

Rule 1.8.7 [3-310] Aggregate Settlements
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

A lawyer who represents two or more clients shall not enter into 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.* This Rule does not apply to class action settlements subject to court approval.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.7
(Current Rule 3-310 (D))
Aggregate Settlements**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310(D) (Avoiding the Representation of Adverse Interest) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the American Bar Association (“ABA”) counterpart, Model Rule 1.8) (Conflict of Interest Current Clients: Specific Rules), paragraph (g). The result of the Commission’s evaluation is proposed rule 1.8.7 (Aggregate Settlements). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 1.8.7 retains the substance of current rule 3-310(D) while expanding the public protection of the current rule. Current rule 3-310 (D) prohibits a lawyer who represents two or more clients from entering into an aggregate settlement of the claims of or against the clients without the informed written consent of each client. The current rule does not refer to criminal matters. The Commission believes this omission creates an ambiguity as to the applicability of the rule in criminal matters. To address this concern, the Commission is recommending the addition of the following language: “in a criminal case an aggregate agreement as to guilty or nolo contendere pleas.” The rationale for the expanded language is to ensure that joint clients in criminal, as well as civil matters, are entitled to receive full disclosure from their lawyer and should be empowered to give or decline to give consent to an aggregate settlement.

Lastly, the Discussion section of current rule 3-310 (D) states that the rule “is not intended to apply to class action settlements subject to court approval.” Proposed rule 1.8.7 incorporates this language into the body of the rule.

Rule 1.8.7 [3-310(D)] ~~Avoiding the Representation of Adverse Interests~~ Aggregate Settlements

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

~~(D)~~ A ~~member~~lawyer who represents two or more clients shall not enter into 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* ~~of each client.~~

Discussion

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