

**BEYOND THE CLASS ACTION:  
LAWYER LOYALTY AND CLIENT AUTONOMY  
IN NON-CLASS COLLECTIVE REPRESENTATION**

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(forthcoming, 2003 U Chi Legal F \_\_)

ABSTRACT

*Class actions receive the lion's share of academic and policymaking attention, but in practice much mass litigation proceeds on a non-class basis. Non-class mass litigation often resembles class actions in the following sense: numerous plaintiffs depend upon the work of counsel with whom they have no meaningful individual lawyer-client relationship, over whom they have no meaningful control, and whose loyalty is directed primarily to the interests of the group as a whole. Class actions retain the distinction of binding nonparties, but in the relationship between counsel and the represented group, non-class litigation resembles class actions to a much greater extent than generally recognized. Given the attention that class actions have received, it makes sense to look to certain class action concepts and developments to inform our understanding of non-class collective representation.*

*The central feature of class actions mirrored in non-class collective representation is the lack of client autonomy. Group lawyers seek to advance collective interests, and clients exercise little control over the course of litigation or negotiation. For many plaintiffs, giving up autonomy is a rational choice. Collective representation--whether by class action, mass representation by a single firm, or mass representation by a cooperating group of lawyers--offers significant advantages over individual litigation. Nonetheless, some plaintiffs may prefer individual representation, either based on a position in which individual representation may maximize recovery, or based on personal preference for autonomy, non-monetary remedies, or other objectives. The*

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*question is how to strike the right balance between individual autonomy and the benefits of collective representation.*

*Class actions attempt to strike that balance by giving class members notice and the right to opt out, and recent developments have enhanced the meaningfulness of opt-out rights, including opportunities to exit class actions with knowledge of the settlement terms. These developments in class actions suggest that plaintiffs can receive the key benefits of collective representation while retaining autonomy at the two most critical moments: the outset of collective representation, and the acceptance of a settlement.*

*A similar approach in non-class collective representation can protect the core of client autonomy while maintaining the lawyer's commitment to group interests. Pursuant to the law of professional responsibility, sensibly applied in the mass litigation context, lawyers should represent clients collectively in mass litigation only if clients give their informed consent to the conflicts of interest that inhere in such collective representation. With informed consent to the inherent conflicts, non-class collective representation resembles an opt-out or opt-in class action on adequate notice. Similarly, an aggregate settlement reached by non-class collective representation should not bind any client without that client's informed consent. Non-class aggregate settlements, to this extent, should resemble opt-out settlement class actions or litigation class settlements with a second opt-out opportunity. With informed consent at the outset, and with the added protection of the aggregate settlement rule, the consent process in non-class collective representation should preserve the core of client autonomy, despite the relinquishment of most client control over the conduct of litigation and negotiation.*

## INTRODUCTION

In broad areas of litigation, individual attorney-client relationships lull our profession into a false sense that clients are adequately protected. Unlike class actions, in which the agency problems of collective representation are well recognized, non-class litigation involves individual representation and appears not to raise similar problems. A class action lawyer understands that she represents the collective interests of the class. Class members, the court, and the public understand this as well. By contrast, the lawyer representing a mass of similarly situated individual clients believes that her loyalty runs to each client individually. In reality, however, the lawyer often represents those clients collectively, seeking to maximize the interests of the group as a whole. Such collective representation is not necessarily a bad thing. To the contrary, effective litigation sometimes requires it. Collective representation enables clients to pursue litigation that otherwise would present insurmountable obstacles. But outside of class actions, the profession's failure to recognize the collective nature of much litigation has left clients unprotected, and has engendered an ethical murkiness that leaves lawyers unsure whether they owe their loyalty to the individual or to the collective.

Class actions get all the attention. That, of course, is one reason savvy plaintiffs' lawyers file them. Class actions generate publicity, which in turn draws additional clients

and creates settlement leverage. Not only lawyers and the press are captivated, but so are the judges, policymakers, and academics who have spent a decade lavishing attention on class actions. Courts, including the Supreme Court on several recent occasions, have rendered prominent decisions on a range of class action issues.<sup>1</sup> Federal rulemakers have pored over the class action rule, producing several rounds of provocative ideas that resulted this year in a package of proposed reforms.<sup>2</sup> Congress has engaged in actual and attempted class action reform.<sup>3</sup> The academic literature has burgeoned, offering insights on the dangers of settlement class actions,<sup>4</sup> the opportunities of class settlement structures,<sup>5</sup> the selection of class counsel,<sup>6</sup> and countless other issues.<sup>7</sup> Empirical studies

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<sup>1</sup> See, for example, *Devlin v Scardelletti*, 536 US 1 (2002) (holding that unnamed class member who objected in a timely manner to approval of class action settlement at the fairness hearing had the power to bring an appeal without first intervening); *Ortiz v Fibreboard Corp*, 527 US 815 (1999) (holding that certification of mandatory settlement class on limited fund requires showing that fund is limited independently of agreement by the parties, and that the class include all those with claims unsatisfied and the time of settlement with intraclass conflicts addressed); *Amchem Products, Inc v Windsor*, 521 US 591 (1997) (holding district court faced with request for settlement-only certification need not inquire whether case would present intractable problems of trial management, but other requirements must still be satisfied); *Matsushita v Epstein*, 516 US 367 (1996) (Plaintiffs who are members of both state and federal classes, and neither opted out of settlement nor appeared at hearing to contest settlement, could not subsequently relitigate claims barred by the state court settlement in federal court); *In Re Bridgestone/Firestone, Inc*, 288 F3d 1012 (7th Cir 2002) (holding that the matter was not manageable as either a nationwide class action, or an action with classes certified for each of the 50 states); *Stephenson v Dow Chemical Co*, 273 F3d 249 (2d Cir 2001) (holding that veterans were not adequately represented in prior class action, such that it was not a bar to their claims), cert granted, 123 S Ct 485 (2002); *In re Cendant Corp Litigation*, 264 F3d 201 (3d Cir 2001) (holding that court's approval of settlement was warranted; lead plaintiff adequately represented the class against the corporation; intra-class conflict was not established; class member had not waived right to object to lead plaintiff's decision to conduct auction to select lead counsel; and use of auction to select lead counsel supplants lead plaintiff's right to select and retain counsel); *In re Prudential Insurance Co of America Sales Practices Litigation*, 148 F3d 283 (3d Cir 1998) (approving class certification, settlement, notice, and fees awarded in class action brought on behalf of over eight million policy holders); *Castano v American Tobacco*, 84 F3d 734 (5th Cir 1996) (holding that multistate class would be decertified because federal district court failed to consider how variations in state law would affect predominance and superiority and class independently failed the superiority requirement); *In the matter of Rhone-Poulenc Rorer, Inc*, 51 F3d 1293 (7th Cir 1995) (holding that certification was precluded by concerns for protection of Seventh Amendment right to trial by jury in federal civil cases, undue and unnecessary risk of entrusting determination of potential multibillion dollar liabilities to single jury, and questionable constitutionality of trying diverse case under legal standard in force in no state).

<sup>2</sup> See Proposed Amendments to FRCP 23 (May 20, 2002); Proposed Amendments to FRCP 23 (1996); Draft Proposed Amendments to FRCP 23(c)(1)(A) (Feb 1995) (on file with author). State rulemakers, too, have engaged in class action reform. See, for example, Cal Rules of Ct 1850-60.

<sup>3</sup> See Private Securities Litigation Reform Act of 1995, 15 USC § 78u-4(b)(2). The proposed Class Action Fairness Act, HR 2341, which would expand federal jurisdiction over class actions, passed the House on March 13, 2002.

<sup>4</sup> See, for example, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343 (1995); Susan Koniak, *Feasting While the Widow Weeps: Georgine v Amchem Prods, Inc*, 80 Cornell L Rev 1045 (1995); Brian Wolfman and Alan Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 NYU L Rev 439 (1996).

<sup>5</sup> See for example, Bruce L. Hay and David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L Rev 1377 (2000); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv L Rev 747 (2002); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 Harv L Rev 831 (2002).

have enriched our understanding of class action practice.<sup>8</sup> Among class action observers and participants, the result of all this attention has been a growing understanding of class actions' advantages as well as their procedural and ethical pitfalls.

For denizens of the class action world, it is extraordinary to think of the changes that have occurred in the past decade. A decade ago, settlement-only class actions were a relatively new phenomenon whose implications had not seriously been analyzed; scholars and the Supreme Court had yet to grapple with the issues raised by the *Georgine*<sup>9</sup> asbestos settlement. Limited fund mandatory class actions still seemed a viable option for a range of cases; the Court's *Ortiz*<sup>10</sup> decision was a long way off. Mass tort class actions were on the rise, and the courts of appeals had yet to render their decisions in *Castano*,<sup>11</sup> *Rhone-Poulenc*,<sup>12</sup> and other mid-1990s mass tort decertifications calling attention to problems of choice of law, mass tort maturity, future claimants, and intra-class conflicts. The Advisory Committee on Civil Rules had begun its work on Rule 23 reforms, but had yet to publish its proposed amendments.<sup>13</sup> One judge had begun to experiment with bidding processes for the selection of class counsel,<sup>14</sup> but the problems of such auctions had yet to be addressed by the Third Circuit Task Force.<sup>15</sup> Congress had not yet enacted

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<sup>6</sup> See, for example, Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel By Auction*, 102 Colum L Rev 650 (2002); Elliott J. Weiss and John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L J 2053 (1995); Symposium, *Third Circuit Task Force Report on Selection of Class Counsel*, 74 Temple L Rev 685 (2001).

<sup>7</sup> See, for example, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum L Rev 370 (2000) (opt-out); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup Ct Rev 337 (class counsel incentives for good governance); Larry Kramer, *Choice of Law in Complex Litigation*, 71 NYU L Rev 547 (1996) (choice of law); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum L Rev 1148 (1998) (collateral attack based on inadequate representation); Judith Resnik, Dennis Curtis and Deborah Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 NYU L Rev 296 (1996) (fees); Marcel Kahan and Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v MCA, Inc*, 73 NYU L Rev 765 (1998) (adequacy and preclusion); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 Tex L Rev 571 (1997) (right of participation).

<sup>8</sup> See, for example, S. Elizabeth Gibson, *Case Studies of Mass Tort Limited Fund Class Action Settlements and Bankruptcy Reorganizations* (Federal Judicial Center 2000); Deborah R. Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gains* (RAND 1999); Laural Hooper and Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study* (Federal Judicial Center 2001); Jay H. Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies* (Federal Judicial Center 1998); Thomas E. Willging et al, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, (Federal Judicial Center 1996).

<sup>9</sup> *Georgine v Amchem Products*, 157 FRD 246 (ED Pa 1994) (granting injunction to asbestos products manufacturers whose stipulation of proposed global settlement of claims by persons exposed to asbestos had been court approved, enjoining actions by individuals who failed to timely opt-out of class), rev'd, 83 F3d 610 (3d Cir 1996), aff'd as *Amchem Products, Inc v Windsor*, 521 US 591 (1997).

<sup>10</sup> *Ortiz v Fibreboard Corp*, 527 US 815 (1999).

<sup>11</sup> *Castano v American Tobacco*, 84 F3d 734 (5th Cir 1996).

<sup>12</sup> *In re Rhone-Poulenc Rorer, Inc*, 51 F3d 1293 (7th Cir 1995).

<sup>13</sup> Proposed Amendments to FRCP 23 (May 20, 2002); Proposed Amendments to FRCP 23 (1996).

<sup>14</sup> See *In re Oracle Securities Litigation*, 131 FRD 688 (N D Cal 1990) (Walker) (holding that selection of class counsel and determination of counsel's compensation would be made through competitive bidding to best further interest of class members).

<sup>15</sup> Report of the Third Circuit Task Force on Selection of Class Counsel (2002).

the Private Securities Litigation Reform Act,<sup>16</sup> which would bring a new model of class counsel and class representative selection to securities class actions. Commentators, courts, and policy-makers have fueled each other's interest in increasingly nuanced class action issues. As a result, the community has grown significantly more sophisticated in its understanding and treatment of the class action device.

Why have class actions generated so much attention? The usual answer is that class actions differ fundamentally from other litigation and therefore raise special problems. Class actions differ from ordinary litigation in two critical respects. First, class actions by definition are representative litigation; the named parties represent others similarly situated.<sup>17</sup> In this respect, class actions constitute the great exception to the principle that non-parties are not bound by a judgment.<sup>18</sup> Second, the duties of class counsel run to the class as a whole, rather than to individual class members.<sup>19</sup>

In the conventional explanation, class actions require special safeguards because of the contrast between the position of absent class members and that of ordinary litigants. Unlike absent class members, each plaintiff in a non-class action has chosen to participate in the suit and is named individually in the pleadings. This is equally true whether the non-class litigation is an individual lawsuit or a massive aggregation through party joinder,<sup>20</sup> consolidation,<sup>21</sup> federal multidistrict litigation transfer,<sup>22</sup> or statewide centralization.<sup>23</sup> Moreover, each litigant in non-class litigation has an individual attorney-client relationship with a lawyer whom that client retained.<sup>24</sup> In non-class litigation, the explanation goes, litigants and their lawyers make decisions about the conduct of the litigation and the course of settlement negotiations. In a class action, by contrast, class counsel pursues the litigation in the best interests of the class as a whole, and absent class

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<sup>16</sup> Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 USC § 78u-4(b)(2) (2000).

<sup>17</sup> See FRCP 23(a). In this regard, shareholder derivative suits and bankruptcy resemble class actions as representative litigation. (See text at notes 42-43).

<sup>18</sup> This principle forms the underpinning of *Pennoyer v Neff*, 95 US 714 (1877), *Hansberry v Lee* 311 US 32 (1940), and *Martin v Wilks*, 490 US 755 (1989). It is no wonder that most proceduralists view the line between class and non-class actions as fundamental.

<sup>19</sup> See, for example, Advisory Committee Note to Proposed Federal Rule of Civil Procedure 23(g)(1)(B) (May 20, 2002) ("Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it."); *In re Agent Orange*, 800 F2d 14, 18 (2d Cir 1986) (noting that class counsel's duty "runs to all members of the class"); *In re Corn Derivative Antitrust Litigation*, 748 F2d 157, 163 (3d Cir 1984) (Adams concurring) ("The obligation of counsel representing a class runs to the class as a whole, although as a general matter class counsel may have worked closely on with the named parties."); *Parker v Anderson*, 667 F2d 1204, 1211 (5th Cir 1982) ("The compelling obligation of class counsel in class action litigation is to the group which makes up the class. Counsel must be aware of and motivated by that which is in the maximum best interests of the class considered as a unit.").

<sup>20</sup> See FRCP 14 (third-party claims); FRCP 19 (compulsory party joinder); FRCP 20 (permissive party joinder); FRCP 24 (intervention).

<sup>21</sup> See FRCP 42.

<sup>22</sup> See 28 USC § 1407 (2000).

<sup>23</sup> See, for example, Cal Civ Proc Code § 404; NJ Ct R 4:38; Pa RCP 213 (consolidation, severance, and transfer of actions and issues within a county), 213.1 (coordination of actions in different counties).

<sup>24</sup> With regard to the pro se litigant, this point could be rephrased in terms of the litigant's client-attorney relationship with herself. The salient point is that in contrast to class actions, where class counsel's duty runs to the class as a whole, the assumption in non-class litigation is that each litigant has someone who takes responsibility for looking after that litigant's individual interests.

members have virtually no role in litigation decisions.<sup>25</sup> In theory, the client in non-class litigation can protect her own interests by stating her objectives, monitoring her lawyer's conduct, and above all, making her own decisions about whether and on what terms to settle.<sup>26</sup> In a class action, absent class members lack the same ability to protect their own interests. Thus, class actions provide a number of procedural safeguards, including judicial supervision of settlement and fees, as well as a requirement of adequate representation: a court certifies the class only if the court is satisfied that the class representatives and class counsel will adequately represent the class as a whole.<sup>27</sup>

In sum, the traditional understanding of procedural joinder devices draws a picture of class actions as collective representation fundamentally distinct from individual litigation or litigation aggregated through non-class procedures. In a class action, numerous plaintiffs depend upon the work of counsel with whom they have no meaningful individual lawyer-client relationship, over whom they have no meaningful control, and whose loyalty is directed primarily to the interests of the group as a whole.

The traditional class action picture gets some things right. It gets right the general description of class actions as litigation over which most class members have no control. It also correctly identifies the difference between class and non-class litigation at the intersection of joinder and *res judicata*. In non-class litigation, the judgment binds only the named parties and their privies, whereas a class action judgment binds the entire class, except those who have opted out. Importantly, the traditional understanding also correctly identifies why class actions require procedural safeguards such as the adequate representation requirement and judicial supervision of settlement and fees: in class actions, class members may be bound despite their lack of control over the litigation or any meaningful individual attorney-client relationship.

To the extent it purports to draw a neat line between class and non-class litigation, however, the traditional understanding misses important aspects of what happens in modern, large-scale, non-class litigation. The reality of class and non-class litigation is messier than suggested by the theoretical distinction between them. As a practical matter, given the way mass litigation has developed over the past couple of decades, much litigation is handled through collective representation even if no class is certified. By collective representation, I mean to describe non-class litigation that functions like class actions in the sense described above: numerous plaintiffs depend upon the work of counsel with whom they have no meaningful individual lawyer-client relationship, over whom they have no meaningful control, and whose loyalty is directed primarily to the interests of the group as a whole.<sup>28</sup>

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<sup>25</sup> The 2002 proposed amendments to Rule 23 reaffirm this traditional distinction between the duties of class lawyers and individual lawyers. In connection with a new provision on the duty of class counsel, the Advisory Committee notes explain that the provision “recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients.” Proposed FRCP 23(g)(1)(B) Advisory Comm Note (May 20, 2002).

<sup>26</sup> See Model Rule of Professional Conduct 1.2(a).

<sup>27</sup> See FRCP 23(a)(4). See also *Hansberry*, 311 US at 32.

<sup>28</sup> An obvious difference between class actions and non-class litigation is the presence of class representatives. In this regard, collective representation of the sort described in this article does not amount to “representative litigation” as that phrase applies to class actions. Whether this difference matters depends upon the significance of class representatives to the conduct and outcome of the litigation. Compare

To engage in collective representation of this sort, counsel organize in at least three ways. First, a single lawyer or law firm may represent a large number of similarly situated clients, whether in a massive action with permissively joined plaintiffs or in a number of formally independent actions. Second, multiple lawyers with similarly situated clients may work closely together, either in a single action or in multiple actions informally aggregated by the lawyers' coordinated efforts. Third, in litigation formally aggregated by procedures such as multidistrict litigation transfer and statewide consolidation, lead and liaison counsel and steering committee members handle significant portions of the work on behalf of the entire group of similarly situated clients.

Such mass collective representation raises a number of problems. One is the problem of inequitable settlement allocations among members of the collectively represented group, without the procedural safeguards of class actions. Lawyers representing the mass of plaintiffs often have little or no incentive to allocate settlements fairly among their clients, and may have incentives to allocate settlements unfairly.

Non-class mass collective representation, moreover, seems to invite muddled thinking among judges, clients, and lawyers. Too many judges treat class action problems as though the alternative is autonomous individual litigation, when in fact the alternative is more likely to be some form of mass collective representation. Too many clients sign retainer agreements thinking that they are signing up for individual representation over which they have some meaningful control, when in fact they are signing up for mass collective representation. And too many lawyers convince themselves that their loyalty runs purely to each client individually, when in fact their litigation decisions aim--as they often should--to advance the interests of the group as a whole.

Given the quantity and quality of commentary that class actions have generated, and the essential similarity between class actions and much non-class litigation, it makes sense to take some of the strongest ideas from the class action literature and case law and examine whether those ideas can sensibly be applied to address some of these problems in non-class collective representation. By viewing mass litigation practices in light of class action concepts, we may better understand the procedural and ethical dimensions of large-scale litigation practice. In particular, such an examination may help us understand certain non-class litigation developments as efforts to erect the sort of procedural and ethical safeguards that collective representation requires. Mass litigation, whether or not certified as a class action and, indeed, whether or not aggregated by any formal procedural mechanism, tends toward de facto class litigation. It tends toward class litigation in the sense that plaintiffs' outcomes depend upon the work of lawyers who seek to maximize the aggregate recovery, and with whom most plaintiffs have no meaningful individual relationship.

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PSLRA litigation, in which class representatives may have a significant monitoring impact, with most other class actions, in which class representatives provide little monitoring. On the empowered plaintiff model of the PSLRA, see Weiss and Beckerman, 104 Yale L J at 2053. On control of class actions by counsel rather than class representatives, see Coffee, 100 Colum L Rev at 384 ("In the class action, the class representative is usually a token figure, with the class counsel being the real party in interest."); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U Chi L Rev 877 (1987). See also Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U Chi L Rev 1 (1991) (proposing auction of class claims and use of fictitious name class representatives).

Looking to class action concepts for guidance in non-class mass litigation, we might consider a number of plausible applications. One direction might be to focus on the duties of class counsel, and to explore the application of similar duties to steering committee members, litigation group leaders, and other hub lawyers in formally or informally aggregated litigation.<sup>29</sup> We might also examine the related issue of whether written cooperation agreements among lawyers in non-class litigation can replicate some of what is accomplished by the class certification procedure in class actions. The class certification procedure requires putative class counsel to define the class they seek to represent. The process of defining the class and seeking class certification can help lawyers identify potential conflicts of interest, and spell out their duty of loyalty, before embarking on representation of the class. In non-class litigation in which lawyers for aligned parties work together and share information, written cooperation agreements can serve similar purposes, although without the judicial oversight that the class certification procedure entails.<sup>30</sup>

Another direction might be to consider judicial approval of class settlements and fees, and to evaluate whether the same concerns that necessitate judicial approval of class settlements and fees also suggest the need for judicial approval of certain non-class settlements and fees in collective representation. Although some judges actively manage the settlement process in multi-district litigation ("MDL") and in other non-class mass litigation, and thus maintain a supervisory role with regard to settlement negotiations, judicial approval of settlements in non-class litigation generally is not required as it is in class actions. Counsel sometimes seek judicial approval of settlements in non-class actions. For example, under some state contribution statutes, judicial approval of a settlement prevents contribution claims by co-defendants.<sup>31</sup> The issue of whether judicial approval ought to take on a greater role in mass settlements naturally invites examination of the class action experience.<sup>32</sup>

Yet another direction might be to examine recent developments in processes for selecting class counsel, to explore whether similar approaches should be employed for selecting counsel for steering committees and other leadership positions in non-class mass litigation. Neither academic commentators nor policy-makers have paid significant attention to processes for selecting counsel to leadership positions in non-class litigation, despite the tremendous importance of lead counsel and steering committees in guiding litigation aggregated by MDL or consolidation. By contrast, the past decade has seen a tremendous focus on the selection of class counsel. The Private Securities Litigation Reform Act of 1995, by establishing a "rebuttable presumption ... that the most adequate

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<sup>29</sup> I have explored elsewhere the duties of hub lawyers in informally aggregated litigation, but left many questions unanswered. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L J 381 (2000). On the duty of hub lawyers to keep outlying lawyers informed about the litigation, see Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* at 58 (Northwestern 1995).

<sup>30</sup> See Erichson, 50 Duke L J at 468-69.

<sup>31</sup> See, for example, Cal Civ Proc Code § 877.6(c) ("A determination by the court that the settlement was made in good faith shall bar any other tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.").

<sup>32</sup> Compare Weinstein, *Individual Justice* at 74 ("Judges occasionally have audited fees after settlement, and a few attorneys have made fee adjustments; a few judges have exerted moral suasion to shift at least some of the benefits of bulk settlements to clients.").

plaintiff ... is the person or persons that ... has the largest financial interest in the relief sought by the class,”<sup>33</sup> permits institutional investors to control selection of class counsel in securities class actions. The current set of proposed amendments to Rule 23 include a new subsection concerning appointment of class counsel, which previously had not been addressed explicitly in the rule.<sup>34</sup> Some judges have experimented with bidding processes for selecting class counsel.<sup>35</sup> One can imagine importing certain class action concepts to assist judges in the appointment of counsel to leadership positions in MDL or other aggregated litigation, particularly in trying to establish sound fee incentives for efficient work by steering committee lawyers, and in trying to achieve representation on the steering committee of different “subclasses.”<sup>36</sup>

Application of these ideas depends, to some extent, on the type of aggregation. For mass litigation aggregated by a single lawyer’s or firm’s representation of many plaintiffs, the most promising topics involve attorney loyalty and conflicts of interest, as well as judicial supervision of settlement and fees. For litigation aggregated informally by the coordinated efforts of multiple firms, promising topics include not only conflicts of interest and judicial supervision, but also the duties of hub lawyers. For litigation aggregated by the formal mechanisms of joinder, consolidation, or multidistrict litigation transfer, promising topics include the duties of hub lawyers, judicial supervision of settlement and fees, and also the selection of counsel for leadership positions.

This paper describes forms of non-class mass litigation to show their functional resemblance to class actions. It then pursues the most promising application of the idea of importing class action concepts for use in non-class litigation. It considers the relinquishment of client autonomy in non-class group representation in light of developments in the class action requirements of notice and opt-out.

Class action notice and opt-out, as shaped by recent class action developments including the pending Rule 23 amendments, offer insight into the proper handling of collective representation in non-class cases. As in a class action, plaintiffs in collective representation relinquish most of their control over the litigation. Relinquishing autonomy is a perfectly rational decision for many plaintiffs, given the potential advantages of group representation. Class action developments, however, emphasize the importance of recognizing the relinquishment of autonomy in the conduct of litigation and settlement negotiations, and substituting opportunities for autonomous decision-

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<sup>33</sup> 15 USC § 78u-4(a)(3)(B)(i) and (iii)(I) (2000).

<sup>34</sup> See Proposed FRCP 23(g) (May 20, 2002). The Advisory Committee Note explains that the rule “responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action.”

<sup>35</sup> See, for example, *Oracle Securities Litigation*, 131 FRD at 688; *Cendant Corp Litigation*, 191 FRD at 387 (choosing lowest qualified bidder to represent plaintiffs as lead counsel); *In re Auction Houses Antitrust Litigation*, 197 FRD 71 (SDNY 2000) (holding that auction was appropriate method for selecting lead class counsel after class certification). See also Report of the Third Circuit Task Force on Selection of Class Counsel (2002).

<sup>36</sup> See *Manual For Complex Litigation Third* § 20.224 at 30 (Federal Judicial Center 1995) (“The court should also ensure that designated counsel fairly represent the various interests in the litigation; where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests.”); Stephen A. Sheller, *Court Appointed MDL Counsel: Who They Represent and Who They Should Represent*, 3 Mealey Litig Rep: Fen-Phen/Redux 22 (Dec 1999) (emphasizing importance of representativeness in the appointment of MDL plaintiffs’ steering committees).

making at the two most critical moments--the outset of collective representation, and the acceptance or rejection of a settlement.

In non-class litigation, we can accomplish the same objectives by looking to lawyers' professional obligations concerning conflicts of interest and aggregate settlements. Applying the rules of professional conduct in light of the commonalities between class actions and non-class collective representation, lawyers can create opportunities for autonomous client decisions at the outset and at settlement, as a substitute for client autonomy in the course of litigation and negotiation.

Once clients have opted for the benefits of collective representation, their lawyer should seek primarily to advance the interests of the group, as in a class action. The lawyer's duty of loyalty runs to each individual client, but in group representation, the lawyer fulfills that duty of loyalty by focusing first and foremost on collective interests. If clients are adequately informed at the outset that the lawyer will seek to advance the interests of the aggregate, and are advised of the benefits and risks of participating in such group representation, as well as the conflicts of interest that may arise, then clients may choose whether they wish to participate. With such informed consent at the outset, and with the added protection of informed consent to settlement at the back end, client autonomy is adequately protected despite the relinquishment of client control over the conduct of litigation and negotiation. Thus, clients represented collectively, like class members, may enjoy opportunities for autonomous decision-making on participation in the litigation and acceptance of a settlement, without unduly burdening the lawyer's litigation and negotiation on behalf of the group.

## I. NON-CLASS COLLECTIVE REPRESENTATION

Class actions are representative litigation by virtue of the presence of class representatives, the named plaintiffs,<sup>37</sup> who litigate on behalf of all others similarly situated.<sup>38</sup> As a practical matter, however, the defining aspect of class actions as representative litigation is that class *counsel* seeks to advance the interests of the class as a group, and individual class members have little control over the litigation or the course of settlement negotiations. It is in this latter sense that much non-class litigation can be understood as functioning like class actions.

This section describes several ways in which non-class mass litigation comes to resemble class actions. As described earlier, my interest is in non-class litigation that functions like class actions in the sense that numerous plaintiffs depend upon the work of counsel with whom they have no meaningful individual lawyer-client relationship, over

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<sup>37</sup> Defendant class actions are permitted by Rule 23(a), and are certified on rare occasion. See, for example, *In re Integra Realty Resources, Inc.*, 262 F3d 1089 (10th Cir. 2001) (upholding district court's certification of defendant class); *Monaco v Stone*, 187 FRD 50 (EDNY 1999) (holding certification of particular defendant class was appropriate). This paper, however, considers only plaintiff class actions, which are far more common and offer a better foil for understanding mass non-class litigation. Although mass litigation sometimes involves hundreds of defendants, and defense lawyers often coordinate their efforts through joint defense agreements, the mass collective representations that resemble class actions occur almost exclusively on the plaintiff side.

<sup>38</sup> See FRCP 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all").

whom they have no meaningful control, and whose loyalty is directed primarily to the interests of the group as a whole.<sup>39</sup> Mass representation by a single lawyer or firm, in this regard, bears a striking resemblance to class action practice.<sup>40</sup> Coordinated mass litigation by multiple firms presents a weaker case of de facto class action, but bears the hallmarks of collective representation in inherent conflicts of interest and attenuated attorney-client relationships.

In thinking about non-class collective representation, it may be useful to consider the wide range of categories of representative or group litigation. First, the class action is the archetype of representative litigation. As representative litigation, class actions raise a host of procedural and ethical problems, but many of those problems are diagnosable because they inhere in the very definition of class litigation. Safeguards addressing some of the problems of representative litigation are built into class action procedure. Second, shareholder derivative suits are explicitly representative litigation. Indeed, the Federal Rules of Civil Procedure recognize the connection between class actions and derivative suits by addressing the latter in Rule 23.1.<sup>41</sup> Third, bankruptcy operates as representative litigation. In a Chapter 11 reorganization, claimants' interests are represented by creditors' committees and others, and the discharge has the effect of binding non-parties. Fourth, certain government lawsuits function as representative litigation, particularly *parens patriae* lawsuits and recoupment actions against tortfeasors. Fifth, public interest impact litigation often takes the form of an individual lawsuit seeking injunctive relief that will benefit an entire class of persons, without formally pursuing the litigation as a class action. Sixth, formally aggregated mass litigation, such as federal court litigation transferred for consolidated pretrial handling pursuant to the multidistrict litigation statute,<sup>42</sup> or state court actions consolidated on a statewide basis, can function as representative or group litigation. Although non-class formal aggregation, in theory, can gather claims in which each plaintiff is represented by counsel on an individual basis, much of the work in practice is performed by lawyers on the MDL steering committees or in other leadership positions. The dominant role of hub lawyers in MDL and statewide consolidations results in de facto group representation. Seventh, a single lawyer or firm that represents massive numbers of plaintiffs with related claims, tends in practice to represent the plaintiffs on a group basis, whether the clients' claims are filed separately or joined in a single action. Eighth, counsel coordination among lawyers handling related but judicially separate lawsuits results in informal aggregation of the claims, and de facto group representation. For purposes of this paper, these last two categories are the most interesting but also the most problematic. It is difficult to define collective representation

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<sup>39</sup> See note 28.

<sup>40</sup> Richard Nagareda, in his analysis of the fen-phen settlement class action, emphasizes the difference between non-class mass tort settlements and class action settlements while acknowledging the lack of client control in either setting: "A mass tort plaintiffs' attorney might well identify and recruit the client, and in practice there may be little or no supervision of plaintiffs' counsel by the client. But neither of these practical realities shatters the consensual nature of the attorney-client relationship. For present purposes, the point is simply that this underlying notion of consent, rooted in client autonomy, is what gives aggregate settlements their legitimacy." Nagareda, 115 Harv L Rev at 768. While my central point, in contrast to Nagareda's, is to deemphasize the difference between class and non-class mass settlements, I share his understanding that aggregate settlements derive their legitimacy from client autonomy.

<sup>41</sup> Rule 23.1 provides the procedural requirements for derivative suits by one or more shareholders.

<sup>42</sup> 28 USC § 1407 (2000).

in a way that provides a line between aggregated and unaggregated litigation once we venture into litigation aggregated on an informal basis rather than pursuant to class action, joinder, consolidation, or other formal procedural mechanisms.<sup>43</sup>

#### A. Collective Representation by a Single Firm

In mass litigation, it has become common for a single lawyer or firm to represent hundreds or thousands of similarly situated clients. Each client signs an individual retainer agreement with the lawyer. In this sense, the picture looks very different from a class action, in which a lawyer represents many similarly situated persons as members of the class, but in which the bulk of the class members did not individually retain the lawyer.

Litigation pursued by a lawyer on behalf of a large number of similarly situated clients may take various non-class procedural forms. The lawyer may file the claims jointly in a single action as a matter of permissive party joinder, if the claims arise out of the same transaction, occurrence, or series of transactions or occurrences.<sup>44</sup> If the lawyer initially files the claims as separate lawsuits, they may nonetheless be formally aggregated through federal consolidation,<sup>45</sup> statewide consolidation,<sup>46</sup> or federal multidistrict litigation.<sup>47</sup> Alternatively, the claims may go forward as hundreds or thousands of formally separate lawsuits.

These matters of procedural form have less impact on the lawyer's handling of the litigation than one might expect. Regardless of whether plaintiffs' claims are formally aggregated, the lawyer representing many similarly situated clients necessarily handles the litigation on a group basis. In preparing pleadings, conducting discovery, retaining experts, preparing for trial, and negotiating settlement, the lawyer addresses the plaintiffs' claims primarily as a group. A lawyer who simultaneously represents hundreds or thousands of similarly situated plaintiffs does not have significant personal involvement with each client, and does not engage each client in the sort of consultation over the conduct of litigation envisioned by traditional principles of professional responsibility.<sup>48</sup>

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<sup>43</sup> I have written elsewhere on some of these categories of collective litigation. On coordination among counsel as a form of aggregation, and on a single firm's accumulation of related claims as a similar form of aggregation, see Erichson, 50 Duke L J at 386-401. On class actions and government lawsuits as types of representative litigation driven by different incentives, duties, and mindsets, see Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 UC Davis L Rev 1, 23-27 (2000).

<sup>44</sup> See FRCP 20(a) (permissive joinder).

<sup>45</sup> See FRCP 42(a) (consolidation).

<sup>46</sup> See, for example, Cal Civ Proc Code § 404; NJ Ct R 4:38; Pa RCP 213, 213.1.

<sup>47</sup> See 28 USC § 1407.

<sup>48</sup> See Model Rule of Professional Conduct 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued."); see also Model Code of Professional Responsibility EC 7-7 ("In certain areas of legal representation not affecting the merits of the cause. . . , a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client. . . ."). In saying that mass litigators do not engage each client in such consultation, I mean this as a descriptive account of mass litigation practice, not as a normative criticism of lawyers for treating clients as a group rather than as individuals. Indeed, as discussed in Part II A, lawyers representing large groups in mass litigation ought to strive to maximize the interests of the group as a whole.

Collective representation most resembles a class action when the group lawyer negotiates a settlement en masse. Handling litigation on a group basis may or may not result in such a group settlement. Even if all of the claims settle, those settlements may be negotiated on a plaintiff-by-plaintiff basis and presented independently to each client, particularly if the claims involve high stakes and if individual differences significantly affect valuation. In many cases, however, lawyers with large numbers of related claims negotiate settlement of those claims either as an entire group or in bundles.

Such aggregate settlements vary tremendously. It may be useful to think of a typology of block settlements along two axes: allocation and conditionality. In terms of allocation of settlement funds, block settlements fall into four categories. First, a settlement may provide for a lump sum payment by the defendant, leaving the allocation of that lump sum to the plaintiffs, their lawyer, or a third party.<sup>49</sup> Second, a settlement may establish a formula or matrix for determining payments based on factors such as disease category and age, with a process for administering claims under the settlement.<sup>50</sup> Third, a settlement may provide for a fixed per-plaintiff amount of compensation.<sup>51</sup> Fourth, a settlement may allocate specific amounts for each plaintiff.

On the axis of conditionality, block settlements divide into at least three levels. In an all-or-nothing package deal, the defendant's settlement offer to each plaintiff is conditioned on acceptance by every other plaintiff in the group. In the same vein but more moderate, a settlement with a walk-away provision gives the defendant the right to abandon the settlement if more than a certain percentage of plaintiffs decline their offers.<sup>52</sup> As a variation halfway between all-or-nothing and walk-away provisions, tiered settlement agreements permit a defendant to withdraw unless the settlement is accepted by, for example, one hundred percent of the most serious category of claimants and ninety percent of the remainder. Finally, settlement offers can be independent in the sense that each plaintiff is free to accept or reject the offer individually. A settlement with plaintiff-specific amounts, not conditioned on acceptance of others' settlements, is the only combination that amounts to truly individual settlements. Every other combination constitutes some form of collective settlement, in its economic underpinnings if not in its legal effect.

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<sup>49</sup> In the diet drugs tort litigation, American Home Products has settled large bundles of claims on a lump-sum basis. See, for example, Mark Hamblett, *New York Firm Accused of Intimidating Clients in Fen-Phen Litigation*, NY L J 1 (Dec 12, 2001) (discussing lawsuit arising from a law firm's lump-sum settlement of over five thousand claims after plaintiffs had opted out of a nationwide class settlement); see also David J. Morrow, *American Home to Settle Some 1,400 Fen-Phen Suits*, NY Times C2 (Dec 23, 1999) (reporting \$350 settlement of Mississippi claims prior to approval of the class settlement); Brenda Sapino Jeffreys, *Stick to the Trial Plan*, Texas Lawyer, Jan 31, 2000, at 19 (reporting that Houston plaintiffs' lawyer Michael Gallagher settled the fen-phen claims of 1200 clients for a reported \$350-500 million, hours after winning a huge verdict for five plaintiffs in a Mississippi fen-phen trial).

<sup>50</sup> See Paul D. Rheingold, *How to Settle Your Inventory of Mass Tort Cases Ethically*, ATLA Annual Convention Reference Materials 475, 478 (July 2002) (describing a "three-step grid" method for settling a large inventory of claims, and noting that this method "has been used by many firms, mine included")

<sup>51</sup> A recent example is the settlement of over thirty thousand Norplant product liability claims by Wyeth Pharmaceuticals for \$1,500 each. See Andrew Harris, *Ruling Finishes Off Norplant Suits*, Natl L J B6 (Sept 30, 2002).

<sup>52</sup> See Rheingold, ATLA Annual Convention Reference Materials at 475, 478 (noting that an acceptance percentage of ninety percent has been used).

How does mass litigation come to be concentrated in the hands of relatively few plaintiffs' lawyers? The group of plaintiffs' lawyers handling mass litigation appears to be growing, most likely as a result of the increasing monetary success of mass tort suits and the advent of internet advertising and networking, but still mass litigation tends to be handled by lawyers with large numbers of similarly situated clients. Mass litigators accumulate plaintiffs either directly or by referral, due to a combination of reputation, marketing, and referral networks.

In mass litigation, the internet has become an important medium for attracting clients, along with television and radio advertisements. Internet advertising enables both established plaintiffs' firms and new entrants to attract mass litigation clients. The medium is perfectly suited to the job of gathering massive numbers of similarly situated persons. Law firms set up websites aimed at attracting clients for specific litigation.<sup>53</sup> For lawyers hoping to attract a sufficient number of similar clients to achieve the critical mass needed for mass representation, earlier forms of lawyer advertising would have been inefficient and prohibitively expensive. Internet advertising, especially web-based consortium advertising services that attract potential clients with particular types of injuries or claims and connect those potential clients with lawyers in their home states,<sup>54</sup> enables small and less-established firms to seek entry into mass litigation practice.<sup>55</sup>

The referral market has fueled the growth of non-class collective representation. Stephen Yeazell has written of this phenomenon in historical context, and notes that "[t]he plaintiffs' bar, with its system of referrals, is achieving transactionally the kinds of specialization and breadth that the corporate bar is achieving by growth in firm size."<sup>56</sup> Ethical constraints on fee-sharing generally require fee-splitting lawyers to divide fees in proportion to the work or to assume joint responsibility, but these rules have not

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<sup>53</sup> An internet search on "ephedra," "Firestone tires," "Baycol," or any other tort du jour reveals heaps of law firms offering their services. A potential fen-phen plaintiff searching the web for a lawyer would quickly find hundreds of sites, with such topical domain names as fenpheninformation.com, fen-phen-settlements.com, fen-phen-legal-resources.com, fen-pheninjurylaw.com, fen-phen-diet-drugs.com, fen-phen-injury.com, phen-fen-lawsuit-attorney.com, fenphencentral.com, and even afenphenattorneyforyou.com. The sites' law firm sponsors range from very small firms to large, established ones. Fen-phen-legal-resources.com belongs to Lief, Cabraser, Heinmann & Bernstein, a San Francisco firm that is among the dominant class action practices in the country. See <<http://www.fen-phen-legal-resources.com>> (visited Jan 30, 2003) [on file with U Chi Legal F]. Others, including afenphenattorneyforyou.com, operate as consortium advertising sites, attracting potential clients nationwide based on the type of injury or claim and connecting the clients to attorneys in the clients' home states seeking those particular categories of claims. <<http://www.afenphenattorneyforyou.com>> (visited Jan 30, 2003) [on file with U Chi Legal F].

<sup>54</sup> One such site promises a steady flow of clients to meet a firm's specific interests: "Join an advertising consortium of lawyers and law firms that market together on BigClassAction.com and receive a flow of quality clients starting within 48 business hours.... [W]e provide a steady flow of mass tort, class action, personal injury, discrimination, and employment clients based entirely on your specific interests." <<http://www.bigclassaction.com>> (visited Jan 30, 2003) [on file with U Chi Legal F].

<sup>55</sup> Perhaps unsurprisingly, the extent and aggressiveness of lawyer advertising for mass litigation plaintiffs has drawn criticism from the better established segment of the plaintiffs' bar. See Paul D. Rheingold, *Excess in Mass Tort Litigation*, 5 Mealey Litig Rep 41 (Sept 19, 2002). The dispute echoes an earlier generation's dispute over the ethics and constitutionality of lawyer advertising in general. Until twenty-five years ago, when the Supreme Court held lawyer advertising to be commercial speech protected by the First Amendment, established law firms and the American Bar Association resisted any attempt by lawyers to advertise for clients. See *Bates v State Bar*, 433 US 350, 365 (1977).

<sup>56</sup> Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DePaul L Rev 183, 202 (2001).

significantly hampered the market in referral of clients.<sup>57</sup> Rather, they promote a hub-and-spoke structure in which referring lawyers remain involved in a limited capacity in their clients' cases, serving as the primary client contact, while the lawyer to whom the cases are referred performs the bulk of the work in litigation and negotiation.<sup>58</sup> Litigation based on such referral networks comes to resemble class actions in which individually retained plaintiffs' attorneys remain on the sidelines while lawyers for the class conduct the litigation.

Increasingly, law firms engaged in mass plaintiffs' practice market themselves to referring lawyers.<sup>59</sup> It is, in essence, a win-win-win pitch: Refer your clients to us because we have the resources and leverage to maximize their recovery, and thereby to maximize your referral fee, so your clients win, we win, and you win.<sup>60</sup> Television and radio advertising combines with the referral market to create an intake system in which potential plaintiffs initially contact lawyers who direct their marketing to the public, and those lawyers in turn refer the clients to lawyers who direct their marketing to other lawyers for referrals.<sup>61</sup> As plaintiffs' lawyers have pursued increasingly aggressive marketing aimed at the accumulation and referral of mass tort clients, referral practices have begun to raise eyebrows. Some worry that referrals do not effectively channel cases to the best-equipped lawyers.<sup>62</sup> Some plaintiffs' lawyers themselves criticize what they

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<sup>57</sup> See Model Rule of Professional Conduct 1.5(e)(1) (permitting referral fees or other fee division among lawyers if the client is advised and does not object, the total fee is reasonable, and the fee sharing is proportional to services rendered by each lawyer "or, by written agreement with the client, each lawyer assumes joint responsibility for the representation."). See also Restatement (Third), The Law Governing Lawyers § 47 (2000). Not all states follow the model rule, however. Texas Disciplinary Rule of Professional Conduct 1.04 permits referring lawyers to collect fees without assuming joint responsibility; the Texas referral market is particularly robust. See Nathan Koppel, *Referrals Get Rough Around the Edges*, *Tex Lawyer* 1, (March 29, 1999).

<sup>58</sup> See Nathan Koppel, *Referrals Pay Off*, *Tex Lawyer* (March 29, 1999) (describing the huge referral fees won by a lawyer who advertised for breast implant clients and then referred the clients to better-established firms, and noting that "she remained involved in all the cases in a limited capacity, acting as a liaison between the clients and handling attorneys.").

<sup>59</sup> See Yeazell, 51 *DePaul L Rev* at 203 ("Unlike the defense bar, then, the plaintiffs' bar is marketing as much to other lawyers as it is to clients. . . .").

<sup>60</sup> One website, for example, touts the firm's resources and promises to treat referring lawyers fairly: "Referring attorneys will be able to match the leverage and financial resources of big corporate firms to successfully advocate the interests of their clients, while receiving fair and equitable treatment. For both consumers and their legal representatives, HermanMathis is solidly committed to one goal: justice for all." Website of Herman, Mathis, Casey, Kitchens & Gerel, LLP, <<http://www.hermanmathis.com/main.htm>> (visited Jan 30, 2003) [on file with U Chi Legal F].

<sup>61</sup> See Mark Ballard, *Coming to Terms with the \$20,000 Ad*, *Natl L J*, Oct 10, 2002 ("Television advertising's success in bringing in new clients, coupled with a sharp increase in the use of the mass tort strategy has created an alliance between trial lawyers and the marketing attorneys they derided only a few years ago. Many of the television lawyers, with their production and intake capabilities already in place, have begun trolling for clients to refer to allied trial lawyers.").

<sup>62</sup> See Koppel, *Referrals Get Rough*, *Tex Lawyer* at 1 ("The idea behind a freewheeling, free-market referral system is to channel cases, usually complex plaintiffs' cases, from the hands of lawyers too inexperienced or otherwise ill-equipped to handle them into the right hands.... That still happens, of course. But lawyers in the middle of the increasingly rough-and-tumble referral market say a new model has arisen. Many lawyers now use mass advertising to dredge in and sign up clients just to refer them out en masse—even shopping them to the highest bidder.").

see as excessive and unethical advertising and referral practices among their colleagues.<sup>63</sup> According to one lawyer who has represented a number of plaintiffs in the diet drugs mass tort litigation, “There are lawyers in diet pills ... who as a function of advertising and the really pernicious referral systems that exist among and between these people who advertise on television and funnel literally thousands of cases to some guy because the guy will split the fees 50/50, a referral fee that’s totally unbelievable and of questionable ethics--they will send cases to people who never saw a document, have never in their lives tried a case to jury verdict, were simply made powerful because they had a thousand cases.”<sup>64</sup> No doubt, advertising and referral systems can be abused, and in the worst case scenario, they can channel cases to incompetent or unscrupulous lawyers who excel in marketing but fail at litigation. In 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.<sup>65</sup>

Whether by marketing, publicity, referrals, or otherwise, firms have found niches and gathered large numbers of clients with related claims. Non-class mass representation of clients by a single firm has become commonplace in a wide variety of mass litigation. Examples include the representation of 349 homeowners in a deceptive trade practices action against a builder<sup>66</sup> and the representation of hundreds of personal injury clients for claims arising out of an explosion at a chemical plant.<sup>67</sup> In some cases, non-class mass representation strongly resembles class actions in the way the lawyers conduct the litigation. In a securities action, for example, a single firm representing over two hundred plaintiffs filed a single complaint on behalf of all the plaintiffs, and empowered a steering committee of “representative plaintiffs” to make decisions on behalf of the group.<sup>68</sup>

Firms have structured their businesses to enhance their ability to represent massive numbers of plaintiffs collectively. Five plaintiffs’ firms from around the country, for example, recently formed a “law firm of law firms” under the name Herman, Mathis, Casey, Kitchens & Gerel LLP (“HermanMathis”). The firms did not merge. Rather, each firm remained intact as a separate law firm, but they created in addition a partnership in which the Class A partners are the five plaintiffs’ firms. Before any of the individual firms may become involved in a monumental case--defined as a case involving at least \$500 million to \$1 billion in damages--the case must be presented to HermanMathis. Essentially, the structure gives the megafirm a right of first refusal on very large cases.<sup>69</sup> The firm markets itself for its ability to handle litigation on a massive nationwide scale.<sup>70</sup>

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<sup>63</sup> See, for example, Rheingold, 5 Mealey Litig Rep at 29-30 (criticizing “lawyers who became merchants and ran ads for cases they had no intention of handling themselves”).

<sup>64</sup> Interview with Alex H. MacDonald, Esq. (April 26, 2002) (“MacDonald Interview”).

<sup>65</sup> See Yeazell, 51 DePaul L Rev at 201-03.

<sup>66</sup> See *Quintero v Jim Walter Homes, Inc*, 709 SW2d 225 (Tex App 1985).

<sup>67</sup> See *Arce v Burrow*, 958 SW2d 239 (Tex App 1997).

<sup>68</sup> See *Abbott v Kidder Peabody & Co*, 42 F Supp 2d 1046 (D Colo 1999).

<sup>69</sup> Interview with Russ Herman, Esq. (Jan 6, 2002) (“Herman Interview”).

<sup>70</sup> The firm’s web site emphasizes the ability to match defendants’ power by litigating on a massive scale and combining the resources of the five member firms: “The mission of HermanMathis is to bring to bear the same quality, leverage and resources of big corporate law firms to defend the interests of our clients.” <<http://www.hermanmathis.com/about.htm>> (visited Jan, 30 2003) [on file with U Chi Legal Forum]. It describes the firm’s network of alliances in terms that sound remarkably similar to the organization of a nationwide defense team for a large corporate defendant:

Rather than organizing an ad hoc group for a particular litigation, as Wendell Gauthier did in gathering the *Castano* group to pursue a nationwide tobacco class action, HermanMathis provides a structure for resource-pooling that is in place and prepared for the next mass litigation opportunity when it arises.<sup>71</sup>

By marketing to targeted potential plaintiffs for specific mass litigation, by building a strong referral market, and by structuring law firms to facilitate mass representation, plaintiffs' firms have established mass collective representation as a form of aggregation unto itself, but with a powerful resemblance to class actions.

## B. Collective Representation by Multiple Firms

Compared to mass representation by a single lawyer or firm, cooperative representation by multiple firms presents a weaker case for treatment as a de facto class action. Nevertheless, counsel coordination can present similar opportunities for economies of scale, investment for high stakes, and bargaining leverage. Counsel coordination also entails similar relinquishment of client autonomy. Through the coordinated work of multiple firms, whether in formally aggregated or formally separate lawsuits, plaintiffs in mass litigation may find themselves relying on the work of counsel with whom they have no lawyer-client relationship, over whom they have no control, and whose loyalty is directed toward collective interests. Thus, while a weaker form of collective litigation than mass representation by a single firm, collective representation by counsel coordination among multiple firms warrants attention.

### 1. Counsel coordination in formally aggregated litigation.

The proposition that mass litigation practice deprives most plaintiffs of meaningful control over the conduct of their litigation is no longer particularly controversial or surprising to most practitioners, judges, and commentators familiar with mass litigation. One aspect of this phenomenon that remains interesting, however, is the similarity in practice between litigation forms that differ in theory. Certain litigation that remains judicially separate comes to resemble formally aggregated litigation.<sup>72</sup> Similarly, litigation aggregated by non-class procedural mechanisms comes to resemble class

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Whether the defendants in your lawsuit are in Fairfax, Virginia, or Fairbanks, Alaska, it's good to know you can rely on the nationwide resources of HermanMathis and our strategic alliances with prominent law firms from coast-to-coast. To better serve you, HermanMathis has organized a nationwide strategic alliance network of more than 20 law firms to work cooperatively with us on litigation. . . . They are our Permanent Co-Counsel in their respective states, serving as the firm's on-site representatives in the event your litigation requires local counsel, in addition to the 13 HermanMathis offices in seven states and the District of Columbia. . . . With the full breadth of these remarkable resources, HermanMathis is committed to go the distance in protecting your rights.

<[http://www.hermanmathis.com/about\\_alliances.htm](http://www.hermanmathis.com/about_alliances.htm)> (visited Jan, 30 2003) [on file with U Chi Legal F].

<sup>71</sup> Herman Interview (cited in note 69)

<sup>72</sup> On informal aggregation through representation by a single firm, see Part I A. On informal aggregation by counsel coordination in separate lawsuits, see Part I B 2.

actions, whether through joint representation by a single firm<sup>73</sup> or by coordination among lawyers within the aggregated litigation.

Procedural rules and statutes provide a number of mechanisms by which related claims by multiple plaintiffs can be aggregated. Plaintiffs may file their claims jointly in a single action pursuant to rules on permissive party joinder.<sup>74</sup> Actions filed separately, but involving common questions, may be consolidated for purposes of pretrial, trial, or both.<sup>75</sup> Some state court systems provide for statewide consolidation or centralization of related claims.<sup>76</sup> Related actions pending in multiple federal district courts may be transferred to a single district for consolidated pretrial handling pursuant to the federal multidistrict litigation statute.<sup>77</sup>

In theory, the procedural mechanisms of party joinder, consolidation, and MDL function differently from class actions. These aggregation procedures do not purport to create representative litigation or to impose on lawyers a duty to represent client interests on a group-wide rather than an individual basis. In practice, however, when these formal aggregation processes are used on a massive scale, the litigation comes to resemble a class action in the sense that hub lawyers conduct important work in the litigation on behalf of a large group of clients, many of whom have little or no relationship with those lawyers.

Hub lawyers include members of steering committees, as well as lead and liaison counsel. In cases involving massive party joinder or consolidation, courts often require parties to act through lead counsel.<sup>78</sup> In federal MDL, the lawyers on the plaintiffs' steering committee, discovery committee, and similar positions generally dominate the conduct of pretrial litigation, and sometimes settlement negotiations as well.

The Continental Grain elevator explosion litigation<sup>79</sup> presents an early example of resource-pooling by plaintiffs' lawyers in MDL to match the resources invested in the litigation by defendants. "Voluntarily, the lawyers in that case got together," explains Russ Herman, one of the lead lawyers.<sup>80</sup> "We all understood that we were going to be facing well-financed national as well as local law firms."<sup>81</sup> Approximately forty plaintiffs' lawyers coordinated their efforts and pooled their resources to handle the Continental Grain litigation. Herman explains the importance of resource-pooling: "All of this takes a terrific amount of resources and single-mindedness. The resources you

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<sup>73</sup> See Part I A.

<sup>74</sup> See FRCP 20(a).

<sup>75</sup> See FRCP 42(a).

<sup>76</sup> See, for example, Cal Civ Proc Code § 404; NJ Ct R 4:38; Pa RCP 213, 213.1. See also Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 Seton Hall L Rev 910, 911-13 (2001).

<sup>77</sup> See 28 USC § 1407.

<sup>78</sup> See Daniel Wise, *Lawyers Pack World Trade Center Hearing*, 211 NY L J 1 (1994) (describing judge's insistence on counsel coordination in litigation arising out of the 1993 bombing of the World Trade Center). Indeed, class action cases addressing the numerosity requirement of Rule 23(a)(1) recognize that with a large enough number of parties, joinder comes to resemble a class action. See, for example, *Alexander Grant & Co v McAlister*, 116 FRD 583, 587 (SD Ohio 1987); *In re Gap Stores Securities Litigation*, 79 FRD 283, 289 (ND Cal 1978).

<sup>79</sup> *In re Continental Grain Co*, 482 F Supp 330 (J P M L 1979) (centralization of MDL in Eastern District of Louisiana in claims arising from grain elevator explosion in Louisiana).

<sup>80</sup> Herman Interview (cited in note 69).

<sup>81</sup> *Id.*

need are lawyers and law firms who can be both leaders and followers at the same time, who have developed some areas of expertise, who have the backup in their own firms where they can focus and dedicate themselves with tenacity to more or less a single case. And the money--very, very important--you can't do this without a big economic engine."<sup>82</sup> Although the Continental Grain litigation was not certified as a class action, the lawyers handled it on a group basis, contributing funds and carrying expenses with the expectation of dividing fees at the end if the case was concluded successfully. In Herman's words, "This case was essentially handled as a class action without its being classed."<sup>83</sup>

State court aggregation, too, provides opportunities for mass collective representation. In the polybutylene pipe product liability litigation in Texas state court, forty-nine law firms coordinated in representing over thirty-seven thousand plaintiffs, with a single firm acting as lead counsel.<sup>84</sup> Mass litigators understand that much collective litigation, in both federal and state courts, occurs by procedural mechanisms other than class actions.<sup>85</sup>

## 2. Counsel coordination in informally aggregated litigation.

Even in the absence of formal aggregation, related claims may be informally aggregated by the coordinated efforts of counsel.<sup>86</sup> Despite their lone-wolf reputation and famously entrepreneurial nature, plaintiffs' lawyers have learned the value of cooperation. Just as they organize to work collectively in MDL and other formally aggregated litigation, so do they organize to gain advantages when pursuing separate but related lawsuits. By working with other lawyers representing similarly situated clients, plaintiffs' lawyers achieve some of the benefits of class litigation. Scale economies result from the sharing of information and divvying up of work among coordinating lawyers. The pooling of resources permits greater investment in the litigation. To the extent lawyers coordinate their negotiation efforts, enhanced bargaining leverage may result as well.

Often, coordination among plaintiffs' lawyers occurs under the auspices of the Association of Trial Lawyers of America ("ATLA"), which sponsors over sixty litigation groups for lawyers working on specific types of lawsuits.<sup>87</sup> The litigation groups,

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<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> See *In re Polybutylene Plumbing Litigation*, 23 SW3d 428 (Tex App 2000). The plaintiffs owned property with allegedly defective plumbing systems. The actions were initially brought as separate product liability actions against the providers of materials for the plumbing systems, but were consolidated for discovery and pretrial with the firm of Fleming, Hovenkamp & Grayson as lead counsel. Id at 432-33.

<sup>85</sup> One plaintiffs' law firm website makes this point for prospective clients: "These mass tort cases are typically congregated in some fashion. One method is the use of class action, where a few named plaintiffs sue on behalf of all those injured. A class action is not necessarily the best way to organize litigation and spread costs, and therefore our firm is involved in many other means of congregation." <<http://www.rheingoldlaw.com/whatAre.html>> (visited Jan 30, 2003) [on file with U Chi Legal F].

<sup>86</sup> For an extensive discussion of the phenomenon of informal aggregation, see Erichson, 50 Duke L J at 381.

<sup>87</sup> See Guide to ATLA Litigation Groups, July 1998.

according to ATLA's literature, "provide a network for ATLA members handling similar cases to exchange information and share successful strategies."<sup>88</sup>

In the diet drugs products liability litigation, a group of lawyers handling state court cases around the country formed a "plaintiffs' consortium,"<sup>89</sup> which among other things set up a web site for sharing information.<sup>90</sup> A group of firms contributed funds to put the defendant's document production in electronic and coded form, and permitted other plaintiffs' lawyers to buy into the arrangement.<sup>91</sup>

## II. RELINQUISHMENT OF AUTONOMY AS A RATIONAL CLIENT CHOICE

### A. The Rational Choice to Relinquish Autonomy

To understand why plaintiffs rationally choose to relinquish aspects of litigation autonomy, we need only consider the primary reasons why a growing segment of the plaintiffs' bar views mass collective representation--whether by gathering clients, by coordinating with other lawyers, or by formal aggregation--as a sound business model. Attenuation of the attorney-client relationship, it turns out, can be good for business in ways that benefit the clientele.<sup>92</sup> Mass collective representation allows firms to take advantage of economies of scale to reduce the per-plaintiff cost of pursuing claims. It allows and encourages them to invest more heavily in the litigation by presenting stakes on the plaintiffs' side that are more in line with those seen by the defendant. Finally, mass representation gives plaintiffs' counsel greater bargaining leverage in settlement negotiations. Most plaintiffs' lawyers would not choose to describe this business model in terms of attenuation of the lawyer-client relationship,<sup>93</sup> but what makes the model work is the lawyer's willingness to give priority to the interests of the group, and

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<sup>88</sup> *Litigation Groups Offer Winning Support to Members*, ATLA Advocate 5 (Feb 2000). See also *ATLA's L-tryptophan Group Provides Model for National Litigation Efforts*, ATLA Advocate 11 (March 1993).

<sup>89</sup> See *Attorneys Debate Merits of Fen-Phen Multi-District Litigation*, Mealey Litig Rep: Fen-Phen/Redux 4 (Feb 1998) (describing formation of a "loose confederation" of lawyers for pursuing discovery); Paul D. Rheingold et al, *State Courts Provide New Forum for Mass Torts*, Natl L J C28 (Feb 22, 1999) (discussing the work of the plaintiffs' consortium in state court cases).

<sup>90</sup> See Multistate Litigation Diet Drugs/Fen-Phen Website and Bulletin Board, <<http://www.lawtomation.com/%7Eeleflaw/fenphen>> (visited Jan 30, 2003) [on file with U Chi Legal F].

<sup>91</sup> See Rheingold et al, Natl L J at C29.

<sup>92</sup> I do not mean to suggest, of course, that most lawyers ought to start ignoring their clients' individual concerns. In the vast bulk of legal representation, attenuation of the attorney-client relationship is both bad lawyering and bad for business. My point focuses solely on mass litigation in which collective representation advances client interests better than individual representation.

<sup>93</sup> Unsurprisingly, law firm promotional materials emphasize concern for individual client needs, even as they advertise the strength that comes from collective representation. One leading asbestos plaintiffs' firm, for example, pronounces its founding principle "that every client's case is the firm's most important case, and that every client deserves his or her lawyer's diligent attention, compassion, and excellence," and touts the firm's "attention to each client's individual needs," Website of Weitz & Luxenberg, <<http://www.weitzlux.com/about/default.asp>> (visited Jan 30, 2003) [on file with U Chi Legal F]. However, the web site also boasts that the firm "handled over 70% of all asbestos cases on the New York City trial docket for the year 2001." Id, <[http://www.weitzlux.com/practice\\_area/asbestos.asp](http://www.weitzlux.com/practice_area/asbestos.asp)> (visited Jan 30, 2003) [on file with U Chi Legal F].

unwillingness to allow individual client preferences to derail the overall effectiveness of the collective representation.<sup>94</sup>

Like their lawyers, most plaintiffs probably do not perceive their choice of counsel as a decision to opt for an attenuated relationship or as a decision to relinquish litigation autonomy. Yet part of a mass litigation practice's appeal is the firm's willingness to invest substantial resources on behalf of its mass of similarly situated clients, to level the field with defendants. Such firms pitch their services to prospective clients based on the advantages the collective representation. The website of one prominent mass tort plaintiffs' firm, for example, emphasizes the importance of both gathering clients and coordinating with other lawyers:

In mass tort work, one firm may handle many of the victims, as we frequently do. This cuts down significantly on costs since the costs of investigation and preparation are spread among the many cases. Also, almost invariably there is a network of attorneys sharing information and jointly handling the legal proceedings against the defendant in the case.<sup>95</sup>

Bruce Hay and David Rosenberg note that the market for mass tort plaintiffs' representation is dominated by groups of plaintiffs' attorneys who represent large inventories of clients. They suggest that this market pattern "expresses the preference of plaintiffs for 'collective' rather than 'individual' representation. ... The vote in the marketplace is decidedly against the individual benefits of so-called 'litigant autonomy,' contradicting the supposition of the Supreme Court."<sup>96</sup> While treating the marketplace for legal services as a meaningful expression of client preferences may assume more rational and knowledgeable client decision-making than is warranted,<sup>97</sup> I agree with their conclusion that most clients in mass litigation settings prefer the strength of collective representation, or at least that the well-informed plaintiff generally would prefer such representation. The dominance of large-inventory firms in the mass litigation marketplace is consistent with the soundness of collective representation both as a business model for plaintiffs' firms and as a rational choice for clients.

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<sup>94</sup> In addition to these sound justifications for preferring mass litigation, there are some ethically troubling reasons why some plaintiffs' firms might view attenuation of the lawyer-client relationship as an appealing business model. Some firms, for example, may find it possible to attract massive numbers of meritless claims through aggressive advertising, and then try to leverage those claims into a settlement by the pressure created by their sheer volume. To address this concern, David Rosenberg suggests forbidding class settlements until after a summary judgment motion has been decided. See Rosenberg, 115 Harv L Rev at 831.

<sup>95</sup> Website of Rheingold, Valet, Rheingold, Shkolnik & McCartney LLP, <<http://www.rheingoldlaw.com/whatAre.html>> (visited Jan 30, 2003) [on file with U Chi Legal F].

<sup>96</sup> Hay and Rosenberg, 75 Notre Dame L Rev at 1380 n.8.

<sup>97</sup> Plaintiffs' firms with very large inventories of clients accumulate more money to spend on advertising, as well as a long list of former clients for referrals and potential solicitation. By reaching out to prospective clients and to referring lawyers, law firms lengthen their client lists. See text accompanying notes 53-65. In mass litigation plaintiffs' practice, it is not surprising that the rich get richer. It is difficult, however, to disentangle the client's choice of a firm with resources, experience, and leverage to maximize the client's recovery, from the client's choice of a firm due to effective marketing.

By representing many clients collectively, lawyers achieve significant economies of scale.<sup>98</sup> Many claims in mass litigation involve sufficiently small stakes, and sufficiently expensive issues to litigate, that as a practical matter the claims would be impossible to pursue individually. The efficiency of collective representation empowers plaintiffs to pursue what otherwise would constitute negative value claims.

Moreover, by investing in the litigation at a level justified by the amplified stakes of collective representation, lawyers can afford to litigate at the highest level, including spending money on investigation and retention of top experts.<sup>99</sup> Mastery of a mass tort requires an enormous amount of time and mental energy, not to mention out-of-pocket expenses and firm resources.<sup>100</sup> To represent plaintiffs effectively, the lawyer must take advantage of economies of scale by spreading those costs among many clients. Some of the most effective mass tort lawyers find that to do top quality legal work, they cannot handle more than one or two different mass torts at a time. As one mass tort plaintiffs' lawyer puts it, "You find plaintiffs' law firms. . . who find themselves in multiple mass torts at the same time, and no matter what your devotion, it's impossible to be total masters of all of the nuances of the millions of documents that any mass tort requires if you're doing more than two at a time. Two I think is the absolute max."<sup>101</sup>

Plaintiffs' lawyers must spend money and time to level the field with defendants. For a defendant facing mass litigation, the stakes of the litigation as a whole justify a huge expenditure of resources for defense. A lawyer or firm representing a single plaintiff cannot invest the money required to do battle against a defendant that views the case as part of a mass litigation. Whether by class action or by representation of multiple clients, plaintiffs' lawyers who hope to battle on a level playing field with mass litigation defendants must gather enough claims to justify the expense of complex large-scale litigation. As one tobacco plaintiffs' lawyer explained with regard to the *Castano* class action, "Class action is about money. You couldn't get enough for a single individual to

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<sup>98</sup> Firms make this point about scale economies to attract clients. See, for example, web site of Rheingold, Valet, Rheingold, Shkolnik & McCartney LLP, <<http://www.rheingoldlaw.com>> (visited Jan 30, 2003) [on file with U Chi Legal F](listing ten pharmaceutical products for which the firm is currently bringing lawsuits, and noting "[b]y handling a number of cases together involving the same product, we can effect cost and time savings").

<sup>99</sup> David Rosenberg emphasizes the importance of "optimal investment" by plaintiffs' counsel, and argues that "total aggregation is necessary to provide plaintiffs and courts a full opportunity to exploit economies of scale in litigation to counter the asymmetry in litigation power favoring defendants that results from their ability to exploit de facto class action scale economies in the standard separate action process." See David Rosenberg, *Mass Production Goods, Torts and Justice: The Problem of Opt-Out* (2002) (working paper on file with author).

<sup>100</sup> The administrator of the Plaintiffs' Legal Committee for the *Castano* Tobacco Litigation describes the exhaustive document review required in mass litigation, and the need to set up new office space to accommodate the sheer volume of documents: "The discovery in these cases, the paper, there's so much. You know, there's just so much that they can't possibly have room for it. . . . They throw millions and millions of pages of garbage at you. You know, their discovery responses are not very specific, OK? You might go through fifteen boxes of paper and find one document that's relevant. But you have to go through it all. You have to look at it all. And the hundreds and hundreds and hundreds and hundreds of depositions and trial testimony from prior cases. It all has to be gone through. And so the sheer volume is unbelievable." Interview with Suzanne Foulds (January 7, 2002) ("Foulds Interview").

<sup>101</sup> MacDonald Interview (cited in note 64).

justify the resources that you'd have to spend to beat the tobacco company."<sup>102</sup> In the diet drugs mass tort litigation, in which Robinson & Cole represented two dozen plaintiffs with high-value cases, the firm spent three million dollars of lawyer time, "plus one million dollars cold hard cash."<sup>103</sup> Had the firm represented only one or a few plaintiffs, it would not have been willing to invest such substantial resources in the litigation.

The business model for a plaintiffs' firm engaged in mass tort litigation requires getting plenty of clients. According to one participant:

The folks who do it in a very well-known way...Stan Chesley and Paul [Rheingold] and Arnold Levin and Turner Branch, the folks who've been doing it for years, understand that if it is a true mass tort, that there's going to be a center of gravity, that they will not be alone, that the first and most pivotal thing to do in a mass tort is to get the cases, is to get the good cases.<sup>104</sup>

As another plaintiffs' lawyer put it, "If you can't sign up enough plaintiffs, the economics don't work."<sup>105</sup>

The economies of scale and other advantages achieved by signing up massive numbers of clients also can be achieved by forging a coalition of plaintiffs' firms. The *Castano* group in the tobacco litigation found that by pooling their talent and resources, they could pursue tobacco cases much more powerfully together than separately. According to one lawyer who was involved in the *Castano* litigation from the start, Louisiana lawyer Wendell Gauthier and his colleagues thought:

Who can fight the tobacco companies? Who can ever outfinance them? But maybe if we get the people that we've met over the last fifteen years who have comparable plaintiffs' firms, and we start off by having everyone put up a hundred grand, then maybe we can have a pool of money that will at least get us through the first stage.<sup>106</sup>

By combining the resources of many firms and investing in the litigation as a group effort, the *Castano* group was able to process documents much more effectively than an individual firm could have done, and at a level that could not have been contemplated on

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<sup>102</sup> Interview with Danny Abel, Esq. (January 6, 2002) ("Abel Interview"). Abel compared the *Castano* class action with *Cipollone v Liggett Group, Inc.*, 505 US 504 (1992), in which an individual smoker and his spouse brought an action against cigarette manufacturers after the smoker contracted lung cancer: "Even if Cipollone had recovered ten million dollars, [plaintiff's attorney] Marc [Edell] may have spent ten million dollars. You have to depose the same experts. The evidence you have to offer to prove your various claims--it's the same gang of experts, and amounts and mass of evidence that you have to present to prove one claim as to prove the claim for the whole class. If you win the whole class you get Cipollone's recovery times a million."

<sup>103</sup> MacDonald Interview (cited in note 64)

<sup>104</sup> Id.

<sup>105</sup> Abel Interview (cited in note 102).

<sup>106</sup> Id.

behalf of any individual or small group of clients.<sup>107</sup> Moreover, the *Castano* group lawyers brought different skills and experiences to the table.<sup>108</sup>

Similarly, pharmaceutical mass tort litigation ordinarily involves a coordinated effort by plaintiffs' lawyers. This kind of litigation tends to be dominated by the same fifty or sixty plaintiffs' law firms, and successful mass tort lawyers understand the importance of putting together a coalition of those firms to handle large-scale litigation capably. "If you don't get a significant number of those people interested in your litigation," says Russ Herman, "you're going to be in big trouble. Because they've got the resources. Not just the money, but the intellectual resources, the know-how, the contacts."<sup>109</sup>

Whether by representing numerous clients, or by coordinating with other firms to put together a coalition representing numerous clients, plaintiffs' lawyers gain bargaining leverage in settlement negotiations.<sup>110</sup> Indeed, the enhanced leverage that comes from combining large numbers of claims has drawn criticism from those who disapprove of the power of collective representation to obtain settlement recoveries for plaintiffs with questionable claims. In the class action context, some judges and defendants decry what they view as the extortionate settlement pressure created by class litigation.<sup>111</sup> In non-class litigation, too, sheer accumulation can create leverage for settlement of individually weak claims.<sup>112</sup> The connection between this leverage and plaintiffs' preference for group

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<sup>107</sup> The *Castano* group provided to each of the member firms a binder of CD's containing the relevant documents. Each binder contained 110 CD's, with approximately 25,000 pages of documents on each CD, for a total of over 2.5 million documents. By sharing the cost of imaging and processing, and treating it as an investment in a massive litigation enterprise rather than any individual case, the group was able to create an accessible, searchable binder of coded documents. Foulds Interview (cited in note 100).

<sup>108</sup> Some, such as Dianne Nast, Elizabeth Cabraser, and Will Kemp, were known especially for their understanding of the law and their ability to craft powerful arguments. Others, such as Ralph Knowles and Francis Hare, were considered particularly strong in discovery and depositions. Still others, such as John Coale, Russ Herman, and Hugh Rodham, were known for their political abilities and connections. The leader of the group, Wendell Gauthier, brought the ability to keep this group of oversized personalities focused on a common objective. Herman Interview (cited in note 69); Abel Interview (cited in note 102); Foulds Interview (cited in note 100). See also Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice* (Henry Holt 1998); Dan Zegart, *Civil Warriors: The Legal Siege on the Tobacco Industry* (Delacorte 2000).

<sup>109</sup> Herman Interview (cited in note 69).

<sup>110</sup> To some extent, the leverage simply derives from the economies of scale and greater investment in the litigation. Lawyers with the wherewithal and incentive to pursue litigation vigorously command respect in settlement negotiations. The settlement leverage of collective representation also flows from defendants' desire for peace. An attorney negotiating on behalf of a large group of plaintiffs can offer the defendant more thorough peace, even if total peace is unobtainable outside of mandatory class actions and bankruptcy. Defendants' search for peace, and plaintiffs' counsel's search for massive numbers of clients, lead settlement negotiations toward inclusive resolutions. In the words of one plaintiffs' lawyer, "[i]n the mass torts, as practiced at the federal level, there is an a priori, intrinsic impulse that the end game will not be trial, but a global settlement." MacDonald Interview (cited in note 64).

<sup>111</sup> See, for example, *In re Rhone-Poulenc Rorer*, 51 F3d 1293 (7th Cir 1995). Charles Silver analyzes four different versions of the "blackmail thesis" and finds that none of them survives scrutiny. See Charles Silver, *Class Certification and Blackmail*, NYU L Rev (forthcoming 2003). Professors Hay and Rosenberg agree that the danger of blackmail settlements is overstated, and in any event can be remedied by adopting a policy of multiple class trials. See Hay and Rosenberg, 75 Notre Dame L Rev at 1402-07.

<sup>112</sup> Judge Jack Weinstein describes the phenomenon as follows: "Often the pressure for block settlements comes from plaintiffs' attorneys who hope to get something for a large mass of questionable cases. Some attorneys are selective about the cases they take, while others will take almost any case without regard to its merit, hoping for a global settlement. The attorneys with thousands of cases are almost invariably in this second category." Weinstein, *Individual Justice* at 74 (1995). He notes that a defense attorney he

representation is obvious. What is not obvious is why this should be frowned upon. Assuming claims that are weak but non-frivolous,<sup>113</sup> there is nothing inherently problematic about settlement amounts that are discounted for the weakness of the claims. Particularly in the mass toxic tort arena, uncertainty concerning scientific causation and difficulty establishing exposure render many plausible claims hard to prove. Such claims may be unlikely to succeed on the merits if they go to trial, but their small possibility of success gives them settlement value, especially when negotiated as a large block. If block settlements reflect the probability that some of the plaintiffs would prevail but others would fail--not because of real differences but because of the randomness inherent in large numbers of low-probability claims--then the settlement may prove sensible for both defendants and plaintiffs, and beneficial for the public.

With economies of scale, expanded litigation investment, and enhanced settlement leverage, mass collective representation brings significant advantages that level the field against well-financed defendants, even without the empowerment that comes from formal class certification.<sup>114</sup>

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interviewed “did not fault plaintiffs’ attorneys for taking all available cases because ordinarily each plaintiff recovers something in large settlements.” Id at 260 n 141.

<sup>113</sup> It is, of course, improper for an attorney to prosecute claims that lack a non-frivolous factual and legal basis, regardless of defendants’ willingness to pay to get rid of nuisance claims. See Model Rule of Professional Conduct 3.1; FRCP 11.

<sup>114</sup> Based on the rational plaintiff’s ex ante preference for optimal deterrence, and thus for the strength of collective representation, David Rosenberg argues that class actions are preferable to either individual actions or voluntary collective efforts. He views the collective action problems of voluntary collective efforts as being insurmountable. See Rosenberg, *The Problem of Opt-Out*; Hay and Rosenberg, 75 Notre Dame L Rev at 1387-88. I have written elsewhere of the need for more thorough formal aggregation mechanisms, see Erichson, 50 Duke L J at 464-69, and to an extent, I am sympathetic to Rosenberg’s preference for formal aggregation. I disagree, however, with Rosenberg’s conclusion that mandatory class actions are the only solution to the collective action problems of mass litigation. Rosenberg’s skepticism about the possibility of significant non-class collective litigation follows from his overstatement of the collective action problems in joinder and counsel coordination. Properly handled, non-class collective litigation not only is viable, but goes a long way toward leveling the field against resource-rich defendants. Contrary to Rosenberg’s logic, there is no need to certify a mandatory class action in order to have sufficient incentive for the plaintiffs’ lawyers to invest heavily in litigation. A firm or consortium of firms representing hundreds or thousands of plaintiffs ordinarily invests sufficient time and money to litigate at a high level. Further investment in litigation inevitably reaches a point of diminishing returns. The field has in fact become much more level in mass tort litigation, where plaintiffs’ firms representing large inventories invest enormous resources in the litigation, sometimes with the help of outside financing, and often by pooling resources with other firms.

Rosenberg worries that non-class collective representation cannot succeed if plaintiffs can free ride. See Rosenberg, 115 Harv L Rev 847. The free rider problem, however, looks more serious in theory than in practice. In mass litigation, most plaintiffs retain lawyers engaged in large-scale collective representation, as Rosenberg acknowledges. Plaintiffs who retain lawyers not engaged in collective representation lose much of the benefit. While they may benefit from the stare decisis value of adjudications, and they may gain access to documents revealed in discovery or used at trial, many of the benefits of collective representation are lost by the would-be free rider. The bargaining leverage that comes from representing a large group inures to the benefit of the represented group, and plaintiffs in mass litigation often find it difficult to employ offensive non-mutual issue preclusion. See Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich L Rev 945, 956-57 n 42 (1998) (discussing solutions to the free rider problem of nonmutual issue preclusion). Moreover, one has to wonder what the free rider hopes to gain by declining collective representation. Ordinarily, the individual plaintiff’s lawyer charges a contingent fee, which is unlikely to be lower than that of the lawyer representing a large number of plaintiffs. If anything, one would expect the costs, and perhaps also the fees, to be lower in the group

## B. The Rational Choice to Retain Autonomy

In mass litigation, most plaintiffs retain lawyers with large inventories of similar claims or lawyers who work closely with others who represent similarly situated clients, and for most plaintiffs, this can be justified as a rational choice for the benefits of group representation rather than for the autonomy of individual representation.<sup>115</sup> It need not, however, be *every* plaintiff's choice. Several considerations might lead a rational plaintiff to choose individual rather than group representation.

First, some clients may rationally decide that they maximize the value of their claim by avoiding massive group representation. Plaintiffs with low value claims would rarely if ever reach this conclusion.<sup>116</sup> Plaintiffs with significant losses, however, face a different decision. Such high-damages claimants in mass litigation may include institutional investors in securities litigation or severely injured plaintiffs in mass tort litigation. The possibility of a large recovery may provide sufficient incentive for a skilled lawyer to pursue such a claim vigorously. A plaintiff with a strong claim may seek a particular lawyer. The top tier of the plaintiffs' bar includes not only class action lawyers and other aggregators, but also lawyers who eschew aggregation, preferring to select individual cases carefully and press them to trial.<sup>117</sup> A lawyer representing a plaintiff individually can select the most advantageous forum for the particular claim, and can pursue the litigation in the particular plaintiff's best interest. By contrast, collective representation presents conflicts of interest, which are amplified by the higher stakes of a particular plaintiff's claim. Thus, while most clients in mass litigation benefit from collective representation, some plaintiffs with strong claims may worry that collective representation will have a damage-averaging effect, raising the value of weak claims and reducing the value of strong ones.<sup>118</sup>

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representation than in the individual representation. In any event, non-class litigation offers certain advantages to plaintiffs. If separate lawsuits go forward, plaintiffs can work along separate paths to obtain more discovery than would be possible in a single action. Also, a defendant facing claims by numerous plaintiffs gain a greater efficiency advantage than plaintiffs from a single suit.

<sup>115</sup> This is not to say that every plaintiff makes a knowing choice. The market dominance of firms that represent plaintiffs in large groups arguably expresses clients' preference for the strength of collective representation, but alternatively can be explained by the power of advertising and referrals. See note 54.

<sup>116</sup> We can divide claims into four levels of viability based on the size of the potential recovery, discounted by probability of recovery, weighed against the cost of obtaining recovery. First-level claims have high enough stakes that they are viable even without mass representation. Second-level claims are viable only with economies of scale, whether by class action or by non-class collective representation. Third-level claims involve sufficiently low stakes that they are viable only as a class action. Fourth-level claims are so low in value, relative to the cost of litigation and probability of success, that they are not viable even as a class action.

<sup>117</sup> See Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DePaul L Rev 219 (2001).

<sup>118</sup> Similar considerations encourage plaintiffs with the strongest claims to opt out disproportionately from class actions:

There are a number of reasons why the right to assert individual claims may be very important to those opt-out plaintiffs who have disproportionately larger damage claims than most members of the class. First, bargaining with the class-plaintiffs' attorney team tends to disfavor high-stakes plaintiffs. ... A related problem is that attorneys for the class may find it easier to facilitate a

Second, individual client preferences vary as to remedies, relationships, and process values. Similarly situated clients may disagree on appropriate remedies. Some plaintiffs may favor maximum monetary compensation, whereas others may place higher priority on non-monetary relief. In employment litigation, some plaintiffs may prefer injunctive relief, and in securities litigation, some plaintiffs may prefer institutional reform within the corporation. Some clients value a personal lawyer-client relationship. They may desire individual counseling on legal and non-legal aspects of the problem at issue in the lawsuit, particularly in personal injury mass torts. Some clients may care more than others about process values such as the opportunity for expression through pleadings, at trial, or otherwise. Some clients may feel that individual representation better protects their personal dignity.<sup>119</sup> The question is to what extent plaintiffs are willing to trade such preferences for maximization of compensation. While most plaintiffs choose to proceed with large-scale group representation, some plaintiffs may rationally choose to avoid massive representation based on their particular litigation position or personal preferences. That choice should be put to plaintiffs explicitly, as discussed in Part III A, by the process of informed consent.

In reality, of course, clients do not face a binary choice between individual and collective representation, between total autonomy and none.<sup>120</sup> Trial lawyers who handle selected individual claims, rather than class actions or massive inventories, need not represent only one client within a mass litigation. A prospective client with a strong claim can seek out a lawyer who, instead of handling thousands of claims, handles a few dozen major claims. Alex MacDonald, one of the prominent lawyers in the fen-phen litigation, rather than representing hundreds of plaintiffs with weaker claims, represented twenty-four fen-phen plaintiffs suffering from primary pulmonary hypertension, by and large the most serious claims in the litigation.<sup>121</sup> A plaintiff with a sufficiently strong claim thus

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settlement by averaging the damages of all class members rather than by expending the extra time and energy required to differentiate among the respective settlement values of individual claims. These two problems are exacerbated by the typical position of high-stakes plaintiffs as a minority among class members; thus, greater political pressure exists for class attorneys to favor low-stakes plaintiffs. ... All of these factors imply that high-stakes plaintiffs have better chances for larger recoveries if they opt out and pursue their claims individually.

Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex L Rev 211, 222-23 (1991).

<sup>119</sup> Frank Michelman describes the “dignity values” and “participation values” served by allowing persons to litigate. See Frank L. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights*, 1973 Duke L J 1153, 1172 (1973). In contrast to prohibitive court access fees or denials of hearings, group representation of the sort I describe need not entirely discard dignity and participation values. Indeed, one might argue that group representation provides more effective political participation than individual representation. Nevertheless, individual litigation probably better serves these process values in most cases. Such values matter to a good number of clients. See E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* at 93-106 (Plenum 1988); John Thibault and Laurens Walker, *A Theory of Procedure*, 66 Cal L Rev 541, 548-52 (1978).

<sup>120</sup> Indeed, even in purely individual tort representation, clients exercise relatively little control over their litigation. See Deborah Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U Ill L Rev 89 (1989).

<sup>121</sup> MacDonald understands the danger of losing sight of the individuality of his clients. “It is easy for all of us who are functionaries in this system to lose the central reality of what we are doing,” he says. “We are dealing with cases each of which has a human face, and too often the human face is made invisible to us. ... It’s an instance in which language and mindsets and cognitive approaches to reality allow one to distance

can choose a lawyer who will take the individual claim seriously, without entirely forgoing the benefits of collective representation.

### III. LAWYER LOYALTY AND CLIENT AUTONOMY

Lawyers owe their clients a duty of loyalty. Loyalty requires lawyers to avoid conflicts of interest,<sup>122</sup> and encompasses a number of more particular duties identified by the law governing lawyers, including the duties of competence<sup>123</sup> and diligence,<sup>124</sup> and the duty to inform and advise.<sup>125</sup> In the canonical language of the Model Code, “A lawyer should represent a client zealously within the bounds of the law.”<sup>126</sup> The duty of loyalty runs to each individual client. In cases where clients retain the lawyer for the benefit of collective representation, however, it makes sense to permit lawyers to comply with their duty of loyalty by focusing on the interests of the group as a whole. But there is a catch. If a lawyer wishes to exercise the duty of loyalty by serving client interests collectively rather than individually in non-class litigation, the lawyer must allow clients to retain two critical moments of autonomy: at the outset of collective representation, and at settlement.

By providing these moments of individual decision-making, but otherwise focusing on the interests of the group, lawyers in non-class collective representation can mirror much of what is achieved by opt-out class actions. The duty of class counsel runs to the class. The Advisory Committee Note to the current Rule 23 amendments states the point plainly: “Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it.”<sup>127</sup> Although a class is likely to include members with some conflicting interests,<sup>128</sup> the class action procedure provides sufficient benefit to class members that some tolerance of conflicts is justified, as long as proper incentives and procedural safeguards are in place to protect the interests of class members.

#### A. Client Autonomy at Outset

##### 1. Class actions: notice, opt-out, and opt-in.

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oneself from the heartbreaking reality of why I do what I do for a living.” MacDonald Interview (cited in note 64).

<sup>122</sup> See Model Rules of Professional Conduct 1.7-1.11. See also Model Rule of Profession Conduct 1.7, comment 1-4 (addressing issues of loyalty to clients).

<sup>123</sup> See Model Rule of Professional Conduct 1.1.

<sup>124</sup> See Model Rule of Professional Conduct 1.3.

<sup>125</sup> See Model Rule of Professional Conduct 1.4.

<sup>126</sup> Model Code of Professional Responsibility, Canon 7. See also Model Rule of Professional Conduct 1.3, comment 1 (“A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

<sup>127</sup> Proposed FRCP 23(g)(1)(B) Advisory Committee Note (May 20, 2002).

<sup>128</sup> See, for example, *Bash v Firstmark Standard Life Insurance Co*, 861 F2d 159, 161 (7th Cir 1988) (“[C]onflicts of interest are built into the device of the class action, where a single lawyer may be representing a class consisting of thousands of persons not all of whom will have identical interests or views.”).

Class members give up nearly all opportunity to control the litigation of their claims.<sup>129</sup> Before relinquishing autonomy, however, each plaintiff in a money damages class action is given a moment for autonomous decision-making. By the notice and opt-out opportunity afforded by Rule 23,<sup>130</sup> class members are offered a chance to decide whether to participate in the group effort. The Supreme Court has emphasized the importance of the opt-out opportunity as a requirement not only of Rule 23, but also of constitutional due process.<sup>131</sup>

A meaningful opt-out opportunity requires effective notice, and recent years have seen significant efforts to improve the readability of class notices. The 2002 proposed amendments to Rule 23 require that “notice must concisely and clearly state in plain, easily understood language” the nature of the action, the class definition, the right to appear through counsel, the right to opt out, and the binding effect of a judgment on class members.<sup>132</sup> The Federal Judicial Center has undertaken a project to improve the readability of class action notices by designing notices using plain language; lawyers can find the model notices at the Federal Judicial Center’s website.<sup>133</sup> Class action lawyers increasingly turn to experts for help in designing effective notice. Such experts not only bring their know-how to bear on the design of eye-catching and comprehensible notice forms, but also use their marketing expertise to plan a notice campaign targeted to reach as many class members as possible.

For the decision whether to participate in a class action, an opt-in process protects client autonomy more fully than the opt-out process of Rule 23, because the opt-out process sets class membership as the default. Indeed, opt-in class actions can be understood as a mass variation on permissive party joinder.<sup>134</sup> Although the opt-out version remains the norm, courts have certified class actions on an opt-in basis,<sup>135</sup> and

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<sup>129</sup> But compare *Devlin v Scardelletti*, 536 US 1 (2002) (holding that objecting unnamed class members may appeal).

<sup>130</sup> See FRCP 23(c). The notice and opt-out requirement of Rule 23(c) applies only to class actions certified under Rule 23(b)(3). Class actions certified under Rule 23(b)(1) or (b)(2), known as mandatory class actions, generally do not allow class members an opportunity to exclude themselves from the class. Because (b)(1) and (b)(2) class actions are best understood as special cases of compulsory party joinder, opt-out does not fit with the principles underlying them. Compare FRCP 23(b)(1) and 23(b)(2) with FRCP 19(a). This paper addresses non-class litigation for money damages that functions like class actions under FRCP 23(b)(3), and therefore treats opt-out as a fundamental requirement, despite the existence of other class actions in which opt-out is unavailable.

<sup>131</sup> See *Phillips Petroleum Co v Shutts*, 472 US 797 (1985) (holding that due process requires notice and opt-out opportunity for absent class members in a money damages class action). See also *Ortiz v Fibreboard Corp*, 527 US 815, 847-48 (1999) (citing *Shutts* for the proposition that “before an absent class member’s right of action was extinguishable due process required that the member ‘receive notice plus an opportunity to be heard and participate in the litigation,’ and we said that ‘at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class’”).

<sup>132</sup> Proposed FRCP 23(c)(2)(B).

<sup>133</sup> See Class Action Notices Page, <<http://www.fjc.gov/newweb/jnetweb.nsf/pages/376>> (visited Jan 30, 2003) [on file with U Chi Legal F].

<sup>134</sup> One appellate court addressing an opt-in class action referred to the litigation as “a form of permissive joinder of parties.” *Male v Grand Rapids Education Association*, 295 NW2d 918, 921 (Mich App 1980). Conceptualizing opt-in class actions as a mass variation on Rule 20 permissive party joinder provides a nice symmetry, inasmuch as mandatory class actions are best understood as mass variations on Rule 19 compulsory party joinder.

<sup>135</sup> See *Doe v United States*, 44 Fed Appx 499 (Fed Cir 2002) (addressing motion to intervene in a Federal Employees Pay Act lawsuit certified by the Court of Federal Claims as an opt-in class action); *Thiessen v*

certain federal statutes explicitly authorize opt-in class actions for civil proceedings.<sup>136</sup> A Philadelphia court offers a straightforward explanation of the difference between opt-out and opt-in class actions:

An “opt-out” class action refers to class actions where every member of the class is included in the class suit unless they file a written election to be *excluded* from the class. In short, you’re in unless you say you’re out. ...An opt-in class action, by contrast, refers to class suits where no one is included in the class unless they file a written election to be *included* in the class. In short, you’re out unless you say you’re in.<sup>137</sup>

Pennsylvania’s class action rule expressly authorizes opt-in class actions as an exception to the usual opt-out process.<sup>138</sup>

In 1995, the federal Advisory Committee on Civil Rules explored the idea of opt-in class actions, although ultimately the committee did not go forward with the proposal. In a draft of proposed amendments to Rule 23, Judge Sam Pointer offered a revision of the class action rule to permit either opt-in or opt-out processes, or neither, at the court’s discretion: “An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, *or included in*, the class.”<sup>139</sup>

The Pennsylvania class action rule authorizes opt-in class actions if “the individual claims are substantial and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation.”<sup>140</sup> In other words, if individual claims are substantial enough that plaintiffs

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*General Electric Capital Corp*, 267 F3d 1095 (10th Cir 2001) (reversing a decertification of an opt-in class action under the ADEA); *Sinyard v Commissioner of Internal Revenue*, T C Memo 1998-364 (Tax Ct Oct 7, 1998) (noting that “ADEA class actions generally constitute opt-in class actions”); *Male*, 295 NW2d 918 at 921-22 (requiring an opt-in procedure for a class action seeking refund of an allegedly illegal assessment on teachers); *Katlin v Tremolgie*, 43 Pa D & C 4th 373 (Phil Ct of Common Pleas June 29, 1999) (certifying an opt-in class action in case based on defendants’ failure to disclose that physician was unlicensed).

<sup>136</sup> See Fair Labor Standards Act, 29 USC § 216(b) (2000) (providing that an employer who violates the act “shall be liable to the employee or employees affected, but that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought”); Age Discrimination in Employment Act, 29 USC § 626(b) (2000) (expressly borrowing the procedures, including the opt-in mechanism, of the Fair Labor Standards Act).

<sup>137</sup> *Katlin v Tremolgie*, 43 Pa D & C 4th at 413-14 n 23.

<sup>138</sup> See Pa RCP § 1711(b) (authorizing opt-in, rather than opt-out, class action if “(1) the individual claims are substantial and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or (2) other special circumstances exist which are described in the order”).

<sup>139</sup> Draft Proposed FRCP 23(c)(1)(A) (1995) (on file with author) (emphasis added). The draft offered factors for courts to consider in deciding whether to certify an opt-in, opt-out, or mandatory class action. “The matters pertinent to this determination will ordinarily include: (i) the nature of the controversy and the relief sought; (ii) the extent and nature of the members’ injuries or liability; (iii) potential conflicts of interest among members; (iv) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and (v) the inefficiency or impracticality of separate actions to resolve the controversy.” *Id.*

<sup>140</sup> Pa RCP § 1711(b)(1).

realistically could choose to proceed individually, the rule permits a court to certify a class on an opt-in basis.<sup>141</sup>

Turning to non-class litigation, the logic of the Pennsylvania rule suggests the importance of giving plaintiffs a meaningful opportunity to decide whether to participate in a collective representation. While not all plaintiffs have business sophistication, plaintiffs in non-class litigation largely are those who sought counsel to pursue their claims, and by definition are those who asserted their claims on a non-class basis.<sup>142</sup>

## 2. Non-class collective representation: informed consent to conflict of interest.

In non-class collective representation, the notice and opt-out requirements of the class action rule do not apply, but legal ethics principles can provide a similar decision-making moment at the outset. To see how the rules of professional responsibility provide the equivalent of a class action opt-out opportunity, one first must recognize the potential conflicts between individual and group interests in collective representation. Next, one must recognize that *ex ante*, most plaintiffs in mass litigation would want their lawyer to focus on advancing collective rather than individual interests. Mass collective representation, then, involves potential conflicts between the client's individual interests and the interests of other clients, but notwithstanding those conflicts, a client rationally could expect the lawyer to advance the client's interests diligently and competently. In terms of legal ethics rules, this describes an easily recognizable situation: a Rule 1.7(a)(2) concurrent client-client conflict of interest, but one that is waivable under Rule 1.7(b).

Model Rule of Professional Conduct 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."<sup>143</sup> Rule 1.7(b) permits clients to consent to conflicts of interest under certain circumstances: "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a

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<sup>141</sup> In *Katlin*, which involved claims against an unlicensed physician and health care provider entities for failing to disclose that the physician was unlicensed. "Because some members of the class may have substantial claims," the court held, "an opt-in procedure is necessary to protect their interests." 43 Pa D & C 4th at 413.

<sup>142</sup> The same logic can be applied from the other direction. Money damages class actions involving negative value claims--i.e., claims on which the cost of litigation would exceed the expected recovery--should be permitted on an opt-out basis, rather than opt-in. As the Supreme Court explained in *Shutts*, 472 US at 812-13:

Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. . . . The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.

See also *Testa v City of Providence*, 572 A2d 1336, 1338 (RI 1990) (rejecting trial court's opt-in requirement in a class action involving average claims of thirty-two dollars for excessive sewer fees, noting that "an opt-in requirement would render this class action prohibitive, both economically and practically").

<sup>143</sup> Model Rule of Professional Conduct 1.7(a)(2).

lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ...and (4) each affected client gives informed consent, confirmed in writing.”<sup>144</sup>

Conflicts of interest inhere in collective representation. Unless the plaintiffs’ interests are perfectly aligned, which is rare, a lawyer representing multiple plaintiffs with related claims inevitably faces decisions about whose interests to advance. As Judge Jack Weinstein has explained with regard to mass tort litigation, “While the attorney representing a large number of clients might, in theory, be able to reach some approximation of the objectives of the group as a whole, that attorney cannot possibly account for the varying desires of individual members of the group.”<sup>145</sup> In mass litigation, any conflict between individual and group interests likely presents not only a concurrent client-client conflict, but also a concurrent client-lawyer conflict.<sup>146</sup> Plaintiffs’ lawyers’ fees, ordinarily tied to the size of the overall recovery for the group, give lawyers an economic stake in favoring group interests.

Even with similarly situated clients, conflicts arise between individual and group interests. Conflicts appear, for example, concerning whose case to bring to trial first. The first trial in mass litigation carries enormous strategic weight, not only in terms of publicity and momentum, but also because of the first judgment’s uniquely powerful potential to generate offensive non-mutual issue preclusion.<sup>147</sup> Suppose a client’s case is moving toward trial. The client desires a trial as soon as possible, perhaps because she needs prompt compensation, or because she has concerns about the unavailability of key witnesses with the passage of time. Her lawyer, however, knows that the particular client’s case is problematic and that the collective interests of the plaintiffs would be better served by delaying that case and speeding another to trial first.<sup>148</sup> Should the plaintiffs’ lawyer be permitted to advance aggregate interests by pushing a stronger case to trial before the problematic case?<sup>149</sup>

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<sup>144</sup> Model Rule of Professional Conduct 1.7(b).

<sup>145</sup> Weinstein, *Individual Justice* at 63.

<sup>146</sup> Rule 1.7(a)(2) addresses not only the risk that representation of a client will be materially limited “by the lawyer’s responsibilities to another client,” but also “by a personal interest of the lawyer.” Model Rule of Professional Conduct 1.7(a)(2).

<sup>147</sup> On the strategic importance of first trials for issue preclusion, see Erichson, *Interjurisdictional Preclusion*, 96 Mich L Rev at 952-54.

<sup>148</sup> The lawyers representing Betty Mekdeci, the first Bendectin plaintiff to go to trial, encountered this problem. After the first jury found against her, a new trial was granted on appeal. Mekdeci’s lawyers considered her case more problematic than some others, and wanted to postpone the retrial to allow other cases to go to trial first. When Mekdeci refused to postpone her trial, the lawyers unsuccessfully tried to withdraw from representing her. See *Mekdeci v Merrell National Lab*, 711 F2d 1510, 1516 (11th Cir 1983); see also Michael Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation* (Pennsylvania 1996). Professor Richard Marcus, looking at the *Mekdeci* case, suggests that coordinating lawyers’ duties to their own clients should be tempered by consideration of collective interests: “Mekdeci’s case provides some reason for feeling that client desires may legitimately be conditioned on the ‘greater good’ of the overall plaintiff group in some litigations involving multiple claimants.” Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 Iowa L Rev 231, 252-53 (1997).

<sup>149</sup> The ethical question I am raising here is the concurrent client-client conflict of interest between individual and group interests regarding the order of trials. The conflict can be understood in light of more particular duties owed to an individual client whose case may be delayed, including the duty of diligence and the duty to allow the client to determine the objectives of the representation. See Model Rules of Professional Conduct 1.3, 1.2. In addition to the potential conflict of interest, pushing one client’s case to

Another area of conflict between individual and group interests involves the confidentiality of discovery materials. In any individual plaintiff's case, the client may benefit by agreeing to whatever confidentiality provisions a defendant requests, because agreement eases the flow of discovery. The collective interests of the plaintiffs, however, are better served by resisting unreasonable confidentiality agreements and protective orders, to maintain the ability of plaintiffs' lawyers to share information concerning the litigation. May the lawyer advance aggregate interests by resisting overprotective confidentiality provisions, or by negotiating a clause in the confidentiality agreement that permits sharing among plaintiffs' lawyers handling similar cases?

Indeed, when a lawyer represents a large group of plaintiffs, conflicts may arise with regard to a wide range of litigation decisions. Some of these conflicts simply involve prioritizing among litigation objectives. In discovery, for example, a lawyer must decide which information to seek first or most aggressively. May a lawyer focus first on information needed for the many, rather than on information needed for an individual?

In most of these situations, the multiple representation ought to be permitted with client consent. Under the conflict of interest rules, a lawyer may seek client consent to a concurrent conflict of interest if the lawyer reasonably believes that she can "provide competent and diligent representation to each affected client."<sup>150</sup> Given the advantages of collective representation--the economies of scale, higher investment, and enhanced settlement position--lawyers should be able to provide representation that is *more* competent and *more* diligent by virtue of collective strength. If the lawyer can serve clients competently and diligently by working to advance the interests of the group as a whole, then informed consent is permitted under Rule 1.7(b).

The answer to the conflict of interest question implies an answer to the loyalty question. The reason to permit the multiple representation is that the strength of collective representation permits a lawyer to represent clients effectively notwithstanding potential conflicts. Therefore, the lawyer representing a massive number of similarly situated clients ought not strive to maximize each client's autonomy in the course of the litigation, but rather ought to strive to maximize the interests of the group as a whole.<sup>151</sup>

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trial ahead of others represented by the same lawyer raises a number of other ethical issues. In particular, any effort to delay weaker cases to allow passing room for stronger ones encounters important ethical and procedural limitations. Federal Rule of Civil Procedure 11, for example, permits sanctions if a paper is "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FRCP 11(b)(1). Federal law also authorizes courts to impose costs and fees on an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." 28 USC § 1927. Model Rule of Professional Conduct 3.1 prohibits frivolous proceedings, assertions, or controvertions, and Model Rule 3.2 requires that lawyers "make reasonable efforts to expedite litigation consistent with the interests of the client."

Nevertheless, as I have addressed elsewhere in connection with issue preclusion strategy, "there remains ample room for practitioners to retard or expedite the process. Delay comes not only from ethically questionable stalling tactics and does not require explicit adjournments. Delay comes, for example, from each nonfrivolous but nonessential motion. It comes from full relevant discovery where partial discovery might suffice. Delay comes from demanding a jury rather than bench trial, from forum-shopping for a crowded docket, and any of a host of other litigation maneuvers." Erichson, 96 Mich L Rev at 953 n.30.

<sup>150</sup> Model Rule of Professional Conduct 1.7(b)(1).

<sup>151</sup> Thomas Shaffer and Robert Cochran, in their book on lawyer-client moral discourse, make the case for engaging clients in discussion concerning both the objectives and the means involved in the representation. See Thomas L. Shaffer and Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* (1994). They offer a conception of the lawyer-client relationship as one that respects and enhances client decision-

In each of the situations described above, if the representation of multiple plaintiffs is permitted, then the lawyer representing them ought to make the decisions that best advance the interests of the group as a whole. After all, the conflict exists in both directions, so a lawyer cannot avoid the conflict simply by favoring a client's individual interests over the group's. If the lawyer chooses to advance an individual client's interests at the expense of the group, she breaches her duty of loyalty to the other clients in the group. Given a situation in which any decision favors some clients' interests over others, the sounder ethical course for the lawyer is to advance the overall interests of the group.<sup>152</sup>

The alternative is for lawyers to refuse to represent multiple similarly situated plaintiffs because of the potential conflicts. In other words, as a matter of legal ethics, the conflict could be deemed disqualifying and unwaivable. Disqualification, however, deprives clients of their chosen counsel. In mass litigation, clients choose established counsel not *despite* counsel's long list of similarly situated clients, but *because* of it. Many plaintiffs benefit from the expertise, experience, resources, and bargaining power of lawyers with substantial inventories of claims. If the clients would give informed consent because they are likely better off with collective representation than without it, then as a matter of legal ethics it is hard to justify depriving plaintiffs of that choice.

Rarely, however, do mass litigators seek their clients' consent to the inherent client-client conflicts of interest in mass collective representation. Lawyers' failure to obtain client consent is driven in part by skepticism about the ability of clients to understand the inherent conflicts, which seem less concrete and immediate than client-client conflicts in other contexts, and a concomitant skepticism concerning the usefulness and enforceability of client waivers.<sup>153</sup>

"Informed consent"<sup>154</sup> requires the lawyer to give clients the information they need in order to make an informed decision concerning whether to go forward with

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making. The mass plaintiffs' lawyer I envision in this paper, I fear, may fit their uncomplimentary description of the Lawyer as Godfather. "Godfather lawyers either decide what their clients' interests are, without consulting their clients, or they persuade their clients to accept lawyers' views on what their interests are." *Id.* at 8. While in most contexts I agree with Shaffer's and Cochran's conception of the ideal lawyer-client relationship, I worry that it would disserve most plaintiff clients in mass litigation. In mass representation, the moment for engaging in discourse with the client concerning the objectives and means of the representation is at the outset, and not ordinarily during the course of litigation and negotiation. Those clients who prefer a lawyer-client relationship with ongoing client autonomy, and who are willing to forgo some of the advantages of group representation, ought not to retain the lawyer with a massive inventory of clients. This moment of autonomous client decision-making at the outset is what can be achieved with the conflict waiver procedure this paper outlines in Part III.

<sup>152</sup> A more difficult conflict of interest question is presented by collective representation in the form of counsel coordination in formally or informally aggregated litigation. See Erichson, *Informal Aggregation*, 50 *Duke L J* at 430. Lawyers involved in common interest agreements with aligned counsel may face concurrent conflicts of interest even if they do not form any client-lawyer relationship with the coordinating lawyers' clients. Contractual or agency duties to coordinating lawyers may give rise to conflicts of interest under Rule 1.7(a)(2) by creating a risk that a lawyer's representation of her own client will be "materially limited by the lawyer's responsibilities to . . . a third person." Model Rule of Professional Conduct 1.7(a)(2). Compare ABA Committee On Professional Ethics and Grievances, Formal Op. 395 (1995).

<sup>153</sup> Telephone interview with Paul D. Rheingold, Esq., (November 13, 2002).

<sup>154</sup> The Ethics 2000 Commission brought the term "informed consent" into the Model Rules, especially the rules governing conflicts of interest, with the following definition: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate

retaining the lawyer notwithstanding a potential conflict of interest. A lawyer handling mass litigation should inform the client that the lawyer represents a large number of similar plaintiffs, or that she is coordinating closely with other lawyers in the litigation. She should further inform the client that such collective representation offers a number of advantages that benefit the plaintiffs as a group, but may involve trade-offs that do not work to the advantage of each plaintiff individually. She should explain that potential conflicts may arise between group interests and the client's individual interests, and that the lawyer intends to resolve such conflicts in favor of pursuing group interests.<sup>155</sup> Armed with information about the collective representation, its advantages, and its inherent conflicts of interest, clients should have the opportunity to decline the representation under those terms, and instead to seek separate counsel.

A careful agreement not only would inform the client of the potential conflicts of interest, but also would function as an express limitation on the scope of representation.<sup>156</sup> If a lawyer intends to pursue litigation to maximize the interests of a group of plaintiffs, then the client should understand that the lawyer intends to represent the client as part of the group, and not to the extent the individual client's interests significantly diverge from the group's. In seeking the client's informed consent not only to the conflict of interest, but also to the limitation on the scope of representation, the lawyer should be sure the client understands that mass collective representation differs from the traditional individual lawyer-client relationship.

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information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule of Professional Conduct 1.0(e).

<sup>155</sup> One California firm that represented numerous individual plaintiffs suing over the release of a toxic chemical from a refinery included the following language in its retainer agreement for that litigation:

Attorneys may represent other persons damaged by the releases mentioned herein and Client understands that such multiple representation has advantages, but also may give rise to potential conflicts of interest of which Client is hereby advised. Each person's recovery may depend on factors such as age, severity of injury, extent of medical treatment, amount and duration of exposure, pre-existing health condition. Despite such potential conflicts of interest Client believes the advantages of multiple representation outweigh any potential disadvantage and hereby waives any and all conflicts of interest that may arise from such multiple representation. Client acknowledges that Client has had the opportunity to discuss the question of conflict of interest with Attorneys and that this waiver is made after all questions have been fully answered.

*Ferguson v Meadows*, 2002 WL 31033065, \*1 (Cal App Sept 12, 2002) (unpublished) (quoting retainer agreement), review granted (Cal Dec 18, 2002). While ideally the agreement should explain more clearly the types of inter-plaintiff conflicts that may arise during the litigation, this retainer agreement embodies the general spirit of what I am advocating: disclosure of the potential conflicts in collective representation and informed consent by the client. In the *Ferguson* case, the court pointed to this language, among other things, in affirming summary judgment for the firm in a legal malpractice action brought by a pair of dissatisfied clients whose claims had been absorbed into a mandatory class action. See *id.*

<sup>156</sup> See Model Rule of Professional Conduct 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."). Compare *Indianapolis Podiatry PC v Efrogymson*, 720 NE2d 376, 381 (Ind App 1999) (noting that "the extent of disclosure to a client required when the scope of representation is being limited is similar, if not identical, to that required in the context of a conflict of interest"); *Hartford Acc & Indem Co v Foster*, 528 So 2d 255, 289 (Miss 1988) (Robertson, dissenting) (noting that lawyer, with client consent, may limit the scope of representation to represent client only to the extent there is no conflict between the client and another, where the conflict is inchoate at the outset of the representation).

With honest information concerning the lawyer's intent to pursue collective interests, most clients would consent to the collective representation. And they should. For most plaintiffs in mass litigation, the wiser course is to retain a lawyer who is part of a coordinated group effort, or who serves a sufficient number of clients to obtain the benefits of collective representation. In mass litigation, collective representation tends to level the field against powerful defendants. Plaintiffs with negative value claims virtually always would prefer collective representation, but many other plaintiffs maximize the value of their claims by litigating collectively as well.

A small number of plaintiffs, however, would decline the collective representation and seek individual representation. And they should. Some plaintiffs possess sufficiently high-stakes claims to justify substantial litigation investment. These clients rationally can consider whether individual or collective representation will maximize their recovery. Individuals with divergent preferences concerning autonomy and the client-lawyer relationship, too, might decide to favor individual representation if they can find lawyers willing to take their cases.

By treating the inevitable priority-setting and aggregate focus of collective representation as waivable concurrent client-client conflicts of interest, lawyers can give each client an opportunity to decide whether the relinquishment of autonomy makes sense in terms of that client's opportunities and preferences. In effect, non-class collective representation, if each client gives informed consent to the concurrent client-client conflicts, functions like an opt-in class action.

Within collective representation, some conflicts do not pit an individual against the larger group, but rather subgroup against subgroup. To understand such inter-subgroup conflicts, we naturally turn to the treatment of subclasses in class actions. In certifying a class action, a court may certify subclasses to address conflicts within the larger class.<sup>157</sup> The Supreme Court, in *Amchem* and *Ortiz*, encouraged greater use of subclassing by striking down the settlement class actions in those cases in part for their failure to provide separate representation for subgroups with divergent interests.<sup>158</sup> The Court emphasized that class actions must provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected."<sup>159</sup>

Looking to the law of class actions for guidance on how to treat non-class collective representation, one might think that any conflict that would require subclassing should constitute an unwaivable conflict of interest. In other words, if an inter-subgroup conflict would prevent a lawyer from representing two subgroups collectively by the class action mechanism, then arguably the conflict should prevent a lawyer from representing them by non-class collective representation. This, however, would be a mistake. The coherence required for a class action differs from the lack of conflicts required for multiple representation. Because class actions bind absent class members, they require greater coherence.<sup>160</sup> In this regard, individual informed consent to potential

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<sup>157</sup> See FRCP 23(c)(4)(B) ("When appropriate ... a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.").

<sup>158</sup> See *Ortiz v Fibreboard Corp*, 527 US 815 (1999); *Amchem Prods v Windsor*, 521 US 591 (1997).

<sup>159</sup> *Amchem*, 521 US at 627.

<sup>160</sup> In terms of the general prerequisites for class certification, Rule 23 demands coherence through the requirements of commonality, typicality, and adequacy of representation. See FRCP 23(a)(2)-(4). In addition, Rule 23(b)(3) class certification involves the additional requirements that common questions

conflicts of interest should make it possible, in some circumstances, for attorneys to represent groups of plaintiffs with generally aligned but somewhat conflicting interests, even where those conflicting interests would make it impossible to represent the larger group in a single class action without subclasses.

Serious inter-subgroup conflicts, however, may be disqualifying and unwaivable. Lawyers do not enjoy an unlimited right to seek clients' consent to conflicts of interest. The conflict of interest rules expressly limit informed consent to situations in which the lawyer has an objectively reasonable belief that, notwithstanding the conflict, she can represent each client competently and diligently.<sup>161</sup> Group conflicts that would prevent the attorney from giving sound representation to each subgroup are impermissible, regardless of informed consent. Such conflicts are distinguishable from less serious inter-subgroup conflicts, and are distinguishable as well from conflicts between the individual and the group that inhere in collective representation but are undifferentiated *ex ante*.

Given the potential conflicts between individual and group interests in mass collective representation, one might ask, why not require judicial approval for undertaking such representation?<sup>162</sup> One could imagine a rule prohibiting mass collective representation in the absence of court approval. In other words, rather than look to the class *opt-out* process, why not look instead to the class *certification* process?<sup>163</sup>

Addressing collective representation problems under the conflict of interest rules promises to be more workable than a compulsory judicial approval process. The highly contextual line-drawing in this realm lends itself initially to a lawyer-centered rather than court-centered solution. On a small scale basis, lawyers often represent multiple parties with related claims, such as two passengers suing a taxi company for injuries sustained due to negligent driving. No one contends that such representation automatically should trigger a need for judicial approval. Rather, we rely on the lawyer to consider whether the multiple representation is permitted under conflict of interest rules.<sup>164</sup> In general, judicial consideration of such multiple representation comes only if an opposing party moves to disqualify counsel based on the conflict. To the extent one might propose requiring judicial approval for mass collective representation but not for smaller scale multiple representation, it presents a difficult line-drawing problem. Instead of two taxicab passengers, the clients may be two dozen bus passengers, two hundred hotel fire victims, or two thousand persons exposed to a toxic product. At what point does the representation become a mass collective representation requiring judicial approval? The question cannot be answered numerically, because the extent of collective representation

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predominate over individual ones, and that the class action be a superior means of handling the litigation. See FRCP 23(b)(3).

<sup>161</sup> Model Rule of Professional Conduct 1.7(b)(1). Regardless of consent, a lawyer may not represent a client if the representation involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Model Rule of Professional Conduct 1.7(b)(3).

<sup>162</sup> In invoking judicial supervision to address problems of mass collective representation, this suggestion relates to the idea of judicial approval of settlements and fees in collective representation. See text accompanying note 31.

<sup>163</sup> See FRCP 23(c) (describing the class certification process).

<sup>164</sup> For example, if the potential clients were not two taxi passengers, but rather an automobile passenger and driver both suing the driver of another car, then the lawyer would have to consider the conflict of interest created if the passenger has a claim against the driver of her own car. See Model Rule of Professional Conduct 1.7.

depends on how closely related the claims are, which varies widely. To the standard objection that all of law involves line-drawing, and that boundary problems do not render distinctions meaningless,<sup>165</sup> it should be noted that this line-drawing problem is not limited to how courts should decide the issue. Rather, this problem involves whether a lawyer must seek judicial approval at all. It is particularly problematic to put lawyers in the position of not knowing whether or not they need judicial approval in order to proceed with a representation. By contrast, for purposes of class certification, the class action rule provides a neat line requiring certification if an action is to be treated explicitly as representative litigation. While a central point of this article is that in practice the line between class and non-class litigation is not as neat as it appears to be, that does not change the fact that the class action rule requires class certification only for explicitly representative litigation.

By treating collective representation in terms of conflicts of interest, rather than in terms of compulsory judicial approval, we avoid the need to make “mass collective representation” a defined term. The lawyer representing multiple similarly situated clients--whether two or two thousand--must consider whether the representation creates a conflict of interest, and faces a risk of disqualification or disciplinary sanctions for proceeding with a prohibited representation or, if the conflict may be consented to, for proceeding without the clients’ informed consent.

## B. Client Autonomy at Settlement

### 1. Class actions: settlement opt-out.

In addition to the opt-out right at the outset of class representation, class members may receive an equally significant moment of autonomy: the decision whether to opt out of a class settlement. Sometimes, this occurs by a back-end opt-out opportunity in a litigation class action, in which class members are given a second opportunity to opt out of the class after seeing the terms of a settlement. More often, class members’ opportunity to exclude themselves from a settlement with knowledge of the settlement terms comes in settlement class actions.

The 2002 proposed amendments to the federal class action rule, at Rule 23(e)(3), explicitly authorize courts to permit a second opt-out opportunity upon approval of a class settlement: “In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”<sup>166</sup> The Advisory Committee Note adds that an “agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement.”<sup>167</sup> The second opt-out rule represents part of a broader trend in class action litigation toward

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<sup>165</sup> See H.L.A. Hart, *The Concept of Law* 121-50 (Oxford 1961).

<sup>166</sup> Proposed FRCP 23(e)(3) (May 20, 2002).

<sup>167</sup> Proposed FRCP 23(e)(3), Advisory Committee Note (May 20, 2002). The note adds a sensible suggestion to prevent misuse of the second opt-out: “The court might direct . . . that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval.” *Id.*

multiple and back-end opt-outs,<sup>168</sup> and it relates as well to recent academic literature on the importance of exit rights as safeguards in class actions.<sup>169</sup> By permitting class members in some cases to decline a settlement by opting out of the settled class action, the proposed rule recognizes the importance of autonomy in settlement decisions. It also demonstrates a way to enhance autonomy without offering any increased role in the pursuit of the collective litigation.

Settlement class actions provide a more common setting for settlement opt-outs. In a settlement class action, the terms of the settlement are agreed upon before class certification is sought. Thus, in any settlement class action certified under Rule 23(b)(3), class members may decide whether or not to participate in the settlement, simply by exercising their initial opt-out right.<sup>170</sup> The Advisory Committee Note to proposed Rule 23(e)(3) acknowledges that the rule does not affect Rule 23(b)(3) settlement class actions, in which settlement opt-out occurs by definition.<sup>171</sup> Settlement class actions emerged and grew in the 1980s and 1990s,<sup>172</sup> and remain viable notwithstanding the Supreme Court's rejection of two asbestos settlement class actions in *Amchem*<sup>173</sup> and *Ortiz*.<sup>174</sup>

## 2. Non-class collective representation: informed consent to aggregate settlement.

Conflicts of interest among collectively represented clients may arise during settlement negotiations, even in the absence of apparent conflicts of interest at the outset of representation. A recent ABA Litigation Section report described the problem:

Even when the lawyer's initial conclusion that multiple clients can be represented was well-founded, however, consideration later of possible settlement options can generate circumstances where interests emerge as potentially divergent, if not actually conflicting. Conflicts can arise from differences among clients in the strength of their positions or the level of their interest in settlement, or from proposals to treat clients in different ways or to treat differently positioned clients in the same way.<sup>175</sup>

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<sup>168</sup> For an interesting analysis of the multiple opt-out provisions in the diet drugs settlement class action, see Nagareda, 115 Harv L Rev 747.

<sup>169</sup> See, for example, Coffee, 100 Colum L Rev 370.

<sup>170</sup> Thus, in the settlement class action rejected in *Amchem Products, Inc v Windsor*, 521 US 591 (1997), which was certified under Rule 23(b)(3), plaintiffs could opt out after learning the terms of the settlement. By contrast, in the settlement class action rejected in *Ortiz v Fibreboard Corp*, 527 US 815 (1999), which was certified under Rule 23(b)(1)(B), plaintiffs had no right to opt out.

<sup>171</sup> See Proposed FRCP 23(e)(3), Advisory Committee Note (May 20, 2002) ("Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication.").

<sup>172</sup> On the rapid growth of settlement class actions, see Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 Geo L J 1983, 1996-97 (1999).

<sup>173</sup> *Amchem Products v Windsor*, 521 US 591 (1997).

<sup>174</sup> *Ortiz v Fibreboard Corp*, 527 US 815 (1999).

<sup>175</sup> ABA Litigation Section, Ethical Guidelines for Settlement Negotiations (Aug 2002).

Particularly when settlement of multiple clients' claims is negotiated as a lump sum, or when individual settlements are made mutually contingent, conflict of interest cannot be avoided. The law governing lawyers has long recognized this problem, and addressed it by the aggregate settlement rule.<sup>176</sup> Model Rule of Professional Conduct 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 or pleas involved and of the participation of each person in the settlement.<sup>177</sup>

The aggregate settlement rule, though stated specifically at Rule 1.8(g), could be derived by straightforward application of several more general rules governing conflicts of interest,<sup>178</sup> the duty to inform and advise,<sup>179</sup> and the rule protecting the client's autonomy to determine the objectives of the representation and, specifically, to determine whether to accept or reject a settlement.<sup>180</sup>

Under the aggregate settlement rule, a lawyer negotiating a settlement on a collective basis<sup>181</sup> must get each client's informed consent to that client's participation in the settlement. The client's right to decide whether to accept or decline a settlement offer, in other words, must not be diminished by the collective negotiation of settlement terms. In this way, block settlements should resemble opt-out settlement class actions, or class settlements with a back-end opt-out. If negotiations in non-class litigation result in a massive block settlement in which the defendant agrees to be bound by the settlement only if 90 percent of the plaintiffs accept it, application of the aggregate settlement rule leaves the settlement roughly resembling an opt-out settlement class action with a defendant walk-away provision.

Professors Charles Silver and Lynn Baker have urged that clients be permitted ex ante to waive their right under Rule 1.8(g) to reduce the risk of extortionate hold-outs.<sup>182</sup>

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<sup>176</sup> See Model Rule of Professional Conduct 1.8(g); Model Code of Professional Responsibility DR 5-106. See also *Abbott v Kidder Peabody & Co*, 42 F Supp 2d 1046 (D Colo 1999) (holding "steering committee" arrangement, in which committee could enter binding settlement on behalf of all, void as against public policy because it deprived individual clients of the right to control their cases); *Arce v Burrow*, 958 SW2d 239 (Tex Ct App 1997) (holding settlement of hundreds of claims involving a plant explosion to violate aggregate settlement rule); *Quintero v Jim Walter Homes*, 709 SW2d 225 (Tex App 1986) (holding aggregate settlement for several hundred clients void under rule).

<sup>177</sup> Model Rule of Professional Conduct 1.8(g).

<sup>178</sup> Model Rule of Professional Conduct 1.7.

<sup>179</sup> Model Rule of Professional Conduct 1.4.

<sup>180</sup> Model Rule of Professional Conduct 1.2(a). See also Fred C. Zacharias, Limits on Autonomy in Legal Ethics Regulation, 81 BU L Rev 199, 214-15 (2001) ("[T]he aggregate settlement rule of 1.8(g) has as its core concern that each client render a personal decision on whether to accept a joint settlement.... The rule implements autonomy on the assumption that, once the individual is fully informed, there is no reason to question the client's choice.").

<sup>181</sup> For an analytical description of various forms of aggregate settlements, see text accompanying notes 36-37.

<sup>182</sup> Charles Silver and Lynn Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L Rev 733 (1997); see also Charles Silver and Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 Va L Rev 146 (1998).

It is important for clients to retain the right to decline an aggregate settlement, however. Several advantages follow from giving each client the right to accept or reject that client's individual share of a settlement negotiated for the group, and the hold-out risk is lower than Professors Silver and Baker suggest.

The client's right to reject a settlement maintains an important incentive on lawyers to negotiate adequate settlements.<sup>183</sup> One monitoring effect on counsel goes to the adequacy of the overall settlement amount.<sup>184</sup> This affects both plaintiffs' counsel and defendants. Plaintiffs' counsel and defendants share an interest in maximizing the number of plaintiffs who accept the negotiated group settlement. To the extent defendants negotiate a walk-away provision, it contributes to the pressure on plaintiffs' counsel to make sure the settlement will appeal to plaintiffs.

An even more important monitoring effect on counsel goes to the lawyers' incentive to allocate settlements fairly. Beyond the adequacy of the total settlement, individual allocations matter for horizontal equity and its inverse, i.e., the propositions that plaintiffs with equal claims should receive equal amounts under the settlement, and plaintiffs with unequal claims should receive proportionally unequal amounts. This is more important than the monitoring effect as to overall size of settlement, because plaintiffs' counsel's incentive is tied to overall settlement amount. Plaintiffs' counsel on contingent fee, like class counsel anticipating a percent-of-outcome fee award,<sup>185</sup> seeks to maximize the aggregate settlement amount, but if plaintiffs are not free to reject their settlements, counsel has little financial incentive to ensure that each plaintiff receives an equitable allocation of that sum based on the strength of the claim and the degree of harm.

Worse yet, plaintiffs' counsel may have financial interests that conflict with equitable allocation of the settlement. Attorney Paul Rheingold explains the potential client-lawyer conflicts:

A law firm with a large inventory has some cases referred to it, whereby it has to give up a forwarding fee. Other cases came directly from the client. The more the settlements are paid to those who have no forwarder, the more the law firm makes. The law firm will, therefore, be more inclined to favor those clients who came directly to the law firm. Other examples of

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<sup>183</sup> Other mechanisms can help protect clients' interest in fair settlements. For example, special masters often are assigned to devise settlement allocations in mass litigation. Similarly, judicial supervision of settlement processes and judicial approval of settlements can offer some protection. This paper's focus on conflict of interest law, particularly the aggregate settlement rule, as a mechanism for protecting clients' interest in equitable settlement allocations, should not be taken as a rejection of other safeguards. As noted earlier, a productive avenue of inquiry may be to consider whether non-class collective litigation would benefit from judicial supervision of settlements and fees along the lines of such supervision in class litigation. See text accompanying notes 31-32. However, requiring judicial approval of settlements in mass collective representation would raise line-drawing issues that are avoided by treating the issue under the law governing conflicts of interest. See text accompanying note 162-165.

<sup>184</sup> In terms of incentives on plaintiffs' lawyers, contingent percentage fees encourage maximization of the total recovery. Plaintiffs' right to reject the settlement reinforces this incentive for their lawyers, and adds an incentive for defendants to negotiate a settlement that is sufficiently attractive to plaintiffs.

<sup>185</sup> See Report of the Third Circuit Task Force on Court-Awarded Attorneys' Fees (1985).

favoring one client over another include favoring a “squeaky wheel” client, favoring a relative, or favoring a friend of the family.<sup>186</sup>

A similar conflict may arise if lawyers use a sliding scale contingent fee,<sup>187</sup> rather than a fixed percentage. If the fees will be paid on a decreasing scale, then the lawyer has an incentive to spread settlements more evenly by reducing the allocations for plaintiffs with the strongest claims, in order to keep individual settlements under certain break points. Even in the absence of any particular incentives contrary to fair allocation, it is problematic that without the aggregate settlement rule, clients have little power to monitor their lawyer’s work with regard to settlement allocation.

If the client retains the right to reject the client’s portion of an aggregate settlement, however, then the lawyers have a strong incentive to allocate fairly. This monitoring effect, too, works on both plaintiffs’ counsel and the defendant. In fact, it works significantly more strongly on the defendant. If plaintiffs cannot individually decline their settlements, then the defendant cares only about the aggregate amount. If plaintiffs retain the power to decline their settlements, however, then a defendant faces a powerful incentive to make each plaintiff’s individual settlement allocation appealing enough for the plaintiff to accept. If a defendant reaches a fair overall settlement sum with plaintiffs’ counsel based on arms-length negotiations, but fails to ensure an equitable allocation among the plaintiffs, then it is the defendant who is penalized primarily. Most of those plaintiffs who receive an over-allocation would accept the settlement, while most of those who get an under-allocation presumably would reject it. The defendant would end up overpaying the plaintiffs in the settlement, and facing a stream of claims from those who expect more. Thus, the defendant has every incentive to work with plaintiffs’ counsel to ensure an equitable allocation. Clients’ retention of power to reject settlements individually provides the best assurance of arms-length negotiations that go not only to the aggregate amount, but also to individual allocations. In contrast to other contexts in which the aligned incentives of defendants and plaintiffs’ counsel work to the disadvantage of plaintiffs,<sup>188</sup> in this context, the aligned incentives work to protect plaintiffs from careless or unfair allocations.

In addition to providing a monitoring effect on the negotiating lawyers, client autonomy at settlement enables clients to effectuate individualistic preferences. Even assuming perfect equity in the allocation of settlement funds, taking into account the strengths of claims, some clients may rationally choose to accept the settlement while others rationally choose to reject it, based on different approaches to settlement decision-making, different levels of risk tolerance, and different objectives and priorities in the litigation. Plaintiffs have different levels of risk aversion, for example. Plaintiffs with a high tolerance for risk may rationally decline a settlement that most plaintiffs would accept; the group lawyer may reasonably negotiate and recommend a settlement that most clients would find acceptable, based on average risk aversion. Plaintiffs’ objectives vary as well, with many seeking to maximize their monetary recovery, but others preferring

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<sup>186</sup> See Paul Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 *Loyola LA L Rev* 395, 396-97 (1998).

<sup>187</sup> See, for example, NJ Ct R 1:21-7 (imposing statutory contingent fee cap for tort cases on a downward sliding scale).

<sup>188</sup> See Erichson, 87 *Geo L J* at 2002-03 (discussing the risk of collusion in settlement class actions).

injunctive relief. While some clients may avoid collective representation from the outset because they know that they wish to pursue primarily institutional change or other non-monetary relief, such preferences may be difficult to anticipate *ex ante*. The client's individual right to accept or reject a collectively negotiated settlement maintains the most critical aspect of client autonomy without unduly restricting counsel's freedom to pursue collective interests during the course of the litigation and negotiation.

As to the risk that plaintiffs will withhold their consent to an aggregate settlement to extort a premium, it should not present a significant problem unless defendants insist on all-or-nothing package settlement deals.<sup>189</sup> The holdout plaintiff's extortion leverage depends on the power to undermine the deal. If the deal goes forward for the remaining parties notwithstanding one plaintiff's rejection of the settlement, that plaintiff's holdout power is negligible. While all-or-nothing settlements are known to be used, conscientious application of the aggregate settlement rule should render such packages generally unappealing to both plaintiffs' counsel and defendants, because of the risk that a rejection would void the settlement. Total peace is more than defendants can reasonably expect from a settlement in most circumstances. Thus, walk-away provisions generally do not require 100 percent acceptance of the settlement.<sup>190</sup>

Contrary to the opinion of those who view the aggregate settlement rule as suited only to small-scale multi-party settlements,<sup>191</sup> Rule 1.8(g) serves valuable functions in mass collective representation. The mass context, however, requires interpretation of the rule with sensitivity to the special concerns of mass litigation and settlement. For mass settlements, Rule 1.8(g) should be interpreted in light of the resemblance between a non-class mass settlement and a settlement class action or a litigation class action with settlement opt-out.<sup>192</sup> In particular, the rule's requirement that "disclosure shall include the existence and nature of all the claims ... involved and of the participation of each

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<sup>189</sup> On the various structures of block settlements, see text accompanying notes 49-52.

<sup>190</sup> See Rheingold, ATLA Annual Convention Reference Materials at 478 (July 2002) ("Knowledgeable counsels will not paint themselves into a corner whereby all of their clients must agree to the plan. Given human nature and the variable way people see the world, it is predictable that not all clients will take a predetermined offer, no matter its seeming reasonableness."). Rheingold notes that a "figure of 90 percent acceptance has been used." *Id.*

<sup>191</sup> See, for example, Fred Misko, Jr., A Professional Responsibility Checklist for the Class Action and Mass Tort Practitioner, University of Texas School of Law Ethics and Mass Torts Symposium (1998) ("While consulting with and gaining the unanimous consent of several plaintiffs is relatively manageable, doing the same where there are hundreds or thousands of plaintiffs in a mass tort case can be an extremely difficult and expensive undertaking."); Rheingold, ATLA Annual Convention Reference Materials, at 477 ("One could accommodate to this rule if one were representing two passengers in an automobile accident. But how about 1000 persons, spread all over the country? ... As many people have recognized, the ethics codes are out of date when it comes to mass tort.").

<sup>192</sup> In some cases involving massive aggregate settlements, courts have declined the find violations, especially where procedural safeguards resemble class action procedure. See *In re Polybutylene Plumbing Litig.*, 23 SW3d 428 (Tex Ct App 2000) (finding no violation of rule by non-class aggregate settlement of approximately 60,000 mass tort claims brought by single firm, in which a special master approved the allocation formula); *Matter of an Anonymous Member of the South Carolina Bar*, 377 SE2d 567 (SC 1989) (declining to discipline attorney representing numerous clients in environmental tort litigation, despite failure to comply with strict requirements of aggregate settlement rule). See also *Scamardella v Fausto Illiano*, 727 A2d 421 (Md Ct of Spec App 1999) (finding that aggregate settlement did not violate Rule 1.8(g), despite failure to inform individual plaintiffs of distribution, because settlement represented maximum potential recovery).

person in the settlement” should not apply in mass litigation precisely as it does in smaller cases. In an aggregate settlement of a case involving three passengers suing a driver, each passenger should know how much money each of the other two would receive in the settlement. In mass representation, however, it should suffice to disclose the information a client reasonably needs in order to decide whether to accept the settlement, such as the total amount of the settlement, the number of plaintiffs, and any formula or grid used in calculating settlement amounts. It ordinarily should not be necessary, in mass representation, to disclose each individual name, injury, and amount. Disclosure of detailed individual information infringes on client confidentiality to an extent unjustified by the purposes of the aggregate settlement rule. Rather, the Rule 1.8(g) disclosure in mass non-class settlements should be treated more like notice in a settlement class action, which provides the information a reasonable client would need in order to decide whether to opt out.

By complying with the aggregate settlement rule, flexibly construed in light of the similarities between collective litigation and class actions, lawyers in non-class litigation should give each client a meaningful opportunity to decide whether to participate in a settlement that has been negotiated on behalf of a group. In this regard, a settlement resulting from collective representation may be treated as an opt-in settlement class action, perhaps with a defendant walk-away provision.

## CONCLUSION

Mass litigation often proceeds with clients collectively represented by counsel, with or without the formal procedural recognition of class certification. While class actions retain the distinction of binding absent class members, non-class collective representation resembles class actions in the critical respect that plaintiffs depend upon counsel over whom they have little control and whose loyalty is directed to group interests.

Most, but not all, plaintiffs whose claims fall within a mass litigation prefer to pursue claims collectively, even in the absence of a class action. Collective representation offers several advantages for plaintiffs facing defendants who ordinarily command greater resources and invest heavily in defense. By combining the stakes of many plaintiffs, collective representation provides group lawyers sufficient incentive to invest heavily in the litigation. It allows lawyers to take advantage of economies of scale, reducing the per-plaintiff cost of litigating. In addition, collective representation often enhances plaintiffs’ bargaining leverage. In sum, collective representation--whether by gathering clients or by coordinating with other counsel, and whether by formal or informal aggregation--tends to level the playing field.

Not all plaintiffs prefer collective representation, however. Some may prefer autonomy and an individual relationship with counsel. Others, particularly those with high-value claims, may consider individual representation the best way to maximize their recovery. For these clients, the loss of autonomy and individual attention outweighs the benefits of collective representation. Moreover, the relinquishment of client autonomy, while essential to effective group representation, raises concerns about counsel’s incentive to ensure equity among plaintiffs in settlement allocation.

The question is how to enable lawyers to advance the interests of most plaintiffs through collective representation, while maintaining those critical aspects of client autonomy that allow clients to effectuate preferences for individual representation and to establish incentives for equity among plaintiffs as well as maximizing the total recovery. An answer can be found by looking first to class action concepts and then to the law of professional responsibility. First, we must recognize the essential similarity between class actions and non-class collective representation in terms of the relinquishment of client autonomy. While class actions differ in important respects from non-class litigation, they share the essential attribute that lawyer loyalty is directed toward the group, and individual members of the collective have little control over the conduct of the litigation. Next, by looking to the law governing concurrent conflicts of interest, we can see how to protect client autonomy at the two most critical junctures--the outset of collective representation and acceptance of a settlement--while empowering group lawyers to pursue collective interests in the conduct of the litigation.

Collective representation ordinarily presents both client-client and lawyer-client conflicts of interest. Many of the conflicts, however, are of the sort that would be tolerated for purposes of class certification, and can be consented to under the law governing lawyers. If plaintiffs' counsel intends to seek to maximize group interests, which presents inherent conflicts of interest, she should get informed consent from the clients at the outset of the collective representation.

In addition to their decision up front whether to accept collective representation, clients should be given another moment of autonomy at the back end, to decide whether to accept their portion of a collective settlement. Back-end autonomy remains critical because it gives counsel an incentive to strive for equity among plaintiffs, and it gives clients an additional opportunity to effectuate individualistic preferences without excessively restricting counsel's ability to pursue group interests during the course of the litigation and negotiation. However, the informed consent process in the context of mass litigation need not require the disclosure of the same individual details that would be required in the aggregate settlement of the claims of several passengers in an automobile negligence case. As in the notice of a settlement class action, or notice of a second opt-out opportunity upon settlement of a litigation class action, the disclosure for informed consent to an aggregate settlement need only contain the information reasonably necessary for plaintiffs to decide whether to accept the settlement.

Class actions offer a picture of collective litigation in which the represented parties relinquish control over the conduct of litigation and negotiation, but are given book-end moments of autonomy: at the outset, and increasingly, at settlement. Non-class collective litigation can follow the same model. The client should retain key moments of autonomy at the opening and closing, but for the course of the litigation and negotiation, the lawyer should pursue the litigation in the best interests of the group.

This paper's position on collective representation will face serious resistance from both directions. Traditionalists will object that my proposal dilutes the lawyer's duty of loyalty to individual clients, and that informed consent should not license lawyers to act contrary to the individual interests and directives of their clients. To them, I respond that effective plaintiff representation in mass litigation often requires collective representation, and that the value of a collective approach to loyalty should be measured from the client's ex ante perspective. From the opposite direction, some pragmatists will

contend that informed consent is meaningless in the absence of a concrete conflict that clients can understand, and that vigorous enforcement of the aggregate settlement rule constricts the ability to settle mass litigation. To them, I respond that lawyers must not allow clients to enter unwittingly into conflicted representations, even if the lawyers believe it is in the clients' best interest. It is the lawyer's job to ensure that the client understands the nature and scope of the representation. As to the aggregate settlement rule, it creates a powerful incentive for lawyers to negotiate equitable settlement allocations, and it preserves the single most essential aspect of client autonomy. Just as class action processes protect a core of autonomy within representative litigation, so should lawyers give their clients two critical moments of autonomous decision-making within mass collective litigation.

I do not wish, however, to overextend the analogy between class actions and non-class collective representation. Class counsel's duty runs expressly to the class. The lawyer representing a mass of similarly situated individual clients, by contrast, owes loyalty to each client individually. But as I have tried to show, the lawyer best serves the interests of the mass of individual clients in certain litigation by pursuing a collective strategy. Conflicts between individuals and the group inevitably arise during the litigation process. Resolving a conflict in favor of the individual at the group's expense does nothing to eliminate the conflict, and yields an inferior solution. Squeaky wheels, full fee payers, and otherwise favored clients make this a very real risk. Rather, the lawyer should prepare for such situations by obtaining the clients' informed consent to collective representation at the outset, and when the conflict materializes, the lawyer should advise the client of the conflict and the client's right to exit the group representation. The lawyer then should pursue the most effective strategy for the collective.

By obtaining clients' informed consent, the lawyer frees herself to pursue group interests without undue concern for the peculiar interests of particular clients. The client's opportunity to opt out of the collective representation at the moment of the conflict waiver should give lawyers comfort that their clients chose to retain a lawyer who will pursue collective interests. The right to decline an aggregate settlement should give clients comfort that their lawyer, while generally pursuing group interests to maximize the collective recovery, retains an incentive to negotiate an adequate and fair settlement for each plaintiff. Satisfied with the protection of these two key moments of autonomy, the lawyer can focus on the zealous representation of collective interests, knowing that it is indeed a *collective* representation to which the clients have autonomously consented.