

Ethical Considerations in Settling Antitrust and Consumer Protection Disputes

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For those involved in contentious matters, particularly litigation, the prospect of a negotiated settlement generally offers welcome relief after the rigors of the adversary process. In working through the various aspects of the settlement process, however, attorneys do not always focus on ethical issues that may be present. There are various limitations imposed by the obligations of legal ethics and professional responsibility that can arise in the settlement process to trip up the unwary or uninformed.

Several recent ethics opinions have brought renewed attention to the ethical issues that can arise in the settlement process. This article reviews four such issues—communication of settlement offers, truthfulness in negotiations, conflicts of interest in settlements, and restrictions on an attorney's right to bring further claims—and discusses how the specific ethical considerations they raise need to be considered by attorneys seeking to resolve antitrust and consumer protection disputes.¹

Communication of Settlement Offers

Parties wishing to settle commercial disputes frequently become frustrated when they believe that their legitimate settlement proposals are not being communicated promptly (or at all) by opposing counsel to the ultimate client. Because of the ethical restriction on direct attorney contact with a party known to be represented by counsel in a matter, opposing counsel can operate as a roadblock in transmitting offers of settlement.

The starting point for analyzing options to address this problem is ABA Model Rule 4.2, which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The reasons for this prohibition are clear: the annotation to the rule explains that “[b]y restricting lawyers from communicating directly with persons who are represented by counsel, Rule 4.2 preserves the lawyer-client relationship, protects clients against overreaching by other lawyers, and reduces the likelihood that client will disclose confidential or damaging information.”

How can these unquestionably legitimate concerns be balanced with the equally important interests in resolving disputes and promoting settlement? One option available to the frustrated proponent of a settlement offer is to rely on the Comment to ABA Model Rule 1.4, which provides:

¹ This article for the most part relies on the current version of the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). Because these rules have not been uniformly adopted by individual U.S. jurisdictions, however, the specific rules in the applicable jurisdiction should be consulted by any attorney confronting particular settlement issues.

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A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be unacceptable or has authorized the lawyer to accept or reject the offer.

To the extent similar ethical rules exist in the applicable jurisdiction, a simple option is to point out to opposing counsel that any refusal to transmit a settlement offer to a client raises not just client relations issues but also potential ethical exposure for the attorneys.²

What about using clients or third parties to make a direct contact and transmit a settlement offer? Understandably frustrated clients often announce their intent to “by-pass” the attorneys and to communicate directly with their counterpart about settlement issues and terms. Relying on the fact that ABA Model Rule 4.2 does not include the phrase “or cause another to communicate,” ABA Formal Opinion 92-362 (1992) determined that the ABA Model Rules do not forbid a lawyer from advising the client about the client’s ability to communicate directly with the opposing party concerning the proposed settlement even though the lawyer could not make such contact. As a prominent ethics scholar has noted:

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Prohibiting such advice would unduly restrict the client’s autonomy, the client’s interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer. The lawyer . . . [how-ever] must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.³

Thus, in most cases, if a business client decides to communicate a settlement offer directly to his counterpart, such a communication will not create ethical liability for the lawyer, even if the lawyer knows of the client’s plan in advance. An obvious caution, however, is the requirement of ABA Model Rule 8.4, which clearly states that a lawyer shall not attempt to violate the rules of professional conduct through the acts of another or to accomplish indirectly what a lawyer cannot accomplish directly. This raises a number of practical questions: does a lawyer have any ethical obligation to attempt to dissuade his client from making such a direct contact? Should the lawyer notify opposing counsel that such a contact is going to be made? At what point does a description of a client’s legal rights “cross the line” and become a suggestion by the lawyer that the client should in fact reach out and make such an affirmative contact?

Another issue in communications with opposing parties is how to treat in-house counsel for purposes of Rule 4.2. A recent ABA Formal Opinion, 06-443 (2006), held that in-house counsel are not covered by the prohibitions against direct contacts contained in Rule 4.2. This opinion thus permits direct communications of settlement offers to opposing in-house counsel (even when represented by outside counsel) without violating ethics rules.

Opinion 06-443 concluded that the protections established by Rule 4.2 were not needed when the representative of the organization being contacted by opposing counsel is a lawyer employee who is acting as a lawyer for that organization. The opinion first recognized that “when communications are lawyer-to-lawyer, it is not likely that the inside counsel would inadvertently make harmful disclosures.”⁴ Moreover, “[t]o forbid an opposing lawyer from contacting inside counsel

² See Philadelphia Bar Ass’n Op. 94-25 (1994) (subordinate lawyer instructed by supervisory attorney not to inform client of settlement offer had ethical obligation to advise client).

³ THOMAS D. MORGAN, LAWYER LAW: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 637 (2005).

⁴ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-443 (2006).

is inimical to the way the legal system works through communications between counsel regarding matters in dispute. Unlike non-lawyer constituents, inside counsel ordinarily are available for contact by counsel for the opposing party.⁵ Thus, in the view of the ABA, an in-house counsel generally is “fair game” for direct contacts by opposing parties.⁶

Because Rule 4.2 also permits direct contacts “authorized by law,” direct communication of settlement offers would not raise ethical issues where there is legal authority for such contacts by, for example, permitting service of settlement offers on opposing parties.⁷ In such situations, a lawyer may ethically make such direct service, although an older ABA ethics opinion also suggests that in such cases a copy of the proposal should be concurrently served on the attorney for the adverse party.⁸

Obligation of Truthfulness in Settlement Negotiations

The “give and take” required in negotiating settlement agreements also may give rise to ethical issues relating to an attorney’s characterizations of his client’s settlement position or accurately describe his own scope of negotiating authority. Model Rule 4.1(a) prohibits a lawyer in the course of representing a client, from knowingly making “a false statement of material fact or law to a third person.” Some commentators suggest that, in complying with this mandate, lawyers in the settlement context must not make false or deceptive statements or accept unfair outcomes even when they benefit the lawyer’s own client.⁹ Others counter that some element of deception is inherent (and recognized) in the negotiation process, and the obligation of zealous client representation requires an attorney to take advantage of every opportunity within the bounds of the law to advance his client’s interest.¹⁰

The application of Rule 4.1 to the settlement context had been addressed in the Comment to that rule, which describes what constitutes “a statement of material fact” in negotiations:

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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Additional guidance was provided recently by ABA Formal Opinion 06-439 (2006), which concluded that “statements regarding a party’s negotiating goals or its willingness to compromise, as

⁵ *Id.*

⁶ The opinion, however, notes several instances in which direct contacts by opposing counsel to in-house counsel may still raise ethical issues. These include when opposing counsel has been told specifically not to contact in-house counsel (potential violation of Rule 4.4, oppressive and harassing behavior) or when the in-house counsel is a member of the organization’s “constituent” group or involved in the matter in a personal capacity and so should be viewed as a client, not a lawyer. The opinion also notes, “Inside counsel are free to avoid such contact by referring the opposing lawyer to other inside counsel or to outside counsel.” *See id.*

⁷ Statutes or procedural rules in a particular jurisdiction may permit a settlement offer to be served directly on an adverse party. *See* ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1348 (1975).

⁸ *See id.* Another possible option in litigation matters is to file a copy of the settlement offer with the court.

⁹ *See, e.g.,* Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 93-102 (1994).

¹⁰ *See, e.g.,* Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiations has gone too far).

well as statements that can fairly be characterized as negotiation ‘puffing,’ are ordinarily not considered ‘false statements of material fact’ within the meaning of the Model Rules.”

Thus, according to Opinion 06-439:

[A] lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's “bottom line” position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

In contrast, false statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have led to professional discipline in some circumstances.¹¹

Affirmative misrepresentations by a lawyer in negotiations remain a source of ethical liability and may also be a source of litigation sanctions.¹² In this regard, it also is important to consider the possible applicability of ABA Model Rule 8.4(c), which broadly prohibits attorney conduct “involving dishonesty, fraud, deceit or misrepresentation.” Opinion 06-439 expressly declined “to delineate the precise outer boundaries of Rule 8.4(c) in the context of truthfulness in negotiations.” It noted, however, that whatever the reach of Rule 8.4(c), it does not prohibit conduct that is permitted by Rule 4.1(a).

Settling Related Claims or Cases

ABA Model Rule 1.8(g) prohibits a lawyer from making an aggregate settlement of two or more clients' claims with a single opposing party without fully informing each client and obtaining consent in a writing signed by the client. This obligation poses potential issues for all lawyers involved in settlements of antitrust claims involving multiple parties.

The danger, of course, is that in such “package” settlements, a lawyer might be tempted to sacrifice the interests of one client in order to obtain an advantage for the other.¹³ Alternatively, a lawyer may be motivated to settle a group of claims and reap a substantial fee without incurring the trouble associated with diligent development of the individual clients' claims that might merit greater recovery.¹⁴

The disclosure required by Model Rule 1.8(a) is intended to ensure that each client is fully informed regarding the impact of the settlement on its individual interest. The following information must be provided to the clients for whom or to whom the settlement or agreement proposal is made:

¹¹ See, e.g., *In re Scanio*, 919 A.2d 1137 (D.C. 2007) (suspending lawyer for dishonest statements while representing himself in settlement negotiations with insurance company; lawyer falsely claimed lost income at billing rate when he was paid fixed salary by firm); *In re Warner*, 851 So. 2d 1029, 1037 (La. 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); *In re McGrath*, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983) (attorney disciplined for statement to opposing counsel that client's insurance coverage was limited to \$200,000, when documents established that client had \$1 million in coverage); *Kentucky Bar Ass'n v. Geisler*, 938 S.W.2d 578, 579–80 (Ky. 1997) (lawyer disciplined for failure to disclose death of client: “Standards of ethics require greater honesty, greater candor, and greater disclosure, even if it might not be in the interests of the client or his estate.”).

¹² See, e.g., *New York County Lawyers' Ass'n Comm. on Prof'l Ethics*, Op. 731 (Sept. 1, 2003).

¹³ See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 8.15 (1986).

¹⁴ See *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. Ct. App. 1997), *aff'd in part, rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999) (“Settling a case in mass without consent of the clients is unfair to the clients and may result in a benefit to the attorney (speedy resolutions and payment of fees) to the detriment of the clients (decreased recovery).”).

It is easy to imagine situations in which the class representatives may have settlement objectives that are not shared by the absent class members or in which the class representatives disagree on a particular settlement proposal.

- The total amount of the aggregate settlement or the result of the aggregated agreement.
- The existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement.
- The details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).
- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.
- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

In February 2006, the ABA issued Formal Opinion 06-438, which offers additional guidance on what a lawyer must do to obtain the informed consent of multiple clients evaluating aggregated settlement proposals. Among the specific issues identified and discussed by the opinion are sharing of confidential information provided by one client with other clients and how to deal with the risk that, if the offer or demand requires the consent of all commonly represented parties, the failure of one or more members of the group to consent may result in the withdrawal of the offer.

Settlements in Class Action Litigation

Class action lawsuits, which are common in both price-fixing and consumer protection litigation, by their very nature are prone to potential conflicts of interest, including conflicts in the settlement process. It is easy to imagine situations in which the class representatives may have settlement objectives that are not shared by the absent class members or in which the class representatives disagree on a particular settlement proposal.¹⁵ In some situations, these conflicts may be so significant that they prevent a single lawyer from representing the entire class with respect to settlement issues.¹⁶

Conflicts also may arise if the personal financial interests of the class lawyer become adverse to the interests of the class in the settlement process. This is most obvious with respect to the lawyer's interest in receiving the largest possible fee while the class members' interest is in minimizing that fee so as to maximize their own recovery.¹⁷ In antitrust and consumer protection matters, a variant of this issue sometimes exists when the settling class members are offered some-

¹⁵ See, e.g., Memorandum of Points and Authorities re Lead Plaintiffs Ryan Rodriguez, Loredana Nesci and Lisa Ginta, et al., filed in *Rodriguez v. West Publishing*, 05-cv-3222 (C.D. Cal. May 17, 2007) (three of seven named plaintiffs in antitrust action against bar exam preparation companies objected to settlement as too low); *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982) (named plaintiffs are not entitled to oppose settlement "primarily to gain leverage in settling their individual claims").

¹⁶ *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984) (although attorney withdrew from representing settlors, prejudice to former clients was too great to allow continued representation of other objecting class members); see also *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18-19 (2d Cir. 1986) ("whenever a rift arises in the class, with one branch favoring a settlement or course of action that another branch resists, the attorney who has represented the class should withdraw entirely and take no position"). But see *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999) (class counsel not disqualified where class representatives object to settlement); *Banyai v. Mazur*, No. 00-Civ-9806(SHS), 2004 U.S. Dist. LEXIS 17572 (S.D.N.Y. Sept. 1, 2004) (class counsel did not have a conflict of interest even though class representatives were objecting to the terms class counsel were seeking).

¹⁷ See David Brainerd Parish, Comment, *The Dilemma: Simultaneous Negotiation of Attorneys' Fees and Settlement in Class Actions*, 36 Hous. L. Rev. 531 (1999).

thing of nominal value (such as coupons for use in future purchases) and the lawyers for the class receive significant attorneys' fees.¹⁸ Another conflict may arise when the lawyer receives payments from the settling defendant that are not disclosed to the lawyer's client.¹⁹ Evaluating when these conflicts require retention of separate counsel is a very fact-intensive inquiry that must be undertaken on a case-by-case basis.

Seeking Agreement of Plaintiff's Counsel Not to Bring Similar Claims or File Similar Suits

Ethical rules in most jurisdictions as well as the ABA Model Rules prohibit an attorney from entering into agreements that restrict the attorney's right to practice law. According to ABA Model Rule 5.6(b), a "lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement." These provisions have been interpreted as forbidding attorneys from entering into settlements conditioned on the attorney's agreement not to represent similarly situated clients or to bring similar claims against the defendant in the future.²⁰

In light of this ethical prohibition, various alternatives have been attempted over the years to preclude the likelihood of a settling plaintiff's attorney from bringing new claims against a defendant before the ink is dry on the first settlement.²¹ Some older ethics opinions hold that settlement agreements that restrict the lawyer's right to reveal information about the terms of the settlement or the underlying case or that prohibit use of that information in other cases are permitted under the applicable ethics rules.²² However, in ABA Formal Opinion 00-417 (2000), the ABA concluded that a lawyer may not participate in or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party except in very limited circumstances. The ABA found that it is "generally accepted" that agreeing not to disclose certain information about a settlement such as dollar amounts or other settlement terms is appropriate as a means to protect client confidentiality. Opinion 00-417 also excluded from its application nondisclosure obligations resulting from compliance with protective orders. Similar conclusions have been reached by various state bar ethics opinions.²³

¹⁸ *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000) (discussing how certain fee arrangements could create conflicts of interest between counsel and members of the class).

¹⁹ *See, e.g., In re Hager*, 812 A.2d 904 (D.C. 2002) (lawyer suspended for one year and required to disgorge \$225,000 payment made to lawyer by opposing party and not disclosed to client).

²⁰ *See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-394* (1995) (prohibition on a lawyer's participating in offering or making an agreement in which a restriction on the lawyer's rights to practice is part of the settlement applies not only to controversies between private parties but also where the party is a government entity); *see also State Bar of Tex. Prof. Ethics Comm., Op. 505* (1994) (lawyer may not agree to refrain from soliciting third parties to bring claims against settling defendant; any restriction on ethical solicitation impermissibly restrains the practice of law).

²¹ *See generally* Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291 (2005).

²² *See, e.g., State Bar of N.M. Advisory Opins. Comm., Op. 1985-5* (1985) (proper for lawyer to agree not to reveal amount and terms of non-public settlement and to turn over file to opposing counsel if client consents).

²³ *See, e.g., D.C. Bar Legal Ethics Comm. Op. 335* (2006) (settlement agreement may not compel counsel to keep confidential and not disclose in promotional material or on law firm Web site public information about the case, such as name of opponent, allegations contained in public complaint, or fact that case settled); *NY State Bar Ass'n Op. 730* (2000) (lawyer may not agree to settlement term that prohibits disclosure of information that lawyer has no ethical duty to keep secret; such agreements restrict lawyer's right to practice and violate NY Code of Professional Responsibility DR2-108(B)).

Other ethics opinions have found that lawyers in a settlement agreement cannot ethically agree:

- Not to refer a potential client with a claim against the settling defendant to another lawyer;²⁴
- Not to reveal names of other franchisees that have contacted the lawyer regarding claims against the defendant franchisor;²⁵ or
- Not to subpoena records or fact witnesses or use particular expert witnesses in future litigation.²⁶

Another approach to avoid future claims by a settling attorney has been to employ the attorney as a consultant to advise on the subject matter of the lawsuit or retain the attorney to provide legal representation on unrelated matters, thus creating an attorney-client relationship that would preclude the attorney from any directly adverse representation while the attorney-client relationship exists. In cases in which the claimed attorney-client relationship is a sham (i.e., money is paid without any intent for actual legal services to be provided), such agreements also would likely be a violation of Rule 5.6(b).²⁷

These issues highlight just some of the ethical concerns that can arise in settling antitrust and consumer protection matters. Attorneys need to be sensitive to these concerns in order to avoid introducing unnecessary complications and delays to the settlement process. ●

²⁴ See D.C. Bar Legal Ethics Comm. Op. 35 (1977).

²⁵ See Ariz. Op. No. 90-6 (1990).

²⁶ See Colo. Bar Ethics Comm. Op. No. 92 (1993).

²⁷ See, e.g., Fla. Bar v. St. Louis, No. SC04-49, 2007 Fla. LEXIS 762 (Fla. 2007) (disbarring lawyer who received separate fee to refrain from litigation against settling defendant and to serve as counsel or consultant for company in future matters); Fla. Bar v. Rodriguez, No. SC03-909, 2007 Fla. LEXIS 761 (Fla. 2007) (suspending second lawyer in same case for two years and requiring disgorgement of settlement fees).