Defining Aggregate Settlements: the Road Not to Take

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I Summary and Introduction

ABA Model Rule 1.8(g) provides that:

A lawyer who represents two or more clients shall not participate in making an aggregated 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.

Unfortunately, the phrase “aggregate settlement,” is not defined in the rule, just as it was not defined in 1969 when the ABA first presented it in former Disciplinary Rule 5-106(A). In addition, the one and only ABA ethics opinion which discusses aggregate settlements did not appear on the scene until ABA Formal Op 06-438 (2006), and even that does not go much if at all beyond stating that the phrase is “not defined” in the Model Rules but “occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas.”

It has therefore been left to case law to attempt a more complete and useful definition. The latest attempt to do so is the Oregon Supreme Court decision in In re Gatti, 356 Or 32, 333 P.3d 994 (2014), which relies upon a definition contained in a 2010 report by the American Law Institute entitled "Principles of the Law of Aggregate Litigation" (the “ALI Report”). For the reasons explained below, this definition is inadequate and internally inconsistent.¹

II The Gatti Facts

Gatti involved a lawyer who represented, as individual clients, the same set of multiple plaintiffs alleged to have been the victims of child abuse in two cases against two different groups of defendants. One of the cases sought damages directly or indirectly from the State of Oregon and the other sought damages from the Catholic Church. Gatti, supra, 333 P.3d at 996-97.

In the course of preparing for the mediation session in both cases, the lawyer orally asked each client for the bottom line settlement number that the client would accept in each case. The lawyer then cumulated those individual bottom line numbers on his own to arrive at a minimum total settlement figure for each case. According to the lawyer, he also discussed orally with each client a proposal by which any excess amount received in settlement over and above this total would be divided pro rata among the settling defendants. Id. 996-97.

¹ As the readers will note, this article is limited to civil cases in which the alleged aggregate settlement is the result of multiple plaintiffs. This is the primary, if not in fact sole, circumstance in which aggregate settlement issues appear to arise.
The opening offer received by the lawyer from the mediator was higher than the minimum settlement amount for each case, and both cases settled above that minimum amount. The lawyer and the plaintiffs therefore proceeded to settle at an amount in excess of the minimum settlement amounts but with no written post-mediation description of the negotiations or of what the lawyer had done and with no written after-the-fact request for client consent or, for that matter, any written or oral description by the lawyer to any client of the amounts that each client would be receiving. Id. at 997-99.

The Gatti court found a violation of both Oregon RPC 1.7, the general concurrent client conflicts rule, which for this purpose is essentially identical to ABA Model Rule 1.7, and also Oregon RPC 1.8(g), which is identical to ABA Model Rule 1.8(g), the aggregate settlement rule as quoted supra. The court imposed a 90 day suspension on the lawyer. Id. at 1002, 1008. In all likelihood, there was no need for the court to reach the aggregate settlement issue because the sanction would likely have been the same under RPC 1.7 alone. Nevertheless, the court may have felt a need to define RPC 1.8(g) which it had not previously defined.

Most if not all of the prior cases in which an aggregate settlement had been found to exist involved coercion of the settling plaintiffs rather than the mere fact of simultaneous settlements of multiple cases or, at a minimum, a situation in which the plaintiffs were entirely kept in the dark as to what their lawyer was doing. In Gatti, by contrast, the Bar had admitted that none of the plaintiffs was coerced into any settlement. Thus, the question on appeal appeared to be whether, in the absence of coercion, a lawyer engaged in settling multiple cases at the same time, could be subject to discipline under the aggregate settlement rule as well as the normal current client conflicts rule.

III The ALI Report

In the course of holding that the lawyer had violated both RPC 1.7 and RPC 1.8(g), the Gatti court adopted the definition of aggregate settlements contained in §3.16 of the ALI Report:

(a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.

(b) The resolution of claims in a non-class aggregate settlement is interdependent if: (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified

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3 By its failure to respond timely to the lawyer’s request for admissions, the Bar had conceded that none of the plaintiffs had in fact been coerced. (See Appellant's Opening Brief, at 30, FN4.

4 One of the two authors of this article filed an amicus brief to the effect that coercion had in fact been, and should remain, a necessary part of any definition of aggregate settlements. See Amicus Curiae Peter R. Jarvis, Brief on the Merits, 2013 WL 9541519.
The dollar amount of claims; or (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations.

(c) In determining whether claims are interdependent, it is irrelevant whether the settlement proposal was originally made by plaintiffs or defendants.\(^5\)

\textit{Gatti}, 333 P.3d at 1003. The \textit{Gatti} court held that because the lawyer had participated in allocations above and beyond the bottom line sums that his individual clients had agreed to accept, the settlements were interrelated and aggregate settlements therefore existed even if the plaintiffs had all affirmatively agreed in advance to participate on the basis of a \textit{pro rata} division of any excess over the sum total of their minimum settlement amounts.

The problem with this definition is that the term "interdependence" is too imprecise to use as a dividing line. For example, the \textit{Gatti} opinion and the commentary to the ALI paper both note that if claims are independently and separately negotiated, each based on its own value, no aggregate settlement exists. \textit{Gatti, supra}, 333 P.3d at 1003-04; ALI Report at §3.16(d). But neither \textit{Gatti} nor the ALI Report explain how true "independence," if that can be assumed to be the opposite of "interdependence," can ever be said to exist in any situation in which multiple plaintiffs are suing one or more defendants on factually related claims. For example:

- There will almost certainly be factual or legal issues common to at least some, if not all, of such cases.
- Those factual or legal issues will almost certainly have been discussed at some point during negotiations if any substantive negotiations occur.
- Even if there were no such discussions at all, it is still likely that counsel for plaintiffs will believe that the cases are inherently worth more standing together than apart.
- Even if there were no such discussions at all, it is still likely that a defendant and its counsel may be willing to pay more to settle each case on the theory that the defendant wants to be done with the entire matter.
- Even without saying a word to each other about this, to counsel for plaintiffs, a defendant might have in mind a fixed dollar sum which is the maximum amount it is willing to pay to settle all cases.
- Even if nothing is said about any of these matters during negotiations and each case is negotiated entirely on its own, it is entirely unrealistic to think that the settlement amount for the first case involving, say, a broken arm and no further damages will not affect the settlement amounts of subsequent broken arm cases.

In short, it simply cannot be said in any of these situations that the settlements are "based \textit{solely} on individual case-by-case facts and negotiations," which is the black letter requirement for non-aggregate settlements under §3.16(b)(2) of the ALI Report. In fact, and as indicated in part above, interdependence can be created because of thought processes on the defense side about which plaintiffs' counsel was never told but which the bar could subsequently assert was

\(^5\) Although the \textit{Gatti} court did not quote subsection (c) in its decision, it is included here for the sake of completeness.
reasonably foreseeable. In other words, there will effectively be no multi-party settlements that are not aggregate settlements.6

IV Why it Matters

None of this might make a difference if there were no situations in which the disclosures required to meet the aggregate settlement rule were or might be inappropriate and in which the time and expense to implement them were always justifiable. That, however, is not the world in which we live.

In sex abuse litigation, for example, individual plaintiffs may well not want others to know their identities, let alone how and why they have been harmed. Under Gatti and the ALI definition as presented, the only legally permissible way for plaintiffs to avoid the requirement to have to explain all of this information to each of the other plaintiffs is to have entirely separate counsel.7 The same could just as well be true in any health-related or HIPAA-covered injury situation.8 It is difficult to imagine that the Model Rules can or should be interpreted to trump patient privacy in whole or in part.

As stated in Official Comment [14] to the Scope Section of the ABA Model Rules, “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” An overbroad interpretation of what constitutes an aggregate settlement fails to meet this critical standard.

This may be a boon to defendants, but it is unlikely to do anything but harm plaintiffs. Stated another way, the definition of what is an aggregate settlement needs to be pared significantly back from what is stated in Gatti and the ALI definition.

6 In a 2013 article, Nancy J. Moore argued that jurisdictions should uniformly adopt "the ALI's definition of an aggregate settlement as one that involves an element of either collective allocation or a collective condition for the settlement to be effective." See, Nancy J. Moore, Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule, 81 FDMLR 3233, 2375 (2013). The authors agree with Professor Moore that collective allocation or collective condition should be included in any definition of an aggregate settlement; however, the authors disagree that the present ALI definition does so.

7 In Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule, supra, Professor Moore asserts that it is perhaps the express disclosure of identifying information (such as the names of the individual clients) is not required by the rule, and that plaintiffs’ attorneys are therefore not required to disclose such information unless it is necessary for a particular plaintiff to evaluate the fairness of his or her settlement offer when compared to the offers being made to others. First, and as Professor Moore herself notes, courts have disagreed about whether or not the disclosure of identifying information is required. So too have commentators. Moreover, it is not at all clear that simply not disclosing the names would alleviate privacy concerns for many individual plaintiffs. If, for example, there is a relatively small group of plaintiffs, disclosure of the facts of individual injuries or claims amounts may disclose which individual is which. See Moore, at 3260.

V Towards a Better Definition

We agree that the definition of aggregate settlements should include all settlement agreements that are conditioned on all or a fixed number or percentage of parties agreeing to the settlement. See ALI Report §3.16(b)(1). That is truly meaningful “interdependence.” We also agree that it should not matter whether plaintiffs or defendants first suggest such a possibility, since that is a matter of form and not substance. See ALI Report §3.16(c). We do not, however, agree with ALI Report §3.16(b)(2) that an aggregate settlement exists whenever there are facts or legal issues common to more than one case. If that were so, all simultaneous settlements of multiple cases would constitute aggregate settlements, and in effect the exception would swallow the rule. As long as cases are individually negotiated and each client is free to settle or not as that client chooses, there should be no aggregate settlement within the meaning of Model Rule 1.8(g).9

Indeed, our revised definition would still have allowed the Gatti court could still have held that an aggregate settlement was present. This could be said to follow not from the factual or legal overlap between the cases (which, as noted above, will always be present) but from the fact that the settling plaintiffs were in effect agreeing to an all or nothing settlement by stipulating to accept their respective percentage shares of the total of their minimum acceptable settlement amounts. To this extent, the Gatti court’s apparent full scale adoption of the ALI definition was not necessary to the conclusion that the court reached.

VI Concluding Remarks

There are other aggregate settlement-related issues that are beyond the scope of this note. For example, and as noted in ABA Formal Op 06-438, a group of plaintiffs with individual non-class claims cannot agree up front to allow all of their cases to be settled by even a super-majority vote. Nonetheless, and as the ALI Report notes in § 3.17, there is an argument to be made in favor of allowing a super-majority vote in at least some circumstances. That is an issue for another day, however. The key point here is that whatever else is true, much more nuance is required in the definition of aggregate settlements than the ALI Report provides.

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9 Cf. Authorlee v. Tuboscope Vetco Int'l, Inc., 274 S.W.3d 111, 120 (1st Dist. 2008) (an aggregate settlement "occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client").