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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.	

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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Even the Bar concedes that the TPO is critically flawed.[1] It should be disregarded.[2] On *de novo* review, the Bar failed to prove its case.

II. ARGUMENT

A. The Bar Failed to Prove Its Aggregate Settlement Charges

The Bar spent two years arguing that this case was primarily about the aggregate settlement rule. On appeal, the Bar both retreats from what was its signature argument below and continues to struggle with a rule for which it admits there is no definition. The Bar advances two arguments. The first was abandoned in the Bar's pleadings below and by virtue of the Bar's own binding admissions. The second is based on authority that did not even exist at the time of the events at issue. The Bar's constantly shifting theories also demonstrate that the aggregate settlement rule is unconstitutionally vague.

1. The Bar Cannot Rely on a Theory Abandoned in Its Pleadings and For Which It Admitted It Had No Evidence

For two years, the Bar prosecuted this case on the central allegation that Gatti supposedly violated the aggregate settlement rule, RPC 1.8(g), because the settlements with the Archdiocese and the State were "all-or-nothing":

- Archdiocese: "A condition of the Archdiocese settlement was that and the other abuse clients must all accept it."[3]
- State: "A condition of the State settlement was that and the other abuse clients must all accept it."[4]

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[1] *See, e.g.*, Bar at 24.
[2] BR 10.6 (Court can reject a trial panel opinion).
[3] Formal Complaint, ¶ 9; Amended Formal Complaint, ¶ 10 (same).
[4] Formal Complaint, ¶ 25; Amended Formal Complaint, ¶ 26 (same).

The Bar agrees that neither the rule nor any decision of this Court defines the term "aggregate settlement."[5] The Bar relied on the *only* definition of aggregate settlement under Oregon law at the time of the events involved, Formal Ethics Opinions 2000-158 and 2005-158.[6] Both define aggregate settlements as involving "all-or-nothing" coercion: *all* claimants must accept for *any* settlements to be effective:

- 2000-158: "[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."[7]
- 2005-158: "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."[8]

On the eve of trial, the Bar conceded that neither set of settlements were "all-or-nothing":

> "**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."

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[5] Bar at 19. The Bar likewise agrees that neither the corresponding ABA Model Rule nor any of its predecessors defined this term. (Bar at 16.)

[6] Bar at 20, n.9.

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

[8] *Id.* at 433.

"**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." [9]

The Bar abandoned its "all-or-nothing" theory at trial by deleting these allegations.[10]

The Bar now attempts to resurrect this theory.[11] This is wholly improper. As a matter of law, although review in this Court is *de novo*, it is on the existing record.[12] As a matter of fact, admissions made under BR 4.5(b)(5), which adopts ORCP 45D, are "conclusively established."[13]

2. The Bar Cannot Rely on a Theory Neither Pled Nor Tried and on Authority that Did Not Even Exist at the Time of the Events at Issue

In the alternative, the Bar now advances a theory not pled or tried below.[14] The Bar's new argument relies on the American Law Institute's *Principles of the Law of Aggregate Litigation*. The Bar's alternative theory fails for two reasons.

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[9] Docket, Entry 29.

[10] SAC, ¶¶ 9 (Archdiocese), 18 (State).

[11] Bar at 21-22.

[12] BR 10.6 ("The court shall consider each matter de novo upon the record[.]"); *In re Leuenberger*, 337 Or 183, 203-04, 93 P3d 786 (2004) (review is based on the pleadings below).

[13] Nor was there any evidence to this effect at trial. (*See* Opening Brief at 32-35.)

[14] The Bar—as it should—abandons its theory advanced at trial that any collection of settlements that occur simultaneously constitute an aggregate settlement. *See In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000); *Bramel v. Brandt*, 190 Or App 432, 79 P3d 375 (2003). Similarly, the Bar essentially concedes that the definition proffered in ABA Formal Ethics Opinion 06-438 is so nebulous that it is ineffective. (Bar at 17.)

Although the Bar describes this theory as "lump sum,"[15] that is *not* what the ALI *Principles* actually say.[16] Section 3.16(b)(2)[17] reads:

> "the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations."

Comment C to Section 3.16(b)(2) explains that this refers to "an average award or an award based on a matrix of categories" or an analogous method in which the individual merits of a particular case are not taken into account. Both the Bar's own pleadings and the evidence were clear that each case *was* evaluated on its own merits. On the former, the complaint upon which the case was tried admitted that Gatti "[i]n advance of the [second] mediation . . . obtained minimum settlement authority from the other abuse clients."[18] On the latter, Gatti addressed the undisputed evidence that each case was handled individually at length in his Opening Brief and incorporates that extended discussion here.[19] Judge Velure's unchallenged testimony as mediator succinctly summarizes this point:

> "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

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[15] The Bar disingenuously tries to link its use of the term "lump sum" with the use of that phrase in the JRAs. In doing so, the Bar ignores the undisputed evidence at trial by the authors of the JRAs that this phrase dealt with a contingency (the Archdiocese having insufficient assets to resolve all claims) that never came to pass. Similarly, the Bar without citation asserts that Gatti and *Amicus* Jarvis agree that these settlements were "lump sum." It is difficult to understand how the Bar could reach this un-cited conclusion in light of 68 pages of collective briefing by Gatti and Jarvis to the contrary.

[16] Bar at 17 (describing, but not quoting Section 3.16(b)(2)).

[17] Section 3.16(b)(1) addresses "all-or-nothing" settlements.

[18] SAC, ¶ 8.

[19] *See* Opening Brief at 8-12.

> 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."[20]

Moreover, the ALI *Principles* did not even exist at the time of the settlements at issue in 2006 and 2007. They were adopted in 2009 and published in 2010.[21] Unlike ALI restatements that synthesize the law as it exists *today*, the ALI *Principles* acknowledge they are a set of proposals for where the law may lead in the *future*: "While this project does not aim to provide a comprehensive code governing all aspects of aggregate litigation, the aim is nonetheless to provide the framework for the recommended law reform and to provide some language suitable for inclusion in statutes or rules."[22] The Bar's current reliance on the ALI *Principles* also illustrates the unconstitutionally vague nature of the aggregate settlement rule. Because that rule has no definition, the Bar in 2013 proposes to discipline a lawyer on a law reform proposal published in 2010 for events that took place in 2006 and 2007.

To the extent there was any Oregon law in 2006 and 2007 defining the term aggregate settlement, it was a settlement that was expressly predicated on an "all-or-nothing" requirement.[23] *Amicus* Jarvis cogently explained that this requirement provides both a clear rationale for the prohibition and an equally clear boundary serving advance notice to Oregon lawyers. For two years, the Bar agreed—until the Bar could not prove its case. That the Bar could not prove its case is not a reason for changing Oregon law after-the-fact as the Bar now suggests.

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[20] Tr. 272:23-273:8

[21] *Id.* at i.

[22] ALI *Principles*, Introduction at 2.

[23] For this reason, the out-of-state cases the Bar cites are not instructive.

B. The Bar Failed to Prove Its Conflict Charges

On appeal, the Bar repeats the same conflict argument it made at trial: that the Archdiocese and the State each supposedly made single unilateral offers, that Gatti cravenly took those offers and that he then divided them himself without prior client agreement.[24] The problem with the Bar's argument on appeal is the same one it had at trial. There is no evidence supporting it. Repeating this argument on appeal does not produce the evidence that Bar did not have at trial. The reason is simple: it did not happen that way.

The Bar's conflict charges are identical:

- Archdiocese: "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 receive from the settlement proceeds, the Accused engaged in an unwaivable current client conflict of interest."[25]
- State: "By continuing to represent and the other abuse clients after the State offered the lump sum settlement, and by thereafter deciding himself the amount each client would receive from the settlement proceeds, the Accused engaged in an unwaivable current client conflict of interest."[26]

The Bar failed to prove both charges.

With the Archdiocese, the Bar admitted in its pleadings that Gatti obtained individual settlement authority before the mediation: "In advance of the mediation . . . [t]he Accused also obtained minimum settlement

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[24] Bar at 13-16.
[25] SAC, ¶ 13.
[26] *Id.*, ¶ 21.

authority from the other abuse clients."[27] Anticipating Judge Hogan might be able to push the Archdiocese higher than the collective sum of his clients' individual authority, Gatti also obtained his clients advance consent to divide any "surplus" in proportion to their individual settlement authority. As was recalled vividly by several trial witnesses (including Judge Hogan, Hoffmann and lawyer, Thomas Cooney), Judge Hogan took Gatti's collective total and then worked his mediator's magic on the Archdiocese without *any* further consultation with Gatti.[28]

The Bar argues there was no evidence of the agreement to divide any surplus.[29] Not so. Gatti testified to this at trial,[30] during his deposition which the Bar offered as a trial exhibit,[31] and in written correspondence with the Bar before trial that the Bar also offered as a trial exhibit.[32] Judge Hogan corroborated this,[33] as did later correspondence with the clients included in the Bar's own exhibits.[34] It bears noting that Gatti is not required to prove his innocence; rather, the burden is on the Bar to prove its charges.[35] As was discussed at length in Gatti's Opening Brief, agreed to accept $7,500 to settle his claims with the Archdiocese and the State.[36] Each of the clients knew precisely what his individual settlement amount was and the collective

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[27] SAC, ¶ 8.
[28] *See* Opening Brief at 13-14.
[29] Bar at 15.
[30] Tr. 190:9-12.
[31] Ex. 45 at 38:1-9.
[32] Ex. 41 at 1-2.
[33] Tr. 289:18-23.
[34] *See* Ex. 25.
[35] *See In re Gildea*, 325 Or 281, 296, 936 P2d 975 (1997).
[36] Opening Brief at 52-55.

total before executing an individual settlement agreement and having that individual settlement approved by a federal court.[37]

With the State, a similar process was used. The Bar 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 share' that each of them had received in the Archdiocese settlement."[38]

The documentary evidence was to the same effect—including Gatti's June 26, 2007, letter to all Clients that was quoted verbatim in the Opening Brief. [39]

Having obtained his clients' permission, Gatti was eventually able to negotiate a collective set of settlements with the State totaling $1,050,000.[40] Each of the clients knew precisely what his individual settlement amount was and the collective total before executing a power of attorney permitting Gatti to conclude the settlements with the State.[41]

Beyond these undisputed facts, the Bar then argues that there is no legal authority allowing Gatti's clients to determine among themselves how

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[37] *See, e.g.,* Ex. 114; First RFA, Request 6.

[38] SAC, ¶ 17.

[39] Ex. 25.

[40] Ex. 29.

[41] *See, e.g.*, Ex. 27. The Bar references (at 12) the exhibits developed by its "Bar prosecutor expert." Gatti simply renews his objection to this purported "expert" (and her proffered exhibits) and refers to his more extended treatment of this evidentiary point in his Opening Brief at 15 n.57 and 20 n.84.

the surplus was divided.[42] Again, not so. The Bar itself suggested the method Gatti used. Opinion 2000-158 counseled that a lawyer can assist clients in developing and implementing a process for dividing funds.[43] Opinion 2005-158 is to the same effect.[44] This second Bar opinion, which was in force at the time of the events involved, also notes the process can be created at the time the funds become available.[45] The Bar argues incongruously that clients must arbitrate their interests even if they (as here) agree.[46] That makes no sense. In fact, the Bar's position again runs counter to its own advice. The Bar's *Ethical Oregon Lawyer* observes: "If, on the other hand, the two creditors were to agree by themselves to split any proceeds on a prearranged basis, no conflict-of-interest question would be present at all[.]"[47]

The Bar also suggests a conflict emerged because Gatti's involvement in distributing the settlement proceeds benefitted some clients over others. Again, not so. As the Bar plainly admitted and the evidence at trial showed: this was not a limited fund settlement. The disbursement of settlement dollars to one client was not to the detriment of others.

In sum, there were no unilateral offers made by either the Archdiocese or the State that Gatti simply "rolled over" and accepted. To the contrary, the undisputed evidence at trial was that Gatti's clients presented collective

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[42] Bar at 15.

[43] *Id.* at 5.

[44] *Id.* at 434. The Bar implies (at 14) that Opinion 2005-158 rests on *In re Barber*, 322 Or 194, 904 P2d 620 (1995). There is no reference to *Barber* in the opinion and *Barber* is inapposite—dealing with "limited fund" conflicts, not those as here involving a surplus.

[45] *Id.*

[46] Bar at 15.

[47] Bar, *Ethical Oregon Lawyer* at 9-27 (2006 rev ed), citing Opinion 2005-158.

offers to the Archdiocese and the State that were accepted by those defendants. The Bar admitted in its pleadings that Gatti obtained settlement authority from all of his clients individually and the undisputed evidence at trial was that the clients then divided the surplus Gatti was able to secure through a prearranged agreement. The Bar failed to prove its conflict charges.

C. This Is Not a Misrepresentation Case

On appeal, the Bar tries to turn this into a misrepresentation case.[48] It is not.

After two years of discovery, the Bar dropped virtually all references to RPC 8.4(a)(3) in the Second Amended Complaint on which it tried the case.[49] Reflecting this, the Bar's own trial counsel 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 that and acknowledge it."[50]

As to the Bar nowhere cites—let alone explains—how at this point it can claim that Gatti did not truthfully tell that his claim settled with the Archdiocese for $7,500 when the Bar admitted numerous requests for admission to that effect.[51] As demonstrated above, this was not an aggregate settlement and Gatti had no duty to inform of the settlement

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[48] Bar at 25-28.

[49] *Contrast* Formal Complaint (filed 9/17/2010) and Amended Formal Complaint (filed 3/29/2011) *with* SAC (filed 8/21/12).

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

[51] *See* Opening Brief at 53-54. As discussed in this passage, trial testimony was to the same effect.

values of other clients. Indeed, to have done so would have violated the protected confidentiality and privacy of the other clients, and would have required Gatti to unilaterally breach the Joint Representation Agreement each client executed, including

As to the client who lost at trial against the State,[52] that client testified unambiguously that he did not pursue an appeal on the advice of counsel.[53] Gatti was able to get the State to waive prevailing fees and costs.[54] Although the Bar underscores—without citation—the sentence in its brief that claims Gatti never told the client of this resolution, what the client actually said was: "I don't recall."[55] Had the State not agreed to the waiver, this client would have been exposed to prevailing party fees of over $5,000 under ORS 20.190 and the defendants' costs incurred over years of litigation and several weeks of trial. The Bar does not explain how this client would have benefited from having a substantial judgment entered against him. Further, the Bar failed to offer any evidence the State settlement funds were intended to compensate this other client's appellate rights.

Although this case does involve complex legal issues, it does not involve misrepresentation.

D. Received Accountings

The Bar continues to argue on appeal that did not receive accountings for his settlements.[56] This is perplexing.[57]

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[52] As Gatti did in his Opening Brief, he will refer to no clients other than by name in this Reply to protect their privacy. None of the other clients have complained in any regard about his representation and none have waived privilege.

[53] Tr. 70:17-23.

[54] Ex. 46, Tab 4; Ex 49 (OJIN Docket) at 16, Entry 170.

[55] *Contrast* Bar at 27 *with* Tr. At 78:18.

[56] Bar at 28.

Initially, the Bar did not recognize the accountings—Exhibits 23 and 32—for what they were until Gatti explained the purpose of an accounting during his deposition:

> "Q. [By Bar Counsel] Can you tell me what Exhibit 23 is?
>
> "A. It's a ledger from our trust account showing that was paid $7[,]500."
>
> "Q. Is this an internal document to your firm? I'm just trying to understand what it is.
>
> "A. It's a document that my bookkeeper has for every case when we distribute funds that shows where the money went and to whom.
>
> "Q. So was this sent to Mr.
>
> "A. Yes."
>
> "Q. Okay. Why is this sent to the client, if it's sent to the client? I think you said it was.
>
> "A. Send it to every client.
>
> "Q. And why?
>
> "A. So they know where the money went."[58]

The Bar admitted and confirmed that he received both.[59] signed his settlement agreement with the Archdiocese and power of attorney authorizing his settlement with the State knowing precisely what his settlements were and the overall totals.[60]

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[57] The Bar implies that Gatti in some unspecified way did not cooperate with the Bar. (Bar at 28.) The Bar has *never* asserted any failure to cooperate. (Record, entire.)

[58] Ex. 45 at 95:3-6, 95:15-21, 96:11-15.

[59] *Id.*

[60] *See* Opening Brief at 23-27.

E. Gatti Should Not Be Suspended

If the Court reaches sanctions, Gatti should not be suspended.

The Bar argues Gatti acted for a selfish motive to conclude these cases for a quick and easy payday.[61] This is totally unfounded. To the contrary, the evidence was uniform that:

- Gatti took on extremely difficult cases and spent countless hours over many *years* developing each individual case.
- He treated all of his clients, many of whom had shattered lives as a result of their childhood abuse, with great respect and equally great compassion.
- He fearlessly took on two of the largest, best-financed and well-represented entities in Oregon and took the State to verdict in an unprecedented multi-week trial.
- Those who were actually involved in these cases were unstinting in their praise of the job Gatti did for his clients.
- Save —whose credibility the Bar pointedly declines to defend in the face of the substantial evidence to the contrary at trial—none of the other clients had any complaint about Gatti's work in any respect.[62]

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[61] Bar at 29-32.

[62] As discussed in Gatti's Opening Brief (at 5 n.7), none of the other clients waived privilege despite the Bar's efforts to invade it. The one client beyond who did appear at trial—the client who had lost his State case—was subpoenaed by the Bar and, through independent counsel, also refused to waive privilege. What this client did say about Gatti is telling:

> "Q. Do you have any complaints at all about the work he did for you?
>
> "A. Absolutely not."
> (Tr. 81:4-6.)

- Gatti gave the client who lost at trial an unsolicited $15,000 gift (out of his own pocket) because Gatti believed that contrary to the jury's findings on the statute of limitation, this client had been abused.[63]

The Bar argues that any conflicts were "obvious."[64] When the Bar takes nine pages[65] of its brief trying to explain what an "aggregate settlement" is, it is hard to reconcile with the conclusion that any conflict was "obvious." The Bar repeatedly criticizes Gatti for *following* the practices recommended in its own ethics opinions.[66] Although the Bar on appeal contends that Gatti ignored any conflicts, that is *not* what the Bar said at trial. The Bar's trial lawyer actually complimented Gatti on his efforts to timely address potential conflicts:

> ". . . 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."[67]

If the Court is inclined to make new law in a case in which there is no evidence of harm, Gatti should not be suspended.

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[63] These points are recounted at greater length in Gatti's Opening Brief at 6-27.

[64] Bar at 34.

[65] Bar at 16-24.

[66] *See, e.g.*, Bar at 20 n.9.

[67] Tr. 22:15-20.

III. CONCLUSION

Gatti asks the Court to dismiss the charges against him.

Dated: September 10, 2013.

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I certify that (1) the attached **Appellant's Reply 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 3,991 words.

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