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The Path to Aggregate Settlements

By Chad R. Hutchinson and Donna Brown Jacobs – May 21, 2012

Aggregate settlements have increased in popularity over the past decade, driven in part by mass-tort litigation and the liberal joinder rules in some states. The proliferation of attorney advertising has meant that plaintiffs' counsel often represents hundreds or even thousands of people asserting the same type of claim against a common defendant. These claims do not qualify for class-action treatment, but counsel nevertheless seeks to leverage the sheer number of plaintiffs into a settlement. The defendant sees an opportunity to dispose of most or all claims in a single transaction. The situation is often further complicated when these counsel associate with other attorneys, often in other parts of the country, and then find themselves representing claimants they have never met and perhaps will never meet.

Attorneys representing multiple parties, and those negotiating with them, must understand the ethical and practical considerations involved in proposing or accepting aggregate settlements. Although Model Rule of Professional Conduct 1.8(g) specifically addresses "aggregate settlements" and "aggregated agreements," those terms are not defined in the rules. In 2006, the ABA Committee on Ethics and Professional Responsibility issued a formal opinion defining an aggregate settlement or aggregated agreement as one where "two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas." *See* ABA Formal Opinion No. 06-438. Thus, it is not necessary for the settling plaintiffs to assert their claims in the same lawsuit, but they must be represented by the same lawyer who wants to resolve their claims together. Similarly, a settlement is "aggregate" even if not all of the lawyer's clients participate—it takes only two. It does not matter whether the settling defendant specifies the amount to be paid to each individual plaintiff or simply agrees to pay a lump sum that the plaintiffs' counsel will later divide. The obligations and concerns are the same.

These aggregate settlements present a unique set of potential conflicts and risks for both the attorney and his or her clients. Settling defendants also face the risk that their settlements will be "undone" because the plaintiffs' counsel did not comply with ethical obligations to all clients. Attorneys on both sides of the bar must recognize that each client is the ultimate decision-maker for that client's claim and ensure that each client receives all information necessary to make an informed decision on the settlement of that claim.

What Are the Special Considerations?

Rule 1.8(g) of the Model Rules of Professional Conduct outlines the road attorneys must follow with regard to aggregate settlements. The 2006 formal opinion issued by the ABA Committee on Ethics and Professional Responsibility provided a detailed account of Rule 1.8(g). This section addresses the ABA's findings.

The rule supplements and amplifies ordinary duties that exist outside the aggregate settlement arena, including the duty of loyalty (Rule 1.7), the duty to defer to the client as the ultimate

decision-maker (Rule 1.2), and the duty to provide information reasonably necessary to make those decisions (Rule 1.4). These additional safeguards are necessary in the context of aggregate settlements for at least two reasons. First, there is the potential for the attorney, even unconsciously or inadvertently, to favor the interests of one client over another. Second, there is a temptation to settle many claims at once, for an aggregate fee, without really developing each client's claim. *See In re Hoffman*, 883 So. 2d 425, 432 (La. 2004) (holding that an attorney owes his or her clients an equal degree of loyalty and "[t]he requirement of informed consent cannot be avoided by obtaining client consent in advance to a future decision by the attorney or the majority of the clients about the merits of an aggregate settlement."); *see also Arce v. Burrow*, 958 S.W. 2d 239, 245 (Tex. App. Ct. 1997), judgment aff'd in part, rev'd in part on other grounds, 997 S.W. 2d 229 (Tex. 1999) (citations omitted) (holding that "[s]ettling a case in mass without consent of the clients is unfair to the clients and may result in a benefit to the attorney (speedy resolution and payment of fees) to the detriment of the clients (decreased recovery).").

Rule 1.8(g) addresses these risks by requiring an attorney representing multiple clients to seek and gain the informed consent of all represented clients involved in the settlement before accepting the offer. "Informed consent" is a term of art under the Professional Rules of Responsibility. In the aggregate settlement context, informed consent requires the attorney to disclose certain information to all represented clients and, following disclosure, to obtain each client's "informed consent" in writing to the terms of the aggregate settlement. Rule 1.8(g) requires an attorney to disclose to the clients for whom or to whom the settlement or agreement is offered the following:

- The total amount of the aggregate settlement or the result of the aggregated agreement;
- The existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregate agreement;
- The details of every other client's participation in the aggregate settlement or aggregated agreement, whether it is their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution;
- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties; and
- The method by which costs, including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds, are to be apportioned among them.

Surely There Is an Easier Way to Do This

There are no shortcuts here. The client should never be asked to waive the right to approve an individual settlement. The attorney cannot, for example, get permission "in advance" to facilitate the negotiation of an aggregate settlement and work out the individual details later. A specific offer or demand must be on the table, and the disclosures must be in the context of that specific offer or demand. *See Hoffman,* 883 So. 2d at 432–33 (holding that an attorney may not avoid the

disclosure requirements of Rule 1.8(g) by obtaining client consent in advance to a future decision by the attorney or the majority of the clients to accept an aggregate settlement).

The clients also cannot agree to "majority rule," where if the majority of affected plaintiffs is in favor of the settlement, it is a done deal. Several courts have held that fee agreements that permit settlements based on a "majority vote" of the clients represented violates Model Rule 1.8(g). *See The Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 187 N.J. 4, 8–23 (N.J. 2006); *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892, 894–95 (10th Cir. 1975). In *Jackson Hewitt*, the New Jersey Supreme Court held that an attorney fee agreement, which provided for approval of settlement offers by majority vote of the represented clients in a matter, was unenforceable and violated Model Rule 1.8(g). *Id*. at 22–3. Specifically, the agreement in *Jackson-Hewitt* provided that "the matter may be resolved by settlement as to any portion or all of the Matter upon a vote of a weighted majority of the Client and all of the Co-Plaintiffs." *Id*. at 10. The court held that the attorney's failure to obtain the prior informed consent of all represented clients rendered any settlement void and constituted a violation of the Professional Rules of Responsibility. *Id*. at 21.

The Tenth Circuit in *Hayes* also dealt with the issue of agreements between counsel and multiple clients represented in a single action that permit approval of settlements by majority vote. *Hayes*, 513 F.2d at 892–5. In *Hayes*, counsel for multiple plaintiffs entered into an agreement that all settlement offers could be approved by majority vote. *Id*. at 892–3. On the eve of trial, the plaintiffs' counsel agreed to a settlement offer despite several clients' disapproval. The Tenth Circuit held that the agreement allowing for approval of settlement by majority vote was "violative of the basic tenets of the attorney-client relationship in that it delegates to the attorney powers which allow him to act not only to the contrary of the wishes of his client, but to act in a manner disloyal to his client and to his client's interest." *Id*. at 895. As a result, the settlement was set aside.

ALI's Principles of the Law of Aggregate Litigation

In May 2009, the American Law Institute (ALI) adopted Principles of the Law of Aggregate Litigation (PLAL). The PLAL propose a modification of Model Rule 1.8(g) to allow claimants to agree in advance, under limited circumstances, to be bound by "a substantial majority vote" in favor of a settlement. *Principles of the Law of Aggregate Litig.* § 3.17(b); *see also* § 3.17(c)-(f) (providing additional requirements for the use of an alternative to the traditional aggregate settlement rule). Whether the courts recognize this variant from the norm remains to be seen.

How Can You Make Sure You and/or Your Clients Don't Get Burned?

If you represent multiple parties:

- Solicit and listen to clients' goals prior to agreeing to representation, and make sure everyone understands your duty to each client is the same.
- Discuss the possibility of aggregate settlements at the outset of representation.
- Make the disclosures, document every step, and get the written consent.

If you represent a party settling with multiples who share a common lawyer, make compliance with Rule 1.8(g) a term of your settlement agreement. At least it might cause the opposing attorney to stop and ask what that means.

Conclusion

Aggregate settlements are possible and, in many cases, desirable. Model Rule 1.8(g) protects clients and their attorneys and provides the path to aggregate settlements that are final and enforceable.

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