

YOUR CLIENT DEMANDS TO SETTLE BUT DISCOVERY
IS NOT COMPLETE. WHAT LANGUAGE SHOULD BE
ADDED TO A PROPERTY SETTLEMENT AGREEMENT?

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Lawyers are frequently confronted with the situation where discovery is not complete yet the client is demanding the case be settled because the existing proposal seems favorable, coupled with an understandable desire to end the litigation and minimize fees. In all probability, this represents a significant number of the cases lawyers handle on a daily basis. What language can be contained in a Property Settlement Agreement to adequately protect the client's interest as well as those of counsel. Yet, what should not be done is when a case is put through counsel, in a triumph of self preservation over sound judgment, expounds at length on the record about seemingly privileged conversations the lawyer and the client had which about the settlement. We have all heard young and even experienced lawyers spread upon the record comments like "you are doing this against my advice" and "I explained to you why you should not enter into this agreement as presented".

It is an elementary, if oft forgotten principle, that communications between a lawyer and a client are privileged. The privilege belongs to the client and not the lawyer. Thus, counsel's self-serving attempt to place on the record the substance of their otherwise privileged communications to minimize their own liability represents an actionable breach of the privilege and immediately provides the other party with prime

ammunition in the event a later application questioning the Agreement is made. After settlement if your adversary makes such comments, you should immediately order a transcript and forward it to the client, advising them to save the transcript. In the event an application is made to attack the Agreement the transcript is prime ammunition to defeat such an application.

When confronted with such an application, counsel should immediately point out that what the party moving to set aside the Agreement did was voluntarily done with the independent advice of counsel, i.e. they knew what they were doing. Our system requires people be responsible for the decisions they make, particularly those made with counsel. There are a whole series of cases that talk about the consequences of voluntary conduct. See Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979); Halliwell v. Halliwell, 326 N.J. Super. 442 (App. Div. 1999).

Coupled with the transcript will be the argument buyers remorse is not a justification to set aside a freely bargained for agreement given the importance the law places on consensual resolution of agreements by parties. Peterson v. Peterson, 85 N.J. 638, 645 (1981); Avery v. Avery, 209 N.J. Super. 155, 160 (App. Div. 1986); Lepis v. Lepis, 83 N.J. 139, 148 (1980); Rolnick v. Rolnick, 262 N.J. Super. 343, 353 (App. Div. 1993).

When viewed in the cold light of our Rules, it is clear that an attorney breaching the lawyer/client privilege to insulate themselves from a potential malpractice suit has violated the Privilege. In the event the subsequent modification application is denied, the attorney who breached the privilege may be confronted with a malpractice claim.

Having said what you should not do, this Article will propose certain language which should then be coupled with a letter sent to the client memorializing advice, as opposed to disclosing in an open Courtroom the substance of otherwise privilege communications. Importantly, it must be understood that the letter, as well, may not be privileged if the Agreement is attacked under the principles of Weingarten v. Weingarten, 234 N.J. Super. 318 (App. Div. 1989). In the event there is an application made to set aside an Agreement in discovery counsel should ask whether there was any communication between counsel concerning the Agreement before it's execution; such communications under Weingarten may not be privileged.

Had discovery been completed, it would be easy (and this is good practice point should be followed in any event) to include language in an Agreement the parties are relying upon the accuracy of what has been disclosed in entering into the Agreement. Essentially, the thrust of the drafting is directed

to incorporating a series of representations by the spouse with assets not only as to the accuracy of what has been disclosed but representations about information that would have been disclosed had discovery been completed.

Initially, the Agreement should contain a reference that the information contained in the Case Information Statement is full, complete and accurate; both as to income, assets and liabilities. Secondly, if the Case Information Statement is in any way outdated, even by a few months, the Agreement should provide that each of the parties shall attach to the Agreement a list that they will certify to at trial accurately represents their present assets, income and liabilities as of the execution of the Agreement.

Since I believe the Fiduciary Responsibility that parties have to each other includes full and complete disclosure of all material information bearing on the Agreement, there should also be language in the Agreement reflecting that fact. The Agreement should memorialize that the parties have fiduciary obligations to each other; that those responsibilities apply to discovery and that all material information bearing on the settlement has been disclosed. Yet, that is not enough, as I believe further that the parties should, within the context of an Agreement, adopt their own definition of what constitutes "material information".

A Court might view materiality differently than the parties. In the context of a case settling without complete discovery, the contractual construct for materiality should not be any information that is material which gives rise to the ability to set aside the Agreement; that is a higher standard. Instead, select a more liberal definition; any information that would have affected how the parties would have negotiated. As lawyers instinctively understand (but trial judges may not) that arguments advanced, even if they cannot be proven at trial, can effect negotiations - and hence the result. Thus, materiality should be defined in that context, i.e. information that would have effected the positions the client would have taken had this information been known during the course of negotiations. That does not mean that the "position" must be one that might reasonably be accepted by the other side. This is a real world observation that Judges who will review applications to modify or set aside Agreements with a jaundiced eye or, alternatively, on an eye on their calendars cannot ignore. It is a far more liberal standard than materiality generally. This materiality standard is to be viewed through the fiduciary obligations spouses have to each other in discovery, while simultaneously recognizing that information in the negotiating process is power.

Some proposed forms of language are set forth hereafter but

they should not be utilized without careful editing. The language must be tailored to the unique facts of the case. Thus, the following must be considered as guides. Some of the provisions may be duplicative so you can select the formulation that best fits the case.

WARRANTIES AND REPRESENTATIONS

1.1 In entering this Agreement, the parties acknowledge they have not completed the types of discovery normally utilized in cases of this complexity. The Wife has not had her own forensic expert, nor have depositions been taken or interrogatories exchanged. Substantial legal issues exist which have not fully been explored. Notwithstanding that, the parties have determined to enter this Agreement and waive completion of discovery as well as certain legal claims advanced by the Wife. These waivers have only been made based upon certain warranties and representations the Husband has made to the Wife upon which she is relying. Both parties further recognize they each have a Fiduciary Responsibility to disclose all material information that would bear on either party's decision to enter this Agreement. In partial satisfaction of that obligation, the parties have attached to this Agreement their Case Information

Statements exchanged in informal discovery (or a current list of assets, liabilities, income).

1.2 Each party represents their list of assets, liabilities and income is full, complete, accurate and truthful notwithstanding the fact the parties had differences as to asset values. Such differences have been compromised in reaching this Agreement. The purpose of the attachment of the Case Information Statement is to identify assets in existence and to provide a baseline for the existence of assets, liabilities and income. It is not intended to constitute a representation as to the amounts of income or the value or amounts of assets or liabilities. It is with that limited purpose that the Case Information Statements have been attached. The parties further acknowledge the other party has relied, to their detriment, on the accuracy of this information in entering this Agreement.

1.3 The Husband further warrants and represents he has made full and complete disclosure concerning the business status of _____, his interest in _____ and it's related assets, and that he is unaware of and has no knowledge of any facts or information of any pending or contemplated transactions that would materially affect the value of his business interests or his compensation or cash flow. This includes but is not limited to the sale of _____ or his obtaining an interest in a related

Company. He further warrants and represents _____ is not presently in the midst of a sale, recapitalization, restructuring or any other transaction (regardless of form) that would constitute a liquidation event, nor is any such liquidation contemplated to occur in the near future.

1.4 The parties have determined to utilize a definition for the term "Material" which they believe is consistent with each party's Fiduciary Obligation to disclose information prior to execution of a Property Settlement Agreement. The term "Material" shall be defined as any information, regardless of the source, that would have effected the negotiating positions the parties would have taken regardless of whether the information constitutes material non-disclosure as that term is utilized in commercial or divorce agreements or as otherwise defined by law. This broad and liberal interpretation of the term "Material" is purposeful; it is intended to confirm the parties' oral agreement that any information that would or could have affected positions the Wife would have taken (even if the Husband disagrees as to the validity of the position) shall be deemed material. Materiality shall thus be defined as any information that might effect negotiations, or how the Wife would negotiate; not whether the information is of such a quality that it would have effected the result, either in settlement or trial. The Husband warrants

and represents he has fully and completely disclosed all material information (as defined herein) of which he has knowledge of as of execution of this Agreement which might bear on the status of his assets, income, or any other factor bearing on his overall financial circumstances.

1.5 As part of the inducement for the Wife to waive her discovery rights, the Husband has warranted and represented that he has not transferred assets to any third party's name subsequent to their separation nor does he have an equitable interest in any asset or other thing of value titled in anyone else's name or any entity. Additionally, the Husband warrants and represents that he has not purchased, nor does he have any interest (legal, equitable or as a contract purchaser) in any real property other than what he owns in the State of New Jersey and New York which has been disclosed herein. This representation does not include gifts of items of personal property, which the Husband may have made to any third person prior to execution of this Agreement except the Husband represents the total value of such gifts made within the last two years prior to execution of this Agreement does not exceed \$20,000.00.

1.6 The Husband further warrants and represents there is no information concerning his overall financial circumstances that

have not already been disclosed and considered by the Wife in entering into this Agreement. In the event it is determined that any of these representations were false and that the urgency in finalizing this Agreement was to obtain a settlement prior to the occurrence of some event that was material, as that term has been defined herein (i.e. effecting the negotiations), then and in that event, upon such a finding by a Court, this Agreement at the Wife's option can be set aside. If a Court makes such a finding, the Husband shall bear all reasonable legal costs incurred by the Wife to obtain the finding.

1.7 The parties acknowledge having exchanged Case Information Statements. The Wife's statement was dated January 1, 2008. The Husband's statement was dated January 1, 2008. The parties further acknowledge they have entered into this Agreement without completing discovery and that this Agreement has been entered into based upon the completeness and accuracy of the Case Information Statements that have been supplied. Each party warrants and represents that they acknowledge that the other party has relied upon the accuracy of the CIS as well as the answers to interrogatories that have been exchanged in entering into this Agreement. In the event the information contained in the CIS and answers to interrogatories is later determined to be

inaccurate and incomplete, then and in that event (to be negotiated)

1.8 The Husband warrants and represents that he has not prepared a draft of a Pre-Nuptial Agreement containing an itemization of his assets, income and liabilities. If such an Agreement is to be prepared prior to the Husband's marriage, provided the marriage takes place within six (6) months of this Agreement, then and in that event, the Husband shall provide not the terms of the Pre-Nuptial Agreement but the list of financial disclosure to the Wife.

1.9 The parties have not fully completed discovery but have determined to enter into this Agreement subject to certain warranties and representations upon which each party is relying. The parties have attached to this Agreement a current list of their income, assets, and liabilities and both warrant and represent that the list is full, complete, accurate, and fairly and reflective of their present financial circumstances. In the event it is later determined by a court that the information contained on these Schedules is incomplete and/or inaccurate, then and in that event the provisions of this Agreement may be set aside and all reasonable legal fees incurred by the party bringing to the court's attention the incompleteness of the bargained-for disclosure shall be paid by the other party.