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Regulating the Behavior of Lawyers in Mass Individual Representations: A Call for Reform.

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ARTICLE

Richard Zitrin

Regulating the Behavior of Lawyers in Mass Individual Representations: A Call for Reform

Abstract. Cases in which lawyers represent large numbers of individual plaintiffs are increasingly common. While these cases have some of the indicia of class actions, they are *not* class actions, usually because there are no common damages, but rather *individual* representations on a mass scale. Current ethics rules do not provide adequate guidance for even the most ethical lawyers. The absence of sufficiently flexible, practical ethical rules has become an open invitation for less-ethical attorneys to abuse, often severely, the mass-representation framework by abrogating individual clients' rights. These problems can be abated if the ethics rules offered better practical solutions to the mass-representation problem. It is necessary to reform the current rules, but only with a solution that is both practical and attainable, and with changes that maintain the core ethical and fiduciary duties owed by lawyers to their individual clients, including loyalty, candor, and independent professional advice.

Author. Lecturer in Law, University of California Hastings College of the Law; founder and former director of the Center for Applied Legal Ethics at the University of San Francisco School of Law; and a fulltime practicing lawyer, now Of Counsel to Carlson, Calladine & Peterson, LLP, San Francisco. This Article is similar to Chapter 4, Problem 11, of *Legal Ethics in the Practice of Law*, of which I am the author of the relevant text. Similar commentary will appear in two of my American Law Media "Moral Compass" columns. I am most indebted to my (new) colleague Morris Ratner, who shared his perspective about mass-plaintiff cases, and to Professor Nancy Moore, who has long written so thoughtfully on this issue from an ethics perspective.

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I. INTRODUCTION

The goal of this Article is to examine some significant practical problems inherent in representation of large numbers of individual clients *en masse* and to recommend alternative, albeit preliminary, solutions. In addressing this issue, I am informed primarily by my own and others' involvement in litigating ethical issues arising out of what I will term, for want of a better phrase, "mass-plaintiff cases," and circumstances I witnessed in which individual clients' rights were shunted aside in the interests of expediency, lawyer arrogance and control, and simple avarice. Even for honest lawyers who are simply trying to fit the round peg of multiple representations into the square and rigid hole of the applicable ethics rules,¹ especially Rule 1.8(g) of the American Bar Association Model Rules of Professional Conduct,² the task proves virtually impossible.

I confess at the outset, in light of the burgeoning explosion of such cases and the disconnect between what attorneys are allowed to do and what they actually do, I am far more interested in practical solutions to these issues (especially those that protect the needs of individual clients who are often improperly treated like passive class members or worse) than in an analysis of the theoretical constructs or philosophies underlying these issues. Thus, this Article focuses on the practical realities of these cases, particularly that these are individual representations, no matter how many in number. While plaintiffs' lawyers sometimes litigate these cases as if they are class actions, those who treat individual plaintiffs like passive class members are violating their duties to their clients.

I believe it is obvious rule reform is necessary. Unfortunately, today plaintiffs' lawyers who undertake mass representations are often emboldened to marginalize essential ethics rules regarding conflicts of interest, the duty of candid disclosure, and the rights of clients to control their own case destiny. These attorneys are able to do this because, given the complexities of such litigation, they are rarely caught. This is a problem that both the rules-makers and disciplinary authorities must tackle head-on.

Significantly, in addressing these issues and proposed reforms, I have intentionally *not* distinguished between groups of unorganized individual

1. See Charles Silver, *Merging Roles: Mass Tort Lawyers As Agents and Trustees*, 31 PEPP. L. REV. 301, 303 (2003) (describing the predicament lawyers encounter in mass tort cases as "[f]orcing square pegs into round holes").

2. See MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2012) (allowing aggregate settlements of claims involving two or more clients only when "each client gives informed consent, in a writing signed by the client").

cases and cases grouped together collectively either by statute,³ judicial fiat,⁴ or both. To me, the hallmark of all these cases, whether grouped together or not and whether involving one lawyer, a law firm, or dozens of firms, is that they are all individual representations. From the perspective of legal ethics, each lawyer owes each client a full panoply of fiduciary duties, including the duty of loyalty, regardless of the venue.⁵

Finally, I recognize there is a tendency in literature to focus on federal law.⁶ Mass representations, however, frequently occur in state court cases, where the regulatory schemes for joint litigation are often less sophisticated than the federal statutes and are sometimes virtually non-existent.

II. MASS INDIVIDUAL CASES ARE NOT CLASS ACTIONS

What happens when lawyers find themselves with cases that look like class actions, with numerous individual plaintiffs, but are not eligible for class action treatment, usually because each case is unique on its facts or has unique damages? Mass cases—typically tort claims such as allegations about toxic pollution or defective drugs—have become more and more common,⁷ but the ethical rules that govern them remain the same. Specifically, despite multiple parties with similar complaints, these cases are *individual* representations, not group representations or class actions, and the same ethical rules that apply to lawyers who represent two clients will apply equally to lawyers representing hundreds.⁸

3. See 28 U.S.C. § 1407 (2012) (describing the process of consolidating “actions involving one or more common questions of fact”); TEX. R. JUD. ADMIN. 11.1, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. F app. (West 2005) (allowing the grouping of cases for joint litigation treatment).

4. See *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006) (illustrating a federal judge taking control of litigation under Section 1407 and describing the case as a “quasi-class action”).

5. While much work has been done evaluating and analyzing institutionally grouped cases, particularly in law review articles and journals focused on mass torts, little of this work has centered on a legal ethics perspective. See, e.g., Nancy J. Moore, *Choice of Law for Professional Responsibility Issues in Aggregate Litigation*, 14 ROGER WILLIAMS U. L. REV. 73, 95 (2009) (lamenting professional responsibility issues are so seldom the focus of analysis).

6. Cf. Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1743 (2004) (“In addition, analysis and discussion of class action litigation obsessively focuses on federal class actions, slighting any analysis of state class action litigation.”).

7. See Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1615 (2008) (“Mass tort litigation in the United States has expanded rapidly in the last few decades.”).

8. See MODEL RULES OF PROF’L CONDUCT R. 1.7 (2012) (delineating and explaining conflicts of interest and the duty of loyalty); *id.* R. 1.8(g) (prohibiting the aggregate settlement of claims when representing two or more clients in the same action); see also *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 514 (N.J. 2006) (applying the New Jersey statute modeled after

Take, for example, a toxic tort case: A large number of people on one side of town sue for damages, alleging a local company deposited toxic waste into the town's groundwater. Given the scientific sophistication of such cases and the specialized area of law, it would be almost impossible for each individual plaintiff to find a separate lawyer. Further, plaintiffs without serious symptoms or prognoses might not be able to find lawyers at all.

As a result, it makes sense for plaintiffs to band together in a single lawsuit. Even if they do not join together, their suits may eventually become consolidated before one court for the sake of judicial economy, where they are generally termed multi-district litigations, or MDLs.⁹ But each plaintiff's circumstances may remain different in a number of ways, from how close to the "plume" of toxicity the plaintiff lives to the severity of damages suffered. Damages alone may range from the sniffles or a rash to cancer; with such disparate damages come disparate proof problems, as well as ineligibility for class action treatment.

In class actions, lawyers represent the class itself through its class representatives, commonly known as named plaintiffs.¹⁰ Cases frequently settle without individual class members' approval and—subject to court approval—may settle without the class representatives' approval.¹¹ However, because mass tort cases involve large numbers of individual lawsuits, lawyers cannot escape the fact that they represent individual clients, no matter how many there are. As with any individual client, each individual has the autonomous right to settle, the right to have his lawyer negotiate the best possible resolution for the individual or to go to trial, and the right to have the lawyer give her considered advice about what is

Rule 1.8(g) to a case with 154 individual plaintiffs).

9. See 28 U.S.C. § 1407 (2012) (governing MDLs in federal courts); TEX. R. JUD. ADMIN. 11.1 (recognizing ways to try cases with common facts together); see also Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 55 (2007) (noting MDL panels consider whether consolidation would "lead to a just and efficient resolution of the dispute" before transferring cases).

10. For the rules regarding federal litigation, see FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members [if certain conditions are met]."). See also Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1145 (2009) ("The class action bundles together the claims of similarly situated claimants, and nominates a class representative and class counsel to prosecute these claims on each claimant's behalf."). Note that at the time a class is certified, the court appoints counsel to represent the class directly. FED. R. CIV. P. 23(c)(1)(B).

11. FED. R. CIV. P. 23(e); see Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 329 (2011) (observing class action settlements may be binding against class members who have not individually approved the settlement).

best for that particular individual.¹²

But if a lawyer or group of lawyers represents 300 individual plaintiffs, or 1,000, or 9,000, how can they possibly do their best job for each, fulfill their fiduciary duties to each, and advise each on what is best for that particular person without compromising their representation of everyone else? The answer is “with great difficulty.”

III. PRACTICAL REALITIES AND PRACTICAL QUESTIONS

Some practical realities routinely occur in mass-plaintiff representation that substantially impact ethical lawyering:

First, defendants like to settle claims by buying global peace, which means that if all or the vast majority of plaintiffs do not settle, a defendant will simply take the offer off the table.¹³

Second, defendants are not in the business of partitioning their settlements. They typically offer a lump sum and leave the division to plaintiffs’ counsel. Thus, groups of cases are commonly settled together—almost always in MDLs and cases consolidated before one judge, and often in single-lawyer, multiple-plaintiff cases—for one aggregate sum.¹⁴

Third, some plaintiffs or groups of plaintiffs inevitably have higher damages and are more likely to succeed at trial and get high settlement values when compared with others. Plaintiffs are likely to be placed in different categories depending on things such as the location in the plume of toxicity or the degree of exposure to defective drugs, the severity of harm

12. The rules explicitly require clients receive considered advice and that the decision whether to settle, having first received that advice, resides with the client. See MODEL RULES OF PROF’L CONDUCT R. 1.4(a) (2012) (requiring a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”); *id.* R. 1.2(a) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . .”). The comment to Rule 1.2 declares in part, “The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client.” *Id.* R. 1.2 cmt. 1.

13. See Matthew L. Garretson, *A Practical Approach to Avoiding Aggregate Settlement Conflicts*, THE SETTLEMENT SERVICES GROUP, at 2 (2004), http://www.settlementplan.com/pdf/aggregate_settlements.pdf (noting that before agreeing to settle, defendants often demand that most of the plaintiffs participate in the settlement); cf. Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 95 (2004) (observing defendants in asbestos litigation routinely “use the bankruptcy laws to obtain global peace” when rules or case law makes it difficult for them to do so otherwise).

14. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784–86 (2005) (analyzing various forms of aggregate settlements in an attempt to better define them); Matthew L. Garretson, *A Practical Approach to Avoiding Aggregate Settlement Conflicts*, THE SETTLEMENT SERVICES GROUP, at 8 (2004), http://www.settlementplan.com/pdf/aggregate_settlements.pdf (describing options plaintiffs’ lawyers have in allocating a lump sum settlement).

or illness suffered, and the likelihood of being able to prove the toxicity or harmful drugs caused the harm.

Fourth, if the cases do not settle and thus go to trial, it is common for both sides to choose some exemplar or “bellwether” cases to try or arbitrate first.¹⁵ These are representative cases used to help define a global settlement after a reasonable sampling of trials.¹⁶

These realities create a plethora of pitfalls for even the most ethical lawyer, and for every pitfall, there are serious questions that must be addressed. The disparate hierarchy of case values puts counsel in a dicey position when advising plaintiffs whose claims seem to be *de minimis* when compared to those with claims that are more serious or provable.¹⁷ How can counsel be loyal to Plaintiff 1, Plaintiff 300, and every plaintiff in between if she suggests more money go to one person than another? Further, how can counsel represent Plaintiff 72 who has more of a causation and proof problem than Plaintiff 264?

Even more troubling may be what happens when the defendant makes a substantial offer to settle, but only if 90% of the plaintiffs agree. If an insufficient number of plaintiffs decide to settle, may the lawyer try to persuade the minority to climb on board because the settlement offer is good for the vast majority of plaintiffs? How can she when she must advise those few only according to what is right for *them*, which might be not to settle because the deal is not beneficial for them personally? Is it ever possible to give a true, honest opinion to all clients in these circumstances without the whole deal cratering? If not, who gets the attorney's best advice and who loses out?

If trial becomes necessary, how does the plaintiff's lawyer choose her representative cases for the bellwether trial? Those cases may involve

15. In bellwether cases a random sample of cases are tried to a jury or arbitrator, and the parties use the result to determine damages as to all of the cases or as a bargaining chip at arbitration. Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–78 (2008).

16. See *id.* (“Judges currently use bellwether trials informally in mass tort litigation to assist in valuing cases and to encourage settlement.”); see also Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008) (noting that under the modern approach, bellwether trials are designed “to provide meaningful information and experience to everyone involved in the litigations”).

17. See Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 730 (2011) (touching on the risk in aggregate litigation of conflicts of interest between clients due to “varying degrees of injury or different statutes of limitations”); cf. *Blecher & Collins, P.C. v. Nw. Airlines, Inc.*, 858 F. Supp. 1442, 1446–48 (C.D. Cal. 1994) (exemplifying the difficulty of pursuing a unified claim when the damages of each individual airline plaintiff were so different that they proved to be impossible to pursue any way but separately).

greater rewards, but the plaintiffs face an all-or-nothing risk.

Today, conflicts of interest are common, and waivers of those conflicts are almost as common.¹⁸ But what does a conflict of interest waiver look like in a case like this? Is it even possible to construct a waiver that protects the individual rights of 300 plaintiffs and provides informed consent?

Just as significantly, how can lawyers avoid the conflicts of interest that face them personally? Cases such as mass toxic tort or defective drug claims are often extremely expensive to litigate and frequently remain problematic as to proof.¹⁹ Rewards are high, but so are the risks. After investing millions, it is understandable that a lawyer may take sides on whether to settle, favoring big-damages clients over small, and may be tempted to take short cuts around the ethics rules.²⁰

IV. THE CURRENT STATE OF THE LAW

Current ethics rules and case law offer little guidance for lawyers faced with the problems discussed above, even when those attorneys strive to be ethical. For instance, every jurisdiction in the country has a rule stating that only the client may decide whether to settle.²¹ The case law addressing this issue generally considers this an unwaivable right.²²

Moreover, the American Bar Association's Model Rule 1.8(g) states 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."²³

18. See MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8 (2012) (discussing conflicts of interest with current clients and describing the requirements of informed consent when waiving rights such as conflicts of interest).

19. See Howard M. Erichson, *Uncertainty and the Advantage of Collective Settlement*, 60 DEPAUL L. REV. 627, 633 (2011) ("Indeed, if one surveys the major mass torts—*asbestos*, *tobacco*, *fen-phen*, and so on—it is difficult to find any in which individual causation does not loom large.").

20. See Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754, 755 (2011) (discussing ethical issues that arise when the attorney invests in the litigation and becomes an agent or joint-venturer).

21. See, e.g., TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X, § 9) (setting forth the Texas rule, which states "a lawyer shall abide by a client's decisions . . . whether to accept an offer of settlement of a matter"). See generally MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2012) (requiring attorneys to provide their clients with considered advice); *id.* R. 1.2(a) (providing the client with the ultimate right to accept or reject a settlement offer).

22. See *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894 (10th Cir. 1985) ("An agreement such as the present one[,] which allows a case to be settled contrary to the wishes of the client and without his approving the terms of the settlement[,] is opposed to the basic fundamentals of the attorney-client relationship."); *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 522 (N.J. 2006) (holding a client cannot consent to a settlement prior to learning the terms of the agreement).

23. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2012). Professor Howard M. Erichson

Avoiding the prohibited aggregate settlement means, simply, that when groups of cases are settled for a lump sum, each individual client must approve of the specific settlement after being adequately informed by that client's lawyer.²⁴ These two closely-related concepts—the client's absolute right to control settlement and the lawyer's inability to accept an aggregate settlement—make it difficult for plaintiffs' lawyers to ethically and efficiently represent hundreds of clients; they cannot represent their clients by majority rule, super-majority rule, electing a litigation steering committee, or any other mechanism that might seem to make intuitive sense.²⁵

In *Tax Authority, Inc. v. Jackson-Hewitt, Inc.*,²⁶ the court held that Rule 1.8(g) does not allow an attorney to bind his clients to a settlement supported by a weighted majority of the plaintiffs.²⁷ Prior to litigation, 154 plaintiffs agreed in the initial retainer agreement to be bound to a settlement agreement approved by a majority vote.²⁸ When a settlement agreement was proposed, several plaintiffs objected to the settlement, but on appeal, only a single client sought to obviate the initial retainer contract

correctly notes that the ABA Model Rules, its predecessor, the ABA Model Code of Professional Responsibility, and the American Law Institute's Restatement (Third) of the Law Governing Lawyers "leaves 'aggregate settlement' undefined. The rule prohibits aggregate settlements in the absence of certain disclosures and client consent, but it never states what constitutes an aggregate settlement." Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1782 (2005),

24. Professor Erichson is in basic agreement with this simple definition: "If the amounts are negotiated individually for each plaintiff, and if the settlements are not conditioned on others' acceptance, then the deal ordinarily should be considered non-aggregate. . . . Sometimes, a bundle of individual settlements is simply a bundle of individual settlements." Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1806 (2005). That is, if each settlement carries with it that client's informed consent, it is individually approved and not "aggregate."

25. See Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 165 (1999) ("As interpreted by courts, however, the aggregate settlement rule forbids lawyers from entering settlement over the objection of any plaintiff, even when that plaintiff has agreed in advance to be bound by a vote of a majority or a supermajority."); see also Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 718 (2011) (discussing a proposed change to the Model Rules that would allow claimants to "agree in advance, under certain circumstances, to be bound by a majority vote in favor of a particular settlement"). But see AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010) (proscribing the requirements for using informed consent to allow multiple clients to use a substantial majority vote to accept aggregate settlements).

26. *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006).

27. *Id.* at 514–15.

28. *Id.* at 514.

and thus to not be bound by the settlement.²⁹ In refusing to enforce the agreement to settle in the attorney–client contract, the appellate court reasoned, “The critical provision of the [rule] is that the client consent to the final settlement. Even assuming sufficient disclosure in this case, the fact remains that the . . . settlement mechanism . . . permitted settlement without consent as to those in the minority.”³⁰ The court then concluded, “While it is indeed regrettable that one of 154 plaintiffs may possibly upset a settlement as to which all others have now agreed, we see no principled basis upon which to require [the one client] to settle when it does not wish to do so”³¹

The Supreme Court of New Jersey agreed, writing, “Simply stated, [Rule] 1.8(g) imposes two requirements on lawyers representing multiple clients. The first is that the terms of the settlement must be disclosed to each client. The second is that after the terms of the settlement are known, each client must agree to the settlement.”³²

This case is hardly an outlier, but rather is in accord with a large body of cases, including the Tenth Circuit’s *Hayes v. Eagle-Picher Industries, Inc.*³³ In *In re Hoffman*,³⁴ the Louisiana Supreme Court insisted that “[u]nanimous informed consent by the lawyer’s clients is required before an aggregate settlement may be finalized. The requirement of informed consent cannot be avoided by obtaining client consent in advance”³⁵ Significantly, this means that the right to settle is *not waivable* by the client—or put another way, if waived, the waiver is fully revocable. The bottom line is the same: only the client gets to decide.

29. *Id.* at 516–17.

30. *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 873 A.2d 616, 624–25 (N.J. Super. Ct. App. Div. 2005).

31. *Id.* at 630. Further, the court rebuked the attorney for representing all of the clients and stated that the attorney “should have withdrawn as counsel for *all* plaintiffs since his position favoring settlement had placed him in an adverse relationship to some of his former clients,” to wit, the minority who opposed the settlement. *Id.* at 621 n.4.

32. *Tax Authority*, 898 A.2d at 522 (N.J. 2006). Despite agreeing with the lower court, the Supreme Court decided to enforce the agreement and only apply the rule against majority approval prospectively. *Id.*

33. *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892 (10th Cir. 1985); *see also supra* note 18 (discussing the court’s ruling that the client’s right to settle is unwaivable). In *Hayes*, the court held an advance agreement to accept a settlement offer based on majority rule is not in line with Rule 1.8(g). *Hayes*, 513 F.2d at 894–95; *accord* *Abbott v. Kidder Peabody & Co., Inc.*, 42 F. Supp. 2d 1046, 1048 (D. Colo. 1999) (allowing defendant’s counsel to disqualify plaintiffs’ counsel on conflict of interest grounds because his clients signed an informed consent in advance, creating a steering committee and the use of majority votes to direct the litigation).

34. *In re Hoffman*, 883 So. 2d 425 (La. 2004).

35. *Id.* at 433 (internal citation omitted).

American Bar Association Formal Opinion 06-438, published on February 10, 2006, reaffirmed that Model Rule 1.2(a) “protects a client’s right in all circumstances to have the final say in deciding whether to accept or reject an offer of settlement.”³⁶ Further, the opinion stated, “Rule 1.8(g) deters lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement.”³⁷ Thus, each client must be told:

[T]he total amount or result of the settlement or agreement, the amount and nature of every client’s participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client.³⁸

Other sources, including a 2009 New York City ethics opinion, are in accord.³⁹

However, the ABA opinion and most cases explicitly fail to state that a lawyer in these circumstances has an independent fiduciary duty to give *each client* the best possible *advice* about how to handle his or her case. This duty goes well beyond merely disclosing the facts about settlement or ensuring the client’s right to settle. While giving this independent advice may seem obvious, it is the ultimate test of loyalty, and courts often do not explicitly discuss it in cases or opinions. Does this omission mean that case law and the ABA opinion find this loyalty less important? Or is it simply assumed or, worse, ignored? While it is speculation, the answer may rest on the virtual impossibility of having a single lawyer or law firm simultaneously give the best possible advice to hundreds of plaintiffs individually. Although full disclosure is a cornerstone of the fiduciary duties owed by lawyers to their clients, here its use may be almost euphemistic in order to avoid tackling the far more difficult issue of a

36. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-438 (2006).

37. *Id.*

38. *Id.*

39. See Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2009-6 (2009) (requiring an attorney to obtain informed written consent from every client involved in an aggregate settlement before the trial conclusion); see also Nancy J. Moore, *The Absence of Legal Ethics in the ALI’s Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 731 (2011) (explaining under rules of professional conduct, a lawyer must inform his clients of duties to other clients that might affect their representation); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 763 (1997) (“The aggregate settlement rule requires a lawyer to provide certain information to each client before obtaining each client’s consent.”).

lawyer advising each client while truly being in his or her client's corner—thus, in 300 different corners at once.⁴⁰

V. DO THE CURRENT RULES FOSTER TOXIC LAWYERING?

All this sets a very high bar for lawyers negotiating their way through mass-plaintiff cases. Perhaps because the rules and cases provide so little flexibility, and because of the disconnect between those rules and the realities of mass-plaintiff practice, there are many examples of lawyers cutting corners, ignoring client rights, and even getting disbarred and going to jail by playing fast and loose with mass-plaintiff cases.

A. *Fen-Phen and Nextel/LMB*

One example is the fen-phen cases.⁴¹ In Kentucky, lawyers William Gallion and Shirley Cunningham were disbarred and then jailed for abusing their clients' trust in distributing \$200 million in fen-phen aggregate settlements.⁴² The special judge appointed over the case stated that the lawyers passed out settlement funds "like it was theirs to do with as they wish,"⁴³ including \$106 million allotted for attorneys' fees.⁴⁴ All four attorneys involved were eventually disbarred, along with the judge first assigned to the case.⁴⁵ Noted third party "neutral" Kenneth Feinberg, who initially approved the settlement, had to disown his own fairness opinion.⁴⁶

40. Similarly, the individual client is entitled to the lawyer's independent professional judgment on all other issues that arise during litigation: how to conduct discovery, where to invest money on experts, etc. Unlike the ability to settle, however, these issues are commonly solved by obtaining the client's informed consent at the inception of representation.

41. See, e.g., *Cunningham v. Abbott*, 2011 Ky. App. LEXIS 24 (Ky. App. Feb. 4, 2011) (representing one order regarding the settlement of some of the cases).

42. See *United States v. Cunningham*, 679 F.3d 355, 369–70 (6th Cir. 2012) (noting the disbarment of William Gallion and Shirley Cunningham and affirming their convictions for conspiracy to commit wire fraud, which resulted in jail time).

43. *Cunningham v. Abbott*, 2011 Ky. App. LEXIS 24 at *18.

44. *Id.* at *15. Of this amount, the attorneys "admitted paying themselves more than [\$20 million] each, . . . millions to other lawyers[,] and close to [\$3 million] to non-lawyers." *Id.*

45. Jon Newberry, *Former N. Ky. Judge Jay Bamberger Disbarred*, BUSINESS COURIER (Oct. 27, 2011, 2:48 PM), <http://www.bizjournals.com/cincinnati/news/2011/10/27/former-n-ky-judge-jay-bamberger.html?page=all>. Further, the Kentucky lawyers were jailed and the judge resigned in order to evade possible removal from office. Andrew Wolfson, *A Breach of Duty: 3 Lawyers Kept Millions from Drug's Victims*, COURIER-JOURNAL (Jan. 20, 2007), <http://www.courier-journal.com/article/20070121/NEWS01/701210383/A-breach-duty-3-lawyers-kept-millions-from-drug-s-victims>.

46. Debra Cassens Weiss, *Ken Feinberg's Affidavit Cited in Appeals Ruling Favoring Fen-Phen Lawyers*, A.B.A. J. (Feb. 18, 2011, 10:57 AM), http://www.abajournal.com/news/article/ken_feinbergs_retracted_affidavit_cited_in_appeals_ruling_favoring_fen-phen/.

A more recent and graphic example is the case of *Johnson v. Nextel Communications, Inc.*,⁴⁷ in which 587 individuals “hired [New York law firm Leeds, Morelli & Brown, P.C. (LMB)] to pursue employment discrimination claims against Nextel.”⁴⁸ Instead of pursuing these claims, LMB and Nextel entered into their own private side agreement, termed a “Dispute Resolution and Settlement Agreement” (DRSA), which they then made “the exclusive means of settlement for all claimants then represented by LMB.”⁴⁹

Under the DRSA, Nextel agreed to pay LMB “\$2 million if it persuaded the claimants to: (i) drop all pending lawsuits and administrative complaints against Nextel within two weeks . . . ; and (ii) sign within ten weeks individual agreements in which each claimant agreed to be bound by the DRSA.”⁵⁰ Upon resolution of the claims, Nextel agreed to pay LMB another \$7.5 million and LMB agreed to take no more Nextel cases.⁵¹ LMB then presented the claimants with agreements that set forth the basic terms of the DRSA, which nearly all of them signed.⁵²

The *Johnson* court held that the DRSA between LMB and Nextel created “overriding and abiding conflicts of interest” for the lawyers and vitiated the attorneys’ ability to honor their clients’ fiduciary duties in light of the monetary incentives for LMB to convince its clients to waive important rights.⁵³ “It cannot be gainsaid that, viewed on its face alone, the DRSA created an enormous conflict of interest between LMB and its

47. *Johnson v. Nextel Commc’ns, Inc.*, 660 F.3d 131 (2d Cir. 2011).

48. *Id.* at 135.

49. *Id.*

50. *Id.*

51. *Id.* The agreement also provided “that Nextel would retain LMB as a legal consultant . . . for . . . two years following the resolution of all claims for an additional consultancy fee of \$83,333.35 per month . . . bringing the total value of the DRSA to LMB to \$7.5 million.” *Id.* at 136.

52. *Id.* The court described the agreement as follows:

In the Individual Agreement, the particular claimant had to state that he or she “reviewed the [DRSA]; had the opportunity to discuss that Agreement with [LMB] or any other counsel of [his or her] choosing; and agree to comply fully with the terms of that Agreement.” With respect to the payment of legal fees, the Individual Agreements stated only that “I acknowledge and understand that . . . Nextel has agreed to pay an amount of money to [LMB] to cover the attorneys’ fees and expenses, other than expert fees, that Claimants might otherwise pay to [LMB]”

Id. Further, the claimants in the appeal alleged “that, notwithstanding the statements in the Individual Agreements and Pledges of Good Faith, LMB did not allow the claimants to review the full DRSA, but rather provided only the signature page of the DRSA, the Individual Agreements, and a document entitled ‘Highlights of Settlement Agreement.’” *Id.*

53. *Id.* at 139.

clients.”⁵⁴

The court then reviewed the consents signed by the plaintiffs and stated that, while many conflicts of interest may be waived, “there may be circumstances in which a conflict is not consentable,”⁵⁵ including the one in this case, for two reasons:

First, because LMB was not lead counsel in a class action, the class-protective provisions of Fed. R. Civ. P. 23 were not triggered. Therefore, LMB’s clear duty as counsel to the parties seeking relief from Nextel was to advise each client individually as to what was in his or her best interests taking into account all of the differing circumstances of each particular claim.⁵⁶

Second, the court stated, “[G]iven the conflicts described above, any advice from LMB to its claimant clients could not possibly be independent advice untainted by the counter-incentives of the DRSA such that the resulting consent would be valid.”⁵⁷

In light of this law firm’s outrageous behavior, perhaps the most surprising feature of this opinion is that it reversed a trial court order that had dismissed the plaintiffs’ claims.⁵⁸

It seems to have taken a while for mass tort litigators to appreciate the difference between class action cases and individual representations, or perhaps many have just ignored them to avoid the difficulties. As Professor Nancy Moore recently wrote, “[M]ass tort lawyers often treat their clients as if they were members of a class without affording them the judicial protections given to actual class members.”⁵⁹ This is an interesting comment because it suggests—in my view, correctly—that not only are individual clients given short shrift in mass-plaintiff cases, but they are actually at a disadvantage when compared to class action members. Class action members are at least guaranteed disclosure in the form of class notices, the ability to opt out of the class if they do not like the settlement, and oversight from the courts.

54. *Id.*

55. *Id.*

56. *Id.* at 140 (internal citations omitted). The court continued, “LMB was being paid by Nextel in effect to ignore its duty to represent clients as individuals with differing claims and interests that might require differing amounts of time and preparation vigorously to pursue a recovery.” *Id.*

57. *Id.* at 141.

58. *Id.* at 142.

59. Nancy J. Moore, *The Absence of Legal Ethics in the ALI’s Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 728–29 (2011).

B. *Other Even More Frightening Examples*

In the last decade, in my own litigation practice, which usually involves ethics overtones, I have repeatedly witnessed mass-plaintiff cases in which lawyers have engaged in behavior that is so horrendous and shocking that their actions seem more far-fetched than the worst offenses in a John Grisham novel. At best, these lawyers seem to have completely forgotten that they represent individual clients.

There are many examples of this type of “toxic lawyering” in practice. I focus here on two areas—engagement agreements and settlements. The following are some examples of engagement agreements I have seen in recent years.⁶⁰

- A case in which the attorneys provided only a brief retention agreement, which made no mention at all of conflicts of interest despite the hundreds of plaintiffs involved.⁶¹
- An engagement agreement that stated the attorneys saw no reasonably foreseeable conflicts of interest among their 600 individual clients and continued with a simple statement that if a conflict arose the clients waived it, without any explanation as to what kind of conflict might occur.⁶²
- Several retainer agreements purporting to have clients both give up the right to settle and give the lawyer the right to accept an aggregate settlement without the client's involvement, ostensibly appointing their lawyers as attorneys-in-fact,⁶³ despite specific rules giving the clients the sole right to settle⁶⁴ and preventing aggregate settlements.⁶⁵
- Attorneys using retainer agreements to claim a committee created by the plaintiffs' lawyer will eventually determine clients' levels of compensation after settlement, in clear contravention of the ethical

60. Each example below refers to documents and evidence from litigation. Due to secrecy agreements to which I am an agent of a party, particularly as it relates to clients' settlements, I do not name here the cases or the lawyers involved. However, all documents demonstrating the following violations, some redacted, are on file with the *St. Mary's Law Journal*.

61. See Exhibit A, Retainer Agreement, at 1–2 (on file with the *St. Mary's Law Journal*) (providing a two-page retainer agreement with no mention of conflicts of interest).

62. See Exhibit B, Retainer Agreement at 1, Maxon v. Initiative Legal Group, No. CGC-12-523966 (Cal. App. Dep't Super. Ct. Sept. 5, 2012) (on file with the *St. Mary's Law Journal*) (“Client acknowledges that at this time there is no conflict and no conflict is foreseen. . . . Client nevertheless knowingly and voluntarily consents to [any potentially adverse representation].”).

63. Exhibit A, Retainer Agreement, at 2 (on file with the *St. Mary's Law Journal*); Exhibit D, Letter to Client, at 1 (on file with the *St. Mary's Law Journal*).

64. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012).

65. *Id.* R. 1.8(g).

rules.⁶⁶ Under some such agreements, if a client objects, she can appeal to an arbitrator selected by the lawyer, but if the client *loses* the arbitration (at which she is not represented) she has to pay the arbitrator's fees.⁶⁷

- Engagement agreements that purport to allow the lawyer to abandon the client if the client does not agree to a settlement approved by a super-majority of the clients.⁶⁸

I have seen the following abuses in settlement agreements or as required conditions of settlement:

- Settlements forged by counsel's agreement with the defendants with little or even no plaintiff participation, often without full disclosure to plaintiffs and occasionally without advising the plaintiffs that a settlement exists.⁶⁹
- Settlements in which plaintiffs' lawyers advised their own clients that the settlement agreements themselves were "confidential" so that the clients could not see them until after signing incomplete ratifications of the settlements, denying the clients the opportunity to examine the settlement's actual terms.⁷⁰
- Cases settled without entering into settlement agreements due to the lack of client participation, notification, or consent. Sometimes the defendant and plaintiffs' counsel make such settlements with the understanding that a sufficient percentage of clients will ratify and

66. Exhibit A, Retainer Agreement, at 2 (on file with the *St. Mary's Law Journal*); Exhibit D, Letter to Client, at 2 (on file with the *St. Mary's Law Journal*).

67. Exhibit F, Letter to Clients, at 2 (on file with the *St. Mary's Law Journal*).

68. See Exhibit D, Letter to Client, at 2 (on file with the *St. Mary's Law Journal*) ("If any of you refuse, we will then represent you for the period of time it's necessary for you to obtain other counsel."); Exhibit E, Letter to Client, at 1 (on file with the *St. Mary's Law Journal*) ("Kindly get a new lawyer."); see also Exhibit B, Retainer Agreement at 1, *Maxon v. Initiative Legal Group*, No. CGC-12-523966 (Cal. App. Dep't Super. Ct. Sept. 5, 2012) (on file with the *St. Mary's Law Journal*) ("Attorneys may withdraw at any time and for any reason . . ."). Such abandonment not only evinces a conflict, but also violates Rule 1.16, regarding what a lawyer must do before withdrawing from a case. See MODEL RULES OF PROF'L CONDUCT R. 1.16(c)–(d) (2012) (stating "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation" and "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests").

69. Complaint at 5:24–6:13, *Maxon v. Initiative Legal Group*, No. CGC-12-523966 (Cal. App. Dep't Super. Ct. Sept. 5, 2012) (on file with the *St. Mary's Law Journal*). This goes at least a step or two beyond the conduct evidenced in the *Nextel/LMB* case. See *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 135 (2d Cir. 2011) (setting forth the terms of the DRSA); Exhibit I, Ratification of Settlement Agreement, at 1 (on file with the *St. Mary's Law Journal*) (forging settlement without meaningful client participation).

70. Exhibit I, Ratification of Settlement Agreement, at 2 (on file with the *St. Mary's Law Journal*).

acknowledge the settlement after the fact, once the clients are advised of the settlement, even if that advisement comes months after the deal has been forged.⁷¹

- More extreme, plaintiffs' counsel drafted settlement agreements for their clients' cases that had the defendant and the *plaintiffs' lawyers* as parties.⁷²
- Most extreme, settlement agreements—again, not shown to the plaintiffs, but merely ratified after the fact—that state if a sufficient percentage of plaintiffs ratify, plaintiffs' counsel agrees to *defend the defendants* against the non-settling plaintiffs, in essence the attorneys' agreement to switch sides and become adverse to their own clients.⁷³

Not every lawyer engages in these subterfuges, which at their worst are fraudulent and even criminal.⁷⁴ However, these examples are not isolated occurrences and, of course, there are less onerous ethical violations.

It seems that some lawyers in mass-plaintiff litigation believe that their ability to act entirely within the bounds of the current ethics rules is so beyond complying “with great difficulty” that it has become impossible. This is hardly an excuse for unethical behavior, but there is a disconnect, even for the most ethical lawyers, between strictly adhering to the current rules and managing a case with huge numbers of plaintiffs.

VI. A PROBLEM IN NEED OF A SOLUTION

No ethical lawyer would think the methods of toxic lawyering described above solve anything. Such actions only make things profitable for the lawyers who lie to or cheat their clients. A solution is necessary to bridge the gulf between the current inflexible rules and the reality of practice.

However, there is no magic bullet here. The reality is that mass torts

71. See Complaint at 5:24–10:20, *Maxon v. Initiative Legal Group*, No. CGC-12-523966 (Cal. App. Dep't Super. Ct. Sept. 5, 2012) (on file with the *St. Mary's Law Journal*) (setting forth a copy of the “Confidential Release and Acknowledgement”); Exhibit J, Correspondence, at 2 (on file with the *St. Mary's Law Journal*) (claiming the purported release and acknowledgement “is the settlement agreement,” a position later abandoned); Exhibit K, Release, at 1 (on file with the *St. Mary's Law Journal*) (demonstrating a release and acknowledgement).

72. See Exhibit M, Settlement Agreement, at 1–2 (on file with the *St. Mary's Law Journal*) (stating the defendants pay the plaintiffs' law firm directly in return for dismissals of the firm's clients' cases); see also Complaint at 7:4–8:25, *Maxon v. Initiative Legal Group*, No. CGC-12-523966 (Cal. App. Dep't Super. Ct. Sept. 5, 2012) (on file with the *St. Mary's Law Journal*) (“naming the Attorney Defendants as the settling party” (emphasis omitted)).

73. Exhibit L, Settlement Agreement and Release, at 25 (on file with the *St. Mary's Law Journal*).

74. See, e.g., *United States v. Cunningham*, 679 F.3d 355, 369–70 (6th Cir. 2012) (affirming two attorneys' convictions for conspiracy to commit wire fraud).

and other large multi-plaintiff cases are here to stay. They are necessary when class actions are not available⁷⁵ and allow more injured persons to receive suitable representation in complex litigation.⁷⁶ Yet, mass-plaintiff cases may be subject to little, if any, court scrutiny,⁷⁷ despite the fact that these cases present daunting fiduciary duty problems, including loyalty, candid communication, confidentiality, and competence.

While several authorities have suggested solutions from both plaintiffs' and defense counsels' perspectives, they hardly seem adequate. One solution would allow an attorney to get clients' prior authorization to a minimum settlement amount or even a minimum aggregate amount.⁷⁸ Another would permit "damages averaging," or allowing a settlement that minimizes differences between the strongest and weakest claims in order to accommodate the vast majority of plaintiffs satisfactorily.⁷⁹ Others suggest—and many lawyers actually use—matrixes based on objective standards such as the degree of harm, proximity to harm, causation, and damages of each client; based on the clients' individual cases, they are placed into a matrix group that gets a particular settlement level.⁸⁰ Others combine the above methods with administration, placement, and distribution of all matrix claims by an independent third-party special master or claims supervisor.⁸¹ Finally, another solution is to allow

75. Cf. FED. R. CIV. P. 23 (defining the prerequisites required before cases may be "fit" into the types of class actions provided); *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008) ("Failure to meet any of the Rule's requirements precludes class certification.").

76. Because mass tort litigation often involves sophisticated scientific issues, many victims are unable to find adequate representation. See *Mass Tort Litigation*, HERMES SARGENT BATES, L.L.P., <http://www.hsblaw.com/legalxp/masstortlit.php> (last visited Feb. 6, 2013) (noting the "complex and demanding" area of mass tort litigation); cf. FED. R. CIV. P. 23(g) (setting forth what a court will consider before appointing class counsel).

77. Unless mass-plaintiff cases receive MDL treatment, they will generally not require significant judicial oversight. Because mass-plaintiff cases often involve only one or two law firms, those cases rarely involve MDL litigation, and thus do not receive significant judicial oversight. *In re World Trade Center Disaster Site Litigation*, 834 F. Supp. 2d 184, 190 (S.D.N.Y. 2011), is a notable exception.

78. Barry Hill, *Ethics in Mass Tort Settlements*, ANAPOL SCHWARTZ, at 23–24 (2009), <http://www.hwlaw.us/pdf/Hill%20Ethics%20in%20Mass%20Torts.pdf>.

79. See David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 854–57 (2002) (positing that a rule compensating an average is preferable for risk-averse individuals).

80. See Charles McCoy et al., *Ethical Issues Raised in Bulk Settlement Agreements in Mass Torts*, RMKB, at 17, <http://www.rmkb.com/tasks/sites/rmkb/assets/image/324.pdf> (last visited Feb. 6, 2013) (suggesting "a settlement matrix or grid" because these systems are objective). Many lawyers in the examples above use this methodology, which purports to vitiate client control and autonomy. Exhibit A, Retainer Agreement, at 2 (on file with the *St. Mary's Law Journal*); Exhibit D, Letter to Client, at 1 (on file with the *St. Mary's Law Journal*).

81. See Barry Hill, *Ethics in Mass Tort Settlements*, ANAPOL SCHWARTZ, at 25 (2009),

individual plaintiffs who do not agree simply to opt out of participation, often, however, without ongoing representation.⁸²

None of these solutions quite does the job. Defendants like minimum aggregate sums, but for plaintiffs' counsel, that is like giving away the bottom line. Plaintiffs are most comfortable with being able to opt out of a settlement that does not get them what they want, but defendants do not like the possibility of a settlement that does not cover all of the plaintiffs. Further, none of these rules square entirely with Model Rule 1.8(g) as it now stands, a rule that was simply not developed with mass-plaintiffs' cases in mind.⁸³

In 2010, the American Law Institute took a different approach from Model Rule 1.8(g) by promulgating a guide for attorneys, titled *Principles of the Law of Aggregate Litigation*.⁸⁴ Among those principles, section 3.17 provides:

(a) A lawyer or group of lawyers who represent two or more claimants on a non-class basis may settle the claims of those claimants on an aggregate basis provided that each claimant gives informed consent in writing. . . .

(b) In lieu of the requirements set forth in subsection (a), individual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate-settlement proposal An agreement under this subsection must meet each of the following requirements:

(1) The power to approve a settlement offer must at all times rest with the claimants collectively and may under no circumstances be assigned to claimants' counsel. Claimants may exercise their collective decision making power to approve a settlement through the selection of an independent agent other than counsel.

<http://www.hwlaw.us/pdf/Hill%20Ethics%20in%20Mass%20Torts.pdf> (discussing a lump sum settlement "with claim matrix and third party administrator").

82. See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1023–25 (2010) (analyzing the possible results of "most-or-nothing" settlements where plaintiffs are allowed to opt out). In the cases I have witnessed, clients who refuse to play ball with the settlement often find themselves abandoned by their lawyers.

83. See Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 512–13 (2008) ("The Rule is a simple set of guidelines for attorney–client relations, but the attorney–client relationship varies greatly depending on the structure of the representation.").

84. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010). These principles are not part of the Restatement of the Law Governing Lawyers, which is also promulgated by the ALI, and they are not generally considered to rise to the level of a formal "restatement." See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 16, 18, 19 (2000). Nevertheless, they are approved ALI principles.

(2) The agreement among the claimants may occur at the time the lawyer-client relationship is formed or thereafter, but only if all participating claimants give informed consent. . . .

(3) The agreement must specify the procedures by which all participating claimants are to approve a settlement offer. . . .

(4) Before claimants enter into the agreement, their lawyer or group of lawyers must explain to all claimants that the mechanism under subsection (a) is available as an alternative means of settling an aggregate lawsuit under this Section. . . .⁸⁵

Unfortunately, the four requirements the ALI sets forth are somewhat diluted by the very language of the *Principles* themselves. In reality, the power to settle “remains with the collective claimants” only if they do not hire a third party, supposedly “independent” agent.⁸⁶ Such an agent would violate Model Rule 1.8(g) as currently drafted because each client is not giving his or her informed consent.⁸⁷ More importantly, however, the *Principles* do not seem to vest power in the plaintiffs as claimed; rather, they vitiate plaintiffs’ power and hand it to someone else. That so-called independent agent may be no more independent than the neutral arbitrator picked by the lawyer under one of the engagement agreements described above.

Moreover, the required informed consent is diluted. The comments to the section state “[t]he amount of information required for informed consent depends on the facts of the case,” which is hardly a clear standard.⁸⁸ Further, disclosure of alternatives in representation—whether to be bound by the substantial-majority vote or not—is something the ALI says can be undertaken at any time prior to settlement.⁸⁹ But if it is not part of the retainer agreement *ab initio*, can it ever be fair to all clients when they are asked to consent after-the-fact? Finally, the proposal “does not prevent counsel from refusing to represent claimants who choose representation [without being bound by the substantial-majority vote].”⁹⁰ That is, those plaintiffs are likely to be abandoned by their lawyers and left without representation.

85. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010).

86. *See id.* § 3.17(b)(1) (providing for “the selection of an independent agent other than counsel”).

87. MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2012).

88. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 cmt. b (2010). *But cf. id.* § 3.17 cmt. c (“Subsection (c) does not define ‘substantial majority’ but leaves that issue to legislative drafting.”).

89. *Id.* § 3.17(b)(4).

90. *Id.* § 3.17 cmt. b.

In short, as Professor Moore has noted:

[The *Principles*] offer a view of mass representation that is unduly rosy. They not only ignore the application of ethics rules to various aspects of nonclass aggregations, but also affirmatively downplay the risks of such representation and the role that ethics rules play in protecting the individual clients against such risks.⁹¹

Are there solutions, then, that are more workable? Some commentators, including Professor Moore, recommend full disclosure.⁹² But, as noted above, even full disclosure may not be enough unless it is accompanied by *advice* tailored to the needs of each individual client—a real obstacle considering the inherent conflicts among the circumstances of various clients.⁹³

Others, including United States District Judges Jack B. Weinstein⁹⁴ and Alvin K. Hellerstein,⁹⁵ argue forcefully that such cases require judicial oversight.

Over the years, Judge Hellerstein issued a number of orders, opinions, and decisions in the World Trade Center cases.⁹⁶ The judge recognized early on that a case with over 9,000 individual, disparate plaintiffs would have “numerous potential conflicts among them and between them and their law firm.”⁹⁷ He appointed an independent ethics counsel, Hofstra

91. Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 728 (2011).

92. See *id.* at 730 (noting without full disclosure, “[b]y the time that an aggregate settlement is proposed, it may be too late for individual clients to protect themselves against the risks of aggregation”).

93. See *id.* at 730 n.78 (recognizing that full disclosure may not fully benefit clients if the attorney has continuing conflicts of interests among multiple clients).

94. United States District Judge Jack B. Weinstein, of the Eastern District of New York, pioneered supervision of mass tort cases, from the Agent Orange case, *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), to the Zyprexa case in the new millennium, *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458 (E.D.N.Y. 2006). In 1994 he expressed his belief that lawyers have an obligation to act in the public interest in such cases. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 490 (1994). Judge Weinstein wrote:

It is my impression that few of the groups of plaintiffs I have dealt with in Agent Orange, asbestos, or DES were helped systematically or sympathetically as communities by lawyers handling their cases. Most lawyers were focused on getting cash for the individual client, obtaining a large fee, and closing the file.

Id.

95. Judge Alvin K. Hellerstein is the United States District Judge for the Southern District of New York and has been most notably involved in the World Trade Center cases. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184 (S.D.N.Y. 2011).

96. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184 (S.D.N.Y. 2011).

97. *Id.* at 190.

law professor Roy Simon, an expert on legal ethics, to oversee the plaintiffs' lawyers.⁹⁸ When in 2010 the lawyers proposed dismissing some non-responding plaintiffs "with prejudice" (meaning that their cases could never be re-filed), he hired an "Independent Special Counsel" to try to contact those plaintiffs and ascertain their wishes.⁹⁹

In a 2011 order, Judge Hellerstein wrote that this case "fit[] neither paradigm—individual or class," but that it had many similarities with class actions.¹⁰⁰ These included "a mass settlement in an aggregate amount," "the settlement amount subject to subdivision among sub-classes," a settlement "negotiated and executed not with Plaintiffs . . . but with the law firm representing the large majority of the Plaintiffs," and plaintiffs who did not "have choice about terms, conditions, or amounts."¹⁰¹ Further, the judge noted, "Their assent was to be manifested, as in class settlements, by an after-the-fact ratification"¹⁰²

The judge also considered the "compelling" conflict between the principal plaintiffs' law firm and the plaintiffs:

[S]ince a normal attorney–client relationship cannot function where one lawyer represents so many clients, each with varying and diverse interests, judicial review must exist to assure fairness and to prevent overreaching. . . . Faced with difficult and complicated choices, the Plaintiffs needed unconflicted attorneys with whom to consult and be advised.¹⁰³

The judge did not dispute that plaintiffs' counsel attempted to provide the plaintiffs with such independent consultation and advice; however, the judge noted that the law firm itself had an interest in settling after years of litigation.¹⁰⁴ The judge specifically noted that the law firm had "borrowed heavily, and incurred a large interest expense" and had "the prospect of settlement and a fee of \$250 million."¹⁰⁵

Thus, Judge Hellerstein concluded, "For the same reasons requiring a judge to review and approve class settlements for fairness, a district judge must review a mass tort settlement such as that now before me."¹⁰⁶

98. *Id.*

99. *Id.* at 192.

100. *Id.* at 196.

101. *Id.*

102. *Id.*

103. *Id.* at 196–97.

104. *See id.* at 197–98 ("[Plaintiffs' counsel] itself had a compelling interest to settle, [having] carried on eight years of strenuous litigation and two appeals without any compensation.").

105. *Id.* at 198. "The prospect of settlement and a fee of \$250 million gave the firm an interest that may not have been in line with many of its clients' interests." *Id.*

106. *Id.* at 196 (citing *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458 (E.D.N.Y.

Judicial oversight might work reasonably well in these circumstances, but there are major unsolved questions. First, strong jurists like Judge Weinstein and Judge Hellerstein might have the public interest—and the interests and overall wellbeing of the plaintiffs—in mind, but they seem a bit too ready to discard some of the rights that plaintiffs have long held. These rights include, to re-quote Judge Hellerstein, not giving plaintiffs a “choice about terms, conditions, or amounts” of settlement except “by an after-the-fact ratification.”¹⁰⁷

Thus, in both the *Zyprexa* and 9/11 cases, the judges saw fit to choose the greater good over the rights of individual plaintiffs. But on what basis? Judge Hellerstein cited no rule, law, or ethical precept to justify taking away these plaintiffs’ choices about terms, conditions, and amounts. Both Judge Weinstein in *Zyprexa* and Judge Hellerstein in the 9/11 cases have referred to such cases as “quasi-class actions.”¹⁰⁸ Is there such a thing?¹⁰⁹ Do they not remain individual plaintiffs, whether swept up into mass tort cases or not?

When a knowledgeable and sophisticated judge experienced in multi-district litigation is involved, and the judge is well intentioned and public-spirited, judicial oversight certainly helps curb some of the worst abuses described above. But is judicial oversight enough in other circumstances? What happens to the 500 plaintiffs in a state court case when the court does not have a coordinating MDL mechanism or the judge does not have particular mass tort case experience?

2006)).

The parties to a lawsuit, if all are involved, may dismiss or settle their own lawsuit; in general, a judge does not have to be involved. In a class action, in contrast, a dismissal or settlement is not effective unless, after hearing the parties and any appearing members of the class who object, a judge finds settlement fair and reasonable, in the interests of the settling class.

Id. (internal citations omitted).

107. *Id.*

108. *Id.* at 196 (citing *In re Zyprexa*, 451 F. Supp. 2d 458). Judge Hellerstein further stated that litigation involving one law firm or a small group of law firms representing a large group of plaintiffs, “although fitting neither paradigm—individual or class—substantially resembles a class action.” *Id.*

109. Whether judges should be allowed this “quasi-class action” vehicle remains in dispute. See, e.g., Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 389–90 (2011) (arguing “there is no such thing as a quasi-class action” and that the term is a “jurisprudential oxymoron that its proponents deploy to justify the expeditious resolution of aggregate claims, while failing to adequately protect the interests of claimants”). Professor Moore has noted that passive class action members may have more protections than individual clients may in mass-plaintiff cases. Nancy J. Moore, *The Absence of Legal Ethics in the ALI’s Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 728–29 (2011).

Finally, judicially supervised cases are only one part of the equation. Many of the abuses I witnessed and described above involved one law firm or a small group of law firms representing all plaintiffs. They are very different from the typical multi-district litigation, such as the *Zyprexa* case, in which dozens of law firms are involved, complete with lead counsel and steering committees, making that case look administratively much more like a class action crying out for judicial supervision and approval. But in a mass-plaintiff case handled by a single law firm, it would be difficult for a judge to have even the opportunity to assert judicial supervision, particularly when it comes to the potential red flag issues of fee agreement abuses and communications between lawyers and clients about settlement.¹¹⁰

Ultimately, the beginning of a solution may rest with the extent of disclosure. While courts, ethics opinions, and commentators have noted that full disclosure should include all the elements of the settlement for the individual plaintiff in question and the group of plaintiffs generally,¹¹¹ there can be, and perhaps should be, disclosure beyond this. Professor Moore suggests this, asking, “[W]hat ensures that the clients have been adequately informed of both the advantages and the risks of proceeding as part of a ‘litigation group’? What ensures that the decisions are truly consensual?”¹¹² She then answers her own question:

Under rules of professional conduct, individual clients must be fully informed, at the outset of the representation, of any significant risk that the representation may be materially limited by the lawyer’s duty to other clients. With that information, individual clients might decide that they want to become part of a litigation group represented by this particular lawyer. But some clients might refuse, or they might decide that they prefer to be represented by a lawyer who represents a more narrowly tailored

110. Compare *id.* (analyzing the voluntary or involuntary dismissal of plaintiffs, as a result of one firm handling a massive case with over 9,000 plaintiffs), with *In re Zyprexa*, 451 F. Supp. 2d at 462 (citing a mass tort, multi-district prescription drug litigation and the settlement agreement stipulations). The 9/11 litigation under Judge Hellerstein’s supervision is a notable exception because one law firm is the principal plaintiffs’ firm. But the unique circumstances under which that case has operated, and its unique and tragic underlying facts, set it apart from more typical one-law-firm cases. The cases I have described under Part V(B), above, are all essentially single law firm cases.

111. See MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2012) (requiring disclosure of “all the claims or pleas involved”); see also AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(a) (2010) (“Informed consent requires that each claimant be able to review the settlements of all other persons subject to the aggregate settlement or the formula by which the settlement will be divided among all claimants.”).

112. Nancy J. Moore, *The Absence of Legal Ethics in the ALI’s Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 731 (2011).

group¹¹³

I suggest taking this disclosure one step further. If prospective clients are informed *at the outset of representation* that if they join the litigation group their lawyers may make certain decisions that will be in the interests of the overall group of plaintiffs—and not necessarily in the best interests of that individual—such disclosure would be not only closer to the truth, but also closer to what should be acceptable. Further still, if the disclosure stated, for example, that their lawyers could recommend settlement if a broad consensus of plaintiffs—80% or more—agree, this disclosure should be sufficient to allow the prospective plaintiffs to give informed consent at case commencement. Moreover, disclosure is more likely to be “consentable” if the plaintiffs are ensured that, regardless of whether they join in the eventual settlement, their lawyers will continue to represent them to the best of their abilities.

Would such a disclosure comport with Model Rule 1.8(g)? Probably not. If the disclosure allowed for a carefully thought out decision-making process involving 80% or more of plaintiffs, this still would not pass muster under the current rule.¹¹⁴ I believe it makes the most sense to revise this rule slightly—not to broadly allow aggregate settlements determined by lawyers with big loyalty conflicts and huge fees at stake, but to *narrowly* allow fully informed clients to knowingly and intelligently abrogate a degree of their settlement autonomy in the interests of becoming represented plaintiffs in a mass-plaintiff case.

This is far from a perfect solution. I suspect that lawyers and their denizens will still try to control the settlement process. Attorneys will select teams of lead plaintiffs to publicize the party line to the masses of “mere” plaintiffs, and clients will still be strong-armed, or at least gently prodded, into settlements being pushed by their attorneys.

However, two things will have changed. First, the gross horror stories that now routinely occur in mass tort cases would likely end. If plaintiffs’ lawyers have an ethical way of achieving results for their many clients, regardless of the objections of the few, most will take that road. Second, rules-makers will be able to narrow the focus of what needs to be fixed, trying to ensure that limited aggregate settlements truly reflect and protect the needs of all plaintiffs. Rules-makers can start by guaranteeing that those plaintiffs with outlying cases be fully informed before the inception

113. *Id.* (citation omitted).

114. *See* MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2012) (prohibiting aggregate settlements without the express consent of all parties).

of representation. Taking that a step further, a system can be developed to allow those plaintiffs to effectively opt out of a super-majority settlement, which happens today when defendants take their chances by buying peace with 85% or 90% of plaintiffs and take on the risk of the remaining 10% or 15%.

As mass torts become part of the litigation firmament recognized under particularized ethics rules, further rounds of nuanced changes can ensure that, over time, the rights of individual plaintiffs are protected and the overreaching of their lawyers is minimized.

VII. CONCLUSION

The perspective taken here is grounded in legal ethics and the overarching principle that individual clients, whether in pairs, small groups, or in large numbers, remain entitled to have their lawyers provide the same fiduciary duties that single individual clients receive. This perspective leads to the inescapable conclusion that all individual plaintiffs have the right to be treated fairly, fully, and loyally by their counsel.

This concept creates inherent dissonance with the manner and the means of handling high-multi-plaintiff cases. The ethical rules may have to bend to end this dissonance, but they should only bend to the extent that individual client autonomy and decision-making is preserved. The rights individual clients may waive, even if they include a *limited* waiver or consent to the right to settle, do not include a waiver of their lawyers' duties of loyalty, candid disclosure, and independent professional judgment and advice.