Consultation and Written Consent.

Canon 5; Disciplinary Rule 5-106. All versions of the current ABA Model Rule 1.8(g), have their origins in Canon 5 of the 1908 ABA Canons of Professional Ethics, which relied upon Sharswood, George, *An Essay on Professional Ethics*, 32 A.B.A. Rep 1 (5th ed. 1907), and provided as follows: "A lawyer should exercise independent professional judgment on behalf of a client." The accompanying disciplinary rule required advice and consent to an aggregate settlement, as follows:

> "(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement." Disciplinary Rule 5-106(A) (1908).

ABA Formal Opinion 235 (1941) provided some insight into representing multiple clients, but not in the context of aggregate settlements, as here, but with a slightly different disclosure standard. Canon 6, as in effect in 1941, provided that "[i]t is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts." Ethical Consideration 5-15 issued to interpret Canon 6 explained the required full disclosure to represent conflicting interests as follows:

> "The full disclosure required by this canon contemplates that the possible adverse effect of the conflict be fully explained by the attorney to the client to be affected and by him thoroughly understood." EC 5-15.

ABA Model Rule 1.8(g). Canon 5 and its Disciplinary Rule 5-106 described *supra* were replaced by Rule 1.8(g) of the ABA Model Rules of Professional Conduct, which, in pertinent part, added the requirement of consultation (rather than advice) and disclosure of the existence and nature of all the claims (instead of being advised of such claims), as follows:

> "(g) 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 consents after consultation, including disclosure of the existence and nature of all the claims . . . and of the participation of each person in the settlement."

The ABA Commentary explained that the above rule "is substantially identical to DR 5-106." Thus, perhaps the replacement of "advice" with "consultation" was not viewed as significant by the drafters of the ABA Model Rule 1.8(g). Clearly, "consultation," however, is bilateral, whereas "advice" may be unilateral.

Post-2002 rule. The Model Rule was amended in 2003 to add the requirement of a writing signed by the client to reflect informed consent and detailing the lawyer's disclosure, as follows:

> "(g) 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 the claims . . . and of the participation of each person in the settlement."

In the accompanying Commentary, the drafters say:

> "The rule stated in this paragraph . . . provides that, before any settlement offer . . . 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 . . . if the settlement . . . is accepted."

Informed consent and Model Rule 1.0(e). With the introduction of the "informed consent" language in 2003, resort must be had to the definition of that term in the Model Rules in order to apply the aggregate-settlement rule. The result of informed consent is described in ABA Model Rule 1(e), as follows:

> "Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The Official Commentary that accompanies Model Rule 1(e) provides informative expansion and substantial flexibility in implementing the concept by adopting a "reasonable efforts" standard, as follows:

> "The communication necessary to obtain such consent will vary according to the Rule involved and the circumstance giving rise to the need to obtain informed consent. The lawyer must make *reasonable efforts* to ensure that the client or other person possess information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives."

Mode Rule 1.8(g) requires that the informed consent be in a "writing" signed by the client." Each of those concepts is addressed in Model Rule 1(n) as follows:

> "(n) 'writing' . . . denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing,

photostating, photography audio or videorecording and e-mail. A ‘signed’ writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.”