



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

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# 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 2 Settlement Negotiations Generally**

### **2.1 The Purpose of Settlement Negotiations**

The purpose of settlement negotiations is to arrive at agreements satisfactory to those whom a lawyer represents and consistent with law and relevant rules of professional responsibility. During settlement negotiations and in concluding a settlement, a lawyer is the client's representative and fiduciary, and should act in the client's best interest and in furtherance of the client's lawful goals.

**Committee Notes:** Subject to applicable rules and law, the lawyer's work in settlement negotiations, like the work in other aspects of litigation, should be client-centered. A lawyer should not impede a settlement that is favored by a client (or likely to be favored) and consistent with law and ethical rules, merely because the lawyer does not agree with the client or because the lawyer's own financial interest in

the case or that of another nonparty is not advanced to the lawyer's or nonparty's satisfaction. *But see, infra*, Sections 3.3. and 4.1.

## 2.2 Duty of Competence

A lawyer must provide a client with competent representation in negotiating a settlement.

**Committee Notes:** With respect to settlement negotiations and any resulting settlement agreement, as is the case generally, *Model Rule* 1.1 requires counsel to provide competent representation. As part of this obligation of competence, a lawyer should give attention to the validity and enforceability of the end result of the settlement process and should make sure the client's interests are best served, for example, by considering tax implications of the settlement.

## 2.3 Duty of Fair-Dealing

A lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing.

**Committee Notes:** While there is no *Model Rule* that expressly and specifically controls a lawyer's general conduct in the context of settlement negotiations, lawyers should aspire to be honorable and fair in their conduct and in their counseling of their clients with respect to settlement. *Model Rule* 2.1 recognizes the propriety of considering moral factors in rendering legal advice and the preamble to the *Model Rules* exhorts lawyers to be guided by "personal conscience and the approbation of professional peers." *Model Rules*, Preamble, [7]. *Cf. infra* Sections 4.1.1, 4.1.2, and 4.3.1. Whether or not a lawyer may be disciplined, sanctioned, or sued for failure to act with honor and fairness based on specific legal or ethical rules, best practices dictate honor and

fair dealing. Settlement negotiations are likely to be more productive and effective and the resulting settlement agreements more sustainable if the conduct of counsel can be so characterized.

## **2.4 Restrictions on Disclosure to Third Parties of Information Relating to Settlement Negotiations**

With client consent, a lawyer may use or disclose to third parties information learned during settlement negotiations, except when some law, rule, court order, or local custom prohibits disclosure or the lawyer agrees not to disclose.

**Committee Notes:** Information learned during settlement discussions may be confidential as “information relating to representation” of the client. Therefore, client consent would be needed prior to disclosure of such information to third parties. *Model Rule 1.6*. Moreover, a lawyer must not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent. *Model Rule 1.8 (b)*; *Model Rule 1.9(c)* (relating to former clients). Even with client consent, there may be other reasons the information should not be disclosed. For example, if public dissemination of the information has a “substantial likelihood of materially prejudicing” the proceeding, that disclosure may run afoul of applicable ethical rules. *See Model Rule 3.6*; *see also, infra*, Section 4.2.6 for a discussion of when a lawyer may be bound by an express agreement not to disclose settlement information to third parties.

Further, lawyers must comply with any other legal or procedural restrictions, including a court order prohibiting disclosure. Among the possible restrictions are mediation rules and rules of evidence, such as Federal Rule of Evidence 408, which excludes proof of offers to settle and “conduct or statements made” during settlement negotiations, when

offered to prove “liability for or invalidity of the claim or its amount.” At trial, lawyers should not refer to settlement discussions or offer proof relating to settlement discussions absent a good faith basis to believe the proof is admissible notwithstanding Federal Rule of Evidence 408 or other relevant limitations.

If there is a known local or judicial custom or practice restricting the disclosure or use of information learned during settlement discussions, lawyers should act accordingly, unless they have given notice of their intention not to do so. *Cf. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY*, Disciplinary Rule [hereinafter, the *Model Code, DR*] 7-106(C)(5) (providing that in a judicial proceeding a lawyer may not “[f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply”). (It should be noted that the *Model Code* was withdrawn in 1983 and is no longer official ABA policy.) In some jurisdictions, the local practice is to confirm the parties’ mutual agreement not to disclose any part of settlement discussions through a mutual oral undertaking that the discussion is “off the record and without prejudice.” Such agreements should be honored. In other jurisdictions, many lawyers may believe that this agreement is implied even if it is not expressly discussed. Lawyers are encouraged to consult several local peers in attempting to discern relevant custom and practice in this area.

## **2.5 Required Disclosure to Court of Information Relating to Settlement Negotiations**

When seeking court approval of a settlement agreement or describing in court matters relating to settlement, a lawyer shall not knowingly make a false statement of fact or law to the court, fail to correct a false statement of material fact or law previously made to the court by the lawyer, or fail to make disclosure to the court, if

necessary as a remedial measure, when the lawyer knows criminal or fraudulent conduct related to the proceeding is implicated. Failure to make such disclosure is not excused by the lawyer's ethical duty otherwise to preserve the client's confidences.

**Committee Notes:** *Model Rule 3.3* requires candor toward a tribunal. A lawyer "must not allow the tribunal to be misled by false statements of law or fact . . . that the lawyer knows to be false." *Model Rule 3.3*, comment 2. The duty not to engage in affirmative misrepresentations or material omissions when seeking court approval of a settlement agreement in accordance with *Model Rules 3.3(a)(1)* and (3) continues to the conclusion of the proceeding. This duty applies even if compliance requires disclosure of information otherwise protected by the lawyer's ethical commitment of confidentiality under *Model Rule 1.6*. Further, substantive law may invalidate a settlement agreement where a lawyer's affirmative misrepresentation or material omission prevents the court from making an informed decision about whether to approve a settlement agreement. See, e.g., *Spaulding v. Zimmerman*, 116 N. W. 2d 704 (Minn. 1962).

Because settlement agreements, by definition, are voluntary undertakings, a lawyer should first consult with the client before disclosing ethically protected confidential information to the court. See generally, *infra*, Section 3. The attorney also should allow the client to decide whether to seek judicial approval of the agreement with the required disclosures, or to abandon or seek to modify the settlement agreement accordingly. See *Model Rule 1.4(b)*: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," and *Model Rule 1.2(a)*: "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." If a mutually agreeable and proper course of action does not result from the consultation, the lawyer must withdraw from representing the client in accordance with *Model Rule 1.16*, for the lawyer may not pursue a course of action that would, on the one hand,

violate the duties required of counsel by *Model Rule 3.3*, or, on the other hand, defy the client's directives or wishes.

## **Section 3 Issues Relating To Lawyers and Their Clients**

### **3.1 The Client's Ultimate Authority Over Settlement Negotiations**

#### **3.1.1 Prompt Discussion of Possibility of Settlement**

A lawyer should consider and should discuss with the client, promptly after retention in a dispute, and thereafter, possible alternatives to conventional litigation, including settlement.

**Committee Notes:** The *Model Rules* do not specifically identify a responsibility to raise the possibility of settlement, but that responsibility arises from several provisions of the *Rules*, including the requirement that “[a] lawyer shall 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 obligation to provide “competent representation” (*Model Rule 1.1*), and the obligation to “consult with the client as to the means by which [the objectives of the representation] are to be pursued” (*Model Rules 1.2(a)* and *1.4(a)(2)*).

Without assistance from lawyers, clients often are not aware of potential alternative methods of dispute resolution, and may not understand how settlement discussions can or should begin in the context of a dispute in which parties are asserting strongly adversarial positions. Early discussion of the option of pursuing settlement may help

the client to develop reasonable expectations and to make better informed decisions about the course of the dispute. These early discussions also may reduce the risk of clients second-guessing their attorneys' strategies if they ultimately settle after paying substantial legal fees.

A lawyer's desire to convince the client of the lawyer's support for the client's position ordinarily will not justify significantly postponing an effort to discuss the possibility of settlement. See, e.g., *Model Rule 2.1*, comment 1 (While "a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits . . . a lawyer should not be deterred from giving advice by the prospect that the advice will be unpalatable to the client").

### 3.1.2 Client's Authority Over Initiation of Settlement Discussions

The decision whether to pursue settlement discussions belongs to the client. A lawyer should not initiate settlement discussions without authorization from the client.

**Committee Notes:** The client's rights with respect to a representation include the right to have the lawyer "reasonably consult with the client about the means by which the client's objectives are to be accomplished." *Model Rule 1.4(a)(2)*. Although the decision to initiate settlement discussions does not reflect a binding commitment of any kind, the initiation of such discussions can effect a significant alteration in the dynamic of a dispute. Clients therefore may want to discuss and approve in advance the initiation of settlement discussions. Accordingly, lawyers should obtain their clients' consent before the initiation of settlement discussions.

One important commentary, *The Restatement (Third) of the Law*

*Governing Lawyers* [hereafter, the *Restatement*], has asserted (§ 22, comment c) that “normally a lawyer has authority to initiate or engage in settlement discussions, although not to conclude them. . . .” While clients may “normally” grant this authorization, better practice is to obtain the client’s express consent prior to initiation of settlement negotiations. The circumstances of a representation rarely present situations in which there is a need for the lawyer, acting in the client’s interests, to initiate such discussions without prior consultation with the client. Similarly, when opposing counsel first raises the possibility of settlement, better practice is to offer no immediate response (other than inquiries into what the counsel may have in mind) until the lawyer consults the client, unless the client has already authorized such discussions or given pertinent directions.

Sometimes a court may direct the parties to conduct settlement negotiations. In that event, if a lawyer has no prior instructions from the client, the lawyer is obligated to discuss with the client the significance of the court’s directive and the possible scope of negotiations with the opposing parties. The lawyer is not obligated to press the client to settle.

### 3.1.3 Consultation Respecting Means of Negotiating Settlement

A lawyer must reasonably consult with the client respecting the means of negotiation of settlement, including whether and how to present or request specific terms. The lawyer should pursue settlement discussions with a measure of diligence corresponding with the client’s goals. The degree of independence with which the lawyer pursues the negotiation process should reflect the client’s wishes, as expressed after the lawyer’s discussion with the client.

**Committee Notes:** *Model Rule* 1.2(a) provides that “[a] lawyer shall abide by a client’s decision concerning the objectives of

representation, . . . and, as required by *Model Rule* 1.4, shall consult with the client as to the means by which they are to be pursued.” The Commentary to that *Rule* provides further guidance on the sometimes complex relationship between the roles of the client and the lawyer with respect to the means by which a representation is pursued:

With respect to the means by which the client’s objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

\* \* \*

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See *Model Rule* 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See *Rule* 1.16(a)(3).

In the context of settlement discussions, clients may differ widely with respect to the scope of the independent authority they want the lawyer to exercise in negotiating a resolution. While the lawyer must always retain the freedom to refuse to take any step that would amount to a violation of the lawyer's ethical obligations, and while the lawyer's role as negotiator may sometimes inescapably place the lawyer in situations where positions must be asserted without an interruption to consult with the client, the client should nevertheless have a full opportunity to decide what scope of authority to give the lawyer, and the lawyer should operate exclusively within the scope of the authority the client has provided.

The client must be given full opportunity to assign priorities to various components of a possible settlement package. Unless the client has authorized otherwise, the lawyer should seek to discuss with the client, before extending a settlement offer, such matters as prioritization between monetary and non-monetary objectives, whether to offer particular terms, and timing. "The client, not the lawyer, determines the goals to be pursued, subject to the lawyer's duty not to do or assist an unlawful act. . . ." *Restatement* § 16, comment c.

Settlement negotiations, like all other components of a representation, implicate the rule that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." *Model Rule* 1.3. See also *Restatement* § 16, comment d ("The lawyer must use those capacities diligently, not letting the matter languish but proceeding to perform the services called for by the client's objectives, including appropriate factual research, legal analysis, and exercise of professional judgment").

Timing, and the level of diligence with which negotiations are pursued, can have a substantial impact on the outcome of settlement negotiations, and on the cost of litigating the dispute before the settlement is reached. The lawyer should pursue settlement negotiations

diligently if and to the extent diligence is consistent with the client's strategic directives and ultimate goals.

### 3.1.4 Keeping Client Informed About Settlement Negotiations

A lawyer must keep the client informed about settlement discussions, and must promptly and fairly report settlement offers, except when the client has directed otherwise.

**Committee Notes:** The duty to keep the client informed respecting settlement discussions is an inherent component of the responsibility to let clients make ultimate determinations respecting the objectives of the representation. “A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required . . . [and shall] keep the client reasonably informed about the status of the matter.” *Model Rules* 1.4(a)(1) and (3). *Accord, Restatement* § 20(1). *See also Restatement* § 20(3) (“A lawyer must notify a client of a decision to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”); *Garris v. Severson, Merson, Berke & Melchior*, 252 Cal. Rptr. 204 (Cal. App. 2 Dist. 1988) (lawyer must inform client respecting facts bearing on advisability of settling)

A lawyer should communicate with the client in a timely manner and should promptly comply with a client’s reasonable requests for information. *Model Rule* 1.4(a)(4). “Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, 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. . . .” *Model Rule* 1.4, comment 5. “The

lawyer ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation.” *Restatement* § 20, comment e.

“[A] lawyer who receives from opposing counsel an offer of settlement . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.” *Model Rule* 1.4, comment 2. As explained in *Model Rule* 1.4, comment 5, “The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of [the] representation.” *See also Restatement* § 122, comment c(1) (“A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the [client’s] consent is invalid.”).

## **3.2 The Client’s Authority Over the Ultimate Settlement Decision**

### **3.2.1 Acting Within the Scope of Delegated Authority**

A lawyer can exercise broad general authority from a client to pursue a settlement if the client grants such authority, but a lawyer must not enter into a final settlement agreement unless either (a) all of the agreement’s terms unquestionably fall within the scope of that authority, or (b) the client specifically consents to the agreement.

**Committee Notes:** The client’s entitlement to control over the objectives of the representation necessarily includes control over the ultimate decision whether to settle a matter. *See Model Rule 1.2(a)*. While a lawyer may properly seek substantial independence or broad authority from the client over settlement strategy and even settlement terms, and may properly exercise such authority if the client provides it, relevant rules “forbid 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 § 22*, comment c. The lawyer puts both the lawyer and client at risk when entering into a settlement agreement without the client’s consent, because such a settlement agreement may be binding on the client if the lawyer had apparent authority to enter the settlement as the client’s agent. *Restatement § 27d*.

Irrespective of the breadth of the settlement authorization the client has apparently provided and irrespective of the lawyer’s ability to take such action on behalf of the client as may be impliedly authorized, *Model Rule 1.2(a)*, best practices dictate that the lawyer communicate to the client the full terms of a proposed final settlement agreement and obtain the client’s specific consent to the settlement before agreeing to it on the client’s behalf. This precaution is warranted by the potentially binding nature of the lawyer’s actions combined with the possibility that the client or lawyer may be confused about, may not have precisely defined, or may not fully understand the precise breadth of the authority the client has conveyed and the lawyer has obtained.

### 3.2.2 Revocability of Authorization to Settle

A lawyer should advise a client who has authorized the lawyer to pursue settlement that the client can revoke authorization to settle a claim at any time prior to acceptance of the settlement. If the

client does revoke authorization, the lawyer must abide by the client's decision.

**Committee Notes:** A client “may authorize a lawyer to negotiate a settlement that is subject to the client’s approval or to settle a matter on terms indicated by the client. . . . [A] client [may] confer settlement authority on a lawyer, provided that the authorization is revocable before a settlement is reached.” *Restatement* § 22, comment c. See, also, *Model Rule* 1.2, comment 3. Clients may not always fully appreciate their power to revoke authorization or to alter the limits of the lawyer’s authority after having initially provided authorization to settle. Better practice is to advise the client of the client’s right to revoke authorization at the time the lawyer seeks the client’s authorization to settle, and as may be appropriate in later discussions regarding settlement.

Lawyers who have received authorization to negotiate a settlement and enter a final agreement on behalf of their client should consult the law of the relevant jurisdiction to determine whether the client’s delegation of such ultimate settlement authority must be in writing or is subject to any other formal preconditions to its validity.

### 3.2.3 Avoiding Limitations on Client’s Ultimate Settlement Authority

A lawyer should not seek the client’s consent to, or enter into, a retainer or other agreement that purports to (a) grant the lawyer irrevocable authorization to settle; (b) authorize the lawyer to withdraw if the client refuses the lawyer’s recommendation to settle; (c) require the lawyer’s assent before the client can settle; or (d) otherwise attempt to relieve the lawyer of ethical obligations respecting settlement. A lawyer may apprise the client in a retainer or other agreement of the scope of the lawyer’s right to withdraw or take other steps based on the client’s approach to settlement under

the applicable ethics rules and law, but any such disclosure should be accurate and complete.

**Committee Notes:** Conditioning agreement to representation on a waiver of the client’s right to approve a future settlement, or on the client’s agreement not to settle without the lawyer’s approval, would fundamentally and impermissibly alter the lawyer-client relationship and deprive the client of ultimate control of the litigation. A lawyer’s insistence on such a provision would seem calculated to place the lawyer’s interests ahead of the client’s interests, and is potentially coercive. See, e.g., *Model Rule* 1.5, comment 5 (“An agreement may not be made whose terms might induce the lawyer . . . to perform services . . . in a way contrary to the client’s interest”); *Restatement* § 22, comment c (“A contract that the lawyer as well as the client must approve any settlement is . . . invalid.”).

As described more fully in Sections 3.3.2, 3.3.3 and 4.1.3., *infra*, applicable ethical rules contain a number of provisions that an attorney might be able to invoke, in appropriate circumstances, to justify withdrawing from a representation based on the client’s approach to settlement, even if such a withdrawal might cause prejudice to the client. These include that the client “insists on pursuing an objective that the lawyer considers repugnant or imprudent,” or that continued representation “will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.” See *Model Rule* 1.16. Disclosing these potential bases for withdrawal in a retainer agreement would not violate any ethical rules, but the disclosure would have to be scrupulously accurate and complete under applicable law and rules to avoid the risk of misleading or manipulating the client.

The obligation of accuracy and completeness would presumptively include informing the client about any requirement of court approval that might impede the attorney’s freedom to withdraw. It would also involve recognizing that the entitlement to withdraw on any of these grounds is

dependent on the particular circumstances at the time when the decision might be made. Any categorical provision in a retainer agreement that the lawyer is entitled to withdraw if the client rejects the lawyer's settlement recommendation would be inaccurate in its implication that such a client rejection would ethically and legally justify the lawyer's withdrawal in all circumstances. ABA Informal Op. C-455 (1961) (under predecessor Canon 44 a client's refusal to settle did not constitute "good cause" for withdrawal); Conn. Eth. Op. 99-16 (provision in contingency fee agreement providing that lawyer is entitled to an hourly fee if client refuses to settle and defendant prevails is unethical); Conn. Eth. Op. 95-24 (provision in fee agreement which gives attorney the absolute right to withdraw if the client refuses to accept a settlement proposal the attorney thinks should be accepted violates the Rules of Professional Conduct because it diminishes the client's right to decide whether to settle and on what basis); Mich. Eth. Op. C-233 (1984) (under Code, unethical for staff attorney of a group legal services plan to require client to sign an "authorization to settle" form with an amount indicated and withdraw from representation if the client refuses to settle for that amount); N.Y. Eth. Op. 719 (1999) (improper under various Code provisions for lawyer to use retainer agreement which misleads client regarding the circumstances under which lawyer may withdraw).

#### 3.2.4 Assisting Client Without Impairing Client's Decisionmaking Authority

A lawyer should provide a client with a professional assessment of the advantages and disadvantages of a proposed settlement, so that the client can make a fully-informed decision about settlement. Any effort to assist the client in reaching a decision should avoid interference with the client's ultimate decisionmaking authority.

**Committee Notes:** The lawyer's role in connection with settlement

negotiations is one of advisor to and agent of the client. The lawyer should adhere to that relationship even when the lawyer's judgment or experience leads the lawyer to believe that the lawyer more fully appreciates the wisdom of a proposed course of action than the client does. While a lawyer can and often should vigorously advise the client of the lawyer's views respecting proposed settlement strategies and terms, that advice should not override or intrude into the client's ultimate decisionmaking authority.

Lawyers should be particularly sensitive to the risk that the client's practical dependency on the lawyer may give the lawyer immense power to influence or overcome the client's will respecting a proposed settlement. A lawyer also should not threaten to take actions that may harm the client's interests to induce the client's assent to the lawyer's position respecting a proposed settlement. Efforts to persuade should be pursued with attention to ensuring that ultimate decisionmaking power remains with the client.

### **3.3 Preserving the Integrity of the Settlement Process; Restrictions on Client Settlement Authority**

#### **3.3.1 Adherence to Ethical and Legal Rules**

A lawyer must comply with the rules of professional conduct and the applicable law during the course of settlement negotiations and in concluding a settlement, and must not knowingly assist or counsel the client to violate the law or the client's fiduciary or other legal duties owed to others.

***Committee Notes:*** A lawyer should not take any action in

negotiating and entering a settlement, or knowingly assist or counsel any client to take any action, that exposes the client to civil or criminal liability or that exposes the lawyer to civil or criminal liability, procedural sanctions, or discipline for violation of professional rules. See *Model Rule* 1.2(d) (unethical for lawyer to counsel or assist client in conduct lawyer knows is criminal or fraudulent). For example, as discussed more fully in Section 4.1.1, *infra*, a lawyer may not make a false statement of material fact or law to an adverse party or a tribunal. *Model Rules* 3.3(a)(1), 4.1; *Restatement* § 120. A lawyer also may not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client (*Model Rule* 3.3(a)(2)), and may not fail to disclose a material fact to a third party in such circumstances unless disclosure would violate the lawyer's confidentiality obligation. *Model Rules* 4.1(b), 1.6; see also, *infra*, Section 4.1.2.

With respect to the option or obligation to disclose confidential information about future improper expected actions by the client, the lawyer should check state and local rules carefully. Rules vary widely: from permitting the lawyer to reveal information that the lawyer believes necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm," *Model Rule* 1.6(b)(1)(prior to 2002 amendment), to permitting revelation of "the intention of a client to commit a crime and the information necessary to commit the crime," *Model Code* DR 4-101(C)(3), to permitting revelation of any information the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm without regard to criminality (*Model Rule* 1.6(b)(1) as amended in 2002), to requiring rather than merely permitting revelations in some of these circumstances. See generally Stephen Gillers and Roy Simon, *Regulation of Lawyers: Statutes and Standards*, Annotations to *Model Rule* 1.6 and Selected State Variations (Little, Brown & Co. 2002 Ed.)

The lawyer's obligation of allegiance to the client will not justify the

lawyer in breaching, or knowingly assisting the client in breaching, duties owed by the lawyer or the client to third parties in connection with settlement. Such duties may arise, for example, because of the lawyer's representation of multiple clients concerning a single matter, *see, infra* Section 3.5, or because the client intends that identified non-clients benefit from the lawyer's services. To the extent that the client holds a fiduciary or other duty to others in connection with the matter in dispute – for example, as a trustee or class representative – a lawyer also may not knowingly assist the client to breach that duty to those other persons. *See Model Rule 1.2, comment 8.*

### 3.3.2 Client Directions Contrary to Ethical or Legal Rules

If a client directs the lawyer to act, in the context of settlement negotiations or in concluding a settlement, in a manner the lawyer reasonably believes is contrary to the attorney's ethical obligations or applicable law, the lawyer should counsel the client to pursue a different and lawful course of conduct. If a mutually agreeable and proper course of action does not arise from the consultation, the lawyer should determine whether withdrawal from representing the client is mandatory or discretionary, and should consider whether the circumstances activate ethical obligations in addition to withdrawal, such as disclosure obligations to a tribunal or to higher decisionmaking authorities in an organization.

**Committee Notes:** A lawyer must withdraw from a representation rather than engage in conduct relating to settlement that will result in the lawyer's "violation of the rules of professional conduct or other law," *Model Rule 1.16(a)(1)*, and may withdraw, even if there is a material adverse effect on the client's interests, if the client "persists in a course of action involving the lawyer's services" during the settlement process that "the lawyer reasonably believes is criminal or fraudulent." *Model Rule*

1.16(b)(2). The lawyer should first consult with the client before refusing to carry out the client's instructions to act in a way that could lead to withdrawal or other steps. Such consultation should give the client the opportunity to abandon the course of action, persuade the lawyer the course is legal, or retain a different lawyer. *Restatement* § 23, comment c, *Cf. Model Rule* 3.3, comment 6 (If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.); *Model Code* DR 7-102(B)(1) (A lawyer who receives information "clearly establishing that the client has . . . perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same"). Any lawyer who withdraws based on the client's refusal to act lawfully must take reasonable steps to protect the client's interests and minimize unnecessary harm as a result of the withdrawal. *Model Rule* 1.16(d); *Restatement* § 32, comment a; *Restatement* § 33(b).

### 3.3.3 Disagreement With or Repugnant Client Strategies

If a lawyer finds a client's proposed strategy or goal regarding settlement to be repugnant, but not contrary to applicable law or rules, or if the lawyer has a fundamental disagreement with the client's strategy or goal, the lawyer may continue the representation on the condition that the lawyer will not be required to perform acts in furtherance of the repugnant strategy or goal, or may withdraw from the representation.

**Committee Notes:** *Model Rule* 1.16(b). A lawyer who has a fundamental disagreement with or considers the client's settlement strategy or goals repugnant or misguided but not illegal may withdraw from the representation or may continue the representation on the

condition that the lawyer will not be required to perform the repugnant acts. The lawyer, however, may not merely decide in secret without disclosure to the client, that the lawyer will not engage in the activities that the lawyer considers offensive. The client is entitled to choose whether to continue retaining the lawyer in connection with the settlement if the lawyer is unwilling to engage in desired activities. The client should not be deprived of that choice because the lawyer has concealed the lawyer's unwillingness. See, e.g., *Restatement* § 32, comment j.

### **3.4 Clients With Diminished Capacity or Special Needs**

A lawyer's general obligations when representing a client with diminished capacity or special needs – the obligations to maintain to the extent possible a normal client-lawyer relationship, and to protect the client when a normal relationship is impossible – apply equally to decisions respecting whether, how and on what terms to settle a dispute. If the client lacks the requisite capacity to make an adequately considered decision, but a guardian or other individual is legally authorized to make decisions in the representation on the client's behalf, the lawyer should abide by the guardian's lawful decisions concerning settlement. If the client lacks the requisite capacity and no one else is legally authorized to make decisions respecting settlement on the client's behalf, a lawyer should take measures to protect the client's interests which may include seeking appointment of a guardian, guardian *ad litem*, or other court-approved representative.

**Committee Notes:** When representing a client with diminished capacity or special needs, “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” *Model Rule* 1.14; *Restatement* § 24(1); *In re M.R.*, 638 A.2d 1274 (N.J.

1994). This includes keeping the client reasonably informed and explaining matters to the extent necessary to permit the client to make informed decisions. *Model Rule 1.4*. It also includes abiding by the client's decisions about whether and on what terms to settle the case, if the client can adequately act in his or her own interests by making an adequately considered decision. *Model Rule 1.14(a)* and (b).

Clients generally should be presumed to be capable of making decisions and participating in the lawyer-client relationship. When a serious question arises as to whether the client has the capacity to direct the settlement process, the lawyer should seek to ascertain as reliably as is practicable the scope and limits of the client's capacity, taking into account that settlement of a dispute may permanently affect the client's rights and interests. In forming conclusions about the client's capacity, "the lawyer must take account not only of information and impressions derived from the lawyer's [communications with the client], but also of other relevant information that may reasonably be obtained, and the lawyer may in appropriate cases seek guidance from other professionals and concerned parties." N.Y. City Eth. Op. 1997-2.

When a client lacks the capacity to make settlement decisions, a lawyer should abide by the decision of a guardian or other legal representative who is acting within the scope of his or her authority to direct the representation. The lawyer may not make the decision whether to settle on his or her own, unless legally authorized to do so. Ordinarily, absent a court order authorizing the lawyer to make decisions on behalf of the client in the litigation, the lawyer is not so empowered. See Conn. Informal Op. 97-19; Charles W. Wolfram, *Modern Legal Ethics* 161 (2d ed. 1986) (the lawyer representing an incompetent client is still "only a lawyer and not a full legal representative" of the client).

If a lawyer concludes that a client cannot adequately act in the client's own interest in making decisions, and no guardian or other legal representative has been appointed for the client, the lawyer should seek

the client's authorization to obtain mental health assistance or appointment of a legal representative. If the client refuses to authorize such steps, the lawyer should evaluate whether pursuing the appointment of a guardian over the client's objections appears in the best interests of the client. In the settlement context, the determination of whether seeking a guardian is in the best interests of the client should include consideration of whether the attorney believes pursuit of settlement opportunities is in the client's best interests, whether the settlement will be better served by involvement of a guardian, whether the process and result will be aided by the active involvement of an independent person without personal interest in the settlement (such as a family member, mental health professional, other independent counselor or the court), how incapacitated the client is, the probable costs of obtaining a guardian in comparison to the amounts in controversy in the dispute, and whether the trauma that the client may suffer from appointment of a guardian makes the appointment seem unwarranted or seems simply to be an inescapable consequence of actions believed to be in the client's best interests. *Model Rule 1.14 (b)* and comments 3, 5 and 7.

The lawyer should seek to take the action that is the least restrictive under the circumstances and be mindful that appointment of a guardian can constitute a serious deprivation of the client's rights and ought not to be undertaken if other less drastic solutions are available. ABA Formal Op. 96-404 (1996). Limited disclosure of the client's condition may also be authorized when the protective action does not extend as far as the initiation of guardianship proceedings. ABA Informal Op. 89-1530 (1989). Under relevant law or ethics rules, a lawyer may have broad discretion in making these decisions. See *Model Rule 1.14*, comment 7 ("Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer.").

### 3.5 Multiple Clients Represented by the Same Counsel

A lawyer who represents two or more clients shall not counsel the clients about the possibility of settlement or negotiate a settlement on their behalf if the representation of one client may be materially limited by the lawyer's responsibilities to another client, unless the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law and does not involve assertion of a claim by one client against another, and each client gives informed consent in writing.

**Committee Notes:** A lawyer ordinarily will not reach the point of representing multiple clients in settlement discussions without having concluded at the outset of the representation that the lawyer could represent each client in the dispute because their interests were generally aligned. *See generally Model Rule 1.7, comment 28.* If contentious litigation or negotiations between the clients are imminent or contemplated, the lawyer cannot undertake representation of both clients. *Model Rule 1.7, comment 29.* Even when the lawyer's initial conclusion that multiple clients can be represented was well-founded, however, consideration later of possible settlement options can generate circumstances where interests emerge as potentially divergent, if not actually conflicting. Conflicts can arise from differences among clients in the strength of their positions or the level of their interest in settlement, or from proposals to treat clients in different ways or to treat differently positioned clients in the same way.

A lawyer must ensure that differences among clients' positions are considered in the settlement negotiations. A lawyer may continue the representation of multiple clients in settlement negotiations only if the lawyer reasonably believes that the lawyer will be able to resolve the matter on terms compatible with each client's interests. A lawyer's conclusion to that effect will be sustainable, even if the settlement of one

client's claim may materially affect the interests of another client, if the lawyer reasonably concludes that the negotiation of such settlement creates no material limitation on the nature, quality or zealousness of the lawyer's representation of any individual client, and if all clients give consent after full disclosure of all material information. *Model Rule 1.7(b)*. This joint representation sometimes properly occurs, for example, when a lawyer represents similarly situated family members against a mutual adversary, or a corporate entity and one or more of its executives in a dispute in which the interests of both are entirely congruent.

Because many dynamics of settlement negotiation will create situations where the interests of multiple clients are sufficiently different to create a conflict, a lawyer representing several clients will often have to assess whether the conflict is waivable. The most common example of an unwaivable conflict is where the settlement of one client's claim is conditioned upon the client's taking a position against another client's interests. In this circumstance, the attorney cannot represent both clients in the settlement. Thus, if there is a reasonable possibility of reaching a proposed settlement which includes terms that would be beneficial or otherwise acceptable to one client but adverse or otherwise unacceptable to another, the lawyer ordinarily should withdraw from representation of one or both of the clients. If, however, the client potentially favored by the settlement makes an informed decision after full disclosure directing the lawyer not to pursue the settlement terms at issue, or if the client affected by the potential adversity nevertheless concludes after full disclosure that the lawyer remains the best representative for the client's claims and consents to the settlement terms, the lawyer may proceed to conclude the settlement on behalf of the multiple clients. The lawyer, however, should advise the affected clients in these circumstances to seek independent advice from separate counsel before proceeding to conclude the settlement on behalf of the multiple clients.

Similarly, when a settlement would provide some benefit to all

clients but arguably benefit a particular client or group of clients more than others, the lawyer must evaluate the settlement in the context of the claims of each client separately and determine, taking into account the interests of each client, whether to treat the claims individually or in groups. The attorney may continue to represent multiple clients, and may settle multiple claims even on different terms and even based on generalized groupings, but only with full disclosure to all clients and meaningful consent from each client. The lawyer's provision of information in connection with such consent should include an explanation of the implications of the group settlement and a discussion of the possible advantages and disadvantages in settling the client's claim along with the claims of others. In most circumstances, even if the settlement fund is not so fixed that a payment by or to one client will necessarily affect the amount payable by or to another client, full disclosure is necessary to obtain multiple clients' consent. This disclosure should include an explanation of what the other clients are paying or being paid, so that each client (and any separate lawyer the client retains for advice on whether to consent to the continued multiple representation) can make an informed assessment of whether that client's treatment in comparison to others is fair.

If the settlement involving multiple clients is an aggregate or global settlement (defined as one where a lump sum is negotiated to settle a number of claims or one where a proffered settlement offer is contingent on another client's acceptance of another proffered settlement offer), then the provisions of *Model Rule 1.8(g)* apply. That rule provides: "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."

### 3.6 Class Actions

An attorney representing a class in settlement of a class action must not only satisfy applicable procedural and legal requirements associated with submission of any proposed class settlement for judicial approval, but also should insure during class settlement negotiations that any agreement providing different recoveries to different categories of class members is grounded upon materially distinct circumstances supporting such different recoveries, and is supported by the attorney's good faith belief that the settlement is fair to each group. An attorney should not represent class members whose interests have become adverse in connection with settlement of class actions.

**Committee Notes:** An attorney will often face situations in negotiating class action settlements where different groups within the class – sometimes identified in commonly represented subclasses, but often not – are offered different recoveries because not all class members' claims or asserted injuries are precisely identical. The nature of the class action warrants a slightly modified and less rigid application in these circumstances of some of the general rules associated with representation of multiple parties. These include the general rule that a lawyer cannot negotiate different recoveries when representing multiple clients without obtaining each client's consent after full disclosure, and the general rule that an attorney may not represent clients having differing interests without obtaining the consent of each after full disclosure (a rule that may particularly be implicated when the availability of a limited or fixed amount of settlement funds means that increasing the recovery for one group of class members might result in a decrease in the recovery to others). Also, representation of a class does not mean that unnamed members of the class are necessarily considered to be clients of the lawyer representing the class. *Model Rule 1.7*, comment 25.

Applicable legal rules mandate procedural protections in class action settlements that are reasonably designed to adapt these general rules to the special context of class action settlement. Those legal rules require such protections as reasonable notice to the class of any proposed settlement that could be binding on its members, provision of an opportunity to object to any proposed settlement, communication of the entitlement to opt out of a proposed settlement and proceed individually in many forms of class actions, and court approval. Notice of a proposed settlement will be adequate as a legal proxy for the ethical obligation to notify all represented clients even though notice virtually never actually reaches all class members – and in the case of published notice, may not even reach a majority of them. *See Federal Rule of Civil Procedure 23(c)(2); Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1973) (requiring only “best notice practicable under the circumstances”). Similarly, court approval after notice and an opportunity to object or withdraw becomes a legal proxy for the ethical obligation to obtain consent to the settlement from each represented person.

While these legal requirements provide important protections to individual class members, adherence to them does not relieve the attorney from all personal ethical responsibility for protecting the interests of individual class members. An attorney representing a class may negotiate different levels of recovery for different class members based on their different circumstances, but should not knowingly disadvantage members of one group within the class for the benefit of members of another group on bases unrelated to differences in their legal or factual positions, and should not present for court approval a proposed settlement providing different recoveries to different groups of class members absent a good faith, personal belief that the settlement is fair to each group. If a lawyer becomes concerned that a proposed settlement would advance the interests of one group within the class but not the interests of another group, the lawyer should raise with the court the potential need for separate representation for separate groups.

An attorney also should not continue to represent different groups of class members if the interests of members of one group become adverse to the interests of members of another. An attorney cannot represent and be an advocate for subclasses with opposing interests, and may not be able to represent class members supporting a settlement while also representing individuals who are objecting to it. The determination whether an attorney can represent a class in seeking approval of a settlement while also representing individual class members who have opted out will depend on the particular circumstances of the case, since opting out and pursuing individual claims may amount to adversity to the class members supporting settlement in some cases and may not reflect such adversity in others. See, e.g., *In re Prudential In. Co. of America Sales Practice Litig.*, Civ. No. 95-4704 (D.N.J.); *Duhaime v. John Hancock Mutual Life Ins. Co.*, No. 96-CV-10706-6AO (D. Mass.).

For a discussion of ethical issues associated with negotiating attorneys' fees as part of a class action settlement, see *infra* Section 4.2.2.

### **3.7 Clients With Insured Claims/Dealing with Insurers**

The ordinary principles governing an attorney's obligations in connection with settlements apply to clients covered by insurance. The insured may be the sole client even though the insurance contract obligates the insurer to pay the attorney's fees and to indemnify the insured. The insurer may or may not also be the client depending upon applicable law, the contract, and the facts of the particular case. If both the insured and the insurer are the lawyer's clients, the lawyer should be governed by the rules respecting representation of multiple clients.

**Committee Notes:** Insurance contracts provide for a broad range of possible arrangements by which one or the other of an insurer and insured select the counsel who will represent the insured and be paid by the insurer. See, e.g., *N.Y. State Urban Dev. Corp. v. VSL Corp.*, 738 F.2d 61 (2d Cir. 1984) (insurer may participate in selection of the insured's independent counsel); *San Diego Navy Federal Credit Union v. Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. 494 (Cal. App. 4 Dist. 1984) (consent to insurer's choice of counsel deemed withdrawn when insured retained independent counsel); *Nandorf, Inc. v. CNA Ins. Cos.*, 479 N.E.2d 988 (Ill. App.1 Dist. 1985) (insurer obliged to pay for separate counsel for insured). In all of these contexts, the insured is the client, and the lawyer's duty is to the insured without regard to the insurer's payment of legal fees or past relationship with the lawyer. See *Model Rule 1.8(f)* (lawyer cannot accept compensation from anyone other than the client unless the client gives informed consent and the compensation arrangement does not interfere with the lawyer's independence or the client-lawyer relationship); *Model Rule 5.4(c)* (lawyer "shall not permit a person who . . . pays the lawyer to render legal services to another to direct or regulate the lawyer's professional judgment"); *Model Rule 1.7*, comment 13 ("A lawyer may be paid from a source other than the client, . . . if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client.") ("when an insurer and its insured have conflicting interests on a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence"). This duty of loyalty extends to all aspects of a lawyer's duties relating to settlement.

In some jurisdictions, the law treats the attorney as representing both the insurance carrier and the insured. Such multiple representation is ethically permitted in appropriate circumstances. See, e.g., ABA Formal Op. 96-403 (1996), at 2, 3 (1996) ("Provided there is appropriate

disclosure, consultation and consent, any of these arrangements would be permissible. . .”), cf. Silver & Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255 (1995). See also *Model Rule 1.7(b)(2)*. The determination whether only the insured or both insured and insurer (as co-clients) have entered into a client-lawyer relationship with the designated lawyer must be made based on the facts of the particular case and applicable law. See *Restatement* §§ 14 and 134 (formulation of the attorney-client relationship and the status of insureds and insurers). When the lawyer is formally representing both insured and insurer, the lawyer’s obligations in the settlement context are governed by the rules respecting multiple client representation. See *Model Rule 1.7(b)(2)*.

In defending and settling a dispute in which the defendant has insurance coverage, the financial and other interests of the insurance carrier and those of the insured will often diverge. The insured’s economic interests may focus on the deductible rather than the full amount claimed (particularly if future premiums are not expected to be heavily experience-rated) and may often be supplanted by non-economic interests if it appears that the deductible will be lost and the insured’s funds consequently no longer seem at risk. By contrast, the insurer’s economic interests may correspond only with its own different range of coverage, and insurers typically have little or no interest in non-economic considerations. When such divergences arise in the context of the lawyer’s representation of both the insured and the insurer, the attorney is obliged to advance the interests of the insured, and to inform the insurer that the attorney is treating the insured’s interests as paramount. See ABA Formal Op. 96-403 (1996), at 5-6 (1996) (dispute between insurer and counsel over settlement may require lawyer’s withdrawal; thereafter former-client conflicts rule may preclude lawyer from assisting insurer in reaching a settlement objected to by the insured).

Insured clients, acting under contractual obligations or otherwise, often authorize the lawyer to consult with or take direction from the

insurer concerning settlement. Some insurance contracts require the insured to delegate to the insurer the right to settle claims. *Cf. Rogers v. Robson, Masters, Ryan, Brummund & Belom*, 407 N.E.2d 47 (Ill. 1980). The lawyer's representation of the insured often may include consultation with the client about the client's obligations under the insurance contract and the ramifications of failing to comply with the requirements of that contract. Irrespective of the scope of delegation by the insured, however, the insured remains a client, and the lawyer may need to consult with and obtain authorization from the insured before finalizing settlement of a claim.

### 3.8 Organizational Clients

A lawyer representing a client that is an organization should generally obtain settlement authority, and take direction concerning settlement, from the representative authorized to act on the organization's behalf.

**Committee Notes:** "An organizational client is a legal entity, but it cannot act except through its officer, directors, employees, shareholders and other constituents." *Model Rule 1.13*, comment 1. *See generally Restatement § 96* addressing representation of an organization. Thus, the authorized representative of an organization charged with supervising a lawyer's settlement efforts for the organization may be an officer, director, an in-house lawyer or other employee, a shareholder, or a person having an analogous position in an organization other than a corporation. *Id.* Any such identified representative generally should be considered the spokesperson for the client for purposes of the lawyer's representation of the organization, unless the lawyer has reason to question whether the representative has authorization to perform that role. In the latter circumstances the lawyer should seek clarification of who will be making decisions for the organization.

Ordinarily, a lawyer has no obligation to seek, within the organization's hierarchy, review of an authorized representative's settlement directive merely because the attorney believes the directive reflects poor judgment or otherwise doubts the utility or prudence of the authorized representative's directive. "Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." *Model Rule 1.13*, comment 3.

Different considerations arise, however, when a lawyer knows that the authorized representative is acting, intends to act or refuses to act in a manner related to the representation in violation of a legal obligation to the organization, or that the organization may be substantially injured by action of the authorized representative that is in violation of law, in which case the lawyer must proceed "as is reasonably necessary in the best interest of the organization." See *Model Rule 1.13(b)*; *Model Rule 1.13*, comment 3.

## **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.").

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<sup>3</sup> Withdrawn in 1983 and no longer official ABA policy.

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