



## ETHICAL CHALLENGES OF AGGREGATE SETTLEMENT AGREEMENTS

By Cathy Yannii

Aggregate settlements pose several ethical challenges, primarily because they involve lawyers representing the interests of more than one client. Care must be taken at all times to ensure the interests of all clients are respected and fully served. This article examines the ethical issues raised by aggregate settlements and the responsibilities of counsel.

Every state has ethical rules governing aggregate settlements, with most modeled on Rule 1.8(g) of the ABA's Model Rules of Professional Conduct. Those that have varied from this Rule do so primarily by way of exclusion, such as Louisiana and North Dakota, which specifically exclude class actions from their aggregate settlement rules, and Ohio and New York, which exclude court-approved settlements altogether.

Rule 1.8(g) states the following:

“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 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.”

Rule 1.8(g) therefore imposes two requirements on lawyers representing multiple clients. The first is that the terms of the settlement agreement must be disclosed to each client. The second is that after the terms of the settlement are known, each client must agree to the settlement.

The ABA Section of Litigation's *Ethical Guidelines for Settlement Negotiations* has recognized that

“[e]ven when the lawyer's initial conclusion that multiple clients can be represented was well-founded... consideration later of possible settlement options can generate circumstances where interests emerge as potentially divergent, if not actually conflicting. Conflicts can arise from differences among clients in the strength of their positions or the level of their interests in settlement, or from proposals to treat clients in different ways or to treat differently positioned clients in the same way.”

These conflicts can be found in all types of aggregate settlement agreements but are particularly prevalent in settlements that involve allocations. Whether the allocation involves either the development of a case matrix or a set of criteria for allocating a lump sum settlement, procedural and ethical questions abound with respect to a lawyer's concurrent representation and duty to disclose.

If it looks likely that parties will reach an aggregate settlement, plaintiffs' counsel should send all clients an initial letter seeking consent to negotiate an aggregate settlement agreement. By keeping clients informed of the process and obtaining their consent at this early stage, any concerns raised by clients can be incorporated early into the settlement process. Clients are thus given time to consider the possibility of an aggregate settlement and will not be surprised after terms are worked out.

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Obtaining prior written consent does not, however, relieve plaintiffs' counsel of their duty to obtain informed consent once an aggregate settlement agreement is reached. Informed consent must be given in the context of a specific demand or offer. As the Louisiana Supreme Court explained, the "requirement of informed consent cannot be avoided by obtaining client consent in advance of a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement."

Once the terms of the aggregate settlement are fully negotiated, the terms must be individually communicated by the attorneys to their clients. If settlement amounts have been set, counsel should communicate them to each client and then disclose all conflicts. If the proposed settlement requires a further allocation process, that process must be sufficiently explained to clients. Once allocation amounts have been determined, an additional disclosure letter should be sent to all clients with all of the details and conflicts outlined. Counsel must disclose the process used in reaching the settlement and any and all contingencies or conditions, including any requirement that a certain percentage of the claimants accept the settlement amounts in order for the settlement to proceed. Other information that should be disclosed to clients includes the status of the litigation, the lawyer's recommendations, the clients' right to accept or reject the proposed settlement and that the client has the right to obtain independent representation.

To provide an added layer of checks and balances, plaintiffs' lawyers should also consider retaining ethics counsel to provide advice specific to these ethical concerns. For example, ethics counsel can review drafts of disclosure letters, advise plaintiffs' attorneys on specific criteria to be used on making allocations and make recommendations on how to proceed when an insufficient number of plaintiffs has agreed to participate in the settlement. This can help to circumvent any potential challenges to counsel's ability to make the proper ethical decisions when representing more than one client in a settlement.

Plaintiffs' counsel might also consider obtaining an order from the court to retain a special master. Special masters can assist counsel in implementing the allocation process, particularly when it involves a pre-negotiated matrix or a lump sum settlement. As with ethics counsel, the participation of a special master can help prevent parties from later challenging an attorney's

impartiality by alleging a conflict of interest when allocating settlement funds.

Before entering into an aggregate settlement, counsel should address potential ethical concerns and evaluate them throughout every step in the process. Attorneys must keep their clients informed at all times and secure formal consent, in writing, to pursue both an aggregate settlement agreement and the final agreement itself. Such care and foresight will help mitigate future challenges to the settlement agreement and ensure its effective implementation. ■

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