FOREWORD

Aggregate Litigation Reconsidered

*Roger H. Trangsrud**

INTRODUCTION

Aggregate litigation has become an integral part of the U.S. civil justice system, used in cases as varied as civil rights, securities, and mass torts. Aggregate litigation, however, is often the cause of intense controversy among the private bar, the bench, and the academy. At its best, it creates substantial efficiencies and expands participation in the civil justice system. At its worst, it skews outcomes, takes legal power out of the hands of litigants, and extracts meritless settlements from businesses. With this in mind, in 2009 the American Law Institute ("ALI") completed a project on the *Principles of the Law of Aggregate Litigation* ("*Principles*"),[1] whose goal was to "identify good procedures for handling aggregate lawsuits"[2] and the "ways of governing them that promote their efficiency and efficacy as tools for enforcing valid laws."[3] The principal authors of the *Principles* were

* James F. Humphreys Professor of Complex Litigation and Civil Procedure, The George Washington University Law School. I wish to thank Dean Frederick Lawrence and James Humphreys for the financial support that made this symposium possible, Wrede Smith for his research assistance with this Foreword and the symposium in general, and Frances Arias for her administrative assistance in all these matters.

1 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).

2 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION 2 (Proposed Final Draft 2009).

3 *Id.*

Professors Samuel Issacharoff, Richard Nagareda,[4] and Charles Silver, and Dean Robert Klonoff.

The completion of the *Principles* in 2009 spurred a host of reactions from attorneys, judges, and scholars from around the nation. On March 12, 2010, The George Washington University Law School's James F. Humphreys Complex Litigation Center hosted a symposium with almost all of the leading scholars on complex and aggregate litigation in the academy. The questions posed by these scholars included: What is the optimal level of aggregation? When is class action litigation appropriate? Where did the *Principles* get it right, and where did they go wrong?

The four panels at the symposium and the resulting articles respond to these questions and more, provide valuable insight into the current state of aggregate litigation, and offer normative arguments for changes in current practice. The participants in the symposium agreed that, in general, the Aggregation Project was a significant and positive step forward in clarifying and making coherent the law attending aggregate litigation. Many of the scholars present, however, criticized important proposals and recommendations in the *Principles*. Others addressed issues in litigation outside of the Aggregation Project. Some articles examined class actions and others discussed nonclass aggregation.

The fifteen articles that follow in this symposium issue reflect a wide diversity of views and subjects. The symposium begins with the paper that resulted from Dean Deborah Hensler's keynote luncheon address.[5] She examines aggregate litigation outside of the United States, finding a substantial increase in such litigation in the last decade. At least twenty-one countries currently have adopted some type of class action; at least six countries have some form of consolidated group proceeding. Countries such as Israel, Canada, and Australia, with procedures similar to ours, have seen the greatest use of class actions. By contrast, the Netherlands has developed an effective nonclass aggregate litigation procedure to settle mass claims using very different procedures. The most intriguing cases arise against multinational corporations in which aggregate litigation is brought in both

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4 Just over six months after this symposium, one of the youngest, yet most accomplished, scholars in this field, Richard A. Nagareda, a coauthor of the *Principles*, unexpectedly passed away. This symposium issue is dedicated to him and to the zeal he brought to the search for justice and equity at this controversial flashpoint in procedural theory.

5 Deborah R. Hensler, Keynote, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306 (2011).

U.S. and foreign courts. Dean Hensler describes securities fraud litigation against Royal Dutch Shell involving both U.S. and Dutch courts that raises novel issues. Finally, Dean Hensler examines procedures for the funding of class actions, noting that the United States is unique in its use of contingency fees and requiring lawyers to fund their clients' cases, while other countries are experimenting with third-party financing of aggregate litigation.

Professors David Rosenberg, joined by Luke McCloud, and Linda Mullenix address choice of law issues. Professor Rosenberg and Mr. McCloud examine which state's law to apply when many states' laws may be relevant to the aggregate litigation, whereas Professor Mullenix asks whether to apply federal or state law. Professors Patrick Woolley, Robert Bone, and Edward Sherman examine the circumstances under which plaintiffs are adequately represented and when preclusion should or should not prevent subsequent litigation. Professors Jay Tidmarsh and David Betson focus on the optimal size of class actions and when litigants should be extended opt-out rights.

Professors Judith Resnik and Elizabeth Chamblee Burch address plaintiffs' roles in aggregate litigation. They discuss how the judicial system interacts with litigants and urge increased communication between lawyers and plaintiffs and among plaintiffs. Professor Richard Marcus and Dean Alan Morrison discuss procedural issues in class actions, including assessing the merits of a case in a class certification ruling, the role of objectors to a settlement, and procedures for aggregate litigation in other countries.

Finally, Professors Thomas Morgan, Lester Brickman, Nancy Moore, and Charles Silver highlight ethical issues in aggregate litigation. They focus on consolidation in nonclass aggregate litigation, advocating for and against the use of advance consent waivers that bind plaintiffs and regulate plaintiffs' lawyers' fees.[6]

Choice of Law

Professors David Rosenberg (along with coauthor Luke McCloud)[7] and Linda Mullenix[8] address two challenging choice of law

6 The article of one of the symposium participants, Professor Howard Erichson, is being published in the *Cornell Law Review*. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 Cornell L. Rev. 265 (2011).

7 Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 Geo. Wash. L. Rev. 374 (2011).

8 Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 Geo. Wash. L. Rev. 448 (2011).

issues in diversity class actions. Professor Rosenberg and Mr. McCloud examine choice of law in multistate, diversity cases, noting that courts have often refused to certify state law claims otherwise ripe for class treatment because of the need to apply diverging or conflicting state laws to the claims of plaintiffs from different states. The added cost and complexity of applying the laws of fifty states makes the use of class treatment unappealing. Professor Rosenberg and Mr. McCloud advocate applying the average of differing state laws and provide guidance for implementing an average law solution to the management of this choice of law problem. They argue that the main justification for averaging state laws is that businesses already make such a determination when calculating risk. Businesses account for differences in state law when predicting liability on a nationwide basis. They balance potential liability against the costs of taking additional precautions. Professor Rosenberg and Mr. McCloud offer an economic analysis showing that businesses are most efficient when they take precautions resulting in expected liability in between the most lenient state standard and the strictest state standard. They argue that multistate, diversity class actions merit special treatment in order to maximize efficiency and ensure that plaintiffs get a just outcome. Average law could be used in any case that would benefit from separating the determination of a defendant's aggregate liability from the distribution of any classwide recovery.

Professor Mullenix analyzes the Supreme Court's recent decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[9] in which the Court addressed whether to apply a New York state law that would preclude class treatment of the dispute or to apply Federal Rule of Civil Procedure 23. She reviews the facts of the case, its procedural history, the briefing and the oral argument, and thoroughly outlines the issues and positions of the parties. Professor Mullenix ultimately argues that the *Shady Grove* decision saved federal class actions from dying a slow death through limitation by state legislation.

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[9] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

Preclusion and Adequate Representation

Professors Patrick Woolley,[10] Robert Bone,[11] and Edward Sherman[12] examine issues surrounding preclusion and adequacy of representation in aggregate litigation. An often troubling element of aggregate litigation is that most plaintiffs have little contact with their attorneys despite the fact that their attorneys have a duty to represent their interests vigorously. Aggregate litigation has developed procedures that attempt to ensure adequate representation and justify binding all parties to the outcome. The key question is when preclusion should bind the absent plaintiffs. Professor Woolley focuses on whether and when an absent class member can challenge a judgment on the basis of inadequate representation. Professor Bone analyzes the justifications for binding plaintiffs in aggregate litigation. Professor Sherman assesses circumstances and techniques judges use to limit the scope of preclusion, including cases where class counsel chooses not to bring all potential claims or where not all claims are common to the class.

Professor Woolley argues that the Due Process Clause grants absent class members the right to collaterally attack a judgment on the basis of inadequate representation if the court did not have personal jurisdiction over them. He argues that the *Principles* do not fully appreciate the link between adequate representation and personal jurisdiction. A court presiding over a proposed class action may render a judgment with preclusive effect only when it has personal jurisdiction over the absent class member, which turns on notice and minimum contacts. Professor Woolley rejects the arguments of Professors Samuel Issacharoff and Richard Nagareda[13] that the proper certification of a class action under Rule 23 should effectively foreclose an adequate representation objection by an absent class member. Professor Woolley contends that adequate representation does not serve as a substitute for notice, service of process, minimum contacts, or the reasonableness findings required for personal jurisdiction. These requirements must be satisfied as to absent class members; otherwise,

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10 Patrick Woolley, *The Jurisdictional Nature of Adequate Representation in Class Litigation*, 79 Geo. Wash. L. Rev. 410 (2011).

11 Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 Geo. Wash. L. Rev. 577 (2011).

12 Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 Geo. Wash. L. Rev. 483 (2011).

13 Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1700 (2008).

class members should have the ability to object, postjudgment, that they were not adequately represented by class counsel.

Professor Bone's article looks to realign the doctrines of preclusion and adequate representation with their justifications. He notes flaws in both an outcome-based approach and a process-based approach to the two doctrines. An outcome-based approach has no need for adequate representation and permits too much preclusion. If the litigation results in the correct outcome, it does not matter whether plaintiffs were adequately represented, and a second lawsuit only wastes resources. A process-based approach allows too little preclusion because the process involves a day-in-court right for each plaintiff with individual control over major litigation decisions. Professor Bone argues against the prevailing justifications for preclusion and adequate representation, including "exceptionalism," which views class actions as administrative proceedings and allows plaintiffs to negotiate and contract away their rights. Instead, Professor Bone advocates rethinking the fit between justification and doctrine through a redefinition and limiting of the process-based day-in-court right. He argues that the day-in-court right is really a flexible right that accommodates competing concerns. Aggregate litigation deals with groups rather than individuals; therefore, achieving collective social goals or improving aggregate welfare should outweigh personal control in many situations. The day-in-court right must be flexible enough to accommodate both aggregation and broader nonparty preclusion, including innovative case aggregation, such as advance waivers by class members.

Professor Sherman analyzes preclusion and adequate representation by examining "abandoned claims," which are claims that plaintiffs' counsel could have pursued but chose not to. Some courts have held that class counsel's abandonment of certain claims, which precludes those claims from being asserted in future lawsuits, can be grounds for a finding of inadequate representation. As a result, courts and plaintiffs' lawyers have developed techniques to avoid or limit the preclusion of abandoned claims in aggregate litigation. One area where courts have reached conflicting holdings on the proper scope of preclusion is with respect to damages in Rule 23(b)(2) class actions. Professor Sherman also analyzes "hybrid" Rule 23(b)(3) class actions, which divide a proceeding into issues common to the class and individual issues, and Rule 23(c)(4) "issues" classes, where a court only certifies a class for certain issues. He notes that many courts have found issue classes to violate Rule 23(b)(3)'s predominance re-

quirement. Professor Sherman concludes by discussing how judges can supervise litigation to reduce the risk of the unfair preclusion of claims through assessing the importance of claims and the likelihood of claims being brought on an individual basis.

Optimal Number of Class Members

Professors Jay Tidmarsh and David Betson[14] analyze the optimal number of members in a class, providing a normative economic account of when opt-out rights should be afforded. They analyze section 2.04 of the *Principles*, which focuses on whether a remedy sought by the class is "divisible," which determines whether the court should allow opt-outs or not. Focusing on class actions where individual claims are too small to be viable on their own (i.e., "negative value" claims), they use a marginal utility analysis, examining the marginal benefit and marginal cost of including additional class members. They find that where the marginal benefit of adding a class member exceeds the marginal cost of doing so, the class has one equilibrium point. In some situations, classes may have two equilibrium points. In that case, the optimal class size is where the expected net benefit of that size exceeds the net benefit of any other size comprised of fewer members. Professors Tidmarsh and Betson discuss arguments for allowing opt-out rights, and do not discount them. They argue, however, that if a class is an optimal size, no opt-outs should be permitted, so as to maximize the social benefit the lawsuit will create. Finally, they contend that the "divisibility" standard for opt-out rights in the Aggregation Project is misguided, and lawyers and courts should instead look to whether the class size is optimal.

Plaintiffs' Roles in Aggregate Litigation

Professors Judith Resnik[15] and Elizabeth Chamblee Burch[16] examine plaintiffs' roles in aggregate litigation and how the judicial system can better serve plaintiffs, many of whom have no direct contact with the proceedings. They both argue that increased interaction among individual plaintiffs and between plaintiffs and lawyers would help plaintiffs better articulate their desires and improve the legiti-

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14 David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 Geo. Wash. L. Rev. 542 (2011).

15 Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 Geo. Wash. L. Rev. 628 (2011).

16 Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 Geo. Wash. L. Rev. 506 (2011).

macy of outcomes. Professors Resnik and Burch differ on their approach to the Aggregation Project; Professor Resnik views it as curtailing due process rights, whereas Professor Burch sees it as an opportunity to provide plaintiffs with more opportunities to communicate.

In her article, Professor Resnik provides an historical account to explain how modern conceptions of due process and procedural fairness have opened the courthouse door for a wide variety of plaintiffs and claims. The contemporary challenge is how to handle this mass of claims while providing due process rights to all claimants. Aggregate litigation is one technique for doing so. Professor Resnik sees two conceptions of due process in the *Principles*. The "due process model" views due process as best served through a public trial before a judge, who controls the proceedings. In contrast, lawyers dominate the "contractual model," which focuses on agreements between plaintiffs and lawyers and between the parties through settlement.

Professor Resnik criticizes the Aggregation Project for curtailing due process rights of absent class members. She argues that it relies too much on the decisionmaking of lawyers and judges and allows for too little litigant control. She views open proceedings and communication with litigants as essential to the fairness and legitimacy of the judicial system. The *Principles* support nonclass settlements and advance waivers of adequacy of representation, which are actions that have minimal judicial or public oversight. She views this approach as retreating from the goal of opening the courthouse door to all.

Professor Burch examines procedural justice in nonclass aggregate litigation and considers how to strike the right balance between the individual and the collective when designing process. She takes the opposite position of Professor Resnik, arguing that section 3.17(b) of the *Principles* presents an opportunity for lawyers and judges to provide plaintiffs more opportunity to communicate and form groups with common interests and goals. Plaintiffs can negotiate over the most desirable outcome, especially involving nonmonetary remedies, and collectively determine the processes to aggregate and litigate their claims. Such communication is positive because it invests plaintiffs in the proceedings, provides for better informed consent, and legitimizes the outcome in the eyes of plaintiffs. Increased communication and fairer procedure, Professor Burch asserts, do not guarantee fair outcomes. Therefore, section 3.18 of the *Principles* remains necessary. Judges must provide a process-dependent check on plaintiffs' communications, and a limited review of the outcome, whether a settlement

or a verdict. But ultimately increasing plaintiffs' involvement in the process will increase substantive justice.

Procedural Issues in Class Actions

While Professor Richard Marcus[17] and Dean Alan Morrison[18] have different focuses, each highlights the evolution of aggregation procedures in the United States legal system and abroad. Professor Marcus focuses on the early stages of the litigation, such as whether judges should consider the merits of the case in making a certification decision. Dean Morrison looks mostly at later procedural stages, highlighting changes regarding class settlement objectors and attorney's fees.

Professor Marcus notes that judges are increasingly making determinations as "gatekeepers" on the merits of a case when granting or denying class certification. He engages in an historical analysis of the role of the judge in fashioning and approving aggregate litigation. He analyzes *Eisen v. Carlisle & Jacquelyn*,[19] a 1974 Supreme Court case which held that judges should not make a merits determination when deciding class certification. He notes that the role of judges as gatekeepers has expanded since 1974 and that gatekeeping is a traditional function of judges. He demonstrates how in recent years judges have moved away from *Eisen*, such as in *In re Hydrogen Peroxide Antitrust Litigation*,[20] in which the Third Circuit held that *Eisen* does not preclude a merits inquiry necessary to make a Rule 23 determination. Professor Marcus points out the substantial consequences of this ruling: Parties must engage in limited merits discovery prior to class certification. Fewer classes will be certified because plaintiffs cannot argue to the judge that they will find essential information once merits discovery begins. Judges must make this pretrial "finding" on the merits without disturbing the jury's right to independently find the facts at trial. Finally, more settlement classes will likely be certified because parties will be further along in the litigation process before certification occurs.

Dean Morrison discusses changes in class action procedures over the past forty years, many of which are adopted in the *Principles*. He

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17 Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324 (2011).

18 Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 Geo. Wash. L. Rev. 428 (2011).

19 Eisen v. Carlisle & Jacquelyn, 417 U.S. 156 (1974).

20 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

argues that these changes have vastly improved the process by which the fairness of a class settlement is evaluated. He focuses on objectors, noting that objecting has become significantly easier. Today, class members have a longer time period in which to object, and technology has allowed greater access to needed information. In contrast with Professor Marcus, Dean Morrison believes the "indivisible" standard for determining opt-out rights in section 2.07 of the *Principles* is a positive development because it focuses on the remedy for the class rather than whether injunctive or monetary damages predominate. Finally, Dean Morrison believes the Aggregation Project shows progress on procedures for assessing "reasonable" attorney's fees.

ETHICAL ISSUES IN AGGREGATE LITIGATION

Professors Thomas Morgan,[21] Lester Brickman,[22] Nancy Moore,[23] and Charles Silver[24] examine ethical issues in aggregate litigation. They focus more closely on nonclass aggregation, which often has many of the features of class actions without the same procedural protections. One issue in nonclass aggregation is that every plaintiff must individually consent to any settlement, a level of unanimity that is difficult to obtain. Professors Morgan, Brickman, and Moore are all critical of lawyers' use of advance consent waivers to get around this difficulty. Professor Silver writes in favor of such arrangements, arguing that the law governing lawyers is constraining innovative techniques for dealing with aggregate litigation. The articles also overlap by questioning appropriate fees for plaintiffs' lawyers and the potential for unethical behavior by lawyers presented with the possibility of large contingency fees.

Professor Morgan highlights scenarios in which a lawyer might aggregate many plaintiffs' claims into one settlement. He notes that both section 3.17 of the *Principles* and Rule 1.8(g) of the American Bar Association's *Model Rules of Professional Conduct* would govern such a situation. He supports Rule 1.8(g), which he argues provides more protection for plaintiffs and less potential for manipulation on the part of lawyers. Specifically, advisory boards and courts have interpreted Rule 1.8(g) to prohibit plaintiffs from consenting in advance

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21 Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734 (2011).

22 Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics*, 79 GEO. WASH. L. REV. 700 (2011).

23 Nancy J. Moore, *The Absence of Legal Ethics in the ALI's* Principles of the Law of Aggregate Litigation*: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717 (2011).

24 Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754 (2011).

of litigation to procedures for accepting a potential settlement. Such procedures often include a provision allowing plaintiffs to accept a settlement through a less-than-unanimous vote of all plaintiffs. Professor Morgan argues that such procedures violate the ethical duties of lawyers to represent every plaintiff. Section 3.17 of the *Principles* allows for such waivers under certain conditions and with certain procedures for challenging an agreement. Professor Morgan argues that such a system is ripe for abuse. When plaintiffs sign the waiver in advance of litigation, they do not know what the settlement terms might include. In addition, informing every plaintiff about the terms of a settlement is a difficult, but necessary, procedure.

Professor Brickman examines ethical issues surrounding plaintiffs' lawyers' contingency fees in nonclass aggregate litigation. He argues that ethical rules such as Rule 1.8(g) are often forgotten or ignored when large fees are at stake. He acknowledges that the unanimous consent requirement for plaintiffs approving a settlement contributes to ethical problems because of the possibility of holdouts and the incentive for lawyers to misrepresent the settlement to induce consent. However, he rejects the idea that "most-or-nothing" settlements, in which only eighty-five or ninety-five percent of plaintiffs must consent to a settlement, would be a better alternative.

As a solution, Professor Brickman suggests that courts enforce reasonable fee provisions in certain cases. Failing that, disciplinary committees should bring actions against lawyers who appear to have colluded or otherwise not represented the interests of their clients. To bring these ethical issues into focus, Professor Brickman uses the plaintiffs' firm of Umphrey Burrow as an example. He highlights the firm's actions litigating claims surrounding an explosion at Phillips Petroleum's Houston plant in 1989 that killed twenty-three people and wounded hundreds. These actions resulted in a malpractice suit that reached the Texas Supreme Court, which held that lawyers who breach their fiduciary duty to their clients can be required to forfeit their fees even where the clients cannot show actual damages resulting from the lawyers' actions.

Professor Moore focuses more on the Aggregation Project, and notes that it lacks a meaningful discussion of ethical rules as they apply to lawyers in both class actions and nonclass aggregation. She views this as a missed opportunity to provide much-needed guidance. Professor Moore also highlights provisions that she believes have adverse effects on ethical behavior. Particularly, she argues that section 1.04(a) of the *Principles* inadvertently endorses the view that each

member of the class is an individual client of the lawyer in its reference to a lawyer "representing multiple claimants in an aggregate proceeding." Professor Moore supports the opposing interpretation of a class as an entity client when applying conflict of interest rules.

She also criticizes the use of the term "structural conflict of interest" in section 2.07(a)(1), which highlights how a court should come to a determination of adequacy of representation. The Aggregation Project does not define "structural conflict of interest," and Professor Moore believes the term could be interpreted to prevent certification of a class where a lawyer has any conflict of interest between two individual class members. In nonclass aggregation, Professor Moore raises similar issues as Professor Morgan and notes the particular need for guidance in large aggregations, where lawyers view clients as similar to absent class members but the judicial protections provided to class members do not apply. She notes that the *Principles* assume these clients are in a position to protect themselves and are fully informed of the proceedings, which is not always the case.

Professor Silver responds to Professors Morgan, Brickman, and Moore by asserting that plaintiffs should be able to consent to procedures guiding the approval of a settlement, even when a less-than-unanimous vote is required for approval. Professor Silver views the lawyer-client relationship as that of agent and principal, in which each group is interested in maximizing its recovery. Plaintiffs hire lawyers because they need expertise, and lawyers keep contingency fees at a certain level to induce plaintiffs to hire them. Lawyers have an incentive to limit the amount of effort they put into a case to the extent that it maximizes their fee per hour, and plaintiffs have an incentive to monitor lawyers to pressure lawyers to maximize the overall recovery.

Professor Silver believes participants in the judicial system should be able to create innovative structures to deal with lawyer-client and client-client conflicts of interest, but that rules governing lawyers often stifle such innovation. Bar rules assume that ideals of individual consent that apply in a single-plaintiff setting must be extended to an aggregate setting. Courts have used bar rules as justification for preventing the types of advance consent agreements the other ethics panelists criticize. Professor Silver argues that current bar rules contribute to the problem of lawyer misconduct rather than offer solutions to unethical behavior.

Conclusion

The fifteen papers in this symposium reflect the wide range of scholarly views attending class actions and nonclass aggregate litigation. While the ALI Aggregation Project represents a dramatic step forward in our effort to make coherent the procedures by which our courts manage aggregate litigation, many questions remain unsettled and hotly disputed. Much is at stake in this debate, for without effective aggregate litigation procedures, our ability to provide justice efficiently to thousands of claimants with similar claims will remain in doubt.