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Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties

*Carol A. Needham**

INTRODUCTION

This Article highlights two key issues that must be addressed when considering an aggregate settlement: (1) client autonomy, particularly in determining the goals of the representation; and (2) the scope of lawyers' fiduciary duties, specifically the duty of loyalty owed to each client. These are crucial elements in the analysis of attorneys' obligations in the representation of any client, but they merit enhanced attention in situations where the lawyer represents two or more clients in litigation resolved through an aggregate settlement.

The term "aggregate settlement" has been used to refer to the settlement of collectively litigated cases that are not class actions. Some non-class aggregate litigation results from the use of formal procedural devices, such as joinder,¹ multidistrict transfer,² and consolidation.³ Still, other groups of cases are litigated together even

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1. See FED. R. CIV. P. 20. Under the permissive joinder rule, plaintiffs may seek relief in a single lawsuit so long as the asserted right to relief arises out of the "same transaction, occurrence, or series of transactions or occurrences" and a "question of law or fact common to all plaintiffs will arise in the action." FED. R. CIV. P. 20(a)(1)(A)–(B). Defendants may be joined in a single action when "any right to relief is asserted against them . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all defendants will arise in the action." FED. R. CIV. P. 20(a)(2)(A)–(B).

2. See 28 U.S.C. § 1407 (2006) (setting forth the federal regulations for multidistrict legislation). Multidistrict transfer—authorized under the provisions of this statute—may proceed as set forth in the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation (MDL), promulgated pursuant to the MDL Panel's authority under 28 U.S.C. § 1407(f) (2006). See *id.*

3. See FED. R. CIV. P. 42(a) ("If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2)

though they have not been officially brought into a single action.⁴ To further complicate the picture, lawyers representing similarly situated clients sometimes opt to engage in a *series* of representations involving settlement negotiations. These lawyers specifically characterize these arrangements as being conducted on a non-aggregated basis. As one example, a lawyer who represented plaintiffs seeking overtime pay under the Fair Labor Standards Act brought approximately eight hundred separate cases against the same defendant in courts across the United States.⁵

As a result of the multiplicity of contexts in which such aggregated non-class action proceedings can move forward, it is important to make clear that the discussion in this Article focuses on the settlement offers that may conclude the litigation, rather than on other aspects of aggregate litigation. Although there is no universally accepted delineation of which case types fall under the term “aggregate litigation,” Howard Erichson’s noteworthy article, *A Typology of Aggregate Settlements*, remains the most comprehensive attempt to systematically address the phenomenon.⁶ This Article focuses on the negotiated conclusion of litigation—“aggregate settlement”—that the American Law Institute’s (“ALI”) *Principles of the Law of Aggregate Litigation* (“*Principles*”) defines as the “settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent,” such that “the value of each claimant’s claim is not based solely on individual case-by-case facts and negotiations.”⁷

consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”).

4. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.15–3.18 (2010) [hereinafter ALI PRINCIPLES] (defining non-class aggregate settlements and explaining the basis and procedure for executing these settlements); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 676 (2011) (describing “non-class aggregate settlements” as an “ambitious aspect of expansionist aggregation” and as including a diverse group of aggregations created through formal mechanisms); Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 506 (2011) (explaining that aggregate litigation covers a “set of tools” that bring plaintiffs together, including joinder consolidation multidistrict transfer, and coordinated handling).

5. See *Murphy v. Dolgencorp, Inc.*, No. 1:09CV00007, 2010 WL 4261310 (W.D. Va. Oct. 28, 2010).

6. See generally Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) (developing a typology of aggregate settlements by defining collective settlements in terms of their essential functions, therefore allowing for a more precise way of understanding and describing such litigation, as well as their applied ethical duties).

7. ALI PRINCIPLES, *supra* note 4, discusses settlement of non-class aggregate litigation in sections 3.15 through 3.18. The term “non-class aggregate settlement” is defined in section 3.16.

I. CLIENT AUTONOMY

A lawyer representing a group of clients in non-class aggregate litigation has a separate attorney-client relationship with each client whose case he is handling on an aggregated basis. He owes to each of the clients the full complement of duties that the lawyer would owe to any client he represents in traditional litigation. Included in these obligations is the duty to allow each of his clients to exercise the full scope of autonomy in determining the objectives of the representation under Rule 1.2(a) of the Model Rules of Professional Conduct (“Model Rules”).⁸ The lawyer must also communicate with each client individually regarding the client’s desires about whether to accept a settlement offer. However, as Tom Morgan has rightly pointed out, the lawyer’s traditional duty of particularized representation of each individual client exists in tension with the goals of judges and lawyers, who seek efficiency in case administration and allocation of judicial resources.⁹

As Charles Silver and Lynn Baker noted in their seminal article on aggregate settlements, aggregating claims that are not worth enough to be effectively brought individually allows those claimants to achieve a result that would be unattainable if the claims were considered separately.¹⁰ However, as Tom Morgan has discussed,¹¹ a central claim relating to client autonomy made by Silver and Baker is the idea that a client should be allowed to contract around the requirements of Model Rule 1.8(g) when that client decides doing so is in his interest.¹² Since

8. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2012).

9. Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 740 (2011).

10. Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 763 (1997).

11. See Morgan, *supra* note 9, at 745 (noting that Silver & Baker’s proposal was not well received and even before the ALI project was finished, it was determined that Rule 1.8(g) did not limit legitimate settlement arrangements to the extent the Professor had stated).

12. As the Rule 1.8(g) of the Model Rules of Professional Conduct (“Model Rules”) provides, 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.

MODEL RULES OF PROF’L CONDUCT R. 1.8(g). Comment 13 to Model Rule 1.8 highlights some of the key aspects of aggregate settlement practice:

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the client’s informed consent. In addition, Rule 1.2(a) protects each client’s right to have the final say in deciding whether to accept or reject

professional responsibility standards allow a client to authorize his lawyer to settle an individual legal matter (within stated parameters) in advance of a settlement negotiation—Silver and Baker argue—a client should *also* have the ability to provide advance consent to whatever settlement terms are approved by a specified majority of the other clients being represented by that lawyer in related litigation.¹³

The duty of loyalty a lawyer owes to each of his clients is a foundational principle of the attorney-client relationship.¹⁴ In addition to mandating that the lawyer avoid conflicts of interest,¹⁵ the duty of loyalty includes an obligation to work diligently on behalf of the client,¹⁶ provide competent representation,¹⁷ communicate effectively with the client regarding the representation,¹⁸ and consult with the client regarding the matters essential to the representation.¹⁹ In the attorney-client relationship, each of an attorney's clients must be afforded the ability to direct the goals of the representation. This remains the case even when the lawyer is representing a number of clients in related matters. One of the enduring problems of aggregate litigation is the

an offer of settlement The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer . . . is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement . . . is accepted.

Id. R. 1.8 cmt. 13.

13. Silver & Baker, *supra* note 10, at 763.

14. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 146 (1986) ("Whatever may be the models that obtain in other legal cultures, the client-lawyer relationship in the United States is founded on the lawyer's virtually total loyalty to the client and the client's interests.") (internal cross-references omitted); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 *GEO. J. LEGAL ETHICS* 15, 21 (1987) ("In the relationship with a client, the lawyer is required above all to demonstrate loyalty.")

15. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.")

16. See *id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."). Note that the Model Rules, although influential, represent only the consensus reached by the House of Delegates of the American Bar Association (ABA). The precise language of a particular standard can (and often does) vary in a given jurisdiction, since the highest court of each state is the body empowered to declare the professional conduct standards in effect within that jurisdiction. This Article will refer to the provisions of the Model Rules where that language reflects the position of the majority of jurisdictions within the United States.

17. See *id.* R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

18. See *id.* R. 1.4. Among others, Rule 1.4 duties include keeping the client reasonably informed about the status of the case, complying with the client's reasonable requests for information, and consulting with the client about the means to achieve the client's objectives. *Id.*

19. *Id.* See also *id.* R. 1.2 (governing the scope of the representation and the allocation of authority between lawyer and client).

clients' reduced ability to meaningfully direct their representation.²⁰

Among the most significant components of the client's direction of the representation is his ability to exercise discretion regarding the terms of an acceptable settlement and whether to agree to an opposing litigant's offer. In his provocative article, *Against Settlement*, Owen Fiss articulated well-founded concerns regarding the inability of individuals involved in aggregate litigation to effectively consent to the defendant's settlement offer.²¹ Even Samuel Issacharoff and Robert Klonoff concede that Fiss is correct in his view that aggregate litigation inevitably constrains the autonomy of the individual clients.²² The Reporter (Issacharoff) and Associate Reporter (Klonoff) for the ALI *Principles* assert the necessity of mass settlement as an inevitable response to "predictable repetitive harms" in a mass society.²³ Although they certainly have a depth of knowledge informing their opinion, they are understandably focused on the wide-angle view—looking at the justice system at the macro level. The experience of the individual client remains a significant element of legal ethics analysis, however, and the lawyers' duties to each client cannot be brushed off as an inconvenient relic of a bygone era. Nancy Moore,²⁴ Tom Morgan,²⁵ Howard Erichson,²⁶ and Ben Zipursky,²⁷ among others, have evaluated proposed innovations regarding the handling of non-class action aggregate litigation in light of current professional responsibility

20. See, e.g., Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 12 (2009) ("Individual plaintiffs within collective representation have little substantive input or authority over how their attorney handles the case.").

21. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078–82 (1984).

22. Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1184 (2009).

23. *Id.* at 1201.

24. See 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, 718 (2011) (explaining the dearth of any meaningful discussion about ethics rules that apply to lawyers in aggregate litigation); Nancy J. Moore, *The Case against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 153 (1999) [hereinafter Moore, *Against Changing*] (arguing that a comprehensive reform of attorney ethics is unnecessary).

25. See Morgan, *supra* note 9 (acknowledging the practical concerns that underlie the ALI's proposals regarding aggregate litigation).

26. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 525–28 (2003) (exploring the ways in which mass collective representation raises a number of problems and proposing how to better understand and solve those issues); Howard Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits*, 50 DUKE L. J. 381 (2000) (contending that the increase in informal aggregation suggests a need for either more formal aggregation mechanisms or a greater formalization of counsel coordination).

27. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 298–99 (2011).

standards. Those notable scholars rightly emphasize a nuanced understanding of the professional obligations a lawyer owes to each of his clients. Of course, if the highest court in a jurisdiction were persuaded that clients could be well-served by the court amending its articulation of lawyers' duties in a way envisioned by the ALI *Principles*, the court could certainly do so. Until a jurisdiction amends its professional responsibility standards in this way, however, lawyers are required to comply with the currently articulated standards.

There is a significant difference between, on the one hand, urging each client to agree to the settlement so that everyone in the group can share in the settlement, and, on the other hand, pressuring a client to completely disavow his own goals so that other clients will benefit. In the latter situation, it is entirely possible that none of the clients view the particular settlement as a desired result. The clients' situation is reminiscent of that portrayed in the O. Henry short story, *The Gift of the Magi*, in which a husband gave up his beloved pocket watch so that he could buy his wife a comb for her luxurious hair, while she sold her hair to buy her husband a now-useless fob for the heirloom pocket watch he no longer owns.²⁸ In throttling down their own preferences and trying to respect the perceived interests of the other, neither husband nor wife obtained an outcome that suited their needs. O. Henry's story emphasizes the selfless love that ultimately motivates each member of the marriage to place the happiness of the other above his or her own. In *negotiation* terminology, however, this result can be seen as a lose-lose dynamic. While both spouses are sacrificing, neither can use the gift the other has obtained.

A similar dynamic operated after the April 2007 shootings at Virginia Tech University, in which Seung Hui Cho killed thirty-two students and faculty and wounded many others, including seventeen seriously. The Commonwealth of Virginia and Virginia Tech offered \$100,000 to the estate of each decedent, and reimbursement for medical care and mental health follow-up to seriously injured survivors. As part of the settlement offer, both groups of potential litigants were offered access to written material relevant to the shootings.²⁹ As the deadline for accepting or rejecting the settlement offer neared, the attorneys handling the settlement apparently pressured the families to accept the offer out of fear that "the state might withdraw the offer if not enough people

28. O. HENRY, *The Gift of the Magi* (1906), in O. HENRY, O. HENRY STORIES 40-48 (1962).

29. Theresa Vargas & J. Freedom du Lac, *Va. Tech Massacre: Two Families Push for Answers, Apology from University*, WASH. POST, Mar. 31, 2012, http://www.washingtonpost.com/local/va-tech-massacre-two-families-push-for-answers-apology-from-university/2012/03/31/gIQAArIWnS_story.html.

agreed to the terms.”³⁰ According to Andrew Goddard, whose son was injured in the carnage, “Families of the deceased were told: ‘If you don’t sign the settlement, families of the injured won’t get any money for medical bills.’ And we were told families of the deceased wouldn’t get money for funerals and all that stuff if we didn’t sign.”³¹ As the deadline approached, family members of those killed were strongly urged to disregard their *own* goals for potential litigation in favor of helping the families whose children were seriously injured.³² At the same time, plaintiffs whose children had survived were apparently bullied into acquiescing to a settlement in order to help other plaintiffs whose family members had died. Lori Hass, the mother of a surviving student, said:

Frankly I was disgusted with the way the settlement was handled. People were being told by their attorney, “This is the best offer you’re going to get. Accept it and exert pressure on other families who might not accept the settlement.” I got calls saying, “Lori, accept the settlement—you have to accept.”³³

Two of the families, the parents of Erin Peterson and Julia Pryde, decided against accepting settlement offers. These parties wanted the opportunity to press Virginia Tech’s President for answers during the discovery process. One particularly pressing inquiry dealt with why the school made the decision to not send out an all-campus alert so that students and university employees would know that two students had died of gunshot wounds and that the gunman had not yet been apprehended.

Since Virginia state law capped the recovery in the lawsuits at \$100,000,³⁴ the decision of these two families to litigate rather than accept a \$100,000 settlement offer was not economically sound. There was a significant risk that there would be no recovery in the lawsuit and the further expenses of litigation would have been avoided following acceptance of the settlement offer. But the families decided to litigate because of a strong desire to hold accountable those running Virginia Tech and to force them to explain their decision-making process. Turning down the offer gave these two families the opportunity to compel discovery of documents that shed light on what the various university departments had known about the difficulties that Cho, the

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Since 1993 Virginia’s Tort Claims Act has capped potential damages for negligence in such cases at no more than \$100,000. VA. CODE ANN. § 8.01-195.3 (West 2012).

shooter, had manifested prior to the morning of the shootings.³⁵ These plaintiffs also had the primary goal of eliciting an explanation of why the facts observed by departments of public safety, dormitory resident advisors, and professors who interacted with Cho had remained separated in information silos, with no mechanism in place to take a systemic look at the full picture presented by Cho's increasingly erratic actions. The families who had accepted the settlement offer had given up their leverage, and they had no way to get additional information after they settled their claims. It is crucial that lawyers for plaintiffs in such circumstances fully elaborate the advantages and disadvantages of accepting a settlement offer and ensure that the client's autonomy is protected during the decision-making process.

The professional standards of ethical conduct for lawyers are expressed as unitary statements to be applied across the profession, rather than explicitly tailored to vary in light of differing types of representations. The late Steven Krane,³⁶ among others, argued vigorously that the legal profession should

give serious consideration to abandoning the "one size fits all" approach to legal regulation applicable across the range of lawyer-client relationships . . . [and instead] explore a more flexible approach that will more closely comport with the reasonable expectations of clients and lawyers in the broad range of relationships they have today.³⁷

35. Lucinda Roy, the former chair of the English Department, gave an excellent account of the events leading up to the shootings and the choices made by administrators at Virginia Tech on the day of the shootings. See LUCINDA ROY, *NO RIGHT TO REMAIN SILENT: THE TRAGEDY AT VIRGINIA TECH* (2009). The book provides details about Roy's experience attempting to intervene with counseling services for Cho, who was her former student, and the ways in which Virginia Tech was, in part, responsible for the tragedy. *Id.* The book, together with the Governor's Commission's report, provides a useful overview of the context in which the events unfolded. See VA. TECH. REV. PANEL, *MASS SHOOTINGS AT VIRGINIA TECH, APRIL 16, 2007: REPORT OF THE REVIEW PANEL* (2007) [hereinafter VA. TECH. SHOOTINGS REPORT], available at <http://www.governor.virginia.gov/TempContent/techPanelReport/FullReport.pdf>. The Review Panel concluded that "[t]he lack of information sharing among academic, administrative, and public safety entities at Virginia Tech and the students who had raised concerns about Cho contributed to the failure to see the big picture." VA. TECH. REV. PANEL, *MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL 52* (2009), available at http://www.governor.virginia.gov/tempcontent/techPanelReport-docs/VT_Addendum_12-2-2009.pdf.

36. Steven Krane, a partner at Proskauer Rose LLP and former chair of the ABA Standing Committee on Ethics and Professional Responsibility and the City Bar of New York, led many efforts to reform the governing regulations to better reflect current practice standards. *In Memoriam: Steven C. Krane*, 82-AUG. N.Y. ST. B.J. 23, 23.

37. Steven C. Krane, *The Fallacy of the Monolithic Client-Lawyer Relationship: Leaving 1908 and Procrustean Regulation Behind*, 2008 J. PROF'L LAW. 43, 44 [hereinafter Krane, *Fallacy*]; see also Steven C. Krane, *Ethics 2000: What Might Have Been*, 19 N. ILL. U. L. REV. 323, 329 (1999) [hereinafter Krane, *Ethics*] (arguing that the model standards promulgated by the

Mitt Regan,³⁸ Richard Painter,³⁹ and David Wilkins⁴⁰ have all discussed relaxing the strictures imposed on the attorney-client relationship when an attorney represents sophisticated clients. Defining which clients will qualify as “sophisticated clients” is not simple, but the category would include those entities that have in-house counsel capable of giving the corporation a second opinion of their legal options or those persons who are “repeat players” with substantial prior experience with lawyers.⁴¹ Given the difficulty of drawing a bright line so as to be certain, *ex ante*, which individuals would be regarded as sufficiently experienced, it is probable that this envisioned restructuring of the attorney-client relationship would prove problematic for lawyers. Malpractice insurers, disciplinary counsel, and others scrutinizing the propriety of the lawyers’ actions may not agree that the client was indeed sophisticated in certain circumstances.

As reflected in Model Rules 1.2 and 1.4, the client, rather than the lawyer, is the person who retains the power to determine the goals of the representation, including the terms of any settlement.⁴² In carrying out the lawyer’s obligation to communicate effectively with the client, the lawyer is required to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”⁴³ and must obtain informed consent from each client—confirmed in writing—prior to entering into an aggregate settlement.⁴⁴ Although these standards may sound straightforward,⁴⁵ the context in which informed consent is sought and the background knowledge

ABA, which have influenced the standards enacted by numerous jurisdictions, are premised on “the fallacy of the monolithic client-lawyer relationship”).

38. Milton C. Regan, Jr. & Palmer T. Heehan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2190–91 (2010).

39. Richard W. Painter, *Advance Waiver of Conflicts*, 13 *GEO. J. LEGAL ETHICS* 289, 323 (2000).

40. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799, 887 (1992).

41. *See, e.g.*, Krane, *Fallacy*, *supra* note 37, at 48 (suggesting a “hub and spokes” regulatory structure under which core attorney-client principles are articulated as the irreducible “hub” while subordinated standards could be elaborated as “spokes”, depending on the role of the lawyer and the type of client relationship involved in the representation).

42. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2012) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation[,] . . . shall consult with the client as to the means by which they are to be pursued[,] . . . [and] abide by a client’s decision whether to settle a matter.”).

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

44. *Id.* R. 1.8(g).

45. The definition of “informed consent” in the Model Rules reads: “Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* R. 1.0(e).

possessed by the particular client being asked to consent can vary to such a degree that it is difficult to articulate a standard in the abstract. Comment 6 to Model Rule 1.0 notes that the communication needed to obtain informed consent will vary and that the lawyer is required to make reasonable efforts to ensure that the client

possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client . . . of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's . . . options and alternatives.⁴⁶

It can be difficult to ascertain whether the lawyer has made the necessary disclosures to constitute informed consent, and whether the client actually understands the risks and disadvantages of the action to which they are giving their assent. Communication between the client and his lawyer can be even more difficult given the day-to-day realities of mass tort representation, where claimants' lawyers' case inventories include hundreds or thousands of clients. In these representations, the theory that the client is directing the attorney's work is at odds with the way the work is handled on the ground.⁴⁷ Any good empiricist would require more data regarding the interaction between lawyers and clients in these practice settings before drawing firm conclusions. However, even at this point, the available evidence supports the conclusion that a disproportionate share of disciplinary complaints that assert neglect and failure to communicate are filed by clients in litigation and other representation in which the client is an individual, rather than by corporations and other entity clients.⁴⁸

Though perhaps only imperfectly observed, the "client directs the representation" principle is critical to the attorney-client relationship: the client sets the goals for which the attorney is retained, while the attorney determines the proper way to carry out those goals.⁴⁹ This

46. *Id.* R. 1.0 cmt. 6.

47. See Paul R. Tremblay, *The Role of Casuistry in Legal Ethics: A Tentative Inquiry*, 1 CLINICAL L. REV. 493, 501-02 (1994) (describing numerous considerations that a lawyer should take into account when directing the course of litigation).

48. This opinion is based on the author's experience as a representative for the National Organization of Bar Counsel.

49. Perhaps the most cogent discussion of this point in connection with aggregate litigation is found in Erichson and Zipursky's article, *Consent Versus Closure*:

The lawyer's job is not to make the decision but rather to advise the client about the pros and cons of the settlement offer and, in the language of [Model] Rule 1.2(a), to "abide by" the client's decision. A lawyer who tells the client, "Settle or you're fired!" is hardly abiding by the client's decision.

Erichson & Zipursky, *supra* note 27, at 283-84. Model Rule 1.2(a) states, "a lawyer shall abide

principle mandates an attorney to consult with the client regarding the terms of settlement offers, a duty that extends beyond simply conveying the offer to the client with instructions directing the client to sign and return by the deadline indicated. The client is supposed to have some chance to convey his views regarding the terms of the offer in a substantive discussion with his attorney. Although aggregated for purposes of efficient handling, each separate claim is just that—a separate cause of action about which that particular client must have a chance to make an independent decision regarding whether to settle. Much has been written on the issue of client consent in connection with the ALI aggregate litigation project; there is no need to repeat all the arguments. The key point is this: lawyers' fiduciary duties, as well as the requirements of the profession expressed in the Model Rules, necessitate an individualized analysis of each client's interests when negotiating an aggregate settlement of their clients' claims.

As Nancy Moore pointed out more than a decade ago, it is exceedingly difficult to ensure that a client's advance consent to an aggregate settlement is actually the informed consent to which the client is entitled.⁵⁰ The degree of knowledge even a "repeat player" or sophisticated client possesses about the likelihood of possible outcomes is unlikely to rise to the level of informed consent, especially when the lawyer obtains the agreement from the client prior to the start of settlement negotiations.⁵¹ When an attorney requires advance consent of a client as a condition of entering into the attorney-client relationship, the client is not freely exercising the ability to direct the representation as contemplated by the current professional responsibility standards. Advance consent sought at the outset of the representation is likely to be insufficiently informed. It would be difficult to counsel the client about all of the potential disadvantages for settling at a point in time when little information is available about the context in which a future

by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROF'L CONDUCT R. 1.2(a). As the rule further provides, "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter." *Id.* Although clearly demarcating the boundaries of the lawyer's authority can be problematic, the principle here is clear. *See, e.g.,* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 106–07 (2012) ("As a general principle, the lawyer is entitled to make decisions in matters that do not affect the merits of the cause or substantially prejudice the client's rights, although, even in these cases, there may be situations where it would be prudent for the lawyer to confer with the client. In other situations, the client has the exclusive authority to make decisions.").

50. *See* Moore, *Against Changing*, *supra* note 24, at 180–81 (discussing what clients relinquish by giving their informed consent in a class action).

51. *Id.* at 181.

settlement offer might be made. Howard Erichson and Benjamin Zipursky have objected to advance consent waivers, not only because they put too much control into the hands of the claimants' lawyers to determine when and on what terms to settle, but also because the conflicts of interest inherent in aggregate settlements cannot be consented to in advance under the terms of Model Rule 1.7(b).⁵² The conflicts of interest issues are indeed intractable.

As articulated in Model Rule 1.7(a)(2), "a concurrent conflict 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."⁵³ In addition to the possible conflict between the lawyer's own interest in efficiently reaching the conclusion of the litigation and an individual client's interest in satisfying his goals for the representation, in aggregate litigation there is a heightened danger that the interests of one client will conflict with those of another of the lawyer's concurrent clients. The factual context of the aggregated litigation can vary widely, of course. But from the standpoint of any individual client whose lawyer is conducting such a representation, there is a zero-sum problem: an inherent conflict between each of the claimants and the other claimants to the limited fund from which all settlements will be paid. The judicial opinions and scholarly commentary analyzing permissible and impermissible conflicts when a lawyer conducts a multiple-client representation are instructive here.

The classic multiple-client representation involves an engagement in which a lawyer in a single matter represents more than one client. For example, a lawyer who defends one or more executives along with a corporation in shareholder derivative litigation is engaging in a multiple-client representation. This situation is similar to those in which a husband and wife retain the same lawyer to draw up a will. Representing more than one party in the same legal matter necessarily involves a conflict of interest, though it is often a consentable conflict, even when those parties are seemingly allied.⁵⁴ In the lawyer's

52. See Erichson & Zipursky, *supra* note 27, at 300–11 (discussing the issues with advance consent, including inauthentic consent and non-consentable conflicts); MODEL RULES OF PROF'L CONDUCT 1.7(b) (2012) (allowing a lawyer to represent a client when there is a concurrent conflict of interest if four requirements are met).

53. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).

54. See, e.g., Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87 (2011) (discussing the inter-personal dimension in non-class aggregation); ROY D. SIMON, CAROL A. NEEDHAM & BURNELE V. POWELL, *LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS* 334–35 (4th ed. 2009) (analyzing the conflicts of representation for allied parties).

explanation of the advantages and risks of having one lawyer jointly represent multiple parties in a single legal matter, he is required to make each client aware of “the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.”⁵⁵ Furthermore, the lawyer must explain, in detail, “the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.”⁵⁶ Even with adequate informed consent, the handling of each client’s confidential information can present an insurmountable barrier to continuing to represent the multiple clients.⁵⁷ As elaborated in Comment 31 to Model Rule 1.7,

[C]ontinued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit.⁵⁸

Each client has a fairly broad right to be informed, and the lawyer is required to tell every client about relevant issues to the representation that could have an impact on that client’s interests.

Thus, consider the court’s decision to seal the settlement reached in *Murphy v. Dolgencorp, Inc.*, a case in which the lawyers represented some eight hundred plaintiffs in courts across the U.S. who sought overtime pay and other remedies for a single defendant’s violations of the Fair Labor Standards Act (FLSA).⁵⁹ The plaintiffs joined the defendant in petitioning the court to seal the settlement agreement, which had been reached in one of the cases, so that the terms offered to and agreed upon by that plaintiff would not be known by the other plaintiffs represented by the same lawyer.⁶⁰ The engagement letters

55. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 18.

56. *Id.*

57. See, e.g., William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 59 (2003) (exploring the intraclient conflict of aggregation of corporate clients); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 17.3 (3d ed. 2001) (exploring the “entity” theory of representation and comparing it with the “group” theory).

58. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 31.

59. *Murphy v. Dolgencorp, Inc.*, No. 1:09-CV-00007, 2010 WL 4261310, at *1 (W.D. Va. Oct. 28, 2010). The Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2006)), standardized work-week hours, minimum wage, prohibition of child labor, and other protections for workers.

60. *Murphy*, 2010 WL 4261310, at *1.

provided that none of the plaintiffs would be told the terms of any settlements reached with the lawyer's other FSLA plaintiffs against that defendant.⁶¹ Both plaintiff and defendant asserted that preventing the other clients from knowing the terms of settlements reached in this case would "allow negotiations to concentrate on the specific merits of each individual case."⁶² This seems, at best, to be a rather flimsy argument. Presumably, the plaintiff in each lawsuit was the only participant from whom this information was being withheld—all the other players were fully aware of the details of the settlement negotiation with every other plaintiff. If the managers making decisions for the defendant, the company's lawyers, and the plaintiffs' lawyer were all able to effectively compartmentalize their knowledge of other settlements, the plaintiff should have also been trusted to do so. How does seeking to keep his other clients in the dark comport with the plaintiffs' lawyer's duty of loyalty? The only apparent benefit to each of the plaintiffs in this arrangement was that their lawyer's work on the other cases could render the lawyer better informed and more efficient in his work on their own case.⁶³ The *Murphy* court assumed that the clients could "understand and accept that their attorneys cannot tell them the terms of other settlements in the course of advising them as to whether they should accept a settlement offered."⁶⁴ Even if that were factually true, however, it is difficult to reconcile the complete withholding of crucial information from a client with the lawyer's duty of loyalty to that client. The example in Comment 31 to Model Rule 1.7 regarding circumstances in which withholding information could be appropriate is an entirely different situation:

In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.⁶⁵

Although technically each client is an individual client of the lawyer, in substance, the pressures on the duty of loyalty in the representation of groups of claimants have significant commonalities with those facing

61. *Id.*

62. *Id.*

63. *See id.* *2 n.2 (reaching the conclusion that multiple representation's primary benefit to the client is a "better informed and more efficient advocate").

64. *Id.*

65. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 31 (2012).

lawyers that represent multiple clients in a single matter. This situation always presents a risk that the interests of the clients will come into conflict; even lawyers who have carefully navigated the required disclosures can find themselves in a situation where a divergence in the interests of joint clients renders the conflict non-consentable. Even if we posit, for argument's sake, that the conflict could be a *consentable* one, the limitations imposed on client autonomy by advance consent to an unreached settlement are substantial.

Requiring clients to make a binding decision about whether to accept a settlement offer before those clients understand the advantages and disadvantages of what that offer will actually provide is contrary to the core principle that each of the clients is an independent agent, entitled to make his own informed decision regarding whether to compromise his claim. When Charles Silver argues that it is a "mistaken notion" to apply the rules designed for single-client representations to multiple-client settlements, including the rule requiring client control of settlement decisions in single-client litigation,⁶⁶ he risks opening Pandora's box. If compromising the client's claim is, in Silver's view, not within the client's control, then who controls it? It is entirely possible that accusations of the ancient charges of champerty⁶⁷ or barratry⁶⁸ will be dusted off and aimed at the claimants' lawyer. The operation of "welfare-enhancing social choice rules, whatever they may be," which Silver views as the replacement for the client's decision,⁶⁹ are an attempt to decisively take the decision-making power out of the hands of the client without relocating that power to another actor. This

66. Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754, 763–64 (2011).

67. Champerty is "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of the judgment proceeds." BLACK'S LAW DICTIONARY 262 (9th ed. 2009). See also *Roberts v. Cooper*, 61 U.S. (How.) 467, 471–72 (1857) ("The writ of champerty lieth where a man, by covenant or agreement, made by writing or by word, agreeth to have a part of the thing, or land, or debt, which is in suit, that shall be recovered if the party recover, to maintain and aid him in the action and in the manner for which he sueth." (citing 2 A. FITZ-HERBERT, NATURA BREVIVM 171A (9th ed., 1794) (1534))). For a more recent definition, see *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1153 (9th Cir. 2011) ("Champerty generally refers to an agreement in which a person without interest in another's litigation undertakes to carry on the litigation at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation." (internal citations omitted)).

68. "Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty." *In re Primus*, 436 U.S. 412, 424 n.15 (1978). For more information on champerty, see *supra* note 67 and accompanying text. See also BLACK'S LAW DICTIONARY 170 (9th ed. 2009) (defining barratry as "[v]exatious incitement to litigation, [especially] by soliciting potential legal clients").

69. Silver, *supra* note 66, at 764.

crowd-sourcing of the decision to settle is irretrievably indeterminate. Even if Silver is right that individual client control is not the best way to handle second-tier agency problems,⁷⁰ individual client control has the decided advantage of clearly identifying the participant who holds decision-making power in the representation.

While highly experienced lawyers stand to gain when they are able to package and deliver an entire group of claimants in aggregate litigation, the incentives of plaintiffs' lawyers are not aligned with those of their individual clients. As Nancy Moore observed, this lack of alignment is particularly apparent in an asymmetric information situation because the clients are much less familiar about the legal context of the negotiation than are the lawyers.⁷¹

Claimants' lawyers can convince themselves that they are not taking advantage of their clients even when they are actually doing so. Research on the effects of cognitive biases building on Herbert Simon's "bounded rationality" theory has revealed the operation of various biases through which information is filtered, including two that are significant in this discussion—the confirmation bias and overconfidence bias.⁷² People often filter incoming information "in ways that serve their interests or preconceived notions."⁷³ Confirmation bias leads to a human tendency to "exaggerate a correlation when doing so confirms [the person's] hypothesis," because the decision-maker's need to view new data as consistent with his or her existing beliefs can influence his or her assessment of that data as supporting the anticipated result.⁷⁴ Researchers have also found that a stronger degree of overconfidence bias is exhibited in situations in which a decision-maker engages in abstract reasoning and assessing ambiguous information.⁷⁵ In light of

70. *Id.*

71. Moore, *Against Changing*, *supra* note 24, at 179–81.

72. See Herbert A. Simon, *Invariants of Human Behavior*, 41 ANN. REV. PSYCHOL. 1, 7 (1990).

73. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1093 (2000). See also Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175–89 (1998) (defining confirmation bias as the "seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis").

74. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 649 (1999). See also Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 104 (1997) (discussing the theory of social constructionism, which is "how organizations perceive themselves, their goals, and their environment, and the potential for myths in conditions of high ambiguity").

75. Hanson & Kysar, *supra* note 74, at 648; Cynthia McPherson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 166 (2006).

psychologists' research on the confirmation bias and overconfidence bias, it is understandable that it would be difficult for claimants' lawyers to see their work on behalf of their clients as anything other than strongly beneficial for their clients.

As Nancy Moore points out, important non-economic values are expressed in Model Rule 1.8(g), and those values should be preserved unless a convincing showing is made that the new course of action is prudent.⁷⁶ Under section 3.17 of the ALI *Principles*, a lawyer would be allowed to represent clients whose claims can be concluded by a section 3.17(b) vote of the other claimants, while, at the same time, representing one or more clients who, under section 3.17(a), opt to require individual consent before settling their claims.⁷⁷ The conflict-of-interest difficulties involved in this set of representations could easily present a non-consentable conflict.

For instance, in *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, the New Jersey Supreme Court declared that individual consent to a settlement is required, and that the New Jersey version of Model Rule 1.8(g) did not permit clients to consent in advance to a decision by a majority of claimants.⁷⁸ However, that ruling was made only prospectively. The court decided that when the law is uncertain or the defendant could have reasonably relied on a different conception of the state of the law, the appropriate and equitable disposition of the case called for enforcement of the settlement against the Tax Authority.⁷⁹ To further evaluate the need for procedures tailored for aggregate litigation, the court suggested that the state's commission on reform of ethics standards should consider whether "permitting less than unanimous agreement in multi-plaintiff mass litigation" should be allowed.⁸⁰ The chair of the commission discussed the issue with Nancy Moore.⁸¹ But, as reported by Charles Silver, the chair did not obtain the views of the scholars whose work led the court to consider the need for changes to Model Rule 1.8(g).⁸²

76. See Moore, *Against Changing*, *supra* note 24, at 171–74.

77. See Morgan, *supra* note 9, at 751; ALI PRINCIPLES, *supra* note 4, § 3.17(d).

78. 898 A.2d 512, 514–15 (N.J. 2006). This case is instructive because it was the first New Jersey case to interpret Rule 1.8(g) of the New Jersey Rules of Professional Conduct, which is modeled after Model Rule 1.8(g). *Id.* at 523.

79. *Id.* at 522–23.

80. *Id.* at 523.

81. 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, 397 n.16 (2008).

82. See Silver, *supra* note 66, at 762 n.53 ("The follow-up was not what the New Jersey Supreme Court might have expected. Although the Commission's Chair contacted Professor

II. EXPLORING FIDUCIARY OBLIGATIONS

A lawyer has fiduciary obligations to each of his clients, including the obligation to act to advance that client's interests.⁸³ How, precisely, is it in the interest of Client A to require Client A to stay in the settlement group when Client A did not know all of the information relevant to the wisdom of that course of action at the time Client A was required to commit to staying in the settlement group? Some, including Lynn Baker and Charles Silver, might argue that Client A would not have any chance of recovery if that client tried to retain a lawyer for only Client A's cause alone. There is too little at stake to interest a lawyer in just one claim. Even if that is true for a subset of situations in which claims are aggregated, in other situations, clients whose claims are large enough to stand alone are short-changed when those claims are aggregated and lumped together with dozens—or thousands—of others.

As described in the Restatement (Third) of the Law Governing Lawyers, a lawyer representing the members of a group of claimants breaches a fiduciary duty owed to his client if that lawyer: (1) fails to safeguard the client's confidences, (2) mishandles the client's property, (3) engages in impermissible conflicts of interest, (4) is dishonest with the client, or (5) uses the attorney-client relationship to take advantage of the client.⁸⁴ Impermissible conflicts of interest include conflicts between differing sub-groups among the claimants, as well as conflicts between the lawyer's interest in wrapping up the entire case quickly and the claimants' interest in obtaining the best possible resolution in the matter. The lawyer would also breach a fiduciary duty owed to each of his clients if the lawyer were dishonest with the client, including misrepresenting the degree of harm other claimants would suffer if the global settlement is not achieved. Additionally, the lawyer for the claimants would also breach a fiduciary duty owed to each client if he uses the attorney-client relationship to obtain a multi-million dollar legal fee while the client obtains only an unlikely-to-be-utilized coupon in exchange for relinquishing his claim.

Nancy Moore, a prominent scholar known to favor preservation of the existing bar rules, the Commission's Chair failed to obtain the views of the authors [Charles Silver and Lynn Baker] whose writings convinced the court to entertain the possibility of liberalizing the rules.").

83. For an introduction to the fiduciary aspect of the lawyer-client relationship, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2 (2012) ("A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity."). See also Moore, *Against Changing*, *supra* note 24, at 176-77 (discussing the fiduciary elements and the natural conflict of lawyer-client relationships).

84. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (explaining the duties owed to a client); *id.* § 49 (explaining generally the bases for malpractice liability).

Charles Wolfram,⁸⁵ Robert Flannigan,⁸⁶ Kathleen Clark,⁸⁷ Nancy Moore,⁸⁸ and Robert Cooter,⁸⁹ among others, have explored the dimensions of the fiduciary duties of lawyers and other professionals at length. A key point for this discussion is that, in addition to an allegation that the lawyer committed malpractice or an assertion that the lawyer violated a duty under the jurisdiction's code of professional conduct, a lawyer's breach of a fiduciary duty can be a separate, independent basis for malpractice liability.⁹⁰ Any jurisdiction considering implementing the innovation promoted by Charles Silver and reflected in section 3.17 of the ALI *Principles* must also grapple with the implications of that innovation for the analysis of the lawyer's fiduciary obligations. Does a jurisdiction that recognizes a procedure modeled on section 3.17 thereby also hold the position that multiple clients represented by one lawyer are not owed the same fiduciary duties that their lawyer would owe a client in an individual representation? If an attorney can avoid some of the fiduciary duties he would otherwise owe to a client by contracting around them, what, if any, are the limits to that ability? If the engagement agreement asserted that the lawyer owed the client no duty of confidentiality, loyalty, and competence, would the arrangement described in that engagement agreement still be cognizable as an attorney-client relationship? Surely

85. Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689 (2006).

86. See generally Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393 (2007) [hereinafter Flannigan, *Accountability*]; Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285 (1989).

87. See Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts of Interest In and Out of Government*, 62 ALA. L. REV. 961, 978–79 (2011) [hereinafter Clark, *Ethics*] (stating that, when government contractors are entrusted with an asset, they should owe fiduciary duties); Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Duty*, 1996 U. ILL. L. REV. 57, 63–79 (explaining fiduciary duty as a proper test to evaluate ethical standards in federal government).

88. See Moore, *Against Changing*, *supra* note 24, at 176–77.

89. See Robert Cooter & Bradley J. Freedman, *An Economic Model of the Fiduciary's Duty of Loyalty*, 10 TEL AVIV U. STUD. L. 297 (1990); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991).

90. Section 49 of the Restatement (Third) of the Law Governing Lawyers provides that a claim for an attorney's breach of fiduciary duty can be brought "in addition to other possible bases of civil liability." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2012). Charles W. Wolfram has strongly criticized this position. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 692 (2006) ("[C]ourts have allowed fiduciary breach claims to proliferate needlessly on the same ground already adequately occupied by negligence. . . . [M]ost fiduciary breach claims are problematic precisely because of their almost complete and useless overlap with available claims of negligence.").

not. The fiduciary relationship between lawyer and client involves obligations that cannot be contractually flouted.⁹¹ Public policy considerations prohibit clients from agreeing to renounce lawyers' fiduciary obligations.⁹² At the risk of reigniting the core values discussion, the issue of what is contained in the irreducible set of obligations that an attorney owes to his clients, in the context of an aggregate settlement, merits serious consideration.

CONCLUSION

When a lawyer represents a group of clients in aggregate litigation, that lawyer owes to each of his clients the full complement of duties that he would owe to any client, notwithstanding the relationship between the factual backgrounds in which each of the claims arose. The duty of loyalty requires that each of an attorney's clients must be afforded the opportunity to autonomously direct the goals of the representation, including instructing the attorney regarding the terms of a settlement acceptable to the client as well as whether the client agrees to accept an offer proposed by an opposing litigant. Requiring a client to make a binding decision about whether to accept a settlement offer before that client understands the advantages and disadvantages of that offer in the client's particular circumstances is contrary to the foundational concept that each client remains a principal and the attorney is acting as his agent. In addition, the fiduciary relationship between lawyer and client involves obligations running from the attorney to his client which cannot be circumvented through contract. Although efficient allocation of judicial resources is a relevant systemic concern, the lawyer's obligations to each of his clients have not yet been explicitly subordinated to the interests of judges, lawyers, and others seeking efficient resolution of claims. Until a jurisdiction amends its professional responsibility standards and governing law to permit the changes articulated in the *ALI Principles* on this point, lawyers

91. See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 (“[O]nce a court concludes that a particular relationship has a fiduciary character, the parties’ manifest intention does not control their obligations to each other as dispositively as it does under a contract analysis.”); Flannigan, *Accountability*, *supra* note 86, at 395–98 (stating that fiduciary duties cannot be circumvented by contract terms); Robert Flannigan, *Immunity Shopping*, 37 QUEEN’S L.J. 39 (2011) (discussing the core nature of fiduciary obligations).

92. Clark, *Ethics*, *supra* note 87, at 979 (“[Fiduciary relationships] are governed not just by the explicit terms of any agreement between the parties, but also by additional terms imposed by the common law.”).

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practicing in the jurisdiction remain bound by that court's currently articulated standards.