He Said WHAT? Ethical Issues in a Mediation Setting; Challenges for Advocates and Mediators

ABA 13th Annual Spring Conference
April 15, 2011

Robbie M. Barr
Susan L. Macey

The authors of this outline are two of twenty six former federal and state court judges who comprise the Judicial Arbiter Group (JAG) in Denver, Colorado. JAG is a firm specializing in judicial alternative dispute resolution. Judge Barr served as a Circuit Court Judge in Miami, FL. Judge Macey served as a Superior Court Judge in Indianapolis, IN.
I. Settlement Authority

**Issues:** Under what circumstances may a lawyer settle in mediation without having the client present? Should the lawyer accept “blanket authorization” to settle?

**Factual scenario(s):** Client is unavailable (or unwilling) to participate in ADR. Client wishes to delegate to attorney, or attorney seeks to obtain, permission to decide whether (and for how much) to settle the case and to sign any necessary settlement documents without additional communication with client.

**Relevant ethical rules** (References throughout are to The ABA Model Rules of Professional Conduct. Practitioners will, of course, cross reference local rules which differ from state to state):

Rule 1.2 *Scope of Representation and Allocation of Authority between Client and Lawyer*

(a) . . . A lawyer may take such action on behalf of the client as impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. . . .

Rule 1.4 *Communication*

(a) A lawyer shall:

. . .

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information;

. . .

(b) A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding representation.

Rule 1.8 *Conflict of Interest: Current Clients: Specific Rules* . . .

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client. . . .

**Discussion:** See Arizona Opinion 06-07 (September 2006): Generally, an attorney may not obtain blanket authorization to settle because doing so could conflict with the attorney’s obligations under Rules 1.2 and 1.4. The client cannot give the attorney permission to settle without client’s prior informed consent, and the lawyer must not allow client to surrender the right to settle.
If the attorney is unable to communicate with and secure informed consent from client, the lawyer must withdraw. Where a contingent fee is involved, giving the lawyer total discretion on settlement well might create a conflict of interest.

Comment [3] to Rule 1.2 does permit a client “at the outset of a representation” to authorize the lawyer to take specific action on the client’s behalf without further consultation. The Comment goes on to say that Rule 1.4 places limits on this authority and that the client may revoke the authority at any time. This suggests that the client could send the lawyer to ADR with express settlement authority, which the lawyer could not go below (on the claimant side) or above (on the respondent side); however, the lawyer would have to be scrupulous to ascertain the client’s authority on non monetary terms, such as confidentiality or payments over time.

Rule 1.0 (e) defines “informed consent” to require disclosure of the facts, circumstances and information necessary for the client, under the particular circumstances, to reasonably evaluate the options available. The level of communication between the client and the attorney contemplated by this definition suggests that more frequent communication, rather than a reliance on a prior authorization by a client, would be the better course of action in the hypothetical here.

Question: What if the lawyer disagrees with the client as to whether to settle? Can a lawyer insert a provision in the retention letter that changes fee structure in the event the client disagrees with attorney’s recommendation to settle? Annotations to the Model Rules suggest such a solution should be discouraged, as it is fraught with peril.
II. Obligations Upon Becoming Aware of Legal Malpractice

**Issue:** Does the mediator have an obligation to report the attorney’s admitted legal malpractice? If so, to whom? What are the attorney’s obligations to self report to the client?

**Factual scenario:** Mediator learns during preparation or at the settlement conference that attorney has failed to name an at-fault party before the statute of limitations ran, thus committing legal malpractice. Attorney does not intend to inform his client of the malpractice, rather attorney requests that information about the malpractice be kept from his client.

**Relevant ethical rules:**

Rule 8.3 *Reporting Professional Misconduct*

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Rule 8.4 *Misconduct*

It is professional misconduct for a lawyer to:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . .

**Discussion:**

**Implications for the mediator:** Rules 8.3(a) and 8.4 (c) (*Reporting Professional Misconduct* and *Misconduct*, respectively) state that a lawyer serving as a mediator is required to report conduct proscribed by these Rules to the appropriate professional authority. Critical to the analysis here is not the lawyer’s admitted malpractice, but his effort to deceive the client. It is the failure to disclose it, rather than the malpractice itself, that would violate the Rule’s prohibition against dishonesty, fraud and deceit. Were the mediator to persuade the lawyer to be forthright with his client, then the duty to report would depend on whether the malpractice rises to the level of rendering the lawyer “unfit in other respects.”

These Rules promote the self regulation of the legal profession. These Rules do not, however, reference what a mediator who is NOT a lawyer is required to do under the same set of facts and circumstances.
**Implications for counsel:** Comment [7] to Rule 1.4 says a lawyer may not withhold information from the client to serve her own interests. Clearly, in the above scenario, the lawyer should not settle without informing his client of the failure to name an at fault defendant. This impacts the value of the claim, and the client cannot make truly informed decisions in the absence of this information. If the attorney settles without informing his client of the risks of non-party fault allocation, a court still could enforce the settlement based on the lawyer’s apparent authority to settle. Then, his client would have grounds for a grievance, in addition to the malpractice claim for the missed statute of limitations.

**Interplay:** DC Opinion No. 260 (1995) concludes that a lawyer may not condition release of a fee dispute on the agreement of the lawyer’s unrepresented former client to release the lawyer from malpractice UNLESS, prior to negotiating such a release, the lawyer discloses the malpractice and advise the client to secure independent counsel to assess the value of the malpractice claim. This suggests that the lawyer had a duty to disclose his/her own malpractice; declining to do so triggers Rule 8.3(a) for the mediator.

One commentator has suggested that conduct displaying “an incompetence clearly amounting to malpractice,” raises a substantial question as to fitness and should be reported. G. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 539.
III. Threatening Opposing Party-Part 1

**Issue:** May counsel threaten to report a party or a witness to immigration authorities to induce a party to capitulate to a settlement?

**Factual scenario:** During discovery phase of a civil lawsuit, defense lawyer learns that plaintiff may be in the country illegally. Some of plaintiff’s witnesses may also be illegal. The immigration status is unrelated to the civil lawsuit.

**Relevant ethical rules:**

Rule 3.1 *Meritorious Claims and Contentions*

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, . . .

Rule 4.1 *Truthfulness in Statements to Others*

. . . a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; . . .

Rule 4.4 *Respect for Rights of Third Persons*

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person . . . .

Rule 8.4 *Misconduct*

It is professional misconduct for a lawyer to:
. . .
(d) engage in conduct that is prejudicial to the administration of justice . . .

**Discussion:** See ABA Formal Opinion No. 92-363. Threats of criminal prosecution are permitted only when there is a nexus between the facts and circumstances giving rise to the civil claim and those supporting criminal charges. The lawyer must also have a well-founded belief that both the civil claim and the criminal charges are “warranted by the law and the facts,” and the lawyer must not exert or suggest “improper influence” over the criminal process. These requirements “tend to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters . . . .”
Rule 4.1 requires that lawyers from threatening to prosecute if they have no intention to proceed. And Rule 3.1 prohibits the assertion of claims that are not well-founded.

The (empty?) threat here serves no purpose other than gaining leverage in the settlement negotiations. Question whether such a threat requires reporting of the attorney making the threat. Some authorities suggest no reporting is required because the threat is not fraud.
IV. Threatening Opposing Party - Part 2

**Issue:** May attorney threaten to take opposing party’s criminal conduct to prosecutorial authorities in the event settlement is not reached?

**Factual scenario:** Attorneys for bank from which defendant has embezzled funds is willing to turn matter over to prosecutor unless certain settlement terms are accepted.

**Relevant ethical rules:**

Rule 4.1 *Truthfulness in Statements to Others*

Rule 4.4 *Respect for Rights of Third Persons*

After 1997, the MR eliminated Rule 4.5. Since 1997, the cases have held that a lawyer may use the threat of criminal prosecution if: the civil and criminal matters are related; there is a reasonable belief that the threat is warranted by the law and the facts; there is no suggestion that the lawyer poses improper influence over the criminal process; and the lawyer’s conduct is not extortionate.

**Discussion:** Here, the damages suffered by the bank are also the result of the acts constituting criminal conduct. Even under former Rule 4.5, there was no proscription against agreeing to refrain from pressing criminal charges as part of a settlement that calls for payment.
V. Threatening To File A Grievance/Refraining from Filing A Grievance

Issue: Can a client agree to refrain from filing a grievance in a malpractice case?

Factual scenario: Defense counsel agrees to mediate before suit is filed against his client for attorney malpractice. (A similar scenario involves medical malpractice and the Medical Board.) Defense counsel seeks, as term of settlement, an agreement that Plaintiff will not pursue a grievance.

Relevant ethical rules:

Rule 8.3 Reporting Professional Misconduct

(b) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

A threat to file a grievance is governed by the considerations discussed in scenarios III and IV above. The issue here is not whether the lawyer must report the malpractice (see Scenario II above), but whether the lawyer may properly counsel her client to refrain from filing a grievance as a condition of settlement.

Discussion: The short answer is: it depends. The allegation here is that the lawyer had an inappropriate relationship with his divorce client. Is the malpractice simply bad lawyer-ing or is it also misconduct under Rule 8.4(d), e.g., or conduct that “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness” and thus must be reported?

Attorneys in several states have been disciplined for agreeing to withhold filing of a grievance. The courts have reasoned, “Public confidence in the legal system would be seriously undermined if we were to permit an attorney to avoid discipline by purchasing the silence of complainants.” Matter of Wallace, 104 N.J. 589 (N.J. 1986).

To complicate the decision, the duty to report misconduct is subordinate to the duty of confidentiality set forth in Rule 1.6. If the client does not consent to the lawyer reporting the misconduct because it would jeopardize the malpractice settlement, attorney should abide by client’s decision. But see, In re Himmel, 125 Ill.2d 531 (1988) (anomalous decision where attorney suspended for one year for failure to report conversion of client funds by another lawyer despite client’s directive not to report).
VI. Lawyer Representations to The Mediator

Issue: What are the lawyer’s ethical duties regarding representations to the mediator?

Factual scenario: Mediator questions attorney about possibility of any witness testimony that is damaging to attorney’s case. Attorney has talked to a witness with damaging testimony; however, attorney’s client states that the witness is mistaken in her perception. The witness is not disclosed on the police report. It is not clear whether other side knows of witness.

Relevant ethical rules:

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
   (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
   (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
   (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 4.1 Truthfulness in Statements to Others

. . . a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; . . .

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
Discussion: The ABA Committee on Ethics and Professional Responsibility, in Formal Op. 06-439 (2006) concluded that a mediation is not a tribunal. Thus, Rule 3.3 does not really apply to the neutral, since the neutral is not a “tribunal” as defined by Rule 1.

Rule 4.1 does require that lawyers be truthful when dealing with others on client’s behalf. Comment [1], however, explains that a lawyer has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation, however, can occur by partially true but misleading statements which are the equivalent of affirmative false statements. Comment [2] explains that the Rule refers to statements of fact and that in the negotiation context, certain statements such as estimates of price or value are not taken as statements of facts under generally accepted conventions. Rule 8.4(c) prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and Rule 8.4 (d) prohibits engaging in conduct that is prejudicial to the administration of justice.

The above rules apply to statements of fact made by counsel during a negotiation. The question then becomes whether under Rule 4.1, in conjunction with Rule 26 of the Federal Rules of Civil Procedure, the attorney’s failure to disclose the newly discovered adverse testimony would constitute a material misrepresentation, concealment of which would be unethical.

Federal Rule of Civil Procedure 26 (e) requires supplementation and amendments of disclosures and responses “when the party learns that in some material respect the information disclosed is incomplete or incorrect. . . .” Section 26 (e) requires that supplementation be performed in a “timely manner.” In the scenario above, the lawyer learned the day before mediation that another witness, previously undisclosed, would—if called—offer adverse testimony. Is the attorney’s supplementation of the witness list “timely” if not done prior to or at the mediation? Even if the attorney supplements his disclosure by telling opposing counsel there is an additional witness, must he disclose that the witness will testify adversely?

In this particular scenario, while the Rules clearly require the attorney to answer the neutral’s question honestly, this author would suggest they do not necessarily require the attorney to volunteer the newly discovered testimony to opposing counsel. There are limits, however, to the negotiating representations an attorney can make. Materially misleading statements are not only prohibited, but can ultimately undo a settlement. For instance, courts have sanctioned lawyers for failing to reveal in negotiations that the personal injury plaintiff has died, ABA Formal Ethics Op. 95-397 (1995), or that defendant has an additional umbrella policy, State ex rel. Neb. State Bar Ass’n v. Addison, 412 N.W.2d 855 (Neb. 1987), but upheld a settlement where the plaintiff’s lawyer did not disclose his client’s one-year life expectancy in a workers’ compensation proceeding where no questions were raised about life expectancy, Pa. Ethics Op. 2001-26 (2001).
There is a tension between advocating for the best result and truth telling. Some authors have advocated that the duties to a mediator are co-extensive with the advocate’s duty of truth to a tribunal. E.g., B. Myerson, *Telling the Truth in Mediation: Mediator Owed Duty of Candor*, 16 No. 2 GP SOLO & SMALL FIRM LAW 32 (1999); R. Gordon, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 U. MICH. J. L. REFORM, 503 (1985).

One could argue, however, that if there is no duty to disclose “relevant facts” to the opposing counsel, there would be no duty to disclose those facts to the mediator. The Comments to Rule 4.1 might militate to the contrary, if the attorney answers directly that no adverse witnesses exist. ABA Formal Opinions 94-387 and 95-397 offers this guidance: A lawyer need not disclose that the statute of limitations has run, but may not make affirmative misrepresentations about that fact, whereas a failure to disclose a client’s death would implicitly misrepresent that the client is still alive.
VII. Scheduling ADR to Avoid Disclosure

Issue: May an attorney manipulate the timing of ADR to avoid disclosing information that would lower the value of the case?

Factual scenario: Attorney learns that client’s answers to interrogatories, accurate when signed, must be amended to correctly disclose newly acquired information that would adversely affect the value of the case. The attorney requests mediation before the interrogatories are amended.

Relevant ethical rules:

Preamble: A Lawyer’s Responsibilities

As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person…

Comment [1]: A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no duty to inform an opposing party
of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

Comment [2]: This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category . . . . [emphasis supplied]

**Discussion:** The attorney states that her supplemental responses are not “due for two weeks.” As in the prior scenario, the question arises whether the attorney has “timely” supplemented her client’s interrogatory answers. If she fails to timely supplement, has she violated her duty to the tribunal under Rule 3.3? Must she correct the misimpression that the original interrogatory answers are still accurate? Is it acceptable to schedule a mediation to avoid disclosing, for instance, that an expert witness has retracted a prior opinion? There is a tension between the concept that a lawyer generally has no duty to inform an opposing party of relevant facts and the prohibition against making misrepresentations, include affirming statements of others known to be false or misleading.
VIII. To What Information is the Mediator Entitled?

**Issue:** If asked, is the attorney obligated to tell the mediator what the attorney’s settlement authority is?

**Factual scenario:** Mediator asks point blank what settlement authority is, and says she cannot effectively settle case unless attorney tells her.

**Relevant ethical rules:**

Rule 4.1 *Truthfulness in Statements to Others*

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact . . . .

**Discussion:** Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, a party’s intentions as to an acceptable settlement of a claim do not ordinarily fall within this category. ABA Formal Ethics Op. 06-439 (2006).

There are actually two issues here. The first is whether the attorney is required to disclose the attorney’s settlement authority, if asked. The authors’ answer would be no. If, however, disclosure is made, it must be accurate.
IX. Bluffing vs. Misrepresentation

**Issue:** When does a communication regarding the client’s position become a statement of fact that is conveyed in language that converts it to a misrepresentation?

**Factual scenario:** Attorney tells mediator truthfully that authority does not exceed $100,000, but adds untruthfully that, “I don’t think we are going to be able to reach anybody . . . today” to obtain additional authority.

**Relevant ethical rules:**

Rule 4.1 Truthfulness in Statements to Others

Comment [2]: This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortuous misrepresentation.

**Discussion:** Is the statement, “I don’t think we are going to be able to reach anybody . . . today,” the attorney’s bluff or is it a material statement of “fact?” Bette J. Roth posits, in *Ethical Considerations for Advocates in Mediation*, Feb. 7, 2005 Mass. Lawyer’s Weekly,” that it is “bluffing,” and that such bluffing about settlement authority is a commonly used tactic that yields effective results, such as testing the opponent and establishing a settlement range. She asserts that, because settlement authority is not something a party would otherwise be compelled to disclose, such conduct would be permitted under Rules 1.3 and 4.1.

Carrie Menkel-Meadow, however, offers this admonition: “Don’t lie if, in the same circumstances, you would not want to be lied to.” C. Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment*, 138 U. PA. L. REV. 761, 764 (1990). Perhaps the better solution is for the lawyer to say only that her current authority is less than $100,000, but say nothing about her ability to obtain more.
X. Prohibiting Lawyers from Accepting Other Cases/Clients

Issue: May a settlement ethically include a lawyer’s agreement not to pursue similar claims or represent other clients not party to ADR?

Factual scenario: Defense counsel for a large retailer asks plaintiff’s counsel (a well regarded employment lawyer) to agree, as part of confidentiality provision in a settlement, not to represent future employees whose claims arise from a similar set of factual circumstances.

Relevant ethical rules:

Rule 1.7 Conflict of Interest: Current Clients

Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making . . . (b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.

Rule 1.9. Duties to Former Clients

Discussion: The agreement not to represent other clients denies members of the public access to the lawyer whose experience and background render him/her best suited to represent them, and creates a conflict for the lawyer who is asked to give up future representation in the interest of the current client. These public policy considerations and Rule 5.6 require attorneys neither to suggest nor to enter into such an agreement.

ABA Formal Ethics Op. 000-417 discusses the public policy concern under such circumstances, i.e., “that the ultimate settlement figure will bear less of a relationship to the merits of the case than to the amounts necessary to ‘buy off’ . . . counsel.”

The confidentiality agreement, depending on its wording, could also impact future representation, if it would expose the attorney to potential liability for breach in representing future clients and using “confidential” information gathered in the current representation. In that event, failing to use the information could materially limit the attorney’s subsequent representation, and it would have to be declined.
XI. Hold Harmless and Indemnification Agreements

Issue: Can the attorney enter into settlement in which attorney guarantees payment of liens?

Factual scenario: Toward the end of mediation, defense attorney demands, as a condition of settlement, that Plaintiff’s attorney--in addition to Plaintiff--agree to hold harmless and indemnify the Defendant, its insurer and/or attorney from claims arising from any liens, items of subrogation, and or 3rd party claims.

Relevant ethical rules:

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

(a) . . . A lawyer may take such action on behalf of the client as impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. . . .

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation . . . .

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. . . .

Discussion: The mere request for such indemnity, for ethical reasons, creates a conflict. The attorney’s declining to accede will impede the client’s ability to secure a settlement. It places the attorney in the position of recommending against an otherwise acceptable offer because it puts the attorney at risk for thousands--or tens of thousands--of dollars. Acceptance of the condition, however, makes the attorney a guarantor, contrary to Rules 1.7 and 1.8. Even were the attorney willing to accept the risk, it would still affect attorney’s exercise of independent professional judgment. Under the circumstances, Rule 1.2 appears to mandate what Rule 1.8 prohibits. Attorney’s only option if client insists upon such a condition would be to withdraw. Rule 1.16 prohibits continuing representation where representation would violate the Rules.