BY DAVID D. DODGE

Secret Deals Undermine Justice System

If you are one of those lawyers who likes to make secret or confidential deals with your opponents, you need to read *In Re Alcorn*[1] as soon as possible. There, the Arizona Supreme Court holds that any agreement that has the potential of affecting the manner in which a case is tried is presumptively one that may encourage wrongdoing and must therefore be disclosed to the trial judge and all litigants in the case.

"Backroom deals" between counsel have been reviewed and condoned by Arizona courts for many years.

- *Damron* agreements allow a plaintiff and an insured co-defendant to execute a covenant not to execute for assigning to the plaintiff a bad faith claim the co-defendant has against the insurer.[2]
- *Gallagher* agreements allow a co-defendant to execute a covenant not to execute with the plaintiff, to be effective only above a certain amount, assuring the plaintiff a minimal recovery from the other co-defendant.[3]

These arrangements have been sanctioned by the courts as long as they are disclosed to the court and opposing counsel, who are then free to disclose their existence to the jury.

The lawyers in *Alcorn* attempted to take this sort of agreement one step further and ended up suspended from practicing law for six months for violations of ERs 3.3(a) (Candor Toward the Tribunal) and 8.4(c)(d) (Misconduct Involving Dishonesty, Fraud, Deceit or Misrepresentation; Conduct Prejudicial to the Administration of Justice).[4]

The underlying lawsuit was a medical malpractice case brought against a doctor and the hospital as co-defendants. Initially, the hospital undertook to assist in the defense of the doctor, whose insurance company had become insolvent. The hospital was able to have the case against it dismissed by summary judgment, leaving the uninsured doctor to his own devices. When the plaintiff's counsel saw that the doctor might help persuade the trial judge to change his mind and reconsider his dismissal of the hospital, the following deal was struck: The plaintiff would execute a covenant not to execute against the doctor

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and would agree to dismiss the case against the doctor after the plaintiff rested its case.

In return, the doctor and his lawyers would participate in a full trial on the merits, during which time the evidence would show that it was the hospital who was completely at fault. The hospital's lawyers, having had their client dismissed from the suit, would no longer be participating in the case or questioning the plaintiff's evidence.

The lawyers did not tell the trial court about the agreement. The ensuing jury trial against the doctor took 10 trial days over a three-week period. At the end of the plaintiff's case, the plaintiff's lawyer moved for a dismissal with prejudice. When the trial court asked what was going on, he was assured that there were no "sweetheart" deals and that everything was "on the up and up."

Later, during the hearing on plaintiff's motion for a new trial on the summary judgment granted to the hospital, the trial judge discovered the true nature of the agreement—including the fact that it was supposed to be confidential—and ordered a hearing to sanction the lawyers involved. After the judge levied a $15,000 fine on each lawyer, the State Bar filed complaints that were considered by the Arizona Supreme Court.

The respondent lawyers' primary defense was that they had acted in good faith and had sought opinions on the propriety of what they did from other members of the Bar, who presumably told them that it was ethical. Justice Stanley Feldman, writing for a unanimous Court, has now made the wisdom of such a secret agreement quite clear.

Justice Feldman pointed out that engaging in sham litigation at the expense of the justice system, including the trial judge's time and knowledge, is a serious offense. Justice Feldman has placed us all on notice that such behavior will most probably subject the lawyers involved to substantial discipline. If such agreements are made, they must be disclosed to the court and all counsel involved so that appropriate action can be considered and taken, if necessary, before the agreements are consummated. Conducting a trial without disclosing to the trial judge that there was no result expected other than dismissal before the case went to the jury was deemed by the Court to be "inherently collusive" and prejudicial to the administration of justice.

The lesson here is that the public's notion of fairness and justice requires, subject to the Rules of Evidence, that all the facts involved in a judicial proceeding be known and understood by the participants. Secret deals between lawyers undermine this notion.

endnotes

1. Arizona Supreme Court No. SB-01-0075-D, 2002 WL 181259.
2. *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969).
3. *City of Tucson v. Gallagher*, 483 P.2d 798, 800 (Ariz. Ct. App. 1971).
4. Rule 42, ARIZ.R.S.CT.