THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2020-3: A LAWYER'S ETHICAL OBLIGATIONS WHEN NEGOTIATING SETTLEMENTS OF MULTIPLE INTERDEPENDENT CASES

TOPIC: Restriction on lawyer's participation in the making of a settlement on behalf of clients where the settlements are interdependent or one settlement may impact others.

DIGEST: Rule 1.8(g) prohibits a "lawyer who represents two or more clients" from "participat[ing] in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client." The rule does not define "aggregate settlement." A "grouping" together of separate but related lawsuits for purposes of settlement negotiations where the settlement terms are interdependent qualifies as an "aggregate settlement." While consummating one settlement alone cannot be considered an aggregate settlement even if that settlement is likely to impact the future terms of settlement for another client of the lawyer, disclosure and client consent is still required in such situations by Rule 1.4, which requires that clients be apprised of important developments, and Rule 1.7, which prohibits a lawyer from simultaneously representing clients with differing interests without informed consent. Practitioners therefore should not settle one lawsuit that is dependent on, or where there is a significant risk that it will impact, the terms of a settlement of another lawsuit being handled by the lawyer without obtaining written informed consent from each client or, in the case of certain aggregate settlements, court approval. The term "participate in making" is also not defined in the Rules. Both negotiating and entering into a settlement agreement fall within the scope of "participate in making." Finally, Rule 1.8(g) expressly permits aggregate settlements with court approval where client consent is not obtained, but does not explain what kind of court approval is required or whether court approval is available in all circumstances. The court approval required is express permission for the lawyer to participate in making an aggregate settlement—*i.e.*, to negotiate and enter into such a settlement—without informing the clients or obtaining the clients' permission to so participate. Moreover, given that attorneys usually must promptly update their clients and client consent is normally required when a lawyer has a conflict of interest, it is the Committee's opinion that lawyers should only attempt to use the "court approval" exception in Rule 1.8(g) in circumstances where client consent is not feasible, such as class or derivative actions.

RULES: 1.4, 1.7, 1.8(g)

QUESTION: What are a lawyer's ethical obligations under the New York Rules of Professional Conduct (the "Rules") when negotiating the settlement of a case where the settlement is either interdependent on the settlement of another case being handled by the lawyer or may impact another case the lawyer is litigating? If a settlement is subject to Rule 1.8(g), under what circumstances may a lawyer obtain "court approval" in lieu of client consent?

OPINION:

I. Introduction

Lawyers representing multiple clients sometimes file separate complaints for each client against the same defendants based upon injuries that allegedly were caused by the same or similar harmful products or occurrences. Inevitably, some of the cases will be stronger than others. If there is a limited pool of money available, there may be a significant risk that the settlement of one of the cases will impact future settlements for other clients of a lawyer even if the settlements of the claims are negotiated separately. The negotiation of settlements of separate lawsuits together where the settlement of one lawsuit is made dependent on the negotiation of a settlement of an entirely separate lawsuit is sometimes referred to as "interdependent settlements." Oftentimes, settlement negotiations are conducted separately as a formal matter, but actually, as a matter of substance, the resolution of the terms of one will affect the other.

This Opinion addresses a lawyer's ethical obligations when negotiating or entering into interdependent settlements of multiple cases. While we have addressed whether the requisite client consent may be given in advance of the negotiations of aggregate settlements (we concluded that it may not), *see* NYCBA Formal Op. 2009-6 (2009), neither the definition of what constitutes an aggregate settlement nor the obligations of practitioners when negotiating a settlement where there is a significant risk that it will impact the recovery of other clients appear to have been addressed squarely by New York case law or bar association ethics opinions. For the reasons discussed below, the Rules restrict the practice of making settlements of separate lawsuits that are interdependent, unless counsel communicates the issues to the clients and obtains each client's written informed consent, and the client waives the conflicts that counsel will have. A narrow exception exists, though, where the court permits the attorneys to negotiate and enter into such an aggregate settlement without informing the clients or obtaining each client's permission to so participate.

The balance of this Opinion will explore the practical ramifications of our conclusions by applying them to four distinct scenarios. These scenarios address, in turn, the definition of an "aggregate" settlement, what it means for an attorney to "participate in the making" of such a settlement, what obligations apply when a settlement is separately negotiated but may impact other future settlements, and the circumstances in which court approval is necessary and effective to allow participation in an aggregate settlement.

II. Analysis

Scenario 1

QUESTION

A lawyer representing several plaintiffs has filed Cases A, B, and C against the same defendants based upon injuries that allegedly were caused by the same or similar harmful products or occurrences. Defense counsel proposes to settle Case A that is close to trial if the plaintiffs' lawyer will settle Cases B and C as well. The defense counsel believes that the plaintiffs' lawyer does not want to take Case A to trial and has concluded that, by offering to settle the case, he

can induce the plaintiffs' lawyer to lower her settlement demands on Cases B and C. Is this an aggregate settlement and, if so, what does Rule 1.8(g) require the lawyers to do?

ANSWER

Scenario 1 presents a classic instance of an interdependent settlement negotiation that, as explained below, does qualify as an "aggregate settlement" under N.Y. Rule 1.8(g). It does not matter whether defense counsel has made an offer to settle all three cases for an aggregate amount, leaving it up to plaintiffs' lawyer to obtain the agreement of her clients as to how to divide up the amount, or specified the amount offered for each of the three cases and conditioned the offers on acceptance by all three plaintiffs of the settlement proposals. To even negotiate such settlements (let alone enter into them), the plaintiffs' counsel in Scenario 1 should secure written informed consent from her respective clients.

A. What is an "aggregate settlement"?

N.Y. Rule 1.8(g) states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature [1] of all the claims involved and [2] of the participation of each person in the settlement.

To understand the scope of N.Y. Rule 1.8(g)'s restriction, it is of course necessary to first define the term "aggregate settlement." As this Committee has observed, however, neither the N.Y. Rules nor the ABA Model Rules define the term. *See* N.Y.C. Bar Ass'n Comm. on Prof. & Jud. Ethics, Formal Op. 2009-6.[1] Accordingly, N.Y. Rule 1.8(g), on its face, does not answer the question of whether it only forbids resolving the claims of multiple, commonly-represented clients in the *same* lawsuit through a single settlement agreement, or likewise applies to a scenario where individual but interdependent settlement offers for *separate* lawsuits are made by counsel for one side.

Other applicable guidance, including from the ABA, American Law Institute ("ALI"), New York legal ethics scholars, and judicial opinions, confirms that interdependent settlements of separate cases qualify as an "aggregate settlement" under N.Y. Rule 1.8(g) and the corresponding ABA Model Rule. *See, e,g,*, ABA Formal Op. 438 (2006) ("[Aggregate settlements] may arise in separate cases"); *Simon's New York Rules of Professional Conduct Annotated* § 1.8:98 (May 2019 update) ("Rule 1.8(g) applies not only to lump sum offers, but also to offers where settlements of different clients are in any way interdependent—*i.e.*, where any one plaintiff or

[1] In Formal Opinion 2009-6, this Committee concluded that "[t]he requirement of individual informed consent may not be waived by any of the jointly represented clients" in advance. Accordingly, the practice sometimes referred to as an "inventory settlement," whereby plaintiff's counsel agrees not to bring new lawsuits against the defendant in return for a payment that plaintiff's counsel may allocate to current and future plaintiffs, violates N.Y. Rule 1.8(g).

group of plaintiffs has the power to veto the offer to other plaintiffs."); *see also* NYSBA Ethics Op. 639 (1992) (interpreting DR 5-106, the predecessor to Rule 1.8(g), to apply to claims of a lawyer's clients in "separate actions against the same defendant"); *Doe v. Yeshiva & Mesivta Torah Temimah, Inc.*, 29 Misc. 3d 1234(A), at *3 (Sup. Ct., Kings Cty. 2010) ("In any event, there is at least a question as to whether counsel should be representing the plaintiffs in both actions.") (citing N.Y. Rules 1.7, 1.8; DR 5–105, DR 5–106). The ALI has also explicitly defined "aggregate settlement" using the notion of "interdependence," thus confirming that even interdependent settlements of separate cases are subject to the ethical restrictions of ABA Model Rule and N.Y. Rule 1.8(g). *See* American Law Institute, Principles of the Law of Aggregate Litigation § 3.16 (2010). Similarly, the rationale behind Rule 1.8(g) supports the conclusion that an aggregate settlement can occur either in a single case or during the settlement of multiple cases where the settlements are interdependent.[2] The Rule identifies aggregate settlements as inherently creating conflicts for lawyers and prevents lawyers from obtaining settlements covering multiple clients without receiving the approval of each client. *See* N.Y. Rule 1.8, *cmt.* [13]. If a group settlement is to be achieved by compromising one client's claim for a lesser amount than would have been possible had that client's claim been settled separately, the lawyer has a conflict in deciding which client to favor and the client who may be making this sacrifice should know and consent. This type of conflict could just as easily occur in separate lawsuits as it could in the same lawsuit.

We therefore agree with the authorities cited above and similarly conclude that, for the purposes of Rule 1.8(g), an "aggregate settlement" can include a settlement of claims of multiple commonly represented clients in the same lawsuit as well as interdependent settlements of separate lawsuits for multiple clients.

B. What does it mean to "participate in making" an aggregate settlement?

Given the policy goal of N.Y. Rule 1.8(g) to ensure that there is no interdependence between the settlement of multiple claims or cases without client consent, the phrase "participate in making" must be construed broadly[3] to encompass *any* discussions, negotiations, offers, or counter-offers pertaining to interdependent settlements where an attorney represents multiple parties. The conflict of interest that Rule 1.8(g) identifies exists for the lawyer as much during the negotiation stage as it does at the time the settlement is actually executed. This is clear from the comments

---

[2] The ALI states that settlements are "interdependent" if: "(1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims; or (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations." We agree with this definition. However, as explained in the discussion of Scenario 4 below, the definition of aggregate settlement and thus the reach of Rule 1.8(g) should not be read so broadly as to subsume truly independent and separate negotiations of settlements in different cases that are being conducted at the same time. If settlements are negotiated separately, and there is no explicit or implicit linkage, they do not constitute an aggregate settlement, although the attorney may have disclosure obligations under N.Y. Rules 1.4 and 1.7.

[3] We note that N.Y. Rule 1.8(g) uses the term "participate in making," whereas N.Y. Rule 5.6(a) uses the term "participate in offering or making." We do not read the absence of the word "offering" as meaning that N.Y. Rule 1.8(g) does not apply to negotiations. N.Y. Rule 5.6(a) is meant to apply to both sides of a dispute, and thus uses the term "offering" to make this clear. N.Y. Rule 1.8(g), on the other hand, only applies to the party who represents multiple clients. Both rules use the term "participate" to make clear that they apply to negotiation, and not just entering into an agreement.

to Rule 1.8, which explains, "Paragraph (g) is a corollary of [Rules 1.2(a) and 1.7] and provides that, *before* any settlement offer is *made* or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement is accepted." *See* N.Y. Rule 1.8, *cmt.* [13] (emphasis added). This Committee's prior opinion on the topic likewise confirms that Rule 1.8(g) applies even prior to the acceptance of an aggregate or interdependent settlement offer.[4]

The reason for the application of the rule to more than simply the final agreement to a settlement appears to be in recognition of the fact that, once a lawyer has begun the negotiation process, a conflict under Rule 1.8(g) is triggered even before a final agreement is reached. When negotiating an aggregate settlement, a lawyer is faced with the issue of how much to seek for each client, and, where the settlements of the claims are interdependent, this may mean allocating settlement funds among clients. A lawyer would have a conflict of interest in making such a decision as he cannot counsel clients in negotiating with each other. Further, and equally importantly, the lawyer's decisions in representing multiple clients may mean clients' rights may be irreversibly compromised in the negotiation process: once a proposal has been made to settle multiple clients' cases, it may subsequently be difficult for one or more of those clients to demand more money or offer less.[5]

C. How should a lawyer proceed when involved in a potential aggregate settlement?

Given that the facts in Scenario 1 constitute an aggregate settlement, what is the plaintiffs' lawyer to do? N.Y. Rule 1.8(g) is clear on this point: the lawyer cannot even participate in the negotiation of such settlements without first obtaining written informed consent from each client.[6]

In addition, participating in the negotiation of a settlement where there is a significant risk that it will impact the settlement of a different client's lawsuit in which the same lawyer[7] is representing that client without advising that client is inconsistent with a lawyer's duty under N.Y. Rule 1.4(a)(1)(iii) to "promptly inform the client of . . . material developments in the matter including settlement or plea offers," and the related duty under Rule 1.4(b) to "explain a matter

---

[4] *See* Formal Op. 2009-6, at 2-3 ("The purpose of Rule 1.8(g) is to 'deter[] lawyers from favoring one client over another *in settlement negotiations* by requiring that lawyers reveal to all clients information relevant to the proposed settlement. . . .'") (emphasis added) (quoting ABA Formal Op. 06-238 (2006)); *id.* at 3 ("Rules 1.7 and 1.8(g) thus work in tandem to ensure that clients are fully informed of the potential conflicts that could arise from joint representation, including the conflicts that could arise *in connection with the negotiation and acceptance of aggregate settlements*.") (emphasis added).

[5] We also note that Rule 1.8(g), by its terms, only applies to a lawyer who represents "two or more clients." It therefore does not apply to a defense lawyer who represents only one defendant and makes an aggregate settlement offer.

[6] Court approval is not an option in this scenario. *See infra* analysis in Scenario 3.

[7] Although not the subject of this Opinion, we note that Rule 1.10(a) would impute any conflict under Rule 1.8(g) to other members of the lawyer's firm.

to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[8]

Rule 1.4 requires that attorneys disclose issues and potential problems related to aggregate or interdependent settlements with their clients as those issues arise. Moreover, as a matter of best practices, it is prudent for the lawyer to discuss the issue with a potential client before the lawyer is retained, especially when it is foreseeable from the outset that the issue may arise. If the issue does not become apparent until after the lawyer has been retained, prompt disclosure should be made and the potential options discussed with each client when the issue does become apparent.

The aggregate settlement rule also is a corollary to the general limitation on representing a client "if a reasonable attorney would conclude that . . . the representation will involve the lawyer in representing differing interests," N.Y. Rule 1.7(a)(1), unless, *inter alia*, "each affected client gives informed consent, confirmed in writing." N.Y. Rule 1.7(b)(4); *see also* N.Y. Rule 1.0(j) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.").

Negotiations of aggregate/interdependent settlements also implicate Rule 1.2(a), which requires, as a general matter, that a lawyer "abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, [] consult with the client as to the means by which they are to be pursued." The rule also requires a lawyer to "abide by a client's decision whether to settle a matter." *Id.* While *negotiating* an aggregate/interdependent settlement without written informed consent does not directly violate these strictures (as the ultimate decision of whether to settle still rests with the client), the goals underlying Rule 1.2—to keep the client in the driver's seat with respect to the objectives of representation, including settlement—dictate that the attorney obtain written informed consent from the client before an attorney begins negotiations of an aggregate/interdependent settlement.

Thus, by operation of Rules 1.2, 1.4, 1.7, and 1.8(g), the disclosure and consent requirements apply to completely separate settlement negotiations where the settlements, though separate, are interdependent. In such situations, the lawyer must explain the settlement and its potential interdependence with the settlement of the other lawsuit to each client and obtain written informed consent from each (including a waiver of the specific conflict at issue).

---

[8] While a lawyer's duty of confidentiality under Rule 1.6 is likely to limit what the lawyer may tell one client about another client's settlement negotiation, it should not prevent a lawyer from disclosing to the client that the settlement of other claims is likely to limit the client's recovery and that an early settlement may result in a greater recovery. *See* N.Y. Rule 1.6(a)(2). If Rule 1.6 would prohibit the lawyer from even communicating this risk, then the lawyer may be required to withdraw. *See* N.Y. Rule 1.16(b)(1) (in general, "a lawyer shall withdraw from the representation of a client when . . . the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law").

Scenario 2

QUESTION

The facts are the same as in Scenario 1, except the plaintiffs' lawyer states that she will not settle Case A that is ready to go to trial unless the defendant will agree to settle Cases B and C at the same time. The plaintiffs' lawyer is content to settle with the defendant in Case A because she knows that she has collected or is likely to obtain substantial settlements from other defendants. Plaintiffs' lawyer, however, now wants to use Case A, which the defendant wants to settle, as an opportunity to force settlement of Cases B and C, for which the defendant has refused to offer anything other than nominal settlement amounts. Is this an aggregate settlement and, if so, what does Rule 1.8(g) require the plaintiffs' and defense lawyers to do?

ANSWER

Scenario 2 likewise involves the making of interdependent settlements. The plaintiffs' lawyer is explicitly making the settlement of one case (which defense counsel does want to settle) dependent on the settlement of two other cases (which defense counsel does not want to settle, because defense counsel believes defendants can prevail at trial in those cases).

This scenario highlights the need for restrictions on aggregate or interdependent settlements. It is not in the interests of the plaintiff in Case A to sacrifice some of the settlement funds that she may have been able to collect in order for the plaintiffs in Cases B and C to receive more settlement funds than they otherwise would. On the defense side, to the extent that the defense attorney is representing more than one defendant that would be involved in the settlement, Rule 1.8(g) would apply to defense counsel.[9] Further, if the defendants represented by the lawyer in Case A were different than those he represents in Cases B and C, the lawyer should recognize that it is not in the interests of his clients in Cases B and C to pay more money to settle their cases because their counsel believes that he otherwise cannot settle the case for his clients that are in Case A.[10] For the plaintiffs' lawyer in such a situation to play Case A, on the one hand, off of Cases B and C, on the other hand, creates a potential conflict of interest between defense counsel and his different clients in Cases A, B, and C. Unless full disclosure is made to each of the defendants and their agreement obtained as required by Rule 1.8(g), the defendants may be prejudiced by plaintiffs' lawyer's interdependent settlement overtures.

Accordingly, in Scenario 2, neither plaintiffs' nor defendants' lawyers (when they represent different defendants in the cases that are the subject of the settlement negotiation) may begin interdependent settlement discussions without first disclosing the potential conflicts and obtaining written informed consent from their respective clients.

---

[9] *See supra* note 6 and accompanying text.

[10] If the defendants are the same in all three cases, there is no conflict for defense counsel. The defendants are simply deciding whether they want to pay more to the plaintiffs in Cases B and C to get rid of Case A.

Scenario 3

QUESTION

The facts are the same as in Scenario 1 and Scenario 2, except instead of the attorneys suggesting the settlement of more than one of the cases at the same time, the judge makes the suggestion and urges the settlement of multiple cases to relieve the court's heavy docket. Does this change the conclusions about Rule 1.8(g) discussed above?

ANSWER

At the heart of Scenario 3 is the following issue: Does the fact that it was the *judge* who suggested the interdependent settlements remove any ethical obstacles to such negotiations proceeding? This raises the question of the scope and meaning of the court-approval exception in N.Y. Rule 1.8(g).

Unlike the ABA Model Rule, N.Y. Rule 1.8(g) explicitly allows an attorney to participate in the making of an aggregate settlement without each client consenting if there is "court approval" for doing so. What settlements a court may or may not approve is a matter of law and so not addressed by this opinion.[11] With that said, we note the following as to when it is appropriate for *counsel* to seek court approval in lieu of informing the clients and obtaining their consent.

Comment [13] to N.Y. Rule 1.8 helps explain the rationale for the court approval exception: "Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class." Rule 1.8(g), Comment [13]. This Comment "suggest[s] that the court approval exception would apply in situations 'such as in class actions,' reflecting the reality that individual consent to a class action settlement is rarely (if ever) obtained from every member of a class," but that it was not intended to act "as a substitute" where a lawyer is able to obtain informed consent from a small number of clients. *See* Simon, *supra*, § 1.8:94; *see also* CPLR 908 (providing that court approval is required for a class action to be "dismissed, discontinued, or compromised");[12] BCL § 626(d)

---

[11] We note that the Rules of Court of the Appellate Division, First Department, impose a categorical ban on "grouping" or "combining" different claims for settlement purposes. *See* 22 NYCRR § 603.28. The Fourth Department has a substantially identical rule, except its ban on grouping is limited to "two or more *unrelated* claims or causes of action on behalf of clients." *See* 22 NYCRR § 1015.10 (emphasis added).

[12] An example of the analysis courts apply to aggregate settlements in the class action context is *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 66 F. Supp. 3d 477 (S.D.N.Y. 2015). There, Judge Alvin K. Hellerstein explained:

> Courts confronted with mass tort cases have an obligation to ensure the fairness of settlements entered into by the parties. . . . Because of multiple representations by counsel of differently situated plaintiffs, individual settlements can raise issues of conflicts of interest, as between plaintiffs' attorneys and the differently situated plaintiffs those attorneys represent. An aggregate settlement may be the result of arm's length negotiations, *but the allocations to individuals tend to*

(requiring court approval for the settlement of derivative claims). New York provides no formal mechanism for court approval of the settlement of any other type of aggregate settlement.

The court approval exception to the usual requirement of making timely disclosure to clients and obtaining informed written client consent is properly used by lawyers only in those situations where client approval cannot readily be obtained. Thus, outside of the class or derivative action context, it will be the rare circumstance where disclosure cannot be made and consent obtained. Moreover, while court approval would resolve the lawyer's obligation under Rule 1.8(g), it would not necessarily resolve the duty of the lawyer to keep the clients informed under Rule 1.4 or the need to obtain a waiver of the conflict under Rule 1.7 that would arise from representing differing interests. Thus, even where a court approves of an aggregate settlement, the lawyer must still explain the settlement to the client and obtain a waiver of the lawyer's conflict as a result of representing differing interests unless the court also specifically has relieved the lawyer of those obligations as well.

This conclusion receives additional support from a review of other states' rules, which provide (either in the text of the rules or the comments) that the court approval exception applies to class or derivative actions. *See, e.g.*, Louisiana R. 1.8(g) (exception to restriction on aggregate settlements where "a court approves a settlement in a certified class action"); Cal. R. 1.8.7(b) (the restriction on aggregate settlements "does not apply to class action settlements subject to court approval"); N.D. R. 1.8(g) ("A lawyer who represents two or more clients, *other than in class actions*, shall not participate in making an aggregate settlement of the claims of or against the clients . . . .") (emphasis added); Ohio R. 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless *the settlement or agreement is subject to court approval* or each client gives informed consent, in a writing signed by the client.") (emphasis added); W.V. R. 1.8(g) Comment ("A *non-class* action aggregate or mass tort settlement is a settlement of the cases of two or more individuals in which the settlement of the cases is not based solely on individual case-by-case settlement negotiations. In such situations potential conflicts of interest exist, thus posing a risk of unfairness to individual litigants.") (emphasis added); *see generally* Jon W. Green, *Ethical Considerations that Plaintiff's Counsel Must Address in a Multi-Plaintiff Settlement* 4-9, ABA, Apr. 2015, *available at* https://www.americanbar.org/content/dam/aba/events/labor_law/2015/april/eeo/jwgreen_ethical_considerations.pdf (reviewing rules in different states). Accordingly, while the New York Rules may carve out situations of "court approval" from the general restriction on aggregate settlements, that does not end a practitioner's ethical inquiry: in situations of "court approval" outside the class or derivative action context (where written informed consent from every single

---

> *be directed by counsel without negotiations*. Because the Court has inherent authority to supervise such attorneys, . . . it has the duty to ensure that the settlements among plaintiffs are fair. . . .

Id. at 481-82 (emphasis added) (citations and footnote omitted); *see also In re World Trade Ctr. Disaster Site Litig.*, 83 F. Supp. 3d 519, 523 (S.D.N.Y. 2015) (Hellerstein, J.) ("Throughout this litigation, I have exercised substantial supervisory authority pursuant to [Federal Civil] Rule 16" because, *inter alia*, "the settlement was negotiated without the authorization of any of the 10,000 plaintiffs, and made in the aggregate rather than with respect to individual cases, *thus resembling a class settlement rather than a collection of individual settlements*") (emphasis added).

party is not practicable), practitioners still will need to make disclosure and obtain written informed consent from each client to comply with their ethical obligations.

Returning to Scenario 3, it does not involve a scenario where client disclosure and consent is not possible. Therefore, the attorneys in Scenario 3 should not consider that the "court approval" exception in N.Y. Rule 1.8(g) applies.

If Scenario 3 did involve a class or derivative action or other kind of lawsuit where client consent was not possible, though, it would beg the question of what the court must approve, and whether the court's "suggestion" and "urging" in Scenario 3 qualifies as adequate "court approval" to relieve the practitioner of seeking written informed consent from the client. We do not believe that it is enough for the court to approve the aggregate settlements themselves. As noted above, N.Y. Rule 1.8(g) does not merely restrict the "making" of an aggregate or interdependent settlement, but also "participation" in the making of such settlement—*viz.*, even negotiations. (*See supra* discussion of Scenario 1.) Accordingly, to the extent that an attorney does not obtain written informed consent from her clients, she can negotiate an aggregate settlement where such approval is not possible *only* if the court explicitly approves such discussions, including the lawyer's conflict of interest, after full disclosure to the court of the ethical issues.

If Scenario 3 involved class or derivative actions, the mere fact that the judge "suggested" and "urged" collective settlement of the three cases would not be enough to qualify as "court approval" for the lawyers to commence interdependent settlement discussions. To comply with N.Y. Rule 1.8(g)'s court-approval exception, the court must provide the attorneys with a formal order, in writing or on the record, permitting them to participate in the negotiation and making of an aggregate or interdependent settlement and approve of the lawyers proceeding in the face of their potential conflicts of interest.

Scenario 4

QUESTION

The plaintiffs' lawyer has filed separate complaints against the same defendants based upon injuries that allegedly were caused by the same or similar harmful products or occurrences. The plaintiffs' lawyer wants to settle Case A with a particular defendant, but is not prepared yet to discuss settlement of Cases B and C because sufficient discovery has not yet been performed for those cases. The plaintiffs' lawyer learns in the course of representing one client that the defendant has cash flow issues and so payment of a large settlement in Case A may mean that the defendant will not want to settle Cases B and C until its next fiscal year or may have to pay less to settle Cases B and C. Is settlement of Case A and, later, separate settlements of Cases B and C an aggregate settlement to which N.Y. Rule 1.8(g) applies and if not, what do N.Y. Rules 1.4 and 1.7 require the plaintiffs' lawyer to do? Does it matter if the plaintiffs' lawyer is uncertain whether the settlement of Case A will impact the settlement amounts of Cases B and C?

ANSWER

Scenario 4 does not present an instance of an aggregate or interdependent settlement. Neither the plaintiffs' lawyer nor defense counsel are tying the settlement (or amount of settlement) of one case to another. To the contrary, the plaintiffs' lawyer is pursuing settlement of Case A by itself,

and refraining from pursuing settlement of Cases B and C due to insufficient discovery in the latter cases, even though the plaintiffs' lawyer knows that a successful settlement of Case A may limit the settlement amounts available in Cases B and C. The settlement of Case A is not linked in any way to the settlement of Cases B and C, which the lawyer has yet to begin to try to settle. Rule 1.8(g) therefore is not applicable.

That, however, does not mean that the lawyer does not have any obligations to his clients in Cases B and C. As discussed in response to Scenario 1, Rules 1.4 and 1.7 still must be considered. This scenario involves a "limited pool"—*i.e.*, a situation where the defendant has limited resources that are not enough to satisfy all the claims filed and thus one settlement will limit the funds available for subsequent settlements. Such a situation makes even more obvious the need to address Rules 1.4 and 1.7 as discussed below. *See, e.g.*, *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 552–53 (S.D.N.Y. 2009) (Hellerstein, J.) ("Because each settlement recovery would erode a limited pool of insurance resources, a procedure of court approvals was provided to assure fairness.").

As noted above in Scenario 1, Rule 1.4 requires that the plaintiffs' counsel disclose the issues and discuss the potential problems related to an aggregate settlement with each client. To the extent the above issue concerning the limited pool of funds is foreseeable from the outset, it should be disclosed to the potential client before the lawyer is retained. If the issue does not become apparent until after the lawyer has been retained by the plaintiffs in Cases A, B and C, prompt disclosure should be made and the potential options discussed with each client when the issue does become apparent. To the extent that the plaintiffs' lawyer is called upon to take steps to allocate potential settlement proceeds among his clients, Rule 1.7(a)(1) is implicated. If the clients do not all agree on a solution after disclosure is made by their counsel, the lawyer cannot negotiate with one of the clients on behalf of the others even with a waiver. The clients can resolve the issue by negotiating directly with each other without the advice of their common counsel, or one or more of the plaintiffs can obtain separate counsel to assist them to resolve the issues.

We note that, although this Committee opined that advance waivers are not available for "aggregate settlements" (*see* Op. 2009-6), because completely separate settlement negotiations are not aggregate settlements where there is no linking of the settlements (either formally or informally), an advance waiver of the conflict is possible, provided that the lawyer is able to competently and diligently represent both plaintiffs.[13] *See supra* note 1. There may be situations where the obligations to the two clients will be such that a waiver is not possible to resolve the conflict because, even with the waiver, the lawyer is not able to competently and diligently represent both clients. For example, if a lawyer represents a secured creditor in a bankruptcy proceeding as well as an unsecured creditor and the lawyer negotiates a settlement for the secured creditor whereby the debtor agrees that virtually all the debtor's assets are covered by the secured creditor's lien, this would leave almost no assets to pay the unsecured creditor. On the defense side, if a lawyer represents two unrelated defendants in an antitrust litigation where both clients face joint and several liability, the settlement of the claims against one client will

[13] *See generally* Green, *Ethical Considerations that Plaintiff's Counsel Must Address in a Multi-Plaintiff Settlement*, *supra* (surveying requirements for informed consent under ABA Model Rules and individual states' rules).

increase the potential liability of the other client. In such circumstances, the conflict may be one that is not waivable.

To the extent that it is unclear to the lawyer that resolution of Case A will actually have an impact on the settlement of Cases B and C, we believe that a conflict under Rule 1.7(a)(1) would exist only if there is a "significant risk" that negotiating a settlement for one client will impact another client such that the lawyer is representing clients in related claims with differing interests. We note that the term "significant risk" is included in Rule 1.7(a)(2) and not (a)(1), but believe that the use of that term to define the contours of "differing interests" is useful. We do not believe that representing clients on unrelated claims where one may impact another is a differing interest. While doing so may impact a client economically, such economic conflicts are not considered conflicts under Rule 1.7. *See* Rule 1.7, *cmt.* [6] ("[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."). Even if the risk is not significant, however, a lawyer may well decide that it is prudent to make disclosure about the potential settlement issue.

Scenario 4 presents thorny issues related to disclosure of one client's confidential information to another since the lawyer learned of the defendant's cash flow issues in the course of representing one client. *See* Rule 1.6(a) (defining "confidential information" as "information gained during or relating to the representation of a client"). As noted above, Rules 1.4 and 1.7 require disclosure of the potential impact of one settlement on another. However, Rule 1.6(a) generally forbids a lawyer from knowingly disclosing a client's confidential information without the client's informed consent. How, then, is it possible for an attorney to negotiate a settlement for one client that may impact the settlement of another client, without improperly disclosing one client's confidential information?

Though it deals with true aggregate settlements, ABA Formal Op. 438 (discussed above at the beginning of Scenario 1) states that Rule 1.6(a) must be complied with under all circumstances, even in the complicated situation of aggregate or interrelated settlement negotiations:

> If the information to be disclosed in complying with Rule 1.8(g) is protected by Rule 1.6, *the lawyer first must obtain informed consent from all his clients to share confidential information among them.* The best practice would be to obtain this consent at the outset of representation if possible, or at least to alert the clients that disclosure of confidential information might be necessary in order to effectuate an aggregate settlement or aggregated agreement.

ABA Formal Op. 06-438 (emphasis added) (footnotes omitted). We agree. Accordingly, if the only way the lawyers in Scenario 4 can make the required disclosures about the various settlements is by disclosing a client's confidential information, the lawyers cannot even make the disclosures unless they first obtain informed consent from each client to do so. If such client consent is not provided, the lawyers may not be able to settle any of the cases in Scenario 4.

CONCLUSION:

Practitioners should refrain from negotiating settlements of separate cases where the settlement of one case is dependent—in substance, if not in form—on the settlement of one or more other cases without informed client consent. This limitation applies not only to an attorney representing one or more clients (in the same or separate cases), but also to an attorney representing a single client in a process of interdependent settlement negotiation involving separate cases. In such instances, practitioners should not even entertain discussions with opposing counsel regarding interdependent settlements unless and until full disclosure is provided to, and written informed consent is obtained from, each client. Moreover, while N.Y. Rule 1.8(g) does contain a court-approval exception, it should not be relied upon outside of the context of class or derivative actions or other lawsuits where seeking and obtaining written informed consent from every single client before commencing negotiations or entering into the settlement is not feasible.

Even in the class or derivative action context, however, the "court approval" exception requires that the court explicitly permit counsel to engage in such discussions without client consent. In turn, when a settlement is reached in a class or derivative action, if disclosure to the clients still has not been made and their consent obtained, then—before finalizing the settlement—either the practitioner should obtain client consent after full disclosure or the court should approve the fairness of the settlement.