

**STATE BAR OF NEVADA  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 35**  
*Issued December 11, 2006*

**QUESTION**

May an attorney properly include in a fee agreement a provision granting the attorney full and absolute discretion and authority to settle the case upon terms decided by the attorney?

**ANSWER**

No. A provision in a fee agreement delegating all settlement authority to the attorney violates Nevada Rule of Professional Conduct 1.2(a).

**AUTHORITIES RELIED UPON**

Nevada Rules of Professional Conduct 1.2; 1.4  
ABA Annotated Model Rules of Professional Conduct (5<sup>th</sup> ed. 2003)  
Restatement, Third, The Law Governing Lawyers (3d ed. 2001)  
*In re Grievance Proceeding*, 171 F. Supp. 2d 81 (D. Conn. 2001)  
*In re Lansky*, 678 NE 2d 1114 (In. 1997)  
*In re Lewis*, 463 SE 2d 862 (Ga. 1995)  
*Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992)

**THE OPINION'S ORIGIN**

At a recent Committee CLE presentation, a defense lawyer inquired about a recent dilemma he had faced. He and the plaintiff's attorney had negotiated a settlement which he (the defendant's attorney) viewed as very favorable to the defendant. The plaintiff's attorney instructed that the settlement check be made payable solely to him, and that the release be prepared for his signature - on behalf of the plaintiff. The defendant's lawyer questioned the propriety of this, but the plaintiff's attorney produced a retainer agreement giving him full power and authority to settle the case, to execute all instruments and documents in the plaintiff's name, and to receive all settlement proceeds on behalf of the plaintiff. The defendant's attorney's situation was further confounded by the fact that he did not believe that the plaintiff spoke or understood English. The case was settled, but the defense lawyer asked whether the conduct of the plaintiff's lawyer was proper.

## ANALYSIS

The analysis of this issue<sup>1</sup> is simple and straightforward: Nevada Rule of Professional Conduct 1.2(a) provides that “a lawyer shall abide by a client’s decision whether to settle a matter.” The cases and opinions interpreting that language<sup>2</sup> are unanimous in concluding that it means what it says: the decision to settle belongs to the client, and may not be abrogated to the attorney in the retainer agreement. For example:

- (i) *In re Lansky*, 678 NE 2d 1114 (In. 1997). A contingent fee agreement stating that “[The Clients] hereby authorize our attorney to settle this matter for any amount he determines is reasonable without further oral or written authorization” is held by the Indiana Supreme Court to violate the comparable Indiana rule.
- (ii) *In re Grievance Proceeding*, 171 F. Supp. 2d 81 (D. Conn. 2001). A fee agreement delegating all settlement authority to the attorney is held by the U.S. District Court to violate the comparable Connecticut rule.
- (iii) *In re Lewis*, 463 SE 2d (Ga. 1995). A fee agreement granting the attorney “full power and authority to settle, compromise, or take such action as he might deem proper,” and to “execute any and all instruments” and receive the settlement proceeds is held to violate the comparable Georgia rule and to merit an 18-month suspension.

Virtually all the cases and other authorities<sup>3</sup> reach this conclusion for three reasons: the decision belongs to the client; the attorney has a duty to consult with the client about settlement, and explain the matter to the extent necessary to permit the client to make an informed decision<sup>4</sup>; and the general relinquishment of the right by the client in favor of the lawyer creates a conflict which violates the attorney’s fiduciary duty to the client.<sup>5</sup>

## CONCLUSION

An attorney has a duty to abide by the client’s decision whether to settle a case, and that duty requires consultation with the client so that the client’s decision is fully informed. An attorney may not abrogate this duty by having the client (in the retainer agreement) delegate to the attorney the full and unfettered right to decide whether or not to settle the case.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

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<sup>1</sup>The issue addressed here involves the wholesale assumption of settlement authority by the attorney in the retainer agreement. It does not address cases of attorney fraud in settling

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without authority, or an attorney's decision to settle within a range of terms and conditions previously authorized by a client.

<sup>2</sup>NRPC 1.2(a) embodies the 2002 amendment to Model Rule of Professional Conduct 1.2(e), which broadened its scope from the authority to accept offers of settlement, to the authority to both make and accept settlement offers. *See* ABA Annotated Model Rules of Professional Conduct, p. 31-32 (5<sup>th</sup> ed. 2003).

<sup>3</sup>Collected in Annotated Model Rules, pp. 33-34, and Restatement Third, The Law Governing Lawyers § 22 (3d ed. 2001).

<sup>4</sup>NRPC 1.4.

<sup>5</sup>*Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992).