ETHICAL CONSIDERATIONS DURING SETTLEMENT

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CHAPTER 22
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“Society, through the legal system, channels people’s grievances into socially controlled, non-violent means of dispute resolution. We — the lawyers — play an indispensable part in that constructive social process.”

Monroe H. Freeman,
UNDERSTANDING LAWYER’S ETHICS, p. 18 (1990)

I. INTRODUCTION: SETTLEMENT & PROFESSIONAL RESPONSIBILITY

The primary objective of the settlement process is to buy peace – permanently – for the parties to the dispute. The case law, however, is replete with post-settlement disputes, many of them based on alleged attorney misconduct. This paper highlights common ethical issues that arise in the settlement context. The theme that links most of these issues is communication – how we communicate with our clients, opposing counsel, the courts, and mediators. To avoid settlement disputes, attorneys must be cognizant of the fine balance between truthfulness and misrepresentation and between cleverness and obstruction. Understanding these distinctions will assist the attorney in preventing settlement-related disputes and grievances.

II. CLIENT’S AUTHORITY TO DECIDE WHETHER TO SETTLE

It is blackletter law that clients are entitled to know about settlement offers and to decide whether to settle a dispute. What are the attorney’s obligations when the client has previously and consistently communicated that he will not settle except on certain defined terms? What if the client is a city or a school district? Who is the “client” when the client is a large organization?

A. Duty to Communicate Settlement Offers

Under Rule 1.02 of the Texas Rules of Professional Conduct, a lawyer must abide by the client’s decisions whether to accept an offer of settlement. Accordingly, the rules require the lawyer to provide the client with information that will help the client decide whether to settle. Under Rule 1.03, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps to permit the client to make a decision regarding a “serious offer” from another party.

Although the rules do not require the lawyer to notify the client of an offer of settlement when the client has previously and clearly indicated that a particular proposal will be unacceptable, the prudent practice is to communicate all offers and receive client feedback, particularly if an extended period of time separates settlement offers. A client’s priorities and evaluation of a case may change over time. The client’s view at the beginning of the case may soften when discovery reveals unexpected weaknesses or strengths, or the cost of the litigation may become burdensome. Analysis of a legal dispute is seldom static.

When the client is a governmental entity, external forces also may affect the client’s view regarding settlement. New officials may be elected or appointed. The law may change; tax revenues may change; and the overall political landscape may change. Even the lawyer’s access to relevant decision-makers may change. Therefore, the attorney must take action throughout the duration of the dispute to ensure that the relevant decision-makers have accurate information regarding developments that may affect the client’s priorities and evaluation of the dispute.

Another prudent practice is to advise the client at the outset about the settlement process, the right of either party to propose settlement, and the fact that the court may order mediation in the future. This communication should occur after the attorney has investigated the facts, evaluated likely risks and outcomes, and prepared a case assessment for the client. This discussion will enable the client representatives to communicate their objectives and concerns to the lawyer.

Under Texas Rule 1.12, when certain leaders at the governmental entity are authorized to make decisions for the entity, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. However, when the lawyer knows that the entity is likely to be substantially injured by the action of the leader (called a “constituent” in Rule 1.12), the lawyer must take reasonable remedial measure, which could include asking the constituent to reconsider the matter or seeking review by a higher authority. At the outset of the litigation, the lawyer should become familiar with the procedures for meeting with the governing board or other officials; if no procedures or guidelines exist, the lawyer should encourage the formulation of such a procedure. The rule further states that, even in the absence of organizational policy, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization’s interest.


Davis Law Firm v. Bates, 2014 WL 585855 (Tex. App.—Corpus Christi—Edinburg, Feb. 13, 2014, no pet.) – A contingency fee contract that required the client to obtain the attorney’s consent to settle violated the rule that requires attorneys to abide by a client’s decision and, thus, the contract was unenforceable as against public policy. The contract stated: “Neither Client nor Attorney will make a settlement of the claim herein or accept any sum without consent of the other....”

James v. Commission for Lawyer Discipline, 310 S.W.3d 598 (Tex. App.—Dallas 2010, no pet.) – The attorney violated Rule 1.03 by failing to keep his client “reasonably informed” regarding a counterclaim, sanctions, or invitations from opposing counsel to settle. It “is not the quantity but the quality and content of the communications that shows compliance with Rule 1.03.”

Sanes v. Clark, 25 S.W.3d 800 (Tex. App.—Waco 2000, pet. den.) – The following provision violated Rule 1.02: “[Clients] fully authorize my said attorney to bring suit, if necessary, and to prosecute the same to final judgment and to compromise and settle this claim....”

Auguston v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658, 663 (5th Cir. 1996) – The cases “are in almost universal agreement that failure of the client to accept a settlement offer does not constitute just cause for a withdrawing attorney to collect fees.”

Bellino v. Commission for Lawyer Discipline, 124 S.W.3d 380 (Tex. App.—Dallas 2004, pet. den.) – An attorney appealed his disbarment. “The evidence in several fact situations in the instant lawsuit indicates Bellino failed to communicate settlement offers to several clients before he accepted those offers. Bellino argues that in each situation there is no evidence the client ever made a decision concerning settlement, and thus there is no evidence he failed to ‘abide by a client’s decisions’ under the rule. We reject Bellino’s argument. ... it is unnecessary to show that a client made a decision to accept or reject a settlement offer when the evidence shows the lawyer never communicated the offer to the client.”

Miller v. Byrne, 916 P.2d 566, 574 (Colo. 1996) – The duty to communicate all settlement offers exists even when an insurance company retains the attorney to defend the action against the insured.

Washington State Bar Ass’n Opinion No. 191 (1994) – A lawyer cannot include a provision in a contingent fee agreement that, if the client rejects a settlement offer that the lawyer deems reasonable, then the contingent fee will be based upon the larger of the recovery obtained at trial or the amount offered in settlement. Washington Rule 1.2(a) requires a lawyer to abide by a client’s decision whether to accept or reject a settlement offer. The proposed contract term restricts the client’s freedom to reject a settlement offer and “functions to economically coerce the client” to make a decision he might not otherwise make.

Nevada Ethics Opinion No. 35 (2006) – An attorney may not include in a fee agreement a provision granting the attorney full and absolute discretion and authority to settle the case.

Arizona Ethics Opinion No. 06-07 (2006) – A lawyer may not ethically ask a client to authorize the lawyer to unilaterally decide whether to settle the client’s case if the attorney is unable to communicate with the client. A lawyer also may not ask a client for authority to sign drafts or releases necessary to finalize a settlement under such circumstances. The proposed term violates Arizona Rule 1.2 (scope of representation) and Rule 1.4 (communication). The proposed term also would result in a conflict of interest under Rule 1.8, which prohibits an attorney from acquiring a proprietary interest in the cause of action or subject matter of the representation.

B. Managing Client Expectations

During a negotiation, it is tempting for the lawyer to want his or client and the opposing client to cut to the chase and state their bottom line. Such pressure may be counter-productive. “Clients in litigation have expectations, ... and those expectations are occasionally (and quite naturally) more optimistic than they should be.” J. DeGroote, “Managing Expectations,” Sept. 12, 2008 (www.settlementperspectives.com).

Clients need accurate information about the case so that they can evaluate the financial, political, and emotional considerations that may be present. During mediation, the attorney must understand the role of “acceptance time” and how it affects both the plaintiff and the defendant. “The idea of acceptance time is so simple that it is often overlooked. ... People need time to accept anything new or different. Both parties walk into a negotiating session with somewhat unrealistic goals. They start with all kinds of misconceptions and assumptions. Being human, they hope against hope that their goals will, for a change, be easily met. The process of negotiating is usually a rude awakening.” J. DeGroote, “Why We Can’t Just ‘Cut to the Chase’: Acceptance Time in Negotiation,” Sept. 16, 2008 (www.settlementperspectives.com) (citation omitted).

C. The Attorney Must Possess Actual Authority to Settle

Monroe v. Corpus Christi Indep. Sch. Dist., 236 F.R.D. 320 (S.D. Tex. 2006), aff’d, 234 Fed. Appx. 213 (5th Cir., June 29, 2007) – The parties participated in a court-ordered mediation in a Title VII employment case. The case was settled subject to
approval of the school board. At a meeting after the mediation, the school board declined to approve the proposed agreement. Plaintiff sought reimbursement of her mediation fee and attorneys’ fees. Plaintiff accused defendant’s counsel of bad faith. The court disagreed. “[T]here is strong support for defendant’s argument that it could not have final settlement authority and that any settlement negotiated at the mediation must be ultimately approved by the school board. Plaintiff has failed to offer any case law to support its position that defendant acted in bad faith by not having delegated settlement authority, or by not obtaining a pre-approved settlement limit from the school board.”

Harmon v. Journal Publishing Co., 476 Fed. Appx. 756 (5th Cir., March 26, 2012) – The Plaintiff sued for sexual harassment. Plaintiff’s attorney and defendant’s attorney negotiated a settlement of $9,600.00. Plaintiff subsequently refused to accept the settlement, and Plaintiff’s counsel withdrew from the case. Defendant moved to enforce the settlement. The district court granted the motion, and plaintiff (acting pro se) appealed. The Fifth Circuit affirmed. Plaintiff had the burden to establish that her attorney of record did not have authority to settle the litigation and that the agreement was invalid. The district court did not abuse its discretion in enforcing the agreement. The evidence showed that Plaintiff had given her attorney general authority to settle the case.

Deville v. U.S., 202 Fed. Appx. 761 (5th Cir., Oct. 18, 2006) – Plaintiff claimed that his attorney coerced him into settling and physically prevented him from leaving the mediation. The attorney and the mediator testified that there was no intimidation or coercion. The trial court found their versions credible. The Fifth Circuit affirmed. The decision to grant a motion to enforce a settlement is reviewed for abuse of discretion.

Enriquez v. Estelle, 427 Fed. Appx. 305 (5th Cir. 2011) – Settlement with prisoner was valid. “There is no merit to Enriquez’s contention that the Texas Attorney General’s Office was without authority to enter into a settlement agreement on behalf of public servant defendants who had been sued in their individual capacities.”

Chen v. Highland Capital Mgmt LP, 2012 WL 5935602 (N.D. Tex., Nov. 12, 2012) – A discrimination case was mediated. The mediation agreement acknowledged that a “more comprehensive” settlement document would be prepared. The lawyers prepared an agreement, but Plaintiff refused to sign it. He sought to enforce the original mediation agreement. The court denied Plaintiff’s motion. Plaintiff’s counsel created a binding agreement when he sent an email transmitting the final settlement agreement: “It is fine. We’ll get it signed. Thank you for bending toward justice. Given lapse of time, do you have the checks?”

Makins v. District of Columbia, 838 A.2d 300 (D.C. App. 2003) – The plaintiff in a discrimination and retaliation suit sought reinstatement and damages. In a settlement conference with the court, at which the plaintiff was not present, the attorney agreed to a cash payment but no reinstatement. The attorney alleged that the plaintiff agreed to these terms over the phone, but she later refused to sign the agreement because it did not include reinstatement. The court of appeals held that a plaintiff is not bound by a settlement agreement negotiated by her attorney during her absence unless the attorney had “actual authority” to settle the case. Although the defendant reasonably could assume that the plaintiff had authorized the attorney to attend the settlement conference and negotiate on her behalf, there is a distinction between the power to conduct negotiations and the power to end the dispute. There was insufficient conduct by the plaintiff to support a reasonable belief by the defendant that the plaintiff’s attorney had full and final authority to agree to the settlement terms. “It is the knowledge of these ethical precepts that makes it unreasonable for the opposing party and its counsel to believe that, absent some further client manifestation, the client has delegated final settlement authority as a necessary condition of giving the attorney authority to conduct negotiations. And it is for this reason that opposing parties – especially when represented by counsel, as here – must bear the risk of unreasonable expectations about an attorney’s ability to settle a case on the client’s behalf.” See also Makins v. District of Columbia, 389 F.3d 1303 (D.C. Cir. 2004) (setting aside enforcement of the settlement agreement).

Farris v. J.C. Penney Co., 176 F.3d 706 (3d Cir. 1999) – Plaintiff’s attorney did not have authority to settle the claims. This was not a situation where a client has created an “ambiguity with respect to the attorney’s authority, where she has delayed in asserting the lack of authority, or where it is clear that the real motive for challenging a settlement involves a change of heart regarding the substance of the settlement.”

Ciaramella v. Reader’s Digest, 131 F.3d 320 (2d Cir. 1997) – The court of appeals reversed the district court’s order that enforced an unsigned settlement agreement in an employment discrimination case. The employer had prepared a settlement draft and sent it to plaintiff’s counsel. Plaintiff authorized the attorney to accept the agreement. Subsequently, plaintiff’s attorney made changes to the agreement before telling the employer’s attorney that they had a “deal.” Plaintiff visited with a second attorney and decided not to settle. The court held that the unsigned draft was not binding on plaintiff.

McEnany v. West Delaware County Community Sch. Dist., 844 F.Supp. 523 (N.D. Iowa 1994) – Plaintiff, McEnany, asserted Title VII and equal pay
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claims. The parties mediated past midnight. Prior to the mediation, the mediator disclosed that his firm had done legal work for the defendant, but that he personally had not. Plaintiff did not object to him. After an extensive back-and-forth over monetary and non-monetary relief, McEnany requested 24 hours to consider the offer, but the request was refused. During a final caucus with the mediator, her attorney stressed that he could not get a better settlement for her. McEnany said, “I guess I better do what my attorney says.” The mediator concluded that the parties had a settlement and went to communicate this to the defendants. McEnany later testified that her attorney told her that, if she had not agreed, she would have been without counsel. Several days later, after the parties exchanged a settlement draft, McEnany asked to add new terms. Shortly thereafter, she hired a new attorney and sought to rescind the agreement, claiming that her attorney had coerced her into settling. The court held that the agreement was enforceable. McEnany made several manifestations to the court regarding the attorney’s authority. McEnany attended the mediation session in the company of her attorney, allowed him to address the defendants and the mediator outside of her presence, allowed him to conduct negotiations with the mediator, and eventually acceded to the settlement he had negotiated on her behalf, and then used the written settlement to “bludgeon” him into signing two versions of a general release. In administrative proceedings, the Secretary of Labor concluded that although the plaintiff had alleged misconduct on the part of his attorneys, the alleged coercion did not affect the validity of plaintiff’s consent to the agreement. The Fifth Circuit held:

Id. at 1157-58.

Goode v. City of Philadelphia, 539 F.3d 311 (3d Cir. 2008) – The city attorney for the City of Philadelphia negotiated a settlement in a First Amendment billboard case. Although the city council generally was familiar with the negotiations, the council did not approve or authorize the city attorney to enter into the agreement. Five city council members then filed suit against the city and the city attorney to prevent enforcement of the settlement. The council itself, however, did not vote to authorize the five members to bring the case. The case was dismissed on a 12(b)(6) motion, and the five council members appealed. The court of appeals concluded that the five council members lacked individual standing to sue. However, “we do not foreclose the possibility that the City Council itself” may have standing.

III. CONFLICTS AND DISAGREEMENTS

Under Rule 1.06, loyalty and independent professional judgment are essential elements of the lawyer’s relationship to a client. Conflicts of interest may jeopardize this relationship. These conflicts may include the lawyer’s responsibilities to another client, a former client, or a third person or even the lawyer’s own interests. Some conflicts are consentable, in which case the lawyer must obtain each client’s informed consent, confirmed in writing. The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.

A. Representation of Client When the Client and Lawyer Strongly Disagree

Texas Ethics Opinion No. 557 (2005) – An employee brought a wrongful termination suit. During settlement negotiations, the employee was extremely displeased with his lawyer’s valuation of the case. The employee later consulted with a malpractice attorney about a potential malpractice claim against the first attorney. The second attorney told the first attorney that the employee was very unhappy and was feeling pressured to take an unfavorable settlement. The first attorney questions whether he should withdraw. Texas Rule 1.02 recognizes that a client is entitled to straightforward advice expressing the attorney’s honest assessment and that “legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.” The fact that a client seeks a second opinion does not mean that the

[c]onsidering the ethical duties of an attorney to his client, the client’s right to seek new counsel, and the availability of a direct action against the attorney, the Secretary concluded
original attorney should withdraw. Here, however, the facts reflect more than a mere misunderstanding between a lawyer and a client. The client has visited with a malpractice attorney, and “this fact creates the likelihood that [the first lawyer’s] representation of [client] in the matter could be adversely affected by [the first lawyer’s] personal interest concerning a possible malpractice claim....” It may be prudent for the first lawyer to recommend that the client consult with the malpractice attorney about whether the client should consent to further representation by the first lawyer. “The lawyer is permitted but not required to withdraw if the client insists upon pursuing an objective with which the lawyer has a fundamental disagreement or if the client makes the representation unreasonably difficult. In any case in which a lawyer withdraws from representation, the lawyer must comply with applicable procedural rules and take reasonably practicable steps to protect the client’s interests.”

Texas Ethics Opinion No. 565 (2006) – A lawyer represented a plaintiff against several defendants. One of the defendants was dismissed and recovered attorneys’ fees. The underlying suit was settled. Subsequently, plaintiff filed pro se motions seeking relief from the settlement. He also filed grievances against his lawyer. Neither the pro se motions nor the grievances addressed the dismissal of the one defendant or that defendant’s recovery of fees. Additionally, despite filing the grievances, plaintiff had not discharged his attorney. The committee addressed whether the attorney was obligated to represent plaintiff on the appeal of the defendant’s recovery of fees. The committee began its analysis by observing that the appeal and the grievances involved different subjects and that “it would not reasonably appear that the representation of the client on that appeal is or has become adversely limited by the lawyer’s own interests.” The attorney may withdraw only if permitted by Rule 1.15. For example, withdrawal may be permitted if the client is insisting upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement or the client has rendered the representation unreasonably difficult. The attorney may withdraw only if the withdrawal can be accomplished without material adverse effect on the interests of the client. The attorney must comply with the procedural requirements of Rule 1.15.

B. Duty to Client When the Attorney is Hired By An Insurance Company

ABA Formal Ethics Opinion No. 01-421 (2001) – A defense attorney hired by an insurer may not allow his or her professional judgment or the quality of legal services to be compromised materially by the insurer.

Texas Ethics Op. No. 533 (2000) – The committee opined that it is “impermissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with an insurance company to restrictions which interfere with the lawyer’s exercise of his or her independent professional judgment in rendering such legal services to the insured/client.”

ABA Formal Ethics Opinion No. 96-403 (Aug. 1996) – A lawyer hired by an insurance company to represent an insured may represent the insured alone or, with appropriate disclosure and consultation, he may represent both the insurer and the insured with respect to all or some of the matter. So long as the insured is the client, however, the Rules of Professional Conduct – and not the insurance contract – govern the lawyer’s obligations to the insured.

Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973) – The relationship between insured and insurance defense counsel imposes the same duties as if the insured had personally retained the attorney.

C. Settlement of Claims Involving Multiple Clients

Settlements involving multiple clients – such as a settlement involving the governmental entity and several of its officials – present special risks and obligations. Because of an on-going relationship between the lawyer and the entity, or because the entity has paid for the lawyer’s services, the lawyer might view the entity as the superior client whose interests are paramount. In the heat of a fast-moving settlement, the lawyer might fail to properly counsel the officials about the pros and cons of the settlement. If one of the officials refuses to settle, it could derail the entire negotiation in cases in which the other party is insisting on an all-or-nothing settlement. Lawyers who represent entities and individual officials in the same lawsuit must routinely communicate with all clients, including the individuals, to obtain their input and to ensure that they understand the consequences of the proposals.

Under Texas Rule 1.08(f), 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 has consented after consultation, including disclosure of the existence and nature of all of the claims and of the nature and extent of the participation of each person in the settlement.

ABA Formal Ethics Opinion 06-0438 (April 2006) – Settlements involving multiple clients present an increased risk of conflicts either between or among the clients or between the lawyer and the client or clients. There is a risk that the lawyer will favor one client’s interests over another client’s. Therefore,
Model Rule 1.8(g) supplements Model Rule 1.7 and requires extensive disclosures and written, informed consent. Under Rule 1.8(g), when clients are considering a proposal to an aggregate settlement that simultaneously resolves the claims, the lawyer must disclose all relevant information regarding the proposed settlement. A lawyer “must advise each client of the total amount or result of the settlement or agreement, the amount and nature of every client’s participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client.” If the disclosures implicate confidential information, the lawyer must have the consent of the affected client to share the information. The clients’ consent to an aggregate settlement must be in writing.

Arthurlee v. Tuboscope Vetco Int’l Inc., 274 S.W.3d 111 (Tex. App. – Houston [1st Dist.] 2008, pet. den.) – An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client. The disciplinary rules “prohibit only undisclosed aggregate settlements.” Id. at 120 (emphasis in original).

Virginia Ethics Opinion No. 1069 (1988) – An attorney represented two employees in two separate suits against the same employer. The attorney learned that Employee A recently engaged in improper conduct and might be fired. The attorney wanted to settle Employee’s B lawsuit upon the condition that the employer not fire Employee A. The committee opined that “if each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement and of the participation of each person in the settlement,” it would not be improper for the lawyer to propose settling the cases upon the condition that the employer not fire Employee A. The committee stressed the importance of obtaining informed consent.

Maine Ethics Opinion No. 154 (1997) – A lawyer represented a 17-year-old and her parents. After the girl turned 18, she asked the lawyer to settle her claims without telling her parents. She also opposed reimbursement to the parent for medical bills. A lawyer is entitled to presume that the minor’s parent is acting in the best interest of the minor until such time as the lawyer has a reason to believe that the parent is no longer putting the child’s interests first. Failure to acknowledge this presumption would impose unacceptable costs on the resolution of disputes, including adding the expense of a guardian ad litem to act on behalf of the child. Notwithstanding this presumption, the committee “strongly” encourages lawyers “to examine the circumstances of each case” before deciding to represent a parent and child in the same case. The committee states that, once the girl turns 18, she is allowed to direct her own litigation. Nonetheless, the parents here have an independent claim for medical expenses incurred on behalf of the minor child. The girl’s request to settle the case without notice or reimbursement to the parents creates a conflict between the two clients and the lawyer must withdraw from the joint representation. The opinion also addresses whether a guardian ad litem always is needed. Because of the presumption that parents generally act in the best interest of their child, a guardian ad litem is not always needed. However, the attorney must carefully assess the facts.

D. Conflicts Between the Attorney’s Personal Interests and the Client’s Interests

Occasionally, a lawyer’s personal interests may create a conflict between the lawyer and the client that may jeopardize the attorney’s loyalty or judgment. The typical scenario is the lawyer who has become ill or overworked and presses for a settlement solely because of his or her desire to dispose of the case. The opposite scenario is a lawyer who discourages settlement because he wants the fees that will flow from the litigation.

Under Texas Rule 1.06(b), a lawyer cannot represent a client when the lawyer “reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.” Evans v. Jeff D., 475 U.S. 717 (1986) – The defendant in a class action special education lawsuit offered virtually all of the relief injunctive requested in the suit but demanded that the plaintiffs waive their right to attorneys’ fees. The plaintiffs’ attorney reluctantly accepted the offer, but later challenged the “forced waiver” on the ground that he was faced with an untenable “ethical dilemma.” The Supreme Court rejected the argument. “His ethical duty was to serve his clients loyally and competently. Since the proposal to settle the merits was more favorable than the probable outcome of the trial, [his] decision to recommend acceptance was consistent with the highest standards of our profession.” “Generally speaking, a lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice. Accordingly, it is argued that an attorney is required to evaluate a settlement offer on the basis of his client’s interest, without considering his own interest in obtaining a fee…”

Nehad v. Mukasey, 535 F.3d 962 (9th Cir. 2008) – The petitioner was from Afghanistan and was mentally
insufficient to compensate the plaintiff’s attorney. The agreement between the plaintiff and the attorney apparently faced a personal situation that prevented him from providing vigorous representation. Under California’s rules of professional conduct, the attorney should have given the client timely notice of his need to withdraw and to protect the client’s interest by ensuring that he had the time and opportunity to find new counsel. The lawyer should have filed a motion to withdraw and a motion for continuance. The first attorney also violated the rule that gives clients the sole authority to decide whether to settle a matter. A lawyer “may not burden the client’s ability to make settlement decisions by structuring the representation agreement so as to allow the lawyer to withdraw, or to ratchet up the cost of representation, if the client refuses an offer of settlement.”

California State Bar Formal Opinion No. 2009-176 (2009) – A city’s attorney offered a settlement that required the plaintiff’s attorney to waive the plaintiff’s right to statutory attorneys’ fees. The offer was insufficient to compensate the plaintiff’s attorney. The agreement between the plaintiff and the attorney stated that the attorney would receive a one-third contingent fee or the statutory attorney’s fee. The plaintiff was weary of the litigation and wanted to accept the offer. The opinion states that the plaintiff’s attorney cannot bar the plaintiff from accepting the offer. The attorney’s personal interest in pressing the case does not permit the attorney to veto the settlement. The committee further opines that it is not unethical for the city’s attorney to convey a fee-waiver settlement. Although such a settlement affects how much money the plaintiff’s lawyer will make in practice, it does not purport to restrict the practice of law itself. Finally, the committee opines that these types of offers are not in general ethically prohibited.

E. Restrictions on Settlements that Waive Sanctions, Malpractice Claims, or Grievances

In general, a party can bargain away a compensatory sanction, but it cannot bargain away a punitive sanction or an individual’s right to file a grievance against a lawyer who violated a disciplinary rule.

Fleming & Associates v. Newby & Tittle, 529 F.3d 631 (5th Cir. 2008) – In this Enron-related case, the district court sanctioned the plaintiffs’ law firm regarding changes to an expert report. Meanwhile, the parties settled the underlying dispute, and the plaintiffs’ firm filed a motion to dismiss that stated that each party would bear its own costs and fees. Subsequently, the district court asked the magistrate judge to determine the monetary penalty for the misconduct related to the expert report. Although the parties informed the court that the defendants had agreed not to collect any sanctions after the settlement, the magistrate judge held a hearing and directed the plaintiffs to pay more than $15,000.00 in fees. On appeal, the court of appeals considered whether the trial court had jurisdiction to issue a sanction. The court held that the trial court did have jurisdiction; a trial court has jurisdiction to enforce its own rules. The purpose of sanctions goes beyond reimbursing parties for their expenses. The court’s interest in having rules of procedure obeyed does not disappear merely because the parties have settled. The court of appeals also looked at whether the firm had a right to appeal. The court allowed the appeal, stating that the attorneys should not be deprived of their right to equity merely because their client settled. Some penalties are compensatory (compensates the opposing party); others are punitive (payment is made directly to the court). A party can bargain away a compensatory sanction, but it cannot bargain away a punitive sanction. Here, the parties could bargain away the $15,000.00 sanction because it was compensatory. However, any non-monetary portion of the sanction was not rendered moot by settlement and was appealable because of its residual reputational effects on the attorney. The court of appeals ultimately upheld the trial court’s sanction.

Aardvark Child Care Learning Center Inc. v. Township of Concord, 2008 WL 2916305 (3d Cir., July 30, 2008) (unpublished) – The underlying suit involved civil rights claims under 42 U.S.C. § 1983. The town moved for summary judgment and sanctions. The district court granted summary judgment. The plaintiff then hired a new lawyer to handle the sanctions motion. Subsequently, the plaintiff and the town settled all of their claims, including those related to the summary judgment and the sanctions motion. The plaintiff’s first lawyer was not a party to the settlement. The first lawyer filed several motions seeking payment for her services before she was replaced by the second lawyer. She also sought to vacate the settlement and to receive reimbursement from the plaintiff for having had to defend against the sanctions motion. On appeal, the court considered only the latter claim, ultimately concluding that it could not decide the issue because the trial court had
was dismissed. Thereafter, the plaintiff’s attorney plaintiff signed the settlement agreement, and the case differently. Finally, any dispute over the reduction in the court acknowledged that other circuits have ruled reputational interest is insufficient to confer standing. An attorney has an ethical obligation as an attorney to act in his client’s best interests, and he could not discourage his client from entering a settlement merely because his client’s example, a plaintiff’s lawyer has no duty to inform the defendant’s lawyer that the statute of limitations has run on the client’s claim. An attorney cannot conceal his client’s death during a settlement negotiation.

**B. Settlement Induced Through Threats, Fraud, or Lies**

1. **Threats**

   “Lawyers must avoid threats that are extortionate or otherwise unlawful or unethical. … Threats that would be illegal if made to convince a party to pay money outside the context of a lawsuit may also be illegal if made to pressure a party to agree to a settlement. Examples would include threats to publicly reveal embarrassing or proprietary information other
than through the introduction of admissible evidence in a legal proceeding.” ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, ABA Section on Litigation p. 50 (2002); see, e.g., Robertson’s Case, 626 A.2d 397 (N.H. 1993) (plaintiff’s lawyer in a civil rights case violated ethics rules by persistently threatening city lawyers with serious criminal and disciplinary charges and publicly maligning them in an effort to settle case).

Kalaynaram v. Burck, 225 S.W.3d 291, 301-02 (Tex. App.—El Paso 2006, no pet.) – A professor claimed that the university placed him under extreme duress to settle by threatening to pursue criminal prosecution and deportation. Such threats would not support a claim of duress. Once the university forwarded the professor’s information to the District Attorney, “the threat of prosecution no longer emanated from [the university], but rather from the District Attorney’s Office. Duress or undue influence can suffice to set aside a contract, but it is well-settled that it must originate from one who is a party to the contract.” The university itself could not carry out the alleged threats.

2. Mistakes and Omissions

When a lawyer is confronted with an advantageous typographical error or mistake in a settlement draft, the lawyer should notify the opposing attorney. The duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct mistakes induced by the lawyer or the lawyer’s client and not to exploit such mistakes. ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, ABA Section on Litigation p. 38 (2002), citing Crowe v. Smith, 151 F.3d 217 (5th Cir. 1998) (upholding sanction where attorney falsely responded to a discovery request that no indemnity agreements were known, then offered to settle on behalf of his clients, emphasizing that his clients were not insured and did not have access to substantial funds for settlement purposes).

Virginia Ethics Opinion No. 1477 (1992) – The attorney determined that his client’s interrogatory answers were not accurate and needed to be amended. The client wanted to attempt settlement before disclosing the correct facts. It would be improper for the attorney to attempt a settlement without first amending the incorrect interrogatory answers. The attorney has a duty under the rules of civil procedure to seasonably amend the incorrect answers. It would be improper for the attorney to participate in a settlement negotiation and to remain silent regarding the incorrect information. A settlement entered into in reliance on sworn, yet incorrect, answers would be fraudulently induced, whether the attorney affirmatively reaffirms the discovery answers or remains silent when they are discussed during negotiations.

3. Lies

Ausherman v. Bank of America Corp., 212 F.Supp.2d 435, 443 (D. Md. 2002) – The court sanctioned an attorney for lying during a settlement negotiation. In this case, the attorney openly admitted at his deposition that he sent a demand letter that contained information that he knew was not true: “That was language put there for the purposes of settlement bluster.” Defendant’s counsel asked, “So this is a lie?” The attorney responded: “That is correct. It is not true.” The court wrote that 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.” Although an attorney has a “duty of confidentiality to his client and must surely advocate his client’s position vigorously,” the system “can provide no harbor for clever devices to divert the search [for truth], mislead opposing counsel or the court, or cover up what is necessary for justice in the end.” A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement. While legal journals “engage in some hand-wringing about the vagueness of this aspect of Rule 4.1, in reality, it seldom is a difficult task to determine whether a fact is material to a particular negotiation. In cases of real doubt, disciplinary committees and ultimately the courts will decide.”

Kalaynaram v. University of Texas System, 2009 WL 1423920 (Tex. App.—Austin 2009, no pet.) (unreported) – A professor settled multiple suits against the university. He later claimed that they were procured through fraud. He claims that the university had agreed to abandon criminal charges if the parties settled. The court agreed that, if a party fraudulently induces another party to settle, the victim of the fraud may move to dissolve the settlement agreement. Here, however, there was no fraud. The alleged oral promise could not be used to set aside a written contract that expressly states that it constitutes the entire agreement of the parties and that no oral representations were relied upon. Further, the agreement gave the plaintiff 21 days to consult with counsel. Additionally, even if the university agreed to cooperate with him with respect to his criminal defense, the university’s employees were obligated to
testify truthfully if they were subpoenaed. Finally, the failure to adhere to a settlement agreement does not mean that the university entered into the agreement with an intent not to perform.

V. COMMUNICATIONS WITH OPPOSING PARTIES

A. Communicating With a Represented Party

Texas Rule 4.02 – In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law.

Texas Ethics Opinion No. 474 (June 1991) – The committee considered a scenario in which a plaintiff’s attorney directly telephoned a city council member to argue that a recent settlement offer was inadequate. When asked about his conduct, the attorney apparently contended that communications with public officials are not prohibited by Texas Rule 4.02. The committee disagreed. Rule 4.02 prohibits communications by a lawyer for one party with public officials are not prohibited by Texas Rule 4.02. The committee disagreed. Rule 4.02 prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

L. Eads, “Ethical Limits to Contacting a Government Official,” TEXAS LAWYER (Dec. 8, 2003) – Although citizens (including lawyers) have a right to petition the government on matters of policy, Rule 4.02 prohibits attorneys from seeking “case-specific” information from government managers. The Texas anti-contact rule “conforms to the approach taken by the Restatement of the Law Governing Lawyers, § 101, and by the American Bar Association in Formal Opinion 97-408, ‘Communication with Government Agency Represented by Counsel.’” There is a “clear distinction” between seeking information on a specific case as opposed to seeking an audience with government officials on matters of policy. Nonetheless, “prudence would dictate” contacting the government’s lawyer and giving advance warning of an intent to discuss policy.

ABA Formal Opinion No. 11-461 (2011) –Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer’s assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.

Massachusetts Ethics Opinion No. 82-8 – A lawyer and the president of his client, the defendant in a suit, developed a settlement strategy. Defendant’s president told the lawyer he would like to speak directly with the president of Plaintiff’s company. Defendant would like to give Plaintiff’s president a copy of a settlement letter that Defendant’s lawyer had given to Plaintiff’s counsel. The committee opines that Defendant’s lawyer needs to advise Defendant not to discuss settlement with Plaintiff’s president. Although there are “doubtless many situations where parties’ relations with one another will lead to discussions on their own of matters relating to the dispute,” this inquiry involves settlement negotiations being handled by the parties’ attorneys. The president’s proposed discussion represents, “in some measure,” the lawyer’s work. Massachusetts Rule 7-104(a)(1) states that a lawyer shall not communicate with a represented party or “cause another” to communicate with a represented party. The settlement position should be communicated only to Plaintiff’s counsel; therefore, Defendant’s lawyer should tell Defendant not to engage in settlement discussions. Regarding Defendant’s interest in providing Plaintiff’s president with a settlement letter that previously had been sent to Plaintiff’s counsel, there is “general agreement” that it would be unethical to send the letter unless Plaintiff’s counsel consented. The committee acknowledges that there are times when a lawyer fears that a settlement offer has not been transmitted to the other party.

B. Communicating With an Unrepresented Party

Texas Rule 4.03 – In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

ABA Model Rule 4.3 – The rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter, prepare documents that require the person’s signature and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.

Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007) – A law firm enabled a vexatious, disabled plaintiff in the filing of numerous frivolous lawsuits under the Americans With Disabilities Act. After filing this suit, plaintiff’s counsel sent a letter to defendant offering “friendly advice” and counseling against the hiring of an attorney. The letter warned
that a defense law firm would embark on a “billing expedition” and that the defendant’s money would be better spent on remedi ing the allegation ADA violations alleged in the suit. The district court sanctioned the lawyers by entering a “pre-filing order” that prohibited the lawyers from filing new ADA suits without judicial permission. The appellate court affirmed, “While we do not rely on the possible ethical violations as a ground for affirming the sanction imposed on the [lawyers], we note that [the firm’s] decision to send letters that many might view as intimidating to unrepresented defendants was, at best, a questionable exercise of professional judgment. The letters gave legal advice to unrepresented parties whose interests conflicted with the interests of the [firm], and this advice quite possibly ran afoul” of Rule 4.3, which states that lawyers shall not give legal advice to unrepresented persons. The letters also advised the defendant that it had no 

**bona fide** defense to the ADA action, when in fact this might not be true. “This possibly false statement of law may have violated ethics provisions regarding a lawyer’s candor to third parties [Model Rule 4.1].”

Texas Ethics Opinion No. 335 (1967) – The Ethics Committee found that the following letter to an unrepresented person went “too far:”

Mr. and Mrs. Plaintiff employed this law firm to investigate the accident which occurred on October 25, 1965, in which you were involved. As you know, as a result of this accident, the Plaintiffs received injuries which may well be permanent. I realize that what happened was unintentional on your part … I want you to know that there are no hard feelings … You may be assured that every effort will be made to amicably secure the payment of the medical bills and losses by settlement, however, it may become necessary … for Mr. and Mrs. Plaintiff to make a claim for their injuries through our Courts. … Although you may be named as Defendant, it is your insurance company against whom suit is brought. The law requires that you be named as the party against whom suit is brought. If suit is filed naming you, I hope you will not feel any personal affront…. I strongly urge that, should you have questions or doubts regarding this matter, you consult an attorney of your own rather than one of the insurance company’s choosing….

**C. Settlements with Pro Se Plaintiffs**

The rules allow an attorney to negotiate a settlement with an unrepresented party. However, the attorney must take extra care to avoid giving legal advice and to avoid creating circumstances that might be viewed as coercive. As a general rule, once the attorney has provided a draft of the settlement agreement to the pro se party, the party should be given an adequate time to consider the agreement in a venue other than the attorney’s office.

Written communications should consistently remind the pro se person that the attorney represents the other party, that the attorney cannot give legal advice, and that the party always has the right to consult counsel of his or her choice. See generally Charles W. Wolfram, MODERN LEGAL ETHICS, § 11.6.3, at 617 (1986) (citing In re Bauer, 581 P.2d 511 (Ore.1978)) (lawyers presenting documents to an unrepresented person for signing should remind the pro se party that the lawyer represents only his or her client and not the pro se party).

**VI. SETTLEMENT AND CONFIDENTIALITY**

**A. Don’t Tell it to the Judge**

ABA Formal Ethics Opinion No. 93-370 (Feb. 1993) – Absent informed consent of the client, a lawyer may not reveal to a judge the limits of the lawyer’s settlement authority or the lawyer’s advice to the client regarding settlement.

“Equally problematic is the common practice of lawyers sharing with judges, mediators, or the other side their difficulty with getting the client to be realistic about settlement. Sometimes that disclosure is simply a ploy to take the blame off of the lawyer and, therefore, is a questionable representation; but if it reflects the truth, it clearly is the disclosure of confidential information, an indication that the negotiations between lawyer and client have failed, and a disparagement of the client that is impermissible under the rules of conduct.” L. Fox, “Those Who Worry About the Ethics of Negotiation Should Never Be Viewed as Just Another Set of Service Providers,” 52 MERCER L. REV. 977 (Spring 2001).

**B. Confidentiality of Negotiations**

Settlements and settlement discussions generally are not admissible in evidence to prove liability or validity of a claim. FED. R. EVID. 408; Tex. R. EVID. 408. Such evidence, however, may be admissible for other purposes, such as to show bias, prejudice, or interest of a witness or a party, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**In Re Empire Pipeline Corp.,** 323 S.W.3d 308 (Tex. App.—Dallas 2010, pet. den.) – After a dispute arose over a settlement agreement, one party sought to depose the other party and sought discovery of all documents in the nature of notes and drafts from the mediation. The trial court allowed the discovery,
including discovery of “any notes or drafts of documents given ... to the mediator or Plaintiff or his representatives, in connection with the mediation or the preparation of documents relating to the alleged mediated settlement agreement.” The other party filed a petition for writ of mandamus, which was granted. The court of appeals held that, under Section 154.001-003 of the Texas Civil Practices and Remedies Code, “[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.” A “‘cloak of confidentiality’ surrounds mediation, and the cloak should be breached only sparingly.” (citation omitted).

Toon v. Wackenhut Corrections Corp., 250 F.3d 950 (5th Cir. 2001) – A juvenile corrections facility settled a sexual abuse case for $1.5 million. The settlement was confidential. The facility was late in funding the settlement, so the plaintiffs’ counsel filed a motion to enforce and attached a copy of the confidential settlement agreement. The defendant then moved to set aside the settlement and asked for sanctions because plaintiffs publicly revealed the confidential settlement terms. The district court enforced the settlement agreement, but it also granted sanctions against plaintiffs’ counsel. The court prohibited plaintiffs’ counsel from representing any other clients against defendant; ordered them to pay $15,000.00 to the court; and reduced plaintiffs’ counsel’s contingency fee in the underlying cases by 10 percent. The Fifth Circuit affirmed. Plaintiffs’ counsel acted in bad faith when they filed, unsealed, the settlement agreement. They had no plausible good faith explanation for their conduct. The lawsuit was a sensitive one, and confidentiality was “at the heart” of the settlement agreement. Moreover, there is “no cure” for the breach of confidentiality.

Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009) – A plaintiff was awarded $12,205.00 in a First Amendment case. Before trial, plaintiff rejected a $75,000.00 settlement offer. Subsequently, the district court awarded plaintiff a fraction of the attorneys’ fees sought. The district court factored in plaintiff’s rejection of the settlement offer. The court of appeals affirmed. Fee awards are reviewed for an abuse of discretion. Rule 408 does not bar a trial court’s consideration of settlement negotiations in its analysis of what constitutes a reasonable fee. The court rejected plaintiff’s argument that use of evidence of settlement negotiations to reduce a fee award was contrary to public policy. In fact, permitting settlement negotiations to be considered would encourage reasonable and realistic settlement negotiations. Plaintiff further noted that defendant could have, but did not, make an offer of judgment under Rule 68.

The court fails to see how the existence of Rule 68, which is a mechanism for limiting one’s costs, “should preclude a district court from considering informal negotiations for the unrelated purpose of determining the extent of relief sought by the plaintiff.”

Ausherman v. Bank of America Corp., 212 F.Supp.2d 435 (D. Md. 2002) – A settlement demand letter containing a known misrepresentation was admissible and would support sanctions. “For those who see within Evid[ence] 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.”

In re Anonymous, 283 F.3d 627 (4th Cir. 2002) – After a successful mediation of a Title VII case, the plaintiff and the plaintiff’s attorney disputed the attorney’s expenses. Their dispute was submitted to an arbitral panel sponsored by the Virginia State Bar. The attorney disclosed information from the Title VII mediation. The court of appeals held that sanctions were not warranted against the client or attorneys for disclosing information provided during a court-sponsored mediation in a discrimination suit. The disclosures did not adversely affect the mediated dispute and were made to a non-public confidential forum. Additionally, there was no showing that the disclosures were made in bad faith or with malice.

VII. UNETHICAL SETTLEMENT TERMS

A. Restrictions on an Attorney’s Right to Practice Law

Texas Rule 5.06 states that a lawyer may not participate in offering or making an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceedings against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Texas Ethics Opinion No. 505 (1994) – The committee opined on whether a law firm could agree, as part of a settlement, not to solicit third parties in the future to prosecute claims against the opposing party. The committee opined that the attorneys are prohibited...
from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

South Carolina Ethics Advisory Committee, Opinion No.10-04 (2010) – A settling defendant may not require the plaintiff’s lawyer to refrain from identifying or using the defendant’s name for commercial purposes.

ABA Formal Ethics Opinion No. 00-417 (2000) – 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 would improperly restrict the lawyer’s right to practice law.

Colorado Bar Ass’n Ethics Opinion 92 (1993) – A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer’s right to practice is part of a settlement. This prohibition includes but is not limited to settlement agreements that bar an attorney from representing other potential claimants against the party defending the claim. A claimant’s attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. When an attorney is contemporaneously representing settling and non-settling claimants, such restrictions could create an irreconcilable conflict of interest. Prohibited restrictions may include barring a lawyer from subpoenaing certain records or fact witnesses in future actions against the defending party and preventing the settling claimant’s lawyer from using a certain expert in future cases.

North Carolina Ethics Opinion 2003 No. 9 (2004) – An agreement requiring a lawyer not to represent potential clients with claims similar to the settling client’s claim “denies members of the public access to the very lawyer who may be best suited, by experience and background, to represent them.”

An agreement improperly restricting an attorney’s right to practice may be enforceable in some jurisdictions; however, enforceability of the agreement would not preclude discipline against the lawyers who agreed to the provision. See, e.g., Shebay v. Davis, 717 S.W.2d 678, 682 (Tex. App.—El Paso 1986, no writ); Feldman v. Minars, 230 App. Div. 356, 658 N.Y.S.2d 614, 617 (N.Y. App. Div. 1st Dept. 1997).

B. Restrictions on the Client’s Right to File a Bar Grievance or Malpractice Claim

ABA Formal Ethics Opinion No. 260 (1995) – A client discharged the lawyer after a long period of representation. The lawyer later sued for nonpayment of fees. Later, the lawyer and former client resolved their dispute, and the lawyer sought a release of malpractice claims and grievances. The committee opines that a lawyer may not condition settlement of a pending fee dispute on the agreement of the lawyer’s unrepresented former client to release the lawyer from a malpractice claim unless, prior to negotiating such a release, the lawyer advises the former client of any facts or circumstances known to the lawyer that he reasonably believes might give rise to a claim of malpractice liability. A lawyer may agree to forego full payment of fees in exchange for a release from or waiver of liability to a client as to a malpractice claim that the lawyer knows might have been resolved in the client’s favor, provided the lawyer first gives timely written notice to the client that independent counsel should be obtained prior to negotiating such a release. Under no circumstances may a lawyer ask a former client to execute a release prohibiting the lawyer from filing a complaint with the state bar. The proposed release violates Rule 1.8(g) (conflict of interest), Rule 8.3(a) (reporting misconduct), and Rule 8.4 (misconduct).

Maine Ethics Opinion No. 100 (1989) – Attorney 1 may have committed malpractice. Client hires Attorney 2 to negotiate a settlement. Client does not want to file a bar complaint but he is interested in maximizing his recovery and has implied that Attorney 2 should threaten Attorney 1 that a grievance might be filed. It is “clear” that it would be unethical to threaten Attorney 1 with a bar grievance. Maine Rule 3.6(d) provides that a lawyer shall not present, or threaten to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter. Further, the second attorney may have an ethical duty to report the violation under Rule 3.2, which requires an attorney possessing unprivileged knowledge of a violation to report it if it raises a “substantial” question as to the lawyer’s fitness. In this instance, although the client strongly believes that there was malpractice, the second attorney does not share his client’s view; therefore, he is not obligated to report the client’s concern. The second attorney, however, can advise the client on how to file his own grievance. The second attorney also should advise the client that state bar rules prohibit him from threatening a grievance. If the client persists, the second attorney may have to withdraw.

In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (Ill. 1988) – A lawyer, Casey, misappropriated a client’s $35,000.00 settlement. A second lawyer was
hired to help the client recover the money from Casey. The second lawyer negotiated a settlement with Casey. The client agreed not to file a bar complaint against Casey, and she agreed to keep the settlement confidential. The lawyer never reported Casey’s misconduct to the state bar. The Illinois Supreme Court suspended the lawyer for one year for failing to report Casey’s misconduct. The information that the lawyer knew was not privileged because Casey had discussed it in the presence of certain third parties. The Court rejected the lawyer’s argument that he was excused from reporting the violation because his client asked him not to report it. The Court also rejected the lawyer’s argument that “his failure to report was motivated not by financial gain but by the request of his client.” The Court explained “that discipline may be appropriate even if no dishonest motive for the misconduct exists.”

**Muhammad v. Strassburger, McKenna, Messer, Shilobod, & Gutnick**, 587 A.2d 1346 (Pa. 1991) – A client who accepts a settlement may not later sue the client’s attorney for malpractice unless the client can show actual fraud by the attorney.

**McCarty v. Pedersen & Houpt**, 621 N.E.2d 97 (Ill.App. 1 Dist. 1993, appeal denied) – A client who accepts a settlement can sue his former attorney for malpractice even if the client had a second lawyer review the settlement agreement before the client signed it.

**People v. Bennett**, 810 P.2d 661, 663-66 (Colo. 1991) – An attorney may not ask a former client to withdraw a bar grievance, whether or not the request is a condition to a settlement of a malpractice claim.

### C. Restrictions on Future Use of Evidence

**Tom L. Scott Inc. v. McIlhany**, 798 S.W.2d 556 (Tex. 1990) – A party in a multi-party case designated certain testifying experts. The party settled with another party. One of the objectives of the settlement was to neutralize the experts. Following the settlement, the party de-designated the experts and claimed that they were consulting experts whose communications were privileged. The Texas Supreme Court held that the settlement agreement was contrary to public policy. A settlement agreement that prevents a party from using certain experts in the future is unenforceable if the purpose of the restriction is to thwart justice. “If we were to hold otherwise, nothing would preclude a party in a multi-party case from in effect auctioning off a witness’ testimony to the highest bidder.” (Quotation omitted).

**Gilbert v. National Corp. for Housing Partnerships**, 71 Cal.4th 1240, 84 Cal. Rptr.2d 204 (1999) – An attorney represented several employees in different suits against the same employer. The attorney negotiated several settlements, and confidentiality was an essential term. The agreements stated: “The parties agree to keep the fact of this Settlement and this Agreement, and each of its terms, strictly confidential. This provision does not apply to discussions between the Employee and his counsel...” Immediately following this Confidentiality Clause was a penalty clause stating: “The Employee agrees that in the event of a breach by him of the confidentiality provision of the preceding paragraph, then the Employer [NHP] shall be entitled to recover from the Employee the amounts paid under... this Agreement, together with costs, expenses and attorney’s fees associated with enforcement of the Agreement.” The attorney then represented a new plaintiff against the same employer. In the new matter, the attorney sought to present the testimony of one of his former clients, Franklin, who had settled. The attorney wanted Franklin to talk about matters apparently governed by the confidentiality agreement. The court concluded that the attorney could not adequately counsel Franklin or the other former clients about the severity of the detriment to them if their testimony happened to enter confidential territory. “Indeed, it is evident from the record that appellant’s attorney in fact had not adequately counseled Franklin.” To the extent that the attorney curtailed his presentation of favorable evidence “in an attempt to reconcile the divergent interests of his multiple clients and the obligations of confidentiality arising from his own participation in the mediation and negotiation of the Settlement Agreement, he necessarily violated his duty of his loyalty to [his new client].”

**EEOC v. Astra USA**, 94 F.3d 738, 744 (1st Cir. 1996) – The employer entered into confidential settlement agreements with employees who allegedly were sexually harassed or who witnessed harassment. Under the agreements, the settling employee agreed not to file a charge with the EEOC; not to assist others who file charges with the EEOC; to release all employment-related claims against the employer; and to agree to a confidentiality regime under which she is barred from discussing the incidents that gave rise to her claim and from disclosing the terms of her settlement agreement. The court affirmed an injunction against an employer that tried to enforce confidentiality agreements against current and former employees. It was overwhelmingly clear that the “non-assistance” provisions prohibiting settlors from assisting in EEOC investigations offended public policy. Although the court recognized that “public policy strongly favors encouraging voluntary settlement of employment discrimination claims,” the court failed “to see that this portion of the injunction creates a substantial disincentive to settlement, and Astra makes no plausible argument to the contrary.”
VIII. DISCLOSING SETTLEMENT TO THE COURT

All counsel have a duty “to bring to the federal tribunal’s attention, without delay, facts that may raise a question of mootness.” Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n. 23 (1997) (internal quotations and citations omitted). The obligation to inform the court of a potential settlement is of such critical importance to the maintenance of orderly proceedings and to the prevention of needless delay that a lawyer who fails to fulfill that obligation may be subject to sanctions. See Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993); In re Cellular 101 Inc., 539 F.3d 1150, 1154 (9th Cir. 2008).

IX. HANDWRITTEN AGREEMENTS, BUYERS’ REMORSE, AND OTHER COMMUNICATION SNAFUS

Ollie v. Plano Indep. Sch. Dist., 2009 WL 938912 (5th Cir., April 8, 2009) – Ollie was a fifth-grade teacher who mediated her Title VII claims. “This mediation produced a hastily drafted, hand-written settlement agreement signed by all parties and their attorneys.” Under the agreement, Ollie agreed to settle “all claims” in exchange for twenty months paid administrative leave. Ollie subsequently refused to sign a more formal agreement, and PISD filed a motion to enforce the hand-written settlement. The district court granted the motion. The district court later issued an order clarifying that the agreement superseded Ollie’s teaching contract with PISD. Ollie, pro se on appeal, timely appealed. “[P]ublic policy favors voluntary settlement of employment discrimination claims brought under Title VII.” [citation omitted] “Nonetheless, we must closely scrutinize a release waiving rights under Title VII because of their remedial nature.” [citation omitted] A release of claims under Title VII is valid only if it is knowing and voluntary. Once the employer has established that the employee “signed a release that addresses the claims at issue, received adequate consideration, and breached the release ... [i]t is then incumbent upon the former employee to demonstrate that the release was invalid because of fraud, duress, material mistake, or some other defense.” The following factors are relevant in determining whether the employee has established a defense to the validity of the release: “(1) the plaintiff’s education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of [the] plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, and (6) whether consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.”

Ollie contended that the parties’ true agreement was to give Ollie enough paid administrative leave to allow her to retire with full benefits, and that the twenty month figure was an estimate to be revisited (and was later determined to be insufficient). The district court rejected this argument, stating that “[i]f Ms. Ollie miscalculated the number of points that she needed to reach her full retirement, then that was a unilateral mistake on her part and she is still bound by the settlement agreement that she signed.” If PISD had agreed to twenty months’ leave without intending or believing that it would allow Ollie to retire with full benefits, then the court would agree that Ollie’s mistake was unilateral. “However, in ruling that the settlement agreement was intended to ‘override and replace’ Ollie’s existing teaching contract, the district court specifically found that ‘the intent of the parties was for the 20 month time frame to enable Ollie to draw full retirement benefits.’” Since both parties intended that the leave allow Ollie to retire with full benefits, the mistake as to whether twenty months was sufficient for this purpose was mutual, not unilateral. The court vacated the dismissal of Ollie’s Title VII claim and remanded it to the district court to allow it to determine whether Ollie had established the defense of mutual mistake.

Wilson v. Smith & Nephew Inc., 2013 WL 1875949 (N.D. Tex., April 10, 2013) – The court granted sanctions against a party that failed to send an “executive person” with settlement authority to a mediation. The Defendant did not send any representative to the mediation; its in-house counsel was available only by phone. “ Courts recognize the importance to the settlement process of having an executive officer with actual settlement authority physically present at the mediation and craft their mediation orders accordingly. When a party violates a mediation order by failing to have an appropriate representative at the mediation, sanctions are appropriate.” Further, it is irrelevant whether the outcome of the mediation would have been any different had Defendant sent a representative. No prejudice is required for sanctions under Federal Rule of Civil Procedure 16(f) [rule allowing sanctions for non-compliance with pretrial order].

Valls v. Johanson & Fairless LLP, 314 S.W.3d 624 (Tex. App.—Houston [14th Dist.] 2010, no pet.) – Valls was a founding member of a company (Prime). He was terminated and sought benefits under a severance package. Prime counteroffered with a
proposal to provide Valls a contingent interest in any recovery that Prime obtained in an unrelated suit against a third party (the “Tensor” lawsuit). The settlement agreement was a three-page letter written by one of Prime’s lawyers to Valls’s attorney. Valls was to receive the first $500,000 and an additional percentage of any amount in excess of $500,000 of any “net recovery.” The parties later disputed the manner in which “net recovery” should be calculated. Their disagreement stemmed from the fact that the settlement agreement proposed one formula for this calculation, but a contingent fee agreement between Prime and its attorneys recited a different method for determining “net recovery.” One calculation deducted expenses first and attorneys’ fees second, while the other calculation reversed the order. The seemingly minor difference in wording between the two contracts resulted in a dramatically different outcome for Valls. After Valls questioned the final calculation, Prime filed a declaratory judgment action, and Valls counterclaimed for breach of contract and sued Prime’s lawyers for negligent misrepresentation and other torts. The summary judgment against Valls was reversed on appeal. The court of appeals held that the contingent fee agreement between Prime and its lawyers was not part of the settlement agreement “because that document is neither signed by Valls nor referred-to in the Settlement Agreement.” The court concluded that “net recovery” must be determined in accordance with the settlement agreement signed by Valls. Because Prime did not comply with those provisions, “they were not entitled to summary judgment from Valls’s breach-of-contract claims.” As to Valls’ tort claims against Prime’s lawyers, the summary judgment against Valls was affirmed. Valls accused the lawyers of negligently misrepresenting, in the settlement agreement, the method by which they planned to deduct attorney’s fees and expenses from any recovery in the Tensor lawsuit. In response, the lawyers did “not quarrel with the allegation that the Settlement Agreement contains a misrepresentation. However, they argue Valls’ reliance on their misrepresentation, if any, was not justified because the statements were offered in an adversarial setting.” The court concluded that the “evidence does not suggest anything other than an adversarial relationship between the parties at the time the alleged misrepresentation took place. When the Settlement Agreement was prepared, the parties were in the midst of negotiations to prevent the onset of litigation between them. Courts have repeatedly held a party may not justifiably rely on statements made by opposing counsel during settlement negotiations.” Here, “the negotiation process involved an arms-length transaction in which both sides were represented and advised by their own counsel.”

Hamilton v. Boise Cascade Express, 519 F.3d 1197 (10th Cir. 2008) – Plaintiff and her employer settled plaintiff’s discrimination claims. The settlement agreement conditioned release of the settlement check on plaintiff’s filing of a stipulation of dismissal. The employer also requested that plaintiff return certain documents, but the release of the check was not conditioned on the return of the documents. Counsel for the parties exchanged emails and faxes. Plaintiff’s counsel eventually filed a motion to enforce. That motion misrepresented defendant’s counsel’s position regarding the issue. Even after defense counsel sent a letter to plaintiff’s counsel, plaintiff’s counsel did not withdraw the motion to enforce. The trial court sanctioned plaintiff’s counsel under 28 U.S.C. § 1927 for attempting to mislead the court. On appeal, plaintiff’s counsel claimed that the trial court had improperly applied a negligence standard because the judge had had said that, “instead of exchanging all the letters and emails,” counsel should have simply picked up the telephone. The court of appeals rejected this argument; the record showed that the sanction was based on counsel’s affirmative misrepresentation. The statement about using the phone was simply advice on how to avoid such problems in the future. Further, sanctions are not reserved only for the worst offenders. Plaintiff’s lawyer also argued that his conduct should be excused because defendant’s counsel did not expressly dispute the facts in the motion and thus they failed to mitigate their damages. The court refused to shift the blame to defense counsel: “There is no general ‘good Samaritan’ duty to save an attorney from himself.”

Sheng v. Starkey Laboratories Inc., 117 F.3d 1081 (8th Cir. 1997) – On Friday, the district court granted summary judgment to the employer in a Title VII case. Copies of the order were placed in the mail. Counsel for the parties did not know that the court had granted summary judgment. They were preparing for mediation that was scheduled for Monday. On Monday, the parties mediated and reached an agreement. The employer agreed to pay $73,500.00. Thereafter, the parties learned about the summary judgment. The employer sought to avoid the settlement. The court held that the parties’ “mistake” – mediating without the knowledge of the court’s ruling – did not affect the enforceability of the settlement.

Kirkland v. St. Vrain Valley Sch. Dist., 464 F.3d 1182 (10th Cir. 2006) – The school district discovered that the assistant superintendent allegedly was responsible for a dramatically large deficit. The assistant superintendent claimed that he had negotiated a resignation with the superintendent that allowed him to resign but to continue receiving his pay for the remainder of the year. The resignation note was handwritten. Several days later, the school board
rejected the resignation and placed the assistant superintendent on unpaid leave. It then sought to terminate him. The assistant superintendent sued. The district court denied the individual defendants immunity; on appeal, the denial of immunity was reversed. The plaintiff argued that he had a property interest in the resignation agreement under state law. Under school board policy, however, the board had to approve any expenditure over $50,000.00. Because the resignation agreement required a pay-out higher than $50,000.00, “the resignation agreement did not bind the District unless and until the Board approved it. And the Board never approved it.” Id. at 1190. The court of appeals also rejected the plaintiff’s argument that he reasonably believed that the superintendent had authority to bind the District. Under Colorado law, a government entity’s power to enter into contractual obligations is circumscribed; anyone contracting with the government is charged with constructive knowledge of those restrictions. Here, the superintendent could not bind the District because the Board had not approved the expenditure in excess of $50,000.00.

Dehning v. Child Development Services of Fremont County, 2008 WL 123533 (10th Cir., Jan. 11, 2008) (unpublished) – A female employee filed claims for sexual harassment and retaliation. The parties engaged in mediation and reached an agreement for a one-time cash payment and the defendant’s agreement to hire her as an independent contractor for one year. The plaintiff then refused to comply with the settlement, claiming that she did not agree to compromise her harassment claim. She also refused to sign the independent contractor agreement. The defendant moved to enforce, and the plaintiff’s original lawyer withdrew from representing the plaintiff. At the enforcement hearing, the mediator testified that the original lawyer had submitted a statement regarding both the harassment and retaliation claims. The mediator further testified that he reviewed the terms of the agreement with the parties before they adjourned. The plaintiff’s original attorney agreed that the settlement applied to both claims and that the plaintiff was fully aware of this. The plaintiff testified that the settlement agreement was never fully explained to her. The district court enforced the agreement against the plaintiff, with the exception of the independent contractor agreement because the plaintiff’s refusal to sign that document constituted a waiver of her right to re-employment. The court ordered the plaintiff to pay the defendant’s and mediator’s costs to attend the enforcement hearing. The court of appeals affirmed.

There was no evidence that the defendant was responsible for the plaintiff’s alleged mistake regarding the scope of the settlement agreement. Further, the testimony of the other witnesses proved that the settlement was intended to cover both claims. Finally, because the plaintiff’s refusal to accept the settlement was willful, the sanction was proper.

Thompson v. City of Atlantic City, 190 N.J. 359, 921 A.2d 427, 430 (2007) – At the time Lorenzo Langford became mayor of Atlantic City in 2002, he and a political ally had a pending federal civil rights lawsuit against the City. Shortly after he assumed his post as mayor, Langford’s municipal appointees negotiated a settlement of the federal suit resulting in a settlement of $850,000.00. The State’s Office of Governmental Integrity sought to have the settlement rescinded because of various violations of the state’s conflict of interest laws. “We now hold that the City’s settlement with its own mayor was so infected with conflicts of interest that it is void as a matter of law.”

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994) – Federal courts do not have inherent power to enforce a private settlement agreement unless the agreement includes a separate provision in the final order of dismissal that expressly retains jurisdiction or incorporates the terms of the settlement into the order.
APPENDIX | Rules of Professional Responsibility

Note: The rules cited in this paper are the Texas Rules of Professional Conduct. In most instances, the rules are excerpted or paraphrased for ease of discussion. Readers are advised to consult the actual rules for a complete statement of each rule and comment.

Texas Rule 1.02
Scope of Representation and Allocation of Authority

A lawyer shall abide by a client’s decisions whether to accept an offer of settlement of a matter, except as otherwise authorized by law.

Comment to Rule 1.02
Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case.

Texas Rule 1.03
Communication with Clients

A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment to Rule 1.03
The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, as for example, where the client is a child or suffers from mental disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Texas Rule 1.06
Conflict of Interest: Current Clients

A lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.

A lawyer may represent a client in the circumstances described above if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer’s firm may engage in that conduct.

Comment to Rule 1.06
Loyalty is an essential element in the lawyer’s relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation.

Loyalty to a client is impaired not only by the representation of opposing parties but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the
lawyer’s own interests or responsibilities to others. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved.

The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

**Texas Rule 1.12**

**Organizational Client**

A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity’s duly authorized constituents, in the situations described in this Rule the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

1. an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
2. the violation is likely to result in substantial injury to the organization; and
3. the violation is related to a matter within the scope of the lawyer’s representation of the organization.

Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the initial procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b) of this Rule, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

1. asking reconsideration of the matter; and
2. advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

**Comment to Rule 1.12**

A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officer, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization such as an unincorporated association, union, or other, entity.
When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.05, the confidentiality rule. Thus, by way of example, if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05.

There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyers should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06, the general conflicts rule. If the organization’s consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer’s responsibility, that the organization is likely to be substantially injured by the action of a constituent that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, the lawyer must take reasonable remedial measure. It may be reasonably necessary, for example, for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization’s interest. At some point it may be useful or essential to obtain an independent legal opinion.

In some cases, it may be reasonably necessary for the lawyer to refer the matter to the organization’s highest responsible authority. Ordinarily, that is the board of directors or similar governing body. The ultimate and difficult ethical question is whether the lawyer should circumvent the organization’s highest authority when it persists in a course of action that clearly violates the law or a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer’s further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization. If the conduct of the constituent of the organization is likely to result in death or serious bodily injury to another, the lawyer may have a duty of revelation under Rule 1.05(e). The lawyer may resign, of course, in accordance with Rule 1.15.

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by
statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for the purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

**Texas Rule 4.01**

**Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

*Comment to Rule 4.01*

The Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.

A lawyer violates this Rule either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead.

This Rule relates only to failures to disclose material facts. Generally, in the course of representing a client a lawyer has no duty to inform a third person of relevant or material facts, except as required by law or by applicable rules of practice or procedure, such as formal discovery. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client. Consequently a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud and the lawyer knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud. Failure to disclose under such circumstances is misconduct only if the lawyer intends thereby to mislead.

When a lawyer discovers that a client has committed a criminal or fraudulent act in the course of which the lawyer’s services have been used, or that the client is committing or intends to commit any criminal or fraudulent act, other of these Rules require the lawyer to urge the client to take appropriate action. Since the disclosures called for by this Rule will be “necessary” only if the lawyer’s attempts to counsel his client not to commit the crime or fraud are unsuccessful, a lawyer is not authorized to make them without having first undertaken those other remedial action. A lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act. This rule governs a lawyer’s conduct during “the course of representing a client.” If the lawyer has terminated representation prior to learning of a client’s intention to commit a criminal or fraudulent act, paragraph (b) of this Rule does not apply.

**Texas Rule 4.02**

**Communication with Person Represented by Counsel**

In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or
advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. For the purpose of this rule, “organization or entity of government” includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

When a person or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited from giving such advice without notifying or seeking consent of the first lawyer.

Comment to Rule 4.02
In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue.

The rule does not prohibit a lawyer from furnishing a “second opinion” in a matter to one requesting such an opinion, nor from discussing employment in the matter if requested to do so.

Texas Rule 4.03
Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment to Rule 4.3
An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer’s representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Comment to ABA Model Rule 4.3
The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer’s client and those in which the person’s interests are not in conflict with the client’s. In the former situation, the possibility that the lawyer will compromise the unrepresented person’s interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter, prepare documents that require the person’s signature and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.