

What Makes A Square Deal?

The Ethics of Settlement

Presented by:

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Presentation PDF available for download:

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The Case settled.

But there is just one more thing....

As we all know, the Devil is in the Details!



Settlement Agreement Last Minute Add-Ons:

- ❑ **Confidentiality** (don't talk about the case, the settlement terms and especially the price of settlement)
- ❑ **Non-Disparagement** (don't say mean things about us)
- ❑ **Non-Cooperation** (don't help others sue us)
- ❑ **Lawyer "buy-out"** (lawyer, don't sue us again)

Business as Usual? Or just bad business?

POLL:

How many of you have participated in settlements with:

1. Confidentiality?
2. Non-disparagement?
3. Non-cooperation?
4. Lawyer buy-out?



If so many lawyers use these, how can they possibly be a **BAD THING**?

Do the Rules Require Lawyers to Re-Think Settlements?

- ▶ Major public harm can come from forcing confidentiality, non-disparagement, and other onerous terms into settlements.
- ▶ Particularly true with tort type cases:
 - ▶ personal injury,
 - ▶ discrimination,
 - ▶ products liability and
 - ▶ consumer protection

Do the Rules Require Lawyers to Re-Think Settlements?

- ▶ Examples of harm from abuses covered up with secrecy clauses:
 - ▶ Ford Explorer/Firestone tire rollover cases
 - ▶ GM ignition switch settlements
 - ▶ Takata airbag settlements; car seats
 - ▶ Catholic priest scandals

Do the Rules Require Lawyers to Re-Think Settlements?

What are your duties, under the rules of ethics, to:

...to your client?

...to future clients?

...to yourself (and your future right to practice)?

...to the judicial system and the search for justice?

What Rules Apply?

MRPC 3.4(f)

Confidentiality of subject matter of representation

MRPC 5.6(b)

Restrictions on the right to practice

MRPC 8.4(d)

Conduct prejudicial to the administration of justice

What Rules Apply?

MRPC 3.4(f)

Mo Rule 4-3.4(f)

Fairness to Opposing Party and Counsel

A lawyer **shall not**:

* * *

(f) **request a person other than a client** to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

What Rules Apply?

MRPC 5.6(b) Mo Rule 4-5.6(b) Restrictions on the Right to Practice

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.

* * *

Comment [2] Rule 4-5.6(b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

What Rules Apply?

MRPC 8.4(d) Mo Rule 4-8.4(d)

Professional Misconduct

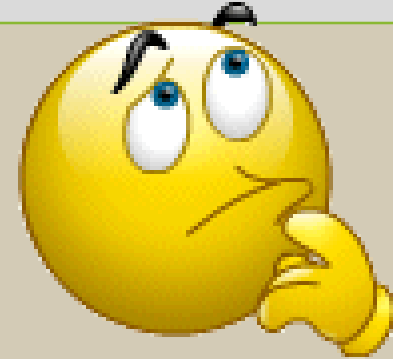
It is professional misconduct for a lawyer to:

* * *

(d) engage in conduct that is prejudicial to the administration of justice;

What Rules Apply?

I know what your thinking.....



...don't we have a duty to follow our client's wishes, especially when it involves accepting a settlement?

A: Yes. Rule 1.2 – Scope of Representation

What Rules Apply?

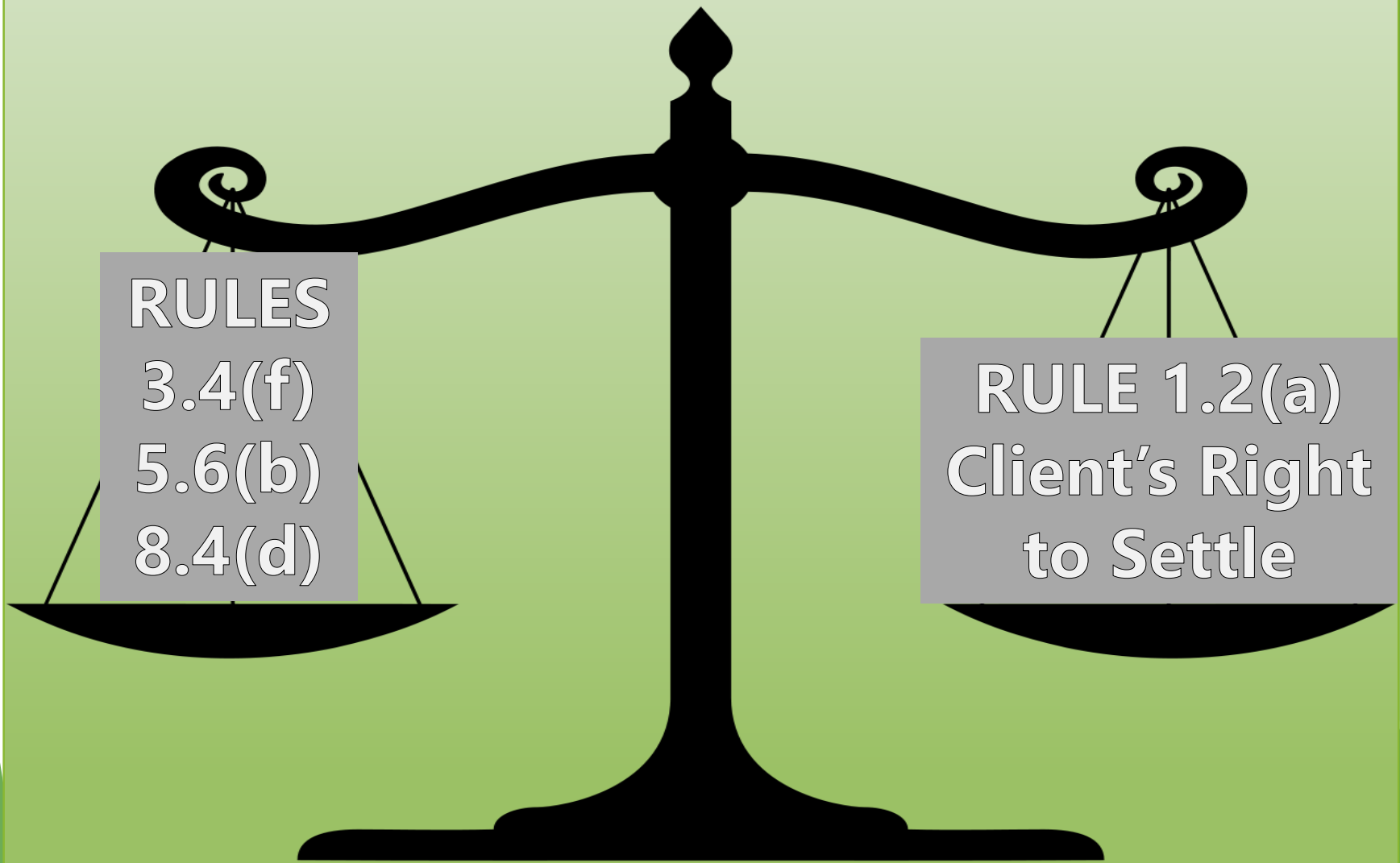
MRPC 1.2

Mo Rule 4-1.2

Scope of Representation

(a) **A lawyer shall abide by a client's decisions concerning the objectives of representation**, subject to Rule 4-1.2(c), (f) and (g), and shall consult with the client as to the means by which they are to be pursued. **A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. ...**

How do we balance the Rules?



How do we balance the Rules?

ABA Ethical Guidelines for Settlement Negotiations 4.2.6

“Except where **forbidden by law** or **disciplinary rule**, a lawyer may negotiate and be bound by an agreement to keep settlement terms and other information relating to the litigation confidential.”

Confidentiality – what is it good for?



Absolutely Nothing! Say it again!
....well, almost nothing.

Confidentiality – Can be bad for the Client

Why does confidentiality hurt clients?



Stella Liebeck signed a secrecy agreement when she reached a post-trial settlement. She could never refute the tort reform publicity machine that painted her case as a runaway verdict.

Confidentiality – Can be bad for the Client

Why does confidentiality hurt clients?

July 2004, Johnny Bradley took his wife and son on a cross-country trip. Prior to the trip, he had Cooper tires installed on his Explorer aware that many Firestone tires were faulty. Tragically, one of the Cooper tires separated and the family crashed, killing the wife.

Johnny did not know that over 200 Cooper lawsuits had been filed throughout the country alleging defects.



Confidentiality – Bad for the Lawyer

Lawyers Should Not Be Parties to Agreement

“...lawyers generally should not become parties to their clients’ settlement agreements because it creates contractual obligations or rights for the lawyer individually. This conflict puts the lawyer in the untenable position of evaluating obligations not arising from the lawyer's engagement agreement with the client for the benefit of the client, but conferred by the lawyer directly to the opposing party.” **SC Ethics Advisory 10-04 (9/09/2010).**

Confidentiality – Bad for the Lawyer

“Under Rule 5.6(b) **an attorney may not agree** -- even at a client's request...to keep confidential **information that is not confidential client information** under Rule 1.6, for example, information that is a public record or that the attorney could otherwise obtain through channels, such as discovery, and use in subsequent cases, but for the proposed confidentiality agreement.”

North Dakota Ethics Opinion 1997-05

Confidentiality – Bad for the Lawyer

TAKEAWAY

A lawyer cannot agree to hide information away that is public record or subject to discovery without violating Rule 5.6(b).

This is true even if the client requests his attorney agree to the provision.

Confidentiality – Not always improper?

However: Limited confidentiality is not improper, for a proper purpose:

- ❑ Strictly the amount of settlement
- ❑ Privileged matters
- ❑ Items properly subject to protective order

Non-Disparagement – what is it good for?



Absolutely Nothing! Say it again!

Non-Disparagement – harm to client

Harm to client:

- ❑ Sets up client for liability and new litigation
- ❑ It's a limitation on free speech
- ❑ Do you **REALLY** want to restrict what a client can mention at a dinner party 20 years later?

Non-Disparagement –harm to lawyer?

Non-Disparagement

If the agreement prevents the lawyer from making allegations against the defendant in a new case, then the agreement violates Conn. Rule 5.6(b).

Conn. Informal Op. 2013-10 (Dec. 18, 2013).

Non-Disparagement

Indiana's Opinion No. 1 2014 Non-Disparagement Clauses

- ▶ specifically explored clauses that would prohibit a plaintiff and plaintiff's counsel from making negative statements about the defendant.
- ▶ sample provision in opinion:
 - ▶ plaintiff's counsel from making "any negative or disparaging statements" that malign, ridicule, or defame the defendant, "in any form," including orally, on social media, on the Internet, or in other forums. Id.

Non-Disparagement

Indiana's Opinion No. 1 2014 Non-Disparagement Clauses (cont.)

Indiana Legal Ethics Committee stated that such broadly worded non-disparagement clauses may violate Rule 5.6(b) of Indiana's Rules of Professional Conduct.

Non-Cooperation – what is it good for?



Absolutely Nothing! Say it again!

Noncooperation – what is it good for?

Designed to prevent a party or party's attorney from furnishing evidence to litigants in other cases

- ❑ Similar and overlapping with other forms of secrecy
- ❑ Often disguised – won't just say "don't cooperate"
- ❑ Broad confidentiality provisions prohibit discussion of the facts of the case
- ❑ Prevents assistance to others in bringing their claims

Noncooperation – what is it good for?

Defendants **can** use confidentiality to:

- ❑ protect trade secrets
- ❑ privileged information
- ❑ Settlement terms such as amount

This is **not** impermissible noncooperation

Noncooperation – improper uses

Defendants **cannot** use confidentiality to:

- ❑ hide “whistleblower” information about allegedly unlawful acts
- ❑ chill former employees from voluntarily participating in other investigations e.g. EEOC
- ❑ Stop settling plaintiffs from talking to other plaintiffs’ counsel

Lawyer “buy out” – what is it good for?



Absolutely Nothing! Say it again!

Lawyer “buy out”

Q: Can a party request that you (the lawyer) NOT sue defendant again?

A: No - the request is a violation of Model Rule 5.6 Restrictions on the Right to Practice.

Lawyer “buy out”

Model Rule 5.6

“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.”

Comment [2]: Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Lawyer “buy out”

ABA Disciplinary Rule 2-108(B) provides:

“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.”

Lawyer “buy out”

Examples of Violations of Model Rule 5.6

Restricting a lawyer’s future client relationships is forbidden:

- ▶ 1) requiring P’s attorney to “be retained” by defendant
- ▶ 2) barring attorney from mentioning on website or in advertising having handled a case against the defendant
- ▶ 3) barring attorney from advertising his/her expertise in a certain area of law

Eskridge, Gayle *Settlement Agreement Provisions That Purport to Restrict an Attorney’s Right to Practice Law* LACBA Update, March 2014

Lawyer “buy out”

All of these disapprove or restrictions on limiting information as it relates to lawyer’s future practice

S.C. Bar Ethics Advisory Comm. Ethics Adv. Op. 10-04(2010)

Bar Assn of San Francisco Legal ethics Comm. Op. 2012-1 (2012)

D.C. Legal Ethics Comm. Op. 335 (2006)

NY State Bar Assn Comm. on Ethics Op. 730 (2000)

Chicago Bar Assn Comm. On PR Op. 2012-10 (2012)

Lawyer “buy out”

Chicago Bar Assn Comm. On PR Op. 2012-10 (2012)

Per Opinion:

- ❑ Rule 3.4(f) prohibits a lawyer from proposing or accepting a settlement agreement that bars a party from disclosing to any other party *“the existence, substance, and content of the claims.”*
- ❑ “other party” includes *“any person or entity with a current or potential claim against one of the parties to the settlement agreement.”* Id.
- ❑ “other party” under this view would encompass the general public.

Lawyer “buy out”

BUT SEE

Indiana’s Opinion No. 1 2014

**Less restrictive than other opinions
re: Lawyer restrictions**

“[The Indiana] committee deviated from other opinions on settlement confidentiality clauses when it concluded that a settlement provision **prohibiting a lawyer from advertising** to the general public that he or she has represented clients against a particular defendant **would not** violate Indiana Rules 5.6(b) or 3.4(f).”

Confidentiality Clauses in Settlement Offers under Rules 5.6 and 3.4

By Larry Fox and Jenny Gu – March 31, 2015

ABA Section of Litigation Ethics & Professionalism

Business as Usual? Or just bad business?

Remember the POLL?



How many of you have changed your minds regarding settlements containing:

1. Confidentiality?
2. Non-disparagement?
3. Non-cooperation?
4. Lawyer buy-out?

PRACTICE POINTER: Let the Rules (and your conscience) be your guide.
If something doesn't feel right, should you be doing it?

How to handle an “Indecent Proposal”

(With my apologies to Harrelson, Moore and Redford)

How do you handle a proposal from another attorney to put something you don't think is proper in the settlement?



Remember: Rule 8.4(a) prohibits a lawyer from knowingly assisting another to violate any rule

How to handle an “Indecent Proposal”

If you have prepared your client properly, you will have time to:

Explain what is wrong with the offer to other counsel

Perhaps counsel didn't mean to offer something less than ethical – ask her to clarify

If pressed, file a grievance or seek advisory opinion

OR avoid the problem preemptively...

Litigation Tools: Sample Term Sheet

- ❑ Puts issues out front EARLY
- ❑ Eliminates ambiguity
- ❑ No more “devilish details” cropping up in settlement discussions

PLAINTIFF V. DEFENDANT

Case: _____

Settlement Demand – for settlement purposes only

Tendered Thursday, May 19, 2016 via email to <opposing counsel>

- This demand automatically expires in 7 days if not previously withdrawn.
- No other terms are material to an agreed-upon settlement beyond those explicitly stated herein.

1. Payment of \$ _____ by check, made payable to <law firm trust> for deposit into the firm’s trust account (EIN #), and received **not later than 21 days** after counsel for Company (“Company”) communicates Company’s acceptance of these settlement terms to counsel for Consumer (“Consumer”).

2. Company and its assigns give a release to Consumer for all past or current claims they may have against Consumer at the time of settlement, including but not limited to any claim Company or its assigns may have relating to the alleged account, debt, and note sued upon in case _____ (hereafter, the “Debt”).

3. In return, Consumer agrees to give Company a release for all past or current claims Consumer has against Company and its assigns at the time of settlement.

4. The Consumer’s release of Company is contingent upon Company’s timely payment of the settlement payment and Company’s compliance with all other settlement terms.

5. The releases granted by the parties will exclude their rights of enforcement for remedies for material breaches of the settlement agreement.

6. The parties will file mutual dismissals with prejudice within ___ days after Company delivers the settlement funds to Consumer’s attorney, and both parties deliver signed counterparts of any written settlement agreement agreed to by the parties to each other.

7. Each party will bear its own court costs and attorney’s fees.

8. Failure to comply with any of the above provisions would be a material breach of the settlement agreement. Any material breach of the settlement entitles the non-breaching party with right to claim for damages, including attorney fees and costs incurred as a result of the breach, as well as any other applicable damages, for enforcement of the contract. **Failing to provide timely payment of settlement funds is a material breach of this agreement.**

9. This Settlement specifically excludes any confidentiality or non-disparagement clauses.

Demand tendered by:

Final Thoughts:



...We choose to go to the moon in this decade and do the other things, not because they are easy, but because they are hard...

It may not be the easy thing to fight for a **fair** and **ethical** settlement. But it is always the **right thing**.

QUESTIONS?

Conclusions – More Resources

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CLE Materials available online:

www.llckc.com/forlawyers/