THE BAR ASSOCIATION OF SAN FRANCISCO

OPINION 2020-1 [Issue date: November 2020]

MASS TORTS LEGAL ETHICS OPINION - PART 2

ISSUE: **What ethical obstacles may a lawyer face during the joint representation of a large group of clients in a mass tort action, and how should those issues be addressed in accordance with a lawyer's ethical obligations?**

DIGEST: **Law Firm represents a large number of individual consumers in litigation pertaining to injuries they each allegedly sustained from the same defective product. The consumers could not join together in a class action because of the disparity of their claims, and their individual claims do not financially support individual actions. Law Firm modified its engagement agreements and streamlined its communications with the clients (as discussed by this Committee in Part 1 of this opinion) to make the large, joint representation practically feasible and cost effective. As set forth in this Part 2 of the opinion, Law Firm now has an ongoing obligation to uphold its ethical duties to each client as the joint representation continues, including: maintaining its duties of communication and confidentiality (Section 1); addressing potential and actual conflicts (Section 2); heeding ethical rules regarding aggregate settlements and settlement offers made to or received from the opposing party (Section 3); and fulfilling ethical obligations regarding the termination of the representation as to all or some of the joint clients (Section 4). Subject to the limitations set forth below, Law Firm may continue the joint representation of multiple clients in the mass tort action.**

AUTHORITIES INTERPRETED

California Rules of Professional Conduct ("CRPC"), Rules 1.1, 1.2, 1.3, 1.4, 1.4.1, 1.6, 1.7, 1.8.7, and 1.16[1]

Business and Professions Code ("Bus. & Prof. C.") Sections 6068 (e), (m)

FACTS

Consumers of an allegedly defective product assert claims for violations of state and federal law. The possible relief varies from person to person, ranging from the cost of the product to relatively minor personal injuries involving a few thousand dollars in medical bills. None of the individual

[1] The current CRPC cited and discussed herein became effective on November 1, 2018. Part 1 of this opinion, originally published in September 2017, relied on and cited to these then-effective former rules of professional conduct, and identified the current CRPC for informational purposes only.

claims alone is sufficient for a financially viable lawsuit against a major corporation. Based on the disparity of claims among the individual clients, the case would not qualify as a class action.

Law Firm ("Firm") primarily handles the prosecution of class actions on behalf of consumers and decided to undertake a non-class action representation of the group of consumers ("clients") to represent them jointly against the manufacturer in a single action. *See* Cal. C. Civ. Proc. § 378. The Firm modified its engagement agreements and streamlined its communications with the clients (as discussed by this Committee in Part 1 of this opinion) to make the large, joint representation practically feasible, cost effective, and in compliance with ethical rules. The Firm now seeks guidance on how it may ethically continue to represent these clients.

DISCUSSION

The attorney-client relationship "is a fiduciary relation of the very highest character." *Cox v. Delmas* (1893) 99 Cal. 104, 123. Lawyers owe duties of loyalty, confidentiality, and communication to each client.

Although the Firm initially assessed the potential conflicts and risks identified in Part 1 of the opinion, believed its lawyers could competently (CRPC 1.1) and diligently (CRPC 1.3) fulfill these duties to each potential joint client, made the pertinent written disclosures in its engagement agreement, and obtained informed written consent to the joint representation from each client (CRPC 1.7), the Firm must continue to fulfill its duties to each client throughout the representation. We divide our discussion of this endeavor into four sections: client communications and confidentiality (CRPC 1.4, 1.6); conflicts of interest (CRPC 1.7); settlement (CRPC 1.4, 1.4.1, 1.8.7); and termination of the representation (CRPC 1.16).

I. CLIENT COMMUNICATIONS AND CONFIDENTIALITY

The Firm owes each client a duty to communicate. CRPC 1.4. It must promptly inform its clients of matters that require disclosure or require the client's informed consent, reasonably consult with them about the means of accomplishing the client's objectives in the representation, and keep the clients "reasonably informed about significant developments relating to the representation" (including promptly complying with reasonable requests for information and copies of significant documents when necessary). CRPC 1.4(a)(3); Bus. & Prof. C. § 6068(m). What constitutes a "significant development" is fact-dependent and may be influenced by the purpose of the representation, the sophistication of the client, client expectations, the importance of the new information, and other variables. *See* CRPC 1.4, Comment [1].

The Firm also owes each client a duty of confidentiality. CRPC 1.6; Bus. & Prof. C. § 6068(e); *Anderson v. Eaton* (1930) 211 Cal. 113, 116. Business and Professions Code section 6068(e)(l) explicitly requires a lawyer to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This duty survives the conclusion of the representation. *City and County of San Francisco v. Cobra Solutions, 1nc.* (2006) 38 Cal.4th 839, 846.

The duties to communicate with clients and to maintain their confidential information take on new dimensions when the lawyer jointly represents multiple clients. As most relevant here, the Firm must consider whether to share a client's confidential information with the rest of the joint clients, how to best communicate updates and significant developments to the clients, and how to protect attorney-client communications from disclosure to third parties.

A. Disseminating Individual Client Information to Other Clients

While the Firm owes its joint clients a duty of confidentiality as to third parties, there is generally no duty of confidentiality or attorney-client privilege between or among the joint clients. *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1294; *Anten v. Superior Court* (2015) 233 Cal.App.4th 1254,1259 (*Anten*); see also Cal. Evid. C. §§ 962, 953(a), 954(a). To the contrary, if information is relevant to the common interest of all joint clients, the Firm is obligated to share it with the other joint clients. CRPC 1.4; Bus. & Prof. C. § 6068(m); *Anten, supra,* 233 Cal.App.4th at 1259-1260. Therefore, a confidential communication made by and between any one of the joint clients and the Firm, if relevant to the joint representation, is subject to disclosure to the other clients.

California law does not require a client's express consent to the disclosure of relevant confidential communications to the other joint clients united in a common interest. *Anten, supra,* 233 Cal.App.4th at 1259-1260.[2] The Firm should nonetheless consider obtaining each client's informed consent in order to control client expectations and reduce the risk of a future misunderstanding or conflict. Here, the Firm would have obtained this informed consent in the engagement agreement, advising that any information communicated to or received by the Firm from one client would not be kept confidential and would not be withheld from the other clients if the information is relevant to the common interest of all joint clients.

During the course of the representation, a client may ask the Firm to keep certain information confidential from the other joint clients. The Firm must evaluate whether the information is relevant to the common interest of all joint clients and whether it is a significant development requiring disclosure. As an example, the scope of each client's injuries would be relevant to the common interest, because that information may affect the allocation of any recovery obtained as part of a global settlement.

[2] In its Formal Op. 08-450, the American Bar Association Committee on Ethics and Professional Responsibility expressed the view that, absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of ABA Model Rule 1.6(a), the lawyer is prohibited by ABA Model Rule 1.6 from revealing information to one client that is harmful to another client. State courts and other ethics committees have concluded that a lawyer engaged in joint representation either may or must reveal the confidential information to the other joint client when the jointly represented clients have agreed prospectively to the disclosure. See Am. Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Form. Op. 08-450 (2008); Mass. Bar Ass'n Ethics Op. 09-03 (2009) (lawyer must disclose to employer client the fact of co-client employee's revocation of employment authorization, in part because "the normal rule in joint client representation is that there is no confidentiality between joint clients, unless they agree otherwise, and that the lawyer should explain this at the outset of the representation"); D.C. Bar Ass'n Ethics Op. 327 (2005) (when jointly represented clients consent to the disclosure of confidential information by the lawyer to each co-client, thereby waiving confidentiality, the lawyer must reveal the confidential information if it is relevant or material to the representation of the other client); Colorado Bar Form. Op. 135 (adopted February 20, 2018).

If the client's information is significant and relevant to the common interest, the Firm must explain to the client that the information cannot be kept confidential from the other joint clients under California law. CRPC 1.4; Bus. & Prof. C. § 6068(m); *Anten, supra*, 233, Cal.App.4th at 1259-1260. If, on the other hand, the information is not significant and relevant to the common interest, the Firm's duties of loyalty and confidentiality to each client preclude disclosing the information to the other clients without first obtaining the client's informed consent. CRPC 1.4(a)(1) and Comment [1] (citing Bus. & Prof. C. § 6068(m)); l.6(a).

The Firm should determine at the outset of the representation what constitutes a matter of common interest, inform each client, and ensure that communications with clients stay within this scope. When necessary, the Firm should remind clients of the matter of common interest and the limited scope of the representation as defined in the engagement letter to focus client communications on information relevant to the common interest. *See Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-1684; *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940.

When the Firm wants to share with the other joint clients information that the Firm is not ethically or legally obligated to share in the common interest of the representation, the Firm must explain the matter to the client to the extent reasonably necessary to permit the client to make an informed decision regarding the disclosure of that information to the other joint clients. CRPC 1.0.1(c), 1.6(a). Lawyers should be especially cautious about disclosing highly sensitive information, such as medical or privacy-protected information, if it is not relevant and significant to the joint representation.[3]

In the event a disagreement arises between a client and the Firm as to the disclosure of any information, an actual conflict exists between the client and the Firm, as well as between the client and the other joint clients. If the conflict cannot be resolved in the best interest of all joint clients, the Firm may need to withdraw from its representation. (*See* Sections II and IV, *infra*, for further discussion of conflicts and termination of representation.)

B. Methods of Communicating with Clients

The Firm must determine the best method for communicating information to its joint clients, while adhering to its ethical obligations. Considerations will likely include the cost of potential methods of providing the information, the Firm's resources, the means of communication available to each client, the risks of disclosure to third parties, and time constraints. Only after careful consideration of these factors, and the implementation of any procedures to minimize the risks of improper disclosure, should the Firm decide whether it is sensible to communicate with each client separately or to communicate with all joint clients collectively, and whether to employ in-person meetings, telephone or video conferences, written communications, or a combination of these methods to avoid delay and ensure a uniform message to all clients.

For instance, regular and routine updates that do not include confidential or sensitive information – such as correspondence with opposing counsel or the court, discussion of

[3] Other applicable privacy laws, beyond the scope of this opinion, may prevent the disclosure of this information.

deadlines, and other procedural information – might be collectively communicated with minimal risk to all joint clients through a client memo, newsletter, email, or other similar means.

As mentioned, however, the Firm may need to communicate with each client about a significant development in the representation, such as a contemplated or received settlement offer or a potential conflict of interest. *See* CRPC 1.4.1, 1.7, 1.8.7. Inevitably, there will be developments and issues during the representation that are not merely procedural or routine[4] and require a client's authorization, including a matter that "implicates a substantial right of the litigant." *Levy v. Superior Court* (1995) 10 Cal.4th 578, 584; *Maddox v. City of Costa Mesa* (2011) 193 Cal.App.4th 1098, 1105 (a decision on any matter that will affect the client's substantive rights is within the client's sole authority). The Firm should anticipate these situations and evaluate how it can best communicate in a timely and efficient manner with each client under the circumstances of the representation. For instance, the Firm should decide whether it would be in the best interest of the clients to have the option of participating in a direct discussion with the Firm as these developments and issues arise, or whether some other means of conveying the information should be created. The Firm should strongly encourage the joint clients, in the engagement agreement and at later times as appropriate, that they should not communicate with one another but only directly with the Firm. *See, e.g., Dawe v. Corrections USA* (E.D. Cal. 2009) 263 F.R.D. 613, 621.

C. Protecting Against Disclosure of Information to Third Parties

While the Firm has an obligation to keep its clients informed, it must also guard against the disclosure of attorney-client communications and other confidential information to third parties. Doing so with a large group of joint clients can be challenging, but it is critical because information disclosed to a third-party by one client could impact other joint clients.

California law provides that one client cannot unilaterally waive the attorney-client privilege as to any of the other joint clients' communications or as to any of the waiving clients' communications that relate to other clients. *See American Mut. Liab. Ins. Co. v. Sup. Ct.* (1974) 38 Cal.App.3d 579, 595; Cal. Evid. C. § 912(b). In other words, except as provided under Evidence Code Section 962, "Client A" may waive the privilege only as to Client A's communications about Client A.[5] Nonetheless, one client's disclosure of information, although waiving the privilege only as to that client, could still harm other joint clients.

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[4] "[I]n both civil and criminal matters, a party's attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters." *In re Horton* (1991) 54 Cal.3d 82, 95, 102. This authority includes the attorney's control of ordinary trial strategy, such as which witnesses to call, the manner of cross-examination, what evidence to introduce, and whether to object to an opponent's evidence. *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 138. On the other hand, a decision on any matter that will affect the client's substantive rights is within the client's sole authority. *Maddox v. City of Costa Mesa* (2011) 193 Cal.App.4th 1098, 1105.

[5] See also B. Babbitt "How to Avoid Attorney-Client Privilege Problems in Joint Representations" American Bar Association July 11, 2018. Note as well that communications made by clients to their joint counsel, while privileged against strangers, are not privileged between the joint clients or any of their counsel when they later assume adverse positions. *Anten, supra,* 233 Cal.App.4th at 1259. There is no attorney-client privilege in a lawsuit between counsel and client based upon an alleged breach of duty by the lawyer. *See Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786. Similarly, no privilege applies to confidential communications with counsel when jointly represented clients sue each other. Cal. Evid. C. § 962; *Zador Corp. v. Kwan, supra,* 31 Cal.App.4th at 1294.

The Firm should be mindful of the information it shares with its clients in written group communications and consider the safest way to protect confidential information from third parties, such as sharing the information orally. The Firm should also advise clients at the outset of the representation, perhaps in the engagement agreement, and remind them regularly, that disclosure of an attorney-client communication to third parties (whether directly or indirectly, including, but not limited to, through social media) could jeopardize the confidentiality of the communication and harm other joint clients.

II. CONFLICTS OF INTEREST

In Part 1 of this opinion, we stated that the Firm should disclose at the outset of the representation all current and reasonably foreseeable conflicts arising from the aggregate representation, including, for example, disclosures that the Firm may have to make litigation decisions favoring one client over another; that joint representation may result in advocacy of a client's interest that is less vigorous than it would be if the lawyer represented only that client; and that the Firm may make decisions that will be in the best interest of the overall group of clients and not necessarily in the best interests of an individual client. As the representation progresses, the Firm must continue to assess whether a conflict of interest may preclude it from representing the clients in the joint representation, or require the clients' informed written consent to continued representation.

A. Conflict of Interest Defined

Conflicts among current clients are governed by CRPC 1.7. Under CRPC l.7(a), "[a] lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter." A directly adverse conflict can arise when the lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict. CRPC 1.7, Comment [1].

Under CRPC 1.7(b), "[a] lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests." The essential question under CRPC 1.7(b) is whether there is a significant risk that any difference in the clients' interests does or will "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of each client." CRPC 1.7, Comments [2] and [4].

If a representation falls within CRPC 1.7(a) or CRPC 1.7(b), therefore, it cannot proceed without both "informed consent" from each client in writing and compliance with CRPC 1.7(d).

Informed consent means "a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." CRPC 1.0.1(e). The Firm must consider whether the disclosures necessary to obtain the

clients' informed consent are precluded under other rules or law – such as the rule against disclosure of confidential client information in the absence of informed consent. CRPC 1.7, Comment [7] (citing CRPC 1.6; Bus. & Prof. C. § 6068(e)(l)).

However, a conflict under CRPC 1.7(b) cannot be waived if CRPC 1.7(d) cannot also be satisfied. CRPC 1.7(d) prohibits the representation unless "(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; and (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." CRPC 1.7(d); *see also* CRPC 1.1(a) (defining competence); CRPC 1.3(b) (defining diligence). In other words, a client cannot simply waive a conflict where it is unlikely that the lawyer can competently and diligently represent each client. CRPC 1.7(d)(l); *see* Los Angeles Bar Ass'n Form. Op. 471 (1993); ABA Model Rule 1.7(b)(l), Comment [15].

In the joint representation of the large group of clients contemplated here, there is no indication that, at least at the time of the initial engagement, the representation of one client was directly adverse to another client. CRPC 1.7(a). However, as discussed in Section II C, *infra*, there is a significant risk the Firm's representation of each client will be materially limited by the Firm's responsibility to another client. Informed written consent is therefore required to be obtained from each client to sustain the representation. CRPC 1.7(b), Comment [2]. In this opinion, we assume the Firm has included in its engagement agreement suitable disclosures to obtain the client's informed written consent. However, the Firm must continue to scrutinize the sufficiency of this advance waiver (as discussed next in Section II B), decide whether additional disclosures and further informed written consent may be needed as the litigation continues, and continually evaluate whether, due to new events, one client has become directly adverse to another client (CRPC 1.7(a)) or there is a significant risk the lawyer's representation of the client will be materially limited during the representation (CRPC 1.7(b)). If a conflict of interest arises, the Firm must take action appropriate under the CPRC.

B. Advance Waivers

At the time Part 1 of this opinion was written, California courts had allowed advance waivers of conflicts only in limited instances. For example, in *Zador Corp. v. Kwan, supra,* 31 Cal.App.4th at 1301, the court upheld an advance conflict waiver where the engagement letter had described in sufficient detail the consequences of a conflict, and the client was relatively sophisticated, obtained separate counsel, and reaffirmed consent. While advance waivers continue to be governed by applicable case law, further guidance now appears in Comment [9] to CRPC 1.7, which states that the "effectiveness of an advance consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails."

Generally, the validity of the advance waiver will depend on the facts and circumstances of the issues, the scope of the waiver, the extent to which the lawyer fully disclosed the consequences of the waiver, the specificity of the waiver, and factors such as the sophistication of each client, the interests of justice, and whether the lawyer advised the client to seek the advice of independent counsel before providing consent. *See Visa U.S.A., Inc. v. First Data Corp.* (N.D. Cal. 2003) 241

F.Supp.2d 1100, 1106; *Concat LP v. Unilever, PLC* (N.D. Cal. 2004) 350 F.Supp.2d 796, 820; CRPC 1.7, Comment [9].

Comment [9] to CRPC 1.7 further advises that "[t]he more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding." Not every possible consequence of a conflict need be disclosed, but "'the closer the lawyer who seeks a prospective waiver can get to circumstances where not only the actual adverse client but also the actual potential future dispute are identified,' the more likely the prospective waiver is ethically permissible." *Visa U.S.A., Inc. v. First Data Corp., supra,* 241 F.Supp.2d at 1107, quoting ABA Form. Op. 93-372 at 1001:177; *see Concat LP v. Unilever, PLC, supra,* 350 F.Supp.2d at 820-821; ABA Model Rule 1.7, Comment [22] ("If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved."); but see Cal. State Bar Form. Op. 1989-115 ("blanket" waiver of right to disqualify not improper per se).

Note, however, that "[a]n advance waiver consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d)" of CRPC 1.7. CRPC 1.7, Comment [9]. Thus, if events arise during the representation that lead the Firm to believe, for example, that the Firm cannot provide competent and diligent representation under CRPC 1.7(d)(1), the advance waiver will not suffice to continue the representation because the conflict cannot be waived; the representation would be prohibited.

Also instructive is the California Supreme Court's decision in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59. *Sheppard* stands for the proposition that a waiver is not informed and will be ineffective if the law firm does not disclose sufficient information regarding any existing conflicts known to the firm. In addition, where the client has signed an advance waiver, the law firm must determine whether any conflict that arises thereafter was adequately disclosed in the advance waiver and, if not, the law firm must obtain a supplemental or revised informed written consent from the client to maintain the representation. See CPRC 1.0.l(e); CRPC 1.7(b), Comment [2]; *see also Visa U.S.A., Inc. v. First Data Corp., supra,* 241 F.Supp.2d at 1105 (second waiver not required under facts of case); *Concat LP v. Unilever, PLC, supra,* 350 F.Supp.2d at 821 (disqualification ordered where lawyer failed to obtain second waiver); *Western Sugar Coop. v. Archer-Daniels-Midland Co.* (C.D. Cal. 2015) 98 F.Supp.3d 1074, 1084 (16-year-old waiver deemed ineffective because the sophisticated and experienced client could not be expected to contemplate potential conflicts that might surface a decade later).

In light of the relatively recent advent of CRPC 1.7, the Firm should reexamine advance waivers in engagement agreements signed when former CRPC 3-310 was in effect. The Firm should also examine all advance waivers from time to time to determine if events or circumstances since the execution of those documents require additional disclosures, further informed written consent, or other modification. See, e.g. CRPC 1.7, Comment [2] ("If a lawyer initially represents multiple clients with the informed written consent as required under [CRPC 1.7] paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent of the clients under [CRPC 1.7] paragraph (a).");

CRPC 1.7, Comment [10] (material change in circumstances may trigger need for new disclosures and consents). When in doubt, the best practice is to disclose any conflict when it arises and obtain informed written consent from the client at that time.

C. Potential Sources of Conflict of Interest During the Joint Representation

As the Firm continues to assess whether conflicts have arisen or may arise during the joint representation, it must remain alert to matters such as, but not limited to, the following.

Allocation of Fees and Costs. As recommended in Part 1 of this opinion, the Firm should address apportionment of fees and costs at the outset of the representation and obtain the clients' informed written consent to the allocation method in the engagement agreement, as much as possible with the information known at that time. Such fees and costs may include attorney fees, filing fees, deposition expenses, and fees for experts and consultants. The Firm should also address at the outset of the representation how to allocate any potential fees or costs awarded to the opposing party.

Approaches to allocation include, but may not be limited to (1) each client contributing equally (per capita) to the fees and costs, regardless of the client's potential or actual recovery in the litigation; (2) each client contributing pro rata to the fees and costs according to the client's potential or actual recovery; (3) each client contributing a share of the fees and costs common to all clients, plus costs specific to the client; or (4) to the extent permitted by CRPC 1.8.5, the Firm advancing, waiving, or capping costs at the amount of the client's recovery. Where the settling clients have similar claims of ascertainable and equal or comparable value, it may be appropriate to allocate the payment of costs from the clients' aggregate recovery on a per capita basis. On the other hand, a pro rata cost payment based on recovery may be more equitable where the value of each client's injuries or damages differs. *See* ABA Form. Op. 06-438, fn. 14.[6]

While informed written consent to the apportionment method in the engagement agreement should help avoid future disputes, the Firm must continue to evaluate whether the method gives rise to a conflict. In addition, there may be situations in which an apportionment method cannot be agreed upon in advance in the engagement agreement; in those instances, the Firm should consider disclosing as much information as possible at the outset of the representation to ensure the clients are reasonably informed, and must continue to communicate relevant and significant information as the representation progresses. As discussed in Section III, *infra*, the clients' informed written consent to a settlement must include agreement on the mechanism for allocating fees and costs.

Vigorous Advocacy Potentially Favoring Client Subset. "A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client." CRPC 1.3(a). Reasonable diligence means "that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer." CRPC 1.3(b). It is assumed in this opinion

[6] ABA Form. Op. 06-438, fn. 14 offers sound guidance and should be referred to by California attorneys involved with multiple client aggregate settlements even though ABA ethics opinions are technically not binding on California lawyers.

that each joint client has similar but different claims against the defendant, with varying amounts of damages. Accordingly, there is an ongoing tension regarding the lawyer's ability to competently represent all of the clients in the matter, both because vigorous representation of one client might affect the ability to represent another client, and because vigorous advocacy of the group may affect each client's individual interests differently. For example, conducting discovery regarding certain facts or of particular witnesses could benefit some clients while not benefitting, or even harming, other clients. Although strategy concerning discovery and testimony is generally within the lawyer's domain (*see* CRPC 1.2(a), Comment [1], citing *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404), the lawyer representing multiple clients must be cognizant that these tactics may favor some clients and disfavor others and continue to provide competent representation to the clients as a group. Thus, the Firm must find a way to act with reasonable dedication to each client's interest; if a tactic, procedure, or strategy benefits some clients more than others, the Firm must take reasonable efforts to protect the interests of those less benefitted.[7] If the Firm does not reasonably believe it can provide competent and diligent representation to each affected client, a nonwaivable conflict exists and representation is prohibited under 1.7(d)(1), requiring the Firm to withdraw.

Arbitration Provisions in Underlying Agreements. Although unlikely in the factual scenario assumed in this opinion, mass tort actions may involve a situation where some clients, but not all clients, have previously entered into agreements with the opposing party to arbitrate claims or to pursue claims in a particular forum. The Firm must evaluate whether this creates a conflict in materially limiting the lawyer's responsibilities to or relationship with another client. CRPC l.7(b).

Revocation of Prior Consent. There is no known California authority on the issue of whether a client's revocation of prior consent to a conflict of interest representation precludes the lawyer from continuing to represent the other client(s). The ABA Model Rules state that a client who consented to a conflict of interest representation may revoke that consent and may terminate the lawyer's representation at any time; however, whether revoking consent precludes the lawyer from continuing to represent other client(s) depends on the circumstances at the time of the revocation, including, but not limited to, the nature of the conflict, whether consent was revoked due to a material change in circumstances, the reasonable expectations of other clients, and whether material detriment to the other clients or the lawyer will result.[8] ABA Model Rule 1.7, Comment [21]; *see also Unified Sewerage Agency v. Jelco Inc.* (9th Cir. 1981) 646 F.2d 1339, 1346, fn.6 (corporate client that repeatedly consented to law firm's representation of adverse party with full knowledge of conflict's potential implications before terminating firm and seeking its disqualification "would be estopped from revoking its consent by everyone's reliance on its

[7] See Comment [1] to ABA Model Rule 1.3, which is similar to CRPC 1.3. After stating that a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf ," the Comment adds: "A lawyer is not bound, however, to press for every advantage that might be realized for a client."
[8] The ABA Model Rules are not binding on California lawyers, and an ABA formal ethics opinion "does not establish an obligatory standard of conduct imposed on California lawyers." *State Compensation Insurance Fund v. WPS Inc.* (1999) 70 Cal.App.4th 644, 656. However, the ABA Model Rules and the ABA's ethics opinions interpreting those rules may be a "collateral source" where there is no direct ethical authority in California. (*Id.*)

longstanding position"); Rest.3d Law Governing Lawyers § 122, Comment f; New York State Bar Ass'n Ethics Op. 903 (2012).

Conflicting Interests at Trial. Despite purported informed written consent from each joint client, the Firm may not represent multiple clients at a hearing or trial if there is an existing, actual conflict between or among them. Under such circumstances, any purported "consent" to the conflicting representation would be found to be "neither intelligent nor informed" as a matter of law. *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 Cal.App.4th 74, 97 ("common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other"); *see also Klemm v. Sup.Ct. (County of Fresno)* (1977) 75 Cal.App.3d 893, 898; CRPC 1.7(d)(3) and Comment [8]. For example, there may be situations where the presentation of certain evidence favors one client to the detriment of other clients. If a court finds a disabling conflict of interest, it may decline to accept the clients' proffered waiver. *In re A.*C. (2000) 80 Cal.App.4th 994, 1002.

Settlement. As discussed in Section III, *infra*, settlement of some or all of the joint clients' claims may give rise to disputes among the clients or benefit some clients more than others, creating a conflict of interest between them.

III. SETTLEMENT

Settlement of a mass tort action may present difficult ethical problems for the lawyer. In particular, settlement of the claims of multiple clients for an aggregate sum requires the informed written consent of each of those clients, which cannot be obtained in advance because no client's claims may be settled without that client's knowing assent to the terms of the settlement proposal at hand. Conflict issues may arise when the lawyer negotiates or communicates a settlement offer as to one, some, or all of the clients. In addition, the Firm must keep in mind its duty of loyalty to each client when advising the clients as to the value of their claims, the favorability of the settlement offer, and whether to aggressively pursue maximum recovery on each client's behalf.[9]

As the Committee discussed in Part 1 of this opinion, before undertaking representation of a large group of clients in a mass tort action, the Firm should advise the clients of reasonably foreseeable conflicts and disputes that could arise in connection with settlement. Such issues could result from differences among the clients' claims – including the severity of harm suffered by each client, the value of each client's claim, and the provability of each client's case – as well as the impact of the group's settlement posture on each client and the effect of one client's settlement on other clients' settlements. The Committee again assumes for discussion purposes that the Firm made the necessary written disclosures and obtained each client's informed written consent at the outset of the representation.

The Firm should consider repeating these disclosures immediately before settlement negotiations. As settlement negotiations develop, the Firm should also provide continued communications to

[9] This opinion does not take a position on any tax implications of a potential settlement. Lawyers are advised to seek the guidance of a tax professional on such matters. The tax implications of the settlement should, however, be disclosed to the clients to the extent necessary for them to be adequately informed about the settlement offer.

clients about any additional information needed to explain the nature of foreseeable disputes and conflicts. In regard to any particular settlement offer, the Firm must provide all information reasonably needed for the clients to evaluate it (CRPC 1.4, 1.4.1) and obtain the informed written consent of the clients before entering into any aggregate settlement proposal on their behalf (CRPC 1.8.7).[10] In addition, the Firm must address any conflicts that arise (CRPC 1.7 and Comment [4]). As highlighted in the following subsections, these key ethical obligations may be implicated in different ways depending on the settlement proposal made or received.

We also note that, in mass tort litigation, the claims of joint clients represented by the Firm may be joined with the claims of joint clients represented by other lawyers (through consolidation, coordination, or multi-district litigation orders), with the court appointing lead counsel or a steering committee to negotiate settlement on behalf of all of the clients. The Firm remains responsible for meeting its ethical obligations to its own clients.

A. Aggregate Settlement Rule

Fundamental to our discussion of settlement in the joint representation context is the aggregate settlement rule set forth in CRPC 1.8.7. An aggregate settlement resolves the claims of (or against) more than one plaintiff (or defendant) represented by the same lawyer for a total settlement sum. CRPC 1.8.7(a) provides: "A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients . . . unless *each* client gives informed written consent. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement." (Italics added.)

The informed written consent required by CRPC 1.8.7 cannot be obtained by proxy or in advance. For example, joint clients may not delegate authority to their lawyer or a litigation steering committee to negotiate and bind them collectively to a settlement, or agree in advance to be bound collectively to an aggregate settlement approved by a specified number or percentage of all the clients. CRPC 1.2(a), 1.4(a)(1), 1.4.1; San Francisco Bar Ass'n Form. Op. 2017-1; New York City Bar Ass'n Form. Op. 2009-6 (collecting cases and other authority); ABA Form. Op. 06-438.[11] A provision in an engagement agreement that expressly states the client may not settle without counsel's consent is thus void and unenforceable, and consent to an aggregate settlement offer cannot be obtained in advance by asking joint clients to waive their rights to approve it.

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[10] Whenever a client's informed consent is sought, the Firm should consider informing each client that the client may obtain independent counsel, if desired, to help ensure that the client reasonably understands the material risks that the consent entails. *See* CRPC 1.7 and Comment [9].

[11] *See also The Tax Authority, Inc. v. Jackson Hewitt, Inc*., 898 A.2d 512 (N.J. 2006); *In re Hoffman*, 883 So.2d 425, 433 (La. 2004); *Abbott v. Kidder Peabody & Co., Inc.*, 42 F.Supp.2d 1046. 1050-1051 (D. Colo. 1999) (law firm's plan to use a steering committee to make case decisions, including settlement, on behalf of jointly represented clients in non-class action was an ethical violation); Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 Fordham L. Rev. 3233, 3235-3236 (2013); Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DePaul L. Rev. 395, 419-420 (2008). The right to settle on particular terms (or to refuse settlement) is one of the client's substantial rights that cannot be compromised or impaired by counsel. CRPC 1.2(a); *Hall v. Orloff* (1920) 49 Cal.App. 745, 749; *Lemmer v. Charney* (2011) 195 Cal.App.4th 99, 103-104.

The primary purpose of the aggregate settlement rule is to ensure that all joint clients understand the value and ramifications of a settlement proposal, so each client can make an informed decision regarding the proposal. The substance of the rule is that the Firm must not only adequately disclose information about the aggregate settlement proposal but also obtain the clients' informed written consent to it. Clients who reject an aggregate settlement offer may preclude the settlement for all clients, giving rise to conflicts with those clients who want to accept the aggregate settlement. As we shall explain, the rule must be considered in all phases of the settlement process.[12]

B. Ethical Obligations Before Making a Settlement Offer

As an initial matter, the Firm should evaluate whether a global settlement on behalf of all joint clients or settlement of the claims of only one or some of the client group is in the best interest of the clients as a whole, mindful that some clients may benefit more than others. The Firm's considerations should be similar to those disclosed to the clients by the Firm at the outset of the representation, including, but not limited to, whether some claims have a stronger legal or factual basis than others, the relative upside of resolving all claims at once, any expressed willingness of clients to initiate settlement negotiations, and whether some clients have personal issues, such as health problems, that make it advisable to try to settle their claims rather than subject them to a lengthy trial or other delay.

As previously mentioned, the Firm must "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation" (CRPC 1.4(a)(2)),"promptly inform the client of any . . . circumstance with respect to which disclosure or the client's informed consent is required" (CRPC 1.4(a)(l)), and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" (CRPC 1.4(b)). Not only is the Firm compelled to obtain each client's informed written consent before agreeing to any settlement on their behalf (CRPC 1.2(a), 1.8.7), it must also take reasonable steps to inform its clients about any settlement the Firm intends to propose, the settlement negotiation goals and strategy (including any contemplated initial demand), and the consequences of pursuing them. CRPC 1.4(a)-(b). If the Firm chooses to pursue settlement on behalf of only some of the clients, the Firm should advise the other clients about the efforts it will undertake, why, and for whom, and how those efforts are likely to affect the claims of clients for whom the lawyers are not pursuing settlement. CRPC 1.4(a)-(b).

The Firm may go beyond disclosure and affirmatively seek the clients' authorization to make a specific settlement proposal before presenting it to opposing counsel. Given the reality of mass tort litigation and the large number of joint clients, however, it may be a challenge to obtain client authorization for every settlement proposition advanced during negotiations. In our view, while CRPC 1.8.7 requires client consent before the Firm can enter into a settlement on the clients' behalf, the rule does not preclude the Firm from floating a settlement proposal with opposing

[12] The aggregate settlement rule "does not apply to class action settlements subject to court approval." CRPC 1.8.7(b). Sometimes settlement of a mass tort action, although not a class action, requires court approval as a condition of settlement. Unlike a class action, however, a mass tort action has no statutory requirement that the court determine whether the settlement is fair to all clients. While there may be some circumstances in which court approval of a mass tort settlement would limit application of CRPC 1.8.7, we assume in this opinion that it does not.

counsel with the proviso that client approval has yet to be obtained. The Firm should still disclose to the clients that it may conduct settlement negotiations on their behalf, clarify that no settlement of the clients' claims will be finalized without the clients' informed written consent, and keep clients reasonably apprised of the negotiations.

If some clients are in favor of the settlement proposal and some express an objection, the Firm must consider whether a conflict exists under CRPC 1.7 before proceeding. CRPC 1.7, Comment [4] ("a lawyer's obligations to two or more clients in the same matter . . . may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients"). *See* Section II, *supra*.

C. Ethical Obligations in Communicating a Settlement Offer

A lawyer must "promptly communicate to the lawyer's client: . . . all amounts, terms and conditions of any written offer of settlement made to the client" by or on behalf of an opposing party in a non-criminal matter. CRPC 1.4.1(a)(2); see also Bus. & Prof. C. § 6103.5(a). An oral offer of settlement must be communicated to a client if it constitutes a "significant development" in the representation. CRPC 1.4.1, Comment (citing CRPC 1.4). What constitutes a "significant development" will generally depend on the surrounding facts and circumstances of the case and the client's objectives. CRPC l.4(a)(l)-(3) and Comment [1].

In addition to informing the client of the fact of a settlement offer received from opposing counsel, the Firm must provide each client with sufficient information to evaluate the proposed settlement – whether the offer is received unilaterally from opposing counsel or obtained as a product of negotiation between the Firm and opposing counsel – so that the clients may decide whether to accept or reject it. CRPC 1.8.7.

The Firm must therefore explain the settlement offer to the extent reasonably necessary to permit each client to make an informed decision (CRPC 1.01(e)-(e-1), 1.4(b)), including a summary of the litigation and settlement negotiations; the existence and nature of the claims involved (as well as defenses and, if applicable, any liens) (CRPC 1.8.7(a)); and the amount and other terms and conditions of the settlement (CRPC 1.4.1(2)). The Firm must further disclose all reasonably foreseeable consequences of the settlement proposal. *See* ABA Form. Op. 06-438. For example, the Firm should advise each client of the likelihood of success and estimated recovery if the matter proceeds without settlement; each client's participation in an aggregate settlement, including what each will contribute and may receive, the means of ascertaining the dollar amount of each client's recovery, and whether one client may receive more than another (CRPC 1.8.7(a); *see* ABA Form. Op. 06-438), as well as whether the failure of any client to accept the offer may (depending on the terms of the offer) preclude the settlement for other clients, which may result in a conflict between the clients requiring the lawyer's withdrawal; that if a dispute arises among the clients regarding the offer, the lawyer may not be able to represent any of the clients against another client; and that the attorney-client privilege may not be available to any of the clients against the others on issues of common advice from the lawyer. *Id*. CRPC 1.7; Cal. Evid. C. 962. Advising each client what all the other clients have been offered or could receive may assist each client in determining whether to accept or reject the settlement. *See* CRPC 1.8.7(a).

The Firm must also disclose the attorney fees and costs to be paid and how those fees and costs will be deducted from the settlement proceeds (if not paid by an opposing party), including the method by which those fees and costs are to be apportioned among the joint clients. (*See* Section II C, *supra*.) This disclosure should be consistent with any method set forth in the engagement agreement.

1. Dividing Aggregate Settlements Among Clients

In a joint representation case, the defendant(s) may offer to pay a lump sum that will be allocated among the plaintiffs (here, the joint clients) in settlement of their claims. Alternative mechanisms for dividing an aggregate settlement may include:

- Negotiating a specific amount with each client;
- Applying a matrix or formula based on factors such as the nature and severity of the injury, the age of the person injured, risks that reduce the claim's value, and potential problems of proof for each client's claim;
- Dividing the total settlement (after deductions for costs) per capita – by the number of settling clients; or
- Using mediation, arbitration, a court-appointed settlement master or referee (C. Civ. P. § 638), a third-party administrator, or similar means to determine what each individual client will receive.

In a mass tort action, the allocation mechanism may be selected in various ways. For example, the settlement offer may incorporate a negotiated matrix by which age, type of injury, and other factors provide a way to calculate what each client would receive. In other cases, the court may appoint a third-party settlement master (or the settlement offer may dictate the use of one) to select and apply the allocation mechanism. In these instances, the Firm must disclose this information to each client, including the details of the mechanism and the scope of the client's recovery to the extent ascertainable, as discussed *supra*.

In other instances, it may be left to the Firm and its joint clients to decide the mechanism for dividing the aggregate settlement proceeds among the clients. If the joint clients consented to a mechanism for dividing an aggregate settlement in the engagement agreement or other communication, generally that mechanism should be applied to avoid the risk of favoring one client or client group over another; however, the Firm should evaluate whether circumstances have changed since the clients consented to the mechanism, such that supplemental disclosures should be provided to the clients or a different mechanism should be proposed. If no mechanism has been agreed upon, the Firm must try to get the clients to agree to one, because informed written consent to the mechanism must be obtained from each client before it can be applied. *See* CRPC 1.8.7(a), 1.4(a)-(b). The Firm may consider hiring ethics counsel to guide it in this regard.

The use of a third party to assist in the division of an aggregate settlement may help to minimize conflict between the joint clients or between a client and the Firm, particularly if each client consented to the approach at the start of the representation. In the proceeding before a mediator or

other third party, however, the Firm may not recommend or advocate for any particular division of the settlement among the settling clients, because that would involve taking a position adverse to at least some of the clients the Firm has been representing in regard to the subject matter of the representation, in likely violation of the Firm's duty of loyalty to each client. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275.

Depending on what allocation mechanism is selected, it may favor some of the Firm's joint clients over others. For example, dividing the proceeds per capita may be better for clients with more problematic or less valuable claims than it would be for clients with the strongest claims. Therefore, while the Firm should have already disclosed possible conflicts at the start of the representation as recommended in Part 1 of this opinion, it must make more detailed disclosures when communicating the settlement offer so that each client is adequately informed of the allocation method and its implications before deciding to accept or reject the offer. CRPC 1.0.1 (e), 1.8.7.

In mass tort litigation, the opposing party or the court may require that the joint clients, or a percentage thereof, agree to accept the total lump sum settlement *before* the division of the settlement proceeds among the clients has been decided. In that case, the Firm must disclose to the joint clients the relevant facts and the reasonably foreseeable advantages and risks of proceeding with the settlement, including, where applicable, the risk that by agreeing to a lump sum settlement at this stage, the amount of settlement funds to be received by each client – if any – is unknown and uncertain.

Insisting that the opposing party make a separate settlement offer to each client would help to avoid conflicts that could arise in dividing an aggregate settlement amount among joint clients, and allow each offer to be evaluated separately; however, in the context of mass tort litigation, which could involve hundreds or thousands of clients, that may not be feasible. Moreover, as discussed next, settlement offers made to fewer than all clients may give rise to other ethical concerns.

2. Settlement Offers Made to Fewer Than All Clients

At times, a defendant may offer a settlement to fewer than all of the joint clients, omitting any resolution of the case as to the remaining joint clients.

Although this type of settlement offer will not in itself resolve the entirety of the case, the aggregate settlement rule of CRPC 1.8.7 applies by its terms whenever the claims of multiple clients will be resolved together. *See* ABA Form. Op. 06-438 (under ABA Model Rule 1.8(g), the aggregate settlement rule is triggered even when less than all joint clients participate in the resolution). Accordingly, the Firm must not enter into the settlement without the informed written consent of each client covered by the settlement offer. The aggregate settlement rule does not, however, empower the remaining joint clients – to whom the settlement was not offered – to block the settlement. Nonetheless, those remaining clients should be advised of the settlement to keep them abreast of significant developments, and the Firm should consider and communicate

the effect of the settlement on the clients to whom the settlement is not directed.[13] CRPC 1.4(a)(3) and (b).

Thus, if the defendant provided a reason for offering settlement only as to some clients, the Firm should communicate that reason to all the clients as part of the Firm's obligation to equip them to make informed decisions about the representation. CRPC 1.4(b). As to the clients receiving the offer, the Firm should make the disclosures addressed *supra* and advise whether the offer is reasonable and what different result might be obtained if the offer is rejected. As to the clients not receiving the offer, the Firm should advise how their claims will be affected if the clients receiving offers accept or reject them. CRPC 1.4(a)(3) and (b). If, for example, the defendant's offer is to clients with the strongest claims, the settlement may weaken the cases of the remaining clients.

The Firm should consider whether a settlement as to some of the joint clients compromises the Firm's ability to represent the rest of its joint clients or otherwise creates a conflict between the clients or between a client and the Firm. CRPC 1.7. If so, the Firm must address the conflict. (*See* Section II, *supra*.)

3. All-or-Nothing Offers

As mentioned, the aggregate settlement rule provides that each client whose claims would be settled together must give informed written consent to the settlement. Where some clients want to accept the offer and some do not (and the settlement offer does not allow the clients to opt-out of the settlement without compromising the availability of the settlement to the other joint clients), a conflict arises between those client groups, and possibly between clients and the Firm, and the Firm must address the conflict as set forth in Section II, *supra*, and Section III C.5, *infra*.

A similar situation arises where the *opposing party* (here, the defendant) requires, as a condition of settlement, the assent of all joint clients in an "all-or-nothing" offer. For example, the defendant may notify the Firm that a settlement offer (or multiple separate offers) to resolve all claims is contingent upon all clients (or a percentage of the clients) accepting the offer(s). A conflict may then develop between joint clients who want to accept the offer and joint clients who want to reject it, as well as between one or more joint clients and the Firm.

The Firm must advise each joint client of the reasonably foreseeable consequences of the offer, including, in this instance, that rejection of the offer by one joint client (or a percentage of clients) may cause the defendant to withdraw the proposal as to all clients. CRPC 1.4.1(a)(2). As always, any conflict must be addressed by the Firm. (*See* Section II, *supra*, and Section III C.5, *infra*.)

4. Attempts to Persuade Clients to Accept or Reject the Offer

[13] A different situation exists when an offer is made to all joint clients, but the offer proposes relief only as to some of them. In that instance, each joint client must decide whether to accept the offer. Also distinguishable is the scenario in which the defendant makes different settlement offers to different subgroups of the joint clients; in that instance, all joint clients should be informed of all settlement offers, and each client must decide whether to accept the settlement directed to that client.

In dealing with an all-or-nothing offer, or any aggregate settlement offer subject to CRPC 1.8.7, the Firm should avoid improper advocacy on behalf of one or some clients against the others. If the Firm believes that the offer is a good one and should be accepted, the Firm is within its rights and duty-bound to so advise the clients and explain its support for its belief. The Firm should also explain the reasonably foreseeable ramifications of not settling, such as additional litigation costs, the risk that the defendant may not make a better offer later, and the risk that the clients may lose if the case goes to trial. These are relevant circumstances that must be communicated to each client to enable the client to reach an informed decision.

However, the Firm cannot use the fact that its fees will be paid sooner, rather than later or not at all, as a factor in favor of settling, because that would place the Firm's own interests ahead of the clients' interests. *See* CRPC 1.7(b). Nor may the Firm engage in falsification, intimidation, coercion or threats to obtain the clients' agreements to the settlement offer. *See, e.g.*, CRPC 1.16, Comment [1] ("A lawyer can be subject to discipline for improperly threatening to terminate a representation."); *In re Guzman* (Rev. Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314; *Matter of Van Sickle* (Rev. Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989.[14]

5. Decision by Some Clients to Reject the Settlement Offer

If one or more clients steadfastly object to the proposed division of an aggregate settlement, or if fewer than all clients (or a required percentage of clients) agree to accept an "all-or-nothing" or aggregate settlement, and, as a result, the settlement cannot be consummated for the joint clients who want to accept the settlement, a conflict exists and the Firm must consider whether it needs to withdraw from its representation of the clients involved or, perhaps, as to all of the joint clients. *See* CRPC 1.7.

As discussed in Section II, *supra*, the Firm must determine whether the conflict is waivable. The conflict is not waivable if the Firm does not reasonably believe it will be able to provide competent and diligent representation to each client under the circumstances. CRPC 1.7(d). The conflict is waivable if the Firm reasonably believes it can maintain its independent judgment and loyalty to each client without compromising its duties of competence and diligence owed to another client, so long as all other requirements of CRPC 1.7(d) are met.

If the conflict is waivable, the Firm must seek each client's informed written consent to the Firm's continued representation by providing a consent form for each client to sign, which explains in writing the conflict of interest and the reasonably foreseeable risks and adverse consequences to the client. CRPC 1.7(b)-(d); *see* CRPC 1.0.1(e)-(e-1), 1.4(b). The Firm's disclosure must advise the clients that failure of any client to waive the conflict of interest means that the Firm will have to withdraw from representing all clients, where the Firm's representation

[14] Mandatory disclosures are not impermissible threats. As mentioned above, the lawyer must disclose to the clients that if not all clients accept, the Firm may have to withdraw from the representation due to a resulting conflict. ABA Form. Op. 06-438. As discussed below, the lawyer may have to disclose that representation of non-settling clients may terminate if the engagement agreement reasonably limited the joint representation to having a minimum number of clients.

of one client will be materially limited by its responsibilities to another client or by its own interests. CRPC 1.7(b).

IV. TERMINATION OF THE REPRESENTATION

Termination of the representation is generally governed by CRPC 1.16, which sets forth circumstances in which the lawyer may or must withdraw from the representation and the lawyer's obligations before and after the termination. In the joint representation litigation context, ethical questions may arise where only some joint clients discharge the lawyer, or where the lawyer must withdraw due to a direct adversity or material limitation conflict of interest under CRPC 1.7. As discussed in Part 1 of this opinion, each client has the absolute right to terminate the Firm regardless of what the other joint clients decide. *See* CRPC l.16(a)(4).

A. Bases for Termination

Sections II and III, *supra*, discussed several conflicts of interest that may require or allow the Firm to withdraw from its representation of one or more joint clients. For example, withdrawal is mandated if a direct adversity or material limitation conflict of interest develops between settling and non-settling clients, and informed written consent to continued representation cannot be obtained from each client. *See* CRPC 1.16(a)(2), (b)(9); 1.7; *see also* CRPC 1.7 [Comment 10] (lawyer may have the option to withdraw from one or more representations in order to avoid a conflict).

Other circumstances may compel the Firm to withdraw. For instance, despite each client's willingness to provide informed written consent, a lawyer may not continue to represent multiple clients in a matter where the lawyer knows or reasonably should know such representation will result in violation of the CRPC or the State Bar Act. CRPC 1.16(a)(2); *see* San Diego County Bar Legal Ethics Comm. Op. 2013-1 (regarding former rule). In addition, while withdrawal is not necessarily permissible merely because some clients have rejected the Firm's recommendation to accept a settlement proposal, withdrawal may be required if the Firm discovers that the non-settling client's case lacks any merit and the client is insisting on pursuing it for the purpose of harassing the defendant. CRPC 1.16(a)(l).

Similarly, CRPC 1.16(b)(4) allows withdrawal if "the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively."[15] Withdrawal is also permissible if the client has breached a material term of an agreement with, or obligation to, the lawyer, and the lawyer has given the client reasonable warning to fulfill the agreement. CRPC 1.16(b)(5).

By contrast, the Firm's withdrawal cannot be compelled as a term of settlement. For example, in the interest of obtaining a global settlement, opposing counsel may not propose terms requiring the Firm to withdraw from its representation of any non-settling clients. The Firm cannot agree to

[15] *See also* New York State Bar Association Committee on Professional Ethics Opinion #823 June 30, 2018 ("A lawyer cannot continue to represent joint clients in the litigation if their strategies significantly diverge. The lawyer can continue to represent one [or more] of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the courts procedures for withdrawal . . . ").

such terms, which would violate the prohibition in CRPC 5.6(a)(2) of any "agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy." *See* ABA Ethics Opinion 93-371.

Lastly, the departure of some joint clients may lead the Firm to consider whether its representation of other joint clients should proceed for various reasons. For example, the Firm may believe that a settlement proposal is the best possible outcome under the facts and that continued representation of a minority group of non-settling clients would not be financially viable in light of the costs of litigation, particularly if the matter is being handled on a contingent fee basis. CRPC 1.16(b) does not contain the language found in ABA Model Rule 1.16(b)(6), which permits withdrawal if "the representation will result in an unreasonable financial burden." However, CRPC 1.6(b)(10) permits withdrawal if "the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal." The unreasonable costs of continued representation of a small group of clients may provide a basis for withdrawal in accordance with California's rules in the appropriate case.

As discussed briefly in Part 1 of this opinion, the Firm may be able to avoid the unreasonable financial burden associated with continued representation of a client group too small to warrant the costs of litigation, by obtaining at the outset of the representation the clients' informed consent to representation only if a threshold number of clients is reached and maintained throughout the case, or if the clients agree to pay the necessary expenses to continue the litigation if the number of clients falls below the threshold. *See* CRPC 1.2(b) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent."). If the number of clients declines below this threshold and continued representation would create an unreasonable financial burden for the Firm, the limited scope of the representation may allow the Firm to withdraw. *See* Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule,* 81 Fordham L. Rev. 3233, 3274 (2013). However, the Committee is unaware of any cases or ethics opinions that have addressed this type of provision in a joint representation matter.

B. Ethical Obligations in Connection with Termination

In the event the Firm is discharged by one or more joint clients, or withdraws from the representation of one or more clients pursuant to CRPC 1.16, the Firm must take "reasonable steps to avoid reasonably foreseeable prejudice to the rights" of those clients, such as notifying the clients about upcoming deadlines and providing sufficient notice of withdrawal to permit the clients to retain other counsel. CRPC 1.16(d).

Subject to specified exceptions – including a non-disclosure agreement – the Firm must also promptly provide the client file (e.g., correspondence, pleadings, exhibits, and physical evidence) upon the client's request. CRPC 1.16(e)(1). To avoid potential disputes between joint clients at the conclusion of the joint representation, the engagement agreement should address who is entitled to the original of the client file (including whether the Firm can maintain the original). Optimally, the engagement agreement should include each client's consent to the Firm retaining control over the original client file through the conclusion of the matter as to all joint clients. It

should also specify types of information that may not be provided to terminating clients who request the file because, for instance, the information raises privacy concerns for a particular client. In the absence of such provisions in the engagement agreement, the Firm may be able to modify the agreement pursuant to the clients' informed written consent. If the Firm maintains the original client file in electronic form, disputes over its provision may be minimized and any cost of providing a copy of the file would be reduced.

In addition, the Firm must promptly refund any unearned fees or expenses paid in advance by the departing clients, except for a "true retainer" fee (CRPC 1.5(d)), paid solely to ensure the Firm's availability. CRPC 1.16(e)(2).

If the case has not been resolved in its entirety, and the Firm continues its representation of the remaining clients, the Firm must do so in compliance with the ethical obligations outlined in this opinion, including ongoing vigilance as to its duties regarding client communications, confidentiality, and potential conflicts of interest. The Firm must also remain mindful that the duties of confidentiality and loyalty as to departed clients survive the termination of its representation of those clients. CRPC 1.7 [Comment 10], 1.9(c) and Comment [1].

CONCLUSION

The Firm, having made proper disclosures in its engagement agreement and having obtained informed written consent from each client to the joint representation, may ethically continue its joint representation in the mass tort litigation provided it continues to fulfill its ethical obligations, including communicating with its clients; protecting their confidences; evaluating and addressing conflicts; and keeping clients reasonably informed of settlement negotiations and offers. The Firm must also satisfy its ethical obligations when there is a termination of the representation as to some or all of the joint clients.