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All or Nothing: Aggregate Settlements

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There are times in civil litigation when lawyers are representing parties in disputes involving multiple claimants who want to resolve all of the claims at once. The classic example comes from product liability litigation when multiple claimants represented by the same lawyer or law firm are pursuing their cases in the same court against a manufacturer represented by one lawyer or law firm. In that scenario, both sides have an incentive to at least examine a “group” or “aggregate” settlement to save time and expense and to bring the certainty of a negotiated resolution to what otherwise might be hard fought trials. The settlement offer in that situation is usually framed as: “My client will pay ‘x’ dollars to resolve all of these cases, but the offer is contingent on all of your clients agreeing to settle.” Although product liability litigation provides the classic example, other ready illustrations come from employment litigation, mass torts such as automobile accidents or airplane crashes and personal and property damage litigation.

Aggregate settlements are permitted under RPC 1.8(g) within specified limits. The ethical questions are somewhat different for counsel on opposite sides. For the defense, the question is: “Can I make an aggregate settlement offer?” For the plaintiffs, the issues are: “How do I make the appropriate

disclosure to my clients and, if they agree, confirm their consent?” In this column, we’ll look at the underlying authority permitting aggregate settlements and the ethical questions that arise on both sides of counsel table.

Authority for Aggregate Settlements. As noted, aggregate settlements are expressly permitted under RPC 1.8(g): “A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims . . . unless each client gives informed consent, in a writing signed by the client.” Oregon’s version of RPC 1.8(g) mirrors both the corresponding ABA Model Rule and the former Oregon rule under DR 5-107. For counsel contemplating a possible aggregate settlement, the ABA issued a comprehensive ethics opinion on the subject last year, Formal Ethics Opinion 06-438 (which is available on the ABA Center for Professional Responsibility’s web site at www.abanet.org/cpr). The Oregon State Bar has also recently discussed aggregate settlements in Formal Ethics Opinion 2005-158 (available on the OSB’s web site at www.osbar.org).

Defense Perspective. The answer to the question posed earlier is comparatively easy: because aggregate settlements are expressly allowed, it is permissible to make an “all or nothing” aggregate settlement offer under RPC 1.8(g). At the same time, that’s not necessarily the end of the story for the defense. As we’ll see in the next section, plaintiffs’ counsel must make extensive disclosure to his or her clients to ensure their informed consent to any group

settlement. Although defense counsel will not be privy to those attorney-client discussions on the other side, defense counsel would be wise to build some assurance into the settlement agreement that the plaintiffs have been fully advised by their lawyer and have been given adequate time to do so to prevent a later collateral attack on the settlement.

Plaintiffs' Perspective. There is no question that RPC 1.8(g) places the greater challenges on plaintiffs' side. That's because although resolutions of this kind are structured to resolve the claims of an entire group, each client retains his or her sole control under RPC 1.2(a) to settle their individual claim. Further, under RPC 1.7, the lawyer for a claimant group cannot act as a mediator between his or her own clients in allocating a group offer or in negotiating between clients (although under OSB Formal Ethics Opinion 2005-158 a client group could use an outside mediator or arbitrator to fill this role).

The keys from the plaintiffs' perspective under RPC 1.8(g) are making sure that the clients have adequate information to give their informed consent to their portion of a group settlement and then confirming that consent in writing.

On the former, RPC 1.8(g) specifies what the lawyer's disclosure to the client must include: "The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and the participation of each person in the settlement." ABA Formal Ethics Opinion 06-438 draws on both the text of ABA

Model Rule 1.8(g) and its accompanying comment to elaborate on the scope and elements of recommended disclosure:

- “▪ The total amount of the aggregate settlement or the result of the aggregated agreement. [Including whether the proposal is ‘all or nothing.’]
- “▪ The existence and nature of all of the claims, defenses . . . involved in the aggregated 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).
- “▪ 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.” (*Id.* at 5; footnotes omitted.)

On the latter, ABA Formal Ethics Opinion 06-438 notes that the disclosure “must be made in the context of a specific offer or demand . . . [and a]ccordingly, the informed consent required by the rule generally cannot be obtained in advance of the formulation of such offer or demand.” (*Id.* at 6; footnote omitted.) It also notes that if the disclosure needed to “inform” consent is protected by the attorney-client privilege or RPC 1.6’s lawyer-confidentiality rule running toward one client, the lawyer must normally obtain the affected client’s consent before sharing that information with co-clients in different cases and further recommends that the lawyer explain at the outset of a joint representation in a single case the impact of that structure on confidentiality between clients. Due to the significant potential for conflicts in situations of this kind, RPC 1.8(g) specifically requires that the clients consenting to an aggregate settlement countersign their disclosure and consent letters. Under Oregon RPC 1.0(g), “informed consent” is a defined term and that provision should be consulted, too, for requirements that cut across disclosure and consent letters generally.

Summing Up. Aggregate settlements can be an important catalyst for resolution of otherwise seemingly lengthy, expensive and difficult litigation for plaintiffs and defendants alike. But, like many creative settlement tools, they need to be used with discretion and handled with care.

ABOUT THE AUTHOR

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