A Practical Approach To Avoiding Aggregate Settlement Conflicts
(As Well as Managing and Satisfying the Problem-Solving Expectations of Individual Mass Tort Clients)
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Perspectives on Mass Tort Settlements

Undeniably, mass torts offer clients many benefits, including access to a team of the nation’s top legal talent, reduced per capita litigation expenses and increased leverage when taking on negligent corporate giants. The results speak for themselves – The playing field has been leveled. Despite the remarkable parity mass tort lawyers have brought to our civil justice system, pundits criticize mass tort lawyers, claiming the interests of individual clients are compromised and neglected in pursuit of huge legal fees. Many commentators believe victims are treated like mere inventory and are not adequately involved in the litigation process.

The reality is that the above-mentioned mass tort benefits originate from the power of aggregation. Common sense dictates that lawyers collectively representing hundreds or thousands of clients cannot have the same interpersonal relationship with clients as they would have in the traditional one-client, one-lawyer model. This is not to say, however, that mass tort lawyers should not take proactive steps to match advocacy with expectations and provide multiple clients the same level of satisfaction as the one-client, one-lawyer

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model. Based upon this author’s experience as special master and / or settlement administrator in numerous cases, mass tort lawyers can accomplish this objective by embracing the simple fact that all clients seek out a lawyer because they need help solving problems. Some problems are economic while others are non-economic, such as the desired form-of-resolution and an acknowledgement of the client’s suffering as well as the defendant’s wrongdoing. Mass tort clients, just like individually represented clients, want a trusted advisor with whom they can talk about all their problems. Mass tort practitioners with a keen awareness of this fact understand that at the same time they deploy their talents to reach resolution for the group as a whole they must also marshal additional resources to manage and satisfy the individual client’s “problem solving” expectations. All this, with the appreciation that at some point the expense associated with individualized client counseling can defeat the cost-savings / economies-of-scale leverage associated with mass torts.3

The first step toward understanding the issues associated with settling multiple claimant cases is to examine the environment in which these cases are negotiated. In most every mass tort, the defendant approaches plaintiffs’ lawyers to discuss the settlement of an inventory of cases.4 While this subject might be broached in various terms, the underlying message is the same – “How much will it cost us to get out of all of these cases?” Complicating matters is the fact that defendants often condition their willingness to settle on high rates of participation by all plaintiffs, immediately creating leverage-based conflicts between clients with lower value claims (who can block a deal) and those with higher-value claims.

Rationally speaking, these issues are not insurmountable. The current professional responsibility rules regarding conflicts of interest and settlements, however, predate mass torts and were not drafted with an eye toward addressing these unique mass tort issues. As a result, current professional responsibility regulations - built around the one-client, one-lawyer model - provide awkward direction to the mass tort lawyer.5 The attorney must proceed in the face of certain inherent conflicts and client-counseling limitations, with little practical guidance on how to deliver the benefit of the mass tort mechanism without unintentionally running afoul with the letter of the Model Rules.6

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3 See Charles Silver and Lynn A. Baker, Mass Lawsuits and the Aggregate Settlement Rule, 32 Wake Forest L. Rev. 733 (1997). Professors Silver and Baker state, “Group-level deals reflect practical judgment that, at some point, the benefit of a more perfect individualized settlement allocation plan would not justify the cost.” See also Menkel-Meadow, supra note 2 at 1172, “The legal system must balance the ideals of individual justice with the reality of a need for “aggregate” justice”.


5 See Menkel-Meadow and Weinstein, supra note 2.

If clients are going to continue to benefit from aggregate representation when confronting negligent corporate giants, then arguably the Model Rules are in need of reform with regards to conflicts of interest and aggregate settlements. Until such reform takes place, mass tort lawyers must abide by these Rules in order to avoid legal malpractice exposure to those few clients that, rightly or wrongly, later suffer from “settler’s remorse”.

It is the intent of this article to provide the mass tort practitioner with a practical approach to avoiding aggregate settlement conflicts as well as a client-counseling model for managing and satisfying the individual client’s problem-solving expectations. These are not academic discussions – this author has successfully assisted many mass tort lawyers with applying the recommended approach to high profile, high stakes multiple client settlements. The methodology recommended below allows individuals, who are otherwise part of a group for settlement purposes, to experience “personalized” justice to a degree that is practical given the circumstances.

**The Standards - Current Rules Governing Professional Responsibility**

As a foundation, Model Rule of Professional Conduct 1.7(b)\(^7\) states that multiple representation conflicts generally can be waived so long as the lawyer reasonably believes that all clients can be represented effectively. Upon the affirmative assumption that this standard can be met, mass tort lawyers are allowed to aggregate clients.

At settlement this well-considered assumption is often challenged when defendants insist, explicitly or implicitly, upon unanimous or near unanimous acceptance as a condition of settling with any victims. Model Rule 1.8(g) concerning aggregate settlements states, "a lawyer who represents two or more clients shall not participate in making an aggregate settlement unless each client consents after consultation, including disclosure of the existence and nature of all the claims involved and of the participation of each person in the settlement".\(^8\) As such, parties cannot have a binding aggregate settlement unless each of the following elements exist: 1) unanimous consent; 2) consultation that meets the

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\(^7\) Model Rules of Professional Conduct Rule 1.7 (1998). See also American Bar Association Section of Litigation, *Ethical Guidelines for Settlement Negotiations* (1999) at 26, stating “Because many dynamics of settlement negotiation will create situations where the interests of multiple clients are sufficiently different to create a conflict, a lawyer representing several clients will often have to assess whether the conflict is waivable. The most common example of an unwaivable conflict is where the settlement of one client’s claim is conditioned upon the client’s taking a position against another client’s interest.”

\(^8\) Model Rules of Professional Conduct Rule 1.8 (1998)
standard for effective communication set forth in the Model Rules; 3) identification of the clients that are settling; and 4) the amount of money each identified client is receiving. Under the Rule, only clients defined by all four criteria are bound by the settlement.

Essentially, the Rule was drafted to discourage lawyers from accepting a defendant’s offer to settle weaker claims in return for plaintiff lawyer agreement to settle the stronger ones. While that “no trade offs” purpose is a laudable aspiration in all cases, Rule 1.8 was arguably drafted when the mass tort mechanism was in an embryonic stage and therefore must have been written to address one-lawyer, few-client scenarios (i.e. multi passenger auto accidents, criminal matters, etc.).

In the larger mass tort context, the Rule 1.8 elements often prove problematic and at cross purposes with other Model Rules. For instance, Model Rule 1.6 mandates that a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation. Thus, as a prerequisite to the Rule 1.8 disclosure requirements, Rule 1.6 requires plaintiffs’ lawyers to consult with each client and obtain his/her permission to share confidential information (i.e. identification and amount) with every other client. Also, the lynchpin to 1.6 seems to be the definition of “consult”. The parameters for Rule-compliant client consulting appear to be embodied in Rule 1.4 and the commentary to Rule 1.7. The former states, “a lawyer shall explain a matter to the client to the extent reasonably necessary to permit the client to make informed decision…” The latter defines “consultation” as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” If lawyers narrowly interpret the totality of these rules, compliance becomes circular – At the time of inking the fee agreement, lawyers must be able to articulate with tremendous clarity the elements of 1.8, which often are not known until years after litigation begins. Not only can it be literally impossible to consult with hundreds or thousands of clients, but should any one client challenge the efficacy of his/her attorney’s “consultation”, the presumption will be in that client’s favor and hindsight will be perfect.

Perhaps the ABA’s Ethical Guidelines for Settlement Negotiations summed up this scenario best, stating “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

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9 Model Rules of Professional Conduct Rule 1.6 (1998)
11 Supra note 7.
interests in settlement, or from proposals to treat clients in different ways or to treat differently positioned clients in the same way.” Against this backdrop, many legal practitioners and academics wrestle to comprehend how the Model Rules – whose spirit is to uphold professional standards for the benefit of the client – can frustrate the tremendous parity that mass torts bring to the adversarial civil justice system.

Problems that Arise

The Model Rules, as originally enacted by the American Bar Association (ABA) in 1983, were not intended to be a basis for a lawyer’s civil liability. The ABA’s Ethics 2000 Commission, however, proposed to modify the Scope Section which articulates the effect of a rule violation on a lawyer’s substantive legal duty. In making their proposal, the Commission recommended changing the Scope to mirror the growing number of judicial opinions in which a violation of the Rules was being admitted as evidence of a breach of the duty of care owed the client.

As exemplified throughout this document, the critical mass of the malpractice complaints filed against attorneys indeed alleges some form of negligent breach of the standard of care, echoed in the Model Rules, that is owed by the attorney to the client.

As the cases below demonstrate, clients experiencing “settlers remorse” are being permitted to proceed with allegations that their lawyers failed to comply with the themes contained in the above mentioned Model Rules, including conflicts of interest (Rule 1.7), the unanimous consent and disclosure requirements of Rule 1.8, consent to disclose confidential information (Rule 1.6) and the client-communication standards set forth in Rule 1.4.

- **Amchem Prods v. Windsor**, 117 S. Ct. 2231 (1997). In *Amchem*, the Supreme Court suggested a “zero tolerance” standard for conflicts in aggregate settlements. The Court held that a group of claims that could not be tried as a class could not, as an alternative, be settled as a group. The parties reached a global settlement with no objective procedures or standards in place for assuring fair and adequate representation for the distinct groups and individuals. The adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement.

13 The Scope section in 1983 stated that a violation of a Rule should not give rise to a cause of action nor create any presumption that a legal duty had been breached. In 1983, the Rules were designed to provide guidance to lawyers and to provide a structure for regulating conduct. They were not designed to be the basis for civil liability. See MODEL RULES OF PROFESSIONAL CONDUCT (1983), Scope.

14 MODEL RULES OF PROFESSIONAL CONDUCT (2002), Scope, Comment [20].

15 As a general rule, to establish a case for legal malpractice, one must prove three elements: 1) the attorney owed a duty; 2) there was a breach of that duty and the attorney failed to conform to the standard of care required by law; and 3) there was a causal connection between the conduct complained of and the resulting damage.
except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.” See also, Ortiz v. Fibreboard Corp., 118 S. Ct. 2339 (1998).

- Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 229 (Tex. App.1985). This case suggests an extremely narrow interpretation of the disclosure requirements (client identification and dollar amount) of Model Rule 1.8. The appellate court held that the trial court was correct in finding that the plaintiffs’ lawyers violated the aggregate settlement rule. Allegedly, the Quinteros were not informed of the nature and settlement amounts of all the claims involved in the aggregate settlement, nor were they given a list showing the names and amounts to be received by the other settling plaintiffs.

- Hayes v. Eagle-Pitcher Industries, Inc, 513 F 2d 892 (CA 10 1985). The court held that nonwaivable, unanimous consent is the hallmark of an ethically proper aggregate settlement. The court refused to enforce a unanimous voluntary agreement made at the beginning of litigation that the plaintiffs would all be bound by any settlement that received the consent of a majority of clients.

- Arce v. Burrow, 958 S.W.2d 239, 245 (Tex. App. 1997) aff’d in part, rev’d in part, 997 S.W.2d 229 (Tex. 1999). The court held that attorneys who represent multiple clients engage in improper aggregate settlements when they settle all cases without individual negotiations on behalf of any one client. Arce demonstrated that the remedy for violating the fiduciary duty to multiple clients might be as severe as complete fee forfeiture if the attorney committed the breach intentionally, willfully, recklessly, maliciously, or with gross negligence.

- Huber v. Taylor Civil Action No. 02-0304 (Filed in Western District of Pennsylvania). The complaint, involving a class of individuals injured by asbestos, may be a harbinger of things to come: stricter scrutiny of the client consultation process mass tort lawyers employ to educate the victims prior to settlement. The Huber complaint was filed on behalf of some of the original members of the class against the original group of mass tort attorneys. The complaint alleges: 1) that the lawyers “defrauded a group of hard-working union members in blue-collar trades” that were treated as “unsophisticated…mere inventory”; and 2) that the attorneys allegedly entered into aggregate settlements of their clients’ claims “without the knowledge or approval of their clients”; and, 3) that the attorneys exercised complete and unsupervised discretion with regard to settlement funds, including the amount and timing of the disbursement of the funds to their clients and the determination of how much the attorneys would retain (in addition to their contingency fees) as expenses.
What Constitutes A Professionally-Proper Mass Tort Settlement?

In light of the cases above, as well as the apparent disconnect between the Model Rules and the realities of mass torts, competing theories exist regarding what constitutes a professionally-proper settlement. At one end of the spectrum, some suggest that:

- The aggregate settlement rule should be abolished or waived.
- Clients should be free to waive conflicts at the outset of representation.
- Clients should be able to consent to abide by majority vote of all clients represented by the lawyer. (Similar to the standards in individual representation cases that afford clients the ability to grant their attorneys binding settlement authority in advance of negotiations).
- Clients should be able to waive the Rule 1.8 disclosure requirement to protect their privacy and security.

Professors Charles Silver and Lynn A. Baker best personify this camp, stating, “...The academic disagreements concerning the (aggregate settlement) rule’s merit and proper application have significant practical consequences for attorneys and clients. They make litigation more expensive and riskier than it ought to be because they prevent plaintiffs’ attorneys from confidently taking advantage of opportunities to reduce costs. They expose excellent and shoddy lawyers alike to charges of having breached the duty of loyalty and to the threat of forfeiting fees. Ultimately, clients pay the bill for this. To cover or reduce their exposure, lawyers have to stay away from group lawsuits or charge higher fees. Both options make clients worse off...” While this author highly respects and largely agrees with Professors Charles Silver and Lynn Baker, a practitioner should heed caution. Despite the soundness of their insight, to date it is still principally an academic discussion - The current Model Rules and interpreting case law are at odds with this approach.

At the opposite end of the spectrum are those commentators who believe mass tort lawyers must strictly adhere to the Model Rules and insist on:

- Unanimous consent by all clients to all settlement terms.
- A prohibition on agreements to waive these requirements even with clients’ unanimous consent.
- Disclosure of all settlement terms to all clients, including disclosure of each client’s name and the amount each client is to receive.

In response, those in favor of reform state that this view is overly paternalistic. “Why shouldn’t”, they ask, “competent clients be able to voluntarily agree to less than unanimous consent requirements?” A compelling reply is that perhaps

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16 See Generally Moore supra note 2 and Silver and Baker supra note 3 and 6.
17 See Silver & Baker, Supra note 3 at 744.
clients cannot make an informed consent at the outset of litigation because they simply lack the ability to comprehend what they are giving up because of the inherent disparity between the lawyer’s knowledge level and that of the client’s. Can a client actually fully consent at the outset to relinquish their right to reject a proposed settlement, having no idea what his/her claim is worth or how it compares to the claim of others? Should objecting clients, who upon acquiring more information than they had at the time of waiving unanimous consent, be held into a settlement? Some existing case law states that dropping one client in favor of another in this situation cannot eliminate a conflict. According to the ABA’s Ethical Guidelines for Settlement Negotiation, “Conditioning agreement to representation on a waiver of the client’s right to approve a future settlement would fundamentally and impermissibly alter the lawyer-client relationship and deprive the client of ultimate control of the litigation.”

In general terms there exist two primary approaches and one hybrid approach to settling multi-client cases. First, plaintiffs’ lawyers can negotiate a lump sum to cover a group of cases, develop an allocation methodology, obtain client consent and then allot individual settlement awards from the common fund. (Remember, Rule 1.8 does not prohibit the making of a global deal; it just lays out minimum criteria for so doing). Under this approach, the methodology for allocating settlement proceeds can be developed as follows:

- While impractical, clients can be told to “work it out”.
- Lawyers can create the process and adhere to standards (Academically speaking, if lawyers can resolve aggregate settlement-related client conflicts, it follows that they must be able to help allocate settlement proceeds).
- A third party - such as a special master, administrator, tribunal or other intermediary - can be appointed.

While each methodology for allocating an aggregate settlement may have its own advantages, research indicates that clients often perceive a process that involves appearance before a third party to be fairer than a process that is based solely on two-party settlement negotiations. Social psychologists assert that mass tort claimants want to participate in the settlement process and have some measure of control over the procedure that is used to resolve their case. Based upon this author’s experience as Special Master in

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notable racial profiling settlements and church-related sexual abuse settlements, I can attest that for personal and legitimate reasons some clients want one-on-one interaction with a third party while others simply want their money.

Due to the problems articulated above, many mass tort attorneys are fearful of the aggregate approach and prefer to structure the deal as a series of individual settlement demands. In doing so, they obtain prior authorization from each client for a settlement range and then make a series of individual demand(s) that can be accepted or rejected by the defendants without limitation.

Another approach, which represents a hybrid of the first two, involves obtaining prior authorization from each client for a settlement range and then making a global demand that filters down to satisfy each demand. Some defendant’s understandably prefer this approach, as it enables the final allocation to remain confidential with the hopes other plaintiffs’ attorneys will not use such details to establish a “market rate” for certain categories of claims.

Implementing A Practical Approach

Disclosures at Case Intake

The following quote effectively encapsulates the mass tort lawyer’s duty to make certain disclosures at case intake:

“No matter what the sophistication level of a client, it is never the client’s duty to recognize the conflicts of interest. Nor is it the client’s duty to seek out such information. No matter what the education level or sophistication of a client, it is always the attorney’s duty to disclose the existence or potential for conflict of interest, to avoid such conflicts and to obtain, if necessary, a full waiver of such conflict.”

Regarding conflicts of interest, courts and disciplinary agencies typically examine when the lawyer made the disclosure to determine if the clients were given sufficient time to think about the joint representation and possible conflicts. For instance, was the disclosure made at the start of the representation or when the conflict arose? To help accomplish a fully informed consent to a waiver of conflicts, plaintiffs’ lawyers should draft fee agreements to explain that:

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The lawyer cannot favor one client over another with respect to settlement.

The defendant may pursue settlement negotiations separately for each plaintiff or on a pure or "hybrid" global basis. Settlement-related conflicts could arise under either negotiation scenario, including the possibility that any settlement(s) may be conditioned on high participation rates of all plaintiffs. Under such conditions some of the plaintiffs may want to settle while others will not. If so, it may be necessary for the lawyer to withdraw from representing certain (but not all) clients. Some client information (discussed more fully below) may not be kept confidential vis-à-vis other clients.

Under any of the negotiation scenarios above, lawyers should provide examples of the types of objective criteria that might be used to evaluate each person’s claim. The key is to communicate that award values will not be arbitrarily assigned (and perhaps that a third party will be retained to assign weights or values to the objective criteria). Case law exists that suggests lawyers might avoid potential conflicts regarding settlement by encouraging clients at the beginning of the representation to agree to an approach for deciding whether to settle.

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23 “Global” is used here to refer to both a true aggregate settlement (wherein a lump sum is negotiated to cover a group of cases) and the “hybrid” approach of obtaining prior authorization from each client for a settlement range and then making a global demand that filters down to satisfy each demand.

24 While some commentators suggest that plaintiff lawyers ask all clients to agree to follow the majority if presented with a global deal, most recognize that it is unlikely any client would be legally bound to do so. Nonetheless, asking clients to do so may be advisable to the extent it gets clients participating in the control and shape of the litigation process. See generally note 21, supra.

25 Consider Allegretti – Freeman v. Baltis, 613 N.Y.S. 2d 449, 205 A.D. 2nd 859 (App. Div., 3d. Dept. 1994). Lawyer not disqualified from representing multiple clients in similar individual damage actions even though conflicts could arise over the requirement that the majority of clients approve individual settlements. Court stated that the risk of conflict was minimal and disqualification could cause hardship and delay. See also, Moore note 2, Supra. Conflict waivers stating that the lawyer will resolve a conflict by representing the majority and withdrawing from representing the objecting client may not be valid if challenged, but could go a long way toward managing expectations via up front communication.

26 Under Rule 1.6, the lawyer has an obligation to keep information the lawyer receives during the representation confidential. In multiple representation cases, however, Rule 1.8 (aggregate settlements) requires that a lawyer disclose certain information to each client about all other clients.

27 While lawyers may be able to articulate such objective criteria as injury categories, age, wage loss, exposure, etc., such criteria still might ultimately have subjective weights or values. In this author’s experience, early communication of the criteria – and not necessarily each factor’s weight – helps manage clients expectations and apprehensions regarding how awards might be determined.
settle and how to divide the settlement monies.\textsuperscript{28} This is not to say that getting clients to agree at the outset to “majority” rule would be a safe harbor. An agreement that allowed a majority of plaintiffs to control settlement-related decisions has been found unenforceable in at least one jurisdiction.\textsuperscript{29}

The very fact that such agreements have been found invalid obligates plaintiffs’ lawyers to disclose that there could be some adverse consequences from taking the course advised.\textsuperscript{30} Otherwise, the conflict waiver agreement would be fatally flawed from the inception because it inherently would be less-than-full disclosure. Even with a thorough written waiver and consent, some courts still have held that a lawyer violated the conflict rules because a conflict did in fact emerge and therefore the prudent lawyer would never have engaged in the representation.\textsuperscript{31}

Nonetheless, these disclosures regarding conflict of interest comply with the intent of Model Rule 1.2 (scope of representation) that provides “a lawyer shall abide by a client’s decision concerning the objectives of representation” as well as the ABA’s Ethical Guidelines for Settlement Negotiations.\textsuperscript{32} Beyond just Rule compliance, these early disclosures help to manage expectation and mitigate the possibility that a client will mistakenly feel “pressured because the lawyers just want to get paid.” As such, these disclosures make the approval of an aggregate settlement more likely.

**Disclosures at Settlement**

At settlement, lawyers must meet certain intra-client disclosure thresholds to ensure there is not an aggregate settlement conflict under Model Rule 1.8. If lawyers understand the purpose of those thresholds, appropriate intra-client disclosures can be made without unnecessarily compromising the privacy of any one client. Specifically, disclosure must be sufficient\textsuperscript{33} so all clients can

\textsuperscript{28} Id.

\textsuperscript{29} Hayes v. Eagle Picher Ind., 513 F.2d 892 (10th Cir. 1975).

\textsuperscript{30} See generally, Smith v. St. Paul Fire & Marine Ins. Co., 366 F.Supp. 1283, 1290 (D.C.La., 1973), aff’d, 500 F.2d 1131 (5th Cir. 1974). The Louisiana Supreme Court recognized the fact that if the attorney has reason to believe, or should have reason to believe that there could be some adverse consequences from taking the course advised, he is obligated to so advise his client.

\textsuperscript{31} See People v. Quiat, 979 P.2d 1029 (Colo. 1999).

\textsuperscript{32} Supra note 12 at 9. Section 3.1.3 Consultation Respecting Means of Negotiating Settlement “A lawyer must consult with the client respecting the means of negotiation and settlement, including whether and how to present or request specific terms. The lawyer should pursue settlement discussions with a measure of diligence corresponding with the client’s goals. The degree of independence with which the lawyer pursues the negotiation process should reflect the client’s wishes, as expressed after the lawyer’s discussion with the client.”

\textsuperscript{33} Note that this rule does not require that lawyers communicate with clients on a one-to-one level. Newsletters, group meetings, teleconferences, websites, grass-root efforts by referring attorneys and / or other client advocates might be sufficient so long as they meet the client-communication standards set forth in Rule 1.4 and the commentary to Rule 1.7. As stated above
reasonably determine if their respective settlement is fair. Contrary to many practitioners' beliefs, Rule 1.8 does not expressly state that each plaintiff must be identified by full name – In many cases, this author advises plaintiffs' lawyers to disclose to all clients the subcategories and objective criteria for being placed therein as well as listing numbers or first names next to each subcategory. In this manner, each client can adequately determine how his/her claim was evaluated and if he/she was treated the same as other similarly situated clients.

While the court in Quintero suggested that the plaintiffs should receive a “list showing names and amounts to be received by the other settling parties”, the issue of how much “name” has not been directly addressed. This author takes solace in the fact that these clients typically do not know each other; the disclosure of a full name does very little to help a client determine if he/she was treated fairly. The only thing such disclosure does is invade the privacy and security of clients.34 If a client truly wants to know the settlement amount of another client, the inquiring client could be told that such information is available at the law firm for his/her personal review, but it will not be distributed in writing.35

The Approach Applied

From this author’s experience in various mass tort settlements, including church-related sexual abuse and racial profiling settlements involving hard-to-quantify damages, fairness should be manifest as follows when the recommended approach is applied:

- **Equality of Treatment**: While a settlement must acknowledge the uniquely complex and personal nature of each individual’s harm, the evaluation process should not produce inconsistent results for similarly situated people. This is not to say that all claims must be valued identically, but rather there are rational guidelines upon which to review and evaluate each person’s claim.

- **User Friendly and Client Focused**: If using an intermediary to allocate, the administrator of the fund must communicate with the plaintiffs. Its structure must not raise unrealistic procedural and substantive

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34 The threat to the security of clients is very real. This author recently traveled to Venezuela to assist dozens of Venezuelan citizens settling personal injury claims against a U.S. Manufacturer. The attorneys representing the families feared that providing large lump sums would make their clients the target of kidnappers and other wrongdoers.

35 Fee agreements should recite this limitation.
expectations. The method for filing claims must be simplified as much as reasonably possible.

- **Fair Claims Resolutions**: The notion of “fair resolution” embodies two ideals. First, from an economic perspective, the settlement should reflect the “market rate” of similar claims, such as expected trial value or historical settlement value. (Often, there is a predetermined amount of money in a settlement fund by the time a fund administrator or special master is appointed. In this regard, some facets of economic fairness may be out of the designated third party’s hands. From that fund, nonetheless, the administrator or special master must fairly place a quantifiable dollar figure on an inherently un-quantifiable amount of damage). Second, from a non-economic perspective, the settlement fund process also should meet the claimant’s threshold for benefits other than money, for instance a degree of closure (including a meeting with a third party and an acknowledgement of their suffering as well as the defendant’s wrongdoing), problem solving expectations and the desired form-of-resolution.

While these observations were made in the context of aggregate settlements, the outcomes articulated are equally important and obtainable in deals structured as a series of individual settlement demands or the in deals structured as a “hybrid” between true aggregate settlements and individualized negotiations.³⁶

**The Changing Landscape For Mass Tort Lawyers**

As further indication of the changing landscape for mass tort lawyers, one can look at the new issues related to: 1) reimbursement under the Medicare Secondary Provider (MSP) statute; and, 2) “failing to inform” clients about: the impact of accepting settlement proceeds on eligibility for government benefits like Medicaid that have strict financial eligibility limits; structured settlements; and, the taxation of the settlement. While not the subject of this article, these areas have many similarities to the aggregate settlement rule in that they involve reasonable expectations of the client (i.e. if the client is not fully advised of the impact of the Medicare claim on the net award *prior* to settlement).

**Medicare Reimbursement Obligations In Mass Torts**

In early December 2003, President Bush signed Public Law 108-173. Prior to PL 108-173 it was unclear whether or not certain plaintiffs must reimburse Medicare when settling with certain tortfeasors – like most pharmaceutical companies –

³⁶ As discussed above, the “hybrid” approach involves obtaining prior authorization from each client for a settlement range and then making a global demand that filters down to satisfy each demand.
that lacked separate liability coverage\textsuperscript{37}. Entering a settlement agreement containing certain conditions actually may have created a reimbursement obligation where none otherwise existed. This was a Hobson’s choice; a plaintiff could have a settlement, but to do so he/she must agree to satisfy a doubtful obligation to repay Medicare. PL 108-173 appears to give the government the right of reimbursement that it was searching for in \textit{Thompson v. Goetzmann}, 5\textsuperscript{th} Circ. (2002); \textit{Brown v. Thompson}, 4\textsuperscript{th} Circ (2003) and \textit{U.S. v. Baxter}, 11\textsuperscript{th} (2003).\textsuperscript{38}

Plaintiffs’ lawyers can no longer rely on a process of \textit{reacting} only after receiving notice from Medicare or CMS of a potential claim. In fact, Medicare is not required to send notice. The obligation is on the client and the lawyer to be \textit{proactive}. Well before distributing settlement proceeds, plaintiffs’ attorneys have the responsibility: 1) to determine if clients are/were recipients of a government assistance program; 2) to determine if those programs have liens against the client’s settlement; and, 3) to compromise, settle or execute a release of the program’s claim. The complexities of the system, combined with the penalties, costs and delays associated with missing certain deadlines, make evident the need for a dedicated Medicare resolution process in mass torts.

Furthermore, a lawyer’s subjective opinion regarding causation does not trump his/her obligation to address Medicare’s interests, even if the lien ultimately is determined to be unfounded. It is this author’s opinion that plaintiffs’ lawyers are more likely to obtain causation-based waivers before Medicare initiates the collection process (even if it is unfounded). Lawyers should not rely upon clients to inform them whether or not the client is a Medicare recipient, as they often are unsure and provide incorrect information about what benefits they are receiving.

The prudent mass tort lawyer should disclose in fee agreements the potential impact of a Medicare claim on a client’s net award. Additionally, mass tort lawyers must establish a process to efficiently and effectively handle hundreds of Medicare claims within weeks of settling cases.

\textbf{“Failure to Inform” Professional Liability Complaints}

Increasingly, professional liability complaints are being filed against plaintiff attorneys for “failing to inform” clients about: the impact of accepting settlement proceeds on eligibility for government benefits like Medicaid; structured


settlements; the taxation of the settlement; and liens and subrogation claims. Lawyers historically have assumed that speaking to the client about the first three topics crosses the line between providing "legal" advice and "financial" advice. If, however, the lawyer takes the position that it is not his or her role to speak about these subjects with the injured client, then whose job is it? Indeed, the client’s options regarding all of these subjects often are eliminated or severely complicated when the settlement agreement is executed and the client takes constructive receipt of the settlement proceeds. Therein lies a professional liability pitfall.

Mass Tort lawyers should start with the fundamental assumption that they have a duty to secure advice for their clients regarding government benefits, structured settlements, and taxation of damages. This is not just the author’s opinion - ethics opinions issued in several states go so far as to declare that a lawyer has a fiduciary duty to refer a client to appropriate resources when the lawyer ascertains that a client needs financial services. These opinions state that such referrals are part of the attorney’s practice of the law and are expected by the client as part of the service for which they are paying the attorney. Additionally, the comments to Model Rule 2.1 (Advisor) direct lawyers to recommend consultation with a professional in another field when doing so is something a competent lawyer would do.

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40 Many of a client’s alternative solutions to his/her problems are eliminated or complicated upon executing a settlement agreement or taking constructive receipt of the settlement proceeds. Causing a client to “miss an opportunity” is directly addressed by the ABA Model Rules of Professional Conduct. Rule 1.2 Scope of Representation states that the lawyer is required to "abide by the client's decisions concerning the objectives of the representation" and to "consult with the client as to the means by which they are to be pursued". Rule 1.4 (Lawyer-Client Communication) instructs the attorney to explain the matter so the client can make an informed decision. Attorneys also are told to consult the client about the means by which the client’s objectives are to be accomplished. The commentary to 1.4 states that the “guiding principal is to fulfill the client’s reasonable expectation for information consistent with the duty to act in the client’s best interest”. In essence, Rule 1.4 articulates a duty to provide clients with relevant facts, such as the impact of constructive receipt on alternatives “forms of settlement” or lien reimbursement obligations. Additionally, Model Rule 1.3 (Diligence) speaks to “diligence” in handling interests of the client that can be adversely affected by the passage of time, such as structured settlements or the negotiation of liens and subrogation claims. Furthermore, in Model Rule 1.1 (Competency), the risk at hand determines the degree of thoroughness, preparation and attention required for “competent representation”.

41 Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2000-1 (2/11/00). See also Utah Ethics Opinion 135 (1993).

42 See Id. See also Connecticut Informal Ethics Opinion, 89-10 (1989).

When introducing an advocate for purposes of government benefit planning (i.e. special needs trust planning) and/or structured settlements, the client should be told expressly that you, as the lawyer, will not provide tax or financial advice – you are simply introducing an advisor to ensure that the client is receiving proper education regarding all options available. The client should be told he/she is free (and perhaps encouraged) to speak with other advisors, as you cannot dictate with whom the client ultimately should consult beyond the limited role as “educator”. It is imperative, however, that you introduce the advocate / educator prior to executing the settlement agreement - Many of your clients’ “form-of-settlement” and lien reimbursement options are eliminated upon constructive receipt of the settlement proceeds. For instance, in order for the claimant to receive an income tax-free structured settlement annuity, he/she cannot accept a cash settlement and then purchase an income tax-free structured settlement annuity on his/her own. Similar to Medicare claims, the client’s fate regarding these “form-of-settlement” issues is often sealed once the proceeds are disbursed.

Many mass tort practitioners may agree in principal with why such client counseling is imperative, but wrestle with the how. Surely, many lawyers may think, “If we add further delay to the settlement process and/or transfer of settlement funds we expose ourselves to yet another potential claim by disgruntled clients.” This response is a slippery slope. Beginning the process early and leveraging appropriate economies of scale makes possible effective “form-of-settlement” client counseling even in the mass tort context.45

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44 The “form-of-settlement” component of any mass tort client-counseling model should be instituted early so it does not cause any unreasonable delay in transferring the settlement funds to the clients (especially those who determine quickly that they are not interested in any form-of-settlement option besides a lump sum award).

45 Given the practical reality of aggregate representation, one of the following approaches may be workable: 1) regional “road shows” prior to settlement or, if the geographic dispersal of the clients makes such group meetings impractical, 2) mailing informational materials (written or multi-media), followed up by telephone conferences, at the appropriate time prior to settlement. The law firm, and not the educator / advocate, should send (perhaps even by certified mail) an educational package that includes the following points in the cover letter: instructions that prior to receiving their settlement check, the clients must consider three important topics (Structured Settlements, the impact of settlement on the client’s eligibility for government benefits and, in certain cases, the taxation of the settlement proceeds); disclosure that the material is being provided to the clients for informational and educational purposes and that the law firm does not provide tax or financial advice; notice that the author, who is not affiliated with the law firm, is solely responsible for the contents of the document; a request that the clients read the information and contact the advocate / educator for further detail and to have questions answered; notice that the final disbursement agreement will contain appropriate “Acknowledgements” that memorialize that they have been presented the material and given the opportunity to ask questions; and, notice that the law firm is not endorsing or recommending the services of educator / advocate beyond that limited role – The client should be told he/she is free (and perhaps encouraged) to speak with other advisors, as lawyers cannot dictate with whom the client ultimately should consult for financial services beyond the limited role as “educator”.

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Conclusion

This article has attempted to provide the mass tort practitioner with a practical approach to avoiding aggregate settlement conflicts as well as a proactive client-counseling model for managing and satisfying the individual client’s problem-solving expectations. The approach is consistent with the realities of aggregate representation as well as the critical themes contained in the Model Rules, including conflicts of interest (Rule 1.7), the unanimous consent and disclosure requirements of Rule 1.8, consent to disclose confidential information (Rule 1.6) and the client-communication standards set forth in Rule 1.4. The approach should provide a logical starting point for practitioners who understand the need for better attorney-client dialogue in mass torts. Ultimately, given the circumstances, the methodology recommended is designed to enable individuals, who are otherwise part of a group for litigation purposes, to experience fair, rationally evaluated and “personalized” settlements to a degree that is practical.