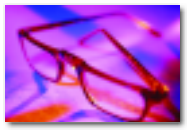

Settlement When Representing More Than One Party

In a previous column, we looked at some of the aspects of representing multiple parties in a single lawsuit.[1] These included a waiver by one party to allow you to continue to represent the other in the event that their interests became divergent, and providing for the free flow of confidential information between you and all of the clients involved.

Other potential ethical problems in that situation include what is known as "the aggregate settlement."

That occurs when two or more clients who are represented by the same lawyer resolve their claims or defenses. Aggregate settlements are specifically covered under ER 1.8(g) (Conflict of Interest: Current Clients: Specific Rules).[2] ER 1.8 supplements the general conflict of interest rules found in ER 1.7 and sets forth 12 specific instances in which a lawyer's self-interest might jeopardize client representation.

ER 1.8(g) provides that a lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claim of or against the client unless each client gives informed consent, in a writing signed by the client. The rule further provides that the lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

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The part about having a writing seems easy enough. But what of the facts required so that the clients can be deemed to have given their "informed consent"? That is a defined term and denotes the agreement by the client to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.[3] In other words, how much do you have to tell your clients about the settlement, and what sort of information should be reflected in the writing giving you authorization to settle?

A recent ethics opinion from the American Bar Association attempts to give some answers to this question.[4] After acknowledging that there is some case authority to the contrary, the opinion suggests the following five items of information be given to each settling client:

- The total amount of the aggregate settlement or the result of the aggregated agreement
- The existence in nature of all the claims, defenses or pleas involved in the aggregate settlement or aggregated agreement
- The details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as the result of an aggregate resolution
- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in full or in part, from the proceeds of the settlement or by an opposing party or parties
- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

These five specific items are not set forth in Arizona's counterpart to the Model Rule 1.8(g) nor are they found in the Comments thereto. They appear to be directed more to a lawyer's obligation to effectively communicate with the client, as required by ER 1.4 (Communication) and the lawyer's duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. The safest course here would be to consider the ABA Opinion as a "safe harbor" in which you can take refuge should one of the settling clients later accuse you of favoring another of your clients over him.

Finally, the ABA Opinion cautions that the disclosures must be made in the context of a specific offer or demand. In other words, the informed consent required by the rule generally cannot be obtained in advance of the receipt of such information. Remember that ER 1.2(a) (Scope of Representation) protects a client's right in all circumstances to have the final say in deciding whether to accept or reject an offer of settlement. The only effective way for a client to exercise this right is to have specific terms on the table and to know what the specific settlement involved means for the client, his lawyer and the other parties to the proposed aggregate settlement.

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endnotes

1. *Representing Multiple Parties in One Suit* (Eye on Ethics column), ARIZ. ATT'Y, Nov. 2004, at 10.
2. Rule 42, ARIZ.R.S.CT.
3. ER 1.0 (Terminology) at subsection (e).
4. *Lawyer Proposing To Make or Accept an Aggregate Settlement or Aggregated Agreement*, ABA Formal Op. 06-438 (Feb. 10, 2006).