AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-370 **Februrary 5, 1993**
Judicial Participatatin in
Pretrial Settlement Negotiations

A lawyer should not, absent informed client consent, reveal to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. A judge participating in pretrial settlement discussions may inquire as to a lawyer's settlement authority or advice to the client concerning settlement terms, but should not require a lawyer to make such disclosures where the information is subject to Rule 1.6 and the lawyer does not have authority to disclose them.

With the increasing and salutary initiatives in the areas of alternative dispute resolution and pretrial settlement, a process sponsored and supported by the courts and the Bar, certain issues concerning the responsibilities of both attorneys and those conducting such proceedings have become apparent and should be addressed.

In this instance the Committee has been asked whether the Model Rules of Professional Conduct (1983, amended 1993), prohibit a lawyer from disclosing to a judge conducting pretrial settlement discussions the limits of settlement authority given by the client. Further, the Committee is asked whether a lawyer may properly be required to disclose to a judge in a settlement conference the lawyer's advice to the client regarding settlement.

The specific facts presented to the Committee are as follows: During pretrial settlement negotiations the judge meets separately with each counsel in chambers, all counsel having notice of the meeting. The judge, without prior notice, asks the lawyer to reveal the limits of settlement authority conferred on the lawyer by the client.[1] The judge also asks the lawyer to disclose the settlement terms the lawyer will recommend to the client.

As a preliminary matter, we note that in many states, and in the federal system, a judge has the discretion to mandate participation of counsel in a pretrial settlement conference. In addition, Model Rule 3.2 imposes on a lawyer the duty to seek expeditious resolution of a matter consistent with the interests of the client. Reasonable settlement is often better for the client than the fortuities of a trial. A lawyer should therefore cooperate to the fullest extent

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1. The phrase "limits of settlement authority" is understood to mean the minimum amount the plaintiff will accept or the maximum amount the defendant will offer.

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possible in a pretrial settlement conference.

A Lawyer's Authority and Advice Regarding Settlement are Confidential Matters

Protected by Model Rule 1.6

Model Rule 1.6.[2] prohibits the disclosure of information relating to the representation without the client's informed consent. Both the limits of settlement authority and the lawyer's advice to the client regarding settlement are clearly "information relating to the representation" within the meaning of Rule 1.6. Therefore, disclosure of this confidential information is prohibited in the absence of consent by the client after consultation,[3] unless the disclosure (1) falls within one of the exceptions specified by Rule 1.6(b), or (2) is "impliedly authorized to carry out the representation."

Neither of the Rule 1.6(b) exceptions applies to the information sought by the judge in the instances here under consideration. The requested disclosures also cannot ordinarily be considered as "impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 discusses the nature of the "impliedly authorized" exception, defining it as a "disclosure that facilitates a satisfactory conclusion."[4] The ethical propriety of the requested disclosures turns on whether these disclosures would facilitate a conclusion satisfactory to the client.

While a lawyer normally has implied authority to enter into routine stip-

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2. Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1)to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2)to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

3. The meaning of "consultation" is given in the Terminology Section of the Model Rules:

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

4. The Comment to Rule 1.6 states in relevant part:

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

ulations and to admit matters not in dispute, the settlement parameters sought by the judge are neither routine nor uncontested. The potential for adversely affecting the client's position, or leading to a disposition of the case that is not satisfactory to the client, will ordinarily be significantly increased by disclosure of the client's ultimate settlement position. Such information is confidential and its disclosure cannot be said to be impliedly authorized simply by reason of the lawyer's representation of the client. Although there will be occasions when a lawyer's authority to reveal a client's settlement position may be implied from the circumstances, no such implication arises simply because the inquiry is made by a judge. Such information should not be disclosed even to a judicial mediator without informed client consent. [5]

While a Judge, During Settlement Discussions, May Inquire as to a Lawyer's Settlement Authority or Advice to the Client Concerning Settlement Terms, a Judge Should Not Require a Lawyer to Make Such Disclosures Where the Information is Subject to Rule 1.6 and the Lawyer Does Not Have Authority to Disclose Them

We turn to the question of whether a judge is precluded from asking such questions of counsel, or from requiring counsel to answer them, by the Model Code of Judicial Conduct (1990) ("MCJC") or the predecessor Code of Judicial Conduct (1972) ("CJC"). While MCJC Canon 3B(7)(d) permits judges to participate in settlement conferences, [FN6] it does not override, nor permit an exception, either explicit or implicit, to the obligation of confidentiality imposed on a lawyer by Rule 1.6.

The predecessor Code of Judicial Conduct (1972) did not contain a counterpart to MCJC 3B(7)(d). Neither did it contain an express prohibition against a judge's participation in voluntary pretrial settlement conferences with the parties and their counsel. If, however, the judge participated in settlement discussions to such an extent that the judge became a witness to crucial fact issues, disqualification would be enforced under Canon 3C(1)(a). See, e.g., Collins v. Dixie Transportation, Inc., 543 So.2d 160 (Miss.1989).

In the pretrial settlement process, the judge's role is to "encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts." MCJC, from the Commentary to Canon 3B(8). It is not appropriate for the judge to compel

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5. The disclosure of settlement limits or recommendations by an attorney where settlement authority is contractually retained by an insurance carrier or other third party is not addressed in this opinion.

6. "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." MCJC Canon 3B(7)(d).

lawyers to make confidential admissions which may be against their clients' interests.[7]

In Kothe v. Smith, 771 F.2d 667 (2d Cir.1985), the court criticized a judge's "excessive zeal" in imposing sanctions on a party who did not settle a case prior to trial within the range recommended by the court, stating "Offers to settle a claim are not made in a vacuum.... [T]he process of settlement is a two-way street, and a defendant should not be expected to bid against himself." Kothe, at 669-670; see also Brooks v. Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir.1937) ("The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged.").

Thus we conclude a judge may not require a lawyer to disclose settlement limits authorized by the lawyer's client, nor the lawyer's advice to the client regarding settlement terms. This is not to suggest, however, that a judge may not, in seeking to facilitate a settlement, and in an appropriate manner, make inquiry of a lawyer as to those matters. For example, while attempting to settle a case a judge may well feel it appropriate and helpful to inquire of counsel the limits of his settlement authority or whether counsel will recommend to the client the terms of settlement the judge recommends. Such an inquiry, if exercised within limits, is proper. Those limitations are formed by the ethical constraints imposed upon lawyers by Rule 1.6 not to disclose information relating to the representation without prior client consent or other expressly-permitted excuse.

The judge should be sensitive to these ethical constraints on counsel and sensitive as well to the superior position of authority the judge enjoys with respect to the lawyer and the effect an inquiry from one in the judge's position may have upon lawyers who must appear before him, particularly those who appear before the judge frequently. Accordingly, a judge making such an inquiry should acknowledge the lawyer's ethical duties and assure the lawyer that the inquiry is not intended to pressure the lawyer to violate them. Properly phrased and sincerely expressed, such prefatory remarks will help strike the balance between the perceived need of the judge to inquire and the ethical duty of the lawyer to comply with relevant confidentiality rules.

If the lawyer, in response to the inquiry, expresses a reticence to disclose

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7. The Advisory Committee's Notes to the 1983 amendment to Fed.R.Civ.P. 16(c) state in relevant part:

> The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rules be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

such information on ethical grounds, the judge should not pursue the inquiry further.

The question may also arise whether a lawyer is justified in lying or misrepresenting in response to questions about the limits of settlement authority on the basis that the judge is behaving improperly and has no right to the information or a truthful answer. Model Rule 4.1 states: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." The Comment to Rule 4.1 states in relevant part:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. 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 in this category....

While as explained in the Comment, supra, a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Conclusion

Despite the benefits of pretrial settlement of litigated matters, the Committee is of the opinion that, absent informed client consent, a lawyer should not reveal to a judge, and a judge conducting pretrial settlement discussions should not require a lawyer to disclose, the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement.