

The Aggregate Settlement Rule: A Rule in Search of a Definition

By Mark J. Fucile

WITH THE advent over the past quarter century of “global” settlements of “mass” torts, the aggregate settlement rule—American Bar Association Model Rule of Professional Conduct 1.8(g)—has come to play an increasingly central role in the settlement calculus of counsel for plaintiffs and defendants alike.¹ Oddly, however, the term “aggregate settlement” has never been defined in the rule, its predecessors or its accompanying comments. The absence of a definition is not merely academic. Because ABA Model Rule 1.8(g) and its state counterparts² impose very strict disclosure obligations, failure to follow the rule raises the specter that the settlement involved will be unenforceable and creates the risk of a wide variety of other serious consequences to claimants’ counsel that

¹ See generally Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000); Samuel Issacharoff and John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

² Links to state counterparts are available on the ABA Center for Professional Responsibility’s web site at www.americanbar.org/groups/professional_responsibility. California is presently the only state that has not adopted the ABA Model Rules. It, too, however, has an aggregate settlement rule, California R.P.C. 3-310(D). The California rule does not define the term “aggregate settlement” either.



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may effectively impede their willingness to entertain collective resolutions.³ Given the severity of the rule’s obligations and the attendant consequences if unmet, the absence of a definition creates significant practical uncertainty about when the rule does and does not apply. This definitional uncertainty becomes very real in an era when “group” settlement conferences and multi-case mediations frequently put more than one case on the proverbial negotiating table at the same time.

This article will examine three facets of the aggregate settlement rule. First, the rule and attempts at an accompanying definition are surveyed. Second, the practical effects of the lack of a definition

³ The disclosure obligations imposed by ABA Model Rule 1.8(g) are not limited to claimant’s counsel. As a practical matter, however, that is the most common application of the rule.

are discussed. Third, practical solutions from the defense perspective are offered to address the uncertainty arising from the absence of a clear definition.

I. The Aggregate Settlement Rule and Attempts at a Definition

ABA Model Rule 1.8(g) currently reads:

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.

The rule reached its present form as a part of the general "Ethics 2000" amendments to the ABA Model Rules adopted by the ABA House of Delegates in 2002.⁴ A comment addressing the rule was added to Model Rule 1.8 at that same time:

Aggregate Settlements
[13] 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.

Aside from the addition of the comment in 2002, the aggregate settlement rule has remained essentially unchanged since it was included in the original ABA Model Rules adopted in

⁴ See generally ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, 183-218 (2006) (hereinafter, "ABA Legislative History").

1983⁵ and the former ABA Model Code of Professional Responsibility adopted in 1969.⁶ Notably, however, the rule has never included a definition of “aggregate settlement.” The legislative history of the rule does not illuminate this fundamental aspect either. The report of the “Ethics 2000” Commission, for example, simply noted that “aggregate settlements entail settlement offers posing potentially serious conflicts of interest between the clients[.]”⁷ It also emphasized the point made in the comment that the rule does not include class actions: “[Comment 13] reminds lawyers involved in class actions that, while this Rule does not apply, lawyers must comply with procedural requirements regarding notification of the class.”⁸

A similar report accompanying the original 1983 Model Rules observed that then-new ABA Model Rule 1.8(g) was functionally similar to its predecessor under the ABA Model Code, DR 5-

106(A).⁹ The Model Code provision, in turn, cross-referenced an ABA formal ethics opinion from 1941 that did not deal with a multiple settlement with a “cf.” cite.¹⁰

State rules of professional conduct, which unlike the ABA Model Rules, are mandatory regulations, do little better. They largely mirror the ABA Model Rule. Those that do vary from the ABA Model Rule do so primarily by way of exclusion. Louisiana and North Dakota, for example, echo Comment 13 to ABA Model Rule 1.8(g) by specifically excluding class actions from their aggregate settlement rules.¹¹ Similarly, Ohio and New York exclude court-approved settlements altogether.¹²

More recently, the ABA’s Standing Committee on Ethics and Professional Responsibility issued a formal ethics opinion addressing the aggregate settlement rule. ABA Formal Ethics Opinion 06-438 (2006) acknowledged the lack of a definition and attempted to supply one:

An aggregate settlement or aggregated agreement occurs when two or more clients who are

⁵ The principal change in the text of the rule in 2002 was to require that client consent be in writing and signed by the client. ABA LEGISLATIVE HISTORY at 198.

⁶ Former ABA DR 5-106(A) read:

“A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.” *Reprinted in* ABA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY 55 (1986).

⁷ *Reprinted in* ABA Legislative History at 207.

⁸ ABA Legislative History at 207.

⁹ “Paragraph (g) is substantially identical to DR 5-106.” *Reprinted in* ABA Legislative History at 195.

¹⁰ ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6 at 55 n.41. The ABA ethics opinion cited—235—dealt with lawyers who were paid by insurance companies to represent the administrators of estates to obtain approval of settlements in wrongful death cases.

¹¹ *See* North Dakota R.P.C. 1.8(g); Louisiana R.P.C. 1.8(g).

¹² *See*, respectively, Ohio R.P.C. 1.8(g); New York R.P.C. 1.8(g).

represented by the same lawyer together resolve their claims or defenses or pleas. It is not necessary that all of the lawyer's clients facing criminal charges, having claims against the same parties, or having defenses against the same claims, participate in the matter's resolution for it to be an aggregate settlement or aggregated agreement. The rule applies when any two or more clients consent to have their matters resolved together.¹³

Formal Ethics Opinion 06-438 notes that Comment 13 excludes settlements in class and shareholder derivative actions.¹⁴ Formal Ethics Opinion 06-438 also does not address "multi-party representation in bankruptcy cases."¹⁵ Despite its seeming sweep, Formal Ethics Opinion 06-438 remains tethered to the fact that RPC 1.8 is a rule addressing conflicts and, therefore, for any multiple settlement to be an "aggregate" one, it must invoke a

conflict.¹⁶ As noted earlier, Comment 13 to Model Rule 1.8 describes the aggregate settlement rule as a "corollary" to the general conflict rule stated in Model Rule 1.7. Formal Ethics Opinion 06-438's own definitional failing, therefore, is that it does not describe the precise conflicts embedded in a settlement that trigger imposition of the rule.¹⁷

Case law suggests two broad kinds of conflicts supply the requisite trigger. Settlements that are offered on an "all or nothing" basis invoke the rule because they effectively pit the lawyer's (or law firm's) clients against each other.¹⁸ In this sense, the rule is a corollary to Model Rule 1.7(a)(1)'s definition of a multiple client conflict as one in which "the representation of one client will be directly adverse to another client[.]" Settlements that leave the lawyer (or law firm) with the sole authority to allocate an overall amount among jointly represented clients also invoke the rule because they potentially compromise the lawyer's professional judgment by choosing among joint clients—to whom the lawyer

¹³ ABA Formal Ethics Opinion 06-438, at 2 (2006) (footnote omitted).

¹⁴ *Id.* at 1 n.3.

¹⁵ *Id.* The rationale for excluding bankruptcy claims is not discussed further in Formal Ethics Opinion 06-438. As noted earlier, however, some states such as New York exclude settlements from the rule when they are court-approved. Courts in other jurisdictions have reached the same conclusion in decisional law, including the bankruptcy context. *See, e.g., In re Central Ice Cream Co.*, 114 B.R. 956, 964 (N.D. Ill. 1989); *In re Matter of an Anonymous Member of the South Carolina Bar*, 377 S.E.2d 567, 568 (S.C. 1989); *Dunn v. Canoy*, 636 S.E.2d 243, 246-247, 254 (N.C. App. 2006).

¹⁶ Model Rule 1.8 is entitled: "Conflict of Interest: Current Clients: Specific Rules."

¹⁷ State and local bar associations have also struggled with the definition. *See, e.g., New York City Bar Ass'n Formal Op.* 2009-6 at 2 (2009) (using the definition from ABA Formal Ethics Opinion 06-438); *Oregon State Bar Formal Ethics Op.* 2005-158 at 433 (2005) (defining an aggregate settlement as an "all or nothing" proposal).

¹⁸ *See, e.g., Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892, 894 (10th Cir. 1975); *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 517-523 (N.J. 2006). For this reason, courts have also held that "majority rule" provisions are not enforceable in this context. *Id.*

owes each a duty of undivided loyalty.¹⁹ In this sense, the rule is a corollary to Model Rule 1.7(a)(2)'s definition of a material limitation conflict as one in which "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client[.]"

By contrast, case law also suggests that individual settlements which are not linked together even though negotiated in a "collective" setting do not invoke the rule because they do not create multiple client conflicts among the clients involved.²⁰ Similarly, if a lawyer's clients have agreed on a division of a total sum among themselves without the lawyer negotiating between them, case law suggests that the rule is not invoked because there is no "material limitation" on the lawyer's professional judgment.²¹

Beyond the professional rules, the American Law Institute in 2010 issued its *Principles of Law for Aggregate Litigation*. *Aggregate Litigation* deals primarily with class actions. But, it also addresses aggregate settlements outside

that context.²² Section 3.16 includes a definition that focuses on interdependence:

§ 3.16 Definition of a Non-Class Aggregate Settlement

- (a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.
- (b) The resolution of claims in a non-class aggregate settlement is interdependent if:
 - (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number of or specified percentage of the claimants or specified dollar amount of claims; or
 - (2) the value of each claimant's claims is not based solely on individual case by case-by-case facts and negotiations.
- (c) In determining whether claims are interdependent, it is irrelevant whether the settlement proposal was originally made by plaintiffs or defendants.

The Comment to Section 3.16 refers to the concepts articulated in subsections (b)(1) and (b)(2) as, respectively,

²² The ALI's Restatement (Third) of the Law Governing Lawyers (2000) addresses aggregate settlements briefly in Comment d(i) to Section 128. It does not offer a definition.

¹⁹ See, e.g., *In re Disciplinary Proceedings Against McNeely*, 752 N.W.2d 857, 859-860 (Wis. 2008); *In re Disciplinary Proceedings Against Berlin*, 743 N.W.2d 683, 686-687 (Wis. 2008); *State ex rel. Oklahoma Bar Ass'n v. Watson*, 897 P.2d 246, 252-253 (Okla. 1995).

²⁰ See, e.g., *Authorlee v. Tuboscope Vetco Intern., Inc.*, 274 S.W.3d 111, 120-121 (Tex. App. 2008); *Attorney Grievance Commission of Maryland v. Engerman*, 424 A.2d 362, 368 (Md. 1981).

²¹ See, e.g., *Baugh v. Baugh*, 973 P.2d 202, 206-07 (Kan. App. 1999); see also *Oregon State Bar Formal Ethics Op.* 2005-158 at 434.

“collective conditionality” and “collective allocation.”²³ In many respects, these concepts reflect the case law just discussed. Although cases addressing the ALI formulation are few, the principal reported appellate decision to date that does, *Tilzer v. Davis, Bethune & Jones, L.L.C.* notes that “interdependency is the key.”²⁴

In sum, despite existing for over 40 years, the aggregate settlement rule has never contained a comprehensive definition. That absence creates significant practical uncertainty that will be addressed next.

II. Practical Effects of the Lack of a Definition

Many—if not most—settlements of mass torts occur outside the context of class actions. Since the Supreme Court’s decisions in *Amchem Products, Inc. v. Windsor*²⁵ and *Ortiz v. Fibreboard Corp.*,²⁶ it has become increasingly difficult to obtain class certification in the mass tort context.²⁷ At the same time, mass tort cases are often “collected” procedurally by other means, such as federal multidistrict litigation under 28

U.S.C. § 1407 or specialized dockets at the state court level.²⁸ That, in turn, means that mass tort cases are often settled in groups, whether through direct negotiations or court-sponsored or private mediation. In this environment, the lack of a definition of “aggregate settlement” and the corresponding uncertainty over when it applies has three primary practical effects.

Claimants’ counsel face a wide range of adverse consequences if they “guess wrong” and fail to adequately disclose and document a settlement that is determined later to be an “aggregate” one. The consequences include potential regulatory discipline, disqualification, civil damage claims for breach of fiduciary duty, fee disgorgement and, at the extreme, even possible criminal prosecution.²⁹

If it is determined later that a settlement is “aggregate” and the requisite disclosure and documentation was not obtained, the agreement itself may be subject to rescission. The rationales vary, but include lack of authority by the lawyer involved to bind the clients and

²³ See also Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005). Professor Erichson’s article first used these terms now found in Section 3.16.

²⁴ 204 P.3d 617, 628 (Kan. 2009).

²⁵ 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed2d 689 (1997).

²⁶ 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed2d 715 (1999).

²⁷ See, e.g., *In re Welding Fume Products Liability Litigation*, 245 F.R.D. 279 (N.D. Ohio 2007); *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450 (E.D. La. 2006).

²⁸ See, e.g., the web sites for the U.S. Judicial Panel on Multidistrict Litigation and the San Francisco Superior Court’s Asbestos Department at respectively, www.jpml.uscourts.gov and www.sfsuperiorcourt.org.

²⁹ See, e.g., *In re Hoffman*, 883 So.2d 425 (La. 2004) (regulatory discipline); *Abbott v. Kidder Peabody & Co., Inc.*, 42 F. Supp.2d 1046 (D. Colo. 1999) (disqualification); *Waggoner v. Williamson*, 8 So.3d 147 (Miss. 2009) (claim for breach of fiduciary duty); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (fee forfeiture); *U.S. v. Gallion*, 257 F.R.D. 141 (E.D. Ky. 2009) (criminal prosecution).

the refusal to enforce contracts that violate law or public policy.³⁰

Proactively treating virtually all multiple settlements as falling within the aggregate settlement rule is easier said than done. ABA Model Rule 1.8(g) on its face requires disclosure of “the existence and nature of all of the claims or pleas involved and of the participation of each person in the settlement” and that client consent be countersigned in writing. ABA Formal Ethics Opinion 06-438 goes further and finds that for the requisite client consent to be “informed,” the following “minimum” information must be provided to the client:

- The total amount of the aggregate settlement[.]
- The existence and nature of all of the claims, defenses . . . involved in the aggregate settlement[.]
- The details of every other client’s participation in the aggregate settlement . . . , whether it be their settlement contributions, their settlement receipts . . . or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).

³⁰ See, e.g., *Knisley v. City of Jacksonville*, 497 N.E.2d 883 (Ill. App. 1986) (lack of authority); *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225 (Tex. App. 1985) (violation of public policy).

- 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.
- 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.³¹

Formal Ethics Opinion 06-438 notes further that “[i]f the information to be disclosed in complying with Rule 1.8(g) is protected by Rule 1.6 [the confidentiality rule], the lawyer must first obtain informed consent from all his clients to share confidential information among them.”³² Finally, Formal Ethics Opinion 06-438 concludes that “[t]hese detailed disclosures must be made in the context of a specific offer . . . [and] the informed consent required by the rule generally cannot be obtained in advance[.]”³³ In short, meeting the

³¹ ABA Formal Ethics Opinion 06-438 at 5 (footnotes omitted). The opinion acknowledges that these additional requirements are not contained in either the rule or the comment and that some courts have held otherwise. *Id.*

³² *Id.* at 6.

³³ *Id.* at 6 (footnote omitted). Section 3.17 of ALI’s *Aggregate Litigation* would allow (subject to specified criteria) advance consent and majority rule. The ALI approach is not without critics. See, e.g., Nancy J. Moore, *The American Law Institute’s Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group*

requirements of the rule in situations involving more than a handful of clients can present significant logistical hurdles.

III. Practical Solutions In the Face of Uncertainty

There is, of course, no prohibition on making an aggregate settlement proposal. It is permitted by both the face of the rule and interpretative case law.³⁴ Further, the rule puts both the requirement of disclosure and informed consent squarely on claimants' counsel, and courts have imposed severe sanctions on claimants' counsel for failure to meet that standard. From the defense perspective, the critical issue is attempting to ensure that a settlement is enforceable. This is a more complex task than simply including a provision in the settlement agreement obligating claimants' counsel to comply with the rule.³⁵ As noted earlier, courts holding that failure to comply with the rule renders the agreement unenforceable usually reach such a conclusion based on a lack of authority on the lawyer's part, public policy grounds, or some combination.

From the defense perspective, a more prudent approach to increase the prospect of enforceability is to structure the proposal in a way that removes it from the ambit of the rule altogether. Definitional uncertainty notwithstanding,

Decision Making? 57 DEPAUL L. REV. 395 (2008).

³⁴ See, e.g., *Williams v. St. Paul Companies*, 492 S.E.2d 560, 561 (Ga. App. 1997).

³⁵ See, e.g., *In re New York Diet Drug Litigation*, No. 700000/98, 2007 WL 969426 at *7 (N.Y. Sup. Mar. 27, 2007).

case law suggests three primary threads to this approach.

- **Opt-Out.** One solution is to structure the proposal so that individuals can “opt out.” Whether viewed through the ABA prism of the conflict rules or the ALI paradigm of “collective conditionality,” giving individual claimants the ability to opt out without affecting other claimants' ability to settle effectively breaks any link between settlements that may simply be negotiated at the same time or through the same process. Without that link, there is no multiple client conflict under either Model Rule 1.8(g) or 1.7(a)(1).
- **Specify.** Even in a collective setting, negotiate on individual facts and reach individual numbers. Again whether viewed under the ABA's conflict rules or ALI's “collective allocation,” cases that are resolved on individual facts, through individual releases and with individual payments do not put the lawyer in the position of allocating a lump sum among the lawyer's clients.³⁶ Without that link, there is no material limitation conflict under either Model Rule 1.8(g) or 1.7(a)(2).
- **Seek judicial approval.** In some jurisdictions, such as New York, the rule itself removes court-approved

³⁶ As noted earlier, the lawyer's clients may have reached agreement among themselves on the allocation. But, defense counsel may not be privy to that fact.

settlements from its scope. Others reach the same result by judicial decision.³⁷ With both, the rationale is that court review and approval supplies the requisite disclosure and client protection otherwise afforded by the rule.

IV. Conclusion

Given the practical uncertainty surrounding the aggregate settlement rule due to its lack of a definition, the most prudent course in many circumstances is to structure negotiations to avoid the rule altogether. The structural mechanisms vary, but can include “opt out” provisions, individual negotiations and releases even within a “group” context and judicial approval.

³⁷ See, e.g., *In re Lauderdale*, 549 P.2d 42, 45-46 (Wash. App. 1976) (wrongful death involving a guardian and requiring court approval of settlement).