Scruples

AGGREGATE SETTLEMENTS

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Paradox approached Ethox, seeking guidance. “I have questions about a possible settlement,” Paradox said. “Remember how we were representing a group of plaintiffs suing ACME Industries for exposure to toxic fumes?”

“Yes,” Ethox said.

“Well, Nemesis represents ACME,” continued Paradox, “and just offered a large lump-sum settlement, saying that if we can settle all our clients’ claims, we could divide the funds among our clients.

“Such an arrangement seems to raise a whole mess of conflicts,” said Paradox with concern. “Some of our clients seem anxious to settle. Others seem far more prepared for a long fight. And some will let the amount of money they are to receive determine what they think of the settlement.”

“Such differing interests among clients are quite common,” Ethox reassured Paradox. “In fact, there is an ethics rule specifically targeted to addressing conflicts in such situations, which are known as aggregate settlements.”

An aggregate settlement. What is that?” Paradox asked.

“Funny you should ask,” Ethox said. “That is one of the complaints with the ethics rule, that it does not define exactly what constitutes an aggregate settlement.

“The key element of an aggregate settlement is some interconnection between the potential settlements, so the lawyer’s clients are effectively competing with each other over the settlement funds. The lump sum ACME has offered is one type of aggregate settlement. But an aggregate settlement also includes when a defendant offers a specific sum to each plaintiff but conditions the resolution of claims on all or a certain portion of the plaintiffs accepting their individual settlement.”

“If a settlement is aggregate, what happens?” Paradox asked.

“When an aggregate settlement is made, ABA Model Rule 1.8(g) requires that the lawyer must disclose ‘the existence and nature of all claims involved and the participation of each person in the settlement.’ Participation here means what each client will be receiving and why. Once you make that disclosure, you will have to secure informed consent from each client involved, in a writing signed by each of those clients.”

“Could we have an agreement in advance that if a majority of clients accept the lump-sum settlement, then all our clients will be bound?” Paradox asked.

“Probably not. Some jurisdictions allow lawyers to obtain advance client agreement to a majority or supermajority decision process,” Ethox explained. “But, reflecting that Rule 1.2 recognizes a client’s absolute control over a decision to settle, most jurisdictions require each client to sign off.”

“What if I don’t want to mess with an aggregate settlement?” Paradox asked, somewhat exasperated. “I am not sure all the clients would want to share information about their health problems and claims.”

“That is a good reason to avoid an aggregate settlement,” Ethox answered. “You could go back to Nemesis and make a separate demand for any plaintiff, clarifying there is no connection between the settlement offers. Such separate settlement demands would not trigger the Rule 1.8(g) aggregate settlement requirements.”

“That sounds appealing,” Paradox mused. “If you are thinking of pursuing separate settlements,” Ethox said, “you should still consider securing conflict waivers from each client. Rule 1.7(a)(2) states a lawyer has a conflict requiring waiver when there is a significant risk the representation of one client may materially limit other clients. That is likely true of your clients’ claims against ACME. One client’s settlement will likely influence what the defendant will pay other clients for similar claims. Also, the funds ACME agrees to pay to one client may limit what ACME has available to settle with other clients. Thus, it would be smart to have all clients waive the relevant conflicts from the concurrent representation as provided in Rule 1.7(b), even though you do not need to satisfy the more stringent requirements Rule 1.8(g) imposes on an aggregate settlement.”

“I already have those Rule 1.7(b) waivers,” Paradox beamed. “I have been learning from our past conversations.”

“That is great to hear,” Ethox answered.