

Ethics Opinion No. 74-1

Propriety of Agreements Between Plaintiff and One of Two Co-Defendants Which Changes Alignment of One or More Parties.

Facts

The plaintiff in a suit for personal injuries entered into an agreement which, where only one of two codefendants was involved, (1) minimizes the negligence of the agreeing defendant, (2) places major responsibility on the non-agreeing defendant, (3) releases the agreeing defendant from any liability outside the agreement, (4) requires the payment of \$10,000 to the plaintiff immediately, (5) requires the payment of an additional \$10,000 to the plaintiff in the event that the ultimate recovery is less than \$20,000, and (6) requires that the agreeing defendant remain in the suit as a defendant.

In addition, the agreeing defendant has also filed a crossclaim against the non-agreeing defendant, although not until after a question had been raised as to the legal and ethical propriety of the agreement. All parties to the action are aware of the existence and terms of the agreement. Counsel for the plaintiff has stated that he intends to use the proceeds to pay expenses of the litigation against the non-agreeing defendant.

Question

Does this agreement constitute maintenance or champerty, or a violation of the Code of Professional Responsibility?

Opinion

It is the opinion of the Committee that the agreement is not maintenance or champerty and that the agreement is not unethical so long as it is disclosed to the court prior to trial.

Discussion

Maintenance is the common law offense of financing litigation, while champerty is that species of maintenance which provides for the return of a portion of the recovery to one advancing financial assistance. The gist of these offenses is the officious intermeddling in the suit of another by a stranger. Here, the agreeing defendant has for his purpose the limitation of his own liability, a proper litigation objective.

Nor is plaintiff's counsel involved in maintenance. The Code of Professional Responsibility affirms the propriety of attorneys advancing the

cost of litigation so long as the ultimate liability for such costs remain that of the client. EC 5-8; DR 5-103 (B).

Thus the above agreement does not constitute maintenance or champerty.

The agreement changes the expected interests of the agreeing defendant. Prior to the agreement his interests were (1) to establish that he was not negligent and (2) to minimize damages. Subsequent to the agreement (disregarding the cross-claim which appears to have been filed as an afterthought) the agreeing defendant has no interest in establishing that he was not negligent, has no interest in minimizing damages and, in fact, is affirmatively interested in establishing that damages are greater than \$20,000. Thus the agreement radically alters the agreeing defendant's expected interest in the outcome of the litigation.

Altering the usual interest of a party by such an agreement is not wrong, in itself, so long as there is no pretense that his interest remains unchanged. *City of Tucson v. Gallagher*, 483 P.2d 798 (Ariz. 1971) 493 P.2d 1197 (1972) and *Maule Industries v. Roundtree*, 264 So.2d 445 (Fla. App. 1972). In *Breitkreutz v. Baker*, Opinion No. 936, Supreme Court of Alaska (1973), our Supreme Court indicated that where there is an agreement which changes the usual interests of a party, disclosure of the change to the trier of fact is mandatory. The court, however, did not disapprove of the agreement and relief (upon the case of *Pellett v. Sanatone Corp.*, 160 P.2d 783 (Cal. 1945), where the California Supreme Court gave tacit approval of such an agreement accompanied by full disclosure.

The Committee believes that agreements which change the anticipated alignment of one or more parties may be distinctly useful in accomplishing such legitimate litigation objectives as compensating an injured party and limiting the potential liability of a defendant; however, to guard against an express or implied misrepresentation of a party's actual interest after such an agreement is made, it is essential that there be disclosure of such an agreement to the court and to all the parties when the agreement is made.

Adopted by Board of Governors on May 15, 1974.