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Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits

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INFORMAL AGGREGATION: PROCEDURAL AND ETHICAL IMPLICATIONS OF COORDINATION AMONG COUNSEL IN RELATED LAWSUITS

HOWARD M. ERICHSON†

ABSTRACT

Even when related claims are not aggregated by any formal procedural mechanism, the lawyers involved in the separate lawsuits often coordinate their efforts. Such “informal aggregation” raises important questions about the boundaries of a dispute and the boundaries of the lawyer-client relationship. As an ethical matter, the central question is whether a lawyer owes ethical duties to a coordinating lawyer’s client. Looking at confidentiality, loyalty, conflicts of interest, and malpractice, Professor Erichson suggests that ethical safeguards for clients of coordinating lawyers are neither strong enough nor explicit enough to provide adequate protection, and the problem inheres in the nature of informal aggregation. Written cooperation agreements, however, alleviate some of the risks. As a procedural matter, Professor Erichson considers the virtual

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representation argument for nonparty preclusion when lawyers have worked together, and concludes that such coordination generally cannot justify binding a nonparty with a judgment. Based on the inadequacy of ethical safeguards and the lack of nonparty preclusion, combined with the decline in litigant autonomy that accompanies counsel coordination, Professor Erichson contends that the rise in informal aggregation suggests the need for more thorough formal mechanisms for aggregating related claims or, at least, greater attention to formalizing counsel coordination through written agreements.

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INTRODUCTION

What the law cannot achieve formally, lawyers achieve informally. Consider how claims of multiple parties are connected in litigation—"aggregated," to use the procedural parlance. Claims may be aggregated through procedural mechanisms such as class action, consolidation, or joinder. Often related claims remain formally independent, and proceed as separate lawsuits, but the lawyers act as though the separate suits were formally aggregated, coordinating their efforts to such an extent as to amount to a treatment of the litigation as a single, integrated whole. This phenomenon—call it "informal aggregation"—raises important questions about the boundaries of a dispute and the boundaries of the lawyer-client relationship.

Imagine a rather ordinary products liability case. A Texas consumer purchases a widget and is injured. The consumer has reason to believe the injury resulted from exposure to widgium, a substance contained in widgets. The consumer brings an action in Texas state court against the retailer, the widget manufacturer, and the widgium supplier. Although the suit may present tricky issues of proof or substantive law, it is straightforward as a matter of party structure—a simple action against three defendants.

Now imagine that a California consumer is similarly injured using a widget. She sues in California state court. Her complaint names the same widget manufacturer and widgium supplier, plus a different retailer. Now a third consumer files suit, this one in federal court in Virginia, naming as defendants the manufacturer and widgium supplier for a different brand of widget.

They look like three separate lawsuits: one in Texas, one in California, and one in federal court in Virginia. Each has its own docket number. The plaintiffs are entirely different in each action; some defendants differ as well. The cases are handled by different lawyers and presided over by different judges.

Now picture one thousand such lawsuits. Each is brought by a plaintiff, or perhaps several plaintiffs, asserting claims against various defendants based on exposure to widgium. Each looks like a free-standing individual lawsuit. But in fact, all thousand *lawsuits* are part of a single *litigation*, linked together much more closely than it appears at first glance. The plaintiffs' lawyers are working together to coordinate their efforts. Many of them belong to the Widgium Litigation Group sponsored by the Association of Trial Lawyers of

America, and receive the Widgium Newsletter, which keeps them abreast of litigation developments. The leading plaintiffs' lawyers—each of whom represents dozens or even hundreds of individual widgium plaintiffs—have presented training sessions to teach other lawyers how to try a widgium case. The plaintiffs' lawyers have pooled resources to hire experts and have shared the costs of discovery.

The defense has coordinated as well. Counsel for the widget manufacturers and widgium suppliers have held joint defense meetings to share information and discuss strategy, pursuant to a written joint defense agreement. They have jointly commissioned a scientific study into the toxicity of widgium. The widgium suppliers have entered into indemnification and cooperation agreements with a number of the retailers and distributors. Not only have lawyers for different defendants worked together, counsel for each defendant has coordinated the handling of its own batch of lawsuits. For defendants sued in multiple jurisdictions, local counsel in each jurisdiction handles the representation in consultation with national lead counsel, while strategic decisionmaking and information-gathering are centralized with lead counsel. Although the thousand widgium claims have not been aggregated through any formal procedural mechanism, the lawsuits of these widget consumers against the various defendants are informally aggregated through the coordinated efforts of the lawyers. Lawyers, judges, politicians, the press, and the public understandably refer to this mass of cases in the singular, as "the widgium litigation."

Informal aggregation, just as it brings together our hypothetical widgium claims, brings together the claims of countless litigants in a wide variety of litigation. This Article considers this phenomenon of informal aggregation and its implications.¹ Part I examines

1. Given the vast attention paid by the academic literature to the formal mechanisms of complex litigation, the dearth of scholarly attention to informal aggregation is noteworthy. As Judith Resnik has pointed out, informal practitioner conduct is "less visible to the academy" than formal procedures documented in rules and judicial opinions. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 39 (Summer 1991). While lawyer coordination has never been given the sustained attention it deserves as a litigation-aggregating phenomenon, several scholars have commented valuably on it in the context of aspects of complex litigation. Professor Resnik raised the issue of informal aggregation in her thought-provoking discussion of aggregate litigation, see *id.* at 36-38, and, with others, has continued to consider lawyer cooperation, especially in the context of fee calculation in mass torts. See Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV.

coordination among counsel in multi-suit litigation and shows the extraordinary and growing extent to which lawyers in related cases coordinate their efforts. Approaching the topic anecdotally, with a variety of examples to illustrate how lawyers coordinate, it shows that lawyers involved in formally separate lawsuits often work so closely together as to amount to a treatment of the litigation, by the lawyers, as a single judicial action. Part II briefly surveys current formal mechanisms for aggregating claims, explaining why related claims often proceed as judicially independent actions. Readers already familiar with the practice of lawyer coordination and current aggregation mechanisms may prefer to skip Parts I and II, and turn directly to Part III.

Parts III through V examine informal aggregation's ethical and procedural implications, focusing particularly on the implications for defining the boundaries of a dispute. Part III considers the phenomenon's ethical implications. It asks whether a lawyer, by virtue of coordinated efforts with another lawyer, owes any ethical or fiduciary duties to that other lawyer's client. Looking at confidentiality, loyalty, conflicts of interest, and malpractice, it

425, 429 (1998) (outlining the impact of informal aggregation on the "allocat[ion] [of] costs and fees"); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 300-01 (1996) (commenting on the "impact of aggregation on the financial incentives of lawyers. . . some of whom may work solely for individual plaintiffs, . . . for individual clients, . . . [or] for the plaintiff group as a whole"). Mitchell Lowenthal and I addressed counsel coordination in mass tort litigation to analyze the admissibility of prior-action depositions. See Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 996-1008 (1995). Deborah Hensler, who has done so much to inject research on the realities of law practice into the academic commentary on procedure, has raised the issue of informal aggregation several times. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, EXECUTIVE SUMMARY 31 (1999); Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1609-12 (1995) [hereinafter Hensler, *A Glass Half Full*] (cataloguing examples of aggregated mass tort suits); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 104 [hereinafter Hensler, *Myths and Realities*] (comparing "formal aggregative procedures" with more "ad hoc" informal aggregation). In fact, the earliest use of the phrase "informal aggregation" to refer to counsel coordination, as far as I am aware, is in Professor Hensler's 1989 article. See Hensler, *Myths and Realities*, *supra*, at 104. Others have mentioned counsel coordination in various contexts as well. See, e.g., John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 708-09 (1986) (describing the creation of "'ad hoc' law firm[s] . . . [to] litigate the plaintiff's side of a [class action] subject to court oversight"); Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 840 (1992) ("[L]awyers informally aggregate cases by representing hundreds of thousands of clients.").

suggests that ethical safeguards for clients of coordinating lawyers are neither strong enough nor explicit enough to provide adequate protection to such clients, and concludes that the problem is inherent in the nature of informal aggregation. Finally, Part III suggests that written cooperation agreements can alleviate some of these risks by making duties explicit and by forcing counsel to consider up front the ramifications of coordinating with other lawyers.

Part IV turns to the implications of informal aggregation on the binding effect of a judgment. It explores the "virtual representation"² argument for nonparty preclusion based on counsel coordination and concludes that informal aggregation generally cannot justify binding a nonparty with a judgment. Based on the inadequacy of ethical safeguards and lack of nonparty preclusion, combined with the decline in litigant autonomy that accompanies counsel coordination, Part V contends that the rise of informal aggregation suggests the need for more thorough formal mechanisms for aggregating related claims or, at least, greater attention to formalizing counsel coordination through written agreements that make explicit the relationships among lawyers, clients, and lawsuits.

I. THE RISE OF INFORMAL AGGREGATION

Complex litigation often proceeds as a number of formally independent lawsuits, yet we refer to multi-suit litigations in the singular: "the tobacco litigation," "the TWA Flight 800 litigation," "the Microsoft antitrust litigation." Likewise, the lawyers involved often treat the litigation as a whole. The growth of lawyer coordination has been so dramatic, and its implications so profound, that it warrants a close examination of the ways in which lawyers coordinate, both for the plaintiffs and for the defense.

A. *Plaintiffs' Coordination*

On the plaintiffs' side, lawyers coordinate to achieve efficiencies and to try to level the playing field with defendants, who generally command greater resources than any individual plaintiff. By coordinating their efforts, lawyers for similarly situated plaintiffs can access more thorough information, avoid working at cross-purposes,

2. Virtual representation refers to the theory that a nonparty "may be bound by a judgment . . . if one of the parties . . . [was] so closely aligned with his interests as to be his virtual representative." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975).

and finance the litigation more powerfully and efficiently. Plaintiffs' coordination takes a number of forms. It can flow from representation of multiple plaintiffs by a single lawyer or firm or from cooperative efforts among separate plaintiffs' lawyers.

1. *Coordination of Multiple Plaintiffs' Lawsuits by a Single Lawyer or Firm.* Particular plaintiffs' lawyers or their firms may represent numerous similarly situated claimants, allowing easy coordination of those claims even if asserted in separate suits. Through niche marketing, lawyers can attract substantial numbers of clients with similar claims, and economies of scale give lawyers a mighty incentive to do so.³ As a lawyer develops a track record in a particular type of claim, similarly situated clients flock to the lawyer.⁴

For a single lawyer or firm representing multiple similarly situated plaintiffs in separate suits, coordinated handling occurs

3. Some law firms, for example, have represented tens of thousands of asbestos plaintiffs. See Roger Parloff, *The Tort That Ate the Constitution: Over Ethical and Constitutional Objections Four Lawyers Hope to Enact a Nationwide Asbestos Compensation System*, AM. LAW., July-Aug. 1994, at 77 (describing the handling of asbestos claims by Ronald Motley and Joseph Rice of South Carolina's Ness Motley Loadholt Richardson & Poole); *Profiles in Power: The 100 Most Influential Lawyers*, NAT'L L.J., Apr. 28, 1997, at C4 (noting that Baltimore's Law Offices of Peter G. Angelos has represented nearly 20,000 asbestos plaintiffs). The Ness Mottley firm established affiliate relationships with lawyers throughout the United States, sharing responsibility for and fees from thousands of asbestos cases filed by such "affiliated counsel." Parloff, *supra*, at 77. As the lead firm, Ness Mottley focused on national discovery and issues of general liability, while the local lawyers or firms handled such case-specific matters as proving individual exposure and damages. See Karen Dillon, *Only \$1.5 Million a Year: Asbestos King Ron Mottley Takes Home Far Less than His Enemies Suspect*, AM. LAW., Oct. 1989, at 41.

4. Melvin Belli, for example, parlayed a single victory in a Bendectin case into a successful marketing campaign for new clients with Bendectin claims. See Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 IOWA L. REV. 231, 236 (1997) (describing Belli's use of a partial success in the first Bendectin trial to attract new Bendectin clients). Veteran mass tort lawyer Paul Rheingold has stated that he accumulated several thousand potential clients in the products liability litigation concerning the "fen-phen" diet drug combination. See Jeremy Laurance, *Thousands to Sue Over Slimming Pills*, INDEPENDENT, Feb. 21, 1998, at 1 ("We have 3,000 cases we are looking into and we are filing five or six a day. We don't know how many will translate into law suits but we have 100 so far."). Florida lawyer Norwood S. "Woody" Wilner, one of the few lawyers to win a trial verdict against a tobacco company, has attracted hundreds of individual tobacco plaintiffs. See Milo Geyelin, *Behind Giant Tobacco Verdicts, a Legal SWAT Team*, WALL ST. J., Apr. 12, 1999, at B1 (describing Wilner's leadership role in tobacco litigation); Suein L. Hwang et al., *Smoke Signal: Jury's Tobacco Verdict Suggests Tough Times Ahead for the Industry*, WALL ST. J., Aug. 12, 1996, at A1 (noting that Wilner's small firm had filed about 200 tobacco claims by 1996). Some lawyers pursue such niches rather aggressively. New York lawyer Ronald Benjamin, who has filed at least five suits for clients alleging personal injuries caused by the drug Viagra, held a press conference to announce a filing and ran a newspaper advertisement seeking additional Viagra plaintiffs. See Bob Van Voris, *Self-Made King of Viagra Suits?*, NAT'L L.J., Aug. 10, 1998, at A6.

inevitably. Knowledge gained through the representation of each client inures to the benefit of other clients. Generally applicable legal research and factual investigation are conducted once on behalf of all the clients,⁵ lawyers may meet with their clients in large groups rather than individually,⁶ and settlements may be negotiated during a single negotiating session with opposing counsel.⁷

2. *Coordination Among Separate Plaintiffs' Lawyers.* The more interesting phenomenon, however, is the informal aggregation that occurs without any single, unifying lawyer or law firm, instead arising when separate plaintiffs' lawyers coordinate their efforts in related cases. Particularly when prosecuting similar claims against a common defendant, plaintiffs' attorneys benefit greatly from teamwork. By pooling resources, counsel not only save money but also enhance their ability to finance litigation at the highest level.⁸ Plaintiffs'

5. See MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 240-41 (1996) (observing that the accumulation of Bendectin cases by Melvin Belli and others enabled the lawyers to achieve some of the same economies of scale provided by formally aggregated litigation).

6. See Saks & Blanck, *supra* note 1, at 840 ("Even in the absence of formal aggregative procedures, lawyers informally aggregate cases by representing hundreds or thousands of clients and meeting with them in large groups.").

7. While lawyers with multiple related cases naturally prefer to address multiple settlements during a single meeting, rather than schedule multiple meetings, ethical problems arise if the lawyers negotiate the settlements as a block rather than on their individual merits. See PAUL D. RHEINGOLD, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOYOLA L.A. L. REV. 395 (1998). The pertinent Model Rule of Professional Conduct provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995). Nevertheless, such block settlements are not uncommon. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 74 (1995) ("Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases."); Resnik, *supra* note 1, at 38 ("While in theory and in form each case is separate, in practice lawyers on both sides deal with the cases as a group, sometimes making 'block settlements'—in which defendants give a lawyer representing a group of plaintiffs money that is then allocated among a set of clients."); Rheingold, *supra*, at 401 (observing that despite the ethical prohibition, aggregated settlements occur with some frequency).

8. See GREEN, *supra* note 5, at 241; WEINSTEIN, *supra* note 7, at 76-79. A lawyer handling a personal injury claim against Wal-Mart, for example, began coordinating with other lawyers handling similar claims against Wal-Mart and found important gaps in the defendant's discovery responses, substantially strengthening the plaintiffs' claims for liability and opening up the possibility of sanctions. See Chad Terhune, *Florida Journal, Economic Report: Injury Case Has Become Headache for Wal-Mart*, WALL ST. J., Dec. 10, 1997, at F1.

lawyers work together to plan strategy, conduct discovery, hire experts, develop scientific evidence, conduct jury focus groups, and join efforts in countless other ways.⁹

Above all, in large-scale multi-suit litigation, plaintiffs' counsel share information. They have used everything from newsletters¹⁰ to e-mail¹¹ to communal online databases.¹² In several mass litigations, including Dalkon Shield¹³ and MER/29,¹⁴ plaintiffs' counsel held "schools" where leading trial lawyers trained others on how to try the particular type of case. In a number of litigations, plaintiffs' counsel have put together trial handbooks or trial packets, which contain all of the documents needed to present a case on liability, with instructions. According to one defense lawyer, "It used to be that defense counsel sometimes had an advantage in access to information when cases were scattered Formal and informal cooperation among plaintiffs' counsel and the explosion of information

9. See GREEN, *supra* note 5, at 175-77 (reporting that discovery in MDL-486 cases resulted in cooperation among counsel); MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 20.22 (describing organizational structures of counsel), 33.24 n.1033 (describing cooperation among plaintiffs' counsel in mass tort litigation) (1995) [hereinafter M.C.L.3d]; Daniel S. Chamberlain, *Truck Cases: Rules of the Road*, TRIAL, Feb. 1998, at 20, 22 (explaining how the Motor Vehicle Collision, Highway, and Premises Liability Section of the Association of Trial Lawyers of America provides its members with information); Lowenthal & Erichson, *supra* note 1, at 998-1007 (describing coordination of plaintiffs' counsel in mass tort litigation); David Ranii, *How the Plaintiffs' Bar Shares Its Information*, NAT'L L.J., July 23, 1984, at 1 (summarizing how plaintiffs' lawyers have established networks for sharing and disseminating information); Resnik, *supra* note 1, at 38-39 (referring to efforts of plaintiffs' attorneys to coordinate in mass tort cases through newsletters, shared discovery, shared experts, and the formation of organizations and training programs); Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1, 5 (1982) (describing the work of plaintiffs' litigation groups); Richard A. Seltzer & Margaret Z. Johns, *Winning Punitive Damages in Environmental Cases*, in PREPARATION AND TRIAL OF A COMPLEX TOXIC CHEMICAL OR HAZARDOUS WASTE CASE 1986, at 303, 308-09 (PLI Litigation & Administrative Practice Course Handbook Series, 1986) (instructing plaintiffs' attorneys that the major focus of discovery efforts should be the decisionmaking process of the defendant and that plaintiffs' attorneys can often obtain company documents not produced in discovery from the ATLA Exchange and other plaintiffs' attorney organizations).

10. See Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 122-23 (1968).

11. See J. Stratton Shartel, *Small-Firm Litigators Say Technology Is Key to Managing Big Cases*, INSIDE LITIG., May 1995, at 7, 8 (indicating that, particularly in large law firms, "advice is only a few steps or an e-mail message away").

12. See Paul Bernstein, *Hunting for Buried Treasures*, TRIAL, July 1998, at 104, 105; Paul Bernstein, *Read All About It: ATLA Goes Online*, TRIAL, July 1995, at 104.

13. See Rheingold, *supra* note 9, at 8.

14. See Rheingold, *supra* note 10, at 131.

technology, however, have rendered this factor less significant than it once was."¹⁵

Frequently, these efforts are coordinated by a central group of lawyers. Where a class action or multidistrict litigation forms part of the litigation, there may be a judicially appointed lead counsel or plaintiffs' steering committee that takes the lead in coordinating the lawyers' efforts.¹⁶ Often, however, the efforts are orchestrated by groups of lawyers without formal judicial recognition. A few examples will give the flavor of such groups and of the types of coordination prevalent in modern multi-suit litigation.

In the tobacco litigation, for example, Woody Wilner heads a group called the Tobacco Trial Lawyers Association. The lawyers in the group—each of whom pay \$5000 to cover administrative costs—share information and documents to enable each other to prosecute tobacco claims more efficiently and effectively.¹⁷ When attorney Madelyn Chaber was preparing for a San Francisco trial against Philip Morris, she sought the input of Wilner, who had won jury verdicts against Brown & Williamson in Florida. "I said to Woody, 'Download your brain to me,'" she recalled.¹⁸ She credits Wilner's input with helping her win a \$51.5 million verdict in the San Francisco case.¹⁹ Shortly thereafter, lawyers representing a tobacco plaintiff in Oregon were caught off guard by the trial testimony of a Philip Morris medical expert, who opined that the decedent died from mucoepidermoid carcinoma, a cancer not caused by smoking. The testimony troubled the plaintiff's lawyers until they received an e-mail from Chaber with a prior deposition of the doctor revealing that in previous smokers' suits he had invariably diagnosed cancer types unrelated to smoking. The deposition weakened the problematic

15. Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, LITIGATION, Summer 1998, at 43, 44-45.

16. See M.C.L.3d, *supra* note 9, at § 20.22.

17. See Geyelin, *supra* note 4, at B1; Milo Geyelin, *Philip Morris Hit with Record Damages*, WALL ST. J., Mar. 31, 1999, at A3 (noting Oregon lawyers' "affiliation with a network of plaintiffs' lawyers brought together by Norwood S. 'Woody' Wilner to share tobacco-litigation strategies"); see also Richard A. Daynard & Mark Gottlieb, *Keys to Litigating Against Tobacco Companies*, TRIAL, Nov. 1999, at 18, 20 (noting that "[o]ne reason these trials are now winnable is that one need not reinvent the wheel with every case," and mentioning both the Tobacco Trial Lawyers Association and ATLA's Tobacco Litigation Group).

18. Geyelin, *supra* note 4.

19. See *id.*

testimony, and the Oregon lawyers went on to win an \$80.3 million verdict.²⁰

In the fen-phen products liability litigation, a number of lawyers formed a "plaintiffs' consortium" for handling state court cases around the country.²¹ This consortium established an Internet site for sharing information about the litigation,²² while a group of plaintiffs' law firms from Pennsylvania, New Jersey, and New York privately arranged for the primary defendant to produce documents on CD-ROM. For this document production, the plaintiffs' lawyers contributed money toward the cost of putting the documents in optical character recognition form, worked collaboratively to code the documents, and allowed other plaintiffs' firms to buy into the arrangement.²³ Not only did such multistate coordination proceed independently of the federal diet drug multidistrict litigation (MDL), the state court lawyers actively resisted control by the MDL judge and the MDL Plaintiffs' Management Committee.²⁴

20. See *id.* Under Oregon state court rules, the lawyers could not depose the defense expert before trial, nor could they see a written report by the expert. Compare *id.* (describing Oregon's procedural rules regarding expert witnesses), with FED. R. CIV. P. 26(a)(2) (requiring a written report, signed by the expert, disclosing—among other things—all opinions to be expressed and justifications for such opinions), and FED. R. CIV. P. 26(b)(4) (allowing counsel before trial to take depositions of the opposing party's experts expected to be witnesses). The Oregon plaintiffs' lawyers acknowledged that their trial success built on "other cases and what other attorneys have done." Geyelin, *supra* note 17 (quoting one of those lawyers who specifically acknowledged similar litigation in Minnesota as a building block of the Oregon success).

21. See *Attorneys Debate Merits of Fen-Phen Multi-District Litigation*, 1 MEALEY'S LITIG. REP.: FEN-PHEN/REDUX, Feb. 1998 (discussing the formation of a "loose confederation" of attorneys to pursue discovery); *More Than 400 Lawyers Learn How Diet Drugs Work, Who to Sue, and How to Defend in Fen-Phen Litigation*, 1 MEALEY'S LITIG. REP.: FEN-PHEN/REDUX, Dec. 1997 (describing a "day-long crash course in neuroscience and . . . plaintiff and defense strategies"); Paul D. Rheingold et al., *State Courts Provide New Forum for Mass Torts*, NAT'L L.J., Feb. 22, 1999, at C28, C29 (discussing the work of the plaintiffs' consortium in state court fen-phen cases).

22. See *Multistate Litigation Diet Drugs/Fen-Phen Website and Bulletin Board*, at <http://www.lawtonation.com/%7Eleflaw/fenphen> (last visited Aug. 29, 2000) (on file with the *Duke Law Journal*).

23. See Rheingold et al., *supra* note 21, at C29.

24. See *id.* (highlighting the tensions between the state court litigation and the federal steering committee); Bob Van Voris, *Bickering in Fen-Phen Litigation*, NAT'L L.J., Sept. 28, 1998, at A1, A25 (discussing the state court lawyers' misgivings concerning the federal judge's decisions in the federal diet drug mass litigation). According to three of the lawyers involved in the consortium:

Perhaps the most startling aspect of this coordinated work among the states is that there are no leaders. Neither any state nor any individual law firm is the "head" of this group. There are not even leaders within a state. Rather, the lawyers seem enthusiastic about working toward the common goal of preparing their cases jointly and without having to pay anyone else to do it.

Plaintiffs' lawyers similarly coordinated their efforts in the Bendectin litigation,²⁵ the L-tryptophan litigation,²⁶ the breast implant litigation,²⁷ and the World Trade Center bombing litigation.²⁸ In another area of large-scale litigation, lawyers handling claims of bad faith denials of insurance coverage have shared information and discovery materials concerning insurance companies.²⁹

In the history of plaintiff coordination, arguably the two collaborative efforts of greatest significance were the MER/29 group in the 1960s and the tobacco litigation's Castano group in the 1990s.³⁰ In 1963, thirty-three lawyers pursuing claims against the manufacturer of the anti-cholesterol drug MER/29 formed the first major plaintiffs' group,³¹ through which the plaintiffs' lawyers tightly coordinated their

Rheingold et al., *supra* note 21, at C29.

25. See GREEN, *supra* note 5, at 170-73 (discussing lawyer structure within the Bendectin multidistrict litigation); *id.* at 240-41 (discussing informal mechanisms for coordinating among Bendectin plaintiffs' lawyers); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 309, 354 (1992) (discussing the holistic benefits of coordinated litigation and citing the areas, including Bendectin, in which such coordination has had significant impact).

26. See ATLA's *L-tryptophan Group Provides Model for National Litigation Efforts*, ATLA ADVOC., Mar. 1993, at 11.

27. In the breast implant litigation, counsel put together a "Master Complaint," filed in the multidistrict litigation, and a "Complaint and Adoption by Reference" that could be filed by any individual plaintiff in the plaintiff's chosen federal district court. See Aaron M. Levine, *Fundamental Issues in Litigating Breast Implant Cases*, in LITIGATING BREAST IMPLANT CASES—A SATELLITE PROGRAM 53, 53-86 (PLI Litigation & Administrative Practice Course Handbook Series, 1992). The individual plaintiff's counsel filled in the blanks on the complaint with the plaintiff's name, surgery date, and other information, and counsel checked off the defendants and claims from a list of thirty-five potential defendants and twenty-eight potential causes of action. See *id.* at 81-86; Lowenthal & Erichson, *supra* note 1, at 1004.

28. See Daniel Wise, *Lawyers Pack World Trade Center Hearing*, 211 N.Y.L.J. 1 (1994).

29. See GUIDE TO ATLA LITIGATION GROUPS, July 1998, at 7 (describing the database compiled by ATLA's Bad Faith Insurance Litigation Group).

30. I do not mean that these were the largest-scale coordination efforts, although the Castano group undoubtedly would be competitive by that measure. Rather, I mean that these two efforts represented milestones in the history of plaintiff coordination. The MER/29 group was the first substantial, organized plaintiffs' group in mass tort litigation and set the stage for coordination in future mass torts. The Castano group represents the power of plaintiffs' lawyers, united to take on even the most intimidating of legal foes, and the reversal of momentum that can be achieved by the accumulation and focused application of lawyer energy and pooled financial resources. In the public law setting, one can find examples of plaintiff coordination with far greater general historical significance, such as the attack on institutional segregation coordinated under the auspices of the NAACP Legal Defense and Education Fund. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994).

31. See Rheingold, *supra* note 10, at 122; see also Ranii, *supra* note 9, at 9 (stating that the group was formed in 1962).

discovery efforts. The group provided its member lawyers with copies of key liability documents, trial transcripts, and other materials,³² submitted a standard set of interrogatories, and reached an agreement with the defendant that discovery could be carried out by the group's representatives on behalf of all the group's cases.³³ The MER/29 group kept attorneys up to date with a newsletter and ran the "MER/29 School" to teach lawyers how to try the cases.³⁴ The MER/29 litigation has been called "one of the great success stories of voluntary cooperation among litigants."³⁵ The importance of the MER/29 group lies in the fact that it laid the groundwork for the growth of coordinated efforts by a cadre of elite lawyers in mass tort litigation. This corps of repeat players, many of whom handled MER/29 cases in the 1960s, then Dalkon Shield and asbestos cases, then breast implants, and most recently fen-phen and tobacco, succeeds by creating "a high degree of informal coordination, continuity, and learning across different mass torts."³⁶

The Castano group was an extraordinary gathering of plaintiffs' lawyers who joined forces in 1994 to pursue the tobacco industry. After years of failed attempts by individual plaintiffs against the well-financed tobacco defense, the lawyers decided to try to level the playing field by creating a team of leading lawyers and amassing a huge litigation war chest.³⁷ The group grew to include sixty firms, each contributing at least \$100,000 toward expenses.³⁸ Although the

32. See Rheingold, *supra* note 10, at 122-24.

33. See *id.* at 127-30.

34. See *id.* at 131.

35. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS & ANALYSIS 10 (1994).

36. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 952 (1995).

37. See Andrew Blum, *Tobacco Fight Grows Hotter: An Alliance of Plaintiffs' Firms Tries New Tactics to Battle Big Tobacco*, NAT'L L.J., Apr. 18, 1994, at A6; Claudia MacLachlan, *Tobacco Foes Force Industry Showdown*, NAT'L L.J., May 2, 1994, at A1, A21 (referring to tobacco executives' description of the "anti-smoking 'industry'"); see also David Ranii, *New Group Takes Aim at the Tobacco Industry*, NAT'L L.J., Feb. 11, 1985, at 4 (describing an earlier tobacco plaintiffs' lawyers group).

38. See Andrew Blum, *\$4M Pledged to Fight Nicotine*, NAT'L L.J., May 2, 1994, at A4; Douglas McCollam, *Long Shot*, AM. LAW., June 1999, at 86, 88. The list of attorneys in the coordinating tobacco group reads like a Who's Who of plaintiffs' lawyers: Peter Angelos, John W. (Don) Barrett, Melvin Belli, Turner Branch, Elizabeth Cabraser, Stanley Chesley, John Coale, Wendell Gauthier, Russ M. Herman, Ron Motley, Dianne Nast, John O'Quinn, and many other of the most successful lawyers in the United States. See Blum, *supra* note 37, at A6; McCollam, *supra*, at 88, 91; see also *Profiles in Power: The 100 Most Influential Lawyers*, NAT'L L.J., Apr. 28, 1997 at C4-C19 (listing Angelos, Cabraser, Chesley, Gauthier, and O'Quinn

group's primary litigation effort, a nationwide tobacco class action filed in Louisiana federal court, was ultimately decertified,³⁹ the formation of such a powerful coalition against the tobacco industry helped turn the tide in the tobacco litigation and set the stage for subsequent state attorney general lawsuits, settlement negotiations, and legislative battles.⁴⁰

The Association of Trial Lawyers of America (ATLA), the leading organization of United States plaintiffs' lawyers, plays a central role in lawyer coordination. ATLA provides opportunities for networking lawyers to coordinate work on similar cases.⁴¹ In addition to sponsoring annual seminars, programs and panels, ATLA sections provide, according to one lawyer, "an invaluable source for locating experts, getting the low-down on opposing experts, and sharing technical information."⁴²

ATLA sponsors sixty-six "litigation groups" that focus on particular types of cases, ranging from bad faith insurance denials to defective vehicle back-up alarms.⁴³ These litigation groups give

among the hundred most powerful lawyers in the United States).

39. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996). Inasmuch as the Castano group focused its effort on a class action, it differs from many of the other examples of lawyer coordination in this Article, which involve lawyer coordination in judicially separate lawsuits. Nevertheless, the Castano group stands out as an example of the power that lawyers can amass when they coordinate their efforts. The Castano group has evolved into a multi-suit operation. Since the defeat of the nationwide class action, Castano group members have filed a number of statewide class actions, and many of the Castano lawyers have recently joined forces to pursue litigation against handgun makers. See McCollam, *supra* note 38, at 89-91.

40. See PETER PRINGLE, *CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE* 10 (1998); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2020-22 (1999).

41. See *ATLA Section Steers Attorneys in Right Direction*, TRIAL, Mar. 1994, at 20 (highlighting ATLA's Motor Vehicle Collision, Highway and Premises Liability section); *Professional Negligence Section Has Widespread Appeal*, TRIAL, May 1998, at 32 ("[S]ection members have an enormous networking advantage [M]embers across the country work together"). Each month, ATLA publishes classified advertisements in which lawyers seek to contact lawyers handling related cases. One recent notice, for example, sought "info re Slim Fast causing diabetes/gall bladder problems," and another sought "information regarding [driving range] patrons being injured by ricocheting golf balls." ATLA ADVOC., Feb. 2000, at 9, 11.

42. *Professional Negligence Section: Extending a Helping Hand to Members*, TRIAL, May 1995, at 40 (quoting ATLA Professional Negligence Section Chair Denise Young).

43. See *GUIDE TO ATLA LITIGATION GROUPS*, *supra* note 29. The list includes the following litigation groups: AIDS; Abortion Malpractice; Albuterol; Automatic Doors; Bad Faith Insurance; Battery Explosion; Benzene/Leukemia; Birth Defect; Birth Trauma; Breast Cancer; Breast Implants; Carbon Monoxide; Cardiac Devices; Child Sex Abuse; Complex Regional Pain Syndrome/"RSD"; Computer Vendor Liability; Construction Site Accidents; Construction Site Accidents Subgroup; Nailguns; Contraceptive Implants; Crane & Aerial Lift

plaintiffs' lawyers access to a wealth of otherwise obscure evidence.⁴⁴ The transmissions/sudden acceleration group, for example, brings together lawyers who represent clients injured when automobiles suddenly accelerate or shift into reverse. Members of the group receive a large packet including "'smoking gun' documents . . . and depositions of plaintiffs' and defendants' expert witnesses," as well as interrogatories, lists of lawyers and experts, legal memoranda and briefs, and a videotape in which "an attorney explains the defects to a jury using a model transmission and provides tips on trial techniques."⁴⁵ These groups have become so prominent in products liability litigation that the absence of an ATLA litigation group is touted as evidence of product safety.⁴⁶

Injury; DES; Diet Product; Fen-Phen; Domestic Violence; Electrical Accidents; ERISA/Employee Benefits; Firearms & Ammunition; Funeral Services; Gammagard; Gas Water Heater Safety; Gas Fire & Explosions; Health Care Finance; Healthcare Management Organization; Herbicide & Pesticide; Imitrex; Inadequate Security; Inadequate Security Subgroup; Wal-Mart Task Force; Interstate Trucking; Laparoscopy; Latex Allergy; Lead Paint; Liquor Liability; Low Impact Collisions; Mining & Oil Field Products & Accidents; Mis-Read Pap Smears; Nursing Homes; Orthopedic Implants; Parlodel; Patient Abuse in Psychiatric Hospitals; Pharmacy Liability; Railroad/Highway Crossing & Derailment; Steroids; Tabloid Outrage; Tap Water Burns; Theophylline; Tire/Rim Mismatches; Tobacco Products; Toys & Recreational Equipment; Transmissions/Sudden Acceleration; Traumatic Brain Injuries; Truck Underride; Tylenol & NSAIDS; Vaccines; Vehicle Back-Up Alarms; Vending Machines; Workplace Injury; and the following subgroups of the Attorney's Information Exchange Group: ATV; Air Bags; Aquatic Injuries; Brakes; Child Restraints; Defective Firearms; Forklifts, Industrial & Agricultural Equipment; Fuel System Integrity; Helmets; Leisure Boats/Personal Watercraft; Motorcycles; Roof Crush; School Buses; Seat Belts; Seat Design; and Vehicle Rollovers. *See id.* at 5. According to ATLA's literature, "[l]itigation groups provide a network for ATLA members handling similar cases to exchange information and share successful strategies." *Litigation Groups Offer Winning Support to Members*, ATLA ADVOC., Feb. 2000, at 5.

44. *See* David Jaroslawicz, *Identifying the Products Liability Case, Preparing It for Trial, and Some Pointers During Trial from the Plaintiff's Point of View*, in TRIAL MECHANICS AND DISCOVERY IN MEDICAL MALPRACTICE, PRODUCTS LIABILITY, AND PERSONAL INJURY CASES 111, 120-21 (PLI Litigation & Administrative Practice Course Handbook Series, 1986) (acknowledging the benefit of ATLA litigation groups in the preparation of products liability cases).

45. GUIDE TO ATLA LITIGATION GROUPS, July 1998, at 22. For another example, members of the nursing homes litigation group, who represent plaintiffs suing nursing homes for negligent care, receive a "litigation manual" and a "compendium report of nursing home litigation verdicts and settlements nationwide." *Id.* at 18-19. In truly massive litigation, the litigation groups grow accordingly. The breast implant group, for example, "maintains a full time staffed office to exchange information on litigation and various settlement programs." *Id.* at 9.

46. *See* Ross D. Petty, *Regulation vs. the Market: The Case of Bicycle Safety*, 2 RISK: ISSUES IN HEALTH & SAFETY 93, 112 (1991) (comparing the existence of an All-Terrain Vehicle Litigation Group with the absence of a bicycle litigation group as evidence of bicycle safety).

ATLA also maintains the ATLA Exchange, a members-only Internet site boasting over 300,000 documents in eleven databases and indexes.⁴⁷ The Exchange allows plaintiffs' attorneys to search the databases for documents, depositions, pleadings, verdict and settlement data, expert witness information, and names and telephone numbers of other lawyers who have handled similar cases. Lawyers who participate in the Exchange pledge to share their experiences to assist other ATLA members who contact them.⁴⁸

The Attorney's Information Exchange Group (AIEG), a nonprofit cooperative comprised of ATLA members representing plaintiffs in products liability cases, provides members with extensive discovery information.⁴⁹ AIEG describes its primary objective: "to provide plaintiffs' counsel with the same collaborative benefits that defense attorneys have long enjoyed."⁵⁰ AIEG information has been credited with aiding plaintiff victories against manufacturers of all-terrain vehicles and other products.⁵¹ One products liability lawyer called AIEG "the first and least expensive step in evaluating [product] design."⁵²

47. See *The Association of Trial Lawyers of America Exchange Web Site*, at <http://exchange.atla.org> (last visited Aug. 28, 2000) (on file with the *Duke Law Journal*); Paul Bernstein, *Hunting for Buried Treasures*, TRIAL, July 1998, at 104; Paul Bernstein, *Read All About It! ATLA Goes Online*, TRIAL, July 1995, at 104; Gerry Miller, *Director's Corner*, ATLA EXCHANGE Q., July 1999, at 1; *Prepare Your Auto Case with Documents from the ATLA Exchange*, TRIAL, Jan. 2000, at 24. The ATLA Exchange demonstrates the power of technology to facilitate lawyer coordination. For other examples, see Mark Gottlieb, *Finding the Smoking Guns in Tobacco Litigation*, TRIAL, Nov. 1999, at 22 (describing numerous electronic collections of tobacco litigation documents), and *The Tobacco Trial Lawyers Association Home Page*, at <http://ttlaonline.com> (last visited Aug. 28, 2000) (offering links to online information sources for tobacco plaintiffs' lawyers) (on file with the *Duke Law Journal*).

48. See Miller, *supra* note 47, at 1; *The Association of Trial Lawyers of America Exchange Web Site*, *supra* note 47. In addition to the searchable databases, the ATLA Exchange offers prepared litigation packets dealing with such topics as fen-phen claims and firearms litigation. See ATLA EXCHANGE Q., May 1999, at 1.

49. See GUIDE TO ATLA LITIGATION GROUPS, *supra* note 29, at 6-7; see also *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982) (removing a broad protective order aimed at preventing dissemination of discovery to AIEG).

50. GUIDE TO ATLA LITIGATION GROUPS, *supra* note 29, at 6.

51. See Gail Diane Cox, *Alleged GM Belt Defect Revealed by California Court*, NAT'L L.J., Sept. 2, 1996, at A6 (citing attorney coordination and AIEG as sources of damaging information used by plaintiffs); Timothy S. White, *Conveying Corporate Misconduct: The Time Line*, DEMONSTRATIVE EVIDENCE, Supplement to MASS. LAW. WKLY., Mar. 15, 1993, at S1 (describing the importance of AIEG data in ATV litigation).

52. James R. Pratt III, *Motor Vehicle Products Liability Litigation—The Basics*, TRIAL, Nov. 1997, at 47.

Coordination may involve not only private attorneys but government lawyers as well. Separate federal agencies, for example, sometimes coordinate their investigations in legal actions.⁵³ State attorneys general have shared resources in pursuing their claims against the tobacco companies.⁵⁴ In the antitrust legal battle involving Microsoft Corporation, lawyers from the U.S. Department of Justice shared information with state attorneys general.⁵⁵ Finally, lawyers may work together on parallel criminal and civil cases, as prosecutors and civil litigators may both reap the benefits of joint preparation.⁵⁶

The line between formal and informal aggregation can become rather fuzzy, as when lawyer coordination in related cases is prompted by a court, or when it takes the form of judicially designated steering committees or lead and liaison counsel.⁵⁷ The Manual for Complex Litigation (Third) advises federal judges handling complex cases how to deal with related lawsuits:

If related litigation is pending in other federal or state courts, the judges should consider the feasibility of coordination among counsel in the various cases. . . . It may be possible through consultation with other judges to bring about the designation of common committees or of counsel and to enter joint or parallel orders governing their function and compensation. Where that is not feasible, the judge may direct counsel to coordinate with the attorneys involved in the other cases to reduce duplication and potential conflicts and to

53. See Joel deJesus, Comment, *Interagency Privity and Claim Preclusion*, 57 U. CHI. L. REV. 195 (1990) (describing interagency cooperation as a response to the threat of claim preclusion).

54. See *More States Consider Suing Firms to Recoup Smoking's Costs*, BOSTON GLOBE, Mar. 25, 1996, at 16 (discussing an information clearinghouse organized by fifteen states).

55. See Daimy Westneat & Thomas W. Haines, *Justice Puts More Heat on Microsoft*, SACRAMENTO BEE, Dec. 19, 1997, at D1.

56. See Robert K. Huffman et al., *The Perils of Parallel Civil and Criminal Proceedings: A Primer*, HEALTH LAW., Mar. 1998, at 1, 4. One controversial example is the reported consultation between independent counsel Kenneth Starr and the lawyers representing Paula Jones in her civil lawsuit against President Clinton. See Peter Baker & Juliet Eilperin, *Inquiry May Turn Table on Starr, Jones Lawyers*, WASH. POST, Oct. 15, 1998, at A8.

57. See M.C.L.3d, *supra* note 9, § 20.22 (addressing lead counsel and committee structures for coordination of counsel in multiparty litigation); see also *Informal Consolidation for Discovery Purposes in West Virginia Cases*, MEALEY'S LITIG. REP.: TOBACCO, Jan. 22, 1998, at 15 (describing the "informal consolidation" of three West Virginia tobacco actions). Professors Curtis and Resnik noted that either judicial action or litigant coordination can create informal aggregation: "Informal aggregation may occur when defendants or plaintiffs deal with cases as a 'block' or when courts apply uniform pretrial orders to cases officially distinct or assign a set of cases to a single judge or special master for case management." Curtis & Resnik, *supra* note 1, at 429.

further efficiency and economy through coordination and sharing of resources.⁵⁸

Partial formal aggregation—the judicial aggregation of some but not all related claims—breeds more extensive informal aggregation. In large-scale class actions, the court appoints lead counsel or a group of lead counsel, who supervise and coordinate the work of teams of lawyers on behalf of the class.⁵⁹ Similarly, the judge overseeing a federal multidistrict litigation generally appoints a steering committee or management committee, as well as lead and liaison counsel.⁶⁰ Although the formal judicial structure for the lawyer team applies only to formally aggregated claims, in practice that structure touches outlying claims as well, affecting the representation of non-class members or opt-outs, as well as state cases that fall outside of the MDL.⁶¹ Whether the impetus for coordination comes from the bench or from the lawyers, judges embrace lawyer coordination for the coherence it brings to multi-suit litigation.⁶²

Whether engineered by attorneys or judicially imposed, coordination among plaintiffs' lawyers often emerges as a hub-and-spoke structure. Individual lawyers retain control over the day-to-day handling of their clients' cases but coordinate strategy and information-gathering through a central litigation group, steering committee, or lawyer.⁶³ Plaintiffs' lawyers often resist ceding control

58. M.C.L.3d, *supra* note 9, § 20.225. For a sample court order addressing the roles of designated lead and liaison counsel in related lawsuits, see *id.* § 41.51.

59. See Resnik et al., *supra* note 1, at 321-26 (describing the ad hoc law firms that develop in large-scale tort litigation).

60. See GREEN, *supra* note 5, at 170-73 (describing the organization of plaintiffs' lawyers in the Bendectin multidistrict litigation); M.C.L.3d, *supra* note 9, § 20.221; WEINSTEIN, *supra* note 7, at 83-84.

61. See Rheingold et al., *supra* note 21, at C28.

62. See JAMES G. APPLE ET AL., MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS 16-18 (1997) (noting that some judges allow joint discovery and describing its advantages); M.C.L.3d, *supra* note 9, § 20.22 (maintaining that coordination avoids unnecessary burdens on courts); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1865-66 (1997) (describing circumstances in which coordination among lawyers is likely to occur); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1732-33 (1992) (describing the benefits of coordination); Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 Touro L. REV. 1, 12 (1988) (maintaining that judicial involvement in coordinated discovery is advantageous).

63. See Myron J. Bronberg & Anastasia P. Slowinski, *Pay or Play in Mass Torts: Alleviate Backlogs with an Expanded Court System or Joinder Methods for Mass Tort Cases*, 45 RUTGERS L. REV. 371, 385-86 (1993) (maintaining that formal coordination of discovery among defendants is preferable); Rheingold, *supra* note 9, at 3 (describing the formation of litigation

over their clients' cases;⁶⁴ thus, coordinated efforts at the hub may dominate discovery, research, and strategy, but tend not to extend to the ends of the spokes, into individual case management.

We can follow the rise of informal aggregation among plaintiffs by noting the frequency and aggressiveness of defendants' measures to combat it. Plaintiffs routinely face efforts by defendants seeking to prevent the plaintiffs from sharing information with each other. In providing discovery responses in litigation involving multiple related lawsuits, defendants often ask the court for protective orders to prohibit dissemination of discovery information to plaintiffs or potential plaintiffs in other cases.⁶⁵ Although some defendants have received such protection,⁶⁶ most courts have rejected attempts to

groups); Rheingold, *supra* note 10, at 125 (describing the consolidation of cases arising from a mass disaster); Roger H. Transrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 811 (1985) (describing the informal coordination of discovery).

64. See WEINSTEIN, *supra* note 7, at 83 (describing struggles among lawyers to gain control of mass tort litigation); Bromberg & Slowinski, *supra* note 63, at 385-86 (maintaining that unwillingness to cede such control usually precludes coordination of discovery); Lowenthal & Erichson, *supra* note 1, at 1006 ("Notwithstanding the benefits of coordination, plaintiffs' lawyers usually insist on retaining ultimate control over their individual cases."); Rheingold, *supra* note 9, at 3 (listing money and power as the primary motivations for this resistance); Rheingold, *supra* note 10, at 125 (describing such resistance in a mass tort litigation case); Transrud, *supra* note 63, at 811 (stating that fear of losing such control usually prevents coordinated discovery).

65. See Thomas M. Flemming, Annotation, *Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation*, 83 A.L.R.4th 987, 990 (1991) (noting that defendants often seek protective orders); Stuart E. Rickerson, *Corporate Counsel's Guide to the New Rules*, 61 DEF. COUNS. J. 192, 196 (1994) (maintaining that pursuit of protective orders is advisable for defendants); Daniel Boyd Smith, *Anti-Dissemination Orders in Product Liability Suits*, 5 AM. J. TRIAL ADVOC. 507, 512 (1982) (describing defendants' attempts to curtail dissemination of information); James A. Campbell, *Protective Orders Are Vital, Promote Fairness*, MASS. LAW. WKLY., Mar. 29, 1993, at 11 (arguing that judges' discretion to grant protective orders should not be limited); Nicolas J. Wittner & Richard P. Campbell, *Protective Orders Under Attack*, ACCA DOCKET, Winter 1990, at 14 (describing the advantages of protective orders).

66. See, e.g., *Grace v. Center for Auto Safety*, 72 F.3d 1236, 1237 (6th Cir. 1996) (noting that a protective order was in force). In one recent securities class action, for example, a federal judge ordered the plaintiffs' lawyers not to communicate with lawyers pursuing a related action in state court. See Phyllis L. Mason, *Is California's Ethical Discovery Firewall Here to Stay?*, ANDREWS CORP. OFFICERS & DIRECTORS LIABILITY LITIG. REP., Dec. 8, 1997, at 19. In the latex gloves products liability litigation, the MDL court established a document depository but ordered elaborate security systems to protect the confidentiality of various documents. See *Document Depository Established by MDL Court*, MEALEY'S LITIG. REP.: LATEX, Mar. 27, 1998, at 10; see also *California Latex Plaintiff Asks High Court to Review Protective Order, Citing Lack of Factual Showing*, MEALEY'S LITIG. REP.: LATEX, Jan. 30, 1998, at 5 (describing a plaintiff's attack on an MDL protective order allowing discovery sharing only on condition of confidentiality by each receiving party).

restrict plaintiffs' information-sharing.⁶⁷ In an action involving an exploding fuel tank, for example, an Ohio judge rejected General Motors' demand for the return of documents at the close of trial, noting that GM's main motivation "is that it fears these documents might fall into the hands of a similarly situated plaintiff."⁶⁸

Defendants' fear of plaintiff coordination manifests in another way: defendants try to learn the extent of plaintiffs' information-sharing. In a number of cases, defendants have sought to discover documents obtained by plaintiffs through litigation groups or other coordinated efforts.⁶⁹ Defendants want the discovery because plaintiff coordination affects defendants' strategic decisions.⁷⁰ Plaintiffs'

67. See Flemming, *supra* note 65, at 991 (noting that both federal and state courts generally permit sharing of information among litigants); see, e.g., *Zapata v. IBP, Inc.*, 160 F.R.D. 625, 629 (D. Kan. 1995) (holding that no good cause for a protective order was shown); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (vacating a magistrate's granting of a protective order); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) (noting that full use of discovered information ordinarily may be made in other forums); *Krahling v. Executive Life Ins. Co.*, 959 P.2d 562, 568 (N.M. Ct. App. 1998) (reversing an order denying a motion to lift a protective order); *Earl v. Gulf & W. Mfg. Co.*, 366 N.W.2d 160, 165 (Wis. Ct. App. 1985) (noting that "the movant must show a positive reason (i.e., 'good cause') for the entry of [a protective] order"); *Blanket Confidentiality Order Found Improvident by New Mexico Appeals Court*, MEALEY'S LITIG. REP.: INS. INSOLVENCY, May 20, 1998, at 6 (discussing *Krahling*); see also Francis H. Hare, Jr. et al., *Confidentiality Orders in Products Liability Cases*, 13 AM. J. TRIAL ADVOC. 597, 601 (1989) (noting that courts have held that plaintiffs' counsel may be prejudiced by such restrictions); Teresa M. Hendricks & Joseph W. Moch, *Protective Orders: The Industry's Silencer on the Smoking Gun*, 73 MICH. BAR J., May 1994, at 425 (arguing that defendants seek protective orders to force individual plaintiffs into isolation). See generally Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (denying the necessity and desirability of judicial and legislative efforts to make discovery presumptively public).

68. *Koval v. General Motors Corp.*, 610 N.E.2d 1199, 1202 (Ohio Ct. App. 1990).

69. See, e.g., *Hendrick v. Avis Rent A Car Sys., Inc.*, 916 F. Supp. 256, 258-59 (W.D.N.Y. 1996) (citing and following *Bartley v. Isuzu Motors Ltd.*, 158 F.R.D. 165 (D. Colo. 1994) and *Bohannon v. Honda Motor Co.*, 127 F.R.D. 536 (D. Kan. 1989)); *Bartley*, 158 F.R.D. at 166 (compelling disclosure of a list of documents obtained from the defendant in earlier litigation but noting that the defendant had access to the documents themselves); *Bohannon*, 127 F.R.D. at 538 (compelling discovery of documents obtained from the defendant by other plaintiffs and holding that it is not the work product of counsel in the instant case); see also *Where Did You Get That Information?*, FED. LITIG., Mar. 1995, at 52 (summarizing *Bartley*).

70. See Richard A. Mueller, *The Use of Standardized Materials and the Role of Local Counsel*, in EFFECTIVE COORDINATION OF MULTIPLE PRODUCT LIABILITY LITIGATION 99, 101 (PLI Litigation Course Handbook Series, 1988) (noting that the sharing of legal theories among plaintiffs requires defendants to become familiar with those theories and to anticipate their assertion by additional plaintiffs); Richard A. Rothman & Eric Ordway, *Coordinating the Defense of Multiple Litigations Relating to the Same Product or Problem*, in EFFECTIVE COORDINATION OF MULTIPLE PRODUCT LIABILITY LITIGATION 117, 124-25 (PLI Litigation Course Handbook Series, 1988) (describing cooperation among plaintiffs' attorneys and noting that what defendants say in one case will be known to counsel in future cases).

attorneys have actively resisted,⁷¹ arguing with some force that even if the documents themselves are neither privileged nor work product, the grouping or packaging of the documents reveals attorneys' mental impressions and, therefore, triggers work product protection.⁷² Such arguments have not met with much success, and defendants generally have been able to learn the contents of information shared among coordinating plaintiffs' lawyers.⁷³ Even without looking directly at the phenomenal extent of plaintiff coordination in multi-suit litigation, we could surmise it by observing the worried reaction of defendants.

B. Defense Coordination

On the defense side, as well, counsel coordination occurs in many types of lawsuits and takes several forms. Informal aggregation can occur where a single defendant faces multiple related lawsuits, or where multiple defendants are named in related lawsuits. First, a single party defending multiple similar actions naturally handles the defense on a coordinated basis. In major multi-jurisdictional litigation, local counsel in various states coordinate with the defendant's national lead counsel and, through lead counsel, with each other. Second, defendants to related lawsuits often work cooperatively to respond to plaintiffs' claims, using joint defense agreements and many of the same devices employed by coordinating plaintiffs. In cases involving a primary or central defendant and other more tangential defendants, the defendants sometimes coordinate their efforts under the leadership of the primary defendant.

1. *Coordination of Multiple Lawsuits by a Single Defendant.* Various legal settings present a defendant with multiple suits that demand a coordinated response. For example, an antitrust defendant may face actions by multiple business competitors and consumers, as

71. See GUIDE TO ATLA LITIGATION GROUPS, *supra* note 29, at 2-3 ("Each litigation group member must affirm that he/she . . . will make every reasonable effort to oppose any motion or request by a defendant to produce documents and information received from the Litigation Group or its members.").

72. See FED. R. CIV. P. 26(b)(3) (instructing the court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney").

73. See, e.g., *Hendrick*, 916 F. Supp. at 258-59 (allowing the defendant in a products liability case to discover information obtained by the plaintiff's counsel from other attorneys with claims against the same manufacturer); *Bartley*, 158 F.R.D. at 167 (rejecting the plaintiff's contention that documents obtained through ATLA are protected under the work product doctrine); *Bohannon*, 127 F.R.D. at 538-40 (same); see also *Where Did You Get That Information?*, *supra* note 69, at 52 (discussing *Bartley*).

well as by the federal and state governments; a products liability defendant with an alleged design defect or failure to warn generally faces actions by multiple victims, as may a securities or consumer fraud defendant; an employer charged with systematic discrimination, or any institution accused of systematic civil rights violations likewise may face multiple lawsuits. In each situation, defense counsel must view the litigation as a whole for purposes of legal research, factual investigation, resource allocation, and overall strategy.

Where related lawsuits are filed in multiple jurisdictions, a defendant's in-house counsel or outside law firm typically cannot handle the defense alone. Each major defendant's lead counsel generally hires local counsel in each state where lawsuits have been filed.⁷⁴ To supervise local counsel effectively, and to make informed strategic decisions, lead counsel must receive a regular stream of information from local counsel regarding suit-specific happenings in each state. To handle each case effectively and efficiently, local counsel must be kept abreast of developments in the broader litigation. Lead and local counsel, therefore, establish lines of communication for sharing information.⁷⁵ The larger the litigation, the more formalized the mechanisms. In addition to simply keeping in touch by telephone, mail, and e-mail, defense counsel have used more structured techniques including periodic seminars and regular mailings,⁷⁶ as well as Internet-based networking.⁷⁷ The result is a hub-

74. See *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (noting that the defendant "coordinate[d] its defenses in the cases filed against it throughout the United States"); Patricia L. Glaser, *Case Management and Depositions in Complex Litigation*, in *MANAGEMENT OF COMPLEX MASS TORT LITIGATION: PREPARING FOR TRIAL* 1986, at 301, 305 (PLI Litigation & Administrative Practice Course Handbook Series, 1986); Hare et al., *supra* note 67, at 598.

75. See Mueller, *supra* note 70, at 101.

76. See Lowenthal & Erichson, *supra* note 1, at 996.

77. See, e.g., *TrialNet*, at <http://www.trialnet.com> (last visited Aug. 29, 2000) (providing an internet resource for defense counsel) (on file with the *Duke Law Journal*). TrialNet markets itself as a provider of "collaborative lawyer networks" for corporations and insurance companies. Its web page emphasizes the need for coordination of multiple matters by multiple lawyers:

TrialNet's typical client is an organization with many outside counsel involved in representation of matters that involve commonality. Anytime the work of such counsel bring them in contact with similar factual, legal, technical issues, the same experts, opposing counsel or fact witnesses, or involve the necessity for close coordination of discovery or presentation of similar strategies, there is a need for TrialNet.

TrialNet Model, at <http://www.trialnet.com/about/what.html> (last visited Aug. 29, 2000) (on file with the *Duke Law Journal*).

and-spoke network—not unlike the plaintiffs' party control structure⁷⁸—with lead or in-house counsel at the hub and various local counsel at the spokes, for coordinating the defense of dispersed lawsuits.⁷⁹

2. *Coordination Among Multiple Defendants.* Defense coordination can emerge in any multi-defendant litigation, including products liability, patent infringement, and insurance defense. Complex products liability litigation, for example, ordinarily involves multiple defendants along the distribution chain, such as manufacturer, distributor and retailer, and may involve multiple manufacturers as well. Such defendants, by working together rather than pointing fingers, may focus their attention on jointly defeating plaintiffs' theories concerning such key issues as product defect, causation, and market share liability.⁸⁰

In multi-defendant patent litigation, where multiple alleged infringers find themselves pursued by a patentee, the defendants often enter joint defense arrangements to combat the patentee's claims.⁸¹ Such arrangements vary, but may involve contributing money to a common fund to further the defense, exchanging information, and discussing such defense issues as patent validity, claim interpretation, and prior art.⁸²

Insurance defense lawyers routinely find themselves litigating matters involving up to twenty or thirty other insurance companies,

78. See *supra* notes 63-64 and accompanying text.

79. See Lowenthal & Erichson, *supra* note 1, at 1007-08 (describing the hub-and-spoke structure of both plaintiffs' and defense counsel in mass tort litigation).

80. See Charles S. Cassis & Donald L. Miller II, *Coordinating the Multiple Product Liability Litigation: Avoid the Pitfalls*, in EFFECTIVE COORDINATION OF MULTIPLE PRODUCT LIABILITY LITIGATION 151, 161-63 (PLI Litigation & Administrative Practice Course Handbook Series, 1988); Lawrence G. Cetrulo, *The Lead Pigment Litigation: An Example of a Successful Coordinated Defense*, in THE THIRD ANNUAL LITIGATION MANAGEMENT SUPERCOURSE 485, 489-93 (PLI Litigation & Administrative Practice Course Handbook Series, 1992). In the dibromochloropropane litigation, which involved thousands of claims against a half-dozen chemical manufacturers and banana growers based on exposure to an agricultural pesticide, the defendants jointly removed the litigation from Texas and Florida state courts to federal court and jointly moved for dismissal on grounds of forum non conveniens. See *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555-56 (11th Cir. 1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1216 (11th Cir. 1985); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1334, 1335-39 (S.D. Tex. 1995); *Rojas v. DeMent*, 137 F.R.D. 30, 31-32 (S.D. Fla. 1991).

81. See John E. Daniel, *Joint Defense Arrangements Raise Antitrust Issues*, NAT'L L.J., Oct. 19, 1998, at C36.

82. See *id.*

all of whose interests are closely aligned. The insurance companies often form a "joint defense consortium" in which lawyers for the various insurance companies work together to advance their clients' united interests.⁸³ For court hearings, lawyers for the insurers often agree to have one lawyer speak on behalf of the entire consortium.⁸⁴

In multi-defendant litigation, counsel for the various defendants commonly hold joint defense conferences to strategize, share information,⁸⁵ and divvy up work on legal issues.⁸⁶ Defendants gain a number of advantages from a coordinated defense. First, each defendant saves money by avoiding duplication of effort. With joint briefs, shared experts, and cooperative factual investigations, each defendant need not reinvent the wheel.⁸⁷ Second, by sharing information, each defendant finds itself better able to anticipate and resist plaintiffs' arguments.⁸⁸ Third, defense coordination decreases

83. See generally ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) (discussing ethical implications of such insurance defense consortiums).

84. See *id.* at 1.

85. Like plaintiffs' counsel, defense lawyers increasingly use the Internet to share information. See Lee H. Glickenhau, *Extranets Merge Virtues of Internet and Intranets*, NAT'L L.J., Mar. 9, 1998, at B14; see, e.g., *TrialNet Model*, *supra* note 77 (offering to create Internet lawyer networks for corporate clients, including mechanisms for sharing information with other defense counsel handling related matters).

86. See Michael M. Gordon, *Juggling Demands of Mass Litigation: Defendants See Ways of Working Together*, N.Y.L.J., Sept. 20, 1993, at S3 (discussing the use of an informal consortium of attorneys for defendants in similar cases, in which "each firm . . . participates in some aspect of the overall defense effort"); Albert H. Parnell, *The Coordinated Group Defense*, FOR THE DEFENSE, Nov. 1980, at 16 (describing the course and structure of the coordinated defense); Peter N. Sheridan & Bradley S. Tupi, *Joint Arrangement Results in Victory for Chemical and Insurance Companies*, LEADER'S PROD. LIAB. NEWSL., Oct. 1984, at 3, 6 (discussing cooperative defense efforts in a pesticide exposure case by lawyers for five chemical companies, three insurers, and one pest-control operator); O.J. Weber, *Mass Tort Litigation: The Pot Boils Over*, 6 J. PROD. LIAB. 273, 280 (1983) (noting the development of "[m]ore effective and economical use of multi-defense counsel by organization within the group, by periodic meetings, delegation of particular tasks to specific attorneys, formation of deposition and trial teams, widespread and effective use of paralegals, and the use of one attorney or firm to represent, where appropriate, more than one defendant").

87. See Cassis & Miller, *supra* note 80, at 154 (describing the manner in which a coordinated structure of national, regional, and local counsel may be employed to minimize the duplication of effort common in complex product liability litigation); Edward Lowenberg, *Consolidated Defense Experience: Working with Co-Defendants to Minimize Costs*, in THE THIRD ANNUAL LITIGATION MANAGEMENT SUPERCOURSE, *supra* note 80, at 485, 489-93; Angela D. Slater & Aney Chandy Kurien, *Joint Defense Agreements: A Cautionary Tale*, N.J. LAW., June 1998, at 12 (noting that joint defense agreements "afford multiple defendants the opportunity to assert a cohesive, cost-effective defense position," and emphasizing that "[d]efendants can share litigation costs, including the often hefty expense of retaining experts").

88. See *Of Big Kahuna Days, Matlock and Ambushed Plaintiff Experts*, FOR THE DEFENSE, Oct. 1996, at 6 [hereinafter *Big Kahuna*].

the risk of finger-pointing⁸⁹ and hostile cross-claims.⁹⁰ The Corporate Counsel Section of the New York State Bar Association offered this advice to corporate litigators:

From a corporate defendant's perspective, a unified defense effort often makes sense, unless the defendant has a winning defense that is unavailable to other defendants. The alternative to a joint defense is sometimes destructive anarchy, with each defendant presenting a different theory of the case while blaming each other. Frequently, the only litigant who benefits from a fractionalized "every-man-for-himself" defense is the plaintiff.⁹¹

Finally, by coordinating during the discovery process, defendants strive for a uniform understanding of the scope, meaning, and propriety of plaintiffs' discovery requests, so that no single defendant will stand out as particularly forthcoming or particularly resistant. Defense coordination is so valuable in complex multi-defendant matters that one leading treatise comments that "it is frequently advisable . . . to devote as much time to coordination as to any other substantive aspect of the case."⁹²

89. See R. Benjamine Reid, *A View from the Bottom: Musings of Local Trial Counsel in a Highly Regulated Industry—Nationally Coordinated Products Litigation*, in EFFECTIVE COORDINATION OF MULTIPLE PRODUCT LIABILITY LITIGATION 183, 187 (1988) (arguing that defense coordination can minimize the risk of "mistakes on a local level which can create problems in the same litigation throughout the nation"); Peter N. Sheridan, *An Alternative to Disaster: Cooperation Among Defendants*, in PRODUCT LIABILITY OF MANUFACTURERS 1987: PREVENTION AND DEFENSE 395, 408-09 (1987) (discussing a case in which, because the defense attorneys did not cooperate, each damaged the case of the other defendant); Slater & Kurien, *supra* note 87, at 12 ("[W]ith respect to product liability actions, defendants can develop a unified, structured theory of defense rather than engaging in piece-meal litigation with every defendant pointing the finger upstream in the distribution chain."); Sheridan & Tupi, *supra* note 86, at 3 (crediting defense counsel cooperation with a defense verdict in a pesticide case, explaining that "[t]he defendants, by declining to adduce evidence against each other, compelled the plaintiffs to attempt to meet their normal burden of proving causation").

90. See Edward Lowenberg, *Consolidated Defense Experience: Working with Co-Defendants to Really Minimize Costs*, in 2 FIFTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE 75, 77-78 (PLI Litigation & Administrative Practice Course Handbook Series, 1994) ("The ineffective use of multiple trial counsel with its attendant 'risk spreading' conglomeration of cross-claims, third party actions and indemnity claims increases the likelihood of plaintiff verdicts."); Sheridan & Tupi, *supra* note 86, at 3 (noting defendants' agreement neither to prosecute cross-claims nor to conduct discovery against each other).

91. Corporate Counsel Section of the New York State Bar Association, *Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263, 309 (1995) (footnotes omitted).

92. JAMES L. STENGEL & ANDREW M. CALAMARI, COMPLEX LITIGATION 1-21 (1994); see also Corporate Counsel Section of the New York State Bar Association, *supra* note 91, at 308-12 (discussing the greater efficiency that can be achieved by a coordinated defense).

As with plaintiff coordination, defense coordination may be imposed by the court.⁹³ But "even where the court does not mandate the organization of a joint defense group, it is likely that the defendants will organize one anyway."⁹⁴

Where one defendant emerges as the plaintiffs' primary target, a multi-defendant network sometimes emerges around that defendant.⁹⁵ The primary manufacturer in a mass products liability litigation, for example, may develop a cooperative litigation relationship with the distributors and retailers who have been named as defendants. Such relationships can range from casual cooperative communications to formal written indemnification and cooperation agreements, in which the manufacturer agrees to indemnify the downstream defendants in exchange for their cooperation in the litigation defense.

Although some defense arrangements operate on a handshake,⁹⁶ coordinating defense counsel may formalize their relationship with a written joint defense agreement. Most commentators advise defendants to put joint defense agreements in writing,⁹⁷ and the use of

93. See DEBORAH R. HENSLER ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 75 (1985) ("In some jurisdictions, the lawyers themselves created these roles [of lead counsel in coordinated asbestos litigation defense]; in others, they were mandated by the court."); Slater & Kurien, *supra* note 87, at 14 ("[J]udges presiding over complex product liability cases sometimes *compel* multiple defendants to engage in joint defense arrangements, such as utilizing a defense liaison counsel, for the sake of efficiency."); see also *supra* notes 57-62 and accompanying text (discussing judicially imposed plaintiff coordination and the connection between formal and informal aggregation).

94. Mark D. Plevin, *Avoiding Problems in Joint Defense Groups*, LITIGATION, Fall 1996, at 42.

95. See Robert L. Haig & Steven P. Caley, *Effective Representation of the "Deep Pocket" or Target Defendant*, FED. LITIG. GUIDE REP. 687 (1996).

96. See Sheridan & Tupi, *supra* note 86, at 6 ("The defendants [in a pesticide exposure case] as a group eschewed either a formal contract or a less formal letter agreement. There was a handshake kind of cooperation, with the understanding that the chips—liability apportionment—would fall as they might.")

97. See Association of the Bar of the City of New York, Committee on Professional Responsibility, *Ethical Implications of Joint Defense/Common Interest Agreements*, in 51 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 115, 116 (1996) ("[W]e conclude that the ethical issues involved among the participants in a joint defense are sufficiently complex that a lawyer should not normally rely on an unwritten or implied agreement, but should instead ensure that each participant has agreed in writing to the specific terms of the joint defense."); Corporate Counsel Section of the New York State Bar Association, *supra* note 91, at 310 ("It is often a good idea for the joint defense group to execute a written joint defense agreement."); Peter N. Sheridan, *Sharing Agreements: One Method of Managing Mass Tort Litigation*, in MANAGEMENT OF MASS TORT LITIGATION 89, 102 (1983) (recommending formal written cooperation agreements, because informal understandings can buckle under the weight of defendants' urge to avoid or minimize liability by pointing the liability finger at each other); Sheridan & Tupi, *supra* note 86, at 6 (suggesting that "a more

formal written agreements appears to be increasing.⁹⁸ The terms of such agreements vary considerably.⁹⁹ Formalized defense arrangements can range from simple contracts for limited joint efforts to such ambitious operations as the Center for Claims Resolution (CCR), a consortium of twenty asbestos defendants, which maintains a database tracking 100,000 claims and over one million documents,¹⁰⁰ and litigates and negotiates as a single entity.¹⁰¹

organized and formal arrangement" would have been preferable to the "informal arrangement" used by defendants in a successful pesticide defense); Slater & Kurien, *supra* note 87, at 12 (stating "it generally is advisable to engage in a written agreement as opposed to an oral one due to privilege concerns").

98. See Jeffrey R. Parsons & David K. Williams, *Considerations Regarding Consolidated Defense Arrangements in Environmental Litigation*, in THE THIRD ANNUAL LITIGATION MANAGEMENT SUPERCOURSE, *supra* note 80, at 523, 526 ("Historically, joint defense arrangements were more frequently informal gentlemen's understandings as opposed to agreements reduced to writing. . . . Increasingly, these gentlemen's agreements have been more difficult to attain and to retain throughout the litigation. Thus, parties have turned to more formal, written joint defense agreements."); Jo S. Kerlinsky, *Beyond the Bounds of the Joint Defense Agreement*, PRACTICAL LAW., Mar. 1998, at 51, 59 ("Courts and counsel have long recognized joint defense agreements as a powerful tool to promote efficiency in civil litigation and encourage early settlements. In recent years, the use of written agreements to memorialize the intentions of the parties has become commonplace in mass tort litigation.").

99. See Corporate Counsel Section of the New York State Bar Association, *supra* note 91, at 310:

[A joint defense agreement] can be as simple as a one page letter signed by all defendants stating defendants' willingness to work together, cooperate on the case, share litigation costs and preserve confidential and privileged information. A joint defense agreement can also be more elaborate, delegating to particular defendants in the group various tasks and responsibilities, e.g., lead trial counsel responsibility, document management, expert witness retention and preparation, etc.

See also Slater & Kurien, *supra* note 87, at 12 ("Joint defense agreements need not conform to any specific standard. Instead, they can be tailored to address the particular needs of individual cases."). For a model joint defense agreement, see Association of the Bar of the City of New York, *supra* note 97, at 125-28.

100. See Jo McIntyre, *Handling the Monster Case*, LAW OFFICE COMPUTING, June-July 1992, at 33, 34.

101. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 599-601 & n.2 (1997) (describing the legal efforts of the CCR in the case before the Court and listing the participating companies). The Center for Claims Resolution was established as a mechanism for alternative dispute resolution of asbestos claims. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13, 13 (Autumn 1990). In the massive asbestos litigation, cooperation among defendants has been essential. See Myra Alpers, *Asbestos Defendants Begin to Cooperate in Litigation*, LEGAL TIMES, Sept. 19, 1983, at 3. Not all asbestos defense coordination can be considered successful, however. See, e.g., *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1075 (3d Cir. 1983). The *Gold* case

is an example of defense coordination gone awry. Defendant Johns-Manville Sales Corp., pursuant to the defendants' informal arrangement, was to gather evidentiary material for use at trial by all of the defendants. When Johns-Manville filed a bankruptcy petition shortly before trial, the other defendants were left with inadequate discovery. The court refused to postpone the trial.

To the extent defendants have an equivalent to ATLA, it is the Defense Research Institute (DRI). Although its lawyer-coordinating operations pale in comparison to ATLA's, the DRI offers defense counsel seminars, research, litigation groups, an expert witness index, a brief bank, and other resources.¹⁰² Its expert witness bank contains information on over 41,000 witnesses,¹⁰³ which defense counsel find particularly useful for locating inconsistencies in the testimony of plaintiffs' experts.¹⁰⁴ Whether through ATLA or DRI, written agreements or ad hoc initiatives, lawyers for aligned parties in related lawsuits coordinate their efforts, despite the formal separateness of the lawsuits.

II. THE INADEQUACY OF FORMAL AGGREGATION

What gives rise to informal aggregation is the failure of formal aggregation mechanisms to achieve a unified handling of controversies involving large numbers of claimants. Procedural rules offer ways to aggregate related claims, but do not achieve fully unified treatment. Permissive joinder, compulsory joinder, intervention, consolidation, and multidistrict litigation transfer suffer from their inability, in most mass litigation scenarios, to reach all related claims. Class actions potentially cure the problem of inadequate reach, but strict requirements for class certification render them unusable much of the time. Above all, the existence of parallel federal and state court systems, with little opportunity for formal intersystem coordination,¹⁰⁵ leaves many related cases pending as separate judicial actions.

Lowenthal & Erichson, *supra* note 1, at 998 n.38 (citations omitted).

102. See Kathryn Dix Sowle, *Toward a Synthesis of Product Liability Principles: Schwartz's Model and the Cost-Minimization Alternative*, 46 U. MIAMI L. REV. 1, 38 n.174 (1991); David Ranii, *For the Other Side*, NAT'L L.J., Sept. 13, 1982, at 1.

103. See *DRI's Expert Witness Bank: The Numbers*, FOR THE DEFENSE, Mar. 1996, at 5 ("The Expert Witness Bank, as of January 31, 1996, had files on 41,890 experts.").

104. See *Big Kahuna*, *supra* note 88, at 6.

105. On the cooperation of state and federal judges in the absence of formal intersystem aggregation, see Schwarzer et al., *supra* note 62.

A. *True Aggregation: Party Joinder and Class Action*

Joinder of parties¹⁰⁶ and the class action device¹⁰⁷ can combine the claims of multiple parties, or against multiple parties, into a single action. In this regard, they constitute the purest versions of formal aggregation. Neither mechanism, however, fully aggregates the various types of related claims that prompt lawyers to coordinate their work.

1. *Party Joinder.* Joinder of parties is generally permitted when claims arise out of the same transaction, occurrence, or series of transactions or occurrences.¹⁰⁸ The test is easy to satisfy,¹⁰⁹ and there is no numerical ceiling, so it is possible to use joinder to aggregate massive litigation. The shortcoming of permissive joinder is that it is just that—permissive. Plaintiffs themselves control the use of permissive joinder as an aggregation mechanism. Moreover, joinder may not be feasible in some cases, especially where plaintiffs' lawyers practice in different states.¹¹⁰ In litigation against geographically dispersed defendants, the requirements of personal jurisdiction¹¹¹ and venue¹¹² further complicate joinder and often doom it to incompleteness.

Compulsory joinder of parties takes control over aggregation away from the plaintiffs and offers it to defendants and to the court.¹¹³

106. See FED. R. CIV. P. 19 (governing compulsory joinder of parties); FED. R. CIV. P. 20 (governing permissive joinder of parties); see also Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361 (1994) (governing statutory interpleader); FED. R. CIV. P. 14 (governing impleader); FED. R. CIV. P. 22 (governing rule interpleader); FED. R. CIV. P. 24 (governing intervention).

107. See FED. R. CIV. P. 23.

108. See, e.g., FED. R. CIV. P. 20; CAL. CIV. PROC. CODE §§ 378-79 (West 1973); N.Y. C.P.L.R. 1002 (McKinney 1976).

109. See CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1653 (1986).

110. One would hope to explain this based on each lawyer's careful choice of the most appropriate and advantageous forum for the particular plaintiff. The phenomenon probably flows just as much, however, from lawyers' concerns over losing clients if lawsuits are filed in a forum where they are not admitted to practice.

111. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (dismissing two of the four permissively joined defendants for lack of personal jurisdiction).

112. See 28 U.S.C. § 1391 (1994) (delineating venue options in federal court).

113. See, e.g., FED. R. CIV. P. 19; CAL. CIV. PROC. CODE § 389 (West 1973); N.Y. C.P.L.R. 1001 (McKinney 1976). Another way defendants control party structure is impleader, which allows a defending party to bring in a third-party defendant who may be liable for indemnity or contribution. See FED. R. CIV. P. 14.

Compulsory joinder, however, is exceedingly limited. It requires joinder, where feasible, of such inextricably linked claims as those involving ownership of jointly held property.¹¹⁴ It does not apply to joint tortfeasors,¹¹⁵ nor does it apply in general to multiple plaintiffs harmed by a single occurrence.¹¹⁶ Despite some calls for greater use of compulsory joinder,¹¹⁷ its use remains the exception. For the vast majority of claims on which lawyers coordinate, none of the parties are "necessary parties" within the meaning of the compulsory joinder rule.¹¹⁸

114. See, e.g., *Haas v. Jefferson Nat'l Bank*, 442 F.2d 394, 398 (5th Cir. 1971) (requiring joinder when one alleged co-owner of a bank's stock sought a mandatory injunction directing the bank to issue him a certain number of shares).

115. See *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (per curiam) (holding that, in the case of alleged defective design and manufacture of a device implanted in the plaintiff's spine, failure to join the doctor and hospital as defendants with the manufacturer was not error).

116. "Simply because a prospective party could *properly* be joined under the permissive joinder rules does not mean that it *must* be joined under the compulsory joinder rules." FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 10.11 (4th ed. 1992). Professors James, Hazard and Leubsdorf offer the following example:

[T]wo persons injured in the same accident may join as plaintiffs in the same action against the alleged tortfeasor or tortfeasors. But this does not mean that they must join; hence, it does not mean that either of them is a necessary party in an action brought by the other. Thus, a parent and child, or spouses, injured in the same accident may bring separate suits for their injuries. It is ordinarily not in their interest to bring separate suits because duplication of effort is involved, and the incentives to join as co-plaintiffs usually result in proceeding through a single suit. But the rules as to joinder of parties generally do not *require* such joinder.

Id. (footnote omitted); see also *Tice v. American Airlines, Inc.*, 162 F.3d 966, 968 (7th Cir. 1998) ("Multiple victims of air disasters, multiple stockholders of companies that have committed securities violations, and multiple holders of rights in pensions, normally may all bring their own suits even if the defendant engaged in a single course of action that affected everyone similarly."), *cert. denied*, 527 U.S. 1036 (1999).

117. See, e.g., Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 822-37 (1989) (advocating the compulsory joinder of some Rule 20 parties).

118. See FED. R. CIV. P. 19(a). In addition to Federal Rule 19 and corresponding state rules, certain preclusion rules function as compulsory party joinder doctrines, but they too are quite limited. See Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 979-83 (1998) [hereinafter Erichson, *Interjurisdictional Preclusion*]. Kansas's "one-action rule" compels joinder of defendants in comparative negligence cases. See *Mick v. Mani*, 766 P.2d 147, 151 (Kan. 1988). Until recently, New Jersey's "entire controversy doctrine" mandated joinder of related defendants. See *Cogdell v. Hospital Ctr.*, 560 A.2d 1169, 1178 (N.J. 1989). Rule amendments in 1998 largely eliminated preclusion-based mandatory party joinder in New Jersey but still allowed for trial judges to order joinder of parties under certain circumstances. See Howard M. Erichson, *Of Horror Stories and Happy Endings: The Rise and Fall of Preclusion-Based Compulsory Party Joinder Under the New Jersey Entire Controversy Doctrine*, 9 SETON HALL CONST. L.J. 757, 768-69 (1999).

Interpleader, in particular statutory interpleader under the Federal Interpleader Act,¹¹⁹ solves some of the jurisdiction and venue problems that limit permissive and compulsory joinder as aggregation devices.¹²⁰ It applies, however, only in the relatively uncommon situation where a stakeholder wishes an adjudication of the rights of multiple claimants,¹²¹ and interpleader cannot pull together the claims involved in most litigation.¹²²

If an interested person is neither voluntarily joined in the action by the plaintiff, nor ordered joined as a necessary party, that absentee may seek to become a party to the action through intervention.¹²³ Like joinder, however, intervention's limitations doom it to incompleteness. First, intervention is voluntary;¹²⁴ it occurs only if the absentee applies to intervene, just as permissive joinder occurs only if the plaintiff chooses to join additional parties.¹²⁵ Second, an absentee

119. 28 U.S.C. §§ 1335, 1397, 2361 (1994); *see also* FED. R. CIV. P. 22 (governing rule interpleader).

120. The Federal Interpleader Act expands federal subject matter jurisdiction by permitting jurisdiction based on minimal diversity among claimants, with an amount in controversy of \$500 or more. *See* 28 U.S.C. § 1335(a) (1994); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967). The statute expands personal jurisdiction by allowing nationwide service of process. *See* 28 U.S.C. § 2361 (1994). Finally, it provides for venue where any claimant resides. *See id.* § 1397.

121. *See, e.g., Cohen v. Republic of the Philippines*, 146 F.R.D. 90, 90-91 (S.D.N.Y. 1993) (involving an interpleader action to determine the ownership of various paintings).

122. The Supreme Court recognized exactly this, in the leading decision on modern interpleader:

We recognize, of course, that our view of interpleader means that it cannot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort. But interpleader was never intended to perform such a function, to be an all-purpose "bill of peace." . . . None of the legislative and academic sponsors of a modern federal interpleader device viewed their accomplishment as a "bill of peace," capable of sweeping dozens of lawsuits out of the various state and federal courts in which they were brought and into a single interpleader proceeding.

State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 535-36 (1967) (footnote omitted).

123. *See, e.g., FED. R. CIV. P. 24* (governing intervention of right and permissive intervention).

124. I use "voluntary" here rather than "permissive" to avoid confusion with Rule 24(b) permissive intervention. "Permissive intervention" refers to intervention that the court may permit or deny as a matter of discretion, as distinguished from "intervention as of right" which the court must allow if the rule's requirements are satisfied. *Compare* FED. R. CIV. P. 24(a) (intervention as of right), *with* FED. R. CIV. P. 24(b) (permissive intervention). Both "intervention as of right" and "permissive intervention" are voluntary in the sense that the absentee is not compelled to intervene, but rather chooses to do so.

125. *See* FED. R. CIV. P. 24(a) ("Upon timely application anyone shall be permitted to intervene . . ."); FED. R. CIV. P. 24(b) ("Upon timely application anyone may be permitted to intervene . . ."); *Martin v. Wilks*, 490 U.S. 755, 763 (1989) ("[T]he drafters cast Rule 24, governing intervention, in permissive terms."). *But see* Civil Rights Act of 1991, 42 U.S.C.

has no right to intervene if the absentee's interests are adequately represented by a party to the action.¹²⁶ In sum, joinder and intervention mechanisms leave many related claims formally unaggregated.

2. *Class Action.* The extreme aggregation mechanism of class action represents both the most promising device for achieving a truly unified handling of complex litigation—and the most troubling. Because it constitutes representative litigation, class action can pull together vast numbers of claims for decisive, one-fell-swoop resolution. In the recent litigation concerning sales practices by Prudential Insurance Company, for example, the claims of eight million insurance policy holders were settled as a federal class action.¹²⁷

Class certification, however, has been rejected in numerous cases, most significantly in a string of recent mass products liability cases. Although several years ago class certifications in such cases appeared to be trending upwards,¹²⁸ that trend has been squelched for the time being by a number of appellate decertifications,¹²⁹ including the Supreme Court's decisions in *Amchem Products v. Windsor*¹³⁰ and *Ortiz v. Fibreboard Corp.*¹³¹ Class actions have fared better outside of

§ 2000e-2(n)(1) (1994) (creating a form of mandatory intervention in Title VII employment discrimination cases by providing that absentees may be bound by a judgment if they had actual notice and an opportunity to intervene); Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingerin' Ghost of Martin v. Wilks*, 57 BROOK. L. REV. 995, 1031-47 (1992) (discussing the implications of the statute).

126. See FED. R. CIV. P. 24(a).

127. See *In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283, 309 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

128. See, e.g., *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1021 (5th Cir. 1992) (upholding class certification in an oil refinery explosion case); *In re A.H. Robins Co.*, 880 F.2d 709, 710 (4th Cir. 1989) (upholding class certification in a Dalkon Shield case); see also Paul D. Rheingold, *Tort Class Actions: What They Can and Cannot Achieve*, TRIAL, Feb. 1990, at 63 ("[T]he trend in the courts seems toward the use of mandatory classes in tort actions as a means of disposing of mass litigation areas that threaten to clog the courts.").

129. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (decertifying a class in a tobacco action); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (decertifying a class in a penile implants action); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 779 (3d Cir. 1995) (decertifying a class in an action regarding pickup trucks); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (decertifying a class in an action regarding HIV-tainted blood).

130. 521 U.S. 591, 597 (1997) (decertifying a settlement class in an asbestos action under Rule 23(b)(3)).

131. 527 U.S. 815, 830 (1999) (decertifying a settlement class in an asbestos action under Rule 23(b)(1)(B)). As I have discussed elsewhere, the Supreme Court's decisions in *Amchem*

the mass tort arena. They have proved effective for aggregating and resolving certain claims involving securities law violations,¹³² consumer fraud,¹³³ and civil rights.¹³⁴ In class actions seeking primarily money damages, class members may opt out of the class.¹³⁵ Thus, even if a class action proponent succeeds in persuading a court to grant class certification, opt-outs may render the formal aggregation incomplete.

Class action's major shortcoming as an aggregation mechanism—the refusal of courts to certify classes without a proper showing of Rule 23's prerequisites—follows naturally from class action's inherent aggressiveness. A class action can achieve unified handling of related claims because it aggressively binds absentees to the judgment. Appropriately, courts look to protect the interests of absent class members. The nature of class actions as representative litigation—the very attribute that makes class actions so effective for achieving

and *Ortiz* do not rule out the use of class actions for mass tort cases, although they may render class certification difficult in the most sprawling cases. See Erichson, *supra* note 40, at 1997-2000 (addressing *Amchem*); Howard M. Erichson, *Taking a Closer Look: Justices Reaffirm Need for Judicial Scrutiny of Mass Tort Settlement Class Actions*, LEGAL TIMES, Aug. 16, 1999, at 18 (addressing *Amchem* and *Ortiz*).

132. See *In re Foundation for New Era Philanthropy Litig.*, 175 F.R.D. 202, 207 (E.D. Pa. 1997); see also *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'") (quoting *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970)). But see Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) (burdening securities class actions with statutory hurdles and limitations).

133. See *In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283, 328 (3d Cir. 1998) (approving a settlement of a class action involving claims of deceptive insurance sales practices), *cert. denied*, 525 U.S. 1114 (1999); *Elkins v. Equitable Life Ins.*, No. CivA 96-296-Civ-T-17B, 1998 WL 133741, at *33 (M.D. Fla. Jan. 27, 1998) (same). In *Amchem Products v. Windsor*, 521 U.S. 591 (1997), the Supreme Court found that the asbestos settlement class lacked predominance as required by Rule 23(b)(3), but noted that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id.* at 625. The Third Circuit, in upholding class certification in the Prudential Insurance litigation, distinguished *Amchem* as a mass tort case in which predominance was not established: "This case, involving a common scheme to defraud millions of life insurance policy holders, falls within that category" of cases in which predominance is satisfied. *Prudential*, 148 F.3d at 314.

134. See, e.g., *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir.) (concerning employment discrimination claims under Title VII), *cert. denied*, 525 U.S. 1033 (1998); *Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 191 (W.D. Tex. 1998) (concerning claims for public transportation access under the Americans with Disabilities Act).

135. See FED. R. CIV. P. 23(c) (requiring that class members be notified of their right to exclude themselves from a class action under Rule 23(b)(3)); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that the opt-out right was constitutionally required under the Due Process Clause).

aggregation—renders their fairness suspect in many cases, and necessitates the vigilant attention of courts.¹³⁶

B. Consolidated Handling: Consolidation and Multidistrict Litigation Transfer

Consolidation of related cases and multidistrict transfer of cases to a single federal district for pretrial handling both offer formal mechanisms that allow courts to handle related actions together. Unlike joinder and class action, however, neither consolidation nor multidistrict litigation (MDL) merges the claims into a single action. Thus, while consolidation and MDL reasonably can be viewed as formal aggregation mechanisms, they do not achieve the true aggregation of joinder or class action.¹³⁷

1. *Consolidation.* Even if claims are filed originally as separate lawsuits, they can be consolidated for aggregated handling.¹³⁸

136. See *Ortiz*, 527 U.S. 815; *Amchem*, 521 U.S. 591; *Phillips Petroleum*, 472 U.S. 797; *Hansberry v. Lee*, 311 U.S. 32 (1940). Settlement class actions—also called “settlement-only” class actions—are a breed of class actions with great potential for achieving global resolution of liability, but with equally great risks of collusion and unfairness. In a settlement class action, the parties reach a negotiated settlement before seeking class certification and then move jointly for class certification conditioned on approval of the settlement. I have discussed elsewhere the use of settlement class actions and the need for vigilant court supervision in such cases. See *Erichson*, *supra* note 40, at 1995-2005. It suffices to note here that a settlement class action cannot occur without the negotiated agreement of the parties, and that even when the parties reach agreement, courts often reject settlement class actions. See *Ortiz*, 525 U.S. at 864 (rejecting an asbestos settlement class action under Rule 23(b)(1)(B)); *Amchem*, 521 U.S. at 625 (rejecting an asbestos settlement class action under Rule 23(b)(3)); *Walker v. Liggett*, 175 F.R.D. 226, 232 (S.D. W. Va. 1997) (rejecting a tobacco settlement class action).

137. Cf. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918-19 (1998) (distinguishing between the “entity model” of class actions and the “aggregation model” of joinder devices).

138. See FED. R. CIV. P. 42(a). Consolidation under Rule 42 does not make the two actions one. As the Supreme Court explained in language that predated Rule 42 but continues to be widely quoted as authoritative, “consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933); see also, e.g., *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 412 (11th Cir. 1998) (quoting *Johnson*). Thus, although consolidated actions may be tried together, each action requires the entry of a separate judgment. See *WRIGHT ET AL.*, *supra* note 109, § 2382. This Article treats consolidation as a type of formal aggregation, because consolidation involves formal judicial recognition and imposition of unified handling of the actions, in contrast to informal aggregation, where lawyers achieve a unified or coordinated handling of the actions independent of any formal judicial action. As a practical matter, although a party to a consolidated action is not made a party to the other action, the outcome of any consolidated trial or dispositive motion has the effect of binding each of the parties to the

Consolidation, however, is limited to cases pending in the same court. A federal court may transfer an action to a district where related litigation is pending to permit consolidation,¹³⁹ but consolidation often remains impossible for actions pending in different courts.¹⁴⁰ Moreover, a state court action cannot be consolidated with a federal court action unless the state court action is first removed to federal court, which in many cases cannot be accomplished.¹⁴¹ Due to these restrictions, consolidation has limited utility as a method of aggregating dispersed cases. Nevertheless, under the right circumstances consolidation can aggregate massive litigation effectively, especially when used in conjunction with joinder, venue transfer, and removal.¹⁴²

2. *Multidistrict Litigation.* Federal MDL has been used effectively in many massive multi-party litigations.¹⁴³ The MDL

consolidated actions. Nevertheless, it is worth keeping in mind the distinction between the total formal aggregation of joinder and class actions, in which the litigants are formally parties to a single action, and the non-total formal aggregation of consolidation or MDL, in which the litigants are not formally parties to a single action.

139. See 28 U.S.C. § 1404(a) (1994) (permitting transfer to another district); *id.* § 1404(b) (permitting transfer to another division within a district); *Ginsey Indus., Inc. v. I.T.K. Plastics, Inc.*, 545 F. Supp. 78, 80 (E.D. Pa. 1982) (transferring an action to the District of Massachusetts to permit consolidation with a related action pending there); see also *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960) (“To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.”).

140. Venue transfer depends on the court’s discretion; transfer is unlikely when each plaintiff files in his or her home state. See *Pava v. Drom Int’l, Inc.*, 8 F. Supp. 2d 1062, 1064-65 (N.D. Ill. 1998) (holding that where an Illinois resident brought an action in his home forum, that choice “weighs heavily against transfer”); *Cerasoli v. Xomed, Inc.*, 952 F. Supp. 152, 154-55 (W.D.N.Y. 1997) (holding that the importance of the plaintiff’s choice of forum “is heightened when the plaintiff resides in his chosen forum”).

141. See 28 U.S.C. § 1441(a) (1994) (providing that an action is removable only if there is original federal subject matter jurisdiction); *id.* § 1441(b) (providing that an action is removable on the basis of diversity of citizenship only if no defendant is a citizen of the state in which the suit was filed); *Jolmson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990) (holding that the removal procedure statute, 28 U.S.C. § 1446, allows removal only if all non-nominal defendants agree to removal).

142. In the DBCP pesticide litigation, for example, the claims of over 10,000 plaintiffs were addressed by a single federal judge. See *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1335-40 (S.D. Tex. 1995). The plaintiffs had filed their claims in seven state court lawsuits in five different Texas counties. The lawsuits ranged in size from a single plaintiff to thousands of plaintiffs suing together as a matter of permissive joinder. The defendants removed the cases to federal district courts in multiple districts and divisions. See *id.* Eventually, the cases were consolidated, transferred, and further consolidated until all of the pending claims were before a single judge in the Southern District of Texas, Houston Division. See *id.*

143. See Sara D. Schotland, *Multidistrict Litigation Presents Litigators with Range of Strategy*

statute allows the Judicial Panel on Multidistrict Litigation to transfer related cases to a single federal district court for consolidated pretrial proceedings.¹⁴⁴ In cases involving mass disasters, products liability, antitrust, securities, and other areas of the law, MDL transfer has pulled together anywhere from dozens to thousands of federal lawsuits for consolidated handling.¹⁴⁵

MDL, however, has several important limitations. First, MDL applies only to pretrial proceedings.¹⁴⁶ The Supreme Court reemphasized this limitation in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,¹⁴⁷ holding that an MDL transferee court may not transfer a case to itself for trial, rather than remanding the case to the original transferor court.¹⁴⁸ Thus, while many cases are resolved within MDL by summary judgment or settlement, MDL does not provide for a formally aggregated *trial*.

Second, MDL reaches only federal court cases.¹⁴⁹ Inasmuch as multi-plaintiff litigation often involves cases filed in state court rather than, or in addition to, federal court, and because many of the state court cases are not removable to federal court or simply are not removed, MDL cannot achieve full formal aggregation of most large-scale multi-suit litigation. In the diet drugs products liability litigation,

Choices, 6 INSIDE LITIG., Feb. 1992, at 22; AMERICAN LAW INSTITUTE, *supra* note 35, at 28-31 (addressing the effectiveness of § 1407 transfer for pretrial proceedings); Trangsrud, *supra* note 63, at 803-04 (discussing the use of MDL in mass litigation).

144. See 28 U.S.C. § 1407 (1994).

145. See *In re Air Crash Off Long Island, New York*, on July 17, 1996, 965 F. Supp. 5, 6-7 (S.D.N.Y. 1997) (consolidating 25 cases resulting from the crash of TWA Flight 800); *In re NASDAQ Mkt. Makers Antitrust Litig.*, 894 F. Supp. 703, 706 (S.D.N.Y. 1996) (consolidating more than two dozen antitrust complaints); *In re Asbestos Prods. Liab. Litig.*, Nos. 875, C-92-3137-DLJ, C-92-2930-DLJ, C-92-2929-DLJ, 1993 WL 463301, at *1 (J.P.M.L. Nov. 2, 1993) (consolidating more than 39,000 asbestos actions); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1098 (J.P.M.L. 1992) (consolidating 78 breast implant cases); *In re American Continental Corp. Lincoln Sav. & Loan Sec. Litig.*, 130 F.R.D. 475, 476 (J.P.M.L. 1990) (consolidating 20 securities cases); *In re A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F. Supp. 540, 541 (J.P.M.L. 1975) (consolidating 54 Dalkon Shield cases).

146. See 28 U.S.C. § 1407(a) (1994) (permitting MDL transfer "for coordinated or consolidated pretrial proceedings," and providing that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated").

147. 523 U.S. 26 (1998).

148. See *id.* at 40. A bill has been introduced in Congress that would overrule *Lexecon* on this point and amend § 1407 to allow an MDL transferee court to transfer actions to itself for trial "in the interest of justice and for the convenience of the parties and witnesses." H.R. 1852, 106th Cong. (1999).

149. See 28 U.S.C. § 1407(a) (1994) (permitting consolidation of federal civil actions for pretrial proceedings).

for example, over 760 federal actions have been aggregated by MDL transfer to a federal district court in Pennsylvania,¹⁵⁰ but much of the litigation remains in state courts.¹⁵¹

Formal aggregation mechanisms such as joinder, intervention, class action, consolidation, and MDL often allow related claims to be handled on a formally coordinated basis. Each mechanism, however, leaves substantial gaps. Despite the opportunities for formal aggregation of claims, many related claims proceed as formally independent lawsuits, leaving the lawyers to aggregate the claims informally by working together and treating the separate suits as one.

III. INFORMAL AGGREGATION AND THE BOUNDARIES OF THE LAWYER-CLIENT RELATIONSHIP

Informal aggregation practices have filled the void left by formal procedures that do not achieve full aggregation of related claims. This raises important questions about, to borrow Robert Bone's phrase, "mapping the boundaries of a dispute."¹⁵² If separate lawsuits are treated by the participating lawyers as a single litigation, should the legal system recognize that the essential dispute is not the individual lawsuit but rather the wider litigation?

This question incorporates two related but distinct aspects. First, what are the boundaries of the lawyer-client relationship? By coordinating with other lawyers, does a lawyer forge some sort of lawyer-client relationship with those other lawyers' clients, and thereby take on ethical obligations to those clients? I address this question here. Second, what are the boundaries of the dispute

150. See *Judge Bechtel Grants AHP's Request to Dismiss Class Action Allegations*, MEALEY'S LITIG. REP.: FEN-PHEN/REDUC, Mar. 19, 1999, at 29 (citing Conditional Transfer Order, *In re Diet Drugs Prod. Liab. Litig.* (E.D. Pa. Jan. 20, 1999) (No. MDL 1203)); see also Verilaw, *The MDL 1203 Web Site*, at <http://www.fenphen.verilaw.com> (last visited Aug. 28, 2000) (on file with the *Duke Law Journal*).

151. See Rheingold et al., *supra* note 21, at C28-29 ("For the first time in the history of mass tort cases, state courts have been playing a significant, if not dominant, role in their organization and operation.").

152. Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 1 (1989). In terms of Professor Bone's historical taxonomy of normative views about lawsuit structure, I suppose my analysis—defining the boundaries of a dispute in part by examining the actual litigation conduct of lawyers—would fall within the "pragmatic view," which came into dominance between 1910 and 1938, rather than either the more formalistic "rights-centered view" or "right-remedy view" or the emerging postrealist view. See *id.* at 79 (describing early "pragmatic view" reformers as "analyz[ing] procedural problems by evaluating practical consequences, including institutional and broader social effects as well as consequences for the individual parties to the suit").

resolved by a judgment? In other words, does a judgment rendered in one action carry any binding effect, as a matter of claim preclusion or issue preclusion, in lawsuits that were informally aggregated? Can a nonparty to an action be bound by the judgment on the grounds of informal aggregation? That question I address in Part IV.

The ethical implications of lawyer coordination warrant much fuller exploration than I offer here. For purposes of this discussion of informal aggregation, I will try to highlight some of the wide-ranging ethical dilemmas presented by lawyer coordination, demonstrate the inherent inadequacy of ethical protections for clients in informally aggregated litigation, and suggest ways to enhance client protection through legal doctrine or private ordering. The overarching question is this: If L_x and L_y , lawyers for clients X and Y respectively, work together as part of a group effort, does L_x thereby form some sort of lawyer-client relationship with client Y, or otherwise take on ethical or fiduciary obligations to Y? Despite occasional language suggesting such a relationship,¹⁵³ most authorities expressly reject the idea that group effort forges a new attorney-client relationship.¹⁵⁴ Nevertheless, duties grounded in contract and agency law impose obligations on coordinating lawyers, and lawyers and judges can enhance client protection by making these duties explicit, rather than relying on implicit understandings or assumptions of interest alignment.

Regarding the ethics of lawyer coordination, at least four aspects deserve consideration: confidentiality, loyalty, conflicts of interest, and malpractice.¹⁵⁵ As to each aspect, clients in informally aggregated litigation, though dependent upon the coordinating lawyers, lack

153. See, e.g., *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (agreeing with the defendants' argument that "in a joint defense of a conspiracy charge, the counsel of each defendant is, in effect, the counsel of all for purposes of invoking the attorney-client privilege"); *Ageloff v. Noranda, Inc.*, 936 F. Supp. 72, 76 (D.R.I. 1996) ("[A]n attorney who serves his or her client's codefendant for a limited purpose becomes the codefendant's attorney for that purpose."); *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 841-42 (1871) (noting that, in joint defense meetings among conspiracy defendants and their separate lawyers, "the counsel of each was in effect the counsel of all").

154. See, e.g., Association of the Bar of the City of New York, *supra* note 97, at 116 ("[T]he Committee concludes that, unless otherwise expressly stated to the contrary, a joint defense agreement does not create an attorney-client relationship among all participants.").

155. This Article considers the duties owed by a coordinating lawyer to the clients of the other lawyers. Another question worth asking is whether a coordinating lawyer may be vicariously responsible for the unethical conduct or negligent performance of the other lawyers in the group. See generally Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 762-64 (1988) (discussing vicarious responsibility for the acts of team lawyers).

some of the ethical protections they would have if the claims were aggregated formally.

A. Confidentiality

If there is a single critical component to counsel coordination, it is the sharing of information.¹⁵⁶ Lawyers share factual information, legal research, and litigation strategies. The lawyers and their clients, of course, consider much of this information confidential. Defense counsel share information with each other that they would never share with plaintiffs, and plaintiffs' counsel likewise share information with each other that they would never share with defendants.¹⁵⁷

Coordinating lawyers take care to protect the confidentiality of their shared information. Plaintiffs' litigation groups have gone to great lengths to protect information from defendants¹⁵⁸ and to keep their meetings secret.¹⁵⁹ Joint defense agreements typically require participants to agree to keep shared information confidential.¹⁶⁰ Even

156. See *supra* notes 10-15, 85-86 and accompanying text.

157. As long as the client consents to the sharing of such information with aligned parties, such arrangements do not themselves violate the lawyer's ethical duty of confidentiality. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995).

158. The ATLA Exchange web page states, in its introductory paragraph, "This information is not available to defense lawyers." *ATLA Exchange*, at <http://exchange.atla.org> (last visited Aug. 29, 2000) (on file with the *Duke Law Journal*). The "Terms and Conditions of Use" provide, in pertinent part:

These materials are confidential trade secrets of the ATLA Exchange prepared in anticipation of litigation and are intended for the exclusive use of ATLA member lawyers representing plaintiffs in personal injury or criminal defense actions. Materials may not be furnished to a defendant, defense interest, criminal prosecutor, or any other person not assisting in a case. Exchange materials may not be resold under any circumstance. If the materials are requested during discovery, we recommend asserting attorney-client privilege as to the inquirers list and work product protection as to the remainder of the materials.

Id.; see also *supra* notes 71-73 and accompanying text (discussing plaintiffs' resistance to defendants' discovery requests concerning shared information).

159. To protect meetings from defense infiltrators, plaintiffs' groups sometimes make it difficult for outsiders to locate the meeting or to get inside. See Rheingold, *supra* note 9, at 4-5. For a meeting of plaintiffs' lawyers in the swine flu vaccine litigation, known members of the plaintiffs' litigation group were mailed a form on odd-colored paper, and returned that form in order to receive a ticket on a different odd-colored paper. See *id.* at 5. A police officer controlled admission at the event. See *id.* "In addition, the location of strategy meetings sometimes is kept 'so secretive that the people who are supposed to be there don't know where it is going to be' until the last minute . . ." Ranii, *supra* note 9 (quoting plaintiffs' lawyer Jonathan T. Zackey).

160. See *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 581 (9th Cir. 1987) (describing a joint defense agreement in a shareholder derivative suit providing that the defendants who settled or were dismissed must maintain the confidentiality of the joint defense information);

in the absence of a written confidentiality provision, coordinating attorneys expect their shared information to remain confidential within the group, given the nature of the communications.¹⁶¹

Do coordinating counsel owe an ethical obligation not to reveal the confidences of the other lawyers' clients? From a number of angles, both legal and prudential, it is clear that coordinating counsel must maintain the secrecy of the group's shared information. No doubt, most such information remains confidential, as lawyers take seriously their shared interest in preventing outside access to sensitive information. Yet most authorities stop short of identifying any *ethical* duty of confidentiality running from a coordinating lawyer to another lawyer's client, relying instead on the lawyer's ethical duty to her own client, or on contractual or agency-based duties owed to the other lawyer or client.

One indicator that coordinating lawyers consider themselves bound to keep shared information confidential is their treatment of the attorney-client privilege. If coordinating lawyers believe their communications are privileged—a point on which they insist and on which many courts agree—then arguably they have a corresponding duty to maintain the confidentiality of those communications. The attorney-client privilege is a matter of the law of evidence, unlike the ethical duty of confidentiality which represents a significantly narrower professional duty owed by a lawyer to a client.¹⁶² Thus, much

Daniel, *supra* note 81:

Typically, joint defense agreements [in patent infringement litigation] require signatories to promise to keep information exchanged within the group confidential. Thus, if it appears that a defendant's proposed settlement agreement would breach this provision, the members of the group would have a legitimate interest—which which would not implicate the antitrust laws—in insisting that confidential information not be disclosed to the patentee.

161. Cf. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 98-411 (1998) (stating that a confidentiality agreement in lawyer-to-lawyer consultation can be inferred where "the information imparted may be of such a nature that a reasonable lawyer would know that confidentiality is assumed and expected"). Apparently lawyers have not always had expectations of confidentiality in joint efforts, nor are lawyer expectations uniform. See Note, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J.L. & SOC. PROBS. 179, 181 (1972) (reporting survey findings that "[a]lthough some attorneys believe that all joint conferences are privileged, others assume that any statement made at a joint conference is potentially subject to discovery"); Note, *Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information*, 63 YALE L.J. 1030, 1030 (1954) ("Lawyers may hesitate to pool information freely... fearing that it might cause loss of immunity for material ordinarily privileged from either evidentiary use or pretrial discovery.").

162. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995) (describing a lawyer's ethical duty of confidentiality).

information is protected by the duty of confidentiality—that is, an attorney is ethically forbidden to reveal the information voluntarily—even though the same information is not covered by the attorney-client privilege.¹⁶³ If information is covered by the privilege, however, then generally the information should be subject to the broader ethical duty of confidentiality.¹⁶⁴ Without an expectation of confidentiality, the attorney-client privilege would fail by definition.¹⁶⁵ Thus, if communications within the coordinating counsel group are protected by the attorney-client privilege, a strong argument follows that the lawyers in the group owe a duty to maintain confidentiality.

A number of courts have held that communications among counsel for aligned parties are privileged.¹⁶⁶ Likewise, and perhaps more importantly, courts have held that if a lawyer-client communication is otherwise privileged, the lawyer does not waive that privilege by sharing the communication with the aligned group.¹⁶⁷

163. For example, if information is related to the representation of a client but not acquired by an attorney-client communication, it generally is not considered privileged as an evidentiary matter, but is nonetheless confidential as an ethical matter. Likewise, the presence of unnecessary third parties during an attorney-client communication may waive the privilege but does not negate the duty of confidentiality. *See* *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266 (Tex. App. 1991) (holding that lawyers breached their fiduciary duty by revealing confidential information “regardless of whether from an evidentiary standpoint [due to the presence of unnecessary third parties] the privilege attached”).

164. *See* STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 23 (5th ed. 1998) (“Much information that is ethically protected will not be privileged. On the other hand, virtually all information considered privileged under the rules of evidence will also be ethically protected.”).

165. *See In re Grand Jury Testimony of Attorney X*, 621 F. Supp. 590, 593 (E.D.N.Y. 1985) (denying attorney-client privilege protection to a non-confidential communication shared by attorneys, as “[t]he addition of another attorney to the chain of communicators does not change the non-confidential nature of the information transmitted”); 8 JOHN HENRY WIGMORE, *EVIDENCE* § 2292 (McNaughton rev. ed. 1961) (defining attorney-client privilege to require that the communication be “made in confidence”).

166. *See Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir. 1985) (protecting communications between a defendant and another defendant’s counsel made to advance a common defense strategy); *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685-86 (S.D. Cal. 1996) (granting work product protection for documents shared by a plaintiff’s attorney with government lawyers); *Schlaecher v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (allowing privileged communications between plaintiffs’ counsel handling separate lawsuits against the same defendant); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (allowing privileged communications among aligned defendants and counsel).

167. *See United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979) (stating that the criminal defendant did not waive the privilege by sharing confidential information with the codefendant’s attorney); *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 435 (Bankr. S.D.N.Y. 1997) (describing the common interest doctrine as “an

The law in this area is far from clear, however, and courts have not defined clearly whether the doctrine functions as an extension of the privilege to common interest arrangements, or as an exception to waiver of the privilege.¹⁶⁸ Despite the lack of definition, many courts appear inclined to protect shared communications within an aligned group. Under a doctrine variously called the "common interest doctrine,"¹⁶⁹ the "allied lawyer privilege,"¹⁷⁰ the "joint defense privilege,"¹⁷¹ and endless other names,¹⁷² communications within a coordinating group of aligned parties and lawyers may receive the protection of the attorney-client privilege. The American Law

exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party"); *In re LTV Sec. Litig.*, 89 F.R.D. at 604 (holding that the privilege was not waived by sharing with aligned defendants and counsel).

In the Woburn contaminated water litigation, chronicled in *A Civil Action*, counsel for defendant W.R. Grace Company made precisely this argument concerning a communication shared in confidence by counsel for codefendant Beatrice Foods:

The judge looked at Cheeseman. "Where's the privilege supposed to be?"

Cheeseman stood to explain. "There was a communication from Beatrice Foods' client to their attorney, which was then communicated to me."

"Well, then," said the judge, "the confidentiality of that is destroyed, isn't it?"

"I think not," said Cheeseman.

"Why not?"

"Because we're engaged jointly in the defense of an action."

JONATHAN HARR, *A CIVIL ACTION* 112-13 (1995).

168. See James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 644-45 (1997).

169. See *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1391 (Fed. Cir. 1996); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1365 (D.D.C. 1986), *aff'd*, 944 F.2d 940 (D.C. Cir. 1991).

170. See 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE: EVIDENCE* § 5493 (1986 & Supp. 2000).

171. See *United States v. Hsia*, No. Cr. 98-0057 (PLF), 1998 WL 634646, at *1 (D.D.C. Sept. 10, 1998). The phrase "joint defense privilege," although sometimes used interchangeably with the common interest doctrine, applies more aptly to communications among a lawyer and two or more defense clients jointly represented by that lawyer. See *Domie Petroleum Ltd. v. Employers Mut. Liab. Ins. Co.*, 131 F.R.D. 63, 66 (D.N.J. 1990); see also 24 WRIGHT & GRAHAM, *supra* note 170, § 5493, at 121 & n.91 (Supp. 2000) (suggesting that the "allied lawyer doctrine" applies when parties with separate lawyers consult together, that the "joint client doctrine" applies when two clients share the same lawyer, and that the "joint defense privilege" mangles the two concepts).

172. See, e.g., *Government of the Virgin Islands v. Joseph*, 685 F.2d 857, 862 (3d Cir. 1982) ("common purpose theory"); *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 478 (S.D. Cal. 1997) ("joint prosecution privilege"); *Griffith v. Davis*, 161 F.R.D. 687, 693 (C.D. Cal. 1995) ("joint client doctrine"); *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. Ct. App. 1987) ("pooled information' exception").

Institute's Restatement of the Law Governing Lawyers includes a common interest privilege provision,¹⁷³ as did the 1974 proposed Federal Rules of Evidence.¹⁷⁴ Of great importance to participants in informally aggregated litigation, the common interest privilege need not be limited to aligned parties within a single lawsuit, but may extend to communications with "friendly litigants in related cases or to others with friendly interests."¹⁷⁵ The law in this area is far from clear, however, and courts rarely define the doctrine with precision.

To facilitate counsel coordination, some judges rule in advance that shared communications remain privileged. One MDL judge included the following provision in his first order in the litigation:

The Court recognizes that cooperation and coordination by and among plaintiffs' counsel and by and among defendants' counsel are essential for the orderly and expeditious resolution of this litigation. The communication of information among and between plaintiffs' counsel and among and between defendants' counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorneys' work product.¹⁷⁶

173. Section 126, "Common-Interest Arrangement," states in pertinent part:

If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126(1) (Proposed Final Draft No. 1, 1996); *see also id.* cmt. c ("Communications of several commonly interested clients remain confidential against the rest of the world, no matter how many clients are involved.").

174. Proposed Federal Rule of Evidence 503 included the following provision:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, . . . (3) by him or his lawyer to a lawyer representing another in a matter of common interest

MODEL RULES OF EVID. Rule 503(b) (1973). The detailed privilege provisions of the proposed evidence rules were scrapped, due to concerns about the proper scope of state and federal law governing privileges. *See* S. REP. NO. 93-1277, at 7052-55 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7053.

175. *Western Fuels Ass'n v. Burlington N. R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 cmt. c (Proposed Final Draft No. 1, 1996) (stating that the common interest privilege applies even in non-litigated matters).

176. *In re L-tryptophan Litig.*, MDL No. 865, Order No. 1, at 9-10 (D.S.C. Feb. 25, 1991) (on file with author); *see also* M.C.L.3d, *supra* note 9, § 20.222 ("Communication among the various counsel on one side and their respective clients should not be treated as waiving work-product protection or the attorney-client privilege, and a specific court order on the point may be helpful.").

The judge understood that the privilege was necessary for achieving "cooperation and coordination" among counsel on each side, and that such coordination, in turn, was necessary for achieving an "orderly and expeditious resolution" of the many related lawsuits involved in the litigation.

If shared information is privileged, who "owns" the privilege? If the privilege is owned by all of the litigants in the coordinating group, may a single litigant waive it?¹⁷⁷ Litigants' interests are bound to diverge, in some cases after their lawyers share sensitive information.¹⁷⁸ Suppose L_x and L_y , lawyers for clients X and Y respectively, have been working together and sharing information with a clear understanding that the information will remain confidential. May L_y seek an advantageous settlement with the opposing party by offering the opponent information about X's strategy? As a zealous advocate on behalf of Y, is L_y not only permitted, but ethically obligated to do so, assuming Y is prepared to waive the privilege as to that information? One court, in a case involving communications among counsel representing several defendant railroads in separate but related quiet title actions, reasoned that waiver should require unanimity "to assure joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally

177. The Restatement would give each member of the group standing to invoke the privilege, but would allow waiver of the privilege only by the one who made the communication. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126(1) (Proposed Final Draft No. 1, 1996) ("Any such client [in a common interest arrangement] may invoke the privilege, unless it has been waived by the client who made the communication."). The Restatement comments note:

Any member of a common-interest arrangement may invoke the privilege against third persons, even if the communication in question was not originally made by or addressed to the objecting member. In the absence of an agreement to the contrary, any member may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication.

Id. cmt. g.

178. See Rex Bossert, *A Splintered Privilege*, NAT'L L.J., Apr. 7, 1997, at A1 (discussing the Liggett Group's withdrawal from the tobacco industry's joint defense, and quoting an R.J. Reynolds attorney's concerns about possible disclosures from joint defense meetings); Christopher M. Jaarda, Note, *CERCLA the Wagons, Our Attorney Just Switched Sides and Now Fights for Apache*: GTE North Inc. v. Apache Products Co., 8 VILL. ENVTL. L.J. 599, 600 (1997) ("Parties who initially have an interest in sharing information may later have divergent interests as liability is assessed and apportioned.").

waive the privileges of all participants, either purposefully in an effort to exonerate himself, or inadvertently."¹⁷⁹

With the common interest privilege, shared confidential communications enjoy some security, yet legal authorities do not, as a general matter, assert that a lawyer owes an ethical duty of confidentiality to the clients of coordinating lawyers.¹⁸⁰ Formal

179. *Western Fuels*, 102 F.R.D. at 203 (citations omitted). More precisely, the court held on this basis that "waiver of privileges relating to information shared in joint defense communications by one party to such communications will not constitute a waiver by any other party to such communications." *Id.* (citations omitted); see also *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 436 (Bankr. S.D.N.Y. 1997) (noting that the privilege exists until voluntarily waived by all participating parties, or until the filing of an action between the former allied parties).

180. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 213 cmt. g(ii) (Proposed Final Draft No. 1, 1996) (noting that if a lawyer has a duty of non-disclosure, it arises out of another area of law, principally agency, rather than the law governing lawyers); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 395 (1995) (advising that a lawyer representing one party in a joint defense consortium does not have an ethical obligation to other parties except any fiduciary obligations otherwise undertaken).

The position of coordinating lawyers sharing sensitive information somewhat resembles the common situation in which one lawyer consults an outside lawyer about a client matter. In the latter situation, the ABA has opined that although the consulted lawyer does not form an attorney-client relationship by virtue of the consultation alone, the lawyer may acquire a duty of confidentiality under certain circumstances. See generally ABA Comm. on Ethics and Professional Responsibility, Formal Op. 411 (1998). The opinion offers the following guidance concerning the consulted lawyer's duty of confidentiality:

A consulting lawyer may request and obtain the consulted lawyer's express agreement to keep confidential the information disclosed in the consultation. There also may be situations in which an agreement to preserve confidentiality can or should be inferred from the circumstances of the consultation. If the consulting lawyer conditions the consultation on the consulted lawyer's maintaining confidentiality, the consulted lawyer's agreement should be inferred if she goes forward even in the absence of an expression of agreement. Similarly, the information imparted may be of such a nature that a reasonable lawyer would know that confidentiality is assumed and expected.

Id. at 6; see also Va. State Bar Ass'n, Legal Ethics Op. 1642 (June 9, 1995), reprinted in NAT'L REP. ON LEGAL ETHICS & PROF. RESP., VA. OPS. 65, 66 (1996) (opining that lawyer-to-lawyer consultation through an anonymous advice network does not create an attorney-client relationship but may nevertheless give rise to a duty of confidentiality and attendant conflicts of interest). By extension, a lawyer consulted as part of a coordinating group arguably owes a duty to keep shared information confidential, if there was an express or implied confidentiality agreement, or if such an expectation can be inferred from the nature of the communications. As the Virginia ethics opinion put it, "the committee recognizes a duty to keep confidential those consultations that occur outside formal attorney-client relationships which nonetheless create an expectation of confidentiality." *Id.* at 66.

There is, however, an important distinction between lawyer *coordination* and the sort of lawyer *consultation* addressed in ABA Opinion 411 and Virginia Opinion 1642. These ethics opinions deal with a consulted lawyer who has no separate client in the matter. In the coordinating lawyer groups addressed in this Article, each lawyer has her own client, making the analysis much more difficult by creating tension between duties to the original client and duties

Opinion 95-395 presented the American Bar Association with a conflict of interest question that depended upon the duty of confidentiality among coordinating lawyers. The ABA was asked to define the ethical obligations of an insurance defense lawyer who had regularly participated in a joint defense consortium as counsel for an insurance company, and who now has been approached by a client that wants him to file suit against other members of the consortium. Despite assuming that the consortium shared work product and that it is "likely that the consortium involved the sharing of attorney-client confidences," the ABA opined:

A lawyer who has represented one, but only one, of the parties in a joint defense consortium does not thereby acquire an obligation to the other parties to the consortium that poses an ethical bar to the lawyer thereafter taking on a related representation adverse to any of the other parties.¹⁸¹

The ABA instead found the lawyer's confidentiality obligation elsewhere, cautioning that "the lawyer's obligations to the party he represented may present such a bar, and the lawyer will almost certainly have undertaken fiduciary obligations to the other parties that have the same effect."¹⁸²

Thus, the lawyer in Opinion 395 owed a duty of confidentiality to his own client, inasmuch as the information gained in the joint defense consortium constituted "information relating to representation of a client."¹⁸³ That confidentiality obligation, however, could be waived by the lawyer's own client,¹⁸⁴ the possibility of which apparently did not worry the ABA:

If Insurance Company did consent to disclosure, then Lawyer would be freed of the obligation imposed by Rule 1.6(a). As a practical matter, however, it is likely that under the consortium agreement Insurance Company would have undertaken the obligation to have its lawyer preserve such confidences, and so could not give such

to the coordinating lawyers and their clients.

181. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 395 (1995).

182. *Id.*

183. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995).

184. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 395 (1995) (noting that Rule 1.6(a) would prohibit the lawyer from disclosing consortium information "unless his former client consented, after consultation, to such disclosure").

consent without exposing itself to liability to the members of the consortium whose confidences were involved.¹⁸⁵

Of course, the other members of the consortium might not share the ABA's comfort that Insurance Company's liability exposure suffices to protect their confidences. Although on the facts presented, it may appear unlikely that the former client would consent to a disclosure of confidential consortium information, one can imagine other situations in which the interests of the consortium members might diverge. Because interests in confidentiality often do not lend themselves to dollar figures, the promise of money damages may not adequately protect confidentiality. Thus, even if Opinion 395 is correct that the former client would expose itself to liability by consenting to disclosure—a point the opinion does not purport to decide and which, in any event, the ABA is powerless to dictate—consortium members may feel less secure in the confidentiality of their communications than if the consortium lawyers owed each of the clients an ethical duty of confidentiality, enforceable through the disciplinary process. Still, the former client's potential liability exposure to consortium members, combined with the lawyer's confidentiality duty to his own client, offers some measure of protection.

In addition to the lawyer's ethical duty to his own former client, Opinion 395 points out that the lawyer "would almost certainly have a fiduciary obligation to the other members of the consortium He would not, however, owe an ethical obligation to them, for there is simply no provision of the Model Rules imposing such an obligation."¹⁸⁶ Even if the coordinating lawyer owes no ethical duty of confidentiality to the other clients, he nevertheless may owe a duty to the other coordinating lawyers or to their clients under principles of agency.¹⁸⁷ As a matter of agency law, the coordinating lawyer may be

185. *Id.*

186. *Id.* (citations omitted). Similarly, the Fifth Circuit considered a possible conflict of interest amid allegations that confidential information had been exchanged among cooperating defendants, and held that "[i]n such a situation, an attorney who is the recipient of such information breaches his *fiduciary* duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants." *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (emphasis added). Despite phrasing this as a breach of fiduciary duty rather than as a breach of an ethical duty, the court also stated that it agreed with the defendants' argument that "in a joint defense of a conspiracy charge, the counsel of each defendant is, in effect, the counsel of all for the purposes of invoking the attorney-client privilege in order to shield mutually shared confidences." *Id.*

187. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 395 n.3 (1995).

considered a subagent of the other lawyer's client. Specifically, if client X shares confidential information as part of an aligned effort with client Y, then Y may be viewed as X's agent, and Y's lawyer as a subagent with attendant fiduciary duties running to X.¹⁸⁸

Similarly, under contract principles, a lawyer who participates in a common interest agreement with other lawyers, such as a plaintiffs' group or a joint defense agreement, may owe contractual duties to the other lawyers pursuant to the agreement, and thus may be liable for breach of those duties.¹⁸⁹ Alternatively, the contractual duties may run among the clients themselves in the coordinating group, as Opinion 395 assumed.¹⁹⁰ If the duty is merely contractual,¹⁹¹ then arguably the lawyer could take advantage of an efficient breach, betraying other members of the group for the benefit of her client. Such betrayal is unlikely, however, given both the client's and the lawyer's potent prudential interests, including fear of ostracism for breaching an explicit confidentiality agreement among a coordinating group.

Shared communications within a coordinating group, in sum, enjoy confidentiality protection from several angles. Many courts consider such communications privileged as an evidentiary matter. Shared information is protected by a lawyer's duty of confidentiality to his own client. A lawyer may also owe agency or contractual duties of confidentiality to the members of a coordinating group. Finally, coordinating lawyers and clients share powerful prudential interests in maintaining the confidentiality of shared information. However, a coordinating lawyer probably does not owe an ethical duty of confidentiality directly to the other lawyers' clients, and thus probably faces neither the risk of disciplinary sanctions nor the value judgment implicit in ethical commands. Unlike in an ordinary client-lawyer

188. See *id.*; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 213 cmt. g(ii) (Proposed Final Draft No. 1, 1996).

189. Indeed, Professors Curtis and Resnik have referred to "informal or contractual aggregation" to distinguish aggregation based on agreement among parties, lawyers or judges, from aggregation based on legislation or court intervention. Curtis & Resnik, *supra* note 1, at 429. On the increasing tendency of coordinating parties to enter written cooperation agreements, see *supra* note 98.

190. See *supra* note 185 and accompanying text.

191. It is worth noting that the common interest privilege may apply even in the absence of any formal agreement, written or otherwise, which suggests that the confidentiality duty probably is not merely contractual. See *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389-90 (Fed. Cir. 1996) (applying the common interest privilege despite the lack of any explicit agreement); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 cmt. c (Proposed Final Draft No. 1, 1996) ("Exchanging communications may be predicated on an express agreement, but formality is not required.").

relationship, where the ethical duty of confidentiality need not be stated explicitly because it inheres in the nature of the professional relationship, participants in coordinating counsel groups are well advised to protect their clients' information with an explicit confidentiality provision in a written cooperation agreement.

B. Loyalty

Beyond some duty to keep information confidential, do coordinating lawyers owe any loyalties to the clients of the others in the group? The lawyer owes her own clients, among other things, a duty of competence,¹⁹² a duty of diligence,¹⁹³ and a duty to inform and advise.¹⁹⁴ In the canonical language of the Model Code, the lawyer "should represent a client zealously within the bounds of the law."¹⁹⁵ Does she owe similar duties to the other clients? Coordinating lawyers frequently divvy up legal work. If a lawyer does her share of the work incompetently or tardily, has she breached any ethical duties owed to the other parties who were counting on her? If in the course of doing her share of the work, the lawyer learns something that all of the coordinating parties reasonably would want to know, has she any ethical obligation to inform them, or does she owe that duty only to her own client?

Judge Jack Weinstein, addressing the ethical duty to communicate with clients, has written of the importance of communication between the "national leaders" at the hub of a mass tort plaintiffs' group and the "outlying single practitioners."¹⁹⁶ "It is submitted that those placed in charge of the national litigation have a responsibility to keep these lawyers apprised of developments," he writes.¹⁹⁷ But what is the source of this "responsibility," and what is its scope? Although Judge Weinstein mentions this responsibility in the context of communications through "the Association of Trial Lawyers of America and ad hoc attorney organizations,"¹⁹⁸ which suggests that it may apply to informally aggregated litigation, his examples come largely from the Agent Orange class action and other formally

192. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995).

193. See *id.* Rule 1.3.

194. See *id.* Rule 1.4.

195. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983).

196. WEINSTEIN, *supra* note 7, at 58.

197. *Id.*

198. *Id.*

aggregated cases.¹⁹⁹ Especially in the absence of any formal aggregation mechanism, it remains unclear whether and to what extent coordinating lawyers owe each other and each other's clients a responsibility to inform and advise and, if so, whether this responsibility is an ethical duty, enforceable under the rules of professional conduct.

As a more general matter, if a coordinating lawyer sees an advantageous strategy for her client that would work to the detriment of another coordinating party, does the relationship constrain her from pursuing her client's advantage? Some lawyers accept that joint litigation relationships may impose such constraints. "Depending upon the type and form of agreement, all defendants may be required to consult on and approve of all actions undertaken by individual defendants. Thus, a singular defendant may be constrained from pursuing an advantageous strategy for the sake of the majority," note a pair of products liability defense lawyers.²⁰⁰ Again, however, these constraints arguably flow from contractual or fiduciary duties, and not from ethical duties owed to the coordinating lawyers' clients.²⁰¹

In contrast to the foggy loyalty duties of coordinating counsel in informally aggregated litigation, formal aggregation mechanisms give courts the power to impose clearer responsibilities on counsel. The Manual for Complex Litigation (Third) observes that attorneys in leadership roles "must understand that their responsibilities in the litigation extend beyond the resolution of their own clients' involvement."²⁰² "The functions of lead, liaison, and trial counsel, and

199. See *id.* at 58-60.

200. Slater & Kurien, *supra* note 87, at 12 (footnote omitted); see also Peter N. Sheridan & John J. McGraw, *A Strategy for Defending Multidefendant Lawsuits*, in LITIGATION 427, 429-38 (PLI Litigation Course Handbook Series, 1987) (suggesting that defendants go along with the group strategy, although more out of enlightened self-interest than out of duty).

201. See *supra* notes 186-91 and accompanying text; cf. GILLERS, *supra* note 164, at 267:

[W]hen the two lawyers for each of Jones and Smith confer on a matter of common interest to their clients (or confer with the client of the other lawyer), the communications may be privileged, but Jones's lawyer does not thereby become Smith's lawyer. (Even that could happen on the right facts, as when Smith is encouraged to view Jones's lawyer as her lawyer too. . . .)

(citing *Trinity Ambulance Serv., Inc. v. G. & L. Ambulance Servs., Inc.*, 578 F. Supp. 1280 (D. Conn. 1984)).

202. M.C.L.3d, *supra* note 9, § 20.222; see also *id.* § 23.21 ("[L]ead counsel, members of a trial team, and other attorneys who have accepted responsibilities on behalf of other parties and attorneys should bear in mind that their fiduciary obligations may survive the dismissal of their own clients."). For a sample court order defining the responsibilities of designated counsel in formally aggregated litigation, see *id.* § 41.31.

of each committee,” the Manual advises, “should be stated in either a court order or a separate document drafted by counsel and reviewed and approved by the court. This writing will inform other counsel and parties of the scope of authority conferred on designated counsel and define responsibilities within the group.”²⁰³ The duty to communicate with the other coordinating attorneys, in particular, lends itself to clear statements of responsibility.²⁰⁴ Moreover, in formally aggregated litigation, the court can offer at least some front-end safeguards of attorney competence by controlling the appointment of lawyers as lead counsel and steering committee members.²⁰⁵

Few clients would want their lawyers to owe equal loyalty to all of the clients in a coordinating group. As a New York bar association committee aptly put it: “The notion that, merely because of the desire to engage in such brainstorming, an attorney takes on a duty to zealously represent *each* participant and owes *each* participant the highest duty of loyalty far exceeds what either attorney or the individual participant could reasonably expect.”²⁰⁶ Of course, a lawyer should focus primarily on her duty to her own client, even as she teams up with other lawyers.

The key is to strike a balance between the advantages of counsel coordination and the client’s need for a lawyer with undivided loyalty. The best way to strike that balance is not to impose the full paucity of attorney-client ethical duties on coordinating lawyers. Nor is it to leave such duties unstated, which would render duties so vague as to be largely unenforceable. Rather, the best way to strike the balance is by a considered, written cooperation agreement specifying the duties and relationships among the coordinating clients and lawyers. A written agreement would not provide the inherent ethical protection provided to a lawyer’s original client, nor would it provide the judicial oversight of formally aggregated litigation, but a written agreement

203. *Id.* § 20.222.

204. *See id.* (“Counsel selected for a position of leadership have an obligation to keep the other attorneys in the group advised of the progress of the litigation and consult them about decisions significantly affecting their clients.”).

205. *See id.* § 20.224:

[T]he judge needs to take an active part in making the decision on the appointment of counsel. . . . The court should take the time necessary to make an assessment of the qualifications, functions, organization, and compensation of designated counsel. The court should satisfy itself . . . that the attorneys to be designated are competent for their assignments, that clear and satisfactory guidelines have been established for compensation and reimbursement, and that the arrangements for coordination among counsel are fair, reasonable, and efficient.

206. Association of the Bar of the City of New York, *supra* note 97, at 122.

provides guidance to lawyers and gives participating lawyers and clients an important opportunity to consider what they are getting themselves into.

C. *Conflicts of Interest*

Not only does lawyer coordination present problems of confidentiality and loyalty, it also can give rise to both concurrent and successive conflicts of interest. A concurrent client-client conflict may arise whenever two clients within a coordinating group have materially divergent interests. Initially, such conflicts should be rare inasmuch as parties with divergent interests ought not to be engaged in the kind of close, confidential, coordinated relationship discussed in this Article.²⁰⁷ If a lawyer were to pursue a coordinated relationship notwithstanding such a conflict, however, there would be little or no ethical protection for the client. Unlike with formal aggregation procedures, the court exercises no oversight power to ensnare against conflicts.²⁰⁸ Unless the coordinating lawyer has formed a lawyer-client relationship with the other clients in the group, the usual concurrent client-client conflict of interest rules do not apply.²⁰⁹

More likely, client-client conflicts within a coordinating group may arise during the course of litigation, despite what initially appeared to be aligned interests. Conflicts may be created by aggregate settlements, pitting one plaintiff against another for slices of a fixed pie.²¹⁰ Conflicts may arise as multiple cases approach trial

207. Parties with some divergent interests, of course, may also have interests that are aligned as to some aspect of a dispute, and may coordinate their efforts concerning that aspect. For example, a plaintiff and a defendant may share an interest in establishing the liability of a third-party defendant, and may work together towards that end. *See, e.g.,* *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987) (protecting documents shared by the plaintiff and the third-party plaintiff concerning alleged manufacturing defects by the third-party defendant).

208. *See infra* notes 244-51 and accompanying text (addressing the court's role in protecting against conflicts of interest in class actions, MDL, and consolidated litigation).

209. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(a), 1.7(b) (1995).

210. *See id.* Rule 1.8(g):

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

See also WEINSTEIN, *supra* note 7, at 74-76 (summarizing the ethical challenges raised by aggregate settlements). Paul Rheingold points out the reasons for the rule, which reflect primarily lawyer-client conflicts:

A law firm with a large inventory has some cases referred to it, whereby it has to give up a forwarding fee. Other cases came directly from the client. The more the

dates, if coordinating lawyers and clients cannot agree on which case should be tried first. For issue preclusion strategic advantage, a group of coordinating lawyers generally would prefer to bring the strongest case to trial first.²¹¹ A particular plaintiff, however, may desire her own case to move forward speedily, perhaps due to a need for prompt compensation, or due to a particularized concern about the unavailability of key witnesses with the passage of time.²¹² Conflicts may arise concerning trial strategy, although such conflicts are more likely to arise in formally aggregated matters headed for joint trial than in informally aggregated litigation. In the Bendectin litigation, for example, "the plaintiffs' lawyers in the multidistrict trial were grappling with an 'ethical dilemma' caused by conflicts among their clients because those who had taken certain drugs, or had certain birth defects, might be better or worse off by given strategies at trial."²¹³ Indeed, in that litigation, "some witnesses who would be helpful to plaintiffs with certain birth defects would be harmful to other plaintiffs with other birth defects."²¹⁴

settlements are paid to those who have no forwarder, the more the law firm makes. The law firm will, therefore, be more inclined to favor those clients who came directly to the law firm. Other examples of favoring one client over another include favoring a "squeaky wheel" client, favoring a relative, or favoring a friend of the family.

Rheingold, *supra* note 7, at 396-97.

211. See Erichson, *Interjurisdictional Preclusion*, *supra* note 118, at 950-53.

212. Plaintiff Betty Mekdeci, for example, sparred with her lawyers in the first Bendectin case to go to trial, eventually persuading them but ultimately failing to persuade the jury. A new trial was granted on appeal, but her lawyers wanted to postpone retrial to allow other cases to be tried first, because of difficulties presented by Mekdeci's case that the other cases did not present. Mekdeci refused, and the lawyers unsuccessfully sought to withdraw. See *Mekdeci v. Merrell Nat'l Lab.*, 711 F.2d 1510, 1516 (11th Cir. 1983); Marcus, *supra* note 4, at 236, 250-51. Professor Marcus suggests that the coordinating lawyers owe some duty to each other's clients, or at least that a coordinating lawyer's duty to his own client can be tempered by considerations of the good of the others: "Mekdeci's case provides some reason for feeling that client desires may legitimately be conditioned on the 'greater good' of the overall plaintiff group in some litigations involving multiple claimants." *Id.* at 252-53.

213. Marcus, *supra* note 4, at 239.

214. *Id.* Such client-client conflicts tend to take on an aspect of lawyer-client conflict, as well, when the lawyer is handling multiple related cases. The lawyer's interest in maximizing total return in the litigation may be inconsistent with the interests of a particular client such as Betty Mekdeci. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1995) (concerning the conflict of interest where a lawyer's representation of a client "may be materially limited . . . by the lawyer's own interests"). Some conflicts in coordinated mass litigation are more clearly lawyer-client. A conflict of interest may arise between a lawyer and the clients of the other coordinating lawyers. In the Bendectin litigation, for example, lawyer Stanley Chesley found himself so heavily invested—he had spent about \$1 million out-of-pocket and \$3.3 million in hours—that settlement class action appeared the only sufficiently certain way to recoup his investment. Although many individual clients may have preferred to go to trial,

Successive client-client conflicts, too, may develop from coordinated lawyer efforts.²¹⁵ Two scenarios raise serious concerns. The first involves a former client representation as part of a coordinated group effort, and a subsequent representation adverse to one of the other coordinating parties. The second involves a former client representation, and a subsequent participation in a coordinated group effort adverse to the former client.

May a lawyer accept a representation materially adverse to a former client's cooperating party in a substantially related matter? In other words, if L_x and L_y , representing plaintiffs X and Y respectively, have worked together and shared confidences as part of a coordinating plaintiffs' lawyer group, may L_x later represent a party being sued by Y in a matter in which Y's shared confidential information may prove useful? Or if lawyers representing defendants have worked together and shared confidences in a defense group, may one of the lawyers later represent someone suing one of the other defendants in a related matter? That was precisely the issue raised in ABA Formal Opinion 95-395,²¹⁶ which stated that no *ethical* duty prevented the lawyer from accepting the representation, but that fiduciary obligations based on agency law may accomplish the same thing.²¹⁷

Several cases have held that duties to the coordinating clients may prevent a lawyer from accepting a representation adverse to a party whose confidences the lawyer had gained as part of a coordinated legal effort. The Texas Supreme Court recently upheld the imputed disqualification of a plaintiff's lawyer because another lawyer in the same firm had previously engaged in a joint defense agreement with the plaintiff's current adversary.²¹⁸ In another case,

whether to hold out for a bigger trial verdict, or to have the opportunity to speak to a jury, or to argue publicly the fault of the defendant, Chesley campaigned to win the support of other plaintiffs' lawyers for a settlement class action. See GREEN, *supra* note 5, at 215-16, 252; Marcus, *supra* note 4, at 239.

215. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1995) (governing former client conflicts); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.4.9 (1986) ("Pooled information cases will result in former-client conflict problems.").

216. See *supra* notes 180-88 and accompanying text (discussing Opinion 395 in the context of the duty of confidentiality).

217. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 395 (1995).

218. See *National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 124 (Tex. 1996); see also *GTE North, Inc. v. Apache Prods. Co.*, 914 F. Supp. 1575, 1580-81 (N.D. Ill. 1996) (disqualifying a law firm's representation against a former member of an allied agreement based on a written promise of confidentiality and evidence of harmful knowledge).

the Fifth Circuit held that disqualification of a plaintiff's lawyer would be proper, based on that lawyer's former participation in coordinated defense meetings with the plaintiff's current adversary, if in fact relevant confidential information was exchanged at the defense meetings.²¹⁹ Other cases, however, have rejected such disqualification.²²⁰ To the extent disqualification is based on fiduciary duties drawn from agency law, rather than based on the ethical duties running from a lawyer to a client, there is some question whether disqualification would be imputed to other lawyers within the same firm.²²¹

As a practical matter, the most important conflict of interest questions arising out of lawyer coordination—and perhaps the most difficult questions as well—concern imputed disqualification. In general, if a lawyer would be disqualified from a representation because of a conflict of interest, then that conflict is imputed to her entire firm, thereby disqualifying every other lawyer in the firm.²²² But

219. See *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977). The Fifth Circuit remanded the disqualification motion for findings as to whether relevant confidential information was exchanged in the coordinated defense meetings. See *id.* The court stated:

Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.

Id. On remand, the district court concluded that no confidences were exchanged, and therefore denied the motion for disqualification. See *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, No. 74-1899, 1979 WL 1614, at *1 (E.D. La. Mar. 28, 1979).

220. See *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607-09 (8th Cir. 1977) (rejecting disqualifications for violations of Canons 4, 5, or 9 of the Code of Professional Responsibility); see also *International Paper Co. v. Lloyd Mfg. Co.*, 555 F. Supp. 125, 133, 136 (N.D. Ill. 1982) (acknowledging a possible basis for disqualification based on a joint defense exchange of confidential information, but nevertheless denying disqualification despite substantial cooperation among counsel).

221. Compare *GTE North*, 914 F. Supp. at 1581 (imputing disqualification to the entire firm, applying Rule of Professional Conduct 1.10), and *National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996) (imputing disqualification to the entire firm, reasoning that "[t]he attorney's promise places him in the role of a fiduciary, the same as toward a client"), with *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 213 cmt. g(ii) (proposed Final Draft No. 1, 1996) (commenting that imputation normally does not apply to agency duties, in contrast to duties flowing from the law governing lawyers).

222. See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.10 (1995). In providing that conflicts are to be imputed among "lawyers . . . associated in a firm," Rule 1.10(a) leaves open what constitutes a "firm," and thus does not answer whether conflicts should be imputed within the types of lawyer-coordination networks discussed here. See Thomas D. Morgan, *Conflicts of*

what if a lawyer is working closely with lawyers from *other* firms? If one of the coordinating lawyers is disqualified because of a conflict of interest, must the others be disqualified as well? In particular, if lawyer L_x was privy to confidential information of former client X, may another member of L_x 's coordinating group handle a substantially related matter that is materially adverse to X?

In *Essex Chemical Corp. v. Hartford Accident and Indemnity Co.*,²²³ plaintiff Essex Chemical Corporation (Essex) moved to disqualify counsel for all defendants in a declaratory judgment action for insurance coverage brought by Essex against nine insurers. Previously, Essex had been represented by the law firm of Skadden, Arps, Slate, Meagher & Flom (Skadden) in connection with a hostile takeover bid. During that prior representation, Skadden was privy to confidential information concerning Essex's finances and other matters.²²⁴ When Essex brought its declaratory judgment action, one of the primary insurers, Home Insurance Company (Home), retained Skadden for its defense.²²⁵ All nine defendants entered into a joint defense agreement.²²⁶ When plaintiff's counsel became aware of Skadden's prior representation of Essex, it moved to disqualify not only Skadden, but also the lawyers for the other defendants with whom Skadden had cooperated pursuant to the joint defense agreement.²²⁷ Skadden withdrew from its representation of Home, which was clearly the appropriate move given its conflict of interest.²²⁸ Counsel for the remaining defendants, however, insisted that they

Interest and the New Forms of Professional Associations, 39 S. TEX. L. REV. 215, 222 (1998). The Comment to Rule 1.10 suggests that "firm" includes not only private law firms, but also corporate legal departments and legal services organizations. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt (1995). The Comment also points out that "[w]hether two or more lawyers constitute a firm within this definition can depend on the specific facts." *Id.* Neither the rule nor the Comment sheds much light on the imputed conflict problems presented by informal aggregation.

223. 975 F. Supp. 650 (D.N.J. 1997), *rev'd*, 993 F. Supp. 241 (D.N.J. 1998).

224. See *id.* at 652.

225. See *id.*

226. See *id.* at 652-53. The defendants titled their agreement the "ECC Coverage Litigation Joint Defense and Cost Sharing Agreement." *Id.* at 653.

227. See *id.* at 653-54. Essex's counsel was unaware of the prior Skadden representation until a deposition brought it to light several years after the lawsuit was filed. See *id.* at 653. Defense counsel certified that they were unaware of the representation until Essex brought it to their attention. See *id.* at 653 n.6.

228. See *id.* at 652 n.1; see also N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.9(a)(1) (2001) (concerning successive conflicts of interest).

had no conflict of interest because Essex was Skadden's former client, not theirs.

The magistrate judge decided to disqualify counsel for all of the defendants.²²⁹ Based on the relationship among defense counsel, the magistrate judge presumed that "confidential and privileged information has been shared between all participants to the joint defense agreement, despite defense counsel's certifications to the contrary."²³⁰ With that presumption of shared confidences, the magistrate judge reasoned that all of the coordinating lawyers suffered from the same imputed conflict as Skadden: "Allowing all defense counsel to remain indirectly creates the same risk that the representation by Skadden posed directly, despite the lack of a prior direct attorney-client relationship between Essex and the defense counsel."²³¹ Defense counsel's assertion of the common interest privilege—they had objected to Essex's interrogatories on that ground—was turned against them: "Defendants cannot enjoy the benefits of the privilege without accepting its burdens. In other words, defendants cannot claim that Skadden did not share any confidential information about Essex while maintaining that joint communications are protected by a recognized privilege, and so cannot be inquired into by Essex."²³²

The defendants appealed the magistrate judge's disqualification order to the district court, and the district court reversed.²³³ The court, troubled by the potentially harsh results of "double imputation,"²³⁴ insisted on a painstaking factual analysis before disqualifying

229. *See id.* at 657.

230. *Id.* at 656.

231. *Id.*

232. *Id.* at 657. Additionally, the magistrate judge concluded that disqualification was warranted under New Jersey's appearance of impropriety standard. *See id.* ("By their participation in the Joint Defense Agreement, all of the defense counsel have created a relationship with Skadden such that it placed them in a position to have access to confidences regarding Essex. Such a relationship creates an appearance of impropriety."); *see also* N.J. RULES OF PROFESSIONAL CONDUCT Rules 1.7(c)(2), 1.9(b) (2001) (preserving the appearance of impropriety doctrine for conflicts of interest under New Jersey law).

233. *See* *Essex Chem. Corp. v. Hartford Accident & Indem. Co.*, 993 F. Supp. 241, 255 (D.N.J. 1998).

234. *See id.* at 251-52. By "double imputation" or "imputation-on-imputation," the court was referring to the two steps required for disqualification of the defense firms. Here, the conflict of interest originally belonged to the Skadden lawyers who personally represented Essex in the takeover matter. That conflict was imputed to the entire Skadden firm, including the lawyers representing Home in the Essex case. The conflict was then imputed to the other lawyers with whom the later Skadden lawyers had coordinated. *See id.* at 253.

coordinating attorneys.²³⁵ The court reversed the disqualification and ordered a hearing "to ascertain the material facts surrounding Skadden's participation in the joint defense consortium and to determine to what extent, if any, confidential information which was shared between Essex and Skadden was communicated to other defense counsel."²³⁶ If Essex's confidences were actually conveyed by Skadden to other members of the joint defense group, then the district court would agree that counsel should be disqualified, but the court refused to presume irrebuttably that such confidences had been conveyed.²³⁷

The district court concerned itself with the balance of hardships, taking into account not only Essex's concerns, but also the interest of each defendant not to be deprived of its chosen counsel midway through a litigation.²³⁸ Ultimately, without a clear showing that Essex's confidences had been revealed to the consortium, the district court understandably refused to deny all the coordinating clients their chosen attorneys.²³⁹ Nevertheless, Essex's concerns were hardly frivolous. A former client sees its former law firm meeting, coordinating, strategizing, and presumably sharing confidences with a group of other lawyers who now are aligned against the client. Naturally, the client fears that its own confidential information has been shared with the group, and naturally the client feels betrayed.²⁴⁰

235. See *id.* at 252.

236. *Id.* at 255.

237. See *id.* at 251. In a similar case, *IMC Global, Inc. v. Moffett*, No. CIV.A.16387-NC, 1998 WL 842312 (Del. Ch. Nov. 12, 1998), the Delaware Chancery Court rejected a disqualification motion. Two of the defense attorneys had conflicts of interest based on prior representation, but before they withdrew, they had commenced an allied agreement and exchanged information with the other defense lawyers. See *id.* at *1-2. The plaintiff moved to disqualify the remaining participants. The court, upon defense counsel's disclosure of the specific documents that had been exchanged, concluded that the exchanged information did not warrant disqualification. See *id.* at *3-4.

238. See *Essex Chem.*, 993 F. Supp. at 254-55; see also Thomas F.A. Hetherington, Note, *Confusing Conflicts: National Medical Enterprises, Inc. v. Godbey and the Problem of Disqualification When No Previous Attorney-Client Relationship Exists*, 34 HOUS. L. REV. 909, 930 & n.133 (1997) (criticizing the *Godbey* court for failing to consider the importance of clients' right to select and retain their counsel of choice).

239. See *Essex Chem.*, 993 F. Supp. at 254-55. For a discussion of *Essex Chemical* from the perspective of two defense lawyers highly critical of the magistrate judge's disqualification order, and supportive of the district court's approach, see Slater & Kurien, *supra* note 87, at 13-15.

240. Professor Thomas Morgan has urged that courts consider imputed conflicts of interest by focusing on genuine concerns of loyalty and confidentiality, rather than by trying to define "firm," given the number and variety of modern forms of lawyer associations. See Morgan,

These conflicts of interest do not admit of easy solutions. The conflicts are real. Lawyer coordination, its benefits notwithstanding, can create conflicts that threaten client interests because coordination renders clients dependent upon the work and trustworthiness of multiple lawyers, most of whom the client did not retain. Yet the governing ethical norms provide little guidance.²⁴¹ Without clearer guidance, disqualification based on ad hoc coordination appears likely to remain a rarity,²⁴² and self-monitoring by lawyers appears unlikely to provide clients with the same level of protection that conflicts checks can provide in other representations.²⁴³

Within formally aggregated litigation, by contrast, judges have opportunities to protect against attorney conflicts of interest. For example, members of class actions receive protection from conflicts of interest at three stages. First, a court may refuse to certify a class action based on a conflict of interest between members of the class or based on a conflict between class members and the proposed class

supra note 222, at 243. In the types of situations that I refer to as "informal aggregation," Professor Morgan argues that some conflicts should be imputed among coordinating lawyers:

[I]f the cooperation between the firms is frequent, clients of each might properly be concerned that neither firm would want to offend the other by fighting too hard in the matters in which their clients are opposed. . . . [T]he possibility would be an appropriate issue for the court to consider on a motion to disqualify either or both of the firms.

Id. at 233. Similarly, "in cases where misuse of a present or former client's confidential information is a significant possibility, the fact that firms regularly share information and strategy in prosecution and defense of particular kinds of cases could properly be the basis for disqualification of more than one of the firms." *Id.*

241. See *Essex Chem.*, 993 F. Supp. at 246 (commenting that the law governing imputed disqualification is "decidedly less clear" where a party seeks to disqualify counsel for members of a joint defense consortium, and noting the lack of "any controlling or even persuasive authority directly on point").

242. See Association of the Bar of the City of New York, *supra* note 97:

That neither [*United States v.*] *Anderson*[], 790 F. Supp. 231 (W.D. Wash. 1992)] nor any other reported decision has resulted in the disqualification of an attorney based on participating in a joint defense does not eliminate the chilling effect that the threat of disqualification and the necessity of judicial questioning of participants may have upon a joint defense arrangement.

Id. at 121. See also Joseph J. Ortega & David J. Vendler, *Recent Decision May Jeopardize Joint Defenses*, NAT'L L.J., Dec. 1, 1997, at C6 (observing, in connection with the magistrate judge's disqualification ruling in *Essex Chemical*, that "it is rare—possibly unique—for a court to disqualify joint defense counsel in civil cases because one firm's conflict 'infected' the others") (footnote omitted).

243. In contrast to the uncharted territory of conflicts based on coordinating lawyer groups, conflicts based on a duty to one's own client are guided by comprehensible, if difficult, rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.11 (1995).

counsel.²⁴⁴ Second, during class action litigation, the judge may remove class counsel who fails to represent the class adequately, whether because of a conflict of interest or otherwise.²⁴⁵ Indeed, the lawyer representing the class has an ethical responsibility to request that separate representation be provided to protect the interests of subgroups within the class if divergent interests become apparent during the litigation.²⁴⁶ Third, a court may refuse to approve a class action settlement if the allocation among class members appears unfair.²⁴⁷ Although virtually no class action remains entirely conflict-free, judicial supervision protects against at least the more egregious conflicts. Judge Weinstein, writing of the importance of judicial oversight to safeguard against client-client conflicts of interest in class actions, asserts that "[t]his exercise of court oversight and discretion is . . . the only available adequate substitute for traditional ethical rules."²⁴⁸

244. See FED. R. CIV. P. 23(a)(4) (requiring adequate representation as a prerequisite for class certification); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831-32 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997).

245. See WEINSTEIN, *supra* note 7, at 505 (noting, in the context of lawyer-client conflicts of interest, that "[i]n class actions where counsel representing the class is not effectively handling the suit, he or she may be replaced by the court").

246. See *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978) ("[T]he attorney's duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members."). The official commentary to the Massachusetts conflict of interest rule, adopted in 1997, reflects a reasonable interpretation of ABA Model Rule of Professional Conduct 1.7 as applied to class actions. The Massachusetts comment reads, in pertinent part:

A lawyer who undertakes to represent a class should make an initial determination whether subclasses within the class should have separate representation because their interests differ in material respects from other segments of the class. Moreover, the lawyer who initially determines that subclasses are not necessary should revisit that determination as the litigation or settlement discussions proceed because as discovery or settlement talks proceed the interests of subgroups within the class may begin to diverge significantly. The class lawyer must be constantly alert to such divergences and to whether the interests of a subgroup of the class are being sacrificed or undersold in the interests of the whole. The lawyer has the responsibility to request that separate representation be provided to protect the interests of subgroups within the class.

MASS. RULES OF PROFESSIONAL CONDUCT, Rule 1.7 cmt. 14A (2000).

247. See FED. R. CIV. P. 23(e) (requiring court approval of class action settlement); *Amchem Prods.*, 521 U.S. at 620-21 (emphasizing that Rule 23(e) functions as an additional requirement and does not displace the requirements for certification under Rules 23(a) and (b)); see also WEINSTEIN, *supra* note 7, at 64 ("The class action gives the court ultimate responsibility to consider fairness between present and future claimants and between the more and less seriously injured claimants.").

248. WEINSTEIN, *supra* note 7, at 64.

In other types of formally aggregated litigation as well, judges may exercise their oversight powers to offer some protection against conflicts of interest, although not to the same extent as in class actions. In consolidated litigation, courts arguably possess the power to remove counsel for failure to handle the litigation properly.²⁴⁹ Moreover, a judge overseeing any formally aggregated litigation has the power to designate lead counsel, steering committees, and other leadership roles²⁵⁰ and may exercise that power to protect against conflicts of interest.²⁵¹

In sum, conflicts of interest in informally aggregated litigation present particularly troublesome situations. The problem is not that the conflicts of interest that arise in informally aggregated litigation are any worse than those that arise in formally aggregated litigation. Rather, it is that the greater judicial oversight in formal aggregation, while no panacea, provides at least some protection for clients, whereas clients in informally aggregated litigation get little protection from either ethical norms or judicial oversight. As with other ethical duties, concerns about conflicts of interest involving coordinating lawyers can be alleviated somewhat by explicit written cooperation agreements, which can facilitate conflicts checks and render certain conflicts more apparent by making the underlying duties more explicit. Even with such agreements, however, difficult conflict of interest problems will remain, such as the imputed successive conflict problem of *Essex Chemical*.

D. Legal Malpractice

Aside from whether coordinating lawyers owe *ethical* duties of competence and diligence to each other's clients, what about legal duties enforceable through civil liability? In other words, may a coordinating lawyer be held liable to those other clients for

249. Judge Weinstein reasons that such power should extend to consolidated litigation:

The same power [to replace class counsel] should be found to exist in a mass tort subject to consolidation or bankruptcy. If the attorney with large masses of clients cannot handle the litigation properly either because of lack of capital, managerial skills, professional competence, or as a result of psychological problems, he or she should be replaced.

Id. at 63.

250. See *supra* note 60 and accompanying text.

251. See M.C.L.3d, *supra* note 9, § 20.224 ("The court should also ensure that designated counsel fairly represent the various interests in the litigation; where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests.").

malpractice?²⁵² I know of no case in which a lawyer has been held liable in malpractice to the client of a coordinating lawyer. The argument for such liability, however, is strong.

When lawyers divvy up work in their coordinated efforts, each client depends upon the quality and timeliness of each lawyer's work. Suppose a joint defense group, comprised of counsel for defendants X, Y, and Z, seeks dismissal on grounds of forum non conveniens and assigns to L_x the task of obtaining an expert affidavit establishing the adequacy of the alternative forum.²⁵³ Suppose further that the defendants' grounds for dismissal are strong, and the court would grant a properly presented motion. Suppose the court denies the motion, however, because of the insufficiency of the affidavit obtained by L_x, which any reasonable lawyer in L_x's position would have recognized. Alternatively, suppose X, Y, and Z are plaintiffs with claims against a single defendant; in coordinated discovery, their lawyers divvy up the task of searching for useful information in boxes containing several hundred thousand documents, and L_x negligently fails to find the "smoking gun" document in one of his boxes. Assuming X, Y, and Z can prove damages, would they have a valid malpractice claim against L_x? L_x owed a duty to X to provide reasonably competent representation. Having breached that duty, L_x has exposed herself to a malpractice claim by X. But what about Y and Z? They were equally harmed by L_x's negligence, but their malpractice claim against L_x depends upon the untested question of whether L_x owed them a duty of care.

In defense, L_x might argue that Y and Z should look to their own lawyers to protect their interests.²⁵⁴ Many lawyer errors, however, are invisible on the surface and become clear only when probed. The holes in L_x's expert affidavit should have been obvious to L_x, but not to another lawyer who is not immersed in the details of the alternative forum's adequacy. The smoking gun document that should

252. Although the matters are related in the sense that both involve lawyers' professional duties, "ethical duties" as used here refers to duties under applicable rules of professional conduct, enforceable through the lawyer disciplinary process, while "malpractice" refers to breach of primarily common law duties enforceable through civil liability.

253. See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 n.22 (1981) (requiring the existence of an adequate alternative forum in order to dismiss under the doctrine of forum non conveniens).

254. Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. c (Tentative Draft No. 8, 1997) (noting, as a reason for the rule that lawyers owe no duty of care to opposing parties in litigation, that litigants are usually protected by their own counsel).

have been found by L_x would not be found by the other lawyers unless they searched L_x 's boxes themselves. If L_y and L_z have to spend their time looking over L_x 's shoulder or redoing L_x 's work, it defeats the purpose of dividing the work.

Perhaps L_y and L_z behaved negligently by trusting L_x to do some of the work. If L_y and L_z should have known not to delegate work to L_x , then Y and Z can hold them accountable for their own negligence on a theory akin to negligent entrustment.²⁵⁵ But L_x 's failure does not necessarily mean that L_y and L_z acted carelessly in dividing work with L_x and trusting her work. As shown in Part I, lawyers—including plenty of reasonable, prudent lawyers—coordinate their efforts, often relying on each other's work.²⁵⁶

Courts increasingly hold lawyers responsible to nonclients based on various malpractice permutations and third-party beneficiary theories. The cases include liability of a real estate seller's attorney for making a negligent misrepresentation to a buyer,²⁵⁷ liability of a borrower's attorney to a creditor for negligently drafting an opinion letter on which the creditor foreseeably relied,²⁵⁸ and liability of a decedent's attorney to an intended beneficiary for negligently drafting or executing a will.²⁵⁹ Applying malpractice liability to the

255. See generally DAN B. DOBBS, *THE LAW OF TORTS* § 330 (2000) (discussing the doctrine of negligent entrustment under which, for example, a defendant can be held liable for harm caused by entrusting an automobile to a person whom the defendant knows or should know is apt to use it carelessly).

256. Even if L_y and L_z did not act negligently, their clients may attempt to hold them vicariously liable for L_x 's negligence. Such vicarious liability for a subagent's negligence may not be appropriate under agency law:

As between the principal and agent, an agent is not responsible where . . . it becomes necessary to employ subagents, by reason of their particular profession or skill, or where the appointment of a subagent has been authorized, if the agent has used reasonable diligence and skill in his choice of the subagent. There is, in such a case, a privity between the subagent and the principal, who must, therefore, seek a remedy directly against the subagent for his negligence or misconduct.

3 AM. JUR. 2D *Agency* § 164 (1986).

In contrast, if an agent delegates powers to a subagent without implicit or explicit authority to do so, the agent is liable to the principal for damages caused by the subagent's negligence or misconduct. See *id.* § 162. Thus, a lawyer who delegates work to other members of a coordinating group, without the client's authorization, risks exposing herself to liability to her client for the negligent or wrongful acts of the coordinating lawyers.

257. See *Petrillo v. Bachenberg*, 655 A.2d 1354, 1362 (N.J. 1995).

258. See *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318, 323 (N.Y. 1992).

259. See *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961); *McLane v. Russell*, 546 N.E.2d 499, 502 (Ill. 1989); *Hale v. Groce*, 744 P.2d 1289, 1291 (Or. 1987). See generally GILLERS, *supra* note 164, at 742-52 (cataloguing the "expanding universe" of attorney liability to third parties);

case of the coordinating lawyer follows naturally from the cases holding attorneys liable to nonclients.

The Restatement of the Law Governing Lawyers, in its chapter on malpractice liability, suggests that a lawyer owes a duty of care to a nonclient to the extent that "(a) the lawyer . . . invites the non-client to rely on the lawyer's opinion or provision of other legal services, and the non-client so relies, and (b) the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection."²⁶⁰ Section 73(2) appears to be aimed primarily at transactional malpractice situations such as liability to beneficiaries for a negligently drafted will, or liability to creditors for a negligent opinion letter.²⁶¹ Nevertheless, the language lends itself to arguments for litigation malpractice liability based on negligent performance of work within an allied plaintiffs' or defendants' group. By working as part of the coordinating group, L_x invited Y and Z to rely on her provision of legal services; Y and Z so relied; and they are not so remote as to establish a lack of proximate causation. The fact that a client did not formally retain a lawyer does not end the inquiry into the lawyer's duty and potential liability.²⁶² Still, it remains to be seen whether courts will be willing to impose liability for harm caused to someone else's client in a common interest alliance.

As a matter of legal fundamentals, malpractice liability follows from the principle of agency law that the client-principal is bound by the lawyer-agent's actions, including the lawyer-agent's mistakes.²⁶³ If

RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* §§ 7.11-7.14 (4th ed. 1996 & Supp. 1999) (discussing various bases for negligence liability to nonclients).

260. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 73(2) (Tentative Draft No. 8, 1997).

261. *See id.* cmt. e; *id.* Reporter's Note cmt. e.

262. *See* *David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112, 1122 (3d Cir. 1994) ("[T]hat Lilly did not formally retain Cadwalader does not end the inquiry into Cadwalader's duty."). In *David B. Lilly Co.*, attorney G. Robert Fisher consulted another law firm, Cadwalader, Wickersham & Taft (Cadwalader), concerning certain aspects of a client's transaction. When problems with the transaction surfaced, the other party to the transaction, who claimed to have relied on Fisher's advice, sued both Fisher and Cadwalader. *See id.* at 1114-16. Cadwalader moved for summary judgment, arguing both lack of duty and lack of causation. The district court granted summary judgment on both grounds. *See id.* at 1121-22. On appeal, the Third Circuit upheld summary judgment on causation grounds and declined to reach the duty question. *See id.* at 1122.

263. The First Circuit addressed this point in affirming the dismissal, for failure to prosecute, of an apparently meritorious complaint:

[A]s matters stand, plaintiffs have quite likely been victimized by a series of blunders on their lawyer's part (for which they may have a claim against him). But in our adversary system, the acts and omissions of counsel are customarily visited upon the

the client were not adversely affected by the lawyer's errors, after all, there would be no injury to be compensated. Whether the same principle can be applied to a nonclient is the crux of the question. Is a nonclient bound by the coordinating lawyer's negligent performance in the same way as is the lawyer's primary client,²⁶⁴ or does the nonclient occupy a different position because he has the protection of his own retained counsel and no direct attorney-client relationship with the negligent lawyer? To whatever extent lawyers may avoid malpractice liability to coordinating clients on "not *my* client" grounds, that cannot alter the reality that each of the coordinating clients may have depended on the lawyer and suffered injury from the lawyer's failure. Without a malpractice claim against the negligent coordinating lawyer, it is conceivable that the injured client would be left without any recourse.²⁶⁵

E. The Problem of Informal Ethics in Informally Aggregated Litigation

Lawyers within a coordinating group depend on each other, perhaps more than they generally admit to their clients. Clients, in turn, depend on the competence, diligence, and trustworthiness of the coordinating lawyers, probably more than they realize. Yet the ethical safeguards for clients in coordinated litigation are, at best, fuzzy. If the lawyers' duties are not explicit, then when a lawyer arguably breaches a duty to another lawyer's client, consequences such as

client in a civil case, and we see no legally cognizable basis for departing from this well-established principle here.

Cotto v. United States, 993 F.2d 274, 281 (1st Cir. 1993) (citations omitted).

264. Cf. *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 762 n.12 (1st Cir. 1994) (rejecting adequacy of representation as a requirement for virtual representation, because such a requirement "would fly in the teeth of the general rule that, in civil litigation, the sins of the lawyer routinely are visited on the client"). As a leading treatise sensibly notes, "the suggestion that the rule that a client is bound by a lawyer's misadventures should apply to a nonparty-nonclient, simply because there are identical interests and notice of the earlier litigation, is surprising." WRIGHT ET AL., *supra* note 109, § 4457 (Supp. 2000).

265. As a practical matter, some clients probably could assert successful claims against their own lawyers, who in turn might have third-party claims against the negligent coordinating lawyer. As discussed earlier, however, it would be incorrect to assume that the client's own lawyer must have been negligent merely because the lawyer relied on another lawyer's shoddy work. The client's claim against her own lawyer should be based either on the lawyer's own negligence or on vicarious liability for the coordinating lawyer's negligence, which presumes a valid basis for liability directly against the coordinating lawyer. See *supra* note 256 and accompanying text.

disciplinary sanctions, disqualification, and malpractice liability are less likely to follow.

The problem is that informal aggregation, by its very nature, leaves too many unanswered questions about the lawyers' duties to coordinating clients, at least in the absence of a well-drafted cooperation agreement rendering duties explicit. Coordinating lawyers have some obligation to maintain confidentiality, under certain circumstances, but the source and scope of this obligation remain unclear, including whether the duty is enforceable under the rules of professional conduct.²⁶⁶ Coordinating lawyers are not entirely free to ignore the interests of the other clients in the group, but no one has defined the scope of any duty of loyalty to the coordinating clients, or the extent to which it constrains the lawyer's ability to pursue single-mindedly the interests of her primary client.²⁶⁷ Conflict of interest rules apply to coordinating lawyers, but their application is sporadic, confusing, and weak.²⁶⁸ Finally, while a strong argument can be made for malpractice liability for negligent work within a lawyer network in informally aggregated litigation, that argument remains untested.²⁶⁹

Formal aggregation mechanisms carry clearer safeguards for clients who depend on the work of other lawyers. This is not to say that ethical duties in formally aggregated litigation are well-defined. Quite the opposite is true. The ethical obligations of lawyers in mass litigation are notoriously murky;²⁷⁰ identifying duties in class actions²⁷¹ and MDL²⁷² is particularly difficult. Nevertheless, formal aggregation

266. See *supra* notes 156-91 and accompanying text.

267. See *supra* notes 192-206 and accompanying text.

268. See *supra* notes 207-50 and accompanying text.

269. See *supra* notes 251-64 and accompanying text.

270. See WEINSTEIN, *supra* note 7, at 85 ("The traditional ethical rules, I believe, are inadequate [in mass tort cases] due to their reliance on the single-litigant, single-lawyer model."); Rheingold, *supra* note 7, at 395 n.2 (noting that general treatises and authorities on professional conduct "tend to have little discussion of the ethical issues in the context of mass-tort litigation"); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. L. REV. 469 (1994) (discussing ethical problems in mass tort litigation that are poorly addressed by traditional legal ethics doctrines).

271. See G. Donald Puckett, Note, *Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1291 (1999) ("Although courts uniformly recognize the existence of these fiduciary duties [owed by class counsel to class members], they have struggled to define their specific content.").

272. See GREEN, *supra* note 5, at 171 (contrasting MDL with class actions and noting that "[t]he role of lead counsel in a multidistrict proceeding is blurred"); PAUL D. RHEINGOLD, MASS TORT LITIGATION § 21:8, at 21-13 n.28 (1996) ("As poorly as any guidance is spelled out

allows for better-defined attorney roles and closer judicial oversight than does informal aggregation. In a class action, the class counsel explicitly owes duties to the members of the class, not merely to the named class representatives.²⁷³ In MDL, lead counsel and steering committee members explicitly owe duties to the clients of other lawyers in the litigation, inasmuch as it is their officially designated responsibility to perform legal work on behalf of an entire side of the litigation.²⁷⁴ Lawyers in coordinating roles in class actions and MDL may quibble about who is their "client,"²⁷⁵ but they do not doubt that

for class lead counsel conduct, either in ethical or legal decisions, there is still less guidance spelled out for multidistrict litigation counsel."); Resnik et al., *supra* note 1, at 321 n.77 ("One might ask who the clients of PSC members are. Courts have commented about obligations of such lawyers to all plaintiffs, rather than only to those clients who had individually retained PSC members. However, neither codes nor case law detail what duties that representative capacity imposes.") (citations omitted). For a look at a forgone opportunity to elucidate the duties of MDL counsel, see *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196 (7th Cir. 1996), in which the court acknowledged that "plaintiffs urge us to set forth the duties which lead counsel in multidistrict litigation proceedings owe to other parties to the litigation, and to subordinate counsel," but refused to offer guidance on the grounds that it would be an advisory opinion. *Id.* at 1205.

273. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 221 (2d Cir. 1987) (noting that class counsel owes a fiduciary duty to class members); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) (noting that divergence of interests among class members "presents special problems because the class attorney's duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class"); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978) (noting that class counsel owes fiduciary duties to each member of class); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (holding that class counsel has a duty to ensure that class members receive proper settlement notice); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 690 (S.D. Fla. 1998) ("[T]he class attorney has a fiduciary duty to the court as well as to each member of the class."); Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1203 (1982); Puckett, *supra* note 271, at 1290-91 ("The adequate attorney representation requirement imposes fiduciary duties upon the class attorney that are owed to each individual member of the class.").

274. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 234 (1st Cir. 1997) ("Whether or not there is a direct or formal attorney-client relationship between plaintiffs and the PSC [Plaintiffs Steering Committee], the PSC and its IRPA [individually retained plaintiff's attorney] members necessarily owed a fiduciary obligation to the plaintiffs."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F.2d 940, 942 (1st Cir. 1989) ("The PSC, as the district court observed, represents 'by its very nature . . . all plaintiffs.'"); *In re Air Crash Disaster at Malaga, Spain*, 769 F. Supp. 90, 91 (E.D.N.Y. 1991) (noting the "duties to plaintiffs" owed by lead counsel); see also M.C.L.3d, *supra* note 9, § 20.22 (advising judges to "ensure that counsel appointed to leading roles . . . will fairly and adequately represent all of the parties on their side"); *id.* § 20.222 (describing the powers and responsibilities of lead, liaison, and trial counsel, and committee members); WEINSTEIN, *supra* note 7, at 84 (stating that plaintiffs' attorneys seeking leadership positions in mass torts "violate their ethical duty to the community of those seeking redress" if they engage in wrongful tactics to acquire power).

275. See Resnik et al., *supra* note 1, at 321 n.77; see also Stephen A. Sheller, *Court Appointed MDL Counsel: Who They Represent, Who They Don't Represent and Who They Should Represent*, 3 MEALEY'S LITIG. REP.: FEN-PHEN/REDUX, Dec. 1999, at 22 (emphasizing the importance of including representatives of divergent interests on MDL plaintiffs' steering

their role gives them some responsibility for the well-being of the entire group whose interests they are assigned to protect.

In informally aggregated litigation, by contrast, that responsibility is far from clear. Although clients may be dependent on the coordinating lawyers to protect sensitive information, to do their share of the legal work competently and diligently, and to maintain a modicum of loyalty, it is entirely plausible, given the vagueness of ethical safeguards, that the coordinating lawyers will not feel any responsibility akin to a lawyer-client relationship with the other lawyers' clients.

The solution is not necessarily to impose more obligations on coordinating lawyers, but rather to spell out their duties with greater clarity. Formal aggregation and judicial oversight can provide a basis for relatively explicit duties. Alternatively, a carefully drafted cooperation agreement can clarify the duties of coordinating counsel. In contrast to formal aggregation rules, cooperation agreements can be drafted to suit the needs of the particular coordinating group.

IV. INFORMAL AGGREGATION AND NONPARTY PRECULSION

It is perhaps the most fundamental rule of civil procedure: one who was not a party to an action is not bound by the judgment. It is a rule with powerful due process overtones,²⁷⁶ the essential message of *Pennoyer v. Neff*,²⁷⁷ *Hansberry v. Lee*,²⁷⁸ and *Martin v. Wilks*.²⁷⁹ It is also, of course, a rule with exceptions. If deemed to be "in privity" with a party, then one can be bound.²⁸⁰ Class actions are another

committees).

276. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999):

[M]andatory class actions aggregating damage claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

(quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)); *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999); *Richards v. Jefferson County*, 517 U.S. 793, 797-805 (1996); James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. REV. 383, 387 (1983).

277. 95 U.S. 714 (1878).

278. 311 U.S. 32 (1940).

279. 490 U.S. 755 (1989).

280. See, e.g., *Albright v. R.J. Reynolds Tobacco Co.*, 463 F. Supp. 1220, 1228 (W.D. Pa. 1979) (holding that the survivors and estate administrator bringing a wrongful death action were in privity with the decedent and, therefore, bound by the decedent's unsuccessful personal injury action); *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1034-36 (E.D.N.C. 1978) (holding that the county board of education was in privity with the state attorney general

exception to the rule against nonparty preclusion; class members are bound by the judgment although they have not been made party to the action in the traditional sense of having appeared or been served.²⁸¹

The question that remains is whether notions of nonparty preclusion ought to extend beyond class actions and traditional privity relationships, to bind a litigant who was not a party to the prior lawsuit but whose lawyer coordinated with the lawyer for a similarly situated party in the lawsuit. If informal aggregation undermines assumptions of individual litigant autonomy and amounts to treatment of the litigation as a single integrated whole, does it provide a basis for nonparty preclusion?

A. *The Argument for Nonparty Preclusion Based on Informal Aggregation*

Some courts have accepted the theory of “virtual representation” for binding nonparties to prior judgments,²⁸² and commentators have

and, therefore, bound by the antitrust consent decree), *aff'd*, 640 F.2d 484 (4th Cir. 1981). The word “privity” does not describe any category of factually defined relationship or set of relationships. Rather, “privity” describes the legal conclusion that a particular relationship warrants binding one person to another person’s legal judgment. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.13 (3d ed. 1999); Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 219 n.92 (1992).

281. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808-14 (1985) (holding absent class members bound by the class action judgment despite their lack of minimum contacts with the forum state); *Hansberry*, 311 U.S. at 39 (noting class actions as an exception to the rule that a nonparty is not bound by a judgment).

282. See, e.g., *Monfils v. Taylor*, 165 F.3d 511, 521 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 43 (1999); *NAACP v. Metropolitan Council*, 125 F.3d 1171, 1175 (8th Cir. 1997), *vacated on other grounds*, 522 U.S. 1145, *reinstated on remand*, 144 F.3d 1168 (8th Cir.), *cert. denied*, 525 U.S. 826 (1998); *Tyus v. Schoemehl*, 93 F.3d 449, 453 (8th Cir. 1996); *Casa Marie, Inc. v. Superior Ct.*, 988 F.2d 252, 265 (1st Cir. 1993); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975); *Chicago Tribune Co. v. United States Dep’t of Health & Human Servs.*, No. 95C3917, 1999 WL 299875, at *3 (N.D. Ill. May 4, 1999); *Dentsply Int’l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 393 (D. Del. 1999), *appeal dismissed sub nom. Dentsply Int’l, Inc. v. Dentsply Research and Dev. Corp.*, 215 F.3d 1348 (Fed. Cir. 1999); *Waldman v. Village of Kiryas Joel*, 39 F. Supp. 2d 370, 380-81 (S.D.N.Y. 1999); *Petit v. City of Chicago*, No. 90C4984, 1999 WL 66539, at *5 (N.D. Ill. Feb. 8, 1999); *DeBraska v. City of Milwaukee*, 11 F. Supp. 2d 1020, 1029-30 (E.D. Wis. 1998), *rev’d*, 189 F.3d 650 (7th Cir. 1999); *City of Chicago v. Shalala*, No. 97C4884, 1998 WL 164889, at *8 (N.D. Ill. Mar. 31, 1998), *aff’d*, 189 F.3d 598 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1530 (2000); *In re Air Crash Disaster near Dayton, Ohio*, 350 F. Supp. 757, 766 (S.D. Ohio 1972), *rev’d sub nom. Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973); *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass’n*, 71 Cal. Rptr. 2d 77, 88 (Ct. App. 1998); *Holzer v. Motorola Lighting, Inc.*, 693 N.E.2d 446, 454-55 (Ill. App. Ct. 1998); *Duffy v. Si-Sif Corp.*, 726 So. 2d 438, 443 (La. Ct. App. 1999). See generally Jack L. Johnson, Comment, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty’s Claim*, 68

urged wider use of nonparty preclusion.²⁸³ The Fifth Circuit offered this widely quoted, though overstated, articulation of the doctrine: "[A] person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative."²⁸⁴

Many of the cases applying this virtual representation doctrine fall into two categories. One category involves an initial action brought by a state agency or other government entity, and a subsequent action brought by a citizen. On the theory that the citizen was adequately represented by the government entity, courts have held the citizen bound by the prior judgment.²⁸⁵ The other category involves private litigants pursuing classic public law litigation,²⁸⁶ such as matters of statutory constitutionality or challenges to government affirmative action plans, where an initial plaintiff pursues the litigation unsuccessfully, and then a new plaintiff brings an identical challenge. Courts have held the new plaintiff bound by the prior judgment, on the theory that the earlier plaintiff represented her interests.²⁸⁷

TUL. L. REV. 1303 (1994) (discussing the procedural fairness of virtual representation).

283. See, e.g., Bone, *supra* note 280, at 195 (advocating expansion of nonparty preclusion rules); Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655, 657 (1980) (urging the abandonment of the privity requirement for binding nonparties); Allan D. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 379-81 (1974) (arguing that, for reasons of judicial efficiency, preclusion principles should apply more extensively to nonparties); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1486 (1974) (arguing that collateral estoppel of nonparties is consistent with due process).

284. *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975).

285. See, e.g., *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 23 (D.D.C. 1998) (holding Alaska state legislators, suing both as legislators and in their individual capacities as Alaska residents, bound by the claim-preclusive effect of a judgment from prior action by the State of Alaska concerning implementation of the federal wildlife management statute), *aff'd*, 181 F.3d 1333 (D.C. Cir. 1999); *Lucas v. Planning Bd.*, 7 F. Supp. 2d 310, 329 (S.D.N.Y. 1998) (holding that a citizens' lawsuit to stop construction of a telecommunications tower was claim-precluded, based on a consent judgment entered in the municipality's prior lawsuit against the cellular telephone companies, on the grounds that "the Town's elected officials were the virtual representatives of all its residents in the prior suit"); *Citizens*, 71 Cal. Rptr. 2d at 88-89 (holding that a citizens' association was barred from suing to establish a public recreation easement, on the grounds that the association and its members were bound by judgments in prior actions between state agencies and coastal property owners, despite a prior court's denial of the association's application to intervene).

286. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (introducing the concept and describing the characteristics of public law litigation).

287. See, e.g., *NAACP v. Metropolitan Council*, 125 F.3d 1171, 1175 (8th Cir. 1997) (holding that a class of Minneapolis public school students were bound by a prior judgment involving a

The doctrine cannot be neatly contained in these two categories, however. A number of courts have applied virtual representation in other circumstances, using the presence of a "virtual representative" as a basis for binding a nonparty.²⁸⁸ Moreover, the language courts use to describe their holdings does not limit the doctrine to government actions or public law litigation.²⁸⁹

Several themes permeate the virtual representation cases as the factors that appear to weigh heavily in courts' determinations of whether to bind the nonparty. One, of course, is alignment of

class of minority residents of, and applicants for, Minneapolis low-income housing), *vacated on other grounds*, 522 U.S. 1145, *reinstated on remand*, 144 F.3d 1168 (8th Cir.), *cert. denied*, 525 U.S. 826 (1998); *Tyus v. Schoemehl*, 93 F.3d 449, 454-56 (8th Cir. 1996) (holding that challengers to redistricted St. Louis aldermanic boundaries were bound by the issue-preclusive effect of a prior judgment upholding the same boundaries against a challenge by a partially different group of objectors, and specifically mentioning that "[a]lthough virtual representation may be used in the private law context, its use is particularly appropriate for public law issues"); *Petit v. City of Chicago*, No. 90C4984, 1999 WL 66539, at *5 (N.D. Ill. Feb. 8, 1999) (holding that the Chicago police officer plaintiffs in a reverse discrimination lawsuit were bound by the issue-preclusive effect of a judgment upon a special verdict in a related suit challenging the Chicago Police Department's affirmative action plan for promotions, even though most of the plaintiffs had not been parties to the prior suit); *DeBraska v. City of Milwaukee*, 11 F. Supp. 2d 1020, 1030 (E.D. Wis. 1998) (holding that Milwaukee police officers and their union were claim-precluded from bringing a lawsuit challenging the city's labor practices, on the grounds that they were virtually represented by the union and other police officers in a prior suit), *rev'd*, 189 F.3d 650 (7th Cir. 1999).

288. See, e.g., *Monfils v. Taylor*, 165 F.3d 511, 521 (7th Cir. 1998) (binding a police chief defendant in an individual civil-rights money-damages lawsuit with the issue-preclusive effect of a prior judgment against the city), *cert. denied*, 120 S. Ct. 43 (1999); *Chicago Tribune Co. v. United States Dep't of Health & Human Servs.*, No. 95C3917, 1999 WL 299875, at *3-4 (N.D. Ill. May 4, 1999) (holding that a government contractor was bound by an injunction against the United States requiring that the information be disclosed pursuant to the Freedom of Information Act); *Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 393-400 (D. Del. 1999) (holding a corporation in contempt for failure to comply with an injunction entered in a previous patent infringement litigation to which the corporation was not a party); *In re Air Crash at Detroit Metro. Airport*, 976 F. Supp. 1076, 1081-82 (E.D. Mich. 1997) (holding the executor of the estate of a flight crew member who died in an air crash bound by a prior judgment determining that the flight crew engaged in willful and wanton misconduct, although neither the decedent nor the estate was party to prior lawsuit); *Duffy v. Si-Sifh Corp.*, 726 So. 2d 438, 443 (La. Ct. App. 1999) (holding that a proposed class representative was bound by a denial of class certification for a different proposed class representative in an action against an insurance company by burial insurance policy beneficiaries).

289. See, e.g., *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054, 1070 (6th Cir. 1995) ("Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." (quoting *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (quoting *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (1978)))); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975) ("Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.").

interests between the party and the nonparty.²⁹⁰ Another is whether the party had adequate incentive to litigate vigorously, and thus to represent the nonparty's interests.²⁹¹ For our purposes, however, the most interesting theme that runs through the virtual representation cases is the involvement of the nonparty's lawyer in the prior litigation.

Involvement in the prior litigation, while not the primary consideration in most cases, comes up routinely as a significant factor mentioned by courts applying the virtual representation doctrine. Many cases regarding virtual representation list participation in the prior suit as a factor in determining whether to apply nonparty preclusion.²⁹² In a recent and thorough analysis of virtual representation, the Seventh Circuit offered factors that courts have considered in addition to parallel interests and adequate representation: "control or participation in the earlier litigation, acquiescence, deliberate maneuvering to avoid the effects of the first case, or the close relationship between the parties to the various cases."²⁹³ A number of courts have applied preclusion against

290. See, e.g., *Aerojet-General*, 511 F.2d at 719 (finding that "the interests of the state boards and the County were closely aligned"); *City of Chicago v. Shalala*, No. 97C4884, 1998 WL 164889, at *11 (N.D. Ill. Mar. 31, 1998) (noting that plaintiff-intervenor class members "are similarly situated to the plaintiffs in" the earlier suit), *aff'd*, 189 F.3d 598 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1530 (2000); *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 71 Cal. Rptr. 2d 77, 89 (Ct. App. 1998) ("We do not find any indication in the record of a direct interest of appellant in the current dispute that was unrepresented by the state agencies in the prior litigation.").

291. See, e.g., *NAACP v. Metropolitan Council*, 125 F.3d 1171, 1175 (8th Cir. 1997) ("Furthermore, the *Hollman* class adequately represented the interests it shares with the student class because the *Hollman* class had a powerful incentive to establish the segregative effects of the Met Council's housing policies and practices."), *vacated on other grounds*, 522 U.S. 1145, *reinstated on remand*, 144 F.3d 1168 (8th Cir.), *cert. denied*, 525 U.S. 826 (1998); *Tyus v. Schoemehl*, 93 F.3d 449, 455-56 (8th Cir. 1996):

Another factor to consider is adequacy of representation, which is best viewed in terms of incentive to litigate. That is, one party "adequately represents" the interests of another when the interests of the two parties are very closely aligned and the first party had a strong incentive to protect the interests of the second party.

(citation omitted) (footnote omitted).

292. See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 802 (1996) (pointing to "the fact that petitioners neither participated in nor had the opportunity to participate in" the prior action in deciding to deny preclusion) (citation omitted); *Tice v. American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998) (listing "control or participation in the earlier litigation" as an additional factor considered in precluding litigation by a nonparty), *cert. denied*, 527 U.S. 1036 (1999); *Tyus*, 93 F.3d at 455 (naming participation in prior litigation as a guiding principle in determining virtual representation).

293. *Tice*, 162 F.3d at 971.

nonparties, based in part on lawyer coordination or client participation in the first suit.²⁹⁴ Courts have been especially willing to bind nonparties represented by the same lawyer who represented the parties to the prior action.²⁹⁵ The presence of overlapping parties, too,

294. See, e.g., *NAACP*, 125 F.3d at 1175 (holding that the student class was virtually represented by the housing class, noting that “the student members of the [housing] class actually participated in that litigation”); *Chicago Tribune Co. v. United States Dep’t of Health & Human Servs.*, No. 95-C3917, 1999 WL 299857, at *3 (N.D. Ill. May 4, 1999) (binding a nonparty that was “fully aware of, and closely aligned with the named defendant”); *Dentsply Int’l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 389 (D. Del. 1999) (holding a nonparty bound based in part on the nonparty’s involvement in litigation decisions and sharing of information); *Waldman v. Village of Kiryas Joel*, 39 F. Supp. 2d 370, 380-81 (S.D.N.Y. 1999) (holding that a nonparty village resident bringing a section 1983 claim based on the Establishment Clause was bound, because he “shared very closely aligned, if not identical, interests as,” and “participated in a representative capacity” for, plaintiff synagogue in earlier action involving “virtually identical” interests); *In re Air Crash Disaster near Dayton, Ohio*, 350 F. Supp. 757, 766-67 (S.D. Ohio 1972) (holding a nonparty air crash victim bound by a judgment exonerating the defendant, where the plaintiff’s counsel had participated in coordinated discovery, issue-framing, and case order selection), *rev’d sub nom. Humphreys v. Tann*, 487 F.2d 666, 671 (6th Cir. 1973).

In *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877 (6th Cir. 1997), the dissenting judge emphasized that virtual representation was warranted because the plaintiffs had coordinated their efforts through an organization called Unified Tecumseh Products Hourly Retirees (UTPHR):

Here, UTPHR authorized, financed, and controlled the investigation and prosecution of both sets of plaintiffs’ suits. In fact, the group was explicitly formed for this purpose. And, in both cases, UTPHR made the decision who the named plaintiffs would be, hired the attorney, and assumed financial liability for the litigation. Thus, UTPHR is precluded from relitigating claims it has already lost; it should not be able to escape the effects of *res judicata* merely by naming a different plaintiff.

Id. at 886-87 (Ryan, J., dissenting); see also Note, *Collateral Estoppel of Nonparties*, *supra* note 283, at 1504 (arguing that where a nonparty has had the opportunity to participate in strategy planning or consolidated discovery, “he has had a vicarious day in court” and therefore can justly be precluded).

295. See, e.g., *Tyus v. Schoenehl*, 93 F.3d 449, 457 (8th Cir. 1996) (holding nonparties bound where the attorney for the plaintiffs in a subsequent suit had been substituted as counsel in a prior suit); *Petit v. City of Chicago*, No. 90-C4984, 1999 WL 66539, at *5 (N.D. Ill. Feb. 8, 1999) (holding nonparties bound where the same attorney represented plaintiffs in both cases); *DeBraska v. City of Milwaukee*, 11 F. Supp. 2d 1020, 1030 (E.D. Wis. 1998) (holding nonparties bound where one of the attorneys in a subsequent suit was also co-counsel in a prior suit and where the same union served as lead plaintiff in both suits), *rev’d*, 189 F.3d 650, 654 (7th Cir. 1999); *City of Chicago v. Shalala*, No. 97-C4884, 1998 WL 164889, at *11 (N.D. Ill. Mar. 31, 1998) (holding a nonparty class of plaintiff-intervenors bound where the attorney for the plaintiff-intervenors in a subsequent suit was also one of the attorneys for the plaintiffs in a prior suit), *aff’d*, 189 F.3d 598, 603 (7th Cir.), *cert. denied*, 120 S. Ct. 1530 (2000); *In re Air Crash at Detroit Metro. Airport*, 976 F. Supp. 1076, 1082 n.17 (E.D. Mich. 1997) (holding a plaintiff bound by a determination in a prior multidistrict litigation (MDL) trial, where the plaintiff’s lawyer had participated in some MDL pretrial discovery matters); *Duffy v. Si-Siff Corp.*, 726 So. 2d 438, 443 (La. Ct. App. 1999) (holding a proposed class representative bound by the prior rejection of class certification for a different proposed class representative, where the two

increases the likelihood that a court will bind the non-overlapping parties on a virtual representation theory.²⁹⁶

A nonparty may also be bound by a judgment if the nonparty financed and controlled the litigation. In *Montana v. United States*,²⁹⁷ the Supreme Court held that the United States was bound by the issue-preclusive effect of a judgment upholding the constitutionality of a Montana tax on government contractors, although the United States had not been a party to that action, which was brought by a government contractor, Peter Kiewit Sons' Co. (Kiewit).²⁹⁸ The United States directed Kiewit to file the suit, had controlled most of Kiewit's litigation decisions, and had paid the attorneys' fees and costs.²⁹⁹ The Court decided that "although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel."³⁰⁰ The *Montana* principle, that a nonparty can be bound if it controls and finances an action, has been applied in several scenarios, including a liability insurer's control of an insured's defense and a corporation's control of litigation involving its officers.³⁰¹

petitions were filed by the same attorneys).

296. See, e.g., *NAACP*, 125 F.3d at 1175 (applying the virtual representation doctrine to a case involving overlapping classes of school children and low income housing residents); *Tyus*, 93 F.3d at 457 (applying the virtual representation doctrine to preclude a challenge to redrawn aldermanic boundaries, where some of the same parties had participated in a prior challenge); *Petit*, 1999 WL 66539, at *5 (precluding a plaintiff class of white patrol officers from bringing an action alleging that the city committed racial or national origin discrimination by adjusting promotional test scores based on race, in part because 19 of 326 plaintiffs overlapped with the class in a prior action).

297. 440 U.S. 147 (1979).

298. See *id.* at 161-62.

299. See *id.* at 155. The Court left no doubt about the extent of the United States' control over the *Kiewit* litigation:

That the United States exercised control over the *Kiewit I* litigation is not in dispute. The Government stipulated that it:

- (1) required the *Kiewit I* lawsuit to be filed;
- (2) reviewed and approved the complaint;
- (3) paid the attorneys' fees and costs;
- (4) directed the appeal from State District Court to the Montana Supreme Court;
- (5) appeared and submitted a brief as *amicus* in the Montana Supreme Court;
- (6) directed the filing of a notice of appeal to this Court; and
- (7) effectuated Kiewit's abandonment of that appeal on advice of the Solicitor General.

Id. at 155.

300. *Id.*

301. See 18 WRIGHT ET AL., *supra* note 109, § 4451, at 429; see also RESTATEMENT

Counsel coordination need not rise to the level of *Montana* financing and control, however, to create a risk of nonparty preclusion.³⁰² In a recent Delaware case, dental device manufacturer Centrix, Inc. was held in contempt for violating an injunction issued in a patent infringement action, an action in which Centrix was not a party.³⁰³ Centrix manufactured the products at issue in the patent infringement action and supplied them to Kerr Manufacturing Corporation (Kerr), the defendant in that action.³⁰⁴ During the infringement action, Centrix paid much of Kerr's legal fees, suggested litigation strategies to Kerr's counsel, and after approximately one year of litigation, took control of Kerr's defense pursuant to an indemnification and defense agreement.³⁰⁵ Unlike the United States government's role in *Montana*, however, Centrix had not instigated the action, had not controlled the litigation from its inception, and had a somewhat adversarial relationship with the named party. The court, relying on "the 'virtual representative' concept of privity,"³⁰⁶ rejected Centrix's argument that it had not yet "had its day in court,"³⁰⁷ and held that Centrix was virtually represented by Kerr, was thus bound by the injunction, and, therefore, was subject to contempt.³⁰⁸

In informally aggregated litigation, the argument for nonparty preclusion appears to follow naturally from the language and holdings of the virtual representation cases. The virtual representation cases

(SECOND) OF JUDGMENTS § 39 cmt. a, illus. 1 and 2 (1982).

302. Mere involvement as a witness or an advisor in the prior action does not suffice to establish privity or *Montana* preclusion. See *Marine Office of Am. v. Vulcan MV*, 921 F. Supp. 368, 372 (E.D. La. 1996); *WRIGHT ET AL.*, *supra* note 109, § 4451, at 430-31; RESTATEMENT (SECOND) OF JUDGMENTS § 39 cmt. c (1982).

303. See *Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 389; see also *id.* at 392-93:

Here, the Court is not faced with a previously adjudged infringer, but with an entity who was not a party in the original litigation that prompted the injunction. Thus, because Centrix is a nonparty, the Court must determine, as a threshold matter, whether Centrix may properly be bound by the injunction.

304. See *id.* at 388-89.

305. See *id.* at 391. Centrix denied that it controlled the substance of the litigation, see *id.*, but the court found otherwise. See *id.* at 399.

306. *Id.* at 393.

307. *Id.* at 394.

308. See *id.* at 399 ("[T]he Court concludes that the relationship between Centrix and Kerr exemplifies the type of virtual relationship necessary to establish privity."). Because *Dentsply* involved an injunction, it implicated Federal Rule of Civil Procedure 65(d) (concerning persons bound by an injunction) rather than the usual doctrines of claim preclusion or issue preclusion. See *id.* at 393. The court's analysis, however, follows the reasoning of the preclusion cases. See *id.* at 398 n.5.

require aligned interests and incentives to litigate, both of which generally adhere in informally aggregated litigation. They treat as a prominent factor the presence of overlapping counsel or the participation of counsel or client in the other lawsuit—precisely the phenomenon of informal aggregation. Thus, the argument might go, if lawsuits have been handled on an intensively coordinated basis, either by the same counsel or through the arrangement of multiple counsel, then one party may be virtually represented in another party's lawsuit, and, therefore, justly bound by the outcome. Even to the extent some courts take a narrower view of virtual representation by requiring "the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties,"³⁰⁹ one might argue that contractual or fiduciary duties among coordinating lawyers and clients³¹⁰ satisfy this additional requirement for virtual representation. If counsel coordination were weighed heavily in the virtual representation analysis, the relatively obscure doctrine could assume much greater significance, given the widespread phenomenon of informal aggregation.

B. Against Nonparty Preclusion

Although informal aggregation does amount to treatment of the litigation by the lawyers as a single integrated whole, that should not be a sufficient basis for permitting nonparty preclusion. The usual reason given for rejecting nonparty preclusion is the "day in court" ideal.³¹¹ Every person, it is said, is entitled to her day in court.³¹² If a

309. Pollard v. Cockrell, 578 F.2d 1002, 1008 (5th Cir. 1978); see also *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997) (listing factors including "an express or implied legal relationship in which parties to the first suit are said to be 'accountable' to parties to the second").

310. See *supra* text accompanying notes 187-91.

311. See, e.g., James Win. Moore & Thomas S. Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 308 (1961) (using the "day in court" ideal to argue against relaxation of mutuality and privity requirements for preclusion, regardless of the perceived judicial economy); Pielemeier, *supra* note 276, at 422-27 (arguing that nonparty preclusion should not be extended without accounting for citizens' "expect[ation] to have their proverbial 'day in court'"); Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 921 & n.17 (1982) (generally opposing expanded nonparty preclusion, emphasizing the value of participation and control); Trangsrud, *supra* note 63, at 816-24 (chronicling the history of opposition to forced joinder of personal injury claims and arguing that courts should continue to refrain from certifying common question class actions when better alternatives exist). See generally Bone, *supra* note 280 (discussing the "day in court" ideal as it relates to virtual representation).

312. See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) ("This rule [against

person has not had her day in court, her one bite at the apple, then it seems unfair to consider her bound by the legal system's resolution of her controversy. She should have the opportunity, the argument goes, to present her own side of the story. Her perspective and input may differ from others who appear to be aligned in interest. And even if her input would be identical to that of similarly situated parties who skillfully presented the position to a court, why should she be denied the opportunity to present the position herself? After all, it is *her* life, liberty or property on the line.

In an era of informal aggregation, however, the day in court argument rings hollower than it once did.³¹³ Even if we could imagine that clients in individual litigation feel that they genuinely participate in the litigation or adjudicatory process—although most clients do not feel that way at all³¹⁴—it would be a leap to imagine that clients in informally aggregated litigation have the same sense of participatory power. It is difficult enough for clients to follow the strategizing of their own lawyer; joint strategizing among aligned counsel removes such planning one step further from clients. And clients have little enough input into and supervision of the work product of their own lawyer. When legal work is spread among coordinating lawyers, much of the work product becomes largely inaccessible to the client. In informally aggregated litigation, the individual client in many ways lacks autonomy. Thus, while the day in court argument retains a good deal of power as an ideal, a court might sensibly question whether that argument justifies denying nonparty preclusion, if indications suggest that the litigant's day in court would be a replay presentation by the same group of coordinating counsel, in which neither the prior nor the subsequent litigant has much genuine litigation autonomy.

binding nonparties] is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" (quoting *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (quoting *WRIGHT ET AL.*, *supra* note 109, § 4449, at 417)); *Mason v. Eldred*, 73 U.S. 231, 239 (1867) ("The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court . . ."); *Tice v. American Airlines, Inc.*, 162 F.3d 966, 968 (7th Cir. 1998) ("It is a fundamental principle of American law that every person is entitled to his or her day in court."), *cert. denied*, 527 U.S. 1036 (1999); *Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996) ("The Ahng plaintiffs are entitled to their own day in court.").

313. See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 833-37, 841-51 (1989); Lowenthal & Erichson, *supra* note 1, at 1020-23.

314. See Hensler, *Myths and Realities*, *supra* note 1, at 92-97 (discussing several empirical studies indicating that many litigants feel that they do not exercise much control over how their cases are handled).

Even if a court does reject the day in court argument, at least two reasons remain to reject expansive application of the virtual representation doctrine based on informal aggregation. First, nonparty preclusion based on counsel coordination should be rejected because such preclusion would create disincentives to counsel coordination, and coordination, on the whole, is valuable to the legal process and should be encouraged rather than discouraged. Second, nonparty preclusion based on informal aggregation should be rejected to avoid circumvention of protections built into formal aggregation mechanisms, especially the class action rule.

1. *Avoiding Disincentives to Coordination.* Informal aggregation is valuable, not only for lawyers and their clients, but for the legal system and the public as well. First, by enhancing litigational efficiency, coordination slows the transfer of wealth from litigants to lawyers and saves taxpayers' money by reducing the judiciary's burden. Second, coordination enhances the quality of legal work, and in many cases levels the playing field between large defendants and individual plaintiffs.³¹⁵ To the extent coordination improves the quality of legal services and cancels out the resource advantage of larger litigants and repeat players, it advances the goals of justice and the substantive law.

A rule of nonparty preclusion based on coordination among counsel would provide a substantial disincentive to counsel to coordinate. In fact, one judge stated that a plaintiff could have avoided nonparty preclusion based on virtual representation by refusing to participate in a coordinated litigation group.³¹⁶ Lawyers will have to think twice before working together if they know that by working together they may bind their clients to otherwise non-binding judgments. Even based on the relatively minor risk of *Montana* preclusion,³¹⁷ lawyers for interested nonparties are cautioned

315. See Herrmann, *supra* note 15, at 44-45 (observing that cooperation among plaintiffs' counsel has reduced defendants' former advantage in access to information); Marcus, *supra* note 4, at 243-44 (noting, in Bendectin litigation, that defendant Merrell Dow exploited its resource advantage in the initial individual lawsuit, but that plaintiff coordination leveled the playing field).

316. See *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 889 (6th Cir. 1997) (Ryan, J., dissenting) ("A putative plaintiff could have merely refused to participate in the group in order to protect his or her right to present a future claim.").

317. See *supra* notes 297-301 and accompanying text (discussing *Montana v. United States*, 440 U.S. 147, 155, 161-62 (1979)).

to maintain at least some distance from parties' litigation decisions.³¹⁸ If the theory of virtual representation were to extend to coordinated lawyer groups, then this caution would take on a new dimension, and lawyers in many cases would be well advised to steer clear of cooperating on related lawsuits.³¹⁹

This argument against nonparty preclusion raises at least two questions. First, if lawyer coordination is as pervasive and inevitable as I contend in this Article, then how can I be sure that nonparty preclusion would discourage it? Second, if nonparty preclusion would make lawyers think twice before working together, what's so bad about that? There is merit to each of these points. The urge to aggregate is powerful enough to overcome impediments, and no doubt many lawyers would continue to coordinate despite the risk of preclusion. Moreover, lawyers ought to think twice about coordinating, if only because of the ethical ramifications. In the end, the possible disincentive to coordination provides at best a soft argument against nonparty preclusion. The more important argument concerns circumvention of formal aggregation safeguards.

2. *Avoiding Circumvention of Formal Safeguards.* Nonparty preclusion threatens to permit inappropriate circumvention of the procedural mechanisms of formal aggregation. For example, suppose a dispute does not fit within Federal Rule of Civil Procedure 23's requirements for class certification, or jurisdictional barriers prevent MDL consolidation. In the absence of the protections that accompany these mechanisms, such as the class action requirement of adequate representation, a litigant should not be permitted to obtain the

318. See Charles R. Bruton & Joseph C. Crawford, *Collateral Estoppel and Trial Strategy*, LITIGATION, Summer 1981, at 50; Howard M. Erichson, *Dealing with Issue Preclusion in Complex Cases*, 148 N.J. L.J. 204, 209 (1997) ("Counsel for an interested outsider, while cooperating with a party, should take care not to let cooperation turn into control. When the nonparty's involvement is so substantial that it amounts to financing and controlling the litigation, the nonparty risks being bound by the court's determinations.").

319. Professor Bone makes nearly the opposite argument. He argues in favor of nonparty preclusion as a way to encourage cooperation among plaintiffs' lawyers: "Because nonparty preclusion reduces the free-rider effect by visiting the adverse consequences of a loss on all parties, it should increase the incentives to act collectively and to invest heavily on the side of the plaintiff in the first suit." Bone, *supra* note 280, at 255. Professor Bone's argument makes sense as to a rule of nonparty preclusion that does not turn on counsel coordination. In the scenario where counsel coordination is urged as a justification for nonparty preclusion, however, it seems probable that the rule would discourage, rather than encourage, cooperation among counsel.

enforcement benefits of aggregation through the back door.³²⁰ If a judge denies class certification, and nonparty preclusion nonetheless is allowed, then the denial of class certification is meaningless. If a plaintiff opts out of a Rule 23(b)(3) class action, and nonparty preclusion is applied against that plaintiff, then the opportunity to opt out is similarly meaningless.³²¹

In *Tice v. American Airlines, Inc.*,³²² twelve former American Airlines pilots sued the airline under the Age Discrimination in Employment Act (ADEA), challenging the airline's "up-or-out" policy under which flight officer positions were reserved as a training ground for future pilots.³²³ The policy had the effect of rendering sixty-year-old pilots, disallowed by a federal regulation from piloting, ineligible to downbid to flight officer positions.³²⁴ The airline had successfully defended its policy against an earlier ADEA challenge brought by twenty-two pilots in *Johnson v. American Airlines, Inc.*³²⁵ In *Johnson*, the airline prevailed in a jury trial, and the judgment was upheld by the Fifth Circuit.³²⁶ In *Tice*, American Airlines contended that the pilots' lawsuit was claim-precluded by *Johnson*. The district court agreed, holding that the *Tice* plaintiffs had been "virtually represented" by the *Johnson* pilots.³²⁷

The Seventh Circuit, reversing, put its finger on the problem. To bind the *Tice* plaintiffs with the judgment in *Johnson*, the court recognized, would be to treat *Johnson* as a class action. If the *Tice* plaintiffs were bound on the theory of virtual representation, then the twenty-two *Johnson* plaintiffs served in effect as class representatives, litigating on behalf of themselves and on behalf of a class of all

320. See *Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996) (rejecting the defendants' argument that the current plaintiffs were virtually represented in prior action, because under Rule 23 prior plaintiffs could not have represented a class including the current plaintiffs).

321. See *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 426-27 (6th Cir. 1999) (en banc) (reversing the district court's application of virtual representation preclusion against plaintiffs who had opted out of an earlier settlement class action, noting that preclusion would render the plaintiffs' opt-out decision meaningless).

322. 162 F.3d 966 (7th Cir. 1998), cert. denied, 527 U.S. 1036 (1999).

323. See *id.* at 968-69.

324. See *id.*

325. 745 F.2d 988 (5th Cir. 1984).

326. See *Tice*, 162 F.3d at 968-69 (describing the facts of *Johnson*). American also prevailed in an ADEA action brought by the Equal Employment Opportunity Commission on behalf of 57 named pilots over age 40, who had been denied employment as flight officers because, under American's up-or-out policy, they lacked enough time to become captains. See *id.* at 969, 974 (citing *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995)).

327. See *id.* at 970.

similarly situated pilots. But Rule 23 dictates that an action is not a class action unless a court so certifies it,³²⁸ and a court may not so certify it without finding that the class action meets the rule's prerequisites of numerosity, commonality, typicality, and adequacy of representation, and fits within one of the class action categories.³²⁹ No such findings had been made in *Johnson*, and no court had certified it as a class action. The *Johnson* plaintiffs and their attorneys were not scrutinized under Rule 23's adequate representation standard, nor did the attorneys have any reason to believe they owed ethical or fiduciary duties to unnamed class members. The Seventh Circuit correctly observed that "the fact that virtual representation looks like a class action but avoids compliance with Rule 23 is a weakness, not a strength, of the doctrine. . . . There would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will."³³⁰

The Sixth Circuit, too, has recognized the tension between virtual representation and the class action rule. In *Bittinger v. Tecumseh Products Co.*,³³¹ a group of workers filed a class action complaint against their employer, but the action was dismissed on summary judgment before the class was certified.³³² A second group of workers filed a new action, which the district court certified as a class action and then dismissed on grounds of claim preclusion, under the theory of virtual representation.³³³ The court of appeals, while sympathetic to the district court's desire to disallow what was, in effect, a refile of the identical class action lawsuit that had already

328. See FED. R. CIV. P. 23(c).

329. See *id.* 23(a), 23(b).

330. *Tice*, 162 F.3d at 972-73. Similarly, in *Ahng v. Allsteel, Inc.*, 96 F.3d 1033 (7th Cir. 1996), the defendant in an employment lawsuit argued that plaintiffs were bound by a judgment from a prior employment action to which these plaintiffs had not been parties. See *id.* at 1037. The Seventh Circuit, in an opinion by Judge Diane Wood, the author of *Tice*, sensibly rejected the defendant's virtual representation argument, noting that under Rule 23, the prior plaintiffs could not have represented the current plaintiffs as class representatives:

The doctrine of "virtual representation" recognizes, in effect, a common-law kind of class action. . . . At oral argument, Allsteel conceded that the *Meredith* [*v. Allsteel, Inc.*, 11 F.3d 1354 (7th Cir. 1993),] plaintiffs could not have represented a class of individuals that included members who retired after March 31, 1991, under Rule 23. For the same reasons that they would fail to qualify as adequate representatives for Rule 23, they also fail the test for virtual representatives.

Id.

331. 123 F.3d 877 (6th Cir. 1997).

332. See *id.* at 879.

333. See *id.*

been dismissed, refused to allow the end run around Rule 23.³³⁴ Preclusion based on virtual representation, the appeals court explained, is "particularly undesirable . . . where its application would replace settled, rule-like procedures."³³⁵ The formal limitations of Rule 23 should not be replaced by "an unruly standard."³³⁶ The dissenter chided the majority for ignoring circuit precedent embracing the virtual representation doctrine: "[T]he majority's unhappiness with the doctrine of virtual representation and preference for the 'crisp rules with sharp corners' of Rule 23 is water over the dam."³³⁷

Despite these cases, in which courts have recognized the conflict between Rule 23 and the theory of virtual representation, a number of other courts have allowed virtual representation to replace, in effect, the requirements of the class action rule.³³⁸ One court went so far as to hold that a subsequent class action was claim-precluded by a prior judgment against two individual plaintiffs, noting that the individuals would have been members of the subsequent class.³³⁹ It remains to be seen whether the Supreme Court's most recent reiteration of the rule against binding non-parties, in *South Central*

334. *See id.* at 882.

335. *Id.* at 881-82.

336. *Id.* at 882.

337. *Id.* at 888 (Ryan, J., dissenting).

338. *See, e.g., Tyus v. Schoemehl*, 93 F.3d 449, 450, 458 (8th Cir. 1996) (holding nonparty challengers to electoral redistricting bound by a prior judgment, although the prior lawsuit was not brought on behalf of a class); *Louisiana Seafood Management v. Foster*, 46 F. Supp. 2d 533, 546 (E.D. La. 1999) (holding a party claim-precluded based on virtual representation, regardless of whether the party was a member of earlier class); *Petit v. City of Chicago*, No. 90 C4984, 1999 WL 66539, at *1-2 (N.D. Ill. Feb. 8, 1999) (holding nonparty white police officers bound by a prior judgment concerning an affirmative action promotions policy, although the prior lawsuit was not brought on behalf of a class); *DeBraska v. City of Milwaukee*, 11 F. Supp. 2d 1020, 1026 (E.D. Wis. 1998) (holding police officers bound by a prior judgment, although the prior lawsuit was not brought on behalf of a class of officers), *rev'd*, 189 F.3d 650 (7th Cir. 1999); *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 71 Cal. Rptr. 2d 77, 89-90 (Ct. App. 1998) (holding citizens bound by a prior judgment involving state agencies, although the state agencies did not purport to represent a class in the prior action); *Duffy v. Si-Sifh Corp.*, 726 So. 2d 438, 442-43 (La. Ct. App. 1999) (holding a putative class representative bound by a prior denial of class certification against a different putative class representative).

339. *See City of Chicago v. Shalala*, No. 97 C4884, 1998 WL 164889, at *11 (N.D. Ill. Mar. 31, 1998):

Members of the [subsequent] class are similarly situated to the plaintiffs in *Zizumbo*. In fact, the *Zizumbo* plaintiffs would have been members of the SSI class. The court also notes parenthetically that one of the attorneys for the plaintiffs in *Zizumbo* also represents the plaintiffs-intervenors in this case. Thus, identity of the parties and the issues exists

aff'd, 189 F.3d 598 (7th Cir.), *cert. denied*, 120 S. Ct. 1530 (2000).

Bell Telephone Co. v. Alabama,³⁴⁰ will stem the tide of virtual representation decisions that circumvent the class action rule.

Virtual representation has allowed courts to circumvent MDL limitations as well. In one air crash litigation, pending federal actions were transferred for consolidated MDL handling, and the MDL court conducted a "joint liability trial" to adjudicate claims between McDonnell Douglas and Northwest Airlines.³⁴¹ The trial resulted in a jury finding that Northwest was responsible for the accident and that its flight crew had engaged in willful and wanton misconduct.³⁴² Subsequently, the executor of the estate of a member of the Northwest flight crew filed a wrongful death action against several defendants.³⁴³ The court held that the executor was bound by the jury finding that the decedent had engaged in willful and wanton misconduct, on the grounds that "the Plaintiff's interests were adequately represented in the joint liability trial" by the decedent's employer, Northwest.³⁴⁴ Although the plaintiff's action did not commence until after the MDL trial, the court held that the plaintiff "had a full and fair opportunity to pursue the decedent's claims" because he could have joined or intervened in the MDL.³⁴⁵ The court

340. 526 U.S. 160 (1999). In *South Central Bell*, the Supreme Court rejected a state court's application of res judicata to a taxpayer action, based on a prior action brought by different taxpayers. The Supreme Court reasoned:

The two relevant cases involve different plaintiffs and different tax years. Neither is a class action, and no one claims that there is "privity" or some other special relationship between the two sets of plaintiffs. Hence, the Case Two plaintiffs here are "strangers" to Case One, and for the reasons we explained in *Richards v. Jefferson County*, 517 U.S. 793 (1996)], they cannot be bound by the earlier judgment.

Id. at 1185. Neither the plaintiffs' awareness of the prior action, nor the overlap of one plaintiff's lawyer, created any "special representational relationship between the earlier and later plaintiffs." *Id.* One would think that this Supreme Court pronouncement would put an end to the virtual representation argument, but one would have thought the same about *Richards v. Jefferson County*, 517 U.S. 793 (1996) (holding that nonparties were not bound by an earlier judgment where they received neither notice of nor sufficient representation in that earlier litigation), and *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that a group of firefighters was not precluded from challenging decisions made pursuant to a consent decree where those firefighters were not parties to the proceeding in which the consent decree was entered), and yet the virtual representation cases appear to have continued unabated.

341. *Dodds v. McDonnell Douglas Corp. (In re Air Crash at Detroit Metro. Airport)*, 976 F. Supp. 1076, 1078 (E.D. Mich. 1997).

342. *See id.*

343. *See id.* at 1078 n.2.

344. *Id.* at 1081-82.

345. *Id.* at 1082. The court continued:

Although the Plaintiff had a full and fair opportunity to pursue the decedent's claims, he apparently made a tactical decision to wait until after the commencement of the joint liability trial to pursue his claims—almost three years after the air crash. Under

may have felt satisfied with the plaintiff's "full and fair opportunity," but nowhere does the MDL statute give judges the power to bind nonparties with MDL adjudications. The MDL statute explicitly limits itself to the transfer of pending civil actions;³⁴⁶ unlike class action, MDL does not purport to achieve representative litigation. To bind the executor, who was not party to the MDL proceedings, is to treat an MDL adjudication as a class action, in contravention of both the class action rule and the MDL statute.

This brings us full circle to the ethics problem and the boundaries of the lawyer-client relationship. To bind a litigant with the outcome of a case in which counsel lacked explicit duties to that litigant amounts to circumvention not only of the procedural protections and limitations of formal aggregation mechanisms, but also of the ethical relationships built into such mechanisms. The controlling lawyers in an informally aggregated litigation—those lawyers at the hub of the hub and spoke network—to a significant extent control the fate of all of the clients in the litigation. In this regard, clients in informally aggregated litigation may find themselves similarly situated to clients in a class action or MDL, but without the same level of judicial oversight or procedural and ethical safeguards.

V. THE WORST OF BOTH WORLDS

A. *Neither True Litigant Autonomy nor True Aggregation*

Although it would be wrong to allow nonparty preclusion based on informal aggregation, that is, based exclusively or primarily on the coordinated conduct of the lawyers, it would be equally wrong to pretend that the individual litigant in massive multi-suit litigation is truly autonomous. Not only does the individual litigant often lack significant control over his own lawyer,³⁴⁷ that lawyer often works as part of a large and complicated network of interdependent lawyers.

Rule 24(a) of the Federal Rules of Civil Procedure, he could have intervened in the multi-district litigation. Thus, the Court finds that the Plaintiff's decedent and Northwest were in privity for collateral estoppel purposes.

Id. (footnotes omitted); *see also id.* at 1082 n.17 (noting that the plaintiff's counsel participated in MDL discovery); *id.* at 1082 n.18 ("The Plaintiff could have also joined in the multi-district litigation prior to September 29, 1989.").

346. *See* 28 U.S.C. § 1407 (1994); *supra* notes 146-51 and accompanying text.

347. *See* Hensler, *Myths and Realities*, *supra* note 1, at 92-97.

Lack of client control is sometimes cited as a concern with formal aggregation mechanisms in mass litigation. Professor Richard Marcus has written of the distance between clients and lawyers in the Bendectin litigation, for example:

Stanley Chesley negotiated a proposed settlement on behalf of plaintiffs who had never heard of him, and without any prior grant of authority to do so. The trial preparation and presentation were done by a committee of plaintiffs' lawyers who were sometimes in conflict with one another and seemingly not in regular contact with many of the over one thousand plaintiffs whose claims were before Judge Rubin.³⁴⁸

What should be added to this account is that it would probably give an accurate description of the level of client involvement and control even as to cases outside the MDL consolidation, and even if MDL consolidation had been denied altogether. In informally aggregated litigation, settlement negotiations may occur with little control by the individual client, and trial preparation often is handled "by a committee of plaintiffs' lawyers" who lack regular contact with most of the plaintiffs who rely on those lawyers' work.

The incongruity of having extensive informal aggregation but not having either preclusion or explicit ethical duties suggests that something is awry. The extent of informal aggregation in mass litigation contradicts the conception of individual lawsuits as independent disputes to be resolved by a process controlled by individual litigants. If the legal system cannot devise mechanisms for addressing a coherent dispute as a unified whole, the litigation will aggregate itself anyway.

The end result may be the worst of both worlds. Neither does the client have individual litigant autonomy, nor does the legal system obtain real finality and consistency by precluding the relitigation of decided issues. Neither can the client rely on full control by the client's individually retained lawyer, nor can the client rely on explicit ethical duties to the client by those who control the case.

B. A Better Way

Among the many implications of informal aggregation, perhaps the most basic is the support it lends to initiatives to improve formal mechanisms for aggregating litigation. Given the powerful drive to

348. Marcus, *supra* note 4, at 251.

coordinate, evidenced by both plaintiffs and defendants in a wide variety of litigation, true litigant autonomy may be unattainable in many situations involving multiple related claims. One way to solve the worst of both worlds problem, then, is to bring procedural and ethical safeguards, as well as consistent binding judgments, to coherent multi-claim litigation.³⁴⁹ In other words, the benefits of formal aggregation may come without much loss of litigant autonomy, given the extent to which lawyers coordinate anyway.

Some courts and commentators have taken precisely the opposite view: that informal coordination among lawyers provides a basis for rejecting formal aggregation. One court, for example, noted that "[i]nformal coordination among plaintiffs' lawyers offers a means for spreading the costs of litigation without the complexity of a class action."³⁵⁰ Similarly, attorneys opposed to class certification have argued that counsel coordination offers a less drastic means to achieve the benefits of class actions.³⁵¹ Professor Michael Green, in his study of the Bendectin litigation, urges a realistic perspective when considering the benefits of MDL: "The point is not that multidistrict consolidation is without its efficiencies—it surely is. Rather, more modestly, the advantages of consolidation must be assessed against the alternative—which is not the individual-lawyer-with-separate-client-litigating-independently paradigm that some have employed."³⁵² Professor Green is absolutely correct that the benefits of formal aggregation should be weighed against the reality of informal aggregation, rather than against an imaginary picture of uneconomical individualized litigation. But I would add that the downsides of formal aggregation, which have kept rulemakers, legislators, and courts from creating comprehensive aggregation

349. See generally Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991) (favoring, generally, formal aggregation as the superior method of achieving finality, fairness, and consistency, but noting concerns about various proposed aggregation devices). In arguing in support of formal aggregation, Dean Sherman notes the increasingly coordinated nature of discovery and pretrial strategy. See *id.* at 247-48.

350. *Martin v. American Med. Sys., Inc.*, No. IP 94-2067-C-H/G, 1995 WL 680630, at *9 (S.D. Ind. Oct. 25, 1995).

351. See Theodore V.H. Mayer & Robb W. Patryk, *Class Actions in Drug and Medical Device Cases: The Trend Against Class Certification*, ANDREWS MASS TORT LITIG. REP., Feb. 1997, at 12 (approving the trend away from class certification in products liability cases, arguing that "[c]lass actions in many instances deprive plaintiffs of the freedom to control their own cases, and there are other, less restrictive, procedural devices available—such as consolidated pretrial discovery and 'informal coordination' among plaintiffs' counsel—which can be used to minimize the burden on the parties and the judicial system").

352. GREEN, *supra* note 5, at 241.

mechanisms, should be viewed in light of the reality of informal aggregation, rather than in light of an imaginary picture of pure individual litigant autonomy.

A point of agreement, I think, is that the phenomenon of informal aggregation suggests that lawyers are filling a need informally that the system has failed to fill formally. The disagreement concerns whether we should be satisfied that the need is being filled adequately. Although informal aggregation brings many benefits, it cannot adequately protect clients from lawyer misconduct, especially when the coordinating lawyers fail to describe their duties explicitly in a written agreement. Nor can informal aggregation offer the efficiency and consistency of a single binding adjudication, at least not without a troubling and unwarranted expansion of the virtual representation doctrine.

The quest for perfect formal aggregation is beyond the scope of this Article, but various proposals for enhanced aggregation mechanisms amply demonstrate that it is possible to devise workable rules for increasing the reach of formal aggregation. Among these proposals are the American Law Institute's Complex Litigation Project,³⁵³ the Uniform Transfer of Litigation Act,³⁵⁴ the proposed Judicial Reform Act of 1998,³⁵⁵ and several rounds of proposed class action rule amendments.³⁵⁶ Even proposed legislative solutions for

353. AMERICAN LAW INSTITUTE, *supra* note 35 (proposing a statutory mechanism to allow consolidation of related actions pending in dispersed federal and state courts). *But see* JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 251-53 (1998) (questioning the ALI proposal's constitutionality).

354. 14 U.L.A. 201 (Supp. 2000) (proposing a uniform state statute to allow consolidation of related actions pending in multiple state courts); *see also* Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994) (favoring the Uniform Transfer of Litigation Act over the ALI Proposal but not suggesting that the ALI Proposal was ill-advised); Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 268 (1994) (suggesting that states could create a "real system of interstate transfer" by adopting the Uniform Transfer of Litigation Act).

355. H.R. 1252, 105th Cong. § 7 (1998) (providing for multiparty, multiforum federal jurisdiction in single accident cases involving at least 25 victims with damages over \$50,000 per person, based on minimal diversity of citizenship). The bill is largely identical to bills that passed the House in the late 1980s and early 1990s. *See* Multiparty, Multiforum Jurisdiction Act of 1991, H.R. 2450, 102d Cong. § 2 (1991); Court Reform and Access to Justice Act of 1988, H.R. 4807, 100th Cong. §§ 301-07 (1988); *see generally* Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1987) (proposing such multiparty, multiforum jurisdiction).

356. *See* PROPOSED AMENDMENTS TO FED. R. CIV. P. 23, Preliminary Draft of Proposed

particular mass disputes such as the failed McCain tobacco bill³⁵⁷ and the proposed Fairness in Asbestos Compensation Act of 1999,³⁵⁸ despite serious problems and controversies, suggest avenues for bringing related claims together for more efficient and consistent resolution.

In the absence of aggregation by a formal judicial mechanism, lawyers can and should replicate some of the same protections for their clients by using written cooperation agreements. Currently, coordinating lawyers often employ written agreements, both among defendants and among plaintiffs, but some coordination occurs on an uncharted basis, with lawyers working together without any written agreement. Perhaps, with apologies for oxymoronic clumsiness, we must distinguish between "formal informal aggregation" and "informal informal aggregation." Formal informal aggregation, despite the lack of judicial aggregation of the litigation, involves explicit guidelines and duties for the coordinating lawyers. Examples include plaintiffs' lawyers coordinating through ATLA litigation groups or using the ATLA Exchange³⁵⁹ and defense lawyers working under written joint defense agreements.³⁶⁰ A well-drafted written agreement among participating lawyers and clients can make explicit the duty of confidentiality, clarify expectations with regard to other duties, and provide a relatively clear contractual basis for liability based on a lawyer's failure to perform her assigned role.

Formalizing the process of informal aggregation can protect clients in some of the same ways formal judicial aggregation does.

Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure (Committee on Rules of Practice and Procedure Aug. 1996); Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23 (Feb. 1995 Draft and Nov. 1995 Draft), *reprinted in* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, app. at 53-73 (1996).

357. Universal Tobacco Settlement Act, S. 1415, 105th Cong. §§ 701-03 (1997). *See* David E. Rosenbaum, *Senate Drops Tobacco Bill with '98 Revival Unlikely*, N.Y. TIMES, June 18, 1998, at A1 (discussing the failed Act, which would have protected tobacco companies from suits in exchange for substantial payments and policies intended to decrease smoking among youth).

358. S. 758, 106th Cong. §§ 401-04 (1999). *See* Stephen Labaton, *Asbestos Cases in for Overhaul by Lawmakers*, N.Y. TIMES, June 28, 1999, at A1 (describing the Supreme Court's request to Congress to devise a plan to resolve asbestos claims); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (urging Congress to pass national legislation to address "the elephantine mass of asbestos cases").

359. *See supra* notes 43-48 and accompanying text (explaining the functions and scope of ATLA litigation groups and the ATLA Exchange).

360. *See supra* notes 96-101 and accompanying text (discussing the use of joint defense agreements).

Ordinarily, however, it cannot create the same opportunities for judicial oversight that formal aggregation provides, nor does it allow for a single binding adjudication. On the other hand, formal informal aggregation has certain advantages over formal aggregation, including much greater flexibility to allow private ordering by the attorneys and clients involved.

The phenomenon of informal aggregation points to gaps in the legal system's formal devices for bringing together related claims. That does not mean that all of those gaps should be filled. Formal aggregation may prove unattainable in some cases due to justified limits built into joinder and consolidation devices. It does mean, however, that lawyer coordination often functions as a litigation-aggregating device. Recognizing that lawyer coordination pulls lawsuits together for coordinated handling, despite the legal system's formal treatment of those lawsuits as separate, suggests two conclusions. First, it suggests that current procedural devices fail to reach some lawsuits suitable for coordinated handling, and procedural revisions might enable formal aggregation to reach such cases. Second, in the absence of formal aggregation, it is important for lawyers to formalize the relationship enough to provide the safeguards that any litigation-aggregating mechanism warrants.

CONCLUSION

Litigation aggregates itself. Formal procedural mechanisms do not always do it, but aggregation happens anyway.

Procedural rules and statutes offer a whole host of formal aggregation devices: permissive joinder, compulsory joinder, impleader, interpleader, intervention, class action, consolidation, MDL. These devices can pull together vast numbers of related claims on a formal, judicially recognized basis, with at least some procedural safeguards, and at least some explicit duties among the lawyers. Many closely related claims, however, remain outside the reach of these procedural mechanisms, and proceed as formally separate actions.

Lawyers with similarly situated clients tend to coordinate their efforts. Just as they coordinate when their clients are co-plaintiffs or co-defendants within a single lawsuit, so do they coordinate when their clients are parties to separate actions. To lawyers and litigants, most of the benefits of coordination do not depend on whether the actions are formally aggregated, but rather on the alignment of interests and the overlap of legal and factual issues. Counsel

coordination occurs to such an extent that, in many cases, it is fair to say that the lawyers treat judicially separate actions as though they were a single lawsuit—"informally aggregating" the litigation.

Informal aggregation raises important questions about the boundaries of a dispute. If separate lawsuits are treated by the participating lawyers as a single litigation, should the legal system recognize that the essential dispute is not the individual lawsuit? Informal aggregation offers litigants an attractive argument for nonparty preclusion on the theory of virtual representation, but that argument should fail. Although the language of many virtual representation cases suggests that coordinated efforts by counsel should be counted as an important factor in determining whether a nonparty may be bound by a judgment, it would be wrong to bind nonparties to a judgment based solely or primarily on the joint efforts of their lawyers. Such preclusion would have the unfortunate effect of discouraging coordination. More important, it would circumvent the procedural and ethical safeguards of formal aggregation.

The procedural and ethical safeguards built into formal aggregation devices such as class actions and MDL, imperfect as they are, are far better than nothing. For a court to certify a class, the court must find that the class representatives and class counsel will "fairly and adequately protect the interests of the class."³⁶¹ In many class actions, moreover, class members may opt out.³⁶² Class counsel are obligated to pursue and protect the interests not only of the named class representatives, but also of the absent class members. In consolidated multidistrict litigation, the MDL court oversees the handling of the litigation, and lead counsel and committee members owe at least some identifiable duties to the parties relying on them. Despite legitimate concerns about the vagueness of ethical and fiduciary obligations in formally aggregated litigation, those duties appear crisp in comparison to counsel's obligations in informally aggregated litigation.

Informal aggregation leaves litigants with little autonomy, but it also leaves the legal system without the finality and consistency of a broadly binding judgment. It leaves clients dependent upon the skill

361. FED. R. CIV. P. 23(a)(4); *see also* *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (mandating adequacy of representation as a constitutional requirement for binding class actions).

362. *See* FED. R. CIV. P. 23(c)(2); *see also* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (holding that opt-out rights are constitutionally required for money damages class actions).

and trustworthiness of multiple lawyers, but potentially without clear lines of accountability. Informal aggregation thus presents a worst-of-both-worlds scenario, but the problem is not counsel coordination itself. Coordination carries palpable benefits for clients, lawyers, and the legal system. Rather, the problem is the lack of a procedural and ethical structure to protect clients when such coordination occurs.

Explicit written agreements among coordinating lawyers provide clients with some of the protection that would be available through formal aggregation. Such cooperation agreements may provide the best balance between the flexibility of informal coordination and the safeguards of procedural aggregation mechanisms. Taking the argument a step further, the problems of informal aggregation suggest the need for more comprehensive formal procedures for linking claims. The various proposals for enhanced formal aggregation to encompass more multi-claim situations, whatever their imperfections, at least would provide judicial recognition and some procedural and ethical safeguards for situations in which lawyers are likely to work in teams.

I do not want to overstate my case for enhanced formal aggregation. There are serious reasons to resist movement toward greater aggregation. In particular, the value of litigant autonomy, both to individual dignity and to litigant satisfaction with the legal system, should not be underestimated.³⁶³ But we ought not resist expansive formal aggregation mechanisms out of an illusion that as long as cases are not formally united, each litigant in multi-suit litigation enjoys the benefits of individual autonomy. Nor should we resist more formal lawyer coordination structures on the misguided assumption that clients' interests are adequately protected by their own lawyer's involvement. Over and over, in diverse areas of law, related claims aggregate themselves through the joint activity of the lawyers, and clients depend on the work and decisions of the coordinating lawyers.

In the end, the question is not whether we should opt for aggregation or individual litigant autonomy. The real question, given that lawyers do handle related cases on a coordinated basis, is whether we should opt for aggregation with formal safeguards or without.

363. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 93-106 (1988); John Thibault & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 548-52 (1978).