Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements

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ABSTRACT

This Essay discusses the approach the American Law Institute's Principles of the Law of Aggregate Litigation *take to the issue of aggregate settlements. Contrary to Rule 1.8(g) of the ABA* Model Rules of Professional Conduct*, and contrary to most of the decided cases, the* Principles *would permit resolution of multiple claims by less than a unanimous vote of the claimants. This Essay acknowledges practical concerns that underlie the proposal and applauds the Reporters' effort to craft a new approach. Ultimately, however, it concludes that the proposal inadequately protects values embodied in the cases and in ABA Model Rule 1.8(g).*

INTRODUCTION

A lawyer who represents two or more clients in a single matter—say, an automobile accident—inherently faces a conflict of interest.[1] One client may have suffered more serious injuries than the other, for example, or one might have an action against the other. Ordinarily, the concerns are not serious, and the conflicts may be waived with the informed consent of all clients, but the lawyer must make the needed disclosures and obtain consent, confirmed in writing, to the representation.[2]

When claims of multiple clients are consolidated in a class action, the lawyer is said to owe duties to the class rather than the individual members. Judicial approval at key steps in the case—including settlement—is required as a substitute for individual consent by class members.[3] One may doubt how carefully judges exercise their independent review in some cases, but in principle, the judge verifies

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1 *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009).

2 *Id.* R. 1.7(b). *But see* Jedwabny v. Phila. Transp. Co., 135 A.2d 252 (Pa. 1957) (holding that a conflict could not be waived where a lawyer represented both the driver and passenger of car *A* against the driver of car *B*; the passenger might want to sue the driver of car *A* as well).

3 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §§ 3.02–.14 (2010).

the absence of prohibited conflicts and that any litigation proceeds are fairly distributed among similarly situated class members.[4]

By definition, nonclass aggregate litigation does not entail the procedures and protection associated with a class action.[5] In nonclass aggregate litigation, the lawyer has a series of similar but legally separate cases. The cases may be consolidated for discovery and trial, but the lawyer owes individual duties to each of the individual clients. Further, when the cases are settled, there is no requirement of judicial review or approval. The ethical issues presented by such settlements can be highlighted by a hypothetical case.

I. The Story of Danny Desperate

Danny Desperate was a midcareer litigator in a small town. He handled a variety of cases, five of which were against PowerCo, the local electric utility company. One was an employee's claim for backwages, another was a radio station's unpaid bill for advertising, the third was a coal supplier's dispute about charges for shipments during a time of shortage, the fourth was a suit for property damage when a PowerCo pole fell on a house, and the fifth was a claim for wrongful death involving a PowerCo truck. None of the five claimants knew about the others' cases. The face amount of the five claims totaled $2 million, and Desperate's engagement agreements with each client provided that Desperate would receive a thirty-five percent contingency fee.

Desperate learned that a vacation house he had always coveted was on the market for $350,000. Desperate was anxious to buy the house, but because his credit was terrible, Desperate needed to offer the full amount in cash. Thus motivated, Desperate proposed to settle all five cases his clients had against PowerCo for a total amount of $1 million. PowerCo's internal estimates of its total exposure in the cases totaled $1.4 million, so the offer was attractive and PowerCo accepted it, subject to Desperate's getting releases from all five clients. Desperate estimated what he could persuade each client to accept, recognizing that some of the clients were more stubborn than the others. After individual meetings with the clients, in which Desperate solemnly advised each that the settlement he had worked out in its case was the best the client was likely to get, each agreed to her deal. The

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4 *Id.* § 3.05.

5 The *Principles of the Law of Aggregate Litigation* discuss settlement of nonclass aggregate litigation in sections 3.15 to 3.18.

settlements totaled exactly $1 million, and Desperate bought his dreamhouse!

Surely, anyone reading this story knows instinctively that Desperate did not act in a professionally responsible manner. It may help discussion of the ethics issues raised by the American Law Institute's ("ALI") Aggregate Litigation project, however, to look at where Desperate went wrong. His failings can be grouped into four categories, each related but useful to separate for analysis.

Desperate's first mistake was in not acknowledging each client's personal and legally autonomous interest in the proper resolution of her claim. Rather than see each client as a distinct individual or entity with the right to define the objectives of its own representation,[6] Desperate treated all five clients as a package to be sold for cash. The client suing to receive backpay, for example, might have wanted to have future employment made part of the agreement. The client who wanted to be paid for prior advertising might have preferred that the settlement require that PowerCo post a bond to guarantee payment of any future advertising contracts. Rather than treating each of his clients as having unique interests, in short, Desperate's approach treated the clients as fungible and assumed their cases could be disposed of with money alone.

Desperate's second failure was in not handling each case with the requisite zeal. The term "zeal" has been properly criticized for implying that a lawyer must be obnoxiously assertive in pursuing a client's interest.[7] I am using zeal here in its proper sense—comprehending the lawyer's "duties of competence and diligence."[8] In this case, for example, Desperate did not assess the value of each case on its merits and apply the "skill, thoroughness and preparation reasonably necessary"[9] to realize the full value of each. Neither did Desperate "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[10] Instead, Desperate intentionally settled each case for as little as he could persuade the client to take.

Third, Desperate ignored obvious conflicts of interest among his clients and with his own interest in buying the house. American Bar Association ("ABA") Model Rule 1.7 reminds: "A concurrent conflict

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6 *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009).

7 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000).

8 *Id.*

9 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009).

10 *Id.* R. 1.3 cmt. 1.

of interests 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 . . . or by a personal interest of the lawyer."[11] Both problems were presented here. The portion of the $1 million settlement available to each client inevitably came out of a sum that might have been made available to the others. Each client was thus a potential beneficiary of the conflict and a potential victim at the same time. In advising each of them against the others, Desperate could not be faithful to anyone. And where the settlements were so deeply tainted by Desperate's personal interest in buying the vacation home, the conflict was unmistakable.

Desperate's final and perhaps most heinous failure was lying to his clients. While PowerCo had correctly reminded Desperate that each client had to decide whether to settle its matter,[12] Desperate expressly did not explain each "matter [to each client] to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[13] Indeed, telling each client that he had done all he could for them was explicitly untrue. Desperate expressly left out information about other claims being settled and about his own motivation. Further, Desperate did not properly advise each client. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."[14] "A client is entitled to straightforward advice expressing the lawyer's honest assessment."[15] That did not happen here.

II. TRADITIONAL ETHICAL TREATMENT OF AGGREGATE SETTLEMENTS

Situations like those underlying Danny Desperate's misdeeds might not seem to be the subject of this symposium. I suggest his story, however, because what Desperate proposed to PowerCo was an aggregate settlement within the definition of section 3.16 of the *Principles of the Law of Aggregate Litigation* ("*Principles*"). It was a "settle-

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11 *Id.* R. 1.7(a); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000). In the example posed, there clearly was no "informed consent, confirmed in writing" from each client. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2009). Indeed, consent would not have sufficed here at all because the lawyer could not "reasonably believe[ ] that the lawyer will be able to provide competent and diligent representation to each affected client." *Id.* R. 1.7(b)(1).

12 MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009).

13 *Id.* R. 1.4(b).

14 *Id.* R. 2.1. One could similarly argue that Desperate's conduct constituted "dishonesty, fraud, deceit or misrepresentation" in violation of Rule 8.4(c). *See id.* R. 8.4(c).

15 *Id.* R. 2.1 cmt. 1.

ment of the claims of two or more individual claimants in which the resolution of the claims [was] interdependent . . . [meaning that] the value of each claimant's claim[ ] [was] not based solely on individual case-by-case facts and negotiations."[16] Furthermore, like many, if not most, of the situations to which the ALI's Reporters expect the *Principles* to apply, Desperate's clients were not a group of friends; they were a disparate group of people who almost certainly did not know each other.

But extreme as the facts of Desperate's case may seem, the kind of conflicts he faced are familiar in legal ethics. Indeed, they are so familiar that for at least the settlement phase of cases like Desperate's, ABA Model Rule 1.8(g) collects the issues in a single rule:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.[17]

In short, the professional standards incorporated in Rule 1.8(g) required Desperate to: (1) honor the autonomy of each client by giving each a free choice whether or not to settle their case, (2) identify and obtain informed consent to the conflicting interests of the clients, and (3) deal candidly with the clients about the benefits and limitations of the settlement to each.[18] Desperate clearly failed on all counts.

III. Misgivings About Today's Ethics of Aggregate Settlements

Few would doubt the application of Rule 1.8(g) to cases like those Desperate tried to settle. Had Desperate faced up to the requirements of the Rule and told each of his five clients what he was doing in all five cases, most would have turned him down. Desperate

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16 Principles of the Law of Aggregate Litig. § 3.16 (2010). The term "aggregate settlement" has not had a consistent definition. The best effort to organize the ideas underlying such a definition is Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 Notre Dame L. Rev. 1769 (2005). Professor Erichson's article arrays aggregate settlements along two variables—allocation and degree of conditionality, i.e., how the agreement divides the settlement and how many in a group must agree in order to bind the rest. *See id.* at 1784.

17 Model Rules of Prof'l Conduct R. 1.8(g) (2009). The *Restatement* contains a similar provision. *See* Restatement (Third) of the Law Governing Lawyers § 128 cmt. d(i) (2000).

18 Implicitly, the Rule also required Desperate to have pursued each client's case up to the point of settlement with competence and diligence.

would have had to find another dreamhouse, but his clients would have been better served. Similarly, in the countless auto accident cases where two or three friends or relatives have been injured, the transparent process of dividing a collective settlement required by Rule 1.8(g) has worked well and produced little pressure for change.

But today, the view of tort law as limited to such cases is hopelessly romantic. In our world, 10,000 unique two-car-crash cases often become 10,000 claims against a carmaker for building a defective product. Or, once a product like asbestos—initially seen as a near miraculous protection against fire in ships and public buildings—is discovered to have carcinogenic properties that put a large number of citizens at risk of fatal disease, Rule 1.8(g) arguably cannot deal adequately with cases involving millions of clients and presenting a wide range of losses.[19]

Think of Clara Caring, Esq. She lives in a city of 50,000 people served by the same PowerCo with which Danny Desperate dealt. Last winter, after a large storm in her area, PowerCo had too few trained technicians to bring power back to all its customers within a reasonable time period. The city in which Caring's clients live was ignored for more than a week. Each of the city's residents was seriously inconvenienced, and several suffered health-related problems. Caring made it known that she would file lawsuits against PowerCo for damage suffered by residents as a result of PowerCo's failure to staff adequately and its inappropriate allocation of service personnel to meet the residents' needs for service. All 50,000 residents have engaged Caring to file cases on their behalf.

What problems will Caring face trying to manage 50,000 cases in a manner consistent with Rule 1.8(g)? If she threatens to try or settle each case one by one, PowerCo will laugh at her. PowerCo is likely to admit that it reached Caring's city last, but some city is always last, and PowerCo will deny that its conduct was negligent. Caring will not have the economic resources to try each case individually and neither will her clients. At the end of the day, the only way PowerCo is likely to settle at all is if that settlement will buy PowerCo peace. Will Rule 1.8(g) let Caring reach an agreement guaranteeing the peace that may be the only chance for any individual citizen to recover at all?

Suppose PowerCo offers $1 million to settle all the cases. Even assuming that Caring could, by questionnaire, get a sense of the dam-

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19 I take this to be the message of Professor Charles Silver's article in this symposium. *See* Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754 (2011).

age suffered by each client, how should she propose to allocate the $1 million? Should she propose to allocate it in proportion to the damages claimed? If so, when Rule 1.8(g) says her "disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement,"[20] would that require her to disclose highly confidential information she knows about her clients? Must she tell everyone in the city, for example, that Joe Clark has a serious illness that he would prefer to keep confidential, and it was the inability to keep his medicine refrigerated that makes his proposed share of the settlement larger than some others?

Suppose Caring proposes that the 50,000 citizen plaintiffs receive $20 each? What can she do about Joe Jackson, who says he will not be satisfied with less than $20,000, and who will try to veto any solution that would give him less? May she exclude Jackson's case from the settlement, give everything to her "reasonable" clients, and throw Jackson to the jackals at PowerCo, who are unlikely to pay him anything at all?

IV. Client Representation vs. Case Administration in the Real World

Fortunately, both Danny Desperate and Clara Caring live in the world of academic hypotheticals. But in the real world, lawyers and courts see issues a lot like those represented by these two examples. Lawyers have multiple clients with similar, but not identical, claims for resolution. Other lawyers' clients have multiple claims pending against them. Courts have long dockets, often with cases presenting similar issues that appear to call for similar resolution.

In this real world, the lawyer's traditional duty of particularized client representation comes face to face with the practical goal of efficient case administration. In the real world, these two bookend values can rarely be entirely satisfied, but lawyers and judges must make an effort to adopt procedures that come as close as possible to doing so.

A moment's self-reflection suggests that lawyers and judges likely have a bias pointing toward the efficiency end of the continuum. Defense lawyers tend to want to get rid of as many pesky lawsuits as possible with a discrete sum of money. Plaintiffs' lawyers tend to want a way to leverage the work in one case over hundreds of cases and thereby swell their own potential return on the time they invest. Judges tend to want to show progress clearing their dockets and move

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20 Model Rules of Prof'l Conduct R. 1.8(g) (2009).

on to other matters. The only people with a powerful bias toward particularized representation, in short, are the clients whose interests the law purports to protect. The risk is that, when lawyers and judges make the rules, clients will tend not to have their interests heard.

V. Aggregate Settlements in the Courts and Ethics Opinions

Concerns about the practicality of applying Rule 1.8(g) to aggregate settlements involving large numbers of clients have led some lawyers to try to have their clients agree in advance that whatever settlement receives approval of a specified percentage of claimants will bind the rest of the claimants as well. Courts and ethics committees, however, have consistently rejected such efforts to avoid the Rule.

In *Hayes v. Eagle-Picher Industries, Inc.*,[21] a total of eighteen asbestos plaintiffs had retained the same attorney to pursue claims against the defendant.[22] The clients had entered into an agreement with each other and their attorney stating that acceptance of a settlement offer would be determined by a majority vote of the clients.[23] On the day before trial, the defendant offered the attorney $155,000 to cover the claims of the entire client group.[24] The following morning, the group voted in favor of the settlement offer by a vote of thirteen to five, but the dissenters appealed the district court's decision to enforce the settlement.[25]

The defendant argued that because the appellants had consented to be bound by a majority vote, the settlement should be binding.[26] The Tenth Circuit disagreed, holding that a settlement arrangement where a majority vote would bind the dissenters was impermissible because the attorney was an agent for each client, making each client's approval of a settlement essential for its enforcement.[27] The agreement to abide by majority rule was made prior to settlement negotiations and before any client knew how he or she would be affected by the agreement.[28] The Tenth Circuit held that "[i]t is difficult to see how this could be binding on non-consenting plaintiffs as of the time

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21 Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir. 1975).

22 *Id.* at 892.

23 *Id.*

24 *Id.*

25 *Id.* at 893.

26 *Id.*

27 *Id.* at 894.

28 *Id.*

of the proposed settlement and in the light of the terms agreed on."[29] The court said a client had to have the right to agree or refuse to agree to a settlement at a time when terms of the settlement are known.[30]

Abbott v. Kidder Peabody & Co.[31] was a collection of securities cases relating to individual investment partnerships of more than 200 plaintiffs.[32] A majority of the plaintiffs had retained the same law firm to represent them in the action.[33] Each plaintiff's engagement agreement with the firm included a "Group Governance" provision that provided for plaintiffs' decisionmaking capabilities to be vested in a "steering committee," to be selected based upon the net cash value invested into the partnerships.[34] The contract also included a "Settlement and Sharing of Proceeds" clause that gave the law firm authority to settle the plaintiffs' claims on the same terms as the claims of the members of the steering committee.[35] The clause further provided that any settlement funds would be shared by the plaintiff group and would be allocated according to the amount of money invested in the investment partnerships, although the steering committee was vested with the power to alter the formula based upon new facts or decisions by the judge.[36]

During pretrial litigation, the parties were required by the court to meet with a magistrate judge to discuss potential settlements.[37] The magistrate judge originally attempted to initiate individual settlement conferences for each plaintiff, but the attorneys objected because they believed the attorney-client contract gave them the authority to settle for the entire group.[38] The court held that disqualification of plaintiffs' counsel was proper. Quoting *Hayes*, the court said, "[A]ttorney-client agreements which allow a case to be settled without the approval of an individual client are 'opposed to the basic fundamentals of the attorney-client relationship.'"[39] Indeed, the *Abbott* case was worse than *Hayes* because the qualifications for the steering commit-

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29 *Id.*

30 *Id.* The court cited Rule 5-106 of the Kansas Code of Ethics, which is now Rule 1.8(g).

31 Abbott v. Kidder Peabody & Co., 42 F. Supp. 2d 1046 (D. Colo. 1999).

32 *Id.* at 1048.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 1048–49.

37 *Id.* at 1049.

38 *Id.*

39 *Id.* at 1051 (quoting Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 894 (10th Cir. 1979)).

tee allowed a "*minority* to control the settlement arrangements for the majority."[40]

ABA Formal Opinion 06-438,[41] issued in February 2006, seemed to expand even further the disclosures required by Rule 1.8(g). It mandated that the lawyer disclose:

> [1] [t]he total amount of the aggregate settlement or the result of the aggregated agreement, [2] [t]he existence and nature of all claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement, [3] [t]he details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s), [4] [t]he total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties, [and] [5] [t]he method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.[42]

The opinion continued: "These detailed disclosures must be made in the context of a specific offer or demand. Accordingly, the informed consent required by the rule generally cannot be obtained in advance of the formulation of such an offer or demand."[43]

VI. The ALI Aggregate Litigation Project Addresses Settlement Issues

From the first version of their proposals, the Reporters for the Aggregate Litigation project took a pronounced turn away from the ABA model of particularized client representation toward the model of efficient case administration. In their first proposal to the ALI membership in May 2006,[44] just after ABA Formal Opinion 06-438,

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40 *Id.* The court ultimately held that disqualification was proper because a disinterested lawyer would have counseled a client against entering such a representation contract and because a valid waiver of the conflict of interests inherent in the arrangement was impossible. *Id.*

41 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 438 (2006).

42 *Id.* at 5.

43 *Id.* at 6.

44 Principles of the Law of Aggregate Litig. (Discussion Draft Apr. 21, 2006).

the Reporters asserted in section 3.17 that, while an aggregate settlement could be approved using the procedures set out in Rule 1.8(g),[45] for cases involving at least forty claimants and total claims of at least $5 million:

> (c) An individual claimant may, after consultation with counsel, affirmatively agree to be bound by a non-class aggregate settlement without prior knowledge of and consent to the terms of other claimants' settlements by agreeing to accept an aggregate settlement as part of a known collective representation.
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> (d) The affirmative waiver may be consented to by a litigant as part of counsel's retainer agreement or at any other point during the course of the litigation.
>
> (e) A waiver is valid only if it is given in writing after the claimant has been adequately informed by counsel of the consequences of agreeing to the waiver.[46]

Proposed section 3.18 went on to raise the important issue of judicial review of settlements. Under the May 2006 proposal, a claimant who had consented to be bound to the nonclass aggregate settlement would have ninety days in which to challenge the manner in which his consent was obtained or the fairness of the settlement.[47] To reduce the possibility of lawyer overreaching, that right to challenge was declared to be nonwaivable,[48] but in any challenge, "the reviewing court shall give substantial deference to the settlement and shall treat it as presumptively fair and reasonable."[49]

The proposal seems largely to have been based on work done by the Reporters in the decade prior to the Discussion Draft. In 1997, Professors Charles Silver and Lynn Baker, for example, had called attention to what they saw as problems created by the requirements of Rule 1.8(g)—problems of settlement allocation, client confidentiality, and unreasonable holdouts of the kinds suggested in our Clara Caring example.[50] Because claim aggregation can force defendants to address claims that are individually too small for plaintiffs' lawyers to prepare and prosecute fully, aggregating the claims adds value, the authors de-

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45 That is the effect of subsections 3.17(a) and (b) of the proposal.

46 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(c)–(e) (Discussion Draft Apr. 21, 2006).

47 *Id.* § 3.18(a), (d).

48 *Id.* § 3.18(b).

49 *Id.* § 3.18(c).

50 Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 755–56 (1997).

cleared.[51] That added value, in turn, tended to make all plaintiffs better off.[52]

Rules should attempt to give lawyers substantial latitude to create such value, Professors Silver and Baker argued, by giving lawyers a credible basis to settle cases in ways that will bind their clients.[53] A client may give her lawyer advance authority to settle her individual case within given parameters. Why not give clients the power to give the same kind of advance consent to an aggregate settlement? Indeed, why not routinely give plaintiffs at least the right to agree to a settlement approved by a majority or a supermajority of the plaintiffs to whom it applied? Real client autonomy, Professors Silver and Baker suggested, requires that clients be able to contract out of the Rule 1.8(g) requirements when and if they see it to be in their interest to do so.[54]

The Silver-Baker proposal was not well received by our fellow panelist, Professor Nancy Moore. Even before the ALI project was commenced, she had responded in a 1999 article that Rule 1.8(g) did not limit legitimate settlement arrangements to the extent Professors Silver and Baker charged.[55] The holdout problem is exaggerated, she said. Lawyers can keep their clients informed and encourage an aggregate settlement even if they cannot compel it.[56] Further, no plaintiff can know in advance what kind of settlement the lawyer will be able to negotiate, so consent to accept it before negotiations have even begun can rarely be fully informed.[57] Plaintiffs' lawyers may

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51 *Id.* at 744–45.

52 *Id.* at 745.

53 *Id.* at 764.

54 *Id.* at 763. Professors Silver and Baker followed up this article with Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998). Professor Samuel Issacharoff joined the debate in 2004, looking historically at how tort law addressed the increase in personal injuries during and after the Industrial Revolution. He and Professor John Fabian Witt described what they called the increasing "inevitability" of an increasing number of aggregate settlements. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

55 *See* Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 152 (1999). Most of Professor Moore's ideas were affirmed by a shareholder in the plaintiffs' firm Baron & Budd. Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When It's Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215 (1999). Professors Silver and Baker responded more critically. Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227 (1999).

56 Moore, *supra* note 55, at 155, 164–66.

57 *Id.* at 181.

have an incentive to take advantage of underinformed clients,[58] and Rule 1.8(g) upholds important noneconomic values that should not be lightly discarded.[59]

Professor Moore's concerns were reflected in the comments of many ALI members at the May 2006 Annual Meeting and in later meetings of the project's advisory groups.[60] Concerns especially involved the disparity of sophistication between lawyers and their clients in many mass tort cases. Information lawyers would be required to convey to clients prior to any advance waiver and after a settlement was reached was of particular concern.

The position of Professor Silver and his fellow Reporters was further undercut by *Tax Authority, Inc. v. Jackson Hewitt, Inc.*,[61] decided May 31, 2006, shortly after the ALI meeting. The case involved claims of Jackson Hewitt franchisees who believed the company had improperly suspended rebate payments.[62] The franchise agreements prohibited a class action, so 154 of the franchisees retained an attorney to pursue individual claims.[63] Each plaintiff signed an identical retainer agreement, which provided that decisions regarding settlement would be based on a vote of a weighted majority with a quorum requirement of sixty percent of the eligible votes.[64] The agreement further provided that any funds recovered would be distributed on the basis of the number of rebate-eligible loans each plaintiff had made.[65] The agreement also provided for a steering committee consisting of four members.[66] Each plaintiff had the opportunity to consult outside counsel before signing the agreement.[67]

The parties entered mediation, during which the attorney and steering committee negotiated a settlement in principle with Jackson Hewitt.[68] The attorney created a website to apprise plaintiffs of the

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58 *Id.*

59 *Id.* at 171–74.

60 Any ALI project such as this one has both a group of appointed Advisors and a self-selected Members' Consultative Group. In addition, before any ALI project is finally approved, it must successfully persuade the ALI Council that reviews all such projects. As the Associate Reporter principally responsible for drafting the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d (2000), I sided with Professor Moore in the debate.

61 Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512 (N.J. 2006).

62 *Id.* at 515.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 516.

progress, including a spreadsheet showing the respective settlement amounts.[69] The settlement was then put to a vote, and was approved by the requisite percentage.[70] A formal settlement agreement was then produced.[71] The attorney then moved to withdraw as counsel for those plaintiffs who opposed the settlement or did not sign the settlement by a certain date and were presumed to be opposed.[72]

Jackson Hewitt then filed a motion to enforce the settlement against all plaintiffs.[73] Three plaintiffs certified opposition to the settlement.[74] The trial court granted both the attorney's motion to withdraw and Jackson Hewitt's motion to enforce the settlement against all plaintiffs, holding that Rule 1.8(g) did not require disclosure of the total amount of the settlement before plaintiff approval, and that the weighted-majority provision did not violate the rule.[75] One of the plaintiffs appealed, and the appellate court reversed, finding that the weighted-majority provision was in conflict with Rule 1.8(g) and was therefore unenforceable.[76] The defendant then appealed to the New Jersey Supreme Court. That court began by discussing the premise that an agreement between a client and attorney may be unenforceable if it violates an ethical rule.[77] The court held that Rule 1.8(g) did not allow for clients to give advance consent to abide by a majority decision, but rather that each must individually agree to the settlement.[78]

Thus, by April 2007, Discussion Draft No. 2 of the *Principles* limited the section 3.17 proposal to permitting clients to consent to "collective decisionmaking" to approve a settlement by a vote of at least seventy-five percent of the clients represented by a given lawyer or law firm.[79] Clients casting such a vote would be entitled to "adequate" information about the risks of and alternatives to the settle-

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69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 518.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 522. The court limited the holding to prospective effect and referred the Rule to the Commission on Ethics Reform to investigate whether Rule 1.8(g) should be changed to better accommodate mass lawsuits. *Id.* at 522–23.

79 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) (Discussion Draft No. 2, 2007). If there were discrete categories of clients, approval of seventy-five percent of each category represented by a lawyer or firm was required. *Id.*

ment proposal.[80] Lawyers would be required to submit detailed information to the clients prior to their agreeing to "collective decisionmaking," but much of the information—e.g., "the claimant is receiving the benefit of the lawyer's ability to represent the client more effectively"—seemed designed to encourage participation rather than counterbalance a lawyer's reluctance to caution against it.[81] Again, the client was to have only ninety days in which to challenge the fairness of the settlement after the requisite number of claimants had given their consent.[82]

By the end of the entire process, when the *Principles* were approved in May 2009, section 3.17 retained the aggregate settlement process of Rule 1.8(g) as subsection (a),[83] but it softened the specific requirements of the May 2007 draft, saying instead:

> (b) In lieu of the requirements set forth in subsection (a), individual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate-settlement proposal (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial-majority vote of each category of claimants). An agreement under this subsection must meet each of the following requirements:
>
> > (1) The power to approve a settlement offer must at all times rest with the claimants collectively and may under no circumstances be assigned to claimants' counsel. Claimants may exercise their collective decisionmaking power to approve a settlement through the selection of an independent agent other than counsel.
> >
> > (2) The agreement among the claimants may occur at the time the lawyer-client relationship is formed or thereafter, but only if all participating claimants give informed consent. Informed consent requires that the claimants' lawyer fully disclose all the terms of the agreement to the claimants to facilitate informed decisionmaking regarding:
> >
> > > (A) Whether to enter into the settlement agreement;

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80 *Id.* § 3.17(c).

81 *Id.* § 3.17(d).

82 *Id.* § 3.18(a).

83 *Id.* § 3.17(a).

(B) Whether to subsequently challenge the fairness of the settlement agreement under subsection (d) or (e);

(C) Whether to subsequently challenge the compliance of the settlement agreement with the requirements set forth in subsections (b) and (c); and

(D) The desirability of seeking, along with a reasonable opportunity to seek, the advice of independent legal counsel.

(3) The agreement must specify the procedures by which all participating claimants are to approve a settlement offer. The agreement may also specify the manner of allocating the proceeds of a settlement among the claimants or may provide for future development of an appropriate allocation mechanism.

(4) Before claimants enter into the agreement, their lawyer or group of lawyers must explain to all claimants that the mechanism under subsection (a) is available as an alternative means of settling an aggregate lawsuit under this Section. A lawyer or group of lawyers may not terminate an existing relationship solely because the claimant declines to enter into an agreement under subsection (b), and the lawyer must so inform the client. A lawyer who is simultaneously representing claimants proceeding under subsection (a) and claimants proceeding under subsection (b) must notify the subsection (a) claimants that they continue to exercise independent control over their cases and that they may refuse an offered settlement after its terms are disclosed.

(c) An agreement pursuant to subsection (b) is permissible only in cases involving a substantial amount in controversy, a large number of claimants, and when the agreement requires approval by a substantial majority of claimants, with the foregoing minimum criteria to be determined by the applicable legislative or rulemaking body.

(d) The enforceability of an agreement under subsection (b) should depend on whether, based on all facts and circumstances, the agreement is fair and reasonable from a procedural standpoint. Facts and circumstances to be considered include the timing of the agreement, the sophistication of the claimants, the information disclosed to the claimants, whether the terms of the settlement were reviewed by a neutral or special master . . . whether the claimants have some

> prior common relationship, and whether the claims of the claimants are similar.
>
> (e) In addition to the requirements of subsection (d), the enforceability of a settlement approved through an agreement under subsection (b) should depend on whether, under all the facts and circumstances, the settlement is substantively fair and reasonable. Facts and circumstances to be considered include the costs, risks, probability of success, and delays in achieving a verdict; whether the claimants are treated equitably (relative to each other) based on their facts and circumstances; and whether particular claimants are disadvantaged by the settlement considered as a whole.[84]

Judicial review under section 3.18 no longer need be sought within ninety days; the time will be set by the legislature or a rulemaking body.[85] If a claimant successfully challenges a negotiated settlement, the lawyer who negotiated it may be required to pay the challenger's attorney's fees.[86]

VII. DO THE *PRINCIPLES* APPROPRIATELY BALANCE CLIENT REPRESENTATION AND CASE ADMINISTRATION?

Ultimately, the relevant question for assessing the ALI's *Principles* must be, compared to what? If the only model being compared is one lawyer/one client case-by-case adjudication, the *Principles* offer an important alternative. It is surely true that under a system in which each side pays its own attorney's fees, the ability of claimants to share lawyers may mean the difference between making a claim viable to pursue and making it prohibitively expensive. If incentives for lawyer zeal were the major consideration, then the *Principles* would represent an important alternative for clients and lawyers.

If one adds class actions to the range of alternatives, however, different questions are raised. Is it true that class actions are undesirable because they have requirements of common issues of fact or law? As the extreme case of Danny Desperate suggested, aggregate litigation can dispense with such requirements. Without substantial com-

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84 *Id.* § 3.17. Subparagraph (f) concludes: "Responsibility for compliance with the prerequisites for the enforceability of an agreement under subsection (b) rests with the claimants' lawyer." *Id.* § 3.17(f).

85 *Id.* § 3.18(a).

86 *Id.* § 3.18(d). This feature of the proposal was carried over from an earlier draft.

monality, however, the wisdom of clients proceeding as one seems reduced and the realistic costs of so doing are increased.[87]

Without substantial commonality, for example, the specific concerns of individual clients can be subordinated to the larger whole. One can argue that the principle of autonomy should allow clients to make that choice. But a similar view of autonomy would permit selling oneself into slavery, for example, and that is a kind of choice one typically would not think should be given respect as fully informed.

I do not mean to equate case aggregation with slavery, but the Principles seem to make similarity of claims only optional. Without substantial similarity, conflict of interest issues are likely to abound. The *Principles* do make a lack of similarity of claims one factor among many in section 3.17(d) with which to challenge a settlement,[88] but in my view, a lack of significant common injury or claim—at least the kind of similarity found among Clara Caring's clients—should presumptively be a basis for challenging an aggregate settlement no matter how many claimants cast votes in favor of it.

The treatment of holdouts and other nonconsenting clients is another awkward feature of section 3.17(b)(4) of the *Principles*. The lawyer pursuing aggregated claims is permitted, in the same matter, to represent both clients whose claims can be approved by a vote of the claimants under section 3.17(b) and clients whose claims require individual consent under section 3.17(a).[89] Indeed, the *Principles* say that a lawyer may not withdraw from representation of a client who is dissatisfied being under the section 3.17(b) regime and wants to join the section 3.17(a) claimants.[90] If, as we tend to assume in these cases, there is not an unlimited sum available to pay claims, such a system of representing clients on two different bases seems inevitably to raise conflict of interest issues that the *Principles* do not effectively address.

That said, the *Principles* represent an important effort to help handle large numbers of claims and require defendants to take relatively small claims seriously. The procedures the *Principles* require go at least part of the way toward putting client representation values on a level with case administration concerns, and in so doing, the *Principles* represent an important step in the effort to serve both objectives.

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87 To be sure, the *Principles* address such issues in several sections prior to the aggregate settlement sections that are the concern of this Essay.

88 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(d) (2010).

89 *See id.* § 3.17(b)(4).

90 *Id.*

But Rule 1.8(g) is still the controlling authority on aggregate settlements and seems likely to remain so. Association of the Bar of the City of New York Formal Opinion 2009-6[91]—issued after adoption of the *Principles*—addressed directly whether a client may waive in advance the right to approve the terms of an aggregate settlement or agree to be bound by an aggregate settlement approved by a specified percentage of the claimants.[92] Expressly rejecting the *Principles* section 3.17 and the article by Professors Silver and Baker, the Opinion concluded that a client may not do so.[93] Noting that several ethical rules are not subject to client consent,[94] the Opinion says:

> The provisions of Rule 1.8(g) are unequivocal and unqualified, and there appears to be no compelling need to permit waiver of this requirement, which protects clients against inadequate settlements and unfair allocations. The importance of this protection outweighs any "burden" a lawyer may face in handling the logistics of obtaining the requisite consent of all jointly represented clients. It also outweighs the benefit of making it easier for joint clients to conclude an aggregate settlement by agreeing to be bound by a majority vote.[95]

At the end of the day, I do not believe Professor Silver and his fellow Reporters have made a convincing case that the approach of ABA Model Rule 1.8(g) is inappropriate or impractical. I do not agree that clients are inherently incapable of giving advance consent in aggregate litigation settings;[96] we permit clients to give advance consent to many other conflicts of interest.[97] But the concerns I expressed earlier that lawyer and judicial incentives are not aligned with those of clients in making tradeoffs between individual client repre-

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91 Ass'n of the Bar of the City of New York, Formal Op. 6 (2009).

92 *Id.* at 1.

93 *Id.* at 5.

94 The Opinion cites Rule 1.2(c), prohibiting unreasonable limits on the scope of representation; Rule 1.5(a), prohibiting excessive legal fees; and Rule 1.7(b), prohibiting waiver of conflicts of interest that would prevent the lawyer from rendering competent and diligent representation to each client. *Id.* at 1, 4.

95 *Id.* at 4.

96 I understand this to be the reason Professor Howard Erichson is uncomfortable with the aggregate settlement proposal. *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011).

97 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 436, 2 (2005); D.C. Bar Legal Ethics Comm'n, Op. No. 309, 205 (2001); Ass'n of the Bar of the City of New York, Formal Op. 1, 6 (2006) (advance waivers permissible where given by a sophisticated client who has advice of counsel).

sentation and efficient case administration lead me to conclude that Rule 1.8(g) provides clients with protection that the *Principles of the Law of Aggregate Litigation* are ultimately too eager to reject.