



INTERNATIONAL ASSOCIATION  
OF YOUNG LAWYERS

## **SETTLE FOR LESS?**

### **LITIGATION COMMISSION**

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#### **National Report of the United States of America**

**Colin R.P. Delaney**

Smith, Gambrell & Russell, LLP  
Promenade, Suite 3100  
1230 Peachtree Street, N.E.  
Atlanta, Georgia 30309  
United States of America  
Tel: 404-815-3790  
[cdelaney@sgrlaw.com](mailto:cdelaney@sgrlaw.com)

**Marcus D. Fruchter**

Schopf & Weiss LLP  
One South Wacker Drive  
28th Floor  
Chicago, Illinois 60606  
United States of America  
Tel: 312-701-9354  
[fruchter@sw.com](mailto:fruchter@sw.com)

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# **1 QUESTIONNAIRE FOR CIVIL LITIGATION**

## **1.1 General issues**

### **1.1.1 How do you define the term “settlement” in civil procedures?**

There is no statutory definition of the term “settlement” in U.S. civil procedure. Settlement is generally understood to mean an agreement or contract that ends some (partial settlement) or all (full settlement) of a lawsuit or dispute. Additionally, a consent judgment or consent decree is a civil settlement incorporated within a civil judgment. Court approval is generally not required for a settlement, whereas a consent judgment or consent decree necessarily contemplate court approval.

Settlement agreements are typically contracts between the settling parties. Thus, settlement agreements in the United States are generally subject to the normal legal and statutory requirements for contracts. It is important to note that strong judicial policy in the United States favors settlement because settlements simplify litigation and “conserve judicial resources” (meaning settlements save courts the work of deciding disputes that come before them). Accordingly, courts will usually uphold settlement agreements if they are entered in good faith and do not violate the law or public policy.

### **1.1.2 Are there statutory provisions (e.g., in your civil procedural rules or substantive rules) dealing with settlements?**

Generally, no. American courts construe settlement agreements as contracts subject to the normal legal and statutory contractual requirements. Courts typically do not review the terms of settlement agreements reached between parties to a dispute.

For certain causes of action, including class actions and some bankruptcy proceedings, for example, settlements reached during litigation require court approval. In those instances, courts will review a proposed settlement to ensure that the parties entered it knowingly and voluntarily. For class actions, a settlement should be approved if it is fair, adequate, reasonable, and free of fraud or collusion. Courts reviewing settlement agreements in the context of an adversary proceeding within a bankruptcy will also consider the settlement’s impact on the bankrupt estate, including whether the settlement will provide money that can be used to pay creditors. Courts in the United States will also review settlement agreements in certain civil and regulatory enforcement actions brought by governmental agencies, such as the Securities and Exchange Commission and the Department of Justice.

These court review requirements are generally for the protection of someone other than the parties entering into the settlement. For example, in the class action context, part of the court’s fairness review will consider whether the settlement is fair to the absent class members being represented by the class representative and class counsel; this ensures that the class representative and class counsel do not put their own interests in a settlement in front of the absent class members who are not present to protect themselves. In the bankruptcy context, the court’s review will consider whether the settlement adequately

protects the interests of creditors of the bankrupt estate. In civil enforcement actions, the court's review considers the public interest.

Some courts have held that "Mary Carter" settlement agreements are illegal and unenforceable against public policy. A "Mary Carter" agreement is a contract by which one co-defendant in a multi-party case secretly agrees with the plaintiff that, if such defendant will proceed to defend itself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants. The settling defendant secretly aligns itself with the plaintiff and helps the plaintiff's case while continuing as an active defendant. In jurisdictions where "Mary Carter" agreements are not per se illegal, courts have approved such arrangements where the agreement was promptly disclosed.

Regardless of whether a settlement agreement is a "Mary Carter" contract, settlement agreements must be free from collusion and bad faith, and cannot be to the detriment of non-settling third parties. For example, a settlement agreement cannot include a promise to commit a crime or tort or induce the breach of existing contractual obligations or fiduciary duties. After certification of a class in a class action, a defendant cannot attempt to settle with individual class members without seeking court approval. Prior to class certification, defendants sometimes try to "pick off" potential class members with more or less handsome settlements to dissuade them from pursuing claims on a class-wide basis. The plaintiff-side class action bar naturally finds picking-off distasteful, but no law actually forbids it.

Additionally, individual states in the United States may have procedural rules or substantive laws that apply to settlement agreements. For example, Section 1542 of the California Code of Civil Procedure provides that "a general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." This rule reflects the public policy of California to protect the interests of settling parties and ensure that settlements are reached knowingly and voluntarily.

Attorneys are advised to consult applicable substantive law and local rules and statutes when negotiating a settlement agreement in the United States.

### **1.1.3 Are there ethical rules and guidelines that affect your negotiation strategies in practice?**

While there are no special ethical rules or guidelines that only apply to settlement negotiations and affect negotiation strategy, there are some ethical rules to which attorneys should pay particular attention when working on a potential settlement

agreement on behalf of a client, including the following principles that are based on the American Bar Association's Model Rules of Professional Conduct:<sup>1</sup>

- A lawyer shall abide by a client's decisions and objectives, including whether to settle a matter, except that a lawyer shall not counsel a client to engage, or assist the client, in conduct that the lawyer knows is criminal or fraudulent.
- A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required.
- A lawyer shall keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information.
- A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is otherwise permitted under the applicable code of conduct (generally dealing with the prevention of a crime or substantial injury, or with controversies between lawyers and clients).
- In representing a client, a lawyer shall exercise independent judgment and render candid advice.
- 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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
- A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, conceal or destroy a document or other material having potential evidentiary value; and a lawyer shall not falsify evidence.

Taken as a whole, these rules (and specific rules in some jurisdictions) mean that a lawyer must promptly inform a client whenever a settlement offer is received, so that the client may make an informed decision about whether to accept the offer.

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<sup>1</sup> As a general matter, attorney ethical rules and guidelines are governed by the various codes of professional conduct adopted by the individual states and federal courts. The various codes of professional conduct are typically similar and generally follow the American Bar Association's Model Rules of Professional Conduct, either in whole or in part. An attorney is obligated to adhere to the ethical rules and standards of each court and state bar where the attorney practices law, and settlement negotiations are no exception.

One ethical rule pertaining to settlement applies uniformly throughout the United States, at least to lawyers if not also to clients. A lawyer may never threaten to pursue criminal prosecution of an adverse party in order to gain leverage in settlement negotiations. This rule is so firmly held and faithfully followed that no lawyer acting professionally would make such a threat, so the rule does not affect how lawyers negotiate settlements in practice.

**1.1.4 Is there a specific point in time in the history of a case that is particularly suitable for settlement discussions?”**

Parties are always well advised to consider the costs and benefits of ongoing litigation versus settlement, but there are certain stages in a typical case where engaging in meaningful settlement discussions may have a greater likelihood for success. The first of these stages is early in the case, soon after the plaintiff files the lawsuit and before the parties spend significant time and money litigating the case. A drawback to early settlement discussions, however, is that the parties have not engaged in discovery and may not have enough information about the underlying facts to conduct productive discussions or make informed settlement decisions.

Other natural stages for settlement discussions include after the parties have finished taking fact discovery (or have taken testimony or evidence from a key party in the case), before the submission of summary judgment motions (akin to a paper trial) to the Court, after an important court ruling in the case that clarifies or narrows the disputed factual and legal issues (for example, a summary judgment ruling, a claim construction ruling in a patent case, or a class certification ruling in a class action lawsuit), or shortly before trial.

One of the objectives of the United States’ liberal policy on discovery is to have all of the relevant facts and legal positions emerge so the parties may see them (not wonder about what the other side knows or is hiding) and, on such an informed basis, consider whether a settlement can be reached. U.S. legal culture’s affinity for liberal discovery often means, in practice, that parties and lawyers are reluctant to entertain serious settlement discussions until at least some important discovery has been completed. This allows the parties and lawyers to enter into settlement discussions with greater assurance that they are fully informed as to the merits of the case.

**1.1.5 We assume that all jurisdictions know the out of court settlement. Is it, however, frequent in your jurisdiction that the court or the judge facilitates settlement discussions between the parties? What enables (if yes) or prevents (if no) the court from doing so?**

Yes, judges in the United States typically encourage parties to explore settlement early and often in a case. This may be active encouragement or passive encouragement reflected in a judicial disposition in favor of allowing parties to pursue settlement discussions when the parties ask, such as by granting continuances of deadlines or adjourning hearings to allow settlement discussions to proceed. The Federal Rules of Civil Procedure (which apply in the federal court system) and the procedural rules of

many states explicitly allow judges to order litigants and attorneys to appear for pretrial conferences to facilitate settlement. Judges are also empowered to encourage and facilitate settlement discussions by the strong policy in the United States that favors settlements and the considerable inherent authority judges have to manage their dockets and caseloads.

The public policy strongly favoring settlement is based on the recognition that parties to a dispute are in the best position to determine how to settle a contested matter in a way which is the least disadvantageous to all involved. While judges cannot force unwilling parties to settle, they can incentivize settlement through the case schedules they adopt and can foment settlement discussions through the procedural and substantive rulings they issue. Sometimes, for example, judges will choose to rule on an important procedural or substantive issue in the case with the expectation that doing so will change the settlement posture of the case—and lawyers sometimes explain to judges that a ruling on an important issue may enable the parties to engage in settlement discussions with greater prospects for success. Some courts or judges order parties to participate in settlement conferences or non-binding mediation routinely at different stages of the case, such as after discovery or immediately before trial or before briefing on appeal. Such an order imposes only an obligation to negotiate in good faith, not an order to actually reach a settlement.

Beyond ordering the parties to participate in non-binding mediation (with another judge or a third-party neutral), or (less commonly) direct settlement negotiations, active encouragement of settlement by the judge presiding over a case is allowed in some jurisdictions, including the federal courts, but nevertheless can be controversial. For example, some judges will order the parties appearing before them to participate in settlement discussions in the presence of the judge, perhaps with the judge acting as an intermediary or evaluator. Some lawyers, parties, and scholars are uncomfortable with the judge presiding over a case taking any direct role in settlement discussions, such as facilitating negotiations or sharing the judge's non-binding views on certain points of fact or law, but it does happen sometimes in some courts.

## **1.2 Enforcement of settlement**

### **1.2.1 Are there differences between the in court and the out of court settlement, for example with respect to their effect in enforcement proceedings? Are there other practically relevant differences?**

Whether an out-of-court settlement agreement is binding and enforceable is governed by normal rules of contract law of the state where the parties executed the agreement or of the state designated in the settlement agreement's choice of law provision, if any. A settlement agreement that has been entered as part of a consent judgment or consent decree is enforceable as a court order and failure to comply with it can expose the noncompliant party to liability for contempt of court.

Where a settlement agreement has been entered as a consent judgment or consent decree and operates as a court order, a party seeking to enforce the agreement will generally not have to file a new lawsuit to enforce the agreement but may bring a motion (application) for enforcement before the court entering the consent judgment or consent decree. Alternatively, the usual methods of enforcing a judgment could be invoked for the consent judgment, such as proceedings to obtain assets, garnish property, etc.

Unless a court specifically agreed to retain enforcement jurisdiction over a settlement agreement that terminated all of the underlying litigation—such an agreement would be unusual in most settings and potentially sitting on unsound jurisdictional footing, especially in federal courts—a party seeking to enforce a settlement agreement will generally have to file a new lawsuit for breach of contract against a non-complaint party. The new suit for breach of contract becomes the “enforcement action.” But since courts know no such animal as a private enforcement action, the second case is just another lawsuit for breach of contract that will have to be prosecuted until claims of breach are reduced to a new judgment. For this reason, practitioners are careful about compromising large or especially powerful claims in settlements that, if breached, leave the aggrieved party with a new and smaller claim for simple breach of contract. As a result, some practitioners make the effectiveness of a release of claims expressly contingent on performance of an important aspect of the settlement, such as full payment of the settlement amount.

Motions to enforce settlement do occasionally come before a court. Such a motion is not about securing compliance with an agreed settlement term, but typically turns on the issue of whether a settlement agreement was reached at all. If discussions about settlement or (most commonly) negotiations over a written settlement agreement break down, one party may argue that a settlement agreement had already been reached and the other party is now backing out of the deal. In that situation, a court will hear and determine, usually by motion, whether the parties intended to (and did in fact) reach a complete agreement to settle in all material respects. If the court determines that such an agreement was indeed reached, the court may enforce it by ordering the parties to consummate the settlement. In such situations, whether the parties reached the settlement in court or out of court does not matter.

### **1.3 Confidentiality and privilege**

#### **1.3.1 Does your jurisdiction consider a civil settlement agreement and the discussions/correspondence leading to such a settlement confidential by law or other rules (e.g., ethical rules) or do the parties have to agree on confidentiality in the context of their settlement or the settlement discussions?**

Settlement agreements and settlement discussions are not deemed per se confidential, so parties must reach agreement regarding confidentiality issues. Parties may, and quite often do, agree to keep settlement agreements and discussions confidential. But parties cannot agree to keep a settlement confidential from a third party (or parties) to whom one of the settling parties owes a contractual obligation or other duty of disclosure. Setting

aside such third-party obligations, the particulars of what may be disclosed and what must be kept confidential are typically left to the parties to resolve by agreement. Of course, if a settlement agreement is subject to court approval for some reason, most settlement terms must be made a matter of public record, except in extraordinary circumstances.

### **1.3.2 What means do you have to protect the confidentiality of your settlement and related discussions/correspondence for civil and other procedures?**

Federal Rule of Evidence 408 (which governs the admissibility of evidence in civil and criminal cases in federal courts) provides that settlement offers and statements made during settlement negotiations are not admissible when offered to prove liability or the validity or invalidity of a claim. Most states have similar rules of evidence. These rules are intended to foment open and candid settlement negotiations by saving a party from fear that a statement made, position taken, or even admission will be introduced against that party later if a settlement is not achieved. In practice, lawyers often identify a given communication or discussion as “for settlement purposes only” and therefore inadmissible. Sometimes, lawyers or parties go further and agree that the discussions themselves will be treated as confidential and not to be disclosed—a protection greater than mere inadmissibility.

Assuming the parties have agreed to keep the settlement agreement and/or discussions confidential, a party can take court action against another party who fails to comply with the applicable confidentiality restrictions. The available enforcement options will depend upon the nature of the settlement agreement and the specific confidentiality violations, but could include claims for breach of contract, contempt of court (if the confidentiality provisions are contained in a consent decree, consent judgment or other court order), or various tort claims depending on the materiality of what was disclosed and the consequences of the improper disclosures.

### **1.3.3 What are possible consequences of a breach of confidentiality?**

Where the parties agreed to maintain the confidentiality of their settlement agreement and settlement discussions, the possible consequences of a breach of confidentiality could include injunctive relief to prevent future breaches, monetary damages where appropriate, and contempt of court where the settlement agreement takes the form of a court order. Depending on the specific terms of the settlement agreement, it is possible that a material breach of confidentiality could rescind some or all of the other terms of the settlement agreement or excuse the other party from further performance.

### **1.3.4 Are you allowed to disclose the settlement agreement in other proceedings**

- a) between the same parties?**
- b) between other parties?**

As discussed above, the extent to which a party may disclose a settlement agreement depends upon what the parties agreed to with respect to confidentiality and disclosure.



Unless the parties have agreed to an extremely broad and well-drafted confidentiality obligation, at a minimum the parties should expect that the settlement agreement will be disclosed in any proceeding to enforce or for breach of the settlement agreement itself.