

MASS TORTS AND THE PURSUIT OF ETHICAL FINALITY

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INTRODUCTION

Judges, lawyers, and academics largely agree that comprehensive finality is a central goal of mass tort litigation and settlements. More controversial is whether such finality is normatively preferable, inherently ethically problematic, or can be achieved through nonclass aggregate settlements without running afoul of the existing ethics rules. This Article joins this important debate.

Part I explains the special allure and complexity of finality in nonclass aggregate settlements for defendants, plaintiffs, and plaintiffs' counsel. Part II sets out five core components of comprehensive finality commonly sought in these settlements. These core components include (1) minimum participation thresholds and affirmations by plaintiffs' counsel that they (2) will cease advertising for new clients with similar claims against the defendant; (3) will not represent any new, similar claimants; (4) will recommend participation in the settlement to all clients; and (5) will (seek judicial permission to) withdraw from representing any client who declines his or her settlement offer. This part also discusses the limitations that the ABA Model Rules of Professional Responsibility ("the Rules of Professional Responsibility" or "the Rules") currently impose on each component and the extent to which comprehensive finality is currently achievable as a practical matter. It also provides a critical analysis of critiques of the ethics and desirability of each component recently offered

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by various scholars. Part III argues, notwithstanding these critiques, that comprehensive finality in nonclass aggregate settlements is both desirable and largely achievable within existing ethical constraints. This Article concludes by proposing an amendment to ABA Model Rule of Professional Responsibility 5.6 that would relax the major problematic constraint and thereby arguably benefit defendants, plaintiffs, and plaintiffs' counsel involved in such settlements.

I. THE SPECIAL ALLURE AND COMPLEXITY OF COMPREHENSIVE FINALITY IN MASS TORTS

For both plaintiffs and defendants, resolution is the goal of litigation. In mass tort litigation, however, the goal is not only resolution but comprehensive finality, which has special allure and presents special complexity for the parties. For a mass tort defendant, the large number of claims involved means large potential liability and, therefore, a large potential "cloud" on the company's accounting ledgers and share price. The incentives for the defendant to resolve *all* claims and thereby remove the cloud are clear.¹ For the mass tort plaintiffs (and their contingent fee counsel), the special allure of comprehensive finality rests in the "finality premium" that the defendant can be expected to pay in exchange for true global peace.² In addition, plaintiffs' counsel may benefit from comprehensive resolution insofar as it provides them closure regarding ongoing expenditures of time and money needed to prosecute their clients' claims against the defendant.³

The allure of comprehensive finality for mass tort defendants, plaintiffs, and plaintiffs' counsel is straightforward. Achieving this finality, however,

1. Indeed, simply obtaining certainty as to the actual total cost of resolving all claims is useful for the defendant (and valuable for its shareholders), even if that total cost is significant. To take one notable example, on the day Merck announced its \$4.85 billion nationwide settlement of nearly 50,000 Vioxx claims in November 2007, its stock rose 2.3 percent "even as the broader stock market was sharply lower." Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1 [hereinafter Berenson, *Analysts*]. Interpreting such data is complicated, however. The increase in the defendant's share price upon announcement of a settlement might reflect a lower-than-expected total settlement amount, the savings in ongoing defense costs, and/or a rebound from a decline in the share price earlier in the litigation process. See, e.g., *id.* (noting that "[t]wo years ago, some analysts estimated that Merck would have to pay as much as \$25 billion to settle Vioxx claims" and that settling the cases enabled Merck "to stop spending \$600 million a year on its defense"); Alex Berenson, *Jury Calls Merck Liable in Death of Man on Vioxx*, N.Y. TIMES, Aug. 20, 2006, at A1 (noting that the first trial of a personal injury case involving Vioxx resulted in a jury verdict of \$253.5 million and caused Merck shares to fall 7.7 percent).

2. See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760, 760-63 (1997) (detailing reasons why defendants who settle group lawsuits "want finality and are willing to pay for it"); see also Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 318-20 (2011); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 412-18 (2014).

3. A partial settlement can leave a plaintiff's firm or consortium with ongoing expenditures of time and money as it continues to prosecute the unsettled claims against the defendant.

is complicated. A mass tort defendant has numerous complex considerations when deciding how best to resolve the many pending claims. A series of confidential, incremental, “global” settlements with individual law firms or consortia is one option. The incremental approach runs the risk that plaintiffs’ attorneys receiving early settlements may use some of the proceeds to fund advertising for, and pretrial discovery related to, additional claims, thereby increasing the eventual number of viable claims and potentially the total amount to be paid by the defendant. Similarly, ordinary media publicity surrounding the early settlements may independently cause additional potential claimants to hire an attorney and pursue their claims. A comprehensive, “nationwide” settlement program is another option. Although it may provide some of the same incentives for additional claimants to join the litigation, it will typically have a deadline for participation, which, as a practical matter, will cap the total number of claims to be paid.⁴

Independently of the total number of claims ultimately paid under either settlement option, the incremental approach may enable the defendant to resolve groups of claims for some law firms at a lower per-claim average value than for others.⁵ This approach may reduce the defendant’s total cost of settling all claims relative to a nationwide settlement program if one assumes that the select group of plaintiffs’ counsel negotiating a nationwide settlement program are likely to be among the best bargainers and from the most well-capitalized law firms.⁶

Whether a defendant ultimately negotiates a public, nationwide settlement program, as in *Vioxx*,⁷ or enters into multiple, confidential

4. A deadline for participation may cap the total number of claims as a practical matter simply because stragglers who later seek to hire counsel may find few, if any, interested plaintiffs’ attorneys. From the perspective of a contingent fee plaintiffs’ attorney, the litigation costs, general transaction costs, and opportunity costs of such a belated individual representation are likely to exceed any potential recovery. In some instances, the statute of limitations may have run, providing the defendant a useful hard stop to the number of potential claimants.

5. The comparison here is between similar claims across different law firms or consortia, such that the variable is the law firm or consortium rather than characteristics or qualities of the total inventory of claims represented by each.

6. See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. (forthcoming 2017) (manuscript at 13, 19, 34), <http://ssrn.com/abstract=2724637> (providing empirical data that “[w]hen judges consider applicants for [multidistrict litigation] leadership positions, they focus on experience, cooperative tendencies, and an ability to finance the litigation—factors that favor repeat players,” that “attorneys with more appearances in proceedings are more likely to be appointed to leadership positions, and those in leadership design settlements,” and “settlement values may likewise reflect repeat players’ knowledge about previous awards, which helps prevent defendants from using information asymmetries to their advantage” (footnote omitted)) [<https://perma.cc/XRK5-LWDB>].

7. See Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657 (E.D. La. Nov. 9, 2007) [hereinafter *Vioxx Settlement*], <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf> [<https://perma.cc/Y9B5-DXHM>]. The *Vioxx* settlement was most notable and the second earliest of the relatively few public, nonclass, personal injury aggregate settlements to date. For a list of the handful of other public, aggregate settlements, see Burch & Williams, *supra* note 6. There have been

“inventory” settlements with individual law firms or consortia of firms,⁸ it will need to work with the relevant plaintiffs’ counsel to craft a written settlement agreement. Under either model of mass resolution, the settlement agreement will reflect both parties’ pursuit of comprehensive finality and its expected benefits for the defendant and the relevant group of claimants. The next part takes up five core components of comprehensive finality that one might expect to see in an optimally comprehensive mass tort settlement agreement.

II. FIVE CORE COMPONENTS OF COMPREHENSIVE FINALITY IN NONCLASS MASS TORT SETTLEMENTS

From the perspective of the mass tort defendant, an optimally comprehensive nonclass settlement likely would include five provisions in the agreement negotiated with the relevant plaintiffs’ counsel⁹: (1) that the defendant has a unilateral option to terminate the settlement unless a specified number of claimants agree to participate in the settlement (a “walk-away” right or minimum participation threshold) and that the signatory plaintiffs’ attorney(s) will (2) recommend participation in the settlement to all potentially eligible clients, (3) not represent any new clients with similar claims against the defendant, (4) not advertise for new clients with similar claims against the defendant, and (5) (seek judicial permission to) withdraw from representing any client who declines his or her settlement offer under the agreement.

From the perspective of the claimant, a settlement offer under an agreement that the mass tort defendant considers optimally comprehensive is likely to be larger than an offer under a similar agreement that lacks the above five restrictions. The defendant should be willing to pay a premium for the finality provided by the optimally comprehensive settlement.¹⁰ Indeed, even an ABA formal ethics opinion critical of one such restriction explicitly acknowledges “*the fact* that the defendant is willing to offer more

vastly more personal injury mass torts resolved via multiple confidential inventory settlements.

8. Some “confidential” inventory settlement agreements are publicly available in redacted form as a result of being filed with the Securities and Exchange Commission. *See, e.g.*, Master Settlement Agreement § IV.H, *In re* Am. Med. Sys., Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 12-md-2325 (S.D. W. Va. June 14, 2013) [hereinafter AMS Settlement], <https://www.sec.gov/Archives/edgar/data/1100962/000110096213000038/ex10144meshsettlementagree.htm> [<https://perma.cc/7CLF-THUY>].

9. Claimants covered by a settlement agreement will often be represented by multiple law firms that agree to share the fees that the claimant has contracted to pay pursuant to the attorney-client retainer agreement. Typically, only one (or a small subset) of those law firms is a direct signatory to the mass tort settlement agreement under which the claimant receives a settlement offer. This is true in both inventory settlements and in nationwide settlement programs.

10. Silver & Baker, *supra* note 2, at 760–63 (detailing reasons why defendants who settle group lawsuits “want finality and are willing to pay for it”).

consideration than it might otherwise offer in order to secure the covenant from the attorney not to represent” new clients.¹¹

If both the mass tort defendant and claimants prefer a nonclass settlement with the five provisions set out above, one might expect virtually all settlement agreements to include these provisions. At present, however, the Rules of Professional Responsibility limit, to varying degrees, the ability of counsel for both sides to include such provisions in the agreements they craft.¹² This part takes up each of the five provisions in turn, discusses the limitations that the Rules of Professional Responsibility currently impose on each, and examines the extent to which comprehensive finality is (nonetheless) currently achievable as a practical matter. It also provides a critical analysis of existing critiques of the ethics and desirability of each component.

A. Minimum Participation Threshold

The minimum participation threshold (or “walk-away” right) in a settlement agreement typically takes one of two forms. Sometimes the agreement will state that “the Defendant shall have the right, in its sole discretion, to terminate this settlement if XX percent of the Claimants who are eligible to settle their claims under this agreement do not provide a valid, executed Release on or before the deadline of Day/Month/Year.”¹³ Other times, this provision may impose different participation thresholds on claimants in two or more different injury categories, with a failure to meet any one of the thresholds affording the defendant the option to unilaterally terminate the agreement.¹⁴ Typically, a significant participation rate, sometimes as high as 100 percent, is required for the subgroup of claimants with the highest valued claims (and most serious injuries), with the lowest participation rate required for the subgroup with the lowest valued claims (and least serious injuries).

Such walk-away provisions are unproblematic under the Rules of Professional Responsibility. There are no state bar or ABA ethics opinions questioning the permissibility of such provisions. Nor is there any such case law. This is not surprising. A participation threshold is simply a

11. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-371 (1993) (emphasis added) (regarding restrictions on the right to represent clients in the future).

12. Possible answers to the fascinating question of *why* the Rules interfere in this way are beyond the scope of this Article.

13. *See, e.g.,* AMS Settlement, *supra* note 8, at 11.

14. The “walk-away” provisions of the Vioxx settlement agreement were yet another variant of this form. *See* Vioxx Settlement, *supra* note 7, §§ 11.1–4, 12.1.1–1.6. The Vioxx agreement imposed separate participation requirements on various subgroups of claimants, but each subgroup was required to meet the same 85 percent participation requirement. *See id.* § 11.1.1–1.4. In addition, the Vioxx agreement provided a walk-away right to the defendant if certain attorneys did not recommend that their clients participate in the nationwide settlement program established by the settlement agreement and did not otherwise comply with particular sections of the agreement. *See id.* § 11.1.5. Distinguishing among particular plaintiffs’ counsel in this way is of potential interest to the defendant (and logically possible) only in an agreement establishing a nationwide settlement program rather than an agreement to settle only the “inventory” of a particular law firm.

bargaining point between the defendant and plaintiffs' counsel, much like the total dollar amount of the settlement or any other material term of the settlement agreement. A participation threshold in a master settlement agreement is ultimately no different from a defendant telling plaintiffs' counsel that if the latter can provide signed releases from X percent or X number of claimants on the attached list that it will then agree to a settlement of those claims for no less than \$Y (or for a total amount of \$Z per such release tendered). That is, a defendant could simply decline to enter into a formal agreement to settle any of the plaintiffs' counsel's claims *until* the plaintiffs' counsel took a "straw poll" of sorts and could provide the defendant appropriate proof that a specified number of claimants *would agree* to settle for a total, specified sum.

Nonetheless, as participation thresholds approach 100 percent, they are increasingly controversial and are considered ethically problematic by some legal scholars. Professor Howard Erichson, for example, contends that "all-or-nothing" provisions "create both client-client and lawyer-client conflicts of interest" and thus violate Rule 1.7(a)(2)'s prohibition against certain representations, which present "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . or by a personal interest of the lawyer."¹⁵ For Erichson, a client-client conflict is created by a 100 percent participation requirement insofar as the "decision of some clients to decline the settlement impairs the ability of other clients to get the deal done."¹⁶ The attorney-client conflict arises in two respects. First, "the client-client conflict makes it extremely difficult for a lawyer to give unbiased counsel to a client who wishes to decline the offer" if the settlement agreement requires 100 percent participation.¹⁷ And a 100 percent participation

15. Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1007 (2010) (quoting MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2009)). Rule 1.7 specifies that such representations are permitted if all of the following conditions are met:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve 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; and
- (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 2016).

Erichson distinguishes "most-or-nothing" settlements with "walkaway clauses requiring 85, 90, or 95% participation" from "all-or-nothing" settlements, and contends that the former "raise far fewer ethical concerns than those that require unanimity." Erichson, *supra*, at 1023–24.

16. Erichson, *supra* note 15, at 1008 (footnotes omitted). Although Erichson is less troubled by the client-client and lawyer-client conflicts of interest in settlements with a participation requirement of less than 100 percent, he notes that even settlements that "include the safety valve of permitting some clients to decline their share of the settlement without spoiling the deal for the other clients and for their lawyer" present these conflicts of interest. Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1798 (2005).

17. Erichson, *supra* note 15, at 1008. Assuming *arguendo* that this difficulty exists, it does not obviate the lawyer's obligation under Rule 2.1 to "exercise independent

threshold “pit[s] the lawyer’s interest in closing the deal against the interests of any client[] who might wish to decline the settlement,” thereby “putting the lawyer’s fee at risk.”¹⁸

None of Erichson’s concerns is persuasive. To begin, the client-client conflict that he contends is created in its most extreme form by a 100 percent participation threshold is both waivable and indeed *must* be waived for the group settlement to proceed. It is arguably waivable under Rule 1.7(b), which provides in relevant part that a concurrent conflict is permissible if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and “each affected client gives informed consent, confirmed in writing.”¹⁹ Even more relevant, however, is Rule 1.8(g).²⁰ As Erichson notes, any participation threshold creates an “interdependence” or “collective conditionality” among claims.²¹ This means that the settlement is arguably an “aggregate settlement,” and therefore Rule 1.8(g) applies.²² As I have previously explained, Rule 1.8(g)

usefully supplements Rule 1.7. Rule 1.8(g) makes clear that aggregate settlements *are* ethically permissible and that the plaintiffs’ attorney *may* ethically participate in the “making” of such settlements The Rule also provides some detail about the content of the disclosures necessary in order for the attorney to obtain a client’s informed consent to such a settlement. Put differently, Rule 1.8(g) provides a safe harbor for attorneys concerned that an aggregate settlement creates a non-waivable conflict under Rule 1.7. It does not impose any new requirements on an attorney beyond those imposed by the other rules, but rather charts a path

professional judgment and render candid advice” to the client. MODEL RULES OF PROF’L CONDUCT r. 2.1. Erichson concedes that “[w]hen a settlement contains a walkaway clause that conditions the deal upon 85% or 90% participation, the conflict is relatively mild because of the safety valve that permits a number of clients to decline the settlement without blowing the deal for everyone else.” Erichson, *supra* note 15, at 1008. Thus, Erichson’s primary concern is with what he terms “all-or-nothing” settlements. *Id.* at 980 (“All-or-nothing settlements . . . cause a lot of mischief.”).

18. Erichson, *supra* note 15, at 1009. Erichson acknowledges that this attorney-client conflict exists even in settlements with participation thresholds of less than 100 percent. Erichson, *supra* note 16, at 1798 (“A settlement with a walk-away provision set at ninety-nine percent, for example, functions almost identically to an all-or-nothing settlement in that the lawyer has a strong self-interest in ensuring that virtually every client accepts the deal, and clients who favor the settlement are pitted against those who do not.”).

19. MODEL RULES OF PROF’L CONDUCT r. 1.7(b)(1), (b)(4).

20. Rule 1.8(g) states in relevant part that a

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

Id. r. 1.8(g).

21. Erichson, *supra* note 15, at 1008 (“Client-client conflicts occur whenever a deal is conditioned on terms that make clients’ settlements interdependent.”).

22. *Id.* at 1008 n.172 (citing, among other sources, Erichson, *supra* note 16, at 1796–99).

by which the plaintiffs' attorney can provide clients the benefits of a non-class-action group settlement without running afoul of Rule 1.7.²³

Thus, any *client-client* conflict created by a participation threshold does not render the participation threshold itself unethical or unenforceable, even if 100 percent participation is required. Rather, the resulting conflict is waivable, and will be waived by settling clients, pursuant to the disclosure and consent requirements of Rule 1.8(g).

The attorney-client conflicts that Erichson contends result in their most extreme form from a 100 percent participation threshold also do not make the threshold unethical. As with the client-client conflicts, these conflicts too are waivable under Rule 1.7(b) and will be waived by settling clients pursuant to the disclosure and consent requirements of Rule 1.8(g). In addition, Erichson's concerns with the impact of a 100 percent participation threshold on the plaintiffs' attorney's fees have things exactly backward. Erichson is correct that any participation threshold (like any other obligation in the settlement agreement) puts the plaintiffs' lawyer's fee at risk: if the threshold isn't met, there may be no settlement and, therefore, no fee for the contingent fee plaintiffs' attorney.²⁴ Erichson correctly concedes that "[a]rguably, a lawyer-client conflict exists whenever a contingent fee lawyer advises a single client about a settlement because the lawyer's fee may depend on the client's decision" and "that level of conflict is inherent in virtually every [contingent fee] lawyer-client relationship."²⁵ Where he errs is in his conclusion that the attorney's risk of losing the fee is greater in the aggregate settlement context than in the single-client representation.²⁶ To be sure, the total fee involved will typically be much greater in the aggregate settlement.²⁷ But the likelihood that the attorney receives *no fee* is significantly greater in the single-client representation.

In the single-client representation, there will be no settlement and therefore no fee for the contingent fee attorney if the client declines the settlement offer.²⁸ In the aggregate settlement context, however, the decision of any one client to decline the settlement offer will not derail the settlement, even if the settlement agreement gives the defendant the option

23. Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 317–18 (2015) (footnotes omitted). Comment 13 ("Aggregate Settlements") to Rule 1.8 is consistent with my analysis. See MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 13.

[Rule 1.8(g)] is a corollary of [Rules 1.7 and 1.2(a)] and provides that, before any settlement offer . . . is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive . . . if the settlement . . . is accepted.

Id.

24. See Erichson, *supra* note 15, at 1009.

25. *Id.*

26. See *id.* at 1009–10. ("What makes the all-or-nothing settlement troubling is the extent to which it ups the ante on the lawyer-client conflict by making the entire deal, and potentially the lawyer's entire fee, subject to the decision of each individual client.")

27. See *id.* at 1009.

28. Rule 1.2(a) is clear that "[a] lawyer shall abide by a client's decision whether to settle a matter." MODEL RULES OF PROF'L CONDUCT r. 1.2.

to terminate the settlement if 100 percent of the eligible clients do not accept their settlement offers. Consider a hypothetical settlement involving 1,000 claimants and a 100 percent participation threshold. If the plaintiffs' attorney is able to obtain releases from "only" 999 of the claimants, will a self-interested defendant's best course of action really be to terminate the settlement and continue litigating against the 1,000 claimants rather than have prompt, final resolution of the claims of the 999 claimants willing to settle? In my nearly two decades of experience as a consultant on dozens of actual large-group, large-dollar, mass tort settlements, I have never seen a defendant terminate a settlement in which the specified participation threshold, whether 100 percent or less, was not met.

If defendants do not enforce these participation thresholds, one might wonder why they are keen to include them in aggregate settlement agreements. The answer is presumably that these provisions impose a kind of "best efforts" obligation on plaintiffs' counsel to maximize the participation of their clients in the settlement. The thresholds do afford the defendant the opportunity to ask the plaintiffs' counsel hard questions about which clients are declining their settlement offers and why. And the defendant does have the option to terminate the settlement if it is ultimately uncomfortable with the number or injury categories of the claimants declining their settlement offers or the reasons reported by the plaintiffs' counsel for those claimants' failure to participate in the settlement.

In any event, the fact that defendants regularly waive their contractual right to terminate aggregate settlements in which the participation threshold is not met means that Erichson's concern is misplaced: the plaintiffs' lawyers do not "stand[] to lose millions of dollars if any client says no."²⁹ These lawyers will typically simply make a bit less in fees if 999 claimants, rather than 1,000, accept their settlement offers under the aggregate agreement.³⁰ Rather, it is the lawyer representing a single client who risks making nothing and whose entire fee depends on a lone client's willingness to accept the settlement offer.³¹

Finally, it is important to appreciate that in deciding whether to accept a settlement offer the client in an aggregate settlement is in a very different position than a client in a non-mass tort, single-client representation.³² For

29. Erichson, *supra* note 15, at 1009.

30. Most aggregate settlement agreements, even those that specify a 100 percent participation requirement, also stipulate the portion of the total settlement fund to be rebated to the defendant in the event that the participation threshold is not met but the defendant nonetheless proceeds with the settlement. *See, e.g.*, AMS Settlement, *supra* note 8, at 11 (providing that if the distribution threshold is not met by the specified date, the defendant has the option to either void the entire agreement or receive "the return of the Individual Allocated Amount . . . for only those Claimants below the ninety-five percent (95%) Distribution Threshold").

31. *Cf. supra* note 26 ("What makes the all-or-nothing settlement troubling is the extent to which it ups the ante on the lawyer-client conflict by making the entire deal, and potentially the lawyer's entire fee, subject to the decision of each individual client.").

32. I am assuming that the single-client representation involves a type of case that is typically free standing and litigated on its own, unlike a mass tort case, which may be one of hundreds or thousands of claims arising from the same event or allegedly defective product.

each of these clients, the issue is one of realistic alternatives. In a non-mass tort, single-client representation, the client will often have more bargaining power with the defendant. If the client does not settle, the case continues in the court system. Depending on the extent of science and medical expertise required to try the client's case, going to trial may not cost the plaintiff (and his or her counsel) much relative to the potential recovery. As a one-off case, it may be highly cost effective for the defendant to reach an expeditious settlement. Thus, the client's decision to decline a settlement offer does not disadvantage the client in any way relative to his or her position if the defendant had not made the offer to settle.

In contrast, a client who is considering declining a settlement offer made as part of an aggregate settlement may face only unattractive options. As one among hundreds or thousands, the client will have little bargaining power with the defendant. Assuming the aggregate settlement goes forward, the defendant will have resolved virtually all the pending cases, and the attendant cloud on its share price (if a publicly traded company) will have lifted.³³ The defendant will not be overly concerned with the outlier nonsettling claimant. If that claimant hopes to go to trial, any trial date may be years off and the anticipated cost of litigating his or her science- or medicine-intensive case may exceed \$250,000. Even a claimant with a strong claim may have difficulty finding a contingent fee lawyer eager to gamble that much money and time on the client's case.³⁴ In addition, the judge in any future trial may be especially unenthusiastic about trying the case. The judge may want to know why the claimant was unsatisfied with a settlement that so many others found acceptable. In sum, the unattractiveness of the various options available to the client who chooses to decline an offer under an aggregate settlement may result in relatively few such clients declining their offers. And this in turn increases the likelihood that even a very high participation threshold will be met.

*B. Plaintiffs' Attorney Will Recommend Participation
in the Settlement to All Clients*

A second provision one would find in the optimally comprehensive settlement agreement is an affirmation that the signatory plaintiffs' counsel will be recommending participation in the settlement to all the covered clients. In many confidential inventory settlement agreements, this provision states that "Claimants Counsel . . . have reviewed the provisions of this Agreement, have concluded that it is in the best interests of the Claimants" and therefore "warrant that they will recommend to each of the Claimants that they settle their [claims] under the terms of this

Litigating the mass tort case will typically involve a great deal of scientific or medical expertise and the testimony of numerous expensive experts.

33. See, e.g., Berenson, *Analysts*, *supra* note 1.

34. The claimant's original lawyer may have no difficulty obtaining judicial permission to withdraw from the client's case if the claimant declines the settlement offer. See *infra* Part II.E.

Agreement.”³⁵ In the public Vioxx settlement agreement, the language was essentially the same but took into account the more complex procedures of that nationwide settlement: “By submitting an Enrollment Form, the Enrolling Counsel affirms that he has recommended, or . . . will recommend . . . to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Eligible Claimants enroll in the Program.”³⁶

This provision in the Vioxx settlement agreement has been criticized as ethically problematic by legal scholars as well as by one state bar ethics committee.³⁷ Most criticisms have focused on a perceived tension with Rule 2.1, which states: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”³⁸ Many of these criticisms, however, are based on an incomplete understanding of the Vioxx settlement agreement, a misunderstanding of the provision itself, or both. And the remaining criticisms are not persuasive.

To begin, consider a hypothetical offer by a defendant to settle a plaintiffs’ lawyer’s entire group of 1,000 cases pursuant to an agreement that specifies the individual settlement offer values in a matrix. Imagine that the defendant offers this to the plaintiffs’ lawyer as a take-it-or-leave-it deal and includes a provision that the plaintiffs’ lawyer must recommend the settlement to all her clients. The plaintiffs’ lawyer finds the matrix values fair, with the exception of one category, involving two claimants, which the lawyer believes is undervalued by approximately \$30,000 per claimant. Despite the plaintiffs’ lawyer’s continued negotiation efforts, the defendant is not willing to change those or any other of the matrix values. Imagine further that to try any of the 1,000 cases would cost the plaintiffs’ lawyer approximately \$250,000 and that, even if victorious at trial, the two claimants in question are highly unlikely to net more for their claim than the amount they would net—with certainty and much sooner—under the imperfect proposed settlement agreement.

Under this hypothetical scenario, the plaintiffs’ lawyer would, in theory, be free to decline the settlement offer. But one would expect the plaintiffs’ lawyer to agree to the proposed settlement notwithstanding her view that it undervalues the claims of two of her clients. One would also expect the plaintiffs’ lawyer to tell those two clients that she wishes they were being offered more under the settlement matrix, that she tried to get them more, but that the defendant was unyielding, *and that she nonetheless recommends that they accept their settlement offer given the alternatives*. Critically, the plaintiffs’ lawyer would explain to the two clients that continuing to prosecute their case in the court system would certainly involve additional expense and delay, with no assurance of a better net outcome than the present settlement offer and some possibility of a worse outcome. In addition, the plaintiffs’ lawyer would detail for the clients the

35. See, e.g., AMS Settlement, *supra* note 8, at 6.

36. Vioxx Settlement, *supra* note 7, § 1.2.8.1.

37. See generally Conn. Bar Ass’n, Informal Op. 08-01 (2008); Erichson & Zipursky, *supra* note 2.

38. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2016).

risks and economics of any eventual trial, all of which, upon careful consideration, have caused the lawyer to conclude that accepting the current, flawed settlement offer is still each client's best option.

The Vioxx settlement agreement offered each plaintiffs' lawyer a choice very similar to that faced by the plaintiffs' lawyer in the preceding hypothetical. It was left to each plaintiffs' lawyer to decide whether she could in good faith recommend participation in the nationwide Vioxx settlement program to each of her clients. A plaintiffs' lawyer who felt that she could not recommend participation to all her clients was free to reject the settlement offer and to not enroll her clients in the settlement.³⁹ Thus, a plaintiffs' lawyer who did agree to the settlement, and who was therefore committing to recommend that each of her clients participate in the settlement, had no reason to run afoul of Rule 2.1. Prior to agreeing to the settlement, that lawyer would have already determined that an exercise of independent professional judgment on behalf of each of her clients would enable her to recommend that they each participate in the settlement. The key question here is, "As compared to what?" A lawyer who agreed to the settlement need only be of the view that for each of her clients, participation in the settlement is (*reasonably likely*) to be as good as any of the available alternatives. The lawyer need not believe that the settlement will be the best possible settlement for each of her clients to be able to recommend in good faith that each client participate. The lawyer is free to, and would be expected to, give each individual client "candid advice" regarding the settlement,⁴⁰ as well to explain the settlement to each client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁴¹ The fact that the lawyer's bottom-line recommendation to each client is the same—to participate in the settlement—does not mean that the lawyer did not "exercise independent professional judgment" on behalf of each client in deciding whether she could in fact recommend the settlement to each of them.⁴²

When the Connecticut Bar Association's Committee on Professional Ethics ("the Connecticut Committee") took up the provision in the Vioxx settlement agreement, it began by describing the provision as one that "compels plaintiffs' counsel to give the same advice to all of her clients."⁴³ The provision does indeed require that the plaintiffs' attorney give the same *bottom-line recommendation* to each client: that the client participate in the

39. Because the Vioxx settlement agreement was public, however, potentially eligible claimants would necessarily know about it and could simply fire their lawyer and participate in the settlement pro se. *See* Vioxx Settlement, *supra* note 7, § 1.6. In addition, even a lawyer who declined the offer would seemingly still be obligated to inform her clients about the settlement, pursuant to her communication obligations under Rule 1.4. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 2 (noting that "a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance").

40. *See* MODEL RULES OF PROF'L CONDUCT r. 2.1.

41. *Id.* r. 1.4(b).

42. *Id.* r. 2.1.

43. Conn. Bar Ass'n, Informal Op. 08-01, at 1 (2008) (discussing obligations of plaintiffs' counsel under a particular aggregate settlement agreement).

settlement.⁴⁴ But it does not preclude the attorney from providing each client “candid advice” regarding the settlement. Such candid advice might include setting out the advantages and disadvantages of an individual client’s participation relative to the alternatives or even stating that the lawyer does not think the settlement matrix treats a particular client fairly but that participation in the settlement is nonetheless the client’s best path in the foreseeable future to receiving reasonable compensation for his or her claims.

The Connecticut Committee contended that “the agreement restricts the advice [the lawyer] can give: either recommend that all clients accept the settlement or that none of them accept it.”⁴⁵ This seems to envision that all plaintiffs’ attorneys *must* participate in the settlement and then comply with each of its requirements including the “universal recommendation” provision. But this is not what the Vioxx settlement agreement requires or how it operates. As in the hypothetical above, a plaintiffs’ attorney must first decide if she can agree to the settlement at all. Given the universal recommendation provision, the attorney must first determine *whether* she can recommend the settlement to each of her clients based on an exercise of her independent professional judgment with regard to each client.⁴⁶ An attorney who does not believe that she can comply with this (or any other) provision of the settlement will simply not agree to the settlement, and, in that event, the settlement agreement will not in any way “restrict the advice she can give” her clients. In sum, the provision does not improperly restrict the advice the attorney can give her clients; it simply imposes a condition on the attorney’s acceptance of the settlement.

44. See Vioxx Settlement, *supra* note 7, § 1.2.7.

45. Conn. Bar Ass’n, Informal Op. 08-01, at 3.

46. The unusual structure of the Vioxx settlement and the length of the settlement agreement may have resulted in an unusually large number of plaintiffs’ attorneys—and the Connecticut Committee—not fully understanding what the settlement agreement required of plaintiffs’ attorneys. Thus, on January 17, 2008, some two months after the November 9, 2007 settlement agreement was signed and one month before the Connecticut Committee issued its February 20, 2008 informal opinion, the defendant (Merck) and the negotiating plaintiffs’ counsel executed an “Amendment to Settlement Agreement.” Amendment to Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657 (E.D. La. Jan. 17, 2008), <http://www.officialvioxxsettlement.com/documents/Amendments%20to%20Master%20Settlement%20Agreement.pdf> [<https://perma.cc/5RWX-FRWN>]. The purpose of the amendment was to “make certain technical and clarifying amendments to the Settlement Agreement . . . to ensure that the document accurately and clearly reflects the Parties’ original intent.” *Id.* Recital C. Section 1.2.2 of the amendment undertook to clarify the universal recommendation provision of the settlement agreement (section 1.2.8.1) by restating it as follows:

Each Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program. By submitting an Enrollment Form, the Enrolling Counsel affirms that he or she has exercised such independent judgment and either (1) has recommended to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Eligible Claimants enroll in the Program or (2) . . . will [make such a recommendation] by no later than February 28, 2008

Id. § 1.2.2.

Professors Howard Erichson and Benjamin Zipursky also found the universal recommendation provision troubling.⁴⁷ They acknowledged, “In theory, a lawyer could determine that the overall settlement and its allocation process are *satisfactory* for all Vioxx claimants and, on that basis, sincerely recommend the settlement to each of her clients.”⁴⁸ Indeed, this is a fully accurate statement of how, I believe, the parties to the Vioxx settlement agreement imagined the thought process of a plaintiffs’ attorney when considering whether to participate in the settlement. Erichson and Zipursky are nonetheless troubled by the provision:

In practice, however, one wonders how a lawyer would handle clients whose claims may be undervalued by the point-allocation system, or whose claims would provoke unusually strong jury sympathy, or who would make uncommonly strong witnesses, or who have high risk tolerance, or who place significant value on the right to go to trial, or who for any other reason might be well advised to decline the settlement.⁴⁹

There are two obvious responses to Erichson and Zipursky’s concerns. First, by their own (correct) account of the universal recommendation provision, a lawyer need only “determine that the overall settlement and its allocation process are *satisfactory*” and not that each client’s settlement offer under the agreement is ideal.⁵⁰ Thus, the lawyer might consider a particular claimant’s settlement offer to be suboptimal because she believes the claim is undervalued by the point-allocation system or for any other reason, yet the lawyer might still conclude that, all things considered, the offer is “satisfactory” and recommend that the client accept it.

Second, the lawyer’s assessment of whether a particular client’s settlement offer is satisfactory is necessarily a relative judgment, which must take into account not only the gross dollar amount of the offer but also the absence of risk, speed of payment, and litigation expenses to be deducted from that offer relative to either a later potential settlement or trial. In the context of the Vioxx settlement, for example, it merits particular note that any eventual trial would involve significant medical and scientific expertise and could be expected to cost \$250,000 or more. Some or all of these litigation expenses would be deducted from the client’s share of any eventual recovery (assuming a verdict in favor of the plaintiff survived all appeals). Thus, any future recovery would need to be both significantly larger than the offer under the settlement agreement (and have a very high likelihood of being obtained) for the client eventually to net more than would be the case under the settlement agreement.

47. Erichson & Zipursky, *supra* note 2, at 283 & n.74. It should be noted that only the Liptak article of the sources cited postdates the January 2008 clarifying amendment. For other criticisms of this provision of the settlement, see Erichson, *supra* note 15, at 1000–04.

48. Erichson & Zipursky, *supra* note 2, at 284 (emphasis added). Erichson and Zipursky are importantly correct in positing a standard of “satisfactory” rather than, say, “best possible” for the plaintiffs’ attorney’s evaluation of the settlement and therefore whether she can recommend it to each of her clients.

49. *Id.*

50. *Id.* (emphasis added).

Moreover, a client's risk of obtaining no recovery at all can be significant. In the Vioxx settlement, for example, the template cover letter for attorneys who agreed to the settlement to provide their clients when explaining and recommending the settlement included sobering information about the very mixed results of the sixteen trials to that date and about a then-pending U.S. Supreme Court case that could "limit the ability of plaintiffs to recover against drug companies if a drug has been approved for marketing by the FDA."⁵¹ In addition, one wonders about the likelihood that a court would be willing to try the case of a plaintiff who opted out of the nationwide settlement program, or the likelihood that the defendant would be willing to provide a more generous settlement offer to such an opt-out client, given the comprehensiveness of the nationwide settlement program and the fact that it was crafted with the implicit consent of the four judges in whose courts more than 95 percent of the active plaintiffs' cases were coordinated.⁵²

*C. Plaintiffs' Attorney Will Not Represent
Any New Clients with Similar Claims*

A third provision one might expect to be included in an optimally comprehensive settlement agreement is an affirmation by plaintiffs' counsel

51. Client Cover Letter, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657 (E.D. La. Nov. 9, 2007), <http://www.officialvioxxsettlement.com/documents/Client%20Cover%20Letter%20-%20FINAL.pdf> [https://perma.cc/YF6D-L68K]. The template letter to clients stated:

- To date, throughout the country, there have been 16 Vioxx trials involving 17 plaintiffs. Of these trials, plaintiffs have won 5, Merck has won 7, and the remaining 5 are awaiting a new trial. Merck has appealed each of the five cases in which the plaintiff was victorious, and all of those appeals are still pending.
- To date, not even the five plaintiffs with hard fought victories against Merck at trial have received any money from Merck. The first verdict in favor of a plaintiff was in August 2005, more than two years ago. Merck has not yet paid a single dollar of that verdict and has no legal obligation to do so unless and until all appeals are exhausted and the verdict in favor of the plaintiff is upheld.

Id.

52. The Vioxx settlement agreement stated that Merck was confronting approximately 47,000 filed claims nationwide, along with approximately 13,250 claims on tolling agreements. Vioxx Settlement, *supra* note 7, Recital B. It then listed the four "Coordinated Proceedings" in which "[m]ore than 95% of the active plaintiffs are presently coordinated": the federal multidistrict litigation (MDL No. 1657), venued in the U.S. District Court for the Eastern District of Louisiana (Judge Eldon E. Fallon); the California proceedings (JCCP No. 4247), venued in the Superior Court of California, Los Angeles County (Judge Victoria G. Chaney); the New Jersey proceedings (Case Nos. 619 and 273), venued in the Superior Court of New Jersey, Law Division, Atlantic County (Judge Carol E. Higbee); and the Texas proceedings (No. 2005-59599), venued in the District Court of Harris County, Texas (Judge Randy Wilson). *Id.* Recital D.

Each of these four judges issued an order staying proceedings in their respective courts in light of the nationwide resolution program, and each subsequently issued an order requiring the registration of claims, consistent with the settlement agreement. *See Vioxx Settlement Documents*, OFFICIAL VIOXX SETTLEMENT, <http://www.officialvioxxsettlement.com/documents/> (last visited Mar. 25, 2017) [https://perma.cc/KZ2C-EAHX]. In addition, Judge Fallon "agreed to preside over the [settlement] Program" and serve as its "Chief Administrator." Vioxx Settlement, *supra* note 7, § 6.1.1. Each of the three state court judges had an explicit role to play regarding the eventual allocation of the "Settlement Fee and Cost Account." *Id.* § 9.2.3.

that they will not represent new clients for the purpose of bringing similar claims against the defendant. Such a provision, however, clearly runs afoul of the plain language of Rule 5.6, which states in relevant part that “a lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.”⁵³ Comment 2 elaborates that this provision “prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.”⁵⁴

Prior to 1970, such provisions were unproblematic under the equivalent to current Rule 5.6.⁵⁵ Since the adoption of the Rule’s current wording, courts and scholars have continued to debate the actual and appropriate scope of the Rule’s prohibition and the justifications for it.⁵⁶ The leading ABA formal ethics opinion regarding the Rule explicitly acknowledges the premium that a defendant would pay plaintiffs and their counsel for such a provision⁵⁷ but concludes Rule 5.6(b) mandates that “a lawyer cannot agree to refrain from representing present or future clients against a defendant pursuant to a settlement agreement on behalf of current clients even in the mass tort, global settlement context.”⁵⁸ In a 1993 ethics opinion, the ABA stated that the policy justification for the Rule “is clear,” and the ABA reaffirmed those policy concerns in a 2000 opinion⁵⁹:

First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to “buy off” plaintiff’s counsel. Third, the offering of such

53. MODEL RULES OF PROF’L CONDUCT r. 5.6 (AM. BAR ASS’N 2016).

54. *Id.* r. 5.6 cmt. 2.

55. See Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291, 295–97 (2005) (detailing the historical evolution of current Rule 5.6).

56. See Erichson & Zipursky, *supra* note 2, at 285 (“To be sure, Rule 5.6(b) is itself controversial.”); Gillers & Painter, *supra* note 55, at 296–302; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2624 (1995) (“The ban on lawyer buyout is virtually the only piece of the ethics codes that recognizes that accumulated legal skills are a public good that should not be squandered on a single favorable settlement.”); see also *Blue Cross & Blue Shield v. Phillip Morris, Inc.*, 53 F. Supp. 2d 338, 341–46 (E.D.N.Y. 1999) (expressing doubt about rationale for the prohibition of no-sue agreements, at least where there is “no threat to the public’s unfettered right to counsel”); *Feldman v. Minars*, 658 N.Y.S.2d 614, 617 (App. Div. 1997) (holding that “an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York”); Stephen Gillers, *A Rule Without a Reason: Let the Market, Not the Bar, Regulate Settlements That Restrict Practice*, A.B.A. J., Oct. 1993, at 118.

57. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-371, at 2 (1993) (acknowledging “the fact that the defendant is willing to offer more consideration than it might otherwise offer in order to secure the covenant from the attorney not to represent other present clients as well as future claimants”).

58. *Id.*

59. *Id.*; see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Ethics Op. 00-417 (2000) (discussing settlement terms limiting a lawyer’s use of information).

restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the strong countervailing policy favoring the public's unfettered choice of counsel.⁶⁰

These policy arguments for the Rule continue to be controversial.⁶¹

Given the obvious benefits to both sides of including so-called "no sue" provisions in certain settlement agreements, defendants and plaintiffs' lawyers have long sought to work around the restrictions imposed by Rule 5.6(b). One approach has been for a defendant, moments after executing a settlement agreement with a plaintiffs' lawyer to resolve her clients' claims, to enter into a consulting agreement with that lawyer.⁶² In this way, the defendant becomes the lawyer's new client and conflict rules will prevent the lawyer from bringing similar, future claims against the defendant.⁶³ Numerous courts and state bar associations, however, have condemned such agreements and have imposed sanctions including disbarment, suspensions, and significant monetary penalties on the attorneys on both sides.⁶⁴

Perhaps the most popular approach in recent years has been the use in settlement agreement of "no present intention" language along the following lines:

While nothing in the . . . Agreement is intended to operate as a restriction on the right of the Claimants Counsel to practice law within the meaning of Rule 5.6(b) of the ABA Model Rules of Professional Conduct . . . the Claimants Counsel represent that *they have no present intent* to solicit or represent new clients for the purpose of bringing [similar] Claims.⁶⁵

A statement that the claimants' law firm "has no present intent" to do something is importantly different, as a legal matter, from an agreement or promise by the firm not to do something in the future. To date, two courts have explicitly found such language in settlement agreements ethically unproblematic on the ground that an affirmation of "no present intention" to do something *is not* "an agreement but merely an attempt by one negotiating party to achieve finality through the settlement."⁶⁶ Although

60. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-371, at 2; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Ethics Op. 00-417.

61. *See, e.g.*, Gillers & Painter, *supra* note 55, at 307-19 (presenting arguments for prohibiting no-sue agreements and responses to them).

62. *See id.* at 309-10.

63. *Id.*

64. *See, e.g.*, Adams v. Bellsouth Telecomms., Inc., No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001); *In re Hager*, 812 A.2d 904 (D.C. App. 2002); Fla. Bar v. St. Louis, 967 So. 2d 108 (Fla. 2007); *In re Brandt*, 10 P.3d 906 (Or. 2000).

65. *See* AMS Settlement, *supra* note 8, at 20 (emphasis added).

66. Desantis v. Snap-On Tools Co., No. 06-cv-2231 (DMC), 2006 WL 3068584, at *12 (D.N.J. Oct. 27, 2006) (emphasis added) (holding also that a provision of a settlement agreement stating that counsel "had no present intention of representing any persons who are not Class Members with respect to defendants" and "does not restrict [counsel's] right to represent any future clients"); La. Mun. Police Emps.' Ret. Sys. v. Black, No. 9410-VCN, 2016 WL 790898, at *5 & n.37 (Del. Ch. Feb. 19, 2016) (citing *Desantis* approvingly and

unsurprising, these holdings raise the question of why a defendant cares to include such language in the settlement agreement if it has no legal force. One possibility is that Wall Street might (mis)interpret the language to impose a legally enforceable limit on the defendant's potential liability, thereby benefitting the company's share price. Another possibility is that the language has actual *in terrorem* force in the small world of repeat players among both defense counsel (and their clients) and plaintiffs' counsel.⁶⁷ Whatever the reasons, such language is increasingly common in settlement agreements. And if the de facto effect of such language is identical to the prohibited language, one wonders if the "finality premium" paid by defendants for the "no present intention" language is comparable. That is, perhaps Rule 5.6(b) results in a subsidy of sorts to defendants if the "no present intention" language, which is the best one can do under the current rules, reduces the premium they must pay the plaintiffs (and their counsel) for finality comparable to what might be achieved with the prohibited language.

*D. Plaintiffs' Attorney Will Not Advertise
for New Clients with Similar Claims*

A related provision one might expect to find in an optimally comprehensive settlement agreement is an affirmation by the plaintiffs' counsel that they will take down and cease all advertising in any and all media for new clients with similar claims against the defendant. Whether such a provision runs afoul of Rule 5.6(b) will depend on whether advertising by plaintiffs' lawyers is considered part of the practice of law such that a restriction on advertising for certain new clients is considered an impermissible "restriction on the lawyer's right to practice."⁶⁸

The state bar ethics committees of Texas and South Carolina have held that advertising and solicitation are "protected under the umbrella of 'a lawyer's right to practice law.'"⁶⁹ In 1995, the Texas Bar Professional Ethics Committee held:

Solicitation generally describes conduct by an attorney or a third person acting for an attorney, which specifically targets potential clients, with the intent of pecuniary gain. To the extent that such is permitted under the State Bar Rules, and other applicable state and federal statutes, solicitation

distinguishing as a violation of Rule 5.6(b) a straightforward promise by plaintiffs' counsel not to initiate litigation against the defendant in the future, "because it involves a prospective guarantee not to represent future clients, the violation of which would . . . terminate the deal").

67. This is the answer I received in a May 2016 conversation with an attorney who has years of experience as outside counsel to defendants in various mass tort settlements.

68. Rule 5.6(b) states in relevant part that a "lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." MODEL RULES OF PROF'L CONDUCT r. 5.6(b) (AM. BAR ASS'N 2016).

69. S.C. Bar Ethics Advisory Comm., Op. 10-04, (2010); Tex. Prof'l Ethics Comm., Op. 505 (1995); cf. Tex. Prof'l Ethics Comm., Op. 590 (2009) ("The conclusion that solicitation of clients, to the extent permitted by applicable disciplinary rules and other law, is an appropriate part of the practice of law was affirmed in Opinion 505.").

is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement than it is restricted in the Rules and applicable law.

....

A settlement agreement which exceeds current limitations placed on solicitation would be a limitation on the practice of law and therefore a violation of [the Texas equivalent to ABA Rule 5.6(b)].⁷⁰

In 2010, the South Carolina Bar Ethics Advisory Committee cited the 1995 Texas ethics opinion in reaching the same conclusion that its “Rule 5.6(b) precludes contracting away rights associated with the practice of law, among them the right to advertise one’s services.”⁷¹ In light of these decisions, defendants and plaintiffs’ lawyers have arrived at a work-around similar to that for the “no new client” restrictions discussed in the preceding section:

[W]hile nothing in this Agreement is intended to operate as a “restriction” on the right of Claimants’ Counsel to practice law within the meaning of the [relevant state(s)] equivalent to Rule 5.6(b) of the ABA Model Rules of Professional Conduct[,] . . . Claimants’ Counsel represents that Claimants’ Counsel *has removed, dismantled, or discontinued, and has no present intention to create in the future, any advertisements for clients relating to [claims involving Product X]*.⁷²

The “no present intention” statement within this provision is permissible for the reasons discussed above.⁷³ The statement that the claimants’ law firm “has removed, dismantled, or discontinued” all advertisements for clients with claims involving “Product X” is ethically unproblematic because it is simply a statement of fact regarding *past actions voluntarily*

70. Tex. Prof'l Ethics Comm., Op. 505. The question presented to the Texas Professional Ethics Committee was, “Would a violation of Texas Disciplinary Rules of Professional Conduct occur if a law firm agreed, as part of the settlement of a lawsuit, not to solicit third parties in the future to prosecute claims against the opposing party?” *Id.* This is a broader, and therefore potentially more problematic, restriction than the one discussed in this Article. In framing its discussion, however, the committee took a more narrow approach:

Under [the Texas equivalent to ABA Rule 5.6(b)], the key issue is whether or not a settlement agreement such as this would in any way prevent a lawyer from representing another person. Generally, it seems that the intent of [this] clause[] would be exactly that: to limit an attorney from representing a client similarly situated in a matter against the opposing party.

Id.

71. S.C. Bar Ethics Advisory Comm., Op. 10-04. The “proposed limitation in this settlement” was that “Lawyer A, the lawyer for the plaintiff, agree that Lawyer A may not identify or use the defendant’s name for ‘commercial or commercially-related publicity purposes.’ Lawyer A may identify generally ‘a settlement was achieved against an industry’—i.e.: trucking or retail store.” *Id.*

The South Carolina Bar Ethics Advisory Committee’s mention of *Bates v. Arizona*, 433 U.S. 350 (1977), is both apt and ironic. Prior to that U.S. Supreme Court decision, state bars routinely prohibited virtually all attorney advertising. Thus, with the South Carolina and Texas ethics opinions, we have gone full circle, from attorney advertising essentially not being permitted to advertising become a constitutional right that the attorney cannot waive.

72. Confidential Master Settlement Agreement (emphasis added) (on file with author); *cf. e.g.*, AMS Settlement, *supra* note 8, at 20.

73. See *supra* notes 65–66 and accompanying text.

taken by the firm. As with the “no present intention” language discussed in Part II.C, one is left to wonder why defendants are concerned to include language in the settlement agreement that has no legal force. If the de facto effect of such language is the same as for the language prohibited by Rule 5.6(b), one also wonders if the “finality premium” paid by defendants for the “no present intention” language is comparable.

*E. Plaintiffs’ Attorney Will Undertake to Withdraw
from Representing Clients Who Decline Their Settlement Offer*

A final provision one might expect to find in an optimally comprehensive settlement agreement is an affirmation by claimants’ counsel that they will take “all necessary steps to disengage and withdraw from the representation” of any claimant who declines his or her settlement offer.⁷⁴ The Vioxx settlement agreement included a variant of this provision, which was highly controversial.⁷⁵ Some of the controversy seemed to result from misreading and mischaracterizing the provision as a “mandatory withdrawal” provision.⁷⁶ The Vioxx provision explicitly included the obvious implicit constraint that this obligation of claimants’ counsel existed only “to the extent permitted by the equivalents to Rules 1.16 and 5.6 of the ABA Model Rules of Professional Conduct in the relevant jurisdiction(s).”⁷⁷ Rule 1.16 is doing the primary work here insofar as it limits the circumstances under which a lawyer may ethically seek to withdraw from representing a client and sets out the procedures the attorney must follow to do so. To begin, Rule 1.16(c) requires a lawyer in a filed case to “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation” and it further obligates the lawyer to “continue representation notwithstanding good cause for terminating the representation” if “ordered to do so by a tribunal.”⁷⁸ Thus, an attorney cannot simply unilaterally withdraw from a filed case.

In addition, Rule 1.16(b) requires that the attorney have “good cause” for seeking to withdraw, and sets out various circumstances that would meet this requirement. The two circumstances most likely to be relevant in a mass tort context, such as the Vioxx settlement, are when “the client insists upon taking action . . . with which the lawyer has a fundamental disagreement” and when “the representation will result in an unreasonable

74. See, e.g., Vioxx Settlement, *supra* note 7, § 1.2.8.2.

75. See *id.* For concurrent commentary critical of this provision, see, e.g., Erichson & Zipursky, *supra* note 2, at 281 n.74 (citing sources); see also, e.g., Conn. Bar Ass’n, Informal Op. 08-01, at 1 (2008); Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs’ Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013).

76. Even commentators such as Erichson and Zipursky, who clearly appreciated the careful wording of the provision and its implications, repeatedly referred to the provision as the “mandatory-withdrawal provision” and stated that “participating lawyers were obligated . . . to withdraw from representing clients who refused the settlement.” Erichson & Zipursky, *supra* note 2, at 283. “Mandatory” withdrawal is not even logically possible if a case has been filed, given the need for notice to the court and court approval. See MODEL RULES OF PROF’L CONDUCT r. 1.16(c) (AM. BAR ASS’N 2016).

77. See Vioxx Settlement, *supra* note 7, § 1.2.8.2.

78. MODEL RULES OF PROF’L CONDUCT r. 1.16(c).

financial burden on the lawyer.”⁷⁹ Some scholars have argued that a qualifying “fundamental disagreement” does not exist when the lawyer fundamentally disagrees with the client’s decision to reject the settlement.⁸⁰ They contend that to hold otherwise would be to “assume the settlement decision belongs to the lawyer despite Rule 1.2(a)’s clear instruction that the lawyer shall abide by the client’s decision whether to accept or reject a settlement.”⁸¹ There are two problems with this argument. First, a lawyer who seeks permission from a court to withdraw from representing a client who has declined a settlement offer has not usurped the client’s decision whether to settle. The client has chosen not to settle and the lawyer has not in any way overridden that decision. Second, the mandate of Rule 1.2(a) that the lawyer “abide by a client’s decision whether to settle a matter”⁸² does not require that the lawyer continue to represent a client who declines a settlement offer; rather, it requires that the lawyer not settle the client’s case without the client’s permission, and the lawyer seeking permission from the court to withdraw from representing the client has not done so.

Scholars such as Erichson and Zipursky, who contend that the withdrawal provision of the Vioxx settlement agreement is ethically impermissible, note in further support of their position that “[c]ases overwhelmingly reject the idea that a lawyer may fire a client for declining a settlement against the lawyer’s advice.”⁸³ The mass tort context, however, is distinguishable in several relevant respects: (1) the attorney is working on a contingent fee and typically is advancing all litigation expenses on behalf of the client with no risk to the client; (2) the settlement offer which the client has chosen to decline may be the best net result the attorney reasonably believes he or she can obtain through settlement for the client in the foreseeable future; and (3) the expected value of the client’s case at trial, even with a favorable verdict, might be too low even to cover the cost of the trial.

Put differently, in a mass tort context, such as the Vioxx settlement, continuing to represent a nonsettling claimant may well impose “an unreasonable financial burden” on the contingent fee claimant’s counsel, justifying withdrawal under Rule 1.16(b)(6). Erichson and Zipursky acknowledge that “[c]ompared with the certainty of payout under Merck’s settlement program, plaintiffs’ lawyers might regard bringing a [Vioxx] case to trial as a highly questionable investment.”⁸⁴ In their view, however, this is not a sufficient basis on which such attorneys can seek withdrawal,

79. *Id.* r. 1.16(b)(4), (b)(6). Other provisions, including 1.16(b)(1) and 1.16(b)(7) might also be relevant in many circumstances.

80. *See, e.g.*, Erichson & Zipursky, *supra* note 2, at 287.

81. *Id.* Erichson is also concerned that a lawyer withdrawing if the client declines a settlement offer means that the client’s informed consent to settlement offer is meaningless: “they essentially had no real choice.” Erichson, *supra* note 15, at 1019. The client does have the choice to find another lawyer, however. And if the client cannot find another lawyer to take his case, it may mean the client is being unreasonable in declining the settlement offer.

82. MODEL RULE OF PROF’L CONDUCT r. 1.2(a).

83. Erichson & Zipursky, *supra* note 2, at 287.

84. *Id.* at 289.

because “[t]he lawyers did not limit the scope of their representation to pursuing settlement,” a contractual limitation that they further acknowledge might not even be permissible under Rule 1.2(c).⁸⁵ In sum, notwithstanding the plain language of Rule 1.16(b)(6), Erichson and Zipursky appear to contend that a contingent fee attorney is obligated to lose money on behalf of a client who declines a settlement offer and wants to pursue his or her case to trial. The argument is not persuasive.

A few further aspects of such withdrawal provisions merit discussion. First, insofar as “good cause” is a prerequisite under Rule 1.16 for an attorney to (seek permission to) withdraw from a client’s (filed) case, a claimant’s attorney is not obligated by a withdrawal provision to (seek the court’s permission to) withdraw if the attorney does not think good cause for withdrawal exists. For example, an attorney might believe that a client’s settlement offer is not sufficiently large given the likelihood that the client would prevail at trial and the expected value of the client’s case net of the costs of trial. In that event, the attorney might consider the client’s decision to decline the settlement offer to be entirely reasonable, and the attorney would therefore not think good cause for withdrawal exists. Second, even if the attorney does believe good cause exists, the court might deny the attorney’s motion to withdraw as counsel. Thus, taking “all necessary steps to disengage and withdraw from the representation of a client” will not necessarily mean that the attorney will no longer represent the client.

Finally, some critics of the Vioxx withdrawal provision have expressed particular skepticism regarding its caveat that lawyers should undertake to withdraw only “to the extent permitted by” Rules 1.16 and 5.6.⁸⁶ Erichson and Zipursky, for example, argue that

[i]f this language is taken seriously, . . . then neither the intent nor the terms of the [Vioxx] agreement required counsel to withdraw from representing clients who declined the settlement. Obedience to Rules

85. *Id.* Erichson and Zipursky contend:

The problem with this argument is that when the lawyer agreed to represent each Vioxx claimant, the lawyer could not assume that Merck would offer a settlement, and even if it did, the lawyer could not assume that the client would accept the offer. The lawyers did not limit the scope of their representation to pursuing settlement.

Id. With regard to the last point, they elaborate as follows:

Under Rule 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. . . . We doubt whether, under the circumstances of the Vioxx litigation, a lawyer could properly limit the scope of representation so that clients understood that the lawyer represented them solely for purposes of a possible settlement. Without the leverage of adjudication, a lawyer could not adequately pursue the interests of tort claimants. In any event, such limited representation is not the scenario that the actual Vioxx case presents.

Id. at 289 n.110.

86. Vioxx Settlement, *supra* note 7, § 1.2.8.2. These critics include Erichson and Zipursky who contend, among other things, that “[t]o a great extent, these clauses are defensive verbiage, and the work they are actually supposed to do is unclear.” Erichson & Zipursky, *supra* note 2, at 290.

1.16 and 5.6 would compel plaintiffs' counsel *not* to withdraw from representing their nonsettling clients.⁸⁷

As explained above, however, this is not a correct reading of Rule 1.16. If one reads Rule 1.16(b)(6) as I set out above, it is possible for plaintiffs' counsel to believe that "good cause" to withdraw exists insofar as continued representation would impose an unreasonable financial burden on the lawyer but for the lawyer nonetheless to be willing to continue the representation. That is, having good cause to withdraw does not require that one withdraw but makes it ethically permissible to do so.⁸⁸ Thus, one way to make sense of the caveat language that Erichson and Zipursky find troubling is for the provision to require that a plaintiffs' lawyer who does have good cause to withdraw, but who is not required by Rule 1.16(a) to withdraw, take appropriate steps to withdraw even if the lawyer might otherwise be willing to continue the representation. Such an agreement seems to be ethically unproblematic and likely to result in more comprehensive closure under the settlement. For a plaintiffs' lawyer who does not believe that good cause exists to (request permission to) withdraw from a representation, the caveat language should indeed provide "contractual comfort."⁸⁹

III. COMPREHENSIVE FINALITY IN NONCLASS MASS TORTS: A DEFENSE AND A PROPOSAL

Comprehensive finality in nonclass mass torts has clear benefits and no significant costs for the defendants, which translates into a "finality premium" for the plaintiffs. The issue then becomes whether such comprehensive finality also has costs for the plaintiffs, which might exceed the benefits of that increased compensation. Throughout the preceding analysis of five core components of comprehensive finality in nonclass mass tort settlements, the primary costs alleged by critics have been the adverse effect on the autonomy and choices available to present (and future) plaintiffs.⁹⁰ The conceptions of client autonomy and choice that underlie many of these critiques, however, seem to be derived from a model of individual, hourly rate representation rather than a model of aggregate, contingent fee representation. In addition, some of the claimed costs to the plaintiffs do not seem to be a function of the comprehensiveness of the settlement but rather of the underlying aggregation inherent in the mass action.

87. Erichson & Zipursky, *supra* note 2, at 290–91.

88. MODEL RULES OF PROF'L CONDUCT r. 1.16(b) (AM. BAR ASS'N 2016) ("[A] lawyer *may withdraw* from representing a client if . . . good cause for withdrawal exists." (emphasis added)).

89. *See* Erichson & Zipursky, *supra* note 2, at 291.

90. Similarly, the bad acts of various attorneys involved in nonclass aggregate settlements, discussed in Erichson, *supra* note 15, at 982–1006, reflect on those particular attorneys and not on aggregate settlements, their negotiation, or the existing ethics rules. Many attorneys who engage in bad acts are not involved in aggregate settlements, and most attorneys do not engage in bad acts.

In undertaking any normative assessment of the ethics rules that do and should govern nonclass mass tort settlements, it is critical to keep in mind that mass actions are importantly different from individual litigation. This distinction is rarely acknowledged in the ethics rules, which embody a largely individualistic model of what lawyers do and who their clients are.⁹¹ In mass litigation, in which a single plaintiffs' law firm may represent a thousand claimants, whose cases it will move toward trial or settlement as a block, the individual plaintiff will typically and inevitably have less autonomy in certain respects than a plaintiff flying solo. In exchange, however, the mass litigation claimants gain several important advantages by prosecuting their claims collectively. These include increased leverage in settlement negotiations, economies of scale in litigation costs, equalization of plaintiffs' and defendants' financial risks, and conservation of defendants' assets.⁹²

In sum, the choice of baseline matters. The appropriate baseline against which to assess the five core components of comprehensive finality discussed in this Article is a nonclass aggregate settlement agreement, which is identical except for the finality provision(s) at issue. When measured against that baseline, it seems clear that the benefits of comprehensive finality in nonclass mass tort settlements exceed the costs for plaintiffs as well as defendants.

As the analysis in Part II has shown, three of the core components of comprehensive finality in mass tort settlement agreements are unproblematic under the existing ethics rules, notwithstanding the criticisms of various commentators.⁹³ The remaining two components in their purest form are problematic under Rule 5.6(b), but the market has generated "work-arounds" through the use of "no present intention" language.⁹⁴ There is reason to expect, however, that these work-arounds may be costing the plaintiffs some portion of their potentially available finality premium and perhaps providing a windfall to the defendants.⁹⁵

I therefore, propose that Rule 5.6(b) be amended to read (in relevant part) as follows:

A lawyer shall not participate in offering or making:

. . . .

91. The "aggregate settlement" rule, Rule 1.8, is the best—and perhaps only—example of an existing Rule that acknowledges the differences between individual and mass litigation and settlements. *See* MODEL RULE OF PROF'L CONDUCT r. 1.8(g).

92. Silver & Baker, *supra* note 2, at 744.

93. These core provisions are the minimum participation thresholds and affirmations by plaintiffs' counsel that they will recommend participation in the settlement to all eligible clients and will (seek judicial permission to) withdraw from representing any client who declines his or her settlement offer. *See supra* Part II.A–B, E.

94. These core provisions are the affirmations by plaintiffs' counsel that they will cease advertising for new clients with similar claims against the defendant and will not represent any new, similar claimants. *See supra* Part II.C–D.

95. Given the role of repeat play in enforcing the current work-around language, the question arises of how large the windfall to defendants might be and how much the plaintiffs would gain by relaxing the restrictions of current Rule 5.6. An amendment would certainly increase clarity and its associated benefits.

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a matter, except that a lawyer may include in such an agreement a promise not to represent, or advertise for, new clients in matters arising out of the same transaction or event as the settled matter.

A formal Comment to the Rule would specify that a lawyer is not obligated to include such a promise simply because a client or defendant requests it. A second Comment would require that any supplemental compensation to be paid by the defendant in exchange for the lawyer's promise must be included in the total settlement payment to be made for the covered clients' claims.

This amendment and the first Comment are similar to, but importantly different from, those proposed by Stephen Gillers and Richard Painter.⁹⁶ Although I share many of the concerns that motivate their proposal for relaxing the existing prohibitions of Rule 5.6(b), I am eager to avoid any side payments to the lawyer in exchange for "no-sue" or "no-advertising" restrictions. My concern is to minimize any incentive for the lawyer to lowball the settlement value of the client's claims to obtain a larger side payment for herself.⁹⁷ A restriction that would permit the lawyer to negotiate a personal side payment from the defendant in exchange for a no-sue promise, but "only after the terms of the plaintiff's settlement are set,"⁹⁸ does not provide sufficient safeguards in this respect.⁹⁹ Indeed, such a limitation seems to be little different than the frequently condemned practice of a defendant negotiating a consulting arrangement with a plaintiffs' lawyer promptly after negotiating an agreement to settle the claims of that lawyer's clients.¹⁰⁰ Under either scenario, one is left to wonder whether some (or all) of the defendant's separate payment to the attorney would have been included in her clients' total settlement value in the absence of the "later negotiated" side agreement. Thus, the better option is to require any no-sue or no-advertising restriction to be included in the mass tort settlement agreement and for the value of such restrictions to be similarly included in the total settlement value of the covered clients' claims, thereby providing the finality premium to both the settling claimants and their lawyer.

96. See Gillers & Painter, *supra* note 55, at 319.

97. This amendment might also be expected to improve perceptions of attorney loyalty relative to the lawyer changing sides, as well as difficult questions about when exactly negotiations regarding the lawyer's separate side payment began.

98. Gillers & Painter, *supra* note 55, at 320. Gillers and Painter are also willing to have the attorney renegotiate the fee to be paid by the clients in light of a no-sue promise negotiated between the attorney and the defendant. See *id.* This option is even more rife with problems and should not be permitted.

99. Among other things, it seems too easy for the defendant and the plaintiffs' lawyer to anticipate such a "later" negotiation and to plan accordingly when setting the settlement value of the clients' claims, even if nothing is said by either party until after the agreement to settle the clients' claims is signed.

100. See *supra* notes 62–63 and accompanying text.

CONCLUSION

Both for plaintiffs and defendants, the benefits of comprehensive finality in nonclass aggregate settlements are highly likely to exceed the costs. The existing Rules of Professional Responsibility, however, constrain rather than facilitate the parties' ability to craft mutually beneficial, optimally comprehensive settlements. And the question we are left with is, "Why?" Or, rather, "Who?"

Who benefits when Rule 5.6(b) precludes a defendant from paying a premium to obtain straightforward, enforceable promises in an aggregate settlement agreement that plaintiffs' counsel will cease advertising for new clients with similar claims against the defendant and will not represent any new, similar claimants? And who benefits when plaintiffs (and their counsel) are unable to reap the entire available finality premium because the settlement agreement can employ only the work-around "no present intention" language rather than the desired straightforward, enforceable promises? Those critical of, and eager to restrict, the parties' pursuit of comprehensive finality, including those who would retain Rule 5.6(b) in its current form, owe us answers to these questions.