

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2022-2: QUALIFICATION OF ADVANCE SETTLEMENT
AUTHORITY: A LAWYER’S DUTY TO COMMUNICATE AND THE CLIENT’S
ABILITY TO REVOKE**

DIGEST: Although it is clear that a client can give advance settlement authority to their lawyer at the outset of the engagement or at any time during the representation, the extent and scope of such authority is not unfettered and is limited under the New York Rules of Professional Conduct (the “Rules”) in certain respects that the lawyer may not ignore or disregard. The client may revoke such authority at any time and the lawyer is under a continuing duty to communicate with the client concerning material developments and to keep the client reasonably informed about the status of the matter, including all settlement offers. In weighing the tension between the delegation of settlement authority and the lawyer’s obligations to keep the client apprised of critical matters relating to the lawyer’s representation, the lawyer should exercise caution in agreeing to a settlement within a previously authorized range if the assumptions underlying the client’s delegation are no longer current. The lawyer is ethically obligated to disclose information which may be critical to the client’s decision whether to revoke such authority. If the client’s revocation of settlement authority is a prelude to adoption of an unrealistic settlement posture, the lawyer is not obligated to pursue what he or she regards as unreasonable settlement demands or litigation strategy.

RULES: 1.1; 1.2; 1.3 1.4; 1.7; 1.16

OPINION:

I. Introduction

In the course of representing a client in a litigation, a lawyer may obtain advance authority from their client to settle the matter. Although the Rules permit a lawyer to obtain advance settlement authority, doing so also raises various ethical considerations which the lawyer must keep in mind. This Opinion will address how, and to what extent, a lawyer can obtain and exercise advance settlement authority from a client. The Opinion will also address how material developments in the representation of a client can impact a client’s earlier provision of advance settlement authority.

Given the impact and interaction of the specific Rules that are implicated (as discussed in detail below), this Opinion will address a lawyer’s ethical obligation when the client delegates advance settlement authority to the lawyer.¹ Specifically, the Opinion will explore:

- i. The allocation of authority between the lawyer and client, and what limits may be imposed on extent and scope;

¹ This Opinion does not address the ethical obligations that may be implicated or could be invoked where the client’s decision to settle may be impacted by the client’s obligations to third parties (e.g., investors, litigation funders, creditors, or other interested parties).

- ii. The duty of the lawyer to communicate with the client about the status of any settlement negotiations, and under what circumstances such duty may be triggered;
- iii. What limits may be imposed by the client directly and/or by applicable ethical rules; and
- iv. Revocation of advance settlement authority and the impact on the lawyer.

II. Background

A. The Delegation of Advance Settlement Authority

Rule 1.2(a) explicitly provides that “a lawyer shall abide by a client’s decisions concerning the objectives of representation.” It further mandates that “as required by Rule 1.4,” the lawyer shall “consult with the client as to the means by which they are to be pursued” and “abide by a client’s decision to settle a matter.”

Notwithstanding the foregoing, the Rules provide that the client may delegate advance settlement authority to the lawyer. The lawyer’s duty to consult and to abide by the client’s decisions regarding settlement can be qualified at the outset of the representation² in the retainer agreement or a separate writing between lawyer and client. Comment [3] to Rule 1.2 provides:

At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such advance authorization. The client, however, may revoke such authority at any time.

Such authority contemplates that the lawyer can make decisions in “real time” with regard to settlement offers or demands proffered by the lawyer’s adversary without the necessity to seek client approval each time there is an incremental move by the adversary.

B. Potential Conflicts of Interest: The Need for Informed Consent

Rule 1.7(a)(2) provides that a lawyer shall not represent a client “if a reasonable lawyer would conclude that ... there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” Rule 1.7(b)(4) provides, however, that a lawyer may represent a client if the “affected client gives informed consent confirmed in writing.” Accordingly, in the setting of advanced settlement authority, if the lawyer reasonably concludes that there is a “significant risk” that the lawyer’s professional judgment on behalf of their client will be adversely affected by the lawyer’s pecuniary interest, then the lawyer must obtain the client’s informed consent

² In fact, the client can delegate such settlement authority subsequent to the initial engagement (*see* Roy D. Simon, *Simon’s New York Rules of Professional Conduct Annotated* (2019 Edition) §1.2:9 (“Although the Comment refers to the “outset” of a representation, a client can authorize a lawyer in advance at any time during the representation”).

(i.e., a waiver of such conflict) in writing. In order to obtain informed consent the lawyer must convey “information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

Although the delegation of advance settlement authority will not, *per se*, give rise to a conflict of interest, it may where the facts and circumstances in the representation create a “significant risk” that a reasonable lawyer’s professional judgment could be compromised by the ability to act on an earlier grant of settlement authority from the client. For example, a lawyer who has been given advance settlement authority may be tempted to prioritize the lawyer’s own financial incentive to settle a case over the interests of the client. In the case of a lawyer retained on a contingency fee, a lawyer may be tempted to reject a settlement offer in the hopes of maximizing the lawyer’s contingency. Similarly, a lawyer retained on an hourly basis may be tempted to accept a settlement on a client’s behalf in an effort to avoid incurring more fees and expenses if the lawyer believes that the client will be unwilling, or unable, to continue paying for the lawyer’s services. *See* Simon, § 1.7:56 (“Fee Agreements and a Lawyer’s Personal Interests”). Depending on the facts and circumstances of the representation, such circumstances could create a substantial risk of compromising the lawyer’s independent judgment on behalf of the client.

In such circumstances, the client must provide informed consent confirmed in writing. *See* Rule 1.7(b)(4). While the exact parameters of what constitutes informed consent will vary from case to case, the client should, at minimum, be informed of any potential conflicts of interest arising from the delegation of advance settlement authority as well as the potential risks associated with the client delegating to the lawyer a function traditionally reserved to the client under the Rules. The lawyer should also explain to the client the reasonably available alternatives, including the option not to provide advance settlement authority to the lawyer or to place other limitations on the grant of advance authority.

In addition, the lawyer should concisely explain the nature and scope of the authority being delegated to him or her, explain all the risks involved and that the client can always revoke such authority, and have the client acknowledge the delegation by signing the engagement letter or other writing. The amount of information that the lawyer needs to communicate to the client to properly obtain informed consent depends on the level of sophistication of the client, with the need for more disclosure being greater where the client lacks sophistication and experience in legal matters. *See* NYSBA Ethics Op. 990 (2013); *see also* Simon, § 1.7:86.

C. Limitations on Extent and Scope of Advance Settlement Authority

As noted above, the Rules contemplate and condone advance delegation of settlement authority by the client to the lawyer. Such advance settlement authority can be provided in two distinct forms. First, the client can delegate “blanket” settlement authority, in which the lawyer seeks to have the client simply leave all settlement decisions to the lawyer, based on what the lawyer alone believes is “reasonable.” The other form of settlement authority is “specific,” where the client delegates the authority to settle within a certain range. The Committee cautions against delegation of “blanket” settlement authority, since it wholly divests the client of the right to determine whether, when and on what terms to settle, and, if the lawyer does not communicate

regularly and completely with the client, the lawyer may arrogate to himself or herself all decision-making authority and render the client incapable of determining whether and when to revoke such authority. However, consistent with Comment [3] to Rule 1.2, the Committee supports delegation of “specific” authority, provided that, as discussed herein, the lawyer adheres to the other Rules that are implicated and govern their relationship with the client. The likelihood that “specific” delegation implicates other Rules is lesser than in circumstances where a client grants “blanket” authority.

While it is hypothetically possible for a client to delegate to a lawyer the authority to settle on whatever terms the lawyer deems reasonable, there are typically limits to the discretion given to the lawyer. For example, the client might provide the lawyer with a high or low scope of authority, so that the lawyer for a plaintiff may accept an offer above a certain sum and cannot accept an offer below a different certain sum. Within that range, the lawyer can negotiate (*i.e.*, make offers or counteroffers within the scope delegated) without first consulting the client and without having to necessarily report to the client on each offer or counteroffer made or rejected.

The client may also place other limits on settlement authority, including, without limitation, terms and conditions other than those that are strictly monetary (*e.g.*, restricting the lawyer’s authority to negotiate and/or agree upon without consultation such settlement issues as payment terms, release, security for payment, non-disparagement, and/or whether the client will provide an affidavit of confession of judgment). Thus, the client might simply provide the lawyer with advance authority to settle “in principle” for a “number,” as opposed to delegating to the lawyer the exclusive discretion and authority to agree to a “final” settlement with all terms, including boilerplate.

The client may also place temporal or other limitations on settlement authority. For example, settlement authority may expire within a certain timeframe or the progression of a case from one phase to another. Alternatively, the client can certainly condition the settlement authority vested in the lawyer on being promptly informed of every change in the other side’s offer or demand above or below a certain sum. For example, if the initial demand by a plaintiff is \$500,000, the defendant can advise the lawyer that the defendant must be advised of every decrease of \$25,000 or greater in the demand.

III. Ethical Duties Following the Delegation of Advance Settlement Authority

Rule 1.4 generally requires a lawyer to keep the client informed and to explain the matter to the client, so that the client has sufficient information to make informed decisions as the matter progresses.

Rules 1.1(a), which requires the lawyer to provide “competent representation” to the client, imposes the obligation on the lawyer to adequately advise the client, including the concomitant duty to make competent representations related to settlement and to help the client make an informed decision about settlement. Moreover, Rule 1.1(c)(1) (requiring the lawyer to refrain from “intentionally...fail[ing] to seek the objectives of the client through reasonably available means permitted by law and these Rules”) and Rule 1.1(c)(2) (proscribing the lawyer from “intentionally [causing]...prejudice or damage [to] the client except as permitted by these Rules”) impose further obligations on the lawyer in the context of settlement.

Accordingly, any advice the lawyer provides concerning settlement must be competent, and the lawyer must keep the client reasonably informed. Further, as detailed below, a lawyer with advance settlement authority still has ethical obligations to inform the client of material developments that may impact the client's decision to maintain, alter, or revoke such authority.

A. The Duty to Communicate Settlement Offers

Recognizing the validity of a delegation of advance settlement authority, Comment 2 to Rule 1.4 states that Rule 1.4(a)(1)(iii) “requires that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy...must promptly inform the client of its substance *unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer*” (emphasis added), citing Rule 1.2(a). In that case, although a lawyer with advance settlement authority is authorized to act on an acceptable settlement proposal, the lawyer must still notify the client of the offer (and presumably the acceptance of the offer).

B. The Effect of Material Developments on Advance Settlement Authority

Rule 1.4(a)(iii) requires a lawyer to “*promptly inform* the client of...material developments in the matter *including settlement or plea offers*” (emphasis added). While a settlement offer within a previously-delegated range may not constitute a “material development” on its own, other developments may occur in a litigation following the provision of advance settlement authority that are material not only to the status of the case itself, but that may also directly or indirectly bear on the value of the case. Such developments may accordingly impact the client's willingness to settle on previously-authorized terms.³

1. What is a “Material Development”?

A material development is an occurrence or action in a matter that if known by or disclosed to the client would cause the client to potentially change their position and/or reconsider the prior delegation of authority including, without limitation, by narrowing the scope of such authority. *See, e.g.*, Rule 1.4, Cmt. [3] (“material developments” are developments “affecting the timing or substance of the representation”); Simon § 1.4:13 (“defining “material developments” as all developments in the matter that would make a difference to the client”); accord NYCBA Formal Op. 2020-3 (2020) (material development includes negotiating settlement for a client where there is a significant risk of impacting a different client's lawsuit); NYCBA Formal Op. 2017-5 (2017) (potential unauthorized access of confidential information constitutes material development requiring notification). In the settlement context, material developments may include, *inter alia*, (a) an event during discovery (*e.g.*, disclosure of a favorable document or damaging answers given by a party or non-party witness in a deposition), (b) the decision on a key motion (*e.g.*, denial of a defendant's summary judgment motion or granting of a plaintiff's motion to preclude certain evidence or to strike the answer), or (c) a

³ We take no position on the enforceability of a settlement where the lawyer settles without the client's consent or where the client seeks to withdraw advance settlement authority after the settlement is finalized.

change in law that may favorably or adversely impact the client's position and likelihood of success on the merits or otherwise impact the issue of damages.

For example, suppose an adversary offers the lawyer's client a one-day, "take it or leave it" offer. If the offer is within the delegated settlement range, and assuming no other material changes or developments, the lawyer might accept the offer. If the offer is outside the delegated settlement range, then the lawyer cannot accept the offer. However, if the offer is within the delegated settlement range but the lawyer learns of a material development that would likely render the settlement offer insufficient, the lawyer cannot accept the offer notwithstanding the previous grant of advance settlement authority.

2. *A Lawyer Should Assess Whether Any Earlier Grant of Advance Settlement Authority Is Still Reasonable Under the Circumstances in Light of a Material Development in the Representation*

Even where advance settlement authority is delegated to the lawyer, it is circumscribed by Rule 1.4(a)(1)(iii), which mandates the lawyer to "promptly inform the client of...material developments in the matter, including settlement or plea offers." Comment [2] to Rule 1.4 makes clear that:

a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Rule 1.2(a).

Rule 1.3 also requires the lawyer to "act with reasonable diligence and promptness in representing a client," including the duty to communicate promptly any new settlement offers or demands or material changes in the other party's position.

The lawyer is not required to prompt the client to reexamine advance settlement authority upon the occurrence of any material event. However, if a material development occurs between the time that the client gave the lawyer advance settlement authority and when the settlement offer is conveyed, the lawyer may not act upon their authority without confirming such authority in light of the post-delegation occurrence of a material development. In other words, material developments should be re-communicated to the client in connection with receipt of a settlement offer prior to the lawyer accepting or rejecting such offer, notwithstanding that such offer is within the range and scope delegated to the lawyer.⁴

Notably, whether something constitutes a material development may not always be clear. Even a change in the settlement offer or demand from an adversary may itself constitute a material development. The lawyer is not always empowered to accept or reject the new offer or demand if it falls within the parameters of their delegated settlement authority without advising the client of the adversary's change in position, as the lawyer's obligations of communication

⁴ We do not address the adequacy of the communication from the lawyer, but simply note that it needs to be informative and sufficient to enable the client to make an informed decision. *See* Rule 1.4.

under Rule 1.3 may trump their discretion (as provided by the client) to settle in a certain range or at a certain number.⁵

The Committee believes that if in doubt, the lawyer should always err on the side of communication, as per their obligations of competence and diligence under Rules 1.1 and 1.3, as even a settlement offer outside (but close to) the range of authority may be material. This is illustrated by the following hypothetical: What if the lawyer files suit and is authorized by the client to settle for \$10 million, and the defendant's lawyer immediately responds with an offer of \$9 million? While the offer technically is below the threshold set by the client for the lawyer, the client is entitled to know of the value that the other party places on their case, and, in such circumstance, once the client hears from the lawyer of the substantial offer, the client may well move the bar up and say that the new minimum number at which the lawyer is authorized to settle is \$15 million. Unless the lawyer conveys the number to the client, the client will not have the predicate knowledge on which to reassess their initial delegation of authority.

The delegation of authority may be more important to lawyers compensated on a contingent-fee basis than those compensated on an hourly-fee basis. Indeed, a meeting of the minds regarding the value of a case may be necessary for the lawyer to agree to accept a case on contingency. For example, a lawyer may only agree to represent a client on a contingent basis if he or she knows that the client will accept reasonable settlement offers rather than insist upon the full measure of damages which may likely require a risky trial. While the client is always within their rights to revoke settlement authority, doing so may constitute an alternate ground for withdrawal pursuant to Rule 1.16(c)(5) to the extent it constitutes the disregard of an agreement regarding fees.

IV. Conclusion

Where a lawyer seeks or receives advance settlement authority from a client, the client's interests must remain paramount. While advance delegation of settlement authority is permissible, it is intended to streamline the lawyer's representation of a client. It is not intended to deprive a client of control over their case or reduce a client's rights to competent, diligent representation by a lawyer bound by a duty to communicate.

Accordingly, unless it is indisputable that no material development has occurred following delegation, the client needs, and is entitled to, complete, accurate, and up-to-date information from the lawyer as to the status of any negotiations to know whether to revoke or modify the settlement authority previously reposed in the lawyer, in accordance with Comment [3] to Rule 1.2. In other words, the lawyer must take care not to become, in effect, the "client," regardless of what authority is initially vested in the lawyer by the client.

⁵ If, after being informed of the material development, the client maintains his or her earlier settlement position in light of changed circumstances and that settlement position is no longer reasonable, the lawyer may be entitled to withdraw, but that is a fact specific inquiry beyond the scope of this Opinion.