

A Grid or a Letter?

Disclosure of participation. The ABA/BNA Lawyer's Manual on Professional Conduct ("MOPC") describes the use of grids to satisfy Model Rule 1.8(g), as follows:

"[Disclosure] does not expressly require lawyer to identify each participant by name. To protect clients' privacy, some lawyers in mass tort cases withhold the name of proposed participants and instead describe clients' participation in terms of proposed payments to categories of individuals or proposed payment for the types of injuries. See Silver & Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 *Wake Forest L. Rev.* 733, 7548-59 (1997). Commentators generally agree that in mass actions where the plaintiffs do not know each other, Rule 1.8(g) should not be construed to require disclosure of clients' name as long as clients are given enough other information about the settlement to make an informed decision whether to accept it [citations omitted]." MOPC 51:375 at 3.

In 2006, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion describing the disclosure that a lawyer must make in soliciting the informed consent required by the 2003 version of Model Rule 1.8(g). The Opinion required five items of information to be disclosed to ensure a valid and informed consent to an aggregate settlement, as follows:

"[1.] The total amount of the aggregate settlement or the result of the aggregated settlement.

[2.] The existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregated settlement.

[3.] The details of every other client's participation in the aggregate settlement or aggregated settlement, whether it be their settlement contributions, their settlement receipts, the resolution of the criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).

[4.] The total fees and costs to be paid to the lawyer as a result of the aggregate settlement or by an opposing part or parties. n 13¹

¹ N 13 provides "See. E.g., *In re Hoffman*, 883 So. 2d at 433. ('During the negotiation of the aggregate settlement, the lawyer must confer with all of his clients and fully disclose all details of the proposed settlement. . . .') When the amounts of fees and costs to be paid to the lawyer as a result of the aggregate settlement are not yet determined at the time of the settlement, the lawyer will need to disclose to each of his clients the process by which those amounts will be established and who will pay them, and the amount he will be requesting to be paid. To the extent that the lawyer will receive compensation from someone other than each client, the lawyer will need to comply with the requirements of Rule 1.8(f)."

[5.] 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.” ABA Formal Opinion 06-438 (Feb. 10, 2006, footnotes omitted).

Settlement information required. The prevailing practice for mass torts is that amounts should be disclosed but name disclosure is inappropriate, as reflected in the following discussion of the disclosure requirement for aggregate settlements in mass torts:

“The mass context, however, requires interpretation of the rule with sensitivity to the special concerns of mass litigation and settlement. For mass settlements, MRPC 1.8(g) should be interpreted in light of the resemblance between a nonclass mass settlement and a settlement class action or a litigation class action with settlement opt-out. . . . In particular, the rule's requirement that "disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement" should not apply in mass litigation precisely as it does in smaller cases. In an aggregate settlement of a case involving three passengers suing a driver, each passenger should know how much money each of the other two would receive in the settlement. In mass representation, however, it should suffice to disclose the information a client reasonably needs in order to decide whether to accept the settlement, such as the total amount of the settlement, the number of plaintiffs, and any formula or grid used in calculating settlement amounts. It ordinarily should not be necessary, in mass representation, to disclose each individual name, injury, and amount. Disclosure of detailed individual information infringes on client confidentiality to an extent unjustified by the purposes of the aggregate settlement rule. Rather, the MRPC 1.8(g) disclosure in mass non-class settlements should be treated more like notice in a settlement class action, which provides the information a reasonable client would need in order to decide whether to opt out.” Erichson, Howard M., *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U Chi Legal F 519, 575 (footnotes omitted).