

# The Absence of Legal Ethics in the ALI's *Principles of the Law of Aggregate Litigation*: A Missed Opportunity— and More

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## INTRODUCTION

There is very little discussion of legal ethics in the American Law Institute's ("ALI") recently adopted *Principles of the Law of Aggregate Litigation* ("*Principles*"),<sup>1</sup> in either the blackletter rules or the comments. To be sure, the *Principles* devote several sections in the final chapter to the so-called aggregate settlement rule, i.e., Rule 1.8(g) of the *Model Rules of Professional Conduct*.<sup>2</sup> In one section, and its accompanying comment, the *Principles* define an aggregate settlement,<sup>3</sup> thereby providing the helpful guidance to both lawyers and courts that is otherwise missing from the Model Rule.<sup>4</sup> In another section, the *Principles* purport to "restate" Rule 1.8(g), including a brief discussion of precisely what sort of information claimants are entitled to receive when their common attorney negotiates and then asks them to approve an aggregate settlement of their claims.<sup>5</sup> Finally,

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<sup>1</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010).

<sup>2</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2008).

<sup>3</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.16 & cmt. (2010).

<sup>4</sup> See Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 396 (2008) (explaining the need for such a definition and the derivation of the ALI's proposed definition).

<sup>5</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(a) (2010). Elsewhere I criticized an earlier but substantially similar version of this section because it did not address the level of detail lawyers must provide. Moore, *supra* note 4, at 396–97. Given that clients often want to keep medical and financial information private, it is important to know to what extent their desires can be respected under the current rule. *Id.*; see also Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 162–64 (1999) (arguing that the concern for privacy does not necessarily require changing the aggregate settlement rule to permit clients to give advance consent to a settlement).

in the section that undoubtedly drives the entire discussion, the *Principles* propose a modification of the Rule as it has been adopted and interpreted in all U.S. jurisdictions,<sup>6</sup> by providing that claimants can agree in advance, under certain circumstances, to be bound by a majority vote in favor of a particular settlement.<sup>7</sup>

I have elsewhere written in opposition to an earlier version of the ALI's proposal to modify the aggregate settlement rule,<sup>8</sup> and I am not going to rehash that opposition in this Essay.<sup>9</sup> What I want to do here is to examine other parts of the *Principles* and comment on the implications of the dearth of any meaningful discussion of the ethical rules that apply to lawyers involved in various types of aggregate litigation, including both class actions and nonclass aggregations.<sup>10</sup> I began this investigation with the idea that the primary implication of the absence of legal ethics in the *Principles* was that the ALI had missed an opportunity both to remind lawyers of their ethical obligations in these types of proceedings<sup>11</sup> and to propose solutions to some of the ethical

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<sup>6</sup> See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. a (2010).

<sup>7</sup> See *id.* § 3.17(b); see also *id.* § 3.17(c)–(f) (providing additional requirements for use of an alternative to the traditional aggregate settlement rule); *id.* § 3.18 (providing for limited judicial review of aggregate settlements reached pursuant to the alternative to the traditional aggregate settlement rule).

<sup>8</sup> See Moore, *supra* note 4. See generally Moore, *supra* note 5 (responding to the proposal coauthored by Professor Charles Silver, one of the Reporters to the *Principles*).

<sup>9</sup> In a nutshell, my opposition was based on the belief that the Reporters had not met their burden to make a persuasive case for change. Moore, *supra* note 4, at 400–01. Specifically, I argued that there is no empirical evidence that advance waivers are necessary to encourage beneficial multiparty settlements. See, e.g., *id.* at 402–06. Also, the proposal is a radical departure from the current law of lawyering, which provides numerous instances of “nonwaivable rights to void agreements likely to have been made on the basis of a lack of information, unequal bargaining power, or coercion.” *Id.* at 401; see also *id.* at 416–20. Based on this opposition, I cosponsored a motion to delete sections 3.17(b) to 3.19 at the May 2008 meeting of the ALI. See LARRY S. STEWART ET AL., AM. LAW INST., MOTION TO DELETE SECTIONS 3.17(B)–3.19 (2008), <http://www.ali.org/doc/Motion-AggLit-Stewart.pdf>. The motion was discussed at that meeting, but no vote was taken, and the Reporters agreed to reconsider those sections. See AM. LAW INST., ACTIONS TAKEN WITH RESPECT TO DRAFTS SUBMITTED AT 2008 ANNUAL MEETING 17–18 (2008), [http://www.ali.org/\\_meetings/6-18-08-ActionsTaken.pdf](http://www.ali.org/_meetings/6-18-08-ActionsTaken.pdf).

<sup>10</sup> As an active participant in the Members' Consultative Group, I share some responsibility for this omission. Although I did inform the Reporters of at least some of these concerns at the outset of the project and at various subsequent meetings, see, e.g., Letter from author to Professors Samuel Issacharoff, Richard A. Nagareda & Charles Silver (May 24, 2005) (on file with author), I could have pressed harder to identify ethical issues and propose specific language. I will say, however, that it was the general feeling among some of the members with a background in ethics that the Reporters were not terribly interested in adding a discussion of ethics to the *Principles*, even in the comments.

<sup>11</sup> In the Introduction, the *Principles* state that “[t]he audience for this project includes judges, legislators, other rule-makers (such as state bar associations and their advisory committees), researchers, and others with control of or interests in civil litigation.” PRINCIPLES OF THE

issues that courts have yet to resolve, particularly in the area of class actions.<sup>12</sup> As I reread these other sections, however, I came to believe that there is an even greater significance to the absence of any meaningful discussion of legal ethics. As set forth below, I argue that in the class action context, the *Principles* appear to have inadvertently taken an unexplained position on the controversial question of client identification in class actions.<sup>13</sup> More important, the use of the unfortunate term “structural conflict of interest”<sup>14</sup> may seriously undermine the otherwise laudable attempt to clarify judicial determinations of the adequacy of legal representation.<sup>15</sup> With respect to nonclass aggregations, I argue that the *Principles*’ failure to address ethical rules governing communication and conflicts of interest outside the context of aggregate settlements makes it likely that mass tort lawyers will continue to treat their clients as if they were absent members of a class, without the protections afforded a class.<sup>16</sup>

#### I. THE MISSED OPPORTUNITY: CLASS ACTIONS AND NONCLASS AGGREGATIONS

Issues of legal ethics arise frequently in class action litigation, including conflicts of interest, solicitation, communication, the reasonableness of attorney’s fees, and the attorney-witness rule.<sup>17</sup> Despite the frequency with which these issues arise, current rules of professional conduct do little to address the application of these rules in the context of class actions specifically,<sup>18</sup> and the ALI’s *Restatement (Third) of the Law Governing Lawyers* similarly devotes little attention to class action lawyers.<sup>19</sup>

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LAW OF AGGREGATE LITIG. intro., at 2 (2010). Although this intended audience does not exclude lawyers involved in aggregate litigation, it would appear that the Reporters did not view it as an important part of the project to educate lawyers as to their obligations (ethical or otherwise) when appearing in these types of proceedings. I view this as unfortunate, and I know that my views were shared among a number of ALI members who, like myself, have a background in legal ethics.

<sup>12</sup> See *infra* notes 17–30 and accompanying text.

<sup>13</sup> See *infra* notes 42–46 and accompanying text.

<sup>14</sup> E.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) (2010).

<sup>15</sup> See *infra* notes 47–56 and accompanying text.

<sup>16</sup> See *infra* note 69 and accompanying text.

<sup>17</sup> Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1477–78.

<sup>18</sup> *Id.* at 1478–80.

<sup>19</sup> The *Restatement* raises a number of issues in the context of class actions but rarely proposes a solution. For example, it notes that “[c]lass actions may pose difficult questions of client identification,” but does not suggest whether it is the class itself or individual class members who should be regarded as the class action lawyer’s client or clients. See RESTATEMENT

In an earlier article, I defended the decision of the American Bar Association's Ethics 2000 Commission not to adopt either a separate class action rule or extensive commentary addressing the application of the rules to class action lawsuits.<sup>20</sup> The first reason I gave was that much of the confusion surrounding the application of rules of professional conduct in class actions could be significantly reduced, without revising the ethics rules, if courts would adopt the view that the class is an entity client of the class action lawyer, even at the precertification stage of the litigation,<sup>21</sup> and if courts would recognize that many so-called "conflicts of interest" issues are the type of agency problems that are not meant to be resolved under conflict of interest doctrine.<sup>22</sup> The second reason I gave was that even if there are some situations in which "relaxation (or special application)" of the rules may be necessary in class actions, whether and when such rules are applied is a question more properly decided under procedural class action rules—primarily Rule 23 of the Federal Rules of Civil Procedure and the caselaw applying that rule—rather than under rules of professional conduct or by ethics committees and courts applying those rules.<sup>23</sup> Focusing on the issue that has dominated much of the discussion of ethics and class actions—the application of current conflict of interest rules—I concluded that viewing the class as an entity client makes it clear that conflicts within the class are not properly the subject of conflict of interest rules, such as Rule 1.7 of the *Model Rules of Profes-*

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(THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f (2000). Similarly, with respect to proceedings requiring a special degree of candor toward the tribunal, the *Restatement* provides that class counsel "has duties of care toward the class and *may be* taking a position that requires an informed decision by the tribunal. In such circumstances . . . the lawyer must disclose information necessary for the tribunal to make an adequately informed decision." *Id.* § 112 cmt. c (emphasis added). For additional passing references to issues arising in class actions, see *id.* § 22 cmt. c (authorization of settlements); *id.* § 36 cmt. c (client responsibility to pay expenses); *id.* § 99 cmt. g (application of no-contact rule); *id.* § 125 cmt. f (defendant's acquiescence in class counsel's proposed fee award); *id.* § 128 cmt. f (differences within class not creating ethical conflicts of interest).

<sup>20</sup> See Moore, *supra* note 17, at 1480–81.

<sup>21</sup> *Id.* at 1482–89.

<sup>22</sup> *Id.* at 1489–92. An example of an agency problem that is not addressed by the conflict of interest doctrine is the "conflict between the client's interest in having the lawyer devote the most time possible to the client's cause at the lowest possible price and the lawyer's interest in devoting the least possible time at the highest possible price." *Id.* at 1490. These types of inevitable agency problems "permeate legal and other professional practice" and are regulated by relying on either lawyer professionalism or on other professional rules, such as those governing competence, diligence, and legal fees. *Id.* at 1490–91. Conflict of interest rules address conflicts that are unique to particular lawyers and that can be avoided or removed by permitting or requiring clients to find another lawyer. *Id.*

<sup>23</sup> *Id.* at 1498–503.

sional Conduct.<sup>24</sup> Nevertheless, I also concluded that, when class counsel is currently representing (or has formerly represented) individuals outside the class, such individuals are entitled to the full protection of professional conflict of interest rules.<sup>25</sup> There may be danger to the class as well; however, I urged that such danger be resolved not under rules of professional conduct, but rather as part of the court's determination of the adequacy of class counsel's representation under Rule 23 of the Federal Rules of Civil Procedure.<sup>26</sup>

These issues that I have previously addressed are some of the ethical issues facing class action lawyers that the Reporters could have addressed in the *Principles*—along with issues concerning communication,<sup>27</sup> solicitation,<sup>28</sup> and the attorney-witness rule<sup>29</sup>—but chose not to in the rules themselves or even in the comments. I view this as a missed opportunity, both to alert class action lawyers to at least some of the ethical problems they might encounter and to assist courts in untangling the knots these problems present, such as when an individually represented client requests disqualification of class counsel because of an ethical conflict of interest.<sup>30</sup>

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<sup>24</sup> *Id.* at 1482–89.

<sup>25</sup> *Id.* at 1492–98.

<sup>26</sup> *Id.* at 1498–503.

<sup>27</sup> *See, e.g.,* ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* §§ 15:5–15:20 (4th ed. 2002) (discussing communication with class members and potential class members, including contacts by class counsel and opposing counsel). *See generally* Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353 (2002) (same).

<sup>28</sup> *See, e.g.,* CONTE & NEWBERG, *supra* note 27, § 15:04.

<sup>29</sup> *See, e.g., id.* § 15:23.

<sup>30</sup> In 2005, I testified as an expert on behalf of an individual member of a putative class who testified that his law firm had told him that his case would be litigated individually and not as part of a class. When he learned that his law firm had negotiated a settlement of a class action before a class action lawsuit was filed, although he had never been informed of these negotiations, he moved to disqualify his law firm as class counsel because of a conflict of interest between himself and the putative class. The motion was denied after a former federal judge, who had been retained as an expert by the lawyers in question, testified to what he believed was intended in a judicial opinion he himself had written concerning the relaxation of ethics rules when a former class counsel appears on behalf of objectors to a proposed settlement. He was also permitted to testify as to conversations he had with another federal judge concerning the interpretation of this and other similar cases. *See Simon v. KPMG LLP*, No. 05-CV-3189 (DMC), 2006 WL 1541048, at \*9–10 (D.N.J. June 2, 2006) (finally approving the settlement with brief reference to an earlier denial of a motion to disqualify); Transcript of Proceedings, *Simon*, 2006 WL 1541048 (No. 05-CV-3189 (DMC)) (Oct. 28, 2005) (on file with author) (including testimony of Hon. Arlin Adams); Transcript of Proceedings, *Simon*, 2006 WL 1541048 (No. 05-CV-3189 (DMC)) (Oct. 31, 2005) (on file with author) (including testimony of Professor Nancy J. Moore).

Outside the class action context, aggregate litigation also raises a myriad of ethical issues, including conflicts of interest,<sup>31</sup> communication,<sup>32</sup> solicitation,<sup>33</sup> referrals,<sup>34</sup> and attorney's fees.<sup>35</sup> Although some of these issues are briefly mentioned in either the comments<sup>36</sup> or the Reporters' Notes,<sup>37</sup> they are not discussed in any meaningful way—except with respect to the aggregate settlement rule<sup>38</sup>—and the references are too fleeting to alert lawyers to the nature of the issues, the applicable rules of professional conduct, or other resources that lawyers might consult.<sup>39</sup> Again, the failure to fully address these issues can be viewed as a missed opportunity to give helpful guidance to both lawyers and courts concerning ethics issues that commonly arise in nonclass aggregations.

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<sup>31</sup> See, e.g., Moore, *supra* note 5, at 177–78 (discussing conflicts among multiple claimants that begin as they agree to pursue collective action through common representation).

<sup>32</sup> See *id.* at 160–62.

<sup>33</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.3 (2008).

<sup>34</sup> See, e.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 535–38.

<sup>35</sup> See generally Judith Resnik, *Money Matters: Judicial Market Interventions, Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000) (advocating for stronger judicial regulation of attorney's fees in aggregate litigation); Nancy J. Moore, *Ethics Matters, Too: The Significance of Professional Regulation of Attorney Fees and Costs in Mass Tort Litigation—A Response to Judith Resnik*, 148 U. PA. L. REV. 2209 (2000) (responding to Professor Resnik's article).

<sup>36</sup> See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. c (2010) ("Speaking generally . . . outside of representational lawsuits the law generally assumes that parties always adequately represent themselves. This assumption may be incorrect in non-class aggregate lawsuits because of deficient incentives, conflicts of interest, or other reasons."). This is an important statement; however, it appears in a paragraph addressing the due process requirement of adequate representation in class actions. Thus, it does not appear to be intended or likely to alert nonclass lawyers to the conflicts of interest problem that is likely to arise when such lawyers represent hundreds or thousands of clients with similar claims against a common defendant.

<sup>37</sup> See, e.g., *id.* § 1.02 reporters' note cmt. b(3) ("Cocounsel representations are subject to professionalism rules that permit lawyers to share fees in proportion to the services rendered or otherwise if all lawyers accept joint responsibility for the matter. Usually, fee sharing is settled by agreement when new attorneys are brought into a case."); *id.* § 1.04 reporters' note cmt. c ("Agreements among litigants or between litigants and lawyers purporting to establish the objectives of litigation may be governed by contract law, the law governing lawyers, agency law, or other law."). Because lawyers are less likely to consult Reporters' Notes, it would have been preferable to put discussions such as these in the comments themselves.

<sup>38</sup> See *supra* notes 1–7 and accompanying text.

<sup>39</sup> See, e.g., *supra* notes 36–37.

## II. MORE THAN A MISSED OPPORTUNITY

### A. *Ethics and Class Actions*

There are at least two ways in which I believe the ALI has done more than simply miss an opportunity to highlight and address the ethics of class action lawyers. One is relatively minor.<sup>40</sup> The other is potentially more significant because it undermines the Reporters' laudable effort to clarify the adequacy of representation requirement under Rule 23 and bears directly on what I believe was the underlying objective of the project—to advance the efficiency concerns of aggregate litigation while simultaneously articulating the manner in which the interests of individual claimants can be protected.<sup>41</sup>

First, instead of simply ignoring the fact that courts have not clearly articulated the relationship of class counsel to the individual members of the class, as well as the class itself,<sup>42</sup> the *Principles* appear to have inadvertently endorsed the view that all members of the class, whether class representatives or absent class members, are individual clients of the lawyer. For example, section 1.04(a) states that “[a] lawyer *representing multiple claimants* or respondents in an aggregate proceeding should seek to advance the common objectives of those claimants or respondents.”<sup>43</sup> This section is clearly intended to address both class and nonclass aggregations,<sup>44</sup> and yet nothing in either the comment or even the Reporters' Notes addresses the confusion that currently exists regarding the precise nature of the relationship between class counsel and the individual members of a class, particularly the absent class members.<sup>45</sup> One of the consequences of identifying class members as clients is that it suggests the need to relax

<sup>40</sup> See *infra* notes 42–46 and accompanying text.

<sup>41</sup> See *infra* notes 47–52 and accompanying text.

<sup>42</sup> See, e.g., Moore, *supra* note 17, at 1484–85.

<sup>43</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04(a) (2010) (emphasis added).

<sup>44</sup> The term “aggregate proceedings” is elsewhere defined to include not only class actions, but also administrative aggregations and private aggregations, which are “informal collection[s] of the claims or defenses of multiple parties, represented persons, claimants, or respondents proceeding under common nonjudicial supervision or control.” *Id.* § 1.02.

<sup>45</sup> In the Reporters' Notes, the Reporters appear to take the view that class counsel represent named plaintiffs, who themselves owe a fiduciary duty to the unnamed members of the class. *Id.* § 1.04 reporters' note cmt. a (“Class counsel is thus a fiduciary to a client who is also a fiduciary.”) The Reporters do not note, however, the apparent contradiction between this statement and the blackletter of section 1.04(a). In addition, it may not be the case that class counsel has a typical attorney-client relationship with each of the named plaintiffs, i.e., on the basis of an individual retention agreement, particularly if the amount of their individual claims is so low that the attorney would not be willing to represent them in an individual capacity. See, e.g., Moore, *supra* note 17, at 1497. I have been involved as an expert witness in a lawsuit by a class representative who sued class counsel in a consumer dispute for breach of fiduciary duty. In that lawsuit,

ethical-conflicts rules in order to permit class actions to proceed, whereas viewing the class itself as an entity client makes it clear that conflict of interest rules simply do not apply to intraclass conflicts.<sup>46</sup>

Second, and more important, the *Principles* create unnecessary and potentially serious confusion by using the term “structural conflicts of interest,” particularly in section 2.07(a)(1), which addresses one aspect of the traditional determination of the adequacy of representation as a prerequisite to satisfying the requirements of constitutional due process in binding absent members of the class.<sup>47</sup> That section is titled “Individual Rights in Aggregation of Related Claims,” and subsection (a)(1) provides as follows:

(a) As necessary conditions to the aggregate treatment of related claims by way of a class action, the court shall

(1) determine *that there are no structural conflicts of interest*

(A) between the named parties or other claimants and the lawyers who would represent claimants on an aggregate basis, which may include deficiencies specific to the lawyers seeking aggregate treatment or

(B) among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.<sup>48</sup>

The use of the term “structural conflicts of interest” is not explained in either the blackletter Rule or the Comment.<sup>49</sup> The Report-

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the class counsel claimed that the plaintiff was merely a named class representative, and not an individual client, even prior to the time that any class action lawsuit was filed.

<sup>46</sup> Moore, *supra* note 17, at 1482–89.

<sup>47</sup> See *id.* at 1501 n.149 (discussing the adequacy of representation by class counsel under both Federal Rule of Civil Procedure 23(a)(4) and the Due Process Clause of the U.S. Constitution).

<sup>48</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) (2010) (emphasis added).

<sup>49</sup> The Reporters did not originate this term. Its first use in the class action context may have been in a 1983 article by Professor John Coffee, in which he makes three arguments: (1) a plaintiffs’ class counsel has a conflict of interest when the fee award is based on hours worked; (2) defense counsel may take advantage of this conflict to tacitly agree with class counsel to settle at a low amount in return for permitting class counsel to expend more time; and (3) this collusion is “structural rather than conspiratorial” and results in inadequate settlements. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty*



ers' Notes, however, inform us that "[t]he casting of subsection (a)(1) in terms of 'structural conflicts of interest' is designed to lend greater precision to the loyalty inquiry in connection with class actions, an inquiry historically phrased in terms of adequate representation."<sup>50</sup> The Notes go on to explain that "structural conflicts of interest" are those that are "discernible as part of the determination to aggregate or that emerge as part of that proceeding" and that "speak[ ] to the legitimacy of the class judgment from its inception and irrespective of its outcome."<sup>51</sup> In other words, the point is to separate those aspects of adequacy that derive from "an improperly constituted class" from those aspects that are "inextricably linked to outcome," for example, the adequacy of a class settlement.<sup>52</sup>

The term is unfortunate. When these structural conflicts encompass serious conflicts of interest among various groups within the class—the type that requires subclassing in order to avoid the due process problems encountered in decisions like *Amchem*<sup>53</sup>—the use of the term is both obvious and helpful. Moreover, conflicts among class members are best viewed as completely outside the protection of the profession's conflict of interest rules.<sup>54</sup> As a result, the failure to reference ethical conflict of interest doctrine creates no particular confusion. However, as used in section 2.07(a)(1), the *Principles* reference not only these types of intraclass conflicts, but also other types of conflicts that *are* covered by traditional conflict of interest rules. Examples include conflicts that arise when a lawyer currently represents individuals outside the class with claims that are similar to those of the

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*Hunter Is Not Working*, 42 MD. L. REV. 215, 247–48 (1983). The term's notoriety, however, was almost certainly the result of its use by the Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n.20, 627 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856–57 & n.31 (1999) (citing *Amchem*). In those two cases, the Supreme Court appeared to be using the term to refer to conflicts within the class itself. The term was also featured prominently in a more recent article by Professor Coffee. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 386 (2000) (discussing "structural conflicts in the mass tort class action" in the following groups: "(1) internal conflicts that exist within the class . . . ; (2) external conflicts that arise because class members (or their attorneys) have some extraneous reason for favoring a settlement that does not truly benefit the interests of all class members; (3) risk conflicts that arise because class members or class counsel have very different attitudes about the level of risk they are willing to bear; and (4) conflicts over control of the litigation"). The use of the term in all of these different contexts is no more helpful than its use by the Reporters in this project, except perhaps when the Supreme Court uses it to reference conflicts within the class that require subclassing.

<sup>50</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 reporters' notes cmt. d (2010).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Amchem Prods., Inc.*, 521 U.S. at 626 & n.20.

<sup>54</sup> Moore, *supra* note 17, at 1487–89.

class and conflicts that arise when a lawyer has previously represented a defendant in a substantially related matter.<sup>55</sup> Section 2.07(a)(1) also encompasses conflicts between members of the class who have individual retainer agreements with the lawyer and those who do not.<sup>56</sup>

It should be the case that when these types of conflicts arise, clients outside the class are entitled to the full protection of the rules of professional conduct, including disqualification of class counsel when necessary to protect the interests of the nonclass clients.<sup>57</sup> But what about the interests of the class itself? Section 2.07(a)(1) suggests that if there is “a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves,”<sup>58</sup> then aggregate treatment by way of a class action is inappropriate. In other words, a precondition to such aggregate treatment by way of a class action is a determination that “there are *no* structural conflicts of interest.”<sup>59</sup> Here, the use of the term “structural conflict of interest” is confusing because the analysis appears to differ in important respects from the treatment of such conflicts under traditional conflict of interest rules.

Under Model Rule 1.7, a potentially impermissible conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”<sup>60</sup> However, the mere existence of such a conflict does not necessarily render the representation unethical. Rather, if the conflict is consentable, then the lawyer may proceed with the

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<sup>55</sup> See *id.* at 1492–98 (urging straightforward application of the conflict of interest rules in order to protect the interests of the nonclass current or former client).

<sup>56</sup> See *id.* at 1493. For example, individual retainer agreements may give the lawyer a legal fee that is a larger percentage of the amount received by a claimant than the lawyer would receive as a fee award from the court. *Id.* at 1499 & n.134. That would give the lawyer an incentive to favor the lawyer’s own clients in any settlement agreement. *Id.* at 1499; see also, e.g., Moore, *supra* note 4, at 409 n.83 (describing a recent case involving allegations to this effect in a nonclass aggregate settlement in which plaintiffs’ counsel allegedly had an incentive to favor directly retained clients, as opposed to referred clients, because of differences in the amount of legal fees the counsel would earn upon settlement).

<sup>57</sup> Moore, *supra* note 17, at 1492–98.

<sup>58</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) (2010).

<sup>59</sup> *Id.* (emphasis added); see *id.* § 2.07 cmt. d.

<sup>60</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2008).

representation after obtaining the informed consent of each affected client.<sup>61</sup>

A conflict is typically consentable if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”<sup>62</sup> Intraclass conflicts that pose significant risks may be cured by the use of subclassing, in which case the conflict no longer exists and does not need client consent. But subclassing is not an option for the other types of conflicts encompassed by section 2.07(a)(1), i.e., conflicts between the class itself and individually represented clients, either within or outside of the class. Perhaps the *Principles* intend to convey that, in all such conflicts, clients cannot consent and, therefore, a lawyer with such a conflict may not represent the class, but I doubt this is the case. After all, “it is not necessarily desirable to create a *per se* ethical prohibition on the simultaneous representation of both a class and individuals with interests potentially at odds with those of the class” as a whole.<sup>63</sup> This is particularly so when the lawyer represents some but not all of the individual members of the class, including some of the absent class members, because the risks to the class may be small in relation to the potential benefits of pursuing the action with a lawyer who is already familiar with the underlying subject matter by virtue of the lawyer’s ongoing representation of individual class members.<sup>64</sup>

When the potential advantages of joint representation outweigh the potential risks, a conflict of interest is typically consentable. But who gives informed consent on behalf of a class? Perhaps the court does so (or could do so) as part of its adequacy of representation determination,<sup>65</sup> and perhaps this is the type of determination that the *Principles* mean to propose in section 2.07(a)(1). But if this is the case, then the *Principles* do not clearly communicate that, in applying this section, courts should determine not only whether a “structural conflict” of this sort exists, but also whether the particular conflict is sufficiently severe that aggregation cannot proceed unless a lawyer

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<sup>61</sup> *Id.* R. 1.7(b); see also *id.* R. 1.7 cmt. 2 (“Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.”).

<sup>62</sup> *Id.* R. 1.7(b)(1).

<sup>63</sup> Moore, *supra* note 17, at 1500.

<sup>64</sup> *Id.* at 1500–01.

<sup>65</sup> See *id.* at 1501 (noting that this would not be sufficient with respect to prefiling conflicts, as when a lawyer negotiates a settlement class action).

without a conflict of interest is substituted as class counsel. Or perhaps the *Principles* intend to suggest that, by definition, a “structural conflict” does not exist unless the particular conflict is of that level of severity such that any potential advantages of representation by this lawyer are clearly outweighed by the risks. But again, if this is the case, then the *Principles* do not clearly communicate the type of analysis contemplated.

In my view, clarification of the proposed analysis necessarily requires an explanation of the relationship between the structural-conflicts analysis contemplated under section 2.07(a)(1) and the analysis more typically conducted under rules of professional conduct, keeping in mind that under Rule 1.7, conflicts are very broadly defined, with the understanding that most conflicts can be waived by the affected clients. Given the inability to obtain the informed consent of the class to the risks of conflicted representation, section 2.07(a)(1) conflicts should probably be much more narrowly defined than Rule 1.7 conflicts. In any event, the failure to address the relationship between section 2.07(a)(1) and Rule 1.7 undermines the ALI’s objective of clearly articulating how the individual interests of individual claimants should and will be protected in aggregate proceedings, including class actions.

*B. More than a Missed Opportunity: Ethics and Nonclass Aggregations*

As for nonclass aggregations, I am principally concerned with what the *Principles* describe as “private aggregation”<sup>66</sup> or “informal aggregation,”<sup>67</sup> particularly situations in which “[m]ass-solicitation efforts, referral networks, and specialization may concentrate large numbers of clients with related claims in the hands of a few attorneys or even a single firm.”<sup>68</sup> Here, I believe that the *Principles* offer a view of mass representation that is unduly rosy. They not only ignore the application of ethics rules to various aspects of nonclass aggregations, but also affirmatively downplay the risks of such representation and the role that ethics rules play in protecting the individual clients against such risks. These protections become especially important once it is recognized that mass tort lawyers often treat their clients as

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<sup>66</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02(c) (2010).

<sup>67</sup> *Id.* § 1.02 cmt. b(3).

<sup>68</sup> *Id.*

if they were members of a class without affording them the judicial protections given to actual class members.<sup>69</sup>

Throughout the document, the *Principles* consistently tout the benefits of individual clients forming “consensual group lawsuits”<sup>70</sup> and other “litigation groups”<sup>71</sup> (e.g., clients with similar claims who have not yet filed a lawsuit), with no significant discussion of any of the accompanying risks. For example, referral networks are described as entirely beneficial because the referral market corrects the mismatch of clients and lawyers that results in deficient representation.<sup>72</sup> There is no mention of the risks entailed in such referral markets. For example, some lawyers may refer cases to another lawyer because that lawyer offers a more favorable referral fee or because that lawyer’s own marketing efforts have misled the referring lawyer to believe that he has more experience and expertise than is in fact the case.<sup>73</sup> There is also no mention of the likely violation of rules that prohibit lawyers from false or misleading advertising when they market themselves to the public without any indication that their intention is to turn these cases over to other lawyers in return for a referral fee.<sup>74</sup>

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<sup>69</sup> See generally, e.g., L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157 (2004) (proposing conferring judicial authority to oversee and authorize mass tort settlements outside the class action context).

<sup>70</sup> See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. c (2010).

<sup>71</sup> See, e.g., *id.* § 1.02 reporters’ note cmt. b(3) (“[I]ndividuals often have (and may even prefer to have) their day in court as part of litigation groups.”).

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Erichson, *supra* note 34, at 536–39. Although it may be true that “it is reasonable to expect that the incentives of the referral market would *generally* channel referral cases to lawyers competent to handle them and positioned to take advantage of economies of scale and opportunities for bargaining leverage,” *id.* at 537–38 (emphasis added), there are numerous opportunities for the referral market to fail, including the inability or lack of willingness of referring lawyers to discern precisely which other lawyers are best positioned to advance the clients’ interests in maximizing recovery, see *id.* at 537 (discussing criticisms of what some plaintiffs’ lawyers “see as excessive and unethical advertising and referral practices among their colleagues”). These failures may be exacerbated by the referring lawyers’ failures to recognize conflicts of interests among the individual clients they are referring. See *infra* notes 89–94 and accompanying text.

<sup>74</sup> I have seen numerous television advertisements directed at potential mass tort claimants, but I have never seen a single advertisement stating that the lawyer or law firm plans to refer claimants to other lawyers who will actually handle their cases. The failure to disclose such an intention makes an advertisement false or misleading and therefore unethical. See MODEL RULES OF PROF’L CONDUCT R. 7.1 (2008) (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”).

Similarly, the *Principles* note that “private aggregation helps level the playing field” by making it possible for individual clients to reduce costs by working collectively and presenting a united front,<sup>75</sup> but there is no significant mention of the risks of aggregation through joint representation, including conflicts of interest among the clients as a result of varying degrees of injury or different statutes of limitations.<sup>76</sup> To be sure, the *Principles* acknowledge the potential for conflict at the stage when the lawyer proposes an aggregate settlement of the clients’ claims.<sup>77</sup> But what about the initial decision to aggregate? By the time that an aggregate settlement is proposed, it may be too late for individual clients to protect themselves against the risks of aggregation.<sup>78</sup>

Outside of aggregate settlements, the *Principles* appear to assume that nonclass claimants do not need protection because, unlike absent class members, these claimants are in a position to protect themselves. For example, under section 1.04, “a lawyer representing multiple claimants . . . should seek to advance the common objectives of those claimants,”<sup>79</sup> and, unless otherwise agreed, the primary common objective is assumed to be “maximizing the net value of the groups of claims.”<sup>80</sup> Once that net value has been maximized, the common objectives are also assumed to include “compensating each claimant appropriately”;<sup>81</sup> however, the comment acknowledges that “[r]ough justice” or “damages averaging” is normal in aggregate proceedings.<sup>82</sup> Significantly, the comment further provides that “[t]he possibility of altering the objectives to be pursued exists mainly in consensual group

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<sup>75</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 reporters’ note cmt. b(3) (2010).

<sup>76</sup> As noted earlier, there is a statement in a subsequent comment acknowledging that parties might not always adequately represent themselves in nonclass aggregations “because of deficient incentives, conflicts of interests, or other reasons.” See *supra* note 36. That statement, however, appears in a paragraph discussing the due process requirements of adequate representation in class actions, *id.*, and hardly serves as a meaningful warning of the risks of aggregation at the outset of the representation of multiple nonclass claimants, i.e., outside the context of aggregate settlements, which arise at a much later time.

<sup>77</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.16 cmt. a (2010).

<sup>78</sup> Most important, the client may not have the benefit of the attorney’s independent professional judgment as to whether the client should accept or reject the settlement offer. Both the attorney and the other clients will have a significant financial interest in securing the client’s approval of the settlement if, as is typical, the settlement will not be effective as to any of the claimants unless all or a substantial majority of them approve it. See, e.g., Moore, *supra* note 4, at 406–09.

<sup>79</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04(a) (2010).

<sup>80</sup> *Id.* § 1.04(b)(1). Although the *Principles* do not say so explicitly, I assume that the objectives listed in section (b) are placed in rank order of assumed importance.

<sup>81</sup> *Id.* § 1.04(b)(2).

<sup>82</sup> *Id.* § 1.04 cmt. f.

lawsuits and other proceedings where participants who enjoy high levels of control can meet face to face.”<sup>83</sup> But surely this does not accurately describe the situation in which a single lawyer represents thousands of individual clients from all parts of the country and such face-to-face meetings will be next to impossible. And even if the clients could meet, what exactly could they do to alter the objectives if they cannot agree on an alternative? What sort of agreement could they reach that would ensure, at the outset, that appropriate compensation will avoid “rough justice” or “damages averaging”?

The problem, of course, is that the *Principles* assume that in “consensual group lawsuits,” the individual clients have chosen to proceed as part of a “litigation group,” thereby consenting to a certain loss of control over their individual cases. But what ensures that the clients have been adequately informed of both the advantages and the risks of proceeding as part of a “litigation group”? What ensures that the decisions are truly consensual? What the *Principles* ignore is that, without the protections afforded to class members, individual nonclass clients have only the rules of professional conduct to protect them against the potential harms of the “class-action-style procedures [that] have come to be employed in mass-tort lawsuits where class actions could not ordinarily be certified.”<sup>84</sup>

Under rules of professional conduct, individual clients must be fully informed, at the outset of the representation, of any significant risk that the representation may be materially limited by the lawyer’s duty to other clients.<sup>85</sup> With that information, individual clients might decide that they want to become part of a litigation group represented by this particular lawyer. But some clients might refuse, or they might decide that they prefer to be represented by a lawyer who represents a more narrowly tailored group, such as individuals with very severe injuries or without serious statute of limitations problems. Indeed, under rules of professional conduct, it might be the case that some conflicts among individual clients cannot be waived by consent.<sup>86</sup> For example, if a lawyer attempts to combine in a single litigation group clients with the type of structural conflicts that would require subclassing if the clients were members of a class,<sup>87</sup> then the fact that there would likely be no judicial approval of any future settlement may lead

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<sup>83</sup> *Id.* § 1.04 cmt. c.

<sup>84</sup> *Id.* § 1.05 cmt. b.

<sup>85</sup> *See supra* note 60 and accompanying text.

<sup>86</sup> *See supra* note 63 and accompanying text.

<sup>87</sup> *See supra* notes 62–63 and accompanying text.

to the inescapable conclusion that adequate representation requires that these groups be represented by different lawyers.<sup>88</sup>

Even when the conflicts are consentable, the risk remains that the lawyer will favor the interests of some clients over other clients, or that the lawyer will favor his or her own interests by settling cases too quickly.<sup>89</sup> Because no judge will determine the fairness of any proposed settlement, it is up to the clients themselves to monitor the lawyer's conduct. In order to do so, however, the client may need access to more information than class counsel typically provides to absent class members. Unfortunately, the *Principles* do not distinguish between class and nonclass counsel with respect to the lawyer's duty to communicate. For example, the Comment to section 1.05 provides that lawyers *should* communicate with their nonclass clients with respect to important decisions, such as the need to select the best test case for bellwether trials.<sup>90</sup> What the *Principles* ignore, however, is that rules of professional conduct actually *require* that lawyers reasonably communicate with their clients, not only to enable them to make important decisions, but also to "keep [clients] reasonably informed about the status of the matter" and to "promptly comply with reasonable requests for information."<sup>91</sup> Similarly, although the Comment notes with approval the use of electronic communications for all forms of aggregate proceedings, it simultaneously approves the decision of many lawyers to reserve the use of more expensive telephone banks for "major decisions, mainly settlement"<sup>92</sup> on the ground that otherwise communication "is simply a burden."<sup>93</sup> Nowhere do the *Princi-*

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<sup>88</sup> When subclassing is required in a class action, it is typically the case that each subclass must be represented by separate counsel. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 & n.31 (1999) ("In *Amchem*, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the 'competency and conflicts of class counsel.'").

<sup>89</sup> See, e.g., Moore, *supra* note 4, at 406–09.

<sup>90</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. f (2010). Bellwether trials are sample cases tried for the purpose of either voluntarily binding other claimants or providing guidance to the court and others. See *id.* § 2.02 cmt. b. See generally Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

<sup>91</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008).

<sup>92</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. i (2010).

<sup>93</sup> *Id.* § 1.05 reporters' notes cmt. i ("Communication should be encouraged when it is likely to enable recipients to make informed decisions and when it is likely to generate informed responses. Otherwise, communication is simply a burden. In aggregate proceedings involving large numbers of persons, lawyers should be encouraged to use low-cost methods of communicating routine information. Expensive methods should be employed only when fundamental matters are at hand, such as communications about settlement or required discovery responses.").



*ples* distinguish between the level and type of communication required of lawyers representing individual clients and that required of class counsel.<sup>94</sup>

#### CONCLUSION

Aside from a proposal to modify the aggregate settlement rule, the *Principles of the Law of Aggregate Litigation* barely mention the wide-ranging ethical issues that arise in both class actions and nonclass aggregate litigation. From my point of view, this is highly regrettable. First, the ALI has missed an important opportunity both to educate lawyers regarding their ethical obligations in these types of proceedings and to propose solutions to some unresolved issues, such as the identity of class counsel's client and the applicability of ethical conflict of interest rules to class actions. Second, and more important, the ALI's failure to integrate ethics and procedure may actually undermine the underlying objective of the project, which was to advance efficiency while simultaneously articulating how the interests of individual claimants can be protected. In the class action context, the *Principles* propose a treatment of "structural conflicts" that is confusing and misleading precisely because it fails to explain the difference between structural conflicts and ethical conflicts. In the context of nonclass aggregations, the absence of ethics creates the false impression that the primary point at which ethical issues arise is the negotiation of an aggregate settlement, although there are numerous ethical issues that are commonly present from the very outset of any aggregation of individual claims, including both conflicts of interest and communication. The failure to address these issues contributes to the unfortunate tendency of mass tort lawyers to treat their individual clients as if they were absent members of a class, thereby ignoring the reality that the most significant protections afforded to nonaggregate claimants are the rules of professional conduct.

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<sup>94</sup> Elsewhere, in addressing the cost of regularly communicating with nonclass clients, I concluded that, "[g]iven the enormous fees that many of these cases generate, I doubt that lawyers who are required to spend additional money on communication expenses will abandon the field of mass tort litigation." Moore, *supra* note 5, at 162 (citation omitted).