Missteps and Your Client's Settlement

It is said that a bad settlement is better than a good lawsuit. Whether or not you agree with this aphorism, we all agree that one of our jobs as civil lawyers is to try to find ways to settle our clients' differences with others, preferably short of the courthouse. But there are limits to what we personally can do to facilitate the settlement process. One of these limits is that we cannot promise, as individuals, to indemnify the other side for any lingering liabilities concerning third-party claims, such as unasserted medical liens and the like.

We touched on these issues briefly in previous columns,[1] and there's a well-written Arizona ethics opinion on the point.[2] Let's review the ethical issues involved.

First, ER 1.7(a)(2)[3] prohibits a lawyer from representing a client when the representation will be materially limited by a personal interest of the lawyer. Obviously, a lawyer's potential liability to third parties is going to influence her ability to counsel a client on what would otherwise be acceptable settlement terms. As pointed out in the Arizona ethics opinion mentioned above, the insistence by opposing counsel that a lawyer guarantee an obligation as a condition of settlement could cause that lawyer to recommend that the client reject what would otherwise be a good offer of settlement because of the fear of potential personal liability. Such an agreement might also compromise the lawyer's exercise of independent judgment required under ER 2.1.

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Second, ER 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation. Guaranteeing payment of potential claims against the settling client would have the same effect as providing financial assistance should a claim arise, and it is not permissible. It is permissible, however, to assist a client in securing a loan from a "lawsuit lender" so that the client can pay for your fees and/or litigation expenses. Again, you as a lawyer should not have a financial interest in the lending organization, nor can you personally guarantee the loan so acquired, either one of which situations puts you in an ER 1.7(a)(2) personal interest conflict, described above.

Third, it is probably a violation of ER 8.4(a) for a lawyer to request that opposing counsel indemnify a party or the party's lawyer against potential claims. That rule prohibits a lawyer from inducing a violation of the ethical rules, or to do so through the acts of another.[4]

Finally, a client's insistence that his lawyer accept a settlement offer requiring the lawyer to guarantee third-party claims would require the lawyer to withdraw from representation under ER 1.16(a)(1), which provides that a lawyer must withdraw from representation if it would result in a violation of the ethics rules, as discussed above. But before anything as drastic as that need occur, remember that ER 1.4(a)(5) requires the lawyer to consult with the client concerning limitations on the lawyer's representation when the lawyer knows that the client expects assistance not permitted by the ethical rules or other law.

Faced with having to break in a new lawyer, most clients will probably opt to keep the one they have, and would be more willing to have a settlement not underwritten by counsel.

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court and is Of Counsel to the firm of Lorona Steiner Ducar, Ltd. in Phoenix.

endnotes

1. *See Paying To Help Your Client's Lawsuit*, ARIZ. ATT'Y (Feb. 2007) at 6; and *Borrowing To Finance a Lawsuit*, ARIZ. ATT'Y (Oct. 2007) at 10.
2. Ariz. Ethics Op. 03-05 (Aug. 2003).
3. Rule 42, ARIZ.R.S.CT.
4. This was the conclusion arrived at in a recent Ohio ethics opinion, Ohio Op. 2011-1 (Feb. 11, 2011).