

ETHICS IN ADR – A SAMPLING OF ISSUES

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INTRODUCTION

This paper addresses a number of ethics issues that can occur in a mediation or an arbitration context. It is not intended to be exhaustive. But it is intended to present simple questions that rarely have simple answers.

Each state except California has rules of professional conduct identical to or patterned after the Model Rules of Professional Conduct, which are the rules I primarily use below. In considering the discussion that follows, lawyers are always well advised to consult state rules of professional conduct for any variations from the Model Rules that might affect any part of the following analysis.

Lawyers serving as mediators or arbitrators are also advised to read state mediation rules of ethics or arbitration administering agency ethics rules to guide them.

TELLING THE TRUTH IN SETTLEMENT DISCUSSIONS

Do parties in settlement discussions or mediation tell the truth? This is not to suggest that any lawyer or the lawyer's client is being dishonest. Rather, I am referring to statements about "final offers" or "the limits of settlement authority." In mediation, frequently "final" does not mean "final" and "limits" are not necessarily fixed.

But, whether or not a mediator is involved, may a lawyer lie in settlement discussions?

Model Rule 4.1 is entitled, “Truthfulness In Statements To Others.” It provides:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

A “lie” may not “knowingly” be made. If a “lie” is not “knowingly” made, or if it is knowingly made but does not involve a “statement of material fact or law,” Model Rule 4.1 does not apply. Unfortunately, what is material itself may be difficult to discern. Prudent lawyers will verify accuracy before making any statements to avoid debate about whether a statement of law or fact is material.

Comment [1] to Model Rule 4.1 makes a distinction between being truthful and being forthcoming: “A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.” “Playing it close to the vest” on relevant facts may not achieve a successful settlement outcome, but this is not a concern of Model Rule 4.1.

Comment [1] also makes a distinction between dishonest conduct or making a misrepresentation when representing a client—covered by Model Rule 4.1—and dishonest conduct or making a misrepresentation when not representing a client—covered by Model Rule 8.4: “For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.” Model Rule

8.4(c) then provides that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation.”

There is no concept of “materiality” in Model Rule 8.4 as there is in Model Rule 4.1. Does that mean that an untruthful statement in a mediation could result in a violation of Model Rule 8.4 because it is conduct involving dishonesty or misrepresentation? Worse yet, would the mediator who is a lawyer and who learns of the untruthfulness be required to report another lawyer’s dishonestly or misrepresentation under Model Rule 8.3(a)? (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”)

Well, again, Model Rule 4.1 speaks to an untruthful statement “in the course of representing a client” and Model Rule 8.4(c) is broader and reaches conduct involving dishonesty or misrepresentation that typically would go beyond representation of a client.¹ Hence, the answer to the former question presumably is “no.”

¹ *But see Statewide Grievance Committee v. Gillis*, 2004 WL 423905 (Conn. Super. 2004). In this matter, the court dismissed a grievance complaint where the prospective plaintiff’s attorney stated during pre-suit settlement negotiations that the plaintiff, who had been involved in three motor vehicle accidents, could not “participate in any activity which requires the slightest bit of physical exertion” and did not directly disclose to the different insurance companies involved that the plaintiff’s injuries may have stemmed from three accidents, not one. Explaining that “clear and convincing evidence” was required to find a violation of Connecticut’s equivalent to Model Rule 8.4(c), the court held: “The Respondent is guilty of imprecision and exaggeration, traits that are not directly addressed by any of the Rules whose violation the petitioner alleges. Although he was less than totally candid about the full extent of his client’s prior accident history, our Rules do not require total candor, and he provided enough information about that history, through the reports submitted by Dr. Barone, to put the insurers on notice that they ought to inquire further. The insurers did not rely, nor could they have reasonably been expected to rely, on the information and representations provided by the Respondent in his correspondence to the adjusters. The Petitioner has not shown by clear and convincing evidence that the conduct of the Respondent amounted to fraud, deceit, misrepresentation or dishonesty, and the petition seeking that he be disciplined is therefore dismissed.” *Id.* at *13.

And even if the answer were “yes,” a mediator might not be able to disclose the lawyer’s conduct because of mediation confidentiality. Standard V, Model Standards of Conduct for Mediators (September 2005) (issued by the American Bar Association, American Arbitration Association, and Association for Conflict Resolution) (“Model Standards”)² (“A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.”)

State mediation rules, however, can be broader. Consider Rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators.³ It provides: “A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.” The phrase “where disclosure is required or permitted by law” is broader than the phrase “required by applicable law” in Standard V and that may put certified mediators in a different position in Florida.

This broader phrase was the focus of the Florida Dispute Resolution Center’s Mediator Ethics Advisory Committee (MEAC) Advisory Opinion 2011-003. This opinion did not involve untruthful statements but instead reporting a lawyer to the Florida Bar by a certified mediator because of very disruptive behavior, abusive conduct, threats, refusals to allow participants in a mediation to talk, constant interruptions of opposing counsel and the mediator, and demanding termination and an impasse “prior to permitting any effort to share information or mediate.” Section 44.405(4)(a)(6), Florida Statutes, provides that, notwithstanding the confidentiality of statements in mediation, there is no confidentiality attached to a mediation communication “offered to

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http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf.

³ http://www.flcourts.org/gen_public/adr/bin/RulesforMediators.pdf.

report, prove, or disprove professional misconduct during the mediation, solely for the internal use of the body conducting the investigation of the conduct.” In addition, Florida Mediation Rule 10.360(a) allows certified mediators to disclose mediation communications permitted by law. Hence, the Advisory Committee determined that the mediator “could choose whether to report the behavior to the appropriate body.” The Committee then gratuitously added that if the certified mediator is a member of the Florida Bar, the lawyer would be required to report the misconduct under Florida’s version of Model Rule 8.3. In making this observation, the Committee reminded lawyer/certified mediators in Florida that under Florida Mediation Rule 10.650, other ethical standards “to which a mediator may be professionally bound are not abrogated by these rules....”

But what if lawyers participating in the mediation or settlement discussions outside of mediation learn of the untruthfulness? Would they have to make an 8.3(a) report because of a 4.1 violation?

Mediation confidentiality likely controls the outcome where settlement discussions occur in a mediation context, *see* Fed. R. Evid. 408(a),⁴ but it is more likely that this question will be answered by focusing on the undefined phrase, “statement of fact.” Just what do these words mean in the context of settlement discussions irrespective of whether they are taking place within a mediation or outside of one?

⁴ Rule 408(a) provides: “(a) **Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.”

Comment [2] provides an insight into the scope of the phrase “statement of fact.” It provides in pertinent part:

This Rule refers to statements of fact. 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 ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

What is a “generally accepted convention in negotiation”? The source of such conventions is not identified in the Comment. Nor does the Comment state whether such conventions are static or dynamic. In any event, what we are told is that estimates of price or value or a party’s intentions as to an acceptable settlement are “ordinarily” in the category of allowable statements because they are not statements of “fact” or, at least, should not be regarded as a statement of fact by listeners.

Formal Opinion 06-439 (April 12, 2006) of the ABA Standing Committee on Ethics and Professional Responsibility gives these examples of “posturing” or “puffing” versus a false statement of material fact.

Example	Category
A plaintiff insists that it will not agree to resolve a dispute for less than \$200 when, in reality, it is willing to accept \$150 to put an end to the matter.	Puffing or posturing
A defendant manufacturer in patent infringement litigation repeatedly rejects the plaintiff’s demand that a license be part of any settlement agreement	Puffing or posturing

Example	Category
when, in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete.	
A prosecutor does not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.	Puffing or posturing ⁵
A lawyer representing an employer in labor negotiations tells union lawyers that adding a particular employee benefit will cost the company an additional \$100 per employee when the lawyer knows that it actually will cost only \$20 per employee.	False statement of material fact
A defendant declares that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible.	False statement of material fact
A prosecutor or a criminal defense lawyer tells the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.	False statement of material fact

⁵ Cf. *Williams v. Texaco Refining and Marketing Inc.*, 1995 WL 253124, *1 (4th Cir. 1995) (Plaintiff unsuccessfully sought to set aside a settlement based on fraud, alleging that Texaco “misrepresented that it would not pay more than \$143,000 for settlement of any property damage claims” relating to contamination of real property, when it had in other similar situations paid up to \$650,000 in settlement. The court of appeals affirmed the district court’s decision: “We agree with the district court that the Appellants cannot succeed on their claim because Texaco’s alleged statement was mere puffery made in arms-length settlement negotiations between opposing counsel. As the district court properly recognized, Texaco’s alleged statement was simply not a misrepresentation of material fact, an element essential to a fraud claim.”)

The Committee gave these examples in discussing the “obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.”

In its analysis, the Committee drew upon its Formal Opinion 93-370 where the Committee determined that a lawyer should decline to answer a judge’s question about the limits of settlement authority rather than lying in response to such an inquiry.⁶

The Committee also contrasted its Formal Opinion 94-387 (a lawyer has no obligation to tell another party in negotiation that the statute of limitations had run, but the lawyer may not “make any affirmative misrepresentations about the facts”) with its Formal Opinion 95-397 (a lawyer in negotiations with another party for a personal injury plaintiff who has died cannot conceal the death and must disclose the death to the other party and the court).⁷

The Committee also gave the following examples of professional discipline where lawyers have failed to make truthful statements:

- A Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died. *Kentucky Bar Association v. Geisler*, 938 S.W.2d 578, 579-80 (Ky. 1997) (relying in part on ABA Formal Opinion 95-397, the Kentucky Supreme Court held that “the respondent’s failure to disclose her client’s death to opposing

⁶ Formal Opinion 93-370 provides: “[A] certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, [but] 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.”

⁷ The Committee explained: “Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive.”

counsel amounted to an affirmative misrepresentation,” and, quoting from the comment to Kentucky’s Rule 4.1 explained that: ““A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.””)

- A New York lawyer was disciplined, in part for stating to opposing counsel that “to the best of his knowledge, his client’s insurance coverage was limited to \$200,000, when documents in his files showed that the client had \$1,000,000 in coverage.” *In re McGrath*, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).
- Affirmative misrepresentations in settlement negotiations have resulted in sanctions. *Sheppard v. River Valley Fitness One, O.P.*, 428 F.3d 1, 11 (1st Cir. 2005)⁸; *Ausherman v. Bank of America Corp.*, 212 F.Supp.2d 435, 443-45 (D. Md. 2002).
- They have also resulted in a court setting aside a settlement. *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983) (relying on Model Rule 4.1 and the duty of candor under Model Rule 3.3, a settlement

⁸ In this matter, a lawyer, Whittington, represented a defendant in two related lawsuits. In one suit, plaintiff, a woman named Shephard, claimed she was sexually harassed. In the other suit, plaintiff, Aubin, claimed he was retaliated against for reporting Shephard’s complaints about harassment. Defendant counterclaimed in both actions accusing both plaintiffs of conspiring to fabricate the lawsuits. The suits were consolidated for discovery. Aubin then settled with defendant. The settlement provided that Aubin would stipulate to a judgment of \$50,000 on defendant’s counterclaim, but would only have to pay \$100 of that amount. Whittington wrote to Shephard telling her of Aubin’s settlement and then making a demand for \$50,000 from her without telling her that Aubin only had to pay \$100. That omission, the court of appeals held, constituted a misrepresentation in violation of New Hampshire’s version of Model Rule 4.1. The court of appeals affirmed the district court’s sanction that Whittington would have to take at least ten hours of CLE credits and tutoring in the area of professional responsibility.

agreement was set aside because a lawyer failed to disclose the client's death prior to settlement).⁹

- Affirmative misrepresentations in negotiations have also resulted in civil lawsuits against lawyers. The Committee cited *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 825-26 (Iowa 2001) (“We hold that once a lawyer responds to a request for information in an arm’s-length transaction and undertakes to give that information, the lawyer has a duty to the lawyer requesting the information to give it truthfully. Such a duty is an independent one imposed for the benefit of a particular person or class of persons. We further hold that a breach of that duty supports a claim of equitable indemnity by the defrauded lawyer against the defrauding lawyer.”); and *Jeska v. Mulhall*, 693 P.2d 1335, 1338-39 (1985) (reversing an order dismissing an amended

⁹ The district court held: “There is no question that plaintiff’s attorney owed a duty of candor to this Court, and such duty required a disclosure of the fact of the death of a client. Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel, even though counsel did not ask whether the client was still alive. Although each lawyer has a duty to contend, with zeal, for the rights of his client, he also owes an affirmative duty of candor and frankness to the Court and to opposing counsel when such a major event as the death of the plaintiff has taken place.” 571 F. Supp. at 512.

complaint because alleged misrepresentations to a real estate buyer by the buyer's attorney were held to be actionable).¹⁰

Against this backdrop, the Committee evaluated whether lawyers in a mediation context should be held to a higher standard of truthfulness.

The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused

¹⁰ But see *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011) in which the California Supreme Court determined a client may not use mediation communications in a malpractice action against its lawyer. California law prohibits the discovery or admissibility of anything said or any writing if the statement was made, or the writing was prepared "for the purpose of, in the course of, or pursuant to, a mediation." *Id.* at 1083 (quoting from California Evidence Code Section 1119). The Supreme Court held that this confidentiality statute is intended to be applied broadly, statutory exemptions are strictly construed, and except in cases where due process is implicated, "the mediation confidentiality statutes must be applied in strict accordance with their plain terms." *Id.* at 1088. In conclusion, the court added: "The obvious purpose of the expanded language is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered, if they are made 'for the purpose of' or 'pursuant to' a mediation. (§ 1119, subds.(a), (b).) It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants." *Id.* at 1090-91 (footnote omitted).

mediation than is required in face-to-face negotiations.¹¹

There is another side to this truthfulness coin, the Committee explained:

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.¹²

Not surprisingly, the Committee concluded that Model Rules do not contain these kinds of distinctions, and the same standards apply to lawyers in settlement discussions or in a mediation context:

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer

¹¹ The Committee here referenced John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 Loy. U. Chi. L.J. 1, 101 (1997); and Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 Alternatives to High Cost Litig. 121 (2002).

¹² Here, the Committee quoted from Cooley's article, "Mediation Magic: Its Use and Abuse" referenced in the prior footnote: "Mediators are 'the conductors – the orchestrators – of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential information, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs.'" Cooley [] (citing Christopher W. Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 35-43 (1986))."

truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a “tribunal,” the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow “understood” that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.

The Committee was quick to emphasize that lawyers must not allow a communication regarding a client’s position that is not a statement of fact to be conveyed in a manner that converts them into false factual representations, even if this occurs inadvertently. The Committee gave this example:

[E]ven though a client’s Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than \$50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of \$50, when authority had in fact been granted to settle for a higher sum.

The Committee also qualified its conclusion by explaining that to satisfy the duty to provide competent representation (Model Rule 1.1), a “greater degree of truthfulness” may be required in a

mediation than in settlement discussions outside of a mediation “to effectuate the goals of the client”:

[C]omplete candor may be necessary to gain the mediator’s trust or to provide the mediator with critical information regarding the client’s goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, “perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives.” (citation omitted). Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer’s duty to provide competent representation under Model Rule 1.1.

ATTORNEY AS MEDIATOR, ARBITRATOR, AND ADVOCATE

Model Rule 2.4 addresses the topic of an attorney as a mediator or an arbitrator with a focus on ensuring that parties understand that the lawyer does not represent a party in the ADR proceeding. Model Rule 2.4 provides:

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or

reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment [3] adds that, "Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege."

Comment [5] reminds lawyers that when they serve as advocates in ADR processes, they are bound by the Rules of Professional Conduct. And when a lawyer appears before an arbitration tribunal, the duty of candor required under Model Rule 3.3 is applicable.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ISSUES

As noted earlier, mediators must maintain the confidentiality of the mediation process. Standard V of the Model Standards of Conduct for Mediators and state mediation rules provide that a mediator must maintain the confidentiality of information obtained by the mediator in mediation.

Standard V sets forth other guidelines for mediators that are well known but worth repeating. They address disclosure of information in a mediation when a party or the parties agree, the content of mediation reports where a court requires them, and protection of anonymity when mediation information is shared for teaching, research, or evaluation of mediation:

- A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during

that private session without the consent of the disclosing person.

- If the parties to a mediation agree “that the mediator may disclose information obtained during the mediation, the mediator may do so.”
- “A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.”
- “If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.”

What are examples of the scope of mediation confidentiality? Consider these opinions by the Mediator Ethics Advisory Committee of the Florida Dispute Resolution Center:

MEAC Opinion	Determination
2012-005	Local Rule 9019-2(d)(2) of the Bankruptcy Court of the Middle District of Florida requires a mediator to report “the willful failure to attend the mediation conference or to participate in the mediation process in good faith.” Florida’s Mediation Rule 10.360 allows disclosure of information that is required or permitted by law, and Florida Mediation Rule 10.520 states that a mediator must comply with “all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” Thus, a

MEAC Opinion	Determination
	mediator should, at the outset of the mediation, advise mediation participants of the requirements of the Local Rule and must then comply with the Local Rule.
2012-010	It is a breach of confidentiality for a mediator to file a mediation report and agreement when one of several parties has not signed the agreement, even when the attorney for that party promised the mediator the party would sign the document when the client returned from being out of town.
2013-001	It is a breach of confidentiality for a mediator to report to a court that a party that appears telephonically at a mediation failed to return a signed agreement after verbally agreeing to it. Reporting to a court that a mediator is “waiting for signatures” is also a breach of a mediator’s confidentiality obligations.

Is There a Settlement Negotiation Privilege?

Does a common law “settlement negotiation privilege” attach to mediation communications?¹³ A number of decisions address this topic but without a consensus view.

In re Urethane Antitrust Litigation, 2009 WL 2058759 (D. Kan. July 15, 2009) involved discovery of a document created by plaintiffs and provided to the “Bayer” defendants in the context of settlement negotiations of an alleged price-fixing and market allocation conspiracy. Plaintiffs sought to withhold the document from production to other defendants claiming a “settlement privilege” and work product. Plaintiff urged the district court to follow the Sixth Circuit in adoption of a settlement privilege, citing *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332

¹³ Rules of evidence preclude the admission of settlement negotiations in certain contexts. Illustratively, Fed. R. Evid. 408 provides evidence of the following is not admissible “to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction”: (1) “furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim....” Rule 408(b) does list exceptions: “The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation.” Cf. Article 9 of the United Nations Commission on International Trade Law’s Model Law on International Commercial Conciliation: “Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.” See *Union Carbide Canada Inc. v. Bombardier Inc*, 2014 SCC 35 (May 8, 2014) (The Supreme Court of Canada held that execution of a mediation confidentiality agreement provided by a mediator did not preclude the use of mediation discussions to prove the terms of a settlement in a proceeding to enforce the alleged settlement because the contract confidentiality term did not clearly prohibit the use of such discussions in the event a motion to enforce a settlement was brought.).

F.3d 976 (6th Cir. 2003).¹⁴ The district court rejected that invitation: “In the end, plaintiffs have failed to demonstrate that a settlement privilege should be recognized as a ‘distinctly exceptional’ exemption to the general policy of broad discovery.” *Id.* at *4. Plaintiff also sought work product protection for the document. There was no dispute that the settlement document was work product. However, because the document had been provided to the Bayer Defendants, work-product protection was waived:

Work-product protection is waived when privileged documents are voluntarily disclosed to an adversary because “[d]isclosure to an adversary is clearly inconsistent with the rule’s goal of promoting the adversarial system.” “Such a waiver occurs even when disclosure is made during the course of settlement negotiations.” “The mere fact that opposing parties may have a common interest in

¹⁴ In *Goodyear Tire*, the Sixth Circuit decided to adopt a settlement privilege as part of federal common law. It invoked the public interest: “There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of ‘impeachment evidence,’ by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.” 332 F.3d at 980. After considering the public interest in fostering settlements, the court of appeals did not feel that Fed. R. Evid. 408 provided sufficient protection: “The fact that Rule 408 provides for exceptions to inadmissibility does not disprove the concept of a settlement privilege. [Defendant] has not presented evidence of any case where the Rule 408 exceptions have been used to allow settlement communications into evidence for any purpose. Rather, the exceptions have been used only to admit the occurrence of settlement talks or the settlement agreement itself for ‘another purpose.’” 332 F.3d at 981 (citation omitted). Finally, the court of appeals explained that without a settlement privilege, there would be third-party discovery of negotiation communications, which could lead to discovery of persons present at the negotiations, including lawyers for the parties, and possibly even a judge were a judge involved in such discussions. 332 F.3d at 982.

settling claims does not neutralize the fact of disclosure, because that common interest always exists between opposing parties in any attempt at settlement.” Moreover, when work-product protection is waived as to one adversary, it is waived as to all adversaries.

Id. at *5 (footnotes omitted).

In re MSTG, Inc., 675 F.3d 1337 (Fed. Cir. 2012), the Federal Circuit also rejected the Sixth Circuit’s adoption of a settlement privilege.¹⁵ Defendant was seeking information on plaintiff’s licensing negotiations with other entities. Plaintiff refused to comply. The district court ordered production. Plaintiff then petitioned for a writ of mandamus to overturn that decision. In denying the petition, the Federal Circuit explained that to establish a settlement privilege would require the court to create a new privilege under Fed. R. Evid. 501,¹⁶ which it was unwilling to do for several reasons:

1. There is no state consensus on a settlement negotiation privilege, *Id.* at 1343¹⁷;
2. In adopting Fed. R. Evid. 408, Congress directly addressed the admissibility of settlements and settlement negotiations and, in

¹⁵ The Federal Circuit pointed out that the Seventh Circuit had declined to adopt a settlement privilege in *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1124 n. 20 (7th Cir.1979). 675 F.3d at 1342. It also explained the split among the district courts: “District courts are divided on whether a settlement negotiation privilege exists. Compare *Matsushita Electric Indus. Co. v. Mediatek, Inc.*, No. C-05-3148, 2007 WL 963975 (N.D.Cal. Mar. 30, 2007), and *In re Subpoena Issued to Commodity Futures Trading Comm’n*, 370 F.Supp.2d 201 (D.D.C.2005), with *California v. Kinder Morgan Energy Partners, L.P.*, No. 07-1883, 2010 WL 3988448 (S.D.Cal. Oct. 12, 2010), and *Software Tree, LLC v. Red Hat, Inc.*, No. 6:09-CV-097, 2010 WL 2788202 (E.D.Tex. June 24, 2010).” 676 F.3d at 1342, n.2.

¹⁶ Fed. R. Evid. 501 provides: “The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege” unless the United States Constitution, a federal statute, or rules prescribed by the Supreme Court provide otherwise.

¹⁷ The court contrasted this conclusion with a mediation privilege that exists in many states because of statutory enactments. 675 F.3d at 1343.

doing so, did not adopt a settlement privilege and allowed the admission of such settlement negotiations to, for example, prove bias or prejudice, negate a contention of undue delay, or prove an effort to obstruct a criminal investigation or prosecution, *Id.* at 1343-44¹⁸;

3. A settlement privilege was not among the list of nine evidentiary privileges “recommended by the Advisory Committee of the Judicial Conference in the proposed Federal Rules of Evidence,” *Id.* at 1345;
4. A broad settlement negotiation privilege is not necessary to achieve settlements since disputes are routinely settled without the benefit of such a privilege, *Id.*;
5. A settlement negotiation privilege would be subject to numerous exceptions that would distract from “the effectiveness, clarity, and certainty of the privilege,” *Id.* at 1346; and
6. Fed. R. Civ. P. 26 gives courts broad discretion to control discovery, including the power to enter protective orders to prevent discovery

¹⁸ The court explained: “In enacting Rule 408, Congress did not take the additional step of protecting settlement negotiations from discovery. Adopting a settlement privilege would require us to go further than Congress thought necessary to promote the public good of settlement, or in other words, to strike the balance differently from the one Congress has already adopted. This also suggests that it is not appropriate to create a new privilege for settlement discussions.” 675 F.3d at 1344.

7. where the burden or expense is not outweighed by its likely benefit. *Id.* at 1347.¹⁹

Settlement questionnaire responses were involved in *Christofferson v. United States* 2007 WL 3156281 (Fed. Cl. Oct. 25, 2007), a Fair Labor Standards Act case involving overtime claims by thousands of former employees of the United States Bureau of Census. The questionnaires had been jointly drafted by plaintiffs' and defendant's counsel, were mailed to plaintiffs, and then returned to plaintiffs' counsel, all to comply with a Memorandum of Understanding between the parties to resolve through settlement the claims of thousands of plaintiffs not yet deposited. After plaintiffs responded to the questionnaires, plaintiffs' counsel input the responses into a database. Where a plaintiff's response was incomplete or unclear, plaintiffs' counsel interviewed the individual to complete or clarify the response. Notes of those conversations were recorded on the original questionnaire responses. The database was produced to defendant

¹⁹ The court again explained: "We note that other courts have imposed heightened standards for discovery in order to protect confidential settlement discussions. In the context of confidential mediation communications, the Second Circuit has held that because 'confidentiality in [mediation] proceedings promotes the free flow of information that may result in the settlement of a dispute,' a party seeking discovery of confidential communications must make a heightened showing 'demonstrat[ing] (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality.' *In re Teligent, Inc.*, 640 F.3d 53, 57–58 (2d Cir.2011) (internal quotation mark omitted). Many district courts also require heightened showings for discovery of settlement negotiations. See, e.g., *Eisai Inc. v. Sanofi–Aventis U.S., LLC*, No. 08–4168, 2011 WL 5416334, at *8 (D.N.J. Nov. 7, 2011) (finding that party seeking discovery 'failed to make a heightened, more particularized showing of relevance' (internal quotation mark omitted)); *Atchison Casting Corp. v. Marsh, Inc.*, 216 F.R.D. 225, 226–27 (D.Mass.2003); *Young v. State Farm Mut. Auto. Ins. Co.*, 169 F.R.D. 72, 76 (S.D.W.Va.1996); *Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 866 F. Supp. 1560, 1576 (D.N.M.1994). But see *Vardon Golf Co. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 650–51 (N.D.Ill.1994) (rejecting the approach of placing a burden upon the proponent of discovery to make some 'particularized showing' of a likelihood that admissible evidence will be generated by discovery of the information). Because the issue is not before us, we reserve for another day the issue of what limits can appropriately be placed on discovery of settlement negotiations. But the existence of such authority, whatever its scope, strongly argues against the need for recognition of a privilege. In other words, the public policy goals argued to support a privilege can more appropriately be achieved by limiting the scope of discovery." 675 F.3d at 1347.

but without these notes. Most of the questions in the questionnaire involved “yes” or “no” answers but two of them—relating to the basis for the estimate of overtime hours worked and how a claimant knew that the supervisor was aware that the claimant would work overtime—required a narrative response. Hence, Defendant sought the original responses rather than relying on counsel’s categorization of the responses to these questions. In response, plaintiffs moved for a protective order claiming the original responses were privileged. The court of federal claims disagreed. It ordered the original questionnaires produced but allowed counsel to redact notes that went beyond factual information necessary to complete the questionnaire. The court’s logic was straightforward: “A written narrative explaining the calculation of estimated overtime and whether the supervisor knew or had reason to know that the claimant would work overtime does not require or seek legal advice,” and could have been discovered in a deposition or through interrogatories. *Id.* at 815. The court added that individual plaintiffs “should have understood that they were providing answers” to defendant even though completed questionnaires were returned to their counsel, all as a central component of a joint effort to reach a settlement. *Id.* Moreover, the court explained, plaintiffs signed the questionnaire under penalty of perjury, which should have suggested to plaintiffs that “someone other than their lawyer would read the responses.” *Id.*

In *Citizens Communications Co. v. Attorney General*, 931 A.2d 503 (Maine 2007), a public environmental agency was not permitted to maintain the confidentiality of draft consent decrees being exchanged with two other parties to resolve a pollution claim. The trial court was dealing with a Maine Freedom of Access Act (FOAA) information request for the draft consent decrees. The trial court refused to apply a settlement privilege to the drafts:

We ... decline the invitation to create a new privilege that would bar the discoverability of draft settlement documents. We are not persuaded that the public policy underlying a settlement negotiation privilege could be fairly reconciled with

the letter and spirit of FOAA. The Legislature denoted its intent to favor public access to documents at the expense of confidentiality of settlement discussions.

Id. at 506.²⁰

The Risk of Waiver of Privileged or Protected Information

Despite mediation confidentiality, prudent lawyers will not disclose client confidential information without obtaining consent from their clients.²¹ As part of informed consent, lawyers will need to explain that there is a risk of waiver.

For example, in *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844 (8th Cir. 1989), a computer database prepared by Chrysler to defend a criminal action for fraud in selling vehicles that had odometers disconnected was given to co-liaison counsel for class action plaintiffs in a related civil matter. The disclosure was made under an agreement that the database represented work product that was not being waived. Chrysler and the plaintiffs' counsel did, however, note in their agreement that the database information may be used in the fairness hearing on the settlement of the class action. The criminal

²⁰ The Maine Supreme Judicial Court also declined an invitation to apply a "common interest" attorney-client privilege doctrine to protect the communications because the parties did not have a common legal interest in the communications: "The argument that adverse entities have shared interests merely because they are willing to negotiate a settlement is an attempt to distort the scope of the attorney-client privilege. The City, DEP, and Citizens clearly do not have a common interest as the term is contemplated by [Maine Evidence] Rule 502(b)(3). The DEP is operating in its enforcement capacity to negotiate an allocation of clean-up responsibilities, whereby as much of the costs and labor are assumed by the liable parties. The City and Citizens, public and private entities respectively, have been found responsible for polluting the Cove, and seek to minimize their clean-up responsibilities. Each entity thus has highly divergent and opposing interests." 931 A.2d at 507.

²¹ Model Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." None of the paragraph (b) exceptions would be applicable to disclosures in settlement discussions.

case was settled by a plea bargain and the government sought the database information to prepare for a sentencing hearing. Invoking work-product protection, Chrysler objected. The court of appeals felt that the database represented ordinary work product and that the government had shown substantial need for the information but did not decide the matter on that basis. Rather, it held that Chrysler waived work-product protection by voluntarily providing the database to plaintiffs in the civil matter even as part of settlement negotiations.²²

Similarly, *Grumman Aerospace Corp. v. Titanium Metals Corp. of Am.*, 91 F.R.D. 84 (E.D.N.Y.1981) involved a consulting report prepared as part of a pre-suit settlement of a price-fixing case with the United States. The prospective defendants in the government investigation provided privileged and confidential business documents to a consultant who had signed a confidentiality agreement and later produced a report that was shared with the defendants and the government. A plaintiff in a related civil action sought the report. While there was considerable discussion in the opinion over whether the document in question represented work product, production to the government waived work-product protection: “The agreements under which the report was produced contemplated that [defendants] were [the Department of Defense’s] potential adversaries. Disclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement.” *Id.* at 90. *See also Mine Safety Appliances Co. v. North River Ins. Co.*, 2014 U.S. Dist. LEXIS

²² The court of appeals explained: “The fact that Chrysler and the class action plaintiffs may have shared a common interest in settling claims arising out of the Overnight Evaluation Program does not neutralize the act of disclosure because that common interest always exists between opposing parties in any attempt at settlement. Nor does the agreement between Chrysler and co-liaison counsel for the class action plaintiffs not to disclose the computer tape to third-parties change the fact that the computer tape has not been kept confidential. ‘Confidentiality is the dispositive factor in deciding whether [material] is privileged.’ *Chubb Integrated Systems Ltd. v. National Bank*, 103 F.R.D. at 67 (citation omitted). Not only did Chrysler fail to keep the computer tape confidential, Chrysler and the class action plaintiffs even contemplated that the computer tape and the analyses therefrom might be used, and thus disclosed to the public, during the fairness hearing or the settlement hearing.” 860 F.2d at 846-47.

42771 (W.D. Pa. Mar. 31, 2014) (in an action by an insured against an insurer, applying *Grumman* in rejecting a motion to seal settlement documents that were provided to an insurer/defendant which had rejected coverage where the settlement information related to underlying asbestos, silica, and coal worker pneumoconiosis actions not all of which had yet been settled: “Plaintiff’s disclosure of privileged work product with a carrier that has denied all tendered claims and has not sought to assist plaintiff in any manner in defending against the tendered or other underlying claims is not an action designed to further the work-product doctrine’s underlying goals. It is the equivalent of releasing such information to an adversary in order to resolve a legal dispute, which is inimical to protecting and preserving the work product in order to maintain secrecy over the information, strategies and insight it provides.”); *Khandji v. Keystone Resorts Management, Inc.*, 140 F.R.D. 697, 700 (D. Colo. 1992) (Disclosure of work product waives protection even when the disclosure is made during settlement negotiations: “In the present case, Plaintiffs’ counsel voluntarily provided the brochure to defense counsel, waiving any potential work product privilege. There was no contract or agreement between the parties regarding conditions on the use of the brochure. In fact, defense counsel specifically informed Plaintiffs’ counsel that he did not intend to abide by any limitations on its use. Thus, even if the Court were to find that the brochure is the type of document generally protected by the work product doctrine, it would have to find that any such protection has been waived by the conduct of Plaintiffs’ counsel.”)

Having an agreement to protect the disclosure from a claim of waiver may preserve privilege claims. For example, in *Akamai Technologies, Inc. v. Digital Island, Inc.*, 2002 WL 1285126 (N.D. Cal. May 30, 2002), a “Damages Memorandum” was in issue and the evidence established that there was an “implied contract between Digital Island and Akamai governing the terms under which the Damages Memorandum was provided.” Counsel for Digital Island (Lasky) provided an affidavit that he and counsel for Akamai (Judson) had agreed “that all exchanges at their settlement

meeting would be used only for settlement purposes.” Lasky “agreed further to give the Damages Memorandum to Mr. Judson for such settlement only purposes.” Judson “had a duty to speak if he was rescinding his earlier agreement to limit the use of their settlement exchanges,” the court held, and then concluded that the implied contract between Digital Island and Akamai was enforceable. *Id.* at *6-7.²³

In addition, an order entered under Fed. R. Evid. 502(d) in federal court,²⁴ or an order embracing the protections of Rule 502(d) in state court, may also preserve the privilege. Prudent lawyers will seek both an agreement and such an order if they want to maximize the likelihood of protecting from a claim of waiver privileged or protected information disclosed as part of settlement negotiations.

²³ The Court distinguished *Khandji* by saying that it implied “that an agreement between the parties that disclosure will not result in waiver as between the contracting parties is enforceable.” 2002 WL 1285126 at *7. It then bolstered its conclusion by reference to other decisions enforcing agreements: “A number of other courts have, in fact, enforced such agreements. See, e.g., *Ames v. Black Entertainment Television*, 1998 WL 812051 (S.D.N.Y.) (enforcing agreement made during deposition allowing general counsel to answer certain questions without waiving attorney-client privilege with respect to a communications on same subject matter); *Dowd v. Calabrese*, 101 F.R.D. 427, 439-440 (D.D.C.1984) (enforcing stipulation made during deposition that testimony on a particular subject would not give rise to waiver of attorney-client or work product privilege); *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 42-43 (E.D.N.Y.1973) (enforcing provision in protective order executed by the parties providing that no privilege would be waived except where expressed in writing). Therefore, the Court concludes that Akamai may not use the Damages Memorandum for any purpose other than settlement discussions, and may not assert that Digital Island’s provision of the Damages Memorandum to Akamai resulted in the waiver of any privilege.” *Id.* (footnote omitted).

²⁴ Rule 502(d) provides: “A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.” For a lengthy discussion of Rule 502(d) see Barkett, J., “Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era,” 81 *Fordham L. Rev.* 1589 (March 2013).

CAN YOU ASK A PLAINTIFF'S LAWYER TO FOREGO AN ATTORNEYS' FEE AWARD?

Imagine this situation. A plaintiff has a civil rights claim against a police officer under Section 1983 for an alleged Fourth Amendment violation. In a mediation, the defendant offers the plaintiff \$100,000 to settle the case, inclusive of attorneys' fees otherwise allowable under 42 U.S.C. § 1988. Defendant insists on an affirmative waiver of the attorneys' fees claim or comparable text in a settlement agreement that precludes plaintiff's attorney from seeking fees. Is there an ethics issue here?

A visceral reaction to this question is, "there must be." But do not be hasty. Who "owns" the attorneys' fees claim under Section 1988? The plaintiff or the plaintiff's attorney?

In *Evans v. Jeff. D.*, 475 U.S. 717 (1986), the Supreme Court considered the question of whether an offer to settle a civil rights claim could be conditioned on the plaintiff's waiver of the attorneys' fees to which the plaintiff's lawyer would otherwise be entitled. The Court held that under Section 1988, the plaintiff owned the attorneys' fees claim, not the plaintiff's lawyer. Thus, it held it was permissible for a defendant to condition a settlement offer on a plaintiff's waiver of plaintiff's attorneys' fee claim.²⁵

In light of this holding, is it then permissible for a lawyer engaged by a civil rights claimant to provide in an engagement agreement that the client may not waive an attorneys' fee claim? Utah Ethics Advisory Opinion 98-05²⁶ answered this question, "no":

It would be unethical for an attorney to contract in advance with a client that the client may not accept or that the attorney may veto a particular offer in

²⁵ And ethics opinions thereafter fell in line and found no prohibition on a fee-waiver settlement offer. See, e.g., California Formal Opinion 98-0001. See also Model Rule 1.2(a): "A lawyer shall abide by a client's decision whether to settle a matter."

²⁶ http://utahbar.org/rules_ops_pols/ethics_opinions/op_98_05.html.

settlement of a case. An attorney must convey all offers of settlement to a client, and the client must always have final say whether or not it will be accepted. This ultimate client authority cannot be contracted away.

The D.C. Bar reached the same conclusion in its Ethics Opinion 289 (January 1999).²⁷

The bottom line: Rule 1.2(a), giving the client control over settlement decisions, cannot be contracted away.

LIMITING A LAWYER'S ABILITY TO REPRESENT OTHER CLIENTS

Model Rule 5.6(b) provides that 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 of a client controversy."²⁸

Prohibiting a Lawyer from Representing Other Clients Against the Defendant

When does a settlement offer restrict a lawyer's "right to practice"? The easy case is an offer that, if accepted, prevents the opposing lawyer from representing other clients against the offeror. That is a naked restriction on a lawyer's right to practice and is impermissible, as numerous ethics opinions have easily determined

²⁷ <http://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion289.cfm>. ("An agreement designed to mitigate the impact of such a settlement offer by committing the client in advance to reject it, or by insisting that the client assign to the attorney his or her right to fees, raises very serious questions under our Rule 1.2(a). While the Committee is aware of a split in opinion between Bar associations and commentators who have considered this issue, we find persuasive the opinions of those Bar associations that have condemned advance agreements of this type regarding settlement terms because they infringe upon a client's absolute right to accept or reject a settlement offer.")

²⁸ Model Code DR 2-108(b) contained a similar prohibition: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."

in applying Rule 5.6. See ABA Formal Opinion 93-371, California Formal Opinion 1988-104,²⁹ Michigan Bar Opinion CI-1165,³⁰ New York City Bar Formal Opinion 1999-03,³¹ North Carolina Opinion RPC 179 (1994),³² Oregon Opinion 2005-47,³³ Vermont Advisory Ethics Opinion 95-11 (1995).³⁴

ABA Formal Opinion 93-371 is the seminal opinion on this topic. It involved the settlement of asbestos claims arising out of a mass action.

The question presented is whether the lawyer may accept as a condition of the global settlement a restriction on his right to represent some of his present clients who will wish to use his services for individual adjudication as well as individuals who in the future seek to become his clients against this defendant. For purposes of this discussion, we assume that a settlement offer of this sort is in the

²⁹ <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=HEvx4ru08hk%3D&tabid=840>. The California Bar Ethics Committee acknowledged “that plaintiff’s attorney may find him or herself in an uncomfortable position if faced with a settlement offer that is in the best interests of the client but which includes the provision being considered.” It took comfort in ethics opinions issued under DR 2-108(B), which was substantially similar to California’s RPC 2-109(A). These opinions had “uniformly held that defendant’s attorney may not directly (District of Columbia Bar Association Opinion 130 (1983)) or indirectly (Maryland State Bar Opinion 82-53 (1982); Oregon State Bar Opinion 258 (1974)) propose such a provision, nor may plaintiff’s attorney accept it (State Bar of Ohio Opinion 81-10 (1981); Virginia State Bar Opinion 649 (1985)).”

³⁰ http://www.michbar.org/opinions/ethics/numbered_opinions/ci-1165.cfm?CFID=68573758&CFTOKEN=6268ee59dd777ab3-E0119282-1A4B-3375-E49BA16C0CBA4991.

³¹ <http://www.nycbar.org/ethics/ethics-opinions-local/opinions-1999/1048-formal-opinion-1999-03>.

³² <http://www.ncbar.com/ethics/ethics.asp?id=179>.

³³ Formerly numbered 1991-47, in 2005, it was renumbered. <http://www.osbar.org/docs/ethics/2005-47.pdf#xml=http://www.osbar.org/sitesearch/searchengine.asp?cmd=pdfhits&DocId=61&index=C%3a%5cProgram%20Files%5cdtSearch%20Developer%5cUserData%5cOSB%2dEthics&HitCount=8&hits=41+42+76+77+c7+c8+157+15d+&hc=1824&req=5%2E6>.

³⁴ <https://www.vtbar.org/UserFiles/files/Webpages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Settlements%20Negotiations/95-11.pdf>.

interest of some, and perhaps even most, of the lawyer's present clients. Indeed, it may be that part of the reason these present clients are able to obtain particularly favorable terms is the fact that the defendant is willing to offer more consideration than it might otherwise offer in order to secure the covenant from the attorney not to represent other present clients as well as future claimants. Thus, if, as expected, most, if not all, of the present clients view the settlement offer with favor, following the injunction of Rule 1.2, the lawyer normally would be required to abide by the client's instructions to accept the settlement offer. (Footnote omitted.)

In deciding that Rule 5.6(b) trumped Rule 1.2, the Standing Committee on Ethics and Professional Responsibility identified three public policy justifications for applying Rule 5.6 to agreements that limit a lawyer's ability to represent future clients despite Rule 1.2. Permitting such agreements:

1. "[R]estricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals";
2. "[M]ay provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to 'buy off' plaintiff's counsel";
3. "[P]laces the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the strong countervailing policy favoring the public's unfettered choice of counsel."

The Committee then concluded:

Given the important public policies reflected in Rule 5.6, the Committee believes that the injunction of

Rule 1.2 that the lawyer shall abide a client's decision regarding settlement must be read as limited by the provisions of Rule 5.6(b) and, as a result, a lawyer cannot agree to refrain from representing present or future clients against a defendant pursuant to a settlement agreement on behalf of current clients even in the mass tort, global settlement context.

Model Rule 5.6 makes no distinction between the offeror-lawyer and offeree-lawyer; the rule's prohibition applies to both,³⁵ as, again, numerous ethics opinions state. *See* ABA Formal Opinion 93-371; Michigan Opinion CI-1165; North Carolina Opinion RPC 179; California Formal Opinion 1988-104; New Mexico Opinion 1985-5³⁶; Colorado Formal Opinion 92³⁷; New York State Opinion 730.³⁸

But what of other limitations? Confidentiality limitations with respect to settlement terms and amount will not run afoul of Rule 5.6, but limitations that indirectly affect a lawyer's right to practice are impermissible, as the following discussion reflects.

Confidentiality of Settlement Terms and Amount

Every ethics committee that has addressed the topic has approved imposition on a settling lawyer of confidentiality provisions relating to the amount and terms of the settlement. *See* ABA

³⁵ A lawyer may also not do indirectly what the lawyer is prohibited from doing directly. Model Rule 8.4(a) makes it professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

³⁶ <http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html>.

³⁷ http://www.cobar.org/repository/Ethics/FormalEthicsOpinion/FormalEthicsOpinion_92_2011.pdf.

³⁸ http://old.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions676750/EO_730.pdf

Formal Opinion 00-417 (2000); New Mexico Advisory Opinion 1985-5³⁹; North Carolina RPC 179⁴⁰; New Hampshire Ethics Committee Advisory Opinion 2009/10-6⁴¹; Los Angeles County Bar Association Formal Opinion 512 (2004)⁴²; Tennessee Ethics Committee Opinion 98-F-141 (1998).⁴³

However, an agreement by a law firm to keep confidential the terms of a settlement is not a basis for a disqualification motion in a subsequent suit against the settling defendant brought by the law firm on behalf of other clients. In *State of West Virginia v Matish*, 740 S.E.2d 87 (W.Va. 2013), the West Virginia Supreme Court of Appeals denied a writ of prohibition challenging a trial court's refusal to disqualify a law firm, Steptoe and Johnson, whose earlier clients had entered into a settlement agreement containing such a clause:

We are gravely concerned that the impetus for the underlying motion to disqualify appears to be the use and existence of agreed protective orders and

³⁹ "A settlement condition providing for nondisclosure of the amount and terms of a settlement is not only proper, but should be recognized where the details are not a matter of public record. The amount and terms of a settlement are the secrets of the client which may not be disclosed by the attorney. If a client agrees to such a settlement condition, the attorney must not disclose the amount or terms of the settlement." (Citations omitted.)

⁴⁰ "The amount and terms of any settlement which is not a matter of public record are the secrets of a client which may not be disclosed by a lawyer without the client's consent. If a client desires to enter into a settlement agreement requiring confidentiality, the lawyer must comply with the client's request that the information regarding the settlement be confidential."

⁴¹ "[Such terms] are sufficiently narrow in scope and arguably serve to protect otherwise private information from public disclosure. In most cases, a narrowly drawn settlement agreement that limits the disclosure of specific information in which the parties or a party has a privacy interest will not be an impermissible restriction on the right to practice under Rule 5.6(b)."

⁴² <http://www.lacba.org/files/lal/vol27no5/2045.pdf>. ("A settlement agreement that is otherwise agreeable to the parties may contain a confidentiality clause that prohibits a lawyer from disclosing the fact and amount of the settlement to the lawyer's other current or future clients without violating the Rules of Professional Conduct, although the lawyer's duties to multiple clients in the same matter may limit such a clause.")

⁴³ <http://www.tbpr.org/Attorneys/EthicsOpinions/Pdfs/98-F-141.pdf>.

confidential settlement agreements in the litigation between Verizon and Steptoe's former clients. We are more troubled, however, that these seemingly innocuous documents, whose singular purpose is to attribute confidential status to the information subject thereto and to secure such confidentiality, has, instead been used as a poisoned dart to target Steptoe and to preclude it from representing the clients who have chosen Steptoe's attorneys to represent them. The express terms of Rule 5.6(b) expressly prohibit the inclusion of such restrictive language in any type of settlement agreement between parties. However, were we to adopt Verizon's interpretation of these documents' provisions and condone their use to disqualify Steptoe from representing its current clients, we would undoubtedly be affording a construction to the confidential settlement agreements that most certainly would violate the pronouncements of Rule 5.6(b). Such a result would not have only a chilling effect on the practice of law in this State; it would completely annihilate the practices of any and all attorneys who specialize in any area of the law, from workers' compensation and products liability to insurance litigation and employment discrimination, and all areas of the law in between, in which attorneys who specialize in a particular field represent numerous, different clients. That is not to say that the Rules of Professional Conduct must not be followed. Let us be crystal clear that they must be diligently adhered to in order to maintain the integrity of the legal profession and to protect both clients and the public at large. See generally W. Va. R. Prof'l Conduct Preamble and Scope. Nevertheless, agreed protective orders and confidential settlement agreements simply cannot, and will not, be construed as imposing restrictions

upon an attorney’s right to practice law in violation of Rule 5.6(b). Accordingly, we hold that, pursuant to Rule 5.6 of the West Virginia Rules of Professional Conduct, a protective order or confidential settlement agreement may not be construed or enforced to preclude an attorney from representing a client in a subsequent matter involving similar facts and/or parties based solely upon the attorney’s obligations to maintain the confidentiality of information subject to such protective order or confidential settlement agreement.

Id. at 97-98.

Other Limitations That Have Been Prohibited

Lawyers who have tried to push the limits beyond this confidentiality boundary have not, however, had success as the following table reflects.

Impermissible Limitation	Opinion	Reasoning
A settlement term banning the use of information learned from a representation.	ABA Formal Opinion 00-417 (2000)	“[T]he proposed settlement provision would not be a direct ban on any future representation. Rather, it would forbid the lawyer from using information learned during the representation of the current client in any future representations against this defendant. As a practical matter, however, this proposed limitation effectively would bar the lawyer from future representations because the lawyer’s inability to use certain information may

Impermissible Limitation	Opinion	Reasoning
		<p>materially limit his representation of the future client and, further, may adversely affect that representation. Once the lawyer reaches these conclusions, client consent is ineffective. Rule 1.7(b) would prohibit the representation. Thus, a prohibition against using the information is a restriction upon the lawyer's right to practice." (Footnote omitted).⁴⁴</p>
<p>A term requiring a lawyer to disclose the</p>	<p>Ariz. Op. No. 90-6 (1990)⁴⁵</p>	<p>“[D]isclosure of the inquiring attorney's attorney/client relationships with various franchisees would violate ER</p>

⁴⁴ At the time, Model Rule 1.7(b) provided: “A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: the lawyer reasonably believes the representation will not be adversely affected; and the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.” Model Rule 1.7 has since been amended and is now broken up into two paragraphs with a bit more leeway: “(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.”

⁴⁵ <http://www.azbar.org/Media/Ethics/90-06.pdf>.

Impermissible Limitation	Opinion	Reasoning
<p>names of all franchisees that have been contacted by the lawyer or that contacted the lawyer “concerning any legal action or potential legal action against the defendant.”</p>		<p>1.6(a), which prohibits a lawyer from revealing information relating to the representation of a client, unless the client consents after consultation, or the disclosure is impliedly authorized to carry out representation.” The Committee added that in some situations a client’s name is information relating to the representation but that it did not know whether any of the franchisees contacted or who made contact with the lawyer instructed the lawyer not to disclose their names. But the Committee still determined the term was impermissible:</p> <p>“However, the revelation of the names of the franchisees by the inquiring attorney would be at a minimum highly embarrassing, and possibly very damaging to them, given the nature of the franchisee/franchisor relationship, where Corporation A could use this information to hinder future dealings with the franchisees.</p> <p>Therefore, the Committee concludes that the inquiring attorney may not disclose the names of any franchisees who have consulted with him in any</p>

Impermissible Limitation	Opinion	Reasoning
		<p>matters regarding Corporation A, unless they consent to have their name revealed after consultation. Otherwise, to do so would violate ER 1.6(a).”</p>
<p>A term barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in the future actions against the defending party.</p> <p>A term preventing the settling claimant’s lawyer from using a certain expert witness in future cases.</p> <p>A term imposing forum or venue limitations in future cases</p>	<p>Colorado Bar Opinion 92 (1993)</p>	<p>A settlement agreement should not be “a facade for creating an actual or potential conflict of interest between the settling claimant’s lawyer and his or her non-settling clients, present or future.”</p> <p>“In the opinion of this Committee, the test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer’s exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. Material restrictions obtained with an eye towards thwarting a non-settling claimant from obtaining counsel of choice fail this test. Although public policy favors fair settlements, the public policy favoring full access to legal assistance should prevail.”</p>

Impermissible Limitation	Opinion	Reasoning
<p>brought on behalf of non-settling claimants.</p> <p>A term prohibiting a lawyer from referring potential clients to other counsel.</p>		
<p>A term compelling counsel to keep confidential and not further disclose in promotional materials or on the law</p>	<p>D.C. Bar Ethics Opinion 335 (2006)⁴⁶</p>	<p>“We believe that the purpose and effect of the proposed condition on the inquirer and his firm is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. While it places no direct restrictions on the inquirer’s ability to bring such an action, even against the same defendant if he is retained to do</p>

⁴⁶ <http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion335.cfm>.

Impermissible Limitation	Opinion	Reasoning
<p>firm’s websites public information about a case, including the name of the opponent, the allegations in the complaint that was filed, or the fact that the case settled.</p>		<p>so, it does restrict his ability to inform potential clients of his experience. As such, it interferes with the basic principle that D.C. Rule 5.6 serves to protect: that clients should have the opportunity to retain the best lawyers they can employ to represent them. Were clauses such as these to be regularly incorporated in settlement agreements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers.” (Footnote omitted.)</p> <p>***</p> <p>“We emphasize, however, that if a client withholds permission for her lawyer to disclose public information, the lawyer should comply with his client’s wishes. D.C. Rule 5.6(b) concerns only settlement agreements. If a client wishes her lawyer not to disclose further public information, she does not need the mechanism of a settlement agreement to enforce her instructions. The only reason to make confidentiality a provision of the settlement agreement is to give the opposing party a</p>

Impermissible Limitation	Opinion	Reasoning
		mechanism to enforce confidentiality. We believe such opponent-driven secrecy clauses are restrictions on the lawyer's right to practice in violation of Rule 5.6(b)." ⁴⁷
Clauses barring (1) disclosure of information about the settlement or terms of the release, and (2) counsel from including or involving claimant's claims,	Florida Opinion 04-2 (January 21, 2005) ⁴⁸	This was apparently the settlement of an arbitration claim against a broker. As to the first clause, the Florida Bar Ethics Committee said while a confidentiality term regarding the terms of settlement is acceptable, as long as this restriction would not restrict any signatory's ability to file a bar grievance against any of the attorneys involved in the case, it was permissible. ⁴⁹

⁴⁷ The D.C. Bar Ethics Committee recognized that the proposed restriction might have value to a client in settlement but explained that the ethical prohibition on lawyers accepting such restrictions is a "policy choice that the value to future clients of the ability to choose the best lawyer to represent them exceeds the harm to the current client of not being able to trade for consideration her lawyer's ability to sue the settling defendant in the future."

⁴⁸ <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+04-2?opendocument>.

⁴⁹ "The only other possible problem with the clause is the confidentiality provision as to the terms of the release itself. The Florida Supreme Court has held that agreements seeking to prevent someone from filing a bar grievance are unenforceable and unethical. See, *The Florida Bar v. Fitzgerald*, 541 So.2d 602 (Fla. 1989) and *The Florida Bar v. Frederick*, 756 So.2d 79 (Fla. 2000). However, the clause does allow information to be given to "self-regulating bodies" and The Florida Bar is a self-regulating body for attorneys. Presumably then this sentence does not impose a restriction on any of the signatories' ability to file a bar grievance against any of the attorneys involved in the case."

Impermissible Limitation	Opinion	Reasoning
<p>accounts, or investments in any other claim, dispute, action, negotiation, or proceeding against the respondent.</p>		<p>The Committee did not view the second clause as a general release and determined it was impermissible:</p> <p>“The clause would prohibit the inquiring attorney from including or involving the ‘Claimant’s claims, accounts or investments in any other claim, dispute, action, negotiation or proceeding’ against the Respondent and the named affiliates and people. Rule 4-1.9(a) would allow the inquiring attorney to bring substantially similar claims to those he brought for the client as long as it would not be adverse to the interests of the now former client. Further, the inquiring attorney would be allowed to use information relating to the representation of the Claimant as long as it was not to the disadvantage of the former client. The provision appears to be a broader restriction on the inquiring attorney than the client would be entitled to impose under Rule 4-1.9. Additionally, if the inquiring attorney could not bring claims otherwise permissible under Rule 4-1.9, as to his former client’s ‘claims, accounts or investments’ against the brokerage</p>

Impermissible Limitation	Opinion	Reasoning
		<p>firm and its named affiliates his independent professional judgment on behalf of clients who may have claims against the brokerage would be limited in such a manner as to cause a conflict under Rule 4-1.7(b) as to such clients. It is not clear how this provision would benefit the inquiring attorney's current client. On the other hand, it certainly would benefit the opposing party to prevent the inquiring attorney from representing others against it and its affiliates. The provision hinders, rather than advances the public policy reasons behind Rule 4-5.6. In sum, the second clause of the settlement provision submitted by the inquiring attorney runs afoul of Rule 4-5.6. Accordingly, the inquiring attorney may not ethically enter into a settlement containing this clause."</p>
<p>A prohibition on a lawyer from divulging to other tax clients a</p>	<p>Illinois State Bar Advisory Opinion 11-02</p>	<p>"For purposes of this opinion, we will assume that the package of ideas (the 'Information') includes interpretations and applications of the tax laws and regulations that</p>

Impermissible Limitation	Opinion	Reasoning
<p>package of ideas developed by an accounting firm that would reduce a specific client's tax obligations.</p>	<p>(January 2011)⁵⁰</p>	<p>would be useful to Lawyer in performing legal services for Clients B, C and D. Thus, we assume that once Lawyer has learned of the Information, she will be prohibited from applying ideas that would directly assist her representation of other clients.”</p> <p>Then among the reasons why the State Bar determined that this confidentiality agreement was impermissible, was Rule 5.6.</p> <p>“The Confidentiality Agreement to be signed by Lawyer does not fall squarely within Rule 5.6 because it is not part of a partnership or employment agreement pursuant to 5.6(a), nor is it ‘part of the settlement of a client controversy,’ under Rule 5.6(b). Nonetheless, the restrictions placed on Lawyer’s ability to represent other clients similar to Client A in the future without facing a conflict of interest may go to the spirit of Rule 5.6.”</p> <p>Citing to the justifications of Rule 5.6 set forth in ABA Formal Opinion 93-371, the opinion</p>

⁵⁰ <http://www.isba.org/sites/default/files/ethicsopinions/11-02.pdf>.

Impermissible Limitation	Opinion	Reasoning
		states: “The terms of the Confidentiality Agreement would create a conflict between the interest of Lawyer’s current Client A and those of future clients who could benefit from the knowledge gained by Lawyer from Accounting Firm.”
A term barring plaintiff’s attorney from disclosing publicly available information about the case.	New Hampshire Ethics Committee Advisory Opinion 2009/10-6	<p>The term is impermissible if the bar on disclosure of public information “would have the effect of restricting the right of plaintiff’s counsel to practice law or the public’s right to identify and retain qualified legal counsel.”</p> <p>The New Hampshire Committee explained that a ban on disclosure of public information “might well result in limiting an attorney’s ability to disclose his or her expertise, thus limiting the public’s ability to identify and obtain the most qualified counsel.”</p> <p>The Committee gave this example: “[A]n agreement that precludes plaintiff’s counsel from disclosing ... a published epidemiological study that resulted in a defendant drug company changing its published warnings concerning a drug, would violate Rule 5.6(b) because it prohibits plaintiff’s counsel from discussing the study</p>

Impermissible Limitation	Opinion	Reasoning
		<p>during the representation of future clients with claims against the same drug company. Similarly, an agreement that restricts an attorney's ability to disclose the fact that the attorney had previously sued the drug company also would violate the Rule because it would impermissibly limit the public's ability to identify the most experienced counsel for representation." "Conversely," the New Hampshire Committee explained, "a settlement agreement that bars plaintiff's counsel from disclosing that a company has been sued 'x' times, which information is part of public court filings" would not violate Rule 5.6(b) "because the restricted information - the number of times the company has been sued - does not impair the attorney's ability to effectively represent future clients or the ability of potential clients to identify experienced counsel."</p>
<p>A term requiring the plaintiff's attorney to give her entire case file to the defense</p>	<p>New Mexico Advisory Opinion 1985-5</p>	<p>Since the file contained the attorney's work product which belonged to the attorney and would not normally be shared with an opposing counsel, New Mexico's RPC 2-1.08(b) was violated because providing the</p>

Impermissible Limitation	Opinion	Reasoning
attorney to be sealed.		entire case file “may inhibit [counsel’s] ability to represent clients in the future” and would allow defense counsel to “accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims.”
An agreement not to disclose information relating	New York State Bar Association Opinion	“In this case, the proposed confidentiality terms appear to apply to some information that, ordinarily, the plaintiff’s lawyer

Impermissible Limitation	Opinion	Reasoning
directly or indirectly to (1) the settlement	730 (2000) ⁵¹	would have no duty to keep confidential under DR 4-101. For example, there is almost certainly information about ‘the business or

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http://old.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=55366. This ethics opinion was prompted by the decision in *Feldman v. Minars*, 230 A.D.2d 356, 357, (1st Dept. 1997) which enforced a settlement-agreement prohibition on a lawyer from assisting or cooperating with other parties or attorneys in a future action against settling defendants. The Appellate Division said that a “strong case can be made” that the agreement violated DR 2-108(B), the predecessor to Rule 5.6(b), but held it “was not against the public policy of the State of New York.” The appellate court added that it “would appear unseemly” to permit the “offending attorneys [to use] their own ethical violations as a basis for avoiding obligations undertaken by them.” *Id.* at 359. It left the ethical propriety of the settlement provision to the “appropriate disciplinary authorities.” A Florida appellate court reached a similar decision. *Lee v. Florida Department of Insurance & Treasurer*, 586 So. 2d 1185 (Fla. 1st DCA 1991). Porter was a lawyer who had left a law firm representing a plaintiff, NCCI, in an action against Lee, an insurance agent. Porter had worked on the matter. The law firm entered into a settlement agreement of that action prohibiting the firm from representing the Department of Insurance in any proceeding against Lee. The Department later brought an enforcement action to revoke Lee’s insurance license and engaged Porter as its counsel. Lee unsuccessfully moved to disqualify Porter on the basis of his former firm’s settlement agreement, and then appealed the denial of his motion. The appellate court refused to accept Florida’s RPC 4-5.6 as a basis to invalidate the settlement term. “To use rule 4-5.6 as the basis for invalidating a private contractual provision is manifestly beyond the stated scope of the Rules and their intended legal effect.” As long as the settlement agreement remained in effect, “it must be treated as valid and binding on all parties legally affected by its terms.” Whether the law firm violated Rule 5.6 by negotiating the settlement term and should be disciplined, “is not the issue in this proceeding.” Instead, the issue was whether Porter “can be ethically and legally disqualified from representing the Department in respect to the same transactions and events as those in which he had previously represented NCCI in view of the presumptively valid contractual provision in paragraph 8 between Lee and NCCI.” *Id.* at 1188. The appellate court went on to hold that NCCI could prohibit the law firm from using or disclosing confidential information learned in NCCI’s action against Lee and the law firm would be bound by its obligations to an existing or former client to protect the client’s confidences. Thus the law firm and by imputation, Porter, would have to be disqualified from representing the Department because of a conflict of interest. “NCCI’s agreement in paragraph 8 to prevent such representation manifests its intent to withhold consent and thereby preclude the use or disclosure of information gained during his representation of NCCI. That fact alone demonstrates sufficient adversity of interests to apply the rules on conflict of interests.” *Id.* at 1190. And the conflict was not overcome by Rule 5.6, the appellate court held. Rule 5.6 “does not reach agreements with or by the client to preclude the lawyer’s representation of other persons with respect to cases that involve the same facts, transactions, and events as does the case settled for the client.” *Id.*

Impermissible Limitation	Opinion	Reasoning
<p>agreement or its terms; (2) the business or operations of the defendant; and (3) the termination of the client's employment with the defendant.</p>		<p>operations of the defendant corporation' that is public information or that can be learned in future representations without relying on confidences or secrets of the current client. The duty of confidentiality under DR 4-101 would not preclude the lawyer from disclosing such information. The settlement terms would also be overbroad insofar as information about the defendant's business was learned by the lawyer prior to the representation or insofar as it was understood at the outset of the representation that the lawyer could use information of this nature in representing future clients. For similar reasons, the proposed settlement term that would prohibit disclosure of 'any information concerning any matters relating directly or indirectly to the settlement agreement or its terms' appears to be overbroad.</p> <p>These provisions would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that</p>

Impermissible Limitation	Opinion	Reasoning
		was not protected as a confidence or secret under DR 4-101 but was nevertheless covered by the settlement terms. A settlement proposal that calls on the lawyer to agree to keep confidential, for the opposing party's benefit, information that the lawyer ordinarily has no duty to protect, creates a conflict between the present client's interests and those of the lawyer and future clients – precisely the problem at which DR 2-108(B) is aimed.”
A provision in medical malpractice and other personal injury settlement agreements restricting both a plaintiff	Tennessee Ethics Committee Opinion 98-F-141 (1998) ⁵²	“As to existing clients, inclusion of such a clause in a release could be construed as the settlement of one client's case to the detriment of another client's case. Such a clause would constitute representation of differing interests in violation of DR 5-

⁵² DR 5-105 addresses the impairment of a lawyer's judgment by employment by multiple clients. In this opinion, the Tennessee Ethics Committee also determined that a requirement that a plaintiff's lawyer become party to a release "might create a conflict of interest between plaintiff's attorney and the plaintiff" in violation of DR 5-101(A), and therefore, such a clause is prohibited unless the attorney is releasing a claim for attorneys' fees. DR 5-101(A) provided: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." The Committee further determined that defendant's lawyer is not a "proper party" to a clause releasing the defendant's lawyer, except as a representative of that lawyer's client. "It is our opinion that plaintiff's counsel would be justified in refusing to negotiate such a term in most circumstances."

Impermissible Limitation	Opinion	Reasoning
and the plaintiff's attorney from assisting others by using case information.		105.”
A term barring an attorney from soliciting third parties to bring suit against the opposing party and from sharing fees with other lawyers with respect to lawsuits or claims brought against the opposing party.	Texas Opinion 505 (1994) ⁵³	<p>“To the extent that [solicitation] is permitted under the State Bar Rules, and other applicable state and federal statutes, solicitation is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement that it is restricted in the Rules and applicable law.”</p> <p>“Fee sharing is also a part of practicing law. ... To the extent that fee sharing is not in violation of the applicable laws and rules, such cannot be further limited by settlement agreements.”</p>

Asking a Lawyer to Switch Sides

Let's consider a different approach. The defense lawyer in a products liability case says to the plaintiff's lawyer, “My client was

⁵³ <http://www.legaethicstexas.com/Ethics-Resources/Opinions/Opinion-505.aspx>.

very impressed with your work here. After we settle this case, we would like to retain you to consult with us and our client to develop defense strategies. To show how sincere we are, here is an engagement agreement that will compensate you at your normal hourly rate.”

Can plaintiff’s counsel consider, much less accept, such an offer before a settlement is concluded? That would not be a good idea, at least not without disclosure to the client. Model Rule 1.2(a) provides that a lawyer must “abide by a client decision whether to settle a matter.”⁵⁴ Model Rule 1.4(a) requires a lawyer to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e),⁵⁵ is required by these Rules.” Model Rule 1.4(b) and (c) add that a lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and “keep the client informed about the status of the matter.” Model Rule 1.4(b) requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Settlement of a claim is an obvious topic that must be discussed with a client.⁵⁶ An offer of employment to the plaintiff’s lawyer could cause the plaintiff concern that the lawyer’s loyalty is

⁵⁴ Comment [13] dealing with aggregate settlements refers to Model Rule 1.2(a) as “protect[ing] each client’s right to have the final say in deciding whether to accept or reject an offer of settlement. ...”

⁵⁵ Model Rule 1.0(e) defines informed consent as follows: “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

⁵⁶ Comment [2] to Model Rule 1.4(a) provides: “If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client’s consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case 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.”

compromised, and thus, the settlement might not be as favorable as it could be.

Let's assume the client has been told and is not at all concerned with the lawyer's loyalty and believes that the settlement is quite favorable. It may be, then, that the plaintiff's lawyer has no desire to represent other plaintiffs against this defendant and would like a more steady income and would be happy to "switch sides" to develop a defense-based practice. The ethics inquiry should end.

On the other hand, it may be that the defense counsel is looking to conflict plaintiff's lawyer out of representing future plaintiffs, thus implicating Model Rule 5.6's prohibition on agreements restricting a lawyer's right to practice. The lawyer proposing what some might call a "bait and switch" tactic will, at a minimum, run afoul of Model Rule 8.4. Model Rule 8.4(a) says it is "professional misconduct" for a lawyer "to violate or attempt to violate the rules of professional conduct" or to "induce another to do so," or "to do so through the acts of another." Model Rule 8.4(c) adds that it is professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit, or misrepresentation."

An extreme example of a lawyer's willingness to sell out a client is *In re Hager*, 812 A.2d 904 (D.C. 2002). This was a bar disciplinary proceeding appeal that answered the question of "whether an attorney may ethically enter into an agreement with an opposing party in which his clients are awarded full purchase price refunds (amid other relief) but where the attorney secretly and without the knowledge of the clients 1) receives (together with his co-counsel) \$225,000 as attorneys' fees and expenses, 2) agrees never to represent anyone with related claims against the opposing party, and 3) agrees to keep totally confidential and not to disclose to anyone all information learned during his investigations." *Id.* at 908 (footnote omitted). The agreement was called a "Settlement Agreement," but it was with just the attorney, not his clients.

The lawyer argued that his clients had not entered into a settlement agreement requiring client consent under Rule 1.2 because under

the lawyer's "Settlement Agreement," his clients did not waive their rights to sue. The lawyer also argued that the restrictions on him did not amount to a restriction on the practice of law in violation of Rule 5.6. Both arguments were rejected. As to the first, while it was true that the clients did not "technically waive their rights to sue in the Settlement Agreement," the lawyer's agreement resulted in his clients losing "their attorneys, their attorney's work product and the names of potential class members," all of which was "close to the equivalent of a release of their claims" requiring disclosure and client consent. Citing the rationale behind Rule 5.6 set forth in ABA Formal Opinion 93-371, the appellate court added that it would be "reluctant to permit evasion of the strictures of Rule 5.6(b) (or 1.2(a)) by the creation of documents such as the Settlement Agreement, which we reiterate resulted in the clients losing both their lawyers and the work done on their behalf."⁵⁷ The appellate court upheld a one-year suspension from the practice of law on the lawyer.

DEMANDING A RETURN OR DESTRUCTION OF DOCUMENTS

May a litigant demand destruction or return of documents as part of a settlement?

In *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005), the Supreme Court noted that document retention policies are common in business, and it is not "wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."

⁵⁷ The court also relied on Illinois Advisory Opinion 00-01, which determined that a term in an agreement by which a lawyer would receive information on a tax reduction scheme in return for not divulging the information to other clients who might benefit from the scheme, was impermissible. The opinion has since been withdrawn by the Illinois State Bar Association. <http://www.isba.org/ethics/byyear>. But it issued a similar opinion in January 2011. See Illinois Bar Ethics Opinion 11-02, *supra*.

The same result is applicable in a settlement as long as there is no separate duty to retain or preserve the documents (because of a statutory, contractual, or common law duty to preserve that is applicable).⁵⁸

AGGREGATE SETTLEMENT OF A CLAIM

Lawyers representing multiple parties have additional ethical concerns in a settlement negotiation.

Model Rule 1.8(g) provides in pertinent part:

(g) 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 ... involved and of the participation of each person in the settlement.

Comment [13] to Model Rule 1.8 then provides that “[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer.” Model Rule 1.7 requires a lawyer to discuss these risks and obtain informed consent before undertaking a representation, and Model Rule 1.2(a), as noted earlier, “protects each client’s right to have the final say in deciding whether to accept or reject an offer of settlement.” Comment [13] then explains that Model Rule 1.8(g) is a “corollary” to Model Rules 1.2 and 1.7 and provides that, before any settlement offer is made or accepted on behalf of

⁵⁸ Cf. ABA Ethical Guidelines for Settlement Negotiations (Aug. 2002) (“Unless otherwise unlawful, a lawyer may agree, as part of a settlement, to return or dispose of documents and other items produced in discovery.”) http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf.

multiple clients, the lawyer must “inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement” is accepted.⁵⁹

Whatever the number of clients, a lawyer is well advised to engage in full disclosure so as to obtain informed consent under Rule 1.0(e) and explain the total amount of a settlement; what each client would receive; how costs will be allocated; what the lawyer’s fee will be; and whether the fee will be paid from settlement proceeds or separately by an opposing party.

Several courts have concluded that fee agreements that allow for a settlement based on a “majority vote” of the clients violate Rule 1.8(g) or its predecessor Model Code provision, DR 5-106.

In *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1975), the Tenth Circuit rejected a majority-rule provision. Two of eighteen plaintiffs rejected a settlement secured by their joint counsel. The district court approved the settlement. The Tenth Circuit reversed. It explained that authorizing settlement “contrary to the wishes of the client and without his approving the terms of the settlement is opposed to the basic fundamentals of the attorney-client relationship.” *Id.* at 894. Making matters ethically worse, the court of appeals explained why an engagement agreement that pre-authorized majority approval of any settlements was improper: “It is difficult to see how this could be binding on non-consenting plaintiffs as of the time of the proposed settlement and in the light of the terms agreed on. In other words, it would seem that plaintiffs would have the right to agree or refuse to agree once the terms of the settlement were made known to them.” The court of appeals also said it was “untenable for the lawyer to seek to represent both

⁵⁹ Comment [13] also addresses class and derivative actions. “Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.”

the clients who favored the settlement and those that opposed it” under DR 5-106.

Knisley v. City of Jacksonville, 497 N.E.2d 883 (Ill. App. 1986) *appeal denied*, 505 N.E.2d 353 (Ill. 1987) followed *Hayes* in rejecting a motion to enforce a settlement with 61 plaintiffs, holding that plaintiffs who appealed the enforcement of the settlement would not be bound by it. The appellate court determined that the record established that objecting plaintiffs “never consented to be bound by the majority,” and added that allowing the majority to control the settlement decision would violate DR 5-106.⁶⁰

The New Jersey Supreme Court reached a similar outcome in *Tax Authority v. Jackson Hewitt*, 898 A.2d 512 (N.J. 2006). The settlement in issue involved franchisees’ claims against a franchisor. A weighted majority of the plaintiffs approved the settlement. Eighteen plaintiffs did not execute the settlement agreement. Of the eighteen, three filed certifications opposing the settlement. Plaintiffs’ counsel moved to withdraw as to the plaintiffs who did not execute the settlement agreement. Jackson Hewitt moved to enforce the settlement as to all of the plaintiffs. The trial court granted the motion to withdraw as to the non-signing plaintiffs and also enforced the settlement as to all plaintiffs. One plaintiff appealed. The Appellate Division reversed, holding that a settlement binding all plaintiffs that was approved only by a majority of the plaintiffs was contrary to New Jersey’s RPC 1.8(g). The New Jersey Supreme Court affirmed, holding that New Jersey’s RPC 1.8(g) “forbids an attorney from obtaining consent in advance from multiple clients that each will

⁶⁰ The appellate court also distinguished between a class action and a “joinder” action: “In a class action court approval is required if the case is to be compromised or dismissed. That approval will come only if the court determines that the settlement is fair, reasonable, and in the best interests of all affected. In a joinder action there is no judicial review of the settlement and a party should not be bound unless he has specifically agreed to it. Fundamental fairness is violated when a settlement is allowed to bind parties who object and no safeguards have been added to protect their interests.” 497 N.E.2d at 887-88. (Citations omitted).

abide by a majority decision in respect of an aggregate settlement. Before a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them.”

Lawyers have also found themselves on the wrong side of disciplinary cases for violating the aggregate settlement rule. *In re Hoffman*, 883 So.2d 425 (La. 2004) (a three-month suspension conditionally deferred if Hoffman committed no professional misconduct during a one-year postjudgment period)⁶¹; *Oklahoma Bar Association v. Watson*, 897 P.2d 1246 (Okla. 1994) (imposing a one-year suspension from the practice of law)⁶²; *Kentucky Bar Association v. Chesley*, 393 S.W.3d 584 (Ky. 2013) (disbarment for violation of Rule 1.8(g) and numerous other ethical rules).⁶³

⁶¹ This was a will contest in which Hoffman accepted a settlement proposal after obtaining consent from only one of his three clients. The Louisiana Supreme Court cited to Louisiana RPC 1.4, 1.8(k), and 1.2(a) in chastising Hoffman: “Respondent never gave Julian or Lillian the opportunity to exercise their absolute right to control the settlement decision. See Rules 1.4 (a lawyer shall give a client sufficient information to participate intelligently in decisions concerning the objectives of the representation) and 1.8(k) (a lawyer shall not obtain a client’s prospective consent to settle a claim without further authorization); see also Rule 1.2(a), pursuant to which a lawyer must abide by the client’s decision whether to settle a matter.” 883 So.2d at 433. Client consent to a future aggregate settlement proposal did not satisfy the informed consent requirement either: “Respondent can take no comfort that the affidavit of representation signed by Julian and Lillian absolved him of any responsibility in this regard, as the informed consent requirement cannot be avoided by obtaining client consent in advance to a future aggregate settlement proposal.” Hoffman “compounded his misconduct” by distributing the settlement proceeds “in accordance with the wishes of only one of his clients, and over the expressed objection of another client.” *Id.* Any issues of allocation should have been resolved “with all of his clients” prior to acceptance of the settlement offer. *Id.* at 433-34.

⁶² Watson’s ethical sins were not limited to a violation of DR 5-106(a), but as to the representation of multiple clients, Watson had three clients and “owed to each the right of disclosure and consent in accepting and distributing the award.” 897 P.2d at 1253.

⁶³ Chesley was complicit in a number of ethical violations. The case involved a \$200 million settlement of a products liability matter. As part of a settlement, what was a certified class became decertified, and 141 persons who were members of the class had their claims dismissed without prejudice while other members of the class were compensated with settlement funds, albeit less than they should have received based on the contingent fee agreements in issue and the amount paid by the defendant. Chesley was brought in as settlement counsel and was paid over \$20 million for his work. His efforts to distance himself from his co-counsel failed:

The takeaway here? Disclose, disclose, disclose. Where you obtain consent, make sure it is informed consent. And then remember that clients, not lawyers, make settlement decisions.

MEDIATOR CONFLICTS OF INTEREST

Standard III of the Model Standards addresses conflicts of interest. Paragraph A provides:

A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

Potential mediators must learn enough about the facts of a matter to evaluate conflicts and must make that evaluation objectively. Model Standard III.B. A mediator is also required to disclose “as soon as practicable, all actual and potential conflicts of interest that

“The evidence established that none of the clients included in the *Guard* case settlement were consulted about the aggregate settlement reached with American Home before, during, or after the mediation, and none were notified or consulted before the cases were dismissed by the Boone Circuit Court. No notice of the decertification of the class action and the dismissal of the lawsuit was given to the class and its potential members. Even though Respondent did not sign the final settlement document with American Home, and thus was not expressly identified as a ‘settling attorney,’ he was co-counsel for the plaintiffs and shared the responsibility of assuring that the rule was followed.

We agree that Respondent is guilty of violating SCR 3.130-1.8(g). Respondent’s argument that he was hired solely to procure a negotiated settlement of the case, and that his responsibility extended no further is simply unavailing. The lawyers were free to divide among themselves the work required to successfully prosecute the claims of their clients, but they may not delegate their ethical responsibilities to another.”

393 S.W.3d at 597.

are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality." Model Standard III.C. After disclosure, "if all parties agree, the mediator may proceed with the mediation." *Id.*

After accepting a mediation, if a mediator learns of a fact that "raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable." Model Standard III.D. Again, after disclosure, if all parties agree, the mediator may proceed with the mediation. *Id.* But if a conflict of interest "might reasonably be viewed as undermining the integrity of the mediation," a mediator must either withdraw or decline to proceed irrespective of the agreement of the parties. Model Standard III.E.

After a mediation, a mediator must still be vigilant about relationships with participants in the mediation. Model Standard III.F. provides:

Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

Mediation ethics opinions offer insights into the application of these rules.

Illustratively, in MEAC 2011-014, the Florida Mediator Ethics Advisory Committee cited the Committee Note to Florida Mediation Rule 10.340 in determining that a mediator who is a

member of a law firm or other professional organization must disclose all past or present client relationships that firm or organization has with any party involved in the mediation.⁶⁴

Conflicts have also been found where a mediator subsequently represents or takes a position for or against a former party in a related matter, MEAC 2008-08, GA-1997-004; MEAC 1994-002; where the mediator formerly heard the case as a judge, MEAC 2009-01; where a mediator under Michigan court rules seeks to serve as an arbitrator in a proceeding involving the same parties concerning the matter that was mediated, MI-1996-265; and where a mediator solicits or accepts an appointment as a fiduciary that flows from the mediation process, NC-2008-15.⁶⁵

May a mediator designate mediation parties or attorneys with whom the mediator has worked in a mediation as “friends” on social networking sites and permit potential mediation parties and attorneys to add the mediator as their friend? That was the question posed in MEAC 2010-001. The Advisory Opinion states that it is not inappropriate for a mediator to designate mediation parties or attorneys as “friends” or to allow them to designate the mediator as a “friend” but cautions the mediator to “keep in mind that doing so may limit the clients with whom the mediator can work in the future.” The Advisory Committee’s analysis appears below:

*The Committee Note [to Florida Mediation Rule
10.340] further advises that mediators establish*

⁶⁴ The Florida Mediator Ethics Advisory Committee cited to Rule 10.340(a) and (c) in reaching its determination: “Rule 10.340 (a) Conflicts of Interest, states: ‘A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator’s impartiality.’ Further, rule 10.340 (c) goes on to state: ‘...if a conflict of interest clearly impairs a mediator’s impartiality, the mediator shall withdraw regardless of the express agreement of the parties.’” (Emphasis in the original.)

⁶⁵ These and other illustrations of conflicts in mediation ethics opinions can be found in the National Clearing House for Mediator Ethics Opinions that can be accessed at http://www.americanbar.org/directories/mediator_ethics_opinion.html.

personal relationships with many attorneys, mediators, representatives, and other members of professional groups. While mediators should not be secretive about such friendships or acquaintances, disclosure is not required unless a particular feature of the relationship might appear to impair the mediator's impartiality.

In today's internet age, social networking sites are widely available and used to communicate both professional and personal information. It is possible that some people do not keep track of all those they have "friended" or who have "befriended" them. It is also possible that an individual visiting a mediator's social networking site (or a social networking site wherein the mediator is listed as a "friend") is able to view the other individuals who are designated as "friends". It is reasonable to believe that potential mediation clients and their attorneys viewing a mediator's social networking site (or a site wherein the mediator is listed as a "friend") would gain the impression that the "friend" is in a position to influence the mediator and therefore the mediator would lack, or be seen as lacking, mediator impartiality and neutrality. Rule 10.330 (a) requires that, "[a] mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual."

It is incumbent upon the mediator to disclose potential conflicts of interest. After the appropriate disclosure, the mediator may serve if all parties agree. Rule 10.340(c). However, if the conflict is clear or the mediator is not impartial, the mediator must withdraw from the mediation. (See Rules

10.330 (a)-(b) and 10.340 (a)-(b) on Impartiality and Conflicts of Interest.) Mediators are wise to err on the side of disclosure and withdrawal, when in doubt, to reflect the character, integrity and impartiality required of certified mediators.

EX PARTE COMMUNICATIONS

Model Rule 4.2 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.

Model Rule 4.2 applies even if the represented person initiates the communication or consents to it. Model Rule 4.2, Comment [3].

Model Rule 4.2 does not apply to former employees, Model Rule 4.2, Comment [7], but not all states necessarily follow the Model Rule approach. A lawyer may also not induce another person to do what the lawyer cannot do, Model Rule 8.4(a); hence a lawyer cannot make contact with a represented person through an agent or other intermediary.

In a mediation, Model Rule 4.2 should not be an obstacle to discussions in a general session with a mediator as long as the represented person has a lawyer present. Where a lawyer is involved but does not appear at a mediation, communications should be made through the mediator and not directly with the represented person.

Outside of a mediation, what should a lawyer do if a lawyer suspects that the lawyer for an opposing party has failed to communicate a settlement offer to the offeree-party? May the lawyer contact the offeree-party to find out if the offer was

communicated? ABA Formal Ethics Opinion 92-362 addressed this question and answered it negatively because of the restrictions imposed by Model Rule 4.2.

The Committee gave the lawyer a solution, however. After noting that Model Rule 4.2 does not govern communications by the lawyer's client and the comment to Model Rule 4.2 states that "parties to a matter may communicate directly with each other..." the Committee explained:

Model Rule 1.1 mandates that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.2(a) provides in pertinent part that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued." Rule 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Comment to Rule 1.4 states in pertinent part:

"The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party...."

Adequacy of communication depends in part on the kind of advice or assistance involved.... 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 representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult."

In the Committee's view, fulfillment of the duties imposed by these Rules requires that the lawyer for the offeror-party advise that party with respect to the lawyer's belief as to whether the offers are in fact being communicated to the offeree-party. Likewise, the offeror-party's lawyer has a duty to that party to discuss not only the limits on the lawyer's ability to communicate with the offeree-party, but also the freedom of the offeror-party to communicate with the opposing offeree-party.

And what about Rule 8.4(a)? The Committee was guarded but determined it was not an obstacle on the facts presented:

[W]here the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation.

In Formal Ethics Opinion 11-461, the ABA ethics opinion writers revisited the topic of party-to-party contacts and the tension between such contacts and Rule 8.4(a). After exploring the reach of Model Rule 4.2, the Committee referenced Comment k to

Section 99 of the Restatement (Third) of The Law Governing Lawyers (2000) (“the Restatement”) which explains: “The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. 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 Committee then determined that a lawyer can give “substantial assistance” to a client before a contact with a “represented adversary” and endorsed the Restatement’s approach. The Committee explained:

This Committee believes that, without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication.

This Committee favors the approach taken by Restatement §99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the

basic terms of a proposed settlement agreement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client's request without violating the lawyer's ethical obligations. However, in advising the client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]:

“This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.”

What would constitute overreaching? The Committee gave these examples:

- assisting the client in securing from the represented person an enforceable obligation,
- disclosure of confidential information, or
- admissions against interest without the opportunity to seek the advice of counsel.

The Committee then offered this guidance to lawyers to prevent clients from overreaching:

[A] lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that

warns the other party to consult with his lawyer before signing the agreement.

In an arbitration, Model Rule 4.2 would be applicable to a lawyer subject to the Model Rules or state rules of professional conduct. What if the arbitration is being handled by lawyers from a foreign jurisdiction not bound by a rule like Model Rule 4.2? The solution there is to adopt ethics rules like Model Rule 4.2 as part of the arbitration clause or to reach out to the arbitration tribunal early to agree on a policy with respect to contacts with represented persons.

ETHICAL CONSIDERATIONS IN ARBITRATION

Unless an arbitration agreement provides for the application of ethics rules, lawyers will be bound by the rules of professional conduct that govern their state of licensure. In domestic arbitrations involving attorneys licensed in a state in the United States, the rules of professional conduct (or the California ethics rules for California lawyers) will be applicable to the advocates.

In international arbitrations, agreements with counsel or a discussion with the tribunal may be necessary to establish ground rules.⁶⁶ There is, however, change in wind of international arbitration ethics. As of October 1, 2014, the London Court of International Arbitration's new rules provide general guidelines for parties' legal representatives that address obstructionist conduct, lying to a tribunal, knowingly sponsoring false evidence to a tribunal, concealing documents from a tribunal that have been ordered produced, and unilateral contacts with the tribunal.⁶⁷ Sanctions, albeit arguably modest ones, can be imposed against the

⁶⁶ Illustratively, does Model Rule 3.3—the duty of candor—apply to a foreign lawyer appearing in an international arbitration with a U.S.-licensed lawyer bound by such a duty? The answer may be “no” depending upon the rules of professional conduct applicable to the foreign lawyer.

⁶⁷ Annex to the LCIA Rules (October 1, 2014), available at: http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

party's representative by the tribunal as well.⁶⁸ The International Bar Association's "Guidelines on Party Representation,"⁶⁹ introduced in 2013, also may play a role in conforming lawyers' ethical conduct worldwide. If adopted in an arbitral agreement or by a tribunal, the Guidelines provide authority for a range of sanctions against a party or a party's lawyers.

What about arbitrators? What rules govern their conduct? Arbitrators should look to the Code of Ethics for Arbitrators in Commercial Disputes that was approved by the ABA House of Delegates and the Board of the American Arbitration Association.⁷⁰ Because arbitration awards can be upset under the Federal Arbitration Act due to the lack of impartiality of an arbitrator, arbitrators should pay particular attention to Canon II, Section A, of these Rules, which provides:

Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator,

⁶⁸ Article 18.6, LCIA Rules (October 1, 2014).

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http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2Fdocument%2FDefault.aspx%3FdocumentUid%3D6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F&ei=v2ODU8KiO8SMqAa1-4KoCQ&usq=AFQjCNGapAFX_Svb7UzJpx0EX_XySwp5zQ&bvm=bv.67720277,d.b2k

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http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/commercial_disputes.authcheckdam.pdf

or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) The nature and extent of any prior knowledge they may have of the dispute; and

(4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

This obligation is a continuing one. And potential arbitrators should also pay close attention to Section D of Canon II: “Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.”

CONCLUSION

The ADR ethics journey reflected by the discussion above is a short one that touches on a few of the many ethical issues that can arise in an ADR setting. As with all ethics issues, whether one is a neutral or an advocate, read the rules! And always seek guidance when there is uncertainty.

662 F.3d 913 (7th Cir. 2011)

753 F.3d 718 (7th Cir. 2014)

768 F.3d 622 (7th Cir. 2014)

Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014) was a consumer class action

In *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012), McGuireWoods, class counsel, entered into an “incentive agreement” by which it agreed to seek additional compensation for five of the class plaintiffs depending upon the amount of any settlements that might be received. “Specifically, the incentive agreements provided that, if the settlement amount was greater than or equal to \$500,000, class counsel would seek a \$10,000 award for each client who signed an agreement; if the settlement amount were \$1.5 million or more, counsel would seek a \$25,000 award; if it were \$5 million or more, counsel would seek \$50,000; and if it were \$10 million or more, counsel would seek \$75,000.” *Id.* at 649-50. The case settled for \$49 million, 25% of which was set aside for legal fees. The law firm also sought \$325,000 in “incentive compensation” for these five of the class plaintiffs pursuant to its agreement with them. The law firm’s conflict of interest ultimately⁷¹ became the subject of a motion to deny the firm attorneys’ fees and that’s just what happened. The district court concluded that the incentive agreements “gave rise to a conflict of interest between the class representatives and the other members of the class that ‘tainted McGuireWoods’s representation,’ and that, under California law, such a conflict ‘constitutes an automatic ethics violation that results in the forfeiture of attorneys’ fees.’ Accordingly, the district court held that McGuireWoods was not entitled to any attorneys’ fees for its

⁷¹ There was an earlier decision in the case. The district court originally approved the legal fees. The Ninth Circuit remanded the matter to have the district court consider, among other issues, the effect of the conflict of interest on the award of attorneys’ fees. *Rodriguez v. West Publishing Co.*, 563 F.3d 948 (9th Cir. 2009).

representation of the class.” *Id.* at 652. After analyzing the case law, the Ninth Circuit established the framework for its review of the district court’s order:

In sum, under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation. In making such a ruling, the district court may consider the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client. The representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees. A district court has a special obligation to consider these equitable principles at the fee-setting stage in common fund class action cases, given the district court’s fiduciary role to protect absent class members.

Id. at 655-56 (citations omitted). It then affirmed the district court’s decision holding that the fact that McGuireWoods was successful in the litigation did not require the district court to award it a fee. “A district court has the primary responsibility for determining a reasonable fee award and must weigh any benefits McGuireWoods conferred on the class against the pervasive conflict of interest caused by the incentive agreements with class representatives.” Given the deferential standard of review, “we cannot say the district court abused its discretion in denying all fees.” *Id.* at 658.

Radcliffe v. Experian Information Solutions, Inc., 715 F.3d 1157 (9th Cir. 2013) was a Fair Credit Reporting Act class action where, under the settlement agreement, class representatives received an incentive payment of \$5,000, but only if they supported the settlement. The Ninth Circuit reversed the district court’s approval of the settlement:

The settlement agreement, like others we have approved in the past, granted incentive awards to the class representatives for their service to the class. But unlike the incentive awards that we have approved before, these awards were conditioned on the class representatives' support for the settlement. These conditional incentive awards caused the interests of the class representatives to diverge from the interests of the class because the settlement agreement told class representatives that they would not receive incentive awards unless they supported the settlement. Moreover, the conditional incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval. Because these circumstances created a patent divergence of interests between the named representatives and the class, we conclude that the class representatives and class counsel did not adequately represent the absent class members, and for this reason the district court should not have approved the class-action settlement.

Id. at 1161. The Court of Appeals later explained that while the conditional incentive awards alone were enough to invalidate the settlement, the difference between what the class members received (\$26 to \$750) and \$5,000 created a “serious question whether class representatives could be expected to fairly evaluate” whether the absent class members were being treated fairly. “Under the agreement, if the class representatives had concerns about the settlement’s fairness, they could either remain silent and accept the \$5,000 awards or object to the settlement and risk getting as little as \$26 if the district court approved the settlement over their objections.” With this kind of choice, “adequacy” to protect the interests of the class no longer existed. *Id.* at 1165.

In re Payment Card Interchange Fee and Merchant Discount
Antitrust Litigation

Viveros v. VPP Group, LLC,