

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310(D) [1.8.7]

Lead Drafter: Martinez
Co-Drafters: Cardona, Eaton, Harris, Stout
Meeting Date: February 19 – 20, 2016

I. CURRENT CALIFORNIA RULE 3-310(D)

Rule 3-310(D) Avoiding the Representation of Adverse Interests (Aggregate Settlements)

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

Discussion

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

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 1.8.7 (CLEAN)

Rule 1.8.7 Aggregate Settlements

A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. In obtaining the client's informed written consent, the lawyer's written disclosure must include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

This Rule does not apply to class action settlements subject to court approval.

IV. PROPOSED RULE 1.8.7 (REDLINE TO CURRENT CALIFORNIA RULE 3-310(D))

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

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

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participation of each person in the settlement.

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~~Discussion:~~ Comment

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

V. PROPOSED RULE 1.8.7 (REDLINE TO MODEL RULE 1.8(g))

Rule 1.8.7 Aggregate Settlements ~~1.8 Current Clients: Specific Rules~~

* * * * *

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

Comment

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This Rule does not apply to class action settlements subject to court approval.

~~Aggregate Settlements~~

~~[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.~~

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VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, _____, 2016:**
A comment on current rule 3-310 is anticipated.
- **RUSSELL WEINER, OCTC, 6/15/2010:**
Rule 1.8.7. Aggregate Settlements.
 1. OCTC OCTC supports the proposal to use the term “informed written consent” as that term is used in other California rules. However, OCTC finds the rule as written and the Commission’s Comments somewhat confusing, especially Comment 4, which is not in the ABA Model Rules. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement that should be stated in the rule, not a comment.
 2. OCTC thanks the commission for defining aggregate package deals in criminal cases in comment 1. Again, there are too many comments and they are too long. The ABA has only one comment on this subject, while these proposed rules have five comments. Comment 2 seems unnecessary in light of proposed rule 1.4. Comment 3 is too long and could be tightened.
- **MIKE NISPEROS, OCTC, 9/27/2001:**
OCTC did not recommend any amendments to rule 3-310(D) in its 2001 memo.
- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Model Rule 1.8(g). The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflicts of Interest: Current Clients: Specific Rules,” revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [last visited 2/1/16]

- Thirty-one jurisdictions have adopted model rule 1.8(g)¹ and twenty (including California) have adopted variations of model rule 1.8(g).²

¹ The thirty-one states are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Wisconsin, and Wyoming.

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VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. The current rule does not refer to criminal matters. The proposed rule adds: “in a criminal case an aggregate agreement as to guilty or nolo contendere pleas.”
 - Pros: This change extends the public protection of the current rule in a manner consistent with purpose of the rule. An aggregate agreement in a criminal matter involving two or more clients implicates the public protection that the current rule is intended to provide. Joint clients in criminal, as well as civil matters, are entitled to receive full disclosure from their lawyer and they should be empowered to give or decline to give consent to an aggregate settlement. Moreover, the consequences in criminal matters suggest that the policy of the current rule is even more important than in a typical civil matter.
 - Cons: None identified.
2. The current rule does not specify particular matters that ought to be disclosed when a lawyer seeks consent from clients with respect to an aggregate settlement. The proposed rule follows the ABA Model Rule in specifying the following elements of a written disclosure: “the existence and nature of all the claims or pleas and of the participation of each person in the settlement.”
 - Pros: As the ABA Model Rule recognizes, in the context of an aggregate settlement, these disclosures are part of what a client should know before providing consent. While “informed written consent” might be interpreted as requiring these disclosures even without specifying them in this rule, the specification makes the requirement clear. Moreover, the specification of these disclosures in the rule governing aggregate settlements makes the requirement easier for lawyers to find.
 - Cons: Although a typical civil matter involves a plaintiff’s release/dismissal in exchange for monetary compensation, other civil matters can involve injunctive relief and other interests (i.e., child custody rights). This change is incomplete to the extent that it does not offer any guidance regarding disclosures on these points. The specification is unnecessary as the requirement of these disclosures is already implicit in the definition of “informed written consent.”
3. The current rule refers to a “member” and the proposed rule substitutes the term “lawyer.”
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45,

² The twenty jurisdictions are: Alabama, California, Connecticut, District of Columbia, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, Washington, and West Virginia.

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- 9.46, 9.47, and 9.48 of the California Rules of Court.)
- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
4. Move the proposed rule out of Rule 3-310 and make it a standalone rule. Assign the number 1.8.7 rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as rule 1.8(f).
- Pros: The drafting team agrees with the approach taken by RRC1. RRC1 proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, RRC1 recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.
 - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

B. Concepts Rejected (Pros and Cons):

1. Retain the rule as a part of current Rule 3-310 rather than as a separate rule following the Model Rule 1.8 approach.
 - Pros: Retaining the rule as a part of Rule 3-310 recognizes that a lawyer addressing an aggregate settlement must approach it as a current client conflicts issue. It also continues the familiarity that lawyers presently have with the current rule’s approach to the topic of conflicts of interest.
 - Cons: A majority of states have adopted Model Rule 1.8 and leaving the aggregate settlement rule with current Rule 3-310 is an unnecessary departure from the national standard.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The proposed rule adds a reference to aggregate agreements in the representation of two or more clients in a criminal matter.
2. The proposed rule adds a description of the required client disclosures for aggregate settlements.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
2. Assign comparable Model Rule number to the proposed rule (1.8.7) rather than follow

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the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as rule 1.8(g).

E. Alternatives Considered:

None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues for the Commission's consideration.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Martinez

- [Date]: Email Comment

Cardona

- [Date]: Email Comment

Eaton

- [Date]: Email Comment

Harris

- [Date]: Email Comment

Stout

- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommends that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-310(D) [1.8.7] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-310(D) [1.8.7] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

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XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)