



Ethics in Mass Tort Settlements



Barry Hill

Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, P.C.
Wheeling, West Virginia
www.anapolschwartz.com



Mass tort benefits to claimants:

- Access to leading lawyers with adequate litigation funding.
- Lower expenses per claim.
- Increased settlement leverage.
- Teams of lawyers on the liability case.
- Individual claim is often economically unfeasible as a solo case.

Criticisms of mass torts from the claimants' perspective include:

- Claimants' lawyers get paid too much.
- Claimants are treated as inventory.
- Claimants are ignored in decision-making.
- Claimants don't have adequate information to make informed decisions.

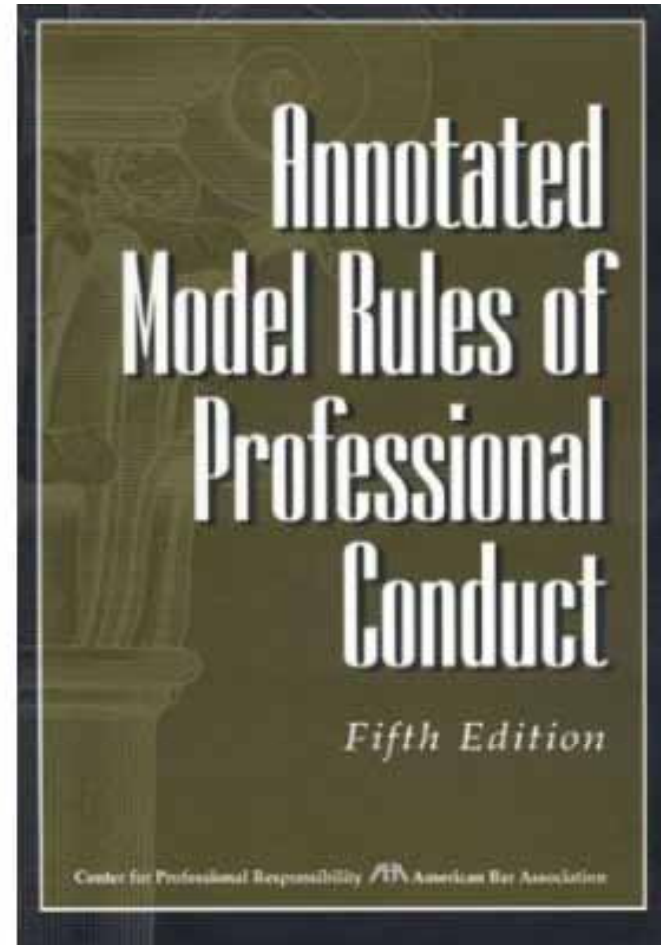
The mass tort compromise:

- Clients benefit from the bargaining power of their lawyer.
- Bargaining power ordinarily increases as the number of clients increases.
- As the number of clients increases, personal contact decreases.
- Client satisfaction with the process and result can compensate for the loss of personal contact.

One way problems start:

- How much for all of your cases?
- An inventory settlement is usually conditioned upon a high participation rate.
- Tension between lower value and higher value cases is always present to some extent. More often the lower value (or no value) cases cause the problem.

The current rules



The Model Rules predate the emergence of mass tort litigation.

- Model Rules are based on the one-client, one-lawyer situation, and their application in the mass tort setting is awkward.
- Common mass tort situations implicate conflicts under the Model Rules.
- Some advocate rule changes, but the existing rules control today.

MR 1.7(b) Conflicts

Multiple representation conflicts can generally be waived, if the lawyer reasonably believes all clients can be represented effectively.

MR 1.8(g): Aggregate Settlement

A lawyer who represents two or more clients shall not participate in making an aggregate settlement, unless each client consents after consultation, including disclosure of the existence and nature of all the claims involved and of the participation of each person in the settlement.

This requires:

- Unanimous consent
- Consultation meeting Model Rule standards
- Identification of all settling clients
- Disclosure of the amount each client receiving

MR 1.8(g): Aggregate Settlement

Rule 1.8(g) is intended to prevent settlement of a weak claim by bundling a strong claim with it, to the detriment of the stronger claim.

Application is fairly easy in the contexts envisioned when the rule was adopted, such as two victims in the same car wreck with the same lawyer.

Application to 10, 100, 1000, or more cases is another story.

Interplay between MR 1.89(g) and MR 1.6

- MR 1.6 (Confidential Information) says that a lawyer shall not reveal information relating to the representation of a client, unless the client consents after consultation.
- MR 1.8 requires lawyer in an aggregate settlement to identify the lawyer's other clients in the settlement and divulge how much each is to receive.
- To satisfy both rules, the lawyer needs to consult with each client and obtain consent to divulge the amount the client will receive, before providing this information to other clients.
- MR 1.6 does not define consultation.

Consultation is defined in MR 1.4 and 1.7

- **MR 1.4:** a lawyer shall explain a matter to the client to the extent reasonably necessary to permit the client to make informed decision.
- **MR 1.7:** communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
- Consultation does not require a one-on-one personal meeting with the client, or any face to-face meeting. The information needed to make an informed decision can be provided by any reasonable means.

Practical 1.8 compliance

- Knowing the full name of others represented by a lawyer is not useful information to a client who is comparing a proposed settlement to those of the lawyer's other clients.
- First name and last initial, or other identification system, will do. Criteria used to determine settlement amounts are important (nature of event, consequences of event, age, etc.)
- Be prepared to withdraw from representation of a person who rejects proposed settlement, but don't threaten to withdraw if the client rejects. You don't want consent subject to being challenged later as coerced.

*Amchem Products v. Windsor**

- No tolerance for aggregate settlement conflicts suggested.
- The court disapproved a global settlement with no objective standards for fair representation of subgroups with different interests.
- If subgroups have differences that would prevent their claims from going to trial together, then their claims cannot be lumped together in a global settlement.

*117 S. Ct. 2231 (1997)

*Quintero v. Jim Walter Homes**

- Narrow interpretation of 1.8 requirements to tell a plaintiff who the other plaintiffs are and what they are going to get under the settlement.
- Court found Quintero was not informed of the nature and amounts of all claims being settled under an aggregate settlement.
- Quintero should have been given a list showing names and amounts.
- The court held that an Attorney's violation of a disciplinary rule (1.8) voids a settlement and release.

*709 S.W.2d 225 (Tex. App. 1985)

*Hayes v. Eagle-Pitcher**

- Nonwaivable, unanimous consent is the hallmark of an ethically proper aggregate settlement.
- But the court refused to enforce a unanimous agreement by the plaintiffs that they would be bound by a majority vote on a settlement, if and when made, that was made at the outset of litigation.

513 F 2d 893 (10th Cir. 1985)

*Arce v. Burrow**

- It is unethical for plaintiffs' counsel to enter into an aggregate settlement without either:
 1. negotiation of individual claims, *or*
 2. informed consent of individual claimants.
- Fee forfeiture if willful or gross negligence.

*958 S.W.2d 239 (Tex. App. 1997)
aff'd in part, rev'd in part, 997 S.W2d 229 (1999)

*Huber v. Taylor**

- Filed by some original members of the class against their original mass tort lawyers.
- Complaint says the lawyers:
 1. defrauded a group of unsophisticated, hard-working union members in blue-collar trades, who were treated as mere inventory;
 2. entered into aggregate settlements without the knowledge or approval of their clients; and
 3. exercised complete discretion as to the amount and timing settlement payments and as to how much the lawyers reimbursed themselves for expenses.
- Summary judgment to the defendant lawyers in February 2004 is on appeal to the Third Circuit.

*Civil Action No.02CV-304,W.D.PA

What to do?

Theory 1: scrap existing rules

- Abolish the aggregate settlement rule.
- Allow clients to waive conflicts at start of litigation.
- Allow clients to consent to be bound by a majority vote.
- Waive MR 1.8 disclosures to protect privacy and security.

What to do?

Theory 2: nothing

- Unreasonable to put a person in the position of waiving the right to reject a settlement without some idea of what the claim is worth or how it compares to others.
- Unreasonable for a person, who later learns what's going on, to be held to an agreement made in ignorance.
- ABA Ethics Guideline: conditioning engagement on client giving up right to approve future settlement is impermissible.

Three acceptable ways to settle the claims of multiple clients

(No claim that these are the only three)

1. Series of individual minimums

- Clean and simple.
- Prior authorization of minimum acceptable settlement from each client.*
- Accept offers meeting minimum and reject those that don't.
- Defendant might impose a participation rate requirement that results in no case being settled using this method.
- Plaintiffs' lawyer has little flexibility.
- Can leave plaintiffs' lawyer with good cases settled and junk left over.

*Better to have one minimum figure than a range.

2. Aggregated individual minimums

- Prior authorization of minimum acceptable settlement from each client.*
- Individual minimums are added up to arrive at an aggregate minimum.
- Negotiate only the aggregate number.
- Some defendants prefer this method.
 - No confidentiality on aggregate amount.
 - Defendant doesn't want to know individual allocation.
 - Avoids setting market rate for claims with similar specifications.

*Better to have one minimum figure than a range.

3. Lump sum with claim matrix and third party administrator

- Lump sum for the group.
- Adhere to MR 1.8 consent and disclosure
- Develop allocation methodology, process, and standards.
- Use a third party claims administrator to implement the claim process.
- Clients perceive a process administered by a third party as being fairer and less suspect than if administered by the lawyers who negotiated the settlement.

Worth remembering:

"No matter what the sophistication level of a client, it is never the client's duty to recognize conflicts of interest nor is it the client's duty to seek out such information. No matter what the education level or the sophistication of a client, it is always the attorney's duty to fully disclose the existence or potential for conflict of interest, to avoid such conflicts, and to obtain, if necessary, a full waiver of such conflict." *In the Matter of Breen*, 830 P.2d 462 (Ariz. 1992).

Early information

- Benefits of having a lawyer with many cases can be explained.
- Good idea to let clients know that one won't be favored over another for reasons unrelated to claim merits.
- Explaining the different settlement models that might come into play is more likely to be confusing and misleading than useful.
- The benefit of explaining early that you might have to withdraw from some cases in order to settle others needs to be balanced against the risks of losing some clients and confusing others.
- Medicare and other third party reimbursement claims should be addressed at some point before negotiations start.

Our Government Friends

Centers for Medicare & Medicaid Services

Department of Health & Human Services, USA

Medicare reimbursement claims

- Don't ignore.
- Forget about *Thompson v. Goetzman*, *Brown v. Thompson*, and *U.S. v. Baxter*. Medicare Prescription Drug Improvement & Modernization Act, §301, took away all the arguments retroactive to 1984.
- Settlement agreement stipulation that medical expenses:
 - are not included is ineffective against the government.*
 - other than those specified are unrelated is not binding on the government.*
- Applied in Rezulin “ingestion only” cases.
- Government can recover double damages against defendant and/or plaintiff's lawyer.

*A court order saying this probably will work.

Remember Baycol

- Few who settled Baycol claims started early on Medicare claims.
- Double holdbacks.
- It was six months to a year, and sometimes longer, from settlement to final distribution to a client with a Medicare reimbursement claim.
- Lots of time and effort spent to resolve related vs. unrelated issues, as well as other frustrating problems.
- Some clients were understanding. Others weren't.
- No one wants to go through this again.

Design a system for managing Medicare claims or hire someone who already has one.

- Avoid the problems that are certain to be visited upon you if you wait until a case is settled, or a month before starting negotiations.
- Start early.
- Does anyone believe Merck is going to litigate every case? *This would take 1000 cases a year going to verdict for 100 years.*
- A grid or matrix agreement with the government would be ideal.