

ABA Opinion 06-438: Aggregate Settlements Require Detailed Disclosures

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As the recommendation of COSAC that New York adopt the format of the ABA Model Rules moves closer to reality (the recommendation was endorsed by the NYSBA House of Delegates on April 1), it behooves New York lawyers to pay close attention to the Ethics Opinions of the ABA Standing Committee on Ethics and Professional Responsibility.

The Standing Committee has recently (February 10, 2006) issued its Formal Opinion 06-438 dealing with aggregate settlements or aggregated agreements. The Opinion construed the provisions of Model Rule 1.8(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. ["Informed consent" is explained in Model Rule 1.0(e), and "Confirmed in writing" is explained in Model Rule 1.0(b).]

MR 1.8(g) corresponds to New York's DR 5-106, a standalone Rule dealing only with aggregate settlements, but with two important differences: MR 1.8(g) covers aggregated agreements in criminal actions while DR 5-106 does not; and MR 1.8(g) requires that the client's informed consent be in writing, whereas DR 5-106 does not. In its Commentary, COSAC described MR 1.8(g) and DR 5-106 as "substantially the same..."

Model Rule 1.8 contains subparagraphs (a)-(j), each describing "a different and specific circumstance in which a lawyer's self-interest might jeopardize the representation of a client." The Rule is therefore a supplement to Model Rule 1.7, the general Rule governing conflicts of interest arising from the representation of current clients. Because of the increased risk of conflicts between clients in aggregate settlements, however, MR 1.8(g) requires that the client's consent to the aggregate settlement be in writing.

Definition of "Aggregate"

Because the terms "aggregate settlement" and "aggregated agreement" are not defined in the Model Rules, the ABA Opinion offered its own definition.

An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas. It is not necessary that all of the lawyer's clients facing criminal charges, having claims against the same parties, or having defenses against the same claims, participate in the matter's resolution for it to be an aggregate settlement or an aggregated agreement. The rule applies when any two or more clients consent to have their matters resolved together.

In civil matters, an aggregate settlement issue can arise in the context of claims by multiple plaintiffs in the same matter, as when several passengers who are injured in a train or bus accident sue the same defendant. Or, the issue can arise when several plaintiffs represented by the same lawyer sue the same defendant in several cases arising from the same circumstances, as when several home buyers sue the same builder for a breach of warranty in construction. In the case of a lawyer who represents multiple defendants in a claim by one plaintiff, the issue can arise when all the defendants are asked to contribute to a sum the plaintiff has demanded in settlement.

In criminal matters, an aggregated agreement occurs when a prosecutor offers to accept pleas from two or more criminal defendants as part of one agreement.

As the ABA Opinion points out, a lawyer has a duty under Model Rule 1.2(a) to defer to the client's role as ultimate decision-maker concerning the objectives of the representation "and to abide by his clients' decision whether to settle a matter." Although there is no comparable provision in the New York Code, COSAC has recommended the adoption of MR 1.2 on the ground that it is "similar in substance to DR 7-101(A)." COSAC points out that New York's EC 7-7 provides that except for the lawyer's right to make decisions "not affecting the merits of the cause or substantially prejudicing the rights of the client," the authority to make decisions belongs exclusively to the client. EC 7-7 continues:

As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer or whether to waive the right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise the client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Model Rule 1.4(a)(1) imposes a general duty on the lawyer to "promptly inform the client of any decision or circumstances with respect to which the client's informed consent...is required by these Rules." Model Rule 1.18(g) "reinforces this duty." In so doing, it protects the lawyer from the claims of clients who consent to the settlement and then become dissatisfied with its terms. "If the clients are fully informed of the terms of the agreement...and the stake of their co[claimants] in it, they are less likely to file claims and if they do, the lawyer is in a better position to defend against them."

What kind of information is the lawyer advised to give his multiple clients? The ABA Opinion lists the following "at a minimum," but emphasizes that the unique facts of a particular settlement may require additional disclosures.

- The total amount of the aggregate settlement or the terms 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 client participation in the aggregate settlement or the aggregated agreement, including 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 others 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 the clients.

In his commentary to New York's DR 5-106, governing aggregate settlements (supra), [Page 779, Simon's New York Code of Professional Responsibility Annotated, 2005 edition], Roy Simon suggests that the following additional disclosures are advisable:

- What claims will be settled under the offer.
- What claims will be left alive if the clients accept the offer.
- What procedures the lawyer is using to determine how the settlement will be divided among the clients.
- The advantages of settlement: why the clients would be wise to accept the offer.
- The risks of settlement: what are the clients giving up by accepting the offer?

ABA Opinion 06-438 discusses several other issues relating to aggregate settlements:

1. If the information to be disclosed to a client or clients in connection with an aggregate settlement or an aggregated agreement is protected by the strictures in Model Rule 1.6 (see, New York's DR 4.101) against the revelation of a client confidence, the lawyer must first obtain the informed consent of the client whose confidence is at stake. The best practice is to obtain this consent before the lawyer accepts the representation of multiple clients with common claims against the same defendant.
2. The lawyer should also warn the clients whose confidences are being shared that if a dispute arises between them after their confidences are revealed by the lawyer, they may not be able to assert the attorney-client privilege on commonly given advice.
3. The lawyer should advise the clients in an aggregate settlement of the risk that if the offer is conditioned on the unanimous consent of all "commonly represented" litigants, the failure of one litigant to consent "may result in the withdrawal of the offer or demand."