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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

In re:	SC No. S061105 61105
Complaint as to the Conduct of	OSB No. 10-60
DANIEL J. GATTI,	
Accused.	

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Nature of the Action and Relief Requested

The Oregon State Bar (Bar) instituted disciplinary proceedings against Daniel J. Gatti (Gatti) on September 17, 2010, alleging five violations of the Rules of Professional Conduct (RPC). The Bar takes the position that an actual conflict of interest arose when Gatti represented multiple victims of sexual abuse by the same predatory priest. The Bar contends that the settlement of individual cases constituted an "aggregate" settlement. A hearing was held before a Trial Panel (Panel), which issued an opinion with findings of fact/law on the first cause of action, partial findings on the second, none on the third, and the Panel did not address the fourth and fifth causes. The Panel recommended a six month suspension. Gatti appeals, seeking dismissal of all charges against him on *de novo* review under ORS 9.536(2) and BRs 10.6 and 10.5(a). Gatti's petition under BR 10.5(a) accompanies this Opening Brief.

Nature of the Judgment

The TPO is dated January 22, 2013, and was served on all parties by the Disciplinary Board Clerk on January 28, 2013.

Statutory Basis for Appellate Jurisdiction

Gatti seeks review of the TPO under ORS 9.536(1) and BRs 10.1, 10.3 and 10.5(a).

Entry of Judgment and Notice of Request for Review

The Disciplinary Board Clerk served the TPO on January 28, 2013, under BR 10.1. Gatti filed his request for review by mail on February 12, 2013, under BR 10.3.

Questions Presented on Review

1. Is Oregon's aggregate settlement rule, RPC 1.8(g), unconstitutionally vague, and, if not, what is the definition of an aggregate settlement?

2. Did the Bar prove by clear and convincing evidence that an actual current conflict arose under RPC 1.7(a)(1), which could not be waived?

3. Did Gatti properly communicate with his individual clients about their individual cases in compliance with RPC 1.4(b)?

4. Does the Panel's failure to address the Fourth and Fifth Causes as required by BR 2.4(i)(2)(A) result in dismissal of those causes, and if not, did the Bar fail to prove its Fourth and Fifth Causes?

5. In the alternative and without prejudice, should the Court impose a reprimand rather than a suspension as a result of the facts of this case.

Summary of Argument

This case focuses on a question of first impression: what is the definition of an aggregate settlement under RPC 1.8(g)? There is no definition in either the Oregon rule or its ABA counterpart nor has there ever been. To the extent that it has been defined in Oregon, two Bar ethics opinions—Formal Opinions 2000-158 (under the former Disciplinary Rules) and 2005-158 (under the current RPCs)—defined them as "all-or-nothing" settlements: *all* claimants must agree for *any* to be effective. In this case, Gatti represented 15 individuals pursuing separate claims against the Archdiocese of Portland (Archdiocese) and the State of Oregon (State). The resulting settlements did *not* contain "all-or-nothing" requirements. Accordingly, using the Bar's own public definition at the time of the events

concerned, there was no aggregate settlement. After finally admitting that neither set of settlements included "all-or-nothing" requirements shortly before trial, the Bar changed its theory at trial to argue that any collection of settlements that can be added to a total invokes the rule. This contradicted both Bar opinions noted *supra* as well as the Bar's own prior application of this rule in *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000) (*not* charging that multiple settlements triggered the rule). The lack of a definition of prohibited conduct and the Bar's shifting attempt to impose a definition after-the-fact make the rule impermissibly vague—both on its face and as applied—under the United States and Oregon Constitutions. It is therefore inconsistent for the Bar to now accuse Gatti of violating a rule that is vague, undefined, and which the Bar previously suggested was all-or-nothing.

Beyond this central element, there are three other principal issues.

First, the Bar asserted in the operative complaint on which the case was tried that Gatti allegedly had a nonwaiveable multiple client conflict under RPC 1.7(a)(1) because he supposedly "decid[ed] himself the amount each client would receive from the settlement proceeds[.]"[1] This is simply wrong as a matter of fact. The undisputed evidence at trial showed that *before* the negotiations which culminated in the settlements involved (with the Archdiocese, through court-supervised mediation; with the State, through direct negotiations), Gatti obtained individual settlement authority from each of his clients. Because Gatti anticipated correctly that the mediators on the Archdiocese claims (Judges Michael Hogan and Lyle Velure) would likely total his clients' demands in presenting them to the Archdiocese, Gatti also obtained his clients' advance agreement to divide

[1] Second Amended Complaint, ¶¶ 13 (Archdiocese), 21 (State).

any surplus over the total of their collective authority in proportion to their individual demands.[2] The clients agreed to this procedure. Formal Opinions 2000-158 (at 5) and 2005-158 (at 434) advise that a lawyer can assist clients in creating a process to divide settlement funds without creating a conflict. Gatti used a similar process of advance client authority and agreement in the State settlements. In short, not only did the Bar fail to prove the conflict charge, but the method used by Gatti was the very same method suggested by the Bar.

Second, the Bar contends that Gatti failed to communicate adequately with his individual clients under RPC 1.4(b). The Court noted in *In re Groom*, 350 Or 113, 124, 249 P3d 976 (2011), that the question of whether an attorney has communicated adequately with a client under RPC 1.4 is inherently fact-specific. The undisputed facts here demonstrate that Gatti communicated extensively with each of his clients on all material issues and at all material times relevant to their individual cases. The Bar failed to show otherwise by clear and convincing evidence.

Third, the Panel made no finding of liability on the Bar's Fourth and Fifth Causes (nor did it even address them) and the Bar did not appeal. They should be dismissed for the Panel's failure to make findings as required by BR 2.4(i)(2)(A). Even on *de novo* review, however, the Bar failed to meet its burden of proof on these two causes by the requisite clear and convincing standard.

Summary of Facts

On October 16, 2008, filed a Bar complaint against Gatti asserting he had not received accountings from Gatti for settlements he

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[2] As will be discussed, one client, complainant agreed to flat amounts of $7,500 with the Archdiocese and the State.

reached with the Archdiocese and State for claims of sexual abuse.[3] By the time complaint was tried—nearly four years later—the Bar admitted that in 2007: (a) settled each claim for $7,500 apiece; (b) Gatti provided and received accountings on each settlement; and (c) Gatti had waived all fees and costs on two settlements.[4] The Panel made no finding against Gatti regarding the accountings[5] and the Bar did not seek review.[6]

Instead, the Bar's case at trial focused on 14 other clients—none of whom has ever complained about Gatti's work in any respect (the Other Clients).[7]

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[3] Ex. 35.

[4] Gatti First Request for Admissions from the Bar (First RFAs), Requests 5-11, 15-19. Gatti's First RFAs were filed on November 12, 2010. (Docket, Entry 11.) The Bar never responded to Gatti's First RFAs (Docket, entire). Gatti filed a Second Set of Requests for Admission (Second RFAs) on July 9, 2012. (Docket, Entry 29.) The Bar did not respond to the Second RFAs either. (Docket, entire.) Both sets, therefore, were deemed admitted by BR 4.5(b)(5) and ORCP 45. The Panel ruled that the First and Second RFAs were incorporated into the record by reference, together with the attached documents. (Tr. 8:21-9:2; 13:8-20.)

[5] TPO, entire.

[6] Docket, entire.

[7] The Other Clients' names are in the record but will not be further identified in this brief to protect their privacy. The Other Clients did not waive privilege. (Tr. 9:11-22.) Declarations by the Other Clients to that effect were presented to the Panel under seal in accord with *Frease v. Glazer*, 330 Or 364, 372, 4 P3d 56 (2000), and were appended to the record as Exhibit 116. (*Id.*) The Bar later attempted to argue that privilege had been waived by at least one of the Other Clients because a Bar prosecutor had contacted him without asking him whether he was willing to waive privilege. (Tr. 331:8-343:15.) The Panel determined that privilege had not been waived. (*Id.*)

1. Gatti

In the early 2000s, Gatti took on a series of difficult cases for individuals who were sexually abused in the 1970s by Fr. (while they were juveniles incarcerated at MacLaren Home for Boys (MacLaren). These individuals included and the 14 Other Clients (collectively, " Clients"). was the former chaplain at MacLaren and was a priest of the Archdiocese as well as a State employee.[8] Gatti eventually obtained favorable settlements for all of the clients—including —from the Archdiocese and the State.[9] The settlements with the Archdiocese were reached during a court-supervised mediation conducted in 2006 by Judges Michael Hogan and Lyle Velure and were approved by the U.S. Bankruptcy Court for the District of Oregon in early 2007.[10] The settlements with the State were reached through direct negotiations with the Oregon Department of Justice, supervised by then-Chief Trial Counsel and now Judge Stephen Bushong, following a landmark trial in 2007.[11]

2. The Other Clients

Each Client retained Gatti to pursue individual claims against the Archdiocese, the State and for the alleged abuse (Cases).[12] The Cases were initially filed in state court.[13] In 2004, the

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[8] Second Amended Complaint (SAC), ¶ 3; Answer to Second Amended Complaint (Answer), ¶ 1.

[9] SAC, ¶¶ 9, 17, 19; Answer, ¶¶ 4, 7, 8.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] SAC, ¶ 4; Answer, ¶ 2.

Archdiocese filed for bankruptcy, and the state litigation was stayed while each Client filed individual claims with the Bankruptcy Court.[14]

The Clients presented especially difficult cases. Retired Salem lawyer Greg Smith (Smith),[15] who was Gatti's initial co-counsel, recalled:

> "[Y]ou were representing people that have not admitted to themselves or anybody for 30 years what happened or the effect that it had on them. And you're going against the most credible group of people in the entire world. Most of these people were wrecks."
>
> "And on top of that most of them had really shattered lives, so they were not particularly what we would call the best plaintiffs that you could ask for.
>
> "So you – we were just starting off with the worst disadvantage[.]"[16]

Judge Velure, who served as a mediator in resolving the Cases with the Archdiocese, echoed Smith:

> "Q. Judge, were the cases tough cases?
>
> "A. Very tough cases. They were among probably the toughest group of cases that we had in the archdiocese cases.
>
> "Q. And why was that?
>
> "A. Well, most of them had been incarcerated over their lifetimes going back to juvenile problems and then other problems.
>
> Father was still alive and cognizant. Many of the priests were either dead or infirm, but Father

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[14] SAC, ¶ 6; Answer, ¶ 3; *see also* Tr. 304:10-13.

[15] Smith later left private practice for the Oregon Department of Justice. (Tr. 370:6-19.) He is now retired. (*Id.*)

[16] Tr. 371:19-24; 372:7-12.

> adamantly denied abusing any of these men. And Father was – had some credibility to him.
>
> The – the State also was involved at the same time as the [A]rchdiocese. And Judge Bushong was the assistant attorney general there. And the State had witnesses that would say that these were, for want of a better word, phony cases because one – one person would say 'I was abused by Father and then it would be, 'Oh, gosh, I guess I was too.'
>
> And so these were the most difficult cases to –because there was a lot of – of all the cases these may have been the most defensible. Very difficult cases."[17]

Nonetheless, Gatti took them on.[18] Smith explained why:

> "Q. Why did Dan take these cases on and take that fight on?
>
> "A. Well, Dan's – he's never been afraid of anything. And he's always had a real strong sense of justice. And – and so I think those cases appealed to him for that reason. There was also some other reasons.
>
> "Q. Was there a personal reason in Dan's background?
>
> "A. Yes.
>
> "Q. And what was that?
>
> "A. Dan had been the victim of sexual abuse as a child."[19]

3. Development of the Cases

Each of the Cases was developed individually—by both sides.[20] As recalled by Gatti's then-law clerk, James Bulthuis (Bulthuis)[21], who worked closely with Gatti:

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[17] Tr. 273:10-274:9.
[18] Tr. 373:17-374:4.
[19] *Id.*
[20] Tr. 350:6-7.

> "Each client would meet with Dan individually and talked about their facts of their case. Dan took hours meeting with each one individually to prepare them for their deposition or go over their discovery responses."[22]

Because the Clients had all been in prison, the defendants had extensive files available on each of the plaintiffs:

> "[T]he State had thousands of pages on each client because they had such extensive criminal records."[23]

The lead lawyer for the Archdiocese, Margaret Hoffmann (Hoffmann) of Schwabe Williamson & Wyatt, P.C. in Portland (Schwabe), attested to the thorough investigation and vigorous defense of each case:

> "Q. Ms. Hoffmann, you mentioned early in your testimony with Mr. Best that the [A]rchdiocese viewed these cases, the cases, as being defensible. And I was just wondering, had the [A]rchdiocese and the State investigated each of the cases?
>
> "A. Yes, we had.
>
> "Q. And –
>
> "A. Well, when you say 'each of them,' we had – we had undertaken – we got extensive investigations into the claims of Mr. Gatti's clients.
>
> "Q. And had you taken each of the client's depositions?
>
> "A. To the best of my knowledge, we had.
>
> "Q. And those depositions in some cases went more than one day?

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[21] Bulthuis is now a lawyer in private practice in Washington with no continuing practice relationship with Gatti. (Tr. 348:3-13.)

[22] Tr. 350:16-30.

[23] Tr. 350:24-351:1.

"A. Yes, they did.

"Q. And amounted in some cases to several hundred pages of deposition transcripts?"

"A. Yes."[24]

While developing the cases individually, Gatti was also attentive to the possibility of conflicts among the Clients and discussed this extensively with each client. He did so both at the outset of each individual representation[25] and as each case progressed.[26] He also discussed this during the resolution of the cases. There were written disclosures as well, including a joint representation agreement.[27] In fact, even the Bar's counsel acknowledged:

> ". . . Mr. Gatti actually had done a very good job of providing documentation including the joint representation agreements that basically spelled out some of the potential problems and what would happen if those problems arose."[28]

4. <u>Settlements with the Archdiocese</u>

The Cases were included in a mediation of all abuse claims against the Archdiocese in 2005.[29] The Cases, however, did not settle at the 2005 mediation.[30]

In 2006, Judge Perris, who was presiding over the Archdiocese's bankruptcy, appointed Judges Hogan and Velure as mediators and ordered all remaining abuse claimants to a second mediation.[31] At that point, there

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[24] Tr. 300:11-301:6.
[25] *See, e.g.*, Exs. 2-7.
[26] *See, e.g.*, Exs. 10-11.
[27] *See, e.g.*, Exs. 2-7, 10-11.
[28] Tr. 22:15-20.
[29] SAC, ¶ 7; Answer, ¶ 4.
[30] *Id.*
[31] Ex. 101.

were approximately 150 claims pending in total (*i.e.*, all claims being handled by several different law firms)—including the 15 Cases.[32]

The second mediation occurred over several weeks at the federal courthouse in Portland during the Fall of 2006.[33]

The Bar conceded in its pleadings that Gatti obtained individual settlement authority from each of the Other Clients (and *before* the second mediation: "In advance of the [second] mediation . . . [t]he Accused also obtained minimum settlement authority from the other abuse clients."[34]

At the federal courthouse, Judges Hogan and Velure separated the parties—with Judge Hogan acting as the go-between for the Cases.[35] Hoffmann confirmed that she had no direct contact with Gatti at the mediation and that neither shared their confidential settlement strategy with the other:

> "Q. And Dan didn't share his confidential settlement strategy with you at that mediation, did he?
>
> "A. No, he did not or at any time.
>
> "Q. And you didn't share your confidential settlement strategy with Dan either; correct?
>
> "A. That is correct."[36]

Judges Hogan and Velure insisted that the cases be presented and evaluated on an individual basis.[37] Judge Velure related:

> "Q. In these particular negotiations that were conducted at the mediation at the federal courthouse in

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[32] Tr. 286:24-287:9.
[33] Tr. 270:21-272:11; 286:24-287:18.
[34] SAC, ¶ 8 at 3:8-10; *accord* Answer, ¶ 4.
[35] Tr. 301:12-23.
[36] Tr. 301:24-302:5.
[37] Tr. 272:17-273:9.

> Portland, did you and Judge Hogan insist the case be presented and evaluated on an individual basis?
>
> "A. Absolutely.
>
> "Q. And when I spoke with you earlier, you indicated to me that there was no bundling. Do you recall that?
>
> "A. Yes. Some of the insurance carriers wanted to – from other states I guess they're used to this. But they wanted to just offer a total sum of money to resolve this lawyer's cases or that lawyer's cases, and we advised them that we didn't think that was appropriate. And so we felt that each case needed to be evaluated on its own merits."[38]

Each case was addressed individually on its merits because no two claims were the same. Moreover, the nature of the sexual abuse was traumatizing and extremely sensitive to the clients involved. Hence, the claims were not discussed in groups, but were evaluated individually and confidentially, as Gatti described when cross-examined:

> "You know, your question is offensive. And, no, they didn't know what the other people got. Every case was determined individually based upon . . . many things. It wasn't based upon what other people got, it was never close to that."[39]

At the mediation, Judge Hogan met with Gatti first.[40] Judge Hogan confirmed that Gatti had individual settlement authority from each of the Clients.[41] Due to the overall number of claims, Judge Hogan's practice was to total individual authority by commonly represented claimants into a combined demand to the Archdiocese.[42] Judge Hogan explained:

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[38] Tr. 272:17-273:8.
[39] Tr. 196:4-19.
[40] Tr. 289:3-13.
[41] Tr. 289:18-23.
[42] Tr. 289:3-17.

> "[T]his happens in multiple mediations I've worked on. . . .
>
> "In this case in a sense it was almost necessary because of the various institutions that some of these people were in."[43]

Gatti anticipated this possibility and, if he was able to obtain a collective number from the Archdiocese that exceeded the sum of his clients' individual settlement authority, had also obtained his clients' advance consent to divide any "surplus" in proportion to each client's individual settlement authority.[44]

The collective demand Judge Hogan presented to the Archdiocese for the Cases was $600,000.[45]

Judge Hogan went to the Archdiocese's separate caucus room and Hoffmann described what occurred next:

> "Judge Hogan came to me and my client who was there on behalf of the [A]rchdiocese, and told us that we could settle all of Mr. Gatti's cases for $600,000. We resisted. The [A]rchdiocese believed that those cases were defensible and resisted the settlement.
>
> "Judge Hogan was adamant and told us that these were some of the very last cases that were involved in the bankruptcy and that we would resolve those. We would not except them out of the process and that he had been very successful in getting money on the table from various insurers and that the [A]rch - - - it was incumbent upon me as the lawyer for the [A]rchdiocese to resolve these cases and that –there was no discussion. He said, 'You will accept the $600,000 demand.'
>
> . . . . .

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[43] Tr. 289:11-16.

[44] Ex. 41 at 1-2. As will be discussed later, had agreed to a flat $7,500.

[45] Tr. 295:15-20.

> And I spoke with my client, and we said 'Okay. We will accept it.'"[46]
>
> "My recollection is there was no back and forth on the number, that Judge Hogan brought us a number and was adamant that there was – that we could not counter and that we would accept that number."[47]

Both Judge Hogan and Father lawyer, Thomas E. Cooney (Cooney) (who was caucusing with the Archdiocese at the mediation) confirmed Hoffmann's account.[48] This number and method was imposed by Judge Hogan, not Gatti.

Once the Archdiocese accepted the total Judge Hogan proposed, Judge Hogan and Judge Velure left it to the attorneys involved to prepare the settlement agreements.[49]

Following the mediation, Gatti's office provided Schwabe with each of the Clients' individual settlement amounts based on their individual settlement authority and the agreed process for dividing the surplus on a proportional basis as described above.[50] Schwabe prepared the individual settlement agreements—one for each of the Clients.[51]

Each of the settlement agreements contained identical recital and integration clauses:

- *Recital*

> "3. Claimant and the Debtor, desiring to avoid the expense and delay inherent in litigation and further legal wrangling, have agreed to settle and compromise their differences on the terms set forth below."

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[46] Tr. 295:17-296:16.
[47] Tr. 302:9-13.
[48] Tr. 290:3-291:1 (Judge Hogan), 360:9-362:4 (Cooney).
[49] Tr. 291:2-16.
[50] Ex. 20.
[51] Tr. 302:20-25.

- *Integration*

"11. **Entire Agreement.** This Settlement Agreement constitutes the entire agreement between the parties."[52]

For the settlements with the Archdiocese:

- Each of the Clients signed his own settlement agreement that included his own individual amount.[53]
- Each Client was also aware of the overall total of the settlements with the Archdiocese.[54]
- Judge Perris approved each of the settlements.[55]
- Each of the Clients received an individual settlement check from the Archdiocese.[56]

There is no contention (nor any charge) that any of the Clients did not receive their settlement with the Archdiocese.[57] None of the Clients ever rescinded their settlement with the Archdiocese.[58]

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[52] Ex. 114.

[53] *Id.*

[54] *See, e.g.*, Ex. 46, Tab 2 (newspaper articles); Tr. 111:9 ("I seen it in the paper [.]," and 111:10-11 (also heard from Gatti's office directly).

[55] First RFA, Request 6.

[56] *See, e.g.*, Ex. 24.

[57] SAC, entire. At trial, the Bar attempted to suggest that there was a mathematical error on one of the Clients' payments. (Tr. 306:21-327:3.) Over Gatti's objection, the Bar made this contention by calling one of its own prosecutors as a supposed "expert" accounting witness. (*Id.*) The Bar prosecutor, however, had no accounting training, was not a CPA or a forensic accountant by either experience or licensure and had never testified as an expert in any proceeding at any time on any subject. (Tr. 306:21-310:7.) This issue had never been raised before trial and was never alleged by the Bar. On cross-examination, the Bar prosecutor admitted that she did *not* take all of the financial information available into account that would have explained—and eliminated—the asserted "discrepancy." (Tr. 323:20-325:18.) In response, Gatti testified that although he did not perform the mathematical calculations involved, he would certainly make any client

Testimony by those closest to the Archdiocese settlements was uniform on the job Gatti did for the Clients:

Judge Velure

"Q. And, Judge, how do you think Dan did for [the [c]lients?

"A. . . . I thought he did an absolutely outstanding job. He cared for each client, dealt with each client individually, and worked out a deal that I thought was simply outstanding given the – given the problems associated with these cases. I have absolutely no criticism whatsoever [of] the way that Mr. Gatti handled these clients."[59]

Judge Hogan

"Q. Judge, do you have an opinion about how Dan did for his clients in these cases?

"A. Yeah. I – yes, I do. He did very well for his clients."[60]

Greg Smith

"Q. What's your opinion of the results that Dan got for the clients?

"A. Unbelievable. There's probably only two or three lawyers in this state that could have got that result. And I didn't think he was going to win at all."[61]

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whole if it was demonstrated that there was a mathematical error. (Tr. 430:10-23.) The TPO does not mention the Bar prosecutor's accounting testimony at all nor does it make any finding that there was any mathematical error. (TPO, entire.) Because review in this Court is *de novo*, Gatti renews his objection to this extremely unusual tact taken by the Bar of calling one of its own prosecutors as an asserted "expert" when the lawyer involved is wholly lacking in the requisite qualifications involved and offered testimony on matters that had never been alleged or alluded to by the Bar. Even under the administrative law standard of BR 5.1(a), this testimony (and associated Exhibits 55-56) should be excluded.

[58] Tr. 304:18-305:2 (no recall by Hoffmann).

[59] Tr. 274:10-18.

[60] Tr. 291:17-20.

[61] Tr. 377:18-23.

5. Trial Against the State and Father

Although the Archdiocese settled with the Clients at mediation, the State and did not.[62] Judge Velure remarked: "I know that the State didn't pay anything because they refused to participate because they felt the cases were so defensible."[63] The State and took three cases to trial in May of 2007 in Multnomah County Circuit Court, where two of the three plaintiffs prevailed.[64]

At that time, the trial was unprecedented.[65] Gatti's then co-counsel, Erin Olson (Olson),[66] explained:

> "[T]he trial of a living priest was unusual and I think the first trial involving allegations against a living priest that had happened in Oregon.
>
> . . . . .
>
> "They were landmark for a couple of reasons. One was the allegations against the State were brought under the Oregon Tort Claims Act which had a two-year statute of limitation. So the first step was to get beyond that, and getting beyond that was a huge challenge.
>
> "But it was [also] landmark in the sense that there just hadn't been a case against a living priest in the state of Oregon."[67]

Both the State and Father defended the cases aggressively.[68] Again, co-counsel Olson noted:

> "So the dynamic was that he [was a much beloved priest who denied any molestation of minors. And his

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[62] SAC, ¶ 16, Answer, ¶ 6.

[63] Tr. 282:10-13.

[64] SAC, ¶ 16, Answer, ¶ 6.

[65] Tr. 394:2-395:7.

[66] Olson is a former prosecutor for the State of Oregon and is now in private practice in Portland. (Tr. 389:4-11.)

[67] Tr. 394:13-15; 394:24-395:7.

[68] Tr. 393:17-19.

> two employers, the State of Oregon and the [A]rchdiocese, supported that position actively."[69]

Hoffmann, the Archdiocese's lawyer, observed the trial and reported:

> "Q: And how do you think Dan did for his clients in the cases?
>
> "A. Well, he won a trial for them. I thought Dan, in my view, proved that he was a – a willing advocate. He took three of his clients' cases to trial against the State and against Father himself. And, in my view, against all odds, or odds that I would have given, he prevailed. And I watched part of the trial, and I thought he did a really nice job."[70]

6. <u>Settlements with the State</u>

Following the trial, Gatti anticipated the State might finally approach the Clients regarding settlement—both those involved in the trial and those whose cases remained to be tried.[71] Gatti first obtained settlement authority from the two clients who had prevailed at trial.[72] He then asked the remaining Clients if they were willing to resolve their claims against the State for the same proportionate share as reflected in their settlements with the Archdiocese.[73] All of the Other Clients agreed.[74]

The Oregon Department of Justice (DOJ) did approach Gatti to discuss resolving the claims of all the Clients. Chief Trial Counsel (and now Judge) Stephen Bushong supervised the negotiations and ultimately negotiated directly with Gatti.[75] The State offered to settle, and

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[69] Tr. 393:22-394:1.

[70] Tr. 305:15-24.

[71] SAC, ¶ 17; Answer, ¶ 7.

[72] Ex. 41 at 3.

[73] SAC, ¶ 17; Answer, ¶ 7. As discussed *infra*, again agreed to accept a flat $7,500. (Tr. 356:7-16 (Bulthuis); 133:22-25 (

[74] *Id.* *See also* Ex. 41 at 3.

[75] *Id.*

the sum involved—$1,050,000—again exceeded the Clients' minimum settlement authority. The Other Clients (and accepted.[76]

DOJ prepared the State settlement agreement.[77] DOJ used a master form to be executed by each of the Clients.[78] It covered both the State and [79]

The DOJ settlement agreement contained both recital and integration clauses:

- *Recital*

  "3. * * * Plaintiffs, State defendants, and desiring to avoid the expense, delay, and uncertainty of litigation and possible appeals, have agreed to settle and compromise their differences on the terms set forth below."

- *Integration*

  "8. **Entire Agreement.**

  "This Settlement Agreement and Release constitutes the entire agreement between the parties."[80]

To expedite distribution of the settlement proceeds, Gatti forwarded powers of attorney to the Clients permitting him to execute the settlement agreement on their behalf.[81] The form letter accompanying the powers of attorney informed the Clients of the overall total and their individual settlement amount calculated using their prior authorization.[82]

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[76] *Id.*
[77] Second RFA, Request 29.
[78] Ex. 29.
[79] *Id.*
[80] *Id.*
[81] *See, e.g.*, Ex. 27.
[82] *Id.*

After receiving the powers of attorney back, Gatti executed the State settlement agreement and disbursed the settlement proceeds accordingly.[83]

There is no contention (nor any charge) that any of the Clients did not receive their settlement with the State.[84] None of the Clients ever rescinded his settlement with the State.[85]

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[83] Exs. 29 (executed State settlement agreement) and 46, Tab 5 (distributions). The client who lost at trial was subpoenaed by the Bar for the hearing in this matter. (Tr. 68:4-14.) He appeared with counsel and did not waive privilege. (*Id.; see also* Tr. 66:16-21.) In response to questions by the Bar, the client who lost at trial testified that he did not appeal based on advice of counsel. (Tr. 70:14-23.) He did not receive a settlement payment, but instead the State and waived costs to resolve his case. (Ex. 46, Tab 4 (7/25/2007 Letter from Gatti to Judge Bushong).) After the settlement was fully concluded, Gatti later gave this client a personal gift of $15,000. (Tr. 80:18-24.) This client voiced no criticism at all of Gatti:

> "Q. When Dan was representing you in the claims against Father against the [A]rchdiocese and the State, did he work hard for you?
>
> "A. Yes, he did.
>
> "Q. Do you have any complaints at all about the work he did for you?
>
> "A. Absolutely not."
>
> (Tr. 80:25-81:6.)

[84] SAC, entire. Over Gatti's objection, the Bar attempted to use its Bar prosecutor "expert" to suggest that there was a mathematical error on this distribution, too. (Tr. 306:21-327:1.) On cross-examination, however, the Bar prosecutor "expert" again conceded that she had not taken into account information that would eliminate the asserted discrepancy. (Tr. 325:19-327:7.) Again, because review in this Court is *de novo*, Gatti renews his objection to this proffered "expert" testimony (and associated Exhibits 55-56.)

[85] *See* Ex. 41at 3 and Ex. E (distributions).

As with the settlements with the Archdiocese, testimony by those closest to the State settlements was uniform on the job Gatti did for his clients:

> ***Erin Olson***
> "Q. How do you think Dan did for his clients in the cases?
>
> "A. Remarkably well. The trial verdict was surprising to a lot of people just because the three plaintiffs were all very troubled men."[86]
>
> ***Tom Cooney***
> "Q. And you had a chance to observe Dan's work on both the [A]rchdiocese cases and the State case including trial. What's your opinion on how Dan did for his clients?
>
> "A. Well, he – he won two and he lost one, so he did very well. Dan's a formidable trial lawyer. People don't seem to recognize that sometimes. But I think he's a very, very, very able trial lawyer.
>
> I also remember that he was very accommodating and very professional."[87]

7.

Of the 15 Clients, there was one whose settlements were different: complainant Gatti acknowledged this from the outset.[88] So did .[89] agreed to accept a flat $7,500 from the Archdiocese and the State.[90]

had a particularly difficult case due to his criminal history. As put it in a letter to Gatti: "[Y]ou have better clients to take to trial, and

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[86] Tr. 404:19-23.
[87] Tr. 364:16-25.
[88] Ex. 36.
[89] Exs. 18, 27.
[90] *Id.*

out of 16, I'm your hardest case because a jury would not be sympathetic to me because of my charges." [91] criminal history is discussed at length by the Court of Appeals in v. *Armenakis*, 156 Or App 24, 964 P2d 1101 (1998). He is serving a 27 year prison sentence.[92]

In light of his criminal history, authorized Gatti to accept $7,500 when it was offered at the first mediation in 2005.[93] Gatti did so, but the Archdiocese later withdrew that offer.[94] As they approached the second mediation (with Judges Hogan and Velure) in 2006, Gatti asked if he would accept $7,500 again.[95] Bulthuis, who was on the call, testified—*and was not cross-examined by the Bar*—regarding this conversation:

> "He [Gatti] reminded Mr. that he had already accepted the previous offer from the first round of mediations of 7500.
>
> "And had always wanted that $7500. He repeatedly let Dan know that even after the offer was pulled off the table from the [A]rchdiocese between the first and second mediation. So Dan asked him, 'Well, if I can get the $7500 back again, will you take it?"
>
> "And said, 'Absolutely.'"[96]

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[91] Ex. 12. reference to 16 Clients reflects the fact that one committed suicide before the second mediation. (Tr. 425:18-22.)

[92] Gatti Request for Judicial Notice, Tab 1 (Opinion and Order Denying Habeas Petition) at 1.

[93] Ex. 12: "So, with all that's happened I would like to accept the offer of $7,500 and let you take the winning cases to trial."

[94] Ex. 15.

[95] Tr. 354:12-21.

[96] *Id.* At trial, admitted that he had agreed to accept $7,500 from the Archdiocese in 2005, but claimed that he did not recall this conversation with Gatti before the 2006 mediation. (Tr. 129:1-24; Ex. 12.) The Panel concluded on credibility: "The complainant is not the most likeable or credible witness." (TPO at 5.) *See In re Obert*, 352 Or 231, 244, 282 P3d 825 (2012) ("When the trial panel's credibility determination is based on the witness's demeanor and supported by explicit findings on that subject, this court will give deference to the credibility determination.").

Gatti reaffirmed that accepted $7,500 as well:

> ". . . I mean, we had permission so many times for $7,500 with his knowledge and consent that it was—multiple times . . . [s]ir, he signed the settlement agreement. He signed the checks. He signed the letters. He sent the letter to you. I mean, he agreed to the $7,500 or less than the $7,500."[97]

In response to Gatti's First RFAs, the Bar has admitted that:

- claim against the Archdiocese was settled for $7,500 at the second mediation.[98]
- signed a settlement agreement with the Archdiocese for $7,500.[99]
- The United States Bankruptcy Court for the District of Oregon approved settlement with the Archdiocese for $7,500.[100]
- received an individual settlement check from the Archdiocese for $7,500.[101]
- Gatti took no costs or fees from settlement with the Archdiocese.[102]
- received the entire $7,500 from the Archdiocese.[103]
- received an accounting from Gatti for his settlement with the Archdiocese.[104]

understood the total of the settlements with the Archdiocese was $600,000.[105] never rescinded his settlement with the Archdiocese:

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[97] Tr. 227:24-228:6.
[98] First RFA, Request 4.
[99] *Id.*, Request 5; Ex. 104.
[100] *Id.*, Request 6.
[101] *Id.*, Request 7, Ex. 106.
[102] *Id.*, Request 11.
[103] *Id.*, Request 9.
[104] *Id.*, Request 10; Ex. 108.

"Q. And you never went back to the bankruptcy court and said, 'Undo the approval'?

"A. Oh, no."[106]

After the successful trial against the State, Gatti again discussed settlement with by telephone.[107] again authorized settlement for a flat $7,500.[108] Bulthuis was also on this call:

"Q. And were you present for that conversation?

"A. I was present for at least half the conversation . . . I don't know if I walked into the office hearing that he was on the phone with Mr. but I know I was there for the latter half of the conversation.

"Q. And is it your understanding that Mr. again accepted $7500?

"A. Yes."[109]

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[105] Tr. 111:10 ("I seen it in the paper[.]"). had agreed in writing at the outset of Gatti's representation that he did not want to know what the other Clients had received—nor did he want them to know what he received. (Tr. 136:24-137:9; Ex. 3, ¶ 8.3 ("CLIENT agrees that the financial terms of settlement negotiations and of any settlement agreement between client and the Diocese shall be kept confidential from all other Clients. CLIENT further agrees to respect the confidentiality of such terms regarding any other Client.").) explained that he regarded the circumstances of his case as extremely personal and did not want it shared beyond those responsible for his case. (Tr. 136:17-23.)

[106] Tr. 133:12-14. is familiar with legal process, having served as a legal clerk in prison (Tr. 132:11-19) and having been involved in post-conviction requests for review in his own case to the Oregon Court of Appeals (cited above), this Court (328 Or 594, 987 P2d 514 (1999)), the United States District Court for the District of Oregon (Gatti Request for Judicial Notice, Tab 1), the Ninth Circuit (*Id.*, Tab 2) and the United States Supreme Court (*Id.*, Tab 3.) The Panel took judicial notice of the court proceedings and documents involved. (Tr. 64:14-17.)

[107] Tr. 355:23-356:16.

[108] *Id.*

[109] Tr. 356:7-16.

agreed:

> "Q. And did Mr. Gatti talk with you and get your permission to settle your claim against the State for $7500?
>
> "A. We – we had talked about it, yes."[110]

When Gatti was able to obtain that amount for he sent a power of attorney requesting authority to sign the settlement agreement with the State for him to expedite payment.[111] Gatti's cover letter—Exhibit 27—confirmed settlement was $7,500 and the overall total of the settlements with the State of $1,050,000.[112] acknowledged that he understood these terms at the time he executed his power of attorney:

> "Q. And in Exhibit 27 which is the letter of July 17, 2007, you signed a power of attorney authorizing him to go forward with that settlement with the State at $7500; correct?
>
> "A. Yes."[113]

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[110] Tr. 133:22-25. At trial, the Bar attempted to contradict testimony on this point by citing a form letter—Exhibit 25—that Gatti sent all of the Clients who were not involved in the State trial in which Gatti used the term "proportionate share" when seeking settlement authority for then-upcoming negotiations with the State. (*See, e.g.,* Tr. 204:11-13.) Gatti had acknowledged early on to the Bar that should not have received one of the form letters in light of his agreement to accept a flat $7,500 from the State. (*See, e.g.*, Ex. 42 (Gatti 6/11/2009 Letter to the Bar at 3.) He reiterated that at trial. (*See, e.g.*, Tr. 204:13 ("I should have [sent him a different letter], but I didn't."); 205:18 ("It's an inartfully written letter.").) had been included in the proportionate share process, he would have netted $200.56 more than he received: $7,700.56 rather than $7,500. (Ex. 41 at 3 (outlining calculations).)

[111] Ex. 27.

[112] *Id.*

[113] Tr. 134:1-5.

"Q. Last sentence it says . . . does it say, 'The total settlement came to $1,050,000?'

"A. Yes, it does. Yes.

"Q. And then in the third paragraph does he tell you that you're getting $7500?

"A. Yes.

"Q. And then you executed the power of attorney?

"A. Yes, sir."[114]

In response to Gatti's First RFAs, the Bar has admitted that:

- claim against the State was settled for $7,500.[115]
- received $7,500 in settlement of his claim against the State.[116]
- Gatti took no costs or fees from settlement with the State.[117]
- received the entire $7,500 from the State.[118]
- received an accounting from Gatti for his settlement with the State.[119]

never rescinded his settlement with the State either:

"Q. And you've never tried to undo the settlement with the State either, have you?

"A. Nope."[120]

In fact, Bulthuis recalled that was quite pleased with both

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[114] Tr. 134:17-25.
[115] First RFA, Request 15.
[116] *Id.*, Request 17.
[117] *Id.*, Request 19.
[118] *Id.*, Request 16; Ex. 112.
[119] *Id.*, Request 18; Ex. 113.
[120] Tr. 135:24-136:1.

settlements:

> "Q. And in the conversations that you were involved in with Mr. did he voice any criticism of getting $7500 from either the [A]rchdiocese or the State?
>
> "A. No. He was quite pleased."[121]

Before filing his Bar complaint against Gatti over a year later, tried to bargain his way out of jail by writing s lawyer, Cooney, a letter—Exhibit 120—in which he claimed he had information that would rescind all of the settlements:

> "This could be all be reversed but I would need immunity from Civil and Criminal Prosecution, a Transfer to an Out of State prison (that isn't Dangerous to me) Where I can Smoke, and a big Time Cut."[122]

Cooney forwarded this information to the State and the State or the FBI (Cooney could not recall which) interviewed .[123] Following this investigation, the State took no action.[124] Cooney explained why:

> "Q. Was it ever explained to you by anybody why no one took any action?[125]
>
> "A. I was told that Mr. was not reliable."[126]

Following this revelation at trial, filed a Bar complaint against Cooney.[127] The Bar dismissed complaint.[128]

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[121] Tr. 357:15-19.

[122] Ex. 120.

[123] Tr. 367:4-6.

[124] Tr. 367:11-13.

[125] Tr. 367:14-15.

[126] Tr. 368:12-13. The Bar objected on hearsay grounds. (Tr. 367:16-369:11.) The Panel overruled the Bar's objection. (*Id.*) The Bar earlier took the position that the Oregon Evidence Code does not apply to disciplinary hearings and specifically noted that hearsay may be admitted. (Bar Trial Memorandum at 10:20-22.)

FIRST ASSIGNMENT OF ERROR

The Bar charged Gatti with violating the aggregate settlement rule, RPC 1.8(g), with both the settlements with the Archdiocese (Second Amended Complaint, First Cause) and the State (*Id.*, Second Cause). The Panel simply "pasted-in" some (but not all) of the Bar's factual allegations from its First Cause into the TPO (at 1-3), but did not cite any RPC provisions in its discussion of the First Cause regarding the Archdiocese settlements nor did it include any legal conclusions. With the Bar's Second Cause regarding the State settlements, the Trial Panel made a one-line legal conclusion ("The Accused violated RPC 1.8(g)[.]" *Id.* at 6), but made no factual findings and, indeed, nowhere even mentions the State settlements.

Due to this lack of clarity and because review is *de novo* in this Court, Gatti will address both sets of settlements with the Archdiocese and the State. Neither constituted aggregate settlements under Oregon law. Because the Bar seeks to impose liability for conduct which Oregon law neither defined nor proscribed at the time of the events at issue, the Bar's application of RPC 1.8(g) in this case also violates Gatti's due process rights under, respectively, the United States (Fifth and Fourteenth Amendments) and Oregon (Article I, Sections 20 and 21) Constitutions.

A. Preservation of Error

Gatti moved to dismiss these charges on the grounds noted *supra*.[129] The Panel denied his motion:

> "Mr. Fucile: Your Honor, we also had the motion to dismiss.

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[127] Gatti's Motion to Reopen the Record (Docket, Entry 44), Ex. 121. The Panel allowed the record to be reopened and the accompanying exhibits were received. (Email Ruling (Docket, Entry 47).)

[128] *Id.*, Ex. 122.

[129] Docket, Entry 35.

"Ms. Brewster: Oh, yes. And that is denied."[130]

B. Standard of Review

Review in this Court is *de novo* under ORS 9.536(2) and BR 10.6. The Bar bears the burden of proof by clear and convincing evidence under BR 5.2.

C. Argument

1. The Aggregate Settlement Rule

RPC 1.8(g) reads in its entirety:

> "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 aggregate 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."

RPC 1.8(g) (Rule) became effective on January 1, 2005, when Oregon replaced the former Disciplinary Rules with the RPCs. Neither the Rule on its face nor the "terminology" section of the RPCs—RPC 1.0—includes a definition of "aggregate settlement." RPC 1.8(g) was patterned on its American Bar Association counterpart. But, neither ABA Model Rule 1.8(g) nor the accompanying comment directed to that provision (Comment 13) contains a definition of "aggregate settlement."

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[130] Tr. 9:7-10. Gatti filed an initial Motion to Dismiss on August 20, 2012. (Docket, Entry 32.) The Bar then amended its complaint on August 21, 2013 (Docket Entry 33) and Gatti renewed his Motion to Dismiss on September 4, 2012 (Docket, Entry 35). Following the denial noted above, Gatti filed an Answer to the Second Amended Complaint. (Docket, Entry 40.) Gatti answered without waiver of the matters advanced in his Motions to Dismiss. (*Id.* at 1.)

RPC 1.8(g) followed a similar provision in former DR 5-107(A).[131] DR 5-107(A), however, did not contain a definition either.[132] DR 5-107(A) was based on ABA Model Code of Professional Responsibility DR 5-106(A).[133] It too did not contain a definition.[134]

ABA Model DR 5-106(A) had no predecessor in the ABA Canons of Professional Responsibility and, at its adoption in 1969, simply cited to a 1941 ABA ethics opinion (Formal Opinion 235) that neither supplied a definition nor even addressed multiple settlements.[135]

The lack of a definition is not unique to Oregon. The American Law Institute noted in its *Principles of the Law of Aggregate Litigation* (2010 at 259): "Surprisingly, although the aggregate-settlement rule exists in every state, no state's rule attempts to define the term 'aggregate settlement.'"

This Court has never construed former DR 5-107(A) or RPC 1.8(g). Again, Oregon is not unique in this regard. A recent scholarly review

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[131] *See* Jarvis, Moore, Sapiro & Tellam, *Oregon Rules of Professional Responsibility Annotated* (*Oregon Rules Annotated*) (2003) at 139. DR 5-107(A) was originally adopted in 1970 as DR 5-106(A). *Oregon Rules Annotated* at 139. It was renumbered in 1986 and its wording was changed slightly at that time in ways not material to this case. *Id.* In final form it read:

> "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 aggregate agreement as to guilty or nolo contendere pleas, unless each client consents after full disclosure, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." *Id.*

[132] *Id.*

[133] *See* ABA, *Model Code of Professional Responsibility and Code of Judicial Conduct (*1986) at 55.

[134] *Id.*

[135] *Id.* at 60.

observed: "Aggregate settlements . . . have received surprisingly little academic and judicial attention[.]"[136]

However, two Bar ethics opinions and one case that was eventually before this Court addressed what, in the Bar's view, *was*—and what was *not*—an aggregate settlement under the Rule.

The Bar issued an ethics opinion in 2000—2000-158—that defined them as "all-or-nothing" settlements: *all* claimants must accept for *any* individual settlement to be effective. Formal Opinion 2000-158 put it: "[T]he term aggregate settlement means an all-or-nothing total settlement of a single sum of money for all claims pending for a group of plaintiffs."[137] When the Bar's ethics opinions were updated in 2005 to reflect the transition from the DRs to the RPCs, this opinion—renumbered as 2005-158—continued to define an aggregate settlement as "all-or-nothing": "If, however, an aggregate or all-or-nothing settlement is offered, the special requirements of Oregon RPC 1.8(g), quoted above, must be met."[138]

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[136] Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 Notre Dame L Rev 1769, 1769 (2005).

[137] *Id.* at 2 n.1.

[138] *Id.* at 433. In 2006, the ABA issued an ethics opinion addressing aggregate settlements, Formal Opinion 06-438. The ABA began by noting (at 2) that "the terms 'aggregate settlement' and 'aggregated agreement' are not defined by the Model Rules of Professional Conduct[.]" It then proposed a definition: "when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas." *Id.* The ABA gave as an example the kind of "all-or-nothing" settlements defined in the Oregon opinions. *Id.* at 3. The ABA opinion, like corresponding Comment 13 to ABA Model Rule 1.8(g), notes that the aggregate settlement rule does not apply to class actions or similar litigation that rely on judicial supervision of settlement. By analogy, the rule should not apply here where each of the Archdiocese settlements was reviewed and approved by the Bankruptcy Court.

By contrast, at the time of the events at issue, the Bar had taken the position that simply settling multiple cases at the same time against a common defendant was *not* an aggregate settlement. *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000), involved two claimants' counsel representing 49 clients with similar business tort claims against a hand tool distributor, Mac Tools. All 49 claims were resolved at the same time through mediation. One of the clients involved, Bramel, later filed both a Bar complaint and a civil claim against the lawyers. Bramel contended in pertinent part that the multiple settlements constituted an aggregate settlement—even though there was no "all-or-nothing" requirement.[139] Although the Bar prosecuted the lawyers on other charges, the Bar did *not* pursue an aggregate settlement charge against the lawyers for settling multiple cases at the same time against a common defendant.

2. The Settlements with the Archdiocese

The Bar admitted in response to Gatti's Second RFAs[140] that the settlements with the Archdiocese did *not* include an "all-or-nothing" requirement:

> "**Request No. 21:**
>
> "Admit that all of the Archdiocese Settlements contained the following recital:
>
> "3. Claimant and the Debtor, desiring to avoid the expense and delay inherent in litigation and further legal wrangling, have agreed to settle and compromise their differences on the terms set forth below."

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[139] *See Bramel v. Brandt*, 190 Or App 432, 436-37 (2003) (quoting Bramel's Bar complaint).

[140] Docket, Entry 29.

> "**Request No. 22:**
>
> "Admit that all of the Archdiocese Settlements contained the following provision:
>
> "**11. Entire Agreement**. This Settlement Agreement constitutes the entire agreement between the parties."
>
> "**Request No. 23:**
>
> "Admit that none of the Archdiocese Settlements contained a provision described in Paragraph 10 (lines 12-13) of the Bar's Amended Formal Complaint as follows:
>
> "A condition of the Archdiocese settlement was that and the other abuse clients must all accept it."

Under BR 4.5(b)(5), requests for admission in a Bar proceeding "shall conform as nearly as practicable to the procedure set forth in the Oregon Rules of Civil Procedure." When, as here (*see* Docket, entire), a party fails to respond to a request for admission, ORCP 45D deems the matter "conclusively established."

Far from including "all-or-nothing" requirements, the settlement agreements prepared by the Archdiocese actually contained individual "opt out" provisions on specified contingencies.[141] The unrebutted testimony of both Judge Hogan, who negotiated the settlements, and Hoffmann, the Archdiocese's lawyer, quoted earlier is to the same effect: Judge Hogan obtained a collective total from Gatti and then obtained the Archdiocese's acceptance without further interaction with Gatti.[142]

In short, by the Bar's own definition, RPC 1.8(g) did not apply to the settlements with the Archdiocese.

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[141] Ex. 114, §3 (in each).

[142] Tr. 290:3-291:1 (Judge Hogan); 302:9-13 (Hoffmann).

At no point in time was Gatti ever presented with an all-or-nothing settlement. It is inconceivable that the Bar now contends a violation of the aggregate settlement rule occurred at a time when (1) no authority ever defined "aggregate settlement" and (2) the Bar itself suggested an aggregate settlement was an all-or-nothing settlement. The evidence conclusively establishes that the Archdiocese settlement was not an all-or-nothing settlement. Therefore, the Bar has not, and cannot, demonstrate by clear and convincing evidence that Gatti violated the aggregate settlement rule.

3. The Settlements with the State

The Bar admitted in response to Gatti's Second RFAs that the settlements with the State did *not* include an "all-or-nothing" requirement either:

> "**Request No. 26:**
>
> "Admit that all of the State Settlements contained the following recital:
>
> "3. * * * Plaintiffs, State defendants, and desiring to avoid the expense, delay, and uncertainty of litigation and possible appeals, have agreed to settle and compromise their differences on the terms set forth below."
>
> "**Request No. 27:**
>
> "Admit that all of the State Settlements contained the following provision:
>
> "**8. Entire Agreement.**
> "This Settlement Agreement and Release constitutes the entire agreement between the parties."
>
> "**Request No. 28:**
>
> "Admit that none of the State Settlements contained a provision described in Paragraph 26 (lines 9-10) of the Bar's Amended Formal Complaint as follows:

> "A condition of the State settlement was that and the other abuse clients must all accept it."

Again by the Bar's own definition, RPC 1.8(g) did not apply to the settlements with the State. As with the Archdiocese settlement, the Bar cannot meet its burden of proof that an all-or-nothing settlement occurred.

4. The Bar's Trial Theory

filed his complaint with the Bar on October 16, 2008.[143] The Bar, in turn, initiated formal proceedings against Gatti on September 17, 2010.[144] Based on the Bar's failure to respond to his Second RFAs and its corresponding admission that there was no "all-or-nothing" requirement in the settlements with either the Archdiocese or the State, Gatti moved to dismiss the Bar's aggregate settlement charge on August 17, 2012.[145]

On August 21, 2012—*less than a month before trial and nearly two years since it filed formal proceedings*—the Bar changed its theory of the aggregate settlement charge with its Second Amended Complaint.[146] Gone was the Bar's long-held definition of an aggregate settlement as "all-or-nothing." [147] Given the undisputed evidence and the Bar's "conclusive" admissions, the reason for the change is simple: the Bar could not prove its case using the definition it publicly employed at the time of the conduct involved.

Instead, the Bar argued that multiple settlements that occurred simultaneously constituted an aggregate settlement under RPC 1.8(g) because they could be added into a combined total.[148] Following that logic,

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[143] Ex. 35.
[144] Docket, Entry 1.
[145] Docket, Entry 32 (filing date).
[146] Docket, Entry 33.
[147] *Id.*
[148] SAC, ¶¶ 9, 12 (Archdiocese); 18, 20 (State).

the Bar contended that, respectively, the Archdiocese and the State had simply offered lump sums to dispose of all of the Cases.[149]

The Bar's approach is fatally flawed for two reasons.

Factually, the Bar's new theory was not supported by the evidence. The undisputed evidence at trial was that Gatti obtained individual client settlement authority *before* each round of negotiation and then presented a total reflecting that authority to, in turn, the Archdiocese and the State—*not* the other way around. In short, the Archdiocese and the State *accepted* totals comprised of individual *demands*.[150]

Legally, the simple fact that multiple individual settlements are concluded at the same time has never been a basis for characterizing such settlements as "aggregate" under RPC 1.8(g) or its analogous predecessor, former DR 5-107(A). To the extent that they were defined in ethics opinions (*see* Formal Ops. 2000-158, 2005-158) or practice (*see In re Brandt/Griffin*, 331 Or 113; *Bramel v. Brandt*, 190 Or App 432), Oregon law required coercive linkage between the settlements involved: the "all-or-nothing" requirement articulated by the ethics opinions and the absence of which is the key point distinguishing the Bar's approach in *Brandt/Griffin*.[151]

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[149] *Id.*

[150] Tr. 302:9-13 (Archdiocese); SAC, ¶ 17 (State). At the time of the events at issue, the State would have been precluded from making an offer of the kind the Bar theorizes. Former ORS 30.265(1)(c) limited tort claim damages to $500,000 for "any number of claims arising out of a single accident or occurrence." *See Clarke v. Oregon Health Sciences University*, 343 Or 581, 585, 175 P3d 418 (2007) (quoting the former tort claims limit). Olson noted that the claims against the State were brought under the Tort Claims Act. (Tr. 394:25-395:1.)

[151] This echoes the ALI's *Principles of the Law for Aggregate Litigation*, which concludes (at § 3.16) that for an aggregate settlement to occur there must be "interdependence" in that the settlements must either be (a) on an "all or nothing" basis or (b) calculated using a matrix that is not related to individual case values and facts.

Indeed, applying the Bar's approach would mean that the Bankruptcy Court's discharge of all 150 clergy abuse cases would constitute an aggregate settlement because all were reached simultaneously. Yet, no one would suggest that Judge Perris, Judge Hogan, Judge Velure, Erin Olson, Margaret Hoffmann, Thomas Cooney and the dozens of other attorneys involved had engaged in an aggregate settlement. The Bar's prosecution of this Cause against Gatti using its suggested aggregate settlement approach is puzzling, and if adopted would pose serious consequences to the ability of an overworked judiciary in resolving claims through alternative dispute resolution. The all-or-nothing component of the aggregate settlement rule provides clarity to the practitioners in this state. The approach suggested by the Bar at trial removes that clarity.

5. Fair Notice and Due Process

The undisputed failure to define what constitutes an aggregate settlement in the Rule and the Bar's shifting definitions in this case illustrate that RPC 1.8(g) is unconstitutionally vague—both on its face and as applied.[152]

The United States Supreme Court examined the constitutional due process doctrine of "void for vagueness" in a pair of decisions: *Skilling v. United States*, ___US ___, 130 S Ct 2896, 177 L Ed2d 619 (2010); and *Black v. United States*, ___ US ___, 130 S Ct 2963, 177 L Ed2d 695 (2010). *Skilling* and *Black* both involved 18 USC § 1346, which, in relevant part, prohibited but did not define the deprivation of "honest services." In each

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[152] Gatti raised this defense in his initial response. (Gatti's BR 4.1(c) Motions (Docket, Entry 3) at 4-7.) The Regional Disciplinary Board Chair denied Gatti's motion on this point. (Docket, Entry 14.) Gatti included this defense in the answer upon which the case was tried. (Answer to Second Amended Complaint (Docket, Entry 40) at 6-7.) The Panel also rejected it. (TPO at 6.)

opinion, the United States Supreme Court reversed portions of criminal convictions under the "void for vagueness" doctrine where the Government had applied the "honest services" statute to undisclosed private self-dealing.

Writing for a unanimous court, Justice Ginsburg summarized the central tenants of the "void for vagueness" doctrine:

> "'To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'"[153]

Justice Scalia elaborated on the nature of the doctrine in a concurring opinion, in which Justices Kennedy and Thomas joined:

> "A criminal statute must clearly define the conduct it proscribes, see *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A statute that is unconstitutionally vague cannot be saved by a more precise indictment, see *Lanzetta v. Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed.2d 888 (1939), nor by judicial construction that writes in specific criteria that its text does not contain, see *United States v. Reese*, 92 U.S. 214, 219-221, 23 L.Ed 563 (1876)."[154]

In addition to the federal right recognized under the Fifth and Fourteenth Amendments to the United States Constitution, the doctrine is also recognized under Article I, Sections 20 and 21 of the Oregon Constitution. This Court summarized the doctrine under the Oregon Constitution:

> "'[A] criminal statute must not be so vague as to permit a judge or jury to exercise uncontrolled discretion in punishing defendants, because this offends the principle against ex post facto laws embodied in Article I, section 21, of the Oregon Constitution. The equal privileges and immunities clause is also implicated when vague laws given unbridled discretion to judges and jurors to decide what is prohibited in a given case,

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[153] 130 S Ct at 2927-28 (citation omitted).
[154] *Id.* at 2935.

> for this results in the unequal application of criminal laws. A criminal statute need not define an offense with such precision that a person in every case can determine in advance that a specific conduct will be within the statute's reach. However, a reasonable degree of certainty is required by Article I, sections 20 and 21.'" *State v. Moyer*, 348 Or 220, 240, 230 P3d 7 (2010), *quoting State v. Graves*, 299 Or 189, 195, 700 P2d 244 (1985).

The "void for vagueness" doctrine is not limited to criminal cases. Both the United States and Oregon Supreme Courts have applied the doctrine to bar disciplinary proceedings.[155] The United States Supreme Court in *Ruffalo,* reversing the imposition of discipline in a case where a lawyer was charged with misconduct that was defined after-the-fact, noted:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380, 18 L.Ed. 366; *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 628, 17 L.Ed.2d 574. He is accordingly entitled to procedural due process, which includes fair notice of the charge." See *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682."[156]

Both reasons for the "void for vagueness" doctrine are aptly illustrated in this instance.

First, the lack of a definition in RPC 1.8(g) provides no fair notice of what is proscribed. The scholarly authority discussed *supra* uniformly notes that no definition of aggregate settlement had been provided at the time in which Gatti negotiated the settlements. Furthermore, in *Brandt/Griffin*, the Bar declined to pursue an aggregate settlement charge where multiple settlements occurred at the same time. Now, the Bar contends that such settlements invoke the Rule.

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[155] *See, e.g., In re Ruffalo*, 390 US 544, 549-551, 88 S Ct 1222, 20 L Ed2d 117 (1968); *In re Meyer*, 328 Or 211, 215, 970 P2d 652 (1999).

[156] 390 US at 550.

Second, it allows the Bar to effectively write its own definition *after-the-fact.* The Bar prosecuted this case for nearly two years under one definition and then abruptly shifted to another shortly before trial when it finally admitted that the evidence did not fit its public definition.

RPC 1.8(g)—both as written and as applied by the Bar in this case—is unconstitutionally vague.

SECOND ASSIGNMENT OF ERROR

The Bar charged Gatti with violating the multiple client conflict rule, RPC 1.7(a)(1), with both the settlements with the Archdiocese (Second Amended Complaint, First Cause) and the State (*Id.*, Second Cause). The Trial Panel "pasted-in" some (but not all) of the Bar's factual allegations from its First Cause into the TPO (at 1-3), but again did not cite any RPC provisions in its discussion nor did it include any legal conclusions. With the Bar's Second Cause regarding the State settlements, the Trial Panel made a one-line legal conclusion ("The Accused violated RPC 1.7(a)(1)[.]" *Id.* at 6), but made no factual findings and, indeed, nowhere even mentions the State settlements. The TPO fails to articulate an explanation of its decision or identify what evidence supports the decision. A six month suspension cannot rest on such a paltry analysis.

Due to this lack of clarity and because review is *de novo* in this Court, Gatti will address both the settlements with the Archdiocese and those with the State. The Bar contends with each set of settlements the defendant involved simply offered a lump sum and Gatti then unilaterally divided the funds without advance client agreement.[157] The evidence at trial, however,

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[157] SAC ¶¶ 13 (Archdiocese), 21 (State). Paragraph 13 asserts:

> "By continuing to represent and the other abuse clients after the Archdiocese offered the lump sum settlement and, by thereafter deciding himself the amount each client would

was just the opposite for each: Gatti obtained advance client authority, presented a demand to the defendant involved reflecting his collective authority, the defendant agreed to the demand and Gatti distributed the resulting proceeds in accord with the clients' advance agreement.

A. Preservation of Error

Gatti denied the Bar's contention (*see* Answer, ¶¶ 4k (Archdiocese), 8g (State)) and presented unrebutted evidence at trial supporting his defenses (discussed below).

B. Standard of Review

Review in this Court is *de novo* under ORS 9.536(2) and BR 10.6. The Bar bears the burden of proof by clear and convincing evidence under BR 5.2.

C. Argument

The Bar's conflict theory is predicated on the argument that the respective defendants simply offered a lump sum and Gatti divided that sum unilaterally without prior client agreement.[158] The Bar's complaint is not supported by the evidence.

1. Settlements with the Archdiocese

The Bar conceded in its pleadings that Gatti obtained individual settlement authority from each of the Clients *before* the mediation with Judges Hogan and Velure that resulted in the Archdiocese settlements: "In advance of the [second] mediation . . . [t]he Accused also obtained

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> receive from the settlement proceeds, the Accused engaged in an unwaivable current client conflict of interest."

Paragraph 21 is worded identically except for substituting the word "State" for "Archdiocese."

[158] SAC, ¶¶ 13, 21.

minimum settlement authority from the other abuse clients."[159] Judge Hogan confirmed that as well:

> "Q. Judge, did you inquire of Dan whether or not he had the individual settlement authority from all of the clients?
>
> "A. I certainly did.
>
> "Q. And what did he tell you?
>
> "A. He said he did."[160]

As quoted earlier, Bulthuis described the telephone conversation with specifically[161] and similar meetings with the Other Clients generally concerning settlement individual authority.[162] The documentary evidence was to the same effect: "Dear Dan, I am responding to your letter dated September 20, 2006 and giving you authority to settle my case at the upcoming mediation on October 11th 2006."[163]

Anticipating that he might be able to secure a collective number from the Archdiocese that exceeded the sum of his clients' individual settlement authority, Gatti had also obtained his clients' advance consent to divide any "surplus" in proportion to their individual settlement authority.[164] Again, Judge Hogan testified:

> "And I said, 'Did you talk to them about the fact that you were going to – we're talking about [an] overall number? Has

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[159] SAC, ¶ 8 at 3:8-10.

[160] Tr. 289:18-23.

[161] Tr. 356:7-16.

[162] Tr. 349:22-24 ("And then I went with the clients or to the clients for mediation or mediation prep meeting.").

[163] Ex. 17 (9/25/06 Letter to Gatti).

[164] Ex. 41 at 1-2. As discussed earlier, had agreed to a flat $7,500. (Ex. 41 at 2.)

> that been addressed to them how that could and should be allocated?' And he affirmed that it had happened."[165]

When Judge Hogan extracted a total of $600,000 that exceeded the Clients' collective settlement authority, Gatti's office[166] then supplied the Archdiocese's lawyers with the individual amounts using the agreed formula.[167] Individual settlement agreements (each with its own integration clause), individual Bankruptcy Court approvals and individual settlement checks followed.[168]

On the eve of trial, the Bar amended its complaint to argue that Gatti was limited to having the clients arbitrate any "surplus" by a provision (Paragraph 5.3) in his joint representation agreements (JRAs) with them.[169] Gatti, however, presented *unrebutted* testimony by Gatti's two co-counsel who developed the JRAs (Gatti did not)—Greg Smith and Erin Olson—that the arbitration provision was intended to cover a contingency that never occurred: if the Archdiocese had insufficient financial and insurance assets to cover all claims being made by all claimants (*i.e.,* Gatti's clients and all others).[170] Both authors affirmed that the situation contemplated by the

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[165] Tr. 289:18-290:2.)

[166] Gatti did not do the calculations himself. (Tr. 430:10-20.)

[167] Ex. 20 (individual amounts).

[168] *See* Exs. 114 (settlement agreements), 105 (Bankruptcy Court approval), 106 (check to

[169] *Compare* Complaint (Docket, Entry 1, dated September 10, 2010), entire *with* Second Amended Complaint (Docket, Entry 33, dated August 20, 2012), ¶ 5.

[170] Tr. 378:13-382:4 (Smith, addressing Exs. 2-3); 399:15-403:10 (Olson, addressing Ex. 11). Olson explained that the second round of JRAs was executed after the Archdiocese actually entered (as opposed to merely threatened) bankruptcy. (Tr. 401:5-24.) Olson also explained that the template was developed originally by Peter Jarvis for others involved in the litigation and she borrowed Jarvis' format. (Tr. 399:24-400:19.)

arbitration provision of the JRAs never occurred because the Archdiocese had sufficient assets to pay its settlements:

- ***Smith***
  "Q. Mr. Smith, as it turned out, was there sufficient insurance coverage and other assets?

  "A. There certainly appeared to be.

  "Q. So you never had to reach that juncture?

  "A. No, we never – we never got there."[171]

- ***Olson***
  "Q. So that particular scenario never came to pass?

  "A. It didn't come up in the [A]rchdiocese cases, no."[172]

The Bar presented *no* evidence contradicting the drafters' intent.[173] Instead, the Bar had parrot the provision back to the Panel.[174] however, did not contradict the testimony of Smith and Olson either.[175]

Moreover, even if this provision had applied, it was *not* limited to arbitration and simply required—*as was the case here*—client agreement:

> "In the event of an aggregate or joint-fund settlement, the participating **Clients may decide among themselves as to how the fund shall be allocated**. An allocation may not be imposed on any Client, except by Arbitration under Section 6 of this Agreement." (Emphasis added.)[176]

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[171] Tr. 381:25-382:4.

[172] Tr. 402:12-15. The Bar did not charge Gatti with a "limited fund" conflict of the kind contemplated by Paragraph 5.3 of the JRAs. (SAC, entire.) Limited fund conflicts address an entirely different scenario than the facts of this case. *See In re Barber*, 322 Or 194, 196-200, 904 P2d 620 (1995).

[173] Transcript, entire.

[174] Tr. 94:11-95:11.

[175] *Id.*

[176] Ex. 3 (¶5.3). Identical language appears in the second set of JRAs executed after the Archdiocese entered bankruptcy. *See, e.g.,* Ex. 11 (¶5.3).

Formal Opinion 2005-158 (at 434) addressing conflicts under the RPCs, and its predecessor under former DRs, Formal Opinion 2000-158 (at 5), advise that lawyers—without creating a conflict—can establish a *process* to facilitate clients' division of settlement resources as long the lawyer is not the one deciding the relative shares. The Bar's *Ethical Oregon Lawyer* – citing Formal Opinion 2005-158 is to the same effect: "If . . . two creditors were to agree by themselves to split any proceeds on a prearranged basis, no conflict-of-interest question would be present[.]" [177] Both Bar opinions also note that the process need *not* be incorporated into original engagement agreements but can be developed to address events as cases develop.[178]

Gatti obtained individual settlement authority from each of his clients *before* the mediation with Judges Hogan and Velure and his clients' agreement on a process for dividing any surplus. Not only did the Bar fail to prove its complaint, the method Gatti used was suggested by the Bar itself in Formal Opinions 2000-158 and 2005-158.

2. Settlements with the State

The Bar also conceded in its pleadings that Gatti obtained individual settlement authority from each of the Clients before the negotiations with Judge Bushong that resulted in the State settlements:

> "On or about June 26, 2007, the Accused informed and the other abuse clients that he anticipated the State would offer to settle. He asked and the other abuse clients who had not gone to trial in May 2007 as described in paragraph 16 above for their permission to settle for the same 'proportionate

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[177] § 9.14 (3d ed 2006) at 9-27. This passage uses the term "creditors" because it uses bankruptcy as an example. The Clients were each creditors in the Archdiocese's bankruptcy. (*See, e.g.*, Ex. 14 (bankruptcy claim).)

[178] Formal Ops. 2005-158 at 434; 2000-158 at 5.

> share' that each of them had received in the Archdiocese settlement."[179]

The documentary evidence was to the same effect:

> "June 26, 2007
>
> "All Clients
>
> "RE: Update
>
> "Gentlemen:
>
> "There are 10 cases that have not gone to trial. I have been negotiating with the State of Oregon, and it is possible that the State of Oregon will actually make an offer in the hopes that these cases will be resolved now that we have a verdict saying did molest at least two clients.
>
> "If all of you agreed to settle your cases on the same percentage basis as we did in the past, then I do not have a conflict . When the number is reached, I will need to know if I have your permission to settle for the number that I can extract from them and that you will accept your proportionate share pursuant to the proportionate share that was given in the past. . . . If any of you disagree with this proportionate share analysis, then in that event I would have to resign and I would have a conflict of interest and I would not be able to represent any of you." [180]

Having obtained his clients' permission, Gatti was eventually able to conclude settlements with the State totaling $1,050,000.[181] The Clients all received what they had agreed.[182] The Bar failed to show by clear and convincing evidence that any of the clients declined to accept the same

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[179] SAC, ¶ 17.

[180] Ex. 25.

[181] Ex. 29.

[182] Ex. 46, Tab 5 (table with individual settlement amounts). As discussed earlier, again agreed to a flat $7,500 (Tr. 356:7-16) and the State waived costs regarding the client who lost at trial (Ex. 46, Tab 4). The two clients who prevailed at trial agreed to a settlement netting them $100,000 apiece. (Ex. 46, Tab 5.)

proportionate share. The Bar failed to show an actual current conflict emerged.

Before authorizing Gatti to sign the State settlement agreement on their behalf, the clients also executed powers of attorney that reflected both their individual amount and the combined total.[183] There is no contention in the Bar's complaint that the Clients did not receive the State settlement proceeds.[184]

Gatti obtained individual settlement authority from each of his clients *before* concluding an agreement with now-Judge Bushong.[185] Again, not only did the Bar fail to prove its complaint, the method Gatti used was suggested by the Bar itself in Formal Ethics Opinions 2000-158 and 2005-158.

With both sets of settlements, the Bar has failed to show that an actual current conflict ever emerged. The Bar has failed to demonstrate that Gatti's involvement in the settlements caused his representation of one client to be to the detriment to any of the other clients. Moreover, by simply totaling the settlement authorities he had in order to negotiate with the defendants and utilizing a proportionate share approach for calculating any surplus, Gatti was never confronted with a scenario in which his duty to one client would be impaired by his duty to another. Having failed to show by clear and convincing evidence that an actual current client conflict arose, the Bar failed to meet is burden of proof and this cause should be dismissed.

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[183] Ex. 27 (6/17/2007 Letter from Gatti to with power of attorney).)

[184] SAC, entire.

[185] Ex. 25.

THIRD ASSIGNMENT OF ERROR

The Bar charged Gatti with violating the communication rule, RPC 1.4(b), with both the settlements with the Archdiocese (Second Amended Formal Complaint, First Cause) and the State (*Id.*, Second Cause). The Trial Panel "pasted-in" some (but not all) of the Bar's factual allegations from its First Cause into the TPO (at 1-3), but did not cite any RPC provisions in its discussion of the Bar's First Cause regarding the Archdiocese settlements nor did it include any legal conclusions. With the Bar's Second Cause regarding the State settlements, the Trial Panel made a one-line legal conclusion ("The Accused violated RPC 1.4(b)[.]" *Id.* at 4.), but nowhere even mentions the State settlements. Although the TPO contains a discussion following its one-line legal conclusion, its "quotation" of RPC 1.4(b) that predicates this discussion is *not RPC 1.4(b) in any respect* nor is the verbiage quoted from any rule charged in either the Bar's First or Second Cause. Due to this lack of clarity and because review is *de novo* in this Court, Gatti will address both the settlements with the Archdiocese and the State.

After litigating this case for two years, the Bar's Second Amended Complaint does not specify how Gatti supposedly violated RPC 1.4(b). The Bar's Trial Memorandum (Docket, Entry 36) simply contends (at 18) that the Clients did not receive information about their individual settlements. The evidence at trial, however, was just the opposite: Gatti obtained individual advance client authority, the clients signed individual settlement agreements with the Archdiocese and individual powers of attorney authorizing Gatti to execute the State settlements on their behalf.

A. Preservation of Error

Gatti denied the Bar's contention (*see* Answer, ¶¶ 4k (Archdiocese), 8g (State)) and presented unrebutted evidence at trial supporting his defenses (discussed below).

B. Standard of Review

Review in this Court is *de novo* under ORS 9.536(2) and BR 10.6. The Bar bears the burden of proof by clear and convincing evidence under BR 5.2.

C. Argument

RPC 1.4(b) reads in its entirety:

> "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Bulthuis, who had the most intimate view of any of the witnesses on how Gatti handled the Cases, addressed the level of individual communication directly:

> "It was all individually. Each client would meet with Dan individually and talked about their facts of their case. Dan took hours meeting with each one individually[.]"[186]

Not only did the Bar not take issue with this characterization—it did not even cross-examine Bulthuis (or present evidence to the contrary).[187]

Olson, who, like Bulthuis, worked closely with Gatti, recalled Gatti spending countless hours on the phone with the Clients:

> "Q. You mentioned that Dan gave out his cell phone number to his clients. Would you describe Dan as a cell phone guy?
>
> "A. He was a cell phone guy. He's also a very sympathetic guy based on his own experience. And

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[186] Tr. 350:16-19.
[187] Tr. 357:25.

> so he would give his clients fairly free access to him. I know he helped several of them get into treatment, and I know he was a counselor in the counseling sense of the word to many of the clients."[188]

As Gatti himself related:

> "I had one client commit suicide that was a victim. Another client committed suicide who was . . . a different priest victim. And I had another client try to commit suicide that I helped him get treatment . . . he had a rope around his neck and was standing at a rock on the Little North Fork . . . he called me on Father's Day, and I got him into treatment and he's alive now."[189]

Olson also recalled that Gatti put a premium on individual communication because the Archdiocese and the State were trying to develop a defense that the Clients had simply conspired to concoct their claims:

> "Q. You mentioned meetings with clients. And we're definitely not going to get into anything covered by the attorney/client privilege. But was there some sort of conspiracy defense that the State was raising that put a premium on individual communication?
>
> "A. Well, not just the State, but the [A]rchdiocese. Because all of these guys had been molested at MacLaren, they were all at least juvenile delinquents and virtually all of them were convicted felons. Some of them had been in prison at the same time.
>
> "And both the State and the [A]rchdiocese were trying to develop evidence that they had all sort of gotten together and concocted this idea that they had been sexually abused. I had cases involving a different priest at MacLaren. And they were trying to develop the same theory with my cases.

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[188] Tr. 391:9-18.
[189] Tr. 425:21-426:4.

> "So individual communication was important so that they – their conspiracy theory wasn't encouraged."[190]

The Bar admitted in its pleadings that Gatti consulted with his clients to obtain individual settlement authority before the Archdiocese mediation with Judges Hogan and Velure (SAC, ¶ 8 ("The Accused also obtained minimum settlement authority from the other abuse clients.") and before the State negotiations with Judge Bushong (*Id.*, ¶ 17 ("He [*i.e.*, Gatti] asked and the other abuse clients who had not gone to trial in May 2007 as described in paragraph 16 above for their permission to settle for the same 'proportionate share' that each of them had received in the Archdiocese settlement.").

The Bar also admitted that each of the Clients signed individual settlement agreements with the Archdiocese[191] and that they received powers of attorney along with the letters reflecting their tentative settlements with the State.[192]

This Court recently noted in dismissing a Bar complaint in *In re Groom*, 350 Or 113, 124, 249 P3d 976 (2011) that whether RPC 1.4 is violated turns largely on the facts of an individual case: "[I]t is clear that deciding whether a lawyer has violated RPC 1.4 requires a careful examination of all of the facts." Here, Gatti communicated with each of his Clients about both the development and the resolution of their individual cases.

In sum, Gatti presented unrebutted testimony from Olson and Bulthuis and documentary evidence which reflected that Gatti spent countless hours with each individual client discussing the merits of their case, settlement

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[190] Tr. 391:19-392:15.

[191] Second RFAs, Request 20.

[192] First RFAs, Request 14 and Ex. 110 (

options and the eventual settlement. The Bar failed to rebut this evidence, much less show by clear and convincing evidence that Gatti violated RPC 1.4.

This charge (in both the First and Second Causes) should also be dismissed.

FOURTH ASSIGNMENT OF ERROR

In its Third Cause, the Bar charged Gatti with violating RPC 1.4(b) and the misrepresentation rule, RPC 8.4(a)(3), because he told that he had settled claim with the Archdiocese for $7,500.[193] The Trial Panel made no findings at all and simply issued one-line legal conclusions: "The Accused violated RPC 1.4(b)[.] The Accused violated RPC 8.4(a)(3)[.]"[194] Before trial, however, the Bar *admitted* that claim was, in fact, settled with the Archdiocese for $7,500.[195] Likewise, the Bar admitted that signed a settlement agreement to that effect, the United States Bankruptcy Court for the District of Oregon approved settlement and that received the entire $7,500 because Gatti did not take any fees or costs.[196]

A. Preservation of Error

Gatti moved to dismiss these charges based on the Bar's admissions, which was denied.[197]

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[193] SAC, ¶ 24.
[194] TPO at 6.
[195] First RFA, Request 4.
[196] *Id.*, Requests 5, 6, 9, 11.
[197] Docket, Entry 35; Tr. 9:7-10.

B. Standard of Review

Review in this Court is *de novo* under ORS 9.536(2) and BR 10.6. The Bar bears the burden of proof by clear and convincing evidence under BR 5.2.

C. Argument

The Bar's Third Cause of Complaint is succinct:

> "On or about October 25, 2006, the Accused told that he had settled lawsuit against the Archdiocese for $7,500. The Accused's statement that he had settled lawsuit against the Archdiocese for $7,500 was false and material and the Accused knew it was false and material when he made it."[198]

Equally succinctly, the Bar admitted before trial that this charge is not supported by the evidence:

> "**Request No. 4:**
>
> "Admit that Archdiocese Claim was settled for $7,500 through a mediation conducted by Judges Hogan and Velure."
>
> "**Request No. 5:**
>
> "Admit that the document attached as Exhibit 4 is the file copy of Settlement Agreement resolving Archdiocese Claim."
>
> "**Request No. 6:**
>
> "Admit that the document attached as Exhibit 5 is an accurate copy of an Order of the United States Bankruptcy Court for the District of Oregon approving (among others) the settlement of Archdiocese Claim."
>
> "**Request No. 9:**
>
> "Admit that received $7,500 in settlement Archdiocese Claim."

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[198] SAC, ¶ 24.

"**Request No. 11:**

"Admit that Gatti took no fees or costs from the settlement Archdiocese Claim."[199]

At trial, confirmed what the Bar had already admitted:

"Q. Do you recall signing a settlement agreement with the [A]rchdiocese settling your claim for $7,500?

"A. Yes.

"Q. And you understand that, because the [A]rchdiocese was in bankruptcy, that a federal bankruptcy court had to approve that settlement?

"A. Yes.

"Q. And if you could take a look at Exhibit 24.

"A. Okay.

"Q. That's the check that the [A]rchdiocese cut to you.

"A. Uh-huh. Yes, sir."[200]

"Q. He [*i.e.*, Gatti] waived his fee that he was otherwise entitled to get?

"A. Yes.

"Q. And he didn't charge you for any costs?

"A. No.

"Q. So you got the full $7,500?

"A. Yes, sir."[201]

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[199] First RFAs.
[200] Tr. 129:25-130:12.
[201] Tr. 131:25-132:6.

Both the Bar and admitted that Gatti settled claim against the Archdiocese for $7,500. In light of these admissions, there is zero evidence to support the Bar's Third Cause and it should be dismissed.

FIFTH ASSIGNMENT OF ERROR

In its Fourth Cause, the Bar charged Gatti with violating RPC 1.4(b) and 8.4(a)(3) by including the client who lost at trial in the State settlements. The Trial Panel made no findings or legal conclusions at all regarding this Cause.[202] The Bar did not cross-appeal.[203] The Panel's failure to enter findings as required by BR 2.4(i)(2)(A) should result in dismissal. Because review in this Court is *de novo*, however, Gatti will address this Cause. The Bar attempted to prove this charge by subpoenaing this client to trial over his objection.[204] But, this client did not support the Bar's charge. To the contrary, the client testified that he decided not to appeal the trial result on the advice of counsel.[205] In return, the State waived costs.[206]

A. Preservation of Error

Gatti denied the Bar's contention (*see* Answer, ¶¶ 4k (Archdiocese), 8g (State)) and presented unrebutted evidence at trial supporting his defenses (discussed below).

B. Standard of Review

Review in this Court is *de novo* under ORS 9.536(2) and BR 10.6. The Bar bears the burden of proof by clear and convincing evidence under BR 5.2.

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[202] TPO, entire.
[203] Docket, entire.
[204] Tr. 68:1-14.
[205] Tr. 70:17-23.
[206] Exs. 59 (correspondence between counsel), 49 at 16 (OJIN Docket).

C. Argument

This client has never complained about Gatti in any respect:

> "Q. Do you have any complaints at all about the work that he did for you?
>
> "A. Absolutely not."[207]

Nonetheless, the Bar subpoenaed this client for trial over his objection (Tr. 68:1-14 (appearing with personal counsel)) and at great inconvenience to the client (Tr. 79:6-8 (his father had just died and the funeral was pending)).

This client did not waive privilege.[208]

This client did not support the Bar's theory either. In response to the Bar's questions, the client made plain that he had decided not to appeal the State's victory in his case at trial:

> "Q. Okay. Excuse me. When you lost the State case, did you consider appealing?
>
> "A. I did not consider appealing.
>
> "Q. And why?
>
> "A. I – based on counsel's advice. We didn't have – you know, in my case there was nothing to appeal."[209]

Gatti confirmed with Judge Bushong that the State would waive costs in light of the decision not to appeal:

> "I presume that when we submit the Judgment Order of Dismissal or Satisfaction of Judgment, that this would note

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[207] Tr. 81:4-6.

[208] Tr. 70:24-71:3 (asserting privilege through his personal counsel).

[209] Tr. 70:17-23. In his case, the jury had concluded as a matter of fact that the alleged abuse had not been proven. (Ex. 47 (Verdict) at 1.)

> . . . [client's] . . .loss and dismissal with prejudice and without costs."[210]

The State did, in fact, waive costs.[211]

By including this client in the State settlement, Gatti protected this client from potential exposure to prevailing party fees and costs. No conflict ever emerged by including this client in the State settlement because the client received no funds.

Even though the Trial Panel never mentioned this Cause, there was no evidence to support it and it should be dismissed.

SIXTH ASSIGNMENT OF ERROR

In its Fifth Cause, the Bar charged Gatti with violating 1.15(1)(d) for allegedly failing to provide with accountings. The Panel made no findings or legal conclusions at all regarding this Cause.[212] The Bar did not cross-appeal.[213] The Panel's failure to enter findings as required by BR 2.4(i)(2)(A) should result in dismissal. Because review in this Court is *de novo*, however, Gatti will address this Cause. Before trial, the Bar admitted that had received accountings from Gatti for both the settlements with the Archdiocese and the State.[214] Both accountings were also admitted at trial.[215] There is no evidence to support this charge.

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[210] Ex. 59. The List of Record submitted by the Bar does not reference Ex. 59. The trial transcript, however, shows it as admitted. (Tr. 3:25.) The same letter is included in Ex. 46 at Tab 4.

[211] Ex. 49 (OJIN Docket) at 16, Entry 170 ("Judgment Dismissal General w/prej w/o costs to any party d/n create jgm lien w/att").

[212] TPO, entire.

[213] Docket, entire.

[214] First RFAs, Requests 10, 18.

[215] Exs. 23, 32.

A. Preservation of Error

Gatti moved to dismiss this charge based on the Bar's admissions, which was denied.[216]

B. Standard of Review

Review in this Court is *de novo* under ORS 9.536(2) and BR 10.6. The Bar bears the burden of proof by clear and convincing evidence under BR 5.2.

C. Argument

There is no dispute that Gatti provided with accountings for the settlements with both the Archdiocese and the State:

> "**Request No. 10:**
>
> "Admit that the document attached as Exhibit 8 is an accurate copy of an accounting of the settlement Archdiocese Claim."
>
> "**Request No. 18:**
>
> "Admit that the document attached as Exhibit 13 is an accurate copy of an accounting of the settlement of State Claim."[217]

Both were in the record.[218]

admitted that he received both:

> "Q. (Referring to Ex. 23) That's the accounting that Mr. Gatti sent you?
>
> "A. Yes.
>
> "Q. And that was for the settlement with the [A]rchdiocese?
>
> "A. Yes."[219]

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[216] Docket, Entry 35; Tr. 9:7-10.
[217] First RFAs.
[218] Exs. 23 (Archdiocese), 32 (State).

"Q. (Referring to Ex. 32) And you got that accounting from Mr. Gatti?

"A. Yes, sir."[220]

There is no evidence to support this charge. This Cause should be dismissed.

SEVENTH ASSIGNMENT OF ERROR

In the alternative and without prejudice to Gatti's position that no RPC violations occurred, Gatti should not be suspended.

A. Preservation of Error

Gatti argued for dismissal. The Panel recommended a six month suspension.

B. Standard of Review

Review in this Court is *de novo* under ORS 9.536(2) and BR 10.6.

C. Argument

The Panel noted that Gatti "clearly cares for his clients" and that he cooperated with Bar over the nearly four years that this matter took from initial complaint to trial.[221] Further, Gatti's only prior discipline in a 40 year legal career—a public reprimand—came in another case of first impression, *In re Gatti*, 330 Or 517, 8 P3d 966 (2000).

In addition, Gatti respectfully requests that this Court take the following into consideration in mitigation and that the Court not suspend him.

First, the central charge in this case turns on a question of first impression in Oregon: the meaning and application of the aggregate settlement rule. As discussed, there has never been a definition in the Rule.

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[219] Tr. 131:10-15.
[220] Tr. 135:14-15.
[221] TPO at 7.

Nor has this Court had the opportunity to supply a definition. To the extent that a definition existed in Oregon law at the time of the events involved, it was the "all-or-nothing" definition offered by two Oregon ethics opinions that the Bar abandoned shortly before trial. The Court noted in *In re Banks*, 283 Or 459, 482, 584 P2d 284 (1978), that the fact that an attorney is confronting novel legal issues should be taken into account on sanction, and, in that well known conflict case, only imposed a public reprimand.

Second, this is not a case in which Gatti tried to skirt his obligations. The record is clear that he explained the circumstances of multiple representation at the outset of his representation of each of the Clients (*see, e.g.,* Exs. 2-7), along the way (*see, e.g.,* Exs. 10-11) and at the time of the settlements now at issue (*see, e.g.,* Exs. 17 (reference) and 25). At the time of the events involved, two Oregon ethics opinions suggested that he could proceed as he did. Indeed, the Bar has not shown an actual conflict ever arose or that any harm ever occurred to the clients as a result of Gatti's actions. Even Bar Counsel commented favorably on Gatti's efforts:

> ". . . Mr. Gatti actually had done a very good job of providing documentation including the joint representation agreements that basically spelled out some of the potential problems and what would happen if those problems arose."[222]

Third, Gatti got excellent results for his clients. Gatti will not repeat the quotes of testimony to that effect from opponents (Hoffmann and Cooney), co-counsel (Smith and Olson) and the mediators (Judges Hogan and Velure). It bears noting, however, that Gatti took on difficult cases for a group of clients who are traditionally underserved and handled those cases with great skill for over the half decade it took to bring them to successful conclusions. None of the Other Clients have voiced any discontent at all

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[222] Tr. 22:15-20.

with Gatti or his work on their behalf. Ironically, neither did received the $7,500 apiece he had agreed to accept from the Archdiocese and the State. Gatti waived his fees and costs on both settlements so could receive the entire amounts. Indeed, not only was this double what previously indicated he would accept, but paid no fee to his attorney. In his concluding letter to Gatti following the State settlements, wrote:

> "I also wanted to thank you and your staff for everything you've done over these last 4 years. I know some people aren't grateful but I am and I wanted to let you know that."[223]

Fourth, the Bar has demonstrated no harm caused to or any other Client. Even if the Bar could prove such harm, Gatti testified he would make any such client whole.

Fifth, the Bar seeks a six month suspension of a lawyer who has diligently served in this state for 40 years. During that time, Gatti received one reprimand for conduct in a matter of first impression that resulted in both rule and statutory changes. *In re Gatti*, 330 Or 517. Otherwise Gatti has a clean and commendable history as a lawyer in this state.

Finally, whatever technical legal issues are before the Court, the evidence was undisputed that Gatti tried his best for his clients. Bar Counsel put it this way as he began his closing:

> "What I would like to do, first of all, is start by talking about what this case isn't about, what you're not going to hear from the [B]ar. You're not going hear from the [B]ar that Mr. Gatti is a bad man. You're not going to hear that he's a bad lawyer. You're not going to hear that he's a dishonest man, that he stole from his clients, none of that. Mr. Gatti is obviously a well-respected member of the legal community, and we concede and acknowledge it."[224]

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[223] Ex. 111.

[224] Tr. 438:22-439:6.

The TPO goes too far in its recommendation of a six month suspension of a well-respected lawyer of 40 years for conduct that (1) the RPCs did not define; (2) the Bar had previously suggested; (3) where traditionally unrepresented clients received stellar legal representation and results; (4) the Bar has not demonstrated harm to any clients; (5) Gatti gained nothing by such conduct; (6) received double what he hoped for; (7) paid no fee or costs; (8) Gatti cooperated with the Bar; and (9) where all Clients knew what was occurring and agreed to it. The six month suspension is unwarranted and unduly harsh in light of these factors.

CONCLUSION

Gatti requests that the Court dismiss the charges against him.

Dated: June 5, 2013.

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Certificate of Compliance

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I certify that (1) the attached **Appellant's Opening Brief** complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 13,085 words.

Dated: June 5, 2013.

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I hereby certify that on June 5, 2013, I filed the original of the attached **APPELLANT'S OPENING BRIEF**, together with the 15 copies required by ORAP 5.10(2), by depositing them in the U.S. Mail addressed to:

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