
Formal Opinion 06-438**February 10, 2006**

Lawyer Proposing to Make or Accept an Aggregate Settlement or Aggregated Agreement
In seeking to obtain the informed consent of multiple clients to make or accept an offer of an aggregate settlement or aggregated agreement of their claims as required under Model Rule 1.8(g), a lawyer must advise each client of the total amount or result of the settlement or agreement, the amount and nature of every client's participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client.

Unlike Model Rule 1.7 of the Model Rules of Professional Conduct¹ which is a general rule governing conflicts of interest relating to a lawyer's current clients, Rule 1.8 provides specific rules regarding eleven types of conflicts of interest. As noted throughout the comments to Rule 1.8, the rule supplements duties set forth in Rule 1.7. Each of Rule 1.8's subparagraphs (a) through (j) describes a different and specific circumstance in which a lawyer's self-interest might jeopardize the representation of a client.² This opinion considers the subject of aggregate settlements or aggregated agreements addressed in Rule 1.8(g).³

¹ This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

² See Annotated Model Rules of Professional Conduct 146 (5th ed. 2002).

³ Rule 1.8(g) states:

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.

"Informed consent" is explained in Rule 1.0(e), and "Confirmed in writing" is explained in Rule 1.0(b). Some of the cases cited in this opinion rely upon Disciplinary Rule ("DR") 5-106 of the Model Code of Professional Responsibility, "Settling Similar Claims of Clients." It provided:

(A) 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.

This opinion does not treat as aggregate settlements those settlements made in certified class action cases or derivative actions. As Comment [13] to Rule 1.8 states:

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 regarding notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Neither does this opinion address multi-party representation in bankruptcy cases.

Rule 1.8 (g) pertains to the conflicts of interest that arise when a lawyer or law firm (collectively referred to as "lawyer") represents multiple clients, some or all of whose claims or defenses are to be resolved under a single proposal (in a civil case) or plea agreement (in a criminal case). In such situations, subparagraph (g) supplements Rule 1.7 by requiring an additional level of disclosure by the lawyer and by requiring that his

clients' informed consent to the settlement be in writing.

As noted in Comment [13] to Rule 1.8, differences in the willingness of each represented client to make or accept an offer of settlement are among the risks that should be considered when a lawyer undertakes to represent multiple clients in matters where a settlement or plea agreement proposal could create a conflict among them. Rule 1.8(g) provides a focused application of Rule 1.2(a), which protects a client's right in all circumstances to have the final say in deciding whether to accept or reject an offer of settlement or to enter a plea; Rule 1.6, which requires that the lawyer have his clients' consent to reveal information relating to his representation of each of them to all other clients affected by the aggregate settlement or plea agreement; and Rule 1.7, which requires consent of all affected clients when the representation of one or more of them will be materially limited by the lawyer's responsibilities to the others.

Because the terms "aggregate settlement" and "aggregated agreement" are not defined in the Model Rules of Professional Conduct, it first is necessary to explain those terms before identifying the disclosures required to satisfy Rule 1.8(g). An aggregate settlement or aggregated agreement occurs when two or more clients who are 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.⁴

⁴ Rule 1.8(g) does not address obligations to other clients having such similar claims or defenses who are not included in the aggregate settlement or aggregated agreement. See Rule 1.7(a)(2).

The claims or defenses to be settled in an aggregate settlement or aggregated agreement may arise in the common representation of multiple parties in the same matter, for example, when damages are claimed by passengers on a bus that rolls over, or by purchasers of a fraudulently issued stock, or when pleas are offered by criminal defendants alleged to be part of a drug ring. They also may arise in separate cases. For example, the rule would apply to claims for breach of warranties against a home builder brought by several home purchasers represented by the same lawyer, even though each claim is filed as a separate lawsuit and arises with respect to a different home, a different breach, and even a different subdivision.⁵

⁵ Comment [13] to Rule 1.8 discusses subparagraph (g) in the context of common representation of multiple clients by a single lawyer. "Common representation" is discussed in Rule 1.7 Comments [29] through [33] solely in the context of the representation of multiple clients "in the same matter." Neither the rule nor its comment, however, explicitly restricts the application of Rule 1.8(g) to common representation of multiple clients in the same matter. Yet, as a practical matter, the more disparate the claims included in an aggregate settlement proposal, the more likely it is that the proposal will run afoul of other provisions of the Model Rules. For example, if a lawyer representing clients with factually and legally dissimilar claims receives an aggregate settlement proposal, the lawyer may find it difficult to obtain the informed consent of each of his clients to the disclosure of confidential client information necessary to satisfy Rule 1.8(g), including the consent required even to disclose the fact that one client's settlement is conditioned on another's. See discussion of Rule 1.6 *infra*. The lawyer also may find it more difficult to satisfy Rule 1.7, particularly Rules 1.7(a)(2) and 1.7(b)(1).

Aggregate settlements or aggregated agreements not only arise in a variety of situations, but they also may take a variety of forms. For example, a settlement offer may consist of

a sum of money offered to or demanded by multiple clients with or without specifying the amount to be paid to or by each client. Aggregate settlements or aggregated agreements can occur both in the civil context, for example, when a claimant makes an offer to settle a claim for damages with two or more defendants, and in the criminal context, when, for example, a prosecutor accepts pleas from two or more criminal defendants as part of one agreement.⁶

⁶ The requirements to be met when a lawyer undertakes such multiple representations in a criminal matter, and the implications of an accused's constitutional right to effective assistance of counsel, are beyond the scope of this opinion.

Rule 1.8(g) deters lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement.⁷ That information empowers each client to withhold consent and thus prevent the lawyer from subordinating the interests of the client to those of another client or to those of the lawyer.⁸ Rule 1.8(g) thereby supplements the lawyer's duties under Rule 1.2(a) to defer to his clients' roles as ultimate decision-makers concerning the objectives of the representation, and to abide by his clients' decisions whether to settle a matter.⁹ In acknowledgment of the heightened conflicts risks encountered when multiple clients are represented in an aggregate settlement or aggregated agreement, Rule 1.8(g) also requires that the clients' consent to the settlement or agreement be in writing, a requirement more strict than that imposed in the general rule on conflicts, Rule 1.7. The lawyer's duty to make disclosures under Rule 1.8(g) reinforces the lawyer's duty under Rule 1.4 to provide information reasonably necessary to permit the client to decide to engage in the proposed settlement or agreement.¹⁰

⁷ See, e.g., *In re Hoffman*, 883 So.2d 425, 432 (La.), reh'g denied (2004) ("Once the joint representation ... commenced, ... respondent owed each of his clients an equal degree of loyalty, and he could not favor the interests of one client over another.")

⁸ One risk posed by aggregate settlements is that the lawyer may be motivated to settle a group of many claims and reap a substantial fee without the trouble of diligent development of the clients' claims. That is likely to be a greater risk in an aggregate settlement than in the settlement of an individual claim, as the sheer number of clients may make the potential fee much greater. As the Texas Court of Appeals stated: Settling 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). Unfairness is the cornerstone in an action for breach of fiduciary duty. Thus, when an attorney enters into an aggregate settlement without the consent of his or her clients, the attorney breaches the fiduciary duty owed to those clients. *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. Ct. App. 1997), judgment aff'd in part, rev'd in part on other grounds, 997 S.W.2d 229 (Tex. 1999) (citations omitted).

⁹ Several courts have concluded that fee agreements that allowed for a settlement based upon a "majority vote" of the clients represented violated Rule 1.8(g). See, e.g., *The Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 873 A. 2d 616, 627 (N.J. Super. Ct. App. Div.), cert. granted, 878 A.2d 855 (N.J. 2005) (applying New Jersey's Rule 1.8(g) which, at the time, was practically identical to the pre-2002 ABA Model Rule); *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892, 894-95 (10th Cir. 1975) (applying Kansas's version of Model Code DR 5-106). Cf., *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046, 1050-51 (D. Colo. 1999) (applying Colorado's Rule 1.7(b) (2) and (c)).

¹⁰ See, e.g., *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229 (Tex. Ct. App. 1985, writ ref'd n.r.e.) (applying Model Code DR 5-106).

The aggregate settlement rule also protects lawyers from claims by clients who consent but become unreasonably dissatisfied following a settlement. For example, if a violation of the rule results in former clients discovering later that their co-parties paid less or

received more than they did, they are more likely to sue or file a disciplinary complaint against their former lawyer. The same is true with aggregated agreements involving multiple criminal defendants. If the clients are fully informed of the terms of the agreement, and the stake of their codefendants in it, they are less likely to file claims and if they do, the lawyer is in a better position to defend against them.

In order to ensure a valid and informed consent to an aggregate settlement or aggregated agreement, Rule 1.8(g) requires a lawyer to disclose, at a minimum,¹¹ the following information to the clients for whom or to whom the settlement or agreement proposal is made:

¹¹ The unique facts and circumstances of any particular settlement may require additional disclosures other than those outlined here.

- 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 aggregated agreement.¹²

¹² See, e.g., *State ex rel. Oklahoma Bar Ass'n v. Weeks*, 897 P. 2d 246, 253 (Okla., Mar. 22, 1994) (interpreting DR 5-106).

- The details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be 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. 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.¹³
-

¹³ See, e.g., *In re Hoffman*, 883 So. 2d at 433 (“[D]uring the negotiation of the aggregate settlement, the lawyer must confer with all of his clients and fully disclose all details of the proposed settlement...”.) When the amounts of fees and costs to be paid to the lawyer as a result of the aggregate settlement are not yet determined at the time of the settlement, the lawyer will need to disclose to each of his clients the process by which those amounts will be established and who will pay them, and the amount he will be requesting to be paid. To the extent that the lawyer will receive compensation from someone other than each client, the lawyer will need to comply with the requirements of Rule 1.8(f).

- 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.¹⁴
-

¹⁴ For example, in cases where the clients are defendants with the same relative risk of an adverse judgment in a civil suit, or if the clients are plaintiffs with similar claims of ascertainable and equal or comparable value, then a sharing of the costs on a per capita basis may be appropriate. On the other hand, if the clients are plaintiffs who were injured to various degrees in a common accident, and are executing a contingency fee agreement where costs are not paid until a settlement is effectuated, a pro rata cost distribution may be more equitable. Best practices would include the details of the necessary disclosures in the writings signed by the clients.

The Committee is aware of authority holding that extensive disclosure is not required

under both Rule 1.8(g) and Model Code DR 5-106. See, e.g., *Scamardella v. Illiano*, 727 A.2d 421, 426-28 (Md. App. 1999), cert. denied, 729 A.2d 406 (Md. 1999) (although acknowledging that “the fullest disclosure is the best disclosure”); *Petition of Mal de Mer Fisheries, Inc.*, 884 F. Supp. 635, 639-40 (D. Mass. 1985). The Committee is unpersuaded by this authority and, therefore, reaches the conclusions stated above. These detailed disclosures must be made in the context of a specific offer or demand. Accordingly, the informed consent required by the rule generally cannot be obtained in advance of the formulation of such an offer or demand.¹⁵

¹⁵ See, e.g., *In re Hoffman*, supra note 13 (“The requirement of informed consent cannot be avoided by obtaining client consent in advance to a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement.”)

If the information to be disclosed in complying with Rule 1.8(g) is protected by Rule 1.6, the lawyer first must obtain informed consent from all his clients to share confidential information among them. The best practice would be to obtain this consent at the outset of representation if possible, or at least to alert the clients that disclosure of confidential information might be necessary in order to effectuate an aggregate settlement or aggregated agreement.¹⁶ If the lawyer seeks permission to share confidential information among his clients, and receives that permission, he should explain to his clients that if a dispute arises between any of the clients subsequent to his sharing their confidential information, the attorney-client privilege may not be available for assertion by any of them against the other(s) on issues of commonly given advice.¹⁷ Finally, in representations where the possibility of an aggregate settlement or aggregated agreement exists, clients should be advised of the risk that if the offer or demand requires the consent of all commonly-represented litigants, the failure of one or a few members of the group to consent to the settlement may result in the withdrawal of the offer or demand.

¹⁶ See Comment [13] to Rule 1.8, which states in pertinent part:

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.

See also Comment [29] to Rule 1.7, which provides in part:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible.

For guidance with respect to undertaking the representation of multiple clients, see Rule 1.7 Comments [29] through [33].

¹⁷ Rules 1.6(a) and 1.4. See also Rule 1.7 Comments [30] and [31] for further discussion of the subject of the treatment of confidential information in formulating and conducting a common representation.

Conclusion

Rule 1.8(g) is a prophylactic rule designed to protect clients who are represented by the same lawyer and whose claims or defenses are jointly negotiated and resolved through settlement or by agreement. Unique and difficult conflicts between the clients and their lawyer, and between the clients themselves, are possible. By complying with Rule 1.8(g), the lawyer protects his clients and himself, and helps to assure the finality and

enforceability of the aggregate settlement or agreement into which those clients have chosen to enter.