



# ETHICS IN SETTLEMENT NEGOTIATIONS



# Competent representation

Promptly communicate,

Define the scope of authority to negotiate.

Understand the case: Manage expectations.

Anticipate settlement terms.





# Who decides?



Contingency fee case: Although Plaintiff's consumer credit case has proceeded from bad to worse from the outset, there are issues of fact which will preclude summary judgment. The parties attend a settlement conference. Defendant agrees to pay \$50,000 (about ½ the cost of trying it), **PROVIDED** Plaintiff agrees to a confidentiality clause.

Plaintiff refuses to accept the offer, explaining he rejects the confidentiality provision; he wants to “shine a light” on the credit card company's misconduct so others are not duped. In the judge's presence, Plaintiff's counsel insists that the plaintiff settle. When Plaintiff refuses, counsel threatens to withdraw. The settlement conference ends without a settlement. One week later (one month before trial), Plaintiff's counsel moves to withdraw, citing an inability to communicate with the client.

Has Plaintiff's counsel violated the ethical rules?

How should the judge respond during the settlement conference to Plaintiff's counsel's demands?

How (and which) judge should handle and rule on the motion to withdraw.

## Model Rule 1.2(a)

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.



## Model Rule 1.16: Declining or Terminating Representation

(a) . . . [A] lawyer **shall** not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.





## Model Rule 1.16: Declining or Terminating Representation

(b) . . . [A] lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.



# Duty of Candor





Plaintiff sues Defendant for a trademark violation. The damage exposure is very high, and Defendant's liability is all but certain.

At a settlement conference. Defendant claims it cannot pay the value of the claim, and if it must, it will declare bankruptcy. Defendant provides financial information to the judge, instructing the judge to pass this information to Plaintiff. The judge does. Eight hours later, the case settles for 20% of the total loss, the plaintiff choosing to take some money rather than risk getting nothing.

As he was leaving, defense counsel states he's relieved the case settled; adding that about half-way through the conference, Defendant told counsel that he (Defendant) had failed to disclose his total assets.

Questions:

Is the settlement valid?

Did defense counsel violate ethical rules? When?

Does it matter that the statements were made to a judge?

What was the correct course of action?



## Model Rule 4.1(b) Transactions With Persons Other Than Clients

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.



## Model Rule 1.2(d) Scope of Representation & Allocation of Authority Between Client & Lawyer

- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

## Model 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. . . .



# Motives and Conflicts



Personal injury—motor vehicle accident occurs when Defendant, driving a U-Haul truck, veers into Plaintiff's lane on the interstate. Plaintiff sues both the Defendant driver and U-Haul.

Service was perfected on U-Haul. Plaintiff failed to serve the Defendant driver. The claim against the driver is dismissed for want of prosecution,

The parties attend a settlement conference. When Plaintiff arrives, it was apparent that Plaintiff does not know U-Haul is now the sole defendant. Any case against the Defendant driver is now barred by the statute of limitations.

Questions:

Are there ethics concerns with proceeding with this settlement conference?

If Plaintiff's counsel does not, must the judge tell the plaintiff why the case against the driver was dismissed?

Must the conduct of Plaintiff's counsel be reported to Counsel for Discipline?

# Posturing and threatening

Fed. R. Civ. P 1:

The **parties** must take an active role in securing the “just, speedy, and inexpensive determination of every action or proceeding.”



# Unrepresented parties

Clarify who you represent – and who you don't.

Correct misunderstandings as to representation.

Do not give advice, other than advising to hire counsel.

Avoid making inaccurate or misleading statements of law or material fact.





Questions?

