

*Resolving the Conflicts of Interest in the Allocation of
Mass Tort Aggregate Settlements*

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Mass torts are more often settled out of court than tried before a judge or jury.¹ In what are colloquially known as “aggregate settlements,” mass tort cases are usually resolved in clusters, and against a common defendant or defendants.² Multiple mass tort plaintiffs (sometimes numbering in the hundreds or thousands) can be represented by a single lawyer who, in coordination with other plaintiffs’ lawyers, negotiates a large-scale settlement with the defendant or defendants. A typical settlement involves a lump sum dollar figure offered by the defendant, conditioned upon acceptance of the settlement by all or a significant percentage of plaintiffs. Since acceptance of such a deal by each individual plaintiff depends largely on his satisfaction with his settlement allocation, the plaintiffs’ lawyer must determine how to allocate the aggregate dollars in a way that convinces all or enough clients that acceptance is the right decision so that the entire deal is not jeopardized. This raises the important question, how can the plaintiffs’ lawyer accomplish the goal of a mass settlement without compromising his duty of loyalty to each individual client? In other words, how can the plaintiffs’ lawyer’s ethical obligation to zealously represent each individual client be reconciled with the practical reality that success of the settlement for all of his clients, collectively, may require making tradeoffs that benefits some clients to the detriment of others?

This paper examines the problems that this question raises, the strengths and weaknesses of proposed solutions to the problems, and the efficacy of Rule 1.8(g) of the Model Rules of Professional Conduct—which governs aggregate settlements. Whereas much of the current literature contains conclusions based on a theoretical assessment of these problems and/or the authors’ personal experience with mass tort settlements, this paper goes beyond that to analyze these problems in the context of first hand accounts of mass tort conflicts from all sides of the debate. Based on this analysis, the paper concludes that despite their inherent conflicts of interest, mass tort settlements are desirable and recommends that Rule 1.8(g) be modified to impose more specific disclosure requirements, use of a special master or neutral third party in

¹ See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1769 (2005) [hereinafter *Typology*].

² *Id.*

settlement allocations, and where a neutral is not used, mandatory judicial oversight of the settlement process.

The analysis is based in part on telephone interviews with leading mass tort plaintiffs' lawyers, a defense lawyer, and a Special Master, as well as academic literature. The first plaintiff lawyer (PL1) interviewed has been involved in approximately twelve mass tort settlements.³ The second plaintiff lawyer (PL2) interviewed has been involved in approximately ten mass tort settlements.⁴ The defense lawyer (DL1) interviewed has been involved in over twenty mass tort settlements.⁵ The Special Master (SM1) interviewed has acted as a neutral third party in at least twenty mass tort settlements.⁶ For confidentiality purposes, all parties will remain anonymous.

I. Background of the Mass Tort Aggregate Settlement Conflict

The two major types of conflicts that arise in the context of mass tort aggregate settlements are the lawyer-client conflict, in which the interests of the attorney are pitted against the interests of one or more clients, and the client-client conflict, in which the interests of clients are pitted against the interests of other clients. These two types of conflicts are largely interrelated. Four primary factors give rise to these conflicts.

The first factor is defendants' typical insistence on "peace" with a substantial percentage of claimants. Defendants favor a broadly inclusive resolution because of their desire to put the dispute in the past and to make it easier to quantify whatever future risk might remain post-settlement.⁷ When a proposed settlement contains such a condition, the plaintiffs' lawyer is faced with an incentive to complete the agreement by pressuring individual clients to accept the terms and allocations.⁸ Thus, the lawyer's self-interest, and the interest of his other clients who are satisfied with their proposed dollar allocation, conflicts with the interest of the clients who

³ Telephone interview with anonymous mass tort plaintiff lawyer 1 (April 9, 2009) [hereinafter "PL1 Interview"].

⁴ Telephone interview with anonymous mass tort plaintiff lawyer 2 (April 13, 2009) [hereinafter "PL2 Interview"].

⁵ Telephone interview with anonymous mass tort defense lawyer (April 13, 2009) [hereinafter "DL1 Interview"].

⁶ Telephone interview with anonymous mass tort settlement Special Master (April 13, 2009) [hereinafter "SM1 Interview"].

⁷ *Typology*, *supra* note 1, at 1776.

⁸ *Id.* at 1796.

may be ambivalent about accepting the settlement.⁹ The larger the percentage of client acceptances required to make a settlement final and effective, the greater this conflict becomes.¹⁰

The second factor creating conflict is the great expense and risk that plaintiffs' lawyers take on when representing many mass tort clients. The attorneys usually have a financial stake in the litigation that is far greater than that of any single litigant.¹¹ "The very nature of complex mass tort litigation often forces the lawyer into an adversarial relationship with his or her own client. The classic paradigm contemplates the predicament of the attorney who represents multiple claimants and who will be forced to invest a great deal of money and time in prosecuting the case. In this context, the attorney's desire to settle the case quickly to offset these daunting costs may conflict with the goals of the [group] members..."¹²

The third factor that creates a conflict of interest is the benefit to the plaintiffs' attorney from favoritism, which results when the attorney has a financial incentive to favor some clients, or a group of clients, over others. This can arise under various circumstances. For instance, some mass tort clients go directly to a law firm whereas others come from a referral source.¹³ In that context, the law firm makes more money for itself from "direct" cases than from cases that are "referred in," since it does not have to share the fee with the referral attorney. Thus, the lawyer has an incentive to favor the cases in his inventory that do not require that he pay a referral fee.¹⁴ For example, in *Parker & Waichman v. Napoli*, involving a dispute between two plaintiffs' firms in the Fen-Phen litigation, Parker & Waichman alleged that Napoli intentionally allocated more money to Napoli's direct clients than to Parker & Waichman's referred clients so as to maximize its own fees.¹⁵ Although this allegation ultimately failed,¹⁶ the case has been

⁹ *Id.* at 1796–97.

¹⁰ *See id.* at 1798–99.

¹¹ Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 502–03 (1994) [hereinafter *Ethical Dilemmas*].

¹² Marc Z. Edell & Phillip J. Duffy, *Ethical Pitfalls Confronting the Mass Tort Lawyer*, NEW JERSEY LAWYER, January, 1995, at 33 [hereinafter *Ethical Pitfalls*].

¹³ Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOY. L.A. L. REV. 395, 396 (1998) [hereinafter *Ethical Constraints*].

¹⁴ *Id.*

¹⁵ 815 N.Y.S.2d 71, 73 (1st Dep't 2006). Defendant law firm Napoli Bern had negotiated a lump-sum settlement with American Home Products Corp., the manufacturer and distributor of the diet drug, Fen-Phen. *Id.* at 73. As a result of this settlement, Parker & Waichman, who had referred Fen-Phen cases to Napoli, received over \$5 million dollars in referral fees pursuant to their fee sharing agreement with Napoli.

¹⁶ *See id.* at 74 ("Even though plaintiff couches the remainder of its breach of contract claim as a challenge to its fee-splitting agreements with defendants, the real attack is to the underlying settlement and, more particularly, whether defendants engaged in any fraudulent conduct in ascertaining how much money referred clients, as opposed to direct

litigated for over six years¹⁷ and demonstrates the danger of firms allocating settlement proceeds for their own clients. Additionally, an allocation may also reflect attorney self-interest when contingency fee percentages of the aggregated clients vary and certain allocations yield higher fees.¹⁸ This creates the incentive to discriminate in favor of clients in jurisdictions that allow for greater contingency fee percentages.¹⁹

The final factor that creates a conflict of interest is the diversity of the plaintiff population. The spectrum of plaintiff injuries can run from very serious, to literally non-existent.²⁰ Attorneys who work to settle multiple claims often represent clients whose interests are not in complete harmony, such as where there are disparities in the severity and/or types of injuries involved,²¹ and negotiations that benefit one class of claimants may impair another.²² In a lump sum deal, one client's gain is another's loss, since there is a set amount of money to go around.²³ In formula or matrix lump sum deals, where money is allocated based on factors like injury, age, and risk characteristics,²⁴ the conflict arises between groups rather than individuals.²⁵ This in turn creates a lawyer-client conflict because in either setting, tradeoffs will be made that leave some clients better off than others.²⁶ However, when these determinations can be made based on general rules of damages, it is possible that this factor is not an issue.²⁷

clients, were entitled to receive as a settlement. The fee agreements between the parties are only an incidental aspect of the overall global settlement agreement in which over 5,000 individuals participated. The real issue is whether there was fraud behind the global settlement, a settlement which was agreed to by plaintiff's referred clients in the underlying action, approved by a recognized legal ethics professor, overseen and approved by a special master, and ultimately confirmed by the Supreme Court. Plaintiff's claim constitutes an improper collateral attack on a prior order." (internal citation omitted)).

¹⁷ See *Parker & Waichman v. Napoli*, 858 N.Y.S.2d 77 (1st Dep't 2008) (Parker & Waichman brought this action on November 9, 2001 and the case is still in progress as of May 22, 2008).

¹⁸ Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 266–67 (2001).

¹⁹ See *id.* at 267. For example, Texas allows for a 40 percent contingency fee, whereas New York only allows for a one-third contingency fee.

²⁰ See Kenneth R. Feinberg, *Reporting From the Front Line—One Mediator's Experience With Mass Torts*, 31 LOY. L.A. L. REV. 359, 366 (1998) [hereinafter *Reporting From the Front Line*]. For example, in pharmaceutical cases, a so-called "pill taker" case is one in which the plaintiff has not experienced the type of injury being compensated per the settlement agreement, or has experienced the relevant injury, but not within the time frame required by the settlement agreement; the plaintiff merely swears by affidavit that he has in fact taken the drug in question and he becomes entitled to compensation. SM1 Interview, *supra* note 6.

²¹ *Ethical Pitfalls*, *supra* note 12, at 33.

²² J. Michael Papantonio, *The Ethics of Mass Tort Settlement*, 2 Ann.2002 ATLA-CLE 2617 (2002).

²³ See *Typology*, *supra* note 1, at 1800.

²⁴ *Id.* at 1789.

²⁵ *Id.* at 1800.

²⁶ See *id.* at 1801.

²⁷ PL1 Interview, *supra* note 3. For example, a 40 year-old would get more than an 80 year-old.

These four factors all contribute to raising conflicts of interest in a legal system premised on the notion of individual client loyalty, rather than collective client loyalty. Traditionally, loyalty is promoted through the duty of the lawyer to be a zealous and effective advocate.²⁸ The duty to the individual client is necessarily undercut when the plaintiffs' lawyer negotiates a lump sum settlement that requires him to do what is best for the group. Federal District Judge Jack Weinstein, one of the few judges in the country to have handled more than one mass tort matter in his career said, "[t]here is nothing that would seem on its face more unethical (or more common) in mass litigation for a defendant to offer an aggregate settlement of all clients' claims and for plaintiffs' counsel to take it."²⁹ Yet, judges often encourage their acceptance, and all parties generally prefer them³⁰ because the alternative is to litigate thousands of cases one by one. So the question is, what is the best way to reduce or eliminate the potential harm of an aggregate settlement?

Rule 1.8(g) of the Model Rules of Professional Conduct governs aggregate settlements, and while scholars are divided on whether this rule is actually effective in resolving the conflicts of interest that arise in the allocation of settlement proceeds, most conclude that it does not resolve the problem. Rule 1.8(g) provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients... unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims... involved and of the participation of each person in the settlement.³¹

The main safeguard to plaintiffs is the opt-out right mandated by the rule.³² It is an important monitoring device that provides an incentive for the plaintiff's lawyer to ensure the settlement is appealing to most clients and that each client receives an equitable allocation based

²⁸ *Ethical Dilemmas*, *supra* note 11, at 493.

²⁹ *Id.* at 521.

³⁰ *Id.* Judges often encourage acceptance of these settlements in order to terminate a large number of case; defendants prefer them because they save transaction costs; and plaintiffs' lawyers like them because they garner large fees for their many cases. *Id.*

³¹ MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2002).

³² While not explicitly labeled, the opt-out right comes from the fact that the rule bars a lawyer from accepting an aggregate settlement for one of his clients without that clients' informed consent—leaving the client free to accept or reject the settlement offer.

on the strength of the claim and the degree of harm.³³ Further, this opt-out right maintains the most critical aspect of client autonomy without unduly constraining plaintiffs’ counsel’s freedom to pursue collective interests.³⁴ But, the opt-out provision can result in the dilution of strong claims through damage averaging and strategic holdouts by clients attempting to leverage a more substantial dollar allocation.³⁵

Damage averaging—which is the standardization of the value of claims despite their varied sizes and strengths—can result in those with strong claims receiving less than they would if the settlement allocation were based on the merits of each individual claim.³⁶ The claimants that benefit most are those whose damages would be too small to justify individual litigation costs and those whose evidence of harm or causation is too weak for litigation.³⁷ Knowing that defendants will often pay a high price to resolve a litigation in its entirety (rather than piecemeal), plaintiffs’ counsel has an incentive to include weaker cases in the settlement, despite the fact that doing so potentially reduces the allocated settlement amount of claimants with more valuable or more legitimate cases.³⁸ This can lead to a holdout problem where claimants whose participation in the deal is more valuable use their opt-out power to extract settlement funds from the other claimants since their non-participation could potentially destroy the entire deal.³⁹ The higher the demanded acceptance rate, the greater the holdout problem becomes. However, it is a rare situation where one plaintiff can unilaterally block a group-wide deal since defendants typically demand acceptance rates of less than 100%, in part, to counter that threat.⁴⁰

In practice, the opt-out right has been used for different motives, which have varied results. PL1 has never had a client use her opt-out right to attempt to leverage a more substantial dollar figure. He noted that in most settlements, reaching the required acceptance rate is not difficult, so when a client has chosen to opt-out of the group settlement, it was not in any attempt to achieve leverage, but because she simply was not satisfied. He said that all “opt-outs”

³³ See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 570–74 (2003) [hereinafter *Beyond the Class Action*].

³⁴ *Id.* at 573–74.

³⁵ Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(G)*, N.Y.U. L. REV. 501, 516–17 (2008) [hereinafter *Proposal to Revise Rule 1.8(G)*].

³⁶ *Id.* at 517.

³⁷ *Id.*

³⁸ See *id.* at 518.

³⁹ *Id.* at 519

⁴⁰ See Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel In Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1531–32 (1998) [hereinafter *I Cut, You Choose*].

eventually settle, but in these cases he has to prepare them for trial—which is true for most individual-type cases anyway.⁴¹

PL2 has represented a “strategic holdout” client who believed his participation in the settlement⁴² was needed and who attempted to obtain a greater allocation of the gross aggregate settlement—which had already been given to PL2’s firm—by exercising his opt-out right. PL2 notified defense counsel of this client’s rejection and reached a negotiation whereby the defendant would get that money back from the gross allocation, but every other plaintiff’s allocation would stay the same, so as not to destroy the entire settlement.⁴³ In this way, PL2 and defense counsel were able to counter the threat that the holdout client attempted to present to the entire group.

Another issue with Rule 1.8(g) is that while attorney opportunism can be discouraged by close monitoring by the claimants, the claimants are unlikely to do so in a way that is efficient for the group as a whole,⁴⁴ and therefore cannot effectively control the lawyers’ conduct in the litigation.⁴⁵ Judge Weinstein notes that he has yet to see plaintiffs successfully ignore their attorney’s advice to settle in mass tort cases.⁴⁶ PL1 agreed that clients always go with the advice of the lawyer, however he always leaves the ultimate decision up to the client.⁴⁷ In response to a question about advising clients to opt-out of a settlement, PL1 stated, “I give them my opinion that I think this amount is low, but the client decides whether or not to accept.”⁴⁸ PL2 does not recall ever advising a client in a mass settlement not to accept the offer based on his necessary analysis of what the client will get under the settlement right now versus what the client is likely to get at trial, the likelihood of success at trial, and the reality that any money would not be seen for four or five years (not including a two-year appeals process).⁴⁹

⁴¹ PL1 Interview, *supra* note 3.

⁴² This settlement was exclusive to PL 2’s firm.

⁴³ PL2 Interview, *supra* note 4. PL2 later explained to the client that he did not have to accept the settlement offer, but rejecting it would not get him more money in settlement. It was further explained that potentially, the client could go to trial and win more. Six months later the client asked if PL2 could get him the same settlement. PL2 said that luckily for the client, he was able to and that it was fortuitous that his firm had a good relationship with the defense counsel because if they had not it would not have worked out the way it did.

⁴⁴ See Charles M. Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 752 (1997) [hereinafter *Mass Lawsuits*].

⁴⁵ See *Ethical Dilemmas*, *supra* note 11, at 504.

⁴⁶ See *id.* at 523.

⁴⁷ PL1 Interview, *supra* note 3.

⁴⁸ *Id.*

⁴⁹ PL2 Interview, *supra* note 4.

According to some, the reality is that the mass tort client's choices in settlement are often to either settle with the collective group or receive no relief at all.⁵⁰ However, according to PL2, that is an overstatement. In his experience, many times clients settle because they are satisfied with their allocation amount. More often than not his clients will thank him and say, "it's such a great result." However, he added that there are definitely clients who feel that if they do not participate in the group deal they will get nothing. He encounters more clients with those feelings in the judicially-engrafted settlements⁵¹ because a lot of times he gets the sense that clients think that the judge feels it is a good deal, so if the client does not take it, the judge must think the client will get nothing.⁵²

Rule 1.8(g) was designed to preserve the integrity of the attorney-client relationship for fear that plaintiffs' lawyers would focus on the total settlement amount and neglect the interests of individual clients, as well as fear that attorneys would serve only the interests of clients with the most valuable claims.⁵³ But, it appears not to have been designed with mass torts in mind.⁵⁴ This is evinced by the fact traditional ethical rules do not provide realistic guidance to mass tort lawyers.⁵⁵ First, the extent to which the rules allow lawyers to incur and resolve allocation conflicts is unclear.⁵⁶ It appears lawyers are guided more by conscience⁵⁷ and/or fear of malpractice claims. Second, Rule 1.8(g) does not say what the attorney could do if there was a holdout plaintiff who threatened the viability of the entire settlement. Would it be fair to offer him more money to save the deal? If that failed, would the lawyer be forced to take that one case to trial? Would it be ethical to ask the plaintiff to find a new lawyer? Should the court allow the attorney to withdraw representation? Should the court permit a majority vote to control acceptance of settlement for the whole group? These are all questions that the current rule leaves unanswered.⁵⁸ SM1 does not think that the rule was designed for the kind of large-scale mass tort settlements that he handles because the rule was created at a time when people did not

⁵⁰ *Proposal to Revise Rule 1.8(G)*, *supra* note 35, at 13.

⁵¹ For example, like Vioxx and Zyprexa.

⁵² PL2 Interview, *supra* note 4.

⁵³ *Proposal to Revise Rule 1.8(G)*, *supra* note 35, at 509.

⁵⁴ *I Cut, You Choose*, *supra* note 40, at 1475.

⁵⁵ *See Ethical Dilemmas*, *supra* note 11, at 482.

⁵⁶ *I Cut, You Choose*, *supra* note 40, at 1500.

⁵⁷ *See id.* at 1475.

⁵⁸ *See Ethical Dilemmas*, *supra* note 11, at 523.

realize how these cases would play out and because the rule does not take enough notice of the kinds of things that actually go on that are beneficial for all sides.⁵⁹

II. Strengths and Weaknesses of the Various Proposed Solutions

A. Eliminate Top Down Deals

One obvious solution is to avoid or eliminate altogether “top down” deals in which the total settlement amount is negotiated without consideration of how much each individual client will receive, and is after-the-fact allocated among individual plaintiffs. The strength of this solution lies in the fact that lump sum settlements of this nature present the most extreme versions of the client-client and lawyer-client conflicts,⁶⁰ so eliminating this option naturally reduces the conflict. However, this solution is not ideal because it might frustrate both sides’ desire to resolve the conflict. If settlement options are narrowed, the likelihood of resolution is obviously constricted too. Furthermore, there is only a superficial difference between the top-down approach and the approach whereby the attorney separately negotiates each plaintiff’s payment because in either scenario, the same amount of money is changing hands and everyone winds up in the same position, including the plaintiffs’ attorney.⁶¹

PL1 stated that he could not say which model—the top-down deal or individual negotiations—was better and noted the pros and cons of each: when settlements occur on a case-by-case basis the lawyer has to fight every single case as if it were going to trial, which requires a lot of additional work, but it might result in a higher settlement figure for each plaintiff. On the other hand, the global settlement model (with percentage requirements) is more efficient and gets plaintiffs money a lot faster.⁶² PL2 believes that requiring one-by-one negotiations would hurt the plaintiffs because some defendants are willing to pay more money in the aggregate to avoid being involved in the allocations required by individualized negotiations, which would garner the plaintiffs higher settlement awards.⁶³

⁵⁹ SM1 Interview, *supra* note 6.

⁶⁰ *Typology*, *supra* note 1, at 1802.

⁶¹ *See I Cut, You Choose*, *supra* note 40, at 1472

⁶² PL1 Interview, *supra* note 3.

⁶³ PL2 Interview, *supra* note 4.

B. Use of a Third Party/Special Master

Another possible solution is the use of third parties, in the form of special master, mediator, or some other neutral party, to allocate aggregate settlement funds. Under such circumstances, a mediator and not the lawyer determines how to allocate the aggregate sum based on some presumably-principled formula that is dependent upon different variables such as seriousness of illness or degree of disability.⁶⁴ SM1 described his role as making sure the settlements were fairly and reasonably allocated among the mass of individuals, and sometimes constructs allocation schemes where all cases get applied to a set of variables.⁶⁵

Since the special master is a “dispassionate, objective neutral,”⁶⁶ he can both review the proposed allocations to ensure they are fair and reasonable, as well as meet with clients who are hesitant to accept the settlement amount to explain the fairness of the methodology resulting in the individual allocation.⁶⁷ Kenneth Feinberg, who is an expert in alternative dispute resolution (“ADR”) and has acted as a court-appointed special master in many mass tort litigations, believes that “[i]nterposing a neutral third party into the allocation mix goes a long way toward resolving [this] serious ethical dilemma.”⁶⁸ Feinberg notes that determinations of fairness should be made on an individual case-by-case basis based on the merits of the litigation.⁶⁹

A strength of the special master solution is that using a third party to allocate the funds among multiple plaintiffs can be a great way to increase the likelihood of a reasonable allocation and inspire confidence among clients that they are being treated fairly.⁷⁰ PL1 believes that the “layers of impartiality” added by the special master act as the check against any partiality the plaintiff lawyer might have.⁷¹ “The key is to recognize, identify, and address [the conflicts], and if you don’t you’re jeopardizing yourself and the client. You need a check and balance. The

⁶⁴ *Reporting From the Front Line*, *supra* note 20, at 370.

⁶⁵ SM1 Interview, *supra* note 6.

⁶⁶ Kenneth R. Feinberg, *Resolving Mass Tort Claims: The Perspective of a Special Master*, DISP. RESOL. J., Feb. 1998 at 10, 12 [hereinafter *Resolving Mass Tort Claims*].

⁶⁷ *See id.*

⁶⁸ *Reporting From the Front Line*, *supra* note 20, at 370–71.

⁶⁹ *See Resolving Mass Tort Claims*, *supra* note 66, at 12.

⁷⁰ *Typology*, *supra* note 1, at 1803.

⁷¹ PL1 Interview, *supra* note 3.

special master is that check.”⁷² PL2 stated that when you have a court-appointed special master, as opposed to just hiring a third party, you have another level of protection because it is like having the court involved.

One potential weakness, however, is that while the third party technique sounds soothing and probably helps convince plaintiffs that the settlement is fair, the ethical dilemmas inherent in the underlying aggregate settlement are not addressed and therefore remain present.⁷³ PL1 agrees that the special master cannot entirely alleviate the conflicts of interest, but still provide a needed balance to the process. “The problems are there whether the special masters are there or not, but [the special masters] certainly make it easier.”⁷⁴ Moreover, while delegating the allocation determinations to a mediator removes the lawyer-client conflict and the risk of favoritism, most of the client-client conflict also still remains.⁷⁵ PL2 does not think the special master alleviates the conflicts very much. He noted that using a special master or third party gives plaintiffs’ lawyers “a small level of neutrality” in the sense that the neutral party is shielded from some of the information in clients’ files that could otherwise create a conflict (such as fee sharing agreements), but if the neutral party makes a mistake, the plaintiff lawyer is still the person liable. He added, though, that using a neutral party does protect him by providing some factual basis to potentially avoid liability for certain types of allegations.⁷⁶ SM1 does not believe that his role as a neutral removes the conflicts of interest, but that it helps ameliorate them. He added, “plaintiff attorneys are always going to have a burden, but it can help if you have the right third party who is experienced and understands the rules, and understands the practical limitations of the rules. It especially helps plaintiff lawyers with masses of clients or those who are inexperienced or inept.”⁷⁷

Another problem with the special master approach is the concept of a “repeat player.”⁷⁸ Currently there are only a limited number of special masters experienced in mass tort litigation,

⁷² PL1 Interview, *supra* note 3. In certain kinds of cases, PL1 sometimes has the defendant make the allocations, since the defendant has no interest in paying one plaintiff more than another out of a limited fund. This saves costs because PL1 does not have to pay a third party to do the allocations.

⁷³ *Ethical Constraints*, *supra* note 13, at 406–07.

⁷⁴ PL1 Interview, *supra* note 3.

⁷⁵ *Typology*, *supra* note 1, at 1803.

⁷⁶ PL2 Interview, *supra* note 4. For example, if the neutral party does not know about any referring counsel relationships on a given case, it cannot be factored into the allocation in any way, but someone later alleges that it was a factor, the plaintiff lawyer can at least prove that it could not have been a factor.

⁷⁷ SM1 Interview, *supra* note 6.

⁷⁸ *Ethical Dilemmas*, *supra* note 11, at 558.

which could lead to potential conflicts of interest because the same attorneys are involved in many mass settlements, the special masters and attorneys are familiar with each other professionally and, in some cases, personally, and therefore there is at least the appearance of conflict if not actual conflict.⁷⁹ Having a larger group of special masters in the legal community who specialize in various areas within mass tort litigation could resolve this problem.⁸⁰

Another weakness with this solution is that outsiders are less likely to have better information than the plaintiffs' attorneys regarding the value of each plaintiff's claim.⁸¹ Because the third party will not know much about the cases, the plaintiffs' lawyers will need to educate him, and as a result, some of the evaluation of the lawyer will likely seep into the neutral's allocation decisions.⁸² PL2 described his role in the allocation process as making recommendations to the third party/special master by providing a detailed factual analysis on each case, both individually and comparatively to the group of cases, as well as identifying what characteristics of the injury he thought were most important in determining how to best allocate the money—meaning what factors indicated the client was more injured and should therefore get more money. He also provides the SM/third party with categories of injuries, who falls into each one, and how heavily each should be weighted based on which categories are more severe, as determined by consulting with doctors and experts throughout the course of the litigation.⁸³ PL1 thinks that the lawyers with “intimate case information” should be able to give that information to the person doing the allocation. “I don't think what I say should be binding because then I'm the allocator, but I'm the one who knows all the facts. My view should be given and considered as one of many factors.”⁸⁴

SM1 commented that it is not uncommon for plaintiff lawyers to offer him their views on what might be appropriate allocations, either by categories or by individual cases, depending on the number of cases. If there is a smaller number of cases, the plaintiff lawyers might tell him why they think one case is more meritorious than another one. If there is a larger number of cases, they might tell him which categories of injuries they found to be most prevalent. Ultimately, they give him all the facts he needs to make the judgment himself. The extent to

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *I Cut, You Choose*, *supra* note 40, at 1536.

⁸² *See Ethical Constraints*, *supra* note 13, at 407.

⁸³ PL2 Interview, *supra* note 4.

⁸⁴ PL1 Interview, *supra* note 3.

which SM1 relies on these recommendations in making his allocation decisions is very circumstance specific. Sometimes the plaintiff lawyers have a lot of information built up over a long time, in many cases, so in those instances, SM1 feels their input is more valuable. However, there are other instances where SM1 thinks he knows as much as the plaintiff lawyers do and only needs certain pieces of information to round out the picture. SM1 very rarely seeks specific dollar allocations from the plaintiff lawyers and never simply rubber stamps recommended dollar allocations, whether requested or unsolicited. He added, though, that there have been times that he has independently reached the same conclusions as to dollar allocations that were recommended to him.⁸⁵

C. Class Action

A third solution is broader use of Rule 23 of the Federal Rules of Civil Procedure—the rule governing class actions.⁸⁶ Client-client and lawyer-client conflicts of interest are inherent in collective representation but are tolerated for purposes of class certification.⁸⁷ Since mass tort litigation functions like a class action only without the procedural safeguard, it makes sense to take some of the strongest ideas from class action literature and law and apply it to the problems of collective representation.⁸⁸ More liberal use of the rule would allow for district court oversight and a hands-on federal judge.⁸⁹ The benefit of this solution is that the class action gives the court ultimate responsibility to consider fairness and reasonableness to the entire class, regardless of severity of alleged injury, and this exercise of judicial oversight and discretion might be an adequate substitute for traditional ethical rules.⁹⁰ A person with no financial interest in the outcome of the settlement can impose order and help avoid chaos.⁹¹ Furthermore, the court would have the power to replace an attorney who collectively represents a large number of clients if the attorney cannot handle the litigation (presumably including the settlement) properly

⁸⁵ SM1 Interview, *supra* note 6.

⁸⁶ FED. R. CIV. P. 23.

⁸⁷ *Beyond the Class Action*, *supra* note 33, at 576–77.

⁸⁸ *Id.* at 525–26.

⁸⁹ See *Reporting From the Front Line*, *supra* note 20, at 365.

⁹⁰ See *Ethical Dilemmas*, *supra* note 11, at 507.

⁹¹ *Id.* at 550.

and ethically.⁹² The downside is that Rule 23 comes with a host of restrictions that might serve to frustrate the interests of both parties, thereby making it more difficult to reach a settlement.⁹³

D. Informed Consent at the Outset of Representation

A final solution is for clients to provide informed consent at the outset, as well as at the time of settlement, to collective representation with the understanding that the lawyer fulfills his duty of loyalty to each client by focusing on the collective interests of the group.⁹⁴ This way, clients can decide whether the benefits associated with group representation are worth sacrificing their individual client autonomy.⁹⁵ While this added measure might help to better inform the client of what he is getting into, it is likely unwieldy and does nothing to guard the client from attorney favoritism, or unethical “horse trading” during the settlement allocation process. For example, a plaintiff lawyer who allocates a significantly higher settlement payment to a strategic holdout client for no other reason than to prevent the deal from falling through should not be deemed to have satisfied his ethical obligations simply because he determined that this action was necessary for collective success and his clients agreed to such representation at the outset.

III. My Position

A. Mass tort aggregate settlements are desirable

Rigid adherence to traditional notions of client loyalty could lead to the undesirable prohibition of large-scale collective representation by a single attorney.⁹⁶ While the status quo may not be ideal, it is practical, realistic, and better than a prohibition against mass-client representation that would impede or eliminate mass resolution. This position has been widely adopted among scholars who also wrote about this issue. PL1 correctly acknowledges that mass

⁹² *Id.* at 505–06.

⁹³ Institutional governing structures based on class action law create the group of plaintiffs in the litigation, determine its members, appoint its leading representatives, fix the scope of the representation, regulate compensation, and establish the criteria that governs the settlement. *Mass Lawsuits*, *supra* note 44, at 749–50. These structures are imposed on all parties, leaving them little flexibility.

⁹⁴ *Beyond the Class Action*, *supra* note 33, at 529.

⁹⁵ *See id.* at 554–64.

⁹⁶ *Ethical Dilemmas*, *supra* note 11, at 535.

torts are a big problem that requires one to “think outside the box,” and considers mass tort settlements less as settlements and more as responses or answers to the problem.⁹⁷ SM1 pointed out, “without an ability to handle things on a mass basis, the tort system is incapable of handling the number of cases that are out there.”⁹⁸

Conflicts of interest and associated tradeoffs among plaintiffs are unavoidable in group settlements and impossible to eliminate.⁹⁹ The mass tort client relationship will inevitably result in some level of client dissatisfaction.¹⁰⁰ Effective litigation sometimes requires that lawyers representing clients collectively seek to maximize the interests of the group as a whole.¹⁰¹ Attorneys must make compromises to formulate strategy for the group, which may result in less than zealous advocacy for the individual clients.¹⁰² Because loyalty cannot run to each client individually in this context, conflicts are inevitable and it is the profession’s failure to recognize the collective nature of much litigation outside of class actions that has left clients unprotected.¹⁰³ But, lawyers make tradeoffs in their professional lives everyday—such as prioritizing one project over another or rationing financial resources in a particular way—that inevitably compromise some clients’ interests.¹⁰⁴ Tradeoffs are simply necessary to achieve the greater good, so the question is not whether we are willing to tolerate it, but rather, how much are we willing to tolerate for the sake of efficiency and practicality?

“Lawyer-client retention agreements grounded in conventional notions of the autonomous client and a lawyer loyal to her alone are strikingly out of line with the reality of aggregate representation in the mass tort setting.”¹⁰⁵ It may be difficult to let go of the old ideal of individualized client autonomy, and the ethical constraints that this ideal possesses, but, “[n]ew times call for new measures.”¹⁰⁶ To resolve the conflict in favor of the individual at the group’s expense would do nothing to eliminate the conflict, and would only result in an inferior

⁹⁷ PL1 Interview, *supra* note 3.

⁹⁸ SM1 Interview, *supra* note 6.

⁹⁹ *I Cut, You Choose*, *supra* note 40, at 1468–69.

¹⁰⁰ See *Ethical Dilemmas*, *supra* note 11, at 534–35.

¹⁰¹ See *Beyond the Class Action*, *supra* note 33, at 519.

¹⁰² *Ethical Dilemmas*, *supra* note 11, at 535.

¹⁰³ See *Beyond the Class Action*, *supra* note 33, at 519.

¹⁰⁴ *I Cut, You Choose*, *supra* note 40, at 1491–92.

¹⁰⁵ Richard A. Nagareda, *The Public and Private Faces of Peace for Mass Torts*, A.L.I.-A.B.A.-CLE, May 29–31, 2008 at 550.

¹⁰⁶ *Id.* at 550.

solution, or no solution at all.¹⁰⁷ Note, also the fact that aggregate settlements have generated few malpractice suits suggests the possibility that most plaintiffs are satisfied with the way their lawyers fulfilled their obligations.¹⁰⁸

B. Proposed Solution

The best way to deal with conflicts of interest that arise in the allocation of mass tort aggregate settlements is by modifying Rule 1.8(g) to impose more specific disclosure requirements and use of a special master or neutral third party in settlement allocations. In settlements where a neutral is not used, judicial oversight of the settlement process should be mandatory.

Plaintiffs' attorneys should be required to disclose to each client the client's settlement offer, how that offer compares with all other claimants in the settlement, and how this offer compares with what the client would be likely to get at trial, as balanced against the risks of pursuing such a strategy. For example, the lawyer would explain to Client 1 that out of a total aggregate settlement offer of \$80 million, she would get \$100,000 because she had a heart attack, that 399 other claimants would get the same amount because they also had heart attacks, and that 500 other claimants would get \$80,000 each because each had a stroke. The lawyer would then explain to Client 1 how her offer compares to what she might be able to obtain at trial, as well as the benefits and risks of going to trial versus opting into the settlement. Client 1 is now in a better position to decide whether she thinks the allocation of the \$80 million is reasonable, whether her offer is fair in relation to all the other claimants, and whether it would be better for her to opt-out and take her chances at trial.

One way this can be done is by providing this information in writing to each client. Where information cannot adequately be conveyed in writing, it should be done by meeting or telephone. In cases where the information can accurately be conveyed by a grid or matrix, this can be provided to each client to satisfy the disclosure requirements. However, such grids can be confusing to clients and will often require explanation by the plaintiffs' lawyer anyway. No matter how the information is disclosed, having "too many clients" should never be an adequate

¹⁰⁷ See *Beyond the Class Action*, *supra* note 33, at 578.

¹⁰⁸ See *I Cut, You Choose*, *supra* note 40, at 1477.

excuse for failing to provide sufficient information to allow clients to give truly informed consent.

With these disclosures, the client is not forced to blindly rely on her attorney's advice. A potential problem with this solution, however, is that even with full disclosure clients may still lack the sophistication necessary to make a truly independent judgment. This problem, of course, is not exclusive to mass tort claimants.

PL1 noted that there is a fine line between proper disclosure and burying a client in information. "You have to be able to synthesize the information for the client. You cannot explain a recent decision in [a particular case] and say, 'you decide whether you should [settle or] go to trial given this decision.'" PL1 made the analogy that just like doctors, lawyers have to explain the risks, benefits, and alternatives of settling in a way that makes sense. PL1 thinks this should be done both verbally and be orally.¹⁰⁹ PL1 does not think that there should be stricter disclosure requirements that would make the rule more specific because what constitutes proper disclosure is "subjective" and "no two settlements are the same." According to PL1, it is up to the professional to act reasonably.¹¹⁰ PL2 agreed, noting that what is sufficient information in a given case might be different in the next because these settlements vary so widely and ultimately, the rule will lead you back to relying on the lawyer to act ethically.¹¹¹

PL2 stated that "the more disclosures you make, the better off you all are, and if it blows up the settlement then you have to go back to the drawing board." However, he went on to say:

"If you were to make the rule more specific in terms of disclosure requirements, you wind up in a situation where the exception swallows the rule. If you make it that specific then you have to take into account every potential variable and that you really can never do. There's kind of a fine subjective line between what you initially disclose that's designed to give them enough information to decide whether they want to participate in the settlement or if they want to ask more questions to get more information. To the extent you want to require more disclosure in the rule, you're putting the lawyer in a position of having to think of every potential question a client would ask and I think that's too high of a burden."¹¹²

¹⁰⁹ PL1 Interview, *supra* note 3.

¹¹⁰ *Id.*

¹¹¹ PL2 Interview, *supra* note 4.

¹¹² *Id.*

On the other hand, SM1 thinks that there should be greater specificity around the rule in terms of what you really have to tell clients and what you do not, but without “tying anybody’s hands.” Allowing clients to know every single thing related to the settlement is irrational and would do more to undermine a settlement than having certain targeting disclosures that are more germane to their issues. He thinks each client should be told that there is an aggregate, how much money is in the aggregate, how many participants are involved, the genesis of how the settlement came about, the client’s own allocation, the factors that were taken into account in determining that client’s allocation, and what was helpful and not helpful to that client’s case. However, SM1 does not think each client should or needs to know the details of other clients’ cases simply because they are represented by the same lawyer.¹¹³

The other benefit to this kind of disclosure relates to human nature. When people know that their actions will be exposed to others, they are less likely to engage in unethical behavior. So, presumably, when lawyers know that their actions and decisions will not remain behind closed doors they are less likely to engage in client or group favoritism or any of the other unfair allocation practices that may be tempting in the allocation process.

Additionally, appointment of a special master by the judge presiding over the litigation or a hired neutral third party should be used. Currently, appointment of a special master is at the sole discretion of the judge, although the parties can request an appointment if they so desire. Judges can either choose the special master(s) of his choice or can solicit names from the parties. Despite its weaknesses,¹¹⁴ use of a special master provides the most effective means of reducing mass tort conflicts of interest during settlement allocation.

First, since the special master generally gets paid on a monthly basis, he has no financial stake in the outcome. He does have a stake in the outcome to the extent that a successful deal will bode well for his reputation, but this interest is significantly countered by the fact that any discovery of unethical behavior would preclude him from future appointments. As a neutral party, the special master is best equipped to make sure that settlement allocations are fair and reasonable, and devoid of internal conflicts. Second, to the extent that the plaintiffs’ lawyers are still involved in the settlement allocation process, the special master’s presence alone is likely to have the effect of promoting ethical behavior among the lawyers for the same reason that strict

¹¹³ SM1 Interview, *supra* note 6.

¹¹⁴ *See* discussion *supra* Part II.B.

disclosure does.¹¹⁵ Third, the special master must report to the court. While judges will rarely compel disclosure of all settlement details—wanting to preserve the court’s neutrality—the special master can keep the judge apprised of the parties’ progress in regard to their settlement efforts and any problems that may require judicial intervention. This judicial oversight adds an additional check on the behavior of the lawyers and the special master.

Alternatively, a neutral third party retained by a plaintiffs’ lawyer can provide some of the same benefits as a special master. Of course, the third party will need to be an experienced ethical advisor who understands the nature of the conflicts of interest discussed in this paper. Ethical advisors are probably better suited to handle allocations on a firm-by-firm basis, rather than in the larger context usually handled by special masters. For example, in a particular settlement, PL2’s firm had several very similarly situated plaintiffs with very similar injuries and because of this, it was harder for him to make the allocation decisions. PL2 broke the categories down even narrower by classifying them in objectively quantifiable criteria such as age, and duration of hospital stays, and hired an ethics counselor to review and approve this process.¹¹⁶ By having the neutral third party review the process, PL2 not only ensured that factors such as favoritism were absent from the final determinations, but he provided himself and his firm with a layer of protection against malpractice liability.

DL1 provided another example, from the opposite perspective, of the dangers of allowing allocations to be made by plaintiffs’ lawyers. In a settlement in which DL1 represented a company, a lump sum was given to the plaintiffs’ lawyer who represented 1,300 clients. DL1 later discovered that the plaintiff lawyer could only locate about half of his clients at the time of the settlement so he allocated 85–95 percent of the money to the half that he could find. DL1 also learned that the plaintiff lawyer knew he was going to have trouble locating many of his clients before negotiations with defense counsel, but never revealed that. DL1 noted that it was probably in his client’s best interest to go through with the deal anyway, but he knew it was unethical and refused to continue to speak with him again unless there was a neutral in the room. Accordingly, the plaintiff lawyer hired a third party to help him sort out his blatant ethical violation.¹¹⁷

¹¹⁵ *i.e.*, people behave more ethically when they know they are being watched.

¹¹⁶ PL2 Interview, *supra* note 4.

¹¹⁷ DL1 Interview, *supra* note 5.

SM1 thinks that use of special master or neutral third party should be mandatory. He stated that plaintiff lawyers should never be doing allocations on their own and that should be stated in the rule.¹¹⁸ PL1 is not sure that the use of a third party or special master should be mandatory, but feels it should be the protocol. “It’s not necessarily needed, but there is definitely the most danger without one.”¹¹⁹ PL2 was also undecided on this issue, but thought that maybe it should be mandatory when you are allocating above a certain number of people. But if you are allocating for a small enough group it might not be necessary and would only presumably extract costs out of the clients’ money to pay the neutral party.¹²⁰

In the event that the judge, the parties, or the plaintiffs’ lawyers choose not to have a special master or neutral third party make the settlement allocation decisions, judicial oversight of the allocation process should be mandatory. When a special master is involved, there is some judicial involvement, but most judges do not ask what each client is getting under the settlement, only asking if it was a fair process and for a description of the process. Outside of the class context, the judge rarely gets to see anything embodied in the deal and relies on the reputation and skill of the special master to make sure it was done correctly.¹²¹ Judges generally only want to know the process. Sometimes they don’t even make an assessment on fairness. Accordingly, as stated by SM1, “to the extent you have an experienced third party, judicial oversight is of little merit. To the extent you don’t have a third party, it’s essential. One is a proxy for the other. If the plaintiff lawyers are going to do it themselves, the judge has to watch over how they do it.”¹²² The degree of supervision that should be given will vary depending on the nature of the case,¹²³ but the judge should remain involved in a way that provides meaningful protection to individual claimants without unduly frustrating the interests of the parties.

IV. Conclusion

It is clear from the literature, the relative mass of commentary on this issue, and interviews with three different types of actors in the mass tort world, that mass torts and their resolution create fertile ground for ethical lapses. However, it is equally clear that mass

¹¹⁸ SM1 Interview, *supra* note 6.

¹¹⁹ PL1 Interview, *supra* note 3.

¹²⁰ PL2 Interview, *supra* note 4.

¹²¹ SM1 Interview, *supra* note 6.

¹²² *Id.*

¹²³ See *Ethical Dilemmas*, *supra* note 11, at 553.

aggregate resolutions are necessary and beneficial and, as such, more specific disclosure requirements and additional oversight—either by a special master, other neutral third party, or a judge—are needed to ensure the continued use of aggregate resolution mechanisms while also protecting the needs of individual claimants.