

ABA Section Offers Settlement Guidelines for Adoption by House of Delegates

A Special Project of the ABA Litigation Section has recommended a number of Guidelines for "practicing lawyers faced with ethical issues in the settlement context." The Special Project was initiated by the chairman of the ABA Litigation Section, who selected as its members, representatives of large firms and small firms, plaintiff's counsel, defense counsel, in-house counsel, academics, a mediator and a federal judge. The Guidelines are based on the ABA Model Rules of Professional Conduct.

The Guidelines were subjected to review and discussion by many groups other than the Project members. They were the subject of a two-day symposium and of many discussions by various bar committees and conferences.

In offering the Guidelines, the Special Project Committee said:

In the last five years, the ABA has adopted and promulgated Guidelines for Litigation Conduct, Civil Trial Practice Standards, and Civil Discovery Standards...there remains a different and unmet need: guidance specifically with respect to settlement negotiations and the ethical issues that arise in that context. These Guidelines are intended to address this need. Adoption of the... Guidelines...by the ABA will go far in accomplishing this goal.

The Guidelines are divided into four parts or Sections.

Section 1. This Section constitutes the Preface. It recognizes that the majority of cases are now resolved through settlement. It limits the Guidelines to the negotiations phase of settlements, not to the enforcement of settlement agreements or to applications for sanctions for misconduct in settlement negotiations. The Guidelines apply to the lawyers in a settlement discussion whether or not a third party neutral is also involved.

The Guidelines draw from existing ABA policies as reflected in the Model Rules and ABA opinions. They also identify significant conflicts between ABA policy and other rules or law. The committee urges lawyers to consult not only the Guidelines, but the rules, codes, ethics opinions and statutes of the jurisdiction controlling the negotiations.

Section 2. This Section confirms the general principles controlling a lawyer's conduct in negotiating settlements. It reminds the lawyer that (1) she is the client's representative and fiduciary; (2) she must provide the client with competent representation; (3) her conduct should be characterized by honor and fair-dealing; (4) with the client's consent, she may disclose to third parties information learned during the negotiations, except when a prevailing rule or law prevents disclosure; (5) when seeking court approval of the settlement, she shall not make a false statement of fact or law or fail to correct a false statement

previously made by her. ("Failure to make disclosure is not excused by the lawyer's ethical duty otherwise to preserve the client's confidences.")

Section 3. This Section deals with issues relating to the lawyer and her clients. Some of the provisions are: (1) the lawyer should consider and discuss alternatives to conventional litigation, including settlement; (2) the decision whether to pursue settlement discussions belongs to the client; (3) the lawyer must discuss the means of negotiation with the client, including whether and how to discuss specific terms; (4) the lawyer must keep the client informed of negotiations and report all settlement offers; (5) the client may grant the lawyer broad authority to pursue a settlement, but the final settlement terms must fall within the scope of that authority; (6) the lawyer should advise the client that the client may revoke the authorization to settle at any time.

Other provisions deal with a lawyer's response to a client who insists on conduct inconsistent with law or with the lawyer's ethical obligations; with the lawyer's obligations to a client who recommends a settlement strategy which is repugnant to the lawyer; and with the lawyer's duties when representing a client with diminished capacity or with special needs. The recommendations also deal with the lawyer's role in settlement negotiations involving multiple clients; with clients in class actions and with clients covered by insurance. In the case of a lawyer who represents an organization or entity, the lawyer is instructed to obtain settlement authority and direction from a representative authorized to act for the organization.

Section 4. This Section deals with the lawyer's obligations to the opposing parties in the settlement negotiations. The essential provisions are: (1) the lawyer must not knowingly make a false statement of fact or law to any third person involved in the negotiations; (2) the lawyer is obligated to disclose a material fact to a third person when doing so is necessary to avoid assisting in a criminal or fraudulent act by the client, unless the disclosure is prohibited by the duty of confidentiality; and (3) the lawyer must withdraw from the negotiations if she discovers that the client will use her services or work product to further criminal or fraudulent conduct; in some instances, the lawyer may withdraw "noisily" by disaffirming a prior opinion or affirmation.

Section 4 continues: (1) a lawyer should not participate in a settlement which prevents any party's lawyer from representing clients in future litigation against another party; (2) a lawyer must not agree to refrain from reporting another lawyer's misconduct as a condition of settlement; (3) unless forbidden by law or rule, a lawyer may agree to keep settlement terms confidential; (4) a lawyer must not communicate with a represented party in the negotiations except with the permission of counsel or as authorized by law or a court order.