

Proposed Rule 1.8.7 [3-310(D)] “Aggregate Settlements”

(Draft #8, 12/14/09)

Summary: Proposed Rule 1.8.7 carries forward the Model Rule and current California concept that a lawyer has a conflict when jointly represented clients are asked to approve an aggregate settlement of their claims or liabilities. This proposal includes the informed written consent requirement normally found in California’s conflict rules but otherwise is substantially the same as the Model Rule.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 3-310(D)

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 3

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

There was public comment received that criticized the requirement of informed written consent, which requirement also appears in current rule 3-310(D).

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.7* Aggregate Settlements

December 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

ABA Model Rule 1.8(g) and proposed Rule 1.8.7 both treat as a potential conflict of interest a lawyer's representation of two or more clients in arranging a settlement of claims, whether civil or criminal. Proposed Rule 1.8.7 largely tracks the first sentence of Model Rule 1.8(g). The only substantive difference is the substitution of California's more client-protective "informed written consent" requirement. That requirement also appears in current California Rule 3-310(D) and the Commission determined that it should be carried forward into proposed Rule 1.8.7. The Commission has slightly modified the second sentence of Model Rule 1.8(g) because it is an incomplete statement of the disclosure necessary to obtain informed client consent. In addition, the proposed comment expands upon Model Rule 1.8, cmt. [13] and includes a more robust discussion of the disclosure necessary under this Rule, increasing the likelihood of lawyer compliance with the Rule and enhancing client protection.

Minority. A minority of the Commission objects to the higher "informed written consent" that the Commission recommends be adopted. The minority takes the position that, while laudable, requiring an informed written consent, which itself requires written disclosures, will likely result in the demise of the last minute settlements that often take place at the court house, with resulting prejudice to the clients involved. They take the position that the Model Rule's standard of a "informed consent, in a writing signed by the client," provides adequate protection to clients. See the complete dissent, below.

Variation in Other Jurisdictions. Every state has adopted some version of Model Rule 1.8(g). See Explanation of Changes for the Rule for a brief discussion of some variations. See also selected STATE VARIATIONS excerpt, below.

* Proposed Rule 1.8.7, Draft 8 (12/14/09).

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.7 Aggregate Settlements</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(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 aggregate agreement as to guilty or <i>nolo contendere</i> pleas, unless each client gives informed <u>written consent</u>, in a writing signed by the client. The lawyer's disclosure shall include, <u>among other things</u>, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.</p>	<p><u>Changes to the Model Rule.</u> Proposed paragraph (a) is substantially the same as MR 1.8(g). For consistency, the term "aggregate" is used in relation to both civil and criminal matters throughout this Rule and its Comment. Instead of the Model Rule phrase "informed consent, in a writing signed by the client," the Commission recommends retaining California's more client-protective requirement of "informed written consent." Unlike the Model Rule language, "informed written consent" requires by definition a written disclosure. It is noteworthy that the Restatement of Law of Aggregate Litigation § 3.17(a) (Tent. Draft No. 1 4/2008) requires that each claimant "be able to review the settlements of all other persons subject to the aggregate settlement," indicating the predicate of a written disclosure to permit "review." Moreover, current California rule 3-310(D), the counterpart to Model Rule 1.8(g), requires "the informed written consent of each client," which under rule 3-310(A)(2) requires written disclosure. The Commission sees no reason to depart from the well-settled client protection rule currently in place. The statement of the lawyer's disclosure duty in the second sentence of Model Rule 1.8(g) does not provide adequate client protection. Therefore, the phrase, "among other things" has been added to the sentence, and a more expansive explanation of disclosure under this Rule appears in the comment. See Comments [2] and [3]. <u>Approaches in Other Jurisdictions.</u> Several other jurisdictions have added other exceptions to the Model Rule. Some jurisdictions exclude settlements in class actions (Louisiana and N.D.) or, more broadly, any settlement that is approved by the court (N.Y. and Ohio) or that is in the court's written record (Maryland). Minnesota removes criminal matters</p>

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<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.7 Aggregate Settlements</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>from the Rule.</p> <p>Concerning the requirement of "informed consent," most jurisdictions follow the Model Rule consent language, but there are a number of jurisdictions that provide less client protection than does the Model Rule. Some of these jurisdictions do not require that the consent be in a writing signed by the client, and some even do not require that the consent be in any writing. For example, Illinois has "consents after disclosure" and N.J. requires "informed consent after consultation". N.D. retains the 1983 Model Rule language that the client "consents after consultation", as do Georgia, Mississippi, and Virginia (which have not revised their rules since the Ethics 2000 revisions were published). Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer.</p> <p>Connecticut requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client."</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission’s Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Model Rule 1.8, cmt. [13]. See below.</p>	<p><u>[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer’s clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a “package deal”. This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer’s duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client’s decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or <i>nolo contendere</i> plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.</u></p>	<p>Comments [1], [2], and [3] substantially expand on the single Comment paragraph found in the Model Rule but are intended to be consistent with it. These three paragraphs supplement the discussion of what an aggregate settlement is and what information about the proposed settlement a lawyer is obligated to provide to the client. This fuller explanation should aid lawyer compliance and thus add to client protection.</p>
<p>Model Rule 1.8, cmt. [13]. See below.</p>	<p><u>[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.</u></p>	

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<p>Comment</p> <p>* * *</p> <p>Aggregate Settlements</p> <p>[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.</p>	<p>Comment</p> <p>* * *</p> <p>Aggregate Settlements</p> <p>[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.</p>	

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	<p>[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).</p>	

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<p>[No corresponding provision]</p>	<p>[4] The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.</p>	<p>Comment [4] is consistent with the Model Rule but expresses ideas that are not generally known. The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule itself does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[No corresponding provision]</p>	<p>[5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).</p>	<p>There is no Model Rule counterpart for proposed Comment [5]. The Commission added this Comment in response to public comment, with which the Commission agrees, to clarify that a court's record of client approval of the terms of a settlement is a "written" disclosure and consent, as the Rule requires.</p>

Rule 1.8.7 Aggregate Settlements

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

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 written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

COMMENT

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. [See Rule 1.4].

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule ~~to accept~~ before accepting an opposing party's aggregate settlement offer or ~~to make~~ before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also [Rule 1.0(e) (definition of informed consent)].

- [4] ~~This~~The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, ~~this Rule~~ does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.
- [5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).

Rule 3-310 Avoiding the Representation of Adverse Interests 1.8.7 Aggregate Settlements

(Comparison of the Current Proposed Rule to Current California Rule)

~~(A) For purposes of this rule:~~

- ~~(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;~~
- ~~(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;~~
- ~~(3) "Written" means any writing as defined in Evidence Code section 250.~~

~~(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

- ~~(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or~~
- ~~(2) The member knows or reasonably should know that:
 - ~~(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and~~
 - ~~(b) the previous relationship would substantially affect the member's representation; or~~~~

~~(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or~~

~~(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.~~

~~(C) A member shall not, without the informed written consent of each client:~~

- ~~(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~
- ~~(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or~~
- ~~(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~

~~(D) A member~~lawyer who represents two or more clients shall not ~~enter into~~participate in making an aggregate settlement of the claims of or against the clients ~~without the, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives~~ informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each client~~person in the settlement.~~

~~(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.~~

~~(F) A member shall not accept compensation for representing a client from one other than the client unless:~~

~~(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and~~

~~(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and~~

~~(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:~~

~~(a) such nondisclosure is otherwise authorized by law; or~~

~~(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.~~

~~Discussion:~~ COMMENT

~~Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in~~

~~different cases, unless representation of either client would be adversely affected.~~

~~Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)~~

~~Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.~~

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

~~Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by

the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

- [2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.
- [3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain *the informed written consent of each client* as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must

include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).

- [4] The aggregate settlement that is the ~~Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including concurrent representation~~ ~~topic of multiple~~ ~~this Rule is the agreement with the adverse parties in litigation.~~ The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a ~~single transaction or civil matter from participating in some other common enterprise or legal relationship.~~ ~~Examples~~ ~~making an aggregate settlement although the allocation of the latter include the formation of a partnership for several partners~~ ~~benefits~~ ~~or a corporation for several shareholders,~~ ~~the preparation~~ ~~burdens of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution.~~ ~~In such situations,~~ ~~settlement is delayed for subsequent agreement among the sake of convenience or economy~~ ~~lawyer's clients, so long as the parties may well prefer to employ a single counsel, but a member must disclose~~ ~~lawyer complies with the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written~~ disclosure and

consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients thereto pursuant to subparagraph (C)(1). Moreover, would receive or pay if the potential adversity should become actual settlement were accepted, and the member must obtain method by which expenses (including any expenses already paid by the further informed written consent lawyer and any expenses to be paid out of the clients pursuant to subparagraph (C) settlement proceeds)(2) would be apportioned among them.

[5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).

~~Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.~~

~~In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.~~

~~There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klomm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)~~

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.~~

~~Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court, operative September 14, 1992; operative March 3, 2003.)~~

Proposed Rule 1.8.7 Aggregate Settlements

Minority Dissent

This Rule requires “informed, written consent” to any aggregate settlement. The idea behind this Rule is noble, but its implementation in many instances will be very problematical; and if literally enforced, the Rule will preclude many settlements.

It must be common ground for all experienced civil litigators -- and probably in multi-person criminal cases as well -- that while ideally, settlements are arranged prior to trial call or its immediate time frame, in fact many settlements are made literally at the courthouse door. Not always are all of multiple clients -- especially multiple plaintiffs -- in immediate attendance. While it is an ideal concept that both the amount and the internal allocation (which is exempt from the Rule's requirement) of a settlement be discussed in detail with all clients in advance, the fact is that these last minute settlements do occur and often involve different terms from those recently discussed, and that in virtually all cases they satisfy the litigants. Experienced lawyers will have had thorough discussions with their clients about the range of possible settlements beforehand and will be acting with their clients' advance general authorization -- i.e., authorization which involves a range of options. But the facts of life are that there may be unanticipated last minute developments, both about the case itself and about a changing settlement picture, which frequently result in settlements. And those settlements will relate to just one of several options which the lawyer may have discussed with his/her clients: Is the lawyer to provide

multiple versions of the informed written consent, encompassing all authorized or desired options?

While it is surely the intent of the Rule that the “informed written consent” can be provided orally by the clients on the court record, this is not always possible. First, not all clients may be present in court. Second, the settlement may take place away from a court reporter and in circumstances which do not lend themselves to a full on-the-record report. Third, the “informed” part of the consent picture (a) requires disclosure of often privileged, confidential information which cannot and should not be spread on a record, and (b) would be of enormous benefit to the opposition by disclosing the weaknesses and evaluations of the parties' case, which could be greatly abused if for any reason the settlement failed. Indeed, upon hearing such a candid disclosure, the opposing party may have second thoughts and may try to scuttle the settlement: such things have happened before.

An “informed” written consent, in the experience of this minority, commonly requires numerous pages of written exposition, which should be carefully prepared and reviewed before signing. That is not something that can be done quickly; but settlements are often done in the twinkling of an eye.

We understand that it is the intent of this Rule that in class action settlements, only the named class

representatives must provide their informed written consent, though we do not see that in the Comments, where it should be stated.

Adoption of this Rule will surely have one of two serious negative consequences, perhaps both: Last minute

settlements, or settlements which require quick acceptance to “seize the moment,” will disappear; and the Rule will almost surely lead to non-compliance and violations. Neither is good for the profession or for the clients it serves.

Rule 1.8.7 Aggregate Settlements (Commission's Proposed Rule – Clean Version)

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 written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

COMMENT

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).

- [4] The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.
- [5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).

Rule 1.8.7: Aggregate Settlements

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2008 Ed.) by Steven Gillers and Roy D. Simon. The text relevant to proposed Rule 1.8 is highlighted)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary

to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship

existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar's investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer's advantage or the advantage of a third person” without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal

malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. **Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client’s consent be “in a writing signed by the client.”** Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)’s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization. any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the

lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer's professional liability insurance ceases to be in effect.”

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's

inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York's counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer’s partner, associate, paralegal, law clerk or other employee of the lawyer’s firm, a lawyer acting ‘of counsel’ in the lawyer’s firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client’s rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client's disadvantage only if the client's consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client's ability to pay.” Finally, Oregon's rule governing sexual relations with clients contains a detailed description of “sexual relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

Pennsylvania: Rule 1.8(g) does not require that client consent be “confirmed in writing.”

Texas: Rule 1.08(c) provides that prior to the conclusion of “all aspects of the matter giving rise to the lawyer's employment,” a lawyer shall not make or negotiate an

agreement “with a client, prospective client, or former client” giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information “for the advantage of the lawyer or of a third person or to the disadvantage of the client.” Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is “an employee” of the client “as long as the client is independently represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 1
Modify = 8
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice	M			<p>CACJ believes that the proposed rule fails to accommodate situations in which a settlement proposal is made by a prosecutor or by the court with an urgent time line for acceptance or rejection, during the course of a hearing, pretrial conference or at trial. In such circumstances, it will frequently be impossible or impractical to obtain the client's written informed consent.</p> <p>The proposed rule should be modified to permit, in criminal cases, the client's informed consent to an aggregate settlement be made "on the record" in court. While multiple representation in criminal cases is rare, it does occur and often finalization of a settlement is made in court, perhaps on the day of trial. In such circumstances, obtaining written consent would be difficult and time consuming. The purpose of the rule can be fulfilled by having the Court accept the consent on the record.</p> <p>CACJ requests that the first sentence of the proposed rule be modified to include the bold, italicized language below:</p> <p>"A lawyer who represents two or more clients</p>	<p>The Commission agrees. See RRC response to the Orange County comment, item 5 above. The Commission does not believe it is necessary to alter the Rule to accomplish the goal sought.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 1
Modify = 8
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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 please, unless each client gives informed written consent or verbally consents on the record. "	
2	California Commission on Access to Justice	M			Urges that this Rule be modified to permit attorneys to obtain clients' prior approval to an aggregate settlement with follow-up notification within a reasonable amount of time after the settlement is finalized.	It is correct that this Rule will prevent the resolution of some disputes and could as a result cause harm to some clients. The Commission has been troubled by this and discussed it at length. This risk also has troubled others, including the New Jersey Supreme Court. See <i>Tax Authority, Inc. v. Jackson Hewitt, Inc.</i> , 187 N.J. 4 (2006) in which the Court referred this issue to its Commission on Ethics Reform [N.J. has not subsequently changed its corresponding Rule]. The Commission concluded, consistent with the Model Rule and California's current Rule, that the predominate concern should be to assure that lawyers do not interfere with their clients' control over settlement. See <i>People v. Davis</i> , 48 Cal.2d 241, 256-57 (1957) [it amounts to taking a position adverse to the client, and therefore violates the duty of undivided loyalty, for an attorney to surrender any of the client's substantial rights without the client's "...free and intelligent consent after full knowledge of all the facts and circumstances...." citing <i>Anderson v. Eaton</i> , 211 Cal. 113, 116 (1930)]; because doing so violates the lawyer's duty of undivided loyalty to each client].

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 1
Modify = 8
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Chamberlain, Suzanne V.	M			Urges the Commission to consider the practicality of a written attorney disclosure as required by propose rule 1.8.7, and the difficulties that such would pose to settlement and to the attorney-client relationship. It is suggested that in connection with aggregated settlements, a lawyer be required to secure the informed written consent of each client to the settlement, but that such informed consent may be effectuated by way of the member's oral disclosure.	The Commission disagrees and did not make the requested change. See the response, below, to the comment from the L.A. County Bar.
4	COPRAC	A			Recommends specific language to clarify Comment [4].	The Commission agrees, and has adopted language suggested by COPRAC.
5	Legal Aid Assoc. of Cal.	D			Urges adoption of the Model Rule in lieu of the Commission's proposal because it believes the proposal likely will lead to fewer settlements in aggregate litigation.	See the RRC response to the comment of the California Commission on Access to Justice, item 3 above. In addition, although Model Rule 1.8(g) does not say when the lawyer must make disclosure to the clients and obtain their consent, Model Rule [13] makes it clear that this must be before the lawyer accepts the settlement. The Commission believes that most and perhaps all jurisdictions have read the Model Rule that way, and it therefore does not provide the flexibility the commenter apparently found in it.
6	Los Angeles County Bar Association, Professional Responsibility and Ethics	M			The proposed rule should recognize an exception for multi-party cases (such as multidistrict litigation) where there is active	The Commission disagrees and did not make the requested change. The Commission is unable to identify any predictable method for distinguishing

TOTAL = __ Agree = 1
 Disagree = 1
 Modify = 8
 NI = __

**Rule 1.8.7 Aggregate Settlements.
 [Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
	Committee				<p>judicial supervision of the settlement. In cases where there are hundreds (or perhaps thousands) of individual litigants, it is impracticable to seek written consent from each client. Where such settlements are crafted under active judicial supervision, the onerous written consent requirement is unnecessary, just as it is unnecessary in class action cases. This issue has been recognized by the American Law Institute in its recently approved Principles of Aggregate Litigation, Topic 3, "Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" (Proposed Final Draft at 264).</p> <p>An aggregate settlement may be reached when it is simply impossible to get the informed written consent of each client after full written disclosure in a timely manner. For example, the case may be called for trial, but a settlement reached at the last minute. Not all of the clients are present – some may be at work or unavailable due to conflicting obligations. The settlement is discussed by phone, and the clients agree to accept the settlement.</p>	<p>multi-party cases except for those that proceed as class actions. No distinguishing rule language was proposed, and the Commission is not aware of any such language in any other jurisdiction.</p> <p>The Commission was closely divided as to whether the informed written consent standard is appropriate here. See the minority statement in the Introduction and a separate minority statement that was filed.</p>

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

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Disagree = 1
Modify = 8
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	OCTC	M			OCTC criticizes Comment [4] without suggesting any correction except to say that the Rule should state the right of lawyers to assist clients in agreeing to the use of a third-party neutral to determine the allocation of an aggregate settlement.	The Commission disagrees and did not make the requested change. Comment [4] explains that the scope of the Rule includes only the settlement with adverse parties, not the allocation of the benefits or burdens of a settlement among jointly-represented clients. This explanation of the limits of the Rule is the proper subject of a Comment. See the COPRAC comment, item 1 above, and the RRC response.
8	Orange County Bar Association	M			Commission should consider whether a separate exception should be delineated in the Comment for oral settlements on the record that include full disclosure of the terms. OCBA proposed specific Comment language for this purpose.	The Commission agrees and has added new Comment [5].
9	San Diego County Bar Association Legal Ethics Committee	M		Rule	<p>The second sentence of the Rule states: “The lawyer’s disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”</p> <p>SDCBA criticizes “among other things” as being vague and not specifically defining exactly what must be covered in a disclosure. It then recommends says that the entire sentence is unnecessary and likely to cause confusion and should be removed.</p> <p>It points out the need for a conforming change to Comment [3] if the second sentence is removed.</p>	The Commission disagrees and did not make the requested change. The phrase “among other things” is an addition to the Model Rule language that does not change its meaning and is intended only to emphasize, as is true of the Model Rule, that information described in the sentence is not intended to be exclusive. On the broader point, removing the sentence would not alter the lawyer’s ability to make a disclosure sufficient to obtain “informed written consent”, but doing so would leave the lawyer without any guidance as to what needs to be disclosed to obtain “informed written consent”. Including the Model Rule sentence does provide some guidance.

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 1
Modify = 8
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
10	Santa Clara County Bar Association	M			<p>SCCBA supports the changes to this rule, in particular, the change to add “written” to the informed consent requirement. However, the SCCBA recommends that an exception be made for public agencies. This rule should not apply to public agencies that are required by law to defend and indemnify their officers and employees for claims or actions arising out of acts or omission occurring within the scope of their employment with the public agency.</p> <p>Requiring the public agency to obtain the written consent of named officers and employees but who have not participated in the litigation could unnecessarily complicate the settlement of these cases and, in some cases, the public agency may not have current contact information for the named employee.</p>	<p>The Commission disagrees and did not make the requested change. This interesting suggestion regarding public agencies is novel so far as the Commission is aware and raises two threshold issues: (i) the Commission is not aware that any such problem has arisen with public agencies that requires that they be treated differently than are other employers who indemnify their employees; and (ii) any such special rule might suggest that lawyers in this situation don’t owe the same set of duties to employees of public agencies that lawyers owe to other clients.</p>