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Negotiating the Ethics of Settling a Product Liability Suit

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According to recent estimates, over 90% of all civil cases settle. Product liability cases are no exception — a small percentage are tried in court to conclusion. Thus, every product liability litigator has or likely will play the role of settlement negotiator during his or her career. Yet many litigators are not aware of or do not understand how their professional responsibilities come into play at the settlement table. One central reason for this blind spot might be the contradictory nature of negotiation. On one hand, a lawyer is expected to be fair and honest, but on the other hand, to be effective, a negotiator often needs to mislead his or her adversary to achieve the best possible outcome for his or her side. Indeed, negotiation has been analogized to a game of poker, where a negotiator hopes that the adversary will not be able to judge the value of the other player's hand. So how does one achieve the best possible "win" at the settlement table while still staying within the bounds of ethical conduct required of all attorneys? We offer the following five "rules of the game" to help provide guidance.

1. Do Not Make False Statements of Material Fact or Law

The primary ethical obligation that comes into play in the course of settlement negotiations is Rule 4.1(a) of the ABA Model Rules of Professional Ethics ("Model Rules"), which prohibits a lawyer during representation of a client from "knowingly making a false statement of material fact or law to a third person." The Model Rules define "knowledge" as actual knowledge of the fact in question, which may be inferred from the circumstances. What constitutes a "fact" is also described in comment to Rule 4.1 as depending upon the circumstances. As for materiality, one court has defined a fact as material if "it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the [deal]." *Ausherman v. Bank of Am. Corp.*, 212 F.Supp.2d 435, 449 (D. Md. 2002). Notably, some jurisdictions' versions of Model Rule 4.1, such as Virginia's, do not require that a fact be "material" and proscribe making a false statement as to any fact.

In the context of settlement negotiations, it is most helpful to know what is generally not considered to be a fact for purposes of Rule 4.1's prohibition and therefore constitutes fair conduct. For example, "statements of opinion or those that merely reflect the speaker's state of mind" fall outside the prohibition. *See* Ethical Guidelines for Settlement Negotiations, the ABA Committee at 4.1.1. (The Guidelines have not been approved by the ABA's House of Delegates or Board of Governors, but still serve as an informational tool for negotiators.)

Significantly, comment [2] to Model Rule 4.1 expressly recognizes that:

> [u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact [such as] [e]stimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim …

In other words, an attorney may puff, bluff, embellish, and make misleading statements concerning his or her client's settlement terms or the perceived strengths or weaknesses of a party's case without running afoul of Rule 4.1. Common examples of puffing include downplaying a client's willingness to compromise and presenting a client's bargaining position without disclosing the client's true "bottom line" position. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439 (2006). Thus, to illustrate the distinction between misrepresenting a material fact and permissible puffery, bluffing about the importance a client places on a certain concession in a settlement negotiation would be permissible. But it would be impermissible for a lawyer representing a defendant manufacturer to declare to plaintiff's counsel that certain 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." *Id.*

2. Disclose Material Facts That, if Left Uncorrected, Will Substantially Deprive Your Opponent of the Benefit of the Bargain

While a lawyer has no affirmative duty to inform an opposing party of relevant facts, there are exceptions to the rule. Underlying each exception is the principle that a lawyer should not trick or manipulate a third party into drawing an incorrect conclusion as to a material fact in order to procure a more favorable settlement. Such conduct runs afoul of Model Rule 8.4(c), which prohibits a lawyer from engaging in any conduct "involving dishonesty, fraud, deceit or misrepresentation."

For example, a plaintiff's lawyer has an affirmative duty to disclose the death of his or her client before accepting a settlement offer. *See, e.g.*, ABA Formal Op. 95-397 (1995); In re Becker, 804 N.Y.S.2d 4, 5-6 (N.Y. App. Div. 2005). The reasons for this exception are evident because of the extraordinary effect that the client's death has on a product litigation. It may extinguish certain causes of action or change damage calculations dramatically. It also terminates the attorney-client relationship, requiring a new client to take the place of the deceased, such as the estate, an executor or an administrator.

A lawyer also may have the duty to disclose if a writing memorializing a settlement does not reflect the parties' agreement, even if the error is to the benefit of the lawyer's client. *See* ABA Informal Opinion 86-1518 (1986). A lawyer also should avoid capitalizing upon a known scrivener's error in a settlement agreement because doing so would violate Rule 8.3(c).

Indeed, a lawyer's duty to disclose material facts extends to situations where a lawyer knows that an opponent is laboring under a mistaken belief that, if uncorrected, will substantially deprive the opponent of the benefit of the bargain. In *Nebraska Bar Ass'n v. Addison*, 412 N.W.2d 855 (Neb. 1987), a personal injury lawyer negotiated the settlement of a lien while knowing that the hospital was unaware of the existence of a $1 million umbrella policy that would have provided coverage for the plaintiff's claims in addition to the $150,000 in primary coverage, of which the

hospital was aware. The lawyer continued to negotiate a release of the hospital's lien that was expressly and directly premised upon the mistaken conclusion that insurance coverage was limited to $150,000. When the hospital later learned of the umbrella coverage, it asserted that the release was not binding because it was obtained as a result of fraudulent misrepresentation. The plaintiff's lawyer was found to have violated Nebraska's professional responsibility rules analogous to Model Rules 8.4(c) and 4.1 and the court suspended him for 6 months.

The New York Court Lawyer's Association (NYCLA) issued its Ethics Opinion No. 731 in 2003 on disclosure of the existence of insurance coverage that provides language that is very helpful in attempting to navigate exactly when and how a lawyer must disclose material facts in settlement negotiations in general — and when the lawyer need not disabuse his adversary of his folly. The NYCLA concluded that a lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by substantive law or court rule, nor correct an adversary's misunderstanding that the adversary gleaned from sources independent of the lawyer and his client. However,

> [o]nce the topic is introduced the lawyer may not intentionally mislead.
>
> If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client … the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance ... This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction.

3. Do Not Agree to Restrict a Lawyer's Right to Practice As Part of A Settlement

There is public policy in favor of the public's unfettered right to choice of counsel. Consistent with this policy, Model Rule 5.6(b) prohibits a lawyer from participating in making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. The principal rationale behind the rule is that a settlement provision that "buys off" a party's lawyer unjustifiably restricts access of future litigants to the lawyer who may be the most capable to handle a particular claim. Moreover, the use of such a restriction creates conflicts of interest between present and potential future clients and potentially between the interests of present clients involved in the same suit. *See* ABA Formal Op. 93-371 (1993).

Significantly, settlement provisions that limit a lawyer's right to use information gleaned from a current representation in future representations of the same or similar parties have also been considered to violate Rule 5.6 because they also effectively restrict the lawyer's right to practice. *See* ABA Formal Op. 00-417 (2000). While some commentators have criticized Rule 5.6 and some courts have upheld agreements that effectively place certain restrictions on practice, the safest course of action is to avoid negotiating terms that violate Rule 5.6.

4. Do Not Threaten a Disciplinary Complaint Against Another Lawyer In Order to Coerce a Settlement

The Model Rules have been construed generally to prohibit threatening disciplinary action against opposing counsel to gain an advantage in settlement negotiations, despite the absence of an express prohibition on the subject. *See* ABA Formal Op. 94-383 (1994). *See also* Robertson's Case, 626 A.2d 397 (N.H. 1993) (where attorney threatened defense lawyers with professional discipline and repeatedly accused them of "felonies and crime" in an effort to strong-arm a settlement, the court deemed his actions "beyond the bounds of acceptable professional conduct" and publicly censured him and assessed costs).

As noted in ABA Formal Opinion 94-383, there are three general reasons for this prohibition:

First, such a threat may not be used as a bargaining chip where the subject misconduct raises a substantial question as to the opposing counsel's honesty, trustworthiness or fitness to practice. This is because Model Rule 8.3 requires a lawyer to report such misconduct of which he or she has knowledge. A lawyer who bargains away her reporting obligation would then find herself in violation of Model Rule 8.4(a), which makes it professional misconduct to "knowingly assist" another in violating the rules of professional conduct.

Second, such a threat that is entirely unrelated to the civil claim at issue (thus seeking restitution for a reason other than the harm alleged in the suit) or is unfounded in fact or law not only violates several of the Model Rules, such as Rule 8.4(b) (proscribing criminal acts reflecting adversely on lawyer's trustworthiness), Rule 3.1 (prohibiting assertion of frivolous claims), and Rule 4.1, but it also may expose an attorney to criminal charges for extortion.

Finally, any such threat that has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client or prejudicing the administration of justice violates Model Rule 4.4 (Respect for Rights of Third Persons) and Model Rule 8.4(d) (prohibition against prejudicing the administration of justice). For example, if the subject of the threat is a matter within the jurisdiction of the trial court, it should be raised in that forum; the failure to do so impairs the ability of the trial court to direct the proceedings before it."

5. Be Mindful of the Rules To Avoid otential Liability For Damages Resulting From Unethical Negotiation Tactics

The last rule we offer is actually a reason for making sure to follow the first four rules. That reason is that violations of ethics rules in settling a case can lead not only to disciplinary action, but to civil liability for damages that are suffered by another party as a result.

Indeed, disciplinary action such as private or public censure, suspension, monetary sanctions and disbarment are only half the story. When the adversary learns of the unethical conduct or discovers a misrepresentation of material fact, litigation seeking to void the settlement agreement may ensue. In turn, the lawyer may then be sued by his or her client for malpractice as a result of the botched settlement and/or the unfavorable judgment the adversary ultimately obtains against the client because of the deceptive negotiating tactics employed by the lawyer.

A third party who is injured by the unethical conduct may also directly sue the lawyer for common law fraud. *See, e.g., Slotkin v. Citizens Casualty*, 614 F.2d 301 (2nd Cir. 1979) (attorney could be sued for fraud for advising opposing attorney during settlement negotiations that his client did not have an additional insurance policy when the attorney knew that the client did); *Shafer v. Berger, Kahn, Shatfon, Moss, Figler, Simon & Gladstone*, 107 Cal. App. 4th 54 (lawyer who made misrepresentation could be sued for fraud by the injured party). Furthermore, in some states, there are criminal statutes that permit a private cause of action for treble damages for attorney deceit. *See* N.Y. Judiciary Law § 487; Ind. Code Ann. § 33-48-1-8.

Conclusion

In sum, the absence of ethical rules that directly apply to the settlement negotiation process coupled with the perception that deception is generally allowable during negotiations, may lead even the most ethical attorney into a professional predicament. While not exhaustive, we hope the five rules of the game set forth above will help provide a framework for both effective and ethical negotiation technique when you are next at the settlement table.