ETHICS AND SETTLEMENT: LET RIGHT PREVAIL

November 17, 2011.

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Litigation in Ontario is an adversarial system of dispute resolution in which voluntary settlement is strongly encouraged. Mandatory mediations and multiple pre-trial conferences are already the order of the day. A more formal concept of judicial mediation is now being actively considered and will be the subject of a policy debate on December 9, 2011 at the OBA Centre in Toronto.

Lawyers in Ontario are governed in their ethical dealings in settlement negotiations by the Rules of Professional Conduct of the Law Society of Upper Canada (LSUC), and are also guided by the CBA Model Code of Professional Conduct. Both codes require lawyers to advise clients of all their alternative dispute resolution options. Neither code expressly deals with ethics in settlement negotiations.

RELEVANT RULES FROM THE LSUC RULES OF PROFESSIONAL CONDUCT

1.02 "Conduct unbecoming a barrister" includes taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health or un-businesslike habits of another, or conduct which undermines the administration of justice.

"Professional misconduct" is conduct that tends to bring discredit upon the legal profession including conduct prejudicial to the administration of justice.

1.03(d) The rules are intended to express to the profession and to the public the high ethical ideals of the legal profession.

1.03(f) A lawyer should observe the rules in the spirit as well as in the letter.

2.01(1)(c) A competent lawyer should apply appropriate skills including alternative dispute resolution.

2.02(2) A lawyer shall advise and encourage the client to compromise or settle a dispute wherever it is possible to do so on a reasonable basis . . .

2.02(3) A lawyer shall consider the use of alternative dispute resolution for every dispute and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

2.02(4) A lawyer shall not advise, threaten or bring a criminal or quasi criminal prosecution in order to secure a civil advantage for the client.

2.04(14) Where a lawyer is dealing on a client's behalf with an unrepresented person the lawyer shall (a) urge the unrepresented person to obtain independent legal representation; (b) take care to see that the unrepresented person is not proceeding under the impression that his/her interest will be protected by the lawyer; and (c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his/her comments may be partisan.

4.01(1) A lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal [the definition of "**tribunal**" includes mediators and bodies that resolve disputes, regardless of informality] with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done.

This rule . . . extends . . . to mediators and others who resolve disputes regardless of their function or the informality of their procedures.

In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged . . . . to assist an adversary or advance matters derogatory to the client's case.

When opposing interests are not represented. . .. the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not mislead.

4.01(2) When acting as an advocate the lawyer shall not do anything (b) dishonest or dishonourable; (e) knowingly attempt to deceive a tribunal or influence the course of justice by misstating facts or law, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct; (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority; (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal.

4.06(1) A lawyer shall encourage public respect for and try to improve the administration of justice.

6.01(1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

Similar obligations are found in the codes of professional conduct of the other provinces and territories as well as in chapters I (Integrity), IX (Lawyer as Advocate), XIII (the Lawyer and the Administration of Justice), XV (Responsibility) and the Appendix (Principles of Civility for Advocates) of the Code of Professional Conduct of the Canadian Bar Association.

IMPACT OF THE ADVERSARIAL PROCESS

The adversarial process is the basis for our judicial system and rule 4.01 embeds it in the rules of professional conduct. The adversarial system means that lawyers do not have a personal ethical responsibility other than as set out in the rules of professional conduct. Lawyers must represent the interests of their clients "fearlessly", without making their own personal, moral or ethical judgments.

The adversarial system can give rise to ethical dilemmas. A dated example is the US case of Spaulding[1] in which a 16 year old car accident victim settled before trial. The settlement was approved by the court. Unbeknownst to the plaintiff or the court the defendant had failed to disclose a medical report which showed the plaintiff had a life-threatening aortic aneurism as a result of the accident. Two years later the plaintiff discovered the aneurism in a routine physical. The plaintiff underwent immediate surgery to correct the life-threatening condition. The plaintiff could have died in that two year period. He should have had the corrective surgery much earlier. Thus, apart from the undervalue of the settlement, the plaintiff was not told significant information about his health, which was known to the defendant and its lawyers.

In a proceeding to set aside the court approved settlement the court stated that:

"There is no doubt that during the course of the negotiations when the parties were in an adversary relationship no rule required or duty rested upon defendants or their representatives to disclose this knowledge."

(The court did, however, set aside the settlement because the plaintiff was a minor at the time of the original approval.)

While Spaulding resulted in certain changes in the U.S. rules, the adversarial model of justice continues in full force.

It has been argued that no other situation provides greater challenge to the adversarial model than that of settlement negotiations.[2] The point is made on the basis that the adversarial system is premised on the fearless advocacy of each side's interests, following specific procedural rules before a third party arbiter, namely the judge. The adversarial system was not premised on a

negotiation or mediation based system in which the vast majority of interactions between the parties do not involve a judge. It is said that the judge ensures fairness in the adversarial process. But the judge does not control mediation or settlement negotiations (subject to the possibility of some enhanced form of judicial mediation).

Lawyers in their roles as negotiators must address significant ethical issues which arguably are more important than those in the courtroom by virtue of the absence of the judge who presides at trial not at negotiation meetings.

The American Bar Association (ABA) responded to these issues when it produced its ethical guidelines for settlement negotiations in 2002.[3] The Canadian Bar Association (CBA), the Ontario Bar Association (OBA) and, indeed, the LSUC, have not found it necessary to adopt guidelines for settlement negotiations.

ACCEPTABLE DECEPTION IN MEDIATION?

Important ethical issues in negotiations include the extent to which deceptive practices are acceptable, the extent to which vital information can be withheld, and the extent to which an advocate in mediation can present a false story to "fearlessly" advance his or her client's interests.

While deliberate direct misrepresentation is obviously unacceptable, to what extent can one fail to disclose? Is it caveat lawyer? The ABA guidelines conclude that there is no duty of fair dealing and no affirmative duty to inform.[4] The guidelines therefore amount to a prohibition on making false statements and a prohibition on failing to disclose only if necessary to avoid assisting a criminal or fraudulent act.

Lawyers engage in competitive bargaining in any mediation. Each must "fearlessly" advance their client's case. The mediator controls or leads the process. Therefore, one must consider the extent to which acceptable deception is engaged in not only by the two advocates but also by the mediator. It has been suggested that caucused mediation rarely occurs without the use of deception by the parties, their lawyers and by the mediator in some form.[5] Depending on your definition of "deception" it is submitted this is neither acceptable nor prudent.

As stated by Martin Teplitsky[6]:

"Always tell the truth. No one will believe you anyway."

"You cannot mislead the other party by providing incomplete or deceptive information or by withholding crucial information."

But:

"I do not want to mislead you about 'telling the truth'. Obviously in a sense asking for 10% when you really will settle for 7% is not strictly truthful. But there is no requirement that demands

accurately reflect your bottom line and there is no expectation of this. In fact, expectations are to the contrary."

This can be contrasted with some US commentators such as Cooley who writes:

". . . competitive bargaining strategies and tactics are layered and interlaced with the mediator's own strategies and tactics to get the best resolution possible for the parties-or at least a resolution that they can accept. The confluence of these, initially anyway, unaligned strategies, tactics and goals creates an environment rich in gamesmanship and intrigue, naturally conducive to the use of deceptive behaviours by the parties and their counsel and yes, even by mediators."[7]

Cooley quotes a 1988 article illustrating the differences in opinions of ethical experts concerning truthfulness standards in negotiation. 15 experts (of whom eight were law professors who had written on ethics, five lawyers and two judges) were asked about four situations. Their answers are summarised below.

Situation 1 Your clients, the defendants, have told you that you are authorized to pay $750,000 to settle the case. In settlement negotiations after your offer of $650,000, the plaintiffs' attorney asks, "Are you authorized to settle for $750,000?" Can you say, "No I'm not?"

Yes: Seven No: Six Qualified: Two

Situation 2 You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing?"

Yes: One No: Fourteen Qualified: None

Situation 3 You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did?

Yes: Five No: Eight Qualified: Two

Situation 4 In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression?[8]

Yes: Nine No: Four Qualified: Two

It is unlikely we would find such divergence of opinion in Canada. Surely Teplitsky is correct: combining straightforwardness and integrity in the mediation process will not only satisfy the ethical rules but will garner the most effective results.

SOME SPECIFIC CONSIDERATIONS

(a) Dealing with multiple clients

When settling a case for multiple clients one must be careful to make full disclosure of all aspects of the settlement and its impact on the different parties. There is undivided fidelity due to each of the settling parties. (Rule 2.04 of the LSUC Rules of Professional Conduct governs conflicts of interest.)

(***b) Class Actions***

The ethical issues in respect of settlement of class actions are myriad and are well discussed elsewhere.[9] The most obvious problem, recently discussed in the Court of Appeal, albeit in the context of a fee approval motion[10], is that in a motion to approve settlement of a class action, essentially no one represents the "other side of the argument". Both plaintiffs' counsel and the defendants' counsel are advocating in favour of settlement approval. While there may be objectors, they are seldom represented and can rarely devote adequate time and resources to analyze the alternatives. Even stronger conflicts arise in the context of the motion to approve fees for plaintiffs' counsel.

An interesting ethical point arising from some settlement agreements is whether plaintiffs' lawyer can agree not to represent current clients or similar clients in similar matters. The BC rules of professional conduct prohibit such an agreement as part of a settlement. No such prohibition expressly applies in Ontario and these clauses are sometimes demanded by defendants' counsel.

Similarly, can lawyers agree not to use information from a current action in future similar actions? Such a prohibition is generally not allowed in the US, subject to any non-disclosure agreement. Different considerations apply in Ontario because of the deemed undertaking rule in rule 30.1 of the Rules of Civil Procedure.

(c) Client Refuses to Honour a Settlement Agreement?

This is one of the few situations expressly dealt with on the LSUC's website. A copy of the LSUC example and answer is attached asSchedule "B". In short, you have a duty to follow your client's instructions after fully and properly advising them on all particulars. You may, however, have to withdraw if your evidence is required in a proceeding to enforce a settlement.

(d) Threatening Criminal Prosecution

In Ontario you may not advise, threaten or bring a criminal or quasi criminal prosecution to secure a civil advantage for the client (rule 2.02(4)). It is interesting that the ABA guidelines apparently permit threatening criminal prosecution which does not amount to criminal extortion if it relates to the civil matter and is not exaggerated and is based on a well founded belief.[11]

(e) Unrepresented Parties

LSUC rule 2.04(14) requires you to urge the unrepresented person to obtain independent legal advice, to take care that the unrepresented person is not under the impression his interests will be protected by the lawyer, and to make clear to the unrepresented person that the lawyer is acting exclusively for his client and is acting in a partisan matter.

Furthermore, rule 4.01(2) sets out various rules which essentially require the lawyer to act honestly and honourably. Further materials can be found on the LSUC website including the proceedings from the Chief Justice's Advisory Committee on Professionalism. In the 9thColloquium, October 2007, Tom Heintzman deals with ethical issues relating to lawyers and unrepresented litigants in the civil justice system.[12]

Heintzman concludes that beyond these specific law society rules, no duty is owed to the unrepresented litigant. Lawyers ultimately do, however, have a certain degree of conflict between their duties to the court and those owed to their own client. In short, one cannot take "undue" advantage of an unrepresented client.

(f) Judicial Obligations

Do judges impose too much pressure on clients and lawyers to settle? Although not dealt with in the LSUC Rules, the CBA Code[13] provides that:

"Counsel are entitled to expect that judges understand that while settlement is always desirable there are some cases that require judicial resolution, and that in balancing interests, neither counsel nor the parties should be unduly urged to settle in such cases."

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[1] Spaulding v. Zimmerman, 116 NW (2d) 704 (Minn. 1962) cited in Brian Haussman, note, 2004 Cornell Law Review, Vol. 89, p. 1218.

[2] Haussman, supra, at p. 1220.

[3] (www.abanet.org/litigation/ethics/settlementnegotiations.pdf). Some relevant extracts are attached as Schedule "A".

[4] See especially ABA Guidelines 4.1.1 and 4.1.2.

[5] John Cooley, 2000, 29 Loyola U. of Chicago Law Rev., 1 (summarised at www.mediate.com/articles/cooley1.cfm).

[6] Teplitsky, "Making a Deal, The Art of Negotiating", 1992 Lancaster, cc. 10 and 12; quotes from p. 89.

[7] Cooley, supra (mediate.com) at p. 2.

[8] See ABA Guideline 4.3.5 for a useful discussion of this issue.

[9] Class Proceedings and Conflicts of Interest, Perell (2009), Vol. 35, The Advocates Quarterly 202. See also ABA Guidelines 3.6 and 4.2.2.

[10] Smith v. National Money Mart, O.C.A. March 28, 2011.

[11] See ABA Guideline 4.3.2 and ABA Commission on Ethics and Professional Responsibility formal opinion, 92-363 (1992).

[12] http://www.lsuc.on.ca/media/ninth_colloquium_ethical_issues.pdf. See also ABA Guideline 4.3.4.

[13] Appendix, Part I, para. 70 (p. 143).