

Disaggregating The Aggregate Settlement Rule

BY STEVEN C. KRANE

Lawyers often represent multiple clients with similar claims against the same defendant. Particularly in the mass tort context, these claims are frequently settled by agreements between the lawyer and the defendant that are intended to dispose of all of the claims. As an example, assume a hypothetical lawyer who has 100 clients who have sued A Corp. A Corp. offers to settle any 50 of the cases for the total sum of \$10 million. A Corp. does not specify which of the cases are to be settled or how the money is to be allocated, or perhaps only provides general guidelines regarding the division of the settlement fund. The lawyer will not settle any case, of course, without actual client authority. Each plaintiff will have the option to accept or reject the settlement. However, in circumstances such as these, it is impracticable as well as undesirable, due to the number of clients involved as well as the timing of the processing of the settlements, to provide any individual client with information about how much money every other claimant is receiving as part of the deal.

Client Consent Required

DR 5106(A) of the New York Code of Professional Responsibility requires a lawyer representing multiple clients participating in an aggregate settlement to obtain the consent of each client after consultation. Consultation involves fully informing the client of the existence and nature of all the claims involved, of the total amount of the settlement, and of the participation of each person in the settlement. Thus, aggregate settlements are not per se prohibited. Rather, the Code requires that each client give his or her fully informed consent before an aggregate settlement can take place. The rules of the Appellate Division, First Department – specifically 22 NYCRR § 603.17 (a provision that is substantially similar to court rules in the other departments) – similarly state that attorneys who represent multiple clients must settle each case “independently upon its own merit and with regard to the individual interest of the client.” Unlike DR 5106(A), the court rule does not explicitly mention that a group settlement can take place if the clients consent.

Settlements That Violate The Rule

Courts have voided settlements that violate DR 5106(A). In *Hayes v. EaglePicher Indus., Inc.*, 513 F.2d 892 (10th Cir. 1975), the court invalidated a settlement made pursuant to an agreement among the plaintiffs that allowed a majority vote to decide the acceptance of a settlement offer. The court stated that a lawyer could not both represent clients who favor a settlement and clients who oppose it. To allow a lawyer to settle a case over the client’s objections would be contrary to the client’s interest. *Id.* at 894. An aggregate settlement was also voided in *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225 (Tex. Ct. App. 1985), which involved an action by 349 homeowners against a builder over the poor quality of their homes. The court, relying on DR 5106, held that the client must be fully informed before his or her consent to an aggregate settlement can be obtained. Several plaintiffs were not informed of the nature and 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 plaintiffs. *Id.* at 229. By not informing the plaintiffs of the other

settlements, the attorney violated the policy of DR 5106 of ensuring that plaintiffs not give up their rights except with full knowledge of the other settlements involved. *See, also, Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046 (D. Colo. 1999) (group settlement was invalid where decision making was delegated to a small group of plaintiffs); Restatement (Third) of the Law Governing Lawyers § 128, cmt. d(i) (2000) (citing Model Rule 1.8(g) and Model Code DR 5106(A)).

On its face, New York's DR 5106(A) prohibits a lawyer from "participating in the making of an aggregate settlement" without getting the consent of each client involved after full disclosure of all pertinent details, including the financial participation of each plaintiff in the settlement sum. The purpose of the rules is to prevent an attorney from sacrificing the interests of one client in order to gain an advantage for another client. *C. Wolfram, Modern Legal Ethics* 493 (1986). By ensuring that the attorney obtains the clients' consent after full disclosure, clients are able to make intelligent, informed decisions about whether or not to participate in a joint settlement.

22 NYCRR § 603.17 also addresses the issue of combining or grouping the claims of separate clients against one defendant for purposes of settlement. Although there are no cases concerning the application of this Section, it would appear from its language that its purpose is the same, i.e. to protect clients' interests by not allowing settlements to occur against their wishes.

Like the attorneys in *Hayes, Quintero and Abbott*, our hypothetical lawyer may represent clients who favor the settlement offered by A Corp. as well as clients who oppose the settlement. The difference, however, is that the settlement offered by A Corp. does not bind all of the plaintiffs. Only those plaintiffs who consent will have their cases settled. Thus, the interests of the objecting plaintiffs, who are free to pursue their individual claims, are not prejudiced.

Using A Special Master Appointed By The Court

How, then, to effectuate an agreement between a group of claimants and a settling defendant without having to make disclosures to all of the lawyer's clients with claims against the same defendant? The answer is to have any allocation of the settlement fund performed under the supervision and subject to the approval of the court, perhaps by a special master appointed by the court in which the actions are pending.

Since only clients who consent will have their cases settled, and particularly given that the settlement process will be supervised by the court, the policy of the rules is preserved. Any technical violation of the disciplinary or court rules should not invalidate the settlement. *See, Brame v. Ray Bills Finance Corp.*, 85 F.R.D. 568, 578 (N.D.N.Y. 1979) (upholding attorney's use of public donations to pay litigation expenses because, even though technically it is a violation for attorneys to advance funds to pay legal expenses, the arrangement complied with the purpose of DR 5103 (B), to prevent lawyers from having a financial stake in the case). Assuming that the clients are fully informed as to the general nature of the settlement process, then their interests should not be harmed by the aggregate settlement.

Courts encourage settlements because they ease crowded dockets and result in savings to the litigants and to the judicial system. *JohnsManville Corp. v. Blinken*, 129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991) (involving the settlement of a class action case against an asbestos manufacturer). Because of the overriding public interest in settling litigation (*AllegrettiFreeman v. Baltis*, 205 A.D.2d 859, 86061 [3d Dep't

1994], allowing a group of plaintiffs to condition settlement on majority approval), settlements should be facilitated at as early a stage of the litigation as possible. *JohnsManville*, 129 B.R. at 847 (citing Advisory Committee Note to Fed. R. Civ. P. Rule 16(c)). Thus, the court in *Manville* approved the class action settlement of asbestos claims without regard to the state's ethical rules, stating that a settlement will be approved if it does not unfairly compromise the rights of the plaintiffs. *Id.* at 848. The primary concern is to ensure that the clients' interests are adequately represented and protected. *See, generally, Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U.L. Rev. 469, 52123 (1994).

The hypothetical settlement offered by A Corp. would satisfy this standard. No plaintiff would have his or her rights compromised because no case would be settled unless the individual plaintiff consented. The other plaintiffs who do not wish to settle would still be able to vindicate their rights. Furthermore, settling some, but not all, of the clients' cases saves considerable time and expense. The settlements that were rejected in the cases discussed above were voided because the plaintiffs who objected were still bound by the settlement. If the aggregate settlement does not bind all the plaintiffs, it does not unfairly compromise the rights of nonparticipants. In addition, the use of special masters to supervise the settlement process reinforces its fairness, including the principles that the negotiations were made in good faith and in the best interests of all plaintiffs. *Manville*, 129 B.R. at 849; Kenneth R. Feinberg, *Creative Use of ADR: The CourtAppointed Special Settlement Master*, 59 Alb. L. Rev. 881, 890 (1996) (describing the use of special masters in aggregate settlements in mass tort cases); Paul D. Rheingold, *Mass Tort Litigation, Aggregate Settlement*, § 21:14 (2002).

Overriding The State's Rules

Courts are also willing to override state ethical rules if they undermine fundamental litigation policies. For example, in *Rand v. Monsanto*, 926 F.2d 596 (7th Cir. 1991), the court refused to follow DR 5103(B), which prohibits a lawyer from granting financial assistance to a client and requires that the client remain responsible for the legal costs. (The underlying rationale of DR 5103 (B) is to prevent attorneys from acquiring a financial interest in litigation because it might undermine their duty to represent their clients diligently. The argument is that attorneys may compromise the interests of their clients by prematurely agreeing to a settlement in order to insure that they recover their costs.) The district court had found the plaintiff as inadequate class representative in a securities fraud action because he was unwilling to pay the legal expenses. *Id.* at 598. The Court of Appeals reversed, stating that it is unreasonable to require that a representative plaintiff bear the entire costs of a class action. By requiring the plaintiff to underwrite all costs of a class action, DR 5103 (B) cripples the class action device. Thus, the court concluded that DR 5103 (B) was inconsistent with Fed. R. Civ. P. Rule 23 and could not be applied to class actions. *Id.* at 600.

DR 5103(B) was also bypassed by the court in *County of Suffolk v Long Island Lighting Co.*, 710 F. Supp. 1407 (E.D.N.Y. 1989), a case involving five plaintiffs who sued LILCO for RICO violations. The court stated that "[a] federal court is not bound to enforce New York's view of what constitutes ethical professional conduct. . . . The ethical standards imposed upon attorneys in federal court are a matter of federal law." *Id.* at 1413. The court held that New York could not discipline an attorney for violating its ethical rules when a federal court approved the departure from the state rules; when enforcement of a state ethics rule frustrates congressional ends, the Supremacy Clause bars its enforcement. *Id.* at 141415. *See, also, Rivera v. Fair Chevrolet Geo Partnership*, 165 F.R.D. 361, 365 (D. Conn. 1996). (Subsequently, courts began allowing class representatives to bear only a pro rata share of costs and expenses, eliminating the problem confronted in *Rand and County of Suffolk*. *See, Berrios v. Sprint Corp.*, 1998 WL 199842, at *16 (E.D.N.Y.

1998). The policy underlying those cases, however, was not affected by this compromise position.)

DR 5106 (A) and the related court rules are inconsistent with a public policy to encourage settlements. The overall purpose of the ethical rules is to protect the client's interests. Allowing an aggregate settlement under the circumstances described above would not harm this purpose. In fact, considerable time and expense can be saved through the use of aggregate settlements. Furthermore, an aggregate settlement allows the attorneys to devote more time and resources to those cases that have not yet settled.

In sum, courts are willing to overlook technical violations of state ethical rules like DR 5106 (A) when it is clear that client interests are already being protected, such as when the settlement process is under the supervision of the court and a special master. Not allowing an aggregate settlement just because it technically violates the ethical rules would be unreasonable, particularly if the settlement applies only to those clients who accepted the settlement offered and would not have a negative effect on the interests of those clients who did not wish to settle.

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