Secret Settlement Terms Can Spell Trouble

Lawyers cannot forsake their clients in order to settle cases.

One recent case involved a Florida law firm that represented 20 clients in a suit against DuPont Corporation for damages resulting from the use of the fungicide Benlate.[1] In the litigation, DuPont's counsel approached the claimants' lawyers, agreeing to settle the case for a lump sum of $59 million—if the lawyers agreed not to use the fees earned to fund future litigation against DuPont and agreed to be counsel for DuPont so that they could not represent their clients or anyone else against DuPont in post-settlement matters or in other Benlate cases. DuPont would separately pay the lawyers' fees directly to the lawyers.

All this was agreed to while the cases were pending. It was not disclosed to the clients or to the court when the parties announced the case had been settled. The claimants' lawyers then convinced their clients to settle for sums that eventually added up to the settlement amount, and got them to agree not to disclose the amount each received.

When word got out, a client reported the matter to the Florida Bar, alleging that the lawyers' conflict of interest resulted in lower settlements than would otherwise have been appropriate.

The Florida Supreme Court found that the settlement deal put the lawyers' financial interest in conflict with their duty of loyalty and diligence toward their clients. The court saw the lawyers as becoming, in effect, the agents of DuPont. The court further found that the lawyers failed to communicate with their clients, represented conflicting interests, acquired interests adverse to their clients, and restricted their right to practice, among other violations. Sanctions ranging from disbarment to public reprimands were given, and the lawyers' fees were ordered disgorged. The DuPont lawyers did not fare as badly; disciplinary proceedings brought against them in Delaware and Pennsylvania were dismissed because they were not timely brought, although there are apparently still some civil lawsuits against them. DuPont settled all remaining claims.[2]

Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics

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The second case is even more disturbing and is the subject of ongoing litigation in several jurisdictions.[3] It involves a New York firm and its representation of hundreds of employment discrimination cases against the cell phone company Nextel. This was not a class action. It was an informal aggregation of 587 individual claims, an important fact because the lawyers, by not having class action status, were able to elude judicial oversight of the contested settlement.

The settlement had Nextel paying the lawyers millions of dollars in amounts that bore no relation to the amounts recovered, and rewarded the lawyers for maximizing the number of claimants they got to agree to the settlement. The lawyers had to get the clients to agree to waive all rights to further litigation and to participate in binding arbitration. Although Nextel agreed to pay for the administrative fees of the arbitration process, no mention was made of the costs of experts or other witnesses for the claimants. The lawyers had to refuse to represent any new claimants or refer them to other counsel. The clients had to remain as clients of the lawyers and were prohibited from discussing their claims with anybody on pain of forfeiting their rights to compensation. Clients who asked were permitted to examine the 50-page settlement document but could not retain copies of it. None of the settlement documents or summaries disclosed the payments that Nextel made to the lawyers.[4]

When word of what happened emerged, many clients sued, claiming they did not agree to the provisions and they had been induced by the lawyers to waive rights and settle for less than their claims were worth. As in the Florida case, allegations of conflict of interest and wrongfully agreeing to restrict their practice were made. Additional claims of wrongfully attempting to prevent their clients from seeking other counsel and accepting payment from someone other than the client without the clients' "consent after consultation" are being asserted.

The bottom line: Do not agree with the opposition to decline to represent any client, existing or prospective[5]; do not agree to accept direct payment from the opposition unless the terms and any potential conflicts are fully disclosed to, and consented to by, the client[6]; and do not attempt to prevent your client from discharging you.[7] There are exceptions to these rules, but they do not justify the risks involved. AZ AT

endnotes

1. *Florida Bar v. Rodriguez*, 959 So. 2d 150 (Fla. 2007).
2. Telephone call on Sept. 4, 2007, with James A.G. Davy, Jr., Florida Bar Counsel.
3. *See, e.g., Ficklin v. Penguin Group USA*, N.J. Super. Ct., Essex County, No. ESX-L-003765-03; *Vaughn v. Leeds, Morelli & Brown* (C.D.N.Y., Civ. No. 04 CV 08391); and *Lee v. Leeds, Morelli & Brown*, N.Y. Supreme Ct., Kings County, No. 8651/05.
4. A more complete description of these cases and their ethical implications can be found in William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting As An Example* (Columbia Law School Paper No. 07-158), at http://ssrn.com/abstract=1025984.
5. *See* ER 5.6(b), Rule 42, ARIZ.R.S.CT.
6. *See* ER 1.8(f).
7. *See* Comment [4] to ER 1.16.