Ron Akasaka of Smart ADR in Los Angeles. And, the ADR Committee just completed producing a four-part webcast series, on the “How-To’s of Mediation.” Speakers Andrew Sveen, Sid Kanazawa, Hal Adkins, and I each presented segments of the series, detailing best practices on every facet of mediation partici-

pation. Stay tuned for details on how to purchase the series or the individual programs.

We do expect a busy upcoming year, which includes partnering with the Trial Skills and Damages Committee, to host a March seminar at the Park MGM Las Vegas Hotel. And, of course, plans are already underway for the 2019 Annual Meeting in New Orleans. If you would like to get involved further with the ADR Committee, we currently have the following positions open: Marketing Vice Chair, Publications Chair and Vice Chair, Membership Chair and Vice Chair, Program Vice Chair, Online Community Vice Chair, and Philanthropic Activities Chair and Vice Chair. Please contact our newly appointed Vice Chair, Tom Maroney at TMaroney@maroneyoconnorllp.com if you are interested in one of these positions, or to discuss other ways you might get involved.

Mary E. Sharp practices law in Beaufort, SC, and is the founder of Sharp Law Firm, LLC. Mary is an experienced litigator and represents clients in civil trial and appellate proceedings in South Carolina state and federal courts. She is a certified mediator and serves as a Municipal Court Judge for the City of Beaufort. Mary currently serves as Secretary of the South Carolina Bar, and is a former Chair of the DRI Alternative Dispute Resolution Committee.

Feature Articles

Successfully Navigating Mediations from the Defense Perspective

By Robert D. Lang and Andrew D. Harms



In our earlier DRI article, we discussed the benefits of plaintiffs appearing in person for a mediation in casualty related matters. Lang and Harms, “Sealing the Deal in Mediation: Requiring Plaintiff to Appear in Person,” *For The Defense* (April 2018 edition) at 81. Put simply, plaintiff’s appearance can go a long way towards facilitating settlement. But a plaintiff’s appearance is not the only crucial piece to a successful mediation; the

presence of a claims examiner, claims supervisor, or self-insured defendant’s appearance can be equally important for reaching settlement. This companion article—the second in our series about mediation – explores why an examiner’s appearance at mediation can be as important as plaintiff’s for successful resolution. (For ease of reading, our reference to “claims examiner” or “examiner” includes both a claims examiner and a self-insured defendant.)

First, there are the obvious reasons: An examiner controls the purse, or acts as the eyes and ears for a supervisor who controls the purse. By appearing, the examiner ensures that he/she hears everything first-hand before deciding whether to offer money for settlement. He or she can make the necessary judgments of plaintiff, plaintiff's counsel, the co-defendant's attorneys and their examiners. Moreover, the examiner can hear all of the arguments for and against, can interact with the parties and the mediator, and also observe the nuanced facial expressions and asides. Although the examiner already knows defense counsel's evaluation of the case, the examiner can also sit down with the attorney in person before mediation to review the claim. Together with defense counsel, the examiner can develop a more nuanced strategy for approaching the mediation, especially in complex, multi-party cases with many moving parts (see more below). Finally, the examiner's appearance ensures that the flow of mediation is not disrupted by unanswered phone calls, delays, or the time an attorney would take to bring the examiner up to speed.

But why not simply trust defense counsel to handle the mediation, maintain an open line to monitor events remotely, and give authority as needed? To be sure, there are many cases where this approach is warranted. For example, a modestly valued case where the examiner would have to fly half-way across the country to attend might be handled remotely. Or, a multi-party litigation where other defendant(s) are the target and the examiner does not want to be pressured to contribute to make up the difference. Or, perhaps, an examiner's absence is deliberate for purposes of slowing the pace of settlement discussions, or for being "unavailable" to convey further authority, thereby causing plaintiffs to lower their demand, or co-defendants to increase their offers. The majority of cases, however, do not fall neatly into these categories. This is where the less discernable aspects of an examiner's appearance come into play.

As described above, an examiner (or examiners if there are co-defendants) represents "the money," therefore her presence immediately signals to all parties that, regardless of the amounts offered in negotiations, the insurance company takes the claim seriously. Instantly there is more urgency because everyone necessary to reach a deal is present (but only for a short time), and the experience is now personalized instead of anonymous. Depending on how the mediation unfolds, the examiners' actions and words can carry more weight with the other parties because they know that she was present, heard the arguments, interacted with the mediator, and received feedback

to her (or her attorney's) arguments. In addition, having the examiner present takes off the table the argument often heard from plaintiff's counsel when cases do not settle that, if only an examiner's supervisor was present in person, the case would have settled.

For example, an examiner appears at mediation and after extended negotiations, declines to ask for money above her pre-arranged authority when plaintiff's counsel maintains a higher demand. Agree or disagree, the examiner observed the same things as everyone else and held her position. Plaintiff and his attorney may re-evaluate their case in light of this, especially as the case gets closer to trial.

We have found that especially in heavier multi-party matters where there is shared liability between 2 or 3 defendants, which is often the situation in Labor Law or construction defect/property damage cases, an examiner's attendance is critical for managing negotiations between the defendants *prior* to negotiating with the plaintiff. Indeed, there are often contractual indemnification, coverage, and excess coverage issues deeply intertwined with the facts of the case. Defense counsel who are versed in coverage issues can help develop a strategy with the examiner for the disputes that inevitably arise between carriers and their attorneys. Additionally, an examiner's "presence" and style of communication during intra-defendant negotiations, along with her attorney, also become a factor for the parties to take into consideration. In any number of ways—overtly, quietly, firmly—an examiner can help define and control the settlement position of her policy holder (and carrier) at mediation. Moreover, the examiner can observe the following: what are the strengths and weaknesses of the co-defendants' positions at mediation? How capable do the co-defendants' attorneys appear? How committed do the co-defendants' examiners appear to be to their positions? How do the co-defendants respond to the examiner herself and her approach at mediation?

In sum, a claims examiner's appearance at mediation can allow for a smoother, and more comprehensive settlement conference. If the circumstances are right, the examiner can make decisions in real time that allow for settlement to be reached swiftly. In more complicated cases, the examiner's presence communicates that this claim is important, and ensures that along with his or her attorney, representation of the insured is maximized to obtain the most favorable results.

The converse is also true. In lighter case, having the examiner present in person is not only preferable but essential to the defense stance that this is a case where

there is little or no exposure and liability. In those instances, having the examiner available by phone is the appropriate act to take. Put differently, it is contraindicated to have an examiner present in person if the position by defense counsel is that the case being mediated is one where the insured has little or no exposure.

One point to be remembered is that when an examiner is only to be present by telephone, it is important that defense counsel have the cell number of the examiner so that where the mediation continues past business hours, which is a fact of life in many cases, defense counsel is able to reach the examiner for final authority if the circumstances arise.

Each mediation is different and calls for a different approach, but the implementation of a strategy that is versed in the facts becomes important in multi-party litigations when the parties reach an impasse. Flexibility to shift strategies and not be locked into any one single approach, is critical to help navigate the challenges presented by plaintiff's counsel or co-defendants.

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ADR Missteps: Avoiding Ethical Traps at Mediation

By Chrys A. Martin



Negotiations are an important part of litigation, yet can involve ethical issues often not present in other aspects of client representation. What common ethical conundrums should the negotiating attorney be aware of? And what should the ethical attorney do when these situations arise?

With court-ordered ADR, the rising use of mediators rather than direct negotiations between counsel and the vast majority of litigation resolved via settlement, these ethical conundrums occur more frequently.

This article will explore ethics problems that often occur during negotiation, including issues that appear in the lawyer-client relationship, in common negotiation tactics, and in communication with third parties. Each section will examine the issue and the relevant Model Rules of Professional Conduct (2013) [hereinafter Model Rule], and describe real cases in which lawyers did not meet professional responsibility standards. This article also will present practical tips to avoid ethics violations while negotiating.

Violations can result in settlements being invalidated and lawyers facing disciplinary action.

A Lawyer Must Keep the Client Informed

The Issue

How should a lawyer keep a client informed during negotiations?

Summary

The client has the right to decide the objectives of the representation and a lawyer should consult with the client about how to pursue those objectives. A lawyer must keep the client reasonably informed about the negotiation's status and must explain matters so that the client can make informed decisions about the representation. Communication with the client should be prompt.

Relevant Rules

Model Rule 1.4; Model Rule 1.4 cmt 2; Model Rule 1.4 cmt 5.

Synopsis

The client has the authority to make decisions concerning the representation's goals and the manner in which to obtain those goals. Model Rule 1.2(a). Professional ethics rules require that an attorney confer with a client regarding the means to accomplish the representation's objectives. Model Rule 1.4 (a)(2). The attorney must promptly inform the client of any circumstance that requires the client's

consent, Model Rule 1.4 (a)(1), unless previous discussions with the client make clear how the client wants the lawyer to proceed. Model Rule 1.4 cmt. 2. A lawyer needs to keep the client reasonably informed about a matter's status, Model Rule 1.4 (a)(3), and must promptly comply with a client's reasonable information request. Model Rule 1.4 (a) (4). Where the law or the Rules of Professional Conduct restrict a lawyer's ability to comply with a client's request, the lawyer should explain the limitation to the client. Model Rule 1.4 (a)(5). An attorney also must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rule 1.4 (b). The frequency and depth of communication will depend on the type of matter at hand and what sort of communication is reasonably practical. The guiding standard is whether the lawyer's communication meets "reasonable client expectations for information consistent with the duty to act in the client's best interests." Model Rule 1.4 cmt. 5. Accordingly, "when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement" but "a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail." Model Rule 1.4 cmt. 5.

Practice Tips

Before beginning negotiations, clarify the client's expectations regarding communication.

- Ask: Does the client wish to be updated regularly? Or does the client request updates only at certain junctures? What level of detail does the client want?
 - Find out whether your client representative has full authority to settle or must obtain permission of others.
 - Be sure to obtain the client's express intent regarding when to communicate, what terms are acceptable, and what actions the client wants the lawyer to take.
 - Determine whether the authority the client gives the attorney is all the client representative has or not.
 - Decide whether the attorney or the client representative will make the offers.
 - When a client needs to make a decision, make sure the client understands the matter to the extent necessary to make an informed decision. In particular, when a client is determining whether to accept an agreement the lawyer should explain all relevant provisions to the client.
 - Always promptly respond to a client's reasonable request for information.
- Document in writing all major decisions concerning the representation, negotiations, authority, monetary and non-monetary aspects of any offers and demands.

Examples from Case Law

The following cases provide examples of lawyers who received disciplinary sanctions for violations of the duty to communicate with a client during negotiations.

- *Green v. Virginia State Bar*, 677 S.E.2d 227 (Va. 2009): Lawyer representing insured in auto insurance claim did not provide client court order for pre-trial hearing and failed to appear for the hearing, resulting in dismissal of the case. Lawyer then attempted to negotiate with insurance company without client's knowledge or authorization. Lawyer suspended for 18 months.
- *Kentucky Bar Ass'n v. Helmers*, 353 S.W.3d 599 (Ky. 2011): Lawyer failed to inform clients that their attorneys, including himself, had decided how much their individual monetary award would be from settlement, that the individual client's case was just one of more than 400 cases that had been settled, and that their class action had been decertified and dismissed. Lawyer also did not provide settlement documents to client and failed to inform client that they could refuse the settlement offer. Attorney permanently disbarred.
- *In re Howe*, 843 N.W.2d 325 (N.D. 2014): Lawyer failed to inform clients facing possible deportation of scheduled hearings and failed to provide clients with statements of costs and expenses incurred in the representation. Lawyer did not tell client he was not working on matter, did not send bill for more than two years, then used nonpayment as justification for discontinuing representation. Attorney suspended for 6 months.
- *In re Morse*, 470 S.E.2d 232 (Ga. 1996): Attorney violated Georgia Rules of Professional Conduct when attorney asked a client to sign an agreement settling a worker's compensation claim without explaining the legal effect of the agreement. Attorney suspended for 90 days.
- *In re Ragland*, 697 N.E.2d 44 (Ind. 1998): Plaintiffs in an employment discrimination case rejected a proposed settlement. Attorney accepted the settlement without client permission, and then attempted to withdraw from the case. Attorney did not inform the plaintiffs about the settlement acceptance or the attorney's withdrawal, but instead said the claim was still pending. Attorney suspended for 6 months.

The Client Has Ultimate Authority

The Issue

What is the scope of a lawyer's authority in negotiations?

Summary

A lawyer must abide by the client's decisions concerning the representation's objectives. Client authorization to negotiate must be expressed by the client or fairly implied from the interactions between the lawyer and the client, and a client may revoke authorization at any time. So the decision whether to even initiate settlement discussions must also be controlled by the client.

In negotiations, a lawyer must reasonably confer with the client regarding the negotiation's goals and progress. Unless the client gives permission otherwise, the lawyer must promptly and fairly report settlement offers. The manner and means of the negotiations is also up to the client, absent clear delegation to the lawyer. If there are disputes about strategy, the Model Rules offer no real solutions for how to resolve such disputes absent the overarching philosophy that the client has ultimate control. The lawyer can always withdraw or be fired. A lawyer may accept an offer only with the client's consent.

Relevant Rules

Model Rule 1.2; Model Rule 1.2 cmt. 3; Restatement Third, The Law Governing Lawyers §22 (2000).

Synopsis

A lawyer must comply with a client's decision regarding the representation's aim and the methods to achieve that aim. Model Rule 1.2(a). A client may expressly or impliedly authorize the lawyer to take steps in the course of the representation, and the lawyer may rely on this authorization absent a change in circumstances. Of course, it is always best to obtain explicit instructions and confirm them in writing. Model Rule 1.2 cmt. 1; Model Rule 1.2 cmt. 3. The client may revoke this authorization at any time. *Id.* Accepting a settlement, however, should only be done with the client's express permission after the client has understood all terms of the agreement. The Restatement (Third) of the Law Governing Lawyers "forbids a lawyer to make a settlement without the client's authorization. A lawyer who does so may be liable to the client or the opposing party ... and is subject to discipline." Restatement Third, The Law Governing Lawyers §22 cmt. c (2000) (internal references

omitted). The lawyer must comply with the client's decision whether to accept an agreement or settle a matter. Model Rule 1.2(a). The lawyer may not enter into an agreement with the client waiving the client's right to approve a future settlement.

Practice Tips

- Document in writing all major decisions concerning the representation.
- Obtain the client's express consent to begin negotiations to make each offer or demand or give the lawyer veto power. (See Model Rule §5 cmt.)
- Outline the client's negotiation goals and strategy.
 - What are the terms the lawyer can present or request? What are the client's priorities? What weight does the client give to different components of the negotiation package? Is the client concerned with timing?
- Define the scope of the lawyer's authority in negotiations.
 - When must the lawyer confer with the client? Is there a negotiation range in which the lawyer can maneuver without first discussing with the client?
- Whenever reasonably possible, inform the client about negotiation discussions unless the client instructs otherwise.
- Communicate with the client regarding all terms of the proposed final agreement. Make sure that the client clearly understands the terms and their consequences.
- Accept an offer only with the client's authorization, preferably in writing and with all monetary and non-monetary terms clear.
- If disputes arise on strategy between the lawyer and client, the mediator/settlement judge can offer help to resolve the issues or may have an entirely different strategy to suggest.

Examples from Case Law

The following cases provide examples of consequences, for both the lawyer and the client, when a lawyer exceeds the scope of authorization in negotiating on behalf of a client.

Lawyers must remember that they are perceived by the other parties/mediator/judge to have apparent authority. They may create a binding agreement that their client is

stuck with—resulting in perhaps another lawsuit or ethical complaint against the attorney.

Clients should be advised ahead of time of their right to revoke settlement authority at any time *before* the authority is offered or accepted. However, the lawyer must not follow a client's illegal or unethical instructions. Such instructions may require the lawyer to withdraw – either quietly or noisily if the latter is required. Model Rule 1.16(a) (1). However, the lawyer may not just secretly refuse to follow the client's directives, even if fraudulent or criminal. (See *e.g.*, Restatements §32 cmt.)

- *In re White*, 663 S.E.2d 21 (S.C. 2008): Plaintiff was injured in an auto accident and brought a claim against insurance company. Lawyer negotiated a settlement with insurance company on behalf of client without conferring with client, without client's authorization, and despite attorney's knowledge that client was still undergoing medical treatment and was still incurring medical expenses. Attorney suspended for 6 months.
- *In re O'Meara's Case*, 54 A.3d 762 (N.H. 2012): Lawyer communicated settlement demand to insurer's attorney in personal injury case, despite client expressly informing attorney that he was not authorized to settle the case. Attorney disbarred (attorney had prior reprimands).
- *Covington v. Cont'l Gen. Tire, Inc.*, 381 F.3d 216 (3d Cir. 2004): Plaintiffs injured in a car accident sued car tire manufacturer. The retainer agreement stated that the lawyer must obtain client consent prior to making a settlement. Lawyer entered settlement negotiations. The plaintiffs and the lawyer disputed whether lawyer informed plaintiffs of the settlement process. The attorney represented to defense counsel and the court that plaintiffs would accept settlement offer. The plaintiffs refused the proposed settlement and the defendant filed a motion to enforce the agreement. The trial court granted the motion. The Third Circuit reversed the trial court's order, stating that an attorney must have express authority, rather than only apparent authority, to settle a suit on a client's behalf.

Defining the Client When an Insurer Is Involved

The Issue

When a lawyer is hired by an insurer to represent an insured, which duties does an attorney owe to the insured, and which duties does an attorney owe to the insurer?

Summary

When an insurer hires an attorney to represent an insured, depending on the factual circumstances and the law of the particular state, the attorney's client may be the insured only or both the insured and the insurer. The attorney must be sure to abide by the ethics rules applicable to multiple client representation. It will be particularly important to obtain informed consent from both parties and to ensure that both parties fully understand the attorney's role in the representation and negotiations.

Relevant Rules

Model Rule 1.7(b); Model Rule 1.8 cmt. 11; Restatement Third, The Law Governing Lawyers §134 cmt. f (2000).

Synopsis

Depending on the insurance contract involved, a client may be only the insured or both the insured and the insurer. Determining which party is the client is "a question to be determined on the facts of the particular case." Restatement Third, The Law Governing Lawyers §134 cmt. f (2000). A co-client arrangement is ethically acceptable. See ABA Formal Op. 96-403 (1996). However, a lawyer representing both the insured and the insurer must follow the ethics rules governing multiple client representation. Such rules require that "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." Model Rule 1.7(b). Furthermore, where a third party (such as the insurer) compensates the lawyer, the lawyer must be sure that "there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client." Model Rule 1.8 cmt. 11. After obtaining informed consent from the insured, in which the insured clearly understands that the representation is limited and that the lawyer will act under the direction of the insurer, the lawyer may proceed as the insurer requests. ABA Formal Op. 96-403 (1996). However, where the lawyer knows the insured objects to a settlement, the lawyer must give the insured an opportunity to reject the agreement and assume his or her own defense at his or her own expense. *Id.* The outcome of such a dispute turns on policy terms and state law.

One common scenario in which the insured and the insurer have conflicting interests is when an insurance policy contains a “hammer clause.” A “hammer clause” provides that if an insured refuses to agree to a settlement the insurer recommends within policy limits, the insurer’s liability is capped at the amount of the proposed settlement plus expenses incurred to that point, even if the insured proceeds in the case. David Schooler, *Ethical Issues for Defense Counsel in Employment Practices Liability Insurance Litigation*, 80 Def. Couns. J. 201, 205–206 (2013). Where a “hammer clause” is involved, an attorney should advise the insured about what the “hammer clause” means and the clause’s potential consequences. An attorney must be sure to provide the insured with enough information to make an informed decision on how to proceed.

Some courts guarantee the insured’s right to independent counsel when a conflict of interest exists between the insured and the insurer. For example, in *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y Inc.*, 162 Cal. App. 3d 358 (Cal. Ct. App. 1984), the court considered the ethical implications of the conflict of interest inherent in insurance policies in which the insurer reserves the right to deny coverage of legal proceedings. The *Cumis* court held that professional ethics rules require a lawyer hired by an insurer to explain to the insured the implications of joint representation. The court further concluded that if the insured declines to give informed consent to the representation, the attorney must cease representing both parties, the insurer may not require the insured to surrender control of the litigation, and the insurer must pay reasonable expenses for the insured to hire independent counsel. *Id.* at 375. Not all jurisdictions adopt the “*Cumis* counsel” approach to conflicts of interest between the insured and the insurer, but an attorney should verify whether local law imposes such a duty. The cases on *Cumis* counsel vary widely depending on the facts of the case. See, e.g., *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 61 Cal. App. 4th 999, 71 Cal. Rptr. 2d 882 (4th Dist. 1998), review denied (Cal. June 10, 1998); *McGee v. Superior Court (Pedersen)*, 176 Cal. App. 3d 221 Cal. Rptr. 421 (4th Dist. 1985); *Emons Industries, Inc. v. Liberty Mutual Insurance Co.*, 749 F. Supp. 1289 (S.D.N.Y. 1990); *Illinois Masonic Medical Center v. Turegum Insurance Co.*, 168 Ill. App. 3d 158, 522 N.E. 2d 611 (1st Dist. 1988); *Central Mich. Bd. of Trustees v. Employers Reins. Corp.*, 117 F. Supp. 2d 627, 64–35 (E.D. Mich. 2000); *U.S. Underwriters Ins. Co. v. TNP Trucking Inc.*, 44 F. Supp. 2d 489, 490–91 (E.D.N.Y. 1999); *Golotrade Shipping & Chartering, Inc., v. Travelers Indemnity Co.*, 706 F. Supp. 214, 219 (S.D.N.Y. 1989); see also *Cardin v. Pacific Employers Ins. Co.*, 745 F. Supp. 330 (D. Md.

1990); *Johnson v. Continental Casualty Co.*, 57 Wash. App. 359, 788 P. 2d 598 (1990); *Local 282 Pension Trust Fund v. Chubb Group of Ins. Cos.*, No. 81 Civ. 3810 (E.D.N.Y. Feb. 16, 1983); *American Home Assur. Co. v. Weissman*, 79 A.D. 2d 923, 434 N.Y.S. 2d 410 (1st Dep’t 1981); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F. 2d 1212 (6th Cir. 1980), clarified on rehearing, 657 F. 2d 814, cert. denied, 454 U.S. 1109 (1981); *Northern County Mutual Insurance Co. v. Davalos*, 140 S.W. 3d 685, 47 Tex. Sup. Ct. J. 786 (2004).

Practice Tips

- Make required disclosures to joint clients. Determine first who are your clients: one or both.
- Always obtain informed consent, in writing, from both the insured and the insurer.
- Define, in writing, exactly which parties constitute the client.
- When acting under the direction of the insurer, be sure to apprise the insured of the limited representation and that the insurer will be directing the lawyer.
- Be sure to understand which settlements would not be acceptable to the insured.

Example from Case Law

- *Hartford Acc. & Indem. Co. v. Foster*, 528 So.2d 255 (Miss. 1988): Attorneys employed by insurer to represent both insurer and insured had a duty to notify insured of potential legal outcomes and liability, advise insured of option to employ insured’s own attorney, and inform insured of settlement offer.
- *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993): Insured objected to insurer’s reservation of right to disclaim coverage with respect to a claim of intentional misconduct. The Court held that the insured had “the unilateral right to select independent counsel,” *id.* at 1121, and could select an attorney reasonably competent to serve as independent counsel in the defense of the insured.

Negotiating Attorney's Fees as Part of a Settlement

The Issue

How should an attorney handle the potential conflict of interest present when attorney's fees are part of a settlement agreement?

Summary

The conflict inherent when attorney's fees are part of, or dependent on, a negotiated agreement can tax a lawyer's ability to objectively obtain the best result for the client. A lawyer should be aware of this potential conflict and make sure to diligently pursue the client's interests.

Relevant Rules

Model Rule 1.7, cmt. 10; Model Rule 1.3, cmt. 1.

Synopsis

"A lawyer's own interests should not be permitted to have an adverse effect on representation of a client." Model Rule 1.7, cmt. 10. When attorney's fees are part of, or dependent on, a settlement negotiation, a lawyer must be careful not to place the lawyer's interest in the fee above the client's interest in a favorable outcome. This potential conflict of interest may arise when a lawyer's fee fluctuates with the amount of the settlement, or when a party is asked to forego attorney's fees in exchange for other favorable terms in the agreement. When attorney's fees become part of the negotiation, a lawyer should take steps to reduce the potential conflict of interest. Such steps could include conducting fee discussions after reaching an agreement on other terms, or using a mediator to oversee the negotiations. A lawyer must be certain to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rule 1.3, cmt. 1. Complying with professional ethics rules demands that a lawyer place the client's interest first.

Practice Tips

- Discuss issues of fees before negotiations begin and clarify such issues in writing or in the original engagement letter.
- Negotiate provisions relating to attorney's fees after agreeing on other provisions of interest to the client.

- Consider using a mediator where potential conflict of interest may prevent a lawyer from objectively obtaining the best result for the client.
- Defense counsel can use separate offers as a strategy during negotiations, *i.e.*, \$50,000 for damages to plaintiff and \$22,000 for fees, rather than a total generic offer of \$72,000. This can sometimes help focus negotiations or create a wedge between the other party and their counsel.

Example from Case Law

- *In re O'Meara's Case*, 54 A.3d 762 (N.H. 2012): Lawyer allowed his interest in securing a fee to take precedence over his primary obligation to further clients' interests. Attorney threatened to sue clients for his contingency fee if they terminated his services, revised original contingent fee agreement without clients' knowledge or consent so that, as revised, it entitled him to fee. Attorney also threatened to withdraw as counsel on morning of mediation so as to secure fee. Attorney disbarred.
- *In re Fee*, 182 Ariz. 597 (Ariz. 1995): Attorney sanctioned for failure to disclose to client and settlement judge a separate, additional settlement agreement governing payment of attorney's fees.

Professional Ethics Rules in Negotiations

The Issue

When does a statement made during negotiation violate ethics rules requiring lawyers to be truthful while representing a client?

Summary

While representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third party. A lawyer also must not knowingly fail to disclose a material fact to a third party when doing so is necessary to avoid assisting in a criminal or fraudulent act, unless the disclosure is barred by the duty of confidentiality. This rule does not apply to statements of opinion.

Relevant Rules

Model Rule 4.1(a)–(b); Model Rule 4.1 cmt. 1; Model Rule 4.1 cmt. 2; Model Rule 4.1 cmt. 3; Restatement Third, The Law Governing Lawyers §98 cmt. c (2000); Model Rule 1.2(d); Model Rule 1.16(a)(1); Model Rule 1.6.

Synopsis

During client representation a lawyer may not knowingly “make a false statement of material fact or law to a third person” or “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality of Information].” Model Rule 4.1(a)–(b). Unethical misrepresentations can occur by affirming a false statement made by another or by making partially true but misleading statements. Model Rule 4.1 cmt. 1. The prohibition against making false statements is of particular concern during negotiations because negotiation strategy often requires making statements that are not accurate. Such statements could include overstating the strength of the client’s position, or bluffing about the terms that are acceptable to the client. The ethics rules, however, prohibit only false statements of material fact. Whether a statement is one of “fact” depends on circumstances surrounding the statement and 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 Third, The Law Governing Lawyers §98 cmt. c (2000); Model Rule 4.1 cmt. 2. Factors that determine whether the statement reasonably can be interpreted as one of “material fact” include “the past relationship among the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communications, the known negotiating practices of the community in which both are negotiating and similar circumstances.” Restatement Third, The Law Governing Lawyers §98 cmt. c (2000). In negotiations, statements that are “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 usually statements of opinion rather than fact. Model Rule 4.1 cmt. 2. “Posturing,” or remarks which exaggerate or understate the strength or weakness of a party’s position, are ordinarily not false statements of material fact on which a party would expect to rely. ABA Formal Op. 06-439 (2006). Statements about negotiating goals or willingness to compromise are similarly not considered statements of material fact. ABA Formal Op. 93-370 (1993). Statements concerning a party’s bottom line, however, or the scope of the lawyer’s settlement authority, are material facts, and should not be misrepresented. *Id.*

Ethics rules prohibit a lawyer from “counseling or assisting a client in conduct that the lawyer knows is criminal or

fraudulent.” Model Rule 1.2(d); Model Rule 4.1 cmt. 3. Thus, a lawyer may not assist a client where the client lies or misrepresents such that it is a crime or fraud. A lawyer may need to withdraw from the representation if such client conduct occurs. Model Rule 1.16(a)(1). Sometimes the law will require the attorney “to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then ... the lawyer is required to do so, unless the disclosure is prohibited” by the duty of confidentiality in Model Rule 1.6. Model Rule 4.1 cmt. 3. The duty of confidentiality trumps the duty of disclosure. However, states have very different rules concerning the duty of confidentiality and required disclosure. Furthermore, even if a failure to disclose does not amount to an ethical violation, a failure to disclose could jeopardize the settlement or expose the lawyer to liability. It is important to always check the rules of the relevant jurisdiction to ensure compliance with local procedures.

Practice Tips

Consider having the client only authorize the attorney to make or accept an offer that is more favorable than what the client might ultimately agree to. Similarly, defendants can instruct their lawyers to only make a demand or accept an offer that is less than what the client might ultimately offer. Thus, it would be a true statement for the negotiating attorney to say that the client has not authorized the attorney to offer or accept a particular settlement. The client can change the scope of the authorization if necessary.

Watch out for false statements of fact or law that may occur in three situations: (1) a false statement or a partially true but misleading statement; (2) affirmation of the statement of another that is known to be false; and (3) failure to disclose a material fact to a third person in certain situations.

The situations in which it is unethical to remain silent include: (1) a previously made false statement of material fact or a partially true statement that is misleading by reason of omission; (2) a client’s prior misrepresentation of a material fact that the other side is relying upon; and (3) a lawyer learns that his or her services have been used in the pursuit of a criminal or fraudulent act by the client, unless confidentiality duties prohibit the disclosure.

Be sure to check local rules concerning the duty of confidentiality and when disclosure is required to avoid assisting in a crime or fraud.

Is it ethical to lie about the “bottom line” in a negotiation? Is that a material fact?

Examples from Case Law

The following cases provide examples of when statements during negotiation become unethical false statements of material fact.

- *In re Filosa*, 976 F. Supp. 2d 460 (S.D.N.Y. 2013): Lawyer negotiating settlement for plaintiff in employment discrimination suit used expert’s damages report premised upon plaintiff’s continued unemployment in order to obtain a more favorable settlement, even though attorney knew plaintiff just accepted higher-paying position elsewhere. Attorney then failed to correct client’s evasive deposition testimony, and failed to timely produce documents that would have revealed that client had accepted two job offers. Attorney suspended for 1 year.
- *In re Cantrell*, 619 S.E.2d 434 (S.C. 2005): Lawyer, while representing client in bankruptcy case and workers’ compensation case, submitted loan application on behalf of client for a loan to be repaid from proceeds of workers’ compensation case, without attorney disclosing to lender the client’s bankruptcy filing. Attorney suspended for 2 years.
- *In re Lyons*, 780 N.W.2d 629, 636 (Minn. 2010): Lawyer made false and misleading statements to opposing counsel about whether he knew of his client’s death before the parties reached a settlement, which court found to be a material fact. Lawyer suspended for 1 year.
- *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435 (D. Md. 2002): Plaintiffs sued bank for allegedly improperly obtaining and disseminating consumer credit reports. Bank deposed attorney to discover the bases for the plaintiffs’ allegations. In his deposition, attorney was questioned about a letter that he sent to defense counsel several months earlier proposing a settlement, as part of which he would reveal the identity of a source. According to the letter, the source was the head of a network that had obtained and disseminated the plaintiffs’ credit reports. In the letter the attorney claimed that he could obtain the source’s identity when the litigation concluded. The bank’s counsel pressed attorney, twice getting him to admit that his statement about arranging for the source’s identification was not true. The district court imposed monetary sanctions against the attorney and referred him to the judicial district’s disciplinary committee.
- *Williams v. Texaco Ref. & Mktg. Inc.*, 53 F.3d 330 (4th Cir. 1995): Plaintiff alleged that defendant misrepresented the amount it would pay in a settlement. The defendant had stated it would not pay more than \$143,000, while in fact it had paid \$650,000 in settlements with other similarly situated plaintiffs. The court found this statement “was mere puffery made by opposing counsel during the course of settlement negotiations. As such, the statement simply was not a misrepresentation of material fact.”

Communicating with the Other Side

The Issue

What are the ethics rules restrictions on a lawyer’s communication with the opposing side in a negotiation?

Summary

A lawyer may not communicate with a party the lawyer knows to be represented by counsel unless the party’s counsel has consented or the communication is authorized by law. A lawyer may not use an intermediary to communicate with a represented party. A client, however, may communicate with an opposing party, and generally a lawyer may provide assistance to the client in determining what to communicate to the other party.

Relevant Rules

Model Rule 4.2.

Synopsis

Model Rule 4.2 prohibits a lawyer representing a client from communicating about the subject of the representation with a party the lawyer knows is represented by counsel unless the party’s counsel has consented to the communication or a law or court order authorizes the communication. This rule applies in negotiations, thus prohibiting a lawyer from communicating about the negotiation with the opposing party. The lawyer’s client, however, may still communicate directly with the opposing party. A lawyer may advise the client concerning this communication, either at the request of the client or on the lawyer’s own initiative. ABA Formal Op. 11-461 (2011). In a Formal Opinion, the ABA Committee on Ethics and Professional Responsibility stated that “a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised

and strategies to be used.” *Id.* This advice may be given regardless of who conceives of the idea to communicate with an opposing party. *Id.* However, ABA Formal Opinion 11-461 cautions that a lawyer should not overreach, where “the line must be drawn on the basis of whether the lawyer’s assistance is an attempt to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel.” *Id.*

Practice Tips

- Do not contact an opposing party who is represented by counsel without express permission from the opposing party’s counsel.
 - This prohibition includes communication in person, over the phone, or in writing.
 - This rule applies regardless of who initiates the communication, the opposing party or the lawyer.
- In advising a client to communicate with an opposing party, it is good practice to inform opposing counsel that your client will communicate with the opposing party.

Example from Case Law

- *Weeks v. Indep. Sch. Dist. No. 1-89 of Oklahoma Cty., OK., Bd. of Educ.*, 230 F.3d 1201 (10th Cir. 2000): Bus driver brought action against school district, under Americans with Disabilities Act (ADA), Title VII, and the Fair Labor Standards Act (FLSA). Lawyer for bus driver had ex parte communications with school employees regarding school procedures. Court held that lawyer communicated with employees who had “speaking authority” for the school district for employee’s areas of responsibility. Plaintiff’s lawyer was thus barred from engaging in ex parte communications with employee because those communications related to subject of action, including procedures for calculating overtime, and overtime specifically owed to driver. Attorney disqualified.
- *Hammond v. City of Junction City, Kan.*, 126 F. App’x 886 (10th Cir. 2005): Lawyer representing city employees in putative class action discrimination suit against city violated Kansas rule of professional conduct when he engaged in ex parte communication with city employee in managerial position, regardless of fact that employee was potential member of the putative class. Employee was city’s director of human relations, and attorney discussed director’s role in city’s document production

and shredding of documents concerning the very subject of the representation, and director retained the authority to make hiring decisions and investigations of discrimination complaints. Attorney prohibited from representing any class of individuals in any other action based upon class allegations in this case.

- *Parker v. Pepsi-Cola Gen. Bottlers, Inc.*, 249 F. Supp. 2d 1006 (N.D. Ill. 2003): Lawyer deposed employee of defendant without his counsel present in discrimination case. The court barred employer from using deposition testimony or evidence obtained, ordered destruction of copies of deposition, limited the length of time allowed for future depositions of employees by employer or offending attorney, and awarded attorney fees arising from preparation of motion for sanctions. Attorney sanctioned.
- *Waller v. Kotzen*, 567 F. Supp. 424 (E.D. Pa. 1983): Plaintiff’s counsel negotiated a settlement directly with defendant’s insurance carrier without consulting defendant’s attorney. The court implied that the Code of Professional Responsibility was violated, and the court set aside the settlement.

Practice Scenarios

Identify the potential ethical concerns in the following scenarios.

A Lawyer Must Keep the Client Informed

A lawyer receives a settlement offer from opposing counsel. The lawyer believes the offer is of less value than what the client deserves. The lawyer rejects the offer.

The Client Has Ultimate Authority

A lawyer receives a very favorable settlement offer from opposing counsel, but the offer will expire shortly and has difficulty reaching the client. The lawyer believes the client would be happy with the agreement. The lawyer accepts the offer.

Defining the Client When an Insurer Is Involved

A lawyer is hired by an insurance company to defend an insured party, as described in the insured’s insurance policy. The lawyer calls the insured to tell her that the lawyer will be handling the matter, and lawyer proceeds by following the direction of the insurance company. When the insurance company decides to settle, on terms the

lawyer believes are favorable to the insured, the lawyer accepts the settlement offer without telling the client first.

Negotiating Attorney's Fees as Part of a Settlement

Opposing counsel presents a lawyer with two settlement options: one in which the opposing party agrees to an injunction, and will pay \$50,000, and one in which the opposing party will not agree to an injunction but will pay \$100,000. The lawyer knows the client wants an injunction, the client is concerned about cost, and the lawyer's fee is contingent on the amount of the agreement. The lawyer accepts the \$100,000 offer.

Professional Ethics Rules Prohibit False Statements of Material Fact

A client has authorized a lawyer to settle a suit for \$100,000, but would prefer to pay \$75,000. During negotiations the lawyer tells opposing counsel that a settlement of \$100,000 is impossible, that the opposing party's claim is clearly worth only \$70,000, but that the lawyer is authorized to agree to up to \$75,000 to settle the case.

Communicating with the Other Side

A lawyer has presented the opposing party with an offer but hasn't received a response. The lawyer believes opposing counsel has not conveyed the terms to the opposing party. The lawyer mails a copy of the proposed terms to the opposing party, and directs the lawyer's client to meet

with the opposing party to encourage acceptance of the settlement offer.

Conclusion

Failure to follow these ethical rules may have a disastrous impact on the lawyer, the client and the adversary. Missteps can result in litigation to enforce or set aside a settlement agreement or sanctions for improper conduct by the lawyer. The lawyers must put aside their personal feelings about a client, the defensibility of a case and their own financial self-interest in continuing to defend a case on an hourly fee basis.

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