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## Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule

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# ETHICAL ISSUES IN MASS TORT PLAINTIFFS' REPRESENTATION: BEYOND THE AGGREGATE SETTLEMENT RULE

Nancy J. Moore\*

*Those who have addressed ethics issues for plaintiffs' lawyers in mass tort litigation have focused on possible reform of the aggregate settlement rule to facilitate global settlements. This Article addresses a broader range of ethical issues, including (1) application of the general conflicts of interest rule to both client-client and client-lawyer conflicts; (2) unresolved issues concerning the interpretation of the current aggregate settlement rule, including the need to disclose client names and the applicability of the rule to court-approved settlements and formula or matrix allocations; and (3) the ability of lawyers to voluntarily withdraw from representing plaintiffs who reject an offer of settlement.*

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## INTRODUCTION

Following the Supreme Court decisions in *Amchem Products, Inc. v. Windsor*<sup>1</sup> and *Ortiz v. Fibreboard Corp.*,<sup>2</sup> plaintiffs' attorneys largely shifted from using class actions to resolve large numbers of personal injury and other tort claims to using nonclass group litigation,<sup>3</sup> including both formal and informal aggregations of individual claims,<sup>4</sup> in which, unlike class actions,<sup>5</sup> each claimant has a more-or-less traditional attorney-client relationship with the plaintiffs' attorney.<sup>6</sup> Although many of these claims are resolved individually—sometimes by trial and sometimes by settlement—it has become increasingly common for both plaintiffs' and defendants' attorneys to attempt to resolve large numbers of claims through negotiated settlements, including both a single, “global” resolution of virtually all claims<sup>7</sup> and more limited resolutions of each plaintiffs' attorney's “inventory” of claims.<sup>8</sup>

Neither courts, practitioners, nor scholars have focused much attention on the ethical issues confronting plaintiffs' lawyers in the group representation of mass tort claimants.<sup>9</sup> To the extent that they have, however, most of their concern has been with American Bar Association (ABA) Model Rule

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1. 521 U.S. 591 (1997).

2. 527 U.S. 815 (1999).

3. See generally Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010).

4. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (2009) (listing types of formal and informal aggregate litigation); see also, e.g., Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

5. For a discussion of the relationship between class counsel and members of the class, see, for example, Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1482–89.

6. For ways in which the relationship between lawyer and client in mass tort representations involving large numbers of clients differs from the traditional representation of individual clients, see, for example, JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 85 (1995) (arguing that “[t]he mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation”), and Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 160–62 (1999) (discussing the challenges of reasonably communicating with large numbers of clients in mass tort representation). See also *infra* notes 89–101 and accompanying text (arguing that there should be some limitation on the number of clients represented by a single lawyer or law firm).

7. See, e.g., Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 980 (2010) (describing the desirability of a “global settlement as a value-generating enterprise and the natural endgame of mass litigation”).

8. See, e.g., Elizabeth Chamblee Burch, *Financiers As Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1296–97 (2012); cf. Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal To Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 514 (2008) (discussing practitioners' reference to multiple clients' similar claims as their “inventory”).

9. Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 723–33 (2011) (criticizing the ALI for failing to do more to educate lawyers concerning their ethical obligations in both class and nonclass aggregated litigation).

1.8(g)—the aggregate settlement rule—which provides that a lawyer representing multiple plaintiffs “shall not participate in making an aggregate settlement of the claims of . . . the client . . . unless each client gives informed consent, in a writing signed by the client.”<sup>10</sup> They have offered various definitions of an “aggregate settlement”<sup>11</sup> and questioned precisely what information must be disclosed in satisfaction of the rule’s requirements.<sup>12</sup> In addition, they have sometimes addressed the ethical propriety of the attempts by defense attorneys to indirectly achieve final resolution by inserting provisions in settlement agreements that prevent plaintiffs’ attorneys from taking on new clients with similar claims against the defendant.<sup>13</sup> Such attempts raise questions concerning unethical restrictions on the right to practice,<sup>14</sup> in violation of Model Rule 5.6(b), which prohibits a lawyer from offering or making “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”<sup>15</sup>

Most recently, ethics scholars have been preoccupied with attempts to make it easier to achieve global resolution through aggregate settlements by revising Rule 1.8(g) to permit plaintiffs to agree, in advance, to be bound by the decision of a majority or supermajority to accept the terms of an aggregate settlement.<sup>16</sup> Courts and ethics committees have uniformly held that such advance waivers do not satisfy the current rule’s requirement that each client give consent after being informed of the particular terms of the proposed settlement.<sup>17</sup> Critics of this requirement argue that it is

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

11. *See, e.g.*, Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1795 (2005). *See generally* Mark J. Fucile, *The Aggregate Settlement Rule: A Rule in Search of a Definition*, 78 DEF. COUNS. J. 296 (2011).

12. *Compare, e.g.*, Moore, *supra* note 6, at 164 (arguing that the current rule does not necessarily require the disclosure of client names in all cases), *with* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 780 (1997) (arguing that the current rule requires the disclosure of the names of all client participants and the amount each will receive). *See generally infra* notes 155–66 and accompanying text (addressing the necessity of disclosing both client names and the actual amounts clients will receive when settlement utilizes a formula to be applied after settlement is approved).

13. *See, e.g.*, Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 279–92 (2011) (discussing the propriety of such a provision in the recent *Vioxx* settlement).

14. *Id.*

15. MODEL RULES OF PROF’L CONDUCT R. 5.6(b); *see infra* notes 22–27, 196–203 accompanying text (discussing whether attorneys would violate Rule 5.6(b) if they complied with the applicable provision of the *Vioxx* settlement agreement).

16. *E.g.*, Erichson & Zipursky, *supra* note 13; Nancy J. Moore, *The American Law Institute’s Draft Proposal To Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395 (2008); Moore, *supra* note 6; Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734 (2011); Silver & Baker, *supra* note 12; Kerrie M. Brophy, Note, *Consent Waivers in Non-class Aggregate Settlements: Respecting Risk Preference in a Transactional Adjudication Model*, 22 GEO. J. LEGAL ETHICS 677 (2009); Dirks, *supra* note 8.

17. *See* Morgan, *supra* note 16, at 741.

unnecessary and unduly burdensome, thereby preventing plaintiffs from fully realizing the potential benefits of aggregating their claims.<sup>18</sup> These critics persuaded the American Law Institute (ALI)—in its recently adopted *Principles of the Law of Aggregate Litigation*—to propose a rule change permitting claimants, in certain circumstances, to agree in advance to accept an aggregate settlement offer approved by a supermajority of similarly situated claimants.<sup>19</sup> The ALI proposal was finalized in 2010, but to date no jurisdiction has adopted such a rule change.<sup>20</sup>

Practitioners involved in group litigation, particularly defense attorneys, continue to search for ways to increase the likelihood of achieving a global resolution of all (or virtually all) claims. In 2007, the pharmaceutical company Merck signed a \$4.85 billion agreement with law firms representing over 33,000 claimants who were suing Merck for injuries allegedly caused by Vioxx.<sup>21</sup> The agreement contained several controversial provisions requiring plaintiffs' attorneys to recommend the settlement to all of their clients and to withdraw from representing any client who rejected the settlement.<sup>22</sup> These provisions arguably violated state versions of ABA Model Rule 2.1, which requires lawyers to exercise independent professional judgment in advising their clients;<sup>23</sup> ABA Model Rule 1.16,<sup>24</sup> which prohibits lawyers from withdrawing from a representation without good cause when the result will be to materially prejudice the client;<sup>25</sup> and ABA Model Rule 5.6, which prohibits settling attorneys from agreeing to restrict their right to practice.<sup>26</sup>

*Vioxx* and other similar settlements<sup>27</sup> raise important ethical issues beyond the aggregate settlement rule. Nevertheless, neither practitioners nor scholars have adequately addressed the full range of ethical issues confronting plaintiffs' attorneys representing large numbers of claimants in mass tort cases. For example, although the aggregate settlement rule is

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18. See, e.g., Silver & Baker, *supra* note 12, at 756–68.

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

20. See N.J. SUPREME COURT PROF'L RESPONSIBILITY RULES COMM., 2010–2012 RULES CYCLE REPORT 41 (2012), available at [http://op.bna.com/mopc.nsf/id/jros-8rskq8/\\$File/NJ%20PRRC2010-12RPT.pdf](http://op.bna.com/mopc.nsf/id/jros-8rskq8/$File/NJ%20PRRC2010-12RPT.pdf).

21. David Voreacos & Allen Johnson, *Merck Paid 3,468 Death Claims To Resolve Vioxx Suits*, BLOOMBERG.COM (July 27, 2010, 5:27 PM), <http://www.bloomberg.com/news/2010-07-27/merck-paid-3-468-death-claims-to-resolve-vioxx-suits.html>.

22. See, e.g., Erichson & Zipursky, *supra* note 13, at 280–81. With respect to the mandatory withdrawal provision, the agreement did provide the caveat that attorneys were not required to withdraw unless ethically permitted to do so under state equivalents of Rules 1.16 and 5.6 of the ABA Model Rules. See *id.* at 290. I agree with Erichson and Zipursky that, even with this caveat, this provision was unethical, although not for the same reasons they give. See *infra* Part III.

23. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2012) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”).

24. *Id.* R. 1.16 (providing for required and permissive withdrawal from representation).

25. See, e.g., Erichson & Zipursky, *supra* note 13, at 283–85 (also discussing probable violations of Rules 1.2(a), 1.4, and 5.6(b)).

26. See *supra* note 15 and accompanying text.

27. For a discussion of several recent settlements that raise significant ethical issues, see Erichson, *supra* note 7.

generally understood as a special application of general conflicts of interest rules (as well as rules specifying that it is for the client, not the lawyer, to determine whether to accept or reject a settlement), there is little understanding as to how these general conflicts of interest rules apply to plaintiffs' lawyers prior to an aggregate settlement proposal, either at the outset of an individual representation or as the representation develops.<sup>28</sup> At what point does a conflict of interest arise? Are any such conflicts ever nonconsentable, either at the beginning of a representation or as events unfold? What specific disclosures are lawyers required to make in order to assure that client consent is adequately informed? Are additional disclosures required as the representation evolves?

As for the specific issues raised by the *Vioxx* settlement agreement, commentators generally agree that it was improper for defense attorneys to require (and for plaintiffs' attorneys to agree) that the plaintiffs' attorneys would recommend the settlement to all their clients<sup>29</sup> and would withdraw from the representation of any client who rejected the settlement.<sup>30</sup> Even in the absence of such heavy-handed provisions, however, the question remains how plaintiffs' attorneys can possibly exercise independent judgment in advising individual claimants whether to accept an aggregate settlement when defense attorneys require (as they are clearly permitted to do) that the settlement will be ineffective for any claimant unless all or a specified percentage of claimants agree to participate. And what if a plaintiffs' attorney cannot afford to continue representing only a few clients—or even one—who reject the settlement and insist on going to trial? Aside from what defense attorneys want them to do, is there no way that plaintiffs' attorneys can protect themselves against the possibility that they will be unable to spread the costs of any ongoing representation among a large number of clients?

In this Article, I address a broader range of ethical issues confronting plaintiffs' attorneys in mass tort cases than is usually found in the writings of either practitioners or scholars. Part I addresses various underanalyzed applications of the general conflicts of interest rule, including not only

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28. *See infra* Part I.A.

29. *See, e.g.*, PAUL D. RHEINGOLD, *LITIGATING MASS TORT CASES* § 14:13:50 (Supp. 2012); Erichson & Zipursky, *supra* note 13, at 283–84. It has been pointed out to me that the pressure placed on attorneys as a result of the mandatory recommendation provision was lessened by the existence of a provision, typically overlooked by commentators, for an “extraordinary injury fund” (EIF), by which clients could seek additional compensation if they were dissatisfied with their compensation under the matrix formula. *See* Settlement Agreement Between Merck Co., Inc. and the Counsel Listed on the Signature Pages Hereto § 4.2 (Nov. 9, 2007), available at [http://www.legalexaminer.com/uploadedFiles/InjuryBoard.com\\_Content/Overviews/VioxxMasterSettlementAgreement.pdf](http://www.legalexaminer.com/uploadedFiles/InjuryBoard.com_Content/Overviews/VioxxMasterSettlementAgreement.pdf). This provision made it easier for attorneys to exercise their independent judgment in favor of recommending the settlement to their clients.

30. *See, e.g.*, RHEINGOLD, *supra* note 29, § 14:13:50; Erichson & Zipursky, *supra* note 13, at 285–92. As noted earlier, the requirement to withdraw was limited to situations in which such withdrawal was ethically permissible. *See supra* note 25. Nevertheless, commentators have generally concluded that the provision was still unethical. *See infra* Part III.

conflicts among different plaintiffs and plaintiff groups but also conflicts between the plaintiffs and the plaintiffs' attorney. Part II briefly addresses continuing difficulties in defining an aggregate settlement for purposes of Rule 1.8(g). It also addresses the significance of a variation of the rule adopted in at least two states, which appears to provide that the rule does not apply when an aggregate nonclass settlement receives court approval, as it did in the *Vioxx* settlement.<sup>31</sup> With respect to the disclosure provisions of the current rule, questions remain whether the rule requires each client to be advised of the name of, and amount being allocated to, every other client; these requirements may impinge not only on the legitimate privacy interests of some clients but also on the ability of the parties to enter into a settlement agreement when the specific allocations have not yet been made—for example, when an independent third person will subsequently make the individual allocations, typically based on a formula or matrix described in the agreement. Finally, Part III addresses the ability of plaintiffs' attorneys to withdraw from the representation of one or more clients who decline to accept an aggregate settlement offer when the expenses of the representation cannot be spread among a large number of clients.

#### I. CONFLICTS OF INTEREST

It is generally acknowledged that Rule 1.8(g)—the aggregate settlement rule—represents a special application of both Rule 1.7—the general conflicts of interest rule—and Rule 1.2(a), which provides that a lawyer must abide by a client's decision whether to settle a matter.<sup>32</sup> What is less often recognized is that Rule 1.8(g) merely *supplements* Rule 1.7, but does not *supplant* it,<sup>33</sup> meaning that it is possible for a plaintiffs' attorney to violate Rule 1.7 in negotiating and recommending an aggregate settlement to a disparate group of plaintiffs even though the attorney has strictly complied with the requirements of Rule 1.8(g). Even more surprising, however, is the failure of most commentators to address the application of Rule 1.7 at earlier stages of the representation, beginning with the acceptance of each new client and continuing through the various stages of the representation. The representation might conclude with an aggregate settlement (including all or part of the attorney's clients) or it might conclude with one or more individual trials to verdict or settlements of

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31. See Erichson & Zipursky, *supra* note 13, at 296–97.

32. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 13 (2012); Brophy, *supra* note 16, at 680.

33. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 438 (2006). For an illustration of commentaries that appear to assume that the conflicts that arise with respect to aggregate settlements are addressed solely or primarily by Rule 1.8(g), without any discussion of the applicability of Rule 1.7 either at the outset of the representation or when negotiating an aggregate settlement, see Robert I. Komitor, *Mediation and Settlement of the Multiparty Action—When Ethical Considerations Clash with Case Resolution*, 2001 ATLA-CLE 2785; J. Michal Papantonio, *The Ethics of Mass Tort Settlement*, 2002 ATLA-CLE 2617; Brophy, *supra* note 16; Dirks, *supra* note 8.

individual cases, or with some combination of individual trials, settlements of individual cases, and aggregate settlements.<sup>34</sup>

#### A. Conflicts at the Outset of the Representation

Rule 1.7(a) provides that a concurrent conflict of interest exists when “the representation of one client will be directly adverse to another client”<sup>35</sup> (a “directly adverse conflict”), or when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer” (a “material limitation conflict”).<sup>36</sup> It is rarely the case that mass tort claimants in similar types of cases will be directly adverse to each other, as would happen if one claimant-client sued another claimant-client, typically in an unrelated matter, or if one appeared as a witness against another and the lawyer had to cross-examine the client-claimant witness on behalf of the client-claimant party.<sup>37</sup> These scenarios are highly remote. What is more likely, however, is that the representation of one claimant, or one type of claimant, will be materially limited by the representation of other claimants, or other types of claimants.<sup>38</sup> This is the *client-client conflict* that most lawyers understand is present when a plaintiffs’ attorney negotiates an aggregate settlement. Indeed, it is precisely this type of conflict that underlies the aggregate settlement rule.<sup>39</sup> In addition, some courts and commentators have expressed concern that there are *client-lawyer* conflicts arising from financial and other interests of

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34. Several commentators discuss the applicability of Rule 1.7 at the outset of the representation when the lawyer is accepting new clients. See, e.g., RHEINGOLD, *supra* note 29, § 14:17; Erichson & Zipursky, *supra* note 13, at 304–11; Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 558–67. See generally Sarah A. Toops, *Ethically Representing Thousands of Plaintiffs: Conflict Problems in Mass Toxic Harm Cases*, 67 DEF. COUNS. J. 462 (2000). Much of this commentary focuses solely on the nature of the disclosure the lawyer must make in order to obtain the informed consent of the clients to the conflicts inherent in mass representation. See, e.g., Matthew L. Garretson, *A Practical Approach to Proactive Client-Counseling and Avoiding Conflicts of Interest in Aggregate Settlements*, 6 LOY. J. PUB. INT. L. 19, 30–33 (2005); cf. *In re Hoffman*, 883 So. 2d 425, 425 (La. 2004) (holding that an attorney violated Rule 1.7(b) by failing to obtain the informed consent of two clients to the joint representation and also violated Rule 1.8(g) by failing to consult with all his clients with respect to the details of the proposed aggregate settlement). Commentators rarely address conflicts that arise subsequent to intake, perhaps assuming that if the lawyer obtains informed consent at the outset, this consent covers conflicts that arise subsequently, including the actual negotiation of an aggregate settlement, which is also addressed by Rule 1.8(g).

35. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1) (2012).

36. *Id.* R. 1.7(a)(2).

37. See *id.* R. 1.7 cmt. 6.

38. Material limitation conflicts arise “if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interest.” *Id.* cmt. 8. In other words, “[t]he conflict in effect forecloses alternatives that would otherwise be available to the client.” *Id.*

39. See *id.* R. 1.8 cmt. 13; ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 438 (2006).



plaintiffs' attorneys in mass tort litigation, particularly when the attorney has incurred massive debt in pursuing the litigation.<sup>40</sup> I will address both types of conflicts, first with respect to conflict identification under Rule 1.7(a)<sup>41</sup> and then under the provisions of Rule 1.7(b), which permit lawyers to undertake conflicted representations with the informed consent of the clients, except when the conflict is nonconsentable.<sup>42</sup>

### 1. Conflict Identification: Client-Client Conflicts

At the time an aggregate settlement is negotiated, plaintiffs' attorneys in mass tort cases typically represent a variety of clients who differ with respect to disease category, extent of injury, length of exposure, date of injury or manifestation of injury, medical history, and other factors bearing on the strength of their claims and the size of their potential recoveries.<sup>43</sup> In addition, they differ with respect to their litigation goals, including their tolerance for risk, preferred remedies, interest in process values, and desire for vindication at trial.<sup>44</sup> All of these factors have an obvious bearing on the clients' willingness to accept an aggregate settlement,<sup>45</sup> with respect to both the size of the total amount and its allocation among the various claimants. Thus, it is obvious that, at the time of responding to an aggregate settlement offer, the obligation of the plaintiffs' attorney to enhance the recovery of any one claimant, or type of claimant, will materially limit the ability of the lawyer to enhance the recovery of other claimants, or types of claimants, thereby triggering a material limitation conflict of interest under Rule 1.7(a).<sup>46</sup> But is this same conflict triggered *at the outset of each representation*, when it may be unclear whether the time will come when the lawyer will be faced with the conflicts that are generated by an aggregate settlement proposal?

Professor Howard Erichson, one of the few commentators to address in any detail the application of the general conflicts rule to a mass tort lawyer's initial acceptance of clients, has argued that conflicts of interest among current clients are inherent in mass tort representation because the

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40. *See infra* notes 64–69 and accompanying text.

41. *See supra* notes 35–39 and accompanying text.

42. *See infra* notes 75–80 and accompanying text.

43. *See, e.g.,* Komitor, *supra* note 33 (noting that differences exist among “clients with injuries ranging from the less significant, such as non-disabling pleural plaques to the more severe, such as disabling asbestosis and malignancies”; other differences “include a variety of competing interests such as category and severity of disease and ability to identify the source of asbestos exposure”); *see also, e.g.,* Toops, *supra* note 34, at 462 (potential differences also include jurisdictional interests).

44. *See, e.g.,* Erichson, *supra* note 34, at 574; Toops, *supra* note 34, at 463.

45. *See, e.g.,* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 438 (2006).

46. *But see, e.g.,* Allegretti-Freeman v. Baltis, 613 N.Y.S.2d 449, 451 (App. Div. 1994) (refusing to recognize the existence of a conflict of interest among seventeen homeowners, who brought an action against a real estate developer and broker based on alleged structural defects and contaminated water in their homes, unless some in fact desired to accept the aggregate settlement offer and would be prevented from doing so by the objections of others to the offer).

plaintiffs' interests are not perfectly aligned.<sup>47</sup> As a result, lawyers representing multiple plaintiffs will inevitably face decisions about whose interests to advance at various stages of the litigation, including decisions concerning how to prioritize among litigation objectives, which cases to push to trial first, and whether to support wide-ranging confidentiality agreements and protective orders in individual cases. Erichson has therefore advocated that plaintiffs' attorneys recognize and deal with these conflicts at the outset of the representation, rather than waiting for specific issues to arise during the litigation.

Not all practitioners agree. Erichson's argument is based on his assumption that the lawyer knows at the outset of a mass tort representation that the representation will be "collective" in nature. Others view each representation as individual, unless and until either the plaintiffs' or the defendants' attorney decides to address these cases collectively, as in the negotiation of an aggregate settlement.<sup>48</sup>

Erichson's argument has merit in many, perhaps even most, mass tort representations. Many lawyers aim from the beginning to take on hundreds, thousands, or even tens of thousands of claimants, regardless of the type or extent of their injuries or any other factor likely to affect the strength of their claims or the size of their potential recoveries.<sup>49</sup> The most thoughtful of these lawyers know that they will be treating the clients as a group, that they will focus on monetary rather than nonmonetary goals in all cases, that they will design the litigation strategy to maximize the size of any overall recovery, and that, in the likely event that they will ultimately negotiate an aggregate settlement, they will attempt to allocate the proceeds in a manner that is generally fair but that inevitably will sacrifice the interests of some to the interests of others.<sup>50</sup> Such a strategy may be ethically permissible but, as Erichson suggests, there is a "significant risk" from the very outset of these representations that the representation of some clients will be

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47. See, e.g., Erichson, *supra* note 34, at 573. Others have addressed the issue, but not at the same level of detail. See, e.g., Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 847–48 (2005); Toops, *supra* note 34, at 463.

48. Cf. RHEINGOLD, *supra* note 29, § 14:3 (discussing particular scenarios in which conflicts may arise). I have had discussions with various plaintiffs' lawyers who insist that there is not necessarily a conflict of interest in representing multiple plaintiffs in mass tort actions and that they treat cases as individual and not collective unless the defendant decides to treat them collectively. These lawyers typically are more selective and choose to represent only a limited number of potentially high-value cases. See *infra* note 52 and accompanying text.

49. See, e.g., Komitor, *supra* note 33.

50. There may be some, perhaps many, settlements in which individual claimants are treated fairly under an objective matrix that accurately reflects the litigation value of cases of various types. Nevertheless, it is likely that attorneys representing only one, or one type, of claimant would have at least argued for differences in the way the matrix was formulated to favor their client(s)' interests. With multiple clients with different types of cases, I continue to believe, along with Erichson, that the interests of some get sacrificed to the interests of others. This is not necessarily wrong or even unfair; it simply suggests that representing multiple clients in mass tort litigation typically presents conflicts of interest that must be addressed under conflict of interest rules.

“materially limited” by the attorneys’ obligations to other clients, thereby presenting a Rule 1.7 conflict.<sup>51</sup>

But this is not what all mass tort plaintiffs’ attorneys envision. Some plan to accept only a limited number of high-value cases, that is, cases in which the plaintiff appears to have both a strong case for liability and very serious injuries.<sup>52</sup> Inevitably there will be differences among even these plaintiffs,<sup>53</sup> but that does not necessarily mean that there is a significant risk of material limitation as a result of these differences.<sup>54</sup> For example, at the early stages of a particular mass tort, before it becomes apparent how widespread the injuries or claims will be or whether the defendants will be unable to fully compensate all victims (or at least all of the victims represented by this particular attorney), the risk that the attorney’s loyalty to one client will limit her loyalty to another client may be remote. Each case may proceed on its own course, with the attorney making decisions in each case, in consultation with the client, as to what strategy is in that client’s best interest. There may be little likelihood that a strategic decision in one case will materially limit what the attorney can do in another case. In these situations, the attorney may plausibly argue that the risk of material limitation is insufficient at the outset to trigger the conflicts of interest rule.

What about the fact that the plaintiffs’ attorneys will almost certainly plan to hire experts who are expected to serve in all or most of their clients’ cases? Given that there will be important similarities in establishing the defendant’s liability, including the need to develop proof of negligence, product defect, or general causation, it seems inevitable that the attorney’s multiple clients will be sharing many of the costs of the representation. Nevertheless, the prospect of cost sharing is a potential *benefit*, not a potential *detriment* of the multiple representation, as is the leverage the attorney gains as a result of the defendant’s awareness that the attorney has more resources at her disposal than if she were representing only one claimant.<sup>55</sup> Unless it can be demonstrated that the representation of multiple plaintiffs also presents a significant likelihood that any one representation will be adversely affected by the others, it would appear that there are no material limitation conflicts in this situation, at least at the beginning of the representation.

Nevertheless, Erichson is surely correct that for most mass tort representations, a material limitation conflict of interest arises among the many clients of a plaintiffs’ attorney—a conflict that must be dealt with at the outset of the representation.

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51. Erichson, *supra* note 34, at 558.

52. *See, e.g.*, Komitor, *supra* note 33.

53. *Id.*

54. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d(i) (stating that there is not always a conflict for a lawyer representing multiple plaintiffs).

55. *See, e.g.*, Silver & Baker, *supra* note 12, at 745.

## 2. Conflict Identification: Client-Lawyer Conflicts

In a recent mass tort litigation involving over 10,000 cases filed by responders who participated in the clean-up of the World Trade Center disaster site, one law firm, Worby Groner Edelman & Napoli Bern LLP (Napoli Bern), represented over 90 percent of the plaintiffs.<sup>56</sup> Pursuant to federal legislation, all the cases were filed in or transferred to the Southern District of New York. Presiding Judge Alvin K. Hellerstein exercised extensive judicial supervision over all aspects of the litigation,<sup>57</sup> which ultimately resulted in Judge Hellerstein approving a comprehensive aggregate settlement of almost all the claims.<sup>58</sup> Judge Hellerstein justified his strong managerial role, including his rejection of the first proposed settlement agreement, by noting not only the potential conflicts among so many plaintiffs represented by a single law firm<sup>59</sup> but also a substantial conflict arising from the law firm's own "compelling interest" in having the settlement approved.<sup>60</sup> Napoli Bern, a relatively small firm, had spent eight years strenuously litigating these cases, including two appeals, without any compensation.<sup>61</sup> The firm had borrowed heavily, incurring a large interest expense, which was secured by personal guaranties of the firm's principals.<sup>62</sup> As a result, Judge Hellerstein concluded that the prospect of settlement and an anticipated fee of \$250 million, plus expenses, "gave the firm an interest that may not have been in line with many of its clients' interests."<sup>63</sup> Subsequently, writing about mass torts generally, Judge Hellerstein continued to express concern over mass tort lawyers' financial incentives:

Their need to finance their cases over several years of hard-fought and expensive litigation creates substantial debts, financed at high compound interest rates. Repayment of the loans tends to depend on settlements or recoveries in the lawsuits, the outcomes of which tend to be far from certain. These debts create powerful motivations that potentially can

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56. See *In re World Trade Ctr. Disaster Site Litig.*, 769 F. Supp. 2d 650, 651 (S.D.N.Y. 2011).

57. See generally Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 129 n.30 (2012).

58. See *id.* at 170–71. For a discussion of the claims that were omitted from the settlement, see *infra* notes 129–31 and accompanying text.

59. See *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 196–97 (S.D.N.Y. 2011) ("Since one law firm . . . represented the substantial majority of the Plaintiffs, and since a normal attorney-client relationship cannot function where one lawyer represents so many clients, each with varying and diverse interests, judicial review must exist to assure fairness and to prevent overreaching." (footnotes omitted)); see also Alvin K. Hellerstein, *Democratization of Mass-Tort Litigation: Presiding over Mass Tort Litigation To Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 477 (2012) (concluding that "only the court can ensure that conflicts arising in the representation do not unfairly harm plaintiffs").

60. *World Trade Center*, 834 F. Supp. 2d at 197–98.

61. *Id.* at 198.

62. *Id.*

63. *Id.*

interfere with the lawyer's professional obligation to serve clients' interests first and foremost.<sup>64</sup>

Judge Hellerstein is not alone in suggesting that a client-lawyer conflict exists when plaintiffs' attorneys invest substantial funds of their own money, or take on extensive debt, in order to finance costly mass tort litigation.<sup>65</sup> And surely it is beyond dispute that both a firm's need to be reimbursed for its advanced expenses (which can be extraordinarily high in a mass tort case), as well as the prospect of a multimillion dollar fee (when proving the defendant's liability is far from certain, and a settlement's rejection could result in a total loss), provide "powerful motivations" for a firm to stray (wittingly or unwittingly) from its fiduciary duty to consider only the clients' interests when responding to a particular settlement offer. And if the nature of a mass tort is such that these financial incentives are reasonably foreseeable from the outset, then don't these incentives create a material limitation conflict of interest under Rule 1.7?

Judge Hellerstein did not specify whether the client-lawyer conflicts he was describing constituted material limitation conflicts under Rule 1.7, such that any failure to adequately address such a conflict under the provisions of that rule would justify the discipline of the attorneys involved. Indeed, there is reason to question whether these types of financial conflicts are subject to Rule 1.7.

Elsewhere I have argued that conflict-of-interest rules such as Rule 1.7 do "not purport to regulate circumstances that are common to all lawyers, but only those circumstances unique to specific lawyers."<sup>66</sup> In other words, "conflict-of-interest doctrine in law does not address largely unavoidable conflicts, but only those that can be avoided or removed by permitting (or requiring) clients to seek out other lawyers, that is, lawyers who are not burdened with a particular conflict of interest."<sup>67</sup> Specifically addressing the financial incentives resulting from potentially enormous fees, such as when class counsel is considering settlement offers, I concluded that such conflicts are not governed by Rule 1.7; rather, they constitute a type of agency problem that permeates legal and other professional practice and must be controlled either by other rules (such as Rule 1.5, which governs legal fees) or by "relying on lawyers' professionalism and their willingness to exercise good judgment and self-restraint."<sup>68</sup>

Of course, it might be argued that, although "potentially enormous fees" are common to all law firms representing extremely large numbers of individual claimants in mass tort litigation, the enormous debt that confronts firms such as Napoli Bern is not necessarily shared by other

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64. Hellerstein, *supra* note 59, at 474.

65. See, e.g., RHEINGOLD, *supra* note 29, § 14.3; Burch, *supra* note 8, at 1280; Toops, *supra* note 34, at 473-74.

66. Nancy J. Moore, *What Doctors Can Learn from Lawyers About Conflicts of Interest*, 81 B.U.L. REV. 445, 451 (2001).

67. *Id.*

68. Moore, *supra* note 5, at 1490.

plaintiffs' firms.<sup>69</sup> Thus, perhaps the debt itself, including the potential for personal liability of the firm's partners, created a financial interest of the plaintiffs' attorney subject to Rule 1.7. But it can also be argued that there are a myriad of financial circumstances that may confront individual lawyers or law firms—such as an individual lawyer's uncovered medical expenses or investment losses or a law firm's impending bankruptcy—which create powerful incentives to compromise the representation of the clients. Must all these circumstances be treated as conflicts of interest under Rule 1.7, which requires either declining the representation or disclosure to clients? Or are these “conflicts” simply different manifestations of the many types of financial pressures that may cause lawyers to depart from their proper role as faithful agents of their client-principals? These are difficult questions for which I do not have a clear answer. At this point, however, all I want to suggest is that Rule 1.7 does not necessarily govern these sorts of financial incentives.

Aside from the prospect of enormous legal fees (with or without the need to repay substantial debt), differences in an attorney's fee agreements with clients or with referring lawyers can also create conflicts between plaintiffs' attorneys and their clients. For example, in a case involving an aggregate settlement of over 5,000 claims arising from the ingestion of “fen-phen” diet drugs, the Napoli Bern law firm was once again under attack.<sup>70</sup> This time, a group of former clients who had been represented by Napoli Bern in the settlement claimed that other “Napoli Firm clients were offered disproportionately larger settlements because the firm unfairly inflated settlement offers for [these other] clients so that the attorneys' fees earned by the firm would be greater.”<sup>71</sup> The incentive to do so arose from the fact that these former clients had been referred by other lawyers who would be paid a referral fee from the fees obtained by Napoli on their settlements, whereas Napoli could keep all of the legal fees from clients who came directly to Napoli.<sup>72</sup>

When, if ever, are fee differences among claimants subject to conflict-of-interest rules? Such differences arise not only from the need to pay referral fees on behalf of some, but not all, clients (and with respect to claimants with referral fees, the size of the referral fee may be different with respect to each referring lawyer) but also from possible differences in the size of

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69. See MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 216–17 (1996) (discussing plaintiffs' attorney Chesley's financing of MDL-486 litigation, investing \$1 million of his own money for expenses in preparation for trial and concluding that, “[w]hile the contingent fee system necessarily results in plaintiffs' attorneys having a financial stake in the case and sometimes results in a conflict between client and attorney, an investment of the magnitude of Chesley's is highly unusual”).

70. See *In re N.Y. Diet Drug Litig.*, No. 700000/98, 2007 WL 969426 (N.Y. Sup. Ct. Mar. 27, 2007). The firm was then known as Napoli Kaiser & Bern. *Id.* at \*1.

71. *Id.* at \*2.

72. *Id.* at \*1; see also Garretson, *supra* note 34, at 21 (noting that mass tort clients come to lawyers from a referral network of other attorneys that typically have separate and distinct fee agreements).

the contingent fee each client has agreed to pay. These differences may be the result of individual negotiations or they may reflect statutory or court imposed caps on contingent fees in personal injury cases in some jurisdictions.<sup>73</sup> These client-lawyer conflicts may be especially pernicious because they affect not so much the attorney's incentive to settle for a lower total amount than might be achieved with further litigation (as is generally the case with client-lawyer conflicts in class actions and mass tort lawsuits), but rather the lawyer's incentive to improperly adjust the allocation of the total amount among the clients themselves for the lawyer's own benefit.

Fee-difference conflicts are not common to all lawyers. Nevertheless, it is not clear that they necessarily create client-lawyer conflicts under Rule 1.7, because the risk of material limitation may not be significant. Whether the risk is real or remote may depend on the ease with which an attorney can adjust a settlement (or other aspect of the multiple representation) to favor certain clients over others based on the differences in their fee arrangements. For example, if the plaintiffs' attorney will be given a lump sum to allocate as he or she sees fit, without the use of a formula, matrix, or other objective criteria, there may be a significant likelihood that the lawyer will be tempted to favor certain clients based on prospective legal fees. On the other hand, if the plaintiffs' attorney negotiates a settlement where the allocation will be based on objective factors, and the factors appear to be evenly distributed among the different client groups, then the prospect of the attorney favoring any particular group based on fee differences is likely to be remote. In any event, because it will be difficult to know at the outset of the representation whether such fee differences are likely to materially limit the lawyer's representation, I conclude that such differences do not present a Rule 1.7 conflict at the outset, but may do so at some later point in the representation. The same could also be said of the financial incentives of firms like Napoli Bern that incur substantial and unusual debt; that is, there is no Rule 1.7 conflict unless and until the firm should reasonably know that it is likely to incur debt far more onerous than is typically undertaken by a similarly situated law firm, taking into account such factors as the number of clients the firm anticipates accepting, the likely expense of litigating the particular mass tort, and the ability of the firm to finance the litigation without taking on unduly burdensome debt.<sup>74</sup>

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73. See, e.g., N.J. CT. R. 1:21-7(c) (providing for sliding scale percentage recoveries in contingent fee personal injury actions); CONN. GEN. STAT. § 52-251c (2009) (establishing maximum percentages—up to one-third—that clients may be charged as contingent legal fees in personal injury, wrongful death, and property damage cases).

74. One commentator argues that financial conflicts between lawyer and client may be reduced by relaxing restrictions against third-party litigation financing. See generally Burch, *supra* note 8.

### 3. Consentability of the Conflicts

Under Model Rule 1.7(b), a lawyer may represent a client notwithstanding the presence of a material limitation conflict if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.<sup>75</sup>

The first three conditions collectively constitute what is commonly referred to as the “consentability” of the conflict.<sup>76</sup> In other words, if these conditions are not satisfied, then the lawyer must decline or end the representation and may not ask the clients to give their consent to the conflict. In the case of mass tort plaintiffs’ representation, there should be no question concerning the satisfaction of conditions (2) and (3). The fundamental question is whether condition (1) can be satisfied; that is, whether it is reasonable for the lawyer to believe that the lawyer can competently and diligently represent each client.

There has been little discussion of the consentability of the conflicts of interest that arise in mass tort representations. Professor Lester Brickman, acknowledging the existence of conflicts in representing large numbers of asbestos claimants, says that he is “unaware of any widespread practice of plaintiff lawyers of seeking informed consent to such conflicts,” and further notes that, “[e]ven were these conditions to be complied with, serious questions exist as to whether a waiver from litigants so recruited would be valid under Model Rule 1.7(b)(1).”<sup>77</sup> Sarah Toops similarly notes the existence of conflicts in representing mass tort plaintiffs.<sup>78</sup> She also contends, without further explanation, that “[m]ost instances of conflicts produced by the diverging interest of an attorney’s clients in a mass toxic harms case cannot qualify for the exception set forth in the Model Rules because the lawyer usually cannot ‘reasonably believe’ that the representation will not be adversely affected.”<sup>79</sup> On the contrary, however,

75. MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2012).

76. *See, e.g., id.* at cmt. 15.

77. Brickman, *supra* note 47, at 859 n.113. Brickman’s views may be inaccurate or out of date. It is possible that it has become increasingly common for mass tort lawyers to include a standard provision in their retainer agreement that the clients understand that their case may be litigated or settled as part of a group of similar cases represented by that lawyer or firm. *See, e.g., Ferguson v. Meadows*, Nos. A094750, A095475, 2002 WL 31033065, at \*1 (Cal. Dist. Ct. App. Oct. 10, 2002) (discussed at *infra* note 100 and accompanying text).

78. Toops, *supra* note 34, at 463–65.

79. *Id.* at 463–64. Prior to the rule’s amendment in 2002, Rule 1.7(b)(1) provided that a lawyer may not accept representation when there is a material limitation conflict unless “the lawyer reasonably believes that the representation will not be adversely affected” by the conflict. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(1) (2001). The change in wording



Paul Rheingold believes that plaintiffs' attorneys may properly represent many clients in mass tort litigation, citing ABA opinions suggesting that some conflicts can be resolved by an appropriate waiver, as well as another commentator who concludes that, under the Model Rules, group representation is banned only when there is "fundamental antagonism" among the plaintiffs.<sup>80</sup>

Erichson is the one commentator who, both alone and with his coauthor, Professor Benjamin Zipursky, has addressed the question at some length, concluding that, in most situations involving mass tort litigation, multiple representation ought to be permitted with appropriate disclosure and client consent.<sup>81</sup> In response to critics such as Toops, who query whether a lawyer can ever reasonably believe that the representation of at least some clients will not be adversely affected, Erichson posits that the clients' consent in such cases functions as "an express limitation on the scope of representation" under Rule 1.2(c),<sup>82</sup> which provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."<sup>83</sup> The nature of the limitation is that the clients are expressly opting for group representation, rather than the more traditional individual representation; that is, they are agreeing to representation in which the lawyer will "seek primarily to advance the interests of the group, as in a class action."<sup>84</sup>

Explaining why it is reasonable for mass tort clients to prefer group representation to individual representation, Erichson and Zipursky conclude that, in most cases, client interests are well served by a lawyer who represents many clients collectively, including in the negotiation of an aggregate settlement:

By offering clients the benefits of leverage and economies of scale, collective representation offers the only practical way for plaintiffs in mass litigation to litigate on a level field against a defendant who invests in the litigation based on the aggregate stakes. . . . Because of the benefits of collective representation and settlement, the conflicts involved . . . generally should be consentable.<sup>85</sup>

Elsewhere, Erichson acknowledges that class actions may require subclasses when a single class purports to include claimants with

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was not intended to clarify or change the substance of the consentability provision of the rule. See ABA Comm'n on Evaluation of the Model Rules of Prof'l Conduct, *Reporter's Explanation of Changes*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule17rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule17rem.html) (last visited Apr. 19, 2013).

80. RHEINGOLD, *supra* note 29, § 14:3.

81. See, e.g., Erichson, *supra* note 34, at 553–75; Erichson & Zipursky, *supra* note 13, at 311–20.

82. Erichson, *supra* note 34, at 563.

83. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2012).

84. Erichson, *supra* note 34, at 529.

85. Erichson & Zipursky, *supra* note 13, at 305. The authors are talking here about the conflicts involved in aggregate settlements, but the principle should also apply at the outset of the multiple representation, when the risks are more remote.

significantly differing interests, but he dismisses any argument that separate groups are required in nonclass aggregation any time subclasses would be required in a class action.<sup>86</sup> He contends that this argument makes no sense because “class actions bind absent class members” and, therefore, “they require greater coherence.”<sup>87</sup> According to Erichson:

[I]ndividual informed consent to potential conflicts of interest should make it possible, in some circumstances, for attorneys to represent groups of plaintiffs with generally aligned but somewhat conflicting interests, even where those conflicting interests would make it impossible to represent the larger group in a single class action without subclasses.<sup>88</sup>

I agree with Erichson and Zipursky that it is generally reasonable for mass tort plaintiffs to choose to litigate collectively rather than individually, and that there are sufficient differences between class actions and nonclass aggregations to warrant allowing some combinations of claims that might require subclasses if the group were an actual class. This conclusion does not necessarily mean, however, that there should be *no* limitation on either the size or the composition of the group. For example, was it reasonable in the World Trade Center litigation for clients to agree to be represented in a group comprised of 10,000 or more members?<sup>89</sup> Is it reasonable for plaintiffs’ attorneys to combine a small number of high-value claims along with a disproportionate number of weak claims?<sup>90</sup>

Having a large number of claimants clearly enhances the ability of a group to “litigate at the highest level, including spending money on investigation and retention of top experts.”<sup>91</sup> But is it necessary for a single attorney to represent 10,000 or more claimants to obtain that ability? Is it even necessary for a single attorney, or even a single law firm, to have all of the resources necessary to “litigate at the highest level?” After all, it is a common practice for multiple plaintiffs’ attorneys, each representing a separate group of claimants, to pool their resources, divide the work, and share the results of their efforts.<sup>92</sup> In such cases, the multiple attorneys will compete with each other to obtain clients, possibly resulting in reduced legal fees and improved client service. In addition, multiple attorneys can

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86. See Erichson, *supra* note 34, at 565.

87. *Id.*

88. *Id.*

89. See *supra* notes 59–63 and accompanying text.

90. See *supra* notes 38–39 and accompanying text. In the context of an aggregate settlement proposal, the ABA Standing Committee on Ethics concluded that “the more disparate the claims included in an aggregate settlement proposal, the more likely it is that the proposal will run afoul of other provisions of the Model Rules,” including Rule 1.7 (particularly (a)(2) and (b)(1)). ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 438 (2006). If these conflicts present consentability issues at the time an aggregate settlement proposal is made, when it may be too late or impractical for clients to obtain a new attorney, then surely they also present consentability issues at the outset of group representation, at least in those cases where an aggregate settlement proposal is a likely development.

91. Erichson, *supra* note 34, at 545; see also Silver & Baker, *supra* note 12, at 746–47.

92. See RHEINGOLD, *supra* note 29, § 14:37; Erichson, *supra* note 34, at 539–43.

act as a check on each other, providing greater scrutiny of both the total size of any aggregate settlement and the fairness of any proposed allocation to individual claimants.

If there are viable means to obtain the benefits of group representation without forming a single group of unlimited size, then it is arguably unreasonable for a single lawyer or law firm to represent a limitless number of clients in a single mass tort. After all, the smaller the group, the easier it will be for the attorney to maintain meaningful communication with individual clients, including obtaining their feedback as the representation progresses and counseling them when the time comes to accept or reject an aggregate settlement.<sup>93</sup> Keep in mind that these are not, in fact, class actions; each claimant has a more-or-less traditional attorney-client relationship with the attorney, and it may be unreasonable to ask clients to agree to be treated no better than the absent members of a class.<sup>94</sup> Of course, it will be difficult to draw lines in determining the appropriate size of a potential plaintiff group, but surely the group of 10,000 clients represented by Napoli Bern in the World Trade Center litigation was simply too big.

Aside from the size of the group, it is questionable whether an attorney should be permitted to combine any and all claims in a single group, regardless of their conflicting nature. For example, how is it reasonable for an attorney to combine a small number of high-value claims with a disproportionate number of claims with little or no value? Attorneys who are not selective about the cases they take, accepting almost any case without regard to its merits, are usually hoping for a global settlement in which all claimants will receive something.<sup>95</sup> It is certainly rational for clients with the weaker claims to opt for such group representation, as these are the claims that will be impossible to pursue individually, and low-value claims clearly benefit from their association with high-value claims.<sup>96</sup> But what about the reverse situation? Erichson acknowledges that high-value plaintiffs may rationally prefer individual representation, given that group representation tends to have a “damage-averaging effect, raising the value of weak claims and reducing the value of strong ones.”<sup>97</sup> If so, then how is it rational for high-value plaintiffs to opt for group representation when the group includes a disproportionate number of weak claims? Erichson does not address this question in any detail, arguing merely that many of such plaintiffs “maximize the value of their claims by litigating collectively,”<sup>98</sup>

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93. See, e.g., RHEINGOLD, *supra* note 29, § 14:15 (noting the importance of adequately communicating with mass clients).

94. See, e.g., Erichson, *supra* note 34, at 577–78 (acknowledging the limits of his analogy of mass tort nonclass lawsuits to class actions, based on the ethical duties plaintiffs’ attorneys have to individual clients).

95. See *id.* at 549 n.115 (citing Judge Weinstein).

96. See *id.* at 551.

97. *Id.* at 552.

98. *Id.* at 564.

presumably by obtaining the benefits of cost sharing and enhanced leverage that result from collective representation.

I agree that even high-value plaintiffs can benefit from group representation; however, there may be an alternative that Erichson has not considered: participation in a smaller group comprised primarily of similar high-value claims. Plaintiffs with weaker claims will likely obtain representation in one or more groups represented by different attorneys, and the attorneys representing all of these separate groups (high-value and low-value) will be motivated to combine their resources and work together toward their common goals. As a result, plaintiffs with high-value claims may have the opportunity to reap the benefits of large group representation (including the pooling of the resources of the combined groups) without incurring all the risks. This is because, by participating as part of a smaller group, these plaintiffs will retain more control over their individual cases and more of the individual attention of their attorneys than they would as members of the largest possible group.

In considering whether any particular group representation presents consentable conflicts, including whether a limited scope representation under Rule 1.2(c) is reasonable, we should also consider whether the clients will continue to be represented by separate attorneys, who presumably can assist the client in deciding whether to accept any offer of settlement, whether in an individual case or an aggregate settlement. Referring attorneys might perform this limited role, but only if they will retain a significant role in keeping abreast of the developing litigation and consulting with the client concerning significant developments.<sup>99</sup> In the absence of referring attorneys, a group attorney could provide access to independent counsel for purposes of advising individual clients on any aggregate settlement offer.<sup>100</sup>

Even Erichson has acknowledged that “[s]erious inter-subgroup conflicts . . . may be disqualifying and unwaivable,” but he does not elaborate or

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99. Most jurisdictions require referring lawyers to participate in the representation or assume joint responsibility if they expect to share in the legal fees. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2012). Some jurisdictions, however, permit referring lawyers to share in the fees even if they do nothing more than refer the case to another lawyer. *See, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 1.5(e) (2012) (restricting the dividing of fees in contingent fee matters is limited to disclosure to the client, so long as total fee is not clearly excessive).

100. *See, e.g.*, *Ferguson v. Meadows*, Nos. A094750, A095475, 2002 WL 31033065, at \*1 (Cal. Dist. Ct. App. Oct. 10, 2002) (describing a retention agreement that advised clients that, in the event of an aggregate lump sum settlement, there would be conflicts between the clients as to the size of each share and that clients could consult with or hire another lawyer in such event); *cf.* Brophy, *supra* note 16, at 692–93 (suggesting the possible use of independent attorneys to advise claimants in waiving their rights under the aggregate settlement rule). Given the difficulty of identifying a separate lawyer who will be sufficiently informed to provide such advice at a reasonable fee, it would be more useful if the common attorney offered to provide access to such a lawyer. If there are large numbers of clients who want to take advantage of such an opportunity, it will be difficult to find separate lawyers who are not themselves conflicted as a result of agreeing to advise multiple clients with differing interests.

suggest when this will occur.<sup>101</sup> The most obvious instances of this type of conflict probably arise subsequent to the acceptance of multiple representations, as the representation is evolving. These situations will be discussed in a later section.

#### 4. Obtaining the Clients' Informed Consent

It is generally believed that mass tort plaintiffs' attorneys rarely obtain their clients' informed consent to multiple representation, either because they do not recognize a conflict of interest under Rule 1.7 or because they are skeptical of the "usefulness and enforceability of client waivers."<sup>102</sup> Apparently expressing such skepticism, Paul Rheingold, an experienced mass tort plaintiffs' attorney, concludes that "[p]erhaps the most that can be expected of a lawyer is that clients are informed that the lawyer is undertaking multiple representation, along with seeking [their] consent."<sup>103</sup> But such a limited disclosure is clearly insufficient. The Model Rules define "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."<sup>104</sup> With respect to conflicts of interest, the comment to Rule 1.7 states that "[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client."<sup>105</sup>

Erichson advocates disclosure that is more detailed than Rheingold's proposed disclosure but is still rather sparse. According to Erichson, clients should be informed that the lawyer represents a large number of similarly situated plaintiffs and "that such collective representation offers a number of advantages that benefit the plaintiffs as a group, but may involve trade-offs that do not work to the advantage of each plaintiff individually."<sup>106</sup> The attorney should further advise that "[p]otential conflicts may arise between group interests and the client's individual interests, and that the lawyer intends to resolve such conflicts in favor of pursuing group interests."<sup>107</sup> Erichson concludes that, ideally, an agreement should explain "the types of inter-plaintiff conflicts that may arise during the litigation,"<sup>108</sup> but he generally approves of the disclosure in individual retention provisions such as the following provision described in a recent mass tort case:

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101. Erichson, *supra* note 34, at 565.

102. *See id.* at 562; *see also, e.g.*, Brickman, *supra* note 47, at 891–92.

103. RHEINGOLD, *supra* note 29, § 14:3.

104. ABA MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012).

105. *Id.* R. 1.7 cmt. 18.

106. Erichson, *supra* note 34, at 562–63.

107. *Id.* at 563.

108. *Id.* at n.158.

Attorneys may represent other persons damaged by the [toxic chemical] releases mentioned herein and Client understands that such multiple representation has advantages, but also may give rise to potential conflicts of interest of which Client is hereby advised. Each person's recovery may depend on factors such as age, severity of injury, extent of medical treatment, amount and duration of exposure, and pre-existing health condition. Despite such potential conflicts of interest Client believes that the advantages of multiple representation outweigh any potential disadvantage and hereby waives any and all conflicts of interest that may arise from such multiple representation.<sup>109</sup>

In addition to providing some detail concerning the client-client conflicts, Erichson also suggests that the attorney should explain the limitation on the scope of the representation as a collective, rather than an individual, representation.<sup>110</sup>

According to a formal opinion of the ABA Standing Committee on Ethics, in cases where it is foreseeable at the outset that the attorney will negotiate an aggregate settlement, a mass tort plaintiffs' attorney should also advise clients about the risks inherent in such settlements, including differences in the clients' willingness to accept a settlement and the possibility that an offer may require the consent of all of the clients, in which case the failure to obtain unanimous consent may result in the withdrawal of the offer.<sup>111</sup> The opinion also concludes that the attorney should further disclose the possibility that disclosure of confidential client information may be necessary in order to effectuate an aggregate settlement.<sup>112</sup>

In my view, a plaintiffs' attorney must disclose as much detailed information as is reasonably necessary to make the clients understand the material risks of the type of group representation the attorneys anticipate providing. Given that personal injury clients are often unsophisticated and inexperienced users of lawyers, plaintiffs' attorneys should not assume that a brief and summary type of disclosure, such as that provided in the case referenced by Erichson, will suffice. Attorneys should inform clients of the approximate size of the expected group, as well as the range of diverse interests the attorney is likely to represent. They should explain how group representation differs from individual representation and give some specific examples of how the clients' interests might be adversely affected. Moreover, since it will be extremely difficult for clients to withdraw from

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109. *Id.* at 563, n.159 (quoting *Ferguson v. Meadows*, Nos. A094750, A095475, 2002 WL 31033065, at \*1 (Cal. Dist. Ct. App. Oct. 10, 2002)). The agreements in *Ferguson* also noted that, in the event of an aggregate lump sum settlement, there would be conflicts between the clients as to the size of each share and that the clients could consult with or hire another lawyer in such an event. *Ferguson v. Meadows*, Nos. A094750, A095475, 2002 WL 31033065, at \*1 (Cal. Dist. Ct. App. Oct. 10, 2002).

110. Erichson, *supra* note 34, at 563.

111. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 438 (2006); see also Garretson, *supra* note 34, at 23–24.

112. *Id.* For a discussion of what needs to be disclosed pursuant to the aggregate settlement rule, see *infra* Part II.

the group and obtain individual representation once an aggregate settlement offer is negotiated, it is critical that clients be advised of the material risks of an aggregate settlement well in advance of the negotiation of such a settlement. In addition to the disclosures advocated by the ABA Standing Committee on Ethics,<sup>113</sup> attorneys should inform clients of the difficulty the attorneys may have giving each client independent advice whether to accept a settlement offer in the likely event that the settlement requires either total or near-total agreement by all of the clients. Indeed, it may be necessary to inform clients that, in the event of such an aggregate settlement offer, they may need to consult separate counsel to help them decide whether to accept or reject their individual offer.<sup>114</sup> The inability of the lawyer to provide independent and meaningful advice to individuals considering an aggregate settlement offer may also be part of the express limitation on the scope of the representation, under Rule 1.2(c), in which case this information is critical to clients deciding whether to enter into a limited scope representation.<sup>115</sup>

As for clients with high-value claims, they should arguably be informed of their status (when reasonably ascertainable) and of the particular risk of damage-averaging that is more likely when a single lawyer represents both high and low-value claims.<sup>116</sup> It may be especially important for clients with potentially high-value claims to have access to independent counsel at various points in the litigation, particularly when they are considering whether to accept an aggregate settlement offer. As a result, whenever an aggregate settlement is reasonably foreseeable, a plaintiffs' attorney should advise these clients of the prospect that they may want to consult independent counsel, because this information might influence them to explore alternative forms of representation before retaining this particular group lawyer.

### B. Conflicts That Arise During the Representation

As noted earlier, there may be some situations involving multiple representation where a plaintiffs' attorney reasonably believes that the representation of each client will be individual until either the plaintiffs' or defendant's attorney decides to treat the clients as a group, as will certainly occur if either one initiates negotiation of an aggregate settlement.<sup>117</sup> At that time, if not before, Rule 1.7(a) will be triggered, and the plaintiffs'

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113. See *supra* note 90 and accompanying text.

114. See *supra* note 100 and accompanying text. Such a disclosure is more useful than the provision in the engagement agreement in *Ferguson*, in which the attorney informed clients that, in the event of an aggregate settlement, they *could* consult independent counsel, but failed to inform them why it might be necessary for them to do so. See *Ferguson*, 2002 WL 31033065, at \*1.

115. See *supra* notes 82–84 and accompanying text (discussing how mass tort group representation functions as an express limitation on the scope of the representation).

116. See *supra* notes 96–98 and accompanying text.

117. See *supra* note 100 and accompanying text.

attorney must proceed in the same way as if the conflict of interest had arisen at the outset of the representation.<sup>118</sup>

Aside from these situations, other events may occur that either trigger the need to seek newly informed consent or render the conflict nonconsentable. For example, the group may turn out to be far larger than the attorney originally anticipated. At some point, a client who was previously advised that the group was likely to be in the hundreds will reasonably want to know that the group is now in the thousands, given that such an expansion may materially alter the client's willingness to be part of such an extremely large group. At the very least, the attorney should be required to communicate information concerning the size and diversity of the group as part of the attorney's ongoing duty of communication,<sup>119</sup> which requires significantly more information than would be the case when an attorney represents a class.<sup>120</sup>

Sometimes an attorney has an opportunity to accept new clients after a lump sum settlement has been negotiated with the defendant but before it has been presented to the attorney's existing clients for their approval.<sup>121</sup> The acceptance of these new clients may require renegotiating the lump sum amount, with the resulting risk that the plaintiffs' and defense attorneys will fail to reach agreement and the settlement will be scuttled. Given a defendant's obvious reluctance to renegotiate the total package, the more plausible result of accepting new clients at this point may be the dilution of the size of the shares the existing plaintiffs could have expected with the original group. Arguably, this new conflict is nonconsentable because there is no apparent benefit to the existing plaintiffs of expanding the group at this point<sup>122</sup> and the risks of material harm are serious. At the very least, accepting new clients should require the attorney to obtain the informed

118. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (2012).

119. See *id.* R. 1.4(a) (requiring a lawyer, inter alia, to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "keep the client reasonably informed about the status of the matter").

120. See, e.g., Moore, *supra* note 6, at 162-64.

121. See, e.g., *Authorlee v. Tuboscope Vetco Int'l, Inc.*, 274 S.W.3d 111, 116 (Tex. App. 2008); *In re N.Y. Diet Drug Litig.*, No. 700000/98, 2007 WL 969426, at \*1-5 (N.Y. Sup. Ct. Mar. 27, 2007); Brickman, *supra* note 47, at 859 (arguing that "law firms that represent large numbers of asbestos claimants and that recruit new claimants who will be actively competing for limited resources simultaneously with the firms' current clients are violating Model Rule 1.7 if they fail to secure the informed consent of the new clients and current clients with pending claims to the conflicts of interest").

122. Sometimes the attorney will not be accepting new clients but rather will be adding to the settlement previously existing clients who have been newly diagnosed with a disease that makes them eligible to participate in the settlement. It is difficult to discern the precise ethical issue raised in such a scenario, especially if the attorney has already recognized a conflict of interests and obtained the informed consent of all of the clients at the outset of the representation. Perhaps this is merely one of many ways in which the potential differences among the clients may adversely affect the representation of some of them. It may not be possible for an attorney to disclose all of the ways in which harm may be anticipated; nevertheless, the more specific examples the attorney can give as part of the initial informed consent process, the more likely it is that the clients' consent will be upheld in any subsequent challenge.



consent of the existing clients because their original consent cannot reasonably be interpreted to include such an unexpected event.<sup>123</sup>

In the World Trade Center litigation, Judge Hellerstein was presented with yet another type of conflict that either arose or worsened sometime after Napoli Bern accepted the representation of close to 10,000 plaintiffs. Among these plaintiffs were fifty-nine persons who had previously made claims to, and received recoveries from, the legislatively established Victim Compensation Fund (VCF). The legislation establishing this fund provided that any person making a claim to the fund “waives the right to file a civil action . . . in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.”<sup>124</sup> When Napoli Bern negotiated an aggregate settlement with the defendants, it agreed to a provision that excluded “any Plaintiff who received an award from the September 11th Victim Compensation Fund.”<sup>125</sup> When some of the fifty-nine plaintiffs complained at public meetings that they wanted to be included in the settlement, Judge Hellerstein raised with Napoli Bern the need for these plaintiffs “to be advised whether to try and opt into the settlement, whether to not opt into the settlement, whether to voluntarily dismiss their cases or to proceed with their cases.”<sup>126</sup> Napoli Bern suggested that it might opt out these fifty-nine plaintiffs (without consulting them), but then retreated when the defendants’ counsel argued that these individuals had no right to accept or reject the settlement.<sup>127</sup> Judge Hellerstein determined that the fifty-nine plaintiffs needed independent counsel and eventually appointed one to represent them, at Napoli Bern’s expense when Napoli Bern failed to voluntarily engage such a lawyer.<sup>128</sup>

Judge Hellerstein’s actions suggest he believed that the conflict of interest affecting the fifty-nine plaintiffs was nonconsentable. Clearly the position of these plaintiffs was now “fundamentally antagonistic” to the other plaintiffs, all of whom were eligible to participate in the settlement.<sup>129</sup>

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123. This situation should be distinguished from one where the lawyer is in the process of accepting new clients at the outset of a representation, in which the clients will be informed that the attorney anticipates accepting subsequent clients to form the expected group. Arguably, new clients may be accepted without revisiting the existing clients’ informed consent up until the time that any aggregate settlement is negotiated, because this is in line with the clients’ expectations. It is a significantly different situation when new clients are added *after* an aggregate settlement has been negotiated, because this is both outside the existing clients’ expectations and significantly harmful to them.

124. *In re World Trade Ctr. Disaster Site Litig.*, 769 F. Supp. 2d 650, 652 (S.D.N.Y. 2011).

125. *Id.*

126. *Id.* at 654.

127. *Id.* at 653.

128. *Id.* at 654.

129. *See supra* notes 120–24 and accompanying text. According to Judge Hellerstein: If the 59 Plaintiffs were admitted to the SPA, as many of them requested, the final settlement amount would be spread thinner, affecting in particular the most severely injured Plaintiffs . . . whose recoveries were variable and dependent on how much of the fixed settlement amount would remain after the less severely injured Plaintiffs had been paid . . . . Further, litigating the eligibility of the 59

Was this conflict nonconsentable from the outset? Perhaps it was, although it is unclear that the differences between these plaintiffs and the other plaintiffs were more significant than the differences between plaintiffs who could not identify any objective manifestation of any injury, serious or otherwise, arguably related to work at the World Trade Center site and the remainder of the plaintiffs who had sustained such injury.<sup>130</sup> Certainly, the defendants had an excellent argument that the VCF litigation rendered the fifty-nine plaintiffs ineligible to litigate, but it was not obvious from the outset that the defendants would insist on excluding them from any settlement. In any event, once the issue arose whether the fifty-nine plaintiffs could participate in the negotiated settlement, it was clear that Napoli Bern could not properly advise them on their options at that time.<sup>131</sup>

## II. SATISFYING THE REQUIREMENTS OF THE CURRENT AGGREGATE SETTLEMENT RULE

Despite much discussion among courts, mass tort practitioners, and commentators concerning the aggregate settlement rule,<sup>132</sup> questions remain concerning the application of the current rule to particular circumstances. The questions include defining what constitutes an aggregate settlement, determining what particular information needs to be disclosed to all participating clients, and the effect of a rule variation in some jurisdictions in which there is a suggestion that the rule does not apply at all when a court has approved the settlement.

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Plaintiffs could have delayed and prejudiced the entire settlement, and therefore prejudiced the expectations of many for timely realization of their settlements, which were to provide funds to pay for medical and other necessities.

*World Trade Center*, 769 F. Supp. 2d at 652. Interestingly, however, Judge Hellerstein stated that once the fifty-nine plaintiffs had been advised concerning “their respective rights and options with regard to continuing in this litigation,” they would be free to remain with Napoli if “after full disclosure and discussion,” both the clients and Napoli henceforth would be able to provide zealous and conflict-free representation to each client. *Id.* at 654.

130. See *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 185, 197 (S.D.N.Y. 2011) (stating that “[a]pproximately a third of the Plaintiffs had little or no objective injury traceable to their work at the WTC site”). Other plaintiffs faced difficulties proving a causal relation with toxins at the WTC site, while others had “serious and lasting ailments strongly related to work at the WTC.” *Id.*

131. A similar issue was presented in an IMC settlement of separate lawsuits of more than 850 plaintiffs who claimed to have suffered harm as a result of living near a fertilizer plant. The defendants insisted on settling these claims as part of a broader class action and further demanded that only plaintiffs who lived within a mile of the plant could be part of the settlement class. The plaintiffs’ attorneys represented twenty-two plaintiffs who lived more than one mile from the plant. These plaintiffs ended up in a better situation than the fifty-nine plaintiffs in the World Trade Center case because the defendant was willing to settle with them individually, outside class action. It is unclear whether they were better or worse off being in or out of the class. See Lewis F. Powell III, *Class Settlement of Mass Tort Cases*, 7 SEDONA CONF. J. 259 (2006).

132. See *supra* notes 11–16 and accompanying text.

A. *What Is an Aggregate Settlement?*

Neither ABA Model Rule 1.8(g)<sup>133</sup> nor its state equivalents<sup>134</sup> define an aggregate settlement, and there has been considerable confusion over what constitutes a settlement subject to the requirements of that rule. In 2005, Professor Erichson published an article in which he proposed that a settlement of a group of related claims is an aggregate settlement for purposes of this rule whenever it involves some element of collective allocation of funds or a collective condition for the settlement to be effective.<sup>135</sup> This definition has been adopted by the ABA Standing Committee on Professional Ethics<sup>136</sup> and by the ALI in its *Principles of Aggregate Litigation*.<sup>137</sup> Despite what appears to be a growing consensus around this definition,<sup>138</sup> there continues to be confusion and controversy over what constitutes an aggregate settlement. For example, in 2005, an Oregon State Bar Formal Ethics Opinion appeared to limit its definition of an aggregate settlement to “all or nothing” proposals,<sup>139</sup> and that opinion continues to be cited as a plausible basis for determining when the rule will be triggered.<sup>140</sup>

In 2008, a Texas Court of Appeals decision held that a settlement of the claims of 176 plaintiffs was not subject to the aggregate settlement rule even though the defendants’ attorney communicated to the plaintiffs’ attorney that, so long as the individual demands did not exceed \$45 million, he would recommend to his clients and their insurance carriers that they settle the claims but only if 95 percent of the plaintiffs’ agreed.<sup>141</sup> Relying on this statement, the plaintiffs’ attorney calculated individual settlement amounts for each plaintiff and sent the defendant a letter detailing an offer

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133. Model Rule 1.8(g) 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 settlement agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

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

134. Minor changes were made to Rule 1.8(g) in 2002. 51 Laws. Man. On Prof. Conduct (ABA/BNA) 375 (2012). Almost all jurisdictions follow the language of either the current or the pre-2002 version of Model Rule 1.8(g). *Id.* For a discussion of jurisdictions that provide an exception for court-approved settlements, see *infra* Part II.C.

135. See Erichson, *supra* note 11, at 1785–93.

136. ABA Comm. on Ethics & Prof’ Responsibility, Formal Op. 438 (2006).

137. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.16 (Proposed Final Draft 2009); see also *id.* at reporters’ notes cmt. a (acknowledging that “[t]he terms ‘conditionality’ and ‘allocation’ were first used by Professor Erichson in his Notre Dame article”).

138. See, e.g., N.Y.C. Bar Comm. on Prof’l & Judicial Ethics, Formal Op. 6 (2009) (adopting definition in ABA Op. 438); Moore, *supra* note 16, at 396.

139. See Or. State Bar Bd. of Governors, Formal Op. 158, at 433 (2005). For a discussion of “all or nothing” proposals, see generally Erichson, *supra* note 7.

140. See Fucile, *supra* note 11, at 299.

141. *Authorlee v. Tuboscope Vetco Int’l, Inc.*, 274 S.W.3d 111, 113, 116 (Tex. App. 2008).

of settlement based on the numbers he calculated. The court defined an aggregate settlement as occurring “when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client.”<sup>142</sup> The court then found that there were individual negotiations in that case because settlement demands were made on behalf of each plaintiff based on factors specific to each of their claims.<sup>143</sup>

As recently as 2011, a practitioner published an article contending that the rule is clearly triggered only by all or nothing settlements and lump-sum settlements in which the plaintiffs’ attorney has the sole authority to make allocations to the clients.<sup>144</sup> In the face of continuing uncertainty,<sup>145</sup> this same practitioner recommends that the rule can likely be avoided by giving individual claimants the ability to opt out (even if the amounts were collectively negotiated), negotiating on individual claims (even though the defendant clearly has a bottom line total sum in mind), and obtaining judicial approval (even in jurisdictions whose version of Rule 1.8(g) contains no express exception for court-approved settlements).<sup>146</sup>

Although there continues to be support for less comprehensive approaches to defining an aggregate settlement, in my view the definition adopted by the ABA and the ALI, based on Erichson’s proposal,<sup>147</sup> provides the most appropriate trigger for determining when to apply the requirements of Rule 1.8(g). This approach is the most defensible because it alone takes into account the underlying purpose of the rule, which is to identify all situations in which there is a significant element of interdependence among the various claims, resulting in the need for claimants to obtain the information they need to know in order to assess the horizontal equity of the settlement allocations.<sup>148</sup>

#### *B. The Disclosure Requirements of Rule 1.8(g)*

Model Rule 1.8(g) provides that in order to obtain the clients’ informed consent to an aggregate settlement, the lawyer must disclose to each client “the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.”<sup>149</sup> This or similar language

142. *Id.* at 120.

143. *Id.* at 121.

144. *See generally* Fucile, *supra* note 11.

145. *See also* Conn. Informal Ethics Op. 08-01 (finding that the *Vioxx* settlement was not an aggregate settlement because the participants had not voluntarily decided to engage in group representation).

146. Fucile, *supra* note 11, at 303; *see also* Komitor, *supra* note 33 (assuming that individual negotiations may avoid finding of aggregate settlement, even if the defendant has walk-away rights and even if the defendant is keeping tabs on the total amount of settlement).

147. *See supra* notes 133–37 and accompanying text.

148. *See* Erichson, *supra* note 11, at 1820.

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

has been adopted in almost all jurisdictions.<sup>150</sup> According to an ABA formal opinion, the rule requires the lawyer to disclose, at a minimum: (1) the total amount of the aggregate settlement; (2) the existence and nature of all claims involved in the settlement; (3) the details of every other client's participation in the settlement; (4) the total fees and costs to be paid to the lawyer; and (5) the method by which costs are to be apportioned among the clients.<sup>151</sup> Not all of these details are specified in the rule itself, and not all authorities agree that all of these facts must be disclosed;<sup>152</sup> nevertheless, these facts appear to be the type of information that claimants typically need in order to evaluate the fairness of both the total sum involved and its allocation among the various participants. Moreover, to the extent that some of these details are not expressly required by the rule itself (including, for example, the attorney's fee and the allocation of costs, such as those already advanced by the attorney), their disclosure is likely required by other rules, such as Rules 1.4 (communication of information reasonably required to make an informed decision)<sup>153</sup> and 1.5 (detailing the disclosures required in connection with contingent fees).<sup>154</sup> As a result, disclosing this information should not prove to be controversial. What *is* controversial, however, is the question of whether the rule requires the disclosure of the names and other identifying information of each client (coupled with the amount each such client is to receive), and whether the rule permits aggregate settlements to be based on the use of formulas and matrices, in which case the amount to be allocated to each client will be unknown at the time that the settlement is approved by the clients.

Courts and commentators have disagreed whether the current rule requires the disclosure of the names and other identifying information of each client participating in the settlement. In a 1985 opinion, the Texas Court of Appeals stated that the common attorney must provide "a list showing the names and amounts to be received by the other settling

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150. See *supra* note 138 and accompanying text. One exception is California, in which the analogue to Rule 1.8(g) provides merely that a lawyer who represents two or more clients "shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client." CAL. RULES OF PROF'L CONDUCT R. 3-310(D) (2012).

151. ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 438 (2006).

152. See, e.g., *infra* at notes 155-77 and accompanying text (discussing a disagreement concerning the necessity of disclosing the names and other identifying information of each claimant participating in the settlement).

153. See MODEL RULES OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

154. See *id.* R. 1.5(c) (providing, in part, that "[a] contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated . . . . Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination").

plaintiffs.”<sup>155</sup> Subsequently, in a 1989 opinion, the Supreme Court of South Carolina similarly required that the clients’ names be revealed because “[w]ithout knowing the identity of all participants and the amount each will receive, a client may not be able to detect irrelevant factors which may have affected the determination of the amount of recovery a given client is to receive.”<sup>156</sup> Other courts have not expressly required that client names be disclosed, but they have suggested that this level of detail may be required, stating generally that clients must be “thoroughly advised of the particulars of the proposed settlement”<sup>157</sup> or that the lawyer must provide “full information” about the proposed settlement to each client.<sup>158</sup> On the contrary, the Supreme Court of Mississippi held in 2004 that, although the plaintiffs in a legal malpractice action were entitled to discovery of all documents pertaining to the allocation of a lump-sum settlement by an attorney representing thirty-one diet-drug plaintiffs, the trial court should permit the defendant “to redact all information specifically identifying the plaintiffs (i.e., name, address, etc.),” and should further require the other defendant to provide the plaintiffs with a chart listing the other plaintiffs, without identifying information, and containing instead: “(1) the medical diagnosis, (2) additional information, if any, which affected the amount of settlement, and (3) the amount of settlement.”<sup>159</sup>

Commentators have similarly disagreed as to whether plaintiffs must reveal the names of all clients who will participate in an aggregate settlement. Professors Charles Silver and Lynn Baker contend that such information is required, which is one reason they have urged reform of the current rule.<sup>160</sup> That also appears to be the position taken by the ALI in the *Principles of Aggregate Litigation*.<sup>161</sup> Others, including myself, have urged that the current rule can and should be interpreted to exclude the need to require client names in all instances, particularly in mass tort litigation.<sup>162</sup>

Given that the rule does not expressly require the disclosure of identifying information such as client names, I continue to believe that the better interpretation is that plaintiffs’ attorneys are not required to disclose such information unless it is necessary for the plaintiffs to evaluate the fairness of the allocation process. Clients have legitimate privacy interests in the amount they will receive in an aggregate settlement, particularly

155. *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229 (Tex. Ct. App. 1985).

156. *In re Anonymous Member of the S.C. Bar*, 377 S.E.2d 567, 568 (S.C. 1989).

157. *Bailey v. Sonnier (In re Sonnier)*, 157 B.R. 976, 980 n.11 (E.D. La. 1993).

158. *In re Faucheux*, 818 So. 2d 734 (La. 2002); *see also In re Hoffman*, 883 So. 2d 425, 433 (La. 2004) (stating that a lawyer must fully disclose all details of a proposed settlement).

159. *Williamson v. Edmunds*, 880 So. 2d 310, 321 (Miss. 2004).

160. Silver & Baker, *supra* note 12, at 759–60.

161. AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 3.17(a) reporters’ note (2010). Professor Silver was a co-reporter for the ALI project.

162. *See* Erichson, *supra* note 34, at 575; Garretson, *supra* note 34, at 34–35; Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When It’s Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215, 221 n.11 (1999); Moore, *supra* note 6, at 162–64; Richard A. Nagareda, *Autonomy, Peace and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 767–68 (2002).

when that amount is extremely high.<sup>163</sup> When the clients know each other, finding out who got what may well be important, because the clients will have (or can easily obtain) the background information necessary to monitor the settlement allocations.<sup>164</sup> But in most mass tort litigation, there are many plaintiffs who do not know each other. In such cases, learning the other clients' names is unlikely to provide any useful information.<sup>165</sup> Rather, it should be sufficient for plaintiffs' attorneys to comply with the disclosure required by the Mississippi Supreme Court, including disease categories, degrees of injury, and any other information pertinent to the settlement allocation, without the need to reveal the clients' names.<sup>166</sup>

In *Scamardella v. Illiano*,<sup>167</sup> the Maryland Court of Special Appeals addressed the issue of disclosing client names in a somewhat different context.<sup>168</sup> There, the court upheld an aggregate settlement despite the fact that the plaintiffs were not given a list with the names and amounts to be received by the other settling plaintiffs.<sup>169</sup> This was not a mass tort lawsuit, and the plaintiffs were well known to each other.<sup>170</sup> The reason that the plaintiffs did not learn what each of them would be receiving was not because the plaintiffs' attorney withheld such information, but rather because the settlement agreement did not make any allocation of the agreed-upon settlement amount.<sup>171</sup> Rather, the plaintiffs agreed that they would attempt to agree on a division of the settlement, and if that effort failed, they would each hire separate lawyers and submit the problem to the court for resolution.<sup>172</sup>

The allocation process involved in *Scamardella* is unlikely to work in a mass tort lawsuit, where it would be unrealistic to suppose either that

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163. See, e.g., Garretson, *supra* note 34, at 33–34 n.54 (discussing a Venezuelan client who feared kidnapping if the amount of his settlement was disclosed). I was recently involved as an expert witness in a case in which a widower did not want to disclose the multimillion dollar sums his minor children received in the settlement of their claim for the wrongful death of their mother. The family lived modestly, and the children were unaware of their wealth. The father was concerned that others might try to take advantage of the children if the size of their settlements was made public.

164. See, e.g., Moore, *supra* note 6, at 163 n.91 (using as an example the group of neighboring families in Woburn, Massachusetts, that hired a plaintiffs' attorney to represent them in connection with the toxic chemical litigation that was the basis for the book *A Civil Action*).

165. See, e.g., Garretson, *supra* note 34, at 33 (“[C]lients typically do not know each other; the disclosure of a full name does very little to help a client determine whether he or she was treated fairly.”).

166. Garretson advises plaintiffs' attorneys to disclose to clients the subcategories and objective criteria for individual distributions, as well as listing numbers or first names next to each subcategory. *Id.*

167. 727 A.2d 421 (Md. Ct. Spec. App. 1999).

168. *Id.* at 423–24.

169. *Id.* at 423 (“No apportionment of the settlement proceeds among the parties was proposed.”).

170. *Id.* (describing the parties to the settlement as a woman's estate, the woman's daughter, and the woman's in-laws).

171. *Id.* at 423–24.

172. *Id.* at 424.

numerous plaintiffs who are strangers to each other might agree on dividing a fixed sum settlement or that, in the absence of such an agreement, a court would be willing to make settlement allocations itself on the basis of evidence submitted to it by each claimant. What is both realistic and increasingly common in mass tort litigation, however, is for a settlement agreement to provide not specific allocations, but rather a detailed process by which a lump-sum settlement amount will subsequently be allocated, usually on the basis of a specific formula or matrix and often by a neutral third person, such as a special master.<sup>173</sup> Of necessity, the clients will not know the specific amounts they are to receive under the settlement at the time their informed consent is requested.<sup>174</sup>

Despite the frequency with which such process settlements are occurring, there has been almost no discussion of their propriety under the current rule. One court recently held that the unavailability of information concerning how much each participant would receive made it impossible for the plaintiffs' attorney to comply with the disclosure requirements of Rule 1.8(g).<sup>175</sup> In addition, although the *Principles of the Law of Aggregate Litigation* specifically provide that attorneys may disclose "the formula by which the settlement will be divided among all the claimants," in lieu of permitting each claimant to review the settlements of all of the others,<sup>176</sup> the comment states that permitting the disclosure of formulas is a "modification" of the current disclosure requirement.<sup>177</sup>

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173. See, e.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2009 WL 5195841, at \*2-3 (D. Minn. Dec. 15, 2009) (describing a settlement under which a special master would determine individual awards based on the allocation plan proposed by a committee of plaintiffs' attorneys); *In re Vioxx Prods. Liab. Litig.*, No. 1657, 2008 WL 3285912, at \*2-3 (E.D. La. Aug. 7, 2008) (discussing objective criteria to be applied by an independent claims administrator, with automatic review by an independent Gates Committee and possible appeal to a Special Master); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490-91 (E.D.N.Y. 2006) (involving a complex claims administration process); *In re N.Y. Diet Drug Litig.*, No. 700000/98, 2007 WL 969426 (N.Y. Sup. Ct. Mar. 27, 2007) (describing the process by which the claimants would be placed in objective categories of severity of injury, economic status, relationship to the defendant's acts, with allocation); *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428, 434 (Tex. Ct. App. 2000) (describing the claims administration process by which the plaintiffs would receive amounts sufficient to cover certain damages "plus some additional amount to be calculated in a formula to be approved by a special master").

174. See *Diet Drug Litig.*, 2007 WL 969426, at \*5 ("[T]he 'individual settlement amounts' referred to in the 'settlement agreement . . . did not exist at the time the agreement was entered into. . . . [They] were not known at the time, they were to be subsequently determined in the process being challenged herein."). *But cf. Guidant Corp.*, 2009 WL 5195841, at \*2-3 (describing how, pursuant to guidance from plaintiffs' steering committee, most claimants' counsel were able to provide each claimant with an estimated base allocation or at least a range in which counsel estimated their settlement allocation would fall).

175. *Tilzer v. Davis, Bethune & Jones, L.L.C.*, 204 P.3d 617, 629 (2009).

176. AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 3.17(a) (2010).

177. *Id.* cmt. a; see also N.J. SUPREME COURT PROF'L RESPONSIBILITY RULES COMM., *supra* note 20, at 42 (describing how the options available for modification of N.J. Rule 1.8(g) include modifying the rule to permit "disclosure of a formula by which the settlement will be allocated").



As with client names, the current rule does not expressly require that an aggregate settlement allocate a particular sum to each client. Rather, it merely provides that “[t]he lawyer’s disclosure shall include the existence and nature of all the claims . . . and of the participation of each person in the settlement.”<sup>178</sup> True, the words “participation of each person in the settlement” could reasonably be interpreted to require that each client be advised of how much both the client and others will receive, but it could also be reasonably interpreted, in a more flexible manner, to permit a description of the process by which each person’s participation will result in the allocation of a particular sum. Given that the rule drafters are unlikely to have specifically considered the propriety of process allocations, such as those using a formula or matrix, the rule should arguably be interpreted in a manner that furthers its underlying purposes.

In *Scamardella* itself, the court noted that the attorneys’ failure to make the actual apportionment was not a failing but rather an advantage of the settlement, because it “preserved the representation from the major conflict of interest that occurs in aggregate settlement cases.”<sup>179</sup> There, the plaintiffs’ attorney made no effort to determine how the lump-sum settlement would be allocated, whether by formula, matrix, or otherwise.<sup>180</sup> This is not typically the case in mass tort litigation, where the settlement agreement will likely set forth detailed information as to the basis for the subsequent allocations. Unquestionably, when the plaintiffs’ attorney plays a significant role in determining the formula or other process by which the settlement will be allocated, the attorney is subject to some of the more important conflicts of interest among the differently situated plaintiffs. Nevertheless, articulating objective criteria for allocating the settlement minimizes the ability of the plaintiffs’ attorney to play favorites, and providing that a neutral third person will apply the criteria to individual cases further enhances the likelihood that the proceeds will be fairly allocated. This is especially the case when each claimant will be provided the opportunity to present evidence to the neutral and to appeal any initial allocation to a reviewing entity.

But can plaintiffs meaningfully evaluate the fairness of the allocation process if they will not learn what they will receive until the process is complete, which will be after the settlement agreement has been approved? In some cases, plaintiffs’ attorneys can provide information concerning a range in which individual settlement allocations are expected to fall,<sup>181</sup> and doing so is likely to prompt a court to conclude that the clients’ consent is adequately informed. When possible, providing such information should be required.

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

179. *Scamardella v. Illiano*, 727 A.2d 421, 427 (Md. Ct. Spec. App. 1999).

180. *Id.*

181. *See, e.g., In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2009 WL 5195841, at \*1 (D. Minn. Dec. 15, 2009).

Even if information concerning the range of an individual's likely recovery is unavailable, it should be possible, even under the current rule, for disclosure of a detailed allocation process to substitute for information concerning the final allocation. When the client has specific information about the criteria by which the allocations will be made, the client should be able to assess whether the process is fair, even when it is unclear how much the client will receive. But what if the only information the client is given is that the plaintiffs' attorney will make the allocations according to whatever the attorney believes is a fair allocation? Arguably this information is not sufficient for the client to determine that the allocation process will be fair, since the lawyer has divided loyalties and will be tempted to favor some clients over others. Even if the allocations will be made by a neutral third person, such as a claims administrator or special master, the disclosure may be insufficient if the settlement agreement provides no information concerning the criteria by which the allocations are to be made.

Perhaps the key to determining when disclosure of information concerning the allocation process may properly substitute for disclosure of information concerning individual allocations is whether there is adequate justification for performing the allocations only after the clients' approval has been sought. When a neutral decision maker will be applying objective factors or a formula only after the plaintiffs are given an opportunity to submit information concerning their individual cases—and maybe even an opportunity to appeal the initial result<sup>182</sup>—then delay makes sense because the claims administration costs will not be justified unless the plaintiffs have agreed in advance to submit themselves to the process. On the other hand, if the plaintiffs' attorney will be making the allocations, then the attorney should be required to make these allocations prior to seeking the plaintiffs' approval; these legal services should not entail any additional cost to the plaintiffs because they are within the scope of the representation reasonably contemplated under the individual contingent fee agreements. Even in the case of a neutral decision maker, there is no apparent justification for delaying the development of the objective criteria for making the allocations until after the settlement is approved.<sup>183</sup>

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182. See, e.g., *In re Vioxx Prods. Liab. Litig.*, No. 1657, 2008 WL 3285912, at \*2–3 (E.D. La. Aug. 7, 2008) (describing a settlement plan that entailed submissions by claimants to an independent claims administrator and possible appeals to an independent gates committee and then a special master; if the special master upholds a finding of ineligibility, claimants then have the opportunity to take their claim to trial).

183. In the implantable defibrillators settlement, it is unclear from the opinion whether the allocation formula was determined prior to individual claimants being requested to approve the settlement, as the settlement and allocation process (including the approval of a proposed allocation plan by a special master) were proceeding simultaneously on “parallel, yet interdependent, tracks.” *Guidant Corp.*, 2009 WL 5195841, at \*2.

### C. Court-Approved Settlements

Model Rule 1.8(g), as enacted in 1983, contained no reference—either in the text of the rule or its comment—to the applicability of the rule to court-approved settlements in class action lawsuits.<sup>184</sup> Louisiana and North Dakota were the first two jurisdictions to address this question—each providing in the text of the rule that it did not apply in class actions.<sup>185</sup> Subsequently, in 2002, the ABA amended the comment to Rule 1.8(g) to provide: “Lawyers representing a class of plaintiffs . . . may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.”<sup>186</sup> This comment was perhaps not as clear as it might have been, but it appeared to exclude the application of the rule only in class actions, in which courts are required to approve a proposed settlement only after determining that the settlement is “fair, reasonable, and adequate.”<sup>187</sup> This makes sense because it is difficult, and often impossible, to obtain the informed consent of each class member prior to implementation of a settlement.

More recently, however, another two jurisdictions—Ohio and New York—have adopted versions of Rule 1.8(g) that provide an exception in the text of the rule for court-approved settlements more generally.<sup>188</sup> What little legislative history exists suggests that the sole basis for adopting such language was to clarify that the rule is not meant to apply to class

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184. See *Reporter’s Explanation of Changes*, AM. BAR. ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule18rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html) (last visited Apr. 19, 2013).

185. See LA. RULES OF PROF’L CONDUCT R. 1.8(g) (2011) (“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 gives informed consent, in a writing signed by the client, or a court approves a settlement in a certified class action.”); N.D. RULES OF PROF’L CONDUCT R. 1.8(g) (2006) (“A lawyer who represents two or more clients, other than in class actions, shall not participate in making an aggregate settlement of the claims of or against the clients, or an aggregated agreement as to guilty pleas in a criminal case, unless, 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, each client consents.”).

186. See Am. Bar Ass’n Ethics 2000 Comm., *Report on the Model Rules of Professional Conduct, Rule 1.8*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule18.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18.html) (last visited Apr. 19, 2013) (showing a red-lined version of the rules amended by the ABA House of Delegates upon the recommendation of the Ethics 2000 Commission).

187. See FED. R. CIV. P. 23(e)(2).

188. See N.Y. RULES OF PROF’L CONDUCT R. 1.8(g) (2009) (“A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, *absent court approval*, unless each client gives informed consent in a writing signed by the client.” (emphasis added)); OHIO RULES OF PROF’L CONDUCT R. 1.8(g) (2007) (“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 the settlement or agreement is subject to court approval* or each client gives *informed consent*, in a writing signed by the client.” (first emphasis added)).

actions.<sup>189</sup> Nevertheless, the adoption of such broad language suggests that the rule could be applied to exclude the application of any situation in which a court approves the settlement of a mass tort lawsuit, even in nonclass aggregate litigation.<sup>190</sup>

In my view, such an interpretation would be unfortunate. No law requires courts to approve nonclass aggregate settlements, except in special cases such as the participation of a minor.<sup>191</sup> This is because it is assumed that the claimants' attorneys are adequately protecting their interests. True, some courts have reviewed nonclass aggregate settlements, claiming in at least one instance that judicial review was necessary because mass tort lawsuits are often litigated as if they were class actions, "with all of the thousands of lawsuits being litigated on a common basis under close judicial management at every stage."<sup>192</sup> These types of cases are increasingly being termed "quasi class actions," in which courts not only review proposed settlements, but also exercise their equitable powers to cut back attorneys fees, as they had been negotiated in the individual retention agreements.<sup>193</sup> Nevertheless, while some judges *may* involve themselves in the details of the litigation and review any proposed settlement in the same manner that they would review a proposed class settlement, this is not always the case. Indeed, as others have noted, courts that have approved aggregate settlements often do so without necessarily conducting "any independent review of the fairness, reasonableness, or adequacy of the terms of the settlement or the process that led to the agreement."<sup>194</sup>

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189. See OHIO RULES OF PROF'L CONDUCT R. 1.8(g) cmt. 13 ("Alternatively, where a settlement is subject to court approval, as in a class action, the interests of multiple clients are protected when the lawyer complies with applicable rules of civil procedure and orders of the court concerning review of the settlement."); *id.* at Comparison to ABA Model Rules of Professional Conduct (no mention of any differences between Ohio Rule 1.8(g) and ABA Model Rule 1.8(g)); see also ROY SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT 379 (2012) (citing the reporters' note suggestion "that the court approval exception would apply in situations 'such as in class actions,' reflecting the reality that individual consent to a class action settlement is rarely (if ever) obtained from every member of a class").

190. See SIMON, *supra* note 189, at 379 ("Read literally . . . the 'court approval' exception [of the New York rule] also could be interpreted to open an avenue for converting 'mass actions' (multiple individual clients bringing related claims) into 'class actions' (allowing court approval to substitute for individual client consent).")

191. See, e.g., PA. R. CIV. P. 2039 ("No action to which a minor is a party shall be compromised, settled or discontinued except after approval of the court pursuant to a petition presented by the guardian of the minor.").

192. See *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 196 (S.D.N.Y. 2011) (justifying the court's role in exercising supervisory authority over nonclass settlement on the grounds that this mass action resembled, and was litigated like, a class action, "with all of the thousands of lawsuits being litigated on a common basis under close judicial management at every stage").

193. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596, 06-CV-2592, 2009 WL 5062109, at \*1 (E.D.N.Y. Dec. 10, 2009) (Judge Weinstein).

194. Willgang & Lee, *supra* note 3, at 802 (discussing court approvals of the *Zyprexa* and *Vioxx* settlements).

Even if a court interprets Rule 1.8(g) as inapplicable to any court-approved settlement, it does not appear that this would significantly change what the plaintiffs' attorney is required to do. At the very least, the attorney must obtain the consent of each client before the settlement can be effective with respect to that client, not only because Rule 1.2(a) requires the attorney to do so,<sup>195</sup> but also because courts have no authority to bind parties to a settlement in nonclass lawsuits. In this respect, nonclass aggregation is significantly different from class actions.<sup>196</sup> Moreover, once it is established that each client must consent to his or her settlement, Rule 1.4 dictates that the attorney explain the settlement offer "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>197</sup> And all or most of the information currently required to be disclosed under Rule 1.8(g) is precisely the type of information that will be "reasonably necessary" for each client to decide whether to accept or reject a settlement offer. Nevertheless, rejecting the application of the disclosure requirements under Rule 1.8(g) itself is probably a bad idea because it makes it less likely that attorneys will comply with their obligations under other applicable rules.

Perhaps the only significance of excluding judicially approved settlements from the application of Rule 1.8(g) is to provide more flexibility in determining precisely what information a plaintiffs' attorney must disclose. If the aggregate settlement rule has been interpreted in a jurisdiction to require that the attorney disclose the names and addresses of all clients who are participating in the settlement, no matter how irrelevant this information would be to a client's evaluation of the fairness of a particular settlement, then courts can decide that Rule 1.4, unlike Rule 1.8(g), does not require the disclosure of such information in all cases. Similarly, if the aggregate settlement rule has been interpreted in a jurisdiction to require that formula and other process settlements are unlawful—because the attorney cannot disclose how much each client will receive at the time the clients are asked to consent to the settlement—then courts can decide that Rule 1.4 does not require the invalidation of these types of settlements, which are typically less subject to plaintiffs' attorney manipulation than settlements in which the attorney plays a more substantial role in determining each plaintiff's allocation.

Many commentators have urged judges to be more active in protecting plaintiffs' interests in mass tort litigation, for precisely the reasons that Judge Hellerstein gave in justifying his own "managerial" role in the World Trade Center litigation. In my view, more judicial supervision may well be desirable, but what may be even more desirable is for judges to insist that plaintiffs' attorneys fully comply with existing ethics rules, including not only Rule 1.8(g) but also Rules 1.2, 1.4, and 1.7—particularly Rule 1.7 as it

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195. See *supra* note 83 and accompanying text.

196. See, e.g., Erichson, *supra* note 34, at 524.

197. See *supra* note 153 and accompanying text.

relates to the size and the composition of any group represented by a single attorney or law firm.

### III. ATTORNEY WITHDRAWAL FROM REPRESENTING NONSETTLING PLAINTIFFS

In the *Vioxx* settlement, defense attorneys required plaintiffs' attorneys to withdraw from representing nonsettling plaintiffs if they could do so without violating state equivalents of Model Rules 1.16 and 5.6.<sup>198</sup> Commentators have been nearly unanimous in condemning these—and other—provisions of the settlement on the grounds that plaintiffs' attorneys who withdraw under these circumstances will violate both of these rules.<sup>199</sup>

I agree that putting such a provision in a settlement agreement constitutes a violation of Rule 5.6, which prohibits lawyers from participating in “offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.”<sup>200</sup> Courts and ethics committees have uniformly held that a settlement agreement may not prohibit a plaintiffs' attorney from representing new clients in lawsuits against the defendant; regardless of the defendant's understandable desire to achieve finality, such agreements violate public policy by limiting the ability of new clients to find adequate representation.<sup>201</sup> If it is unethical for a plaintiffs' attorney to agree to turn away *new* clients, then how can it be ethical for the same attorney to agree to terminate the representation of *existing* clients?<sup>202</sup> Perhaps some of these attorneys might decide for themselves that they want to withdraw, but the only reason for putting such a provision in a settlement agreement<sup>203</sup> (i.e., a provision requiring all of the plaintiffs' attorneys to withdraw from all of their nonsettling clients—even if only when ethically permissible)<sup>204</sup> is to satisfy the defendants'

198. *See supra* notes 15, 24 and accompanying text.

199. *See supra* notes 15–16 and accompanying text.

200. *See supra* note 15 and accompanying text.

201. Some commentators have disagreed with this policy and urged that the rule be changed, but this is clearly the result under the current rule. *See* Erichson & Zipursky, *supra* note 13, at 284–85.

202. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 371 (1993) (stating that a settlement agreement requiring the plaintiffs' attorney to refuse to represent certain opt-out clients—whether they were clients at the time of the settlement or became clients thereafter—would violate Model Rule 5.6(b)).

203. I use the term “settlement agreement” because this is what they are typically called, but of course, under the existing aggregate settlement rule, there is no actual settlement agreement until the terms have been accepted by the requisite number of plaintiffs. *Cf.* Erichson, *supra* note 11, at 1793.

204. As Erichson and Zipursky have noted, another questionable provision in the *Vioxx* agreement was where the attorneys agreed that all disputes about interpretation and compliance were required to be decided by the chief administrator, who was to sit as a binding arbitration panel, and whose decision would be “final, binding and Non-Appealable.” *See* Erichson & Zipursky, *supra* note 13, at 291 n.115. Moreover, the chief administrator was none other than “Judge Eldon Fallon, the federal district judge who presided over the *Vioxx* MDL and who played a major role in pushing the parties to settle.” *Id.* at 291 (footnote omitted).

desire to achieve finality by removing experienced plaintiffs' attorneys from continuing to pursue this type of litigation,<sup>205</sup> which defendants are not permitted to do under Rule 5.6.

On the other hand, I am not convinced that the mandatory withdrawal provision necessarily violated Rule 1.16 as it has been interpreted in various jurisdictions. That rule permits lawyers to withdraw when "the client insists upon taking action . . . with which the lawyer has a fundamental disagreement."<sup>206</sup> Although a lawyer may fundamentally disagree with a client's decision to refuse an offer of settlement, many courts and ethics committees have found that a fundamental disagreement whether or not to settle a lawsuit is insufficient grounds to withdraw because it conflicts with the client's absolute right to decide whether to settle a case.<sup>207</sup> Nevertheless, courts have not uniformly held that an attorney is prohibited from withdrawing or attempting to withdraw<sup>208</sup> when a plaintiff in a contingent fee representation refuses to accept a settlement offer recommended by the attorney. Although it may not be accurate that a majority of courts permit withdrawal in these circumstances (as a recent law review note asserted<sup>209</sup>), there are at least some jurisdictions where the *Vioxx* plaintiffs' attorneys may have been ethically permitted to withdraw from representing nonsettling plaintiffs.

For example, the Kentucky Supreme Court recently held that, although a trial court properly permitted a plaintiff's attorney to withdraw from an individual lawsuit when the plaintiff refused an offer of settlement, the same attorney could not recover legal fees under quantum meruit.<sup>210</sup> This

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205. If they could require the plaintiffs' attorneys to refuse to accept new clients, defendants would clearly do so. A second best solution is to remove plaintiffs' attorneys from all existing litigation and then assume that there is an implicit agreement that these attorneys will not accept new clients. Plaintiffs' attorneys will understand the implicit agreement and will be motivated to honor it because first, they will earn enormous fees as a result of the current settlement and will likely be satisfied with this return on their investment, and second, if they accept new clients in breach of the implicit agreement, future defendants will refuse to engage in favorable settlement agreements with them, preferring to deal with other plaintiffs' attorneys who can be trusted to understand and honor the implicit agreement.

206. See MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2012).

207. See, e.g., Erichson & Zipursky, *supra* note 13, at 286–87 (collecting authorities).

208. Once a lawsuit is filed, plaintiffs' attorneys are typically required to obtain the court's permission before withdrawing from the representation. See MODEL RULES OF PROF'L CONDUCT R. 1.6(c). Prior to filing the lawsuit, an attorney may withdraw without court permission, although the attorney is still bound by ethical rules regarding mandatory and permissive withdrawal. *Id.* R. 1.6(b). At least some of the plaintiffs' attorneys in the *Vioxx* settlement were certainly representing numerous clients who had not yet filed lawsuits against Merck.

209. See generally Jane Y. Kim, Note, *Refusing To Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 WASH. U. J. L. & POL'Y 383 (2012).

210. See *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 593–94 (Ky. 2012). With respect to the trial court's permitting the attorney to withdraw, the Kentucky Supreme Court first noted that trial courts have "broad discretion in granting such [withdrawal] motions liberally, as long as the client's interests are not affected." *Id.* at 596. The court then stated that "[a]rguably, [the attorney's] claim to withdraw may have been made under subsections (3) [client insisting on pursuing an objection the lawyer considers

was because “good cause” for purposes of permissive withdrawal is not the same as “good cause” for quantum meruit compensation.<sup>211</sup> In addition, the court stated that the attorney might even have recovered under quantum meruit if he had put a provision in the engagement agreement permitting him to withdraw if the plaintiff refused the attorney’s recommendation to settle the case.<sup>212</sup> Given that the *Vioxx* plaintiffs’ attorneys were agreeing not to seek legal fees in cases involving nonsettling plaintiffs,<sup>213</sup> their attempts to withdraw would apparently be perfectly proper in Kentucky and other jurisdictions as well.<sup>214</sup>

Of course, for purposes of the *Vioxx* settlement, it is probably irrelevant whether the mandatory withdrawal provision necessarily violated Rule 1.16, because it apparently violated Rule 5.6(b).<sup>215</sup> As a result, it was unethical for both the defense and plaintiffs’ attorneys to agree to that

repugnant or imprudent], (5) [representation resulting in unreasonable financial burden on the lawyer or rendered unreasonably difficult by the client], and (6) [other good cause] of that Rule.” *Id.* at 596. Although this was not necessarily a ringing endorsement of the ethical propriety of the attorney’s attempt to withdraw, it strongly suggests that attorneys may properly withdraw or attempt to withdraw under the Kentucky rules.

211. *Id.* at 596.

212. *Id.* at 598.

213. See Erichson & Zipursky, *supra* note 13, at 280. This provision of the *Vioxx* settlement agreement has also been controversial. See, e.g., Conn. Informal Op. 08-01 (concluding that such an agreement created client-lawyer conflicts by requiring plaintiffs’ attorneys to forego any financial interest in cases involving nonsettling plaintiffs).

214. For cases permitting withdrawal when the client had rejected a recommended settlement offer, see authorities cited in 31 Laws. Man. on Prof. Conduct (ABA/BNA) 1107 (2006). The Seventh Circuit and First Circuit opinions cited in a recent law review note as permitting withdrawal following rejection of a settlement offer, see Kim, *supra* note 209, at 404–05, involved factors in addition to mere rejection of the lawyer’s advice. For example, in *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081 (7th Cir. 1982), the Seventh Circuit held that it was not an abuse of discretion for the trial court to allow the plaintiffs’ attorney to withdraw, stating that “in private engagements counsel may withdraw if advice (even to settle) is not followed.” *Id.* at 1087 (citations omitted). The court also emphasized, however, that the plaintiffs did not object to, or express any disagreement with, the request to withdraw, and that it was therefore reasonable for the trial court to conclude that the plaintiffs acquiesced in the lawyer’s withdrawal. *Id.* at 1088; see also *Jiricko v. Ill. Anesthesia, Ltd.*, Nos. 92-2613, 92-2682, 1993 U.S. App. LEXIS 22030 (7th Cir. Aug. 27, 1993) (holding that the trial court did not abuse its discretion in granting a lawyer’s motion to withdraw where a contractual provision allowed the lawyer to terminate the representation; however, there was no settlement offer in that case, and the contract provided that the lawyer could withdraw if it should appear that the lawsuit “lacks merit or is otherwise not feasible to pursue”); *Citibank, N.A. v. Accounting Sys. of P.R., Inc.*, No. 90-1145, 1990 U.S. App. LEXIS 14377 (1st Cir. Aug. 7, 1990) (upholding a grant of permission to withdraw when the court determined that plaintiffs were solely responsible for proceeding to trial pro se because they expressed their dissatisfaction with the lawyer, demonstrated an unwillingness to cooperate with his plans, stated their intention to retain new counsel, and did not object to the withdrawal or ask for a continuance). Even so, these jurisdictions have clearly not held that it is impermissible to request to withdraw following rejection of a settlement offer; therefore, it was certainly possible that the *Vioxx* plaintiffs’ attorneys could have permissibly withdrawn there. Of course, it was also possible that the *Vioxx* plaintiffs’ attorneys could cite reasons other than the mere rejection of their advice to settle. For a discussion of the permissibility of withdrawal on other grounds, see *infra* note 218 and accompanying text.

215. See *supra* note 197 and accompanying text.



provision. What interests me, however, is a different question: whether there are any circumstances in which plaintiffs' attorneys can decide for themselves to withdraw or attempt to withdraw from representing nonsettling claimants in mass tort litigation.

I agree with those courts and commentators who interpret Rule 1.16 to prohibit lawyers from withdrawing *merely* because the client has rejected the lawyer's recommendation to accept a settlement offer.<sup>216</sup> This interpretation appropriately recognizes that it is for the client, and not the lawyer, to accept or reject a settlement offer, and that an attorney's withdrawal—or threat of withdrawal—prompted solely by the client's settlement decision, constitutes an impermissible restriction on the client's decision-making authority.<sup>217</sup> I also agree with the view that attorneys may not circumvent this result by having clients consent in the engagement agreement to the attorney's withdrawal under such circumstances.<sup>218</sup>

On the other hand, there are some circumstances in which the presence of additional factors will allow a plaintiffs' attorney to ethically withdraw from the representation after the plaintiff has rejected an offer of settlement. For example, if continued representation would result in an ethical violation, then the attorney is *required* to withdraw, or at least attempt to withdraw.<sup>219</sup> This will be the case if the attorney's investigation (including discovery) reveals that a nonsettling plaintiff's lawsuit has no merit,<sup>220</sup> although this may be unlikely when the defendant has offered to settle the lawsuit with respect to this, as well as similarly situated plaintiffs. Continued representation is also prohibited when there is a conflict of interests between the settling and nonsettling plaintiffs, and either the conflict is nonconsentable or the clients refuse to give their informed consent.<sup>221</sup> Erichson and Zipursky cite to several authorities suggesting this result, including instances involving only a few claimants in situations where there was insufficient coverage for all the claimants.<sup>222</sup> Unless it is manifest that the defendant cannot pay all claims, however, it is unclear how the existence of nonsettling plaintiffs creates conflicts that are either nonconsentable or outside the informed consent that should have been

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216. See, e.g., *Nehad v. Mukasey*, 535 F.3d 962 (9th Cir. 2008); Conn. Informal Op. 08-01; Nathan M. Crystal, "Let's Make a Deal"—*Settlement Ethics*, S.C. LAW., Nov. 2008, at 8; Sylvia Stevens, *When a Client Repudiates a Settlement: What Can You Do?*, OR. ST. B. BULL., May 2008; see also authorities cited in 31 *Laws. Man. on Prof. Conduct (ABA/BNA)* 107; cf. *Best v. City of N.Y.*, No. 04CIV10114, 2005 WL 3071546 (S.D.N.Y. Nov. 15, 2005) (granting the plaintiff's lawyer's motion to withdraw despite fact that the lawyer did not have good cause to withdraw on the grounds that the plaintiff with "unreasonable expectations" had refused a recommended settlement).

217. See *supra* note 32 and accompanying text.

218. See, e.g., *Nehad*, 535 F.3d at 971.

219. See MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2012).

220. See FED R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 3.1.

221. See MODEL RULES OF PROF'L CONDUCT R. 1.7.

222. See Erichson & Zipursky, *supra* note 13, at 286 & n.94 (citing N.C. State Bar Op. 251 (1997); Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Formal Op. 95-F-136 (1995); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d(i), illus. 2 (2000)).

obtained either at the beginning of the representation or sometime before the negotiation of the aggregate settlement.<sup>223</sup>

What about an attorney's belief that continued representation constitutes an "unreasonable financial burden,"<sup>224</sup> given the cost of trial in individual cases and perhaps only the small or negligible prospect of obtaining a verdict that will cover the attorney's costs? Courts disagree whether withdrawal is permissive in such cases. Some courts permit withdrawal on the grounds that the rule clearly states that "unreasonable financial burden" creates good cause to withdraw,<sup>225</sup> but others disagree on the grounds that this is one of the risks that attorneys accept when they represent clients on a contingent fee basis.<sup>226</sup> For some courts, the financial burden may be unreasonable only if it results from some totally unexpected event.<sup>227</sup>

Some lawyers have attempted to deal with the problem by providing, in their retention agreements, that a contingency fee will be converted to an hourly fee if the client rejects a settlement recommended by the attorney.<sup>228</sup> Not surprisingly, most courts reject such provisions on the obvious ground that they unduly interfere with the client's right to accept or reject a settlement offer.<sup>229</sup> One commentator suggests that attorneys put a

223. See *supra* notes 117–18 and accompanying text. Erichson and Zipursky also argue that even when withdrawal is required as a result of a conflict of interests, the lawyer is typically required to withdraw from the representation of both clients. Erichson & Zipursky, *supra* note 13, at 286–87. They do not address the situation where the retention agreement (or similar informed consent provision) permits the lawyer to continue to represent one of the clients when a conflict of interest arises that requires the withdrawal of the lawyer from at least one of clients. These sorts of provisions are not uncommon. Also, with respect to a nonsettling client's status as a former client, there is no conflict unless the continued representation of the settling plaintiffs is "materially adverse" to the nonsettling former client. See MODEL RULES OF PROF'L CONDUCT, R. 1.9(a). This is unlikely except when the plaintiffs are in direct competition for limited funds.

224. See MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(6) (permitting a lawyer to withdraw when "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client").

225. See, e.g., *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820, 831 (N.J. Super. Ct. App. Div. 1993); see also *In re Withdrawal of Attorney*, 594 N.W.2d 514, 518 (Mich. Ct. App. 1999) (allowing withdrawal where there was no realistic chance that the firm would recover fees in a case that required another 1,000 hours in addition to the 4,000 hours already expended).

226. See, e.g., *Rusinow v. Kamara*, 920 F. Supp. 69, 72 (D.N.J. 1996) ("[S]udden disenchantment" with the plaintiff in a contingent fee case does not justify withdrawal); *Suffolk Roadways, Inc. v. Minuse*, 287 N.Y.S.2d 965, 970 (Sup. Ct. 1968) ("The mere fact that the retainer is not as profitable as first imagined is no excuse for withdrawal.").

227. Cf. *Portsmouth Redevelopment & Hous. Auth. v. BMI Apartments Assocs.*, 851 F. Supp. 775, 785 (E.D. Va. 1994) (noting that although at the time of engagement, the law firm knew that the partnership was experiencing financial difficulty, it also knew that the individual partners had the ability to pay the firm's legal fees; client was now claiming inability to pay).

228. See, e.g., *Compton v. Kittleson*, 171 P.3d 172, 180 (Alaska 2007) (holding that such a "hybrid" fee agreement violated the Alaska Rules of Professional Conduct).

229. See *Crystal*, *supra* note 216, at 9 (citing *Compton*, 171 P.3d 172). The *Compton* court also expressed concern with the "predictable difficulty of forecasting the effects of the fee-conversion provision" given the number of variables involved in determining the effect that such a provision will have in any particular case. *Compton*, 171 P.3d at 179.

provision in their retention agreements permitting the attorney to decide at any time not to advance expenses, so long as the attorney provides the client with reasonable notice.<sup>230</sup>

In my view, the more appropriate solution is to make use of the limited scope of the representation under Rule 1.2(c).<sup>231</sup> In the case of clearly identified group representations, attorneys ought to be free to specify that, in the event there is no longer a sufficiently large group to warrant the costs of the litigation, the attorney will be permitted to withdraw, or the client will agree to pay the necessary expenses to pursue the client's case. Such a provision would bring home to the client some of the risks of group representation at a time when the client still has the option of searching for another attorney who is willing to provide a more traditional individual representation. For high value claimants, who are the ones most likely to reject aggregate settlement offers,<sup>232</sup> this particular disclosure might well prompt them to reevaluate whether they want to be part of a group representation in which the attorney is incapable of pursuing the client's individual case should the client reject an unacceptable offer.

I caution, however, that this solution should only be available in cases in which it is in fact unreasonably burdensome for a plaintiffs' attorney to pursue litigation on the part of nonsettling claimants.<sup>233</sup> This will not always be the situation in mass tort litigation, only some of which present the challenges of highly complex cases like *Vioxx*. For example, in single event disasters, such as airplane crashes, the expenses of trying a single case may not be excessive, particularly if the common attorney has already completed all or most of the investigation, including the identification of expert witnesses.

#### CONCLUSION

Elsewhere I have criticized the ALI for failing to include, in its recent *Principles of Aggregate Litigation*, a meaningful discussion of the ethical issues that arise for lawyers in aggregate litigation, including both class actions and nonclass aggregations.<sup>234</sup> My initial concern was that the ALI had missed an opportunity to give necessary and helpful guidance to both lawyers and courts concerning the ethical issues in aggregate litigation, including conflict of interest issues.<sup>235</sup> In addition, however, I came to believe that, with respect to nonclass aggregations, such as commonly occur in mass tort litigation, the ALI did more than miss an opportunity to educate

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230. Crystal, *supra* note 216, at 9.

231. See *supra* note 82 and accompanying text.

232. See *supra* note 52 and accompanying text.

233. In *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820, 821 (N.J. Super. Ct. App. Div. 1993), the Supreme Court of New Jersey Appellate Division remanded the case for a hearing on the anticipated costs of continuing to pursue the lawsuit. I express no opinion on whether such a hearing should be required in any or all cases.

234. See generally Moore, *supra* note 9.

235. *Id.* at 722.

mass tort lawyers regarding their ethical obligations—rather, it affirmatively downplayed both the risks of this type of group representation and the role of ethics rules in protecting individual clients against these risks.<sup>236</sup> The result, I feared, was to indirectly approve the common practice of mass tort lawyers treating individual clients as if they were members of a class action but without affording them even the minimal judicial protections given to actual class members.<sup>237</sup>

It has been my goal in this Article to initiate the sort of discussion I wish the ALI had engaged in before adopting the *Principles of Aggregate Litigation*. With respect to conflicts of interest, I have attempted to identify when potentially impermissible conflicts arise under Rule 1.7(a)—including conflicts among current clients and conflicts between the clients and their lawyer—both from the outset of the representation and as the representation evolves, even before a defendant makes an aggregate settlement offer. As for the consentability of such conflicts under Rule 1.7(b), I agree that the potential advantages of mass representation often outweigh the risks; however, I suggest that there ought to be some limitation on both the size and the composition of a group represented by a single lawyer or law firm. Finally, I argue that obtaining the clients' informed consent requires more than a simple explanation that the representation will be collective, rather than individual, urging that lawyers disclose as much detailed information as is reasonably necessary for clients to understand the material risks of the type of group representation that the lawyer anticipates giving.

With respect to the aggregate settlement rule itself, I address questions that continue to arise under the existing rule, including what constitutes an aggregate settlement, the type of information that must be disclosed to clients, and the effect of several state rules that may not require satisfaction of the rule when a court has approved the settlement. I urge uniform adoption of the ALI's definition of an aggregate settlement as one that involves an element of either collective allocation or a collective condition for the settlement to be effective. I agree with others that detailed information concerning the allocation to each client is required, but I question whether this necessarily includes client names or other identifying information in situations where this information is unlikely to be useful in assessing whether the allocation is a fair one. I am also concerned that a literal application of the aggregate settlement rule may prohibit the use of a formula or matrix, where the clients may not know the precise amount of their allocation before being asked to approve the settlement. I agree that formula or matrix settlements can be abused, but they are often the most objective means of allocating settlement proceeds and therefore need to be accommodated under the existing rule. Finally, for those state versions of the aggregate settlement that create an exception for court-approved settlements, I urge that these rules be interpreted to limit the exception to

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236. *Id.* at 728–33.

237. *Id.* at 728–29.

court approval of class actions, given that other rules—such as Rules 1.2 and 1.4—also require that lawyers provide adequate information to allow clients to decide whether to accept or reject a proposed settlement offer.

The last section of the Article addresses the complicated question of when plaintiffs' attorneys may withdraw from representation of a plaintiff who rejects a reasonable settlement offer. I agree with others who condemn settlement agreements requiring plaintiffs' attorneys to do so when ethically permitted; however, my concern is not that there are few, if any, circumstances in which such withdrawal is ethically permissible, but rather that defendants have no legitimate interest in forcing plaintiffs' attorneys to withdraw, even if they could do so voluntarily. As for entirely voluntary withdrawal, unlike many others, I am sympathetic to the economic realities of some mass tort representations, where it may not be feasible to force an attorney to litigate only one or a few claims when the anticipated expenses are enormous. So long as the attorney provides advance warning, I believe that voluntary withdrawal can sometimes constitute a necessary aspect of a limited-scope group representation under Rule 1.2(c), although I concede that this conclusion will be controversial.

I did not come to this Article with any particular theme in mind. If there is a theme, it is that the issues are more complex than I initially thought they would be and that to adequately address the risks of mass representation—without losing its potential for enormous benefits—we need to take a nuanced approach to the application of the existing rules to factual situations that may vary considerably. Nevertheless, it is imperative that mass tort lawyers take their ethical obligations seriously and that courts, commentators, and organizations such as the ALI continue to discuss these issues and provide as much guidance as they can to the practicing bar.