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Viewpoint: Full Disclosure Is Key in Mass-Plaintiff Cases

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

How can mass-plaintiff lawyers handle 300 or more individual cases ethically? Last week, I suggested that the answer is "with great difficulty" ("Viewpoint: How to Handle Mass Tort Conflicts," Dec. 7). But the answer more accurately may be "they can't." As I suggested, if a lawyer has to truly give individual advice to all 300 clients — those who would, for example, benefit from a settlement, and those, perhaps a small minority, who would be harmed — it seems that a law firm could not fulfill its fiduciary duties to each and every client without giving conflicting advice.

The California and American Bar Association ethics rules both throw two major ethical roadblocks in the way of mass-plaintiff lawyering: the right of every individual client to agree to all the terms of a settlement, and the prohibition against lawyers accepting "aggregate," or lump-sum, settlements that are not specifically accepted by each client. Lest my call for reform be misunderstood, these are both important client-protective rules. But they are inflexible given the reality of litigation practice today.

Both California and the ABA have had recent opportunities to provide some flexibility in mass-plaintiff cases, but neither has done so. The recent California rules commission never seriously considered the issue. And in 2006 the ABA strongly reaffirmed and arguably extended the existing ethical limitations of its Rule 1.8(g) in Formal Opinion 06-438: Not only does the rule "protect a client's right in all circumstances to have the final say," but plaintiffs lawyers must disclose all "information relevant to the proposed settlement," including "the total amount or result of the settlement or agreement, the amount and nature of every client's participation in the settlement or agreement, the fees and costs to be paid to the lawyer from the proceeds or by an opposing party or parties, and the method by which the costs are to be apportioned to each client."

Whew! That doesn't leave much room for innovative solutions.

The result has been that lawyers wanting to use this useful vehicle feel compelled to take ethical shortcuts. And among more unscrupulous lawyers, their clients often become their victims.

Take the case of the law firm of Leeds, Morelli & Brown, or LMB, described in the 2011 case *Johnson v. Nextel Communications*, 660 F.3d 131, at the U.S. Court of Appeals for the Second Circuit. LMB represented 587 individuals on employment discrimination claims against Nextel. Instead of pursuing these claims, LMB entered into *its own private side agreement* with the defendant.

Nextel agreed to pay LMB $2 million if it persuaded its own clients to drop all pending lawsuits and agree to be bound by the settlement procedure Nextel created. Upon resolution of the claims, Nextel agreed to pay LMB another $7.5 million and LMB agreed to take no more Nextel cases. Almost all of LMB's trusting clients signed off on this procedure.

If anything, the *Johnson* court understated LMB's vitiation of its fiduciary duties to its clients: "Viewed on its face alone, the [plan] created an enormous conflict of interest between LMB and its clients." But importantly, the *Johnson* court reminded us all of the distinction between class actions and mass-plaintiff individual representations:

"First, because LMB was not lead counsel in a class action, the class-protective provisions of Fed. R. Civ. P. 23 were not triggered. Therefore, LMB's clear duty as counsel to the parties seeking relief from Nextel was to advise each client individually as to what was in his or her best interests taking into account all of the differing circumstances of each particular claim."

Boston University School of Law professor Nancy Moore recently put it more clearly: "Mass tort lawyers often treat their clients as if they were members of a class without affording them the judicial protections given to actual class members." In other words, individual clients are actually at a disadvantage when compared to class action members, who are at least guaranteed disclosure in the form of class notices, the ability to opt out, and oversight from the courts.

The LMB case hardly stands alone. The actions of Southern California firm Initiative Legal Group, described in a Nov. 19 *Recorder* article (about a case in which I am an attorney of record), has many unfortunate similarities to the *Johnson* case.

Here are some more horror stories I have seen in recent years:

• Brief retention agreements that make no mention of conflicts of interest despite the hundreds of plaintiffs involved.

• Retainer agreements in which clients expressly give up both the right to settle and the right to avoid aggregate settlements, ostensibly appointing their lawyers as "attorneys-in-fact," even though these are unwaivable rights.

• Settlements that are forged by counsel's agreement with defendants with little or no participation of the clients, as in the LMB and ILG matters.

• Plaintiffs asked to sign "ratifications" of settlement agreements without ever being shown the agreements themselves, even being told by their lawyers that the settlement agreements that they are ratifying are "confidential" so they may not see them.

• Settlement agreements that state that if a sufficient percentage of plaintiffs agree to (or "ratify") the settlement, plaintiffs counsel will defend *the defendants* against the nonsettling plaintiffs – essentially plaintiffs counsel's agreement to switch sides and become adverse to their own clients.

No ethical lawyer would think that the methods described above "solve" anything other than making things easy and profitable for the lawyers who engage in them. But abiding by the current letter of the law is exceptionally difficult for any lawyer. We must find a way bridge the gulf between the current inflexible rules and the reality of practice: Both that mass torts and other large multiplaintiff cases are here to stay, and that they are simply *not* class actions.

In 2010 the American Law Institute came up with one solution through a set of "Principles of the Law of Aggregate Litigation." But these principles not only allow the clients to consent *ab initio* to be bound by a supermajority of plaintiffs — a worthy idea — but also erode individual client autonomy. They allow third-party surrogates to decide for the clients; limit the extent of disclosure required of plaintiffs lawyers; and most unfortunately, allow the lawyers to drop clients who don't agree with the majority like hot potatoes. In short, as Boston University law professor Moore noted, the principles offer an "unduly rosy" view that lawyers "ignore ... the ethics rules [while] they affirmatively downplay the risks of such representation."

Are there, then, more workable solutions? In federal court, multidistrict cases, or MDLs, proceed under a federal regulatory scheme. Wide judicial oversight is the rule. A knowledgeable, sophisticated, well-intentioned and public-spirited judge experienced in multidistrict litigation will certainly help curb some of the worst abuses described above. But many federal judges have been too ready to term these cases "quasi-class actions" in which the powerful judge replaces the lawyer as decision maker, while the clients still lose their right to decide. The "greater good" prevails over individual client autonomy. There are arguments that protecting the greater good, as in class actions, is at least much better than no judicial oversight. But there is no substantial *de jure* basis for the existence of a "quasi-class action."

But what is a fair solution to the 500 plaintiffs in a state court case without a coordinating MDL mechanism and with a judge who does not have particular mass tort case experience?

Some commentators, Moore, recommend full disclosure, a sensible road to follow. But even full disclosure may not be enough unless it's accompanied by *advice* tailored to the needs of each individual client — a real stumbling block considering the inherent conflicts in the circumstances of various clients.

Moore suggests as much, asking, "What ensures that the clients have been adequately informed of both the advantages and the risks of proceeding as part of a 'litigation group'? What ensures that the decisions are truly consensual?" She then answers her own question: the rules of professional conduct, which require clients to be fully informed from the beginning about the risks of representation and conflicting interests of the prospective lawyers.

Taking this one step further, if prospective clients are *fully* informed *at the outset* that if they join the litigation group, their lawyers may make decisions that will be in the interests of the overall group of plaintiffs and not necessarily in the best interests of that individual, and going a step further, that their lawyers will recommend settlement based on a broad consensus of plaintiffs, say 75 percent or more, this disclosure is enough in my view to allow the prospective plaintiffs to give informed consent. This is particularly true if the plaintiffs are assured that even if they don't accept the eventual settlement, their lawyers will continue to represent them to the best of their abilities.

Would such a disclosure comport with California Rule 3-310(D) or ABA Model Rule 1.8(g)? Probably not. But it makes sense to revise the current rules slightly, not to *broadly* allow aggregate settlements decided on by lawyers with big loyalty conflicts and huge fees at stake, but to *narrowly* allow fully informed clients to knowingly and intelligently abrogate a degree of their settlement autonomy in the interests of becoming represented plaintiffs in a mass-plaintiff case.

At least that would be a start.

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