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INFORMAL OPINION 08-01

**Obligations of Plaintiffs' Counsel under a Particular Aggregate Settlement Agreement**

We have been asked to give our opinion on two provisions in a non-class action aggregate settlement agreement. One provision compels plaintiffs' counsel to give the same advice to all of her clients. The other, to the extent permitted by Rule 1.16 and Rule 5.6, compels her to withdraw from representing clients who reject her advice to settle. In our opinion, for the reasons set forth below, both provisions compel lawyers to violate the Rules of Professional Conduct. This opinion applies to a particular type of aggregate settlement agreement.<sup>1</sup> In order to understand what "aggregate settlement agreement" means in this opinion, the following background information is necessary.

We have been asked to assume that a lawyer represents numerous individual clients each alleging injury or death resulting from the same product. Each of the clients retained the lawyer separately; none of them agreed to be part of a group. There are tens of thousands of similar cases pending around the country which were consolidated for pre-trial, but were not certified as a class

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<sup>1</sup> As used in this opinion, aggregate settlement does NOT mean the type of aggregate settlement apparently referred to in Rule 1.8(g). The comment to 1.8(g) refers to a situation in which clients have agreed to be represented as a group.

action. Therefore, the terms of the settlement are not subject to a fairness hearing under Federal Rule of Civil Proc. 23.

Negotiating plaintiffs' counsel<sup>2</sup> and the defendant entered into an agreement intended to resolve all claims by creating a private, structured settlement fund, and a claims evaluation, processing, and payment system. The agreement has the following characteristics, which make it, for the purposes of this opinion, an aggregate settlement agreement:

- 1) The defendant has the right to walk away from the settlement agreement unless at least 85 percent of the plaintiffs agree to it.
- 2) Plaintiffs' counsel must exercise independent professional judgment on behalf of each client.
- 3) By submitting a settlement enrollment form, plaintiffs' counsel and all clients covered by the form shall be deemed to have agreed to be bound by the settlement agreement.
- 4) When submitting an enrollment form, plaintiffs' counsel must affirm that she has recommended settlement to 100 percent of her clients and that they will enroll in the program. In other words, plaintiff's counsel must make one of two recommendations: either recommend the settlement to all of her clients or to none of them (in which case no enrollment form will be submitted).
- 5) Plaintiffs' counsel must withdraw from representing clients who reject the recommendation to settle if withdrawal is permitted under Rules 1.16 and 5.6.
- 6) If plaintiffs' counsel withdraws, she and all other lawyers (referring counsel) having a financial interest in the case must forgo their respective financial interests.

**The Agreement Deprives Clients of the Independent Advice Of Their Lawyers.**

The Rules of Professional Conduct (the "Rules") require lawyers to give independent professional advice to each client, to abide by a client's decision whether to settle, and to represent each client without violating conflict of interest

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<sup>2</sup> Negotiating plaintiffs' counsel is a small number of plaintiffs' lawyers appointed to negotiate with the defendant.

rules. See Rules 1.2, 2.1, and 1.7. These are among the principal duties of lawyers and have been upheld over the years by this Committee in a variety of contexts.

The agreement would compel plaintiffs' counsel to do the impossible. It would require her to provide "independent professional judgment" to each client. Then the agreement restricts the advice she can give: either recommend that all clients accept the settlement or that none of them accept it. Applying Independent professional judgment, she may believe that some clients should accept the settlement while others should reject it. In compelling the lawyer to give the same advice to all clients, it compels the lawyer to act in the best interest of those who negotiated the agreement, which may or may not lead to the same result as the one the lawyer and her clients, individually, would have reached had she given independent professional advice to each of her clients. The Rules do not permit a lawyer to do what the agreement requires.

#### The Agreement Interferes with the Client's Decision Whether to Settle

The Rules of Professional Conduct and prior codes recognize that it is the client who has the authority to accept or reject a settlement.<sup>3</sup> Yet the agreement compels the lawyer not to abide by a client's decision not to settle, but rather to withdraw from representing the non-settling client "to the extent permitted by Rule 1.16 and 5.6." Our opinions hold that a lawyer may not threaten to withdraw or withdraw from a case because the client rejects a settlement offer. See Informal Opinions 95-24, 99-18 and 05-11.

This opinion does not address withdrawal where (a) the client consents and (b) there is no adverse effect on the client.

#### The Agreement Creates Conflicts of Interest

By compelling the lawyer to give the same advice to all clients, the agreement forces the lawyer either (a) not to determine whether some clients would benefit from the settlement while others would be better served by continuing to litigate, or (b) to ignore what the lawyer realizes are differing interests among clients. The agreement requires the lawyer to treat her clients as if they had agreed to be part of a group and to put the interests of the group above those of individual clients, a requirement that creates conflicts of interest. Rule 1.7 prohibits concurrent client-client conflicts of interest.

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<sup>3</sup> Rule 1.2 provides: "A lawyer shall abide by the client's decision whether to settle a matter."

The agreement also creates client– lawyer conflicts of interest by requiring plaintiffs’ counsel to forgo all financial interest in a case from which she withdraws. She would not be entitled to a reasonable fee for work done before withdrawal. Nor would she be entitled to a fee for referring the case to new trial counsel. She would not even be allowed to recover expenses. In addition, no other referring lawyers would be entitled to a fee. In the language of Rule 1.7, the agreement creates a “significant risk that the representation of one or more clients will be materially limited...by a personal interest of the lawyer.” Under the circumstances, the total loss of all financial interest in the case certainly constitutes a personal interest of the lawyer.<sup>4</sup>

Surely, if a defendant bribed plaintiffs’ counsel to persuade her clients to settle rather than to refer the client to experienced trial counsel not burdened by a conflict of interest, there would be no question of the scheme’s illegality or of the harsh punishment to follow. Depriving a lawyer of a financial interest in a case in order to influence the advice the lawyer gives to her client is not unlike a bribe. We are not in a position to assume that the withdrawal provision was created to put further pressure on plaintiffs’ lawyers to persuade as many clients as possible to enroll in the settlement, but we are wary of the provision’s effect—intended or not—which is to create a financial conflict of interest covered by Rule 1.7.<sup>5</sup>

In the situation described to us, the lawyer must disclose to her clients the financial incentive to (a) recommend settlement and (b) not to withdraw and refer the case to new trial counsel.

In summary, Rule 1.7 prohibits the lawyer from representing clients when the lawyer is burdened by the conflicts of interest the agreement creates unless with respect to each conflict of interest each of the conditions in 1.7(b)(1)-(4) is

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<sup>4</sup> There may also be a positive financial incentive for plaintiffs’ to counsel to recommend settlement to all clients. If having clients enroll in the settlement program so changes the relationship between risk and reward from what was contemplated at the outset of representation as to constitute a “windfall” for plaintiffs’ counsel, then that fact should be disclosed to clients and handled in a manner consistent with Rule 1.7. We do not suggest that is the case. We don’t know. Our only point is that financial incentives can be both positive and negative.

<sup>5</sup> We are also mindful of the words of the Comment to Rule 1.2:

A lawyer must pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required vindicate a client’s cause or endeavor.

fully satisfied, including the requirement that every client give informed consent in writing.<sup>6</sup> By referring to 1.7(b) we do not mean to suggest that it would be reasonable for the lawyer to believe she would be able to provide competent and diligent representation to each affected client, despite the various conflicts of interest. About whether a lawyer could have such a reasonable belief and then satisfy the other conditions in 1.7(b) we express skepticism but no opinion, because specific facts matter. For example, representing five clients with factually similar claims is quite different from representing fifty clients, some with much stronger claims than others.

### Conclusion

Where the aggregate settlement agreement requires a lawyer to violate the Rules of Professional Conduct, the lawyer must obey the Rules and not the agreement.

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R. Chambers  
Wick R. Chambers, Chair

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<sup>6</sup> See Rule 1.0 Terminology, subsection (f) for definition of “informed consent.”