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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I represent co-defendants in a suit for misappropriation of trade secrets. The plaintiff has offered to settle for a total sum of $1 million. Although both defendants were involved, it appears from the evidence that the plaintiff has a very good case on damages against one but not the other. What are my obligations in presenting the settlement demand to the clients? Should I have thought of this in the engagement process? What do I do now?

A: This is another variation of the possible problems arising from joint representation of multiple clients. Model Rule 1.8(g) addresses aggregate settlements in which the lawyer represents two or more clients. It requires the lawyer to obtain informed consent from each client in a signed writing, following disclosure by the lawyer concerning the existence and nature of all claims and the participation of each person/party in the settlement. The lawyer must provide each client with sufficient information to make an informed decision about their participation in the settlement. See ABA Formal Ethics Op. 06-438 (2006).

Significant differences between co-parties in their litigation posture can present difficulties and give rise to conflict issues. It is best to evaluate and discuss these issues, to the extent known, at the time of initial engagement. Any issues about sharing of confidential information or relating to each party are easier to discuss and deal with at the outset (such as through a joint defense or common interest agreement), and can free the lawyer to be more candid about later providing to each client the information ultimately needed to obtain approval of an aggregate settlement. If those issues have not been dealt with, and the information that needs to be conveyed is not otherwise available to be provided to each client without the lawyer breaching a duty to one or both of them, the lawyer may still seek approval of each client for information sharing at the time of an aggregate settlement offer. However, it becomes more difficult because the lawyer will need to advise each of the clients whether it is in their best interest to do so. This could place the lawyer in a conflict situation with the competing interests of the two clients. In that case, the lawyer would need to advise each client to obtain separate counsel to advise about the settlement and/or the case overall.

Ultimately, if consent to the aggregate settlement cannot be obtained, you must consider whether continued representation of the multiple parties (or either party in certain circumstances) is ethically permissible in view of any competing obligations under Rules 1.8(g) and 1.7. Again, these issues are best addressed with careful

discussion at the outset of a joint representation, and documentation in the engagement letter of each client's consent to a manner of sharing information and resolving issues.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 132 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.