Model Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(g) 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.

Comment

Aggregate Settlements

[13] 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. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). 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 regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.
§ 3.15 Need for Special Treatment of Non-Class Aggregate Settlements

Significant differences between class and non-class cases require that these two types of cases be treated differently for purposes of settlement.

Comment:

a. Differences between class and non-class settlements. The most common resolution of both class actions and non-class aggregate cases is settlement. As with simpler one-on-one litigation, few such cases go to trial. Nonetheless, there is often judicial involvement with non-class cases in the trial of bellwether cases or preliminary rulings on jurisdiction or evidentiary questions, even if a full-blown trial of the aggregated cases is unlikely. Although much attention has been given to class-action settlements, little scholarly or judicial attention has been given to non-class aggregate settlements.

Non-class settlements arise in a variety of contexts: through multidistrict litigation or consolidation, through informal coordination by multiple claimants’ counsel, or informally as multiple clients of a single lawyer or law firm. In the case of multiple clients of a single law firm, the lawyer’s entire inventory of cases against a particular defendant may be settled as a unit before most cases are even filed and, in some cases, before a single lawsuit is even filed. Moreover, cases may be informally aggregated on the defense side as well, through such mechanisms as joint-defense agreements or as a consequence of substantive rules governing joint and several liability.

The structure, mechanics, and effects of a settlement may vary greatly between class and non-class aggregate litigation on the claimants' side of the equation. In the non-class aggregate setting, an attorney-client relationship exists between each claimant and at least one attorney in the case. Class actions, by contrast, involve representation by attorneys who typically have a relationship only with the class representatives and not with the unnamed class members, although the lawyer owes fiduciary duties to all class members. Class-action settlements are governed by special procedural rules and occur under court supervision. It is only the judicial imprimatur in a class-action settlement that creates formality and, hence, all parties must structure their settlement agreement so as to secure court approval. By contrast, non-class aggregate settlements may occur with no active judicial oversight whatsoever. Non-class aggregate settlements are governed primarily by ethical rules and are rarely subject to court review or approval for fairness. As discussed in the following Sections, a fresh look needs to be taken at how non-class aggregate settlements should be regulated.
§ 3.16 Definition of a Non-Class Aggregate Settlement

(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 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.

Comment:

a. Interdependency of claims. The term “aggregate settlement” is intended to encompass multiclaimant settlements in which potential conflicts of interest stemming from interdependency exist, thus posing a risk of unfairness to individual claimants. This Section seeks to define the concept based on the characteristics that create conflicts of interest. Surprisingly, although the aggregate-settlement rule exists in every state, no state's rule attempts to define the term “aggregate settlement.” The scholarly literature, however, has identified two characteristics that render claims interdependent: collective conditionality and collective allocation.

b. Collective conditionality. Subsection (b)(1) describes conditionality, a characteristic common in aggregate settlements. Conditionality involves the practice of a defendant conditioning its acceptance of a settlement on a specific number or percentage of claimants agreeing to the settlement. Under subsection (b)(1), the degree of conditionality need not be unanimous. Whenever a settlement is conditioned on the acceptance of a set number or percentage of claimants, the settlement is an aggregate one.

c. Collective allocation. Subsection (b)(2) addresses collective allocation. That concept describes the process by which each individual claimant's claim is assigned a monetary value. In most cases involving multiple claimants, individual claimants usually will not have suffered identical injuries. Consequently, in any settlement, it will be necessary to allocate money or other relief to each claimant. A recognized method of allocation is individual, claimant-by-claimant valuation in which each claimant (typically through or with claimant's counsel) and the defense analyze the merits of each claimant's claim and reach an agreement on the settlement value of that claim. This form of allocation is noncollective because the value of each individual claim reflects the strength of that claim, as determined by claimant-specific negotiations, so long as the total value of the settlement is not fixed ahead of time. If the total value of the settlement is a predetermined amount, then the claim-by-claim individual review is nonetheless an aggregate settlement since the final value of each claim is interdependent.

Under subsection (b)(2), allocation is collective if the value of any claimant's claim is determined by a method other than individual, claimant-by-claimant analysis. For example, an allocation is collective whenever a defendant
conditions the settlement of the claims of multiple claimants and leaves to claimants' counsel the responsibility of proposing the allocation of that money among the members of the group. When a defendant conditions its offer to claimants' counsel to settle all existing claims on a lump-sum basis, the claims are interdependent because the parties have not assessed the precise value of each claimant's claim in arriving at the settlement figure. More realistically, the defendant's and claimants' attorneys simply looked at the claims as a whole and negotiated a figure that would compensate claimants with either an average award or an award based on a matrix of categories (e.g., depending on the nature of the injuries). Because the settlement does not reflect the value of each individual's claim, there is a possibility that the settlement undervalues some claims relative to others, or in any other way fails to provide equity in treatment among the affected claimants.

The same problem arises if the settlement allocates an identical sum to each claimant, without regard to the facts and circumstances of each claim, or if it apportions identical sums based on a few broad categories (e.g., property damage, personal injury).

d. Multiclaimant nonaggregate settlements. It is theoretically possible for a lawyer to settle multiple claimants' claims without creating issues under the aggregate-settlement rule. For example, a lawyer might have 10 claimants as clients. When the lawyer commences settlement negotiations, the defendant might be willing to negotiate an individual, fact-specific settlement for each claimant without setting a cap on the aggregate damages or insisting that a set percentage of the potential claimants agree to the settlement. As long as each claimant's claim is settled on an individual basis, such a settlement would not fall within the definition of an aggregate settlement, although in practice each claimant will insist on learning the amount to be received by the lawyer's other clients involved in the joint representation before agreeing to the settlement sum proposed for that claimant. In the real world, however, a defendant generally knows the amount it is willing to pay to settle a group of claims, so the notion that the defendant will treat each of the lawyer's multiple claimants as separate and unrelated does not represent the typical manner in which such claims are negotiated. If a settlement is subject to implicit caps, matrices, or other collective methods of allocation, then the settlements constitute an aggregate settlement.

Illustrations:

1. An attorney represents 100 plaintiffs complaining of various injuries caused by an allegedly defective drug manufactured by Defendant. During settlement negotiations, the attorneys for the plaintiffs and Defendant individually assess each claim with a goal that the total settlement would equal $1 million. Defendant agrees to the settlement only if at least 95 percent of all of the claimants agree. The settlement is an aggregate one under subsection (b)(1), even though the amounts were individually negotiated, because Defendant has conditioned its acceptance of the settlement on a set percentage of claimants agreeing to the settlement and because Defendant placed a cap on the collective settlement. The settlement is also an aggregate one under subsection (b)(2) because of the overall $1 million cap.

2. Same group of 100 claimants as in Illustration 1. Defendant offers to settle each claimant's claim for $10,000, regardless of the facts of any particular underlying claim. Defendant does not require that a certain percentage of claimants agree to the settlement. The settlement is an aggregate one under subsection (b)(2) because the amount of compensation allocated to each claimant is linked to the others.

3. Same group of 100 claimants as in Illustration 1. Counsel for claimants and Defendant individually negotiate each claimant's claim based on the facts of each claim,
and Defendant does not condition its acceptance of the settlement on a certain percentage of clients agreeing to the settlement. The settlement is not an aggregate settlement under subsection (a) or (b).

§ 3.17 Circumstances Required for Aggregate Settlements to Be Binding

(a) A lawyer or group of lawyers who represent two or more claimants on a non-class basis may settle the claims of those claimants on an aggregate basis provided that each claimant gives informed consent in writing. Informed consent requires that each claimant be able to review the settlements of all other persons subject to the aggregate settlement or the formula by which the settlement will be divided among all claimants. Further, informed consent requires that the total financial interest of claimants' counsel be disclosed to each claimant.

(b) In lieu of the requirements set forth in subsection (a), individual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate-settlement proposal (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial-majority vote of each category of claimants). An agreement under this subsection must meet each of the following requirements:

1. The power to approve a settlement offer must at all times rest with the claimants collectively and may under no circumstances be assigned to claimants' counsel. Claimants may exercise their collective decisionmaking power to approve a settlement through the selection of an independent agent other than counsel.

2. The agreement among the claimants may occur at the time the lawyer-client relationship is formed or thereafter, but only if all participating claimants give informed consent. Informed consent requires that the claimants' lawyer fully disclose all the terms of the agreement to the claimants to facilitate informed decisionmaking regarding:

   (A) Whether to enter into the settlement agreement;

   (B) Whether to subsequently challenge the fairness of the settlement agreement under subsection (d) or (e);

   (C) Whether to subsequently challenge the compliance of the settlement agreement with the requirements set forth in subsections (b) and (c); and

   (D) The desirability of seeking, along with a reasonable opportunity to seek, the advice of independent legal counsel.

3. The agreement must specify the procedures by which all participating claimants are to approve a settlement offer. The agreement may also specify the manner of allocating the proceeds of a settlement among the claimants or may provide for future development of an appropriate allocation mechanism.

4. Before claimants enter into the agreement, their lawyer or group of lawyers must explain to all claimants that the mechanism under subsection (a) is available as an alternative means of settling an aggregate lawsuit under this Section. A lawyer or group of lawyers may not terminate an existing relationship solely because the claimant declines to enter into an agreement.
agreement under subsection (b), and the lawyer must so inform the client. A lawyer who is simultaneously representing claimants proceeding under subsection (a) and claimants proceeding under subsection (b) must notify the subsection (a) claimants that they continue to exercise independent control over their cases and that they may refuse an offered settlement after its terms are disclosed.

(c) An agreement pursuant to subsection (b) is permissible only in cases involving a substantial amount in controversy, a large number of claimants, and when the agreement requires approval by a substantial majority of claimants, with the foregoing minimum criteria to be determined by the applicable legislative or rulemaking body.

(d) The enforceability of an agreement under subsection (b) should depend on whether, based on all facts and circumstances, the agreement is fair and reasonable from a procedural standpoint. Facts and circumstances to be considered include the timing of the agreement, the sophistication of the claimants, the information disclosed to the claimants, whether the terms of the settlement were reviewed by a neutral or special master as defined in § 3.09(a)(2), whether the claimants have some prior common relationship, and whether the claims of the claimants are similar.

(e) In addition to the requirements of subsection (d), the enforceability of a settlement approved through an agreement under subsection (b) should depend on whether, under all the facts and circumstances, the settlement is substantively fair and reasonable. Facts and circumstances to be considered include the costs, risks, probability of success, and delays in achieving a verdict; whether the claimants are treated equitably (relative to each other) based on their facts and circumstances; and whether particular claimants are disadvantaged by the settlement considered as a whole.

(f) Responsibility for compliance with the prerequisites for the enforceability of an agreement under subsection (b) rests with the claimants' lawyer.

Comment:

a. Aggregate-settlement rule. Subsection (a) sets forth the current aggregate-settlement rule, with the modification that informed consent is satisfied if the claimants are allowed to review the formula by which the settlement will be allocated. Under the aggregate-settlement rule, a claimant may not challenge a settlement if, after disclosure of all pertinent information, the claimant agrees in writing to be bound. A version of that rule exists in all 50 states and the District of Columbia. Under subsection (a), compliance with the aggregate-settlement rule is one way to bind parties to a non-class aggregate settlement. Subsection (a) provides that compliance with the aggregate-settlement rule remains a viable way of achieving a settlement.

The aggregate-settlement rule is based on the view that, without reviewing and analyzing the existence and nature of all claims and of the participation of each person in a proposed settlement (including but not limited to all proposed settlement terms), a claimant cannot make an informed decision whether to agree to a proposed aggregate settlement. Moreover, the rule posits that, because of this need to review all relevant information before making a decision, a claimant cannot waive in advance the right to challenge a conditional—or collective—allocation settlement. Further,
the aggregate-settlement rule is intended to preserve in the claimants' hands—as opposed to the lawyers'—the power to decide whether and when to settle.

b. Alternative to aggregate-settlement rule. Subsection (b) provides an alternative to the aggregate-settlement rule as a vehicle for finalizing aggregate non-class settlements. Subsection (b) departs from the current aggregate-settlement rule by providing that a waiver of individual approval may be valid and binding provided that it is knowingly and voluntarily made, is in writing, is signed by the claimants after full disclosure, and vests decisionmaking power in the claimants either collectively or through some preestablished voting structure.

Waivers of important rights are valid in a variety of areas, including the most cherished of constitutional rights. Subsection (b) rejects the view that individual decisionmaking over the settlement of a claim is so critical that it cannot be subject to a contractual waiver in favor of decisionmaking governed by substantial-majority vote. To that end, subsection (b) proposes a contractual-waiver mechanism for settling aggregate cases, while subsection (a) reaffirms that the aggregate-settlement rule remains the default mechanism for aggregate settlement.

Although an aggregate settlement may be binding on a claimant, the claimant remains free to terminate the attorney-client relationship. Subsection (b) does not change existing law governing a claimant's right to pursue malpractice or breach-of-fiduciary-duty claims against his attorney. Further, subsection (f) emphasizes that the risk of improper inducement into an aggregate settlement falls with claimants' counsel.

Current law prohibits waiving individual-claimant settlement decisionmaking, thereby empowering individual holdout claimants to exercise control over a proposed settlement and to demand premiums in exchange for approval. Moreover, in many instances, multiple claimants derive substantial benefits from joint representation by one lawyer or law firm, particularly one with expertise and stature in the particular area of law in which the claimant's claims arise. To the extent that reasonable aggregate settlements—achieved after good-faith, arm's-length negotiations and independent review—cannot go forward because one claimant (or a small number of claimants) objects, the other claimants lose the benefit of the collective representation. Indeed, there are numerous reported cases invalidating collective settlements for noncompliance with the aggregate-settlement rule. Even the threat of such a holdout may cause the defendant to withhold the premium associated with complete peace, thereby inuring to the detriment of all the represented claimants. Subsection (b) sets out an alternative mechanism for settling an aggregate lawsuit in certain circumstances, provided that specific safeguards, as described in subsections (b) through (e), are in place.

In form, agreements subjecting group settlements to a substantial-majority rule may be agreements solely between or among clients or agreements between or among clients that also include their attorneys. The form of agreement may affect the governing law, the revocability of the agreement, or other matters. Subsection (b) assumes that the Restatement Third of the Law Governing Lawyers—which sets limits on lawyer-client agreements—applies to agreements subjecting group settlements to a substantial-majority rule, even when the agreements are nominally client-client agreements rather than client-lawyer agreements. The assumption is especially warranted when the lawyer acting for a group of clients is involved in the creation of the agreement. Subsection (b) further assumes that the existence of an agreement does not obviate the lawyer's duty of faithful representation, nor does it act as a prohibition on subsequent challenges to the attorney's discharge of his or her duties.
Four requirements must be satisfied for an agreement under subsection (b) to be valid:

(1). Power to settle must remain with claimants. Subsection (b)(1) recognizes that, under prevailing ethics rules, a lawyer may not obtain a nonrevocable assignment of the client's individual authority to decide whether to settle a case and for what amount. Consequently, the authority to settle without complying with the aggregate-settlement rule is not given to counsel but, instead, remains with the collective claimants, who may act to accept a settlement pursuant to a waiver only upon agreement of a substantial majority of the claimants who are covered by the proposed settlement (or a substantial majority of the claimants in each significant settlement category).

(2). Informed-consent requirement for a waiver of individual-claimant decisionmaking. As stated in subsection (b)(2), a waiver under subsection (b) is valid only when the claimant gives informed consent. Because the decision to settle is fundamental, when agreements encumbering control of settlement are made, clients must be fully informed. The amount of information required for informed consent depends on the facts of the case. In some cases, the lawyer may wish to discuss with the claimant the substantial benefit the claimant may potentially receive from the lawyer's ability to represent the claimant more effectively as a result of the waiver. The lawyer must discuss with the claimant the potential material disadvantages that could result from agreeing to such a waiver. Informed consent also requires advising the client (or prospective client) of the desirability of seeking the advice of other counsel before executing a waiver, and the client must be given a reasonable opportunity to do so. The affording of such an opportunity to seek independent legal counsel tends to indicate that the lawyer did not apply improper pressure to the client and that the client was given time to consider the implications of the agreement.

(3). Procedures for settlement approval. An agreement under subsection (b) must specify the procedures for approval of any settlement offer by participating claimants. Claimants may, but are not required to, exercise their collective decisionmaking power to select an independent agent to represent the best interests of the claimants, provided that the agent is not affiliated with claimants' counsel. Although claimants must be fully informed when subjecting their control of the settlement decision to majority rule, they need not know, and typically will not know, the terms of a proposed settlement when doing so. To reduce uncertainty regarding the allocation of settlement proceeds, claimants may, but are not required to, agree on an allocation plan when providing for substantial-majority rule. For example, they may agree that a settlement fund will be divided pro rata on the basis of each claimant's monetary loss. They may also specify that each claimant will receive at least a specified sum or a specified percentage of the recovery. When the allocation mechanism is unresolved at the time of proposed settlement, counsel for the participating claimants should normally provide for a disinterested neutral to oversee the allocation of settlement proceeds to the settling claimants.

(4). Disclosure of alternatives. Subsection (b)(4) requires that the lawyer inform claimants that they have the option of insisting upon compliance with the aggregate-settlement rule under subsection (a) as an alternative to the approach under subsection (b), and that a lawyer may not terminate an existing representation because the claimant elects an approach under subsection (a) rather than under subsection (b). This requirement ensures that claimants' choices about how to structure settlements are freely made, and is designed to eliminate any possibility that a claimant may feel improperly pressured to follow the approach in subsection (b) in order to secure his or her preferred choice of
counsel. Those who elect to proceed under subsection (a) rather than subsection (b) remain free to negotiate their own individual settlements. Subsection (b)(4) also ensures that the decision about whether, when, and how to settle remains with the claimants rather than the lawyer. In addition, subsection (b)(4) requires lawyers who are simultaneously representing separate groups of claimants under subsection (a) and subsection (b) to inform claimants represented under subsection (a) of their power to refuse the settlement after its terms are disclosed.

Subsection (b) does not prevent counsel from refusing to represent claimants who choose representation under subsection (a); however, if a legislature finds, after adopting the approach of subsection (b), that claimants choosing representation under subsection (a) are consistently unable to secure representation, it may choose to prohibit counsel from refusing to represent claimants solely because such claimants opt for representation under subsection (a).

c. Limits on availability of subsection (b) agreements. The approach under subsection (b) is available as an alternative to the traditional aggregate-settlement rule in certain situations only when the following requirements are satisfied:

(1). Numerical and monetary limits. The purpose of modifying the strict requirements of the aggregate-settlement rule is to facilitate large-scale settlements that may have been impeded by the mechanical application of the aggregate-settlement rule to a substantial multiparty settlement. Although such cases are not handled on a class basis, they share similarities with class actions, both in terms of numbers and amounts at stake. In such cases, strong reasons exist for allowing claimants to waive the formalized protections of the aggregate-settlement rule while retaining the underlying aim of protecting all claimants and maximizing their capacity for individual recovery. It is not the intent of subsection (b), however, to address every multiparty claim that falls within the definition of an aggregate settlement under § 3.16. For example, in a multiparty automobile-accident case involving a small number of claimants, the aggregate-settlement rule is easy to administer and poses few practical difficulties for the lawyer representing multiple claimants. The same is not true, however, for a lawyer representing hundreds of asbestos claimants and negotiating multimillion-dollar settlements. Thus, under subsection (c), the waiver provisions in subsection (b) apply only to situations involving claims that, in the aggregate, are substantial and involve large numbers of claims.

However, subsection (c) does not set a minimum number of claimants or minimum amount in controversy; those decisions are left to legislative drafting. One potential model for the number of claimants is the “numerosity” requirement of Rule 23(a)(1). Cases under that rule generally find classes of 40 or more members to be numerous. Similarly, one model for the aggregate amount of claims is the $5 million jurisdictional minimum under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

(2). Need for substantial-majority approval. The object of subsection (b) is to provide a means by which a group of clients may respond to a settlement offer requiring the participation of a specified number or percentage of the clients. Subsection (c) does not define “substantial majority” but leaves that issue to legislative drafting. One possible model for legislatures or rulemaking bodies is Section 524(g) of the Bankruptcy Code, which requires a substantial majority of 75 percent of the “class or classes” of asbestos creditors (typically asbestos claimants) to approve a plan of reorganization in an asbestos bankruptcy.
Depending on the sophistication of the claimants, the subsection (b) agreement may specify such working arrangements for group representations as are deemed to be in the best interest of the participating claimants as a whole. For example, the claimants may appoint certain members to act on behalf of the group by receiving communications and overseeing the day-to-day conduct of the lawsuit. They may also allocate responsibility for litigation costs. Subsection (b) also gives claimants the freedom to design their own voting rules, again subject to the informed consent of the participating claimants. They may, by way of example, select a substantial-majority rule requiring that 90 percent of all claimants approve a settlement for all claimants to be bound. They may also select a lower threshold, consistent with the statutory minimum.

d. Criteria to apply in evaluating an agreement under subsection (b). As stated in subsection (d), the enforceability of an agreement under subsection (b) depends on all of the relevant facts and circumstances. Several facts and circumstances may be relevant to evaluating the procedural fairness and reasonableness of a contract:

(1). Timing of the agreement. The Restatement Third of the Law Governing Lawyers allows clients to enter into agreements with other clients at any time. Consequently, clients in litigation groups may decide how to handle group-wide settlement offers when a joint representation begins or after one commences. Timing is important, however. Under the Restatement Third of the Law Governing Lawyers, clients' consent to lawyer-client agreements must be reasonably informed. Claimants under this Section are likely to have more information about the benefits and risks associated with group-wide voting arrangements after some litigation has occurred than at the time of formation of the lawyer-client relationship. This consideration provides a circumstance surrounding the agreement that weighs in favor of postretention agreements, and against the use of agreements entered into at the outset of representation. At the same time, a voting rule should be in place before the evaluation of any particular settlement offer. The concern is that settlement structures created once a settlement is in place will induce cram-down efforts against individuals disadvantaged by the terms of the settlement.

(2). Sophistication of the clients. Claimants who subject themselves to substantial-majority rule should understand the potential consequences of the decision, including the effects and any material disadvantages of their decision. Sophisticated clients, such as businesspersons or investors, are more likely than others to appreciate the benefits and the risks of subjecting themselves to some form of substantial-majority rule. Consequently, it is easier to justify the use of such voting rules when sophisticated clients are involved.

(3). Information disclosed to clients. The considerations discussed in Comment b regarding the amount and nature of disclosure required to obtain informed consent are also relevant in assessing whether a settlement is procedurally fair and reasonable under subsection (d).

(4). Review by a neutral. Approval of a proposed settlement by a neutral or special master is another factor that may increase the likelihood of enforceability of an agreement pursuant to subsection (b). Recognizing that unintended overreaching by lawyers may occur in agreements between lawyers and clients, review of the terms of the underlying settlement by a neutral or special master provides a safeguard to ensure a contract's fairness and reasonableness for the claimant. The neutral or special master selected to review the terms of the settlement must have no stake in the adoption of the settlement, such as a hope of future employment as a mediator for the parties or their counsel.
(5). Prior relationship and relative similarity of claims. A settlement agreement is more likely to be fair and reasonable when claimants have some prior common relationship and relatively similar claims. For example, an aggregate settlement executed under § 3.17(b) is more likely to be procedurally fair and reasonable for claimants who share some prior relationship that accustoms them to working together. Thus, it is likely that agreements to proceed collectively will be more readily realized for claimants with common membership in a trade association or union sharing similar grievances against such organization than for asbestos claimants with no prior relationship to one another and relatively different claims.

e. Substantive fairness of a settlement. Even if the facts and circumstances indicate that an agreement under subsection (b) is procedurally fair and reasonable pursuant to subsection (d), subsection (e) provides that a settlement is not enforceable unless its terms are substantively fair and reasonable. Subsection (e) utilizes several of the fairness criteria articulated in § 3.05 in the context of class-action settlements.

f. Choice of law. This Section does not definitively specify which law will govern when, for example, the attorney and claimant are in different states. Consistent with other Sections of these Principles, this Section accepts existing choice-of-law rules as they currently stand. See also § 2.05. Such issues concerning representation and litigation that stretch across state boundaries frequently arise in multistate litigation, and the body of choice-of-law jurisprudence governing ethical rules would apply here.

§ 3.18 Limited Judicial Review for Non-Class Aggregate Settlements

(a) Any claimant who is subject to a settlement entered into pursuant to § 3.17(b) is entitled, within the time period set by the legislature or rulemaking body, to challenge the settlement on the grounds that the settlement does not satisfy some or all of the requirements of § 3.17(b) and § 3.17(c), or is not procedurally and substantively fair and reasonable pursuant to § 3.17(d) and § 3.17(e). Such a challenge may be brought in the court in which the claimant’s case is or was pending or, if no case is or was pending, in any court of competent jurisdiction.

(b) Any claimant who contests the amount of his or her share of a settlement approved under § 3.17(b)-(e) is entitled, within the time period set by the legislative or rulemaking body, to challenge the fairness of the settlement. Such a challenge may be brought in the court in which the case is or was pending or, if no case is or was pending, in any court of competent jurisdiction.

(c) The right to challenge the settlement under subsections (a) and (b) of this Section is nonwaivable.

(d) A claimant’s lawyer who negotiates a settlement that a court later determines to be unenforceable under § 3.17(b)-(e) may be required to pay the reasonable attorneys’ fees and costs incurred by the challenging claimant.

Comment:

a. Challenging the settlement. Although a claimant may waive the protections of the aggregate-settlement rule, this Section nonetheless provides a safety valve for a claimant who executed (or is purported to have executed) a
waiver of the aggregate-settlement rule to seek relief if the settlement did not comply with § 3.17(b)-(c) or if the settlement is alleged to be unfair to the claimant under § 3.17(d) or (e). A challenge to the settlement may be brought in the court where the case is or was pending or, if no action was commenced in a judicial forum before the challenged settlement, in any court of competent jurisdiction, i.e., any court capable of exercising jurisdiction over the defendants to any such challenge. Normally, the defendants to such a challenge would include claimants' counsel and the defendant who entered into the settlement. The challenge must be brought within a specified time established by the legislature or rulemaking body, and should be brought and adjudicated promptly to allow for distribution of the settlement proceeds within as short a time as possible. The legislature or rulemaking body shall specify the relevant discovery procedures that are available to a claimant bringing such a challenge. If a challenge is successful, the court has discretion to consider all relevant facts and circumstances to determine whether relief should be limited to the claimant who filed the challenge or should extend to other parties to the settlement agreement.

b. Why the ability to challenge the settlement is not waivable. The challenges permitted under this Section are designed to ensure that (1) the lawyer representing all affected claimants complies with all of the requirements of § 3.17(b) and (c), and (2) the terms of the settlement are fair to the claimant challenging those terms as provided in § 3.17(d) and (e). Making the right to challenge the settlement nonwaivable provides a strong incentive to claimants' counsel to make sure that each claimant understands precisely what is being waived and understands the benefits and potential disadvantages of the waiver, along with alternatives to the proposed waiver that the claimant ought to consider, including but not limited to representation on an individual basis by another lawyer who is not subject to conflicts arising from multiple-client representations. Making the right nonwaivable also provides an important incentive for the parties to ensure that the total settlement and the allocation of the settlement to each claimant are fair.

c. Payment of challenger's attorneys' fees. This Section authorizes the court to award attorneys' fees to the challenger who is successful in contesting the settlement. Fees shall be paid by the counsel who represented the claimant in the settlement.

Illustrations:

Illustrations: 1. Claimants' counsel has 10,000 clients complaining of injuries caused by Defendant's allegedly defective product. None of the claimants signs a waiver of the right to informed consent, in a writing signed by the client, for any proposed settlement. Defendant offers—and claimants' counsel accepts—a $1 million lump-sum settlement. No claimant who files a timely challenge is bound by the settlement. The court may also decide to extend relief to those who do not file timely challenges. 2. Same situation as in Illustration 1, except that all claimants executed a purported waiver of their right to informed consent pursuant to § 3.17(b). The waiver fails to warn the claimants that they will be bound by any proposed settlement that a substantial majority of claimants approves. The settlement is unenforceable against any claimant who files a timely challenge because the waiver was based upon inadequate disclosure. The court may also decide to extend relief to those who do not file timely challenges. 3. Same situation as in Illustration 1, except that the waivers obtained comply with § 3.17(b). Each client is allocated the same amount of money, even though some clients suffered serious permanent injuries, while others suffered only minor or temporary injuries. A claimant with serious personal injuries who mounts a timely challenge under this Section is not bound by the settlement. The court may also decide to extend relief to those who do not file timely challenges.
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 Conduct 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. This opinion considers the subject of aggregate settlements or aggregated agreements addressed in Rule 1.8(g).

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
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.\(^5\)

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.\(^6\)

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

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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).

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.

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.”)
lawyer. 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. 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.

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 mini-

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.


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)).


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.
mum, the following information to the clients for whom or to whom the settlement or agreement proposal is made:

- 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.
- 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.
- 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.

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


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).

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.\textsuperscript{15} 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.\textsuperscript{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.\textsuperscript{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.

\textbf{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 con-

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\textsuperscript{15} See, e.g., In re Hoffman, \textit{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.")

\textsuperscript{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].

\textsuperscript{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.
flicts 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.
REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 879
September Term, 1998

GIUSEPPINA SCAMARDELLA, ET VIR

v.

FAUSTO ILLIANO, ET AL.

Salmon,
Thieme,
Kenney,
JJ.

Opinion by Thieme, J.

Filed: April 9, 1999
This appeal is from an order of the Circuit Court for Montgomery County apportioning the proceeds of an aggregate settlement of claims arising from an automobile accident and an order denying the appellants' Motion to Amend the court's order. The appellants argue alternatively that there was no consent to the settlement, that the settlement agreement was unethically made and should therefore be voided, and that the court abused its discretion in apportioning the settlement. We affirm the court’s order apportioning the settlement, except with regard to the attorney fees assessed against the appellants.

Facts of the Case

This case had its genesis in a tragic automobile accident that took place on June 30, 1994. Gloria Illiano was driving southbound on Route 27 in Montgomery County, Maryland. Sara Illiano, her infant daughter, and Giuseppina Scamardella, her mother, were passengers in the car. Jeffrey Fletcher, a teenager driving northbound on Route 27, lost control of his car, crossed over the center line, and violently struck the Illiano vehicle head-on. Gloria’s injuries kept her in the hospital for several weeks, and eventually proved fatal. She was twenty-four years old and had been married to Fausto Illiano for eighteen months. Giuseppina Scamardella, who was forty-eight years old at the time of the accident, also suffered severe injuries. Sara, then six months old, escaped with minor physical injuries. Giuseppina Scamardella and her husband, Cresenzo Scamardella, the appellants, who are
citizens of Italy and reside in that country, and who speak very little English, retained Paul D. Bekman (Bekman) to represent them for claims arising out of the accident. Fausto Illiano retained Bekman on his own behalf, on behalf of Sara, and on behalf of his wife's estate, of which he is the personal representative.

**Statement of the Case**

On October 17, 1994, suit was filed in the Circuit Court for Montgomery County against Fletcher, his employer, William Jarcy (doing business as William Jarcy's Film Delivery Service), and Century Ford, Inc. (Century Ford). On August 28, 1995, Century Ford filed a motion for summary judgment. On February 16, 1996, the circuit court granted summary judgment in favor of Century Ford. That decision was appealed to this Court and was affirmed on April 7, 1997.

In October 1995, Fausto Illiano and Cresenzo Scamardella met with Bekman to discuss settlement of their claims in the event judgment in favor of Century Ford was affirmed on appeal. It was proposed that they would accept from Fletcher and Jarcy (the defendants) $1.25 million in settlement of their claims. The amount of the settlement offer represented the full extent of insurance coverage of the defendants. No apportionment of the settlement proceeds among the parties was proposed. It was, however, proposed that the parties would later agree to a division of the settlement. If, after acceptance of the $1.25 million
settlement, agreement could not be reached on a division of the proceeds, the parties would obtain other counsel, and the court would have to apportion the monies. Although it is disputed by the appellants, it seems clear that assent to this plan was given by all the parties.

Pursuant to the parties’ agreement, Bekman accepted the offer of $1.25 million in settlement of the parties’ claims. At Bekman’s request, Giuseppe DiRosano, the appellants’ nephew, who was acting as a go-between for the appellants and Bekman, conveyed to the Scamardellas Bekman’s proposal that the funds be allocated ninety percent (90%) to the claims of Fausto Illiano, Sara Illiano, and the estate of Gloria Illiano, and ten percent (10%) to the claims of Mr. and Mrs. Scamardella. When DiRosano advised Bekman that the appellants rejected the proposal, Bekman asked DiRosano to inform them that they should retain other counsel. The appellants, through DiRosano, hired new counsel.

On July 16, 1997, when it had become apparent that counsel for the parties could not agree, Bekman filed a Motion to Allocate the Proceeds of Settlement. After filing the motion to allocate, Bekman withdrew from further participation in the case. In response to the motion to allocate, the appellants, through new counsel, objected to a division of the proceeds in the manner proposed. In an amended reply, they asserted that they had not consented to the settlement.
On March 11, 1998, the court, sitting as trier of fact, concluded after plenary hearings that the appellants had consented to the settlement and that Bekman had not breached any duties to them. The court received evidence regarding the injuries to Mrs. Scamardella, the four-week period of hospitalization of Gloria before her death, and the economic and noneconomic losses to Sara and Fausto due to Gloria’s death. The court allocated the settlement monies in a manner proportionate to the respective injuries sustained and in consideration of the law of damages applicable to the parties’ claims.\[1\] Attorney fees of one-third were deducted from the parties’ allocations, as per their contingent fee arrangement. The appellants object to payment of the contingent fee out of their share of the settlement. After further hearing on April 17, 1998, the court denied the Appellants’ Motion to Amend Judgment and entered judgment accordingly. The appellants have appealed those determinations, their appeal being timely noted on May 8, 1998.

**Questions Presented**

The appellants present two questions for our review, which we have recast in an abbreviated form:

\[1\] The allotments, prior to the subtraction of attorney fees, were as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Giuseppina Scamardella:</td>
<td>$96,870.74</td>
<td>7.75%</td>
</tr>
<tr>
<td>Estate of Gloria Illiano:</td>
<td>$66,120.65</td>
<td>5.29%</td>
</tr>
<tr>
<td>Fausto Illiano:</td>
<td>$470,569.72</td>
<td>37.65%</td>
</tr>
<tr>
<td>Sara Illiano:</td>
<td>$616,438.89</td>
<td>49.31%</td>
</tr>
</tbody>
</table>
I. Did the trial court err in finding that the appellants had authorized settlement of their claims when their assent was arguably ambiguous and when they were not informed of the apportionment of the settlement prior to their consent being solicited?

II. Did the trial court abuse its discretion in allocating the $1.25 million in settlement proceeds?

In response to Question I, we say, "no." In response to Question II, in the main we say, "no." On the issue of the court’s allotment of attorney fees, we reverse and remand.

**Standard of Review**

The two questions presented to us necessitate that we employ different standards of review. We will set out those standards at the beginning of the substantive discussion of each issue below.

**Discussion**

**Authority to Settle**

We begin by noting that it is well settled that the attorney’s authority to settle claims is a question of fact.

"[T]he burden of proof of express authority of an attorney to compromise a claim rests upon the party asserting such authority. This is so because the attorney-client relationship is governed by the law of agency and the issue of burden of proof must be determined by agency principles. As the Court of Appeals observed in Fertitta v. Herndon, 175 Md. 560 (1939):"

"[W]here the relation of the agency is dependent upon the acts of the parties (as here), the law makes no presumption of agency, and then it is always a fact to be proved, with
the burden of proof resting upon the person alleging the agency to show not only the fact of its existence, but also its nature and extent."

Kinkaid v. Cessna, 49 Md. App. 18, 23 (1981) (quoting Fertitta v. Herndon, 175 Md. 560, 564 (1939)) (second alteration in original) (added emphasis in original deleted) (citations omitted). When the trial court determines a question of fact without a jury, we review such determinations only to see that they are not "clearly erroneous." Md. Rule 8-131(c); Shallow Run Limited Partnership v. State Highway Admin., 113 Md. App. 156, 173-74 (1996) (discussion of "clearly erroneous" standard of review).

The trial court found as a matter of fact that the appellees had authorized Bekman to settle their claims as a contingency following upon the failure of the appeal of the summary judgment of their claims against Century Ford. There is sufficient evidence in the record to justify such a determination. The testimony of Bekman and Fausto Illiano, which is the obvious basis for the court's conclusion, was that Mr. Scamardella, at the October 1995 meeting, both verbally (by saying, in Italian, "Yes, I understand") and nonverbally (by nodding affirmatively), clearly indicated his assent to the contingent settlement plan. We will not disturb the court's finding based on that evidence. See Carroccio v. Thorpe, 230 Md. 457, 463-64 (1963) (upholding the trial court's finding of authority to settle claims as not clearly erroneous); Poseko v. Climatic Control Corp., 198 Md. 578, 584 (1951) (same).
Maryland Lawyers' Rules of Professional Conduct Rule 1.8(g)

The appellants argue in the alternative that Bekman violated his ethical duty when representing multiple clients by failing to make adequate disclosure of all the factors of the aggregate settlement before obtaining consent to settle. On that basis, the appellants believe, the settlement should be set aside. We disagree.

The Maryland Lawyers' Rules of Professional Conduct (MLRPC) provide that:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

MLRPC Rule 1.8(g) (1986). The appellants argue that the duty to disclose "the participation of each person in the settlement" requires that each client be informed not only of the involvement of all other clients in the settlement, but also of the exact share of the settlement proceeds that each is to receive. The weight of authority does not mandate that view in this case.
The cases that interpret Rule 1.8(g),\(^2\) including those cited by the appellants, are in the main about the failure to obtain consent, not about the scope of disclosure. See ABA, Annotated Model Rules of Professional Conduct 134-35 (3d ed. 1996) (annotations to Rule 1.8(g)) (citing In re Sonnier, 157 B.R. 976 (Bankr. E.D. La. 1993); Knisley v. City of Jacksonville, 497 N.E.2d 883 (Ill. App. Ct. 1986), appeal denied, 505 N.E.2d 353 (Ill. 1987); In re Deloney, 470 N.E.2d 65 (Ind. 1984); Estate of Vafiades v. Sheppard Bus Serv., Inc., 469 A.2d 971 (N.J. Super. Ct. Law Div. 1983); Oklahoma ex rel. Oklahoma Bar Ass'n v. Watson, 897 P.2d 246 (Okla. 1994); In re Green, 354 S.E.2d 557 (S.C. 1987)); see also Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir. 1975); Scott v. Randle, 697 N.E.2d 60 (Ind. Ct. App. 1998).

Few cases have addressed directly the scope of disclosure required by Rule 1.8(g). See In re Anonymous Member of the South Carolina Bar, 377 S.E.2d 567, 568 (S.C. 1989) (noting the dearth of relevant authority); cf. Acheson v. White, 487 A.2d 197, 201 (Conn. 1985) (reserving the question of whether an attorney with a conflict of interest arising from multiple representation “can never effectively make the required disclosure”). One case that

\(^2\)Maryland Rule of Professional Conduct 1.8(g) comes directly from the ABA Model Rules of Professional Conduct 1.8(g) (1983), which has now been adopted in a majority of states. Rule 1.8(g) is substantially identical to the prior ABA Model Code of Professional Responsibility Disciplinary Rule 5-106 (1969), which is still in force in a few states.
does seem to support the appellants’ contention directly is Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225 (Tex. App. 1985). Quintero involved the settlement of nearly 350 claims of misrepresentation against a builder. The appellants in that case had, unbeknownst to them, won a separate judgment against the appellee prior to consenting to a significantly smaller settlement. The Court set aside the settlement on the basis that the appellants had not been “informed of the nature and settlement amounts of all the claims involved in the aggregate settlement, nor were they given a list showing the names and amounts to be received by the other settling plaintiffs.” Id. at 229.

Quintero is distinguishable on its facts from the case sub judice. Quintero involved a class-action-sized multiple representation, where all the plaintiffs were effectively anonymous, and their claims and their settlement allocations unknown to each other. The allocations were to be determined by the plaintiffs’ attorney, and the process was to be overseen by the defendant’s legal staff. Additionally, upholding the settlement would have involved a clear injustice, given that the judgment previously won by the appellants was several times the size of the settlement that they had agreed to without actual knowledge of the judgment. None of these elements are present in the case sub judice. Here the parties are all well known to each other, as are their claims. The settlement amount is plain. A method for
formulating the apportionment was agreed upon, and any resulting apportionment either would be disclosed or would be transparent. Finally, there would be no such obvious injustice in upholding the settlement in this case where it is agreed the maximum recovery had been obtained. In fact, quite the opposite situation pertains. Upsetting the settlement would work against justice.

Additionally, other cases have held that an incomplete disclosure did not defeat a consented-to settlement when the information provided was adequate to make an intelligent decision to consent. See In re Petition of Mal de Mer Fisheries, Inc., 884 F. Supp. 635, 639-40 (D. Mass. 1995) (upholding settlement even though fact of aggregate settlement was not disclosed); In re Anonymous Member of the South Carolina Bar, 377 S.E.2d at 568 (stating in dictum that safeguards to fairness of settlement were adequate, and holding that no disciplinary sanction ought to be imposed in that particular case, despite the fact that attorney failed to disclose names and settlement amounts of other parties to aggregate settlement); cf. Acheson, 487 A.2d at 199-200 (upholding the conclusion that "the appellant’s consent to the terms of the stipulated judgment as they affected her interest in [the property at issue] did not necessarily depend upon her specific knowledge of what interests in that property might be retained by other defendants not similarly situated"). Like these cases, we hold that the information provided to the appellants was sufficient to
safeguard their rights, and we do not find the need to apply Rule 1.8(g) with the harsh force of Quintero.

Another crucial distinction between the present case and all the others we have examined is that in this case the deficiency of disclosure did not result from a withholding of information but rather from a failure to formulate in advance the apportionment itself. This distinction is admittedly rather fine. The appellants were left with an obvious uncertainty concerning apportionment when making their decision to consent to the settlement proposal. On the other hand, the very failure to formulate an apportionment preserved the representation from the major conflict of interest that occurs in aggregate settlement cases. In cases like the present one, where the maximum available settlement was reached, the apportionment of the settlement is exactly the locus of the conflict for the attorney: however much one party receives automatically means a detriment to the other party or parties. See North Carolina State Bar v. Whitted, 347 S.E.2d 60, 64 (N.C. Ct. App. 1986), aff'd, 354 S.E.2d 501 (N.C. 1987); In re Guardianship of Lauderdale, 549 P.2d 42, 45-46 (Wash. Ct. App. 1976). If the multiple representation is to continue, this conflict may be resolved only by the consent of all the parties, fully informed as to the apportionment of the settlement. In the present case, when this particular conflict of interest
arose the parties sought and obtained separate counsel, thus avoiding the conflict.

The appellants further argue that the substitute for apportionment—namely, the agreement to seek consensus concerning apportionment or, failing that, to petition the court to divide the settlement proceeds—was void as an “agreement to agree.” The appellants cite Horsey v. Horsey, 329 Md. 392 (1993), for this proposition. The agreement in Horsey was not, however, an “agreement to agree” strictly speaking. Rather, it was an agreement to agree with a provision for arbitration following upon a failure to agree. The difficulty came when both parties waived arbitration, as was their right.

Because of the waiver of arbitration, the modification provision of the Horseys’ separation agreement is simply an agreement to attempt to agree in the future, without any guidelines, formula or basis for ascertaining the amount of modification. In accordance with the principles that the terms of a contract must be sufficiently definite for enforcement and that a court will not make a contract for the parties, it is generally held that an “agreement to agree” is unenforceable.

Id. at 420. But for the waiver of arbitration the agreement in Horsey would have been upheld because it is also generally held that “[a]n agreement is not unenforceable for lack of definiteness of price or amount if the parties specify a practicable method by which the amount can be determined by the court without any new expression by the parties themselves. . . . It is sufficient if
the agreement provides that the price shall be the amount that arbitrators or that X, a specific third person, shall fix as a fair price." 1 Corbin on Contracts § 4.4, at 581, 583 (Joseph M. Perillo ed., rev. ed. 1993) (footnote omitted); see also 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.28, at 402 (2d ed. 1998).

We applied this rule in Hanna v. Bauguess, 49 Md. App. 87 (1981), where, reversing the chancellor, we found a lease purchase option not void for indefiniteness when its only specification as to price was that it was to be determined by three independent appraisers at the expiration of the lease. Id. at 95-96.

In the present case, the agreement as to apportionment of the settlement required the parties to attempt to agree on a division and, failing that, to submit the problem to the court. When the parties failed to agree on an apportionment, the question was submitted to the court. Neither party disputes, and it is established, that the authority to divide the proceeds of a settlement is within the discretionary powers of the trial court, Jones v. Jones, 259 Md. 336, 343-44 (1970), and so there is no objection to the court as a proper arbiter of settlement apportionment as per the parties' agreement. While the agreement as to apportionment of the settlement in this case may be unusual, we do not find it to be void for vagueness as an agreement to agree.
Finally, we must emphasize the great seriousness with which we take the ethical requirements of Rule 1.8(g) in cases involving an aggregate settlement. In the present case, we find the disclosure, in its specific context, to be adequate to protect the rights of the appellants. In doing so, we place great weight on the fact that the parties agreed that the settlement amount represented the maximum potential recovery and, thus, was in the best interest of everyone. We stress, however, that the fullest disclosure is the best disclosure, and note that other courts have used an attorney’s failure of appropriate disclosure as the grounds for setting aside the apportionment of a settlement, In re Guardianship of Lauderdale, 549 P.2d at 45-46; as the grounds for setting aside an entire settlement, Quintero, 709 S.W.2d at 229; and as partial grounds for disbarment in a disciplinary proceeding. Whitted, 347 S.E.2d at 64.

**Division of Settlement Proceeds**

Finally, we have been asked to review the court’s division of the settlement proceeds. That is an action within the discretion of the court. "'[J]udicial discretion’ means ‘that power of decision exercised to the necessary end of awarding justice and based upon reason and law, but for which decision there is no special governing statute or rule.’" Colter v. State, 297 Md. 423, 426-27 (1983) (quoting Saltzgaver v. Saltzgaver, 182 Md. 624, 635 (1944) (quoting Renzo D Bowers, *The Judicial Discretion of Trial
Courts § 10, at 13-14 (1931)). The Court of Appeals has previously held that the power to divide and distribute the proceeds of the settlement of a tort claim is such a discretionary power. *Jones*, 259 Md. at 343-44; cf. *Ross v. Ross*, 90 Md. App. 176, 188, judgment vacated on other grounds, 327 Md. 101 (1992) (holding that “both the amount and manner of payment of a monetary award [following divorce] are committed to the discretion of the trial court”).

It follows, therefore, that we will review the court’s distribution of tort claim settlement proceeds for an abuse of the court’s discretion. We will find an abuse of discretion only if “the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.” *North v. North*, 102 Md. App. 1, 14 (1994); see also id. at 13-14 (more complete discussion of “abuse of discretion” standard of review). The appellants make several specific arguments concerning the court’s exercise of discretion in this matter. We will address each briefly in turn.

First, the appellants argue that the appellees’ share of the settlement is limited to the amount they indicated in the Motion to Allocate. For this proposition they cite *Scher v. Altomare*, 278 Md. 440 (1976), wherein the Court of Appeals stated that “the recovery, if any, by the plaintiff cannot exceed in nature or amount either the damage proved or the sum claimed in the ad
damnum, whichever is the lesser.” Id. at 442. What was at issue in Scher was damages, proven or pled, as an element of a claim at law. Of course, that rule has no relevance to the equitable division of settlement proceeds by the court. Even if Scher were relevant, we would note that the statement quoted above is dictum. See Falcinelli v. Cardascia, 339 Md. 414, 423 (1995). The Court of Appeals has since clarified the rule, given the liberality of the rule on amending complaints, Md. Rule 2-341, and has held “that the ad damnum does not inherently limit the power of the jury to render a verdict and does not inherently limit the power of the court to enter a judgment.” Falcinelli, 339 Md. at 427. An amendment to an ad damnum clause of a complaint may be made at almost any time, even after a jury verdict has been returned. See Md. Rule 2-341(b) Committee note; see also Owens Corning v. Bauman, No. 98-744, 1999 WL 41997, at *39 (Md. Ct. Spec. App. Feb. 1, 1999). Finally, if it needed to be pointed out, we would note that the appellees’ Proposed Findings of Fact and Conclusions of Law filed with the court before its apportionment of the settlement was in accord with that apportionment.

Second, the appellants argue that the method used by the court to divide the settlement, namely calculating proportional shares rather than equal shares, was an abuse of discretion. To the contrary, the clear policy in Maryland is for proportional shares. See Md. Code (1974, 1998 Repl. Vol.) § 3-904(c)(1) of the Courts
and Judicial Proceedings (CJP) Article (Maroon Volume) ("[D]amages may be awarded to the beneficiaries proportioned to the injury resulting from the wrongful death."). Within the contemplation of that policy is the requirement that even proportional awards be reduced by statutory damage award caps. See id. §§ 3-904(c)(2), 11-108(b), (d). If the court had used another method of apportioning the settlement, we would be prepared to entertain an abuse of discretion argument. As it is, the court’s use of the proportional shares method was clearly not an abuse of discretion.

Third, the appellants argue that because the accident took place on June 30, 1994, a date during the period when Maryland’s statutory cap on noneconomic damages did not apply to wrongful death claims, the appellees have received a kind of windfall in that their share of the settlement was not calculated with the statutory cap in mind. The appellants argue that the court’s refusal to take the cap into consideration was an abuse of discretion. Discretion does not mean whatever the court arbitrarily wills; rather “discretion means ‘sound discretion

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guided by law.'" Saltzgaver, 182 Md. at 632. In this case, the law forbids the retrospective application of the statutory damages cap. See United States v. Searle, 322 Md. 1, 5-6 (1991) (holding that "absent clear legislative expression to the contrary, statutes are to be applied only prospectively and shall not be given retroactive effect. The $350,000 cap is prospective only and should not be given retroactive effect as a presumptive maximum"). Because the cap would not have applied to any judgment rendered in this case, it is no abuse of discretion not to have applied it to the appellees' shares in calculating the division of settlement proceeds.

Fourth, the appellants suggest that the appellees were the beneficiaries of another kind of windfall, in this case one flowing from the fact that the insurance policies by which the settlement was paid were of the "aggregate coverage" type rather than the purportedly more common "per person/per occurrence" type, thus affording the appellees a larger share of the settlement than they would otherwise have received. Regardless of the truth of this claim, it is manifestly irrelevant. A court in the exercise of its discretion should not rest its decision on a hypothetical case, particularly not on one contrary to the actual facts. Cf. Sininger v. Sininger, 300 Md. 604, 616 (1984) ("[T]his Court decides actual cases, not hypotheticals."). We find no abuse of discretion in this matter.
Fifth, the appellants assert that there was no competent evidence to support the court’s apportionment of noneconomic damages to the appellees and that the court’s apportionments in that regard constitute an abuse of discretion. Damages in the case of the wrongful death of a spouse or the parent of a minor child are not limited or restricted by the “pecuniary loss” or “pecuniary benefit” rule but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable...CJP § 3-904(d); see also Daley v. USAA, 312 Md. 550, 553 & n.2 (1988). In the present case, the court heard testimony from Fausto Illiano who, speaking in a language that is not his mother tongue, described the loss experienced by his infant daughter and by himself. This testimony was not challenged at the time it was given nor afterward in the appellants’ Motion to Amend. It certainly is no abuse of discretion for the court to have found this testimony competent evidence when apportioning noneconomic damages to the appellees.

Finally, the appellants object to the payment out of their share of the settlement of attorney fees to Bekman. The appellants had entered into a contingent fee contract with Bekman in July 1994, agreeing that he should be paid 33 1/3 percent of the gross amount recovered for legal services rendered, including the compromising of their claims. The appellants claim that the
contingency fee should not be assessed against their share of the settlement because Bekman labored under a conflict of interest throughout his representation of all the parties. The trial court explicitly found, however, that there was no conflict of interest in Mr. Bekman’s representation of all the parties to the settlement in the period before the appellants indicated disapproval of the proposed settlement distribution. Such a determination of a conflict of interest is a question of fact. See Attorney Grievance Comm’n v. Kent, 337 Md. 361, 379 (1995) (citing Austin v. State, 327 Md. 375 (1992); In re Special Investigation No. 231, 295 Md. 366 (1983); McCoy v. Warden, 234 Md. 616 (1964); Pressley v. State, 220 Md. 558 (1959)) ("While the law is clear that the mere representation by one lawyer of two defendants charged with the same offenses does not of itself constitute a conflict of interest, whether or not a conflict exists must be determined by the facts of each individual case."). As noted above, we review the court’s determination of questions of fact only to insure that they are not clearly erroneous. Md. Rule 8-131(c); Shallow Run Limited Partnership, 113 Md. App. at 173-74. We find no clear error here.

We are concerned, though, that the appellants be charged appropriately for their representation by Bekman. That representation was on a contingency basis. The rules governing remuneration of an attorney under such circumstances are clear. A contingent fee is earned only on the occurrence of the contingency,
but his subsequent dismissal will not affect his right to the contingent fee. See 7A C.J.S. Attorney & Client §§ 313, 319 (1980). If the attorney-client relationship ends before the occurrence of the contingency, his compensation is determined by how the relationship ended. If the attorney is discharged for cause in a situation in which the attorney commits serious misconduct, he will receive no compensation. See Somuah v. Flachs, 352 Md. 241, 256 (1998). If the attorney is discharged for cause, but the cause is only the good faith dissatisfaction of the client with representation during which the attorney has acted competently, then the attorney is entitled to be compensated for the reasonable value of services rendered prior to discharge. See id. at 256, 258. Under such circumstances, in a contingent fee contract the attorney must await the occurrence of the contingency before he can claim even the reasonable value of his pre-discharge services. See id. at 256. Finally, if the attorney is discharged without cause, i.e., when the client has "no basis for being dissatisfied with the attorney’s services or the discharge is in bad faith," or if the attorney himself withdraws with justification, then he may recover a fee quantum meruit immediately upon discharge or withdrawal. See id. at 255.

In the present case, we do not find the record complete enough to make the requisite determinations of these issues. We find insufficient information to determine when Bekman’s representation
of the appellants concluded; whether that conclusion was a discharge by the appellants or withdrawal by Bekman, and, if it was a discharge, what the grounds for the discharge were; when the contingency, in this case, the settlement, occurred; and what the grounds for the discharge were.¹ There is certainly no information with which to calculate a quantum meruit fee should that be the required result. See id. at 265-66. We therefore reverse the circuit court’s assignment of attorney fees and remand the case to the circuit court to make the appropriate determinations.

**Conclusion**

We affirm the judgments of the circuit court against the appellants on all issues except that of the attorney fees charged against the appellants’ share of the settlement. On that latter issue, we remand to the circuit court to make the requisite determinations in accord with this opinion.

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¹In the record, among the parties’ exhibits, we did find a letter from Peter A. Allegra, one of the appellants’ new attorneys, dated April 18, 1997, and informing Bekman that he, Allegra, was taking over representation of the appellants. There is also in the record a letter from Bekman to the defendants’ attorney, dated April 23, 1997, that “confirms the fact that the parties will accept” the settlement offer. These exhibits suggest to us that Bekman ended his representation of the appellants prior to the occurrence of the relevant contingency, namely, the formal acceptance of the settlement. We will, however, leave such determinations to the circuit court on remand.
JUDGMENT AFFIRMED, EXCEPT WITH REGARD TO THE ISSUE OF ATTORNEY FEES, WHICH WE REVERSE AND REMAND.

COSTS TO BE PAID 75% BY THE APPELLANTS; 25% BY THE APPELLEES.
HEADNOTE: ATTORNEY AND CLIENT — RETAINER AND AUTHORITY — SETTLEMENTS, COMPROMISES, AND RELEASES — IN GENERAL

Rule of professional conduct did not require that settlement be set aside, despite the fact that the appellants were not informed of the exact amount of the portion of an aggregate settlement they would receive, when the parties, their respective claims, and the total settlement amount were all well known; when apportionment of settlement was not actually made, but a method for formulating the apportionment was agreed upon, and any resulting apportionment either would be disclosed or would be transparent; and when there would be no obvious injustice in upholding the settlement when it was agreed the maximum total recovery had been obtained. Rules of Prof. Conduct, Rule 1.8(g).
IN THE SUPREME COURT OF THE
STATE OF OREGON

In re Complaint as to the Conduct of
DANIEL J. GATTI, OSB #731036,
Accused.
(OSB No. 1060; SC S061105)

On review of the decision of the trial panel of the Disciplinary Board.*

Argued and submitted November 8, 2013.
Mark J. Fucile, Fucile & Reising LLP, Portland, argued the cause and filed the briefs for the Accused.
Mary A. Cooper, Assistant Disciplinary Counsel, Tigard, argued the cause and filed the brief for the Oregon State Bar.
Peter R. Jarvis, Portland, filed a brief for amicus curiae Peter R. Jarvis.

Before Balmer, Chief Justice, and Walters, Landau, Brewer, and Baldwin, Justices.**

PER CURIAM
The accused is suspended from the practice of law for 90 days, commencing 60 days from the date of the filing of this decision.

** Kistler and Linder, JJ., did not participate in the consideration or decision of this case.
Disciplinary proceedings against the accused arose from the accused's joint representation of 15 sexual abuse victims (the Sprauer plaintiffs) in settling claims brought against the Portland Archdiocese and the State of Oregon for the actions of Father Michael Sprauer. All of the Sprauer plaintiffs had, at various times, been incarcerated at the MacLaren Home for Boys, a facility for juvenile offenders, and all alleged that, while there, they had been sexually molested by Father Sprauer, the facility's chaplain. Following a complaint from one of the accused's clients regarding the accused's implementation of those settlements and a two-year investigation by the Bar, a trial panel of the Bar's Disciplinary Board found that the accused had violated the following rules: RPC 1.4(b) (failing to explain matters to the extent reasonably necessary to allow clients to make informed decisions), RPC 1.7(a)(1) (failing to secure clients' informed consent before engaging in representation that constituted a current conflict of interest), RPC 1.8(g) (failing to secure clients' informed consent before participating in aggregate settlement of their claims), and RPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on fitness to practice law). As a result of those findings, the trial panel imposed a six-month suspension from the practice of law as a sanction.

Held: The accused violated RPC 1.4(b), RPC 1.7(a)(1), and RPC 1.8(g), but did not violate RPC 8.4(a)(3). A 90-day suspension is an appropriate sanction.

The accused is suspended from the practice of law for 90 days, commencing 60 days from the date of the filing of this decision.
PER CURIAM

In this lawyer disciplinary proceeding, the Oregon State Bar (Bar) charged Daniel J. Gatti (the accused) with violating the Rules of Professional Conduct (RPC). The Bar’s charges were set out in five causes of complaint, all of which arose as a result of settlements that the accused had brokered for a group of clients—all sexual abuse victims—in civil actions brought against the Portland Archdiocese, the State of Oregon, and Father Michael Sprauer.

In January 2013, a disciplinary trial panel determined that the Bar had proved three of the five causes of complaint and that, in engaging in that conduct, the accused had violated four ethical rules—RPC 1.4(b) (failing to explain matters to the extent reasonably necessary to allow clients to make informed decisions), RPC 1.7(a)(1) (failing to secure clients’ informed consent before engaging in representation that constituted a current conflict of interest), RPC 1.8(g) (failing to secure clients’ informed consent before participating in aggregate settlement of their claims), and RPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on fitness to practice law). The trial panel did not address the remaining two causes of complaint, but concluded that the accused should be suspended from the active practice of law for six months.

The accused now seeks review of that decision. We review the trial panel determinations de novo. ORS 9.536(2); BR 10.6. For the reasons that follow, we conclude that (1) the Bar met its burden of proof with respect to the three causes of complaint addressed by the trial panel and that the accused violated three of the four rules of professional conduct set out above—RPC 1.4(b), RPC 1.7(a)(1), and RPC 1.8(g); (2) the Bar did not prove that the accused violated RPC 8.4(a)(3); and (3) the accused should be suspended from the practice of law for 90 days.

FACTS

The following facts are undisputed. During the period roughly spanning 2001 through 2007, the accused represented 15 clients (the Sprauer plaintiffs) in joint actions
brought against the Portland Archdiocese and the State of Oregon for the actions of Father Michael Sprauer. All of the Sprauer plaintiffs—among them, Earl New, the complainant in this disciplinary matter—had several things in common: At various times, all had been incarcerated at the MacLaren Home for Boys, a facility for juvenile offenders, and all alleged that, while there, they had been sexually molested by Sprauer, the facility’s chaplain.

At the outset of the Sprauer litigation, the accused sent each of the 15 plaintiffs a letter setting out the pros and cons of joint representation and advising them to obtain independent legal advice about whether to have the accused represent them jointly. The accused also provided the plaintiffs with a Joint Representation and Prosecution Agreement (JRA), which they all signed. Among other things, the agreement set out the terms under which the accused would pursue settlement of his clients’ claims and addressed his clients’ rights and responsibilities in the event that the opposing parties proposed an “aggregate or joint fund” settlement. Specifically, the agreement provided:

“5.2. Client and Attorneys agree that it is generally desirable to conduct settlement negotiations on an individual client basis and will endeavor to do so, with each client’s case negotiated separately, based on its own strengths and weaknesses, and not linked to the settlement of any other client’s case. No client may interfere with any other client’s right to settle. However, client recognizes that it is possible that an aggregate settlement might be in plaintiff’s interest, with a single lump sum fund to be shared by all clients, or a joint-fund settlement, with a lump sum to be shared by two or more clients. ***”

“5.3. In the event of an aggregate or joint fund settlement, the participating clients may decide among themselves as to how the fund shall be allocated. An allocation may not be imposed on any client, except by Arbitration under Section 6 of this Agreement. Attorneys shall have no role whatsoever in the allocation decision, and shall not represent any client in that process. Client may, however, be represented by other counsel. If the participating clients

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1 Sprauer was a defendant in those actions, and the plaintiffs settled their claims against him when they settled their claims against the Archdiocese and the state.
cannot decide upon an allocation, the allocation decision shall be submitted to final and binding arbitration as provided in Section 6 of this Agreement.”

In July 2004, the *Sprauer* plaintiffs’ litigation was halted while the Archdiocese filed for bankruptcy protection. In 2005, at the bankruptcy court’s direction, the *Sprauer* plaintiffs and the Archdiocese began a series of mediation meetings. In anticipation of those meetings, the accused sent his clients a letter addressing the conflict that would arise if the Archdiocese assets were less than the total value of the *Sprauer* plaintiffs’ claims:

“The Oregon attorney ethics rules are clear that when the defendant’s assets exceed the total value of all claims, there is no conflict of interest. The rules are also clear that when the defendant’s assets are known to be less than the total value of all claims, there is a conflict of interest. This conflict allows a lawyer or firm to represent multiple clients on common issues but prevents the lawyer or firm from representing individual clients *vis a vis* each other in deciding the relative allocation of dollars to be received by each client.”

The accused also sent the plaintiffs a second letter setting out the advantages and disadvantages of joint representation and a second JRA containing provisions similar to the first. The second JRA again provided that “an aggregate settlement might be in plaintiff’s interest, with a single lump sum to be shared by all clients,” and that the accused would “have no role whatsoever in the allocation decision.” The *Sprauer* plaintiffs also signed the second JRA.

The parties’ first mediation meeting took place in September 2005, at which time the Archdiocese offered each of the *Sprauer* plaintiffs $7,500 to settle their claims. Plaintiff New was willing to accept that offer. Then, as now, New was serving a 27-year sentence based on his 1994 convictions for burglary, kidnapping, sodomy, and menacing. Acknowledging in a letter to the accused that “I’m your hardest case because a jury would not be sympathetic to me because of my charges,” New indicated that he “would like to accept the offer of $7,500 and let you take the winning cases to trial.” Initially, the accused did not act as New had requested and refused to settle any of the plaintiffs’ claims
for the sum offered. Later, however, the accused attempted to accept the Archdiocese’s $7,500 offer on New’s behalf; the Archdiocese rejected that attempt as untimely.

A second mediation meeting was scheduled for the fall of 2006. In preparation for that meeting, the accused obtained individual minimum settlement offers from each of his clients. The total of those individual minimum settlement offers was $284,500.

At the mediation, the accused told the two judges who served as mediators that the plaintiffs would settle their cases for $284,500. Instead of relaying that offer to the Archdiocese, however, mediator Judge Hogan told the Archdiocese that it must pay $600,000 to settle the plaintiffs’ claims. The Archdiocese agreed and Judge Hogan so informed the accused. Neither the Archdiocese nor its attorney had any role in allocating the $600,000 between the plaintiffs. After the mediation concluded, the attorney for the Archdiocese sent the accused a letter in which she listed the plaintiffs and their respective claim numbers and confirmed “that you have settled all of the above-reference cases with the Archdiocese for the total sum of $600,000.” The accused’s office then informed the attorney for the Archdiocese of “plaintiffs’ understanding” concerning the “settlement breakdowns” and supplied her with a list of the sums that each plaintiff should receive in settlement of his claims. In accordance with those “settlement breakdowns,” the Archdiocese sent the accused individual settlement agreements and checks. Each plaintiff signed his own settlement agreement and each settlement was separately approved by the bankruptcy court. The individual settlement agreements did not make the agreement of any one plaintiff contingent on the agreement of any other plaintiff.

When later questioned by the Bar about how he had determined the “settlement breakdowns,” the accused explained that, in addition to obtaining minimum settlement authority from each of his clients, he also had obtained their advance consent to disburse any sum that exceeded the total of their minimum settlement offers proportionately. The accused explained that the plaintiffs had agreed that a plaintiff whose minimum settlement offer represented, for
example, five percent of the total of the individual minimum settlement offers would receive five percent of any offer exceeding that total.

However, the accused explained, his agreement with New was different. According to the accused, New had agreed to settle his claim for a maximum of $7,500—an amount that would remain unchanged, even if the Archdiocese offered to settle for more than the total of the plaintiffs’ minimum settlement offers. That $7,500 maximum was acceptable to New, the accused asserted, because (1) New was cognizant of the fact that his claim had little value as a result of his criminal history; (2) New previously had been willing to accept the same sum when the Archdiocese initially offered it; and (3) the accused had agreed not to withhold any attorney fees or costs from New’s settlement. When the accused wrote to New informing him of the settlement, he stated that, “with your permission, I was able to settle your case for the $7,500 you requested. I informed you that I would not be charging you any costs or attorney fees under your unique circumstances.”

After the settlement with the Archdiocese was concluded, the accused brought to trial three cases against the State of Oregon. The jury found in favor of two of the plaintiffs—R.S. and R.P.—awarding the pair $590,000 and $595,000 respectively, plus punitive damages. In the other case, the jury entered an adverse verdict, apparently as a result of a statute of limitations defense.

Following those verdicts, the accused anticipated that he would be able to settle all of the Sprauer plaintiffs’ claims against the state, and, in June 2007, he sent each a letter stating as follows:

“If all of you agreed to settle your cases on the same percentage basis as we did in the past, then I do not have a conflict. When the number is reached, I will need to know if I have your permission to settle for the number that I can extract from them and that you will accept your proportionate share pursuant to the proportionate share that was given in the past. In other words, if your proportionate share came to 10 percent, then you need to say you will take the same proportionate share. If your proportionate
share came to 15 percent or any number can be used, then again, I need your permission to settle for that same proportionate share once we find out what the ultimate sum will be. If any of you disagree with this proportionate share analysis, then in that event I would have to resign and I would have a conflict of interest and I would not be able to represent any of you.”

New responded promptly with a letter giving the accused permission to “settle for my proportionate share,” while at the same time noting that “I do not remember you mentioning anything about 10 percent or 15 percent when the Church disrespectfully (sic) offered a nuisance settlement on my case.”

In July 2007, the accused informed New by mail that he had settled with the state for a total of $1.05 million. The accused wrote that “[a]ll of you agreed that you would take the same percentage, or more if I could get it, that you accepted from the Portland Archdiocese,” and went on to inform New that he could “expect to receive a check in the approximate sum of $7,500 within the next 45 days” upon executing and returning a power of attorney to the accused. New responded with a letter informing the accused that he had mailed his power of attorney and thanking the accused for his efforts. New also observed that he was “a little surprised that I only received from the State (after your win in court) the same amount as the Church offered”; he added, however, “but that’s what I get for being in jail.”

Pursuant to powers of attorney executed by his clients, the accused signed all of their names, save that of N.K., the client who had lost at trial, to a settlement agreement and release prepared by the state’s counsel. In the letter accompanying the tender of that release, the accused explained that he had omitted N.K.’s name because he had lost at trial and therefore was not entitled to share in the settlement. The state, however, insisted that N.K. execute the document because it contained, among other things, a provision releasing the right to appeal. Without telling N.K., the accused then signed N.K.’s name to the settlement agreement and returned it to the state’s counsel.

In August 2007, the state’s counsel issued checks totaling $1.05 million. After depositing those funds in his
trust account, the accused disbursed them to all of the Sprauer plaintiffs except for N.K. The accused did not, however, distribute those funds according to the percentages used in the Archdiocese settlement. Instead, according to letters that the accused later wrote to the Bar, the accused divided the total settlement into two pools of funds. The first, approximately $357,676, he disbursed in two equal sums to the plaintiffs who had prevailed at trial. The second, approximately $692,323, he appears to have disbursed as follows. For the plaintiffs other than R.S., R.P., and New, the accused apparently calculated the sums that each plaintiff would receive by applying the percentages that the accused had used in distributing the Archdiocese settlement. Because R.S. and R.P. had received approximately 20 percent of the Archdiocese settlement, the other plaintiffs’ percentages of the Archdiocese settlement totaled approximately 80 percent. That left approximately 20 percent of the second state pool remaining to be allocated. The method that the accused used to allocate those funds is unclear. It appears that the accused allocated additional sums to some of the plaintiffs but not to others and that he allocated $7,500 to New. On review before this court, the accused does not contend that the plaintiffs actually received the same percentage of the state’s settlement as they had received in the Archdiocese settlement. When asked about that at the trial panel hearing, the accused took the position that, if “mathematical errors” were made, he was willing to correct them.

At the time that they received their settlements, none of the plaintiffs objected. Later, however, New filed a complaint with the Bar, claiming that it was prompted both by the accused’s failure to respond to New’s request for a detailed accounting and by the accused’s “less than forthright and evasive handling of this matter.”

The Bar investigation that followed spanned several years and, in September 2010, the Bar initiated disciplinary proceedings against the accused. In August 2012, the Bar filed a Second Amended Formal Complaint alleging the following five causes of complaint:

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2 Later, the accused paid N.K. $15,000 as a gift.
1. By (1) continuing to represent New and the other Sprauer plaintiffs after the Archdiocese had offered a lump-sum settlement, and (2) deciding the amount that each plaintiff would receive from those proceeds, the accused engaged in an unwaivable current client conflict of interest that violated RPC 1.4(b), RPC 1.7(a)(1), and RPC 1.8(g).

2. By (1) continuing to represent New and the other Sprauer plaintiffs after the state had offered a lump-sum settlement, and (2) deciding the amount that each plaintiff would receive from those proceeds, the accused engaged in an unwaivable current client conflict of interest in violation of RPC 1.4(b), RPC 1.7(a)(1), and RPC 1.8(g).

3. By telling New that he had settled New’s lawsuit against the Archdiocese for $7,500, the accused made a statement that he knew to be both false and material when he made it, thus violating RPC 1.4(b) and RPC 8.4(a)(3).

4. By settling all the Sprauer plaintiffs’ abuse claims against the state for a lump sum without informing N.K. that he had entered into such an agreement on N.K.’s behalf, the accused withheld a material fact from N.K. that it could have significantly influenced N.K.’s decision-making processes. As a result, the accused violated RPC 1.4(b) and RPC 8.4(a)(3).

5. By failing to provide a complete and detailed accounting of the settlement funds that he had received from the Archdiocese and the state when he was asked to do so by New, the accused violated RPC 1.15-1(d).

In 2012, a Disciplinary Board trial panel conducted a hearing at which the accused was represented by counsel. The trial panel opinion addressed only the first three causes of complaint alleged by the Bar and, as noted, concluded that the accused had violated RPC 1.4(b), RPC 1.7(a)(1), RPC 1.8(g), and RPC 8.4(a)(3). The trial panel also concluded that the accused should be suspended from the practice of law in Oregon for six months. The accused appealed and now asks this court to dismiss all charges against him. Alternatively, the accused contends that a public reprimand would be a more appropriate sanction.

ASSIGNMENTS OF ERROR

The accused’s first two assignments of error are interrelated. In the first, the accused contends that the trial
panel erred in concluding that he violated RPC 1.8(g) by failing to secure his clients’ informed consent before participating in an aggregate settlement of their claims. In the second, the accused contends that the trial panel erred in concluding that he violated RPC 1.7(a)(1) by failing to secure his clients’ informed consent before engaging in representation that constituted a current conflict of interest. The Bar contends that the requirement of securing informed consent before entering into an aggregate settlement is a “more specialized application of general conflict of interest rules to group settlement situations.” We agree that the two provisions address similar issues and think it helpful, in the analysis of both provisions, to initially consider whether the interests of the plaintiffs were in conflict; we therefore begin with RPC 1.7(a)(1).

A. **RPC 1.7(a)(1)**

RPC 1.7(a)(1) provides:

“Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

“the representation of one client will be directly adverse to another client[.]”

Paragraph (b) of the rule sets out the applicable exceptions:

“Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

“(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

“(2) the representation is not prohibited by law;

“(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

“(4) each affected client gives informed consent, confirmed in writing.”

As an initial matter, the accused asserts that the trial panel’s one-line conclusion in its written opinion—“The
Accused violated RPC 1.7(a)(1)—is unsupported by any legal or factual analysis or explanation of the basis for the panel’s conclusion. Nevertheless, because the accused recognizes that this court’s review of disciplinary trial panel decisions is *de novo*, he goes on to address the evidence adduced at his disciplinary hearing and to explain why, in his view, it was insufficient to establish a violation of RPC 1.7(a)(1). The Bar’s threshold premise—that the accused accepted defendants’ lump-sum offers to settle and then unilaterally allocated the settlement sum among his clients—is incorrect, the accused argues, because, before accepting the settlement offers from the Archdiocese and the state, he had secured individual minimum settlement authority from each of his clients, along with their advance consent to proportionally divide any settlement offer that exceeded the total of their individual minimum settlement offers.

In response, the Bar contends that the accused violated RPC 1.7(a)(1) because the facts of this case represent what the Bar describes as a “limited pot” scenario. According to the Bar,

> “the ‘limited pot’ creates a zero sum situation in which every dollar received by one client is a dollar unavailable to the others—the very definition of a non-waivable conflict. A similar zero sum situation is created after a group of clients accepts a lump sum settlement. The group’s shared lawyer cannot divide the proceeds because to each client he owes a duty—irreconcilable with his identical duty to his other clients—to advocate for the largest possible share of the proceeds.”

With respect to the accused’s argument that he obtained his clients’ advance consent to proportionally divide any surplus settlement, the Bar contends that there is (1) no factual evidence in the record to support that claim, and (2) no legal authority for the proposition that a lawyer can secure an advance agreement from his clients allowing him to utilize a particular method for dividing settlement proceeds among them. To do so, the Bar maintains, is to actively represent one current client against another.

The accused’s initial observation regarding the trial panel’s failure to explain how the accused violated RPC 1.7(a)(1)
is well-taken; the trial panel opinion is, indeed, limited to a one-line legal conclusion that the accused violated that rule. Factual findings and legal analysis would have been very helpful to this court, and the trial panel's opinion does not meet the standard that we expect when an attorney's license to practice law is at stake. Nevertheless, as the accused recognizes, we are obligated to review the evidence in disciplinary decisions de novo in an effort to ascertain whether an alleged violation is supported by clear and convincing evidence. *In re Renshaw*, 353 Or 411, 417, 298 P3d 1216 (2013) (citing *In re Koch*, 345 Or 444, 447, 198 P3d 910 (2008)).

Turning to the merits of the trial panel's conclusion, we first observe that, when the accused began his representation of the Sprauer plaintiffs, he recognized that, although their interests did not presently conflict, they could conflict at some point in the future. He subsequently wrote letters to each of his clients outlining the advantages and disadvantages of joint representation, advised them to obtain independent legal advice, and obtained their consent to proceed with joint representation. As noted, the JRAs that the plaintiffs signed explained that the accused would endeavor to negotiate each client's claims individually and that he would have no role in any allocation decision.

When the accused began negotiations with the Archdiocese, he proceeded as agreed. The accused conferred with his clients individually and helped each decide on an acceptable individual settlement offer. As the Bar correctly recognizes, when the accused added those amounts together and offered to settle with the Archdiocese for the resulting total, the accused did not violate any rule of professional conduct. However, when the Archdiocese offered to settle for a figure that was nearly twice that total, a conflict arose. Each plaintiff had an interest in obtaining as great a portion of the surplus settlement as he could. Under those circumstances, the accused was ethically prohibited from deciding how to allocate the sum offered, and the accused does not contend otherwise.

What the accused does argue, however, is that, before the surplus settlement offer was received, each plaintiff had agreed to divide any amount in excess of the total of
the individual minimum settlement offers proportionately. Under that agreement, a plaintiff whose individual minimum settlement offer constituted, for example, 5 percent of the total of all of the plaintiffs' minimum settlement offers would receive 5 percent of any surplus settlement offer. There is nothing inherently wrong or unfair about such an agreement, but when multiple plaintiffs make any agreement to divide an offer that exceeds the total of their minimum offers, the plaintiffs have competing interests in that surplus. In agreeing to divide such a surplus lump-sum settlement offer in any way, a plaintiff necessarily must consider how to value his or her individual claim \( \text{vis-à-vis} \) the claims of the other plaintiffs. An individual plaintiff who is one of a number of jointly-represented plaintiffs rationally can decide without any knowledge or consideration of any other plaintiff's claim that his or her own claim is worth, for example, $15,000, and offer to settle for that sum. There is no upper limit on the amount that the plaintiff decides to offer and the offer is unaffected by offers that other plaintiffs might make. However, if an individual plaintiff instead agrees to accept a percentage of a defendant's lump-sum offer, the offer limits the amount available to the plaintiff and the plaintiff necessarily decides the value of his or her claim in comparison to the claims of others. Moreover, an individual plaintiff who agrees to settle for a percentage of a defendant's lump-sum offer determined by the relationship between the plaintiff's $15,000 minimum settlement offer and the total of all of the plaintiffs' minimum settlement offers, but who does not know that total, has no way to calculate the percentage that the individual plaintiff will receive.

In this case, we need not decide whether, with informed consent, the accused could have represented his clients in reaching an agreement to use that method to divide any Archdiocese offer in excess of $284,000. Although the accused testified that he obtained his clients' oral agreement to proceed according to that method,\(^3\) there is no evidence that the accused obtained the plaintiffs' written

\(^3\) The evidence that the plaintiffs orally agreed to divide any surplus offer proportionately is contested. In reaching our conclusion in this case, we assume, without deciding, that the accused's testimony is accurate.
informed consent as required by RPC 1.7(a)(1). There also is no evidence that the accused counseled his clients about the advantages and disadvantages of that method of allocation or advised them to seek independent legal advice before they agreed to proceed in that fashion.

An additional problem for the accused—and, in our view, an even more significant one—is evident in his division of the proceeds of the state settlement. Before negotiating the state settlement, the accused had informed his clients that, “[i]f all of you agreed to settle your cases on the same percentage basis as we did in the past, then I do not have a conflict.” However, when the accused accepted the state’s offer to settle the claims of all the Sprauer plaintiffs for a $1.05 million lump sum, he did not, in fact, distribute those funds on that basis. In his brief, the accused does not address that failure nor allude, as he did at the trial panel hearing, to possible “mathematical errors.” From the letters that the accused sent to the Bar, it appears that the accused decided, after agreeing to settle with the state, which client should receive what portion of the state settlement. The accused’s method of allocation may have been exceedingly fair, but each dollar that the accused allocated to one plaintiff was a dollar that he did not allocate to another—an allocation decision that, as he recognized in his JRAs, was one in which he was to have no role. The accused’s decision to allocate the sum of $7,500 to New also was problematic for the same reason. The distribution to New may have been fair—perhaps more than fair, given New’s criminal history and the accused’s willingness to waive attorney fees and costs—but by allocating $7,500 to New, the accused deprived other client of those funds.

The fact that New and the other Sprauer plaintiffs agreed to accept the sums that they received in the two settlements is immaterial to whether the accused violated RPC 1.7(a)(1). There is clear and convincing evidence that the accused violated that rule.

B. **RPC 1.8(g)**

The accused also assigns error to the trial panel’s conclusion that he violated RPC 1.8(g). That rule provides:
“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 aggregate 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.”

Thus, if a settlement is an “aggregate settlement” under RPC 1.8(g), a lawyer may engage in such a settlement only if his clients give “informed consent, in writing.” To do so, the lawyer must disclose “the existence and nature of all claims” and “the participation of each person in the settlement.”

In this case, the accused does not argue that he obtained his clients’ informed consent. Rather, he contends that he did not engage in an “aggregate settlement.” The accused first notes that, as used in RPC 1.8(g), the term “aggregate settlement” has been, and remains, undefined by rule or this court’s case law. Furthermore, the accused points out that two formal advisory opinions from the Bar have both categorized “aggregate settlements” as “all-or-nothing” settlements in which all claimants must accept a settlement offer for any one individual settlement to be effective. In this case, the accused contends, the Bar departed from that previous understanding to pursue a novel theory: i.e., that under RPC 1.8(g), aggregate settlements can encompass multiple, simultaneously occurring settlements. The accused asserts that, as a result, the Bar seeks to impose liability for conduct neither defined nor proscribed by Oregon law at the time of the events at issue here, rendering RPC 1.8(g) void for vagueness under both the United States and Oregon Constitutions.

In response, the Bar argues that the term “aggregate settlement” connotes more than an all-or-nothing settlement; its ordinary meaning includes all settlements made on behalf of multiple clients when their claims are interdependent. In support of that proposition, the Bar cites several definitions of the terms “aggregate,” or “aggregate settlement,” drawn from different sources,4 including one

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4 The Bar notes, for example, that Black’s Law Dictionary defines “aggregate” as “formed by combining into a single whole or total.” The Bar also sets out
now used by the American Law Institute (ALI). Under the ALI definition, aggregate settlements include both “lump sum” and “all-or-nothing” settlements because in both circumstances, the plaintiffs’ claims are “interdependent.” The ALI definition provides:

“Definition of a Non-Class Aggregate Settlement

“(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

“(2) the value of each claim is not based solely on individual case-by-case facts and negotiations.”

Principles of the Law of Aggregate Litigation § 3.16.

The ALI definition is particularly apt, the Bar continues, because it encompasses two broad bases of interdependency: collective conditionality, where a settlement is predicated on acceptance by all of the lawyer’s clients (an “all-or-nothing” settlement), and collective allocation, where the value of a claim is not based solely on individual facts and negotiations (a “lump sum” settlement). The Bar maintains that a rule expressly covering both scenarios is important because both carry with them the potential to affect a lawyer’s loyalty to individual clients (RPC 1.7), deference to client decisions concerning settlement (RPC 1.2), and the obligation to sufficiently apprise clients of facts that must be made clear before deciding whether to settle a matter (RPC 1.4).

The accused is correct that the ALI definition was not in place at the time of the settlement negotiations in this case and that this court has yet to construe the term “aggregate settlement” as it is used in RPC 1.8(g). However, we agree with the Bar that RPC 1.8(g) is intended to address the following definition from ABA Formal Ethics Opinion No. 06-438 (2006): a settlement is aggregate when (1) the claims or defenses of multiple clients represented by the same attorney are (2) resolved together under a single proposal.
conflicts of interest that may arise when an attorney conducts settlement negotiations on behalf of multiple clients. As the creator of the Model Rules from which Oregon’s Rules of Professional Conduct are derived, the American Bar Association (ABA) has explained that the aggregate settlement rule is designed to protect clients whose claims or defenses are jointly negotiated and resolved through by agreement. Specifically, the ABA writes that the rule “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. 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.”


The ALI definition of an “aggregate settlement” succinctly sets out the circumstances in which a lawyer’s multiple clients may have conflicting interests when they engage in joint settlement negotiations. Under the ALI definition, a lawyer does not make an “aggregate settlement” if the lawyer consults with each client individually, obtains minimum settlement authority from each, and then makes a settlement offer that represents the total of the individual minimum settlement offers. In that circumstance, each client has individually valued his or her own claim before settlement is reached. However, when the value of one client’s claim depends on the value of other clients’ claims, the interests of the clients conflict, and the settlement that a lawyer reaches constitutes an “aggregate settlement.” The ALI definition reflects the underlying rationale of both RPC 1.8(g) and RPC 1.7, and we therefore adopt it in construing the term “aggregate settlement” as that term is used in RPC 1.8(g).

In adopting that definition, we reject the accused’s arguments that we are bound by the Bar’s advisory opinions defining “aggregate settlements” as “all-or-nothing” agreements or, alternatively, that RPC 1.8(g) is void for vagueness. First, our case law makes clear that, with regard to advice from the Bar that leads a lawyer to engage in a particular
set of actions, that advice does not estop the Bar from subsequently bringing disciplinary charges if warranted by the resulting conduct. *In re Brandt*, 331 Or 113, 132, 10 P3d 906 (2000). Neither can such advice be invoked as a defense to the charged violations. *In re Ainsworth*, 289 Or 479, 490, 614 P2d 1127 (1980). Consequently, any past advice or opinion proffered by the Bar in an effort to clarify what constitutes an “aggregate settlement” does not shield the accused from the allegations that he violated RPC 1.8(g) in this case.

Second, with regard to the accused’s void-for-vagueness arguments, we adhere to this court’s observation that constitutional void-for-vagueness challenges are generally inapplicable in the context of a disciplinary matter. *See In re Rook*, 276 Or 695,705, 556 P2d 1351 (1976) (observing that technicalities of criminal law not necessarily relevant in disciplinary matters and rejecting argument that rule at issue was void for vagueness); *see also In re Carini*, 354 Or 47, 54 n 5, 308 P3d 197 (2013) (declining accused’s request to overrule *Rook* and rejecting argument that rule at issue was void for vagueness). In this case, we conclude, as we did in *Rook*, that the standards of professional conduct in RPC 1.8(g) are sufficiently definite for the purpose of a disciplinary proceeding.5

Having concluded that RPC 1.8(g) applies to all multiple client settlements that meet the ALI definition of “aggregate settlement,” we hold that, in this case, both the Archdiocese and state settlements fall within that definition. When the accused offered to settle with the Archdiocese, he was not engaged in an aggregate settlement. At that time, the value of each plaintiff’s claim was based solely on each individual plaintiff’s evaluation of the facts in his own case. The value of the plaintiffs’ individual claims, when totalled, equaled the lump sum that they sought. However, when the Archdiocese and later, the state, made lump-sum settlement offers to the *Sprauer* plaintiffs, their lump-sum offers exceeded the plaintiffs’ total individual minimum settlement offers. At that point, the total value of each plaintiff’s claim was greater than each plaintiff had determined it to be

5 We also note that, when the accused himself used the term “aggregate settlement” in his JRAs, he understood that he could have “no role whatsoever” in a decision about how a “single lump sum fund” was to be allocated between clients.
when viewing it in isolation. In the Archdiocese settlement, the value of each plaintiff’s claim was determined by using a formula that calculated the value of each plaintiff’s claim in comparison to the value of other plaintiffs’ claims. In the state settlement, the accused did not follow that formula; he used a method of own design to determine the value of each client’s claim.

The accused concedes that he did not obtain his clients’ informed consent, in writing, to the formula or method that he used to divide the defendants’ lump-sum settlement offers. We therefore conclude that the accused violated RPC 1.8(g).

C. **RPC 1.4(b) and RPC 8.4(a)(3)**

In his third and fourth assignments of error, the accused assigns error to the trial panel’s conclusions that he violated RPC 1.4(b) and RPC 8.4(a)(3). RPC 1.4(b) provides:

“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

RPC 8.4(a)(3) provides:

“It is professional misconduct for a lawyer to:

“*****

“engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law[.]”

Again, the trial panel decision does not explain the basis for its conclusion that the accused violated those provisions. In its brief to this court, the Bar focuses on the letter that the accused sent to New stating, “I was able to settle your case for the $7,500 you requested.” According to the Bar,

“[t]hat statement was affirmatively false and false by omission. The Accused did not settle New’s case for an individual sum of $7,500. He had very recently settled the cases of all the clients for the lump sum of $600,000, and planned to divide it among the clients and give New the smallest share. By telling New that his case had settled for $7,500, the Accused knowingly stated a falsehood and omitted
material facts. Had New realized that his settlement was part of a much larger whole, he might well have refused it or at least asked the Accused to explain how the apportionment was decided.”

(Emphases in original; citation omitted.) The Bar also asserts that the accused violated RPC 1.4(b) by depriving New of information that he needed in order to make an informed decision regarding his role vis-à-vis: (1) the accused’s continued representation of the Sprauer plaintiffs as a whole, and (2) their respective participation in the Archdiocese and state settlements.

We already have concluded that, to comply with RPC 1.7(1)(1) and 1.8(g), the accused was required to apprise all of the Sprauer plaintiffs—including New—of the information that they needed to determine how defendants’ settlement offers would be allocated between them. The accused’s failure to provide the information necessary to satisfy those rules also means that he failed to explain matters to the extent necessary for informed decision-making under RPC 1.4(b). Consequently, we conclude that the accused violated RPC 1.4(b) with respect to New, and turn to RPC 8.4(a)(3).

RPC 8.4(a)(3) prohibits an attorney from making misrepresentations to a party that are knowing, false, and material. See In re Eadie, 333 Or 42, 53, 36 P3d 468 (2001) (so stating from former version of RPC 8.4(1)(3), DR 1-102(A)(3)). Such misrepresentations can be made affirmatively or by omission. In re Hostetter, 348 Or 574, 594-95, 238 P3d 13 (2010). When considering whether a lawyer’s conduct amounts to dishonesty, fraud, deceit, or misrepresentation for disciplinary purposes, we restrict our examination of that question to the theories presented by the Bar in support of its allegations. See In re Carpenter, 337 Or 226, 233, 95 P3d 203 (2004) (so stating under former version of RPC 8.4(1)(3), DR 1-102(A)(3)). Here, the Bar’s theory is that the accused misrepresented affirmatively or by omission the particulars of the Archdiocese’s settlement in his letter informing New of that settlement. Thus, to establish a violation of RPC 8.4(3) in this case, the Bar must prove by clear and convincing evidence that (1) the accused’s statement to New regarding his settlement with the Archdiocese was affirmatively false or
false by omission, (2) the accused knew it to be false, and (3) the statement was material—that is, it “would or could significantly influence the hearer’s decision-making process.” *In re Eadie*, 333 Or at 53; *see also In re Huffman*, 331 Or 209, 218, 13 P.3d 994 (2000) (“material facts” are those that, had they “been known by the court or other decision-maker, would or could have influenced the decision-making process significantly” (quoting *In re Gustafson*, 327 Or 636, 648-49, 968 P 2d 367 (1998))).

We conclude that the Bar failed to meet its burden to prove those elements. Although the Bar argues that, if New had known that other plaintiffs had negotiated for a proportional share of the any settlement amount, he may have sought a similar benefit, the record is to the contrary. New agreed to accept the sum of $7,500 when the Archdiocese initially offered it, and persisted in his efforts to obtain that sum. The letter on which the Bar relies was written *after* settlement negotiations were concluded and it correctly states that the accused had settled New’s case for the sum that New had requested. Although the accused should have disclosed more information about the terms of the aggregate settlement to New and would have better represented New had he done so, we conclude that the Bar did not prove that the accused made false or material statements to New or that he violated RPC 8.4(1)(3).

D. *Causes of action that the trial panel failed to address*

As noted, the trial panel’s opinion in this case addressed only the first three causes of complaint alleged by the Bar. The Bar now urges this court, on *de novo* review, to examine and rule on the allegations set out in its fourth and fifth causes of complaint. First, the Bar argues that, under *In re Koch*, 345 Or 444, 198 P3d 910 (2008), a trial panel’s failure to make the necessary findings in a disciplinary matter does not preclude this court from making such findings on *de novo* review. The Bar then notes that BR 10.5(c) expressly allows the respondent in a Bar disciplinary matter to address issues on appeal not raised by the appellant. That rule provides, in part:

“Answering briefs are not limited to issues addressed in petitions or opening briefs, and may urge the adoption,
modification or rejection in whole or in part of any decision of the trial panel.”

We agree that BR 10.5 allows the Bar unusually broad latitude. That is particularly true in situations where, as here, the Bar is the respondent on appeal and not an appellant or cross-appellant. The question before us, however, is not whether the Bar can make such arguments—it can—but whether, on this particular record, we should rule on them in light of Koch.

In Koch, the court was confronted with a unique set of circumstances. Because the accused in that case had failed to answer the Bar’s complaint, the Bar had entered a default order against her pursuant to BR 5.8(a). In the wake of that default, BR 5.8(a) required subsequent trial panels to view the allegations in the complaint against the accused as true. After the default order was entered, a trial panel was appointed and proceeded to impose sanctions without first determining that the accused had, in fact, committed the ethical violations in question. Id. The trial panel appeared to assume—because of the previous default—that the alleged violations had automatically been established by clear and convincing evidence. On appeal, however, this court made clear that disciplinary sanctions could be determined only upon a finding that an ethical violation had occurred. Id. at 447. We nevertheless concluded that remand to the trial panel was unnecessary. Citing our authority to conduct de novo review in disciplinary matters, see In re Fitzhenry, 343 Or 86, 88, 162 P3d 260 (2007) (“We review a decision of the trial panel de novo”), we proceeded to fill the analytical gap left in the trial panel’s decision, concluding that the accused had, indeed, committed multiple violations of the Rules of Professional Conduct and imposing a 120-day suspension as a sanction.

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6 BR 5.8(a) provides, in part:

“If an accused lawyer fails to resign or file an answer to a formal complaint within the time allowed by these rules, or if an accused lawyer fails to appear at a hearing set pursuant to BR 2.4(h), the trial panel chairperson, or the regional chairperson if a trial panel has not been appointed, may file with the Disciplinary Board Clerk an order finding the accused in default under this rule. Copies of the order shall be served on the parties. The trial panel shall thereafter deem the allegations in the formal complaint to be true.”
However, this case is substantively different from *Koch*. Because there has been no default on the part of the accused, we cannot deem the allegations set out in the Bar's fourth and fifth causes of complaint to be true under BR 5.8(a). In addition, there are no trial panel findings concerning the factual underpinnings of those allegations, no findings related to the accused's culpability in that regard, and no sanction-related analysis. Indeed, the trial panel has failed to provide this court with anything addressing the fourth and fifth causes of complaint against the accused, and certainly nothing that resembles a decision on the merits of the allegations set forth therein.

In disciplinary matters, Oregon law expressly authorizes parties to seek review of trial panel "decisions." *See* ORS 9.536(1) ("The Oregon State Bar or the accused may seek review of the decision by the Supreme Court.") (Emphasis added.) In this case, because the trial panel failed to provide any semblance of a decision regarding the two omitted causes of complaint, we decline to consider them on review.

**SANCTION**

We turn, finally, to the appropriate sanction. We begin by applying the analytical framework set out in the American Bar Association's *Standards for Imposing Lawyer Sanctions* (ABA Standards). *In re Obert*, 352 Or 231, 258, 282 P 3d 825 (2012). In accordance with the ABA Standards, we first consider the duty violated, the accused's state of mind, and the actual or potential injury caused by the accused's conduct. *In re Kluge*, 332 Or 251, 259, 27 P 3d 102 (2001); ABA Standard 3.0. We next determine the existence of any aggravating or mitigating circumstances. *Kluge*, 332 Or at 259. Finally, we consider the appropriate sanction in light of this court's case law. *Id.* In fashioning an appropriate sanction, our purpose is to protect the public and the administration of justice from lawyers who have not properly discharged their duties to clients, the public, the legal system, or the profession.

Here, the accused violated RPC 1.7(a)(1), RPC 1.8(g), and RPC 1.4(b) and, in doing so, breached his duty to avoid conflicts of interests with his clients, ABA Standards
4.3, and his duty to be candid with them, ABA Standards 4.6. In failing to obtain his clients’ informed consent to the method of allocation that he used in the Archdiocese settlement and in failing to adhere to that method of allocation in the state settlement, the accused acted intentionally. See ABA Standards at 7 (“intent” defined as “the conscious objective or purpose to accomplish a particular result”). In doing so, the accused created at least the potential for injury to each client. Some clients obtained a greater portion of the surplus settlement offers than did others, and none of the clients had the information that the rules contemplate when they accepted the distribution that they received. Under ABA Standards 4.32(b), suspension generally is appropriate when a lawyer knows of a conflict of interest, does not disclose its possible effects, and causes injury or potential injury to the client in the process.

We next consider whether mitigating or aggravating factors might affect that determination. We find several aggravating factors at play here. First, the accused has a prior disciplinary history, having been admonished in 1989 for making misrepresentations to clients in order to increase his fee, and publicly reprimanded in 2000 for misrepresenting his identity in the course of gathering information for his clients. Second, the accused has substantial experience in the practice of law. As mitigating factors, we consider the accused’s cooperation with Bar’s investigation and the fact that there is no evidence that any of the plaintiffs suffered actual injury. None of the Sprauer plaintiffs objected to the settlement distributions at the time that they received them, and only New objected thereafter. That mitigating factor is tempered, however, by the fact that the accused did not distribute the state settlement to the plaintiffs according to the formula that he had told them he would use—a formula that he must, at some point, have believed to be a fair one.

Having made a preliminary determination that a suspension of some term is appropriate here, we turn to this court’s case law to help determine the duration of that suspension. As we have noted in the past, case-matching in the context of disciplinary proceedings “is an inexact science.” In re Stauffer, 327 Or 44, 70, 956 P2d 967 (1998). Still, this court’s past cases provide some guidance in fashioning an
appropriate sanction here and demonstrate the propriety of a suspension in this particular matter.

As we have explained, a finding that a lawyer has engaged in a conflict of interest, without more, typically justifies a 30-day suspension. *In re Campbell*, 345 Or 670, 689, 202 P3d 871 (2009). Similarly, a finding that a lawyer has failed to adequately explain a legal matter to a client under RPC 1.4(b), without more, also justifies a 30-day suspension. *In re Snyder*, 348 Or 307, 323-24, 232 P3d 952 (2010). What is less clear, however, is the sanction that should be imposed for the accused's violation of RPC 1.8(g).

That is so because this court has yet to consider what constitutes an appropriate sanction for lawyers who overstep the ethical boundaries that delineate the aggregate settlement rule. Other jurisdictions have arrived at a variety of sanctions ranging from one year of conditional supervision to disbarment, depending on the facts of each case. *See, e.g.*, Kentucky Bar Association v. Mills, 318 SW3d 89 (Ky 2010) (disbarment appropriate when multiple violations—including fraudulent settlement method and misrepresentation to court—also accompanied by violation of aggregate settlement rule); *In re McNeely*, 313 Wis 2d 283, 752 NW2d 857 (2008) (60-day suspension appropriate when multiple violations—including misconduct involving misrepresentation and making false statement to tribunal—also accompanied by violation of aggregate settlement rule); *In re Berlin*, 306 Wis 2d 288, 743 NW2d 683 (WI 2008) (six-month suspension appropriate when multiple violations—including failure to act with reasonable diligence and conduct involving dishonesty—also accompanied by violation of aggregate settlement rule); *In re Hoffman*, 883 So 2d 425 (La 2004) (three-month conditionally deferred suspension appropriate when failure to obtain informed consent for joint representation of three siblings in will contest also accompanied by violation of aggregate settlement rule); *In re Faucheux*, 818 So 2d 734 (La 2002) (one year of supervised probation appropriate when multiple violations—including failure to communicate with client, engaging in current client conflict of interest, and conduct prejudicial to the administration of justice—also accompanied by violation of aggregate settlement rule).
Here, the Bar seeks a six-month suspension predicated largely on the notion that the accused’s actions in this matter (1) contained a strong element of self-interest and (2) involved a misrepresentation that reflected poorly on the legal profession. This court has imposed substantial sanctions when a conflict of interest is accompanied by a dishonest act reflecting poorly on a lawyer’s fitness to practice law. See, e.g., In re Morris, 326 Or 493, 953 P2d 387 (1998) (120-day suspension for attorney who (1) knowingly altered and filed a document previously signed and notarized by client and (2) represented multiple current clients when such representation was likely to result in a conflict). However, because the Bar did not prove that the accused engaged in such misrepresentations, that combination is not present here.

What we do find is that the accused’s substantial experience in the law had made him aware of the ethical problems that could arise if he were to participate in the allocation of a lump sum settlement offer; yet—particularly with respect to the state settlement—that is exactly what the accused did. In addition, the accused did not obtain the informed consent required by the rules of professional conduct at issue here, and, as a result, he exposed his clients to a risk of injury. Those are significant violations that, in light of the accused’s disciplinary history, warrant more than a 30-day suspension. We conclude that a 90-day suspension is appropriate.

The accused is suspended from the practice of law for 90 days, commencing 60 days from the date of the filing of this decision.
Defining Aggregate Settlements: the Road Not to Take

By: Peter R. Jarvis and Trisha M. Rich

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 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.

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.

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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.
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]

Gatti, 333 P.3d at 1003. The 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 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 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. Gatti, supra, 333 P.3d at 1003-04; ALI Report at §3.16(d). But neither 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 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

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[5] Although the 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").
ETHICAL ISSUES IN MASS TORT PLAINITIFFS’ REPRESENTATION: BEYOND THE AGGREGATE SETTLEMENT RULE

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ETHICAL ISSUES IN MASS TORT PLAINTIFFS’ REPRESENTATION: BEYOND THE AGGREGATE SETTLEMENT RULE

Nancy J. Moore*

Those who have addressed ethics issues for plaintiffs’ lawyers in mass tort litigation have focused on possible reform of the aggregate settlement rule to facilitate global settlements. This Article addresses a broader range of ethical issues, including (1) application of the general conflicts of interest rule to both client-client and client-lawyer conflicts; (2) unresolved issues concerning the interpretation of the current aggregate settlement rule, including the need to disclose client names and the applicability of the rule to court-approved settlements and formula or matrix allocations; and (3) the ability of lawyers to voluntarily withdraw from representing plaintiffs who reject an offer of settlement.

TABLE OF CONTENTS

INTRODUCTION .......................................................................................... 102
I. CONFLICTS OF INTEREST ....................................................................... 106
  A. Conflicts at the Outset of the Representation ........................................ 107
     1. Conflict Identification: Client-Client Conflicts ................ 108
     2. Conflict Identification: Client-Lawyer Conflicts .......... 111
     3. Consentability of the Conflicts .......................................... 114
     4. Obtaining the Clients’ Informed Consent ......................... 120
  B. Conflicts That Arise During the Representation ............................... 122
II. SATISFYING THE REQUIREMENTS OF THE CURRENT AGGREGATE SETTLEMENT RULE .................................. 125
  A. What Is an Aggregate Settlement? ............................................. 126
  B. The Disclosure Requirements of Rule 1.8(g) ................................. 127
  C. Court-Approved Settlements ..................................................... 134
III. ATTORNEY WITHDRAWAL FROM REPRESENTING NONSETTLING PLAINTIFFS ............................................................. 137
CONCLUSION ............................................................................................. 142

* Professor of Law and Nancy Barton Scholar, Boston University Law School. I am grateful to Howard Erichson and Benjamin Zipursky for organizing this Symposium on group representation. My thanks to the participants in the Symposium for their comments on an earlier draft and to Lynn Baker for her generous comments.
INTRODUCTION

Following the Supreme Court decisions in Amchem Products, Inc. v. Windsor¹ and Ortiz v. Fibreboard Corp.,² plaintiffs’ attorneys largely shifted from using class actions to resolve large numbers of personal injury and other tort claims to using nonclass group litigation,³ including both formal and informal aggregations of individual claims,⁴ in which, unlike class actions,⁵ each claimant has a more-or-less traditional attorney-client relationship with the plaintiffs’ attorney.⁶ Although many of these claims are resolved individually—sometimes by trial and sometimes by settlement—it has become increasingly common for both plaintiffs’ and defendants’ attorneys to attempt to resolve large numbers of claims through negotiated settlements, including both a single, “global” resolution of virtually all claims⁷ and more limited resolutions of each plaintiffs’ attorney’s “inventory” of claims.⁸

Neither courts, practitioners, nor scholars have focused much attention on the ethical issues confronting plaintiffs’ lawyers in the group representation of mass tort claimants.⁹ To the extent that they have, however, most of their concern has been with American Bar Association (ABA) Model Rule

4. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (2009) (listing types of formal and informal aggregate litigation); see also, e.g., Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 DUKE L.J. 381 (2000).
5. For a discussion of the relationship between class counsel and members of the class, see, for example, Nancy J. Moore, Who Should Regulate Class Action Lawyers?, 2003 U. ILL. L. REV. 1477, 1482–89.
6. For ways in which the relationship between lawyer and client in mass tort representations involving large numbers of clients differs from the traditional representation of individual clients, see, for example, Jack B. Weinstein, Individual Justice in Mass Tort Litigation 85 (1995) (arguing that “[t]he mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation”), and Nancy J. Moore, The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits, 41 S. TEX. L. REV. 149, 160–62 (1999) (discussing the challenges of reasonably communicating with large numbers of clients in mass tort representation). See also infra notes 89–101 and accompanying text (arguing that there should be some limitation on the number of clients represented by a single lawyer or law firm).
1.8(g)—the aggregate settlement rule—which provides that a lawyer representing multiple plaintiffs “shall not participate in making an aggregate settlement of the claims of . . . the client . . . unless each client gives informed consent, in a writing signed by the client.”¹⁰ They have offered various definitions of an “aggregate settlement”¹¹ and questioned precisely what information must be disclosed in satisfaction of the rule’s requirements.¹² In addition, they have sometimes addressed the ethical propriety of the attempts by defense attorneys to indirectly achieve final resolution by inserting provisions in settlement agreements that prevent plaintiffs’ attorneys from taking on new clients with similar claims against the defendant.¹³ Such attempts raise questions concerning unethical restrictions on the right to practice,¹⁴ in violation of Model Rule 5.6(b), which prohibits a lawyer from offering or making “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”¹⁵

Most recently, ethics scholars have been preoccupied with attempts to make it easier to achieve global resolution through aggregate settlements by revising Rule 1.8(g) to permit plaintiffs to agree, in advance, to be bound by the decision of a majority or supermajority to accept the terms of an aggregate settlement.¹⁶ Courts and ethics committees have uniformly held that such advance waivers do not satisfy the current rule’s requirement that each client give consent after being informed of the particular terms of the proposed settlement.¹⁷ Critics of this requirement argue that it is

¹⁰. MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2012).
¹². Compare, e.g., Moore, supra note 6, at 164 (arguing that the current rule does not necessarily require the disclosure of client names in all cases), with Charles Silver & Lynn A. Baker, Mass Lawsuits and the Aggregate Settlement Rule, 32 WAKE FOREST L. REV. 733, 780 (1997) (arguing that the current rule requires the disclosure of the names of all client participants and the amount each will receive). See generally infra notes 155–166 and accompanying text (addressing the necessity of disclosing both client names and the actual amounts clients will receive when settlement utilizes a formula to be applied after settlement is approved).
¹⁴. Id.
¹⁵. MODEL RULES OF PROF’L CONDUCT R. 5.6(b); see infra notes 22–27, 196–203 accompanying text (discussing whether attorneys would violate Rule 5.6(b) if they complied with the applicable provision of the Vioxx settlement agreement).
¹⁷. See Morgan, supra note 16, at 741.
unnecessary and unduly burdensome, thereby preventing plaintiffs from
fully realizing the potential benefits of aggregating their claims. These
critics persuaded the American Law Institute (ALI)—in its recently adopted
Principles of the Law of Aggregate Litigation—to propose a rule change
permitting claimants, in certain circumstances, to agree in advance to accept
an aggregate settlement offer approved by a supermajority of similarly
situated claimants. The ALI proposal was finalized in 2010, but to date
no jurisdiction has adopted such a rule change.

Practitioners involved in group litigation, particularly defense attorneys,
continue to search for ways to increase the likelihood of achieving a global
resolution of all (or virtually all) claims. In 2007, the pharmaceutical
company Merck signed a $4.85 billion agreement with law firms
representing over 33,000 claimants who were suing Merck for injuries
allegedly caused by Vioxx. The agreement contained several
controversial provisions requiring plaintiffs’ attorneys to recommend the
settlement to all of their clients and to withdraw from representing any
client who rejected the settlement. These provisions arguably violated
state versions of ABA Model Rule 2.1, which requires lawyers to exercise
independent professional judgment in advising their clients; ABA Model
Rule 1.16, which prohibits lawyers from withdrawing from a
representation without good cause when the result will be to materially
prejudice the client; and ABA Model Rule 5.6, which prohibits settling
attorneys from agreeing to restrict their right to practice.

Vioxx and other similar settlements raise important ethical issues
beyond the aggregate settlement rule. Nevertheless, neither practitioners
nor scholars have adequately addressed the full range of ethical issues

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19. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (2010).
CYCLE REPORT 41 (2012), available at http://op.bna.com/mopc.nsf/id/fros-
8rsq8/$File/NJ%20PRRC2010-12RPT.pdf.
21. David Voreacos & Allen Johnson, Merck Paid 3,468 Death Claims To Resolve
Vioxx Suits, BLOOMBERG.COM (July 27, 2010, 5:27 PM),
vioxx-suits.html.
22. See, e.g., Erichson & Zipursky, supra note 13, at 280–81. With respect to the
mandatory withdrawal provision, the agreement did provide the caveat that attorneys were
not required to withdraw unless ethically permitted to do so under state equivalents of Rules
1.16 and 5.6 of the ABA Model Rules. See id. at 290. I agree with Erichson and Zipursky
that, even with this caveat, this provision was unethical, although not for the same reasons
they give. See infra Part III.
shall exercise independent professional judgment and render candid advice.”).
24. Id. R. 1.16 (providing for required and permissive withdrawal from representation).
25. See, e.g., Erichson & Zipursky, supra note 13, at 283–85 (also discussing probable
violations of Rules 1.2(a), 1.4, and 5.6(b)).
26. See supra note 15 and accompanying text.
27. For a discussion of several recent settlements that raise significant ethical issues, see
Erichson, supra note 7.
confronting plaintiffs’ attorneys representing large numbers of claimants in mass tort cases. For example, although the aggregate settlement rule is generally understood as a special application of general conflicts of interest rules (as well as rules specifying that it is for the client, not the lawyer, to determine whether to accept or reject a settlement), there is little understanding as to how these general conflicts of interest rules apply to plaintiffs’ lawyers prior to an aggregate settlement proposal, either at the outset of an individual representation or as the representation develops.28 At what point does a conflict of interest arise? Are any such conflicts ever nonconsentable, either at the beginning of a representation or as events unfold? What specific disclosures are lawyers required to make in order to assure that client consent is adequately informed? Are additional disclosures required as the representation evolves?

As for the specific issues raised by the Vioxx settlement agreement, commentators generally agree that it was improper for defense attorneys to require (and for plaintiffs’ attorneys to agree) that the plaintiffs’ attorneys would recommend the settlement to all their clients29 and would withdraw from the representation of any client who rejected the settlement.30 Even in the absence of such heavy-handed provisions, however, the question remains how plaintiffs’ attorneys can possibly exercise independent judgment in advising individual claimants whether to accept an aggregate settlement when defense attorneys require (as they are clearly permitted to do) that the settlement will be ineffective for any claimant unless all or a specified percentage of claimants agree to participate. And what if a plaintiffs’ attorney cannot afford to continue representing only a few clients—or even one—who reject the settlement and insist on going to trial? Aside from what defense attorneys want them to do, is there no way that plaintiffs’ attorneys can protect themselves against the possibility that they will be unable to spread the costs of any ongoing representation among a large number of clients?

In this Article, I address a broader range of ethical issues confronting plaintiffs’ attorneys in mass tort cases than is usually found in the writings

28. See infra Part I.A.
29. See, e.g., PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 14:13:50 (Supp. 2012); Ericson & Zipursky, supra note 13, at 283–84. It has been pointed out to me that the pressure placed on attorneys as a result of the mandatory recommendation provision was lessened by the existence of a provision, typically overlooked by commentators, for an “extraordinary injury fund” (EIF), by which clients could seek additional compensation if they were dissatisfied with their compensation under the matrix formula. See Settlement Agreement Between Merck Co., Inc. and the Counsel Listed on the Signature Pages Hereto § 4.2 (Nov. 9, 2007), available at http://www.legalalexaminer.com/uploadedFiles/InjuryBoardcom_Content/Overviews/VioxxMasterSettlementAgreement.pdf. This provision made it easier for attorneys to exercise their independent judgment in favor of recommending the settlement to their clients.
30. See, e.g., RHEINGOLD, supra note 29, § 14:13:50; Ericson & Zipursky, supra note 13, at 285–92. As noted earlier, the requirement to withdraw was limited to situations in which such withdrawal was ethically permissible. See supra note 25. Nevertheless, commentators have generally concluded that the provision was still unethical. See infra Part III.
of either practitioners or scholars. Part I addresses various underanalyzed applications of the general conflicts of interest rule, including not only conflicts among different plaintiffs and plaintiff groups but also conflicts between the plaintiffs and the plaintiffs’ attorney. Part II briefly addresses continuing difficulties in defining an aggregate settlement for purposes of Rule 1.8(g). It also addresses the significance of a variation of the rule adopted in at least two states, which appears to provide that the rule does not apply when an aggregate nonclass settlement receives court approval, as it did in the Vioxx settlement.31 With respect to the disclosure provisions of the current rule, questions remain whether the rule requires each client to be advised of the name of, and amount being allocated to, every other client; these requirements may impinge not only on the legitimate privacy interests of some clients but also on the ability of the parties to enter into a settlement agreement when the specific allocations have not yet been made—for example, when an independent third person will subsequently make the individual allocations, typically based on a formula or matrix described in the agreement. Finally, Part III addresses the ability of plaintiffs’ attorneys to withdraw from the representation of one or more clients who decline to accept an aggregate settlement offer when the expenses of the representation cannot be spread among a large number of clients.

I. CONFLICTS OF INTEREST

It is generally acknowledged that Rule 1.8(g)—the aggregate settlement rule—represents a special application of both Rule 1.7—the general conflicts of interest rule—and Rule 1.2(a), which provides that a lawyer must abide by a client’s decision whether to settle a matter.32 What is less often recognized is that Rule 1.8(g) merely supplements Rule 1.7, but does not supplant it,33 meaning that it is possible for a plaintiffs’ attorney to violate Rule 1.7 in negotiating and recommending an aggregate settlement to a disparate group of plaintiffs even though the attorney has strictly complied with the requirements of Rule 1.8(g). Even more surprising, however, is the failure of most commentators to address the application of Rule 1.7 at earlier stages of the representation, beginning with the acceptance of each new client and continuing through the various stages of the representation. The representation might conclude with an aggregate

32. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. 13 (2012); Brophy, supra note 16, at 680.
33. See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 438 (2006). For an illustration of commentaries that appear to assume that the conflicts that arise with respect to aggregate settlements are addressed solely or primarily by Rule 1.8(g), without any discussion of the applicability of Rule 1.7 either at the outset of the representation or when negotiating an aggregate settlement, see Robert I. Komitor, Mediation and Settlement of the Multiparty Action—When Ethical Considerations Clash with Case Resolution, 2001 ATLA-CLE 2785; J. Michal Papantonio, The Ethics of Mass Tort Settlement, 2002 ATLA-CLE 2617; Brophy, supra note 16; Dirks, supra note 8.
settlement (including all or part of the attorney’s clients) or it might conclude with one or more individual trials to verdict or settlements of individual cases, or with some combination of individual trials, settlements of individual cases, and aggregate settlements.\(^{34}\)

### A. Conflicts at the Outset of the Representation

Rule 1.7(a) provides that a concurrent conflict of interest exists when “the representation of one client will be directly adverse to another client”\(^{35}\) (a “directly adverse conflict”), or when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer” (a “material limitation conflict”).\(^{36}\) It is rarely the case that mass tort claimants in similar types of cases will be directly adverse to each other, as would happen if one claimant-client sued another claimant-client, typically in an unrelated matter, or if one appeared as a witness against another and the lawyer had to cross-examine the claimant-client witness on behalf of the client-claimant party.\(^{37}\) These scenarios are highly remote. What is more likely, however, is that the representation of one claimant, or one type of claimant, will be materially limited by the representation of other claimants, or other types of claimants.\(^{38}\) This is the client-client conflict that most lawyers understand is present when a plaintiffs’ attorney negotiates an aggregate settlement. Indeed, it is precisely this type of conflict that underlies the aggregate settlement rule.\(^{39}\)

\(^{34}\) Several commentators discuss the applicability of Rule 1.7 at the outset of the representation when the lawyer is accepting new clients. See, e.g., Rheingold, supra note 29, § 14:17; Ericsson & Zipursky, supra note 13, at 304–11; Howard M. Ericson, Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation, 2003 U. Chi. Legal F. 519, 558–67. See generally Sarah A. Toops, Ethically Representing Thousands of Plaintiffs: Conflict Problems in Mass Toxic Harm Cases, 67 Def. Couns. J. 462 (2000). Much of this commentary focuses solely on the nature of the disclosure the lawyer must make in order to obtain the informed consent of the clients to the conflicts inherent in mass representation. See, e.g., Matthew L. Garretson, A Practical Approach to Proactive Client-Counseling and Avoiding Conflicts of Interest in Aggregate Settlements, 6 Loy. J. Pub. Int. L. 19, 30–33 (2005); cf. In re Hoffman, 883 So. 2d 425, 425 (La. 2004) (holding that an attorney violated Rule 1.7(b) by failing to obtain the informed consent of two clients to the joint representation and also violated Rule 1.8(g) by failing to consult with all his clients with respect to the details of the proposed aggregate settlement). Commentators rarely address conflicts that arise subsequent to intake, perhaps assuming that if the lawyer obtains informed consent at the outset, this consent covers conflicts that arise subsequently, including the actual negotiation of an aggregate settlement, which is also addressed by Rule 1.8(g).

\(^{35}\) Model Rules of Prof’l Conduct R. 1.7(a)(1) (2012).

\(^{36}\) Id. R. 1.7(a)(2).

\(^{37}\) See id. R. 1.7 cmt. 6.

\(^{38}\) Material limitation conflicts arise “if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interest.” Id. cmt. 8. In other words, “[t]he conflict in effect forecloses alternatives that would otherwise be available to the client.” Id.

In addition, some courts and commentators have expressed concern that there are client-lawyer conflicts arising from financial and other interests of plaintiffs’ attorneys in mass tort litigation, particularly when the attorney has incurred massive debt in pursuing the litigation. I will address both types of conflicts, first with respect to conflict identification under Rule 1.7(a) and then under the provisions of Rule 1.7(b), which permit lawyers to undertake conflicted representations with the informed consent of the clients, except when the conflict is nonconsentable.

1. Conflict Identification: Client-Client Conflicts

At the time an aggregate settlement is negotiated, plaintiffs’ attorneys in mass tort cases typically represent a variety of clients who differ with respect to disease category, extent of injury, length of exposure, date of injury or manifestation of injury, medical history, and other factors bearing on the strength of their claims and the size of their potential recoveries. In addition, they differ with respect to their litigation goals, including their tolerance for risk, preferred remedies, interest in process values, and desire for vindication at trial. All of these factors have an obvious bearing on the clients’ willingness to accept an aggregate settlement, with respect to both the size of the total amount and its allocation among the various claimants. Thus, it is obvious that, at the time of responding to an aggregate settlement offer, the obligation of the plaintiffs’ attorney to enhance the recovery of any one claimant, or type of claimant, will materially limit the ability of the lawyer to enhance the recovery of other claimants, or types of claimants, thereby triggering a material limitation conflict of interest under Rule 1.7(a). But is this same conflict triggered at the outset of each representation, when it may be unclear whether the time will come when the lawyer will be faced with the conflicts that are generated by an aggregate settlement proposal?

Professor Howard Erichson, one of the few commentators to address in any detail the application of the general conflicts rule to a mass tort

40. See infra notes 64–69 and accompanying text.
41. See supra notes 35–39 and accompanying text.
42. See infra notes 75–80 and accompanying text.
43. See, e.g., Komitor, supra note 33 (noting that differences exist among “clients with injuries ranging from the less significant, such as non-disabling pleural plaques to the more severe, such as disabling asbestosis and malignancies”; other differences “include a variety of competing interests such as category and severity of disease and ability to identify the source of asbestos exposure”); see also, e.g., Toops, supra note 34, at 462 (potential differences also include jurisdictional interests).
44. See, e.g., Erichson, supra note 34, at 574; Toops, supra note 34, at 463.
46. But see, e.g., Allegretti-Freeman v. Baltis, 613 N.Y.S.2d 449, 451 (App. Div. 1994) (refusing to recognize the existence of a conflict of interest among seventeen homeowners, who brought an action against a real estate developer and broker based on alleged structural defects and contaminated water in their homes, unless some in fact desired to accept the aggregate settlement offer and would be prevented from doing so by the objections of others to the offer).
lawyer’s initial acceptance of clients, has argued that conflicts of interest among current clients are inherent in mass tort representation because the plaintiffs’ interests are not perfectly aligned.\textsuperscript{47} As a result, lawyers representing multiple plaintiffs will inevitably face decisions about whose interests to advance at various stages of the litigation, including decisions concerning how to prioritize among litigation objectives, which cases to push to trial first, and whether to support wide-ranging confidentiality agreements and protective orders in individual cases. Erichson has therefore advocated that plaintiffs’ attorneys recognize and deal with these conflicts at the outset of the representation, rather than waiting for specific issues to arise during the litigation.

Not all practitioners agree. Erichson’s argument is based on his assumption that the lawyer knows at the outset of a mass tort representation that the representation will be “collective” in nature. Others view each representation as individual, unless and until either the plaintiffs’ or the defendants’ attorney decides to address these cases collectively, as in the negotiation of an aggregate settlement.\textsuperscript{48}

Erichson’s argument has merit in many, perhaps even most, mass tort representations. Many lawyers aim from the beginning to take on hundreds, thousands, or even tens of thousands of claimants, regardless of the type or extent of their injuries or any other factor likely to affect the strength of their claims or the size of their potential recoveries.\textsuperscript{49} The most thoughtful of these lawyers know that they will be treating the clients as a group, that they will focus on monetary rather than nonmonetary goals in all cases, that they will design the litigation strategy to maximize the size of any overall recovery, and that, in the likely event that they will ultimately negotiate an aggregate settlement, they will attempt to allocate the proceeds in a manner that is generally fair but that inevitably will sacrifice the interests of some to the interests of others.\textsuperscript{50} Such a strategy may be ethically permissible but,\textsuperscript{47} See, e.g., Erichson, \textit{supra} note 34, at 573. Others have addressed the issue, but not at the same level of detail. See, e.g., Lester Brickman, \textit{Ethical Issues in Asbestos Litigation}, 33 \textit{Hofstra L. Rev.} 833, 847–48 (2005); Toops, \textit{supra} note 34, at 463.

\textsuperscript{48} Cf. \textit{Rheingold}, \textit{supra} note 29, § 14.3 (discussing particular scenarios in which conflicts may arise). I have had discussions with various plaintiffs’ lawyers who insist that there is not necessarily a conflict of interest in representing multiple plaintiffs in mass tort actions and that they treat cases as individual and not collective unless the defendant decides to treat them collectively. These lawyers typically are more selective and choose to represent only a limited number of potentially high-value cases. \textit{See infra} note 52 and accompanying text.

\textsuperscript{49} See, e.g., Komitor, \textit{supra} note 33.

\textsuperscript{50} There may be some, perhaps many, settlements in which individual claimants are treated fairly under an objective matrix that accurately reflects the litigation value of cases of various types. Nevertheless, it is likely that attorneys representing only one, or one type, of claimant would have at least argued for differences in the way the matrix was formulated to favor their client(s)’ interests. With multiple clients with different types of cases, I continue to believe, along with Erichson, that the interests of some get sacrificed to the interests of others. This is not necessarily wrong or even unfair; it simply suggests that representing multiple clients in mass tort litigation typically presents conflicts of interest that must be addressed under conflict of interest rules.
as Erichson suggests, there is a “significant risk” from the very outset of these representations that the representation of some clients will be “materially limited” by the attorneys’ obligations to other clients, thereby presenting a Rule 1.7 conflict.51

But this is not what all mass tort plaintiffs’ attorneys envision. Some plan to accept only a limited number of high-value cases, that is, cases in which the plaintiff appears to have both a strong case for liability and very serious injuries.52 Inevitably there will be differences among even these plaintiffs,53 but that does not necessarily mean that there is a significant risk of material limitation as a result of these differences.54 For example, at the early stages of a particular mass tort, before it becomes apparent how widespread the injuries or claims will be or whether the defendants will be unable to fully compensate all victims (or at least all of the victims represented by this particular attorney), the risk that the attorney’s loyalty to one client will limit her loyalty to another client may be remote. Each case may proceed on its own course, with the attorney making decisions in each case, in consultation with the client, as to what strategy is in that client’s best interest. There may be little likelihood that a strategic decision in one case will materially limit what the attorney can do in another case. In these situations, the attorney may plausibly argue that the risk of material limitation is insufficient at the outset to trigger the conflicts of interest rule.

What about the fact that the plaintiffs’ attorneys will almost certainly plan to hire experts who are expected to serve in all or most of their clients’ cases? Given that there will be important similarities in establishing the defendant’s liability, including the need to develop proof of negligence, product defect, or general causation, it seems inevitable that the attorney’s multiple clients will be sharing many of the costs of the representation. Nevertheless, the prospect of cost sharing is a potential benefit, not a potential detriment of the multiple representation, as is the leverage the attorney gains as a result of the defendant’s awareness that the attorney has more resources at her disposal than if she were representing only one claimant.55 Unless it can be demonstrated that the representation of multiple plaintiffs also presents a significant likelihood that any one representation will be adversely affected by the others, it would appear that there are no material limitation conflicts in this situation, at least at the beginning of the representation.

Nevertheless, Erichson is surely correct that for most mass tort representations, a material limitation conflict of interest arises among the many clients of a plaintiffs’ attorney—a conflict that must be dealt with at the outset of the representation.

51. Erichson, supra note 34, at 558.
52. See, e.g., Komitor, supra note 33.
53. Id.
54. See, e.g., Restatement (Third) of the Law Governing Lawyers § 128 cmt. d(i) (stating that there is not always a conflict for a lawyer representing multiple plaintiffs).
55. See, e.g., Silver & Baker, supra note 12, at 745.
2. Conflict Identification: Client-Lawyer Conflicts

In a recent mass tort litigation involving over 10,000 cases filed by responders who participated in the clean-up of the World Trade Center disaster site, one law firm, Worby Groner Edelman & Napoli Bern LLP (Napoli Bern), represented over 90 percent of the plaintiffs. Pursuant to federal legislation, all the cases were filed in or transferred to the Southern District of New York. Presiding Judge Alvin K. Hellerstein exercised extensive judicial supervision over all aspects of the litigation, which ultimately resulted in Judge Hellerstein approving a comprehensive aggregate settlement of almost all the claims. Judge Hellerstein justified his strong managerial role, including his rejection of the first proposed settlement agreement, by noting not only the potential conflicts among so many plaintiffs represented by a single law firm but also a substantial conflict arising from the law firm’s own “compelling interest” in having the settlement approved. Napoli Bern, a relatively small firm, had spent eight years strenuously litigating these cases, including two appeals, without any compensation. The firm had borrowed heavily, incurring a large interest expense, which was secured by personal guaranties of the firm’s principals. As a result, Judge Hellerstein concluded that the prospect of settlement and an anticipated fee of $250 million, plus expenses, “gave the firm an interest that may not have been in line with many of its clients’ interests.” Subsequently, writing about mass torts generally, Judge Hellerstein continued to express concern over mass tort lawyers’ financial incentives:

Their need to finance their cases over several years of hard-fought and expensive litigation creates substantial debts, financed at high compound interest rates. Repayment of the loans tends to depend on settlements or recoveries in the lawsuits, the outcomes of which tend to be far from certain. These debts create powerful motivations that potentially can

58. See id. at 170–71. For a discussion of the claims that were omitted from the settlement, see infra notes 129–131 and accompanying text.
59. See In re World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 196–97 (S.D.N.Y. 2011) (“Since one law firm . . . represented the substantial majority of the Plaintiffs, and since a normal attorney-client relationship cannot function where one lawyer represents so many clients, each with varying and diverse interests, judicial review must exist to assure fairness and to prevent overreaching.” (footnotes omitted)); see also Alvin K. Hellerstein, Democratization of Mass-Tort Litigation: Presiding over Mass Tort Litigation To Enhance Participation and Control by the People Whose Claims Are Being Asserted, 45 COLUM. J.L. & SOC. PROBS. 473, 477 (2012) (concluding that “only the court can ensure that conflicts arising in the representation do not unfairly harm plaintiffs”).
60. World Trade Center, 834 F. Supp. 2d at 197–98.
61. Id. at 198.
62. Id.
63. Id.
interfere with the lawyer’s professional obligation to serve clients’ interests first and foremost.64

Judge Hellerstein is not alone in suggesting that a client-lawyer conflict exists when plaintiffs’ attorneys invest substantial funds of their own money, or take on extensive debt, in order to finance costly mass tort litigation.65 And surely it is beyond dispute that both a firm’s need to be reimbursed for its advanced expenses (which can be extraordinarily high in a mass tort case), as well as the prospect of a multimillion dollar fee (when proving the defendant’s liability is far from certain, and a settlement’s rejection could result in a total loss), provide “powerful motivations” for a firm to stray (wittingly or unwittingly) from its fiduciary duty to consider only the clients’ interests when responding to a particular settlement offer. And if the nature of a mass tort is such that these financial incentives are reasonably foreseeable from the outset, then don’t these incentives create a material limitation conflict of interest under Rule 1.7?

Judge Hellerstein did not specify whether the client-lawyer conflicts he was describing constituted material limitation conflicts under Rule 1.7, such that any failure to adequately address such a conflict under the provisions of that rule would justify the discipline of the attorneys involved. Indeed, there is reason to question whether these types of financial conflicts are subject to Rule 1.7.

Elsewhere I have argued that conflict-of-interest rules such as Rule 1.7 do “not purport to regulate circumstances that are common to all lawyers, but only those circumstances unique to specific lawyers.”66 In other words, “conflict-of-interest doctrine in law does not address largely unavoidable conflicts, but only those that can be avoided or removed by permitting (or requiring) clients to seek out other lawyers, that is, lawyers who are not burdened with a particular conflict of interest.”67 Specifically addressing the financial incentives resulting from potentially enormous fees, such as when class counsel is considering settlement offers, I concluded that such conflicts are not governed by Rule 1.7; rather, they constitute a type of agency problem that permeates legal and other professional practice and must be controlled either by other rules (such as Rule 1.5, which governs legal fees) or by “relying on lawyers’ professionalism and their willingness to exercise good judgment and self-restraint.”68

Of course, it might be argued that, although “potentially enormous fees” are common to all law firms representing extremely large numbers of individual claimants in mass tort litigation, the enormous debt that confronts firms such as Napoli Bern is not necessarily shared by other

64. Hellerstein, supra note 59, at 474.
65. See, e.g., Rheingold, supra note 29, § 14.3; Burch, supra note 8, at 1280; Toops, supra note 34, at 473–74.
67. Id.
68. Moore, supra note 5, at 1490.
plaintiffs’ firms. Thus, perhaps the debt itself, including the potential for personal liability of the firm’s partners, created a financial interest of the plaintiffs’ attorney subject to Rule 1.7. But it can also be argued that there are a myriad of financial circumstances that may confront individual lawyers or law firms—such as an individual lawyer’s uncovered medical expenses or investment losses or a law firm’s impending bankruptcy—which create powerful incentives to compromise the representation of the clients. Must all these circumstances be treated as conflicts of interest under Rule 1.7, which requires either declining the representation or disclosure to clients? Or are these “conflicts” simply different manifestations of the many types of financial pressures that may cause lawyers to depart from their proper role as faithful agents of their client-principals? These are difficult questions for which I do not have a clear answer. At this point, however, all I want to suggest is that Rule 1.7 does not necessarily govern these sorts of financial incentives.

Aside from the prospect of enormous legal fees (with or without the need to repay substantial debt), differences in an attorney’s fee agreements with clients or with referring lawyers can also create conflicts between plaintiffs’ attorneys and their clients. For example, in a case involving an aggregate settlement of over 5,000 claims arising from the ingestion of “fen-phen” diet drugs, the Napoli Bern law firm was once again under attack. This time, a group of former clients who had been represented by Napoli Bern in the settlement claimed that other “Napoli Firm clients were offered disproportionately larger settlements because the firm unfairly inflated settlement offers for [these other] clients so that the attorneys’ fees earned by the firm would be greater.” The incentive to do so arose from the fact that these former clients had been referred by other lawyers who would be paid a referral fee from the fees obtained by Napoli on their settlements, whereas Napoli could keep all of the legal fees from clients who came directly to Napoli.

When, if ever, are fee differences among claimants subject to conflict-of-interest rules? Such differences arise not only from the need to pay referral fees on behalf of some, but not all, clients (and with respect to claimants with referral fees, the size of the referral fee may be different with respect to each referring lawyer) but also from possible differences in the size of

69. See Michael D. Green, Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation 216–17 (1996) (discussing plaintiffs’ attorney Chesley’s financing of MDL-486 litigation, investing $1 million of his own money for expenses in preparation for trial and concluding that, “[w]hile the contingent fee system necessarily results in plaintiffs’ attorneys having a financial stake in the case and sometimes results in a conflict between client and attorney, an investment of the magnitude of Chesley’s is highly unusual”).
70. See In re N.Y. Diet Drug Litig., No. 700000/98, 2007 WL 969426 (N.Y. Sup. Ct. Mar. 27, 2007). The firm was then known as Napoli Kaiser & Bern. Id. at *1.
71. Id. at *2.
72. Id. at *1; see also Garretson, supra note 34, at 21 (noting that mass tort clients come to lawyers from a referral network of other attorneys that typically have separate and distinct fee agreements).
the contingent fee each client has agreed to pay. These differences may be the result of individual negotiations or they may reflect statutory or court imposed caps on contingent fees in personal injury cases in some jurisdictions.73 These client-lawyer conflicts may be especially pernicious because they affect not so much the attorney’s incentive to settle for a lower total amount than might be achieved with further litigation (as is generally the case with client-lawyer conflicts in class actions and mass tort lawsuits), but rather the lawyer’s incentive to improperly adjust the allocation of the total amount among the clients themselves for the lawyer’s own benefit.

Fee-difference conflicts are not common to all lawyers. Nevertheless, it is not clear that they necessarily create client-lawyer conflicts under Rule 1.7, because the risk of material limitation may not be significant. Whether the risk is real or remote may depend on the ease with which an attorney can adjust a settlement (or other aspect of the multiple representation) to favor certain clients over others based on the differences in their fee arrangements. For example, if the plaintiffs’ attorney will be given a lump sum to allocate as he or she sees fit, without the use of a formula, matrix, or other objective criteria, there may be a significant likelihood that the lawyer will be tempted to favor certain clients based on prospective legal fees. On the other hand, if the plaintiffs’ attorney negotiates a settlement where the allocation will be based on objective factors, and the factors appear to be evenly distributed among the different client groups, then the prospect of the attorney favoring any particular group based on fee differences is likely to be remote. In any event, because it will be difficult to know at the outset of the representation whether such fee differences are likely to materially limit the lawyer’s representation, I conclude that such differences do not present a Rule 1.7 conflict at the outset, but may do so at some later point in the representation. The same could also be said of the financial incentives of firms like Napoli Bern that incur substantial and unusual debt; that is, there is no Rule 1.7 conflict unless and until the firm should reasonably know that it is likely to incur debt far more onerous than is typically undertaken by a similarly situated law firm, taking into account such factors as the number of clients the firm anticipates accepting, the likely expense of litigating the particular mass tort, and the ability of the firm to finance the litigation without taking on unduly burdensome debt.74

3. Consentability of the Conflicts

Under Model Rule 1.7(b), a lawyer may represent a client notwithstanding the presence of a material limitation conflict if:

73. See, e.g., N.J. CT. R. 1:21-7(c) (providing for sliding scale percentage recoveries in contingent fee personal injury actions); CONN. GEN. STAT. § 52-251c (2009) (establishing maximum percentages—up to one-third—that clients may be charged as contingent legal fees in personal injury, wrongful death, and property damage cases).

74. One commentator argues that financial conflicts between lawyer and client may be reduced by relaxing restrictions against third-party litigation financing. See generally Burch, supra note 8.
BEYOND THE AGGREGATE SETTLEMENT RULE

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing. 75

The first three conditions collectively constitute what is commonly referred to as the “consentability” of the conflict. 76 In other words, if these conditions are not satisfied, then the lawyer must decline or end the representation and may not ask the clients to give their consent to the conflict. In the case of mass tort plaintiffs’ representation, there should be no question concerning the satisfaction of conditions (2) and (3). The fundamental question is whether condition (1) can be satisfied; that is, whether it is reasonable for the lawyer to believe that the lawyer can competently and diligently represent each client.

There has been little discussion of the consentability of the conflicts of interest that arise in mass tort representations. Professor Lester Brickman, acknowledging the existence of conflicts in representing large numbers of asbestos claimants, says that he is “unaware of any widespread practice of plaintiff lawyers of seeking informed consent to such conflicts,” and further notes that, “[e]ven were these conditions to be complied with, serious questions exist as to whether a waiver from litigants so recruited would be valid under Model Rule 1.7(b)(1).” 77 Sarah Toops similarly notes the existence of conflicts in representing mass tort plaintiffs. 78 She also contends, without further explanation, that “[m]ost instances of conflicts produced by the diverging interest of an attorney’s clients in a mass toxic harms case cannot qualify for the exception set forth in the Model Rules because the lawyer usually cannot ‘reasonably believe’ that the representation will not be adversely affected.” 79 On the contrary, however,

75. MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2012).
76. See, e.g., id. at cmt. 15.
77. Brickman, supra note 47, at 859 n.113. Brickman’s views may be inaccurate or out of date. It is possible that it has become increasingly common for mass tort lawyers to include a standard provision in their retainer agreement that the clients understand that their case may be litigated or settled as part of a group of similar cases represented by that lawyer or firm. See, e.g., Ferguson v. Meadows, Nos. A094750, A095475, 2002 WL 31033065, at *1 (Cal. Dist. Ct. App. Oct. 10, 2002) (discussed at infra note 100 and accompanying text).
78. Toops, supra note 34, at 463–65.
79. Id at 463–64. Prior to the rule’s amendment in 2002, Rule 1.7(b)(1) provided that a lawyer may not accept representation when there is a material limitation conflict unless “the lawyer reasonably believes that the representation will not be adversely affected” by the conflict. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(1) (2001). The change in wording was not intended to clarify or change the substance of the consentability provision of the rule. See ABA Comm’n on Evaluation of the Model Rules of Prof’l Conduct, Reporter’s Explanation of Changes, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule17rem.html (last visited Mar. 7, 2013).
Paul Rheingold believes that plaintiffs’ attorneys may properly represent many clients in mass tort litigation, citing ABA opinions suggesting that some conflicts can be resolved by an appropriate waiver, as well as another commentator who concludes that, under the Model Rules, group representation is banned only when there is “fundamental antagonism” among the plaintiffs.80

Erichson is the one commentator who, both alone and with his coauthor, Professor Benjamin Zipursky, has addressed the question at some length, concluding that, in most situations involving mass tort litigation, multiple representation ought to be permitted with appropriate disclosure and client consent.81 In response to critics such as Toops, who query whether a lawyer can ever reasonably believe that the representation of at least some clients will not be adversely affected, Erichson posits that the clients’ consent in such cases functions as “an express limitation on the scope of representation” under Rule 1.2(c),82 which provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”83 The nature of the limitation is that the clients are expressly opting for group representation, rather than the more traditional individual representation; that is, they are agreeing to representation in which the lawyer will “seek primarily to advance the interests of the group, as in a class action.”84

Explaining why it is reasonable for mass tort clients to prefer group representation to individual representation, Erichson and Zipursky conclude that, in most cases, client interests are well served by a lawyer who represents many clients collectively, including in the negotiation of an aggregate settlement:

By offering clients the benefits of leverage and economies of scale, collective representation offers the only practical way for plaintiffs in mass litigation to litigate on a level field against a defendant who invests in the litigation based on the aggregate stakes. . . . Because of the benefits of collective representation and settlement, the conflicts involved . . . generally should be consentable.85

Elsewhere, Erichson acknowledges that class actions may require subclasses when a single class purports to include claimants with significantly differing interests, but he dismisses any argument that separate groups are required in nonclass aggregation any time subclasses would be required in a class action.86 He contends that this argument makes no sense

80. RHEINGOLD, supra note 29, § 14:3.
81. See, e.g., Erichson, supra note 34, at 553–75; Erichson & Zipursky, supra note 13, at 311–20.
82. Erichson, supra note 34, at 563.
83. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2012).
84. Erichson, supra note 34, at 529.
85. Erichson & Zipursky, supra note 13, at 305. The authors are talking here about the conflicts involved in aggregate settlements, but the principle should also apply at the outset of the multiple representation, when the risks are more remote.
86. See Erichson, supra note 34, at 565.
because “class actions bind absent class members” and, therefore, “they require greater coherence.”

According to Erichson:

[I]ndividual informed consent to potential conflicts of interest should make it possible, in some circumstances, for attorneys to represent groups of plaintiffs with generally aligned but somewhat conflicting interests, even where those conflicting interests would make it impossible to represent the larger group in a single class action without subclasses.

I agree with Erichson and Zipursky that it is generally reasonable for mass tort plaintiffs to choose to litigate collectively rather than individually, and that there are sufficient differences between class actions and nonclass aggregations to warrant allowing some combinations of claims that might require subclasses if the group were an actual class. This conclusion does not necessarily mean, however, that there should be no limitation on either the size or the composition of the group. For example, was it reasonable in the World Trade Center litigation for clients to agree to be represented in a group comprised of 10,000 or more members? Is it reasonable for plaintiffs’ attorneys to combine a small number of high-value claims along with a disproportionate number of weak claims?

Having a large number of claimants clearly enhances the ability of a group to “litigate at the highest level, including spending money on investigation and retention of top experts.” But is it necessary for a single attorney to represent 10,000 or more claimants to obtain that ability? Is it even necessary for a single attorney, or even a single law firm, to have all of the resources necessary to “litigate at the highest level?” After all, it is a common practice for multiple plaintiffs’ attorneys, each representing a separate group of claimants, to pool their resources, divide the work, and share the results of their efforts. In such cases, the multiple attorneys will compete with each other to obtain clients, possibly resulting in reduced legal fees and improved client service. In addition, multiple attorneys can act as a check on each other, providing greater scrutiny of both the total size of any aggregate settlement and the fairness of any proposed allocation to individual claimants.

87. Id.
88. Id.
89. See supra notes 59–63 and accompanying text.
90. See supra notes 38–39 and accompanying text. In the context of an aggregate settlement proposal, the ABA Standing Committee on Ethics concluded that “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,” including Rule 1.7 (particularly (a)(2) and (b)(1)). ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 438 (2006). If these conflicts present consentability issues at the time an aggregate settlement proposal is made, when it may be too late or impractical for clients to obtain a new attorney, then surely they also present consentability issues at the outset of group representation, at least in those cases where an aggregate settlement proposal is a likely development.
91. Erichson, supra note 34, at 545; see also Silver & Baker, supra note 12, at 746–47.
92. See RHEINGOLD, supra note 29, § 14:37; Erichson, supra note 34, at 539–43.
If there are viable means to obtain the benefits of group representation without forming a single group of unlimited size, then it is arguably unreasonable for a single lawyer or law firm to represent a limitless number of clients in a single mass tort. After all, the smaller the group, the easier it will be for the attorney to maintain meaningful communication with individual clients, including obtaining their feedback as the representation progresses and counseling them when the time comes to accept or reject an aggregate settlement. Keep in mind that these are not, in fact, class actions; each claimant has a more-or-less traditional attorney-client relationship with the attorney, and it may be unreasonable to ask clients to agree to be treated no better than the absent members of a class. Of course, it will be difficult to draw lines in determining the appropriate size of a potential plaintiff group, but surely the group of 10,000 clients represented by Napoli Bern in the World Trade Center litigation was simply too big.

Aside from the size of the group, it is questionable whether an attorney should be permitted to combine any and all claims in a single group, regardless of their conflicting nature. For example, how is it reasonable for an attorney to combine a small number of high-value claims with a disproportionate number of claims with little or no value? Attorneys who are not selective about the cases they take, accepting almost any case without regard to its merits, are usually hoping for a global settlement in which all claimants will receive something. It is certainly rational for clients with the weaker claims to opt for such group representation, as these are the claims that will be impossible to pursue individually, and low-value claims clearly benefit from their association with high-value claims. But what about the reverse situation? Erichson acknowledges that high-value plaintiffs may rationally prefer individual representation, given that group representation tends to have a “damage-averaging effect, raising the value of weak claims and reducing the value of strong ones.” If so, then how is it rational for high-value plaintiffs to opt for group representation when the group includes a disproportionate number of weak claims? Erichson does not address this question in any detail, arguing merely that many of such plaintiffs “maximize the value of their claims by litigating collectively,” presumably by obtaining the benefits of cost sharing and enhanced leverage that result from collective representation.

I agree that even high-value plaintiffs can benefit from group representation; however, there may be an alternative that Erichson has not

93. See, e.g., Rheingold, supra note 29, § 14:15 (noting the importance of adequately communicating with mass clients).
94. See, e.g., Erichson, supra note 34, at 577–78 (acknowledging the limits of his analogy of mass tort nonclass lawsuits to class actions, based on the ethical duties plaintiffs’ attorneys have to individual clients).
95. See id. at 549 n.115 (citing Judge Weinstein).
96. See id. at 551.
97. Id. at 552.
98. Id. at 564.
considered: participation in a smaller group comprised primarily of similar high-value claims. Plaintiffs with weaker claims will likely obtain representation in one or more groups represented by different attorneys, and the attorneys representing all of these separate groups (high-value and low-value) will be motivated to combine their resources and work together toward their common goals. As a result, plaintiffs with high-value claims may have the opportunity to reap the benefits of large group representation (including the pooling of the resources of the combined groups) without incurring all the risks. This is because, by participating as part of a smaller group, these plaintiffs will retain more control over their individual cases and more of the individual attention of their attorneys than they would as members of the largest possible group.

In considering whether any particular group representation presents consentable conflicts, including whether a limited scope representation under Rule 1.2(c) is reasonable, we should also consider whether the clients will continue to be represented by separate attorneys, who presumably can assist the client in deciding whether to accept any offer of settlement, whether in an individual case or an aggregate settlement. Referring attorneys might perform this limited role, but only if they will retain a significant role in keeping abreast of the developing litigation and consulting with the client concerning significant developments. In the absence of referring attorneys, a group attorney could provide access to independent counsel for purposes of advising individual clients on any aggregate settlement offer.

Even Erichson has acknowledged that “[s]erious inter-subgroup conflicts . . . may be disqualifying and unwaiveable,” but he does not elaborate or suggest when this will occur. The most obvious instances of this type of conflict probably arise subsequent to the acceptance of multiple

99. Most jurisdictions require referring lawyers to participate in the representation or assume joint responsibility if they expect to share in the legal fees. See Model Rules of Prof’l Conduct R. 1.5(e) (2012). Some jurisdictions, however, permit referring lawyers to share in the fees even if they do nothing more than refer the case to another lawyer. See, e.g., Ala. Rules of Prof’l Conduct R. 1.5(e) (2012) (restricting the dividing of fees in contingent fee matters is limited to disclosure to the client, so long as total fee is not clearly excessive).

100. See, e.g., Ferguson v. Meadows, Nos. A094750, A095475, 2002 WL 31033065, at *1 (Cal. Dist. Ct. App. Oct. 10, 2002) (describing a retention agreement that advised clients that, in the event of an aggregate lump sum settlement, there would be conflicts between the clients as to the size of each share and that clients could consult with or hire another lawyer in such event); cf. Brophy, supra note 16, at 692–93 (suggesting the possible use of independent attorneys to advise claimants in waiving their rights under the aggregate settlement rule). Given the difficulty of identifying a separate lawyer who will be sufficiently informed to provide such advice at a reasonable fee, it would be more useful if the common attorney offered to provide access to such a lawyer. If there are large numbers of clients who want to take advantage of such an opportunity, it will be difficult to find separate lawyers who are not themselves conflicted as a result of agreeing to advise multiple clients with differing interests.

101. Erichson, supra note 34, at 565.
representations, as the representation is evolving. These situations will be discussed in a later section.

4. Obtaining the Clients’ Informed Consent

It is generally believed that mass tort plaintiffs’ attorneys rarely obtain their clients’ informed consent to multiple representation, either because they do not recognize a conflict of interest under Rule 1.7 or because they are skeptical of the “usefulness and enforceability of client waivers.”\(^\text{102}\) Apparently expressing such skepticism, Paul Rheingold, an experienced mass tort plaintiffs’ attorney, concludes that “[p]erhaps the most that can be expected of a lawyer is that clients are informed that the lawyer is undertaking multiple representation, along with seeking [their] consent.”\(^\text{103}\) But such a limited disclosure is clearly insufficient. The Model Rules define “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”\(^\text{104}\) With respect to conflicts of interest, the comment to Rule 1.7 states that “[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.”\(^\text{105}\)

Erichson advocates disclosure that is more detailed than Rheingold’s proposed disclosure but is still rather sparse. According to Erichson, clients should be informed that the lawyer represents a large number of similarly situated plaintiffs and “that such collective representation offers a number of advantages that benefit the plaintiffs as a group, but may involve trade-offs that do not work to the advantage of each plaintiff individually.”\(^\text{106}\) The attorney should further advise that “[p]otential conflicts may arise between group interests and the client’s individual interests, and that the lawyer intends to resolve such conflicts in favor of pursuing group interests.”\(^\text{107}\) Erichson concludes that, ideally, an agreement should explain “the types of inter-plaintiff conflicts that may arise during the litigation,”\(^\text{108}\) but he generally approves of the disclosure in individual retention provisions such as the following provision described in a recent mass tort case:

Attorneys may represent other persons damaged by the [toxic chemical] releases mentioned herein and Client understands that such multiple representation has advantages, but also may give rise to potential conflicts of interest of which Client is hereby advised. Each person’s recovery may

\(^{102}\) See id. at 562; see also, e.g., Brickman, supra note 47, at 891–92.

\(^{103}\) Rheingold, supra note 29, § 14:3.

\(^{104}\) ABA Model Rules of Prof’l Conduct R. 1.0(e) (2012).

\(^{105}\) Id. R. 1.7 cmt. 18.

\(^{106}\) Erichson, supra note 34, at 562–63.

\(^{107}\) Id. at 563.

\(^{108}\) Id. at n.158.
depend on factors such as age, severity of injury, extent of medical treatment, amount and duration of exposure, and pre-existing health condition. Despite such potential conflicts of interest Client believes that the advantages of multiple representation outweigh any potential disadvantage and hereby waives any and all conflicts of interest that may arise from such multiple representation.109

In addition to providing some detail concerning the client-client conflicts, Erichson also suggests that the attorney should explain the limitation on the scope of the representation as a collective, rather than an individual, representation.110

According to a formal opinion of the ABA Standing Committee on Ethics, in cases where it is foreseeable at the outset that the attorney will negotiate an aggregate settlement, a mass tort plaintiffs’ attorney should also advise clients about the risks inherent in such settlements, including differences in the clients’ willingness to accept a settlement and the possibility that an offer may require the consent of all of the clients, in which case the failure to obtain unanimous consent may result in the withdrawal of the offer.111 The opinion also concludes that the attorney should further disclose the possibility that disclosure of confidential client information may be necessary in order to effectuate an aggregate settlement.112

In my view, a plaintiffs’ attorney must disclose as much detailed information as is reasonably necessary to make the clients understand the material risks of the type of group representation the attorneys anticipate providing. Given that personal injury clients are often unsophisticated and inexperienced users of lawyers, plaintiffs’ attorneys should not assume that a brief and summary type of disclosure, such as that provided in the case referenced by Erichson, will suffice. Attorneys should inform clients of the approximate size of the expected group, as well as the range of diverse interests the attorney is likely to represent. They should explain how group representation differs from individual representation and give some specific examples of how the clients’ interests might be adversely affected. Moreover, since it will be extremely difficult for clients to withdraw from the group and obtain individual representation once an aggregate settlement offer is negotiated, it is critical that clients be advised of the material risks of an aggregate settlement well in advance of the negotiation of such a


110. Erichson, supra note 34, at 563.

111. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 438 (2006); see also Garretson, supra note 34, at 23–24.

112. Id. For a discussion of what needs to be disclosed pursuant to the aggregate settlement rule, see infra Part II.
settlement. In addition to the disclosures advocated by the ABA Standing Committee on Ethics, attorneys should inform clients of the difficulty the attorneys may have giving each client independent advice whether to accept a settlement offer in the likely event that the settlement requires either total or near-total agreement by all of the clients. Indeed, it may be necessary to inform clients that, in the event of such an aggregate settlement offer, they may need to consult separate counsel to help them decide whether to accept or reject their individual offer. The inability of the lawyer to provide independent and meaningful advice to individuals considering an aggregate settlement offer may also be part of the express limitation on the scope of the representation, under Rule 1.2(c), in which case this information is critical to clients deciding whether to enter into a limited scope representation.

As for clients with high-value claims, they should arguably be informed of their status (when reasonably ascertainable) and of the particular risk of damage-averaging that is more likely when a single lawyer represents both high and low-value claims. It may be especially important for clients with potentially high-value claims to have access to independent counsel at various points in the litigation, particularly when they are considering whether to accept an aggregate settlement offer. As a result, whenever an aggregate settlement is reasonably foreseeable, a plaintiffs’ attorney should advise these clients of the prospect that they may want to consult independent counsel, because this information might influence them to explore alternative forms of representation before retaining this particular group lawyer.

B. Conflicts That Arise During the Representation

As noted earlier, there may be some situations involving multiple representation where a plaintiffs’ attorney reasonably believes that the representation of each client will be individual until either the plaintiffs’ or defendant’s attorney decides to treat the clients as a group, as will certainly occur if either one initiates negotiation of an aggregate settlement. At that time, if not before, Rule 1.7(a) will be triggered, and the plaintiffs’ attorney must proceed in the same way as if the conflict of interest had arisen at the outset of the representation.

113. See supra note 90 and accompanying text.
114. See supra note 100 and accompanying text. Such a disclosure is more useful than the provision in the engagement agreement in Ferguson, in which the attorney informed clients that, in the event of an aggregate settlement, they could consult independent counsel, but failed to inform them why it might be necessary for them to do so. See Ferguson, 2002 WL 31033065, at *1.
115. See supra notes 82–84 and accompanying text (discussing how mass tort group representation functions as an express limitation on the scope of the representation).
116. See supra notes 96–98 and accompanying text.
117. See supra note 100 and accompanying text.
Aside from these situations, other events may occur that either trigger the need to seek newly informed consent or render the conflict nonconsentable. For example, the group may turn out to be far larger than the attorney originally anticipated. At some point, a client who was previously advised that the group was likely to be in the hundreds will reasonably want to know that the group is now in the thousands, given that such an expansion may materially alter the client’s willingness to be part of such an extremely large group. At the very least, the attorney should be required to communicate information concerning the size and diversity of the group as part of the attorney’s ongoing duty of communication, which requires significantly more information than would be the case when an attorney represents a class.

Sometimes an attorney has an opportunity to accept new clients after a lump sum settlement has been negotiated with the defendant but before it has been presented to the attorney’s existing clients for their approval. The acceptance of these new clients may require renegotiating the lump sum amount, with the resulting risk that the plaintiffs’ and defense attorneys will fail to reach agreement and the settlement will be scuttled. Given a defendant’s obvious reluctance to renegotiate the total package, the more plausible result of accepting new clients at this point may be the dilution of the size of the shares the existing plaintiffs could have expected with the original group. Arguably, this new conflict is nonconsentable because there is no apparent benefit to the existing plaintiffs of expanding the group at this point and the risks of material harm are serious. At the very least, accepting new clients should require the attorney to obtain the informed consent.

119. See id. R. 1.4(a) (requiring a lawyer, inter alia, to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” and “keep the client reasonably informed about the status of the matter”).

120. See, e.g., Moore, supra note 6, at 162–64.

121. See, e.g., Authorlee v. Tuboscope Vetco Int’l, Inc., 274 S.W.3d 111, 116 (Tex. App. 2008); In re N.Y. Diet Drug Litig., No. 700000/98, 2007 WL 969426, at *1–5 (N.Y. Sup. Ct. Mar. 27, 2007); Brickman, supra note 47, at 859 (arguing that “law firms that represent large numbers of asbestos claimants and that recruit new claimants who will be actively competing for limited resources simultaneously with the firms’ current clients are violating Model Rule 1.7 if they fail to secure the informed consent of the new clients and current clients with pending claims to the conflicts of interest”).

122. Sometimes the attorney will not be accepting new clients but rather will be adding to the settlement previously existing clients who have been newly diagnosed with a disease that makes them eligible to participate in the settlement. It is difficult to discern the precise ethical issue raised in such a scenario, especially if the attorney has already recognized a conflict of interests and obtained the informed consent of all of the clients at the outset of the representation. Perhaps this is merely one of many ways in which the potential differences among the clients may adversely affect the representation of some of them. It may not be possible for an attorney to disclose all of the ways in which harm may be anticipated; nevertheless, the more specific examples the attorney can give as part of the initial informed consent process, the more likely it is that the clients’ consent will be upheld in any subsequent challenge.
consent of the existing clients because their original consent cannot reasonably be interpreted to include such an unexpected event.123

In the World Trade Center litigation, Judge Hellerstein was presented with yet another type of conflict that either arose or worsened sometime after Napoli Bern accepted the representation of close to 10,000 plaintiffs. Among these plaintiffs were fifty-nine persons who had previously made claims to, and received recoveries from, the legislatively established Victim Compensation Fund (VCF). The legislation establishing this fund provided that any person making a claim to the fund “waives the right to file a civil action . . . in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.”124 When Napoli Bern negotiated an aggregate settlement with the defendants, it agreed to a provision that excluded “any Plaintiff who received an award from the September 11th Victim Compensation Fund.”125 When some of the fifty-nine plaintiffs complained at public meetings that they wanted to be included in the settlement, Judge Hellerstein raised with Napoli Bern the need for these plaintiffs “to be advised whether to try and opt into the settlement, whether to not opt into the settlement, whether to voluntarily dismiss their cases or to proceed with their cases.”126 Napoli Bern suggested that it might opt out these fifty-nine plaintiffs (without consulting them), but then retreated when the defendants’ counsel argued that these individuals had no right to accept or reject the settlement.127 Judge Hellerstein determined that the fifty-nine plaintiffs needed independent counsel and eventually appointed one to represent them, at Napoli Bern’s expense when Napoli Bern failed to voluntarily engage such a lawyer.128

Judge Hellerstein’s actions suggest he believed that the conflict of interest affecting the fifty-nine plaintiffs was nonconsentable. Clearly the position of these plaintiffs was now “fundamentally antagonistic” to the other plaintiffs, all of whom were eligible to participate in the settlement.129

123. This situation should be distinguished from one where the lawyer is in the process of accepting new clients at the outset of a representation, in which the clients will be informed that the attorney anticipates accepting subsequent clients to form the expected group. Arguably, new clients may be accepted without revisiting the existing clients’ informed consent up until the time that any aggregate settlement is negotiated, because this is in line with the clients’ expectations. It is a significantly different situation when new clients are added after an aggregate settlement has been negotiated, because this is both outside the existing clients’ expectations and significantly harmful to them.
125. Id.
126. Id at 654.
127. Id. at 653.
128. Id. at 654.
129. See supra notes 120–124 and accompanying text. According to Judge Hellerstein:
If the 59 Plaintiffs were admitted to the SPA, as many of them requested, the final settlement amount would be spread thinner, affecting in particular the most severely injured Plaintiffs . . . whose recoveries were variable and dependent on how much of the fixed settlement amount would remain after the less severely injured Plaintiffs had been paid . . . . Further, litigating the eligibility of the 59
Was this conflict nonconsentable from the outset? Perhaps it was, although it is unclear that the differences between these plaintiffs and the other plaintiffs were more significant than the differences between plaintiffs who could not identify any objective manifestation of any injury, serious or otherwise, arguably related to work at the World Trade Center site and the remainder of the plaintiffs who had sustained such injury.\textsuperscript{130} Certainly, the defendants had an excellent argument that the VCF litigation rendered the fifty-nine plaintiffs ineligible to litigate, but it was not obvious from the outset that the defendants would insist on excluding them from any settlement. In any event, once the issue arose whether the fifty-nine plaintiffs could participate in the negotiated settlement, it was clear that Napoli Bern could not properly advise them on their options at that time.\textsuperscript{131}

\section*{II. SATISFYING THE REQUIREMENTS OF THE CURRENT AGGREGATE SETTLEMENT RULE}

Despite much discussion among courts, mass tort practitioners, and commentators concerning the aggregate settlement rule,\textsuperscript{132} questions remain concerning the application of the current rule to particular circumstances. The questions include defining what constitutes an aggregate settlement, determining what particular information needs to be disclosed to all participating clients, and the effect of a rule variation in some jurisdictions in which there is a suggestion that the rule does not apply at all when a court has approved the settlement.

\textsuperscript{130} See \textit{In re World Trade Ctr. Disaster Site Litig.}, 834 F. Supp. 2d 185, 197 (S.D.N.Y. 2011) (stating that “\textasciitilde a\textasciitilde pproximately a third of the Plaintiffs had little or no objective injury traceable to their work at the WTC site”). Other plaintiffs faced difficulties proving a causal relation with toxins at the WTC site, while others had “serious and lasting ailments strongly related to work at the WTC.” \textit{Id.}

\textsuperscript{131} A similar issue was presented in an IMC settlement of separate lawsuits of more than 850 plaintiffs who claimed to have suffered harm as a result of living near a fertilizer plant. The defendants insisted on settling these claims as part of a broader class action and further demanded that only plaintiffs who lived within a mile of the plant could be part of the settlement class. The plaintiffs’ attorneys represented twenty-two plaintiffs who lived more than one mile from the plant. These plaintiffs ended up in a better situation than the fifty-nine plaintiffs in the World Trade Center case because the defendant was willing to settle with them individually, outside class action. It is unclear whether they were better or worse off being in or out of the class. \textit{See Lewis F. Powell III, Class Settlement of Mass Tort Cases, 7 SEDONA CONF. J. 259 (2006).}

\textsuperscript{132} \textit{See supra} notes 11–16 and accompanying text.
A. What Is an Aggregate Settlement?

Neither ABA Model Rule 1.8(g)\textsuperscript{133} nor its state equivalents\textsuperscript{134} define an aggregate settlement, and there has been considerable confusion over what constitutes a settlement subject to the requirements of that rule. In 2005, Professor Erichson published an article in which he proposed that a settlement of a group of related claims is an aggregate settlement for purposes of this rule whenever it involves some element of collective allocation of funds or a collective condition for the settlement to be effective.\textsuperscript{135} This definition has been adopted by the ABA Standing Committee on Professional Ethics\textsuperscript{136} and by the ALI in its *Principles of Aggregate Litigation*.\textsuperscript{137} Despite what appears to be a growing consensus around this definition,\textsuperscript{138} there continues to be confusion and controversy over what constitutes an aggregate settlement. For example, in 2005, an Oregon State Bar Formal Ethics Opinion appeared to limit its definition of an aggregate settlement to “all or nothing” proposals,\textsuperscript{139} and that opinion continues to be cited as a plausible basis for determining when the rule will be triggered.\textsuperscript{140}

In 2008, a Texas Court of Appeals decision held that a settlement of the claims of 176 plaintiffs was not subject to the aggregate settlement rule even though the defendants’ attorney communicated to the plaintiffs’ attorney that, so long as the individual demands did not exceed $45 million, he would recommend to his clients and their insurance carriers that they settle the claims but only if 95 percent of the plaintiffs’ agreed.\textsuperscript{141} Relying on this statement, the plaintiffs’ attorney calculated individual settlement amounts for each plaintiff and sent the defendant a letter detailing an offer...
of settlement based on the numbers he calculated. The court defined an aggregate settlement as occurring “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.” The court then found that there were individual negotiations in that case because settlement demands were made on behalf of each plaintiff based on factors specific to each of their claims.

As recently as 2011, a practitioner published an article contending that the rule is clearly triggered only by all or nothing settlements and lump-sum settlements in which the plaintiffs’ attorney has the sole authority to make allocations to the clients. In the face of continuing uncertainty, this same practitioner recommends that the rule can likely be avoided by giving individual claimants the ability to opt out (even if the amounts were collectively negotiated), negotiating on individual claims (even though the defendant clearly has a bottom line total sum in mind), and obtaining judicial approval (even in jurisdictions whose version of Rule 1.8(g) contains no express exception for court-approved settlements).

Although there continues to be support for less comprehensive approaches to defining an aggregate settlement, in my view the definition adopted by the ABA and the ALI, based on Erichson’s proposal, provides the most appropriate trigger for determining when to apply the requirements of Rule 1.8(g). This approach is the most defensible because it alone takes into account the underlying purpose of the rule, which is to identify all situations in which there is a significant element of interdependence among the various claims, resulting in the need for claimants to obtain the information they need to know in order to assess the horizontal equity of the settlement allocations.

B. The Disclosure Requirements of Rule 1.8(g)

Model Rule 1.8(g) provides that in order to obtain the clients’ informed consent to an aggregate settlement, the lawyer must disclose to each client “the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.” This or similar language

142. Id. at 120.
143. Id. at 121.
144. See generally Fucile, supra note 11.
145. See also Conn. Informal Ethics Op. 08-01 (finding that the Vioxx settlement was not an aggregate settlement because the participants had not voluntarily decided to engage in group representation).
146. Fucile, supra note 11, at 303; see also Komitor, supra note 33 (assuming that individual negotiations may avoid finding of aggregate settlement, even if the defendant has walk-away rights and even if the defendant is keeping tabs on the total amount of settlement).
147. See supra notes 133–137 and accompanying text.
148. See Erichson, supra note 11, at 1820.
149. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2012).
has been adopted in almost all jurisdictions. According to an ABA formal opinion, the rule requires the lawyer to disclose, at a minimum: (1) the total amount of the aggregate settlement; (2) the existence and nature of all claims involved in the settlement; (3) the details of every other client’s participation in the settlement; (4) the total fees and costs to be paid to the lawyer; and (5) the method by which costs are to be apportioned among the clients. Not all of these details are specified in the rule itself, and not all authorities agree that all of these facts must be disclosed; nevertheless, these facts appear to be the type of information that claimants typically need in order to evaluate the fairness of both the total sum involved and its allocation among the various participants. Moreover, to the extent that some of these details are not expressly required by the rule itself (including, for example, the attorney’s fee and the allocation of costs, such as those already advanced by the attorney), their disclosure is likely required by other rules, such as Rules 1.4 (communication of information reasonably required to make an informed decision) and 1.5 (detailing the disclosures required in connection with contingent fees). As a result, disclosing this information should not prove to be controversial. What is controversial, however, is the question of whether the rule requires the disclosure of the names and other identifying information of each client (coupled with the amount each such client is to receive), and whether the rule permits aggregate settlements to be based on the use of formulas and matrices, in which case the amount to be allocated to each client will be unknown at the time that the settlement is approved by the clients.

Courts and commentators have disagreed whether the current rule requires the disclosure of the names and other identifying information of each client participating in the settlement. In a 1985 opinion, the Texas Court of Appeals stated that the common attorney must provide “a list showing the names and amounts to be received by the other settling

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150. See supra note 138 and accompanying text. One exception is California, in which the analogue to Rule 1.8(g) provides merely that a lawyer who represents two or more clients “shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.” Cal. Rules of Prof’l Conduct R. 3-310(D) (2012).


152. See, e.g., infra at notes 155–177 and accompanying text (discussing a disagreement concerning the necessity of disclosing the names and other identifying information of each claimant participating in the settlement).

153. See Model Rules of Prof’l Conduct R. 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

154. See id. R. 1.5(c) (providing, in part, that “[a] contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated . . . . Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination”).
plaintiffs.” Subsequently, in a 1989 opinion, the Supreme Court of South Carolina similarly required that the clients’ names be revealed because “[w]ithout knowing the identity of all participants and the amount each will receive, a client may not be able to detect irrelevant factors which may have affected the determination of the amount of recovery a given client is to receive.” Other courts have not expressly required that client names be disclosed, but they have suggested that this level of detail may be required, stating generally that clients must be “thoroughly advised of the particulars of the proposed settlement” or that the lawyer must provide “full information” about the proposed settlement to each client. On the contrary, the Supreme Court of Mississippi held in 2004 that, although the plaintiffs in a legal malpractice action were entitled to discovery of all documents pertaining to the allocation of a lump-sum settlement by an attorney representing thirty-one diet-drug plaintiffs, the trial court should permit the defendant “to redact all information specifically identifying the plaintiffs (i.e., name, address, etc.),” and should further require the other defendant to provide the plaintiffs with a chart listing the other plaintiffs, without identifying information, and containing instead: “(1) the medical diagnosis, (2) additional information, if any, which affected the amount of settlement, and (3) the amount of settlement.”

Commentators have similarly disagreed as to whether plaintiffs must reveal the names of all clients who will participate in an aggregate settlement. Professors Charles Silver and Lynn Baker contend that such information is required, which is one reason they have urged reform of the current rule. That also appears to be the position taken by the ALI in the Principles of Aggregate Litigation. Others, including myself, have urged that the current rule can and should be interpreted to exclude the need to require client names in all instances, particularly in mass tort litigation.

Given that the rule does not expressly require the disclosure of identifying information such as client names, I continue to believe that the better interpretation is that plaintiffs’ attorneys are not required to disclose such information unless it is necessary for the plaintiffs to evaluate the fairness of the allocation process. Clients have legitimate privacy interests in the amount they will receive in an aggregate settlement, particularly

158. In re Faucheux, 818 So. 2d 734 (La. 2002); see also In re Hoffman, 883 So. 2d 425, 433 (La. 2004) (stating that a lawyer must fully disclose all details of a proposed settlement).
161. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(a) reporters’ note (2010). Professor Silver was a co-reporter for the ALI project.
when that amount is extremely high. When the clients know each other, finding out who got what may well be important, because the clients will have (or can easily obtain) the background information necessary to monitor the settlement allocations. But in most mass tort litigation, there are many plaintiffs who do not know each other. In such cases, learning the other clients’ names is unlikely to provide any useful information. Rather, it should be sufficient for plaintiffs’ attorneys to comply with the disclosure required by the Mississippi Supreme Court, including disease categories, degrees of injury, and any other information pertinent to the settlement allocation, without the need to reveal the clients’ names.

In Scamardella v. Illiano, the Maryland Court of Special Appeals addressed the issue of disclosing client names in a somewhat different context. There, the court upheld an aggregate settlement despite the fact that the plaintiffs were not given a list with the names and amounts to be received by the other settling plaintiffs. This was not a mass tort lawsuit, and the plaintiffs were well known to each other. The reason that the plaintiffs did not learn what each of them would be receiving was not because the plaintiffs’ attorney withheld such information, but rather because the settlement agreement did not make any allocation of the agreed-upon settlement amount. Rather, the plaintiffs agreed that they would attempt to agree on a division of the settlement, and if that effort failed, they would each hire separate lawyers and submit the problem to the court for resolution.

The allocation process involved in Scamardella is unlikely to work in a mass tort lawsuit, where it would be unrealistic to suppose either that

163. See, e.g., Garretson, supra note 34, at 33–34 n.54 (discussing a Venezuelan client who feared kidnapping if the amount of his settlement was disclosed). I was recently involved as an expert witness in a case in which a widower did not want to disclose the multimillion dollar sums his minor children received in the settlement of their claim for the wrongful death of their mother. The family lived modestly, and the children were unaware of their wealth. The father was concerned that others might try to take advantage of the children if the size of their settlements was made public.

164. See, e.g., Moore, supra note 6, at 163 n.91 (using as an example the group of neighboring families in Woburn, Massachusetts, that hired a plaintiffs’ attorney to represent them in connection with the toxic chemical litigation that was the basis for the book A Civil Action).

165. See, e.g., Garretson, supra note 34, at 33 (“[C]lients typically do not know each other; the disclosure of a full name does very little to help a client determine whether he or she was treated fairly.”).

166. Garretson advises plaintiffs’ attorneys to disclose to clients the subcategories and objective criteria for individual distributions, as well as listing numbers or first names next to each subcategory. Id.


168. Id. at 423–24.

169. Id. at 423 (“No apportionment of the settlement proceeds among the parties was proposed.”).

170. Id. (describing the parties to the settlement as a woman’s estate, the woman’s daughter, and the woman’s in-laws).

171. Id. at 423–24.

172. Id. at 424.
numerous plaintiffs who are strangers to each other might agree on dividing a fixed sum settlement or that, in the absence of such an agreement, a court would be willing to make settlement allocations itself on the basis of evidence submitted to it by each claimant. What is both realistic and increasingly common in mass tort litigation, however, is for a settlement agreement to provide not specific allocations, but rather a detailed process by which a lump-sum settlement amount will subsequently be allocated, usually on the basis of a specific formula or matrix and often by a neutral third person, such as a special master. Of necessity, the clients will not know the specific amounts they are to receive under the settlement at the time their informed consent is requested.

Despite the frequency with which such process settlements are occurring, there has been almost no discussion of their propriety under the current rule. One court recently held that the unavailability of information concerning how much each participant would receive made it impossible for the plaintiffs’ attorney to comply with the disclosure requirements of Rule 1.8(g). In addition, although the Principles of the Law of Aggregate Litigation specifically provide that attorneys may disclose “the formula by which the settlement will be divided among all the claimants,” in lieu of permitting each claimant to review the settlements of all of the others, the comment states that permitting the disclosure of formulas is a “modification” of the current disclosure requirement.

173. See, e.g., In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2009 WL 5195841, at *2–3 (D. Minn. Dec. 15, 2009) (describing a settlement under which a special master would determine individual awards based on the allocation plan proposed by a committee of plaintiffs’ attorneys); In re Vioxx Prods. Liab. Litig., No. 1657, 2008 WL 3285912, at *2–3 (E.D. La. Aug. 7, 2008) (discussing objective criteria to be applied by an independent claims administrator, with automatic review by an independent Gates Committee and possible appeal to a Special Master); In re Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490–91 (E.D.N.Y. 2006) (involving a complex claims administration process); In re N.Y. Diet Drug Litig., No. 700000/98, 2007 WL 969426 (N.Y. Sup. Ct. Mar. 27, 2007) (describing the process by which the claimants would be placed in objective categories of severity of injury, economic status, relationship to the defendant’s acts, with allocation); In re Polybutylene Plumbing Litig., 23 S.W.3d 428, 434 (Tex. Ct. App. 2000) (describing the claims administration process by which the plaintiffs would receive amounts sufficient to cover certain damages “plus some additional amount to be calculated in a formula to be approved by a special master”).

174. See Diet Drug Litig., 2007 WL 969426, at *5 (“[T]he ‘individual settlement amounts’ referred to in the “settlement agreement. . . did not exist at the time the agreement was entered into. . . [They] were not known at the time, they were to be subsequently determined in the process being challenged herein.”). But cf. Guidant Corp., 2009 WL 5195841, at *2–3 (describing how, pursuant to guidance from plaintiffs’ steering committee, most claimants’ counsel were able to provide each claimant with an estimated base allocation or at least a range in which counsel estimated their settlement allocation would fall).


176. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(a) (2010).

177. Id. cmt. a; see also N.J. SUPREME COURT PROF’L RESPONSIBILITY RULES COMM., supra note 20, at 42 (describing how the options available for modification of N.J. Rule 1.8(g) include modifying the rule to permit “disclosure of a formula by which the settlement will be allocated”).
As with client names, the current rule does not expressly require that an aggregate settlement allocate a particular sum to each client. Rather, it merely provides that “[t]he lawyer’s disclosure shall include the existence and nature of all the claims . . . and of the participation of each person in the settlement.”178 True, the words “participation of each person in the settlement” could reasonably be interpreted to require that each client be advised of how much both the client and others will receive, but it could also be reasonably interpreted, in a more flexible manner, to permit a description of the process by which each person’s participation will result in the allocation of a particular sum. Given that the rule drafters are unlikely to have specifically considered the propriety of process allocations, such as those using a formula or matrix, the rule should arguably be interpreted in a manner that furthers its underlying purposes.

In Scamardella itself, the court noted that the attorneys’ failure to make the actual apportionment was not a failing but rather an advantage of the settlement, because it “preserved the representation from the major conflict of interest that occurs in aggregate settlement cases.”179 There, the plaintiffs’ attorney made no effort to determine how the lump-sum settlement would be allocated, whether by formula, matrix, or otherwise.180 This is not typically the case in mass tort litigation, where the settlement agreement will likely set forth detailed information as to the basis for the subsequent allocations. Unquestionably, when the plaintiffs’ attorney plays a significant role in determining the formula or other process by which the settlement will be allocated, the attorney is subject to some of the more important conflicts of interest among the differently situated plaintiffs. Nevertheless, articulating objective criteria for allocating the settlement minimizes the ability of the plaintiffs’ attorney to play favorites, and providing that a neutral third person will apply the criteria to individual cases further enhances the likelihood that the proceeds will be fairly allocated. This is especially the case when each claimant will be provided the opportunity to present evidence to the neutral and to appeal any initial allocation to a reviewing entity.

But can plaintiffs meaningfully evaluate the fairness of the allocation process if they will not learn what they will receive until the process is complete, which will be after the settlement agreement has been approved? In some cases, plaintiffs’ attorneys can provide information concerning a range in which individual settlement allocations are expected to fall,181 and doing so is likely to prompt a court to conclude that the clients’ consent is adequately informed. When possible, providing such information should be required.

180. Id.
Even if information concerning the range of an individual’s likely recovery is unavailable, it should be possible, even under the current rule, for disclosure of a detailed allocation process to substitute for information concerning the final allocation. When the client has specific information about the criteria by which the allocations will be made, the client should be able to assess whether the process is fair, even when it is unclear how much the client will receive. But what if the only information the client is given is that the plaintiffs’ attorney will make the allocations according to whatever the attorney believes is a fair allocation? Arguably this information is not sufficient for the client to determine that the allocation process will be fair, since the lawyer has divided loyalties and will be tempted to favor some clients over others. Even if the allocations will be made by a neutral third person, such as a claims administrator or special master, the disclosure may be insufficient if the settlement agreement provides no information concerning the criteria by which the allocations are to be made.

Perhaps the key to determining when disclosure of information concerning the allocation process may properly substitute for disclosure of information concerning individual allocations is whether there is adequate justification for performing the allocations only after the clients’ approval has been sought. When a neutral decision maker will be applying objective factors or a formula only after the plaintiffs are given an opportunity to submit information concerning their individual cases—and maybe even an opportunity to appeal the initial result—then delay makes sense because the claims administration costs will not be justified unless the plaintiffs have agreed in advance to submit themselves to the process. On the other hand, if the plaintiffs’ attorney will be making the allocations, then the attorney should be required to make these allocations prior to seeking the plaintiffs’ approval; these legal services should not entail any additional cost to the plaintiffs because they are within the scope of the representation reasonably contemplated under the individual contingent fee agreements. Even in the case of a neutral decision maker, there is no apparent justification for delaying the development of the objective criteria for making the allocations until after the settlement is approved.183

182. See, e.g., In re Vioxx Prods. Liab. Litig., No. 1657, 2008 WL 3285912, at *2–3 (E.D. La. Aug. 7, 2008) (describing a settlement plan that entailed submissions by claimants to an independent claims administrator and possible appeals to an independent gates committee and then a special master; if the special master upholds a finding of ineligibility, claimants then have the opportunity to take their claim to trial).

183. In the implantable defibrillators settlement, it is unclear from the opinion whether the allocation formula was determined prior to individual claimants being requested to approve the settlement, as the settlement and allocation process (including the approval of a proposed allocation plan by a special master) were proceeding simultaneously on “parallel, yet interdependent, tracks.” Guidant Corp., 2009 WL 5195841, at *2.


C. Court-Approved Settlements

Model Rule 1.8(g), as enacted in 1983, contained no reference—either in the text of the rule or its comment—to the applicability of the rule to court-approved settlements in class action lawsuits. Louisiana and North Dakota were the first two jurisdictions to address this question—each providing in the text of the rule that it did not apply in class actions. Subsequently, in 2002, the ABA amended the comment to Rule 1.8(g) to provide: “[I]lawyers representing a class of plaintiffs . . . may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.” This comment was perhaps not as clear as it might have been, but it appeared to exclude the application of the rule only in class actions, in which courts are required to approve a proposed settlement only after determining that the settlement is “fair, reasonable, and adequate.” This makes sense because it is difficult, and often impossible, to obtain the informed consent of each class member prior to implementation of a settlement.

More recently, however, another two jurisdictions—Ohio and New York—have adopted versions of Rule 1.8(g) that provide an exception in the text of the rule for court-approved settlements more generally. What little legislative history exists suggests that the sole basis for adopting such

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185. See LA. RULES OF PROF’L CONDUCT R. 1.8(g) (2011) (“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, or a court approves a settlement in a certified class action.”); N.D. RULES OF PROF’L CONDUCT R. 1.8(g) (2006) (“A lawyer who represents two or more clients, other than in class actions, shall not participate in making an aggregate settlement of the claims of or against the clients, or an aggregated agreement as to guilty pleas in a criminal case, unless, after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement, each client consents.”).


187. See FED. R. CIV. P. 23(e)(2).

188. See N.Y. RULES OF PROF’L CONDUCT R. 1.8(g) (2009) (“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.”) (emphasis added); OHIO RULES OF PROF’L CONDUCT R. 1.8(g) (2007) (“A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless the settlement or agreement is subject to court approval or each client gives informed consent, in a writing signed by the client.”) (first emphasis added).
language was to clarify that the rule is not meant to apply to class actions.\footnote{189. See \textit{Ohio Rules of Prof’l Conduct} R. 1.8(g) cmt. 13 (“Alternatively, where a settlement is subject to court approval, as in a class action, the interests of multiple clients are protected when the lawyer complies with applicable rules of civil procedure and orders of the court concerning review of the settlement.”); \textit{id.} at Comparison to ABA Model Rules of Professional Conduct (no mention of any differences between Ohio Rule 1.8(g) and ABA Model Rule 1.8(g)); \textit{see also} Roy Simon, Simon’s New York Rules of Professional Conduct 379 (2012) (citing the reporters’ note suggestion “that the court approval exception would apply in situations ‘such as in class actions,’ reflecting the reality that individual consent to a class action settlement is rarely (if ever) obtained from every member of a class”).

190. See Simon, supra note 189, at 379 (“Read literally . . . the ‘court approval’ exception [of the New York rule] also could be interpreted to open an avenue for converting ‘mass actions’ (multiple individual clients bringing related claims) into ‘class actions’ (allowing court approval to substitute for individual client consent).”).

191. \textit{See}, e.g., Pa. R. Civ. P. 2039 (“No action to which a minor is a party shall be compromised, settled or discontinued except after approval of the court pursuant to a petition presented by the guardian of the minor.”)

192. \textit{See In re} World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 196 (S.D.N.Y. 2011) (justifying the court’s role in exercising supervisory authority over nonclass settlement on the grounds that this mass action resembled, and was litigated like, a class action, “with all of the thousands of lawsuits being litigated on a common basis under close judicial management at every stage”).


194. Willgang & Lee, \textit{supra} note 3, at 802 (discussing court approvals of the Zyprexa and \textit{Vioxx} settlements).}
Even if a court interprets Rule 1.8(g) as inapplicable to any court-approved settlement, it does not appear that this would significantly change what the plaintiffs’ attorney is required to do. At the very least, the attorney must obtain the consent of each client before the settlement can be effective with respect to that client, not only because Rule 1.2(a) requires the attorney to do so, but also because courts have no authority to bind parties to a settlement in nonclass lawsuits. In this respect, nonclass aggregation is significantly different from class actions. Moreover, once it is established that each client must consent to his or her settlement, Rule 1.4 dictates that the attorney explain the settlement offer “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” And all or most of the information currently required to be disclosed under Rule 1.8(g) is precisely the type of information that will be “reasonably necessary” for each client to decide whether to accept or reject a settlement offer. Nevertheless, rejecting the application of the disclosure requirements under Rule 1.8(g) itself is probably a bad idea because it makes it less likely that attorneys will comply with their obligations under other applicable rules.

Perhaps the only significance of excluding judicially approved settlements from the application of Rule 1.8(g) is to provide more flexibility in determining precisely what information a plaintiffs’ attorney must disclose. If the aggregate settlement rule has been interpreted in a jurisdiction to require that the attorney disclose the names and addresses of all clients who are participating in the settlement, no matter how irrelevant this information would be to a client’s evaluation of the fairness of a particular settlement, then courts can decide that Rule 1.4, unlike Rule 1.8(g), does not require the disclosure of such information in all cases. Similarly, if the aggregate settlement rule has been interpreted in a jurisdiction to require that formula and other process settlements are unlawful—because the attorney cannot disclose how much each client will receive at the time the clients are asked to consent to the settlement—then courts can decide that Rule 1.4 does not require the invalidation of these types of settlements, which are typically less subject to plaintiffs’ attorney manipulation than settlements in which the attorney plays a more substantial role in determining each plaintiff’s allocation.

Many commentators have urged judges to be more active in protecting plaintiffs’ interests in mass tort litigation, for precisely the reasons that Judge Hellerstein gave in justifying his own “managerial” role in the World Trade Center litigation. In my view, more judicial supervision may well be desirable, but what may be even more desirable is for judges to insist that plaintiffs’ attorneys fully comply with existing ethics rules, including not only Rule 1.8(g) but also Rules 1.2, 1.4, and 1.7—particularly Rule 1.7 as it

195. See supra note 83 and accompanying text.
196. See, e.g., Erichson, supra note 34, at 524.
197. See supra note 153 and accompanying text.
relates to the size and the composition of any group represented by a single attorney or law firm.

III. ATTORNEY WITHDRAWAL FROM REPRESENTING NONSETTLING PLAINTIFFS

In the Vioxx settlement, defense attorneys required plaintiffs’ attorneys to withdraw from representing nonsettling plaintiffs if they could do so without violating state equivalents of Model Rules 1.16 and 5.6. Commentators have been nearly unanimous in condemning these—and other—provisions of the settlement on the grounds that plaintiffs’ attorneys who withdraw under these circumstances will violate both of these rules.

I agree that putting such a provision in a settlement agreement constitutes a violation of Rule 5.6, which prohibits lawyers from participating in “offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.” Courts and ethics committees have uniformly held that a settlement agreement may not prohibit a plaintiffs’ attorney from representing new clients in lawsuits against the defendant; regardless of the defendant’s understandable desire to achieve finality, such agreements violate public policy by limiting the ability of new clients to find adequate representation. If it is unethical for a plaintiffs’ attorney to agree to turn away new clients, then how can it be ethical for the same attorney to agree to terminate the representation of existing clients? Perhaps some of these attorneys might decide for themselves that they want to withdraw, but the only reason for putting such a provision in a settlement agreement (i.e., a provision requiring all of the plaintiffs’ attorneys to withdraw from all of their nonsettling clients—even if only when ethically permissible) is to satisfy the defendants’

198. See supra notes 15, 24 and accompanying text.
199. See supra notes 15–16 and accompanying text.
200. See supra note 15 and accompanying text.
201. Some commentators have disagreed with this policy and urged that the rule be changed, but this is clearly the result under the current rule. See Erichson & Zipursky, supra note 13, at 284–85.
202. See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 371 (1993) (stating that a settlement agreement requiring the plaintiffs’ attorney to refuse to represent certain opt-out clients—whether they were clients at the time of the settlement or became clients thereafter—would violate Model Rule 5.6(b)).
203. I use the term “settlement agreement” because this is what they are typically called, but of course, under the existing aggregate settlement rule, there is no actual settlement agreement until the terms have been accepted by the requisite number of plaintiffs. Cf. Erichson, supra note 11, at 1793.
204. As Erichson and Zipursky have noted, another questionable provision in the Vioxx agreement was where the attorneys agreed that all disputes about interpretation and compliance were required to be decided by the chief administrator, who was to sit as a binding arbitration panel, and whose decision would be “final, binding and Non-Appealable.” See Erichson & Zipursky, supra note 13, at 291 n.115. Moreover, the chief administrator was none other than “Judge Eldon Fallon, the federal district judge who presided over the Vioxx MDL and who played a major role in pushing the parties to settle.” Id. at 291 (footnote omitted).
desire to achieve finality by removing experienced plaintiffs’ attorneys from continuing to pursue this type of litigation, which defendants are not permitted to do under Rule 5.6.

On the other hand, I am not convinced that the mandatory withdrawal provision necessarily violated Rule 1.16 as it has been interpreted in various jurisdictions. That rule permits lawyers to withdraw when “the client insists upon taking action . . . with which the lawyer has a fundamental disagreement.” Although a lawyer may fundamentally disagree with a client’s decision to refuse an offer of settlement, many courts and ethics committees have found that a fundamental disagreement whether or not to settle a lawsuit is insufficient grounds to withdraw because it conflicts with the client’s absolute right to decide whether to settle a case. Nevertheless, courts have not uniformly held that an attorney is prohibited from withdrawing or attempting to withdraw when a plaintiff in a contingent fee representation refuses to accept a settlement offer recommended by the attorney. Although it may not be accurate that a majority of courts permit withdrawal in these circumstances (as a recent law review note asserted), there are at least some jurisdictions where the Vioxx plaintiffs’ attorneys may have been ethically permitted to withdraw from representing nonsettling plaintiffs.

For example, the Kentucky Supreme Court recently held that, although a trial court properly permitted a plaintiff’s attorney to withdraw from an individual lawsuit when the plaintiff refused an offer of settlement, the same attorney could not recover legal fees under quantum meruit. This

205. If they could require the plaintiffs’ attorneys to refuse to accept new clients, defendants would clearly do so. A second best solution is to remove plaintiffs’ attorneys from all existing litigation and then assume that there is an implicit agreement that these attorneys will not accept new clients. Plaintiffs’ attorneys will understand the implicit agreement and will be motivated to honor it because first, they will earn enormous fees as a result of the current settlement and will likely be satisfied with this return on their investment, and second, if they accept new clients in breach of the implicit agreement, future defendants will refuse to engage in favorable settlement agreements with them, preferring to deal with other plaintiffs’ attorneys who can be trusted to understand and honor the implicit agreement.


207. See, e.g., Erichson & Zipursky, supra note 13, at 286–87 (collecting authorities).

208. Once a lawsuit is filed, plaintiffs’ attorneys are typically required to obtain the court’s permission before withdrawing from the representation. See Model Rules of Prof’l Conduct R. 1.6(c). Prior to filing the lawsuit, an attorney may withdraw without court permission, although the attorney is still bound by ethical rules regarding mandatory and permissive withdrawal. Id. R. 1.6(b). At least some of the plaintiffs’ attorneys in the Vioxx settlement were certainly representing numerous clients who had not yet filed lawsuits against Merck.


210. See Lofton v. Fairmont Specialty Ins. Managers, Inc., 367 S.W.3d 593, 593–94 (Ky. 2012). With respect to the trial court’s permitting the attorney to withdraw, the Kentucky Supreme Court first noted that trial courts have “broad discretion in granting such [withdrawal] motions liberally, as long as the client’s interests are not affected.” Id. at 596. The court then stated that “[a]rguably, [the attorney’s] claim to withdraw may have been made under subsections (3) [client insisting on pursuing an objection the lawyer considers
was because “good cause” for purposes of permissive withdrawal is not the same as “good cause” for quantum meruit compensation. In addition, the court stated that the attorney might even have recovered under quantum meruit if he had put a provision in the engagement agreement permitting him to withdraw if the plaintiff refused the attorney’s recommendation to settle the case. Given that the Vioxx plaintiffs’ attorneys were agreeing not to seek legal fees in cases involving nonsettling plaintiffs, their attempts to withdraw would apparently be perfectly proper in Kentucky and other jurisdictions as well.

Of course, for purposes of the Vioxx settlement, it is probably irrelevant whether the mandatory withdrawal provision necessarily violated Rule 1.16, because it apparently violated Rule 5.6(b). As a result, it was unethical for both the defense and plaintiffs’ attorneys to agree to that

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211. Id. at 596.
212. Id. at 598.
213. See Ericson & Zipursky, supra note 13, at 280. This provision of the Vioxx settlement agreement has also been controversial. See, e.g., Conn. Informal Op. 08-01 (concluding that such an agreement created client-lawyer conflicts by requiring plaintiffs’ attorneys to forego any financial interest in cases involving nonsettling plaintiffs).
214. For cases permitting withdrawal when the client had rejected a recommended settlement offer, see authorities cited in 31 Laws. Man. on Prof. Conduct (ABA/BNA) 1107 (2006). The Seventh Circuit and First Circuit opinions cited in a recent law review note as permitting withdrawal following rejection of a settlement offer, see Kim, supra note 209, at 404-05, involved factors in addition to mere rejection of the lawyer’s advice. For example, in Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081 (7th Cir. 1982), the Seventh Circuit held that it was not an abuse of discretion for the trial court to allow the plaintiffs’ attorney to withdraw, stating that “in private engagements counsel may withdraw if advice (even to settle) is not followed.” Id. at 1087 (citations omitted). The court also emphasized, however, that the plaintiffs did not object to, or express any disagreement with, the request to withdraw, and that it was therefore reasonable for the trial court to conclude that the plaintiffs acquiesced in the lawyer’s withdrawal. Id. at 1088; see also Jiricko v. Ill. Anesthesia, Ltd., Nos. 92-2613, 92-2682, 1993 U.S. App. LEXIS 22030 (7th Cir. Aug. 27, 1993) (holding that the trial court did not abuse its discretion in granting a lawyer’s motion to withdraw where a contractual provision allowed the lawyer to terminate the representation; however, there was no settlement offer in that case, and the contract provided that the lawyer could withdraw if it should appear that the lawsuit “lacks merit or is otherwise not feasible to pursue”); Citibank, N.A. v. Accounting Sys. of P.R., Inc., No. 90-1145, 1990 U.S. App. LEXIS 14377 (1st Cir. Aug. 7, 1990) (upholding a grant of permission to withdraw when the court determined that plaintiffs were solely responsible for proceeding to trial pro se because they expressed their dissatisfaction with the lawyer, demonstrated an unwillingness to cooperate with his plans, stated their intention to retain new counsel, and did not object to the withdrawal or ask for a continuance). Even so, these jurisdictions have clearly not held that it is impermissible to request to withdraw following rejection of a settlement offer; therefore, it was certainly possible that the Vioxx plaintiffs’ attorneys could have permissibly withdrawn there. Of course, it was also possible that the Vioxx plaintiffs’ attorneys could cite reasons other than the mere rejection of their advice to settle. For a discussion of the permissibility of withdrawal on other grounds, see infra note 218 and accompanying text.
215. See supra note 197 and accompanying text.
provision. What interests me, however, is a different question: whether there are any circumstances in which plaintiffs’ attorneys can decide for themselves to withdraw or attempt to withdraw from representing nonsettling claimants in mass tort litigation.

I agree with those courts and commentators who interpret Rule 1.16 to prohibit lawyers from withdrawing merely because the client has rejected the lawyer’s recommendation to accept a settlement offer. This interpretation appropriately recognizes that it is for the client, and not the lawyer, to accept or reject a settlement offer, and that an attorney’s withdrawal—or threat of withdrawal—prompted solely by the client’s settlement decision, constitutes an impermissible restriction on the client’s decision-making authority. I also agree with the view that attorneys may not circumvent this result by having clients consent in the engagement agreement to the attorney’s withdrawal under such circumstances.

On the other hand, there are some circumstances in which the presence of additional factors will allow a plaintiffs’ attorney to ethically withdraw from the representation after the plaintiff has rejected an offer of settlement. For example, if continued representation would result in an ethical violation, then the attorney is required to withdraw, or at least attempt to withdraw. This will be the case if the attorney’s investigation (including discovery) reveals that a nonsettling plaintiff’s lawsuit has no merit, although this may be unlikely when the defendant has offered to settle the lawsuit with respect to this, as well as similarly situated plaintiffs. Continued representation is also prohibited when there is a conflict of interests between the settling and nonsettling plaintiffs, and either the conflict is nonconsentable or the clients refuse to give their informed consent.

Erichson and Zipursky cite to several authorities suggesting this result, including instances involving only a few claimants in situations where there was insufficient coverage for all the claimants. Unless it is manifest that the defendant cannot pay all claims, however, it is unclear how the existence of nonsettling plaintiffs creates conflicts that are either nonconsentable or outside the informed consent that should have been given.


217. See supra note 32 and accompanying text.

218. See, e.g., Nehad, 535 F.3d at 971.


221. See MODEL RULES OF PROF’L CONDUCT R. 1.7.

obtained either at the beginning of the representation or sometime before
the negotiation of the aggregate settlement.223

What about an attorney’s belief that continued representation constitutes
an “unreasonable financial burden,”224 given the cost of trial in individual
cases and perhaps only the small or negligible prospect of obtaining a
verdict that will cover the attorney’s costs? Courts disagree whether
withdrawal is permissive in such cases. Some courts permit withdrawal on
the grounds that the rule clearly states that “unreasonable financial burden”
creates good cause to withdraw,225 but others disagree on the grounds that
this is one of the risks that attorneys accept when they represent clients on a
contingent fee basis.226 For some courts, the financial burden may be
unreasonable only if it results from some totally unexpected event.227

Some lawyers have attempted to deal with the problem by providing, in
their retention agreements, that a contingency fee will be converted to an
hourly fee if the client rejects a settlement recommended by the attorney.228
Not surprisingly, most courts reject such provisions on the obvious ground
that they unduly interfere with the client’s right to accept or reject a
settlement offer.229 One commentator suggests that attorneys put a

223. See supra notes 117–118 and accompanying text. Erichson and Zipursky also argue
that even when withdrawal is required as a result of a conflict of interests, the lawyer is
typically required to withdraw from the representation of both clients. Erichson & Zipursky,
supra note 13, at 286–87. They do not address the situation where the retention agreement
(or similar informed consent provision) permits the lawyer to continue to represent one of
the clients when a conflict of interest arises that requires the withdrawal of the lawyer from
at least one of clients. These sorts of provisions are not uncommon. Also, with respect to a
nonsettling client’s status as a former client, there is no conflict unless the continued
representation of the settling plaintiffs is “materially adverse” to the nonsettling former
client. See MODEL RULES OF PROF’L CONDUCT, R. 1.9(a). This is unlikely except when the
plaintiffs are in direct competition for limited funds.

224. See MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(6) (permitting a lawyer to
withdraw when “the representation will result in an unreasonable financial burden on the
lawyer or has been rendered unreasonably difficult by the client”).

App. Div. 1993); see also In re Withdrawal of Attorney, 594 N.W.2d 514, 518 (Mich. Ct.
App. 1999) (allowing withdrawal where there was no realistic chance that the firm would
recover fees in a case that required another 1,000 hours in addition to the 4,000 hours already
expended).

disenchantment” with the plaintiff in a contingent fee case does not justify withdrawal);
that the retainer is not as profitable as first imagined is no excuse for withdrawal.”).

Supp. 775, 785 (E.D. Va. 1994) (noting that although at the time of engagement, the law
firm knew that the partnership was experiencing financial difficulty, it also knew that the
individual partners had the ability to pay the firm’s legal fees; client was now claiming
inability to pay).

228. See, e.g., Compton v. Kittleson, 171 P.3d 172, 180 (Alaska 2007) (holding that such
a “hybrid” fee agreement violated the Alaska Rules of Professional Conduct).

229. See Crystal, supra note 216, at 9 (citing Compton, 171 P.3d 172). The Compton
court also expressed concern with the “predictable difficulty of forecasting the effects of the
fee-conversion provision” given the number of variables involved in determining the effect
that such a provision will have in any particular case. Compton, 171 P.3d at 179.
provision in their retention agreements permitting the attorney to decide at any time not to advance expenses, so long as the attorney provides the client with reasonable notice.²³⁰

In my view, the more appropriate solution is to make use of the limited scope of the representation under Rule 1.2(c).²³¹ In the case of clearly identified group representations, attorneys ought to be free to specify that, in the event there is no longer a sufficiently large group to warrant the costs of the litigation, the attorney will be permitted to withdraw, or the client will agree to pay the necessary expenses to pursue the client’s case. Such a provision would bring home to the client some of the risks of group representation at a time when the client still has the option of searching for another attorney who is willing to provide a more traditional individual representation. For high value claimants, who are the ones most likely to reject aggregate settlement offers,²³² this particular disclosure might well prompt them to reevaluate whether they want to be part of a group representation in which the attorney is incapable of pursuing the client’s individual case should the client reject an unacceptable offer.

I caution, however, that this solution should only be available in cases in which it is in fact unreasonably burdensome for a plaintiffs’ attorney to pursue litigation on the part of nonsettling claimants.²³³ This will not always be the situation in mass tort litigation, only some of which present the challenges of highly complex cases like Vioxx. For example, in single event disasters, such as airplane crashes, the expenses of trying a single case may not be excessive, particularly if the common attorney has already completed all or most of the investigation, including the identification of expert witnesses.

CONCLUSION

Elsewhere I have criticized the ALI for failing to include, in its recent Principles of Aggregate Litigation, a meaningful discussion of the ethical issues that arise for lawyers in aggregate litigation, including both class actions and nonclass aggregations.²³⁴ My initial concern was that the ALI had missed an opportunity to give necessary and helpful guidance to both lawyers and courts concerning the ethical issues in aggregate litigation, including conflict of interest issues.²³⁵ In addition, however, I came to believe that, with respect to nonclass aggregations, such as commonly occur in mass tort litigation, the ALI did more than miss an opportunity to educate

²³⁰ Crystal, supra note 216, at 9.
²³¹ See supra note 82 and accompanying text.
²³² See supra note 52 and accompanying text.
²³³ In Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820, 821 (N.J. Super. Ct. App. Div. 1993), the Supreme Court of New Jersey Appellate Division remanded the case for a hearing on the anticipated costs of continuing to pursue the lawsuit. I express no opinion on whether such a hearing should be required in any or all cases.
²³⁴ See generally Moore, supra note 9.
²³⁵ Id. at 722.
mass tort lawyers regarding their ethical obligations—rather, it affirmatively downplayed both the risks of this type of group representation and the role of ethics rules in protecting individual clients against these risks. The result, I feared, was to indirectly approve the common practice of mass tort lawyers treating individual clients as if they were members of a class action but without affording them even the minimal judicial protections given to actual class members.

It has been my goal in this Article to initiate the sort of discussion I wish the ALI had engaged in before adopting the Principles of Aggregate Litigation. With respect to conflicts of interest, I have attempted to identify when potentially impermissible conflicts arise under Rule 1.7(a)—including conflicts among current clients and conflicts between the clients and their lawyer—both from the outset of the representation and as the representation evolves, even before a defendant makes an aggregate settlement offer. As for the consentability of such conflicts under Rule 1.7(b), I agree that the potential advantages of mass representation often outweigh the risks; however, I suggest that there ought to be some limitation on both the size and the composition of a group represented by a single lawyer or law firm. Finally, I argue that obtaining the clients’ informed consent requires more than a simple explanation that the representation will be collective, rather than individual, urging that lawyers disclose as much detailed information as is reasonably necessary for clients to understand the material risks of the type of group representation that the lawyer anticipates giving.

With respect to the aggregate settlement rule itself, I address questions that continue to arise under the existing rule, including what constitutes an aggregate settlement, the type of information that must be disclosed to clients, and the effect of several state rules that may not require satisfaction of the rule when a court has approved the settlement. I urge uniform adoption of 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. I agree with others that detailed information concerning the allocation to each client is required, but I question whether this necessarily includes client names or other identifying information in situations where this information is unlikely to be useful in assessing whether the allocation is a fair one. I am also concerned that a literal application of the aggregate settlement rule may prohibit the use of a formula or matrix, where the clients may not know the precise amount of their allocation before being asked to approve the settlement. I agree that formula or matrix settlements can be abused, but they are often the most objective means of allocating settlement proceeds and therefore need to be accommodated under the existing rule. Finally, for those state versions of the aggregate settlement that create an exception for court-approved settlements, I urge that these rules be interpreted to limit the exception to

236. Id. at 728–33.
237. Id. at 728–29.
court approval of class actions, given that other rules—such as Rules 1.2 and 1.4—also require that lawyers provide adequate information to allow clients to decide whether to accept or reject a proposed settlement offer.

The last section of the Article addresses the complicated question of when plaintiffs’ attorneys may withdraw from representation of a plaintiff who rejects a reasonable settlement offer. I agree with others who condemn settlement agreements requiring plaintiffs’ attorneys to do so when ethically permitted; however, my concern is not that there are few, if any, circumstances in which such withdrawal is ethically permissible, but rather that defendants have no legitimate interest in forcing plaintiffs’ attorneys to withdraw, even if they could do so voluntarily. As for entirely voluntary withdrawal, unlike many others, I am sympathetic to the economic realities of some mass tort representations, where it may not be feasible to force an attorney to litigate only one or a few claims when the anticipated expenses are enormous. So long as the attorney provides advance warning, I believe that voluntary withdrawal can sometimes constitute a necessary aspect of a limited-scope group representation under Rule 1.2(c), although I concede that this conclusion will be controversial.

I did not come to this Article with any particular theme in mind. If there is a theme, it is that the issues are more complex than I initially thought they would be and that to adequately address the risks of mass representation—without losing its potential for enormous benefits—we need to take a nuanced approach to the application of the existing rules to factual situations that may vary considerably. Nevertheless, it is imperative that mass tort lawyers take their ethical obligations seriously and that courts, commentators, and organizations such as the ALI continue to discuss these issues and provide as much guidance as they can to the practicing bar.