

# The Duty To Disclose All Settlement Offers

BY MARY C. DALY

**B**etween ninety-five and ninety-eight percent of all civil cases are settled. Because so much lawyer activity centers around the path to settlement, the conduct of lawyers in negotiating settlements is a matter of grave concern. This article examines two ethical issues that continually perplex and frustrate litigators: (1) the extent of a lawyer's obligation to inform a client of the existence of a settlement offer and (2) the extent to which a lawyer must obey the client's instructions to accept or reject the offer. These issues can arise in a variety of contexts, ranging from personal injury lawsuits, to civil rights claims, to property disputes. They can present themselves in class actions or in matters in which a lawyer represents a single individual or organization. They bedevil lawyers who represent defendants as well as lawyers who represent plaintiffs.

No specific disciplinary rule in the New York Lawyer's Code of Professional Responsibility (Code) addresses the two issues. Lawyers seeking guidance have to look to the Code's Ethical Considerations instead. In analyzing the extent of a lawyer's obligation to inform a client of the existence of a settlement offer, most courts and bar association ethics committees look first to EC 92 and EC 78. They provide, in part:

EC 92. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform the client of material developments in the matters being handled for the client...

EC 78. A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. (Emphasis added)

*See, generally, Susan Martyn, Informed Consent in the Practice of Law, 48 Geo. Wash. L. Rev. 307 (1980).* The possibility that a matter may be settled is obviously a critical piece of information. A lawyer must therefore keep a client apprised of all important aspects of settlement negotiations.

EC 77 reinforces this conclusion and also emphasizes the primacy of the client's authority in deciding to accept or reject a settlement:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client, and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, *it is for the client to decide whether to accept a settlement offer....* (Emphasis added)

It is not difficult to foresee circumstances in which a lawyer would object to the client's right to determine the response to a settlement offer. In a personal injury case, for example, the client may be poor or uneducated, or in immediate need of money to pay his living and medical expenses. The defendant may try to take advantage of the plaintiff's lack of sophistication or his financial needs by offering to settle the case for less than the likely recovery, but nevertheless, a sum much larger than any the plaintiff has ever dreamed of. In these circumstances, the lawyer may conclude that the plaintiff will do better by rejecting the offer, but fear that the client lacks the experience and knowledge needed to make that judgment. Accordingly, the lawyer may decide that it will work to the client's best interest if he is not told of the settlement offer.

The decision not to disclose has been consistently condemned by bar association ethics committees and the courts. For example, the Committee on Professional Ethics of the New York County Bar Association has declared: "We disagree with the concept, sometimes expressed, that it is in the first instance for the lawyer rather than the client to decide whether an offer is in the client's 'best interests' . . . The lawyer may not arrogate to himself or herself this determination." N.Y. County Lawyers' Ass'n Comm. on Professional Ethics, Op. 667 (1988). Similarly, the Committee on Professional Ethics of the American Bar Association, interpreting the Model Code of Professional Responsibility, emphatically stated: "[I]t is the duty of a lawyer to inform his client of every settlement offer made by the opposing party." ABA Comm. on Professional Ethics, Formal Op. 326 (1970).

Given the clarity of ECs 77 and 78 and the uniform position of bar association ethics committees, courts have not hesitated to sanction lawyers for failing to relay a settlement proposal. E.g., *Matter of Wess*, 94 A.D.2d 356, 464 N.Y.S.2d 227 (2d Dep't 1983). The duty to communicate is not reduced even if the lawyer believes that acceptance of the offer would cause the client to violate the law. In *Abraham v. Volkswagen of America, Inc.*, 1991 WL 89917 (W.D.N.Y. Mar. 11, 1991), the lawyer justified his refusal to communicate a settlement offer to his clients on the ground that the settlement would have violated the Federal Rules of Civil Procedure. In granting Volkswagen's motion for sanctions, the court rejected that argument, concluding:

Attorney Shoolman certainly had the right and, perhaps, the obligation to remind the class representatives of their duty to the class and the advantages and disadvantages of rejecting individual settlement offers. What he did not have was the authority to decide for himself that the offers were attractive or unattractive, proper or improper, substantial or insubstantial, and then based on his own opinions, without even so much as notifying his clients that the offers existed, reject them out-of-hand. *Id.* at 4.

### **Affirmative Duty to Explain Terms**

Furthermore, as *Volkswagen* suggests, a lawyer does not automatically fulfill his ethical responsibilities by communicating the fact of a settlement offer to a client. A lawyer has an affirmative duty to explain the terms of a settlement proposal, especially if the lawyer has reason to believe that the client is misinformed. EC 78 states that a lawyer "should exercise best efforts to insure that decisions of the client are made *only after the client has been informed of relevant considerations.*" (Emphasis added). The court in *Wade v. Clemmons*, 84 Misc.2d 822, 826, 377 N.Y.S.2d 415, 419 (Sup. Ct. Kings Co. 1975) captured the essence of this obligation when it succinctly observed that it was the lawyer's duty "to inform himself of all the facts as to how the settlement affected his client. Having done so, it was his duty to inform her...."

The failure to communicate information concerning a settlement offer to a client not only subjects a lawyer to possible discipline and sanctions, but it may also expose the lawyer to liability for malpractice. *E.g., Rubenstein & Rubenstein v. Papadakos*, 31 A.D.2d 615, 295 N.Y.S.2d 876 (1st Dep't 1968), *aff'd*, 25 N.Y.2d 751, 250 N.E.2d 570, 303 N.Y.S.2d 508 (1969).

The lawyer's duty to communicate is inextricably linked with the client's absolute right to accept or reject the settlement offer. As previously noted, EC 77 explicitly locates the source of settlement authority in the client not the attorney. "[I]t is for the client to decide whether to accept a settlement offer...." (Emphasis added). The only restriction EC 77 places on the client's authority is that the decision must be "made within the framework of the law." *Id.* The Court of Appeals for the Second Circuit captured this dynamic in the attorney-client relationship in observing "[a]s a matter of professional responsibility, an attorney owes a duty of loyalty to his client. This duty encompasses an obligation to defer to the client's wishes on major litigation decisions . . ." *In re "Agent Orange" Product Liability Litigation*, 800 F.2d 14, 17 (2d Cir. 1986). This duty is rooted in the agency relationship between the client and the lawyer. As the court observed in *Reynolds v. Maramorosch*, 208 Misc. 626, 628, 144 N.Y.S.2d 900, 904 (Sup. Ct. N.Y. Co. 1955):

[a] principal in an action has the ultimate control of that litigation. If he does not desire to follow the advice, guidance or suggestion of his counsel, the attorney has the right to terminate the relationship, but he may not, against the express wish of the client, take any step in an action, no matter how appropriate it may be.

#### **Retainer Agreement May Not Switch Settlement Power to Lawyer**

Because the power to accept or reject a settlement offer resides exclusively in the client, a lawyer may not impede the exercise of that power by, for example, including a provision in a retainer agreement requiring the lawyer's consent to any settlement. *See* N.Y. County Lawyers' Ass'n Op. 699 (1994).

Nor may a lawyer seek to accomplish that same end by indirection. In Opinion 719, the Committee on Professional Responsibility of the New York State Bar Association (NYSBA) reviewed a proposed letter of engagement in which the client acknowledged a law firm's right to withdraw from the representation if the client failed to follow the firm's instructions and advice "which bear upon ethical, strategic or tactical considerations or matters." The Committee labeled the provision "misleading". Citing ECs 77 and 78, the Committee noted, "at times the Code may require the lawyer to accede to the client's decisions concerning the representation." N.Y.S. Op. 719 (1999).

A letter of engagement need not be wholly silent with respect to issues relating to the settlement of a civil action, however. For example, it may grant the lawyer a revocable power of attorney for settlement purposes. An irrevocable power would violate the spirit and intent of ECs 77 and 78. However, before the lawyer exercises the revocable power, he must fully discuss the settlement with the client and must reach a clear understanding of the client's instructions. *See* N.Y.S. Bar Op. 760 (2003).

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*Mary C. Daly is the James H. Quinn Professor of Legal Ethics at Fordham University School of Law. On August 1, she will assume the position of Dean, St. John's University School of Law.*