THE ALI DRAFT PROPOSAL TO BYPASS THE AGGREGATE SETTLEMENT RULE: DO MASS TORT INDIVIDUAL CLIENTS NEED (OR WANT) GROUP DECISION-MAKING?

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Nancy J. Moore, “The ALI Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Individual Clients Need (or Want) Group Decision-making?”

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The American Law Institute has recently undertaken an entirely new project---
Principles of the Law of Aggregate Litigation\(^1\)---whose aim is “to recommend procedures
for aggregate lawsuits that will enable civil justice systems to handle these cases better.”\(^2\)
The bulk of the project is devoted to class actions; however, a number of sections address
various forms of non-class aggregations, and there is an extensive discussion of non-class
aggregate settlements.

Non-class aggregations have received considerably less attention from both
judges and scholars than have class actions;\(^3\) nevertheless, various cases, ethics opinions
and articles have addressed a number of issues that commonly arise in these lawsuits,
primarily in connection with the application of the so-called “aggregate settlement rule.”
Rule 1.8(g) of the ABA Model Rules of Professional Conduct, a form of which has been

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\(^1\) This paper comments on proposals set forth in the two drafts that preceded the symposium in which the
paper was presented. See American Law Institute, Principles of the Law of Aggregate Litigation,
Law Institute, Principles of the Law of Aggregate Litigation, Preliminary Draft No. 4 (Sept. 21, 2006)
(hereinafter “ALI Draft Proposal, Prelim. Draft No. 4”).
\(^2\) American Law Institute, Principles of Aggregate Litigation, Preliminary Draft No. 2 (Apr. 20, 2005) at
xiv.
\(^3\) See, e.g., ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at 18-19 (Reporters’ Notes).
adopted in every U.S. jurisdiction,\(^4\) limits the lawyer’s ability to participate “in making an aggregate settlement of the claims of or against the clients” without the informed consent of each client,” in which the clients have been advised of “the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”\(^5\) Questions that have been raised concerning the interpretation of this rule include: what constitutes an aggregate settlement; the nature and amount of information that the lawyer must disclose; whether the clients may waive their right to learn what other clients will receive; and finally, and most importantly, whether a group of clients may agree in advance to whatever settlement either the lawyer or a portion of the group approves.\(^6\)

Neither the text of the rule nor its comment defines an “aggregate settlement,”\(^7\) and courts and ethics committees have been unable to agree on an authoritative definition.\(^8\) Based largely on an article by Professor Howard Erichson,\(^9\) the ALI reporters propose to broadly define aggregate settlements to include settlements of multiple claims “in which the resolution of the claims are interdependent,” that is, when “the defendant’s acceptance of the settlement is contingent upon the acceptance by a specified percentage of the claimants” or “the value of each claimant’s claim is not based solely on individual case-by-case facts and negotiations.”\(^10\) Given the persistent problem of determining

\(^4\) Id. at §3.15, cmt. b.
\(^7\) See, e.g., ABA Standing Committee on Professional Responsibility, Formal Op. 06-438 at 1 (hereinafter ABA Formal Op. 06-438”).
\(^9\) ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.16, Reporter’s Notes to cmt. a (citing Professor Erichson’s article cited in note ___ supra as the source of the proposal’s key terms).
\(^10\) ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.16.
which settlements are covered by the aggregate settlement rule, the reporters are to be commended for what appears to be both a principled and workable definition.

As for the nature and amount of information the lawyer must disclose, recent changes to the ABA Model Rules of Professional Conduct clarify that when a lawyer participates in an aggregate settlement, the lawyer must inform each client “about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted.” Questions remain, however, concerning the level of detail the lawyer must provide; for example, whether the lawyer must disclose the names of the other clients when those clients prefer that details of their medical conditions not be made available to others. The ALI proposal does not specifically address this question, but as I have suggested elsewhere, it should be possible for a client’s desire for privacy to be respected, unless particular identifying information is important for other clients to know in order to evaluate the fairness of the settlement allocation.

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11 For example, some authorities define an aggregate settlement narrowly to mean only “an all-or-nothing total settlement of a single sum of money for all claims pending for a group of plaintiffs.” Or. State Bar Legal Ethics Comm., Formal Op. 2000-158, at n. 1 (2000), discussed in Erichson, Typology, supra note ___ at 1783. Others define it more broadly to include any settlement “when two or more clients consent to have their matters resolved together.” ABA Formal Op. 06-438 at 1.

12 Model Rules, supra note ___ 1.8, Comment [13]. This entire paragraph commenting on Rule 1.8(g) was added at the recommendation of the ABA Commission on Evaluating the Rules of Professional Conduct (“Ethics 2000 Commission”). I was the Chief Reporter for the Commission.

13 Section 3.17 currently provides that under the current aggregate settlement rule, each client must give informed consent, in writing, “after reviewing the settlements of all other persons subject to the aggregate settlement.” ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17(a). The comment that section appears to endorse an ABA interpretation of the aggregate settlement rule that requires a number of specific disclosures, including “[t]he details of every other client’s participation in the aggregate settlement,” but neither the ABA interpretation nor the comment itself specify whether or under what circumstances the name of every other client is among the details that must be disclosed. Id. at §3.17, cmt. a (discussing ABA Formal Opinion 06-438).

14 Moore, supra note ___ at 162-164. But cf. Silver & Baker, Mass Lawsuits, supra note ___ at 757-758 (lawyers who do not disclose plaintiffs’ names assume the risk that their interpretation of the ambiguous rule will be subsequently determined to be incorrect).
The possibility of client waiver—either of the right to receive information about other clients’ participation or the right to reject a settlement offer after learning of its terms—is not mentioned in either the rule itself or the comment. However, numerous cases and ethics opinions have addressed the effectiveness of such advance waivers and have uniformly rejected any interpretation of the current rule that would permit them.\(^\text{15}\) Nevertheless, the ALI reporters are proposing that the aggregate settlement rule be modified in order to facilitate advance waivers allowing a portion of the group to decide how settlement funds should be allocated. In my view this proposal is seriously flawed and should be rejected in favor of the continued viability of the aggregate settlement rule.

The current ALI draft proposal (“ALI Draft Proposal”)—which may be modified prior to final submission to the ALI membership—creates two major exceptions to the aggregate settlement rule. The first exception applies when the total value of the aggregated claims is more than $5,000,000 and the total number of claimants is 40 or more.\(^\text{16}\) In such circumstances, Section 3.17 allows individual claimants, after consultation with counsel,\(^\text{17}\) to agree in advance to be bound to a proposed settlement when 75% of the claimants approve the settlement or, “if the settlement significantly distinguishes among different categories of claimants, a separate 75 [%] vote of each

\(^{15}\) See, e.g., Tax Authority, Inc. v. Jackson Hewitt, Inc., 187 N.J. 4, 898 A.2d 512 (2006) (discussing cases and commentary interpreting both Rule 1.8(g) and its predecessor DR 5-106). Because this was an issue of first impression in New Jersey, the court applied its holding prospectively and enforced an aggregate settlement against a plaintiff who had previously agreed to be bound the decision of a weighted majority. The court also noted that some commentators have proposed that Rule 1.8(g) “be changed to accommodate mass lawsuits” and referred the issue to the New Jersey Commission on Ethics Reform for review and recommendation to the court. 898 A.2d at 523. At the request of the Commission’s chair, I communicated my own views to the Commission, urging that the aggregate settlement rule be retained in its current form.

\(^{16}\) See ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17(e).

\(^{17}\) The proposal provides a lengthy and detailed list of the matters that must be disclosed by the lawyer in order to communicate “adequate information and explanation about the material risks of, and reasonably available alternatives to, the proposed [waiver].” Id. at §3.17(d).
category of claimants” approves the settlement.\textsuperscript{18} This waiver of the client’s “right to prior knowledge of and consent to the terms of all other claimants’ settlements”\textsuperscript{19}---that is, of the client’s rights under the current aggregate settlement rule---may be given as part of the original retention agreement or at any subsequent time and must be in writing.\textsuperscript{20} Section 3.18 provides for limited judicial review of aggregate settlements that are approved as a result of such waivers, but only if the claimant brings the challenge “within 90 days of receiving actual notice of the consummation of a settlement.”\textsuperscript{21} Even then, the reviewing court may declare the settlement unenforceable as to any claimant only if the court finds either that the challenger’s waiver was not adequately informed or that the 75\% approval or 40 person/$5million requirements were not met.\textsuperscript{22}

The second exception applies in situations in which effective waivers under Section 3.17 have not been obtained. Under Section 3.19, a lawyer who receives an offer for a “lump sum settlement of interdependent claims may seek approval for the fairness of the settlement.”\textsuperscript{18}

\textsuperscript{18} Id. at §3.17(b).
\textsuperscript{19} ALI Draft Proposal, Preliminary Draft No. 4, supra note ___ at §3.17(c). The quoted language does not appear in the current ALI Draft Proposal, either in the text or the comment. Nevertheless, the current text of the proposal refers to the required consent as a “waiver,” and it is clear that what the client is waiving is the client’s rights under the current aggregate settlement rule. ALI Draft Proposal, Disc. Draft No. 2, at §3.17(d).

The prior draft did not provide for approval by either a majority or supermajority; instead, the first exception under that draft permitted a client to waive existing rights under the aggregate settlement rule as long as the client consented (after disclosure) to “accept an aggregate settlement as part of a known collective representation.” ALI Draft Proposal, Preliminary Draft No. 4, supra note ___ at §3.17(c). This proposal would have permitted the lawyer alone to decide whether to accept the settlement on the client’s behalf even though the lawyer has a significant financial interest not only in having an aggregate settlement approved regardless of its overall fairness, but also in allocating the proceeds in a manner that favors certain claimants over others. See infra notes ___ & accompanying text. The only protection against unfair allocations was a provision for very limited judicial review of the settlements by claimants bringing a challenge “within 90 days of receiving actual notice of the consummation of a settlement.” Id. at §3.18(a). Even then, the settlement would have been unenforceable to any claimants only if the court found either that the settlement was “grossly unfair or inadequate to the challenger” of that the challenger’s waiver was not adequately informed. Id. at §3.18(d). The reviewing court was required to “give substantial deference to the settlement” and “treat it as presumptively fair and reasonable.” Id. at §3.18(c). For a discussion of the deficiencies of this proposal, see infra notes ___ & accompanying text.

\textsuperscript{20} ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17(c).
\textsuperscript{21} ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.18(a)
\textsuperscript{22} Id. §3.18(c). For a discussion of a very different proposal for judicial review in an earlier draft, see supra note ___ & infra notes ___ & accompanying text.
and adequacy of a such a settlement before a court of competent jurisdiction in the state where the original attorney-client agreement was formed.”23 Here the lawyer has the burden not only of proving the fairness and adequacy of the proposed settlement, but also of establishing “that efforts to secure direct approval from clients were unavailing and why the terms of Section 3.17 could not be satisfied without judicial approval.”24 In other words, the lawyer “must provide a compelling explanation for why a waiver was not secured pursuant to § 3.17.”25

The reporters give two separate reasons for relaxing the aggregate settlement rule. First, they state that “[t]he purpose of modifying the strict requirements of the aggregate settlement rule is to facilitate large-scale settlements in situations in which the aggregate settlement rule has impeded a substantial multi-party settlement.”26 According to the reporters, the current rule undermines such settlements by permitting individual clients “to exercise unfair control over a proposed settlement and to demand premiums in exchange for approval.”27 The reporters further argue that although the current rule assumes that claimants need to review all of the terms before making an informed decision, “giving veto power to each claimant individually (as opposed to collectively)

23 ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.19(a). The proposal further provides that before invoking this alternative procedure, “claimants’ counsel must use all reasonable efforts to notify all affected claimants and provide such claimants an opportunity to participate in the judicial proceedings.” Id. at §3.19(b). The proposal does not currently specify what should be included in the notice; for example, whether the notice must disclose all of the information regarding the settlement terms that would ordinarily be required under the aggregate settlement rule. See infra ____. In addition, the proposal does not specify how to determine in which state the original attorney-client agreement was formed or how the lawyer should proceed if there is more than one state involved, e.g., where the relationship is found to have been formed in the state where the client resides, and multiple clients reside in different states.
25 Id. at §3.19, cmt b.
26 Id. §3.17, at comment b.
27 Id. at comment a.
not necessary to ensure the fairness of aggregate settlements."²⁸ In other words, modifications are necessary to encourage multi-party settlements, and such modifications will not harm individual claimants by promoting inadequate or unfair settlements.

Second, the reporters note that “waivers of important rights are valid in a variety of areas including the most cherished constitutional rights.”²⁹ As a result, they reject “the view that individual decisionmaking over the settlement of a claim is so uniquely important that it cannot be subject to a contractual waiver in favor of group decisionmaking, provided that there is a supermajority-approval requirement.”³⁰ This rationale is not fleshed out in the proposal as such, but receives greater attention in several articles written by Professor Charles Silver, one of the ALI reporters, and his co-author, Professor Lynn Baker, in which they elaborate the view that to refuse to permit clients to adopt procedures they prefer is unnecessarily paternalistic.³¹

ALI Principles, unlike Restatements, are not limited to reflecting the law as it presently stands, but rather “assume the stance of expressing the law as it should be.”³² As a result, the proposal cannot be criticized on the ground that the aggregate settlement rule, which has been adopted by every U.S. jurisdiction,³³ cannot be plausibly interpreted to permit waivers of the type described in Section 3.17.³⁴ Nevertheless, given that the rule emerged unscathed during the Ethics 2000 Commission’s wide-ranging review of the

²⁸ Id. This statement mischaracterizes the effect of the aggregate settlement rule. Individual claimants do not have a veto over the settlements approved by others, i.e., unless the defendant requires unanimous approval of the settlement for it to be effective. See infra notes ___ & accompanying text.
²⁹ Id at §3.17(a).
³⁰ Id.
³³ See supra note ___ & accompanying text.
³⁴ See American Law Institute, Projects, Overview at www.ali.org/index.cfm?fuseaction=projects.main (restatements “aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court”).
ABA Model Rules, as well as the individual state reviews that followed in its wake, surely the burden is on the reporters to make a persuasive case for change. For reasons set forth below, I argue that neither rationale offered by the reporters meets that burden.

**Client Waivers Are Not Necessary To Secure Substantial Multi-Party Settlements**

The Reporter’s Notes to Section 3.15 states that some “scholars have recognized that the aggregate settlement rule imposes onerous restrictions that impede fair and legitimate settlements of large number of claims,” citing one of several articles by Professors Silver and Baker. Elsewhere in the draft proposal, the reporters suggest two reasons why they believe the rule is not workable in mass lawsuits: first, the possibility of strategic hold-outs and, second, the burden of obtaining consent after full disclosure.

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35 The only change recommended by the Ethics 2000 Commission was the adoption of an entirely new comment. See supra note ___ & accompanying text.
36 According to an ABA chart noting state departures from the new Model Rules text, most states have adopted the text of Rule 1.8(g) without change, and the changes that have been made are relatively minor and do not relate to the issues addressed in the reporters’ proposal. See http://www.abanet.org/cpr/jclr/charts.html (noting minor changes in the rule text in the following jurisdictions: DC, LA, MD, ND, OH, and WA). One state, New York, will consider a proposal to revise the rule to provide that with court approval, a lawyer need not follow the rule’s requirement for fully informed consent. http://www.nysba.org/Content/ContentGroups/COSAC_Report/COSAC_Proposed_Rules_of_Professional_Conduct.htm

The comment does not address this proposed change, and it is not entirely clear that the proposal is meant to apply outside of the class action context. If it does apply to non-class aggregated settlements, it is unclear how judicial approval would be sought for the settlement of claims not yet filed or what standards courts would use to approve settlements that do not meet the requirements of the aggregate settlement rule.

37 ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.15, Reporter’s Notes to comment b (citing Silver & Baker, Mass Lawsuits, supra note ___ at 755-66). The reporters also note that “[s]ome scholars have offered a strong endorsement of the aggregate settlement rule and oppose arguments to ease its requirements,” citing Moore, supra note ___. Id. Another scholar who has offered a strong endorsement of the aggregate settlement rule is Professor Howard Erichson. See, e.g., Howard M. Erichson, “Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation,” 2003 U. Chi. Legal Forum 519 (2003) (“Non-Class Collective Representation”).

38 See ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at § 3.17, comment a (“Not allowing waiver could enable individual claimants to exercise unfair control over the settlement and to demand premiums in exchange for giving their approval to the settlement.”).
39 See id. at §3.17, comment b (“...[I]n a multi-party automobile accident cases [sic] involving a small number of claimants, the aggregate settlement rule is easy to administer and poses little practical difficulties for the lawyer representing multiple claimants. The same is not true, however, for a lawyer representing hundreds of asbestos clients and negotiating multi-million dollar settlements.”). See also ALI
Other than the citation to the Silver and Baker article, the reporters cite no authority for their contention that the aggregate settlement rule constitutes a significant impediment to settlement in mass lawsuits.

The reporters’ concern for strategic holdouts appears to be based on their belief that under the aggregate settlement rule, each individual claimant has a “veto power” over the effectiveness of the aggregate settlement. But this is not an accurate description of the effect of the current rule. Rule 1.8(g) requires only that the lawyer not purport to accept an aggregate settlement on behalf of a group of clients unless each of those clients has given fully informed consent to its terms; nothing prevents the lawyer from negotiating a tentative settlement agreement that will become binding only as to those clients who accept its terms after the required full disclosure.

Strategic holdouts might be a problem if unanimity is required before a settlement will be effective as to any of the claimants, but neither the reporters nor the Silver and Baker articles supply any empirical information indicating how often defendants insist on structuring settlements so that “even a single plaintiff’s refusal to consent to a settlement could scuttle the settlement for the other plaintiffs.” Under the aggregate settlement rule, it is currently unethical for a common attorney to have claimants agree in advance to approve settlement terms agreed to either by the lawyer alone or by a portion of the

Draft Proposal, Preliminary Draft No. 4, supra note ___ at §3.18, comment a (“The requirements of disclosure and consent can be very burdensome when there are numerous claimants.”)

See supra note ___ & accompanying text. See also ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17, cmt. a (describing the aggregate settlement rule as requiring that “the settlement will not be effective unless “each client gives informed consent, in writing, after reviewing the settlements of all other persons subject to the aggregate settlement”).

See Moore, supra note ___ at 155, 164-166.

Michael J. Maloney & Allison Taylor Blizzard, Ethical Issues in the Context of International Litigation: “Where Angels Fear to Tread,” 36 S. Tex. L. Rev. 933, 963 (1995). Indeed, Professors Baker and Silver concede in one of their articles that “because the possibility of holdouts is obvious, defendants typically demand acceptance rates of less than 100%” and this, as a result “denies an individual plaintiff the power unilaterally to block a group-wide deal.” Silver & Baker, “Allocating Settlement Proceeds,” supra note ___, 84 Va. L. Rev. at 1532.
group. As a result, defendants should be satisfied with a “walk-away provision [that] gives the defendant the right to abandon the settlement if more than a certain percentage of plaintiffs decline their offers.” Indeed, according to one plaintiffs’ lawyer, an acceptance rate of 90% is often used. Defendants do not typically expect 100% of class members in an opt-out class action to agree to a proposed settlement; therefore, they should not be expected to require unanimity in the typical non-class mass lawsuit. If the facts are otherwise, there ought to be some way of demonstrating how often this is currently occurring.

Even when unanimity is required, an individual plaintiff’s ability to act strategically may be limited. For example, a common attorney can reduce the possibility of individual plaintiffs holding out in an effort to demand a “premium” by making it clear from the outset (and sticking to the position) that the individual offers are “take it or leave it” and that no one will receive a premium in exchange for approving the

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43 See supra note ___ & accompanying text.
45 Id. Professor Erichson also discusses a variation in which “100 percent of the most serious category of claimants and 90 percent of the remainder” must accept the settlement for it to be effective. In this variation, any of the most seriously injured claimants would be in a position to act strategically.

46 See, e.g., Erichson, “Non-Class Collective Representation,” supra note ___, 2003 U. of Chicago Legal Forum at 574 (“walk-away provisions generally do not require 100 percent acceptance of the settlement”).
47 As Professors Silver and Baker note, walk-away provisions are “sources of transaction costs” because neither defendants nor the common attorney can be certain how many plaintiffs will consent. Silver & Baker, Mass Lawsuits, supra note ___, 32 Wake Forest L. Rev. at 765. But merely because they are the source of transaction costs does not mean that defendants will not use them, and we still do not know whether there are a significant number of mass lawsuits that should but do not settle because the defendants cannot obtain unanimity. In the absence of such information, we should not assume that the costs of the current rule outweigh its benefits.
settlement. Once it is clear that no “premium” is available, then individual plaintiffs will reject the offer only when they believe that they can do better by continuing with the litigation. And when this happens, the defendant can still come back with an offer to settle the remainder of the attorney’s cases, leaving the hold-out isolated and forced to continue his or her case without the ability to share the costs of the trial.

As for the burdensomeness of obtaining informed consent after full disclosure of the terms of the settlement, there are numerous steps attorneys can take in mass tort cases to accomplish the required disclosure. For example, attorneys can and do keep their clients informed by using a combination of group meetings, mass e-mails, dedicated websites, toll-free call-in numbers, and paralegals. Given the amount of legal fees plaintiffs’ attorneys expect to make in mass lawsuits (which are typically larger on a per capita basis than in class actions, because of the individual contingent fee retainer agreements), they should be willing---and expected---to devote considerable resources

48 Indeed paying any such “premiums” may be evidence that an attorney has acted unethically by favoring some clients over others. See, e.g., Model Rules, supra note ___, Rule 1.7, Comment [29] (lawyer required to be impartial between commonly represented clients). Plaintiffs’ attorneys can also reduce the likelihood of strategic hold-outs by developing the attorney-client relationship, i.e., “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).” Moore, supra note ___, 41 S. Tex. L. Rev. at 165, n. 4 (interview with lawyer from well-known plaintiffs’ law firm).

49 Elsewhere I have suggested that lawyers may be able to structure the representation in advance in a way that makes widespread approval of an aggregate settlement more likely, e.g., by having clients “tentatively agree” to follow the wishes of a majority, even though they are not required to do so: this may go far to encourage loyalty to the group. Moore, 41 S. Tex. L. Rev. at 165. I also argued that it might be possible to ask prospective clients to agree that if the client rejects a settlement offer approved by the requisite majority, the lawyer may withdraw and continue representing the majority. Id. (noting that Rule 1.2(c) permits lawyers to limit the scope of the representation with the client’s informed consent.) Whether such restrictions constitute an undue burden on the client’s right to approve settlements is not entirely clear. In any event, in the absence of such an agreement, I do not believe that a lawyer has a unilateral right to withdraw merely because the client refuses to accept a settlement offer that the lawyer has recommended. See, e.g., Auguston v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658 (5th Cir. 1996).

50 See Moore, supra note ___, 41 S. Tex. L. Rev. at 160-162.

51 See, e.g., Jill E. Fisch, “Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction, 102 Colum. L. Rev. 650, 661 & n. 57 (2002) (comparing typical fee award of %25 in class action cases with standard contingent fee of 33% to 40%).
to this effort. Even if the aggregate settlement rule requires the attorney to contact the clients twice---once to obtain their consent to the settlement and then again to mail them their checks---there is no evidence that such contacts are unduly burdensome, keeping in mind that the attorneys are supposed to be keeping their clients reasonably informed throughout the litigation. The case has not yet been made that such methods of informing clients are unrealistic for either the majority or even a significant number of mass tort lawsuits in which an aggregate settlement is likely to be the best result for most claimants.

In any event, under the current ALI Draft Proposal, the lawyer must effectively notify at least 75% of the claimants, whose approval will not count toward the supermajority requirement unless they have received detailed information regarding the

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52 For example, in Burrow v. Arce, 997 S.W.2d 229 (Tex. 1998), lawyers representing 126 plaintiffs settled a mass tort lawsuit for $190 million, collecting attorneys’ fees of $60 million. It is unclear whether lawyers are entitled to charge the costs of communication to the clients rather than to the lawyer---in other words whether these costs are more like ordinary litigation costs (chargeable to client) or overhead (chargeable to lawyer). In any event, even if ultimately chargeable to the clients, the cost per client is justifiable and unlikely to detract substantially from the amount each client will receive.


54 It should be kept in mind that the inquiry should not be absolute cost, but rather cost in relation to anticipated fees or net client awards.

55 See Model Rules, supra note ___, Rule 1.4(a)(2)-(4) (lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” “keep the client reasonably informed about the status of the matter,” and “promptly comply with reasonable requests for information”). Another way to keep farflung clients informed is to make use of local referring attorneys, who can be expected to maintain closer relationships with the clients than the common attorney can do. Moore, supra note ___, 41 S. Tex. L. Rev. at 161-162.

56 Professors Silver and Baker have also argued that requiring the clients to consent to the terms of the settlement may entail undue delay in effectuating a mass settlement. Silver & Baker, Mass Lawsuits, supra note ___, 32 Wake Forest L. Rev. at 763-764. But once again, aside from a single anecdotal account, the authors offer no evidence that the delay entailed under the aggregate settlement rule is sufficiently problematic to warrant modification of the current rule. After all, there is necessarily delay in approving class action settlements, in which members of the class must be notified and (in most instances) given an opportunity to opt out; nevertheless, defendants routinely settle class actions in order to achieve as much finality as they can get. Defendants may prefer to avoid such delay if they can, but we have no indication that they will be unwilling to settle mass tort lawsuits (in more than an occasional case) if their preferences are not honored.
proposed settlement.\textsuperscript{57} As a result, burdensome should be measured only by the incremental cost of notifying the remainder of the claimants.\textsuperscript{58}

Aside from the cost of communication, the reporters may have in mind the burden to some claimants of sharing with others the private details of their settlements, including sensitive information regarding their medical diagnoses and prognoses. Elsewhere, Professors Silver and Baker have argued that “the emotional and other costs to the plaintiffs of these invasions of privacy may well exceed any benefits of having information about other group members’ claims and anticipated settlement payments,” and that this warrants permitting claimants to waive the disclosure requirements of the aggregate settlement rule.\textsuperscript{59}

The ALI Draft Proposal is unclear whether the amount of detailed information at least 75\% of the claimants must receive is the same or different from the information required to be provided under the aggregate settlement rule. The text of Section 3.17 specifies that the claimants must be informed of the total amount of the settlement offer, the total costs and attorneys fees, the manner in which the settlement will be divided, the category into which the claimant has been placed (if that determination has already been made), and the existence of related and unrelated claims held by claimants represented by the same lawyer that will not be covered by the settlement.\textsuperscript{60} It is certainly plausible to interpret the proposal as reducing the amount of information each claimant must receive

\textsuperscript{57} ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.18(a).
\textsuperscript{58} Of course, to ensure 75\% approval, the lawyer must effectively notify more than 75\% of the claimants or there is a significant risk that the supermajority-approval requirement will not be met. In all likelihood, the lawyer will want to notify as many claimants as he can, in which case it is not clear that the current ALI Draft Proposal significantly reduces the burdensomeness of the current notification requirement.
\textsuperscript{59} Silver & Baker, Mass Lawsuits, supra note ___, 32 Wake Forest L. Rev. at 756-759.
\textsuperscript{60} ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17(d)(4).
regarding the details of other claimants’ settlements, which would indeed reduce the burden of disclosure. Whether this change is justifiable is another matter entirely.

**Aggregate Settlements Present Risks of Inadequate Settlements and Unfair Allocations**

The rationale for the aggregate settlement rule is that giving claimants an opportunity to review the terms of an aggregate settlement before making an informed decision is necessary to avoid binding them to inadequate settlements and unfair allocations.\(^61\) In defending their proposal to modify the current rule, the reporters assert that “giving veto power to individual claimants is not necessary to ensure the fairness of aggregate settlements.”\(^62\) As noted earlier, this statement mischaracterizes the effect of the aggregate settlement rule because individual claimants do not have the ability to veto an aggregate settlement unless the defendant has insisted upon unanimity of approval before the settlement will be effective.\(^63\) In any event, although tacitly acknowledging that the purpose of the current rule is to prevent unfair settlements, other than offering the alternative of approval by a supermajority of claimants, the reporters do not explain why the rationale given for the current rule is mistaken or how supermajority approval serves as an adequate alternative. Thus, it is important to see how the aggregate settlement rule

\(^{61}\) See, e.g., Silver & Baker, Mass Lawsuits, supra note ___ at 749-753 (identifying and discussing dangers attributable to “attorney opportunism” and “allocation conflicts” among plaintiffs and then concluding that “the purpose of Rule 1.8(g) is to enable each plaintiff to police allocation conflicts by vetoing a proposed settlement”). The current ALI Draft Proposal does not make that rationale clear, stating merely that “[t]he aggregate settlement rule is based on the view that, without reviewing and analyzing the existence and nature of all claims and of the participation of each person in a proposed settlement, including but not limited to all proposed settlement terms, a claimant cannot make an informed decision whether to agree to a proposed settlement.” ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17, cmt. a. The proposal does not clearly identify and address what Professors Silver and Baker have previously identified as the additional risks of attorney opportunism and allocation conflicts in mass lawsuits, as well as the decreased incentives for individual group members to closely monitor their lawyers, given that in mass lawsuits “monitoring is a public good.” Silver & Baker, Mass Lawsuits, supra note ___, 32 Wake Forest L. Rev. at 752.


\(^{63}\) See supra note ___ & accompanying text.
currently serves as a necessary constraint on both inadequate settlements and unfair allocations.

Aggregate settlements might be inadequate in their total amount because the common attorney will be tempted to accept “a relatively cheap settlement that would nonetheless pay the attorney a handsome premium on his or her hourly rate.” Individual claimants reviewing the amounts they will receive under an aggregate settlement perform an important monitoring function that checks this form of “attorney opportunism.” Under a prior draft proposal, advance waivers would have allowed the attorney alone to bind claimants to an aggregate settlement negotiated by the attorney. This proposal was defective because it would have entirely eliminated the monitoring function of the current rule. Requiring a supermajority of the group to approve the settlement before it becomes binding on other group members is an improvement because it helps to reduce the likelihood of attorney opportunism by providing for at least 75% of the group to perform its current monitoring function.

This explanation, however, assumes that the claims of the supermajority are typical of the claims of the group as a whole. If most of the claims are relatively small in

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64 Silver and Baker, Mass Lawsuits, supra note ___, 32 Wake Forest at 751 (characterizing the problem as one of “attorney opportunism”).
65 See supra note ___.
66 See ALI Draft Proposal, Prelim. Draft No. 4, supra note ___ at §3.17(c). The only protection offered claimants against inadequate settlements was limited judicial review of the adequacy and fairness of the settlement. See infra notes ___ & accompanying text.
67 Interestingly, this is not the explanation the reporters give for imposing the supermajority-approval requirement. Rather, the reporters allude only to the fact that another rationale of the current rule is to “preserve in the hands of the clients, as opposed to lawyers, the power to settle cases.” ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17, cmt. a. Current law provides that the decision whether to settle belongs to the client and that a client may revoke any previous grant of authority to the lawyer to settle the client’s case. Id. at Reporters’ Notes, cmt. a (citing both to the Restatement of the Law Governing Lawyers and Model Rule 1.2(a)). Whether vesting decisionmaking power in a percentage of a group satisfies the requirements of the current law in this respect is unclear. Even if it does, however, the criticism would still remain that the supermajority-approval requirement is inadequate to guard against attorney opportunism and unfair allocations.
value, then the total amount might be adequate for these claimants. But the total amount might still be vastly inadequate for the minority of claims that are far more serious, and these claimants will not have had the opportunity to check attorney opportunism affecting particular claims. The reporters will undoubtedly respond that this was the purpose of providing that when settlements distinguish among separate categories of cases, super-majority approval within each category is required. However, for reasons I explain later, I do not believe that even a supermajority approval within each category protects against attorney opportunism in aggregate settlements.

Even more important than protecting against inadequate settlements is the aggregate settlement rule’s function in protecting against unfair allocations. After all, the common attorney’s collective fee will depend on the total amount of the settlement, so the problem of inadequate settlements might not be widespread. On the other hand, a common attorney has little financial incentive to ensure horizontal equity among the various claimants. As a result, the attorney will not be motivated to counter a defendant’s desire to favor certain claimants over others; for example, a defendant’s desire to favor customers, shareholders, suppliers or employees or to favor certain employees over others. Even if neither the plaintiffs’ nor defendants’ attorney is biased in favor of some group of the claimants, neither will they be motivated to expend the time and effort to individualize the settlements in ways that many of the claimants might

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68 See supra note ___ & accompanying text.
69 See infra notes ___ & accompanying text.
71 See Ericson, “Non-Class Collective Representation, supra note ___, 2003 U of Chicago Legal Forum at 572. See also Coffee, supra note ___ at 1542.
72 Cf. id. at 1546.
prefer. This leads to “damage averaging,” in which those with more serious injuries end up receiving less than they would have under an allocation that gives more weight to individualized factors.

Of even greater concern is the fact that the plaintiffs’ attorney may be operating under financial incentives that actively work in favor of a biased allocation. For example, the attorney will earn more money from cases in which the attorney is retained directly, as opposed to those in which the attorney receives the case as a result of a referral and must therefore share the contingent fee with the referring attorney. Similarly, if the attorney uses a sliding scale contingent fee (as opposed to a fixed percentage), the attorney will be motivated to distribute the amounts in such a way as to maximize the total fee by keeping the percentages higher in particular cases. In addition, if the effectiveness of the settlement depends on a group vote, the attorney will be motivated to please those in the majority, which will often be those with the smallest and weakest claims. Finally, there may be other situations in which the attorney has special relationships with certain claimants or even third parties (such as unions) that would bias

73 Id. at 1545.
74 Id. See also Moore, supra note ___ , 41 S. Tex. L. Rev. at 168-169.
75 Erichson, “Non-Class Collective Representation,” supra note ___, 2003 U of Chicago Legal Forum at 572. This is precisely what is alleged to have occurred in the recent publicity surrounding allegations that a plaintiffs firm falsely told the plaintiffs that their settlement portions had been individually negotiated with the defendant, when they were in fact determined solely by the firm. The scheme was allegedly designed to hide the fact that “a major determinant in the size of a client’s share was whether he or she had retained [the firm] directly or been referred by another firm.” The firm “allegedly inflated the settlement payments of its direct clients because its fees from those clients would not be reduced by referral fees.” Anthony Lin, Trial Ordered Over Firm’s Distribution of Fen-Phen Settlement, New York Law Journal (3-28-07), reported at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1174986238152.
76 Erichson, “Non-Class Collective Representation,” supra note ___, 2003 U of Chicago Legal Forum at 572. Professor Erichson also describes how monitoring by claimants creates incentives for defendants’ counsel to offer settlements that the claimants are likely to accept. Id. at 572-573.
77 See, e.g., Silver & Baker, “Allocating Settlement Proceeds,” supra note ___, 84 Va. L. Rev. at 1531 (“because plaintiffs with low-value claims greatly outnumber those with high-value claims, plaintiffs’ attorneys feel some pressure to maximize the number of claimants who accept a particular settlement”; “[t]his encourages plaintiffs’ attorneys to distribute settlement funds broadly within the claimant group instead of concentrating them in a small number of hands”).
the attorney in favor of a particular group of claimants (such as union over non-union employees).  

The Proposed Supermajority-Approval Requirement Provides Insufficient Protection to Claimants

The reporters do not explain how supermajority approval guards against inadequate settlements and unfair allocations, but I assume they believe that the individual monitoring provided by 75% of the claimants, after being provided with details of the settlement proposal, will be sufficient to check the potential for attorney abuse. As I argued earlier, this might be true when the claims of the 75% are representative of all of the claims, but this will not be the case when the claims are dissimilar, particularly when the minority claims have substantially higher values than the majority claims.

Why isn’t it enough, as the reporters will undoubtedly argue, to require that when settlements distinguish among separate categories of cases, supermajority approval within each category is required? The answer is that aggregate settlements that are unfairly biased in favor of some claimants over other claimants do not necessarily identify separate categories of cases. For example, a settlement might provide that the claimants will share equally in a lump sum offered by the defendant. As a formal matter, there is only one category of claimants, and they are all being treated the same. But it is obvious that the proposal favors claimants with less serious injuries over claimants with more serious injuries, because their awards do not take individual damages into

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78 Cf. Coffee, supra note __, 84 Va. L. Rev. at 1546 (giving example in context of employment discrimination class action in which the class attorney’s relationship with the union causes the attorney to favor union over non-union class members).

79 See supra note ___ & accompanying text.
account. If the claimants with less serious injuries constitute 75% or more of the group, then they are in a position to bind those with the more serious injuries, despite the obvious unfairness of the allocation. Of course, there are circumstances in which equal allocations, despite some differences in the value of claims, might be appropriate, but unless the claimants who stand to lose agree to be bound by an equal division, the allocation is presumptively unfair as to them.

A similar situation is presented by settlement sums that are allocated through the use of a matrix formula, which is a common technique used in aggregate settlements. The matrix takes into account a variety of relevant factors, weighting each factor differently. For example, the formula might consider factors such as medical diagnosis, presence of certain symptoms, and documented progression of disease, as well as factors indicating the strength of particular claims (e.g., evidence relating both to the credibility of the claimant and causation) and the availability of various defenses (e.g., whether there is an arguable statute of limitations defense). Once again, as a formal matter, there is only one category of claimants, and they are all being treated the same. But individual claimants may object that some factors are either not relevant at all or are being given too much or too little weight or that additional relevant factors are not being considered at all. Use of a matrix formula poses an obvious risk of unfair allocations, and it is entirely possible that

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80 Indeed, this is precisely what is meant by the problem of “damage averaging” in class and non-class aggregated settlements. See supra note ___ & accompanying text. See also Moore, supra note ___, 41 S. Tex. L. Rev. at 163, n. 91 (discussing the potential unfairness of the settlement in the Woburn case that was the subject of the book A Civil Action, in which each family received an equal amount, despite the fact that their injuries differed and that some of the families were likely to have their cases dismissed).

81 When individual claims are small, it may be more efficient to distribute the settlement equally rather than attempting to individualize each claimant’s recovery. See Silver & Baker, Allocating Settlement Proceeds, supra note ___ at 1522 (common practice to make equal payments when sums involved are small). In addition, plaintiffs who know each other may be more willing to share equally despite significant differences in their claims. See, e.g., New Jersey Supreme Court Advisory Com. on Prof. Ethics, No. 616 (1988) (describing a toxic chemical case in which many plaintiffs wanted to reject a “contingent blanket offer,” but most ultimately agreed to accept the settlement when they found out that a number of their co-workers were going to have their claims dismissed on statute of limitation grounds.)
those being unfairly treated will be in the minority. Indeed, given the common attorney’s financial incentive to ensure the effectiveness of the settlement, the attorney will be biased in favor of whatever allocation is likely to gain the approval of 75% of the claimants.

Aside from equal distributions and use of a matrix, there are other ways in which claimants may be treated unfairly without the settlement agreement creating different categories of cases. For example, the defendants’ attorney may agree to a settlement in which the plaintiffs’ attorney has allocated individual settlement values that add up to an amount the defendant is willing to pay. The plaintiffs’ attorney may not have used a matrix or any other formula to determine the individual settlement values, but may simply have relied on her own assessment of the worth of each case. As long as the settlement agreement does not create formal distinctions in the way in which the claimants were treated, all the attorney needs to do is convince 75% of the claimants that their settlement offers are fair to them in order to bind the remaining claimants.

Finally, there is the question of how much information the claimants will receive under Section 3.17. As noted earlier, the text of the proposal suggests that claimants need not receive the same detailed information about other claimants’ settlements that is required under the aggregate settlement rule.82 I have argued elsewhere that the aggregate settlement rule can and should be interpreted to respect a claimant’s desire for privacy, unless particular identifying information is important for other claimants to evaluate the fairness of the settlement allocation.83 But the ALI Draft Proposal appears to go well beyond that limited restriction on the amount of disclosure that may be currently

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82 See supra note ___ & accompanying text.
83 See supra note ___ & accompanying text.
required. If Section 3.17 is meant to require only the specific information listed in the text of the rule, which does not appear to include much, if any, detail regarding what other claimants will receive,84 then it is difficult to see how the 75% supermajority-approval requirement provides a meaningful check on unfair allocations.

Reinstating an Earlier Proposal for a Limited Fairness Hearing Would Not Fix the Problem

In an earlier draft, the reporters’ proposal for limited judicial review---available only if the claimant brings the challenge within 90 days after being notified of the settlement’s consummation85---included a provision in which the court could declare the settlement unenforceable to any claimant if the court found that the settlement was “grossly unfair or inadequate to the challenger.”86 By its own terms then, the proposal was not designed to ensure either the “fairness” or “adequacy” of aggregate settlements, but only to protect against the most egregious of abuses, and even then, only when one or more claimants affirmatively exercised their right to challenge the settlement.

There were other deficiencies in the proposal. For example, it provided that the reviewing court give “substantial deference to the settlement” and treat it as “presumptively fair and reasonable” (regardless of the method of allocation), without any explanation for either the deference or the presumption.87 Elsewhere, Professors Silver and Baker have argued that a combination of uniform contingent fees, market regulation of the choice of lawyers and the threat of malpractice liability can significantly reduce the risk of attorneys acting arbitrarily or opportunistically in allocating aggregate settlements,

84 See supra note ___ & accompanying text.
85 See supra note ___ & accompanying text.
86 ALI Draft Proposal, Prelim. Draft No. 4, supra note ___ at §3.18(a).
87 Id. at §3.18(c) & cmt. b.
particularly when coupled with variations of a majority voting rule, including super-majority requirements. 88 Although the current ALI proposal requires approval by a supermajority, it does not require uniform contingent fees. 89 As to the remaining risk-reducers, Silver and Baker concede the difficulty of proving a malpractice case in many cases, 90 and their optimistic view of the role of the market in providing quality control of mass tort lawyers is highly questionable. For example, cultivating a “reputation for superior performance” may steer some percentage of referrals to the most competent lawyers, 91 but referral practices have criticized, because the receiving lawyers may be offering the highest percentage or because they may have gained their reputations primarily on the basis of mass marketing directly to the public. 92

The earlier proposal could have been revised to require both uniform contingent fees and super-majority approval as a condition of obtaining the court’s deference to an aggregate settlement. Even these conditions, however, would not justify either the presumption that a settlement allocation is fair or the underlying standard that the burden is on the challenger to prove that the settlement is grossly unfair or inadequate. Uniform contingent fees may not be achievable (at least where referral fees are permitted) and, in

88 Silver & Baker, Mass Lawsuits, supra note ___, 32 Wake Forest L. Rev. at 773-778 (discussing “[o]ther protections [that] can supplant the unanimity requirement” even in the absence of judicial review of an aggregate settlement).
89 As noted earlier, the requirement of uniform contingent fees would eliminate the plaintiffs’ attorney’s incentive to favor claimants with whom the attorney has a direct retainer agreement over those referred by other lawyers (because in the latter cases, the attorney will have to divide the fee with the referring lawyer). See supra note ___ & accompanying text.
90 See Silver & Baker, Mass Lawsuits, supra note ___, 32 Wake Forest L. Rev. at 777-778 (difficult for many plaintiffs to establish that “the value of his or her claim was worth more relative to other settled claims than he or she received”).
91 Id. at 777.
92 See, e.g., Ericsson, “Non-Class Collective Representation,” supra note ___ at 537 & n. 537 (reporting criticisms of some plaintiffs lawyers). Professor Ericsson himself concludes that “[i]n general, however, it is reasonable to expect that the incentives of the referral market would generally channel referral cases to lawyers competent to take advantage of economies of scale and opportunities for bargaining leverage.” Id. at 537-538.
any event, they would eliminate only one of a number of incentives for common
attorneys to favor one group of claimants over another.93 As for supermajority approval,
as discussed earlier, that requirement reduces but cannot eliminate “the number of clients
in danger of being sold out,”94 particularly when claimants with smaller, less credible
claims vastly outnumber claimants with more serious claims.95

Aside from the unwarranted presumption of fairness and the refusal to provide
relief unless a settlement is grossly unfair, the earlier proposal was inadequate in several
respects. First, the claimant had to file the challenge “within 90 days of receiving actual
notice of the consummation of a settlement,”96 but 90 days is almost certainly inadequate
for a claimant not only to decide that he or she believes the settlement is inadequate or
unfair (which, under the current rule, is all a claimant needs to do in order to reject the
settlement and therefore avoid being bound), but also to find a lawyer with the required
knowledge and experience who is willing to file the challenge on such short notice.

Even if the short time frame were not an obstacle in itself, it is unclear what
incentive there would be for competent lawyers to take on these challenges. The proposal
provided that they might be entitled to reasonable attorneys’ fees and costs if they
prevailed,97 but there would be no guarantee that they would prevail, and in any event,
winning would not be easy given both the presumption of adequacy and fairness and the
need to prove gross injustice. Of course, there is also no guarantee that attorneys who

93 See supra notes ___ & accompanying text.
94 Silver & Baker, Mass Lawsuits, supra note ___, 32 Wake Forest at 778.
95 See supra notes ___ & accompanying text.
96 See supra note ___ & accompanying text.
97 Section 3.18(f) provided that the common attorney who negotiates a settlement later determined to be
unenforceable “may be required to pay the reasonable attorneys’ fees and costs incurred by the challenging
claimant,” but the reporters did not explain why the challenging claimant is not automatically entitled to
receive these fees and costs or what factors should determine when they are recoverable. ALI Draft
Proposal, Prelim. Draft No. 4, supra note ___ at §3.18(f) (emphasis added).
agree to represent plaintiffs in mass tort lawsuits on a contingency fee basis will prevail, and yet clients can often find attorneys to represent them. There, however the attorneys stand to earn very substantial fees if they do prevail (including negotiated settlements), and they can spread what can be the very substantial costs of developing mass tort claims among a large number of claimants. Here, however, the amount that the attorneys stood to earn was considerably less,98 and they will not be able to spread the costs of proving inadequacy or unfair allocation among as large a group.

And how would these lawyers demonstrate that a settlement agreement was either grossly inadequate or unfair? Under the current aggregate settlement rule, a claimant’s mere suspicion that the settlement is unfair is sufficient to warrant the claimant’s refusal to be bound by its terms. But under the earlier draft proposal, the claimant would have to prove inadequacy or unfair allocation. Individual claimants are unlikely to have the requisite evidence at their disposal, and it was unclear from the proposal whether or to what extent they would be entitled to formal discovery---from both the common attorney and the defendant’s attorney---concerning all of the pertinent information necessary to prove their claim.

Neither Supermajority Approval Nor a Fairness Hearing Provides for Unique Client Preferences and Individual Client Autonomy

According to Professor Erichson, the aggregate settlement rule not only provides a monitoring effect on the lawyers, but also “enables clients to effectuate individualistic

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98 Undoubtedly, as with most fee shifting provisions, the prevailing attorney’s reasonable fees would be determined by the lodestar method, under which fees are determined on the basis of a reasonably hourly rate. Hensley v. Eckerhart, 461 U.W. 424 (1983). In these cases, however, the work would be limited in scope, particularly if discovery of information surrounding the settlement is limited. Even if the challenging claimant or claimants agreed to pay the attorney a contingent fee, success in the litigation would not result in an award of damages (unless the common attorney offered a sum of money in return for the claimant dropping his or her challenge to the settlement), and in any event, the total amount of fees would still be small because of the fewer numbers of claimants involved than in the main litigation.
preferences.”99 In other words, “[e]ven assuming perfect equity in the allocation of settlement funds, some clients may rationally choose to accept the settlement while others rationally choose to reject it, based on different approaches to settlement decisionmaking, different levels of risk tolerance, and different objectives and priorities in litigation.”100 No doubt the reporters would respond that it is also rational for clients to agree to waive their rights under the aggregate settlement rule, in return for increased efficiencies and bargaining leverage that benefit the group as a whole; and that we should support unique client preferences by respecting a client’s preference to rely on both the integrity of the individual lawyer and a limited form of judicial review to protect them against inadequate and unfair settlements.101

I remain unconvinced that the increased efficiencies and bargaining leverage gained through aggregating claims are not already available to the vast majority of claimants under the current rule.102 In any event, client waivers obtained under the draft proposal are not likely to reflect true client “preferences” in most cases. Particularly in mass tort lawsuits, many of the clients will be unsophisticated and inexperienced users of legal services.103 They are unlikely to have had an ongoing relationship with the common attorney and will probably have selected him or her (or even a referring lawyer) on the

100 Id.
101 This is the thrust of the position that Professors Silver and Baker put forth in their earlier articles cited at supra notes ___ & ___.
102 See supra note ___ & accompanying text.
103 See, e.g., Moore, supra note ___, 41 So. Texas L. Rev. at 181. (discussing mass tort claims) Of course, the aggregate settlement rule also applies in cases involving more sophisticated clients, typically those involving contract rather than tort claims. See, e.g., Tax Authority, Inc. v. Jackson Hewitt, Inc., 187 N.J. 4, 898 A.2d 512 (2006) (applying Rule 1.8(g) to attorney representing 154 individual franchisees suing tax preparation franchisor alleging improper retention of funds in loan risk pool after delinquent loans were paid, in violation of franchise agreements). Whether it would be desirable—or even possible—to limit the proposed modifications to cases involving sophisticated and experienced users of legal services is beyond the scope of this article. My initial reaction, however, is that this would require reviewing an attorney’s conduct on a case-by-case basis, which would seriously impinge on the ability of plaintiffs and defendants lawyers to know in advance when aggregate settlements are permissible.
basis of mass marketing. 104 Their “preference” to waive will undoubtedly be shaped almost entirely by the attorney. They will have little basis to evaluate the trustworthiness of the attorney, the risk of conscious or even unconscious bias in settlement allocation, or the deficiencies of any limited judicial review. The attorney will be strongly motivated to persuade them to sign the waiver, and indeed will probably refuse to represent them unless they do so. In such circumstances, I believe we respect true client preferences and autonomy by allowing clients the freedom to accept or reject an aggregate settlement offer only after ensuring that they have received the information they need to evaluate the fairness and adequacy of that settlement.

But what of the reporters’ response, as noted earlier, that “waivers are valid in a variety of areas in which important rights are at stake,” and thus a waiver that is “knowingly and voluntarily made, is in writing and it signed after full disclosure” should be binding? 105 Isn’t the refusal to permit clients to waive their rights under the aggregate settlement rule is unnecessarily paternalistic. 106 I agree that there is an undeniable element of paternalism in refusing to honor client “preferences” to execute these waivers, but I disagree that such paternalism is unwarranted. 107 Indeed, it is entirely consistent with other aspects of the law governing attorney-client relations, including law that was recently approved by the ALI in its Restatement of the Law Governing Lawyers. 108

The ALI Draft Proposal Is A Radical Departure From The Current Law of Lawyering

104 See Erichson, “Non-Class Collective Representation,” supra note ___ at 534-539.
105 See supra note ___ & accompanying text.
In the ALI Draft Proposal, the reporters say very little about the autonomy argument. Rather, they merely note that litigants are permitted to waive important rights “in a variety of areas.” It is noteworthy, however, that the examples they cite are not from the law of lawyering, but rather primarily from constitutional cases in which litigants have been permitted to waive their due process rights to notice, to a hearing and to trial. Of course, the standard for determining when waivers are binding in constitutional cases is not necessarily the same standard applied in other contexts. Both federal and state governments are free to and commonly do offer protections beyond those granted under their constitutions, including non-waiveable rights to void certain agreements likely to have been made on the basis of either a lack of information, unequal bargaining power or coercion. This is particularly true when it comes to the law of lawyering.

According to the Restatement, “[a] lawyer is an 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

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110 Id. at Reporter’s Notes to comment a. The reporters cite to cases holding that litigants may waive procedural due-process protections, including notice, hearing and trial, and further note that criminal defendants who enter guilty pleas thereby waive their rights to a jury trial, to confront adverse witnesses, and to have the case against them proved beyond a reasonable doubt. Id. They also cite to a federal statute permitting military personnel to waive various rights, including the right to terminate residual and automobile leases. Id. They cite to only one example in the context of the law of lawyering—a recent ABA opinion relaxing somewhat the ability of sophisticated clients to give advance waivers of conflicts. Id. It is notable, however, that the ABA opinion they cite continues to find that many advance waivers are nonconsentable, particularly when the clients are unsophisticated, as are most mass tort plaintiffs. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 05-436 (2005).
complexity.” Further, “[b]ecause those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law...provides a number of safeguards for clients beyond those generally provided to principals.”

Consider the number of situations in which the current law of lawyering refuses to honor client “preferences” in order to protect clients from attorney overreaching. Under Rule 1.2(c), lawyers may not limit the scope of the representation, even with the client’s informed consent, unless the limitation is “reasonable.” Similarly, under Rule 1.5(a), lawyers may not charge “unreasonable” legal fees. Under Rule 1.7(b), lawyers may not represent clients with conflicting interests, even with the clients’ informed consent, unless the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” Under Rule 1.8, lawyers may not: engage in business transactions with clients unless the terms are objectively “fair and reasonable,” prepare instruments giving the lawyer a substantial gift, make agreements giving the lawyer literary or media rights based on information relating to the representation, make an agreement prospectively limiting the lawyer’s liability for

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112 Restatement LGL, supra note ___, Ch. 2, Introductory Note.
113 Id. (emphasis added).
114 Model Rules, supra note ___, Rule 1.2(c). See also Restatement LGL, supra note ___ at §19 & comment c.
115 Model Rules, supra note ___, Rule 1.5(a). See also Restatement LGL, supra note ___ at §34 & comment b.
116 Model Rules, supra note ___, Rule 1.7(b). See also Restatement LGL, supra note ___ at §122(2)(c) & comment g(iv).
117 Model Rules, supra note ___, Rule 1.8(a). See also Restatement LGL, supra note ___ at §126 & comment b.
118 Model Rules, supra note ___, Rule 1.8(c). See also Restatement LGL, supra note ___ at §127(1) & comment b.
119 Model Rules, supra note ___, Rule 1.8(d). See also Restatement LGL, supra note ___ at §36(3) & comment d.
malpractice (unless the client is independently represented in making the agreement);120 or have sexual relations with a client.121 These limitations on client consent are not free from criticism,122 but they have been widely adopted123 and, more important, they were recently approved by the American Law Institute itself when it adopted the Restatement of the Law Governing Lawyers.124

Advance waivers have been singled out as particularly problematic. Consider Comment [22] to Rule 1.7:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [which includes both a requirement of informed consent and a requirement that the lawyer must reasonably believe that the lawyer will be able to provide competent and diligent representation]. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent….In any case, advance consent cannot be effective if the circumstances that materialize in

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120 Model Rules, supra note ___. Rule 1.8(h)(1). Cf. Restatement LGL, supra note ___ at §54(2) & comment b (providing no exception for independently represented clients).
121 Model Rules, supra note ___. Rule 1.8(j). Cf. Restatement LGL, supra note ___ at §16(3) & comment e (providing no per se ban but prohibiting sexual relations when that would “undermine the client’s case, abuse the client’s dependence on the lawyer or create risks to the lawyer’s independent judgment [as in divorce cases]”).
122 See, e.g., Lawrence J. Fox, “When It Comes to Sex with Clients, Whom Do You Trust: Nanny or the ABA?” 19 GP Solo 36 (Oct./Nov. 2002) (urging ABA rejection of then proposed Model Rule 1.8(j) prohibiting most sexual relationships with clients). More states have rejected Model Rule 1.8(j) than the other rules discussed here. See infra note ___.
123 For an ABA chart noting state versions of various Model Rules, see http://www.abanet.org/cpr/jclr/charts.html.
124 See supra notes ____.
the future are such as would make the conflict nonconsentable under paragraph (b). 125

The ALI Draft Proposal clearly contemplates a form of advance waiver, not necessarily of the right to representation free of conflicting interests, 126 but rather of the client’s right to accept or reject a settlement offer after being advised not only of its terms with respect to the individual client, but also of any other information reasonably necessary to permit the client to make an informed decision, including information currently required to be disclosed under the aggregate settlement rule. 127 It is difficult to

125 Model Rules, supra note ___, Rule 1.7, Comment [22]. See also Restatement LGL, supra note ___ at §122, comment d.
126 Attorneys who represent multiple clients with similar claims in mass tort lawsuits typically do have such conflicts of interest, particularly if they are negotiating (or anticipate negotiating) an aggregate settlement of those claims. See Moore, supra note ___, 41 So. Tex. L. Rev. at 177. The propriety of the representation itself, even with conflict waivers, is governed by Rule 1.7 and is beyond the scope of this paper. In any event, however, it is clear that waivers under Rule 1.7 are separate from the type of waiver the reporters contemplate to the protections of Rule 1.8(g).
127 Even in the absence of Rule 1.8(g), the client would have these rights under Rule 1.2(a) (providing that it is the client’s decision whether to accept or reject a settlement offer) and 1.4(b) (providing that a lawyer “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”). See Model Rules, supra note ___, Rules 1.2(a); 1.4(b). According to the Restatement, clients can authorize an attorney to accept a settlement offer on their behalf, but they can also revoke that authority at any time prior to acceptance, and they cannot effectively create an irrevocable authority to settle in favor of the attorney. Restatement LGL, supra note ___ at §22(3). These limitations on waiveability derive from agency law, which generally provides that an agent may not act contrary to a principal’s instructions, even when the instructions are contrary to a contract been the parties and the authority is expressed to be irrevocable. In a prior draft, the reporters argued that the recognized exception for agents “possessing a power given as security” applies in the case of aggregate settlement waivers, even one purporting to give the lawyer alone the right to bind the client to a settlement, because the purpose of the waiver was to protect the interests of other claimants. See ALI Draft Proposal, Prelim. Draft No.4, §3.17, Reporter’s Notes to cmt. a. This argument may or may not be correct as a matter of agency law, but it ignores the additional protections provided under fiduciary (as opposed to contract) law, particularly the law governing lawyers. According to the Restatement, an agreement between a lawyer and a client that limits “a duty that a lawyer would otherwise owe to the client” is not enforceable unless “the terms of the limitation are reasonable in the circumstances,” [cite]. See generally Moore, supra, 41 S. Tex. L. Rev. at 175-176.

Apparently conceding the weakness of the argument they made in the prior draft, the reporters now recognize that “under prevailing ethics rules, a lawyer may not obtain a nonrevocable assignment of the client’s individual authority to decide whether to settle a case and for what amount.” ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17, cmt. a. They further argue, however, that this rule is not violated when the authority to settle “is not given to counsel but, instead, remains with the collective clients, who may act to accept a settlement pursuant to a waiver only [in accordance with the 75% approval requirement]”. Id. I am not persuaded that the supermajority-approval requirement changes the analysis.
imagine that the attorney could provide disclosure at the outset of the representation that would be adequate for unsophisticated mass tort clients to reasonably understand the material risks such a waiver entails. At the time of retention—which is when the draft proposal contemplates many waivers will be obtained—clients will typically have little idea what the value of their claims is likely to be, how their claims will compare to the claims of others, and how various methods of allocating a lump sum settlement are likely to affect them. Such information is more readily available the farther along the lawsuits proceed, but if we modify the proposal to require that waivers will be effective only if obtained until much later in the representation, the burden of fully informing the clients of the material risks of an impending aggregate settlement (given their individual circumstances as compared to the others in the group) will be virtually identical to the burden of providing relevant information after the settlement has been negotiated. At this point, the only rationale for allowing the waivers would be avoiding the possibility of strategic hold-outs, but the reporters have yet to demonstrate that this problem alone is a sufficiently serious to warrant abrogation of the aggregate settlement rule.

In the Absence of Ex Ante Waivers Under §3.17, Judicial Approval is Clearly No Substitute for the Aggregate Settlement Rule

In addition to ex ante waivers under Section 3.17, the reporters are proposing in Section 3.19 that a plaintiff’s attorney who receives an aggregate settlement offer “may

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under either Rule 1.2(a) or agency law, as the client would still be giving up the right to make the final decision regarding settlement.

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See ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.17(c).

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See, e.g., Silver & Baker, “Allocating Settlement Proceeds,” supra note ___ at 1505 (plaintiffs have no idea what the size of their “ownership interest in a litigation group is and, moreover, [have] no objective way of finding out”); “[p]laintiffs typically do not learn how large their shares are until they receive settlement offers for approval”; “[h]aving little or no idea how much their claims are worth, clients [both individually and in groups] pay their lawyers in part to provide an assessment”).

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See supra notes ___ & accompanying text.
seek approval for the fairness and adequacy of such a settlement before a court of competent jurisdiction in the state where the original attorney-client agreement was formed.” The approval would extend only to the claims that are presented to the court for its review, and the attorney would be forced not only to “affirmatively demonstrate the fairness of the proposed settlement,” but also to “provide a compelling explanation for why a waiver was not secured pursuant to §3.17.” The reporters provide no explanation for why such an exception to the aggregate settlement rule is either necessary or desirable. In an earlier draft, they suggested that a potentially “compelling reason” for not securing an advance waiver under Section 3.17 was that the affected claimants did not meet the numerosity or amount in controversy requirements of that section (thereby implying that ex ante waivers were in fact obtained), but they did not explain what is compelling about such a case, given that the reporters themselves expressly designed these requirements to pinpoint circumstances in which the aggregate settlement rule is thought to be unworkable.

Moreover, the reporters do not limit the exception to cases in which some form of ex ante waiver has been obtained. What possible reason could there be to permit a court to impose a settlement over the objection of one or more of the claimants in a non-class aggregation in which there is no ability---either ex ante or ex post---to opt out of the group settlement? It cannot be the burden of obtaining informed consent to the terms of the settlement, because Section 3.19(b) provides that prior to invoking this form of

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131 See supra note ___ & accompanying text.
132 ALI Draft Proposal, Disc. Draft No. 2, supra note ___ at §3.19, cmt. b. For reasons that are not explained, the text itself states that the lawyers who seek judicial approval “bear the burden of establishing that efforts to secure direct approval from clients were unavailing and why the terms of §3.17 could not be satisfied without judicial approval,” but does not state, as does the comment, that the lawyers bear the burden of establishing the fairness of the proposed settlement. Id. at §3.19.
133 ALI Draft Proposal, Preliminary Draft No. 4, supra note ___ at §3.19, comment b. The current draft gives no explanation for the removal of this language from the comment.
judicial review, “claimants’ counsel must use all reasonable efforts to notify all affected claimants and provide such claimants an opportunity to participate in the judicial proceedings.”\textsuperscript{134}

The reason for imposing settlements in the absence of ex ante waivers can only be that the attorney believes that the settlement is so good that any claimant who objects must be acting either irrationally or strategically. But it is not necessarily irrational to reject a settlement that someone else (even a court) believes is adequate and fair, given that individual preferences vary so widely,\textsuperscript{135} and the reporters cannot possibly contemplate that courts will determine whether individual claimants are or are not acting rationally, given their own unique preferences. Even if a claimant is acting either irrationally or strategically, attorneys have no right to attempt to override a client’s rejection of a settlement offer (through court approval) merely because the attorney purports to know what is best for the client or has other clients who want to accept the offer. For reporters who place a high value on the client’s right to autonomous decision-making,\textsuperscript{136} this particular proposal is both unjustifiably paternalistic and contrary to the attorney’s duty of loyalty to individual clients, including the duty to abide by each client’s decision concerning the objectives of the representation.

\textbf{Conclusion}

The goals of the ALI’s Principles of the Law of Aggregate Litigation are laudable, not only with respect to recommending procedures to better handle class action lawsuits, but also in it’s efforts to clarify and improve non-class aggregations, including the negotiation and settlement of mass tort claims. The aggregate settlement rule has

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\footnote{(\textsuperscript{134}) \textit{Id. at \S3.19(b).}}
\footnote{(\textsuperscript{135}) See supra note \_\_\_ & accompanying text.}
\footnote{(\textsuperscript{136}) See supra notes \_\_\_ & accompanying text.}
\end{footnotes}
spawned much confusion, making it difficult for both plaintiffs’ and defendants’ lawyers, acting in good faith, to conform their conduct to the rule. One of the primary difficulties has been the lack of a clear definition of what constitutes an aggregate settlement for purposes of triggering the rule’s requirements. Here the ALI Draft Proposal offers a definition that is not only clear, but also both principled and workable.

Another problem has been the failure to articulate precisely what information the plaintiffs’ lawyer must disclose to the claimants concerning the nature of all of the claims being settled. The ALI Draft Proposal endorses both recent changes to the ABA Model rules and an opinion of the ABA Standing Committee on Professional Ethics, which sets forth a number of specific matters the lawyer must disclose. In this respect, the proposal is to be commended. Unfortunately, the proposal does not clarify an important ambiguity under the current rule regarding the lawyer’s ability to protect the claimants’ privacy interests when detailed information (such as the claimants’ names) may not be necessary for other claimants to monitor the fairness of settlement allocations. It is to be hoped that the reporters will address this concern in future drafts.

Where the ALI Draft Proposal is seriously defective, however, is in the reporters’ efforts to make it possible for plaintiffs’ lawyers to bypass the aggregate settlement rule, primarily by having clients execute advance waivers of their right to the protections offered under that rule. The reporters have neither offered evidence that the rule significantly impedes the settlement of mass lawsuits nor drafted provisions that provide adequate alternative protection against inadequate and unfair settlements. Moreover, although purporting to honor client preferences and autonomy, the reporters ignore the danger that overreaching attorneys will shape client preferences at a time when the clients
have insufficient information to assess whether advance waivers are really necessary to obtain the benefits of collective litigation. The current law of lawyering recognizes that clients are often vulnerable and thus provides numerous safeguards for clients beyond those generally provided by other law. One of those safeguards is the current aggregate settlement rule. The burden is on the reporters to justify significant changes to that rule, and in my view they have not come close to meeting that burden.’