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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

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

OREGON STATE BAR'S RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

The Oregon State Bar accepts the Statement of the Case offered by the Accused, Daniel J. Gatti (hereinafter, "Accused").

II. RESPONSE TO ACCUSED'S QUESTIONS ON REVIEW

A. The Bar proved by clear and convincing evidence that by dividing the settlement proceeds among his clients, the Accused engaged in a non-waivable current client conflict in violation of RPC 1.7(a)(1) (Response to Accused's Second Question on Review).

B. RPC 1.8(g) provides adequate notice of prohibited conduct. The Bar proved by clear and convincing evidence that the Accused violated the rule by entering into two aggregate settlements without making the required disclosures and obtaining the required consents (Response to Accused's First Question on Review).

C. The Bar proved by clear and convincing evidence that the Accused failed to adequately advise and made affirmative misrepresentations and misrepresentations by omission to clients Earl and in violation of RPC 1.4(b) and RPC 8.4(a)(3). (Response to Accused's Third and Fourth Questions on Review).

D. The Bar proved by clear and convincing evidence that the Accused failed to provide client Earl New with an accounting and a copy of his file upon request, in violation of RPC 1.15-1(d). (Response to Accused's Fourth Question on Review).

E. The Trial Panel appropriately imposed a 6-month suspension. (Response to Accused's Fifth Question on Review).

III. SUMMARY OF THE BAR'S ARGUMENTS

The Trial Panel correctly found violations of RPC 1.8(g), RPC 1.4(b), RPC 1.7(a)(1), and RPC 8.4(a)(3), as alleged in the First through Third Causes of Complaint. Although the panel failed to make findings concerning the Fourth and Fifth Causes of Complaint, the Bar proved violations of the rules alleged therein (RPC 1.4(b) and RPC 8.4(a)(3) with respect to client and RPC 1.15-1(d)). On *de novo* review the Court can and should so find.

On behalf of 15 clients claiming they had been sexually abused by a priest (at MacLaren School for Boys, the Accused sued the Archdiocese of Portland and various persons and entities associated with the State of Oregon (hereinafter, collectively, "the State"). Realizing that one or both defendants might offer a single sum to settle all of his clients' cases – and that he would have an unwaivable conflict if he were called upon to divide the settlement proceeds between them – the Accused sent his clients two "Joint Representation and Prosecution Agreements." These agreements disclosed that in the event of a lump sum "aggregate" settlement, the clients themselves or a third party arbitrator would have to allocate the proceeds.

In October 2006, the Archdiocese offered and the Accused accepted a $600,000 lump sum settlement. Without telling his clients he was doing so, the Accused himself divided the proceeds.

Litigation continued against the State defendants. After the Accused tried three of the cases to a jury, the State offered and the Accused accepted a $1.05 million lump sum settlement. Once again, unbeknownst to his clients, the Accused himself divided the proceeds.

the client who received by far the smallest share of both settlements, questioned the Accused, asked for his file and an accounting, and receiving no response, complained to the Bar.

The Bar charged, the trial panel found, and the Bar contends on appeal that:

- by allocating the settlement proceeds among his clients, the Accused engaged in a current client conflict of interest in violation of RPC 1.7(a);
- by failing to make the disclosures or obtain the written consents required for aggregate settlements, the Accused violated RPC 1.8(g); and
- by telling that his case settled for a sum certain rather than as part of an aggregate settlement, the Accused affirmatively misrepresented a material fact, in violation of RPC 8.4(a)(3).

The Bar further alleged and contends on appeal that that:

- by not telling his clients the amount received by each settlement participant – and the method by which the proceeds were allocated – the Accused failed to reveal information that his clients reasonably needed to make informed decisions, in violation of RPC 1.4(b);
- by not telling client that he was a party to the State settlement, the Accused made a misrepresentation by omission in violation of RPC 8.4(a)(3); and
- by failing to timely respond to request for his file and an accounting, the Accused violated RPC 1.15-1(d).

Finally, the Bar asks the court to adopt the 6-month suspension imposed by the Trial Panel for the Accused's misconduct.

IV. STATEMENT OF FACTS

The Bar does not accept the Accused's Statement of Facts and would substitute the following.

1. The Accused begins representing Earl

In 2002, the Accused began representing on sexual abuse claims involving a priest who worked at the MacLaren School for Boys when was incarcerated there as a juvenile offender. Anticipating additional clients with similar claims, the Accused gave two documents: a letter discussing the potential advantages and disadvantages of joining multiple abuse cases (Ex. 2); and a "Joint Representation and Prosecution Agreement" (hereinafter, "JRA") addressing potential issues arising from a multiple plaintiff representation. (Exs. 2, 3.) The template for the JRA was written by attorney Peter Jarvis, *amicus curiae* in this case. (Tr. 399-401.)

Section 5 of the JRA (entitled "Settlement Strategy and Common Fund Settlement") stated that although it was "generally desirable" that each client's case be negotiated separately and not be "linked to the settlement of any other client's case,"

> "it is possible that the defendants may insist upon an aggregate settlement, with a single lump sum fund to be shared by all Clients, or a joint-fund settlement, with a lump sum to be shared by two or more Clients." (Ex. 3 § 5.2.) (emphasis added.)

The JRA explained that no client could be forced to accept – and every client had the power and right to prevent – an aggregate settlement, but that if the clients did accept one, the Accused could play "no role whatsoever" in dividing the funds; the clients themselves or a third party arbitrator would have to do it. (Ex. 3 §§ 5.3, 6.1-7.)

2. The first mediation.

By late 2004, the Accused represented 15 clients (including who claimed to have been abused by Several of the clients (including were incarcerated.

The Accused sued the Archdiocese of Portland, and various State of Oregon entities in state court. The litigation was stayed when the Archdiocese filed for bankruptcy protection.

Beginning in 2005, at the bankruptcy court's direction, the abuse claims against the Archdiocese were negotiated in a series of mediations. On July 26, 2005, anticipating the first of these, the Accused sent his clients another letter addressing the possibility that the Archdiocese would offer an aggregate settlement. This letter, which was also drafted by Peter Jarvis and modified for use by the Accused (Tr. 407-08), stated:

> "It is possible that the church will insist on a common settlement fund. That is, that it will pay $ x to settle all cases. How should the fund be divided among my clients? I could not represent any client against the interests of any other clients. It might therefore be necessary in that situation to refer all my clients to separate attorneys to resolve the issue of the distribution of the common fund. To alleviate this concern, it is my general policy to refuse to entertain common-fund settlement offers." (Ex. 10, p. 4.)

The Accused enclosed with this letter a second Joint Representation Agreement. (Ex. 11.) Like the first, it discussed the possibility of an "aggregate" settlement (again defining it as "a single lump fund to be shared by all the clients") and reiterated that the Accused could not allocate the proceeds of such a settlement. (Ex. 11, § 5.3.)

In September 2005, at the first mediation, the Archdiocese offered each of the Accused's clients $7,500. (Ex. 45, pp. 63-64; Tr. 178.)

was willing to accept the offer (Exs. 12, 13); however, the Accused settled none of the cases at that time.

3. The second mediation.

In June 2006, on behalf, the Accused tried to accept the $7,500 offer, but the Archdiocese rejected the acceptance as untimely. (Exs. 15, 16.)

In September 2006, before a second mediation, the Accused telephoned his incarcerated clients (including – and met personally with his other clients – to discuss their claims and obtain their minimum settlement figures. (Ex. 41, p. 1.) authorized the Accused to settle for $7,500 but asked him to do his "best" in the negotiations. (Ex. 17; Tr. 109-10.) Combined, the minimum settlement authority of all the Accused's clients was $277,500 (Ex. 42.)

The Accused's Opening Brief claims repeatedly (see pp. 13, 42) that during these pre-mediation discussions, the clients also authorized the Accused to divide any "surplus [meaning any lump settlement offer exceeding $277,500] in proportion to each client's individual settlement authority."[1] However, there is **no evidence** in the record (not even the Accused's own testimony – see Tr. 186, 195-96) that the Accused discussed with his clients or that they agreed upon in advance of the Archdiocese mediations any "formula" for dividing settlement proceeds.[2]

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[1]See also Opening Brief at p. 14 ("[the clients] agreed [to a] process for dividing the surplus on a proportional basis"); at p. 43 ("[there was an agreed formula [for dividing settlement proceeds]"; and at p. 45 ("before the mediation…[the] clients' agree[d] on a process for dividing any surplus.")

[2] As support for this proposition, the Opening Brief cites a letter from the Accused to the Bar dated May 26, 2009: Exhibit 41. The Bar asks the court to review this letter carefully because it does not say that the Accused told his clients in advance about – or that they agreed to – this or any other formula for calculating their shares of the Archdiocese settlement.

The clients who testified at the disciplinary hearing – and – denied having any such discussion or agreement. (Tr. 72, 111-12.)

At the second mediation, the Accused proposed to the mediator, Judge Hogan, a lump sum settlement that Judge Hogan considered reasonable "for that number of cases." (Tr. 288-89.) After being assured that the Accused had explained to his clients the possible conflicts attendant to such a settlement, Judge Hogan proposed to the Archdiocese that it resolve all of the cases for payment of $600,000. (Tr. 289-90, 296.) The Archdiocese accepted. (Exs. 20, 21, 41, p. 1-2.)

4. The Accused allocates the Archdiocese settlement proceeds.

Contrary to what the JRAs had said about how lump sum "aggregate" settlements would be handled – and without his clients' knowledge or approval – the Accused divided the settlement proceeds. He assigned each client (except a percentage based on that client's minimum settlement authority relative to the combined minimum settlement authority; he then applied that percentage to the $600,000 settlement. (Ex. 41, p. 1-2; Ex. 42, p. 1; Ex. 45, pp. 78 – 83.) Thus, each client (except received approximately twice his minimum settlement figure, for settlements ranging between $21,621 and $100,608. (Compare Exs. 20 and 42.)

To however, the Accused gave only $7,500, minimum settlement figure. (Tr. 111.) share was thus the smallest of any client, although the Accused offset this somewhat by not deducting any costs or fees from it (contrary to the JRAs, which provided that clients would share joint costs – Ex. 3, paragraph 7.2). (Ex 18; Ex. 41, p. 3; Ex. 42, p. 1; Ex. 44.)

The Accused did not tell or the other clients:

- that the Accused decided the allocation;
- the allocation method he used;
- the amount/percentage received by each participant in the settlement; and
- who paid (and in what portions) the Accused's costs and attorneys fees. (*See, e.g.*, Exs. 22, 42, 52; Tr. 111-12; Tr. 193-95).

The Accused also did not tell the nature of the settlement (lump sum), saying instead that "got the $7,500 because that's what [the Archdiocese] offered and that – you know, that was all [was going to get." (Tr. 111-12.) On October 25, 2006, the Accused wrote to that:

> "I was able to settle your case for the $7,500 you requested. I informed you that I would not be charging you any costs or attorney fees under your unique circumstances." (Ex. 18.)

It was only later – from reading the newspaper – that learned that the Archdiocese had settled all of the Accused's abuse cases for $600,000. (Tr. 111).

5. Bankruptcy court approval and the distribution of funds to the individual clients.

The bankruptcy court required that each abuse claim be separately approved. (Tr. 296-97). On November 29, 2006, Margaret Hoffman, the Archdiocese's lawyer, confirmed the settlement and asked the Accused's assistant, James Bulthuis, to specify how the funds should be allocated. (Tr. 297; Exs. 20, 21)[3]

Bulthuis provided this information by letter dated December 7, 2006. (Ex. 2.) Next to the names of each of the Accused's 15 clients,

[3] On December 7, 2006, Hoffman wrote to the Accused that, "We have not yet received from you an indication of how the monies were allocated on a case-by-case basis." (Ex. 21.)

Bulthuis stated a sum ranging between $7,500 and $100,608. (Exs. 20, 21.) The Archdiocese complied with these allocation instructions, preparing separate settlement agreements and checks for each client. (*See, e.g.,* Exs. 22, 24, 43 (Tab 3), 45, pp. 91-92). After the Accused returned the executed settlement agreements, the Archdiocese sent the settlement checks. (Exs. 22, 24, 45 p. 92.)

6. The State claims.

After the settlement, the Accused continued litigating against the State. In May 2007, he tried the claims of clients R.S., R.P., and

The jury found in favor of R.S. and R.P. (awarding, respectively, $590,000 and $595,000, plus punitive damages) but against on statute of limitations grounds. (Ex. 47.)

Immediately after the trial, the State's counsel, Stephen Bushong, approached the Accused about settling all the abuse claims. On June 26, 2007, the Accused wrote to and his other clients that:

> "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....I will need to know if I have your permission to settle for the number that I can extract from [the State] and that you will accept your proportionate share pursuant to the proportionate share that was given in the past. In other words, if your proportionate share came to 10 percent, then you need to say you will take the same proportionate share....If any of you disagree with this proportionate share analysis, ...I would have to resign and I would have a conflict of interest." (Ex. 25.)

On July 1, 2007, authorized the Accused to settle for "my proportionate share" and asked him to "please get what you can." (Ex. 26, emphasis in the original.) But in that same letter, expressed confusion about the "proportionate share" concept, writing: "I do not remember you mentioning anything about 10 percent or 15 percent [in

connection with the Archdiocese settlement]." (Ex 26.) The Accused did not respond to concern. (Tr. 119-20.)

On July 17, 2007, the Accused told his clients that he had reached settlement with the State for a total of $1.05 million, less attorneys fees and trial costs, and that:

> "All of you agreed that you would take the same percentage, or more if I could get it, that you accepted from the Portland Archdiocese" (Ex. 27.)

He told that his share was $7,500 and that should immediately return an enclosed power of attorney so that the Accused could "deposit the [settlement] checks immediately and disburse as soon as they clear." (Ex. 27.)

complied. However, he expressed surprise that he was receiving precisely the same dollar amount he received from the Archdiocese settlement. (Ex. 28.) He thought that since the State settlement was almost twice as much as the Archdiocese settlement, his "proportionate share" should also be almost twice as much. (Tr. 121.) The Accused did not explain. (Tr. 123.)

On July 25, 2007, pursuant to his clients' powers of attorney, the Accused signed their names (except for to a Settlement Agreement and Release prepared by defense counsel Bushong. (Ex. 29.) Transmitting the executed agreement to Bushong, the Accused explained that he had not included signature because had lost at trial and was therefore not entitled to share in the settlement. (Ex. 45, Tab 4, p. 9.)

The State insisted that execute the document, which recited that was releasing his right to appeal.[4] The next day (July 26, 2007), without telling the Accused signed name to the Settlement Agreement and provided it to Bushong. (Ex. 30, p. 6; Tr. 78.)

On August 1, 2007, Bushong sent the Accused nine checks from the State and the State's insurer totaling $1.05 million; Bushong expressed no concern or preference about how the Accused divided the funds.[5] Bushong told the Accused that he could negotiate the checks only if he had been duly authorized by his clients to sign their names to the settlement agreement. (Ex. 30.)

The Accused led or allowed to believe that he was not entitled to share in the State settlement. (Tr. 77-78.) At the disciplinary hearing, was still unaware that he was a party to the State settlement, that he had released his appellate rights as a condition of that settlement, that the State had paid compensation in part for that release, or that the Accused had signed name to the Settlement Agreement. (Tr. 74-75, 78.)

The Accused gave none of the settlement proceeds. (Tr. 76), but eventually gave him $15,000 that he characterized as a "personal gift." (Ex. 43, p. 10, fn 16; Tr. 80.)

7. The Accused allocates the State settlement funds.

The Accused deposited the State settlement checks into his trust account and then, without telling his clients, divided the funds himself.

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[4] Judgment had not yet been entered in the / / cases, so the parties could still appeal. (Ex. 29, p. 1.)

[5] The number of checks was for the State's own accounting convenience; it had no bearing on how the proceeds would be divided among the clients, a decision the State left to the Accused.

He did not use the "proportionate share" approach he had told the clients about in his June 26, 2007 letter. (Ex. 25.) Instead, he divided the $1.05 million into two parts: $357,676.30 for the successful litigants R.S. and R.P., and the remaining $692,323.70 for the remaining clients (except (Ex. 41, p. 3.) He then divided R.S.'s and R.P.'s pool in half, deducted trial costs and a slightly reduced attorney fee, and distributed exactly $100,000 to each of them. (Ex. 43, Tab 5.)

As to the remaining twelve clients (except the Accused distributed their pool according to the same percentages used for the Archdiocese settlement. However, because R.S.'s, R.P.'s, and shares had accounted for almost 20% of the earlier settlement, money was left over. (Ex. 41, p. 3.) The Accused distributed this excess to his remaining non-litigant clients (except but not in equal (or even proportional) amounts. (Exs. 55, 56; Tr. 320.)

As before, the Accused assigned $7,500 and did not deduct any fees or costs. (Exs. 43, Tab 5; Ex. 56.) The other clients (except for received between $41,539 and $124,743.

8. The Accused fails to respond to request for a more detailed accounting.

After each settlement, the Accused gave a cursory written "accounting" that stated that he was receiving $7,500, from which no amount was deducted for fees or costs. (Ex. 23, Ex. 32.)

On August 24, 2008, asked for a copy of his file and a more detailed accounting of the settlements. (Ex. 34; Tr. 126, 224.) On October 12, 2008, after receiving no response, complained to the Bar. (Ex. 35; Tr. 127-28; 224.)

It was not until May 26, 2009, in response to the Bar's inquiry, that the Accused revealed how he had disbursed the settlement funds. (Exs. 42, 43.)

V. ARGUMENTS

A. The Bar proved by clear and convincing evidence that by dividing the settlement proceeds among his clients, the Accused engaged in a non-waivable current client conflict, in violation of RPC 1.7(a)(1) (Response to Accused's Second Question on Review).

The Accused's most vigorously expressed defense is that the Archdiocese and State settlements were not "aggregate" within the meaning of RPC 1.8(g). However, RPC 1.8(g) is simply a more specialized application of general conflicts of interest rules to group settlement situations.[6]

RPC 1.7(a) prohibits lawyers from representing multiple clients if they have a conflict of interest, which exists when the representation of one client is directly adverse to another client. RPC 1.7(a)(1). Conflicts can be waived by client consent after full written disclosure unless the representation requires the lawyer to contend for something on behalf of

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[6] As stated in Comment 13 to ABA Model Rule 1.8:

> "Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under RPC 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, RPC 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement … The [aggregate settlement rule – RPC 1.8(g)] is a corollary of both these Rules."

one client that which he is required to oppose for another. RPC 1.7(b)(3).

In *In re Barber*, 322 Or 194, 904 P2d 620 (1995), this court found that when it became obvious to a lawyer representing multiple clients that the recoverable assets were insufficient to compensate all of them for their injuries, he had a non-waivable conflict that prohibited his continued representation. The "limited pot" scenario is also discussed in *Formal Ethics Opinion* No. 2005-158, which states that although a lawyer in that situation may (with informed client consent) limit his representation to collecting the resources for the group, once the resources are obtained, he "cannot actively represent one current client against another current client [in dividing the proceeds between them]."

The "limited pot" creates a zero sum situation, in which every dollar received by one client is a dollar unavailable to the others – the very definition of a non-waivable conflict. A similar zero sum situation is created after a group of clients accepts a lump sum settlement. The group's shared lawyer cannot divide the proceeds because to each client he owes a duty – irreconcilable with his identical duty to his other clients – to advocate for the largest possible share of the proceeds.

When the Accused sent the JRAs to his abuse clients, he recognized both the possibility of a lump sum settlement and the ethical impossibility of his apportioning the proceeds. He told his clients that in the event of a lump sum settlement, he ethically could not – and assuredly would not -- divide the proceeds himself. Yet with the money on the horizon, awaiting only the return of signed settlement agreements, the Accused chose expedience over ethics. Although client consent could not have cured the conflict, the Accused did not even try. He kept his clients in the dark, unaware of and therefore unable to

protest his disloyalty/favoritism or the adequacy of the amounts **he** decided each of them should receive.

The Accused now claims that before the Archdiocese settlement, he "obtained his clients' advance consent to divide any 'surplus' [over the $277,500] in proportion to each client's individual settlement authority," and that this procedure eliminated any conflict. (Opening Brief, p. 4.)

There are two insurmountable problems with this argument. First, there is no factual support for the claim – no evidence – that the Accused obtained his clients' advance consent to the method he used to divide the Archdiocese settlement.[7] (Tr. 72; 111-12.) Second, there is no legal authority that allows a lawyer to obtain his clients' advance agreement to a methodology by which he can divide settlement proceeds between them. *Oregon Formal Ethics Opinion* No. 2005-158, cited by the Accused, states only that clients can agree in advance that any recovery procured for them by an attorney can be divided by a third party arbitrator or mediator, and that the lawyer can help them set up such a process (precisely the mechanism contemplated by the JRAs). However, as the *Opinion* concludes, " [The l]awyer…cannot actively represent one current client against another current client."

[7] Again, the only evidence the Opening Brief cites for this proposition is Exhibit 41, the Accused's May 26, 2009 letter to the Bar. But that letter does not say what the Accused alleges: that before the mediations with the Archdiocese, his clients agreed on a formula he could use to divide any lump sum settlement. (Ex. 41.)

By choosing to allocate the settlement, the Accused positioned himself to play favorites among his clients. Unfortunately for he was not one of them.[8] The Accused violated RPC 1.7(a)(1).

B. RPC 1.8(g) provides adequate notice of prohibited conduct. The Bar proved by clear and convincing evidence that the Accused violated the rule by entering into two aggregate settlements without making the required disclosures and obtaining the required consents (Response to Accused's First Question on Review).

RPC 1.8(g) prohibits lawyers who represent two or more clients from making an aggregate settlement of their claims unless each client gives informed consent, in a writing signed by the client. The lawyer must disclose the existence and nature of all the claims involved and of the participation of each person in the settlement.

1. Definition of aggregate settlement.

Aggregate: adj. Formed by combining into a single whole or total. *Black's Law Dictionary* (8th Ed. 2004).

Oregon's RPC 1.8(g) does not define "aggregate settlement" and there is no Oregon case law applying the rule. ABA Model Rule 1.8(g), identical to Oregon's, likewise contains no definition; however, *ABA Formal Ethics Opinion* No. 06-438 (2006) states that a settlement is

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[8] The Accused claims that he treated differently because, of all his clients, only authorized him to accept a flat amount. At the disciplinary hearing, the Accused even suggested that set a maximum limit on his recovery, testifying: "The maximum was 7500 bucks. That was the deal. That was it." (Tr. 207.)

However, the Accused never explained what distinguished "bottom line" settlement figure from those of his other clients. They all (including (Tr. 109-10)) authorized a minimum and hoped for better. Preparatory to negotiations with the Archdiocese, thanked the Accused in advance for "doing your best." (Ex. 17.) Preparatory to negotiations with the State, asked the Accused to "Please get what you can." (Ex. 26, emphasis in the original.) The only factor that explains the Accused's dissimilar treatment of New is personal distaste. (Ex. 45, p. 19; Tr. 242.)

aggregate if (1) the claims or defenses of multiple clients represented by the same attorney are (2) resolved under a single proposal.

In 2009, the American Law Institute (ALI) adopted a more restrictive definition: "a non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is *interdependent*." (emphasis added.) ALI, *Principles of the Law of Aggregate Litigation*, Section 3.16(a). ALI pointed to two kinds of interdependency: collective conditionality, where the settlement is conditioned on its acceptance by all of a lawyer's clients (*i.e.*, the "all or nothing" situation); and collective allocation, where the claimants' lawyer has to allocate lump sum proceeds among his clients (*i.e.*, the "lump sum" situation).

Both the all-or-nothing and the lump sum settlement situations offer temptations that threaten to overwhelm: a lawyer's loyalty to his individual clients (RPC 1.7); his deference to client decisions concerning settlement (RPC 1.2); and his obligation to sufficiently apprise clients of facts they need to know when deciding whether to settle. (RPC 1.4). Lawyers who receive "all-or-nothing" settlement offers might be tempted to secure 100% client approval by withholding relevant information from some or all of the clients or by threatening to withdraw from representing a hold-out client; lawyers who receive lump sum settlement offers might similarly be tempted to withhold information or to favor one client (or set of clients) over another. Hence the need for a rule that "supplements and amplifies" ordinary ethical duties by clarifying the information the lawyer must disclose and the consents he must receive before proceeding with aggregate settlements. *See* Hutchinson and Jacobs, *The Path to Aggregate Settlements, Mass Torts Litigation* (ABA Litigation Section – 2012).

States interpreting the aggregate settlement rule have applied it to situations that can be characterized as "all-or-nothing," "lump sum," or both. Mark J. Fucile, *The Aggregate Settlement Rule: A Rule in Search of a Definition*, Defense Counsel Journal 296, 298 (July 2011).

In *Oklahoma Bar Association v. Watson*, 897 P2d 246 (1994), a lawyer represented three clients in a personal injury and wrongful death case. After trial resulted in a favorable verdict for two of the clients but not the third, the attorney (without consulting his clients) accepted a lump sum settlement and divided it among all three clients. The lawyer provided no accounting or calculations and made misleading statements about whether the client who had lost at trial received any share of the settlement. The Oklahoma Supreme Court held that the lawyer violated the aggregate settlement and misrepresentation rules and suspended him for one year.

In *In re Hoffman*, 883 So.2d 425 (La 2004), family members of a recent decedent were disappointed with the amounts left to them in his will. One family member (Jack) hired a lawyer to contest the will and other family members (Julian and Lillian) reluctantly agreed to join the litigation. Although the lawyer represented all the contesting family members, he communicated only with Jack. Prior to a mediation, the lawyer obtained Julian's settlement authority for "any amount…which [exceeds] the amount of the legacy to me contained in the will [$10,000]." At the mediation, the defendants offered to settle all the claims for a $225,000 lump sum. The lawyer accepted the offer, allocated the proceeds in a way that greatly favored Jack, and sent $20,000 to Julian with instructions not to talk about the settlement with anyone. The Louisiana Supreme Court held that the lawyer violated the aggregate settlement rule and failed to provide his clients with sufficient

information about the settlement and suspended him for three months, stayed.

In *Kentucky Bar Assn. v. Helmers*, 353 SW3d 599 (2011), a lawyer worked at a law firm that represented many plaintiffs claiming to have been injured by the diet drug Fen-Phen. After mediation, the defendants agreed to pay a $200 million lump sum in exchange for releases from at least 95% of the plaintiffs. After preparing a schedule of each client's presumptive monetary settlement amount, the lawyer met with the clients and offered them less than those amounts, intending thereby to create a fund that he could use to increase offers to any hold-out clients. The lawyer did not tell his clients that they could reject the offer, that the settlement was aggregate, or that he himself had decided the proposed settlement amount. The Kentucky Supreme Court found that he violated the aggregate settlement rule, made misrepresentations to his clients, and failed to provide them with relevant information. He was disbarred.

Because the disclosures and consents required by the aggregate settlement rule are intended to ensure that lawyers deal with their individual clients openly and fairly in group settlement situations, the rule logically applies to <u>all</u> group settlements that can fairly be characterized as interdependent.

2. The aggregate settlement rule in Oregon.

Again, there is no Oregon case law defining aggregate settlement. RPC 1.8(g). The JRAs – written by Peter Jarvis – define a settlement as "aggregate" if it consists of "a single lump sum fund to be shared by all Clients." Although this definition may not describe all possible aggregate settlement situations, the Bar agrees that lump sum settlements are aggregate within the meaning of RPC 1.8(g).

The Accused agrees that the Archdiocese and State settlements were "single lump sum funds to be shared by all the clients." However, he and Peter Jarvis claim that the settlements were not "aggregate" because they were not "all-or-nothing." Not only do the Accused and Jarvis thereby disavow their own definition, Jarvis argues that by applying it to the facts of this case, the Bar is advocating "new, unprecedented, and highly undesirable law." (*Amicus Curiae* Brief, p. 1.)

The Accused and Jarvis offer no substantive legal authority for their claim that, in Oregon, the aggregate settlement rule (RPC 1.8(c) or its predecessor, DR 5-107(A)), applies only to explicitly "all-or-nothing" settlements.[9] They also do not explain why its application to "lump sum"

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[9] The "authority" they offer consists of:

- a retired ethics opinion (former *Formal Ethics Opinion* No. 2000-158);
- a passing comment in a current ethics opinion that does not purport to define "aggregate settlement" (*Formal Ethics Opinion* No. 2005-158);
- the fact that the Bar did not charge violation of DR 5-107(A) in *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000);
- Jarvis's personal, outside the record recollections of *Brandt/Griffin,* its similarities to this case, and his speculation/opinion about why the Bar did not charge DR 5-107(A) in that case; (*Amicus Curiae* Brief, p. 2);
- Jarvis's personal, outside the record recollections of unidentified "express statements" made by "the Bar" about its charging decisions in *Brandt/Griffin*; (*Amicus Curiae* Brief, p. 2);
- Jarvis's personal, outside the record recollections about how he and other (unidentified) CLE speakers have interpreted the aggregate settlement rule. (*Amicus Curiae* Brief, p. 3).

However, ethics opinions – even those that are current and precisely on point -- are not law and do not bind this court in disciplinary matters. *See* Mark Fucile, *Overview of Resources on the Law Governing Lawyers*, *The Ethical Oregon Lawyer,* Section 1.5 (2006 rev. ed.). And Peter Jarvis's personal recollections, speculations, and conclusions about the Bar's charging decisions in a long ago, unrelated case are even less authoritative. If he and the Accused mean to suggest that the Bar's failure to charge violation of the aggregate settlement rule in *Brandt/Griffin* estops it from alleging a violation now, they have not demonstrated even one of the required elements of estoppel: a knowingly false representation of material fact; made with the intention to induce reliance; and justifiable reliance by the other party. *Bruer's Contract Cutting v. National Counsel on Compensation Insurance*, 116 Or 485, 489-90, 841 P2d 690 (1992).

settlements would be "highly undesirable" for anyone other than the Accused in this disciplinary action.

Other jurisdictions applying the aggregate settlement rule have not articulated an "all-or-nothing" requirement and to impose one would undermine RPC 1.8(g)'s intended purpose, which is to ensure disclosures and consents in all interdependent group settlements. However, even if the Accused could articulate some sound reason for limiting the rule's application, the Archdiocese and State settlements were "all-or-nothing."

3. The State and Archdiocese settlements were interdependent because they were both "lump sum" and "all-or-nothing."

Because the Archdiocese and the State offered lump sums to all the Accused's clients, to be divided among them, the settlements were interdependent. They were also interdependent in the sense that they contemplated releases from all of the Accused's clients.[10]

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[10] The Accused accuses the Bar of abruptly changing its theory of the case before trial, a shift that he claims demonstrates the Bar's recognition that these were not "all-or-nothing" settlements. (Opening Brief, p. 35.)

However, the Bar's theory has been consistent throughout. Its Formal Complaint (filed on September 17, 2010) alleged that the settlements were both "lump sum" and "all-or-nothing" in nature, that they were "aggregate," and that by failing to make the required disclosures and obtain the required consents, the Accused violated RPC 1.8(g). (See Formal Complaint, paragraphs 9-11, 25-27.)

The Bar's Amended Formal Complaint (filed on March 29, 2011) used identical language to allege violations of the aggregate settlement rule. (See Amended Formal Complaint, paragraphs 10-12, 26-28.)

The Bar's Second Amended Formal Complaint (filed on August 21, 2012) used only slightly different language, alleging that the settlements were "lump sum" and were intended by the defendants to settle the claims of all the Accused's clients (*i.e.*, were "all-or-nothing"). (See Second Amended Formal Complaint, paragraphs 9, 18.)

Judge Hogan proposed and Hoffman accepted made the $600,000 settlement offer understanding that this lump sum would resolve all of the Accused's abuse cases. (Tr. 289-90; 296.) Hoffman's November 29, 2006 letter to the Accused stated: "This will confirm that you have settled all of the above-referenced cases with the Archdiocese for the total sum of $600,000." (emphasis added.)[11]

The State's offer was likewise contingent on obtaining releases from all of the Accused's abuse clients. When the Accused returned the settlement agreement without signature, the State insisted that he provide it before it forwarded the settlement checks.

The Archdiocese and State intended and expected these settlements would resolve the claims of all the Accused's clients. There is no evidence suggesting that they would have paid the negotiated settlement if the Accused had delivered releases from fewer than all of his clients. But the Accused ensured that there would be no hold-outs by restricting his clients' access to information that might have made them question whether the settlements were in their best interests.

4. The Accused violated RPC 1.8(g).

Because the settlements were interdependent, they were aggregate and RPC 1.8(g) required the Accused to disclose to his clients "the existence and nature of all the claims or pleas involved and … the participation of each person in the settlement," and to obtain their signed, written consent.

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[11] The Accused argues that the individual settlement agreements with the Archdiocese contained "opt out" clauses. However, the paragraph he points to does not allow individual plaintiffs to back out of the settlement except in the event of possibilities outside their control – a refusal by the bankruptcy court to approve the settlement or a dismissal of the bankruptcy and a refusal by the Archdiocese to pay the agreed amount. (Ex. 114, paragraph 3 (in each).)

The Accused did not advise or his other clients of all material terms of the settlements, most significantly the amounts that each of the other settlement participants would receive, the method by which these amounts were determined, and that fact that the Accused himself made the determination. Not only did the Accused fail to provide this information, he actively asserted that each client's settlement was none of the other clients' business. (Ex. 42, p. 2; Tr. 195-96.) The only written consents the Accused obtained from any of his clients – the JRAs – promised that "each client has the power and right to prevent an aggregate settlement" and "[the Accused] shall have no role whatsoever in the allocation decision." The Accused did not keep these promises.

5. RPC 1.8(g) provides fair notice.

The Accused and Peter Jarvis argue that because RPC 1.8(g) does not define "aggregate settlement," it is unconstitutionally vague and that given the lack of prior interpretation by this court, the Accused should not be penalized if he violated it.

The trial panel rejected the Accused's argument because "Mr. Gatti knew what an aggregate settlement was…he simply chose to ignore his own agreements." (ER 21.)

The Accused testified that in his more than 40 years of almost exclusively personal injury practice, he has handled approximately 100 multiple plaintiff cases and is familiar with the ethical challenges they can create. (Tr. 155-56). He twice sent his abuse clients JRAs that accurately although not exhaustively defined aggregate settlement as "a single lump sum fund to be shared by all clients." With his experience, and having so explained "aggregate settlement" to his clients, the Accused cannot credibly claim to be surprised by the applicability of

RPC 1.8(g) to the settlements he negotiated with the Archdiocese and the State,

Even if it were not abundantly clear that the Accused was well aware of the ethical implications, due process does not require that a rule explicitly define every term. Rather, it need only prescribe general principles so that those subject to it are reasonably able to determine what conduct is appropriate. *Ex Parte Secombe*, 60 U.S. 19 (1856).

In *In re Charges of Unprofessional Conduct against N.P.*, 361 NW2d 386 (1985), the Minnesota Supreme Court rejected a lawyer's argument that his state's version of the aggregate settlement rule was impermissibly vague, stating that:

> "Particularly when viewed in the general context in which the rule was invoked, we find it most difficult to see how petitioner was misled or misinformed. In any event, the complete text of the rule needs no parsing of words and phrases to clearly inform an attorney as to the kind of conduct that is prohibited."

C. The Bar proved by clear and convincing evidence that the Accused failed to adequately advise and made material misrepresentations by omission to clients and an in violation of RPC 1.4(b) and RPC 8.4(a)(3). (Response to Accused's Third and Fourth Questions on Review).

The Accused asks the Court to dismiss the Fourth and Fifth Causes of Complaint because the trial panel did not make findings on them and the Bar did not file a cross-appeal. However, in *In re Koch*, 345 Or 444, 198 P3d 910 (2008), the court stated that a failure by the trial panel to make necessary findings does not preclude the court from making such findings on *de novo* review, and BR 10.5(c) allows the respondent in Bar disciplinary matters to address issues not raised by the appellant.

1. Misrepresentation.

RPC 8.4(a)(3) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."

Misrepresentation is a broad term that encompasses the nondisclosure of a material fact. A misrepresentation may consist of a lie, a half-truth, or even silence, and even misrepresentations made with the best of intentions can constitute a violation. *In re Gatti*, 330 Or 517, 527-28, 8 P3d 966 (2000) [discussing former DR 1-102(A)(3) and citing *In re McKee*, 316 Or 114, 125, 849 Pd 509 (1993)].

A misrepresentation – whether affirmative or by omission – violates the rule if it is false, made knowingly, and it is material. *In re Kumley,* 335 Or 639, 644, 75 P3d 432 (2003); *In re Gatti*, *supra*. A misrepresentation is material if it would or could have influenced significantly the recipient's decision-making process or conduct. *In re Obert*, 336 Or 640, 649, 89 P3d 1173 (2004) [citing *Gatti, supra*].

(a) Misrepresentation to New.

Shortly after concluding the $600,000 lump sum settlement with the Archdiocese, the Accused told "I was able to settle your case for the $7,500 you requested."[12]

That statement was affirmatively false and false by omission. The Accused did not settle case for an individual sum of $7,500. He had very recently settled the cases of all the clients for the lump sum of $600,000, and planned to divide it among the clients and give the

[12] The Accused initially repeated this claim to the Bar. In his response letter of June 11, 2009, he stated, "[New's] claim was settled for a flat amount due to his previous acceptance of the Archdiocese's settlement offer of $7,500. I could not get him more than $7,500....Judges Velure and Hogan will no doubt verify that the maximum value of Mr. New's claim was $7,500 and no more." (Ex. 42, p. 3.)

smallest share. (Ex. 19-21.) By telling that his case had settled for $7,500, the Accused knowingly stated a falsehood and omitted material facts. Had realized that his settlement was part of a much larger whole, he might well have refused it or at least asked the Accused to explain how the apportionment was decided.

In fact, the only reason that had enough information to question the State settlement was because (1) he learned the total amount of the Archdiocese settlement from a newspaper article, and (2) before the State settlement, the Accused mistakenly sent him a letter asking him to accept the same "proportionate share" as he had accepted from the Archdiocese.[13] could not understand how his "proportionate share" of the second settlement was precisely the same dollar amount as his share of the much smaller first settlement. (Tr. 121-26.)

The court found misrepresentation under similar circumstances in *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000). In that case, while negotiating to settle a group of cases, plaintiffs' lawyers signed a secret agreement to represent defendant after the settlement concluded. The lawyers told their client that they had reached the employment agreement after they had concluded the settlement negotiations. The court found the lawyers guilty of both affirmative misrepresenting that the employment agreement was "separate" from the settlement, and of misrepresenting by omission that they'd signed the employment agreement during rather than after settlement negotiations).

[13] The Accused admitted that he mistakenly sent the form letter mentioning proportionate shares. He testified that he should have sent a different letter because he did not intend for to receive any more than his $7,500 minimum settlement amount. (Tr. 204-05.)

Because the Accused misrepresented the nature of the Archdiocese settlement, affirmatively and by omission, and his misrepresentations were material to the Accused violated RPC 8.4(a)(3).

(b) Misrepresentation to

Before the judgment was filed in R.S., R.P., and case, the State proposed and the Accused accepted a lump sum settlement of all the abuse cases.

The Accused told that because he had lost at trial, he could not share in the State settlement. The Accused told Bushong the same thing when he returned the State settlement agreement without signature. But that not acceptable; the State insisted that be part of the settlement. Accordingly, the Accused signed name pursuant to his power of attorney and returned the signature page. However, the Accused never told that he had done so. At the disciplinary hearing, was still unaware he was a party to the settlement, that the State had paid $1.05 million in part for his right to appeal, and that he might have claimed a share of the settlement proceeds.

Settlement is a decision that always belongs to the client. RPC 1.2(a). Yet the Accused signed away appellate rights, something that defendant valued, without knowledge or approval. The Accused accepted funds that were intended, at least in part, to compensate for right to appeal, yet gave none of the settlement funds. When he did give money, he told that it was a personal gift, deserving of gratitude. (Tr. 80-81.) The facts concerning the State settlement were material and the

Accused's knowing failure to disclose them to violated RPC 8.4(a)(3).

2. Failure to communicate necessary information to a client.

RPC 1.4(b) requires: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The Accused asked clients to execute individual settlement agreements with the Archdiocese and to authorize him to sign an agreement with the State defendants, without disclosing vital information reasonably necessary for the clients to be able to make informed decisions concerning not only his conflicts of interest but also the object of the representation – obtaining the best possible recovery from the defendants. The Accused particularly failed to explain the facts to New and as discussed above. He therefore violated RPC 1.4(b).

D. The Bar proved by clear and convincing evidence that the Accused failed to provide client Earl with an accounting and a copy of his file upon request, in violation of RPC 1.15-1(d). (Response to Accused's Fourth Question on Review).

RPC 1.15-1(d) requires lawyers to promptly deliver to the client any funds or other property that the client is entitled to receive and, upon request by the client, promptly render a full accounting regarding such property." (emphasis added.)

The Accused's failure to respond to requests for his file and a detailed accounting prompted to complaint to the Bar. In his initial responses to Bar inquiry, the Accused repeated that he had settled claims for $7,500 and there was nothing to add. (Ex. 42.) Only after several months and several Bar inquiries did the Accused provide file and a more complete explanation concerning the settlements.

His belated response was not "prompt" and therefore violated RPC 1.15-1(d). See *In re Hedges*, 313 Or 618, 836 P2d 119 (1992).

VI. SANCTION – The Trial Panel appropriately imposed a 6-month suspension. (Response to Accused's Fifth Question on Review).

A. ABA *Standards*.

In addition to its own case law, the court applies the analytical framework set out in the *American Bar Association's Standards for Imposing Lawyer Sanctions* (1991) (amended 1992) (hereinafter "*Standards*") to determine the appropriate sanction for a lawyer's ethical violations. Under the *Standards*, the court first looks at the ethical duty violated, the lawyer's mental state, and the actual or potential injury caused, to arrive at an initial presumptive sanction. The court then adjusts the sanction to reflect applicable aggravating or mitigating circumstances. *In re Jaffee*, 331 Or 398, 408-09, 15 P3d 533 (2000).

1. Duties Violated.

The Trial Panel correctly found that the Accused violated duties to his clients to avoid conflicts of interest (*Standards* § 4.3), to be candid with them (*Standards* § 4.6), to act diligently *(Standards* § 4.4), and to preserve their property (*Standards* § 4.1).

2. Mental State.

The panel correctly found that the Accused acted intentionally or knowingly. "Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure to heed a substantial risk that circumstances exist or that a

result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. *Standards*, p. 7.

The Accused intentionally entered aggregate settlements without his clients' informed, written consent. Although he understood the conflicts that would arise after he accepted lump sum settlements, and although he promised to protect his clients' individual interests, when the prospect of settlement money loomed tantalizingly close, the Accused ignored his ethical obligations and broke his promises. He divided the proceeds, favoring some clients over others, withholding from all of them the information they needed to assess both his conduct and the adequacy of their settlements.

3. Actual or Potential Injury.

The *Standards* consider both actual and potential injury, and both were present in this case. *Standards*, p. 6; *In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The Accused's clients agreed to settlements without access to crucial information and some were apparently shortchanged to benefit others.

The Accused's misconduct also created potential injury to defendants in that his failure to comply with the aggregate settlement rule might have rendered the settlements unenforceable. *See, e.g.*, *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A2d 512 (NJ 2006); *Quintero v. Jim Walter Homes*, 709 SW2d 225 (Tex. Appl. 1985).

4. Preliminary Sanction.

Before consideration of aggravating or mitigating factors, the *Standards* provide:

Disbarment is generally appropriate when a lawyer, without the informed consent of the clients, simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the

lawyer or another, and causes serious or potentially serious injury to a client. *Standards* § 4.31(b). Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. *Standards* § 4.32.

Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client. *Standards* § 4.61.

Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. *Standards* § 4.62.

Reprimand is generally appropriate when a lawyer is negligent in dealing with client property (here, by failing to provide a prompt and full accounting) and causes injury or potential injury to a client. *Standards* § 4.13.

Suspension is generally appropriate when a lawyer engages in a pattern of neglect (here, by failing to communicate important information to the client) and causes injury or potential injury to a client. *Standards* § 4.42(b).

The *Standards* suggest that an appropriate preliminary sanction would be suspension or disbarment.

5. Aggravating and Mitigating Factors.

The following aggravating factors apply:

The Accused has a prior disciplinary history. *Standards* § 9.22(a). In August 2000, he was publicly reprimanded for making misrepresentations concerning his identity in order to gather information

on his clients' behalf. *In re Gatti*, *supra*.[14] In February 1989, the Accused was admonished for making misrepresentations to clients in order to increase his fee. (Ex. 57.)

Additionally, as found by the panel, the Accused acted selfishly, choosing not to make required disclosures in order to complete the settlements quickly and collect his fee. *Standards* § 9.22(b).[15] Also aggravating are the Accused's substantial experience in the practice of law (*Standards* § 9.22(i)) and the vulnerability of the victims, his clients. *Standards* § 9.22(h).

The panel found only one mitigating factor: the Accused's cooperation with the Bar's investigation. *Standards* § 9.32(e).

Because the aggravating factors outweigh the mitigating ones, the *Standards* suggest that the appropriate sanction would be a significant suspension or disbarment.

B. Case Law.

Oregon case law is in accord.

The court has repeatedly stated that the presumptive sanction for engaging in a "patent" conflict of interest, standing alone, is a 30-day suspension. *See, In re Hockett*, 303 Or 150, 164, 734 P2d 877 (1987)

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[14] In determining the weight of prior disciplinary offenses, the court considers: (1) the relative seriousness of the prior offense and resulting sanction; (2) the similarity of the prior offense to the offense in the case at bar; (3) the number of prior offenses; (4) the relative recency of the prior offenses; and (5) the timing of the current offense in relation to the prior offense and resulting sanction and whether the lawyer was sanctioned for the prior offense before engaging in the offense in the case at bar. *In re Jones*, 326 Or 195, 200, 951 P2d 149 (1997).

[15] *Restatement of the Law, 3d, the Law Governing Lawyers*, Section 35(2) provides that: "Unless the contract construed and the circumstances indicate otherwise, when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment."

[where lawyer simultaneously represented two husbands with respect to their business interests and represented their wives in dissolution proceedings against them]; *In re Knappenberger*, 337 Or 15, 32-33, 90 P3d 614 (2004) [citing *In re Hockett, supra*].

Where, as here, a lawyer's conflict results in injury or contains a strong element of self-interest, the court has imposed much longer suspensions. In *In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999), the lawyer persuaded his client, a widow, to loan substantial sums to the business for which he was general counsel. The lawyer then continued to represent the widow in ongoing legal matters concerning the loan after the business encountered financial difficulties. Although the facts suggested possible selfishness and dishonesty, the only aggravating factors found by the court were multiple offenses and a pattern of misconduct. Although credited with a cooperative attitude toward disciplinary proceedings and possessing no prior record of discipline over a long career, the lawyer was still suspended for four months.

Where the conflict involves misrepresentations to the client, the court has also imposed longer suspensions. In *In re Brandt/Griffin*, *supra*, in addition to their conflict of interest, the accused lawyers were found guilty of misrepresentations to their clients. With aggravating factors similar to those in this case, the lawyer (Brandt) who had a prior disciplinary history (an admonition for conflict of interest) was suspended for 13 months, while the other lawyer (Griffin) was suspended for 12 months.

The Accused argues for leniency citing his long service in the profession, the difficulty of the abuse cases, his clients' good fortune in having any legal representation at all, and complainant general unworthiness.

However, the Accused walked into an obvious conflict with his eyes wide open and chose to push the aggregate settlement through and forestall possible criticism by withholding information from all his clients and making affirmative misrepresentations to others. Dividing the settlement proceeds himself enabled him to conclude the settlements much more quickly and easily than could have been managed had he made the full disclosures the rules required. While the element of self-interest is not as pronounced as in *In re Brandt/Griffin*, *supra*, the Accused chose expediency over ethics, at his clients' expense, and ignored requests for information that would have exposed his wrongdoing. The 6-month suspension imposed by the panel is warranted.

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VII. CONCLUSION

This case illustrates the ethical problems that inevitably arise with interdependent group settlements. Unlike class action litigation, which requires court approval of settlements, no one protects individual clients' interests during non-class group settlements except their lawyers. The aggregate settlement rule seeks to ensure that these lawyers give their clients sufficient information so that individual interests are not sacrificed to those of the group, other clients, or the lawyers themselves. Although sharing information makes achieving group settlement significantly more difficult, the alternatives are secrecy, misrepresentation, and favoritism – all of which are on display in this case. For breaching his fundamental duties of loyalty and candor to and his other clients, the Accused should be suspended for six months.

DATED this 30th day of July, 2013.

OREGON STATE BAR

By: _____
Mary A. Cooper, Bar No. 910013
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 30th day of July, 2013, by submitting the electronic form in Portable Document Format (PDF) that allows text searching and allows copying and pasting text into another document to:

http://appellate.courts.oregon.gov

I further certify I served the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 30th day of July, 2013, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this 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 9,666 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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