

AGGREGATE SETTLEMENTS AND ATTORNEY LIABILITY: THE EVOLVING LANDSCAPE

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I. INTRODUCTION

Over the past several decades, attorneys involved in mass tort settlements, especially those representing the plaintiffs, have faced an increasing number of large-dollar liability claims centered on the aggregate settlement rule; that is, the state equivalents to Rule 1.8(g) of the *ABA Model Rules of Professional Conduct* (“*Model Rules*”).¹

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I serve as a consultant to law firms that handle group settlements, and was a consultant in some of the cases referenced in this Article. I co-authored a pro bono Amicus Brief (1998 WL 35336105), Supplemental Amicus Brief (1999 WL 35047216), and Supplemental Letter Brief (1999 WL 35047216) in support of David Burrow (all with Charles Silver) in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

1. For the text of Rule 1.8(g) of the *Model Rules*, see *infra* note 7 and accompanying text. The vast bulk of cases involving such liability claims, with opinions or orders available on Westlaw, have arisen since 2004. *See, e.g.*, *Britton v. Girardi*, 185 Cal. Rptr. 3d 509, 511, 513 (Ct. App. 2015) (breach of fiduciary duty claims, inter alia, filed by clients against their attorneys in connection with alleged aggregate settlement “in excess of \$100 million” of claims of ninety-three insureds against State Farm Insurance Co. arising out of the 1994 Northridge earthquake); *Prakashpalan v. Engstrom, Lipscomb & Lack*, 167 Cal. Rptr. 3d 832, 841 (Ct. App. 2014) (same); *Abbott v. Chesley*, 413 S.W.3d 589, 596-97 (Ky. 2013) (breach of fiduciary duty claims brought by clients against their attorneys in connection with alleged aggregate settlement of 431 Fen-Phen claims against American Home Products for \$200 million); *Fleming v. Curry*, 412 S.W.3d 723, 729 (Tex. App. 2013) (breach of fiduciary duty claims, inter alia, brought by more than 600 former clients against attorneys in connection with alleged aggregate settlement of Fen-Phen claims of “8,051 clients for an aggregate amount of \$339 million”); *Waggoner v. Williamson*, 8 So. 3d 147, 149-51 (Miss. 2009) (breach of fiduciary duty claims, inter alia, brought by clients against their attorney in connection with \$73.5 million alleged aggregate settlement of forty-five clients’ Fen-Phen claims against American Home Products); *Middleton v. Arledge*, Nos. 3:06-cv-303, 3:07-cv-350, 2008 WL 906525, at *1-4 (S.D.

During this period, courts have held that fee forfeiture, potentially totaling millions of dollars, is an appropriate remedy for violations of the aggregate settlement rule (“the Rule”), even in the absence of any demonstrated economic harm to the client.² At the same time, courts and other authoritative bodies have expressed a variety of often conflicting views regarding the obligations that the Rule imposes on attorneys and

Miss. Mar. 31, 2008) (motion seeking certification of a class of 6200 individuals who had settled Fen-Phen claims against American Home Products as part of two alleged aggregate settlements totaling \$784 million, and who alleged their attorneys breached their fiduciary duties in connection with the settlements); *Authorlee v. Tuboscope Vetco Int’l, Inc.*, 274 S.W.3d 111, 113, 116 (Tex. App. 2008) (breach of fiduciary duty claims, inter alia, brought by former clients against a law firm in connection with \$45 million alleged aggregate settlement of approximately 179 individuals’ occupational exposure silicosis claims against AMF Tuboscope); *Huber v. Taylor*, 519 F.2d 542 (W.D. Pa. 2007) (breach of fiduciary duty claims brought by clients against their attorneys in connection with eleven alleged aggregate settlements with various asbestos defendants totaling some \$400 million); *Huber v. Taylor*, 469 F.3d 67, 72, 82 (3d Cir. 2006) (same); *Jacobs v. Tapscott*, No. 3:04-CV-1968-D, 2006 WL 2728827, at *1, *7 (N.D. Tex. Sept. 25, 2006) (breach of fiduciary duty claims, inter alia, brought by clients against attorney in connection with alleged aggregate settlement of asbestos claims); *Williamson v. Edmonds*, 880 So. 2d 310, 314, 320 (Miss. 2004) (breach of fiduciary duty claims, inter alia, brought by clients against their attorney in connection with \$73.5 million alleged aggregate settlement of forty-five clients’ Fen-Phen claims against American Home Products); *see also* cases discussed *infra*, Part II.

The pre-2004 cases include: *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 866-67 (Tex. App. 2000) (breach of fiduciary duty claims, inter alia, brought by clients against law firm in connection with \$170 million alleged aggregate settlement of property damage claims of more than 30,000 parties against two manufacturers of defective polybutylene pipes used in plumbing systems); *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999) (breach of fiduciary duty claims brought by former clients against five law firms in connection with \$190 million alleged aggregate settlement of wrongful death and personal injury lawsuits of some 126 plaintiffs in connection with explosions at a Phillips 66 chemical plant in 1989); and *Scrivner v. Hobson*, 854 S.W.2d 148, 149 (Tex. App. 1993) (breach of fiduciary duty claims, inter alia, brought by clients against attorney who represented them and 100 other families in connection with alleged aggregate settlement of toxic waste claims against various corporations).

2. *See, e.g.*, *Hendry v. Pelland*, 73 F.3d 397, 399 (D.C. Cir. 1996) (“[C]lients seeking disgorgement of legal fees for a breach of their attorney’s fiduciary duty of loyalty need only prove that their attorney breached that duty, not that the breach injured them . . .”); *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917, 920 (2d Cir. 1950) (“Certainly by the beginning of the Seventeenth Century it had become a common-place that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either, no matter how successful his labors.” (footnotes omitted)); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 213 (Minn. 1984) (holding that no causation or damage need be proved when seeking fee forfeiture because “[t]he injury lies in the client’s justifiable perception that he or she has or may have received less than the honest advice and zealous performance to which a client is entitled”); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 843 N.Y.S.2d 749, 762 (Sup. Ct. 2007) (holding that fee “forfeiture will be ordered notwithstanding that ‘the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent’” (citation omitted)); *Arce v. Burrow*, 958 S.W.2d 239, 249 (Tex. App. 1997) (holding that “fee forfeiture exists in Texas in the context of the attorney-client relationship, and that all the client need prove is a breach of fiduciary duty by the attorney”); *Eriks v. Denver*, 824 P.2d 1207, 1213 (Wash. 1992) (“The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.”).

when the Rule applies, resulting in much uncertainty and little guidance for attorneys.³

This Article offers both positive and normative clarification. It provides a thick description of the current interpretations of the aggregate settlement rule in order to identify the specific areas of authorities' disagreement. It goes on to offer a normative theory of the Rule and its purpose, which could usefully mitigate the current interpretive confusion regarding which settlements are "aggregate settlements" and what client disclosures are mandated by the Rule.

Part II begins with a brief examination of the text of the Rule and its literal requirements. Part III describes the current confusion about the Rule among courts and lawyers by presenting a detailed case study of the malpractice and breach of fiduciary duty lawsuits centered on the Rule, which were filed in various state and federal courts against one plaintiffs' attorney in connection with a \$75 million mass tort settlement in 2002, and many of which are still ongoing in 2016. Part IV builds on the confusion portrayed in the case study by exploring three major developments in the interpretation of the Rule on the core issues of what an "aggregate settlement" is, and what client disclosures are mandated by the Rule: (1) the 1997 decision of the Texas Court of Appeals in *Arce v. Burrow*;⁴ (2) the 2006 *Formal Ethics Opinion 06-438* issued by the ABA ("ABA *Opinion*");⁵ and, (3) the 2010 publication by the American Law Institute ("ALI") of *Principles of the Law: Aggregate Litigation* ("*Principles*").⁶ Part V offers a normative theory of the Rule, with the aim of clearing up much of the current confusion among courts, policy-makers, and attorneys, and thereby also making more predictable the professional liability to which the Rule increasingly gives rise.

II. THE AGGREGATE SETTLEMENT RULE AND ITS REQUIREMENTS

The aggregate settlement rule is Rule 1.8(g) of the *Model Rules*, and it states:

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

3. See, e.g., *Authorlee*, 274 S.W.3d at 120-21 (holding that the "trial court erred in concluding that the settlements here were aggregate settlements"); *id.* at 129 (Keyes, J., dissenting) ("I cannot agree with the majority's factual conclusion that the agreed judgment is not an aggregate settlement and that the individual plaintiffs' claims were not settled as part of an aggregate settlement . . ."); *infra* Parts II-III.

4. 958 S.W.2d 239 (Tex. App. 1997).

5. See generally ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op.* 06-438 (2006).

6. See generally PRINCIPLES OF THE LAW: AGGREGATE LITIGATION (AM. LAW INST. 2010).

signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.⁷

Every state has adopted a version of the Rule, either as written or with only minor alterations.⁸ The ABA version of the Rule has been essentially unchanged since its adoption as part of the *Model Rules* in 1983.⁹ Rule 1.8(g) of the *Model Rules* "carries forward Disciplinary

7. MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2013). The excerpt omits those portions of the rule relevant to criminal cases, which are not the focus of this Article.

8. Every state has adopted Rule 1.8(g) of the *Model Rules*, the nearly identical Disciplinary Rule ("DR") 5-106 of the *Model Code of Professional Responsibility*, or a similar rule. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1781 (2005). A few states have adopted Rule 1.8 with slight variations. Two states provide in the text of the Rule that it does not apply in class actions. See LOUISIANA RULES OF PROF'L CONDUCT r. 1.8(g) (LA. SUPREME COURT 2015) ("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, or a court approves a settlement in a certified class action."); NORTH DAKOTA RULES OF PROF'L CONDUCT r. 1.8(g) (N.D. SUPREME COURT 2009) ("A lawyer who represents two or more clients, other than in class actions, shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless, after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement, each client consents."). Two states provide an exception in the text of the Rule for court-approved settlements more generally. See NEW YORK RULES OF PROF'L CONDUCT r. 1.8(g) (N.Y. STATE BAR ASS'N 2009) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client."); OHIO RULES OF PROF'L CONDUCT r. 1.8(g) (OHIO SUPREME COURT 2007) ("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 the settlement or agreement is subject to court approval or each client gives *informed consent*, in a *writing* signed by the client."). For a useful discussion of state variations on Rule 1.8(g) involving court-approved settlements, see Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233, 3266-69 (2013).

In addition, several states omit the requirement in the ABA version of the Rule that each client's consent be "in a writing signed by the client." See, e.g., MICHIGAN RULES OF PROF'L CONDUCT r. 1.8(g) (MICH. SUPREME COURT 2015); PENNSYLVANIA RULES OF PROF'L CONDUCT r. 1.8(g) (PA. SUPREME COURT 2015); TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.08(f) (STATE BAR OF TEX. 2014).

9. The only change to the text of Rule 1.8(g) since 1983 was the addition of the written consent requirement as part of the broader 2002 amendments to the ethics rules, as proposed by the ABA Ethics 2000 Commission. See STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 238 (2015). At the same time, the ABA added to Rule 1.8 a new Comment [13], titled "Aggregate Settlements," which states, in relevant part:

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

Rule (DR) 5-106 of the Model Code of Professional Responsibility [“*Model Code*”] ‘almost verbatim.’”¹⁰ Thus, from the adoption of the ABA *Model Code* in 1969¹¹ through the present, the Rule has existed in essentially the same form.

In the plain language of its text, the Rule imposes two requirements on attorneys representing multiple clients in connection with a proposed aggregate settlement: (1) the attorney must provide each client covered by the proposed settlement certain information regarding the terms of the settlement, including the settlement offers to be made to each of the covered clients; and, (2) the attorney must obtain the informed consent of a covered client in order for that client’s claims to be settled.

Over the past twenty years, much of the discussion and controversy surrounding the Rule has been in the context of mass tort settlements. Mass tort cases often involve personal injury claims and are only infrequently brought as class actions.¹² Rather, each claimant retains a

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).

ABA CTR. FOR PROF’L RESPONSIBILITY, ETHICS 2000 COMMISSION REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.8 (2001), http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18.html.

10. Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 734 (1997) (quoting 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.8:801, at 227 (2d ed. supp. 1997)). Rule 1.8(g) differs from DR 5-106 in that only the latter includes “the total amount of the settlement” among the disclosures to be made by the lawyer to her clients covered by the aggregate settlement. Compare MODEL CODE OF PROF’L RESP. DR 5-106 (AM. BAR ASS’N 1981), with MODEL RULES OF PROF’L CONDUCT r. 1.8(g) (AM. BAR ASS’N 2013). See also Silver & Baker, *supra*, at 734 n.4.

11. GILLERS ET AL., *supra* note 9, at 617-18 (discussing evolution of the ABA ethics rules from 1908 through 1983); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 8-10 (10th ed. 2015) (same).

12. For a discussion of the difference between a mass action and a class action, see Silver & Baker, *supra* note 10, at 739-43. Professor John Coffee has observed:

At the beginning of [the 1980s], the mass tort class action was uniformly rejected by appellate courts. By the end of the decade, it was at least provisionally embraced by many.

Some of the reasons for the initial judicial skepticism of the mass tort class action were obvious. First, the Advisory Committee that drafted Rule 23 of the Federal Rules of Civil Procedure had suggested that a “mass accident” . . . is ordinarily not appropriate for a class action” because of the presence in such cases of significant issues (including causation and possible defenses) that would impact upon the individual class members differently. Individual issues and defenses, it was felt, would likely overwhelm the common questions, and eventually disaggregation would become inevitable. Judicial decisions following the 1966 revisions of Rule 23 were quick to take this hint to decline class certification in mass tort cases.

Even when trial courts did certify a mass tort case, they were usually reversed.

John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356-57 (1995) (footnotes omitted).

lawyer of her choosing, usually on a contingent fee basis, in order to seek a recovery from the defendant(s). A law firm with experience in mass tort litigation may end up representing hundreds or thousands of individuals who claim they were injured by the same product¹³ or in the same event.¹⁴ Often, these individual cases will be consolidated for discovery purposes under the jurisdiction of a single federal district court pursuant to the Multi-District Litigation (“MDL”) statute.¹⁵

A handful of cases in a particular mass tort may go to trial, but the overwhelming majority will ultimately be settled while the cases are under the jurisdiction of the MDL court.¹⁶ In order to settle the hundreds

13. Common examples are asbestos and pharmaceuticals. *See, e.g.*, *Madeksho v. Abraham, Watkins, Nichols & Friend*, 57 S.W.3d 448, 450-51 (Tex. App. 2001) (regarding a referral fee dispute between plaintiffs’ attorneys in connection with settlement involving “about two hundred asbestos claimants”); *Middleton v. Arledge*, Nos. 3:06-cv-303, 3:07-cv-350, 2008 WL 906525, at *1-4 (S.D. Miss. Mar. 31, 2008) (motion seeking certification of a class of 6200 individuals who had settled Fen-Phen claims against American Home Products as part of two alleged aggregate settlements totaling \$784 million, and who alleged their attorneys breached their fiduciary duties in connection with the settlements); *see also supra* note 1.

14. Examples include plant explosions and toxic waste. *See, e.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999) (lawsuit against five plaintiffs’ attorneys who together represented 126 plaintiffs in wrongful death and personal injury lawsuits related to explosions at a Phillips 66 chemical plant in 1989); *Scrivner v. Hobson*, 854 S.W.2d 148, 149 (Tex. App. 1993) (breach of fiduciary duty claims, inter alia, brought by clients against an attorney who represented approximately 100 families in connection with alleged improper aggregate settlement of toxic waste claims against various corporations).

15. 28 U.S.C. § 1407(a) (2012) states:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated

For useful discussions of the MDL process, see generally Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329 (2014); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001); John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

16. A well-known example is the Vioxx litigation that was largely resolved through a \$4.85 billion nationwide settlement in 2009. Lynn A. Baker, *Alienability of Mass Tort Claims*, 63 DEPAUL L. REV. 265, 272 n.17 (2014). As I have previously noted, “more than 47,000 claimants had filed cases and were potentially eligible to participate in the settlement, but only 16 cases involving 17

or thousands of claims against a defendant, its counsel may begin by negotiating with those plaintiffs' lawyers whose firms each represent a large number of claimants. Defense counsel will often seek to reach a settlement with each such firm for its entire "inventory" of cases. In negotiating such group settlements, defense counsel may seek to arrive at a total dollar amount for which the plaintiffs' firm is willing to settle all of its clients' claims. The allocation of the total settlement fund among that firm's claimants is frequently left to the plaintiffs' counsel, with defense counsel often explicitly declining to play any role in that allocation process.

It is important to note that such a settlement agreement does not itself settle any claimant's case. It is simply an agreement between the plaintiffs' firm and the defendant for settlement offers to be made to the firm's clients, which total no more than the specified dollar amount. The settlement agreement will often contain a "walk-away" provision, under which the defendant will have a unilateral option to terminate the settlement agreement and to settle none of the claims covered by the agreement unless a specified percentage of covered claimants accept their settlement offers under the terms of the agreement.¹⁷

In the mass tort context, two core questions arise with regard to the aggregate settlement rule: (1) When is a settlement an "aggregate settlement" covered by the Rule, rather than simply a group settlement (to which the Rule may not apply)? And, (2) what disclosures must be made by the plaintiffs' attorney to the clients potentially eligible to participate in the aggregate settlement?

The answers to both questions clearly matter to the plaintiffs' lawyers undertaking such settlements if they are to handle them properly under the Rule and avoid breach of fiduciary duty claims or disciplinary sanctions or both.¹⁸ The answers also should matter to defense counsel, however, insofar as a settlement that is determined to be improper under

claimants were tried." *Id.* at 272. Elizabeth Chamblee Burch has observed, "[w]hile multidistrict litigation is ostensibly for pretrial purposes only . . . transferee judges have remanded a scant 2.9% of cases to their original districts [for trial or other resolution]." Burch, *supra* note 15, at 73.

For discussions of the processes by which the MDL judge may select "bellwether" cases for trial, see generally Loren H. Brown et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663 (2014); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

17. See, e.g., Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto, Dated as of November 9, 2007, at 41-43, <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf> (discussing conditions under which defendant Merck could exercise its "walk-away" rights).

18. See *infra* Parts III-IV.

the Rule could result in a finding that defense counsel violated the relevant state equivalent of Rule 8.4(a) of the *Model Rules*, which states: “It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”¹⁹

Currently, however, there is much confusion among courts and other authorities, and therefore, also among attorneys, regarding the answers to these two questions.²⁰ To illustrate both the nature of this confusion and its significant implications for plaintiffs’ attorneys, the next Part discusses the lawsuits which were filed in various state and federal courts against one plaintiffs’ attorney in connection with a \$75 million mass tort settlement in 2002, several of which are still ongoing more than a decade later.

III. A CASE STUDY

In 2002, Missouri plaintiffs’ attorney Grant Davis negotiated a \$75 million settlement agreement (“Settlement Agreement”),²¹ which sought to resolve the claims of approximately 240 cancer patients who he represented against drug manufacturers Eli Lilly and Bristol-Meyers Squibb.²² The cancer patients sued the drug companies for negligence involving pharmacist Robert Courtney’s admitted dilution of chemotherapy drugs, alleging that the drug companies had knowledge of Courtney’s dilution and had breached a duty to prevent it.²³

The Settlement Agreement that Davis negotiated with the drug companies was seemingly crafted with care. The Missouri trial judge, the Honorable Lee E. Wells, explained that “[a]fter the proposal of the pharmaceutical companies was advanced, counsel for the parties sought the Court’s involvement in devising an appropriate methodology for the settlement proposal.”²⁴ And, the Kansas Supreme Court described the result of this collaboration as follows:

[A] settlement agreement was reached in which all plaintiffs who had filed a lawsuit against the companies were eligible to “opt in.” Under the agreement, titled “Global Settlement,” the defendants would establish a settlement fund of not less than a specified amount and not

19. MODEL RULES OF PROFESSIONAL CONDUCT r. 8.4(a) (AM. BAR ASS’N 2013).

20. There is also disagreement among various authorities regarding the answers to these two questions, as discussed further below in Part IV.

21. *Booth v. Davis*, 57 F. Supp. 3d 1319, 1320 (D. Kan. 2014).

22. *Id.*; *Tilzer v. Davis, Bethune & Jones LLC*, 204 P.3d 617, 620 (Kan. 2009).

23. *Booth*, 57 F. Supp. 3d at 1320; *Tilzer*, 204 P.3d at 620.

24. Appellants’ Brief on Unsealing the Record at 4, *G.H. v. Eli Lilly & Co.*, 412 S.W.3d 326 (Mo. Ct. App. 2013) (No. WD75942).

more than a specified amount, with the exact amount to be determined through binding arbitration.

The Missouri trial judge, Judge Lee Wells, appointed two special masters. One was a former circuit court judge and the other was a former Missouri Court of Appeals judge. Judge Wells worked with the special masters to develop a system for evaluating the individual claims . . . Essentially, the special masters would apply uniform standards to each claimant who had opted in to the settlement and would determine the amount of money each claimant would receive from the settlement fund.²⁵

Within a few months after the Settlement Agreement was executed, all of the covered claimants had signed a Release and had agreed to settle their claims under the terms of the Settlement Agreement.²⁶ Throughout the settlement process, Judge Wells entered various orders approving and implementing the settlement.²⁷ On May 29, 2003, the “[trial] court approved individual dollar allocations, ordering that the awards entered on behalf and in [favor] of plaintiffs . . . are equitable and appropriate, and those monies should be distributed accordingly.”²⁸

Toward the end of 2003, one of the claimants who had voluntarily opted into the settlement, the surviving family of deceased cancer patient Rita Tilzer (“the Tilzers”), refused to go forward with the settlement.²⁹ The defendant pharmaceutical companies filed a motion with the Missouri trial court to enforce the Settlement Agreement against the Tilzers.³⁰ Two days later, Davis filed a motion to enforce an attorney’s lien in the case.³¹

The Tilzers argued, in opposition to the motion to enforce the Settlement Agreement, that it was “illegal and unethical on its face” and that it violated the Missouri aggregate settlement rule.³² Shortly thereafter, the Tilzers filed a counterclaim against Davis’s motion to enforce an attorney’s lien, alleging breach of fiduciary duty, professional negligence, and breach of contract in connection with the Settlement Agreement.³³ The core of the Tilzers’ claim, as in their opposition to the

25. *Tilzer*, 204 P.3d at 620.

26. Appellants’ Brief on Unsealing the Record, *supra* note 24, at 4.

27. *Id.* at 6.

28. *Id.*

29. As reported by the Kansas Supreme Court: “[The] Tilzers opted in to the settlement agreement and completed the applicable claim form. . . . The special masters established the dollar amount to be awarded to [the] Tilzers, and Judge Wells [of the Missouri trial court] approved that award, despite [the] Tilzers’ objection.” *Tilzer*, 204 P.3d at 620.

30. *Id.*

31. *Id.*

32. *Id.* at 620, 627-28.

33. *Id.* at 620. The Tilzers also asserted the same claims in a separate action filed in the U.S.

motion to enforce the settlement, was that the Settlement Agreement that Davis negotiated, and which Judge Wells had helped craft and had approved, violated the Missouri aggregate settlement rule.³⁴

In its order of January 14, 2004, the Missouri trial court (Judge Wells) granted Davis's motion on the attorney's lien and

memorialized its order granting enforcement of the settlement agreement. Judge Wells specifically found that the Global Settlement was not an aggregate settlement within the meaning of [Missouri's aggregate settlement rule], because of the methodology developed by the court and special masters.³⁵

In his order, Judge Wells specifically held:

The law firms did not settle the plaintiffs' claims on an aggregate basis or otherwise. Rather, the law firms negotiated a proposed settlement in which plaintiffs could either elect to participate or else continue to pursue their own lawsuit. Plaintiffs were under no obligation to choose this settlement method to resolve their case. They could have continued litigating their case and proceeded to trial, but they elected not to do so. If plaintiffs had elected to continue litigating their case, that decision would not have affected the other parties to the settlement. Rule 4-1.8(g)[, Missouri's aggregate settlement rule,] therefore does not apply.³⁶

Judge Wells also found "no credible evidence of any misconduct by Davis."³⁷

The Tilzers did not appeal the Missouri trial court's rulings. Instead, three weeks later, they filed a legal malpractice claim in a Kansas court (the District Court of Johnson County), making essentially the same claims against Davis and his firm that they had presented unsuccessfully in the Missouri case.³⁸ Notwithstanding the Missouri trial court's finding that the settlement was not an "aggregate settlement," in the Kansas case, the Tilzers "specifically alleged that the Missouri settlement agreement was effectively an aggregate settlement and that Davis had failed to comply with the disclosure requirements of

District Court for the District of Kansas prior to January 2, 2004, but that action was dismissed for lack of complete diversity. *Id.* at 620-21.

34. *Id.* at 620, 625.

35. *Id.* at 621.

36. Memorandum in Support of Motion of Defendants Grant L. Davis & Davis, Bethune & Jones, LLC for Summary Judgment at 13, *Tilzer v. Davis, Bethune & Jones, LLC*, No. 04 CV 03239, 2007 WL 6782308 (Kan. Dist. Ct. Oct. 18, 2007) (quoting the Jan. 14, 2004, order from the Circuit Court of Jackson County, Missouri).

37. *Tilzer*, 204 P.3d at 621.

38. *Id.*

[Missouri's aggregate settlement rule]."³⁹ Although the Johnson County court held that the "Tilzers were collaterally estopped from relitigating the aggregate settlement question,"⁴⁰ it nonetheless went on to note, in denying the Tilzers' motion for partial summary judgment, that because "the amount that each of [Davis's and his firm's] clients would receive . . . was not and could not have been known by the lawyers prior to the announcement to all of the opted in claimants[,] . . . this could not be an aggregate settlement contemplated by the rules of professional conduct."⁴¹

The Tilzers appealed the summary judgment rulings to the Kansas Supreme Court, which overturned the Kansas district court's holdings on the aggregate settlement issues. The Kansas Supreme Court reasoned as follows:

Under the ALI definition, the Global Settlement had both characteristics of interdependency which define an aggregate settlement. There was collective conditionality because the pharmaceutical companies were granted the right to opt out of the settlement if fewer than all of the covered plaintiffs accepted the proposed settlement. Although Judge Wells attempted to circumvent the conditional allocation characteristic by appointing special masters to individually assess each claim, the Global Settlement contained a maximum amount that the defendants would pay into the settlement fund and provided for an across-the-board minimum payment to all opt-in claimants. In other words, each claimant did not receive individualized, fact-specific damages, but rather each claimant received an individualized, fact-specific allocation of a proportion of the capped settlement fund, subject to a minimum award for every participant.

Likewise, the Global Settlement runs afoul of the ABA guidelines. A particular amount of damages was not negotiated on behalf of each individual plaintiff. Rather, a percentage of the total settlement fund was established for each individual plaintiff. Thus, the amount awarded to one plaintiff directly affected the amount of the other plaintiffs' awards. More importantly, each plaintiff was not free to accept or reject the special masters' proffered award, as poignantly illustrated by Judge Wells' order forcing [the] Tilzers to accept their calculated share of the pot.

Therefore, notwithstanding the concerted effort of Judge Wells and the special masters to devise a mechanism to avoid labeling the Global Settlement as an aggregate settlement, the defining characteristic of

39. *Id.*

40. *Id.*

41. *Id.* at 621-22.

interdependency remained intact. The terms of the Global Settlement contained all of the important features of an aggregate settlement.

The Kansas district court was seduced by Judge Wells' opinion that the Global Settlement could not be an aggregate settlement because the information that Rule 4-1.8(g) required to be disclosed to obtain an informed consent was not available to Davis. However, that dearth of information was the direct result of the interdependent characteristics of the Global Settlement, *i.e.*, the information could not be ascertained because the arrangement was an aggregate settlement. Rather than establishing a non-aggregate settlement, the unavailability of the information required to be disclosed by Rule 4-1.8(g) simply corroborated that it was an aggregate settlement and rendered it impossible for Davis to obtain an informed consent under the rule. The district court's ruling to the contrary was erroneous.⁴²

The Kansas state court case was remanded for further proceedings,⁴³ and a decision has not been rendered as of January 18, 2016.

Shortly after the Kansas Supreme Court handed down its 2009 decision, the same attorneys who sued Davis on behalf of the Tilzers in the Missouri and Kansas state courts filed a similar, aggregate-settlement-based, legal malpractice suit against Grant Davis in federal district court in Kansas on behalf of the surviving family of deceased cancer patient Connie Booth.⁴⁴ As of October 2014, six additional former clients had joined the Booth family's federal court malpractice lawsuit against Davis, in which the court stated: "It is agreed that the state law of Missouri must be applied."⁴⁵ A portion of that case was ongoing as of January 18, 2016.⁴⁶

In a final, related proceeding, twenty clients who settled their claims against the defendant drug companies under the 2002 Settlement

42. *Id.* at 628-29.

43. *Id.* at 630.

44. Booth v. Davis, No. 10-CV-4010, 2010 WL 4160116, at *1-3 (D. Kan. Aug. 31, 2010); Tilzer, 204 P.3d at 619 (listing the attorneys for both sides).

45. Booth v. Davis, 57 F. Supp. 3d 1319, 1320 (D. Kan. 2014). As noted in the case caption, the six parties that joined the Booth family in their claims against Grant Davis are Kimberly Carrell, Virgil Wille, Prudence Kirkegaard, the Boehmer family, the Waldon family, and the Schmitz family. *Id.*; see also Wille v. Davis, No. 11-4121, 2015 WL 3822762, at *1 (D. Kan. June 19, 2015) ("Currently, there are six other cases assigned to this court with similar claims against defendant.").

46. Virgil Wille's case against Grant Davis was dismissed on summary judgment on June 19, 2015, as having been untimely filed. See Wille, 2015 WL 3822762, at *1, *7. An appeal to the U.S. Court of Appeals for the Tenth Circuit was filed in that case on July 21, 2015. See *id.* On August 20, 2015, the Waldon family's case was also dismissed on summary judgment as having been untimely filed. See Waldon v. Davis, No. 11-4060, 2015 WL 5006151, *1 (D. Kan. Aug. 20, 2015) (noting that the "court's reasoning follows and shall track the format and text of the Wille order in substantial part"). An appeal to the U.S. Court of Appeals for the Tenth Circuit was filed in that case on September 1, 2015. *Id.*

Agreement filed with the Jackson County, Missouri court in 2012 a “Motion to Reopen Case, Void the Settlement and Releases, and Vacate Orders Affirming Awards of Special Master” (“Motion”).⁴⁷ En route to affirming the lower court’s decision to deny the Motion, the Missouri Court of Appeals devoted substantial space to a critique of the Kansas Supreme Court’s ruling on the aggregate settlement issues:

Rule 4–1.8(g) states that “[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 . . . and of the participation of each person in the settlement.” We recognize that the Kansas Supreme Court in a malpractice action against one of the attorneys involved with the settlement in this case found that “the unavailability of the information required to [be] disclosed by Rule 4–1.8(g) simply corroborated that [the settlement agreement in this case] was an aggregate settlement and rendered it impossible for [the attorney] to obtain [his client’s] informed consent under [Rule 4–1.8(g)].” . . . We question, however, how an attorney can violate Rule 4–1.8(g) when he or she discloses all aspects of the settlement that were known at the time that the clients agreed to participate in the settlement. Indeed, an attorney is obligated to “abide by a client’s decision whether to accept an offer of settlement of a matter.” . . . In this case, the attorneys would have had to convey the settlement offer to their clients but then basically would have had to tell their clients: “Although you may be interested in taking advantage of the settlement offer, you can’t because I don’t know the exact amount all my clients may receive under the settlement agreement.” If the client demanded that the attorney accept the settlement agreement and the attorney refused, then the attorney would violate Rule 4–1.2(a). Surely, Rule 4–1.8(g) is meant to protect clients from situations when an attorney, who represents two or more clients in an aggregate settlement, fails to disclose information *known* to him or her about the existence and nature of all the claims and of the participation of his clients in the settlement. Moreover, aggregate settlements are permitted under Missouri law. Indeed, even Rule 4–1.8(g) does not prohibit aggregate settlements. Rule 4–1.8(g) merely is an ethical rule prohibiting an attorney, who represents two or more clients, from participating in the making of an aggregate settlement of the clients’ claims unless each client gives informed consent.⁴⁸

47. *G.H. v. Eli Lilly & Co.*, 412 S.W.3d 326, 327 n.1, 328 (Mo. Ct. App. 2013).

48. *Id.* at 329 n.4. (citations omitted) (quoting *Tilzer*, 204 P.3d at 629).

Whatever one's view of the merits of the ongoing case(s) against Grant Davis in connection with the 2002 group settlement he negotiated with the defendant drug companies, it is clear that much confusion surrounds the aggregate settlement rule. Despite seeking and obtaining the assistance of the Missouri trial court in crafting and administering the 2002 settlement, and despite the fact that the Missouri trial court in 2004 "found no credible evidence of any misconduct by Davis,"⁴⁹ fourteen years later, Davis finds himself to still be a defendant in multiple malpractice cases in federal and state court in Kansas. All of these cases involve allegations that (1) the 2002 settlement was an aggregate settlement, and (2) Davis did not properly comply with the relevant disclosure requirements of Missouri Rule 4-1.8(g) governing aggregate settlements.⁵⁰ As discussed above, there has been significant disagreement on both of these issues among the four courts that have thus far opined on the aggregate settlement rule and its requirements in the various cases involving Davis's 2002 settlement: the Circuit Court of Jackson County, Missouri (2004); the District Court of Johnson County, Kansas (2007); the Missouri Court of Appeals, Western District (2013); and the Kansas Supreme Court (2009).

If courts cannot agree on when a settlement is an "aggregate settlement" for purposes of the ethics rules, or what disclosures are required to be made by an attorney who negotiates a group settlement along the lines of the one Davis agreed to in 2002, we might reasonably expect that attorneys, too, are uncertain and confused about these issues. Unlike judges, however, the attorneys—especially those who represent the claimants in such settlements—are targets for potentially financially devastating civil suits alleging malpractice and breach of fiduciary duty.

The attractiveness of these lawyers as targets is enhanced by several facts: that a lawsuit based on a violation of the aggregate settlement rule can be brought as a breach of fiduciary duty claim;⁵¹ that the plaintiff need not show any economic loss from the attorney's breach in order to

49. *Tilzer*, 204 P.3d at 620-21.

50. *See supra* notes 21-47 and accompanying text.

51. *See, e.g., Arce v. Burrow*, 958 S.W.2d 239, 249 (Tex. App. 1997) (holding, in a lawsuit filed by former clients alleging, inter alia, that attorneys breached the aggregate settlement rule, that "fee forfeiture exists in Texas in the context of the attorney-client relationship, and that all the client need prove is a breach of fiduciary duty by the attorney"); *Hole v. Wyeth-Ayerst Labs.*, No. 700000/98, 2007 N.Y. Slip. Op. 50647(U), 2007 WL 969426, at *3-4, *4 n.10 (Sup. Ct. Mar. 27, 2007) (noting that "[n]o penalty is specified for a violation" of the New York aggregate settlement rule, but citing *Arce* for proposition that "the remedy for violating the fiduciary duty to multiple clients might be as severe as complete fee forfeiture if the attorneys committed the breach intentionally, willfully, recklessly, maliciously, or with gross negligence"); *see also supra* note 2.

prevail;⁵² that full or partial forfeiture of the fees that the attorney received from the former client is the remedy;⁵³ and, that many mass tort settlements in which the aggregate settlement rule potentially applies are for tens and hundreds of millions of dollars⁵⁴ and involve contractual contingent attorneys' fees of one-third or more.⁵⁵

Given all this, it should not be surprising that numerous plaintiffs' attorneys besides Grant Davis have been sued by their former clients for alleged violations of the aggregate settlement rule in multi-million dollar group settlements.⁵⁶ It should be equally unsurprising that the two attorneys who filed the first aggregate-settlement-related malpractice and breach of fiduciary duty claims against Grant Davis have filed similar lawsuits against various other plaintiffs' attorneys in connection with other multi-million dollar settlements.⁵⁷

In the next Part, I explore an additional potential source of confusion for both attorneys and courts engaged with the Rule, which was not noted to date by any of the courts involved in the lawsuits against Grant Davis: the evolution over the past two decades of the liability landscape surrounding the Rule. In particular, I discuss different authorities' approaches to two core issues: what is an "aggregate settlement;" and what client disclosures are mandated by the Rule when an aggregate settlement is involved?

52. See *supra* note 2.

53. See, e.g., *Eriks v. Denver*, 824 P.2d 1207, 1213 (Wash. 1992) ("The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized."); see also *supra* note 51.

54. See *supra* note 1; see also *supra* note 16 (discussing \$4.85 billion nationwide settlement of Vioxx litigation).

55. See, e.g., *Schmitz v. Davis*, No. 10-CV-4011, 2010 WL 3861843, at *2 (D. Kan. Sept. 23, 2010) (noting that a mass tort claimant family agreed to pay their chosen law firm a contingent fee of forty percent); *Huber v. Taylor*, No. 002-304, 2010 WL 358522, at *8 (W.D. Pa. Jan. 25, 2010) (same); *Abbott v. Chesley*, 413 S.W.3d 589, 596 (Ky. 2013) (noting that the 431 Fen-Phen claimants had each signed a contingent fee contract for between thirty percent and thirty-three and one-third percent, depending on the particular law firm); *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999) (noting that the mass tort cases at issue settled for a total of "close to \$190 million, out of which the attorneys received a contingent fee of more than \$60 million").

56. See cases cited *supra* note 1. In addition to these "published" cases, there are, of course, other cases not readily found through a Westlaw search in which plaintiffs' attorneys were sued by their former clients for an alleged violation of the aggregate settlement rule, but which were resolved via confidential settlement.

57. In addition to the various lawsuits filed against Grant Davis discussed in this Part above, attorneys William Skepnek of Kansas and Steven M. Smoot of Texas were counsel for the former clients who sued the plaintiffs' attorneys in connection with the \$190 million alleged aggregate settlement in *Arce v. Burrow*, 958 S.W.2d 239 (Tex. App. 1997), which was affirmed as modified and remanded in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). They were also counsel for various clients who sued the plaintiffs' attorneys in connection with a \$45 million alleged aggregate settlement of approximately 179 individuals' occupational exposure silicosis claims against AMF Tuboscope in *Authorlee v. Tuboscope Vetco International, Inc.*, 274 S.W.3d 111 (Tex. App. 2008).

IV. THE EVOLVING LIABILITY LANDSCAPE SURROUNDING THE RULE

A. What Is an “Aggregate Settlement”?

Although one might expect that an ethics rule explicitly concerned with regulating aggregate settlements would define that critical term, the text of Rule 1.8(g) has never included such a definition.⁵⁸ Nor is such a definition provided in the lone Comment to this subsection of Rule 1.8, which is devoted to and titled, “Aggregate Settlements.”⁵⁹

58. This is true of the version of the Rule adopted by the ABA, as well as the variants adopted in every state. It should also be noted that the ABA’s Ethics 2000 Commission (“the Commission”) did not include among any of its proposed amendments to the *Model Rules* any definition of an aggregate settlement. It did, however, amend the text of Rule 1.8(g) to specify that the client’s informed consent “be in a writing signed by the client” and added Comment [13]. See *supra* note 9 and accompanying text. The Commission’s lack of interest in offering a definition of an “aggregate settlement” is especially noteworthy since Professor Nancy Moore, who was appointed Chief Reporter of the Commission, was independently interested in Rule 1.8(g) before the Commission began its work. See generally Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999); see also Charlotte “Becky” Stretch, *Overview of Commission and Report*, ABA ETHICS 2000 COMMISSION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html (last visited Feb. 15, 2016).

59. MODEL RULES OF PROF’L CONDUCT r. 1.8 cmt. 13 (AM. BAR ASS’N 2013). Comment [13] goes no further by way of a definition than to reference “the risks of *common representation of multiple clients by a single lawyer*.” *Id.* (emphasis added). One state, Kentucky, has adopted a variant of Comment [13] which seeks to provide lawyers both a definition and additional guidance:

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, as described herein.

A non-certified, non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent. The resolution of claims in a non-class aggregate settlement is interdependent if the defendant’s acceptance of the settlement is contingent upon the acceptance by a specified number or percentage of the claimants or specified dollar amount of claims; or the value of each claim is not based solely on individual case-by-case facts and negotiations. In such situations potential conflicts of interest stemming from interdependency exist, thus posing a risk of unfairness to individual claimants.

When the terms of an aggregate settlement do not determine individual amounts to be distributed to each client, detailed disclosures are required. For example, if a lump sum is offered in an aggregate settlement and the claimants’ attorney is involved in dividing the settlement sum, that attorney must disclose to each client the number of his or her clients participating, specifics of each client’s claim relevant to the settlement, and the method of dividing the lump sum. In addition, the attorney must disclose the total attorney fees and costs to be paid, payments to be made other than to clients, to their

Until the 1997 decision of the Texas Court of Appeals in *Arce v. Burrow*, no state or federal court had offered a definition of “aggregate settlement” under Rule 1.8.⁶⁰ In *Arce*, the Texas court stated: “An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client.”⁶¹

Although the notion of “the entire case” being settled seems misplaced here since group settlements involve the settlement of *multiple, individual* cases, this first attempt at a definition arguably offered attorneys (at least in Texas) a modicum of negative guidance. In particular, this lone sentence could be read to suggest that an “aggregate settlement” for purposes of Rule 1.8(g) would *not* exist if either the settlement did *not* resolve all of the covered claims or the settlement agreement specified the dollar amount of the individual settlement offer for each of the covered claims. Thus, after *Arce*, there seemed to be some difference between a group settlement and an aggregate settlement for purposes of Rule 1.8(g).

attorneys and for costs, the method by which the costs are to be apportioned among the clients and ultimately the amount each client receives.

By contrast, if the terms of the aggregate settlement establish the method of calculating and distributing payments to each claimant, based upon the individual claim for liability and/or damages, the disclosures to each client represented by the same attorney do not need to be as detailed. In that instance, each client should be generally informed of the terms of the aggregate settlement offer, how such terms apply specifically to such client, the fact that the attorney represents multiple clients in the settlement and, if applicable, any contingency in the settlement requiring a percentage of claimants to accept the settlement. The claimants’ attorney must also disclose fees and costs to each client (including how costs are apportioned among the joint clients) but attorney fees may be stated as a percentage of the total recovery as opposed to a specific dollar amount.

RULES OF THE SUPREME COURT OF KENTUCKY SCR 3.130 cmt. 13 (KY. BAR ASS’N 2015).

60. See *Arce*, 958 S.W.2d at 245. In *Arce*, the court’s one-sentence definition of an “aggregate settlement” was immediately followed by a citation to *Scrivner v. Hobson*, 854 S.W.2d 148 (Tex. App. 1993). *Arce*, 958 S.W.2d at 245. The relevant sentence in *Scrivner* states implicitly that an aggregate settlement is one in which an attorney who represents multiple clients obtains a “settlement for which no individual negotiations on behalf of any one client were undertaken by the attorney.” 854 S.W.2d at 152. The *Arce* court continued as follows: “The attorney owes a duty of loyalty and good faith to *each* client, and it is the ethical responsibility of an attorney representing multiple clients to obtain individual settlements, unless those clients are informed and consent. See *Judwin Properties v. Griggs & Harrison*, 911 S.W.2d 498, 506 (Tex.App.—Houston [1st Dist.] 1995, no writ).” 958 S.W.2d at 245 (footnote omitted). It is not clear why the *Arce* court cited the *Judwin Properties* case here, since neither the page cited nor any other page of the decision seems to state anything along the lines of the proposition for which *Judwin Properties* is being cited. See 911 S.W.2d 498, 506 (Tex. App. 1995).

61. *Arce*, 958 S.W.2d at 245.

In 2006, the ABA issued *Formal Ethics Opinion 06-438*, which acknowledged that the term “aggregate settlement” is not defined in the *Model Rules* and explicitly undertook to explain that term:⁶²

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

The claims . . . to be settled in an aggregate settlement or aggregated agreement may arise in the common representation of multiple parties in the same matter They may also arise in separate cases. . . .

Aggregate settlements or aggregated agreements not only arise in a variety of situations, but they also may take a variety of forms. For example, a settlement offer may consist of a sum of money offered to or demanded by multiple clients with or without specifying the amount to be paid to or by each client.⁶³

To the extent that this definition would include all situations “when any two or more clients consent to have their matters resolved together,” it is broader than the definition offered by the *Arce* court. Indeed, the definition set out in the ABA *Opinion* seems to eliminate the space left after *Arce* between a group settlement and an aggregate settlement for purposes of Rule 1.8(g); all “group” settlements are now arguably “aggregate settlements” and must comply with the disclosure requirements of Rule 1.8(g).

Then, in 2010, the ALI published the *Principles*, which include four sub-sections devoted to “non-class aggregate settlements.”⁶⁴ The ALI *Principles* also undertook to explicitly define a non-class aggregate settlement, and its definition clearly views aggregate settlements as a subset of, rather than synonymous with, group settlements:

- (a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.

62. ABA Comm. on Ethics & Prof’l Responsibility, *supra* note 5. The ABA *Opinion* was titled, “Lawyer Proposing to Make or Accept an Aggregate Settlement or Aggregated Agreement.” The ABA *Opinion* also explicitly notes that “aggregated agreement” is not defined in Rule 1.8(g).

63. *Id.* (footnotes omitted).

64. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION §§ 3.15–.18, at 257-82 (AM. LAW INST. 2010).

- (b) The resolution of claims in a non-class aggregate settlement is interdependent if:
 - (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims; or
 - (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations.⁶⁵

This definition, in contrast to that set forth in the ABA *Opinion*, seems to provide some space for group settlements to exist that are not aggregate settlements under Rule 1.8(g).

For example, consider a hypothetical settlement involving forty claimants represented by the same law firm in which defense counsel and claimants' counsel first review each individual claim and then agree that the sole relevant fact for purposes of determining a settlement offer value for each claim is the claimant's injury category. Thus, each claimant with a Category 1 injury will be offered \$X to settle her claims; each claimant with a Category 2 injury will be offered \$Y to settle her claims; and so on, for each of the four injury categories. If we assume further that the defendant is willing to settle the claims of as many or as few of the forty claimants as are willing to accept their settlement offer,⁶⁶ then the only remaining question under the ALI *Principles*'s definition of an "aggregate settlement" is whether "the value of each claimant's claims" is or is not "based solely on individual case-by-case facts and negotiations."⁶⁷ An entirely plausible case can be made that the settlement offer values in this hypothetical were based solely on individual case-by-case facts and negotiations, both of which ultimately focused solely on each individual's injury category.

65. *Id.* § 3.16, at 258. Section 3.16(c) of the *Principles* further states: "In determining whether claims are interdependent, it is irrelevant whether the settlement proposal was originally made by plaintiffs or defendants." *Id.* § 3.16(c), at 259.

66. In section 3.16(b)(1), the ALI *Principles* state that an aggregate settlement as denoted by "interdependent" claims is present if "the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims." *Id.* § 3.16(b)(1), at 258. The hypothetical in the text has assumed that this type of interdependence is not present.

In addition, the hypothetical in the text assumes that the defendant is not operating under an explicit or implicit cap on the total damages, and would therefore not present the concerns raised by the ALI *Principles* on this issue. *Id.* § 3.16 cmt. b, at 260 ("[A] defendant generally knows the amount it is willing to pay to settle a group of claims, so the notion that the defendant will treat each of the lawyer's multiple claimants as separate and unrelated does not represent the typical manner in which such claims are negotiated. If a settlement is subject to implicit caps, matrices, or other collective methods of allocation, then the settlements constitute an aggregate settlement.").

67. *Id.* § 3.16(b)(2), at 258.

Viewed in this way, the hypothetical settlement is not an aggregate settlement under the ALI *Principles*'s definition.⁶⁸ At the same time, however, this hypothetical settlement arguably presents a situation in which "two or more clients who are represented by the same lawyer together resolve their claims," which makes it an aggregate settlement under the ABA *Opinion*'s definition.⁶⁹

B. *What Client Disclosures Are Mandated by the Rule?*

Unlike the definition of "aggregate settlement" which is nowhere to be found in the text of Rule 1.8(g) or the official Comments, the disclosures required by the Rule in order for a client to give valid consent to an aggregate settlement are set out in the text of the Rule as follows:

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 . . . involved and of the participation of each person in the settlement.⁷⁰

Although the Rule's statement regarding the required disclosures could be clearer,⁷¹ the text of the Rule can reasonably be understood to require that all claimants eligible to participate in the settlement must

68. The comments to section 3.16 give several examples of settlements that are considered to involve the "interdependent" resolution of claims under section 3.16(b)(2). *See id.* § 3.16 cmts. a–d, at 258–60. However, my hypothetical in the text is distinguishable. For example, although my hypothetical settlement treats claimants in like injury categories alike, it does not "apportion[] identical sums based on a few broad categories (e.g., property damage, personal injury)." *Id.* 3.16 cmt. d, at 260. The categories in my hypothetical are significantly narrower than "property damage, personal injury." *Id.*

69. ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 5.

70. MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2013).

71. As Charles Silver and I have previously written,

[t]he rule's disclosure requirement is also unclear—perhaps even incoherent. How can a lawyer tell any client about the "extent of the participation of each person in the settlement" until every client decides whether or not to participate? Counsel can disclose each person's *proposed* participation, but *actual* participation cannot be known until each client's consent is obtained. If information about actual participation is required, the rule creates a Catch 22: Client X cannot give informed consent until he knows whether Client Y consented, and Client Y cannot give informed consent until she knows whether Client X consented. This conundrum led one commentator to observe that "literal compliance" with the rule "is onerous, if not impossible."

Brief of Amici Curiae Law Professors Lynn A. Baker & Charles Silver in Support of Petitioner David Burrow at 17, *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (No. 98-0184), 1998 WL 35336105, at *17 (quoting Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOY. L.A. L. REV. 395, 402 (1998)).

receive certain information about the terms of the larger group settlement, including: the number of claimants covered by the settlement agreement; the aspects of their individual claims relevant to determining their individual settlement offer values; each claimant's relevant claim characteristics for purposes of determining her settlement offer value; and, each individual's settlement offer value.⁷² In many group settlements, this information is readily provided in the form of a matrix along these general lines:⁷³

	Number of Claimants	Individual Gross Settlement Offer Amount	Total Gross Settlement Offers
Injury Category 1 [defined]	100	\$10,000	\$1,000,000
Injury Category 2 [defined]	72	\$25,000	\$1,800,000
Injury Category 3 [defined]	24	\$120,000	\$2,880,000
TOTAL	196		\$5,680,000

In addition, it is usually thought advisable for claimants' counsel to disclose in broad terms whether any conditions exist on the consummation of the larger settlement, such as when the settlement agreement specifies that the defendant retains the option to terminate the settlement if more than a certain number of covered claimants decline their settlement offers.⁷⁴

72. See Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 229-30, 229 n.9 (1999) (discussing possibility of providing disclosures required by the Rule while still affording clients anonymity); Moore, *supra* note 8, at 3260-61 (2013) (noting that "[c]ourts and commentators have disagreed whether the current rule requires the disclosure of the names and other identifying information of each client participating in the settlement" and concluding that since "the rule does not expressly require the disclosure of identifying information such as client names . . . the better interpretation is that plaintiffs' attorneys are not required to disclose such information unless it is necessary for the plaintiffs to evaluate the fairness of the allocation process"); Moore, *supra* note 58, at 164 (contending that "it should be sufficient for the lawyer to disclose whatever information is needed to understand why some individuals are receiving a different amount from other individuals," for example when "different disease categories or degrees of injury may account for the discrepancy"); Silver & Baker, *supra* note 10, at 756-60 (discussing ambiguities in the Rule's disclosure requirements).

73. The column in the matrix titled "Total Gross Settlement Offers" is not required by the text of the Rule, but that information can be readily calculated by the claimants in any event, from the information provided in the other three columns.

74. On its face, the Rule does not require the disclosure of this information regarding the defendant's "walk-away" option, except insofar as the existence of that option indicates that the settlement offers are merely "tentative" offers being made pursuant to a "potential" settlement

Until 2006, there was no extended discussion of these disclosure requirements in any ABA or state bar ethics opinions or in the opinions of any court.⁷⁵ In February 2006, however,

agreement. That information arguably is part of the information regarding “the participation of each person in the settlement” which is obligated by the text of the Rule to be disclosed. *See supra* note 7 and accompanying text. It should be noted, however, that the Rule does not require that the precise details of the defendant’s walk-away right be provided to the claimants, for example, that “ninety-five percent of eligible clients must accept their settlement offer or the Defendant has the option to terminate the settlement.” And there are many good reasons to provide the claimants information on this issue only in broad terms rather than in precise detail. *See Silver & Baker, supra* note 10, at 767-68 (discussing opportunities for clients to engage in strategic behavior in connection with group settlements that require unanimous consent of all eligible claimants). For a discussion of the normative theory underlying a requirement that information about the defendant’s “walk-away” option be disclosed to clients, see *infra* notes 100-02 and accompanying text.

75. As noted in the ABA *Opinion*, *see supra* note 5, a handful of cases that mentioned the aggregate settlement rule had been decided by the courts prior to 2006, but only a few of those cases discussed the Rule’s disclosure requirements, and none did so in any significant depth. *See Hayes v. Eagle-Picher Indust., Inc.*, 513 F.2d 892, 894 (10th Cir. 1975) (stating that “it would seem that plaintiffs would have the right to agree or refuse to agree once the terms of the settlement were made known to them”); *In re Mal de Mer Fisheries, Inc.*, 884 F. Supp. 635, 640 (D. Mass. 1995) (holding that “even if there were an actual misrepresentation [by the plaintiffs’ attorney] as to the [aggregate] nature of the settlement, that is not material because [the client] knew how much both the other widow and she were getting”); *In re Hoffman*, 883 So. 2d 425, 433 (La. 2004) (“[D]uring the negotiation of the aggregate settlement, the lawyer must confer with all of his clients and fully disclose all details of the proposed settlement, including information about each client’s claim and share of the proposed settlement The requirement of informed consent cannot be avoided by obtaining client consent in advance to a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement.”); *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 522 (N.J. 2006) (“[Rule] 1.8(g) imposes two requirements on lawyers representing multiple clients. The first is that the terms of the settlement 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.”); *State ex rel. Okla. Bar Ass’n v. Watson*, 897 P.2d 246, 253 (Okla. 1994) (holding that plaintiffs’ counsel violated the Rule because he “made an aggregate settlement without obtaining each client’s consent or advising each client as to the proposed settlement and distribution. [Plaintiffs’ counsel] did not consult with all of his clients before accepting the defendant’s . . . settlement offer. . . . [One client] was unaware of the final total award, its distribution, and the participation of each client in the settlement”); *Arce v. Burrow*, 958 S.W.2d 239, 245 & n.4 (Tex. App. 1997) (stating that “when an attorney enters into an aggregate settlement without the consent of his or her clients, the attorney breaches the fiduciary duty owed to those clients” and it is a violation of the aggregate settlement rule for “an attorney who represents two or more clients to make an aggregate settlement without the clients’ consent”), *modified*, 997 S.W.2d 229 (Tex. 1999); *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229 (Tex. App. 1985) (holding that plaintiffs’ counsel violated the Rule because plaintiffs “were not informed of the nature and settlement 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 settling plaintiffs”); *see also Scamardella v. Illiano*, 727 A.2d 421, 426-28 (Md. Ct. Spec. App. 1999). The *Scamardella* court observed that “[f]ew cases have addressed directly the scope of disclosure required by Rule 1.8(g).” *Id.* at 427. The court noted that “in this case the deficiency of disclosure did not result from a withholding of information but rather from a failure to formulate in advance the apportionment itself. . . . On the other hand, the very failure to formulate an apportionment preserved the representation from the major conflict of interest that occurs in aggregate settlement cases.” *Id.* Ultimately, the court concluded that the disclosure was adequate to protect the rights of the clients

the ABA issued *Formal Ethics Opinion 06-438*. The ABA *Opinion* interpreted Rule 1.8(g) to

require[] a lawyer to disclose *at a minimum*, the following information to the clients for whom or to whom the settlement or agreement proposal is made:

- The total amount of the aggregate settlement
- The existence and nature of all of the claims . . . involved in the aggregate settlement
- The details of every other client's participation in the aggregate settlement . . . whether it be their . . . settlement receipts . . . or any other . . . receipt of something of value as a result of the aggregate resolution. . . .
- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.
- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.⁷⁶

Of the five mandated disclosures set out above, the second and third are fully consistent with the text of the Rule. Although the first disclosure is not required by the current text of the Rule, the information involved is usually readily available to clients through the second and third disclosures, and this disclosure had been explicitly required by the text of the Rule's predecessor, DR 5-106.⁷⁷ The fourth and fifth disclosures, in contrast, have no basis in the text of the Rule and did not exist prior to the ABA *Opinion*.⁷⁸ And, the authors of the ABA *Opinion* do not explain why they believed that Rule 1.8(g) requires these

because "the parties agreed that the settlement amount represented the maximum potential recovery and, thus, was in the best interest of everyone." *Id.* at 428.

76. ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 5 (emphasis added) (footnotes omitted).

77. See *supra* notes 10 & 73 and accompanying text. In most settlements, the clients will be easily able to calculate the total value of the settlement from the information they are provided regarding the number and settlement offer values of the claims included in the settlement.

It is not clear why this requirement was dropped from the Rule in the 1983 transition from DR 5-106 to Rule 1.8(g). As Charles Silver and I have previously noted, however, "[w]e doubt that the difference matters much in practice, as the total size of the settlement is frequently disclosed." Silver & Baker, *supra* note 10, at 734 n.4.

78. Although the Rule itself covers settlements involving multiple defendants, as well as multiple plaintiffs, disclosure number four is aimed solely at plaintiffs' attorneys who, unlike defense counsel, will typically have contingent fee agreements with their clients under which "the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement." ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 5.

additional disclosures.⁷⁹ Their addition is especially puzzling in light of the fact that each individual plaintiff's contingent fee contract will necessarily specify the attorney's fees to be paid, as well as the handling of litigation-related expenses, consistent with the relevant state's equivalent of Rule 1.5(c) of the *Model Rules*.⁸⁰

The adoption of the ALI *Principles* in 2009 provided yet another view of the disclosures required under Rule 1.8. Section 3.17(a) of the ALI *Principles* states:

[Informed consent to an aggregate settlement] requires that each claimant be able to review the settlements of all other persons subject to the aggregate settlement or the formula by which the settlement will be divided among all claimants. Further, informed consent requires that the total financial interest of claimants' counsel be disclosed to each claimant.⁸¹

The first requirement, that each claimant be provided information about how the total settlement will be divided among all of the claimants included in the settlement, is fully consistent with the text of the Rule. The second requirement, however, that "the total financial interest of claimants' counsel be disclosed to each claimant," does not appear anywhere in the Rule. And the comments to section 3.17(a) never mention this additional requirement; nor, therefore, do they offer any insight into the reason for its addition.⁸²

C. Implications

As the discussion in this Part makes clear, both the definition of an "aggregate settlement" and the disclosures to clients required to be made pursuant to the Rule have been subject to a variety of interpretations by

79. The ABA *Opinion* does include a footnote at the end of each of disclosures four and five. But the sole authority cited is in support of disclosure four, and does not explain the addition of even disclosure four: "See, e.g., *In re Hoffman*, 883 So. 2d at 433 ('[D]uring the negotiation of the aggregate settlement, the lawyer must confer with all of his clients and fully disclose all details of the proposed settlement . . .')." ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 5.

80. Rule 1.5(c) states, in relevant part:

A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (AM. BAR ASS'N 2013).

81. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.17(a), at 262 (AM. LAW INST. 2010).

82. *Id.* § 3.17 cmt. a, at 264.

various authoritative bodies since the adoption of the ABA's *Model Code* in 1969.⁸³ This presents at least two issues for attorneys seeking to comply with the Rule, as well as for courts (and state bar disciplinary committees) adjudicating claims that an attorney did not comply with the Rule.

First, in any matter involving allegations that an attorney violated a particular state's aggregate settlement rule, a reviewing court should pay careful attention to how the applicable authorities interpreted the Rule and its disclosure obligations *at the time that the lawyer undertook the settlement*.⁸⁴ That is, a 2002 settlement should be considered solely from the perspective of the applicable authorities regarding the Rule available to an attorney at that time, even if a court is reviewing the matter many years later when additional, more recent authorities are available.

Second, as detailed above in this Part, the views of the various authorities that have opined since 1997 on the definition of an "aggregate settlement" and on the client disclosures that are mandated by Rule 1.8(g) are not easily reconciled.⁸⁵ Thus, at present, there is no obvious consensus on either issue, which exacerbates the difficulties of attorneys currently seeking to comply with the Rule. This lack of consensus, I believe, is largely the result of various decision-makers failing to focus on, and think clearly about, the *purpose* that the aggregate settlement rule is intended—and arguably needed—to serve.

V. TOWARD A NORMATIVE THEORY OF THE AGGREGATE SETTLEMENT RULE

In this Part, I undertake to situate the Rule in the larger context of the ethics rules and offer a tentative normative theory for the function that the Rule can uniquely serve. Such a normative theory can provide guidance to courts and state bar committees seeking to apply the Rule in particular cases.⁸⁶ In addition, such a theory can provide lawyers greater

83. See *supra* Part IV.A–B.

84. Beyond the temporal issues, it is important to note that the mere existence of an "authority" interpreting a particular variant of the aggregate settlement rule does not mean that the authority's interpretation is applicable to, and therefore should be followed by, an attorney crafting a particular settlement. An ABA Ethics Opinion, for example, is not binding on any state bar disciplinary committee in general, or with regard to the "proper" interpretation of a state's own rules of professional responsibility. Such an opinion is simply a statement of what a particular ABA Committee believes in connection with the rule and/or topic addressed. A state bar committee, of course, may choose to take guidance from such an opinion, but is not obligated to do so.

85. See *supra* Part IV.A–B.

86. Such a theory may also have benefits for policymaking groups such as the ABA and the ALI.

predictability regarding the likely application of the Rule, as well as some first principles from which to reason about the Rule when confronting a new situation.

A. *The Normative Theory*

To begin, one should note that in addition to the aggregate settlement rule, a plaintiffs' attorney contemplating a non-class group settlement is bound by potentially relevant rules of professional responsibility governing conflicts of interest, communications, confidentiality, decisions to settle, and contingent fees. Thus, in order to fully understand the normative underpinnings of the Rule, one must ask what special problems are presented by certain types of group settlements that are not resolved by those other rules such that an additional aggregate settlement rule is required. That is, what does the "aggregate settlement" rule add to the client protections and attorney obligations afforded by those other rules?

I believe that the core normative function of the Rule is to ensure the waivability of certain concurrent conflicts that might not otherwise be waivable under Rule 1.7,⁸⁷ thereby making ethically permissible certain group settlements that might be prohibited in the absence of the aggregate settlement rule.

87. Rule 1.7 of the *Model Rules* states:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013).

In addition, Rule 1.8(b) of the *Model Rules* is arguably relevant in many aggregate settlement situations. This rule provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." *Id.* r. 1.8(b).

In the absence of Rule 1.8(g), an attorney who represents multiple clients against the same defendant and who receives an offer of a fixed sum from the defendant to resolve all of their claims would potentially have an irreconcilable client-client conflict. Every dollar of the lump sum which the plaintiffs' attorney allocates to Client A is one less dollar available to be allocated to any of the other clients. Under Rule 1.7(a), the attorney's involvement in the settlement fund allocation is a potentially prohibited concurrent conflict insofar as "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."⁸⁸ The question under Rule 1.7(b) then becomes whether, notwithstanding the conflict, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and "each affected client gives informed consent, confirmed in writing."⁸⁹

Many lawyers may "reasonably believe" that they cannot zealously represent each of their multiple clients when allocating the limited settlement funds among them and that the concurrent conflict is therefore *not* one to which the affected clients can be asked to consent.⁹⁰ Thus, taken alone, Rule 1.7 arguably prohibits certain group settlements and might indirectly make non-class multiple-client representations less attractive to attorneys, notwithstanding the clear benefits to the plaintiffs and also, potentially, the defendant(s).⁹¹

The aggregate settlement rule, however, usefully supplements Rule 1.7. Rule 1.8(g) makes clear that aggregate settlements *are* ethically permissible and that the plaintiffs' attorney *may* ethically participate in the "making" of such settlements, including allocating a limited settlement fund. The Rule also provides some detail about the content of the disclosures necessary in order for the attorney to obtain a

88. *Id.* r. 1.7(a)(2).

89. *Id.* r. 1.7(b)(1), (4).

90. Nor could the attorney resolve the intra-client conflict by simply delegating the allocation problem to a neutral third-party. The same conflict exists; it has simply been transferred to a different person, who is the attorney's agent. Indeed, it merits note that Rule 1.8(g) is explicit that the role of the attorney representing multiple clients in an aggregate settlement is to make certain disclosures to the clients and obtain their consent; the rule does *not* state that the attorney should hand off to a third-party the making of the settlement (along with any attendant allocation or other conflicts). *Id.* r. 1.8(g).

91. *See, e.g.,* Baker & Silver, *supra* note 10, at 744-49 (discussing various important advantages that plaintiffs can gain by litigating collectively); *id.* at 760-63 (discussing benefits of group settlements for both defendants and plaintiffs).

client's informed consent to such a settlement.⁹² Put differently, Rule 1.8(g) provides a safe harbor for attorneys concerned that an aggregate settlement creates a non-waivable conflict under Rule 1.7. It does not impose any new requirements on an attorney beyond those imposed by the other rules, but rather charts a path by which the plaintiffs' attorney can provide clients the benefits of a non-class-action group settlement without running afoul of Rule 1.7.

When Rule 1.8(g) is understood in this way, the disclosures it requires the attorney to provide each affected client also take on broader significance. Information about "the existence and nature of all of the claims . . . involved and of the participation of each person in the settlement"⁹³ is consistent with the attorney's obligations under Rule 1.4(b) to explain a settlement offer "to the extent reasonably necessary" for the client to be able to make an informed decision about whether to accept it.⁹⁴ At the same time, that information enables the client to decide whether to consent to the concurrent conflict inherent in the attorney's making of the aggregate settlement, consistent with Rule 1.7(b)(4).⁹⁵ In sum, the disclosure and consent obligations under Rule 1.8(g) seek to ensure that a client who is accepting her settlement offer gives informed consent both to that offer and to representation by the client's attorney who is laboring under a concurrent conflict in the making of the settlement, including the allocation of the settlement fund.⁹⁶

If I am correct that the core normative function of the Rule is to ensure the waivability of certain concurrent conflicts at the time of settlement that might not otherwise be waivable under Rule 1.7, then non-class-action group settlements can usefully be divided into two categories: those settlements whose "making" presents a concurrent conflict of interest for the plaintiffs' attorney, and those without any such conflict. For the latter category of settlements, the absence of a concurrent conflict limits the plaintiffs' attorney's disclosure obligations to the communications required under Rule 1.4(b).⁹⁷ This means that the

92. See MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2013) ("The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement."); *supra* note 7.

93. MODEL RULES OF PROF'L CONDUCT r. 1.8(g).

94. *Id.* r. 1.4(b).

95. *Id.* r. 1.7(b)(4).

96. See *id.* r. 1.8(g).

97. *Id.* r. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

attorney should not be found ethically remiss or civilly liable if those disclosures do not include “the existence and nature of all the claims” involved in the group settlement and “the participation of each person in the settlement” as required by Rule 1.8(g), unless disclosure of that information is determined to be otherwise required under Rule 1.4(b) and not prohibited by Rule 1.6(a).⁹⁸ For the former category of group settlements, the presence of a concurrent conflict means that the attorney’s disclosures should comply with Rule 1.8(g) in order for the clients to be able to give informed consent to both their settlement offer and their attorney’s conflict of interest. Thus, the term “aggregate settlement” in Rule 1.8(g) should be defined to include only settlements that present a concurrent conflict of interest for the plaintiffs’ attorney at the time of their making.

B. *Applying the Normative Theory*

The analysis above can now be used to evaluate, for example, whether the definition of an “aggregate settlement” set out in the ALI *Principles* is over-inclusive, under-inclusive, or just right in its scope. Recall that the ALI *Principles* defines an aggregate settlement as one in which “the resolution of the claims is interdependent,” and further defines the necessary claim interdependence as existing either when “the defendant’s acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims,” or when “the value of each claimant’s claims is not based *solely* on individual case-by-case facts *and negotiations*.”⁹⁹ Does each of these interdependences involve a concurrent conflict of interest for the plaintiffs’ attorney at the time of the settlement?

Consider the ALI *Principles*’s first definition of “interdependent claims” for purposes of specifying an “aggregate settlement.” Does a settlement in which “the defendant’s acceptance of the settlement is

98. Rule 1.6(a) states, in relevant part, that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent” or “the disclosure is impliedly authorized in order to carry out the representation.” *Id.* r. 1.6(a). Thus, Rule 1.4(b) should not be interpreted to require an attorney involved in a group settlement that does *not* pose any conflict for the attorney to disclose information about other clients’ settlement offers to any greater extent than an attorney involved in an individual settlement would be obligated to share with that client information about settlement offers obtained for other of the attorney’s clients in the past.

99. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.16(b)(1)–(b)(2), at 258 (AM. LAW INST. 2010) (emphasis added).

contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims”¹⁰⁰ necessarily involve a concurrent conflict? Yes. It presents an attorney-client conflict.¹⁰¹ When confronted with such a condition, as the ALI *Principles* observes, “the [plaintiffs’] attorney has incentives to coerce clients to agree to terms that may not be in the individual claimant’s best interests but that facilitate an aggregate settlement.”¹⁰² The attorney’s incentives “to coerce clients” in this context derive from the fact that the fee of the plaintiffs’ attorney is typically contingent on obtaining a recovery for the client, which in turn requires that the settlement be consummated.

Now consider the ALI *Principles*’s second definition of “interdependent” claims. Does a settlement in which “the value of each claimant’s claims is not based solely on individual case-by-case facts and negotiations”¹⁰³ necessarily present “a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client . . . or by a personal interest of the lawyer”?¹⁰⁴ I do not think so.

Consider, for example, a hypothetical situation in which counsel for an asbestos defendant offers to enter into a settlement agreement with a plaintiffs’ law firm that currently represents 500 claimants. Under the terms of the proposed settlement agreement, the defendant will offer the following gross values to settle individual clients’ claims against it, assuming that a client can demonstrate the requisite exposure to the defendant’s asbestos-containing product:

- \$100,000 for each claimant diagnosed with mesothelioma;
- \$60,000 for each claimant diagnosed with lung cancer;
- \$40,000 for each claimant diagnosed with cancers other than lung cancer; and
- \$15,000 for each claimant diagnosed with a non-malignant asbestos-related disease (that is, asbestosis or pleural disease).

Assume further that under the proposed settlement agreement, the defendant agrees to pay these specified values for as many or as few of the law firm’s clients—both its current clients and any future clients who retain the law firm during the next five years—as are interested in

100. *Id.* § 3.16 (b)(1), at 258 (emphasis added).

101. That is, it presents “a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.” See MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2).

102. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.16, cmt. b, at 261.

103. *Id.* § 3.16(b)(2), at 258.

104. MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2).

settling their claims for that amount. Finally, assume that the law firm believes that these are very good financial terms for claimants in each of the four injury categories to resolve their asbestos-related claims against this defendant.

This hypothetical settlement agreement does not involve a concurrent conflict of interest for the plaintiffs' attorney. It does not present any allocation conflicts among the attorney's 500 claimants. There is not a pre-determined total dollar amount to be paid for the law firm's 500 current clients, and indeed the total value of the settlement has no specified limit and cannot be known until five years have passed. The value of any individual claimant's settlement offer is unaffected by the value of any other claimant's settlement offer, and each individual claimant is free to accept or reject the settlement offer specified for her injury category. Finally, the defendant's acceptance of the settlement is not in any way contingent upon the number or dollar amount of claims that are resolved under the agreement. Thus, this hypothetical settlement would *not* constitute an "aggregate settlement" under the definition derived from my normative analysis.

This settlement *would* seem to be an "aggregate settlement" under the ALI *Principles*, however, because "the value of each claimant's claims is not based *solely* on individual case-by-case facts *and negotiations*."¹⁰⁵ The plaintiffs' attorney would therefore be obligated to make the disclosures required by Rule 1.8(g) under the ALI *Principles*, but not under the definition of an "aggregate settlement" derived from my normative analysis (unless disclosure of that information is otherwise required under Rule 1.4(b) and not prohibited by Rule 1.6(a)).¹⁰⁶

My normative theory and the hypothetical settlement agreement discussed above suggest that the second prong of the ALI *Principles*'s definition of an "aggregate settlement" is over-inclusive. A settlement in which "the value of each claimant's claims is not based *solely* on individual case-by-case facts *and negotiations*"¹⁰⁷ does not necessarily

105. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.16(b)(2), at 258 (emphasis added).

106. See *supra* note 98. Plaintiffs' counsel might well want to tell each claimant covered by the settlement agreement that all claimants diagnosed with the same injury as the claimant are receiving identical settlement offers from the defendant. But this would presumably be pursuant to an obligation under Rule 1.4(b) of the *Model Rules* to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," rather than pursuant to any obligation under Rule 1.8(g). MODEL RULES OF PROF'L CONDUCT r. 1.4(b). In addition, claimant's counsel would need to ensure that such disclosures did not violate counsel's confidentiality obligations under Rule 1.6(a). *Id.* r. 1.6(a). For discussion of confidentiality and privacy issues raised by the aggregate settlement rule, see Silver & Baker, *supra* note 10, at 756-60.

107. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.16(b)(2), at 258 (emphasis added).

involve a concurrent conflict. The over-inclusiveness of the ALI *Principles*'s definition could be eliminated, however, if this prong were narrowed to include only settlements with a predetermined total dollar value. A settlement that provides for a total predetermined sum to be paid by the defendant to settle a specified number of claims, and which leaves to the claimants' attorney the task of determining each claimant's settlement offer amount from that sum, will present *client-client* concurrent conflicts. Each dollar of the total settlement fund which the claimants' attorney includes in one claimant's settlement offer is one less dollar available for every other claimant's settlement offer.

My normative theory can also be used to evaluate whether the additional disclosures required by the ALI *Principles* and the 2006 ABA *Opinion* in their interpretations of Rule 1.8(g), as discussed above in Part IV.B, should be required. If I am correct that the core normative function of the aggregate settlement rule is to ensure the waivability of certain concurrent conflicts at the time of settlement that might not otherwise be waivable under Rule 1.7, then any required disclosures should focus on those concurrent conflicts. Consider, for example, the requirement set out in the text of Rule 1.8(g) that the "lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement."¹⁰⁸ Such a disclosure enables a client to better evaluate the equity of her settlement offer than would information solely about the amount and terms of the client's individual settlement offer because it informs the client how the plaintiffs' attorney has resolved the client-client conflicts inherent in the settlement allocation. It enables the client to determine, for example, whether, in that client's opinion, the plaintiffs' lawyer has unjustifiably favored one client over another in establishing each client's individual settlement offer amount.¹⁰⁹ A client dissatisfied with her individual settlement offer in light of this broader information about other clients' claims and settlement offer values is free to decline to settle her claim (and simultaneously to decline to consent to the attorney's conflict of interest when making the settlement).¹¹⁰

108. MODEL RULES OF PROF'L CONDUCT r. 1.8(g).

109. The key phrase here is "unjustifiably favored"—after all, any allocation of a settlement fund will inevitably "favor" one client (or category of clients) over another in terms of giving them different settlement offers. For a critical discussion of the Rule's ability to protect clients in a group settlement from an "unfair" or "bad" allocation of the settlement fund, see Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1515-39 (1998); see also Baker & Silver, *supra* note 72, at 240-45 (discussing costs and benefits of damage averaging in group settlements).

110. Of course, the client's authority to accept or reject the settlement offer does not derive from Rule 1.8(g), but rather from Rule 1.2(a), which states in relevant part: "A lawyer shall abide by

In contrast to the disclosures required by the text of Rule 1.8(g), there does not seem to be any conflict-based normative justification for interpreting the aggregate settlement rule to require special, additional disclosures regarding “the total fees and costs to be paid to the lawyer as a result of the aggregate settlement”¹¹¹ or “the total financial interest of claimants’ counsel.”¹¹² Neither the ABA *Opinion* nor the ALI *Principles* explain why they added these disclosure requirements, and it is not clear what function they are intended to serve. As discussed above in Part III.B, Rule 1.5(c) already requires that each individual claimant receive clear and precise information regarding the contingent attorneys’ fees to be paid by that client, as well as the handling of that client’s litigation-related expenses. There is no reason to also provide clients the totals of that information across the group of clients covered by the settlement agreement. No client-client conflict or attorney-client conflict is involved. The implication of these additional disclosure requirements in both the ABA *Opinion* and the ALI *Principles* seems to be that they will better enable the clients to monitor an attorney-client conflict unique to aggregate settlements. But, as discussed above, the only unique incentive that an attorney has to coerce a client to agree to an aggregate settlement derives from the presence of a walk-away provision in the settlement agreement.¹¹³ The fact that an attorney will be receiving fees and a reimbursement of litigation expenses from the clients included in an aggregate settlement—just as an attorney does when representing a single settling client—does not create any special incentives for the attorney to put her own interests ahead of the best interests of her clients.

VI. CONCLUSION

Over the past twenty years, non-class-action group settlements have become increasingly common, especially for resolving mass torts, and a wide range of policy makers and scholars have considered how the potential conflicts can best be managed. Central to these discussions has been the aggregate settlement rule, Rule 1.8(g) of the *Model Rules* and the state equivalents. Courts, state bar associations, the ALI, and the ABA have all offered thoughtful views on what an “aggregate settlement” is and what client disclosures are mandated by the Rule. For lawyers, however, these often conflicting opinions have provided increased uncertainty rather than guidance.

a client’s decision whether to settle a matter.” MODEL RULES OF PROF’L CONDUCT r. 1.2(a).

111. ABA Comm. on Ethics & Prof’l Responsibility, *supra* note 5.

112. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.17(a), at 262.

113. See *supra* notes 100-02 and accompanying text.

In this Article, I have sought to offer both positive and normative clarification. I have identified the specific areas of existing disagreement among authorities and have charted a path forward by proposing a tentative normative theory for the function that the aggregate settlement rule can uniquely serve within the larger context of the ethics rules. I hope that even those who do not embrace my theory will nonetheless profit by being provoked to contemplate how best to resolve the current interpretive confusion.