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Viewpoint: How to Handle Mass Tort Conflicts

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Editor's note: This is the first article in a two-part feature examining ethical considerations in mass tort representation.

What happens when lawyers find themselves with cases that look like class actions, with high numbers of individual plaintiffs, but are not eligible for class action treatment, usually because each case is unique on its facts or has unique damages? Mass cases — usually but not always tort claims, such as allegations about toxic pollution or defective drugs — have become more and more common, but the ethical rules that govern them remain unchanged. Despite multiple parties with similar complaints, these cases are individual representations, not class actions, and the same ethical rules that apply to lawyers who represent two clients will apply equally to lawyers representing hundreds.

Take, for example, a toxic tort case: A large number of people on one side of town sue for damages, alleging that a local plant deposited toxic waste into the town's groundwater. Given the scientific sophistication of such cases and the specialized area of law, it would be almost impossible for each potential victim to find a separate lawyer. And plaintiffs without the most serious symptoms or prognoses might not find lawyers at all.

As a result, it makes sense for plaintiffs to band together in a single lawsuit. For each plaintiff, proximity to the "plume" of toxicity is different, and damages may range from the sniffles or a

rash to cancer. Disparate damages and disparate proof problems mean ineligibility for class action treatment.

Some of these lawsuits are national in scale and result in consolidation under federal rules governing multidistrict litigation (called MDLs). These cases often involve close judicial oversight, with some judges even calling them "quasi-class actions." That term itself is controversial. In class actions, of course, the lawyers represent the class itself through its class representatives, and cases are settled without individual passive class members' approval. But because mass tort cases remain an accumulation of individual actions, lawyers cannot escape the fact that they represent individual clients, no matter how many there are, even in MDLs.

But the focus here is on the many cases, often in state court, which — like *Erin Brockovich*-style toxic torts or the lawsuits that followed this summer's Chevron refinery fire — are handled by a single or small group of law firms. For these plaintiffs, as with any client, each individual has the autonomous right to settle, the right to have his or her lawyer negotiate the best possible resolution for that individual, or, in the alternative, to go to trial, and the right to have the lawyer give considered, particularized advice about what is best for that client.

But if a lawyer or group of lawyers represents 300 individual plaintiffs, or 1,000 or more — yes, this happens, and with increasing frequency — how can they possibly do their best job for each, fulfill their fiduciary duties to each, and advise each on what is best for that particular person without compromising their representation of everyone else? The flip answer is "with great difficulty."

Still, this difficulty is not a good reason to prohibit such cases. Thousands of members of the public are well-served by lawyers taking large numbers of similar cases where taking individual claims would be financially untenable. Cases such as mass toxic tort or defective drug claims are often extremely expensive to litigate and frequently remain problematic as to proof. While the rewards are high, so are the risks, especially causation. Lawyers may invest millions in developing their own scientific proofs. Individual clients' $50,000 claims would be very unlikely to garner individual representation.

Still, under current rules in both California and under the ABA, a law firm with a high number of individual plaintiffs has an almost impossible task conforming to the ethics rules. One big roadblock is that defendants and their counsel are not in the business of cooperating with the needs of plaintiffs lawyers. In settlement, they want to buy global peace for a lump sum, not deal with individuals, which is simply not their responsibility. That leaves plaintiffs' counsel with a whole host of sticky ethical issues.

First, what can the lawyer do with this "lump sum," which under the ethics rules is called an "aggregate settlement"? Under both California Rule of Professional Conduct 3-310(D) and ABA Model Rule 1.8(g), a lawyer is explicitly forbidden from accepting an aggregate settlement. That means getting each and every plaintiff to agree to not just the total amount, but his or her individual amount. Without that agreement, the whole settlement could fail. One recent New Jersey case allowed one of 154 plaintiffs to change its mind and refuse settlement, thus destroying the settlement for everyone.

Besides, getting each plaintiff to agree is not as simple as taking the settlement number and dividing by the number to plaintiffs. Some plaintiffs inevitably will have suffered more or less harm, while others have more proof problems than others. It's common to place plaintiffs in different categories, or "matrixes," depending on these issues, and other factors such as their location in the plume of toxicity or the degree of exposure to defective drugs.

But how does the lawyer place these people on the matrix, much less explain to each the reasons for that placement and get consent to the settlement before it's consummated?

Second, just to complicate things a bit more, the defendant's offer may be conditioned on getting at least 85 percent or 90 percent of the plaintiffs to agree to their settlements, without which the offer goes off the table. That means that not only does that percentage of plaintiffs have to accept their amounts, but the lawyer has to fairly and impartially advise each plaintiff as to what's best for him or her.

May the lawyer try to persuade the minority to climb on board because the settlement offer is good for the vast majority of plaintiffs? If so, how is counsel properly advising those what is right for them even if the deal is not good for them personally? Is it possible to ever give a true, honest opinion to all clients in these circumstances without the whole deal cratering? If not, who gets the attorney's best advice and who loses out?

Today, conflicts of interest are common, and waivers of those conflicts are almost as common. But what does a conflict of interest waiver look like in a case like this? Is it even possible to construct a waiver that protects the individual rights of 300 plaintiffs and provides informed consent? And how can plaintiffs lawyers, with their huge investment of time and money, avoid the conflicts of interest that face them personally? After investing millions, it is understandable that a lawyer may take sides on whether to settle, favoring big-damages clients over small, and may be tempted to take short cuts around the ethics rules.

I have nothing but questions this week. I hope to provide some answers next time after explaining why the current ethical rules can foster unethical lawyering.

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