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Protecting Yourself and Your Settlement: Risk Management Considerations in Settlement Negotiations

**By Mark J. Fucile
Fucile & Reising LLP**

Most civil cases settle. That's nothing new. Over the past generation, however, the dynamics of settlements have changed significantly. Mediation now plays a large role in organizing negotiations. Increased specialization by both plaintiffs' and defense counsel means that lawyers regularly handle claims—and settle them—against the same opposing counsel and often the same defendants. Litigation with multiple claimants—joined together in the same proceeding or with similar, yet separate lawsuits—has also become more common in practice settings ranging from mass torts to consumer cases.

New risk management considerations have come along with these changing dynamics. In this column, we'll look at three. First, we'll examine whether a litigation opponent can be prevented from handling future claims against a defendant as part of a current settlement. Second, we'll survey recent developments governing “aggregate” settlements. Finally, we'll discuss how conflicts can emerge among jointly represented clients during settlement negotiations. With each, we'll flag the potential pitfalls for both the lawyers and their settlements—and how to avoid them.

Restrictions on Future Representations

Because it is increasingly common for defendants to face the same claimants' counsel in similar litigation involving repetitive issues, potential restrictions on future representation sometimes find their way into settlement discussions in an effort to preclude particularly effective claimants' counsel from handling cases against a defendant. Oregon RPC 5.6(b), like its ABA Model Rule counterpart, prohibits outright restrictions of this kind. Nonetheless, "creative" wrinkles that attempt to skirt the prohibition occasionally surface under the pressure of trying to "seal a deal."

In re Brandt/Griffin, 331 Or 113, 10 P3d 906 (2000), for example, involved two claimants' lawyers handling multiple business tort cases that were being mediated on a national basis with a corporate defendant's principal outside and inside counsel. The two claimants' lawyers had earlier rejected a proposal that contained a direct restriction of the kind prohibited by RPC 5.6(b)'s predecessor, DR 2-108(B). As a way to break an impasse in the negotiations, the mediator later suggested that the two agree to be retained by the corporate defendant at the conclusion of the settlements to provide the company with advice on how to avoid the problems that caused the litigation. This arrangement had the indirect effect of precluding them from handling similar claims against the defendant in the future because they would be "conflicted out" as a result of their work for the defendant. The lawyers reluctantly agreed. One client was later dissatisfied with

the amount he received and filed a bar complaint that led to an examination of the retention provision. The Supreme Court found that this indirect restriction was also prohibited. When our professional rules moved from the DRs to the RPCs in 2005, Oregon's version of RPC 5.6(b) was changed from the ABA Model Rule to specifically call out that both "direct or indirect" restrictions are prohibited.¹

RPC 5.6(b) includes both "offering" and "making" a settlement containing a prohibited restriction and, therefore, applies to plaintiffs' and defense counsel alike. In *Adams v. BellSouth Telecommunications, Inc.*, 2001 WL 34032759 (SD Fla 2001) (unpublished), for example, the court sanctioned the defense lawyers for offering a "consulting" agreement similar to the one just discussed and reported the lawyers to their state bar associations. Without reaching the merits because it was dismissed as time-barred, at least one Oregon case also attempted to frame the lawyers' agreement to a restriction as a civil damage claim for breach of fiduciary duty.²

Beyond repercussions for the lawyers involved, these provisions are likely unenforceable as a matter of contract law. The Restatement (Third) of the Law Governing Lawyers (2000) notes that "such agreements are void and unenforceable."³ Similarly, in the analogous context of restrictive covenants on law firm departure, Oregon's appellate courts have concluded that limitations are generally unenforceable.⁴ Whether restrictions of this kind invalidate the entire

settlement agreement usually turns on the extent to which failure to disclose the restriction amounted to fraud in the inducement—giving rise to rescission as remedy.⁵

For the lawyers and their settlements, therefore, the safest course is simply to avoid tying current negotiations to any future restrictions on opposing counsel.

“Aggregate” Settlements

The “aggregate” settlement rule, RPC 1.8(g), and its predecessor, DR 5-107(A), have been around since 1970. Nonetheless, neither rule, nor any decision of the Supreme Court, had ever defined what constituted an “aggregate” settlement outside the context of class actions.⁶ The lack of a definition created great practical uncertainty as multiple-case negotiations and resolutions became increasingly common. The Supreme Court recently supplied a definition in *In re Gatti*, 356 Or 32, 333 P3d 994 (2014).

The lawyer involved represented 15 abuse clients in a mediation against the Archdiocese of Portland in 2006. He had obtained individual settlement authority from each of his clients. The mediator, however, was able to extract significantly more from the Archdiocese than the sum of the individual clients’ authority. The lawyers’ clients had agreed on a formula to allocate any surplus. One client, however, later grew dissatisfied with the amount he received and filed a bar complaint that, in turn, led to a review of whether the settlements triggered

RPC 1.8(g). The rule does not prohibit aggregate settlements, but requires extensive disclosure to all of the clients affected of what each will be receiving and comparative information about their respective claims.⁷ Given the sensitivity of the personal circumstances involved, the lawyer had not shared their individual information with the others.

The Supreme Court concluded that the settlements had triggered the rule, and, in doing so, adopted the definition of “aggregate settlement” suggested by the American Law Institute’s *Principles of Aggregate Litigation*, a scholarly work published in 2010.⁸ Under the ALI formulation, two kinds of settlements are considered “aggregate”: (a) those requiring all clients to agree before any settlements are effective, which the ALI called “collectively conditionality”; or (b) those in which clients share a lump sum based on some factor other than the simple total of individual authority, which the ALI called “collective allocation.” In this instance, the Supreme Court found that there was no “collectively conditionality.” But, it concluded the formula used to divide the surplus was a form of “collective allocation.” None of the clients—including the complainant—sought rescission of their settlements with the Archdiocese. At the same time, it is not difficult to imagine clients in another setting contending that the lack of detailed comparative information required by RPC 1.8(g) created grounds for rescission under a theory of unilateral mistake of fact.⁹

Gatti counsels that the safest path for both sides is to negotiate case values individually. If negotiations move beyond that, any resulting settlements will likely trigger RPC 1.8(g) and its attendant disclosure and consent obligations.

Conflicts Among Joint Clients

Gatti also addressed—but did not fully resolve—conflicts among jointly represented clients.¹⁰ The Supreme Court concluded that when the mediator obtained more than the sum of the clients' individual settlement authority the allocation decision also created a conflict under the multiple client conflict rule, RPC 1.7(a)(1). The Supreme Court noted that “any” mechanism selected in that context puts the clients' interests in competition both for the dollars involved and the particular allocation method suggested.

The Supreme Court declined to reach the question of whether conflicts of this kind are waivable under RPC 1.7(b). In an earlier case involving clients competing for the same limited fund, however, the Supreme Court held that the resulting conflict for their lawyer was nonwaivable.¹¹ Similarly, on the facts before it, the Supreme Court did not reach the question of whether the clients on their own could agree on an allocation method. OSB Formal Ethics Opinion 2005-158 suggests this avenue and that a lawyer can assist the clients after they chose a method with the logistics and provide information for the process.¹²

In reaching its conclusion, the Supreme Court stressed that individual clients may not have sufficient information to make an informed settlement

decision absent comparative data regarding co-clients and the overall total. That suggests that the resulting settlements might also be vulnerable to rescission based on “mistake of fact.”

Again, *Gatti* counsels that the safest path for both sides is to negotiate case values individually. If negotiations move beyond that and the clients on their own agree on an allocation process, their lawyer would want to carefully document that key fact.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB’s Ethical Oregon Lawyer and the WSBA’s Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NWLawyer (formerly Bar News) and is a regular contributor on risk management to the OSB Bar Bulletin, the

Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

¹ See Final Report of the Special Legal Ethics Committee on Disciplinary Rules at 30 (2003), contained in 2003 Oregon State Bar House of Delegates Meeting Agenda, available on the OSB web site at: https://www.osbar.org/_docs/leadership/hod/2003/03HODagenda.pdf. Limitations on the future use of information that amount to a prohibited restriction also fall within the scope of RPC 5.6(b). See ABA Formal Ethics Op 00-417.

² *Bramel v. Brandt*, 190 Or App 432, 79 P3d 375 (2003). Civil damage claims in this area may be affected on a practical level by the extent to which evidence is barred by the mediation confidentiality statute. See *Alfieri v. Solomon*, 263 Or App 492, 329 P3d 26 (2014).

³ § 13, cmt. c.

⁴ See *Gray v. Martin*, 63 Or App 173, 181-82, 663 P2d 1285 (1983) (under former DR 2-108(A)); *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or App 700, 703-04, 683 P2d 563 (1984) (same).

⁵ See *Jackson v. BellSouth Telecommunications*, 372 F3d 1250, 1277-79 (11th Cir 2004) (another phase of the *BellSouth* litigation discussed above).

⁶ Under Comment 13 to ABA Model Rule 1.8, class actions are generally excluded due to their close judicial supervision of settlement.

⁷ See ABA Formal Ethics Op 06-438 (discussing the disclosures required).

⁸ § 3.16. See 356 Or at 47-48.

⁹ See *Union Cemetery Association v. Coyer*, 214 Or App 24, 30, 162 P3d 1072 (2007) (summarizing Oregon law on unilateral mistake).

¹⁰ See 356 Or at 45-46.

¹¹ *In re Barber*, 322 Or 194, 199-200, 904 P2d 620 (1995).

¹² *Id.* at 434.