

MEMORANDUM

August 6, 2021

TO: Plaintiffs' Executive Committee (PEC), National Prescription Opiate Litigation,
U.S. District Court N.D. Ohio, MDL No. 1:17-MD-2804

FROM: Professor Lynn A. Baker
Professor Samuel Issacharoff

RE: Ethical Obligations Related to the Janssen and Distributors Settlement
Agreements (dated July 21, 2021)

We have been asked by the Plaintiffs' Executive Committee (PEC) appointed by MDL Judge Dan Polster in the National Prescription Opiate Litigation to provide an expert opinion on specific ethical obligations that arise from the Distributor Settlement Agreement and the Janssen Settlement Agreement, both announced on July 21, 2021. The question presented to us concerns the ethical obligations of Plaintiffs' Attorneys that arise from the structure of the relief obtained under the Settlements. For the reasons set forth, our expert opinion is that the structure and details of the Settlements impose certain distinct ethical obligations on any attorney representing a Participating Subdivision in the Settlements. This opinion Memorandum addresses only the circumstances of attorneys who represent Participating Subdivisions and the effect of those obligations on an attorney's ability ethically to solicit and/or to accept new clients — i.e., those that were not litigating at the time the Settlements were announced, who seek to litigate similar claims against the settling Distributors and/or Janssen (collectively, the "Settling Defendants").

1. The primary ethical concern from our perspective arises from the multiyear payment structure of the Settlements and the yearly downward adjustments resulting from later litigations against the Settling Defendants. The payment levels to each Participating Subdivision are subject to annual recalibration to reflect the level of new litigation against the Settling Defendants. As a result, the decision of a Subdivision to file suit after the commencement of the Settlements would result in a downward adjustment of recoveries for those Subdivisions that had already accepted the settlement resolution and had become Participating Subdivisions. Exhibit D to the Distributor Settlement Agreement and Section IX of the Janssen Settlement Agreement establish the adjustments made to settlement proceeds based on the varying levels of participation in the Settlements. As then set out in Exhibit H of the Agreements, and in footnotes 3 and 4 of those Exhibits, the payment level for the subdivisions of any state is dependent upon the level of participation by the other political subdivisions across the states. The Agreements define the Participation Tier to be "commensurate with the percentage of Litigating Subdivisions in that State that are Participating Subdivisions." At its most basic, over the lifespan of the Agreements, the more Later Litigating Subdivisions there are, the lower the payouts from the Agreements for Participating Subdivisions. Future

decisions by Non-Participating Subdivisions to retain new counsel and to litigate affect the amount of recovery of those who have settled.

2. Our bottom line is that any attorney who represents one or more Participating Subdivisions in the Settlements would have a conflict if that attorney also seeks to represent any new entity whose entry into the litigation arena would adversely affect currently represented parties. As a general matter, an attorney may not take on subsequent representations that are adverse to the interests of an already represented client in an ongoing matter. Applied to these Settlements, an Attorney representing a Participating Subdivision could not ethically also represent a Later Litigating Subdivision because of the impact of that subsequent representation on the attorney's Participating Subdivision. The details of the structure of the Settlements render the representation of such a new Later Litigating Subdivision a conflict of interests for such an attorney, in violation of ABA Model Rule 1.7 and its equivalent in every state.
3. The Global Settlement Abatement Amount to be paid under the Settlement Agreements is structured as a variable series of annual payments. The yearly payout structure under the Settlements is a maximum amount that may be reduced (but not increased) depending on various events, including the presence of a Later Litigating Subdivision. The entry of a Later Litigating Subdivision adversely affects the Abatement Amount available to Participating Subdivisions by: (a) adversely affecting the annual Participation Tier Determination; (b) adversely affecting the annual amount of Base Payments (by causing Offsets and Suspensions); and (c) adversely affecting the annual amount of Incentive Payments. By definition, Later Litigating Subdivisions are political units that have not filed suit as of the time of the Settlements. The decision to file suit is a condition subsequent that lowers the recovery of Participating Subdivisions. Thus, by representing a new Subdivision client who is not a Litigating Subdivision at the time of the Settlements but subsequently becomes a Later Litigating Subdivision, an attorney who represents a Participating Subdivision would be taking actions adverse to the Participating Subdivision in connection with the Settlements, in violation of Rule 1.7.
4. Consistent with Paragraph (2) above, it also would be an impermissible conflict of interests under Rule 1.7 for an attorney who represents a Participating Subdivision to charge or accept a referral fee in connection with another attorney's representation of a Later Litigating Subdivision. Because the attorney could not personally represent the Later Litigating Subdivision, the fees related to that representation would constitute a personal interest of the attorney which conflicts with the attorney's representation of the Participating Subdivision, in violation of Rule 1.7.
5. An attorney who represents a Participating Subdivision in the Settlements also cannot ethically engage in any advertising or solicitation for representations involving a new, Later Litigating Subdivision. Ordinarily, it is a violation of ABA Model Rule 5.6 and its state equivalents for a settlement agreement to restrict an attorney from advertising for new clients with similar claims against the defendant(s). See, e.g., Tex. Prof'l Ethics Comm., Op. 505 (1994) and Op. 590 (2009); S.C. Bar Ethics Advisory Comm., Op. 10-04 (2010). Such a restriction is problematic because advertising and solicitation are

protected under the umbrella of an attorney's right to practice law. As explained in Paragraph (2) above, however, an attorney who represents a Participating Subdivision in the Settlements cannot ethically represent a Later Litigating Subdivision. Thus, the restriction on advertising and solicitation set out in Exhibit R to the Settlement Agreements does not improperly restrict an attorney's practice of law and, indeed, further ensures that the attorney does not seek a new representation that conflicts with the attorney's representation of a Participating Subdivision.

6. Nothing expressed in this opinion Memorandum alters the obligations of the PEC to discharge the functions for which it was appointed by the MDL court. Similarly, none of the above ethical restrictions otherwise interfere with an attorney's obligations and duties to their clients which are Litigating Subdivisions, whether Participating or Non-Participating.