

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS**

FORMAL OPINION 2009-6

AGGREGATE SETTLEMENTS

TOPIC: Multiple Representations; Aggregate Settlements; Advance Waivers

DIGEST: Rule 1.2(a) requires lawyers to “abide by a client’s decision whether to settle a matter.” Rule 1.8(g) further addresses a lawyer’s obligations with respect to aggregate settlements on behalf of multiple, jointly represented clients. Under Rule 1.8(g), absent court approval, a lawyer may not conclude an aggregate settlement without first obtaining the informed written consent of each settling client. A lawyer may not ask clients to waive their rights under Rule 1.8(g) or to bind themselves to an aggregate settlement approved by some, but not all, of the affected clients.

RULES: 1.2(a), 1.7, 1.8(g)

QUESTION: May a client waive the right to approve the terms of an aggregate settlement negotiated on her behalf by her counsel?

OPINION

I. Rule 1.8(g): The Aggregate Settlement Rule

Rule 1.8 of the New York Rules of Professional Conduct (the "Rules") addresses conflicts that may arise between or among current clients of a lawyer or law firm. Rule 1.8(g) in particular focuses on conflicts presented when a lawyer seeks to settle disputes on behalf of multiple, jointly represented clients pursuant to a single, aggregate settlement agreement. The Rule provides as follows:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, 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 involved and of the participation of each person in the settlement.¹

¹ Rule 1.8(g) is substantially identical to Disciplinary Rule 5-106, the predecessor rule under the Code of Professional Responsibility. The most significant difference between the rules is the addition of the language “absent court approval” to Rule 1.8(g). In contrast to DR 5-106, Rule 1.8(g) obviates the need for client consent to an aggregate settlement in the event it is approved by a court. Absent court approval, Rule 1.8(g) requires the lawyer to obtain “informed consent in writing signed by the

The term “aggregate settlement” is not defined in the Rules, but has been defined by the American Bar Association (the "ABA") as follows:

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 an aggregated settlement. The rule applies when any two or more clients consent to have their matters resolved together.

ABA Formal Op. 06-438 (2006).

The purpose of Rule 1.8(g) is to “deter[] lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement. That information empowers each client to withhold consent and thus prevent the lawyer from subordinating the interest of the client to those of another client or to those of the lawyer.” ABA Formal Op. 06-438.

ABA Formal Opinion 06-438 provides guidance regarding the disclosures to be made by a lawyer when seeking informed consent in compliance with Rule 1.8(g). The recommended disclosures include:

- The total amount of the aggregate settlement.
- A description of all claims, defenses, or pleas covered by the settlement.
- The terms of each client’s participation in the settlement, including the settlement consideration to be contributed and/or received by each client.
- The total fees and costs to be paid to the lawyer pursuant to the settlement if they will be paid, in whole or in part, from settlement proceeds or by an opposing party or parties.
- The method for apportioning fees and costs among clients.

Rule 1.8(g) supplements the provisions of Rule 1.7 addressing the general requirements for undertaking the concurrent representation of multiple clients. Pursuant to both rules, prior to undertaking the representation, a lawyer must disclose the risks attendant to the representation, including the potential conflicts that could arise when seeking to settle a contested matter on behalf of multiple clients. As explained in the ABA’s *Ethical Guidelines for Settlement Negotiations* (2002): “[e]ven when the lawyer’s initial conclusion that multiple clients can be represented was well-founded . . . consideration later of possible settlement options can generate circumstances where interests emerge as

client.” DR 5-106 had no writing requirement, mandating only consent after full disclosure.

potentially divergent, if not actually conflicting. Conflicts can arise from differences among clients in the strength of their positions or the level of their interests in settlement, or from proposals to treat clients in different ways or to treat differently positions clients in the same way.” *Id.* § 3.5. A lawyer must discuss these risks and potential conflicts with each prospective client to obtain the informed consent required to proceed with the joint representation. Rules 1.7 and 1.8(g) thus work in tandem to ensure that clients are fully informed of the potential conflicts that could arise from joint representation, including the conflicts that could arise in connection with the negotiation and acceptance of aggregate settlements.

II. The Informed Consent Requirement of the Aggregate Settlement Rule Cannot Be Waived.

The question we address is the following: assuming informed consent at the outset of a joint representation of multiple clients, may the clients delegate complete authority to their lawyer to negotiate and bind them collectively to a settlement, thereby waiving any right to review and approve the settlement before it is concluded by counsel. A related question is whether the joint clients may agree to be bound collectively to any aggregate settlement approved by a specified number or percentage of those clients, following counsel's disclosure of the terms of the proposed settlement.

A number of commentators have argued that the prohibition of advance waivers in this context unnecessarily impedes multiparty settlements.² For example, they note that when a lawyer negotiates an aggregate settlement on behalf of 50, 100 or 1000 clients, it may be logistically difficult for the lawyer to make the requisite disclosures to, and obtain the written consent of, each and every client. They further observe that if each client has the right to veto the entire settlement, aggregate settlements rarely could be concluded. Critics of Rule 1.8(g) therefore argue that clients should be permitted to provide advance waivers and to grant their lawyer either unilateral authority to negotiate and conclude an aggregate settlement or authority to bind all jointly represented clients if a majority consents to the settlement.³

² “[T]he academic disagreements concerning [the aggregate settlement rule’s] merit and proper application have significant practical consequences for attorneys and clients. They make litigation more expensive and riskier than it ought to be because they prevent plaintiffs’ attorneys from confidently taking advantage of opportunities to reduce costs. They expose excellent lawyers and shoddy lawyers alike to charges of having breached the duty of loyalty and to the threat of forfeiting fees. Ultimately, clients pay the bill for this. To cover or reduce their exposure, lawyers have to stay away from group lawsuits or charge higher fees. Both options make clients worse off.” Lynn A. Baker and Charles Silver, Responses to the Conference: *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. Tex. L. Rev. 227, 246 (1999)(footnote omitted); see also Charles Silver and Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733 (1997).

³ At its annual meeting in May 2009, the American Law Institute approved the final draft of *Principles of the Law of Aggregate Litigation*. Under Section 3.17(b) of the

This view, however, has been rejected both by most of the courts and ethics committees that have addressed the issue. The majority view, and the view of this Committee, is that a client may not waive her individual right to approve the terms of a proposed aggregate settlement that would, if accepted, bind her along with other parties jointly represented by the same counsel.

Our conclusion is based on several factors. First, neither the text of Rule 1.8(g) nor the comments to the Rule provide for waiver of the informed consent requirement. The provisions of Rule 1.8(g) are unequivocal and unqualified, and there appears to be no compelling need to permit waiver of this requirement, which protects clients against inadequate settlements and unfair allocations. The importance of this protection outweighs any "burden" a lawyer may face in handling the logistics of obtaining the requisite consent of all jointly represented clients. It also outweighs the benefit of making it easier for joint clients to conclude an aggregate settlement by agreeing to be bound by a majority vote.

In that regard, Rule 1.8(g) is of a piece with other Rules creating non-waivable rights for the protection of clients. For example, Rule 1.2(c) provides that lawyers may not limit the scope of representation, even with the client's informed consent, unless the limitation is reasonable. Rule 1.5(a) flatly prohibits lawyers from charging "excessive" legal fees. Rule 1.7(b) prohibits lawyers from representing clients with conflicting interests, unless the lawyer reasonably believes she will be able to provide competent and diligent representation to each client; the Rule also flatly prohibits a lawyer from asserting a claim by one client against another client represented by the same lawyer in the same litigation.

Moreover, because of the dynamics of litigation and the settlement process, "informed consent" to an advance waiver is virtually a contradiction in terms. Comment 22 to Rule 1.7 states that "[t]he effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails." In most cases, at the outset of an engagement, and indeed at any point prior to an actual settlement negotiation, it may be difficult, if not impossible, for a lawyer to possess, and therefore disclose, enough information to enable the client to understand the risks of waiving the right to approve a settlement following disclosure of all material facts and terms. The client therefore would be in no position to intelligently evaluate the waiver of the right.

The authorities are in accord. The detailed disclosures required by Rule 1.8(g) "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." ABA Formal Op. 06-438. As stated in the ABA's *Ethical Guidelines for Settlement Negotiations*, "[c]onditioning agreement to representation on a

draft, subject to certain conditions including informed consent, a plaintiff may "be bound by a substantial majority vote of all claimants concerning an aggregate-settlement proposal."

waiver of the client's right to approve a future settlement would fundamentally and impermissibly alter the lawyer-client relationship and deprive the client of ultimate control of the litigation." *Id.* § 3.2.3. committee notes.

Courts also have invalidated advance waivers of the right to approve aggregate settlements. For example, in *In re Hoffman*, 883 So. 2d 425 (La. 2004), the Louisiana Supreme Court, referencing Rule 1.8(g), held that "[u]nanimous informed consent by the lawyer's clients is required before an aggregate settlement may be finalized. The requirement of informed consent cannot be avoided by obtaining client consent in advance of a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement." *Id.* at 433(footnote and citation omitted). In *Tax Authority, Inc. v Jackson Hewitt, Inc.*, 187 N.J. 4, 898 A.2d 512 (2006), the New Jersey Supreme Court ruled that Rule 1.8(g) "forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement. Before a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them." *Id.* at 21, 898 A.2d at 522. And in *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1985), the Tenth Circuit Court of Appeals invalidated an agreement whereby multiple clients represented by the same attorney agreed to allow a majority to govern the rights of the minority under an aggregate settlement. Referring to the agreement, which was entered prior to the date of settlement negotiations, the court ruled: "[i]t is difficult to see how this could be binding on non-consenting plaintiffs as of the time of the proposed settlement and in the light of the terms agreed on. In other words, it would seem that plaintiffs would have the right to agree or refuse to agree once the terms of the settlement were made known to them." *Id.* at 894; *see also Knisley v. City of Jacksonville*, 147 Ill. App. 3d 116, 497 N.E.2d 883, 100 Ill. Dec. 705 (1986).

CONCLUSION

To bind multiple clients jointly represented by the same lawyer, an aggregate settlement requires the informed written consent of each and every client. The requirement of individual informed consent may not be waived by any of the jointly represented clients.