

MINUTES

COMMITTEE: Ethics Committee

DATE: April 3, 2008

4. CHAPTER 6, RULE 4: WHETHER LAWYER CAN DISREGARD RULE 4(b) WITH CLIENT CONSENT

A lawyer is proposing to represent approximately 100 clients in an action against a number of defendants arising out of an investment scheme that caused the plaintiffs to collectively lose about 6 to 7 million dollars. The losses for any one plaintiff are not sufficient to outweigh the costs of litigation but if the plaintiffs undertake a joint litigation the costs of proceeding measured against the potential return may be economical.

A difficulty arises at the outset because not all potential plaintiffs want to sue all the potential defendants, of which there are six. A subset of the plaintiffs do not wish to sue one defendant, Mr. A. The lawyer calls the plaintiffs who wish to sue all potential defendants "Class A". He calls the remaining potential plaintiffs who wish to sue all defendants except Mr. A "Class B."

The lawyer asked the Committee whether it is proper for his firm to jointly represent all plaintiffs on the understanding that the plaintiffs in Class B, after receiving independent legal advice concerning the issue, would not receive information concerning Mr. A.

The Committee noted that Rule 4(b) requires a lawyer acting jointly for two or more clients to advise each client that no information received from one of them as a part of the joint representation can be treated as confidential as between them. It was the Committee's view that the lawyer cannot contract out of this obligation with the Class B clients, even if those clients agree to do so after having received independent legal advice concerning the issue.

In the opinion of the Committee, a lawyer cannot properly represent a client, including receiving instructions from the client in appropriate circumstances, while withholding information from the client that is relevant or may become relevant to the client's case. The lawyer would inevitably be placed in that position were the lawyer to attempt the joint representation of both Class A and Class B plaintiffs on the basis he contemplates.