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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF *AMICUS CURIAE* PETER R. JARVIS

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Peter R. Jarvis ("Jarvis") respectfully submits this Brief on the Merits of *Amicus Curiae*. Jarvis appears for one sole purpose: to address the interpretation of the so-called aggregate settlement rule, more formally known as rule 1.8(g) of the Oregon Rules of Professional Conduct (the "RPCs"). Jarvis takes no position on any other factual or legal issues raised by appellant Daniel Gatti ("Gatti").

INTRODUCTION

RPC 1.8(g) provides that:

> "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."

For a very long time, the Oregon State Bar (the "Bar") has construed the reference to "an aggregate settlement of claims" to refer to coercive settlements—in other words, to settlements in which the right or ability of Plaintiff A to settle was expressly conditioned on Plaintiff B also settling, or on some proportion of all plaintiffs settling, as distinct from settlements that occur at the same time but do not involve coercion. In the present case, however, the Bar has broken from its consistent past interpretations and has instead sought to make new, unprecedented and highly undesirable law.

ARGUMENT

The longstanding position of the Oregon State Bar has been that aggregate settlements are not present merely because several cases are resolved at the same time and as part of a single process. Instead, aggregate settlements require coercion. This is clear, for example, from the reference in Former Oregon Formal Ethics Opinion 2000-158 (2000) (at 2 n.1): "[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." (Emphasis in original.) It is also clear from the reference in Oregon Formal Ethics Opinion 2005-158 (2005) (at 433): "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." At no time until the present case has the Bar said or done anything inconsistent with this interpretation.

This interpretation also explains why the Bar did not charge an aggregate settlement violation under former DR 5-107(A), the predecessor to RPC 1.8(g), in *In re Brandt/Griffin,* 331 Or 113, 10 P3d 906 (2000), a case in which Jarvis represented both accused lawyers. There, as here, a great many cases were settled at the same time but there, as here, each plaintiff was free to settle or not as that plaintiff chose. To Jarvis' best recollection, this was not a matter of surmise on his part as to the Bar's intent but of express statements by the Bar. Also to Jarvis' best recollection, this has been the interpretation that he and

other CLE speakers have given to the aggregate settlement rule.

The requirement of coercion no doubt explains as well the Bar's inclusion in Paragraph 10 of the Bar's Amended Formal Complaint, filed March 29, 2011, of an express allegation of coercion. Paragraph 10 provides, in relevant part, that:

> "A condition of the Archdiocese settlement that and the other abuse clients must all accept it. Neither nor any of the abuse clients could reject the Archdiocese settlement without affecting the settlements of the other abuse clients."

To the same effect, Paragraph 13(a) of the Bar's Amended Formal Complaint goes on to charge Mr. Gatti with the making of false representations on the ground that he told his clients or allowed them to believe that "the Archdiocese settlement was a group of individual settlements rather than an aggregate settlement***." *See also Id.* at ¶26 (State settlements). It is unreasonable to assume that the Bar included these coercive/conditional allegations without the concomitant belief that this was a necessary part of the Bar's case. Thereafter, however, the Bar chose not to object to and is therefore deemed to have admitted Gatti's requests for admissions to the effect that the settlements were not coercive but were merely a group of simultaneous and non-coerced

settlements. *See* Gatti's Second Request for Admissions, filed July 9, 2012.[1]

Nonetheless, the Bar sought through its Second Amended Formal Complaint filed on August 21, 2012, and at trial to argue that an aggregate settlement could exist without coercion. As has already been noted, this is a significant change in the Bar's position. Moreover, it is a change that, from a policy perspective, makes no sense. Suppose, for example, that Plaintiff's Lawyer represents Clients A, B, and C, each of whom has a tort claim against for Defendant, and only against Defendant, arising from an automobile accident. Suppose further that Plaintiff's Lawyer consults independently with A, B, and C and asks each one to give her an amount for which each would be willing to settle his or her individual cases. Suppose further that Plaintiff's Lawyer simultaneously sends counsel Defendant three letters (one for each client) containing that client's settlement demand but that counsel for Defendant responds with a single letter to Plaintiff's Lawyer which states "Defendant accepts." No aggregate settlement could or should be said to exist. In the language of Paragraph 13(a) of the Bar's Amended Formal Complaint, this would be nothing more than "a group of individual settlements rather than an aggregate settlement." The settlement proposals were not submitted on a all-or-nothing basis and nothing about the response indicates that they were only

[1] As it happens, this is also what the evidence presented by Gatti appears to show. *See, e.g.*, Ex. 114 (individual settlement agreements with the Archdiocese of Portland).

accepted on that basis. Even if one were to assume that the lawyers on both sides subjectively preferred that all cases settle at the same time, nothing about their subjective intentions could or would create coercion where none exists.

Alternatively, suppose that instead of sending three separate letters on behalf of A, B, and C, Plaintiff's Lawyer had written a single letter to the effect that she had consulted each of her clients and that the sum total of their demand was $X. Now suppose as before that Defendant's counsel writes back that "Defendant accepts." Again, there would and should be no "aggregate settlement." There is instead "a group of individual settlements." Anything else constitutes an unnecessary and inappropriate trap for the unwary.

As stated in Official Comment [14] to the Scope section of the ABA Model Rules:

> "The Rules of Professional Conduct are rules of reason. They should be interpretive and reference to the purposes of legal representation and of the law itself."

The reason for the aggregate settlement rule in particular, and for conflict of interest rules more generally, is to protect clients against the potential risk that lawyers may consciously or even subconsciously favor one client's interests over another. *See generally* Oregon State Bar, *The Ethical Oregon Lawyer* (2006 rev ed), §9.2. Where, as in these two examples, there are simultaneous individual settlements and no coercion, the purpose of the conflicts rules would

not be served.

This also is not a situation in which a reasonably prudent Oregon attorney could have turned to the law of other jurisdictions in order to determine that coercion was not a required portion of this rule. *See, e.g.,* Mark J. Fucile, "The Aggregate Settlement Rule: A Rule in Search of a Definition," 78 *Defense Counsel Journal* 296 (2011) and sources cited. It follows that even if the Court were to wish at this time to interpret the aggregate settlement rule as the Bar requests, this should be done only on a prospective basis.[2]

Dated: June 6, 2013.

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[2] *See, e.g., In re Haley*, 156 Wash.2d 324, 126 P.3d 1262 (2006); *In re A*, 276 Or 225, 554 P2d 479 (1976).

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With Brief Length and Type Size Requirements

I certify that (1) the attached **BRIEF ON THE MERITS OF *AMICUS CURIAE* PETER R. JARVIS** 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 1,487 words.

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I hereby certify that on June 6, 2013, I filed the original of the attached **BRIEF ON THE MERITS OF *AMICUS CURIAE* PETER R. JARVIS,** 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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