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THE CASE AGAINST CHANGING THE AGGREGATE SETTLEMENT RULE IN MASS TORT LAWSUITS

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“THE CASE AGAINST CHANGING THE AGGREGATE
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INTRODUCTION

The American legal system has witnessed “a gradual, almost surreptitious movement toward collective litigation,”¹ most recently including so-called “mass tort” litigation.² Indeed, while mass torts (or “mass accidents,” as they were first called³) were initially considered inappropriate for at least some forms of collective treatment—notably, class actions⁴—“a

¹Stephen Yeazell, “Collective Litigation as Collective Action,” 1989 U. Ill. L. Rev. 43. According to Professor Judith Resnick, “[w]hile the ‘gradual, almost surreptitious’ description toward aggregation may be apt given the time frame (medieval law to the present) that Yeazell has analyzed, such description does not capture the dynamic changes of the past thirty years.” Judith Resnick, “From ‘Cases’ to ‘Litigation,’” 54 Law and Contemporary Problems 5, 51 (1991).

²See *infra* [] (discussing the difficulty of defining “mass torts.”)

³See Resnick, *supra* note 1 at 9 (discussing the 1966 advisory committee note to Rule 23(b)(3) on class actions). Prior the advent of lawsuits involving toxic torts and injuries caused by consumer products, mass tort lawsuits were largely based on train and plane crashes. *Id.*

⁴See, e.g., *id.* At 9-11. See also [].

consensus has emerged calling for substantial modifications in traditional court processes”⁵, including the availability of the class action device.⁶ Recently, however, the early enthusiasm for the use of class actions in mass tort litigation has waned in the wake of numerous criticisms, primarily directed at the existence of faulty incentive mechanisms for class action lawyers, leading lawyers to sacrifice the interests of individual class members in pursuit of enormous legal fees.⁷ This problem is aggravated both by the inability of class members to effectively monitor the lawyer’s conduct⁸ and by difficulties facing courts charged with protecting the interests of absent class members.⁹ Outcomes aside, commentators have criticized class actions as failing to provide any meaningful opportunity for victims to participate in the resolution of their claims, including the absence of a close working relationship with their lawyers.¹⁰

⁵Deborah R. Hensler, “Resolving Mass Torts: Myths and Realities,” 1989 U. Ill. L. Rev. 89, 89-90.

⁶See, e.g., Deborah R. Hensler & Mark A. Peterson, “Understanding Mass Personal Injury Litigation: A Socio-legal Analysis,” 59 Brooklyn L. Rev. 961, 963 (1993) (briefly noting the “myriad proposals [recently made] to facilitate aggregative treatment of mass tort claims, including amending Rule 23 governing the availability of class actions). See also, e.g., Charles Silver, “Comparing Class Actions and Consolidations,” 10 Rev. of Litig. 495, n.2 (1991) (providing a partial list of authorities recommending the use of class actions for pretrial or trial purposes in mass tort lawsuits).

⁷See, e.g., Michael A. Perino, “Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions,” 46 Emory L.J. 85 (1997); Barry F. McNeil and Beth L. Fancsal, “Mass Torts and Class Actions: Facing Increased Scrutiny,” 167 F.R.D. 483, 519-521 (1996); John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995); Susan P. Koniak, “Feasting While the Widow Weeps: *Georgine v. Amchem Products, Inc.*,” 80 Cornell L. Rev. 1046 (1995); cf. Charles Silver, *supra* note [] at 504, n. 33 (providing list of authorities discussing underrepresentation in class actions generally).

⁸See, e.g., Lynn A. Baker & Charles Silver, “Mass Lawsuits and the Aggregate Settlement Rule,” 32 Wake Forest L. Rev. 733, 740-741 (1997).

⁹Michael D. Ricciuti., “Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult,” 1 Geo. J. of Legal Ethics 817 (1988).

¹⁰See, e.g., Jack B. Weinstein, Individual Justice in Mass Tort Litigation 54-56 (1995); Hensler & Peterson, *supra* note [] at 1032; Roger H. Transgrud, “Mass Trials in Mass Tort Cases: A Dissent: 1988 U. Ill. L. Rev. 69, 82-84. But see Linda Mullinex, “Mass Tort as Public Law Litigation: Paradigm Misplaced,” 88 Northwestern L. Rev. 579 (1994) (citing empirical findings that clients do not have close working relationships with their attorneys even in simple, bi-polar litigation).

Nevertheless, attracted by economies of scale and other efficiencies of collective action,¹¹ numerous commentators continue to insist that mass tort lawsuits are here to stay¹² and that the antidote to class action failures is the adoption of various reforms. Among the various reform proposals are those focusing on ethics, rather than procedure.¹³ In particular, commentators urge flexibility in the application of ethical rules that appear to limit either the availability or efficacy of aggregate lawsuits,¹⁴ that is, those in which individual lawyers or law firms represent numerous individuals whose claims arise out of the same incident or series of incidents.¹⁵ According to some of these commentators, the aggregation of individual claims, unlike class actions, involves the formation of consensual relationships between tort victims and their lawyers, thereby giving victims the ability to exercise more control than is possible in the class action context.¹⁶ While group lawsuits are admittedly far from ideal (so the argument goes), they

¹¹See, e.g., Silver & Baker, “Mass Lawsuits,” supra note ___ at 744-748 (discussing advantages of collective action in mass tort lawsuits, including economies of scale, increased leverage in settlement negotiations, equalizing plaintiffs’ and defendants’ risks, and conservation of defendants’ assets) .

¹²Carrie Menkel-Meadow, “Ethics and the Settlement of Mass Torts: When the Rules Meet the Road,” 80 Cornell L. Rev. 1159, ___ (1995) (quote). See also, e.g., Coffee, supra note ___ at ___ (“proposals for the return to a traditional system of individual case litigation are apt to be as quixotic as they are costly”).

¹³For a brief summary of some of the reform proposals in the area of procedure, see supra note ___.

¹⁴See, e.g., Weinstein, supra note ___ at 85:

Rigid adherence to traditional notions about an attorney’s duty to his or her client could lead us to refuse to permit representation of large numbers of clients by single attorneys—an undesirable limitation....Outside the class action context, practical considerations require that we tolerate mass representation.

See also Menkel-Meadow, supra note ___ at ___; [other cites].

¹⁵See infra [section on defining mass torts].

¹⁶See Silver & Baker, “Mass Lawsuits,” supra note ___ at 741-744.

may still be better than either class actions or individual lawsuits.¹⁷

Aggregate lawsuits, however, are said to face several obstacles in the form of the regulation of lawyer ethics. As Judge Jack Weinstein has observed,

The traditional ethical rules...are inadequate due to their reliance on the single-litigation, single lawyer model. The mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation. This diffuse relationship inevitably will yield some level of client dissatisfaction and, because of compromises the attorney must make to formulate strategy for the group as a whole, may result in less-than-zealous advocacy for the positions of particular clients.¹⁸

Nevertheless, Judge Weinstein goes on to conclude that trade-offs are required and that “[r]igid adherence to traditional notions about an attorney’s duty to his or her client could lead us to refuse to permit representation of large numbers of clients by single attorneys—an undesirable limitation.”¹⁹ Others agree. In a choice between litigant autonomy and aggregative justice, they argue that aggregative justice should prevail, in part because litigant autonomy is not achievable in any event in mass tort litigation.²⁰

My purpose in this paper is to challenge this view. I do not believe that any widespread reform of traditional lawyer ethics is either necessary or desirable. In my opinion, commentators

¹⁷Charles Silver & Lynn Baker, “Mass Lawsuits and the Aggregate Settlement Rule, 32 Wake Forest L. Rev. 733 (1997) (comparison to individual lawsuits); Silver, Comparing Class Actions and Consolidations (comparing class actions to consolidated individual lawsuits).

¹⁸Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 85 (1995). See also Menkel-Meadow, *supra* note ___ at ___ (existing ethics rules do not really contemplate the kind of attorney-client relationships that exist in the settlement of mass torts).

¹⁹Weinstein, *supra* note ___ at ___.

²⁰See, e.g., Menkel-Meadow, *supra* note ___ at ___ (legal system and ethics rules must confront tension between ideals of individual justice and reality of need for aggregate justice, ___ (current crisis teaches that present paradigms for dispute settlement may not be working and that we may be unable to provide every client with a humanly meaningful relationship with a lawyer). For discussions of the tension between litigant autonomy and aggregative justice with regard to proposed procedural reforms, see, e.g., [Resnick, other cites].

label as “mass torts” too many cases in which the stated rationale for proposed special exemptions is totally lacking.²¹ Moreover, these commentators fail to recognize that the traditional rules are already more flexible than is often suggested and that this flexibility can do much to accommodate the legitimate needs of clients.²² Finally, where existing rules *do* pose insurmountable obstacles to aggregate representation (including aggregate settlements), I submit that the case has not yet been made that these rules *should* be changed in order to further facilitate collective action in mass tort litigation.²³

I. THE REFORM PROPOSALS

Despite increasing calls for the relaxation of ethical rules in mass tort cases,²⁴ it is perhaps telling that few detailed proposals for change have emerged.²⁵ Summing up the views of the participants at a mass torts symposium, one commentator concluded that “[a]lthough the Symposium participants expressed discomfort at requiring strict adherence to the rules of client communication and client autonomy with respect to settlement, no alternative to strict enforcement... was proposed that effectively balanced those interests.”²⁶

²¹See *infra* ____.

²²See *infra* ____.

²³See *infra* ____.

²⁴See *supra* ____.

²⁵But see Silver & Baker, “Mass Lawsuits, *supra* note ____ (detailed proposal for reform to Model Rule 1.8(g). See *infra* ____.

²⁶David Hricik, “The 1998 Mass Tort Symposium: Legal Ethical Issues at the Cutting Edge of Substantive and Procedural Law,” 17 *Rev. of Litig.* 419, 423 (1998).

The primary candidate for reform is the so-called “aggregate settlement rule”.²⁷ Rule 1.8(g) of the ABA Model Rules of Professional Conduct provides that “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients...unless each consents after consultation, including disclosure of the existence and nature of all the claims...involved and of the participation of each person in the settlement.”²⁸ In one of the few articles to advocate a specific reform proposal, Professors Charles Silver and Lynn Baker of the University of Texas argue that fundamental changes in the operation of this rule are necessary in order to further facilitate collective action in mass tort lawsuits.²⁹

The aggregate settlement rule inhibits collective action in several ways. First, it requires

²⁷See, e.g., Silver & Baker, “Mass Lawsuits,” supra note ____.

²⁸ABA Model Rules of Professional Conduct, Rule 1.8(g). The predecessor to this rule, DR 5-106, similarly provided:

A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

ABA Model Code of Professional Responsibility DR 5-106(A) (1970). According to Professors Silver and Baker, the rule has its origins not in the settlement of claims arising from litigation groups, but rather “the situation in which a lawyer *separately* represents multiple clients with unrelated lawsuits” and there is a danger of “horsetrading” in claims. [Va. L. Rev. manuscript at 10, n. 11].

²⁹See Silver & Baker, “Mass Lawsuits,” supra note _____. Professors Silver and Baker correctly note that legal ethics professors have effectively ignored the aggregate settlement rule and mass torts generally and that whether their reform proposals are right or wrong, “scholarly examination of the aggregate settlement rule and practices to which it relates are long overdue.” *Id.* At 736. Elsewhere they state that the “blackletter law governing counsel’s role in group lawsuits is ambiguous and immature.” [Va. L. Rev. manuscript] While I disagree with their conclusions and much of their analysis, I commend them for bringing serious scholarly focus to a pressing real world problem.

the lawyer to consult with each client prior to agreeing to an aggregate settlement of claims.³⁰

When a lawyer has thousands or tens of thousands of clients, meaningful consultation with each of them regarding the terms of the settlement may be difficult, perhaps impossible.³¹ Professors Silver and Baker propose that the rule be changed to permit clients to give lawyers the authority to settle on their behalf, without further consultation.³²

Aside from the logistical difficulty of consulting clients on settlement offers, critics cite the obstacles presented when lawyers are required to inform each of them of the “nature of all the claims” and of the “participation of each person in the settlement.”³³ Apparently some clients simply refuse to allow their lawyers to tell other clients how much they will receive, either because they fear unwanted publicity regarding their financial affairs or because they do not want to reveal the details of their medical condition.³⁴ Professors Silver and Baker suggest either a modest change, in which the lawyer would be permitted to keep some information private, such as the names of the various plaintiffs,³⁵ or a more radical change, in which the lawyer would be permitted to disclose to each client only the total amount of the settlement and that individual’s

³⁰The rule provides that the lawyer may not participate in an aggregate settlement “unless each client consents after consultation.” See supra _____. Aggregate settlements involve lump-sum payments for a group of clients, as opposed to separate settlement demands made by a lawyer on behalf of jointly represented clients. See Silver & Baker, “Mass Lawsuits,” supra note ____ at 758-759 & n. 84.

³¹See infra ____.

³²See Silver & Baker, “Mass Lawsuits,” supra note ____ at 763-764 (discussing pesticide exposure lawsuit involving approximately 25,000 farm workers residing in twelve countries).

³³See supra ____.

³⁴See Silver & Baker, “Mass Lawsuits,” supra note ____ at 756-757.

³⁵Id. at 758-760 (approving interpretation of Rule 1.8(g) that would not require that each person must be identified by name, but disapproving lack of explicit support for this interpretation).

share of the settlement.³⁶

Finally, and arguably most important, the rule prohibits the lawyer from accepting an aggregate settlement unless each client approves the settlement after learning its terms.³⁷ The problem is that defendants often insist on unanimous or near unanimous acceptance among plaintiffs as a condition of settling with any of them.³⁸ Some lawyers have persuaded plaintiffs to agree in advance to be bound by a majority or even a super-majority vote in favor of settlement, but courts have refused to enter settlement over the objection of a disapproving plaintiff, citing the aggregate settlement rule.³⁹ Lawyers fear not only that the proposed settlement will fall apart, but also that they will be forced to withdraw from representing *all* of the plaintiffs, not just those disapproving the settlement.⁴⁰ Professors Silver and Baker propose that clients be permitted to

³⁶This proposal is implicit in Professors Silver and Baker's first article on mass tort lawsuits, where they argue that Rule 1.8(g) ought to be a default rule that can be altered by the agreement of the parties. Silver & Baker, "Mass Lawsuits," supra note ___ at 779. The proposal is made more explicit in a subsequent article on allocating settlement proceeds, in which they argue that it is not necessary for plaintiffs to know what other litigants are receiving, either to assess their own willingness to accept the offer made to them, to monitor the adequacy of the total size of the settlement, or to monitor the fairness of the settlement apportionment. See Silver & Baker, "Allocating Settlement Proceeds," supra note ___ at 44-60.

³⁷See supra note ___.

³⁸See Silver & Baker, "Mass Lawsuits," supra note ___ at 765 ("mass settlements usually contain walk-away provisions" that permit the defendants to avoid the settlement if fewer than a certain number of plaintiffs accept). See also, e.g., Michael J. Maloney & Allison Taylor Blizzard, "Ethical Issues in the Context of International Litigation: 'Where Angels Fear to Tread,'" 36 So. Texas L. Rev. 933, 963 (it is common in transnational cases for defendants to offer joint settlement for all parties: "even a single plaintiff's refusal to consent to a settlement could scuttle the settlement for the other plaintiffs") Even when unanimity or near unanimity are not a condition of reaching a settlement, the ability of the plaintiffs to act collectively may make settlement more attractive to defendants desiring finality. *Id.* At 760-762.

³⁹See, e.g., *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1975) (held judgment should not have been entered over objection of minority of 17 plaintiffs who voted against accepting settlement offer, even though all 17 clients and the attorney had previously agreed that majority rule would govern acceptance of the settlement); *Knisley v. City of Jacksonville*, 147 Ill. App. 3d 116, 497 N.E.2d 883 (1986) (same).

⁴⁰See Sofia Adrogué, "Mass Tort Class Actions in the New Millennium," 17 *Rev. of Litig.* 427, 457-458 (1998); cf. Maloney & Buzzard, supra note ___ (serious conflict of interest presented when single client rejects settlement and attorney must consider how to reconcile interests of both the rejecting plaintiff and the approving plaintiffs). Apparently defendants also have an interest in whether plaintiffs' lawyer will continue to represent

agree in advance to be bound by the approval of either a majority or super-majority of participating plaintiffs.⁴¹

Before evaluating the merits of these proposals, it is important to consider whether the need for these or other reforms has been unduly exaggerated. In my opinion, the need is considerably less than is sometimes suggested. For example, there is a pervasive tendency in the literature to treat as “mass torts” too many cases where the rationale for reform is entirely lacking.⁴² In addition, I believe there is far more flexibility in the traditional rules than is commonly recognized.⁴³

II. THE NEED TO DEFINE “MASS TORTS”

Although there are a few critics who would change existing rules in virtually any case involving multiple plaintiffs,⁴⁴ most commentators assume that there is a unique category of

nonsettling claimants in any future litigation, often refusing to proceed with partial settlements unless the attorneys agree *not* to do so. Silver & Baker, “Mass Lawsuits,” supra note ___ at 766. Such an agreement by an attorney probably violates Model Rule 5.6, which prohibits a lawyer from making “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.” Model Rules, supra note ___, Rule 5.6(b). This rule has been widely criticized, at least in the context of an agreement not to represent future claimants who are not yet clients of the attorney in question. See Silver & Baker, “Mass Lawsuits,” supra at 766 & n. 116. It is difficult to understand, however, how an attorney could properly agree to withdraw from representing *existing* clients (i.e., the group disapproving a proposed settlement) in order to facilitate the desire of other existing clients to reach a settlement agreement, unless those clients previously consented to the lawyer’s withdrawal under such circumstances. See infra ___.

⁴¹Silver & Baker, “Mass Lawsuits,” supra note ___ at 770-779.

⁴²See infra ___.

⁴³See infra ___.

⁴⁴See Silver & Baker, “Mass Lawsuits,” supra note ___ at 768-779 (arguments for waiveability of both unanimity and disclosure requirements of Rule 1.8(g) based on notion that as competent adults, clients should be “free to structure their relationships as they wish, and competent to enter into binding contractual arrangements”, and

“mass torts” that cannot be adequately handled by existing rules.⁴⁵ Moreover, while few specific rule changes have actually been proposed,⁴⁶ the assumption appears to be that whatever is done to accommodate the special needs of mass tort litigation, will only be done in this particular group of cases.

But what is a “mass tort,” anyway? According to one commentary, mass torts are distinguished by their numerosity, the commonality of issues and actors, and the interdependence of the monetary values of claims.⁴⁷ Mass actions, in which thousands of clients are represented by only a handful of law firms,⁴⁸ are said to form because they provide the advantages to their members of economies of scale,⁴⁹ increased leverage in settlement negotiations,⁵⁰ and access to a

are therefore applicable not only in mass tort lawsuits but in any multiple client representation). See also (law and economics arguments opposed to non-consentability provisions of conflicts rules).

⁴⁵See supra [Weinstein, Menkel-Meadow, Hrcik].

⁴⁶See supra ____.

⁴⁷See Deborah R. Hensler & Mark A. Peterson, “Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis,” 59 Brooklyn L. Rev. 961, 965-960 (1993).

⁴⁸Among the common actors are the relatively small number of law firms that represent most plaintiffs in mass tort litigation. Id. at 966.

⁴⁹See, e.g., Silver & Baker, “Mass Lawsuits,” supra note ____ at 744-745 (economies of scale are achieved by sharing: goods and services, including information produced by investigations of common legal and factual questions; representation in settlement negotiations; document preparation; expert witness testimony; and computer simulations: as a result, “plaintiffs can substantially reduce their per capita litigation costs”). When plaintiffs’ lawyers advance litigation costs (as they typically do) and the cost of proving liability is extremely high (as it often is in mass tort lawsuits), then plaintiffs’ lawyers must each represent substantial numbers of plaintiffs in order to recoup their costs and earn substantial profits from their labors. See, e.g., Hensler & Peterson, supra note ____ at ____ (after initial investment in litigation, plaintiffs’ attorneys have incentives have incentive to identify more claims in order to spread their costs across the client pool and maximize fees). Of course, costs can also be reduced by multiple firms joining forces and sharing costs. Id. at ____.

In some cases the expenses are astronomical, and attorneys may spend tens of millions of dollars before receiving any fees . See Weinstein, supra note ____ at 76. In the Agent Orange case, the size of the expenses led to a “creative” arrangement whereby some lawyers were permitted to “invest” in the litigation by contributing money, instead of time, in return for an agreed-upon multiple repayment of cash investment. Id. at 77. While approved in part by the trial court, this financial arrangement was disapproved by the Court of Appeal, which held that “return on investment” is an inappropriate means of determining attorneys fees in a class action lawsuit. *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216, 222 (2d Cir. 1987), discussed in Weinstein, supra, at 77. See also Vincent Robert

small number of qualified attorneys.⁵¹ If lawyers are going to represent thousands or even tens of thousands of clients,⁵² then arguably we are going to need to have some relaxation of the rules regulating both communication and conflicts of interest.⁵³

But some cases cited as examples of so-called “mass torts” do not seem to fit this definition, or at least they do not appear sufficiently unique to warrant special treatment under the ethics rules. For example, Professors Silver and Baker, in their leading article urging reform of the aggregate settlement rule, preface the article with an excerpt from Jonathan Harr’s *A Civil Action*, a true story involving a single attorney who represented eight families suing two companies allegedly responsible for permitting toxic waste to enter the water supply, causing death and other serious illnesses in family members.⁵⁴ The number of plaintiffs in that case was

Johnson, Ethical Limitations on Creative Financing of Mass Tort Class Actions, 54 Brook. L. Rev. 539, 545-88 (1988).

⁵⁰See, e.g., Silver & Baker, supra note ___ at 745-748 (discussing how aggregation increases leverage in settlement by reducing per capita litigation costs, increasing the likelihood that plaintiffs will prevail at trial, and minimizing the defendant’s bargaining advantage as a repeat player); cf. Weinstein, supra note ___ at ___ (where thousands of claims are involved, the only route to settlement is through negotiations involving a few lawyers who can speak on behalf of many claimants).

⁵¹See, e.g., Weinstein, supra note ___ at 43 (“[a]massing large numbers of cases in the hands of relatively few specialized lawyers can greatly facilitate settlement and afford plaintiffs the benefit of attorneys experienced in complex cases”); cf. Menkel-Meadow, supra note ___ at 1189 (questioning whether the public is better served with wider dispersion of legal services to greater number of lawyers or with concentration of lawyers in sub-specialities that may lead to efficiencies and other benefits of expertise).

⁵²Both the asbestos workers’ personal injury suits and the Dalkon Shield litigation involved hundreds of thousands of cases, while several recent examples of mass tort litigation involve at least a thousand individual claims. Hensler & Peterson, supra note ___ at 965. Most claimants are represented by a small number of law firms, each of which is representing hundreds or thousands of claimants. *Id.* at 966. Sometimes individual practitioners control inventories totalling in the tens of thousands of claimants. Jack C. Coffee, Jr., “Class Wars: The Dilemma of the Mass Tort Class Action,” 95 Colum. L. Rev. 1343, ___ (1995).

⁵³See infra ___.

⁵⁴Silver & Baker, “Mass Lawsuits,” supra note ___ at 733, quoting Jonathan Harr, *A Civil Action* 442 (1995).

not particularly large,⁵⁵ and the cases were in fact tried together in a single action.⁵⁶ Similarly, the same article cites *Knisley v. Jacksonville*,⁵⁷ a case in which 61 plaintiffs sought an injunction preventing the construction of certain buildings, and *Arce v. Burrows*,⁵⁸ a plant explosion case in which most of the victims were represented by a single law firm with 126 clients.⁵⁹ None of these cases appear to have raised insurmountable obstacles to resolution under traditional ethics rules.⁶⁰

Indeed, personal injury claims resulting from catastrophic events are typically limited to a few hundred claims or less.⁶¹ Such litigation is not particularly problematic.⁶² Not only are the

⁵⁵[total of 30 plaintiffs]

⁵⁶Because of the complexity of legal issues involved in that case (not the number of plaintiffs), the trial judge agreed to a trifurcated trial. In the first phase, the jury determined whether either or both of the two defendant companies was responsible for dumping toxic chemicals in the town's water supply and, if so, on what date the dumping began. The second phase was to determine if the toxic chemicals caused the death and illnesses alleged by the various plaintiffs, and the third phase would determine individual damages. The first part of the case was tried, and the jury found that the plaintiffs had proved their case against one but not the other defendant. The jury also came back with a date for initial dumping that made it likely that the case against some of the plaintiffs would be dismissed in the second phase of the trial. The case was settled prior to commencement of the second phase of the trial.

⁵⁷*Knisley v. Jacksonville*, 147 Ill.App.3d 116, 497 N.E.2d 883 (1986).

⁵⁸*Arce v. Burrows*, 958 S.W.2d 239 (1998) [on appeal to Texas Supreme Court].

⁵⁹See Peter Passell, "Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers," *New York Times* 3/24/95.

⁶⁰In *Arce v. Burrows*, claimants represented by a single law firm subsequently sued the law firm claiming that the lawyers did not develop or evaluate their claims individually, that they reached an aggregate settlement without prior authority, and that they then "summoned" the claimants for a twenty-minute meeting to discuss the settlement. 958 S.W.2d at 243. Given that the law firm represented only 126 clients, see *supra* note ___ & accompanying text, there was no apparent reason why the lawyers should not have been held to the same standards that are applied to other lawyers engaged in multiple-party representation.

⁶¹See Hensler & Peterson, *supra* note ___ at 1014 ("mass injury litigation resulting from past catastrophic events has rarely involved more than a thousand claims and more typically has been limited to a few hundred claims or less").

⁶²*Id.* See also Coffee, *supra* note ___ at ___ (ordinary mass disaster cases are litigated on a much smaller scale than mass tort product liability cases).

numbers relatively low, but also there is often an investigation by an independent agency,⁶³ thus reducing the need for economies of scale to establish the underlying basis of liability. Global resolution may be an attractive alternative to the defendants,⁶⁴ but given both the ability to have the cases tried and the likely ability of the defendants to cover the claims of all plaintiffs,⁶⁵ there is not the same compelling need for an aggregate settlement as there may be in true mass torts involving products such as asbestos, benedictin, and the Dalkon Shield.⁶⁶

Moreover, plaintiffs often end up represented by a few lawyers not because these lawyers have unique expertise, but rather because they aggressively advertise⁶⁷ or even solicit clients⁶⁸ or because clients are steered to them by organizations like unions with whom they have special ties.⁶⁹ If the application of tradition rules results in lawyers representing fewer clients, then perhaps this is the best result, so long as all of the victims have access to potentially effective

⁶³[e.g., FAA investigations of airplane crashes: check to see if there was an investigation of Phillips Petroleum explosion]

⁶⁴Defendants will prefer to reduce their transaction costs by resolving all claims at once, particularly when there is good reason to believe that cases filed will be taken to trial and that liability will be proved. Moreover, individual cases taken to trial will enhance the settlement value of the remaining cases, again providing incentive for defendants to achieve a global resolution prior to trial of any of the cases. [authorities]

⁶⁵Conservation of the assets of defendants confronted with claims so large and so numerous that they threaten defendants with bankruptcy is presented as yet another potential advantage of collective over individual litigation. See Silver & Baker, "Mass Lawsuits," supra note ___ at 749.

⁶⁶For a detailed profile of mass tort lawsuits involving pharmaceutical products and medical devices, food and diet supplements, and chemicals and toxic substances, see Hensler & Peterson, supra note ___ at 977-1013.

⁶⁷Hensler & Peterson, supra note ___ at 1015-1026. Aggressive advertising is not limited to firms that specialize in mass tort litigation, but also includes lawyers who will serve only as referring lawyers. Id.

⁶⁸See, e.g., Rocco Cammarere, "Lawyers scolded for soliciting blast victims," *New Jersey Lawyer*, Aug. 3, 1998 (involving lawyers who went to an apartment complex shortly after a massive conflagration destroying apartments, cars and personal belongings of victims).

⁶⁹See, e.g., Hensler & Peterson, supra note ___ at 1023-1024 (critical role of labor unions in developing mass tort litigation arising from work place injuries); Passell, supra note ___ at ___ (families of employees directed to law firm by union officials: union lawyer was member of law firm to whom cases were referred).

representation.

I doubt Professors Silver and Baker would be troubled by these findings. Unlike some commentators, they believe that their suggested reforms should be available in *any* case in which a client agrees to waive the protections otherwise available under the aggregate settlement rule.⁷⁰ For others, however, there will be difficulties in determining how to relax the requirements in some but not all cases. Moreover, if the “true” mass tort lawsuits are fairly uncommon, and are limited to those in which the numbers are extremely high, then perhaps most of the potential plaintiffs in these lawsuits are better off continuing to be treated as members of class actions, where at least there is some supervision of both the attorney’s fees and fairness of any proposed settlement.⁷¹

III. THE FLEXIBILITY OF TRADITIONAL ETHICAL RULES

Whether in true mass torts or in “ordinary high volume litigation,”⁷² the current regulation of both communication and conflicts is not nearly as inflexible as is often assumed. Indeed, a common sense application of the relevant rules can go far to accommodate the legitimate needs of clients.

A. *Communication and Consultation*

1. *Communication generally*

⁷⁰See supra note ___ & accompanying text.

⁷¹See infra ___.

⁷²Hensler & Peterson, supra note ___ at 965.

Nothing in the current rules requires that lawyers communicate with their clients on a one-to-one basis in all cases.⁷³ Rule 1.4 of the ABA Model Rules of Professional Conduct requires only that “[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information” and, further, that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁷⁴ Some lawyers have successfully kept clients well-informed of the progress of a case by using not only paralegals and group meetings, but also such creative devices as newsletters, phone banks (including the use of 800 numbers for long distance

⁷³But cf. Weinstein, *supra* note ____ at 85:

The traditional ethical rules, I believe, are inadequate due to their reliance on the single-litigant, single-lawyer model. The mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation....Even if attorneys in these situations are not clearly violating the Model Rules of ethics, their conduct falls short of the ideal of the loyal advocate for an individual client envisioned by the traditional model of ethics.

It is unclear how Judge Weinstein would change the traditional ethical rules to accommodate the representation of numerous clients in mass tort lawsuits. He calls for “a new formulation of the lawyer’s ethical duty,” in which “the lawyer in the mass tort case understands his or her duty as running in part to the community to which the clients belong, or the communities which may be affected by the result, *id.* at 87, but he suggests no specific reforms to existing rules. His formulation of a “communitarian ethic” has been subjected to considerable criticism and has not been embraced by other commentators. See, e.g., Mullinex, *supra* note ____.

⁷⁴ABA Model Rules of Professional Conduct, Rule 1.4:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

While it is certainly true that both the Rule and Comment appear to contemplate a single lawyer personally informing a single client, the clear purpose of the rule is to provide clients with reasonably adequate communication. *Id.* at Comment [2] (“[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation”).

calls), electronic mail, and the development of videotapes to be viewed in the clients' homes.⁷⁵

Referring attorneys can also be used to help keep clients informed.⁷⁶ They can interpret data and counsel clients individually, providing the more traditional service that is so obviously lacking in cases where lawyers take on hundreds or thousands of individual clients.⁷⁷ Referring attorneys or local counsel are particularly useful in international cases, where there are often substantial economic or cultural barriers to understanding,⁷⁸ or even in cases involving victims in several different states, where the cost of travel prohibits frequent meetings between clients and

⁷⁵Weinstein, *supra* note ___ at 55-60. Judge Weinstein doubts whether most attorneys do in fact maintain appropriate relationships in mass cases, *id.* at 56, but this may be a function of the attorneys' unwillingness to devote the necessary time and energy rather than a practical inability to satisfy the lawyer's ethical obligations under Rule 1.4. Thus, even in simple, bi-polar litigation, it is not uncommon for lawyers to fail to keep their clients adequately informed. See, e.g., Mullinex, *supra* note ___ at ___. The fact that many lawyers violate their ethical obligations under the rules is not, in itself, sufficient reason to relax the requirements of those rules.

⁷⁶Referrals are a staple of mass tort litigation. See, e.g., Hensler & Peterson, *supra* note ___ at 1026. [description on various approaches to propriety of fee splitting: even when participation not required as condition of receiving referral fee, participation may be a desirable means of facilitating communication with primary attorney]

⁷⁷Judge Weinstein describes such techniques for use in cases where attorneys representing just one or two clients can stay in touch with attorneys leading mass litigation, who themselves stay in touch through national meetings, telephone calls and exchange of correspondence. Weinstein, *supra* note ___ at 58 (litigation information can be made readily available to these "outlying single practitioners at little marginal costs"). This is an excellent model for use in networks where referring attorneys or other local counsel are used primarily to assist in communication between primary attorneys and their clients.

⁷⁸See, e.g., Maloney & Buzzard, *supra* note ___ at ___ 956-960. Because transnational cases typically involve questions of foreign law, it may be more common for foreign referring attorneys to remain more active in mass tort cases. *Id.* at 948. If so, then it will not be difficult to assign the referring attorney the task of maintaining regular communication with the client or clients. Use of interpreters alone may be insufficient. *Id.* at 957 :

[E]ven the presence of an interpreter does not necessarily render communications between a foreign client and an attorney as effective as those between an attorney and an English-speaking client. An attorney must count on the interpreter entirely to communicate, not only the words, but the tenor of his communication and the emphasis the attorney gives to his recommendations. If a message somehow miscarries in import between the attorney, the interpreter, and the client, how is the attorney to know and correct it. If the decision made by the client flies in the face of conventional wisdom and the attorneys' advice, how is the attorney to ascertain that the decision was based on the correct understanding of the information relayed? These and other issues confront the attorney who is attempting to communicate with a non-English speaking client.

It would seem that involving referring attorneys or other local counsel would be the ideal solution to problems of communication in transnational mass tort litigation.

their lawyers.⁷⁹

It may well be true that we are unable “to provide every potential client with a humanly meaningful relationship with an attorney,”⁸⁰ but it appears that the ideal can be fairly approximated in most cases.⁸¹ Of course requiring the use of innovative forms of communication will necessarily increase the cost of litigation, but modern technology—including the use of electronic communication—can help keep those costs down. Given the enormous fees that many of these cases generate,⁸² I doubt that lawyers who are required to spend additional money on communication expenses will abandon the field of mass tort litigation.⁸³

2. *Privacy concerns*

There is also flexibility in the handling of information clients may prefer to keep private. Rule 1.8(g) does not itself detail precisely how much information the lawyer must disclose about the “existence and nature of all the claims” or the “participation of each person in the settlement.”⁸⁴ There is at least one decision suggesting that plaintiffs should receive “a list showing the names and amounts to be received by the other settling plaintiffs,”⁸⁵ but the issue has

⁷⁹See Weinstein, *supra* note ___ at ___.

⁸⁰Menkel-Meadow, *supra* note ___ at 1220.

⁸¹See *supra* notes ___ & accompanying text. Judge Weinstein expresses concern that “[e]ven if the communication rules are technically complied with, clients may not be satisfied with these forms of contact with their lawyers.” Weinstein, *supra* note ___ at 56. Clients are more likely to be satisfied if lawyers explain at the time of the initial retention what the clients can expect in the way of communication. See *infra* notes ___ & accompanying text.

⁸²See *infra* notes ___ & accompanying text.

⁸³[how expense recovery affects size of both legal fees and plaintiffs’ recovery]

⁸⁴See Silver & Baker, “Mass Lawsuits,” *supra* note ___ at 758 (“the Rule does not expressly state that each person must be identified by name”).

⁸⁵Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 229 (Tex. App. 1985).

yet to be squarely addressed.⁸⁶

Presumably what must be disclosed is the type of information each client reasonably needs to know in order to decide if the settlement is fair.⁸⁷ When the plaintiffs know each other, or have ready access to information about each other, learning the amounts being given to each named person may well be important and useful information, particularly when the amounts offered to each plaintiff differ significantly. In these situations, the plaintiffs will have background information sufficient to enable them to monitor the fairness of the settlement allocation, or at least to ask questions prompting the lawyer to explain why one plaintiff is receiving more or less than another.⁸⁸

It is hard to see why individual plaintiffs' names would be required to be disclosed in all cases, particularly when there are numerous plaintiffs and their names are likely to be

⁸⁶See Silver & Baker, "Mass Lawsuits," supra note ___ at 757 (rule contains ambiguities: "[a]s the case law develops, such ambiguities are likely to disappear").

⁸⁷The obvious purpose of the disclosure requirement is to promote "horizontal equity," i.e., "to enable [plaintiffs] to compare their claims and proposed payments with others' and to decide whether they are satisfied with the treatment they and others are to receive." Silver & Baker, "Allocating Settlement Proceeds," supra note ___ at 40.

⁸⁸In some cases, the fact that the plaintiffs are to receive *equal* amounts may be the cause of some concern. For example, in the Woburn case that was the subject of *A Civil Action*, each family received an equal sum, despite the fact that their injuries differed and, more important, that some of the families were likely to have their cases dismissed in the second phase of the trial, as the result of factual findings made in the first part of the trial. Harr, supra note ___ at ___. It is not uncommon for plaintiffs who know each other to be willing to share equally despite obvious differences in likelihood of prevailing. See, e.g., New Jersey Supreme Court Advisory Com. on Prof. Ethics, Opinion No. 616 (1988) (describing toxic chemical case in which although substantial number of plaintiffs wanted to reject a "contingent blanket offer," all but an inconsequential number agreed to accept the settlement when they learned that failure to settle would cause 100 of the plaintiff co-workers to have their claims dismissed on statute of limitations grounds). Professors Silver and Baker believe that concern for horizontal equity is not an important factor in a rational plaintiff's evaluation of the acceptability of a settlement offer. See Silver & Baker, "Allocating Settlement Proceeds," supra note ___ at ___. This claim is not, however, supported by evidence of what motivates actual human behavior, not only in the rare case but in ordinary cases. See generally Christine Jolls, Cass R. Sunstein, & Richard Thaler, "A Behavioral Approach to Law and Economics," 50 *Stan. L. Rev.* 1471 (1998) (questioning assumptions of neoclassical economics based on empirical evidence of how agents behave, leading to a new approach called "behavioral law and economics").

meaningless to others in evaluating the fairness of the settlement. Rather, it should be sufficient for the lawyer to disclose whatever information is needed to understand why some individuals are receiving an amount different from other individuals, for example, different disease categories or degrees of injury.⁸⁹ Even here, however, plaintiffs should be informed and asked to agree at the outset of the representation to any limitation on the nature and amount of information to be received at the time of settlement.⁹⁰

B. *The Unanimity Requirement*

As previously stated, defendants often condition settlement on unanimous or near

⁸⁹Professors Silver and Baker describe a case in which lawyers representing over 1700 plaintiffs injured in a natural gas explosion revealed “only proposed payments by disease categories and the number of persons with each disease.” Silver & Baker, *supra*, *supra* note ___ at 757-758. The names of the plaintiffs were withheld in order to prevent them being hounded by reporters and others, as well as to keep private the information that a number of them were suffering from a fatal disease. *Id.* Concerned with the possibility that they may have violated the Texas equivalent of Rule 1.8(g), the lawyers kept a list containing the complete information for each plaintiff that was available for inspection in the lawyers’ offices. *Id.*

It is difficult to find fault with the lawyers’ conduct, particularly if plaintiffs were informed at the outset that this is how the lawyers planned to proceed. See *infra* ___. One wonders, however, whether the impetus to keep the information came from the plaintiffs themselves or from the lawyers. See *id.* at 757 (stating that it was the *lawyers’* fear “that their clients would be hounded by reporters, stock brokers, con men, and long-lost family members if information about their recoveries became public” that led the lawyers to look for a way to avoid disclosing the plaintiffs’ names to each other.) The withholding of potentially relevant information ought to be the exception, not the general rule, and ought not be *imposed* on plaintiff groups by lawyers speculating about what some or most of them would want.

⁹⁰Another way of resolving the dilemma is to inform plaintiffs at the time of the initial engagement that their names and settlement payments will have to be disclosed to all other plaintiffs at the time any settlement offer is made. See Silver & Baker, *supra* note ___ at 760-761. This procedure may well put “clients with legitimate privacy interests in a bind,” *id.* at 760, but persons who bring lawsuits necessarily sacrifice some degree of privacy when they seek to take advantage of the public justice system. In any event, lawyers clearly should discuss questions of privacy and disclosure at the outset of the representation so that all clients will be fairly informed of what will happen in the course of the lawsuit and what information they can expect to have when they are asked to approve or disapprove an offer of settlement.

unanimous participation by plaintiffs.⁹¹ As interpreted by courts, however, the aggregate settlement rule forbids lawyers from entering settlement over the objection of any plaintiff, even when that plaintiff has agreed in advance to be bound by a vote of a majority or a supermajority.⁹² Lawyers fear that the settlement may fall apart or that they will be forced to withdraw from representing *all* of the plaintiffs, not just those rejecting the settlement.⁹³

It is true that present law clearly forbids a lawyer from agreeing to settle a case over the objection of her client.⁹⁴ There is nothing in the aggregate settlement rule, however, that prevents lawyers from structuring the representation from the outset to make approval of an aggregate settlement more likely. For example, before agreeing to represent victims, a lawyer could discuss with them the advantages and disadvantages of a global resolution of all claims and explain how the defendant might condition a favorable settlement on widespread acceptance by the victims. The lawyer could then ask the victims if they would be willing to tentatively agree to follow the

⁹¹See supra ____.

⁹²See supra ____.

⁹³See supra ____.

⁹⁴This result is dictated not only by Rule 1.8(g), see supra ____, but also by Rule 1.2(a). Model Rules, supra note ____, Rule 1.2(a) (“A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”) See also American Law Institute, Restatement (Third) of the Law Governing Lawyers § 33(3) (regardless of any contrary agreement with a lawyer, a client may revoke a lawyer’s authority to make certain decisions, including the decision whether and on what terms to settle a claim).

An interesting but ultimately flawed attempt to avoid this result is proposed by Professors Geoffrey Hazard and William Hodes, who suggest that multiple plaintiffs who want to enter into a non-unanimity agreement should be viewed not as individual clients, but rather as persons who have formed an “entity,” which is itself the primary client of the lawyer. Hazard & Hodes, supra note ____ at § 1.8:803. See also id. at § 1.2:407; 1.3:108. Under this view, the lawyer could implement the settlement over the objections of some of the individual plaintiffs, because it is the entity itself (which makes decisions according to majority vote) which is the lawyer’s only client. Id. at § 1.8:803. The problem with this view is that it would require the individuals to give up all or most of the benefits of their status as clients of the lawyer. It may well be true that as “derivative” clients they may be entitled to some protections, such as confidentiality, but this is not uniformly the case in all jurisdictions: in addition, they would almost certainly have to give up the ability to sue the lawyer for malpractice. See generally Nancy J. Moore [S. Carolina article] (deficiencies of “primary”/“derivative” client view in situations involving entities where individual members reasonably rely on lawyer to protect their individual interests).

wishes of the majority, understanding that they are not legally bound to accept the settlement. This type of discussion may go far to encourage unanimous or near unanimous acceptance of aggregate settlements.⁹⁵

As a further inducement, I see no reason why the lawyer could not also ask each prospective client to agree that if the client ultimately decides to reject a settlement offer approved by the requisite majority, then the lawyer not only will withdraw from representing that client,⁹⁶ but also will continue to represent the majority. Prospective waivers of a conflict of interest are not always binding, but they are likely to be effective when the clients are fully informed of the likely circumstances and any reasonably foreseeable risks.⁹⁷

IV. THE LIMITS OF FLEXIBILITY: IS CHANGE WARRANTED?

⁹⁵According to Steve Baughman, Esq., of Baron & Budd, P.C., another way to enhance the likelihood of plaintiffs agreeing to accept an aggregate settlement offer is to develop the attorney-client relationship by regularly providing plaintiffs with as much information as possible about the progress of the lawsuit and affording them opportunities to consult regularly with members of the lawyer's staff (and occasionally with the lawyer as well).

⁹⁶Lawyers may limit the scope of the representation from the outset, with the informed consent of the client. See Model Rules, *supra* note ___ at Rule 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation.")

⁹⁷See Restatement of the Law Governing Lawyers § 202, cmt. d. It is not entirely clear that a conflict of interests exists at the time the lawyer withdraws from representing the disapproving plaintiff and continues to represent the approving plaintiffs. So long as the withdrawal is consensual, the disapproving plaintiff is considered a former client, and not a current client, and the applicable standard for conflicts is Rule 1.9, not Rule 1.7. Under Rule 1.9, the lawyer is prohibited from representing a client only when the current client's interests "are materially adverse" to the former client in the same or a substantially related matter. Implementing a settlement agreement between approving plaintiffs and the defendant is not necessarily "materially adverse" to the interests of the disapproving plaintiffs, who are free to continue negotiating with the defendant or take their cases to trial. Nor is there typically any concern that confidential information regarding the former clients will be used by the lawyer to their disadvantage. Nevertheless, prudent lawyers will obtain the consent of all plaintiffs to the continued representation of the other plaintiffs in any circumstance where one or more of them ceases to be represented by the lawyer.

A. *The Presumption Against Change*

There is some flexibility in the ethical rules commonly cited as posing insurmountable barriers to collective action in the mass tort lawsuit,⁹⁸ but that flexibility is clearly limited. There are some cases, for example, in which the number of plaintiffs is so numerous and their locations so far-flung, that keeping them informing them of the progress of the lawsuit would simply not be cost-effective.⁹⁹ Similarly, differences in language and culture, and the absence of suitable interpreters or local counsel, may make meaningful contact between lawyer and client virtually impossible.¹⁰⁰ Moreover, the aggregate settlement rule clearly does require lawyers to consult with their clients before accepting a settlement, thereby preventing any advance agreement authorizing the lawyer to enter into a “reasonable” settlement, without incurring the cost of further consultation.¹⁰¹

We *could* do more to facilitate collective action in mass tort lawsuits. But *should* we? I

⁹⁸See supra ____.

⁹⁹For example, Professors Silver and Baker discuss a lawsuit involving approximately 25,000 farmworkers residing in 12 foreign countries, in which the plaintiffs alleged that exposure to a pesticide reduced their fertility. See Silver & Baker, “Mass Lawsuits,” supra at 763.

¹⁰⁰Id.:

“The difficulty of contacting 25,000 agricultural workers in twelve foreign countries is hard to exaggerate. Few claimants had telephones or permanent addresses, and most workers therefore had to be contacted in person to be reached at all. It was nearly inconceivable that the lawyers should attempt to reach each plaintiff twice; once before a settlement was closed and a second time to hand out checks. The plaintiffs’ attorneys therefore wanted to make only one contact, at which time the settlement would be described and checks would be distributed to those plaintiffs who accepted the manufacturer’s offer.”

See also Maloney & Blizzard, “Ethical Issues in the Context of International Litigation,” supra note ____ at 963 (discussing difficulties of obtaining meaningful consent from foreign plaintiffs to aggregate settlements due to language and cultural differences).

¹⁰¹See supra ____.

submit that there are several good reasons not to go further than is presently possible under the relatively flexible current regime of ethical regulation. Even Professors Silver and Baker concede that there should be a strong presumption in favor of the application of traditional rules in aggregate lawsuits:

[L]awyers who undertake to represent large numbers of clients should ordinarily do so with the expectation of giving each client standard service. A properly staffed law firm should be able to develop each client's case fully, to communicate with each client, and to attend to each client's unique interests or emotional needs in most cases.¹⁰²

This is as it should be. Given our historical commitment to the “ideals of individual justice”¹⁰³ and our reluctance to sacrifice the interests of a few to “some larger good,”¹⁰⁴ we ought not even consider settling for “aggregate justice”¹⁰⁵ until we are convinced that the trade-offs are justified.¹⁰⁶ In my opinion, the proponents of change have not yet met that burden of proof.

B. *Will the “Greater Good” Truly Be Served?*

If we were convinced that “aggregate justice” in fact would be done, then we might well be willing to sacrifice the interests of some to the greater good, particularly when the alternative

¹⁰²Silver & Baker, “Mass Lawsuits,” supra note ___ at 766-777.

¹⁰³Menkel-Meadow, supra note ___ at 1172 (“Our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for ‘aggregate’ justice.”).

¹⁰⁴Silver & Baker, “Mass Lawsuits,” supra note ___ at 769 (stating that it is a regular practice in class actions and consolidations of to ignore the wishes of individual plaintiffs “for the sake of some larger good”).

¹⁰⁵See supra note [103—Menkel-Meadow quote].

¹⁰⁶This is not to concede that we *should* settle for aggregate justice if the greater good would clearly be served, but only that we should not even *consider* doing so unless the net gains have been proved to be substantial.

may be no justice at all. But what constitutes “aggregate justice,” and how can we tell when we have it? Examination of aggregate settlements in individual cases reveals many of the same dangers that are present in mass tort class actions..

1. *The Effects of “Damage Averaging” or “Rough Justice”*

Consider the fact that aggregate settlements, like allocation plans in class actions, are necessarily based on some form of “damage averaging”¹⁰⁷ or “rough justice.”¹⁰⁸ Those who are most harmed by settlements that pay claimants only the median value of all claims¹⁰⁹ are clearly the “high stakes” plaintiffs, that is, those with the largest and best potential claims.¹¹⁰ These are the individuals most likely to opt out of class action settlements to pursue individual actions.¹¹¹ Their claims are highly attractive to the so-called “boutique” law firms, who screen potential cases carefully, selecting only those for which liability is strong, and then invest substantial

¹⁰⁷“Damage averaging occurs when an allocating plan ignores or minimizes the importance of differences between claims that could or would effect their expected value at trial.” Charles Silver & Lynn Baker, “I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds,” 84 Va. L. Rev. 1465, 1481 (1998)(discussing work of Professor John C. Coffee, Jr., in regard to class actions). Some form of damage averaging is characteristic of allocation plans in class actions. *Id.* Damage averaging, or “rough justice” is also characteristic of aggregate settlements, *id.* at 1475-77, and in this respect, aggregate settlements are similar to class action lawsuits. *Id.* at 1477 (“The point is that rough justice is done in all settled group lawsuits, consensual and nonconsensual alike, and...lawyers’ judgments affect the degree of roughness in all such cases.”)

¹⁰⁸*Id.* at 1475-77.

¹⁰⁹See John F. Coffee, Jr., “The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,” 54 U. Chi. L. Rev. 877, 925-30 (1987). According to Professors Silver and Baker, settlement payments are more probably more refined in consensual group lawsuits than in class actions, but the differences are minimal. *Id.* at 1483 (“To the extent that the two kinds of group lawsuits differ in their tendency to yield narrowly tailored settlement payments, the difference is one of degree.”)

¹¹⁰See Coffee, *supra* note [109] at 925-30.

¹¹¹*Id.*

amounts to develop their chosen cases.¹¹²

On the contrary, those who *benefit* most from damage average are the victims whose claims are the smallest or the most questionable. Unlike high stakes plaintiffs, they are more likely to be represented by firms that adopt a “wholesale” approach, that is, one based on representing large numbers of claims and investing little in developing them for settlement or trials.¹¹³ As in class actions, it is difficult to justify as “aggregate justice” settlements that facilitate mass actions for the benefit of those with the weakest claims, at the expense of those with the most compelling claims.¹¹⁴

2. *Faulty Incentive Mechanisms for Lawyers*

Like class actions,¹¹⁵ the aggregation of extremely large numbers of individual claims provides numerous incentives for lawyers to promote their own financial gain at the expense not only of victims but of the public good as well.¹¹⁶ Take the fee itself. Each client the lawyer signs

¹¹²See Hensler & Peterson, *supra* note ___ at 1042. “Boutique” law firms are contrasted with firms that adopt a more “‘wholesale’ approach based on representing a large number of claims.” *Id.* The “wholesale” firms are said to “spend relatively little to develop individual cases for settlement or trial.” *Id.*

¹¹³See *supra* note [112]. See also Weinstein, *supra* note ___ at 74 (“Some attorneys are selective about the cases they take, while others will take almost any case without regard for its merit, hoping for a global settlement.”)

¹¹⁴See, e.g., Coffee, *supra* note ___ at 925-30 (damage determination phrase of class action triggers more important litigant autonomy interest than liability stage because opt out right at this stage protects “high stakes” plaintiff from settlement that pays only the median value of all claims).

¹¹⁵For a detailed discussion of faulty incentive mechanisms for lawyers in mass tort class actions and in class actions generally, see generally John C. Coffee, Jr., “Class Wars: The Dilemma of the Mass Tort Class Action,” 95 *Colum. L. Rev.* 1344 (1995); Coffee, *supra* note ___. See also, e.g., Charles Silver, “Comparing Class Actions and Consolidations,” 10 *Rev. of Litig.* 495, ___ (“The evidence suggests that lawyers [in class actions] often underprepare for litigation and settle these suits too cheaply and that judges have neither the incentive nor the ability to protect absent plaintiffs’ interests and rights.”).

¹¹⁶The criticism of class actions generally is that the lack of individual and judicial control provides opportunities for “opportunistic behavior” by lawyers to enter into non-adversarial settlements that advance the interests of the attorneys and not of the class members. See generally Coffee, “Entrepreneurial Litigation,” *supra* note ___. The circumstances of mass tort class actions generally “supply the preconditions for collusion between defendants and a favored plaintiffs’ counsel: repeat players, a single form in which the court is eager to achieve a

up agrees to pay the lawyer a percentage of the amount recovered on behalf of that client.¹¹⁷ Once the lawyer determines that an aggregate settlement is likely or possible, the lawyer has a strong incentive to expand the litigation as far as possible, including plaintiffs with highly questionable claims.¹¹⁸ Adding such plaintiffs has the effect not only of diluting the worth of other, more valid claims,¹¹⁹ but also of further reducing the lawyer's ability to communicate with and counsel the lawyer's existing clients.¹²⁰

The more clients the lawyer has, the more the lawyer will be looking for a quick settlement from the defendant, particularly when many of those clients have highly questionable claims.¹²¹ And defendants have their own interests in achieving a quick settlement, particularly when they can enter into an aggregate settlement that gives them the finality they badly want.¹²² Thus, like class actions, the aggregation of large claims appears to afford defendants and

global settlement, and 'passive' future claimants." Coffee, "Class Wars," supra note ___ at 1366-67.

¹¹⁷See, e.g., Coffee, "Class Wars," supra note ___ at 1373 ("plaintiffs' attorneys [in mass tort cases] are almost invariably compensated on a contingency basis by their individual clients"). Typically, the fee is 30% or more. Id.

¹¹⁸See Hensler & Peterson, supra note ___ at 1032 ("Further, by aggregating cases to achieve efficient dispositions, court may increase incentives of plaintiffs' attorneys to expand the litigation to include claimants with questionable losses or grounds for liability, which may further diminish the compensation available to more meritorious plaintiffs with significant losses, and drive up transaction costs.")

¹¹⁹See supra note [118].

¹²⁰See supra ____.

¹²¹See Hensler & Peterson, supra note ___ at 1051 ("plaintiff attorneys with larger numbers of less valuable cases are more supportive of aggregation and global resolution").

¹²²See supra ____.

plaintiffs' lawyers both the opportunity and the incentive to engage in collusive behavior.¹²³

Professors Silver and Baker do not disagree that there is some danger of attorney opportunism in mass tort lawsuits.¹²⁴ They argue, however, that the danger is less than in class actions.¹²⁵ In their view, because both plaintiffs' and defense attorneys are repeat players, settling too cheaply lowers the value of claims brought by plaintiffs' attorneys in future actions.¹²⁶ What this argument ignores, however, is that the greater significance of the fact that both sets of attorneys are repeat players is that plaintiffs' attorneys who settle cheaply (for enormous fees) are more likely to be sought out by defense attorneys to settle future claims. Thus, the willingness to settle large inventories of cases on terms favorable to defendants may actually *enhance* the value of future claims *to the lawyers themselves*.

Professors Silver and Baker also argue that monitoring mechanisms, while not ideal, are also more effective in mass lawsuits than in class actions.¹²⁷ Thus, while conceding that there is not much any claimant can do to effectively monitor the overall size of a settlement offer, they argue that unlike class actions, *each* claimant in a mass lawsuit has the incentive to monitor the

¹²³The greatest potential for collusion may exist when plaintiffs' attorneys simultaneously represent large numbers of individual plaintiffs *and* a class including future claimants. According to Professor Coffee, "both sides have an incentive to trade a settlement of the plaintiffs' attorneys entire inventory [of individual claims] (on terms favorable to the attorney) for a global settlement in a class action of all future claims (on terms favorable to the defendants). Coffee, "Class Wars," supra note ___ at 1373.

¹²⁴Silver & Baker, "Allocating Settlement Proceeds," supra note ___ at 1530 ("the concern that mass action attorneys may settle claims too cheaply is justifiable"). See also Silver & Baker, "Mass Lawsuits," supra note ___ at 751 ("The danger of attorney opportunism is predictably greater in mass actions than in conventional lawsuits.")

¹²⁵Silver & Baker, "Allocating Settlement Proceeds," supra note ___ at 1528-29.

¹²⁶*Id.*

¹²⁷*Id.* at 1530.

adequacy of the amount offered to that claimant.¹²⁸ Given that plaintiffs rely almost entirely on their lawyers' advice in assessing the expected value of their individual claims (a fact acknowledged by Professors Silver and Baker¹²⁹), the monitoring of lawyers by individual plaintiffs is unlikely to be more effective than judges monitoring the opportunism of class action lawyers.

On balance, the incentive and monitoring mechanisms do not appear to be significantly more favorable to claimants in mass tort lawsuits. Indeed, such mechanisms may actually be *less* favorable than in class actions, where judges not only supervise the adequacy of the settlement agreed to by the lawyer, but also determine the size of the lawyer's fee. Moreover, attorneys' fees awarded under the lodestar formula in class actions are typically smaller than those agreed to by individual plaintiffs.¹³⁰ The very size of the typical contingent fee motivates lawyers to sign up individual plaintiffs whenever they can, even when judges cannot be relied upon to monitor lawyers effectively in the much criticized class action.¹³¹

c. *Non-economic aspects of justice*

Finally, like class actions, the aggregation of extremely large numbers of claims contributes to all of the non-economic harms that occur when lawyers begin seeing themselves as representing "interests rather than individuals".¹³² Cases come to be viewed more like financial

¹²⁸Id.

¹²⁹Id. at 1529.

¹³⁰[to be supplied]

¹³¹Cf. Weinstein, *supra* note ____ at ____ (plaintiffs' attorneys dislike class actions because courts control the fees and the judge has explicit power to ensure that clients are treated in a way the court thinks is appropriate).

¹³²Coffee, "Class Wars," *supra* note ____ at ____.

transactions than a search for justice, with a tendency to ignore the victims' need for communication and participation.¹³³ Thus, lawyers come to view themselves not as advocates of injured parties, but rather as "risk taking entrepreneurs"¹³⁴ who identify and develop "new investment opportunities."¹³⁵ Professors Silver and Baker take this view to an extreme when they characterize mass actions as resembling corporations, with victims contributing their "assets" in a "joint undertaking" with lawyer-managers, who attempt to sell these to defendants at the highest price.¹³⁶ Indeed, Professors Silver and Baker openly criticize judges who allow concerns for "professionalism" to guide their treatment of what should be viewed as purely economic issues.¹³⁷

¹³³On the significance to mass tort victims of the ability to tell their stories, see, e.g., Weinstein, *supra* note ___ at ___; Hensler & Peterson, *supra* note ___ at ___.

¹³⁴Hensler & Peterson, *supra* note ___ at 1060.

¹³⁵*Id.* at 964 ("The specialized mass tort plaintiffs' bar that emerged during the 1980's has accumulated capital as a result of its success in litigating earlier mass claims, and is skillful and aggressive in identifying new investment opportunities.")

¹³⁶Silver & Baker, "Mass Lawsuits," at 743:

Mass actions are natural products of market forces that encourage claimant groups to form. They are spontaneous collective actions organized by lawyer-entrepreneurs who use retainer contracts to establish governance structures. In these respects, mass actions resemble corporations, partnerships, and voluntary membership organizations, whose shareholders, partners, and members decide whether to participate and on what terms. Plaintiffs contribute assets—their claims—to the joint undertaking. In a few of the cases, they also contribute money or time. They engage lawyer-managers to run the enterprise and give these individuals incentives to maximize their gains. The primary forms of lawyer-manager compensation are stock in the enterprise (the right to a contingent percentage of the recovery) plus a priority claim to repayment of monies advanced on behalf of the enterprise.

The lawyer-manager's job is to sell the assets of the enterprise to the defendant at the highest possible price. One way to effect the transaction is by trying the group lawsuit. A trial forces the defendant to pay, and the plaintiffs to accept, a price set by a jury or a judge. Plaintiffs' attorneys can also sell claims by negotiating consensual transactions called settlements. Because settlements occur in all but a tiny fraction of disputes, trial preparation is largely an effort in salesmanship and is often seen by participants as such. Its purpose, from the plaintiffs' perspective, is to persuade a reluctant defendant-purchaser that a trial would yield a high forced-sale price so that settlement at a still high, but slightly lower, price would be a good deal.

¹³⁷*Id.* at 741.

Yet here, as in class actions, victims have needs that are not economic in nature, including the desire to tell their story and receive an acknowledgment of the defendant's wrongdoing.¹³⁸ They want an attorney who will spend time talking to them and treat them as individual suffering persons. It may well be that we cannot provide every victim with a "humanly meaningful relationship" with a lawyer,¹³⁹ but if the aggregation of individual claims does not in fact give victims a more meaningful relationship than they would have had as members of a class action, then perhaps they are better off in class actions, where they will receive at least some protections not available outside that context.¹⁴⁰

Indeed, the dehumanization of clients may be worse for some clients in aggregate lawsuits than in class actions. Members of a class are not the lawyer's clients, although they may be beneficiaries of the lawyer's fiduciary duties.¹⁴¹ But in aggregate lawsuits, we find some lawyers actively working to subvert the actual needs and desires of their individual clients. For example, lawyers have argued that "[o]pen communication between the attorney and the client... may actually disserve the client," for example, when "poorly educated and unsophisticated" foreign clients are likely to accept what the lawyer views as a ridiculously low settlement offer.¹⁴² Not dealing face to face with these clients as individuals, these lawyers may find it all too easy to

¹³⁸See Hensler & Peterson, *supra* note ____ at 1032. See also Weinstein, *supra* note ____ at 56 ("Studies indicate that plaintiffs value the result yielded by a lawsuit more if they believe they have participated meaningfully in the system and their voice has been heard.")

¹³⁹Menkel-Meadow, *supra* note ____ at ____.

¹⁴⁰See *supra* ____.

¹⁴¹[To be supplied.]

¹⁴²Maloney & Blizzard, *supra* note ____ at 958-59.

dismiss them as potentially impaired decision-makers,¹⁴³ thereby justifying the lawyer's failure to communicate a settlement offer which, if accepted, would substantially reduce the lawyer's fee.¹⁴⁴

Similarly, the lawyer's interest in persuading clients to agree to an aggregate settlement that the lawyer has negotiated and is now recommending may lead the lawyer to judge harshly any plaintiff who indicates an unwillingness to sign on to the proposed settlement. Such plaintiffs may be unfairly characterized as "disgruntled, greedy and strategic plaintiffs attempting to block settlement,"¹⁴⁵ rather than as individuals who have concluded, whether rightly or wrongly, that the settlement offer they have been given does not meet their individual needs.

C. *The Consensual Litigation Model*

Faced with skepticism about the benefits of further facilitating mass lawsuits, Professors Silver and Baker are likely to respond that even if we do not *know* that plaintiffs will be better off, as consenting adults, they ought not be forbidden from agreeing to collective litigation tactics that *might* make them better off than they would be under the strictures of the aggregate

¹⁴³Id. at 959 (arguing that attorney might not have a duty to communicate an unreasonably low settlement offer when the attorney "knows his poverty stricken clients will accept the offer, although it is not in the clients' best interest," citing the Model Code provisions that "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer.")

¹⁴⁴It is not necessary to suppose that an attorney in this position consciously considers the fact that the fee will be drastically reduced if the clients accept a settlement offers that the attorney believes is unreasonably low. It is sufficient to recognize that an attorney may be unconsciously influenced by a natural bias in favor of a settlement that the attorney views as in the best interests of both the clients and the attorney.

¹⁴⁵Silver & Baker, "Mass Lawsuits," supra note ____ at 767.

settlement rule.¹⁴⁶ Under their economic model of professionalism, rules like the aggregate settlement rule are best viewed as analogous to the default provisions of incorporation or partnership statutes.¹⁴⁷ And if incorporators or partners are “competent adults, free to structure their relationships as they wish, and competent to enter into binding contractual relationships,”¹⁴⁸ so, too, should clients be “free to structure their relationships as they wish” and waive the protections of the aggregate settlement rule.¹⁴⁹

Under this view, clients should be permitted to enter into consensual agreements with their lawyers whereby they either give the lawyer authority to settle on their behalf without further consultation, waive their right to receive information regarding the proposed settlement that would otherwise be required under the aggregate settlement rule, or agree in advance to be bound by the approval of either a majority or a super-majority of other clients involved in a proposed settlement.¹⁵⁰ The problem, however, is not just with the aggregate settlement rule itself, but rather with the framework of fiduciary law that governs lawyer-client relationships generally. Moreover, even if this law did not clearly dictate the precise terms of the aggregate settlement rule, there are important reasons why client waivers of the protection of that rule cannot be viewed as “fully consensual.”

¹⁴⁶See, e.g., Silver & Baker, “Mass Lawsuits,” supra note ___ at 771-72 (analogizing plaintiffs in mass lawsuits to partnerships, in which “the assumption is that partners are competent adults, free to structure their relationship as they wish”).

¹⁴⁷Silver & Baker, “Allocating Settlement Proceeds,” supra note ___ at 1466.

¹⁴⁸Silver & Baker, “Mass Lawsuits,” supra note ___ at 771-72 (citing Robert W. Hamilton, *Business Organizations: Unincorporated Business and Closely Held Corporations* 65 (1996)).

¹⁴⁹See id. at 770-79 (arguing in favor of waivability of aggregate settlement rule).

¹⁵⁰See supra ___ (discussing specific reform proposals of Professors Silver and Baker).

1. *Fiduciary law and conflicts generally*

Focusing on the unanimity rule, Professors Silver and Baker argue that there is “no legal barrier to waivability of the requirement other than the [aggregate settlement] rule itself.”¹⁵¹ They acknowledge that agency law generally provides that an agent may not act contrary to a principal’s instruction,¹⁵² but argue that the exception for agents “possessing a power given as a security” applies because the lawyer’s authority to settle is given “to secure performance of a client’s duty to abide by a group’s decision.”¹⁵³

Even if correct as a matter of agency law,¹⁵⁴ the problem remains whether the initial agreement creating the client’s duty of performance is itself valid and enforceable.¹⁵⁵ Here the applicability of the economic model is misleading. Lawyer-client relationships are typically governed not by the law of contracts but rather by the law of fiduciary relationships,¹⁵⁶ and under fiduciary law, if an agreement between a lawyer and a client is made after formation of the

¹⁵¹Silver & Baker, “Mass Lawsuits,” supra note ___ at 770.

¹⁵²Id. at 772 (discussing section 385 of the Restatement of Agency). They do not cite section 118 of the Restatement of Agency, which provides that an agent’s “[a]uthority terminates if the principal or the agent manifests to the other dissent to its continuance,” even though “doing so is in violation of a contract between the parties and although the authority is expressed to be irrevocable.” Restatement (Second) of Agency § 118 & cmt. (b).

¹⁵³Silver & Baker, “Mass Lawsuits,” supra note ___ at 772 (citing sections 138 and 139 of the Restatement of Agency as examples of circumstances when an agent is “privileged to protect his own or another’s interests,” which is a recognized exception under section 385).

¹⁵⁴ As Professors Silver and Baker indicate, there is little case law to indicate clearly that such an exception would apply to a lawyer authorized by a majority of a client group to accept a settlement offer. Id. I will assume for purposes of this discussion that they are correct in their analysis.

¹⁵⁵Similarly, if the clients agreed to waive their right to learn the full terms, or indeed *any of the terms* of a proposed settlement offer, the question would necessarily arise whether such an agreement is valid and enforceable.

¹⁵⁶See, e.g., Restatement of the Law Governing Lawyers, Ch. 2 Introductory Note (Prop. Final Draft, Mar. 1996) (“A lawyer is a fiduciary agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity.”) See also Charles W. Wolfram, *Modern Legal Ethics* 145-148 (1986) (discussing lawyers’ status as fiduciary agents).

lawyer-client relationship, then the lawyer has the burden of showing that “the agreement and the circumstances of its formation were fair and reasonable to the client.”¹⁵⁷ In addition, an agreement between a client and a lawyer that limits “a duty that lawyer would otherwise owe to the client” is not enforceable unless “the terms of the limitation are reasonable in the circumstances.”¹⁵⁸

As between lawyer and client, the concern is that the lawyer’s own interest in realizing a potentially enormous legal fee will cause the lawyer to secure the client’s commitment—to abide by the will of the majority or to waive the right to receive information regarding a proposed settlement—by taking unfair advantage of the relationship between lawyer and client.¹⁵⁹ This relationship, which is one based on a client’s trust and dependence, underlies all aspects of fiduciary law, and is the basis for imposing restrictions on fiduciaries that do not apply to ordinary contracting parties.¹⁶⁰ Indeed, even Professors Silver and Baker acknowledge that dependency exists in the lawyer-client relationship, conceding that in deciding whether to proceed individually or as part of a group, both “plaintiffs and defendants usually rely heavily on lawyers for advice.”¹⁶¹

¹⁵⁷Restatement of Law Governing Lawyers § 29A(1)(a). See also Wolfram, *supra* note [previous] at 481 (rules regulating transactions between lawyers and clients have been heavily influenced by common law rules governing transactions between fiduciaries and their clients). Even when the agreement *precedes* formation of the attorney-client relationship, a lawyer may not take unfair advantage of a client, for example, by entering into an agreement for an “unreasonable fee.” See, e.g., Restatement of Law Governing Lawyers § 46 & cmt. a (court will not approve unreasonable fees even when agreed to by the parties).

¹⁵⁸Restatement of Law Governing Lawyers § 30.

¹⁵⁹See, e.g., Restatement of the Law Governing Lawyers § 29A, cmt. (e) (rationale for restrictions on agreements entered into during representation); § 30, cmt. (b) (rationale for agreements limiting a duty a lawyer would otherwise owe to a client).

¹⁶⁰See, e.g., Wolfram, *supra* note ___ at 145-148.

¹⁶¹See Silver & Baker, “Mass Lawsuits,” *supra* note ___ at 744.

Under the fiduciary model for examining agreements between lawyers and their clients, particular agreements may be found to be “fair and reasonable” to the clients. Nevertheless, in order to make such a finding, a court would almost certainly need to examine the terms of any settlement ultimately approved on behalf of the client, or at least the detailed circumstances in which the client’s agreement was secured. If so, then the clients’ ability to freely structure their relationships as they wish has been significantly (and rightly) undermined.

Aside from the inherent conflict between lawyer and client, there is the additional and even more significant conflict of interests between the clients themselves. This conflict surfaces not only at the time clients come to vote on a particular offer of settlement, but also at the time they agree to be bound by majority vote, or to waive other rights in an attempt to facilitate collective action, or even earlier, when they agree to pursue collective action through multiple representation by a single lawyer. Unfortunately, there is little discussion in the literature of the circumstances under which lawyers may properly agree to represent hundreds or thousands of plaintiffs simultaneously or the nature of the disclosures lawyers must make in order to do so.¹⁶²

Under Model Rule 1.7(b) a conflict of interest exists if the representation of one client

¹⁶²See, e.g., Silver & Baker, “Allocating Settlement Proceeds,” supra note ___ at 1474 (concluding that lawyers do not violate the conflicts rule by participating in the allocation process); Maloney & Blizzard, supra note ___ at 954-955 (brief discussion of conflicts in transnational litigation mistakenly assumes that a conflict of interest exists only when the interests of the parties clearly differ); Menkel-Meadow, supra note ___ at 1172 (current conflicts rules were not drafted with special issues of mass tort settlements in mind and do not provide adequate guidance as to how these issues should be resolved); Hricik, supra note ___ at 421 (summarizing conflicts discussion at mass torts symposium by noting that potential for conflicts increases when lawyers represent plaintiffs in mass torts and then questioning whether lawyer who “chose to represent thousands of scattered plaintiffs and is financially rewarded for doing so” should be able to “engage in conduct that would plainly be unethical in the run-of-the-mill case”); Marc Z. Edell & Philip J. Duffy, “Ethical Pitfalls Confronting the Mass Tort Lawyer,” 166 N.J.L.J. 32, 33 (1995) (brief discussion of conflicts notes that the interests and needs of a mass tort lawyer’s present clients may conflict with each other).

“may be materially limited by the lawyer’s responsibilities to another client.”¹⁶³ Obviously, there are conflicts of interest whenever a lawyer purports to represent multiple clients in a mass tort lawsuit arising from the same incident or series of incidents. There are numerous differences between these clients, including degrees of injury, strength of claims, and need for immediate or delayed compensation.¹⁶⁴ Moreover, when the lawyer can fairly predict that an aggregate settlement offer will be made or sought, there are certainly going to be differences arising from the need to allocate damages among the clients as well as different attitudes toward settlement generally.¹⁶⁵

Professors Silver and Baker are correct in noting that conflicts are generally waiveable under Rule 1.7(b), so long as the “lawyer reasonably believes that [all] clients can be represented

¹⁶³ABA Model Rules of Professional Conduct, *supra* note ____, Rule 1.7:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

See also Restatement of the Law Governing Lawyers, § 201 (“A conflict of interests is involved if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”) For a discussion of the extent to which the Restatement chapter on conflicts clarifies some ambiguities in the Model Rules provisions on conflicts, see generally Nancy J. Moore, “Restating the Law of Lawyer Conflicts,” 10 *Geo. J. Legal Ethics* 541 (1997).

¹⁶⁴See, e.g., Hensler & Peterson, *supra* note ____ at 1048-1050.

¹⁶⁵Even when the clients ultimately agree to accept or reject a settlement offer, the conflict exists because the lawyer is limited in his or her ability to give each client the lawyer’s independent professional judgment regarding whether a proposed settlement allocation is in the best interests of that particular client. Such limitations do not necessarily mean that the lawyer cannot represent the clients, but rather that the conflict of interest is one that must be addressed under Rule 1.7(b). See Moore, “Restating the Law of Lawyer Conflicts,” *supra* note ____ at ____.

effectively.”¹⁶⁶ When the clients retain the right to reject any proposed settlement offer, after receiving sufficient information regarding the proposed allocation formula, then the conflict of interests is almost certainly consentable. Even here, however, each client would need to be fully informed regarding the risks of multiple representation, including the likelihood of damage averaging in the event of an aggregate settlement.¹⁶⁷

If, however, the clients are asked to waive their individual rights (other than the right to conflict-free representation) in order to facilitate collective action, then it may be doubtful that the lawyer can effectively represent each client.¹⁶⁸ Certainly these doubts will increase as the representation proceeds and as individual clients begin to question the adequacy of a proposed settlement. Imagine the point at which a particular clients changes her mind and refuses to agree to an offer approved by a majority of the other clients—or demands additional information that she had previously agreed she would not be receiving. Surely the common attorney could not continue to represent her, attempting to force a settlement over her vigorous objection? And yet this is precisely the scenario that Professors Silver and Baker must have in mind if they are

¹⁶⁶Silver & Baker, “Allocating Settlement Proceeds,” supra note ___ at 1503. The precise language of Rule 1.7(b) is that the lawyer must reasonably believe that “the representation will not be adversely affected,” see supra note ___, but Professors Silver and Baker’s formulation better articulates how the rule is meant to be applied. See Moore, “Restating the Law of lawyer Conflicts,” supra note ___ at ___.

¹⁶⁷See note ___ supra (text of Model Rule 1.7(b)(2)). See also Restatement of the Law Governing Lawyers, § 202 and cmt. (c)(1) (requirement that client give informed consent to conflict of interest).

¹⁶⁸Clients who are jointly represented typically assume greater responsibility for decisions than when each client is separately represented. See, e.g., Model Rules of Professional Conduct, supra note ___, Rule 2.2, cmt. [9]. The ability of clients to assume such responsibility varies according to the sophistication of the clients and the nature of the decisions they are being asked to make. See Restatement of the Law Governing Lawyers, § 202, cmt. (g)(iv). The more rights the client is asked to waive at the beginning of the representation, the more difficult it is to assume that the client is capable of making such a decision without the benefit of independent representation. At the outset of mass tort representation, it is doubtful that personal injury clients are capable of deciding whether it is in their best interests to agree to a non-revokable waiver of their right to receive basic information regarding a proposed settlement or to have an opportunity to reject that settlement. See infra ___.

serious about permitting the lawyer to agree to settlement on behalf of an objecting client.

Indeed, securing the performance of “the client’s duty” under any such non-unanimity agreement necessarily entails the possibility of a lawyer refusing to terminate the representation at the client’s insistence.¹⁶⁹ And while principals other than clients may agree, in some very limited circumstances, to give an agent an irrevocable authority to act on their behalf,¹⁷⁰ fiduciary law has always provided that client-principals have a near-absolute right to terminate the lawyer-client relationship for any reason whatsoever.¹⁷¹

At this point, there is one remaining move, and that is to shift identification of the client from the individual plaintiffs to a group comprised of individual plaintiffs agreeing to be bound by a less-than-unanimous vote. Professors Silver and Baker use the analogy of partners agreeing to be bound by a majority (or even less than majority) vote in authorizing action on behalf of the partnership, although they do not explicitly argue that a group of co-plaintiffs constitute an entity analogous to a partnership or a corporation.¹⁷² This argument is made elsewhere by Professors Geoffrey Hazard and William Hodes, who conclude that agreements to be bound by majority vote are justified only when the situation is properly considered to be one of group or entity

¹⁶⁹If a client instructed her lawyer to reject a proposed settlement offer on her behalf, and the lawyer refused to do so, it is likely that the client would attempt to terminate the lawyer-client relationship in order to prevent the lawyer from disobeying the client’s instruction.

¹⁷⁰See supra note ___ & accompanying text.

¹⁷¹See, e.g., Restatement of the Law Governing Lawyers § 44 (client may discharge lawyer at any time, except that lawyer must comply with valid order of a tribunal requiring the representation to continue). Aside from court orders refusing permission for a lawyer to withdraw in litigation, a limited exception to the right of clients to discharge lawyers may exist under some statutory prohibitions on discharges that are based on impermissible discrimination. See, e.g., Nancy J. Moore, “Conflicts of Interest For In-House Counsel: Emerging Issues in the Expanding Role of the Attorney-Employee,” 39 So. Texas L. Rev. 497, ___ (1998).

¹⁷²See Silver & Baker, “Mass Tort Lawsuits,” supra note ___ at 771-772.

representation.¹⁷³ Professors Hazard and Hodes conclude that there are some circumstances under which it is proper to conclude that a number of individuals “have formed an ‘organization’ for the purpose of hiring a lawyer and directing his conduct of the representation.”¹⁷⁴ This conclusion, however, could not plausibly be reached under the circumstances present in most mass tort actions, where the victims do not know each other and do not act as a group in selecting and hiring the lawyer.¹⁷⁵ Even if they did, as in *A Civil Action*,¹⁷⁶ viewing the lawyer as representing the group as a whole, *and not each individual member*,¹⁷⁷ means that individual plaintiffs would be giving up other extremely important attributes of the lawyer-client relationship, including the ability to sue the lawyer in malpractice.¹⁷⁸ I seriously question

¹⁷³Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering* § 1.8.802 (2d ed. 1997). See also id at § 1.2:407 (same question considered as a case of representation limited by contract under Rule 1.2(c) and client control over settlement actions under Rule 1.2(a)), 1.13:203 (same question considered as a case of informal entity representation).

¹⁷⁴Id. at ___ (giving the example of seventeen homeowners who form a group that hires a lawyer to prosecute a nuisance action against a nearby factory, agreeing in writing that if a settlement is offered, any twelve members of the group may accept it on behalf of all). Under this view, the lawyer can implement settlement over the objection of one or more of the individual plaintiffs because it is the entity itself (which makes decisions according to majority vote) that is the lawyer’s only client. Id. at § 1.8:803.

¹⁷⁵In most mass tort actions, plaintiffs sign separate and individual contracts with the lawyer, typically at varying times and places.

¹⁷⁶See supra ___.

¹⁷⁷1 *Law of Lawyering* § 1.2:407 at 45 (1993 Supp.) . See supra note ___ (lawyer represents entity itself, not individual plaintiffs).

¹⁷⁸According to Professors Hazard and Hodes, individual constituents of an entity-client may sometimes be considered “derivative” (as opposed to “primary”) clients who are entitled to some protections, such as confidentiality. 1 *Law of Lawyering* ___. This is not uniformly the case in all jurisdictions; moreover, it is the ability to sue the lawyer in malpractice that may be the most important protection for individual plaintiffs in these cases, particularly if the lawyer has improperly favored one group of plaintiffs over another in allocating the proceeds of an aggregate settlement. See generally Nancy J. Moore, “Expanding Duties of Attorneys to ‘Non-Clients’: Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations,” 45 *S. Carolina L. Rev.* 659, ___ (1994) (discussing deficiencies of “primary”/“derivative” client view in situations involving entities where individual members reasonably rely on the lawyer to protect their individual interests).

whether the ability to sign less-than-unanimous voting agreements is ever worth sacrificing the benefits afforded individuals under the more traditional lawyer-client relationship.

3. *Clients waivers are not “fully consensual”*

The rationale for limiting a client’s power to contractually redefine a lawyer’s duties is a concern that clients unsophisticated in such limitations will not have fully understood or appreciated the risks involved and that a lawyer who benefits from the limitation cannot always be trusted to explain its benefits and costs fairly.¹⁷⁹ These are certainly valid concerns in mass tort litigation. Lawyers who can sign up hundreds or thousands of clients, using standard contingent fee contracts, stand to earn enormous legal fees¹⁸⁰: such lawyers have a vested interest in having clients agree to waive any rights they might have that would interfere with the lawyer’s ability to negotiate an aggregate settlement with the defendant. Moreover, the typical client has little or no familiarity with the legal system and relies heavily on the lawyer to decide both the initial terms of the engagement and the adequacy of any proposed settlement of the client’s claim.¹⁸¹ Given the enormous disparities in information available to the lawyer and to the client, it can hardly be said that clients who agree to relinquish their right to reject a proposed settlement, having no idea what their claim is worth or how it compares to the claims of others, have done so in a manner that is fully consensual.¹⁸²

¹⁷⁹See, e.g., Restatement of the Law Governing Lawyers § 30, cmt. (b). See also Fred Zacharias [Yale L. J. article on non-consentable conflicts].

¹⁸⁰See supra ____.

¹⁸¹See supra ____.

¹⁸²See Menkel-Meadow, supra note ____ at ____.

CONCLUSION

[To be added.]