

In part two of this series, I consider ethical issues in negotiation of an aggregate settlement agreement, the ethical requirements imposed on lawyers with regard to obtaining client approval of an aggregate settlement, and the propriety of settlement provisions that impose obligations on plaintiffs' counsel with regard to recommendation of settlements and with regard to withdrawal from representation of clients who reject an aggregate settlement.

### **Negotiation of aggregate settlements**

*The duty of loyalty—equal treatment of similarly situated clients.* The dynamics of negotiation and possible structures of aggregate settlements vary widely depending on the type of case, the number of claimants and the extent of their injuries, the medical histories of the claimants, the degrees of exposure of claimants to the product or incident, the litigation history, and other factors. However, in my opinion there is one fundamental principle that must guide lawyers in these negotiations: *equal treatment of similarly situated clients* (the “equality principle”). The principle flows from the duty of loyalty that the lawyer owes equally to all of the clients the lawyer represents. The lawyer is representing multiple clients with different injuries and possibly different claims and defenses. The duty of loyalty means that lawyer cannot favor one client or group of clients over another.

*Compliance with the equality principle.* The lawyer must have the equality principle in mind when negotiating every aspect of the settlement. More specifically, a settlement agreement typically includes two major components: the total amount of the aggregate settlement

and the method of allocation of the settlement among the claimants. Negotiation of the overall settlement amount normally does not implicate the equality principle because the larger the settlement the greater the benefit to all of the clients, regardless of the method of allocation, unless of course the settlement is so burdensome on the defendants that they ultimately cannot pay it. If the settlement has non-cash aspects—coupons or other discounts, for example—the amount of the settlement may pose issues under the equality principle. For example, some claimants may find coupons to be valueless.

However, the problem of equality of treatment does arise frequently with regard to the allocation of the settlement among claimants. One way of complying with the equality principle is through a point system in which claimants receive points based on a variety of factors, such as age, degree of exposure to the product, other medical conditions, and so on. A settlement agreement could incorporate such a point system, as the settlement agreement in the Vioxx case did. See Exhibit 3.2.1 to the Vioxx Settlement Agreement, which is available online (or you can write me for a copy), for an example of such a point system. Another approach is for the agreement to provide for appointment either of a private claims administrator or for judicial appointment of a special master, who would be given the task of developing a point system based on the equality principle and of administering the procedures for implementation of the system. On the other hand, use of the average of awards in prior cases as the basis for settlement and allocation of all claims is generally not a proper method of allocation. While this

approach is relatively easy to apply, it violates the equality principle. Treating all clients the same does not treat them equally unless they all have the same injuries, which is rarely the situation when personal injuries are involved.

*Claims administrators or special masters.* Could the claimants' lawyer serve as claims administrator for his or her own clients? Ethically, it might be possible to do so. Under the ethics rules, a lawyer may represent clients who have differing interests in an effort to overcome those differences. Comment 26 to SCRPC 1.7 states that “a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis.” Such a role is common in business organizations, but the same role of neutrality could be applied to the allocation of an aggregate settlement. Of course, such a role would require the informed consent of clients confirmed in writing. SCRPC 1.7(b)(4). In addition, lawyers should carefully consider whether they want to undertake the task of being a claims administrator for their own clients. It could be time consuming, involve dealing with questions from clients that the lawyer might find to be trivial, and could lead to grievances by disgruntled clients who claim that their lawyer has turned against them. A better approach for most lawyers would be for the lawyer to propose to the clients the use of either a privately appointed claims administrator or a judicially appointed master who would devise a point allocation system and administer the system.

A well-designed system should provide:

- A clear explanation to the clients about how the point system was

established. Because these systems can be complex, the explanation must be reasonably concise and meaningful to a layperson.

- An estimate to the clients of how the point system applies to their situation.
- A mechanism for clients to have their questions answered.
- A mechanism for administrative appeal for dissatisfied clients.

In addition, the settlement agreement should specify the administrative responsibilities of the claims administrator or special master, which can be broader or narrower depending on a variety of circumstances, particularly the number, needs, and sophistication of the claimants.

The use of a claims administrator or special master has a number of advantages:

- It removes administration of the claims from the lawyer's office.
- The administrator is independent, so lawyers avoid the charge that their role as counsel for the claimants clouded their impartiality in assigning settlement values or in allocating the settlement sums.
- The administrator provides a forum for clients to be heard on their individual cases.
- It ensures that consistent and objective criteria are used in the allocation process of individual cases.

*Negotiation of legal fees.* One of the conflict issues that lawyers face in aggregate settlement negotiations is that they have a personal financial interest in the matter when they are negotiating attorney fees. This type of conflict is a material limitation conflict under Rule 1.7(a)(2). It arises not only in aggregate settlement negotiations, but in any case in which the opposing party may be paying a part or all of the lawyer's fees. Clients may give their informed consent confirmed in writing to a lawyer negotiating settlement amounts and legal fees. See Rule 1.7(b)(4). The consent could allow the lawyer to negotiate both settlement amounts and legal fees at the same time, but a better practice would be for the negotiation of legal fees to be separate from the negotia-

tion of the settlement amount. In the event that the parties could not reach agreement on legal fees after negotiating the settlement of client claims, the issue of legal fees could be presented to a court or to an arbitrator for determination.

### Settlement approval

*Compliance with the aggregate settlement rule.* SCRPC 1.8(g) dealing with client approval of aggregate settlements provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

The rule requires informed consent signed by every client who will participate in an aggregate settlement. Sometimes it is said that an aggregate settlement requires unanimous client consent, but this characterization is incorrect. A client can "opt out" of an aggregate settlement by refusing to agree to its terms; the client would then proceed with the client's claim separately from the aggregate settlement. The remaining clients who do agree to the settlement under Rule 1.8(g) are bound by its terms.

Rule 1.8(g) refers to disclosure of the "existence and nature of all the claims" along with the "participation of each person in the settlement." But what exactly must be disclosed? In Formal Opinion #06-438, the ABA Committee discussed the application of Rule 1.8(g). The Committee advised that the rule requires the following disclosures:

- The total amount or results of the aggregate settlement;
- The existence and nature of all of the claims, defenses, or pleas in the aggregate agreement;

- The details of every client's participation in the agreement;
- The total fees and costs to be paid to the lawyer and whether they will be paid out of the proceeds of the settlement or by the opposing party;
- The method of allocation of costs.

The opinion addresses some but not all of the disclosure issues that may arise under the Rule. For example, must the lawyer disclose the names of each of the clients, or would identification by number or some other anonymous system be permissible and perhaps even required under either the ethical duty of confidentiality or privacy laws? Must the lawyer disclose the way in which a particular client's settlement amount was determined? Must the lawyer disclose the number or percentage of claimants who decided not to accept the settlement? In addition, arguably the opinion goes beyond what is required by the rule when it advises lawyers that they must disclose the total amount of the settlement. The opinion gives no authority for this requirement.

*Creative but unworkable workarounds.* Some lawyers have attempted to reduce the possibility that a significant number of clients might reject an aggregate settlement by seeking advance consent by the claimants to agree to be bound by majority or super-majority vote. The courts, however, have found such agreements to be invalid. See, e.g., *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 616 (N.J. 2006); *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10<sup>th</sup> Cir. 1975). See also N.Y. City Bar Assn. Op. #2009-06 (advising that the requirements of Rule 1.8(g) are not waivable).

Rule 1.8(g) has both its defenders and its critics. See, e.g., Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733 (1997). In 2009 the American Law Institute approved a mechanism by which claimants could agree in advance to approve a settlement by a "substantial-majority vote." See ALI, *Principles of the Law of Aggregate Litigation* §3.17(b) (2009).

However, such an agreement is subject to a number of stringent requirements. In particular, the agreement must be fair and reasonable, both procedurally and substantively, and the lawyer bears responsibility for compliance with the requirements for enforceability. *Id.* §§3.17(d)-(f). In addition, claimants must have a right to challenge the fairness of the agreement. *Id.* §3.18. The ALI proposal has not been accepted by any legislature or court, and even if it is, the requirements are so demanding that lawyers are unlikely to find it to be an attractive option to consider.

Another possible way in which the relationship among claimants could be structured to reduce the number of opt outs is through claimant assignment to an entity in exchange for shares in the entity. The entity would then hold all of the claims. The shareholders would elect a board that would select officers who would be empowered to manage the assets of the entity, i.e. its claims. However, the difficulties with such a mechanism are enor-

mous. In many jurisdictions personal injury claims are not assignable. Even if they are, a lawyer would need to create the entity, establish its governing structure, prepare assignments of claims to the entity, and obtain the informed consent of the claimants to the assignment. Moreover, the number of shares that each claimant would receive would depend on the valuation of the person's claim relative to the other claimants. But finding an acceptable method of valuation is one of the major difficulties with any aggregate settlement. In addition, the creation of the entity could give rise to other problems, such as adverse tax consequences.

Lawyers are quite creative, but as of now it seems unlikely that a solution will emerge that allows lawyers to avoid directly the requirement of informed client consent under Rule 1.8(g).

#### **Restrictive settlement provisions like Vioxx**

On November 9, 2007, Merck & Co., Inc. entered into a settle-

ment agreement with plaintiffs' counsel representing the overwhelming number of plaintiffs who had claims against Merck for use of the pain-killing drug Vioxx. Two of the provisions of the agreement are particularly interesting from the perspective of ethical obligations of counsel: mandatory recommendation and mandatory withdrawal. All of the counsel who participated in the settlement agreed to recommend to 100 percent of their clients that they enroll in the program established by the settlement agreement. As to any claimant who refused or failed to enroll in the program, counsel agreed to withdraw from representation. The Vioxx settlement contained "saving" clauses designed to make these provisions proper by stating that they applied to the extent permitted by the rules of professional conduct, particularly Rules 1.16 (withdrawal) and 5.6 (restrictions on right to practice). An amendment to the agreement stated that participating counsel were expected to exercise "inde-



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pendent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program.” The results of the settlement were impressive because 99.79 percent of the eligible claimants accepted the agreement. See Erichson & Zipursky, *Consent Versus Closure*, 96 Cornell L. Rev. at 266, n.3. It is impossible to know the extent to which the mandatory recommendation and withdrawal provisions increased the participation rate, but my guess is they had a large impact. However, these provisions, both individually and collectively, may be viewed as unethical because they burden the client’s right to decide whether to accept or reject a settlement. Lawyers who are considering participating in aggregate settlement agreements with these or similar provisions should carefully evaluate their ethical propriety as well as alternatives that would increase the participation rate of claimants without presenting the ethical problems raised by these provi-

sions. See Nathan M. Crystal, “Let’s Make a Deal”—*Settlement Ethics*, 20-Nov Ethics Watch 8 (2008) (suggesting the use of discretionary expense advance clauses and limited engagement agreements).

**Conclusion**

In these articles I have tried to highlight a number of important ethical issues involved in aggregate settlement of non-class litigation. In particular, I have discussed the following:

- the concept of interdependence as crucial to the determination of whether an agreement is an aggregate settlement;
- the importance of including a number of informed consent provisions in engagement agreements, including authorization of lawyers to engage in aggregate negotiation, consent to possible conflicts of interest involving multiple clients and negotiation of legal fees, and permission to reveal confidential client information to other clients in connection with the approval of an aggregate set-

tlement under Rule 1.8(g);

- the need for lawyers to consider including other provisions in their engagement agreements that might reduce the number of opt outs to an aggregate settlement agreement;
- the desirability of lawyers communicating to their clients their intent to engage in aggregate settlement negotiations prior to commencing the negotiations;
- how the duty of loyalty requires lawyers to negotiate aggregate settlement agreements based on the principle that similarly situated clients should be treated equally;
- the possible use of point systems coupled with claims administrators or special masters to implement the equality principle;
- the requirements for compliance with SCRPC 1.8(g); and
- the ethical propriety of settlement provisions involving mandatory recommendation and mandatory withdrawal by lawyers who participate in aggregate settlements, like those used in the Vioxx settlement. ■



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