

# Ethical Pitfalls in Settlement Negotiations

## Avoiding Sanctions and Malpractice Liability

### A Live 90-Minute Audio Conference with Interactive Q&A

#### Today's panel features:

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**Wednesday, May 6, 2009**

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# **ETHICAL PITFALLS IN SETTLEMENT NEGOTIATIONS**

## ***Restrictions on Future Representation***

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# ABA Model Rule 5.6(b)

“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.”

# Direct Restrictions

- Can't directly condition settlement on the lawyer promising not to take on cases against the settling party
- Based on public policy considerations

# “Indirect” Restrictions

- *In re Brandt/Griffin*,  
10 P.3d 906 (Or. 2000)
- *Florida Bar v. St. Louis*,  
967 So.2d 108 (Fla. 2007)
- *Florida Bar v. Rodriguez*,  
959 So.2d 150 (Fla. 2007)

# Other Restrictions

- ABA Formal Ethics Opinion 93-371 & settlement “opt out” restrictions
- ABA Formal Ethics Opinion 00-417 & restrictions on use of information

# Whose Problem?

- Not just the claimant's lawyer
- Model Rule 5.6(b) prohibits both making *and offering*
- *Adams v. Bellsouth*,  
2001 WL 34032759 (S.D. Fla. Jan. 29,  
2001)

# What Kinds of Problems?

- Regulatory Discipline
- Civil Liability Claims
- Enforceability Problems~Restatement (Third) of the Law Governing Lawyers (2000), §13, Comment c: “void and unenforceable”

# For Further Reading

- February 2009 DRI *For the Defense* article included with program materials (reprinted with permission)
- ABA Center for Professional Responsibility web site~[www.abanet.org/cpr](http://www.abanet.org/cpr)



## Follow the Rules

# Facets of Settlement Ethics

By Mark J. Fucile

It's a fact of our practice lives that most cases settle. That's been true for a long time. The dynamics of settlement negotiations, however, have changed significantly in recent years. These changes include the increasing "organization" of negotiations through court-annexed and private mediation, an attendant effort to find "new" ways to resolve cases and, especially in the mass tort context, "group" or other multiple case settlements. In this column, we'll look at three facets of settlement ethics. *First*, we'll discuss the sometimes not-so-bright line differentiating opinions from material misstatements during negotiations. *Second*, we'll examine whether a litigation opponent can be prevented from handling future cases against a defendant as part of a settlement agreement. *Third*, we'll survey the rule governing aggregate settlements. Failure to follow the ethics rules in these areas can result in court-imposed sanctions on lawyers and their clients, bar discipline and potentially undo the very settlements the parties have tried to achieve. With all three areas, we'll focus primarily on the American Bar Association's influential Model Rules of Professional Conduct that form the template for the ethics rules in most states, and the ABA's equally influential formal ethics opinions. Both are available on the ABA Center for Professional Responsibility's web site at [www.abanet.org/cpr](http://www.abanet.org/cpr). (Note: ABA Ethics Opinions are available for a fee.)

## Opinions vs. Misstatements

In settlement negotiations, ABA Model Rule 4.1 sets the marker for our dealings with opponents:

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 [the confidentiality rule].

It is important at the outset to emphasize what is *not* required under this rule: there is no affirmative obligation to disclose weaknesses in your client's case to the other side. ABA Formal Ethics Opinion 94-387 (1994) notes:

As a general matter, the Model Rules of Professional Conduct... do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the context of settlement negotiations or otherwise. Indeed, the lawyer who volunteers such information without her client's consent would likely be violating her ethical obligation to represent her client diligently, and possibly her obligation to keep client confidences.

*Id.* at 1.

It is also important to stress that hard bargaining that includes expressions of opinion is not prohibited either. ABA Formal Ethics Opinion 06-439 (2006), drawing on Comment 2 to ABA Model Rule 4.1, attempts to delineate the sometimes imperfect line between opinions and misstatements:

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.

*Id.* at 3 (footnote omitted).

What *is* prohibited are outright misrepresentations of material facts, through either knowing misstatement or nondisclosure. ABA Formal Ethics Opinion 95-397 (1995) offers a very real example that can come up when negotiating resolution of mass torts or other serious personal injury claims: the claimant dies. In some instances, a claimant's death may increase the amount of a claim. In others, however, a claimant's death may actually work a dramatic reduction in the value of a claim due to state substantive law. My home state of Oregon falls into the latter category: when a plaintiff dies, the case is converted to a statutory action for wrongful death



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and is subject to a \$500,000 “cap” on non-economic damages. See *Hughes v. Peace-Health*, 344 Or. 142, 178 P.3d 225 (2008). If, as in my example, the death of the claimant is material, the failure to disclose it is not only a violation of Model Rule 4.1, which would subject the lawyers involved to court-imposed sanctions and bar discipline, but it might also serve as a basis for rescission of any settlement reached under that mistaken assumption.

### Restrictions on Future Representation

ABA Model Rule 5.6(b) states the black-letter rule that a lawyer can neither offer nor accept a direct restriction on a lawyer’s right to handle adverse claims as a condition of the settlement of a current case:

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.

Black can fade to gray, however, when the restriction is indirect. In *re Brandt/Griffin*, 331 Or. 113, 10 P.3d 906 (2000), for example, involved two claimants’ lawyers handling multiple business tort cases that were being mediated on a national basis with the corporate defendant’s principal outside and inside litigation counsel. The two claimants’ lawyers had rejected an earlier proposal that would have contained a direct restriction of the kind prohibited by ABA Model Rule 5.6(b). Later, as a way to break an impasse in the overall negotiations, the mediator suggested that the two agree to be retained by the corporate defendant at the conclusion of the litigation to provide the corporate defendant with legal advice on how to structure its operations to avoid similar problems in the future. This arrangement had the indirect effect of preventing the lawyers from handling future claims by effectively “conflicting them out” of matters adverse to the corporate defendant. After obtaining an opinion from the general counsel of their state bar that such an indirect restriction was permissible, they reluctantly agreed to it. One of their clients later complained,

and their state bar’s disciplinary counsel, which was a different arm of the bar than the general counsel of the state, prosecuted the lawyers for violating this rule. The Oregon Supreme Court found that such an indirect restriction was also prohibited and disciplined the lawyers.

Companion cases from the other side of the country, *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007), and *Florida Bar v. Rodriguez*, 959 So. 2d 150 (Fla. 2007), involve both strikingly similar facts and resulting discipline. Again, in the context of a mediation of multiple tort cases, the corporate defendant offered to retain the claimants’ law firm at the conclusion of the litigation involved. Again, the lawyers were told, this time by the mediator, that this sort of arrangement was permitted. Again, one of the claimants raised the issue later. And again, the lawyers were disciplined.

Along the same lines, the ABA, in Formal Ethics Opinion 93-371 (1993), concluded that a global settlement of mass tort litigation with a law firm’s clients that created a predetermined settlement rate for future claims while prohibiting the law firm from representing clients who “opted out” also violated ABA Model Rule 5.6(b). Similarly, the ABA, in Formal Opinion 00-417 (2000), found that a settlement agreement that prevented a claimant’s counsel from using the information learned during the case being settled in any future case violated ABA Model Rule 5.6(b).

Finally, it is important to note from the defense perspective that ABA Model Rule 5.6(b) is not just a “problem” for claimants’ counsel. The rule is framed to prohibit offering such restrictions, as well as accepting them. In *Adams v. Bellsouth Telecommunications, Inc.*, No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001) (unpublished), for example, the defense lawyers were sanctioned for offering a “consulting” arrangement to claimants’ counsel reminiscent of those discussed above and were also ordered to forward copies of the decision to their state licensing authorities. Further, although state substantive law will control the enforceability of such provisions in a contractual

sense, the Restatement (Third) of the Law Governing Lawyers (2000), in Section 13, Comment c, finds that they are “void and unenforceable.” Depending on the relationship of a provision of this kind to the overall deal struck, that also suggests that at least in some instances, provisions violating ABA Model Rule 5.6(b) could put a settlement itself at risk.

### Aggregate Settlements

Aggregate settlements of multiple claimant litigation are usually framed as: “My client will pay ‘x’ dollars to resolve all of these cases, but the offer is contingent on all of your clients agreeing to settle.” Aggregate settlements are permitted under ABA Model Rule 1.8(g), within specified limits, and ABA Formal Ethics Opinion 06-438 (2006) discusses them comprehensively. (As an aside, under Comment 13 to Model Rule 1.8(g), class actions are governed by their own procedural rules.)

ABA Model Rule 1.8(g) specifies that the claimants affected must be told “the existence and nature of all the claims... involved and the participation of each person in the settlement.” ABA Formal Ethics Opinion 06-438 counsels that the disclosure should also include:

- The total amount of the aggregate settlement or the result of the aggregated agreement. [Including whether the proposal is ‘all or nothing.’]
- The existence and nature of all of the claims, defenses... involved in the aggregated settlement[.]
- The details of every other client’s participation in the aggregate settlement... , whether it be their settlement contributions, their settlement receipts... or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).
- The total fees and costs to be paid to the lawyer as a result of the aggregate

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gate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.

- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

*Id.* at 5 (footnote omitted.)

ABA Formal Ethics Opinion 06-438 also

notes that the disclosure “must be made in the context of a specific offer or demand... [and a]ccordingly, the informed consent required by the rule generally cannot be obtained in advance of the formulation of such an offer or demand.” *Id.* at 6 (footnote omitted). Due to the significant potential for conflicts, ABA Model Rule 1.8(g) requires both that the claimants' consent be confirmed in writing and that they actually countersign the consent document.

From the defense side, aggregate settlements are “easy” in the sense that they are

expressly permitted and often provide significant practical benefits to clients facing multiple claimants represented by the same law firm that are all based on the same basic facts. From the plaintiffs' side, aggregate settlements can offer significant practical benefits as well but they also place equally significant disclosure obligations on plaintiffs' counsel. For both sides, the ethical obligations need to be addressed to preclude opening a door to possible rescission of the settlement based on state substantive contract law. 

# **Ethical Implications of Aggregated Settlement or Aggregated Agreement**

## **Ethical Pitfalls in Settlement Negotiations Avoiding Sanctions and Malpractice Liability**

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## The Operative Rule - ABA Model Rule 1.8(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."

# The Leading ABA Opinion

Formal Opinion No. 06-438

## Scope of Model Rule 1.8:

The Rule applies to civil and criminal matters.

# Is the Application of Model Rule 1.8(g) Exclusive?

Answer: No.

The Rule "supplements," and provides a "focused application" of, other Model Rules, including:

a. ABA Model Rule 1.7 (Conflicts of Interest: Current Clients): Generally prohibits representation of a client if the representation involves a concurrent conflict of interest absent informed consent, confirmed in writing.

b. ABA Model Rule 1.2 (Allocation of Authority Between Client and Lawyer): Lawyer must abide by client's decision regarding objectives of representation and whether to settle matter, or enter plea.

c. ABA Model Rule 1.6 (Confidentiality of Information): Lawyer may not disclose client confidences without client's informed consent or unless impliedly authorized in order to carry out the representation.

# What ABA Formal Opinion No. 06-438 Does Not Deal With:

- a. Settlements made in certified class action cases or derivative actions are not treated as "aggregate settlements" for purposes of the Opinion.
  - Such matters have their own procedural requirements and unique issues pertaining to the existence of an attorney-client relationship.
- b. Multi-party representation in bankruptcy cases.

## How Does Model Rule 1.8(g) Supplement Model Rule 1.7 (Conflicts of Interest: Current Clients)?

Answer:

- a. It requires an additional level of disclosure by the lawyer;
- b. It requires the clients' informed consent to the settlement or plea to be in writing.

\*Note: The lawyer must still comply with ABA Model Rule 1.7.

How Does Model Rule 1.8(g) Provide a Focused Application of Model Rule 1.2 (Allocation of Authority Between Client and Lawyer)?

Answer: Rule 1.2 protects a client's right in all circumstances to have the final say in deciding whether to accept or reject an offer of settlement or to enter a plea.

How Does Model Rule 1.8(g) Provide a Focused Application of Model Rule 1.6 (Confidentiality of Information)?

Answer: Rule 1.6 requires a lawyer to obtain the clients' consent to reveal information relating to his or her representation of each of them to all other clients affected by the aggregate settlement or plea agreement.

# What is an "Aggregate Settlement" or "Aggregated Agreement"?

- The term is not defined in the ABA Model Rules of Professional Conduct
- ABA Formal Opinion No. 06-438 Defines it as follows:
  - "An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas."
  - "The rule applies when any two or more clients consent to have their matters resolved together."

- Consequence: Not all of the lawyer's clients facing criminal charges, having claims against the same parties, or having defenses against the same claims, have to participate in the matter's resolution in order for the resolution to be an aggregated settlement or aggregated agreement.
- In Other Words: Rule 1.8(g) does not address the lawyer's obligations to other clients having similar claims or defenses who are not included in the aggregate settlement or aggregated agreement.

Note: Lawyer still has other ethical obligations to such clients. For example, if the representation of the clients in the aggregate settlement or aggregated agreement creates a significant risk that the lawyer's representation of the other client(s) will be materially limited by the lawyer's responsibilities to the clients involved in the aggregate settlement or aggregated agreement, or the lawyer's personal interest in the settlement, he may need the informed consent of the client(s) not participating in the aggregated settlement or aggregated agreement.

# Does Model Rule 1.8(g) Apply Only In Cases of Joint Representation?

Answer: No.

- Common representation of multiple parties *in the same matter*. Rule 1.8(g) applies if there is an aggregate settlement or aggregated agreement involving two or more clients.

Examples:

- Damages claimed by passengers injured in bus rollover;
- Purchasers of fraudulently issued stock
- Pleas offered by criminal defendants alleged to be part of a drug ring

- Common representation of multiple clients *in separate cases*: Rule 1.8(g) applies if there is an aggregate settlement or aggregated agreement involving two or more clients.

## Examples:

- Breach of home warranties against a home builder brought by several home purchasers represented by the same lawyer, even though each claim is filed as a separate lawsuit and arises with respect to a different home, a different breach, and even a different subdivision.

Note: As a practical matter, the more disparate the claims included in the aggregate settlement proposal, the more likely it is the proposal could violate other provisions of the Model Rules.

# What Are the Forms Aggregate Settlements Can Take?

Answer: They can take a variety of forms.

Examples:

- A sum of money offered or demanded by multiple clients without specifying the amount to be paid to or by each client.
- Claimant makes offer to settle claim for damages with two or more defendants.
- Prosecutor accepts pleas from two or more criminal defendants as part of one agreement.

# What Does Compliance With Rule 1.8(g) Require?

1. The *client must consent* to the aggregate settlement or aggregated agreement *in writing*.

\*Note: This is stricter than Rule 1.7 which simply requires that the client give informed consent, confirmed in writing when there is a conflict (i.e., under Rule 1.7 the consent can be *oral* confirmed in a writing by the lawyer).

2. Valid and informed consent, which at a *minimum* requires disclosure of:

a. Total amount of the aggregate settlement or aggregated agreement

b. Existence and nature of all claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement

c. Details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution.

d. Total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by any opposing party or parties.

\*Note: When the amount of fees and costs to be paid to the lawyer as a result of an aggregate settlement are not yet determined at the time of the settlement, the lawyer should disclose to each client the process by which those amounts will be established and who will pay them, and the amount he will be requesting to be paid.

e. The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

\*Note: Best practices would include the necessary disclosures involving these details in the writing signed by the client

\*Note: This list is not exclusive – the facts and circumstances of a particular settlement could require additional disclosures.

# Can the Lawyer Make the Required Disclosures and Obtain the Requisite Consent Up Front?

Answer: No.

The detailed disclosures must be made in the context of a specific offer or demand.

\*Note: "Majority vote" fee agreements have been rejected by several courts

# What if the Information That Must Be Disclosed Is Protected Under Model Rule 1.6 (Confidentiality of Information)?

Answer: The lawyer must first obtain informed consent from all of his clients to share confidential information among them.

\*Note: Best practice would be to obtain this consent at the outset of the representation, if possible, or to at least alert the clients that disclosure of confidential information might be necessary to effectuate an aggregate settlement or aggregated agreement.

# If the Clients Consent To Your Sharing Such Information Then What?

Answer:

The lawyer should explain to the clients that if a dispute arises between any of the clients subsequent to the sharing of such confidential information, the attorney-client privilege may not be available for assertion by any of them against the other(s) on issues of commonly given advice.

## Anything Else the Lawyer Should Do in Prospective Matters That Could Involve Aggregate Settlements or Aggregated Agreements?

Answer:

The lawyer should advise clients in such representations that there is a risk that if the offer or demand requires the consent of all commonly-represented litigants, the failure of one or a few members of the group to consent to the settlement may result in the withdrawal of the offer or demand (i.e., one client could potentially "veto" the settlement).

## Final Note: The Rule is Prophylactic for the Protection of the Client

BUT: It protects lawyers as well by helping insulate them from claims by clients who consent to a settlement but later become unreasonably dissatisfied with the result. It also helps ensure the finality and enforceability of the aggregate settlement or aggregated agreement that the clients have chosen to enter into.

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# Ethical Pitfalls in Settlement Negotiations

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Ethical Pitfalls in Settlement Negotiations  
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**Introduction**

The rules of professional conduct and their interpretation are traditionally a matter of state statutory and common law. This article reviews a representative sampling of cases and professional responsibility opinions from various jurisdictions that reflect the spectrum of permissible and impermissible conduct in the context of settlement negotiations. The ABA Model Rules of Professional Conduct (1983, as amended through 2002) have been used as the baseline. California has its own combination of statutes and judicial rules governing attorney conduct. It must be emphasized that even if two jurisdictions have adopted the same version of a provision of the Model Rules, the interpretation of that provision by the courts and committees on professional conduct may significantly differ between the two jurisdictions.

Useful links to bar associations, rules of conduct, ethics opinions and related resources, at the state level, include:

ABA Center for Professional Responsibility <<http://www.abanet.org/cpr/home.html>>  
Georgetown Law Library <[http://www.ll.georgetown.edu/guides/legal\\_ethics.cfm](http://www.ll.georgetown.edu/guides/legal_ethics.cfm)>  
Internet Legal Services <<http://www.legalethics.com/>>  
Legal Information Institute <<http://www.law.cornell.edu/ethics/>>

**Settlement Negotiations**

Three ethical issues that can arise during settlement negotiations are: (1) puffery or overstating the client's position; (2) settlement agreements that preclude an attorney from future representation of other clients or otherwise restrict the attorney in the practice of law; and 3) conflicts that arise in the context of aggregate settlements. Given that cases are more likely to be settled than go to trial, it is imperative that employment litigators be aware of pitfalls that may

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occur in settlement. See generally American Bar Ass'n, Section of Litigation, Ethical Guidelines for Settlement Negotiations (2002).

**I. Truthfulness In Statements to Other: misstatements, opinions, puffery**

Rule 4.1, ABA Model Rules, governs statements made during settlement negotiations:

**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
- (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.

The rule applies to misstatements of material fact or law, not opinions. Whether a particular statement is considered one of fact is determined based on the circumstances. Rule 4.1 Comment 2. Relevant circumstances include whether the statement was made in response to a specific question, whether it contains qualifications, or whether it is made in a disputed negotiation between represented parties. See e.g., Office of Disciplinary Counsel v. DiAngelus, 589 Pa. 1, 907 A.2d 452 (Pa. 2006).

A 2002 case from Maryland illustrates the problems that can arise when counsel misstates facts during settlement negotiations. Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435 (D. Md. 2002). In Ausherman, a putative multi-plaintiff action involving alleged violations arising from unauthorized disclosure of the plaintiffs' credit reports, the defendant asked the plaintiff's counsel for information about the identity of the person who had allegedly disclosed these unauthorized actions to one of the plaintiffs. Id. at 438. Despite numerous requests and court orders, plaintiff's counsel refused to provide this information until he finally complied with an order that he be subjected to a deposition to be presided over by the Magistrate Judge. Id. at 438-39. During this deposition, the plaintiff's counsel, in response to a question about his written statement that he had made "confidential arrangements" to obtain the identity of this inside person, candidly responded as follows:

Q. Well, in your [settlement] letter, in the second paragraph, you indicate, please be advised that I do not at present know the identity of this individual. I have made confidential arrangements, however, to have that information provided to me once any possibility of my own deposition or answers to interrogatories has passed. What confidential arrangements are you talking about?

A. There were none. That was language put in there for the purposes of settlement bluster.

Q. So this is a lie?

A. That is correct. It is not true.

Q. So you never made any arrangements to find out the identity of John Doe Number 3?

A. No. I was attempting to find out the identity of John Doe Number 3, but while we were in settlement discussions, I wanted to make the representation, for the purposes of maximizing my clients' settlement position, that I could obtain an individual to provide to your in-house counsel.

Q. And can you?

A. No.

Q. So at the time you made this statement, you were lying?

A. That's correct.

Id. at 440. Magistrate Judge Grimm aptly remarked that:

As it presently is conducted, the judicial resolution of civil disputes certainly must include settlement negotiations involving pending litigation, as they are an integral part of this process. . . .

It does not require a rule of professional responsibility for a lawyer to know that, during the process of settlement negotiations, he or she may not lie to opposing counsel about a fact that is material to the resolution of the case. It is just as damaging to the integrity of our adversary system for an attorney knowingly to make a false statement of material fact to an opposing counsel during settlement negotiations, as it is to lie to a lawyer or the judge in court.

Id. at 443-44. Thus, the court applied ABA Rule 4.1(a) (as adopted essentially verbatim by the Maryland Court of Appeals), which requires "truthfulness in statements to others," including opposing counsel. Id. at 445-46. The court recognized that some level of puffery might be acceptable, but not that at issue in this case:

The treatises also make reference to an issue that extensively is discussed in legal publications: recognizing just where the line is to be drawn between ethical and unethical behavior during the negotiation process can be difficult to discern. Patently, certain aspects of the process unavoidably involve statements that are less than completely accurate, such as posturing or puffery, intentional vagueness regarding a negotiating party's "bottom line," estimates of price or value, and the party's ultimate intentions regarding what an acceptable settlement would be -- all of which are thought to encompass representations that are not "material."

Id. at 446 (citations omitted). Here, however, counsel's conduct crossed that line:

While there still may be legitimate debate regarding which aspects of the negotiation process demand strict adherence to the requirements of candor, as the legal journals demonstrate, this much at least is not subject to principled argument: Rule 4.1(a)(1) prohibits an attorney from knowingly deceiving a third person, including an opposing counsel, during negotiations. The misrepresentation may be either express or by a failure to disclose. It also must involve a fact or the law that is material to the negotiation, which necessarily must be evaluated on a case-by-case basis.

Id. at 448-49. The court, therefore, referred this matter to the court's disciplinary committee:

While the duty imposed by Rule 4.1(a)(1) may be a narrow one -- not to misrepresent knowingly facts or law material to the negotiation -- it is also an absolute one.

In each instance the questions for the negotiating attorney, as well as a reviewing disciplinary committee or court if called upon to do so, is to determine: (1) what is the statement or omission in dispute? (2) is it untrue or deceptively incomplete in any significant respect? (3) reasonably viewed, is it important to the subject that is being negotiated? and (4) at the time it was made, did the attorney know or should have known under the circumstances that the statement was untrue? In the pending case, answering these questions easily shows why there is abundant evidence requiring the referral of Mr. Sweetland's statements in his settlement letter to the Defendants' attorney to the Court's disciplinary committee.

Id. at 451. The court further noted that Rule 408, Fed. R. Evid., which shields certain statements made during settlement negotiations, could not be used to exculpate an attorney from his unethical conduct during settlement negotiations:

For those who see within Evid. Rule 408 the reflection of their own ingenuity at having discovered a means to lie, threaten, or coerce with impunity to negotiate a settlement advantageous to their clients, the sanctuary they perceive is illusory. The rule itself, on its face and interpreted as it must be -- under Evid. Rule 102 to obtain a fair and just result -- allows no such use. Nor will the courts allow a rule intended to promote the fair resolution of disputes to be perverted by a use that would undermine the very reason for its existence. Accordingly, the disciplinary committee of this Court is asked to investigate Mr. Sweetland's conduct in connection with the settlement letter and take any appropriate action based on the outcome of that investigation.

Id. at 455.

Similarly, a 1999 case from New Mexico illustrates comparable problems with sanctionable conduct based on plaintiff's counsel's behavior during settlement negotiations of an employment discrimination claim brought by an employee at a state prison. Pendleton v. Central New Mexico Correctional Facility, 184 F.R.D. 637 (D.N.M. 1999). Here, the parties had negotiated a settlement which required the plaintiff to resign his position and release all claims he had against the employer. Id. at 638-39. However, the plaintiff filed a new charge of retaliation immediately before signing the agreement and release, and refused to resign, both of which were contrary to his counsel's representations during the negotiations. Id. The plaintiff belatedly resigned several months later and then filed a second action in court, based on the retaliation charge, id. at 639; the employer moved for Rule 11 sanctions, based in part upon plaintiff's counsel's material misrepresentations during settlement negotiations. Id. at 640.

The court denied the Rule 11 sanctions, solely because the employer failed to serve it upon the plaintiff in advance of filing it. *Id.* However, the court expressed its strong displeasure with plaintiff's counsel's conduct during the settlement negotiations:

As we go through this life we learn, and sometimes the hard way, who we can trust to be candid and who we cannot. It is unfortunate that some attorneys apparently feel no obligation to their fellow attorneys, but then again, as the saying goes, "it's a short road that doesn't have a bend in it." The Rules of Professional Conduct and the case law suggest that, even in the context of finalizing a settlement agreement and release, a knowing failure to disclose a non-confidential, material and objective fact upon inquiry by opposing counsel is improper. . . . The court agrees with Defendant that the failure to disclose a fact may be a misrepresentation in certain circumstances. What is particularly troubling in this case is that the second retaliation lawsuit arose directly and immediately out of efforts to settle the prior action. Holding back information that if divulged might have led to a quick low-cost resolution of this action without resort to additional litigation is exactly the type of conduct that the public finds abhorrent and that contributes to the low esteem that the bar currently is trying to reverse.

Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference. The profession is more than a business, and should remain so. As professionals we should, while trying to solve our clients' problems, make every effort to avoid needless litigation. The conduct employed in this case certainly was not calculated to achieve that end.

*Id.* at 641.

The 2002 revision to Rule 4.1, ABA Model Rules, included revised phrasing in the Comments to this Rule that addresses these issues (updated language is underlined and the phrase to be deleted by strike-out):

#### Misrepresentation

[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 ~~failure to act~~ partially true but misleading statements or omissions that are the equivalent of affirmative false statements. 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.

#### Statements of Fact

[2] 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.

Comments to ABA Model Rule 4.1 (2002). The Reporter's Explanation of Changes states that the addition of "ordinarily" in Comment 2 is intended "to clarify that, under some circumstances, an estimate of price or value may constitute a false statement of fact under this Rule."

It is a violation of rule 4.1 to refer to, incorporate, or affirm the statement of another person, including the client, that the lawyer knows to be false. Rule 4.1 Comment 1. It is also important to note that omissions of material fact may also constitute violations of the rule. See Rule 4.1, Comment 1 (prohibiting "partially true but misleading statements or omissions" that are the equivalent of affirmative false statements); see also, Chavez v. New Mexico, 397 F.3d 826 (10th Cir. 2005) (defendants were entitled to rescission of settlement agreement in Title VII case where employees' counsel withheld from employers' attorney the existence of a second, undisclosed suit, similar to the one the parties were attempting to settle. The existence of a second, undisclosed suit was a material fact and, therefore, court properly refused to enforce the settlement agreement.)

False statements regarding the party's willingness to settle or the party's negotiation goals, or statements that can fairly be described as negotiation "puffing" do not generally constitute false statements of material fact within the meaning of the Model Rules. See e.g., United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982) ("Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are 'motivated by a desire for peace rather than from a concession of the merits of the claim.'"). The ABA, in Formal Opinion No. 06-439 "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation" (2006), addressed the question of how much leeway an attorney has in making representations about their client's settlement position. The opinion states:

We emphasize that ... care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even 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.

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even 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 opinion also considered whether "puffing" about a client's settlement position should be prohibited in a caucused mediation setting where a third party neutral becomes involved, and held that the same standard applies to this setting as applies in direct settlement negotiations between counsel. Id.

## **II. Restriction on Attorneys' Ability to Practice Law**

### **A. In General**

Under ABA Model Rule 5.6 a lawyer may not offer, nor may opposing counsel accept, a settlement agreement which would obligate them to limit the representation of future claimants. This prohibition includes direct agreements to limit practice and indirect agreements which have the effect of limiting an attorney's ability to practice.

An important ethical issue that can arise during settlement negotiations occurs when a settlement agreement precludes an attorney from using information acquired in one case in future litigation involving other clients. A plaintiff's counsel may have several pending or prospective cases against the same employer. The plaintiff's counsel may want to use information learned or obtained during discovery in the first case to help litigate other cases. Even if the plaintiff's counsel is willing to keep such information confidential, *i.e.*, by not releasing it to the public and by filing court documents containing that information under seal, defendant's counsel may object to any future use of that information by the plaintiff's counsel.

In 2000, the ABA issued a formal ethical opinion, holding that while a settlement agreement could restrict an attorney from releasing information, a settlement agreement could not prohibit an attorney from making any use of that information, as that would be an improper restraint on an attorney's right to practice. See ABA Formal Opinion 00-417, "Settlement Terms Limiting a Lawyer's Use of Information" (April 7, 2000). The ABA concluded that:

Although a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except in limited circumstances. An agreement not to use information learned during the

representation effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b).

Id.; see also “ABA Opinion Says Lawyers May Restrict Release, But Not Use, of Secret Information,” 68 U.S.L.W. 2757 (June 20, 2000).

The New York State Bar Association similarly held that, under Disciplinary Rule 2-108(B), a New York attorney could not be prohibited, through a settlement agreement, from representing other clients in future cases against that client’s employer. See N.Y. State Bar Ass’n, Committee on Professional Ethics, Opinion 730, “Settlement Agreements; Restrictive Covenants” (July 27, 2000), available online at: <<http://www.nysba.org/>>; see also “Lawyers May Not Promise in Settlement to Keep Mum About Facts that Aren’t Secret,” 69 U.S.L.W. 2102 (Aug. 22, 2002). This opinion noted that although such agreements may be enforceable, see Feldman v. Minars, 230 A.D. 356, 658 N.Y.S.2d 614 (1997), they were prohibited under Rule 2-108(B).

The Supreme Court of Florida held that an attorney who entered into a secret agreement for a fee, not to bring future cases against that party would be required to forfeit the funds acquired through secret engagement agreement with opposing party and to disgorge the prohibited fee to the Clients' Security Fund. See The Florida Bar v. Rodriguez, 959 So.2d 150 (Fla. 2007) (imposing two year suspension on attorney).

The D.C. Court of Appeals upheld the one-year suspension of an attorney who entered into a secret settlement agreement with the defendant in a products liability class action. In re Hager, 812 A.2d 904 (D.C. 2002). Here, the settlement agreement would, inter alia, prohibit the attorney representing current or future clients with claims against the defendant, and preclude the current clients from obtaining the attorney’s work product or the names of potential class members, which effectively foreclosed the clients from continuing with their claims. Id. at 917-18. The court found that the attorney’s conduct violated D.C. Rules 1.2(a) (a lawyer must abide by the client’s decision whether to accept a settlement offer) and 5.6(b) (prohibiting a lawyer from entering into a settlement agreement that restricted the lawyer’s right to practice).

The Virginia Bar, in 2004, concluded that a settlement agreement’s restriction on a plaintiff’s lawyer’s ability to file future lawsuits against the employer was an impermissible restriction on the attorney’s ability to practice law, since the settlement agreement provisions were so broad that even departing attorneys could not sue the employer in their new law firm. See Va. Bar. Legal Ethics Op. 1788 (Feb. 17, 2004) (<http://www.vacle.org/opinions/1788.htm>). This issue arose in the settlement of asbestos litigation against what was then “the largest private industrial employer in [Virginia].”

## **B. Consulting Agreements**

Some employers have tried to circumvent ethical proscriptions by including a settlement provision retaining the plaintiff’s counsel to provide legal services for the employer, such as in a monitoring or consulting role with respect to the implementation of the settlement, or providing harassment training.

A race discrimination case filed against BellSouth illustrates the serious consequences of such agreements by plaintiffs' counsel to provide "consulting" services to the employer, where those "consulting" fees have the effect of reducing the plaintiffs' settlements. See Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1255-60 (11th Cir. 2004); Adams v. BellSouth Telecomm., No. 96-2473, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001); Adams v. BellSouth Telecomm., No. 96-2473, 2000 WL 33941852 (S.D. Fla. Nov. 20, 2000). In the BellSouth litigation, several attorneys, led by Norman Ganz, filed a race discrimination case on behalf of 56 plaintiffs, and threatened to file another lawsuit against BellSouth on behalf of 22 additional plaintiffs. Before the litigation progressed very far, the attorneys reached a global settlement with a total value of \$1.6 million for all 72 plaintiffs. However, of that amount, the plaintiffs received only about \$300,000, with their counsel receiving the remainder, including \$120,000 in a four-year consulting fee, \$230,000 in an "engagement" fee, and \$51,500 in other expenses. After one plaintiff complained to the court that she was forced to sign a settlement agreement that prohibited her from finding out the total value of the settlement or the amounts that the attorneys would receive, the district court appointed a magistrate judge to conduct an investigation. The court adopted most of the magistrate's recommendations, including sanctioning Mr. Ganz by requiring him to disgorge \$300,000 to the plaintiffs and suspending him from practicing before the federal court for three years. However, the court declined to impose monetary sanctions on BellSouth's counsel, even though they had suggested the "consulting fees," and only imposed a requirement that the defense counsel complete ethics training. Adams, 2001 WL 33941852, at \*2-\*10. Subsequently, Ganz was disbarred by the Florida Supreme Court, for this and related misconduct, and his co-counsel agreed to disgorge \$250,000 to the plaintiffs. Jackson, 372 F.3d at 1258 n.9.

Practitioners who are asked to consider the provision of training to the employer/defendant as part of settlement should carefully review Virginia Legal Ethics Opinion 1715, "Settlement Agreement: Future Conflicts; Restriction of Lawyer's Practice," (Feb. 24, 1998). The Opinion considered a hypothetical settlement agreement between an employee and an employer in which, as part of the settlement, the employee's attorneys agreed to provide a specified number of hours of training about employment law to the employer in exchange for a specified sum of money. The agreement specifically stated that the plaintiff-employee's interest in the case is not monetary but rather the improvement of employment practices by the employer. It further stated that the employee releases all claims against the employer and will not seek employment with the employer again.

In response to an inquiry into whether the agreement constituted a violation of DR 2-106(B), which prohibits a lawyer from entering into a settlement agreement that "broadly restricts" the lawyer's right to practice law, the Ethics Committee noted that the agreement contained no express prohibition on the lawyers' right to practice law and therefore refused to speculate about the employer's possible attempts to "buy off" the attorneys by conflicting them out of future lawsuits against the employer, particularly in light of the plaintiff's stated interest in improving the employer's employment practices. However, because the employer proposed making a payment to the employee's attorneys for training services, the Committee noted that a full disclosure of the attorney's financial interest in the settlement and informed consent from the employee would be required to render the agreement ethical as written. Id.

### **C. Restrictions on the Use of Publicly Available Information About A Case**

In a 2006 D.C. Bar Legal Ethics Committee Opinion, the D.C. Bar addressed the question of “whether a lawyer may, as part of a settlement agreement, prohibit the other party’s lawyer from disclosing publicly available information about the case.” See D.C. Bar Legal Ethics Committee Opinion 335 (2006). In that case, a defendant sought as a condition of settlement, a provision that would restrict the plaintiff counsel’s ability to disclose in promotional materials and on the law firm website public information about the case. The issue arose when a law firm, representing a client whose case received substantial media attention, reported developments about the litigation on its website. The defendant sought to compel the plaintiff and her attorney to remove all references to the case from their website and keep confidential not only the terms of the settlement, but also the fact of the settlement, the identity of the defendant, and the allegations of the complaint.

Noting that one of the central purposes of the Rule is to protect consumers of legal services (clients) and their right to choose counsel, the Opinion makes clear that settlement provisions may not impede or prevent potential clients from identifying lawyers with the relevant expertise and experience to bring similar actions. The Opinion reasoned that conditions restricting the use of publicly available information “have the purpose and effect of preventing counsel from informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases.” Id. The Opinion concluded that such a settlement provision constituted an impermissible restriction on a lawyer’s right to practice, in violation of Rule 5.6(b) of the D.C. Rules of Professional Conduct.

### **III. Ethical Issues Posed By Settlement With Multiple Plaintiffs**

Settlement raises a number of difficult issues when representing multiple plaintiffs. Rule 1.8 (g) provides that: “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 consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.” See Rule 1.8. Under Model Rule 1.2(a), a lawyer must abide by a client’s decisions concerning the objectives of representation and whether to accept an offer of settlement.

Settlement issues can create a variety of conflicts between co-plaintiffs. It is frequently the case that a defendant will not wish to settle a case piecemeal, and will condition settlement on attainment of a global resolution between the parties. If some, but not all, of the co-plaintiffs wish to settle the matter, a conflict will develop between the co-plaintiffs. In employment discrimination cases, where emotions tend to run high, a plaintiff who sees her role as vindicating larger interests than her own may wish to take her case to trial to have a public airing of the issues. Her co-plaintiff(s) might not share this public interest goal, and may instead wish to settle the case.

Another common conflict occurs between plaintiffs when apportioning or distributing settlement monies. Although Rule 1.8 prohibits attorneys from making an aggregate settlement of the claims without consent of the clients, defense counsel often present settlement offers in that manner. While it is not considered unethical for a defendant to make such "blanket" settlement offers,<sup>1</sup> the plaintiffs' attorney is potentially confronted with a conflict of interest. If the co-plaintiffs do not consent to the lawyer's participation in aggregate settlement discussions, co-plaintiffs often find themselves bidding against one another to secure the largest share of the settlement monies that the defendant has offered or would be prepared to pay. Co-plaintiffs may also differ on the type of relief that they would be prepared to accept, creating yet other types of conflict. For example, a defendant might be willing to pay a large sum of money for the plaintiffs to forego reinstatement or the right to reapply for a position with the company. This might be acceptable to one plaintiff who has secured alternate employment in the interim, but not to his co-plaintiff who has been unemployed since his termination.

The Standing Committee on Professional and Judicial Ethics of the State Bar of Michigan addressed the issue of acceptance of a court-ordered mediation award by some clients and its rejection by others in Opinion No. RI-134 (May 28, 1992). A mediation determination of \$7,500 was made, to be divided equally among three plaintiffs - \$2,500 to each. Under court rules, the mediation award was deemed rejected unless all the clients accepted it. Applying the Model Rules, the Committee determined that an attorney must withdraw from the representation of all clients unless they all consented to the attorney's continued representation. The rejection of a mediation award by one client is directly adverse to the interests of the other clients who wish to accept the award, therefore triggering Michigan Rule 1.7(a). An attorney may not represent a client where the representation of that client is directly adverse to another unless the attorney reasonably believes the representation will not adversely affect the relationship with the other client, and each client consents. Where two or more clients accept the terms of the mediation award and one objects, Michigan Rule 1.7(b) applies, since this situation materially limits the attorney's responsibilities to the client who rejects the award.

The Committee, however, noted that if the mediation award is rejected, and the matter goes to trial, the lawyer may continue to handle the joint representation because the conflict arose with respect to decisions about settlement, and not because of any factual dispute, differing legal argument or benefit or detriment to a client in pursuing the representation, as long as the clients waive the conflict. The Committee also found that paying individual mediation fees in order to receive separate mediation awards for each client would not relieve the conflict question. The Committee reasoned that the conflict arose because the lawyer had undertaken duties to each client that were in conflict if the clients made differing decisions regarding acceptance of the award, not because the mediation award was presented in the aggregate.

Attorneys may wish to head-off potential conflicts by encouraging plaintiffs at the commencement of the representation to agree to an approach for deciding whether to settle, and how to divide settlement monies. For example, plaintiff's counsel in Allegretti-Freeman v.

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<sup>1</sup> See, e.g., N.J. S. Ct. Adv. Comm. Prof. Eth. Op. 616, "Blanket Settlement Offers to Multiple Plaintiffs" (Sept. 22, 1988).

Baltis, 205 A.D.2d 859, 613 N.Y.S.2d 449 (N.Y. App. Div. 1994), a breach of contract case, drew up an agreement which conditioned settlement of any individual plaintiff's case, upon majority approval by the other plaintiffs. Defendants sought the disqualification of the law firm, arguing that this agreement violated public policy by placing an improper restriction on the ability of any individual plaintiff to settle, and therefore created an impermissible conflict of interest.

The court held that the agreement did not violate public policy. It reasoned, that where several plaintiffs agree to pool their resources for litigation purposes, "we cannot say that it is improper for them to require as part of that agreement that their cases be handled in a uniform matter." The court also rejected the defendants' argument that multiple representation of the parties posed an impermissible conflict of interest justifying the firm's disqualification.

The court noted that "[i]n this case it is not difficult to envisage a scenario wherein [the attorney's] loyalty to the multiple plaintiffs would become divided should certain plaintiffs desire to accept a settlement offer notwithstanding the majority's lack of consent." Id. at 861. The attorney could not represent the interests of the plaintiffs who decided to breach the agreement conditioning settlement on majority approval, and plaintiffs who decided not to accept the settlement. However, the court then stated that such a scenario had not arisen, and seemed unlikely to arise. Because of the hardship that disqualification would pose in the form of delay and increased costs, the court declined to disqualify the attorney, despite the fact that the situation might create the appearance of impropriety. The court further concluded that the interests of a client in retaining an attorney of his/her choice and preference should prevail as against the general rule that the appearance of impropriety should be avoided.

Although plaintiffs may agree to impose additional settlement conditions on one another, as they did in Allegretti-Freeman, plaintiffs may not enter into an agreement that waives their rights under Rule 1.8. Specifically, plaintiffs may not contract around the requirement that all plaintiffs consent to an aggregate settlement. An arrangement that allowed a majority of plaintiffs to govern settlement decisions was found to violate basic ethical proscriptions and was not enforceable. See Hayes v. Eagle-Picher Ind., Inc., 513 F.2d 892 (10th Cir. 1975). After two out of the eighteen plaintiffs challenged the settlement accepted by the majority, the court found that the arrangement violates the "basic tenets of the attorney-client relationship in that it delegates to the attorney powers which allow him to act not only contrary to the wishes of his client, but to act in a manner disloyal to his client and his client's interests." Id. at 894-95; see also M.A. Stratton, "Hit Hard, not Low," Trial, Sept. 2003, at 60, 62-63.

The ABA, in Formal Ethics Opinion 06-438 (2006) addressed the disclosures that attorney's must make to clients in an aggregate settlement context. These include:

- The total amount of the settlement or result of the agreement
- The existence and nature of all claims, defenses or pleas involved
- Details of each client's participation in the aggregate settlement or agreement, whether by contribution to payment, share of receipts or resolution of criminal charges
- Total fees and costs to be paid to the lawyer as a result of the settlement, whether paid from proceeds of the settlement or by an opposing party or parties

- The method to be used to apportion costs among the parties Id.