

# ETHICS IN EMINENT DOMAIN: NEW OREGON LANDSCAPE ON JOINT REPRESENTATION

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## **Introduction**

Since last year's program, the Oregon Supreme Court issued two major decisions on joint representation conflicts. One, *In re Ellis/Rosenbaum*, 356 Or 691, 344 P3d 425 (2015), arose in the context of an SEC investigation. The other, *In re Gatti*, 356 Or 32, 333 P3d 994 (2014), arose in the context of the settlement of multiple personal injury cases.

Although the factual settings are different, both are instructive to condemnation lawyers who represent clients jointly—and to other condemnation lawyers on the opposite side of a joint representation. In direct condemnation, for example, a property owner's lawyer may be asked to represent both the owner and another interest holder—such as a secured lender. In inverse condemnation, to use another illustration, a government lawyer may consider offering a “group” settlement to resolve similar claims brought by multiple property owners who share a single lawyer.

*Ellis/Rosenbaum* is useful from the perspective that the Supreme Court reiterated legal tenets it had long-articulated for joint representation. At the same time, the bulk of the *Ellis/Rosenbaum* opinion consists of a microscopic application of those tenets to facts that are very specific. Because it is so fact-specific, the longer-term significance of *Ellis/Rosenbaum* may be as a reiteration of the general principles involved rather than its particular result.

*Gatti*, by contrast, has a comparatively more common fact pattern and, therefore, is somewhat more instructive as a teaching tool. *Gatti* also addresses the related issue of first impression in Oregon of what constitutes an “aggregate” settlement.

Joint representation conflicts in Oregon are governed generally by RPC 1.7, the multiple client conflict rule. Aggregate settlements, in turn, are governed by RPC 1.8(g).

### **A. *In re Ellis/Rosenbaum*, 356 Or 691, 344 P3d 425 (2015)**

*Ellis/Rosenbaum* was a disciplinary case involving two partners at a large Portland firm. The lawyers, both very experienced business litigators, represented a number of officers and employees of a local publicly-traded company during the preliminary phase of an SEC investigation when their collective positions were aligned. The lawyers later transitioned out of the multiple representations when the SEC (and a separate criminal investigation) began focusing on specific individuals. Nonetheless, the Oregon State Bar later charged the lawyers under a variety of conflict-based theories. The case had a tortured procedural history—including allegations over a decade old that were decided under the former Oregon Disciplinary Rules.<sup>1</sup>

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<sup>1</sup> Under the Supreme Court's order (No. 04-044, dated December 1, 2004) moving from the DRs to the RPCs, conduct occurring before January 1, 2005, is assessed under the former DRs.

As noted above, the Oregon Supreme Court’s decision is fact-specific in the extreme—totaling 75 pages in the official reporter version in exonerating the lawyers. Given that degree of microscopic detail, lawyers should be wary about drawing parallel conclusions to their own situations.

But as is also noted above, *Ellis/Rosenbaum* contains a useful reiteration of general principles of joint representation. Although under the former DRs, the same general principles should apply to our current multiple-client conflict rule—RPC 1.7. *Ellis/Rosenbaum* emphasizes that in evaluating whether a single lawyer (or firm) can represent two (or more) clients jointly in litigation (or its precursors) the focus of the inquiry is whether the interests of the clients are “adverse.” 356 Or at 713-14. “Adverse” in this context means its common, dictionary definition of “opposing” or “inconsistent.” *Id.* Although lawyers are responsible for continuing to monitor for conflicts as a representation proceeds, the simple fact that a conflict may theoretically develop later does not create a conflict under the professional rules today. *Id.* Under Comment 29 to ABA Model Rule 1.7 on which our RPCs are now patterned,<sup>2</sup> a conflict that develops during the course of a joint representation ordinarily creates a duty to withdraw altogether.

**B. *In re Gatti*,  
356 Or 32, 333 P3d 994 (2014)**

*Gatti* was also a disciplinary case. The lawyer involved was a very experienced plaintiffs’ personal injury lawyer in Salem. In the early 2000s, he took on a difficult group of cases—15 former residents of the State’s MacLaren School for Boys who claimed they each had been abused at different times and occasions by the Catholic chaplain. The lawyer brought individual claims on behalf of the clients against both the Archdiocese of Portland and the State of Oregon because chaplain was both a priest of the Archdiocese and an employee of the State. After the Archdiocese entered Chapter 11 bankruptcy in 2004, the claims were litigated within the context of the bankruptcy court against the Archdiocese while the parallel claims against the State remained in state court.

The lawyer settled the 15 claims against the Archdiocese at a mediation and later resolved related claims against the State for the same clients through direct negotiations following a large verdict for two of the clients. With each set, the lawyer had received individual baseline authority from each client, totaled that in making collective offers to the defendants and then used a formula to divide the excess he was able to extract from the defendants above the sum of their individual authority. Although all of the cases were resolved at the same time with each defendant, neither set of settlements contained an explicit requirement that all resolve for any of the individual

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<sup>2</sup> Unlike most other states that use professional regulations based on the ABA Model Rules, Oregon for parochial reasons has not adopted the corresponding comments.

settlements to be effective. One of the 15 clients later became dissatisfied with his settlement and filed a bar complaint against the lawyer. That, in turn, led to a lengthy investigation by the Oregon State Bar that came to focus on the “aggregate settlement” rule—RPC 1.8(g)—and conflicts under RPC 1.7 in the settlement context.

RPC 1.8(g) is unusual in that neither the Oregon rule nor its predecessor under the former Disciplinary Rules—DR 5-107(A)—contain a definition of what constitutes an “aggregate” settlement. In an added twist, the corresponding ABA Model Rule on which the Oregon rule is patterned does not contain a definition either. This has great practical significance for plaintiffs’ counsel (and their defense counsel counterparts) because a collection of settlements that falls within the rule requires extensive disclosure and consent from all of the clients involved.<sup>3</sup>

At the time the settlements occurred, the only definition of what constituted an aggregate settlement in Oregon was found in two OSB ethics opinions: 2000-158, addressing former DR 5-107(A); and 2005-158, addressing RPC 1.8(g). Both opinions defined an aggregate settlement as one that is “all-or-nothing”: all of the clients must agree for any of the settlements to be effective.

The Bar argued that, notwithstanding its ethics opinions, the lawyer had violated RPC 1.8(g). The Supreme Court agreed. The Supreme Court noted that it is not limited by the Bar’s ethics opinions. Instead, the Supreme Court looked to a definition that the American Law Institute had developed after the conduct at issue in this case for ALI’s *Principles of Aggregate Litigation* (2010). The ALI definition (§ 3.16) includes two alternative formulations: (1) “all-or-nothing” settlements; and (2) where a settlement total is allocated using something other than simply individual case values. The ALI *Principles* refer to the first as “collective conditionality” and the second as “collective allocation.” The Supreme Court found that the settlements with both the Archdiocese and the State involved “collective allocation” in light of the formula the lawyer had used to divide the respective “surpluses” above the simple totals of individual authority. Therefore, it disciplined the lawyer under RPC 1.8(g) because he had not made the extensive disclosures required under the rule.

The Supreme Court also disciplined the lawyer under RPC 1.7(a)(1) for a multiple client conflict. The Supreme Court found that the lawyer’s use of the formula to divide the “surplus” above collective baseline authority also triggered a multiple client conflict. The Supreme Court reserved judgment on whether conflicts of this kind are waivable because, on the facts before it, the lawyer had not obtained conflict waivers.<sup>4</sup>

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<sup>3</sup> Because settlements in class actions are subject to close judicial review, Comment 13 to ABA Model Rule 1.8 exempts class actions from the aggregate settlement rule. ABA Formal Ethics Opinion 06-438 (2006) discusses the disclosures required for an aggregate settlement and generally includes both the total amount and the portion each client is sharing in that total.

<sup>4</sup> An earlier, unrelated decision by the Supreme Court—*In re Barber*, 322 Or 194, 199-200, 904 P2d 620 (1995)—suggests that the answer may be “no.” See Mark J. Fucile, *Protecting Yourself and*

For the same reason, the Supreme Court also did not reach the issue of whether the clients on their own (*i.e.*, not involving their lawyer) could agree to an allocation method in this kind of situation. OSB Formal Ethics Opinion 2005-158, however, suggests this approach and that a lawyer can assist the clients with the logistics and information after they have independently chosen a process among themselves.

In the condemnation context, a single firm might be able to jointly represent all interest-holders to obtain the largest possible “pot.” If there were disagreements between the interest-holders on their respective shares of the overall total, the interest-holders would all likely need separate counsel in any subsequent allocation proceeding under ORS 35.285(1). See generally *Dept. of Trans. v. Weston Inv. Co.*, 134 Or App 467, 473-75, 896 P2d 3 (1995) (discussing allocation proceedings).