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ETHICS OF PREPARING AGREEMENTS FOR JOINTLY REPRESENTED CLIENTS IN LITIGATION TO MAKE COLLECTIVE SETTLEMENT DECISIONS

Adopted January 4, 2018

Question

Under the Colorado Rules of Professional Conduct (Colo. RPC or Rules), may a lawyer prepare an agreement for multiple jointly-represented clients providing that majority rule, or other non-unanimous procedures, will govern collective settlement decisions?¹

Syllabus

A lawyer ethically may prepare an advance agreement for multiple jointly-represented clients, which provides that majority rule will govern future settlement decisions. Rule 1.8(g) is not implicated at the stage of drafting such an agreement, but the lawyer must ensure compliance with Rule 1.7. Specifically, before undertaking this representation, the lawyer must adequately disclose to the potential clients the risks and potential conflicts that may arise from such an

¹ This opinion does not address the application of Rule 1.7 to joint representation generally. *See generally* Colo. RPC 1.7 and cmts. [29]-[33]. Nor does this opinion address the enforceability of an agreement among jointly-represented clients that they will manage all aspects of their joint litigation by majority rule, although much of the discussion in this opinion may be relevant to that issue. Finally, for simplicity of language, this opinion refers to a “majority-rule” decision on settlement matters, but the analysis would be the same for any settlement-decision rule that does not require unanimity among jointly-represented clients.

agreement and from joint representation in the drafting of that agreement, and must obtain the informed consent of each potential client.

When a proposed settlement is being considered, Rule 1.8(g) does apply and a lawyer may not participate in a joint settlement without consent from all clients. At that time, and notwithstanding the existence of a prior agreement that majority rule will govern future settlement decisions, if one or more of the joint clients does not abide by a majority decision regarding a specific settlement proposal, the lawyer may neither compel the dissenting clients to settle nor otherwise take steps to enforce the agreement. In that event, the clients who form a majority on the specific settlement proposal may have a claim against the dissenting minority clients for breach of the agreement. The lawyer, however, may not represent any of the clients in this dispute among the clients, and might need to withdraw from any further representation of any of the clients.

Introduction

A, B, and C ask Lawyer to represent them jointly in a single action against a single defendant. Recognizing the potential benefit of a unified position regarding settlement, the potential clients ask Lawyer to prepare an agreement among the clients providing that (1) the clients will make all settlement decisions by majority vote,² and (2) settlement proceeds will be divided pro rata based on the amount of each client's initial claim.³

² This is a majority of the clients, only, and does not include a vote for the lawyer. As noted below, under Rule 1.2(a), because the lawyer must abide by client decisions regarding settlement, the lawyer may not have control of settlement decisions.

³ The following discussion focuses on the agreement's provision that settlement decisions will be governed by majority rule. The same analysis applies to the agreement's advance provision regarding division of any eventual settlement proceeds.

Lawyer undertakes the joint representation and prepares an agreement that includes the requested provisions regarding settlement decisions. Lawyer files the lawsuit and proceeds to jointly represent all three clients in the litigation. The defendant makes a settlement proposal. A and B wish to accept the settlement, but C does not. Even though a majority of the clients wish to accept the settlement, the minority client, C, refuses to follow the majority decision and refuses to enter into the settlement.

These facts raise the following questions:

1. May Lawyer ethically prepare the agreement among the jointly represented clients that they will make settlement decisions by majority rule?
2. Once C dissents from the majority decision of A and B regarding the proposed settlement, may Lawyer take action to compel the dissenting client, C, to settle? In other words, may Lawyer enforce the majority-rule agreement against C on behalf of A and B?
3. May Lawyer continue to represent all three clients, A, B, and C, once C refuses to comply with the majority-rule agreement?

We answer the first question in the affirmative, and the second and third questions in the negative.

Analysis

Rules 1.7 and 1.8 apply when a lawyer considers entering into an engagement to represent multiple clients jointly. Generally, joint representation is permissible, notwithstanding the existence of possible conflicts of interest among the jointly-represented clients, if

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Colo. RPC 1.7(b).

Rule 1.8(g) applies specifically to possible conflicts of interest among jointly-represented clients presented by aggregate settlements of litigation:⁴ “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client.”

Rule 1.2(a) also provides guidance regarding a lawyer’s responsibility to abide by client decisions regarding settlement: “[A] lawyer shall abide by a client’s decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client’s decision whether to settle a matter.”

Several courts and ethics committees have concluded that a lawyer may not enforce against any of the lawyer’s clients an advance agreement to settle. That is, if some of a lawyer’s clients do not wish to accept a settlement proposal, the lawyer may not compel the lawyer’s dissenting clients to settle, even if all clients have previously agreed to abide by majority decision regarding settlement and a majority of the clients wish to accept that proposal. Nor may clients delegate in advance *to their lawyer* the decision to settle so that the lawyer may bind all

⁴ Rule 1.8(g) does not define “aggregate settlement.” The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility suggested an appropriate definition: “An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses . . .” ABA Comm. on Ethics and Prof’l Resp., Formal Op. 06-438, “Lawyer Proposing to Make or Accept an Aggregate Settlement or Aggregated Agreement,” 2 (2006).

clients in responding to a settlement proposal.⁵ The Colorado Bar Association Ethics Committee (Committee) concurs. These conclusions proceed directly from Rules 1.2(a), 1.7, and 1.8(g), which give clients, and not their lawyer, full authority regarding settlement decisions.

These court decisions and ethics opinions often use broad language that suggests that, not only is a lawyer forbidden from compelling any joint client to settle notwithstanding the client's prior agreement that the majority of jointly-represented clients will control settlement decisions, but also that a lawyer cannot draft such an agreement in the first place. The Committee concludes otherwise. A lawyer may prepare an agreement for jointly-represented clients providing that future decisions regarding settlement will be made by majority rule. An agreement to govern litigation decisions, including possible decisions regarding settlement, is in many respects similar to any other agreement among jointly-represented clients that provides how their future relationship will be governed, such as an operating agreement for a business entity formed for jointly-represented clients.

Under Rule 1.8(g), a lawyer “shall not participate in making an aggregate settlement” of claims belonging to more than one of the lawyer's clients without written, informed consent from each client. The quoted language from Rule 1.8(g) is somewhat ambiguous. Arguments could be made that any activity that relates in any way to a potential settlement would fall within the scope of “participat[ion] in making.” The Committee concludes, however, that such an interpretation of the language would be too broad. Preparing an agreement in advance of an offer to settle is not “making” a settlement based on that offer, much less “participat[ion]” in

⁵ See ABA Formal Op. 06-438; N.Y. City Bar Ass'n Formal Op. 2009-06, “Aggregate Settlements” (2009); *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894–95 (10th Cir. 1975); *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046 1050-51 (D. Colo. 1999); *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 521-22 (2006); *In re Hoffman*, 883 So. 2d 425, 432-33 (La. 2004).

making such a settlement. Therefore, Rule 1.8(g) does not apply to the drafting. Rule 1.8(g) does not apply until the jointly-represented clients are considering a proposed settlement.

The Committee further concludes that Rule 1.7 applies to a lawyer drafting the requested agreement among multiple clients. In Ethics Opinion 68, the Committee set forth a framework to analyze the propriety of potential joint representation under Rules 1.7 and 1.8, and addressed some common circumstances in which multiple clients may ask a lawyer to represent them jointly. A lawyer considering a potential joint representation should determine (1) whether a concurrent conflict of interest exists, (2) whether the clients may consent to waive that conflict, and, if so, (3) what information must be communicated to the clients to obtain their informed consent. The Committee applies that framework here.

I. Whether a Conflict of Interest Exists.

A potential conflict of interest is inherent in any joint representation. Settlement decisions by multiple clients present additional potential conflicts of interest among joint clients.

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent.

Colo. RPC 1.8, cmt. [13].

One client may wish to accept a proposed settlement, and another client may wish to reject the same proposed settlement. Or clients may disagree about how an aggregate settlement amount will be apportioned among them. These potential conflicts are inherent and unavoidable.

II. Whether the Clients Can Consent to Waive Potential Conflicts Associated With an Agreement to Make Future Settlement Decisions by Majority Rule.

When a joint representation creates an existing or potential concurrent conflict of interest among the multiple clients, Rule 1.7 requires "informed consent" in writing from each client.

Colo. RPC 1.7(b)(4). "Informed consent," in turn, requires the lawyer to communicate

“adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Colo. RPC 1.0(e). Comment 22 to Rule 1.7 explains that, with respect to advance waivers, “[t]he effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.”

Thus, the question is whether it is possible for a lawyer to provide, in advance, adequate information and explanation of the material issues and risks likely to arise in connection with a joint decision by multiple clients to respond to a settlement proposal so that the clients can (1) agree at the outset of the representation to intelligently waive their individual rights to respond to a specific future settlement proposal in favor of submitting their decisions to a majority-rule decision, and (2) intelligently waive their rights to be represented by separate counsel in negotiating and preparing the agreement to submit future settlement decisions to majority rule.

In this regard, it is critical to define exactly what “consent” is being provided in advance. One possible “consent” is consent to having the lawyer prepare a current agreement among the jointly-represented clients that provides that the group will respond to future settlement proposals by majority rule. Another possible “consent” is current consent to having the lawyer enforce that agreement in the future by accepting a proposed aggregate settlement on behalf of all of the lawyer’s clients, intending to bind all clients, over the objections of a client who does not wish to comply with a majority decision in the context of a specific settlement proposal.

The Committee concludes that, with adequate disclosures, a lawyer may seek multiple clients’ consent to the lawyer’s preparation for all of them of an agreement providing a majority-rule mechanism for the jointly-represented clients to respond to an aggregate settlement

proposal. However, under no circumstances may a lawyer seek those clients' advance consent to the lawyer's participation in enforcing that agreement if one of the clients subsequently does not wish to comply with the majority-decision rule in the context of a specific settlement proposal. In that circumstance, the lawyer may need to withdraw from the joint representation.

A. Preparing an Agreement for a Majority-Rule Response to an Aggregate Settlement Proposal

Rule 1.2(a) provides that "A lawyer shall abide by a client's decision whether to settle a matter." This Rule prohibits a lawyer from compelling a client, whether a sole client or one of multiple clients, to accept (or reject) a specific settlement proposal. If a lawyer represents multiple clients, and one of those clients does not want to accept a proposed settlement, then there is a conflict among the lawyer's joint clients and the lawyer may not compel an aggregate settlement that includes the dissenting client.

Rule 1.8(g) is a straightforward statement of this principle. Neither Rule 1.2(a) nor Rule 1.8(g), however, says anything about the timing of a client's decision regarding settlement.⁶ In particular, those Rules say nothing about whether the decision may be made only in the context of a specific settlement proposal. They also do not address whether multiple claimants may agree among themselves, in advance of considering any specific settlement proposal, to make settlement decisions by majority decision. That is, the Rules are silent regarding whether the "client's decision whether to settle a matter" may take the form of an advance agreement to make that decision as part of a group. The Rules clearly do not prohibit such an agreement.

There is no good reason why litigants, properly advised, cannot agree in advance to give up, or waive, their rights to make their own settlement decisions and, instead, submit those

⁶ Rule 1.8(g) requires "informed consent, in a writing signed by the client." It does not specify when that informed consent must be provided, or whether it must in all circumstances be provided only in the context of a specific settlement proposal.

decisions to majority decision. Waivers of important rights are valid in a variety of areas, including the most cherished of constitutional rights. *See* American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (2010), comment b. “[W]e commonly permit litigants to waive their due process rights to notice, to a hearing, and to a trial. One may even waive one’s right to appeal a death sentence. Against this backdrop, the proposition that litigants should be free to use less-than-unanimity rules to govern their collective behavior seems unremarkable, even pedestrian.” Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733, 769 (1997).

Just as the Rules are silent regarding whether multiple claimants may agree to a majority-decision rule governing future settlement decisions, the Rules do not provide that such an agreement among multiple claimants would be unenforceable. Therefore, if multiple claimants are each advised by separate counsel, the Rules would not in any way prohibit those claimants, through their respective counsel, from drafting and entering into such an advance agreement governing future settlement decisions.⁷

The question, thus, is whether those same multiple claimants could jointly engage a single lawyer and have that lawyer draft the agreement. The Committee concludes that, if multiple claimants wish to be jointly represented and have their joint lawyer prepare that agreement, the lawyer may do so if the lawyer is able to make adequate disclosures and the clients can provide informed consent to the joint representation.

⁷ The Committee notes that, in other contexts, claimants routinely agree, by contract, to allow another person or entity to control their claims, and that such contracts are enforceable. For example, an insurance agreement or other indemnification contract often gives the insurer or indemnitor the authority to control a claim, including the authority to settle or compromise the claim. Furthermore, a claimant can assign an entire claim to a third party by contract.

There are many similarities between (1) preparing an agreement for jointly-represented clients who are co-parties in a litigation governing how the clients will make decisions for the litigation, including responding to settlement proposals, and (2) preparing an agreement for jointly-represented clients who are forming an entity and wish to include in the formation agreement a mechanism for governing the entity by majority rule, or a mechanism for valuing each client's ownership interest in the entity, or for dividing the assets and liabilities of the entity among the clients if they subsequently disagree about how the entity should be run.

In both circumstances, the jointly-represented clients wish to set up a joint enterprise. In one the enterprise is the lawsuit. In the other the enterprise is the to-be-formed entity. Both circumstances involve inherent uncertainty about exactly what might arise in the future. In both circumstances, the lawyer can anticipate and explain many potential risks and uncertainties to the joint clients.

In Formal Opinion 68, the Committee concluded that, with appropriate disclosures to the potential clients, a lawyer ethically may represent multiple clients in preparing an entity agreement to form a joint enterprise for the clients:

The comments to Colo. RPC 1.7 specifically contemplate a lawyer acting on behalf of multiple clients when their interests are generally aligned, such as helping entrepreneurs to organize and establish a business entity. ... In such circumstances, "the lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests."

CBA Formal Op. 68, "Conflicts of Interest: Propriety of Multiple Representation" (1985, revised 2011) (citing and quoting Colo. RPC 1.7, cmt. [28]).

Similar circumstances exist when multiple claimants ask a lawyer to prepare an agreement specifying how they will manage their common litigation, including making settlement decisions, by majority rule. Potential claimants with common interests in litigation often have generally aligned interests. There are potential benefits to all claimants in having an

advance agreement governing how they will make joint settlement decisions. The lawyer may secure those benefits for the claimants by working to resolve their potentially adverse interests and to develop their mutual interests in such an advance agreement.

The main difference between preparing an entity agreement and preparing a settlement-decision-making agreement for jointly-represented clients is in the types of risks and uncertainties that must be anticipated and explained. The jurisprudence and case law relating to disputes that are likely to arise among joint owners of a business enterprise are well-developed and generally can be readily explained in advance.

In contrast, there is little jurisprudence or experience regarding the complications that may arise from an agreement regarding future majority-rule settlement decisions by multiple claimants. The absence of substantial jurisprudence and experience regarding such agreements does not raise an insurmountable bar to obtaining multiple clients' consent to having their joint lawyer draft the settlement-decision-making agreement for them—but it does heighten the burden on the lawyer to communicate sufficient information to obtain informed consents. Ultimately, the Committee concludes that, just as a lawyer ethically may prepare an agreement among joint clients to set up a common business enterprise, if a lawyer makes appropriate disclosures the lawyer ethically may prepare an advance agreement for jointly-represented clients governing how the client group will make litigation decisions, including how to respond to an aggregate settlement offer, so long as the clients have provided informed consents.⁸

B. Enforcing an Advance Agreement on How to Respond to an Aggregate Settlement Proposal

Even though a lawyer may prepare an advance agreement providing for majority rule on settlement decisions, a lawyer may not enforce that agreement against the lawyer's clients who

⁸ The types of disclosures that must be made are discussed below.

are in the minority with respect to whether to accept a specific, aggregate settlement proposal. This conclusion flows directly from Rule 1.2(a), which requires a lawyer to abide by a client’s decision on whether to settle a matter, and from Rule 1.7(b)(3), which precludes a lawyer from representing one client in the assertion of a claim against another client. The latter rule expressly prohibits a lawyer from seeking consent to represent one client directly against another client. The Committee agrees with the cases that have held that a lawyer also may not seek advance consent for the lawyer to override a client’s absolute control over settlement decisions. *See Hayes*, 513 F.2d at 894–95; *Abbott*, 42 F. Supp. 2d at 1050-51; *Tax Auth., Inc.*, 898 A.2d at 521-22; *In re Hoffman*, 883 So. 2d at 432-33; *see also Nichols v. Orr*, 63 Colo. 333, 166 P. 561, 561 (1917) (“[A]ny agreement which deprives the litigant of the right to control his case, before it is finally determined, is void as against public policy.”).

If multiple clients agree in advance on a majority-decision rule for how they will respond to an aggregate settlement proposal, but one client in the future refuses to follow the majority’s decision, the dissenting client might be in breach of that agreement. The other clients might have claims against the dissenting client. This circumstance creates an unwaivable conflict for their joint lawyer due to the dispute between the dissenting client and the other clients.⁹ The lawyer may not take sides in this dispute, and may not seek to enforce the agreement against the dissenting client, on behalf of the majority clients, by compelling the dissenting client to settle. The lawyer might need to withdraw from the joint representation entirely.

⁹ Note that there is no conflict (and no possible breach of agreement) if the clients who are in the minority regarding how to respond to a settlement decision follow the advance agreement and submit to the majority decision. In the fact pattern above, when A and B vote to accept the proposed settlement, and C votes against the settlement, there is no conflict if C agrees to abide by the majority decision and enter into the proposed settlement in a writing signed by C (and A and B). Rather, a conflict arises only if C refuses to abide by the majority-decision rule to which A, B, and C agreed in advance.

Returning to the analogy to a lawyer's permissible preparation of an agreement for multiple clients forming a business entity, if a dispute arises among the clients in which a subset of clients seeks to enforce the entity agreement against another client or clients, the lawyer may not take sides in that dispute and might need to withdraw from further joint representation. If the lawyer does withdraw, then the lawyer's clients could engage new, separate counsel to represent their no-longer-aligned interests.¹⁰

III. Necessary Disclosures by Lawyer Drafting the Agreement for Joint Clients

As the Committee noted in Opinion 68, under the Rules, the propriety of any joint representation is always contingent on the lawyer making adequate disclosures to the joint clients of the risks inherent in joint representation.

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.

Colo. RPC 1.0, cmt. [6].

If joint clients request their common lawyer to prepare an agreement providing that they will make settlement decisions by majority rule, the lawyer must make all disclosures necessary for joint representations in general. Lawyers frequently make these disclosures in undertaking joint representation of clients in litigation. The Committee will not discuss these disclosures here, other than to note that “[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation ... that should be discussed” before undertaking

¹⁰ No Colo. RPC would prevent the new counsel from pursuing a claim against the original lawyer's former clients who do not wish to comply with the majority-rule agreement. Because the new lawyer would not be proceeding against any of the new lawyer's current or former clients, there would be no conflict of interest, and Rules 1.7 and 1.8 would not be implicated.

joint representation of multiple claimants, even if the issue of an advance agreement among the claimants is not on the table. Colo. RPC 1.8, cmt. [13].

In addition to the disclosures that are required before a lawyer may undertake joint representation of co-litigants, the lawyer must make additional disclosures sufficient for the clients to make an informed decision about waiving the conflicts inherent in drafting the agreement and regarding how the agreement might affect the clients in the ensuing litigation. These disclosures, at a minimum, would need to include an explanation of ways in which the clients' individual interests or opinions might diverge in the context of any specific settlement proposal and the consequences of that divergence. For example, the merits of the individual clients' claims might differ or might develop differently over the course of the litigation. Or the allocation of a potential settlement might appear more favorable to some clients than others. These are examples only. Clients' respective opinions on the merits of accepting or rejecting a particular settlement proposal could diverge for other reasons.

Regardless of the reason that the clients' respective opinions regarding a proposed settlement may diverge, any divergence could lead to a potential conflict of interest between the majority and dissenting clients. The lawyer would need to explain what might happen in that event, *i.e.*, that (1) the minority clients might choose to abide by the majority decision, even if they disagree with it, or they might choose not to abide by the majority decision; (2) if the minority chooses not to abide by the majority decision, Rule 1.8(g) would preclude the lawyer from closing a settlement over the objection of any client; (3) in that circumstance, the lawyer, or any other lawyer representing all of the claimants jointly, might need to withdraw from further representation of all clients, which might adversely affect the joint litigation and possible

settlement¹¹; (4) the majority clients could seek to enforce the majority-decision agreement against the dissenting minority clients, or seek damages from the dissenting clients for breach of the agreement; and (5) some of the case law cited in this opinion might persuade a court to hold the majority-rule agreement not to be specifically enforceable, or enforceable at all.¹²

It might be difficult to foresee and explain all potential future events that could arise relating to an agreement among common claimants to make settlement decisions by majority rule. Indeed, in some circumstances it might be impossible to provide disclosures sufficient for the clients to consent to joint representation. However, the Committee concludes that, in at least some circumstances and for some potential joint clients, lawyers can make sufficient disclosures for clients to make a reasonably informed decision allowing the lawyer to prepare an agreement providing that the joint clients will submit settlement decisions to a majority-decision rule.

¹¹ Withdrawal in the event of a conflict among the claimants regarding a specific settlement proposal is required under Rule 1.7 because that conflict would represent an unwaived present conflict of interest among jointly-represented clients. This conflict would affect any lawyer who represented the claimants jointly, whether or not that lawyer drafted the majority-decision-rule agreement among the claimants.

¹² *See Hayes*, 513 F.2d at 894 (suggesting in dictum that majority-decision-rule agreement might not be binding on dissenting minority in the face of a specific settlement proposal); *Nichols*, 166 P. at 561; *Tax Authority*, 898 A.2d at 522 (“We conclude that RPC 1.8(g) forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement.”); *see also Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 34 (Colo. App. 1994) (“Any provision in an agreement to provide legal services that would deprive a client of the right to control settlement is unenforceable as against public policy.”), *rev’d on other grounds*, 926 P.2d 1244 (Colo. 1996).