

2010 Torts Law Update  
Ethics in Settlement  
November 12, 2010

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# False Statements of Fact or Law

## Rule 4.1: Truthfulness in Statements to Others

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 . . .

# False Statements of Fact or Law (2)

Rule 4.1, Comment 3: 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. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

# False Statements of Law or Fact (3)

## Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

# Disclosure Obligations

## Rule 4.1: Truthfulness in Statements to Others

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

...

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

# Disclosure Obligations (2)

## Rule 4.1, comment 1

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. 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 partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

# Crystal's Analysis of Disclosure Obligations

- *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky. L.J. 1055 (1998-1999)
- It is unethical for a lawyer to fail to disclose material information when the nondisclosure amounts to misrepresentation or when the failure to disclose violates discovery rules or other law.
- Nondisclosure is equivalent to a misrepresentation in four situations: (1) corrective disclosure; (2) disclosure of known mistakes in a writing; (3) fiduciary disclosure; and (4) disclosure of mistakes about basic facts when required by good faith.

# Crystal's Analysis of Disclosure Obligations (2)

- Examples of situations in which good faith and fair dealing requires disclosure. Disclosure of:
  - Knowledge of a life threatening condition of the opposing party not known by that party or his counsel, *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962);
  - significant procedural developments;
  - recantation of witness testimony;
  - mistakes regarding insurance coverage;
  - fee agreements when the fees are part of the negotiation.



# Crystal's Analysis of Disclosure Obligations (3)

- The duty of confidentiality does not preclude disclosure because the duties not to engage in misrepresentation and not to violate the law are superior to the duty of confidentiality.
- Further, when clients authorize lawyers to enter into contract or settlement negotiations, they impliedly authorize their lawyers to reveal information necessary to facilitate a satisfactory conclusion. This implied authority reasonably includes authorization to reveal information necessary to prevent the agreement from being unenforceable due to nondisclosure.

# Mediation or Arbitration

## Rule 2.5: Lawyer Serving as Third Party Neutral

### Comment 5

[5] Lawyers who represent clients in alternative dispute resolution processes are governed by the Rules of Professional Conduct. When the dispute resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(n)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third party neutral and other parties is governed by Rule 4.1.

# Threats of Criminal Prosecution

## Rule 4.5: Threatening Criminal Prosecution

A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.

# Threats of Criminal Prosecution (2)

## How to Handle Criminal Implications of Civil Cases

- Do not mention criminal aspects in connection with settlement.
- In response to request for no-prosecution agreement, refuse such agreement. Can indicate no present intention to refer to authorities, but will cooperate with authorities to extent required by law.

# Aggregate Settlements

## Rule 1.8(g)

(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, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

# Aggregate Settlements (2)

## Rule 1.8, comment 13

The rule stated in this paragraph is a corollary of both these Rules [dealing with informed consent] and provides that, before any settlement offer or plea bargain is made or accepted on behalf of 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 or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent).

# Negotiation of Attorney Fees

If case involves fee shifting, negotiation of attorney's fees and amount of settlement creates concurrent conflict of interest under 1.7(a)(2) because "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."

# Negotiation of Attorney Fees (2)

## How to Handle

- Obtain informed consent of client to negotiate fees and settlement. Permissible under 1.7(b)(4) provided confirmed in writing. Could negotiate merits and fees together or separately, but best to do separately to minimize conflict. Lawyer would disclose amount of fees to client. Client would decide whether to accept settlement.



# Negotiation of Attorney Fees (3)

- If can reach agreement on settlement of merits but not fees, can perhaps have agreement that court will determine fees.
- If defendant insists on negotiation of lump sum including merits and fees, can do with informed consent of client under 1.7(b)(4). Would then need to deal with problem of allocation of settlement between lawyer and client. Could do through mediation, arbitration, or court decision. Settlement would, of course, be subject to client approval. Client could defer decision whether to accept settlement until client knows how much will be allocated to fees.

# Authority to Make Settlement

- Rule 43(k), SCRCP: “No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.”

# Authority to Make Settlements (2)

- Lawyers have authority to settle cases on behalf of their clients. Such settlements are binding absent fraud or mistake. *Motley v Williams*, 374 S.C. 107, 647 S.E.2d 244 (S.C. Ct. App. 2007).
- The lawyer's authority is limited, however, to claims set forth in the pleadings, and any settlement that goes beyond the pleadings must be expressly agreed to by the client. *Graves v. Serbin Farms, Inc.*, 295 S.C. 391, 368 S.E.2d 682 (Ct. App. 1988).
- A lawyer who enters into a settlement without client authority may be liable to the client for negligent advice with regard to the settlement. *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997).

See Nathan M. Crystal, "Let's Make a Deal – Settlement Ethics," *Ethics Watch* (November 2008).

# Practice Restrictions

## Rule 5.6(b): Restrictions on Right to Practice

Rule 5.6(b) provides:

A lawyer shall not participate in offering or making: (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

## Practice Restrictions (2)

- Applies to direct restrictions on practice. See *ABA Formal Op. #93-371* (agreement as part of civil settlement that plaintiff's lawyer will not later represent other parties against defendant violates Rule 5.6 and request by counsel for such agreement violates Rule 8.4 (a)).

## Practice Restrictions (3)

- Also applies to indirect restrictions. *ABA Formal Op. #00-417* (lawyer may participate in settlement agreement that prohibits lawyer from revealing information relating to representation, but lawyer may not participate in agreement that prevents lawyer from using such information in later representations because prohibition on use amounts to restriction on practice in violation of Rule 5.6).

# Practice Restrictions (4)

- Recent South Carolina Ethics Opinion, #10-04, under reconsideration, held that settlement agreement could not contain a provision prohibiting lawyer from advertising for clients against defendant.

# Putative Class Actions

- Prior to certification of a class and expiration of the opt-out period, members of a putative class are not treated as represented by putative class counsel. Accordingly, counsel for either the plaintiff or defendant may contact such individuals to obtain relevant information or negotiate a settlement). See *ABA Formal Op. #07-445*.
- Failure to notify all members of a class in the settlement of a class action may result in discipline against the lawyer. See *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) (public reprimand).