

City of New York Bar Issues Formal Opinion That Jointly Represented Clients May Not Waive the Right to Approve Aggregate Settlements

Lawyers for the Profession® Alert

Lawyers for the Profession® Alert | 2 min read

Feb 25, 2010

City of New York Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-6 (2009)

Brief Summary

Joining the majority of jurisdictions, the Association of the Bar of the City of New York has concluded that jointly represented clients may not waive the right to approve an aggregate settlement.

Complete Summary

The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, opined that an individual client's right to approve the terms of an aggregate settlement is not waivable, pursuant to Rule 1.8(g). This Formal Opinion is in line with most jurisdictions that have considered the matter, although it also recognizes that in May 2009, the American Law Institute approved the final draft of *Principles of the Law of Aggregate Litigation*, which in § 3.17(b) would allow settling co-plaintiffs to be bound by a substantial majority vote, subject to certain conditions, including informed consent.

The Committee explained why two potential exceptions to the rule prohibiting waiver were not advisable. Specifically, both delegation of settlement authority to the attorney and an agreement to be bound by a majority vote of the clients would impermissibly infringe on the jointly represented client's individual rights to approve an aggregate settlement that would perforce settle the individual's claim along with the other clients' claims.

The Committee explained that both exceptions fail to meet the informed consent requirement of Rule 1.8(g) (the aggregate settlement rule). Stating that informed consent to an advance waiver is virtually a contradiction in

terms in this context, the Committee further noted that the text of Rule 1.8(g) is unequivocal and does not provide for waiver of the informed consent requirement. To bind jointly represented clients, an aggregate settlement agreement requires the expressed and informed written consent of each client. Finally, the Committee conceded that while advance waivers could simplify the settlement process, the lawyer's convenience is outweighed by the importance of the clients' protection against unfair settlements.

Significance of Opinion

This opinion conforms with the majority of courts and Bar ethics committees by drawing a bright line rule regarding the informed consent requirement of Rule 1.8(g), prohibiting advance waivers for aggregate settlements.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.