

**THE AMERICAN LAW INSTITUTE'S DRAFT  
PROPOSAL TO BYPASS THE AGGREGATE  
SETTLEMENT RULE: DO MASS TORT CLIENTS  
NEED (OR WANT) GROUP DECISION MAKING?**

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INTRODUCTION

The American Law Institute (ALI) recently undertook an entirely new project: Principles of the Law of Aggregate Litigation.<sup>1</sup> The Principles aim “to recommend procedures for aggregate lawsuits that will enable civil justice systems to handle these cases better.”<sup>2</sup> Although the bulk of the project is devoted to class actions, a number of sections address various forms of non-class aggregations, including non-class aggregate settlements.<sup>3</sup>

Judges and scholars have given considerably less attention to non-class aggregations than to class actions.<sup>4</sup> Nevertheless, various cases, ethics opinions, and articles have addressed a number of issues that commonly arise in these lawsuits, primarily in connection with the application of the so-called “aggregate settlement rule.” Rule 1.8(g) of the ABA Model Rules of Professional Conduct, which every U.S. jurisdiction has adopted in various forms,<sup>5</sup> limits lawyers’ abilities to participate “in making an aggregate settlement of the claims of or against the clients” without the clients’ informed consent after they have been advised of “the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”<sup>6</sup> Questions have been raised concerning the interpretation of

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1. This Article comments on proposals set forth in the two drafts that preceded the Thirteenth Annual Clifford Symposium. See AM. L. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Discussion Draft No. 2, Apr. 6, 2007) [hereinafter ALI DRAFT PROPOSAL]; AM. L. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Preliminary Draft No. 4, Sept. 21, 2006) [hereinafter ALI PRELIM. DRAFT NO. 4].

2. AM. L. INST., PRINCIPLES OF AGGREGATE LITIGATION xv (Preliminary Draft No. 2, Apr. 20, 2005).

3. See ALI DRAFT PROPOSAL, *supra* note 1, § 1.02 cmt. a. Judges and scholars have given considerably less attention to non-class aggregations than to class actions.

4. *Id.*

5. *Id.* § 3.15 cmt. b.

6. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2007).

this rule, including the following: What constitutes an aggregate settlement? What is the nature and amount of information that the lawyer must disclose? May clients waive their right to learn what other clients will receive? Most importantly, may a group of clients agree in advance to whatever settlement either the lawyer or a portion of the group approves?<sup>7</sup>

Neither the text of the rule nor its comment defines an “aggregate settlement,”<sup>8</sup> and courts and ethics committees have disagreed on an authoritative definition.<sup>9</sup> Based largely on an article by Howard Erichson,<sup>10</sup> the ALI reporters propose to broadly define aggregate settlements to include settlements of multiple claims when “the defendant’s acceptance of the settlement is contingent upon the acceptance by a specified percentage of the claimants” or “the value of each [claimant’s] claim is not based solely on individual case-by-case facts and negotiations.”<sup>11</sup> Given the persistent problem of determining which settlements are covered by the aggregate settlement rule,<sup>12</sup> the reporters should be commended for what appears to be both a principled and workable definition.

As for the nature and amount of information a lawyer must disclose, recent changes to the Model Rules of Professional Conduct clarify that, when a lawyer participates in an aggregate settlement, she must inform each client “about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted.”<sup>13</sup> Questions remain, however, concerning the level of detail lawyers must provide—for example, whether the lawyer must disclose the names of the other clients when

7. See generally Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

8. See ABA Comm. on Prof’l Responsibility, Formal Op. 06-438 (2006) [hereinafter ABA Formal Op. 06-438].

9. Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005).

10. See *id.* (cited in ALI DRAFT PROPOSAL, *supra* note 1, § 3.16 Reporters’ Notes cmt. a).

11. ALI DRAFT PROPOSAL, *supra* note 1, § 3.16(a)–(b).

12. For example, some authorities define an aggregate settlement narrowly to mean only “an all-or-nothing total settlement of a single sum of money for all claims pending for a group of plaintiffs.” Erichson, *supra* note 9, at 1783 (quoting Or. State Bar Legal Ethics Comm., Formal Op. 2000-158, at n.1 (2000)). Others define it more broadly to include any settlement “when two or more clients consent to have their matters resolved together.” ABA Formal Op. 06-438, *supra* note 8, at 1.

13. MODEL RULES OF PROF’L CONDUCT R. 1.8(g) cmt. 13 (2007). This paragraph, entitled “Aggregate Settlements,” was added at the recommendation of the ABA Commission on Evaluating the Rules of Professional Conduct (“Ethics 2000 Commission”). I was the Chief Reporter for the Ethics 2000 Commission.

those clients prefer that details of their medical conditions remain confidential. The ALI Draft Proposal (“Proposal”) does not specifically address this question,<sup>14</sup> but it should be possible for a client’s desire for privacy to be respected, unless other clients need particular identifying information in order to evaluate the fairness of the settlement allocation.<sup>15</sup>

The possibility of client waiver—either of the right to receive information about other clients’ participation or the right to reject a settlement offer after learning of its terms—is not mentioned in either the rule or the comment. Yet numerous cases and ethics opinions have addressed the effectiveness of advance waivers and have uniformly rejected an interpretation of the current rule that would permit them.<sup>16</sup> Nevertheless, the reporters propose that the aggregate settlement rule should be modified to facilitate advance waivers, allowing a portion of the group to decide how settlement funds should be allocated. This Proposal is seriously flawed and should be rejected in favor of the continued viability of the aggregate settlement rule.

The ALI Draft Proposal—which may be modified prior to final submission to ALI members—creates two major exceptions to the aggregate settlement rule. The first exception applies when the total value of the aggregated claims is more than \$5 million and the total number of claimants is forty or more.<sup>17</sup> In such circumstances, § 3.17 allows

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14. Section 3.17 provides that, under the current aggregate settlement rule, each client must give “informed consent, in writing, after reviewing the settlements of all other persons subject to the aggregate settlement.” ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(a). Subsection (a) appears to endorse the ABA interpretation of the aggregate settlement rule, which requires a number of specific disclosures, including “[t]he details of every other client’s participation in the aggregate settlement.” *Id.* § 3.17 Reporters’ Notes cmt. a (discussing ABA Formal Op. 06-438, *supra* note 8). Yet neither the ABA interpretation nor the comment itself specifies whether or under what circumstances the name of every other client is among the details that must be disclosed.

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15. Moore, *supra* note 7, at 162–64. *But cf.* Silver & Baker, *supra* note 7, at 757–58 (lawyers who do not disclose plaintiffs’ names assume the risk that judges will determine that their interpretation of the ambiguous rule is incorrect).

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

17. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(e).

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individual claimants, after consultation with counsel,<sup>18</sup> to “agree in advance to be bound in a proposed settlement by the collective decision-making of 75 percent of the claimants,” or, “if the settlement significantly distinguishes among different categories of claimants, a separate 75 percent vote of each category of claimants” approves the settlement.<sup>19</sup> The clients<sup>20</sup> may waive their “right to prior knowledge of and consent to the terms of all other claimants’ settlements”<sup>21</sup>—that is, of the client’s rights under the current aggregate settlement rule—as part of the original retention agreement or at any subsequent time in writing.<sup>22</sup> Section 3.18 provides for limited judicial review of aggregate settlements approved as a result of such waivers, but only if the claimant brings the challenge “within 90 days of receiving actual notice of the consummation of a settlement.”<sup>23</sup> Even then, the reviewing court may declare the settlement unenforceable as to any claimant only if it finds either that the challenger’s waiver was not

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18. The Proposal provides a lengthy and detailed list of the matters that must be disclosed by the lawyer in order to communicate “adequate information and explanation about the material risks of, and reasonably available alternatives to, the proposed [waiver].” *Id.* § 3.17(d).

19. *Id.* § 3.17(b).

20. The ALI Draft Proposal refers to “claimants,” see *supra* note 17 and accompanying text, whereas the aggregate settlement rule refers to “clients,” see *supra* note 6 and accompanying text. I use the terms interchangeably, although I have attempted to use the term “clients” as much as possible to emphasize the fundamental distinction between claimants who have formal attorney-client contracts and claimants who are merely absent members of a class. On occasion, I also refer to “plaintiffs” and “plaintiffs’ counsel.” Although the aggregate settlement rules apply to both plaintiff and defendant groups, the ALI Draft Proposal is clearly directed to settling the claims of actual or potential plaintiffs.

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21. ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.17(c). The quoted language does not appear in the ALI Draft Proposal, either in the text or the comment. Nevertheless, the current text of the proposal refers to the required consent as a “waiver,” and it is clear that the client is waiving her rights under the aggregate settlement rule. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(d). The prior draft did not provide for approval by either a majority or supermajority. Instead, the first exception under that draft permitted a client to waive existing rights under the aggregate settlement rule as long as they consented, after disclosure, to “accept an aggregate settlement as part of a known collective representation.” ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.17(c). This proposal would have permitted the lawyer alone to decide to accept the settlement on the client’s behalf, even though the lawyer had a significant financial interest not only in having an aggregate settlement approved regardless of its overall fairness, but also in allocating the proceeds in a manner that favors certain claimants over others. See *infra* Part III. The only protection against unfair allocations was a provision for very limited judicial review of the settlements by claimants bringing a challenge “within 90 days of receiving actual notice of the consummation of a settlement.” ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.18(a). Even then, claimants could challenge enforcement of the settlement only if the court found either that the settlement was “grossly unfair or inadequate to the challenger” or that the challenger’s waiver was not adequately informed. *Id.* § 3.18(d). The reviewing court was required to “give substantial deference to the settlement” and “treat it as presumptively fair and reasonable.” *Id.* § 3.18(c). For a discussion of the deficiencies of this proposal, see *infra* Part V.

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22. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(c).

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23. ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.18(a).

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adequately informed or that either of the two requirements under § 3.18(c) was not met.<sup>24</sup>

The second exception applies if lawyers have not obtained effective waivers. Under § 3.19, a lawyer “who receives an offer for a lump-sum settlement of interdependent claims may seek approval for the fairness and adequacy of such a settlement before a court of competent jurisdiction in the state where the original attorney-client agreement was formed.”<sup>25</sup> Here, the lawyer has the burden not only to prove the fairness and adequacy of the proposed settlement, but also to establish “that efforts to secure direct approval from clients were unavailing and why the terms of § 3.17 could not be satisfied without judicial approval.”<sup>26</sup> In other words, the lawyer “must provide a compelling explanation for why a waiver was not secured pursuant to § 3.17.”<sup>27</sup>

The reporters give two separate reasons for relaxing the aggregate settlement rule. First, they state that “[t]he purpose of modifying the strict requirements of the aggregate-settlement rule is to facilitate large-scale settlements in situations where the aggregate-settlement rule has impeded a substantial multiparty settlement.”<sup>28</sup> According to the reporters, the current rule undermines such settlements by permitting individual clients “to exercise unfair control over a proposed settlement and to demand premiums in exchange for approval.”<sup>29</sup> The reporters further argue that, although the current rule assumes that claimants need to review all of the terms before making an informed decision, “giving veto power to each claimant individually (as opposed to collectively) is not necessary to ensure the fairness of aggregate settlements.”<sup>30</sup> In other words, the reporters assert that modifications

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24. *Id.* § 3.18(c). For a discussion of a very different proposal for judicial review in an earlier draft, see *supra* note 20 and *infra* Part V.

25. ALI DRAFT PROPOSAL, *supra* note 1, § 3.19(a). The proposal further provides that, before invoking this alternative procedure, “claimants’ counsel must use all reasonable efforts to notify all affected claimants and provide such claimants an opportunity to participate in the judicial proceedings.” *Id.* § 3.19(b). The proposal does not currently specify what should be included in the notice. For example, it is unclear whether the notice must disclose all of the information regarding the settlement terms that would ordinarily be required under the aggregate settlement rule. Additionally, the proposal does not specify how to identify the state in which the original attorney-client agreement was formed or how the lawyer should proceed if more than one state is involved—for example, where the relationship is found to have been formed in the state where each client resides, and multiple clients reside in different states.

26. *Id.* § 3.19(a).

27. *Id.* § 3.19 cmt. b.

28. *Id.* § 3.17 cmt. b.

29. *Id.* § 3.17 cmt. a.

30. *Id.* This statement mischaracterizes the effect of the aggregate settlement rule. Individual claimants do not have a veto over the settlements approved by others unless the defendant

are necessary to encourage multi-party settlements and that such modifications will not harm individual claimants by promoting inadequate or unfair settlements. Second, the reporters note that “[w]aivers of important rights are valid in a variety of areas, including the most cherished constitutional rights.”<sup>31</sup> As a result, they “reject[ ] the view that individual decisionmaking over the settlement of a claim is so uniquely important that it cannot be subject to a contractual waiver in favor of group decisionmaking, provided that there is a supermajority-approval requirement.”<sup>32</sup> That rationale is not fleshed out in the Proposal as such, but ALI Reporter Charles Silver and his coauthor, Lynn Baker, defend the view that refusing to permit clients to adopt procedures they prefer is unnecessarily paternalistic.<sup>33</sup>

ALI Principles, unlike Restatements, do not necessarily reflect the law as it presently stands, but rather “assume the stance of expressing the law as it should be.”<sup>34</sup> As a result, critics would be unable to criticize the proposal on the ground that the aggregate settlement rule cannot plausibly be interpreted to permit waivers of the type described in § 3.17.<sup>35</sup> Nevertheless, given that the rule emerged unscathed during the Ethics 2000 Commission’s wide-ranging review of the ABA Model Rules,<sup>36</sup> as well as during the individual state reviews that followed in its wake,<sup>37</sup> surely the burden is on the reporters to

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requires unanimous approval for the settlement to be effective. *See infra* notes 48–49 and accompanying text.

31. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(a) cmt. a.

32. *Id.*

33. *See* Silver & Baker, *supra* note 7; Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998).

34. The ALI Projects Overview, [www.ali.org/index.cfm?fuseaction=projects.main](http://www.ali.org/index.cfm?fuseaction=projects.main) (last visited Sept. 15, 2007).

35. *See id.* (describing how restatements “aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court”).

36. The only change the Ethics 2000 Commission recommended was the adoption of an entirely new comment. *See supra* note 12 and accompanying text.

37. According to an ABA chart noting state departures from the new Model Rules of Professional Responsibility text, most states have adopted the text of Rule 1.8(g) without modification, and the changes that have been made are relatively minor and do not relate to the issues addressed in the reporters’ proposal. *See* Am. Bar Ass’n, Ctr. for Prof’l Responsibility, *Charts Comparing Professional Conduct Rules as Adopted by States to ABA Model Rules*, <http://www.abanet.org/cpr/jclr/charts.html> (last visited Sept. 15, 2007) (noting minor changes in the rule text in the following jurisdictions: the District of Columbia, Louisiana, Maryland, North Dakota, Ohio, and Washington). One state, New York, will consider a proposal to revise the rule to provide that, with court approval, a lawyer need not follow the rule’s requirement for fully informed consent. *See* Rule 1.8: Current Clients: Special Conflict of Interest Rules, [http://www.nysba.org/Content/ContentGroups/COSAC\\_Report/COSAC\\_Proposed\\_Rules\\_of\\_Professional\\_Conduct.htm](http://www.nysba.org/Content/ContentGroups/COSAC_Report/COSAC_Proposed_Rules_of_Professional_Conduct.htm) (last visited Sept. 15, 2007). The comment does not address this proposed change, and it is not entirely clear that the proposal is meant to apply outside of the class action context.

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make a persuasive case for change. In my view, neither rationale offered by the reporters meets that burden.

Part II of this Article argues that the reporters have not demonstrated that the aggregate settlement rule is a significant impediment to settlement in mass lawsuits.<sup>38</sup> Part III then explains how the rule protects clients against the risks of inadequate settlements and unfair allocations.<sup>39</sup> Part IV asserts that the proposed supermajority approval requirement provides insufficient alternative protection, because there are many ways in which a settlement agreement may be unfairly biased toward specific groups without triggering the Proposal's requirement of supermajority approval within each formal category of cases created by the agreement.<sup>40</sup> Next, Part V demonstrates how reinstating an earlier proposal for a limited fairness hearing would not fix that problem.<sup>41</sup> Part VI turns to the reporters' argument that *ex ante* waivers are necessary to honor client preferences and client autonomy.<sup>42</sup> Here, it is argued that waivers obtained under the Draft Proposal are not likely to reflect true client preferences.

Part VII argues that the reporters' Draft Proposal, not the aggregate settlement rule, is a radical departure from the current law of lawyering.<sup>43</sup> That law, which is reflected in the ALI's recently adopted Restatement (Third) of the Law Governing Lawyers, offers considerable protection to clients in the form of nonwaivable rights to void agreements likely to have been made on the basis of a lack of information, unequal bargaining power, or coercion. The reporters' Draft Proposal is particularly problematic, because it contemplates an advance waiver of clients' rights under the aggregate settlement rule. It is unlikely that an attorney could provide disclosure at the outset of the representation that would be adequate for unsophisticated mass tort clients to reasonably understand the material risks that such waivers entail. Part VIII examines the Draft Proposal's provision for judicial approval of an aggregate settlement in circumstances where the attorney is unable to satisfy the supermajority approval requirements and finds that this provision is both unexplained and unjustified.<sup>44</sup> Fi-

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If the change applies to non-class aggregated settlements, it is unclear how judicial approval would be sought for the settlement of unfiled claims or what standards courts would use to approve settlements that do not meet the requirements of the aggregate settlement rule.

38. *See infra* notes 46–69 and accompanying text.

39. *See infra* notes 70–86 and accompanying text.

40. *See infra* notes 87–93 and accompanying text.

41. *See infra* notes 94–107 and accompanying text.

42. *See infra* notes 108–117 and accompanying text.

43. *See infra* notes 118–139 and accompanying text.

44. *See infra* notes 140–145 and accompanying text.

nally, Part IX summarizes these arguments and concludes that the ALI Draft Proposal is seriously defective in its efforts to allow plaintiffs' lawyers to bypass the aggregate settlement rule through ex ante waivers or otherwise.<sup>45</sup>

II. CLIENT WAIVERS ARE NOT NECESSARY TO SECURE SUBSTANTIAL MULTI-PARTY SETTLEMENTS

Citing one of several articles by Silver and Baker, the Reporters' Notes to § 3.15 state that some scholars have recognized "that the aggregate settlement rule imposes onerous restrictions that impede fair and legitimate settlements of [a] large number of claims."<sup>46</sup> Elsewhere in the Draft Proposal, the reporters suggest two reasons why they believe the rule is not workable in mass lawsuits: first, the possibility of strategic holdouts;<sup>47</sup> and second, the burden of obtaining consent after full disclosure.<sup>48</sup> Other than Silver and Baker, the reporters cite no authority for their contention that the aggregate settlement rule constitutes a significant impediment to settlement in mass lawsuits.

The reporters' concern for strategic holdouts appears to be based on their belief that, under the aggregate settlement rule, each individual client has a "veto power" over the effectiveness of the aggregate settlement.<sup>49</sup> But this belief is inaccurate. Rule 1.8(g) requires only that the lawyer not purport to accept an aggregate settlement on behalf of a group of clients unless each of those clients has given fully informed consent to its terms. Nothing prevents the lawyer from ne-

45. See *infra* Part IX.

46. ALI DRAFT PROPOSAL, *supra* note 1, § 3.15 Reporters' Notes to cmt. b (citing Silver & Baker, *supra* note 7, at 755-66). The reporters also note that "[s]ome scholars have offered a strong endorsement of the aggregate settlement rule and oppose arguments to ease its requirements." *Id.* (citing Moore, *supra* note 7). See also Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519.

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47. See ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt. a ("Current law prohibits waiving individual-claimant settlement decisionmaking, thereby empowering individual claimants to exercise unfair control over a proposed settlement and to demand premiums in exchange for approval.").

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48. See *id.* § 3.17 cmt. b ("[I]n a . . . case involving a small number of claimants, the aggregate-settlement rule is easy to administer and poses little practical difficulties for the lawyer representing multiple claimants. The same is not true, however, for a lawyer representing hundreds of asbestos clients and negotiating multi-million dollar settlements."). See also ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.18 cmt. a ("The requirements of disclosure and consent can be very burdensome when there are numerous claimants.").

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49. See ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt. a (stating that the aggregate settlement rule renders settlements ineffective unless "each client gives informed consent, in writing, after reviewing the settlements of all other persons subject to the aggregate settlement").

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gotiating a tentative settlement agreement that will become binding only as to those clients who accept its terms after the required full disclosure.<sup>50</sup>

Strategic holdouts might be a problem if unanimity is required before a settlement can become effective as to any of the clients, but neither the reporters nor Silver and Baker cite empirical information indicating how often defendants insist on structuring settlements so that “even a single plaintiff’s refusal to consent to a settlement could scuttle the settlement for the other plaintiffs.”<sup>51</sup> Under the aggregate settlement rule, it is unethical for a common attorney to seek advance approval from clients of settlement terms agreed to either by the lawyer alone or by a portion of the group.<sup>52</sup> As a result, defendants should be satisfied with a “walk-away provision [that] gives the defendant the right to abandon the settlement if more than a certain percentage of plaintiffs decline their offers.”<sup>53</sup> According to one plaintiffs’ lawyer, an acceptance rate of 90% is often used.<sup>54</sup> Defendants do not typically expect 100% of class members in an opt-out class action to agree to a proposed settlement; therefore, they should not be expected to require unanimity in the typical non-class mass lawsuit.<sup>55</sup> If the facts are otherwise, there ought to be some way to demonstrate how often this occurs.<sup>56</sup>

50. See Moore, *supra* note 7, at 164–66.

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51. Michael J. Maloney & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: “Where Angels Fear to Tread,”* 36 S. TEX. L. REV. 933, 963 (1995). Indeed, Silver and Baker have conceded that, “because the possibility of holdouts is obvious, defendants typically demand acceptance rates of less than 100%.” Silver & Baker, *supra* note 33, at 1532. As a result, this “denies an individual plaintiff the power unilaterally to block a group-wide deal.” *Id.*

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52. See Maloney & Blizzard, *supra* note 51, at 963–64.

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53. Erichson, *supra* note 46, at 534.

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54. See *id.* at 534 n.52 and accompanying text (citing Paul Rheingold, a well-known plaintiffs’ lawyer). Erichson discussed a variation in which “100 percent of the most serious category of claimants and 90 percent of the remainder” must accept the settlement for it to be effective. *Id.* at 534. In this variation, any of the most seriously injured claimants would be in a position to act strategically. It is important to understand how a walk-away provision requiring something like 90% claimant approval differs from the 75% supermajority approval required under the ALI Draft Proposal. In a walk-away provision, the 90% approval is required before the settlement is effective as to any claimant, but once 90% approval is achieved, it binds only those claimants who voted in favor of the settlement. In the ALI Draft Proposal, however, once the 75% approval is obtained, the settlement also binds those who voted against it, so long as they signed an advance waiver agreeing to be bound by the 75% collective vote. See *supra* note 19 and accompanying text.

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55. See, e.g., Erichson, *supra* note 46, at 574 (“[W]alk-away provisions generally do not require 100 percent acceptance of the settlement.”).

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56. As Silver and Baker have noted, walk-away provisions are “sources of transaction costs,” because neither defendants nor the common attorney can be certain how many plaintiffs will consent. Silver & Baker, *supra* note 7, at 765. But merely because they are the source of trans-

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Even when unanimity is required, an individual plaintiff's ability to act strategically may be limited. For example, a common attorney can reduce the possibility of holdouts by clarifying at the outset that the individual offers are "take it or leave it" and that no one will receive a premium in exchange for approving the settlement.<sup>57</sup> Once it is clear that no premium is available, individual plaintiffs will reject the offer only when they believe that they can do better by continuing with the litigation. When this happens, the defendant can still come back with an offer to settle the remainder of the attorney's cases, leaving the holdout plaintiff isolated and forced to continue her case at her own expense.<sup>58</sup>

As for the burden of obtaining informed consent after full disclosure of the settlement's terms, attorneys can take numerous steps in mass tort cases to accomplish the required disclosure. For example, attorneys can—and do—keep their clients informed by using a combination of group meetings, mass emails, dedicated websites, toll-free numbers, and paralegals.<sup>59</sup> Given the amount of legal fees plaintiffs' attorneys expect to make in mass lawsuits,<sup>60</sup> they should be willing—

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action costs does not mean that defendants will not use walk-away provisions, and it is still unclear whether there are a significant number of mass lawsuits that should settle, but do not, because the defendants cannot obtain unanimity. In the absence of such information, observers should not simply assume that the costs of the current rule outweigh its benefits.

57. Indeed, paying any such "premiums" may be evidence that an attorney has acted unethically by favoring some clients over others. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2007) (requiring attorneys to be impartial towards commonly represented clients). Plaintiffs' attorneys can also reduce the likelihood of strategic holdouts by developing the attorney-client relationship—in other words, "by regularly providing plaintiffs with as much information as possible about the progress of the lawsuit and affording them opportunities to consult regularly with members of the lawyer's staff (and occasionally with the lawyer as well)." Moore, *supra* note 7, at 165 n.98 (citing an interview with a lawyer from a well-known plaintiffs' law firm).

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58. Lawyers may be able to structure representation in advance in a way that makes widespread approval of an aggregate settlement more likely—for example, by having clients "tentatively agree" to follow the wishes of a majority even though they are not required to do so. This may go far to encourage loyalty to the group. Moore, *supra* note 7, at 165. It might also be possible to ask prospective clients to agree that, if the client rejects a settlement offer approved by the requisite majority, the lawyer may withdraw and continue representing the majority. *Id.* (noting that Rule 1.2(c) permits lawyers to limit the scope of representation with the client's informed consent). Whether such restrictions constitute an undue burden on the client's right to approve settlements is not entirely clear. In any event, in the absence of such an agreement, a lawyer does not have a unilateral right to withdraw merely because the client refuses to accept a settlement offer that the lawyer has recommended. *See, e.g.*, Augustson v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658 (5th Cir. 1996).

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59. *See* Moore, *supra* note 7, at 160–62.

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60. Legal fees in mass lawsuits are typically larger on a per capita basis than in class actions, because of the individual contingent fee retainer agreements. *See, e.g.*, Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV.

and expected—to devote considerable resources to these cases.<sup>61</sup> Even if the aggregate settlement rule requires the attorney to contact the clients twice—once to obtain their consent to the settlement and then again to give them their checks<sup>62</sup>—there is no evidence that such contacts are unduly burdensome,<sup>63</sup> keeping in mind that the attorneys are supposed to keep their clients reasonably informed throughout the litigation.<sup>64</sup> The case has not yet been made that such methods of informing clients are unrealistic for the majority or even a significant number of mass tort lawsuits in which an aggregate settlement is likely the best result for most claimants.<sup>65</sup>

In any event, under the ALI Draft Proposal, the lawyer must effectively notify at least 75% of the clients, whose approval will not count toward the supermajority requirement unless they have received detailed information regarding the proposed settlement.<sup>66</sup> As a result, the burden should be measured only by the incremental cost of notifying the remainder of the clients.<sup>67</sup>

650, 661 & n.57 (2002) (comparing the typical fee award of 25% in class action cases with the standard 33% to 40% contingent fee).

61. For example, in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), lawyers representing 126 plaintiffs settled a mass tort lawsuit for \$190 million, collecting attorneys' fees of \$60 million. It is unclear whether lawyers are entitled to charge the costs of communication to clients rather than to themselves—in other words, whether these costs are more like ordinary litigation costs, which are chargeable to clients, or overhead, which is chargeable to the lawyer. In any event, even if those costs are ultimately chargeable to clients, the cost per client is justifiable and unlikely to substantially detract from the amount of the award each client will receive.

62. See Silver & Baker, *supra* note 7, at 764.

63. The inquiry should not focus on absolute cost, but rather on cost in relation to anticipated fees or net client awards.

64. See MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2)–(4) (2007) (a lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” “keep the client reasonably informed about the status of the matter,” and “promptly comply with reasonable requests for information”). Another way to keep far-flung clients informed is to use local referring attorneys, who can be expected to maintain closer relationships with the clients than the common attorney can. See Moore, *supra* note 7, at 161–62.

65. Silver and Baker have argued that requiring clients to consent to the terms of the settlement may entail undue delay in effectuating a mass settlement. See Silver & Baker, *supra* note 7, at 763–64. But, once again, aside from a single anecdotal account, the authors offer no evidence that the delay entailed under the aggregate settlement rule is sufficiently problematic to warrant modification. After all, there must necessarily be some delay in approving class action settlements: members of the class must be notified and, in most instances, given an opportunity to opt out. Nevertheless, defendants routinely settle class actions in order to achieve as much finality as possible. Defendants may prefer to avoid such delays if they can, but there is no indication that they will be unwilling to settle mass tort lawsuits if their preferences are not honored.

66. ALI DRAFT PROPOSAL, *supra* note 1, § 3.18(a).

67. To ensure 75% approval, the lawyer must effectively notify more than 75% of the claimants. In all likelihood, the lawyer will want to notify as many claimants as she can, in which case it is not clear that the ALI Draft Proposal significantly reduces the burdens of the current notification requirement.

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Aside from communication costs, the reporters may be concerned about the burden on some clients when the private details of their settlements are shared, including sensitive information regarding medical diagnoses and prognoses. Silver and Baker argued that “the emotional and other costs to the plaintiffs of these invasions of privacy may well exceed any benefits of having information about other group members’ claims and anticipated settlement payments” and that this warrants permitting claimants to waive the disclosure requirements of the aggregate settlement rule.<sup>68</sup>

The ALI Draft Proposal does not clarify whether the amount of detailed information that at least 75% of the clients must receive is the same as or different from the information required under the aggregate settlement rule. Section 3.17 specifies only that claimants must be informed of the following: the total amount of the settlement offer; the total costs and attorneys’ fees; the manner in which the settlement will be divided; the category into which the claimant has been placed, if that determination has already been made; and the existence of related and unrelated claims held by claimants represented by the same lawyer that will not be covered by the settlement.<sup>69</sup> It is certainly plausible to interpret the proposal as reducing the amount of information each client must receive regarding the details of other clients’ settlements, which would indeed reduce the burden of disclosure. Whether this change is justifiable is another matter entirely.

### III. AGGREGATE SETTLEMENTS PRESENT THE RISK OF INADEQUATE AWARDS AND UNFAIR ALLOCATIONS

The rationale of the aggregate settlement rule is the necessity of giving an opportunity to review the terms of an aggregate settlement before making an informed decision to avoid binding them to inadequate settlements and unfair allocations.<sup>70</sup> In defending their propo-

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68. Silver & Baker, *supra* note 7, at 756–59.

69. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(d)(4).

70. See, e.g., Silver & Baker, *supra* note 7, at 749–53 (identifying and discussing dangers attributable to “attorney opportunism” and “allocation conflicts” among plaintiffs and then concluding that “the purpose of Rule 1.8(g) is to enable each plaintiff to police allocation conflicts by vetoing a proposed settlement”). The ALI Draft Proposal does not make that rationale clear:

The aggregate-settlement rule is based on the view that, without reviewing and analyzing the existence and nature of all claims and of the participation of each person in a proposed settlement, including but not limited to all proposed settlement terms, a claimant cannot make an informed decision whether to agree to a proposed aggregate settlement.

ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt. a. The proposal does not clearly identify and address what Professors Silver and Baker have previously identified as the additional risks of attorney opportunism and allocation conflicts in mass lawsuits or the decreased incentives for

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sal to modify the current rule, the reporters assert that “giving veto power to each claimant individually . . . is not necessary to ensure the fairness of aggregate settlements.”<sup>71</sup> As noted above, this statement mischaracterizes the effect of the aggregate settlement rule, because individual clients do not have the ability to veto an aggregate settlement unless the defendant has insisted upon unanimous approval before the settlement will be effective.<sup>72</sup> Although the reporters tacitly acknowledge that the purpose of the current rule is to prevent unfair settlements, they do not explain why the rationale given for the current rule is mistaken or how supermajority approval serves as an adequate alternative. Thus, it is important to see how the aggregate settlement rule currently serves as a necessary constraint on both inadequate settlements and unfair allocations.

Aggregate settlements might be inadequate in their total amounts, because the common attorney may accept “a relatively cheap settlement that would nonetheless pay the attorney a handsome premium on his or her hourly rate.”<sup>73</sup> When individual clients review the amounts they will receive under an aggregate settlement, they perform an important monitoring function that checks this form of attorney opportunism. Under a prior draft proposal, advance waivers would have allowed the attorney alone to bind clients to an aggregate settlement negotiated by the attorney.<sup>74</sup> This proposal was defective, because it would have entirely eliminated the monitoring function of the current rule. Requiring a supermajority of the group to approve the settlement before it becomes binding on other group members is an improvement, because it reduces the likelihood of attorney opportunism by allowing at least 75% of the group to perform its current monitoring function.

This explanation,<sup>75</sup> however, assumes that the claims of the supermajority are typical of the claims of the group as a whole. If

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individual group members to closely monitor their lawyers given that, in mass lawsuits, “monitoring is a public good.” Silver & Baker, *supra* note 7, at 752.

71. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt a.

72. See Silver & Baker, *supra* note 33, at 1532.

73. Silver & Baker, *supra* note 7, at 751 (characterizing the problem as one of “attorney opportunism”).

74. See ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.17(c). The only protection offered to claimants against inadequate settlements was limited judicial review of the adequacy and fairness of the settlement. See *infra* Part IV.

75. Interestingly, this is not the explanation the reporters give for imposing the supermajority approval requirement. Instead, the reporters only allude to the fact that another rationale of the current rule is to “preserve in the hands of the clients, as opposed to lawyers, the power to settle cases.” ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt. a. Current law provides that the decision to settle belongs to the client and that a client may revoke any previous grant of authority to

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most of the claims are relatively small in value, then the total amount might be adequate for these claimants. But the total amount might still be vastly inadequate for the minority of claims that are far more serious, and these claimants will be unable to check attorney opportunism as it affects them. The reporters will undoubtedly respond that this was the purpose of providing that, when settlements distinguish among separate categories of cases, supermajority approval within each category is required.<sup>76</sup> However, for reasons explained below,<sup>77</sup> even a supermajority approval within each category does not protect against attorney opportunism in aggregate settlements.

Even more important than protecting against inadequate settlements is the aggregate settlement rule's function in protecting against unfair allocations. The common attorney's collective fee will depend on the total amount of the settlement, so the inadequate settlement problem might not be widespread.<sup>78</sup> On the other hand, a common attorney has little financial incentive to ensure horizontal equity among the various clients.<sup>79</sup> As a result, the attorney will not be motivated to counter a defendant's desire to favor certain claimants over others. For example, a defendant may favor customers, shareholders, suppliers, employees, or even a specific group of employees over others.<sup>80</sup> Even if neither the plaintiffs' nor the defendant's attorneys are biased in favor of certain claimants within the group, they will not be motivated to expend the time and effort to individualize the settlements in ways that many of the claimants might prefer.<sup>81</sup> This leads to "damage averaging," in which those with more serious injuries receive less than they would have under an allocation that gives more weight to individualized factors.<sup>82</sup>

Moreover, the plaintiffs' attorney may be operating under financial incentives that actively favor a biased allocation. For example, the

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the lawyer to settle the client's case. *Id.* § 3.17 Reporters' Notes cmt. a (citing to both RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(3) and Model Rule 1.2(a)). Whether vesting decision-making power in a percentage of a group satisfies the requirements of the current law in this respect is unclear. Even if it does, however, the criticism remains that the supermajority approval requirement is inadequate to guard against attorney opportunism and unfair allocations.

76. See ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(b).

77. See *infra* Part IV.

78. See John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1542 (1998) (attorneys "generally have a strong economic incentive to maximize the size of the settlement fund").

79. See Erichson, *supra* note 46; see also Coffee, *supra* note 78, at 1542.

80. See Coffee, *supra* note 78, at 1546.

81. *Id.* at 1545.

82. *Id.*; accord Moore, *supra* note 7, at 168–69.

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attorney will earn more money from cases in which she is retained directly, as opposed to those in which the attorney receives the case from—and must share the contingent fee with—a referring attorney.<sup>83</sup> Similarly, if the attorney uses a sliding scale contingent fee, as opposed to a fixed percentage, she will be motivated to distribute the amounts in such a way as to maximize the total fee by keeping the percentages higher in particular cases.<sup>84</sup> If the effectiveness of the settlement depends upon a group vote, the attorney will be motivated to please those in the majority, which will often be those with the smallest and weakest claims.<sup>85</sup> Finally, there may be other situations in which the attorney has special relationships with certain clients or even third parties, such as unions, which would bias the attorney in favor of a particular group of clients, such as union over non-union employees.<sup>86</sup>

IV. THE PROPOSED SUPERMAJORITY APPROVAL REQUIREMENT PROVIDES INSUFFICIENT PROTECTION TO CLIENTS

The reporters do not explain how supermajority approval guards against inadequate settlements and unfair allocations. This Article assumes that they believe that the individual monitoring provided by 75% of the claimants, informed of the settlement proposal’s details, will be sufficient to check the potential for attorney abuse. This might be true when the supermajority claims are representative of all claims, but this will not be the case when they are dissimilar, particularly

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83. Erichson, *supra* note 46, at 572. This is precisely what may have occurred in a recent case involving allegations that a plaintiffs’ firm falsely told its clients that the settlement portions had been individually negotiated with the defendant, when in fact they were determined solely by the firm. The scheme was allegedly designed to hide the fact that “a major determinant in the size of a client’s share was whether he or she had retained [the firm] directly or been referred by another firm.” Anthony Lin, *Trial Ordered Over Firm’s Distribution of Fen-Phen Settlement*, N.Y. L.J., Mar. 28, 2007, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1174986238152>. The firm “allegedly inflated the settlement payments of its direct clients because its fees from those clients would not be reduced by referral fees.” *Id.*

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84. Erichson, *supra* note 46, at 572. Erichson also described how monitoring by claimants creates incentives for defendants’ counsel to offer settlements that the claimants are likely to accept. *Id.* at 572–73.

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85. See, e.g., Silver & Baker, *supra* note 33, at 1531 (“[P]laintiffs with low-value claims greatly outnumber those with high-value claims, [thus,] plaintiffs’ attorneys feel some pressure to maximize the number of claimants who accept a particular settlement. This encourages plaintiffs’ attorneys to distribute settlement funds broadly within the claimant group.”).

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86. Cf. Coffee, *supra* note 78, at 1546 (giving an example in the employment discrimination class action context in which the class attorney’s relationship with the union caused the attorney to favor union over non-union class members).

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when the minority claims have substantially higher values than the majority claims.<sup>87</sup>

The reporters will undoubtedly argue that it is sufficient to require supermajority approval within each category of a case when settlements distinguish among them. However, aggregate settlements that are unfairly biased in favor of some clients do not necessarily identify separate categories of cases. For example, a settlement might provide that the claimants will share equally in a lump sum offered by the defendant. As a formal matter, there is only one category of claimants, and the settlement treats them the same. But this Proposal favors claimants with less serious injuries over claimants with more serious injuries, because their awards do not take individual damages into account.<sup>88</sup> If the claimants with less serious injuries constitute 75% or more of the group, then they are in a position to bind those with more serious injuries despite the obvious unfairness of the allocation. There are circumstances in which equal allocations, despite some differences in the value of claims, might be appropriate.<sup>89</sup> But, unless the claimants who stand to lose the most agree to be bound by an equal division, the allocation is presumptively unfair.

A similar situation occurs when attorneys allocate settlement sums according to a matrix formula, a common technique in aggregate settlements. The matrix accounts for a variety of relevant factors, weighting each one differently.<sup>90</sup> For example, the formula might consider medical diagnosis, presence of certain symptoms, and documented progression of disease, as well as factors indicating the strength of particular claims—such as evidence relating to both the credibility of the claimant and causation—and the availability of vari-

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87. See *supra* notes 81–82 and accompanying text.

88. Indeed, this is precisely what the problem of “damage averaging” means in class and non-class aggregated settlements. Coffee, *supra* note 78, at 1545. See also Moore, *supra* note 7, at 163 n.91 (discussing the potential unfairness of the settlement in the Woburn case that was the subject of the book *A Civil Action*, in which all the families received the same settlement amount even though their injuries differed and “some of the families were likely to have their cases dismissed”).

89. When individual claims are small, it may be more efficient to distribute the settlement equally rather than attempt to individualize each claimant’s recovery. See Silver & Baker, *supra* note 33, at 1522 (describing the common practice of making equal payments, “especially when the sums involved are small”). Additionally, plaintiffs who know each other may be more willing to share equally despite significant differences in their claims. See, e.g., N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics, Op. 616 (1988), available at [http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp616\\_1.html](http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp616_1.html) (describing a toxic chemical case in which many plaintiffs wanted to reject a “contingent blanket offer,” but most of whom ultimately agreed to accept the settlement when they found out that a number of their co-workers were going to have their claims dismissed on statute of limitation grounds).

90. See, e.g., Erichson, *supra* note 9, at 1789–80.

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ous defenses—such as whether there is an arguable statute of limitations defense. Once again, as a formal matter, there is only one category of claimants, and the settlement treats them the same. But individual claimants may object that some factors are irrelevant, that others are given too much or too little weight, or that additional, relevant factors are not considered at all. The use of a matrix poses an obvious risk of unfair allocations, and it is possible that those being treated unfairly will be in the minority. Indeed, given the attorney's financial incentive to ensure the effectiveness of the settlement, the attorney will be biased in favor of the allocation most likely to gain 75% approval.

Aside from equal distributions and matrices, there are other ways in which claimants may be treated unfairly when the settlement agreement does not create different categories of cases. For example, the defendant's attorney may agree to a settlement in which the plaintiffs' attorney has allocated individual settlement values that add up to an amount the defendant is willing to pay. The plaintiffs' attorney may not use a matrix or any other formula to determine the individual settlement values, instead relying on her own assessment of each case's value. As long as the settlement agreement does not formally distinguish the way in which the claimants are treated, the attorney need only convince 75% of her clients that their settlement offers are fair in order to bind the remaining claimants.

Finally, there is the question of how much information the claimants will receive under § 3.17. As noted above, the text of the Proposal suggests that claimants need not receive the same detailed information about other claimants' settlements that is required under the aggregate settlement rule.<sup>91</sup> The aggregate settlement rule can, and should, be interpreted to respect a client's desire for privacy, unless particular identifying information is important for other claimants to evaluate the fairness of the settlement allocation.<sup>92</sup> But the ALI Draft Proposal appears to go well beyond that limited disclosure restriction. If § 3.17 requires only the specific information listed in its text—which does not appear to include much, if any, detail regarding what other claimants will receive<sup>93</sup>—then it is difficult to see how the 75% supermajority approval requirement provides a meaningful check on unfair allocations.

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91. See *supra* note 14 and accompanying text.

92. See *supra* note 15 and accompanying text.

93. See *supra* note 14 and accompanying text.

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V. REINSTATING AN EARLIER PROPOSAL FOR A LIMITED  
FAIRNESS HEARING WOULD NOT FIX THE PROBLEM

In an earlier draft, the reporters' proposal for limited judicial review—available only if the claimant brings the challenge within ninety days after being notified of the settlement's consummation<sup>94</sup>—included a provision under which courts could declare settlements unenforceable if they found that the settlement was “grossly unfair or inadequate to the challenger.”<sup>95</sup> Thus, by its own terms, the proposal was not designed to ensure either the fairness or adequacy of aggregate settlements, but only to protect against the most egregious abuses and, even then, only when one or more claimants affirmatively exercised her right to challenge the settlement.

There were other deficiencies in the proposal. For example, it required that the reviewing court give “substantial deference to the settlement” and treat it as “presumptively fair and reasonable,” regardless of the method of allocation and without any explanation for either the deference or the presumption.<sup>96</sup> Silver and Baker have argued that a combination of uniform contingent fees, market regulation of the choice of lawyers, and the threat of malpractice liability can significantly reduce the risk of attorneys acting arbitrarily or opportunistically in allocating aggregate settlements, particularly when coupled with variations of a majority voting rule, including supermajority requirements.<sup>97</sup> Although the current ALI Draft Proposal requires supermajority approval, it does not require uniform contingent fees.<sup>98</sup> As to the remaining risk reducers, Silver and Baker concede the difficulty of proving a malpractice claim in many cases.<sup>99</sup> Additionally, their optimistic view of the role of the market in providing quality control of mass tort lawyers is highly questionable. For example, cultivating a “reputation for superior performance” may steer some percentage of referrals to the most competent lawyers,<sup>100</sup> but referral practices have been criticized, because the receiving lawyers may be

94. ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.18(a).

95. *Id.*

96. *Id.* § 3.18(c) & cmt. b.

97. *See* Silver & Baker, *supra* note 7, at 773 (discussing “[o]ther protections [that] can supplant the unanimity requirement” even in the absence of judicial review of an aggregate settlement).

98. As noted above, mandatory uniform contingent fees would eliminate the plaintiffs' attorney's incentive to favor claimants with whom the attorney has a direct retainer agreement over those referred by other lawyers. *See supra* note 86 and accompanying text.

99. *See* Silver & Baker, *supra* note 7, at 777 (describing the difficulty for many plaintiffs to establish that “his or her claim was worth more relative to other settled claims than he or she received”).

100. *Id.*

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offering the highest percentage or because they may have gained their reputations primarily on the basis of mass marketing directly to the public.<sup>101</sup>

The reporters could have revised the earlier proposal to require both uniform contingent fees and supermajority approval as conditions of obtaining the court's deference to an aggregate settlement. Even these conditions, however, would not justify either a presumption that a settlement allocation is fair or the underlying standard that the burden is on the challenger to prove that the settlement is grossly unfair or inadequate. Uniform contingent fees may not be achievable, at least where referral fees are permitted, and they would eliminate only one of a number of incentives for common attorneys to favor one group of clients over another.<sup>102</sup> As for supermajority approval, that requirement reduces, but cannot eliminate, "the number of clients in danger of being sold out,"<sup>103</sup> particularly when clients with smaller, less credible claims vastly outnumber claimants with more serious claims.<sup>104</sup>

Aside from the unwarranted presumption of fairness and the refusal to provide relief unless a settlement is grossly unfair, the earlier proposal was inadequate in several respects. First, the claimant had to file the challenge "within 90 days of receiving actual notice of the consummation of a settlement."<sup>105</sup> Ninety days is almost certainly inadequate for a claimant not only to decide that she believes the settlement is inadequate or unfair—which, under the current rule, is all a client needs to do in order to reject the settlement—but also to find a lawyer with the required knowledge, experience, and willingness to file the challenge on such short notice.

Even without the short time frame, it is unclear what incentives competent lawyers have to take on these challenges. The proposal provided that they might be entitled to reasonable attorneys' fees and costs if they prevailed,<sup>106</sup> but there would be no guarantee that they

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101. See, e.g., Erichson, *supra* note 46, at 537 & n.63 (reporting criticisms of some plaintiffs' lawyers). Professor Erichson concluded that, "[i]n general, however, it is reasonable to expect that the incentives of the referral market would generally channel referral cases to lawyers competent to handle them and positioned to take advantage of economies of scale and opportunities for bargaining leverage." *Id.* at 537–38.

102. See *supra* notes 78–85 and accompanying text.

103. Silver & Baker, *supra* note 7, at 778.

104. See *supra* notes 88–89 and accompanying text.

105. ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.18(a).

106. Section 3.18(f) provided that the common attorney who negotiates a settlement that is later determined to be unenforceable "may be required to pay the reasonable attorneys' fees and costs incurred by the challenging claimant," but the reporters did not explain why the challenging claimant is not automatically entitled to receive these fees and costs or what factors should

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would prevail. Moreover, winning would not be easy given both the presumption of adequacy and fairness and the need to prove gross injustice. There is also no guarantee that attorneys who agree to represent plaintiffs in mass tort lawsuits on a contingency fee basis will prevail, yet mass tort plaintiffs often find attorneys to represent them. There, the attorneys stand to earn substantial fees if they prevail or reach a negotiated settlement, and they can spread what can be substantial costs among a large number of clients. Here, however, the amount that the attorneys stand to earn is considerably less,<sup>107</sup> and they will be unable to spread the costs of proving inadequacy or unfair allocation among such a large group.

How would these lawyers demonstrate that a settlement agreement was either grossly inadequate or unfair? Under the current aggregate settlement rule, a client's mere suspicion that the settlement is unfair is sufficient to warrant the client's refusal to be bound by its terms. But, under the earlier draft proposal, the claimant would have had to prove inadequacy or unfair allocation, which individual clients are unlikely to have the requisite evidence to prove. Further, it was unclear from the proposal whether, and to what extent, they would be entitled to formal discovery—from both the common attorney and the defendant's attorney—concerning all of the information necessary to prove their claim.

VI. NEITHER SUPERMAJORITY APPROVAL NOR A FAIRNESS  
HEARING PROVIDES FOR UNIQUE CLIENT PREFERENCES  
AND INDIVIDUAL CLIENT AUTONOMY

According to Erichson, the aggregate settlement rule not only provides a means of monitoring the lawyers, but it also “enables clients to effectuate individualistic preferences.”<sup>108</sup> In other words, “[e]ven assuming perfect equity in the allocation of settlement funds . . . some clients may rationally choose to accept the settlement while others rationally choose to reject it, based on different approaches to settle-

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determine when they are recoverable. ALI PRELIM. DRAFT No. 4, *supra* note 1, § 3.18(f) (emphasis added).

107. Undoubtedly, as with most fee-shifting provisions, the prevailing attorney's reasonable fees would be determined by the lodestar method, under which fees are determined on the basis of a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In these cases, however, the work would be limited in scope, particularly if discovery of information surrounding the settlement is limited. Even if the challenging claimant or claimants agreed to pay the attorney a contingent fee, success in the litigation would not result in an award of damages unless the common attorney offered a sum of money in return for the claimant dropping her challenge to the settlement, and the total amount of fees would still be small because of the low number of claimants involved.

108. Erichson, *supra* note 46, at 573.

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ment decisionmaking, different levels of risk tolerance, and different objectives and priorities in the litigation.”<sup>109</sup> No doubt the reporters will respond that it is also rational for clients to waive their rights under the aggregate settlement rule in return for increased efficiencies and bargaining leverage that benefit the group as a whole. Further, they will argue that the law should support unique client preferences by respecting a client’s choice to rely on both the integrity of the individual lawyer and a limited form of judicial review to protect them from inadequate and unfair settlements.<sup>110</sup>

These arguments are unconvincing. The increased efficiencies and bargaining leverage gained through aggregating claims are already available to the vast majority of claimants under the current rule.<sup>111</sup> In any event, client waivers obtained under the Draft Proposal are not likely to reflect true client “preferences” in most cases. Particularly in mass tort lawsuits, many of the clients are unsophisticated and inexperienced users of legal services.<sup>112</sup> They are unlikely to have an ongoing relationship with the common attorney and will probably select her, or even a referring lawyer, on the basis of mass marketing.<sup>113</sup> Their preference to waive will undoubtedly be shaped almost entirely by the attorney. They will have little basis upon which to evaluate the trustworthiness of the attorney, the risk of conscious, or even unconscious, bias in the settlement allocation, or the deficiencies of any limited judicial review. The attorney will be strongly motivated to persuade them to sign the waiver and will probably refuse to represent them unless they do so. In such circumstances, true client preferences and autonomy are respected by allowing clients the freedom to accept or reject an aggregate settlement offer only after ensuring that they have received the information that they need to evaluate its fairness and adequacy.

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109. *Id.*

110. This is the thrust of the position that Silver and Baker put forth in their articles cited above. See Silver & Baker, *supra* note 7; Silver & Baker, *supra* note 33.

111. See *supra* Part II.

112. See, e.g., Moore, *supra* note 7, at 181 (discussing client waivers in mass tort claims). Of course, the aggregate settlement rule also applies in cases involving more sophisticated clients, typically those involving contract, rather than tort, claims. See, e.g., Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512 (N.J. 2006) (applying Rule 1.8(g) to an attorney representing 154 individual franchisees suing a tax preparation franchisor for improper retention of funds in a loan risk pool). Whether it would be desirable—or even possible—to limit the proposed modifications to cases involving sophisticated and experienced users of legal services is beyond the scope of this Article. This would require reviewing an attorney’s conduct on a case-by-case basis, which would seriously impinge upon the ability of both plaintiffs’ and defendants’ lawyers to know in advance when aggregate settlements are permissible.

113. See Erichson, *supra* note 46, at 534–39.

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But what of the reporters' response that "waivers are valid in a variety of areas in which important rights are at stake," and thus a waiver that is "knowingly and voluntarily made, is in writing, [and] is signed by the claimant after full disclosure" should be binding?<sup>114</sup> Isn't the refusal to permit clients to waive their rights under the aggregate settlement rule unnecessarily paternalistic?<sup>115</sup> Although there is an undeniable element of paternalism in refusing to honor client preferences to execute these waivers, such paternalism is warranted.<sup>116</sup> Indeed, it is entirely consistent with other aspects of the law governing attorney-client relations, including law that was recently approved by the ALI in its Restatement (Third) of the Law Governing Lawyers.<sup>117</sup>

#### VII. THE ALI DRAFT PROPOSAL IS A RADICAL DEPARTURE FROM THE CURRENT LAW OF LAWYERING

In the current ALI Draft Proposal, the reporters say little about the autonomy argument. Instead, they merely note that litigants are permitted to waive important rights "in a variety of areas."<sup>118</sup> It is noteworthy, however, that the examples they cite are not from the law of lawyering, but rather primarily from constitutional cases in which litigants were permitted to waive their due process rights to notice, hearing, or trial.<sup>119</sup> But the standard for determining when waivers are binding in constitutional cases is not necessarily the same standard applied in other contexts. Both federal and state governments are free to offer, and commonly do offer, protections beyond those granted under their constitutions, including nonwaiveable rights to void certain agreements likely to have been made on the basis of ei-

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114. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt. a.

115. See Silver & Baker, *supra* note 7, at 769; Silver & Baker, *supra* note 33, at 1503 n.125.

116. See Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 233-40 (1982) (discussing justifications for paternalism in the context of the general conflicts of interest rule).

117. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

118. ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt. a.

119. *Id.* at § 3.17 Reporters' Notes, cmt. a. The reporters cite to cases holding that litigants may waive procedural due-process protections and note that criminal defendants who enter guilty pleas thereby waive their rights to a jury trial, to confront adverse witnesses, and to have the case against them proved beyond a reasonable doubt. *Id.* They also cite a federal statute permitting military personnel to waive various rights, including the right to terminate residential and automobile leases. *Id.* They cite only one example in the context of the law of lawyering: a recent ABA opinion that somewhat facilitates the ability of sophisticated clients to give advance waivers of conflicts. *Id.* It is notable, however, that the ABA opinion they cited makes many advance waivers nonconsentable, particularly when the clients are unsophisticated, like most mass tort plaintiffs. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005).

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ther a lack of information, unequal bargaining power, or coercion.<sup>120</sup> This is particularly true in the law of lawyering.

According to the Restatement, “[a] lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity.”<sup>121</sup> Further, “[b]ecause those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law . . . provides a number of safeguards for clients beyond those generally provided to principals.”<sup>122</sup>

Consider the number of situations in which the current law of lawyering refuses to honor client preferences in order to protect clients from overreaching attorneys. Under Rule 1.2(c), lawyers may not limit the scope of representation, even with the client’s informed consent, unless the limitation is “reasonable.”<sup>123</sup> Similarly, under Rule 1.5(a), lawyers may not charge “unreasonable” legal fees.<sup>124</sup> Under Rule 1.7(b), lawyers may not represent clients with conflicting interests, even with their clients’ informed consent, unless the lawyer “reasonably believes that [she] will be able to provide competent and diligent representation to each affected client.”<sup>125</sup> Under Rule 1.8, lawyers may not do any of the following: engage in business transactions with clients unless the terms are objectively “fair and reasonable”;<sup>126</sup> prepare instruments giving the lawyer a substantial gift;<sup>127</sup> make agreements giving the lawyer literary or media rights based on

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120. *See, e.g.*, 15 U.S.C. § 1635 (2000 & Supp. 2003) (absent Board action to prescribe certain regulations, no waivers are permitted allowing rescission when a security interest is taken in a consumer’s principal residence); N.J. STAT. ANN. § 17:16C-36 (West 2001) (retail installment sales contracts may not contain a provision purporting to waive certain defenses in actions against seller). *Cf.* Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651-678 (2000 & Supp. 2003); Family & Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000 & Supp. 2003) (nonwaivable right to family leave).

121. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, Introductory Note (2000).

122. *Id.*

123. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2007). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 & cmt. c (2007).

124. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2007). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 & cmt. b (2007).

125. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(1) (2007). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122(2)(c) & cmt. g(iv) (2007).

126. MODEL RULES OF PROF’L CONDUCT R. 1.8(a) (2007). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 & cmt. b (2007).

127. MODEL RULES OF PROF’L CONDUCT R. 1.8(c) (2007). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127(1) & cmt. b (2007).

information relating to the representation;<sup>128</sup> make an agreement prospectively limiting the lawyer's liability for malpractice, unless the client is independently represented;<sup>129</sup> or have sexual relations with a client.<sup>130</sup> These limitations to client consent are not free from criticism,<sup>131</sup> but they have been widely adopted.<sup>132</sup> More importantly, they were recently approved by the ALI itself when it adopted the Restatement (Third) of the Law Governing Lawyers.<sup>133</sup>

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

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

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128. MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2007). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36(3) & cmt. d (2007).

129. MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2007). *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) & cmt. b (2007) (providing no such exception, even for independently represented clients).

130. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2007). *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) & cmt. e (2007) (providing no per se ban but prohibiting sexual relations when such relations would "undermine the client's case, abuse the client's dependence on the lawyer, or create risk to the lawyer's independent judgment," such as in divorce cases).

131. *See, e.g.,* Lawrence J. Fox, *When It Comes to Sex with Clients, Whom Do You Trust: Nanny or the ABA?*, 19 GPSOLO 36 (2002) (urging the ABA to reject the then-proposed Model Rule 1.8(j), which would have prohibited most sexual relationships with clients).

132. *See* Charts Comparing Professional Conduct Rules as Adopted by States to ABA Model Rules, *supra* note 37.

133. *See supra* note 117.

circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).<sup>134</sup>

The ALI Draft Proposal clearly contemplates a form of advance waiver, not necessarily of the right to representation free of conflicting interests,<sup>135</sup> but rather of the client’s right to accept or reject a settlement offer after receiving appropriate information as required under the aggregate settlement rule.<sup>136</sup> It is difficult to imagine that attorneys could provide disclosures at the outset of their representations that would be adequate for unsophisticated mass tort clients to reasonably understand the material risks of such waivers. At the time of

134. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 22 (2007). Accord RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2007).

135. Attorneys who represent multiple clients with similar claims in mass tort lawsuits typically do have such conflicts of interest, particularly if they are negotiating or anticipate negotiating an aggregate settlement of those claims. See Moore, *supra* note 7, at 177. The propriety of the representation itself, even with conflict waivers, is governed by Rule 1.7 and is beyond the scope of this Article. In any event, it is clear that waivers under Rule 1.7 are separate from the type of waiver the reporters contemplate with respect to the protections offered under Rule 1.8(g).

136. Even in the absence of Rule 1.8(g), the client would have these rights under Rule 1.2(a) (providing that it is the client’s decision whether to accept or reject a settlement offer) and 1.4(b) (providing that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”). See MODEL RULES OF PROF’L CONDUCT R. 1.2(a), 1.4(b) (2007). According to the Restatement, clients can authorize an attorney to accept a settlement offer on their behalf, but they can also revoke that authority at any time prior to acceptance, and they cannot effectively create an irrevocable authority to settle in favor of the attorney. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(3) (2007). These limitations on waiveability derive from agency law, which generally provides that an agent may not act contrary to a principal’s instructions, even when those instructions are contrary to an irrevocable contract between the parties. RESTATEMENT (SECOND) OF AGENCY § 118 cmt. b (1958). In a prior draft, the reporters argued that the recognized exception for agents “possessing a power given as security” applies in the case of aggregate settlement waivers, even one purporting to give the lawyer alone the right to bind the client to a settlement, because the purpose of the waiver was to protect the interests of other claimants. See ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.17, Reporters’ Notes to cmt. a. This argument may be correct as a matter of agency law, but it ignores the additional protections provided under fiduciary (as opposed to contract) law, particularly the law governing lawyers. According to the Restatement (Third) of the Law Governing Lawyers, an agreement between a lawyer and a client that limits “a duty that a lawyer would otherwise owe to the client” is not enforceable unless “the terms of the limitation are reasonable in the circumstances.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2007); accord Moore, *supra* note 7, at 175–76. Apparently conceding the weakness of the argument they made in the prior draft, the reporters now recognize that “under prevailing ethics rules, a lawyer may not obtain a nonrevocable assignment of the client’s individual authority to decide whether to settle a case and for what amount.” ALI DRAFT PROPOSAL, *supra* note 1, § 3.17 cmt. a. They further argue, however, that this rule is not violated when the authority to settle “is *not* given to counsel but, instead, remains with the collective clients, who may act to accept a settlement pursuant to a waiver only” in accordance with the 75% approval requirement. *Id.* (emphasis in original). It is unclear whether the supermajority approval requirement changes the analysis under either Rule 1.2(a) or agency law, because the client would still be relinquishing the right to make the final decision regarding settlement.

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retention—when the Draft Proposal contemplates many waivers will be obtained<sup>137</sup>—clients will typically have little idea of the likely value of their claims, how their claims will compare to the claims of others, and how various methods of allocating a lump sum settlement are likely to affect them.<sup>138</sup> Such information is more readily available the further along the lawsuits proceed, but, if the Proposal is modified to require that waivers become effective only if obtained much later in the representation, the burden of fully informing the clients of the material risks of an impending aggregate settlement will be virtually identical to the burden of providing relevant information after the settlement has been negotiated. At this point, the only reason to allow the waivers is to avoid the possibility of strategic holdouts, but the reporters have yet to demonstrate that this problem alone is sufficiently serious to warrant abrogation of the aggregate settlement rule.<sup>139</sup>

VIII. IN THE ABSENCE OF EX ANTE WAIVERS UNDER § 3.17,  
 JUDICIAL APPROVAL IS AN INSUFFICIENT SUBSTITUTE  
 FOR THE AGGREGATE SETTLEMENT RULE

In addition to ex ante waivers under § 3.17, the reporters propose in § 3.19 that a plaintiffs’ attorney who receives an aggregate settlement offer “may seek approval for the fairness and adequacy of such a settlement before a court of competent jurisdiction in the state where the original attorney-client agreement was formed.”<sup>140</sup> The approval would extend only to the claims that are presented to the court for review, and the attorney would be forced not only to “affirmatively demonstrate the fairness of the proposed settlement,” but also to “provide a compelling explanation for why a waiver was not secured pursuant to § 3.17.”<sup>141</sup> The reporters do not explain why such an ex-

137. See ALI DRAFT PROPOSAL, *supra* note 1, § 3.17(c).

138. See, e.g., Silver & Baker, *supra* note 33, at 1505:

[Plaintiffs have] no idea what the size of [their] ownership interest in a litigation group is and, moreover, [have] no objective way of finding out. Plaintiffs typically do not learn how large their shares are until they receive settlement offers for approval. . . .

Having little or no idea how much their claims are worth, clients pay their lawyers in part to provide an assessment.

*Id.*

139. See *supra* notes 47–58 and accompanying text.

140. ALI DRAFT PROPOSAL, *supra* note 1, § 3.19(a).

141. *Id.* § 3.19 cmt. b. For reasons that are not explained, the text itself states that the lawyers who seek judicial approval “bear the burden of establishing that efforts to secure direct approval from clients were unavailing and why the terms of § 3.17 could not be satisfied without judicial approval,” but does not state, as does the comment, that the lawyers bear the burden of establishing the fairness of the proposed settlement. *Id.* § 3.19(a).

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ception to the aggregate settlement rule is either necessary or desirable. In an earlier draft, they suggested that a potentially “compelling reason” not to secure an advance waiver under § 3.17 was that the affected claimants did not meet the numerosity or amount in controversy requirements of that section,<sup>142</sup> thereby implying that ex ante waivers were obtained. But the reporters did not explain what is compelling about such a case, especially given that the reporters themselves expressly designed these requirements to pinpoint circumstances in which the aggregate settlement rule is thought to be unworkable.

Moreover, the reporters do not limit the exception to cases in which some form of ex ante waiver has been obtained. What possible reason could there be to permit a court to impose a settlement over the objection of one or more of the claimants in a non-class aggregation in which there is no ability—either ex ante or ex post—to opt out of the group settlement? It cannot be the burden of obtaining informed consent to the terms of the settlement, because § 3.19(b) provides that, prior to invoking this form of judicial review, “claimants’ counsel must use all reasonable efforts to notify all affected claimants and provide such claimants an opportunity to participate in the judicial proceedings.”<sup>143</sup>

The only reason for imposing settlements in the absence of ex ante waivers is that the attorney believes the settlement is so good that any claimant who objects must be acting either irrationally or strategically. But it is not necessarily irrational to reject a settlement that someone else, even a court, believes is adequate and fair, given that individual preferences vary so widely,<sup>144</sup> and the reporters cannot possibly contemplate that courts will determine whether individual claimants are acting irrationally given their own unique preferences. Even if a claimant is acting irrationally or strategically, attorneys have no right to override a client’s rejection of a settlement offer through court approval, merely because the attorney purports to know what is best for the client or has other clients who want to accept the offer. For reporters who place a high value on the client’s right to autonomous decision making,<sup>145</sup> this particular proposal is both unjustifiably paternalistic and contrary to the attorney’s duty of loyalty to individual cli-

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142. ALI PRELIM. DRAFT NO. 4, *supra* note 1, § 3.19 cmt. b. The current draft gives no explanation for the removal of this language from the comment.

143. *Id.* § 3.19(b).

144. *See supra* notes 107–108 and accompanying text.

145. *See supra* note 109 and accompanying text.

ents, including the duty to abide by each client's decision concerning the objectives of the representation.

#### IX. CONCLUSION

The goals of the ALI's Principles of the Law of Aggregate Litigation are laudable, not only because they recommend procedures to better handle class action lawsuits, but also because they attempt to clarify and improve non-class aggregations, including the negotiation and settlement of mass tort claims. The aggregate settlement rule has spawned much confusion, making it difficult for both plaintiffs' and defendants' attorneys, while acting in good faith, to conform their conduct to the rule. One of the primary difficulties has been the lack of a clear definition of what constitutes an aggregate settlement for purposes of triggering the rule's requirements. Here, the ALI Draft Proposal offers a definition that is not only clear, but also both principled and workable.

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

The ALI Draft Proposal is seriously defective, however, in the reporters' efforts to allow plaintiffs' attorneys to bypass the aggregate settlement rule, primarily by having clients execute advance waivers of their right to its protections. The reporters have neither offered evidence that the rule significantly impedes the settlement of mass lawsuits nor drafted provisions that provide sufficient alternative protection against inadequate and unfair settlements. Although purporting to honor client preferences and autonomy, the reporters ignore the danger that overreaching attorneys will shape client preferences at a time when the clients have insufficient information to assess whether advance waivers are really necessary to obtain the benefits of collective litigation. The current law of lawyering recognizes that clients are often vulnerable and thus provides numerous safeguards for clients

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beyond those generally provided by other law. One of those safeguards is the current aggregate settlement rule. The burden is on the reporters to justify significant changes to that rule, and they have failed to meet that burden.

