CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

HANDLING CONFIDENTIALITY, ADVERSE INTERESTS, AND SETTLEMENTS IN GROUP SUITS

Posted on October 25, 2021 by Cyrus Mehta

By Cyrus D. Mehta and Brad Banias*

Immigration lawyers have filed lawsuits on behalf of several hundred plaintiffs challenging various immigration policies. These lawsuits have involved demanding that the government speed up the processing of work permits, or asking the government to reserve visas before the expiration of the program. Many of the lawsuits have resulted in settlements.

What ethical issues must a lawyer consider when signing on plaintiffs as clients? In the event that the government desires to settle, should the lawyer take into account additional ethical considerations?

There are certainly advantages when an attorney represents multiple clients in the same matter. One lawyer representing multiple plaintiffs in a litigation can ensure better coordination and communication. Legal costs are also reduced. On the other hand, the lawyer will be representing plaintiff clients with different expectations regarding the outcome of the same litigation. Representing clients with differing interests can result in conflicts of interest.

Before representing multiple clients in a lawsuit against the government seeking injunctive relief, the lawyer must get informed consent from the clients. ABA Model Rule 1.0(e) provides:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Practice Pointers on What to Communicate to Plaintiff Clients Before Commencing Litigation

Professor Simon recommends that the following pointers, among others, be communicated to multiple clients before embarking on group litigation:

- One lawyer representing multiple plaintiffs can facilitate better coordination and communication, and thus lower expenses.
- However, if the clients get into a dispute with each other, none of them will be able to claim the attorney client privilege as to each other with respect to communications with the common lawyer
- Where the lawyer represents multiple clients in any litigation, some clients may accept a settlement offer while others may not. This can cause conflicts. For example:
- Some plaintiffs may get the benefit they are seeking while others may not, and this can result in competition and jealousy
- If there is a settlement offer, the lawyer will seek informed consent from the clients before participating in a settlement
- In group litigation, where plaintiff clients may have different stories, the lawyer may need to emphasize one client's version of facts over another client's story.
- If the lawyer has a long standing relationship with one client, or likes one over the other, then the lawyer may subconsciously tend to favor the client they like or hope to represent again in other matters.
- If a conflict arises that cannot be resolved, then the lawyer may have to withdraw from representing some or even all the clients. When the lawyer withdraws, then the clients will have to get another lawyer or lawyers, which in turn will result in additional expenses.
- Some information obtained from one client may be shared with the other clients in the group. Clients agree to waive any confidentiality if one client in the group discloses the information to third parties (such as on social media).
- If the lawyer will be seeking fees under Equal Access to Justice Act if victorious, whether all of the clients are eligible for such fees or whether each client receives the same pro rata reimbursement (despite actual work on each individual case).

Although providing the communication as outlined above to multiple plaintiff

clients may be onerous, it may be well worth the effort because a conflict can ruin the relationship not only with the lawyer but also with the other clients. Full disclosure will also alert the clients to the dangers of the multi-party representation, and the lawyer will also be able to get advance notice of any conflicts before launching the litigation on behalf of the group.

Practice Pointers on Communicating with Clients in the event of a Settlement

A settlement may not benefit all the plaintiffs. For instance, if the settlement involves the allocation of a certain number of recaptured visas, then all will not benefit. Moreover, if the settlement in a delay litigation lawsuit only includes the resolution of applications filed as of a certain date, then those plaintiffs who applications were file after that cutoff date will not benefit.

How does the attorney spearheading group immigration litigation of this kind resolve the conflicts that may arise? Another important concern is how must the attorney handle confidentiality issues? If there is a settlement offer involving hundreds of plaintiffs who are likely to communicate every development of the case on social media, how can the attorney ensure confidentiality of such communications?

ABA Model Rule 1.8(g) provides guidance to the lawyer in such instances. It provides as follows:

> 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 each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment 16 to ABA Model Rule 1.8(g) states:

> Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed

> before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain 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 or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). 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.

Although the lawyer already made the appropriate disclosures to obtain informed consent before embarking on litigation, in the event of a settlement offer, Rule 1.8(g) requires the lawyer to again make disclosure before participating in making an aggregate settlement that would “include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” Since Rule 1.8(g) requires obtaining informed consent from each client, taking a decision regarding a settlement based on a majority vote is disfavored. The lawyer would need to specifically disclose what claims will be settled if the plaintiffs accept the offer and what claims may remain if they take the offer.

Rule 1.8(g) intersects with Rule 1.7, which governs how a lawyer needs to go about representing multiple clients when there is a potential or actual conflict. Rule 1.7(a) prohibits a lawyer from representing two or more clients when the representation of one will be directly adverse to the other, or where there is a significant risk that the representation of one client will be materially limited by the lawyer’s responsibilities to the other client. However, Rule 1.7(b) nevertheless allows such representation even if there is a conflict if the lawyer

believes that he or she can still provide competent and diligent representation to the affected client. Rule 1.8(g) also intersects with Rule 1.2(a) which requires the lawyer to abide by a client's decision whether to accept a settlement. Underpinning all of these rules is to ensure that the lawyer has obtained informed consent under Rune 1.0(e) and that the lawyer has appropriately communicated with the client under Rule 1.4 to obtain this informed consent.

Finally, a lawyer must also maintain the confidentiality of communications with all the plaintiff clients under Rule 1.6, although when the lawyer is representing multiple clients, information provided by one client may be shared with the other clients. If the lawyer wishes to keep confidential certain communication with one client, then the lawyer must obtain the informed consent from the entire group that certain communication with individual clients may not be shared with other clients so long as maintaining such confidentiality does not adversely impact the lawyer's ability to represent all the clients competently and diligently. As noted above, plaintiffs may have a propensity to leak out confidential communications with the attorney on social media. While the lawyer may not be able to prevent such disclosure, Rule 1.6(c) states that "a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Good Faith Allegations, Candor to the Court, and Hundreds of Clients You Will Never Meet

Twitter and Facebook are replete with attorney advertising directed at potential plaintiffs who live abroad. Recent group suits—sometimes including thousands of plaintiffs each—challenging travel bans and consular delays, by definition, comprise hundreds of plaintiffs who are currently abroad. In such a situation, it may be impossible to investigate the stories and facts (often provided through a standard, self-guided questionnaire) that are provided by your very own clients. So, how can you be sure the facts are true? What do plaintiffs' counsel need to do to satisfy their obligations under Rule 11 to do a good faith investigation of the facts they aver in a pleading *and* their ethical obligations of candor toward the tribunal?

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The relevant rules and controlling principles are as follows:

Federal Rule of Civil Procedure 11(b)(3):

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . .

Fed. R. Civ. P. 11(b).

ABA Model Rule 3.3:

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . .
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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Best Pre-Allegation Practices:

These apply when you are preparing your case and drafting the pleadings. First, demand copies of actual documents from your clients. Require that clients in the far reaches of the world upload official documents substantiating their claims (receipts from State, USCIS, or Labor; Consular emails; Consular returns; Actual payment receipts). This also includes identity documents that match the potential plaintiffs alleged name, date of birth, and nationality. You should also REVIEW these documents and compare them to the information in the questionnaire. Second, require your clients to sign declarations under 28 USC 1746. This provision of federal law allows individuals to declare factual matters subject to penalty of perjury from inside *and outside* the United States. Whether you attach the declaration to the complaint or not, you now have an additional declaration subject to penalty of perjury to rely upon should a court require you to prove that you had a good faith basis for certain allegations. Third, avoid allegations "upon information and belief." Such allegations also need a good faith basis, though the attorney has more liability exposure on such allegations. Finally, go easy on hyperbolic allegations. Do you have a good faith basis that the consulate refused a visa because of personal animus, political bias, or sheer prejudice? While you may be able to intimate through such possibilities through circumstantial evidence, be mindful of your obligations to have a good faith basis to make certain factual allegations.

Best Post-Allegation Practices:

So, you've filed a pleading with factual allegations and, now, you've learned they are not true. First, determine whether the allegations are material and require remedial action. If the false allegation relates to something immaterial, there is likely no duty under Rule 3.3 to conduct remedial measures. However, it is a good practice to go ahead and correct any falsity through an errata, footnote, or notice. Again, while it may not be required because the "falsity" is immaterial and will be "fixed" through the course of litigation, there is a strategic benefit to fix the misstatement before the government points it out to attack you and your client's credibility. Second, if it is a material misrepresentation, you must take "reasonable remedial measures." Of course, there is no black and white on what is a "reasonable" remedy for correcting falsities. But the remedial

measure must fix the misstatement. Reasonable measures may include an amended pleading with the proper information; a notice of correction of certain facts; or a supplemental declaration from the client correcting the information. There is no way to identify all possible remedies, but one principal is clear: you must identify and fix the falsity. And unfortunately, if the client refuses to fix the falsity and demands you push the case forward based on the falsity, you will likely need to withdraw from representation based on an irreconcilable conflict *and* notify the court of the falsity. This can be very tricky in a group case to have one plaintiff unrepresented (who lives somewhere far, far away) while you continue forward with the remainder of the group.

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See Simon's New York Rules of Professional Conduct Annotated Volume 1, §1.7:81, 2020-21 Edition.

To bind multiple clients jointly represented by the same lawyer, an aggregate settlement requires the informed written consent of each and every client, and the requirement of individual informed consent may not be waived by any of the jointly represented clients. See NYC Bar Opinion 2009-06, available at https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/aggregate-settlements-formal-opinion-2009-06