THE AGGREGATE SETTLEMENT RULE AND IDEALS OF CLIENT SERVICE*

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I. INTRODUCTION

Professor Nancy Moore and practicing attorney Steve Baughman Jensen have contributed greatly to the analytical discussion of the aggregate settlement rule.[1] We question some of their claims and disagree with others, but we nonetheless learned many things from them. One of the most important things we learned is that both Moore and Jensen share our deep commitment to excellence in client service. Our disagreements are largely about the best means to that end. They are differences about the institutional arrangements that will encourage lawyers to serve clients best. We believe that clients would benefit by having greater freedom of contract than the rules presently allow.[2] Moore and Jensen believe that clients need the

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1. *See* Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999); Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When It's Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215 (1999).

2. *See* Charles Silver & Lynn A. Baker, *I Cut, You Choose: The Role of Plaintiffs'*

protection of certain paternalistic constraints. The differences between us are real, but the debate is among friends.

Moore and Jensen each raise many issues worthy of further discussion. We shall focus on three: (1) the role of the aggregate settlement rule in encouraging lawyers to provide non-economic benefits to clients; (2) client competence and autonomy; and (3) the ethics of "damage averaging."

II. THE AGGREGATE SETTLEMENT RULE AND NON-ECONOMIC ASPECTS OF THE ATTORNEY-CLIENT RELATIONSHIP

Moore and Jensen contend that many clients want attorneys to be as attentive to their psychological and personal needs as to their economic interests.[3] In our earlier articles about the aggregate settlement rule, we did not neglect non-economic interests. To the contrary, we argued that clients should be allowed to waive or modify the disclosure requirement of the aggregate settlement rule in order to protect their privacy and dignity.[4] We also argued that clients litigating in groups should be free to adopt majoritarian social choice

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Counsel in Allocating Settlement Proceeds, 84 VA. L. REV. 1465 (1998) (symposium on "The Law & Economics of Lawyering") [hereinafter *Allocating Settlement Proceeds*]; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997) (symposium on "Legal Professionalism") [hereinafter *Mass Lawsuits*].

3. *See* Jensen, *supra* note 1, at 219 ("Although the primary role of a plaintiffs' lawyer is to seek monetary compensation for clients who have been victimized, many clients seem to derive equal or greater benefit merely from the psychological validation of having an advocate who listens and believes in their stories."); Moore, *supra* note 1, at 171 ("[V]ictims have needs that are not economic in nature, including the desire to tell their story and receive an acknowledgment of the defendant's wrongdoing. They want an attorney who will spend time talking to them and treat them as individual suffering persons.").

4. Rule 1.8(g) of the *Model Rules of Professional Conduct* is known as the aggregate settlement rule. The portion of the rule relating to civil actions provides:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

MODEL RULES PROF'L CONDUCT Rule 1.8(g) (1998). For discussion of our proposal to make this rule's disclosure requirement waivable, see *Allocating Settlement Proceeds*, *supra* note 2, at 1519–39; *Mass Lawsuits*, *supra* note 2, at 779; *see also Mass Lawsuits*, *supra* note 2, at 756–60 (discussing clients' privacy concerns, and observing that in mass actions "the emotional and other costs to the plaintiffs of these invasions of privacy [wrought by the rule's nonwaivable disclosure requirement] may well exceed any benefits of having information about other group members' claims and anticipated settlement payments").

rules.[5] This option would meet with the approval of clients who regard majority rule as a better way of governing voluntary membership groups than a unanimity rule. Since majority rule is the norm for voluntary groups of all kinds, the number of clients who feel more comfortable with majority rule may be very large.

Because client welfare is our touchstone, we agree with Moore and Jensen that lawyers should explore options that are available under existing ethical rules for improving client service in multiple client representations.[6] Lawyers should communicate using telephone banks, newsletters,[7] and websites.[8] They should guard clients' privacy through anonymized disclosures.[9] They should plan in advance for

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5. *See Mass Lawsuits*, *supra* note 2, at 768–79; *see also id.* at 767–68 (discussing the rule's nonwaivable unanimous consent requirement as "probably the most significant barrier to settlement in mass lawsuits"); *Allocating Settlement Proceeds*, *supra* note 2, at 1519–39.

6. In our first article on the aggregate settlement rule, we stated that

> [W]e are persuaded that lawyers who undertake to represent large numbers of clients should ordinarily do so with the expectation of giving each client standard service. A properly staffed law firm should be able to develop each client's case fully, to communicate with each client, and to attend to each client's unique interests or emotional needs in most clases.

Mass Lawsuits, *supra* note 2, at 766–67; *see also* Jensen, *supra* note 1, at 223–24 (describing improved service in multiple client representations as a matter of commitment of resources); Moore, *supra* note 1, at 160–66 (discussing "[t]he flexibility of traditional ethics rules").

7. *See* Jensen, *supra* note 1, at 224; Moore, *supra* note 1, at 161. An example of such a newsletter is the *Marriott Limited Partnership Litigation Report*, described by its authors as "A Client Communication Produced By Investors' Counsel in the 'Milkes' CBM II Case." The May 1999 issue is a glossy, eight-page, color booklet, complete with photographs and diagrams that discusses various developments in the litigation, and provides contact information for plaintiffs' counsel. Included with the newsletter is an "Interactive CD-ROM" containing "[v]ideo highlights of evidence and transcripts of witness testimony." *See "Marriott Limited Partnership Litigation Report,"* May 1999, with CD-ROM (on file with the authors).

8. Use of the internet to communicate with clients and class members is increasingly common. *See, e.g.*, <http://www.clientline.com> (website for persons involved in the Marriott Limited Partnership Litigation); <http://www.notice.com> (website posting class action notices).

9. Moore notes that "[t]here is at least one decision suggesting that plaintiffs should receive 'a list showing the names and amounts to be received by the other settling plaintiffs,' but the issue has yet to be squarely addressed." Moore, *supra* note 1, at 163 (footnote omitted). She goes on to observe that:

> It is hard to see why individual plaintiffs' names would be required to be disclosed in all cases, particularly when there are numerous plaintiffs and their names are likely to be meaningless to others in evaluating the fairness of the settlement. Rather, it should be sufficient for the lawyer to disclose whatever information is needed to understand why some individuals are receiving a different amount from other individuals. For example, different disease categories or degrees of injury may account for the discrepancy.

group decision making and settlement by, for example, obtaining prior consent to withdraw from representing anyone who refuses to abide by a majority vote to settle.[10]

We did not intend to say anything in our earlier articles that would excuse or discourage lawyers from communicating with their

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> Even here, however, plaintiffs should be informed and asked to agree at the outset of the representation to any limitation on the nature and amount of information to be received at the time of settlement.

Id. at 163–64 (footnotes omitted); *see also* Jensen, *supra* note 1, at 221 n.11 (observing that "the language of Model Rule 1.8(g) does not require that the lawyers disclose the *names* of other clients who are participating in an aggregate settlement" and contending that, in any case, "disclosure of settlement terms to other co-plaintiffs is simply a cost of being represented by the same lawyer, which . . . has considerable benefits").

We agree with Moore and Jensen that the plain language of the Rule does not require attorneys to disclose their clients' names or other information, such as their addresses, that would enable their names to be deduced and matched with a particular settlement payment. This is consistent with the lawyer's duty of confidentiality, set forth in Texas in Disciplinary Rule of Professional Conduct 1.05, which expressly mandates that "a lawyer shall not knowingly . . . [r]eveal confidential information of a client or a former client to . . . anyone else, other than the client . . . [or use] confidential information of a client to the disadvantage of the client . . . ." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. ART. X, § 9). Withholding names also protects clients' privacy in the event that information contained in a disclosure document is accidentally or intentionally revealed to a non-client, such as a newspaper reporter or credit agency, that might use the information to clients' disadvantage.

Despite the preceding, one Texas Court of Appeals, as Moore notes, has read the Rule more broadly than its plain language requires, stating that plaintiffs should be provided "a list showing the names and amounts to be received by the other settling plaintiffs." Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 229 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). The *Quintero* court did not specify whether first and last names must be disclosed or whether last names or first names alone would suffice. Obviously, the latter would protect clients' privacy better. In addition, the *Quintero* court did not specify whether a client must be permitted to retain (or copy) the list of names and amounts, or whether they need only be given such a list in order to have an opportunity to review it.

Given the potential conflict between an attorney's duties of confidentiality and disclosure, given the ambiguity in the *Quintero* court's statement that "names . . . [of] the other settling plaintiffs" must be disclosed, and given the relative dearth of law on the disclosure requirements of the aggregate settlement rule, we believe that an attorney would be justified in disclosing only the first or last name of each participating plaintiff along with the nature and extent of their participation in the settlement. *Id.* at 229.

10. Moore states:

> I see no reason why the lawyer could not also ask each prospective client to agree that if the client ultimately decides to reject a settlement offer approved by the requisite majority, then the lawyer not only will withdraw from representing that client, but, will continue to represent the majority. Prospective waivers of a conflict of interest are not always binding, but they are likely to be effective when the clients are fully informed of the likely circumstances and any reasonably foreseeable risks.

Moore, *supra* note 1, at 169–70 (footnotes omitted).

clients, from investigating and understanding clients' injuries and needs, or from serving clients well in other ways. The thrust of our earlier articles was simply that lawyers could sometimes serve clients better if they were free to experiment with majoritarian decision-making procedures and limited disclosures. Our earlier articles give lawyers no basis for ignoring any interests that clients hold dear.

Even so, Moore and Jensen oppose our modest reforms. Moore believes that "a common sense application of the relevant [existing] rules can go far to accommodate the legitimate needs of clients,"[11] and she is not persuaded that the benefits of "aggregate justice" exceed the costs.[12] Jensen makes the stronger claim that the "aggregate settlement rule establishes a few simple parameters that encourage the development of meaningful relationships between lawyers and clients "[13] and that "filter out those lawyers who lack the resources or commitment to develop individual relationships in the mass tort context."[14] He fears that these important non-economic benefits would be sacrificed if the rule's requirements were relaxed.[15] "Permitting waiver of the constraints of [the aggregate settlement rule]," Jensen contends, would "transform[] multiple clients into a single, amorphous, and essentially powerless group that stands at the mercy of the plaintiffs' attorney representing it."[16]

The changes we propose for the aggregate settlement rule would affect lawyers' behavior, but we do not think they would do so as our critics predict. We begin by noting our skepticism concerning Jensen's claim that the unanimous consent requirement built into the aggregate settlement rule gives attorneys a special incentive to communicate frequently and meaningfully with clients.[17] If this were so, one would expect to find lots of communication and many close relationships in ordinary tort cases where, because there is only one client, unanimity is the only possible rule. In fact, lawyers and clients communicate infrequently in ordinary tort cases, as Deborah R. Hensler, the Research Director at RAND Corporation's Institute for Civil Justice, observed in a famous literature review.[18] One study that Hensler discusses reported that "[t]wenty-five percent [of clients in ordinary

11. *Id.* at 164.
12. *Id.* at 170.
13. Jensen, *supra* note 1, at 222.
14. *Id.* at 228.
15. *Id.* at 222–24.
16. *Id.* at 229.
17. *See id.* at 222–23.
18. Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 ILL. L. REV. 89, 92–95 (1989).

tort cases] never met with their lawyers or met with them only once, and thirty-two percent talked by telephone fewer than three times."[19] When cases that settled without court intervention were considered separately, the percentage of clients who met with their lawyers one time or less rose to thirty-six percent, and the number who talked with their lawyers less than three times increased to forty percent.[20] Despite the need to gain clients' consent, lawyers did not build close relationships with clients.

Jensen's belief that mass tort lawyers communicate frequently may reflect his or his law firm's commitment to doing so. Other mass tort lawyers may share this commitment. Our point is simply that something other than the unanimity requirement accounts for it. The "something" may be the lawyers' reputational interests, their character, or their belief that communication helps them develop cases. It does not appear to be the lawyer's need to obtain unanimous client consent, however.

The modest change in the rule's consent requirement which we propose might even result in more attorney-client communication, not less. In order to depart from the unanimity rule, a lawyer would have to obtain clients' consent to majority rule in advance. This would require some communication, as well as an explanation of the benefits and risks of majority rule. At the very least, some education about the group nature of litigation and settlement negotiations would occur.

Jensen fears that attorneys would strategize if client groups were permitted to use majority rule. He predicts that attorneys would communicate and develop relationships of trust only with bare majorities of clients.[21] Although we cannot allay this fear entirely, we believe that it is exaggerated. First, attorneys cannot always accurately predict which clients will approve settlements and which will reject them. A strategy of building relationships with all clients and hoping for majoritarian support may therefore be the prudent course. Second, to the extent that, as Jensen agrees, communication helps attorneys derive economic value from claims, the prospect of earning fees would continue to encourage communication under our

19. *Id.* at 92–93.

20. *Id.*

21. Jensen, *supra* note 1, at 219 ("If mass tort victims are permitted at the outset of representation to consent to abiding by a majority vote with respect to any settlement offers, then the plaintiffs' lawyer representing those victims need not worry about building a relationship of trust with *every* client. With the 'majority rule' in place, so long as the lawyer does a competent job with respect to the group *as a whole*, then a few disgruntled, mistrustful, and unhappy clients will not be able to upset the settlement apple cart for everyone else.").

proposal. Third, the availability of alternatives to simple majority rule, such as various super-majority rules, could reduce attorney's incentive to strategize to an acceptable level. Fourth, clients who prefer a unanimity rule could still choose to be governed by it. We want to make majority rule an option, not to force it upon clients.

Finally, even if the existing rule encourages attorneys to communicate with their clients more frequently and more meaningfully than our proposal would, it does not follow that, all things considered, clients are better served. Jensen and Moore emphasize one consideration, namely, the non-economic benefits that a client can derive from "a humanly meaningful relationship with a lawyer."[22] Thus, as Moore puts it, "victims have needs that are not economic in nature, including the desire to tell their story and receive an acknowledgment of the defendant's wrongdoing. They want an attorney who will spend time talking to them and treat them as individual suffering persons."[23] The question, however, is not whether clients' non-economic interests matter—of course they do—but how much these interests matter and who should decide how ardently to pursue them. All interests matter in the abstract, but not all are worth an expenditure of additional resources in every situation. Budgetary constraints force each of us to prioritize our interests. It costs money—ultimately, clients' money—for lawyers to provide services. Because there is no free lunch, someone has to allocate limited resources among clients' competing and unlimited interests and needs, including their need (if any) for a "humanly meaningful relationship with a lawyer."[24]

Because clients' interests and dollars are at stake, it seems obvious to us that *clients* should decide how to deploy their limited resources to best satisfy their interests. Clients who have experienced serious traumas, suffered life-threatening injuries, or lost loved ones may need and be willing to pay for all the support, empathy, communication, and encouragement that lawyers can provide. Others may be satisfied with less counseling at less cost. Most of the 67,000 plaintiffs who participated in the Texas polybutylene pipe case did not need counseling.[25] They needed to have their plumbing fixed and the

22. Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1220 (1995), *quoted in* Moore, *supra* note 1, at 162.

23. Moore, *supra* note 1, at 171.

24. Menkel-Meadow, *supra* note 22, at 1220.

25. A brief describing the litigation can be found on the internet at http://www.fhg-law.com/briefs/brief.pdf. *See generally* Dean Starkman, *Should a Lawyer Get Over Half of*

collateral damage to their property repaired. We see no reason to force plaintiffs like these, whose primary interests are economic, to pay for support services they do not need. Moreover, even clients who want counseling may prefer to pay lawyers less so that they can pay psychotherapists more. Lawyers have no monopoly on the provision of counseling services, and they may be neither the most qualified nor the least expensive providers.

Our assertion that clients should be free to decide which services to pay lawyers to provide places us squarely in the mainstream. Clients always have the right to decide how much to spend on their cases, and they are always free to reject their lawyers' recommendations on this score. A lawyer may want to hire an expert witness, to take a raft of depositions, to spend a day researching a legal issue, or to fly to a faraway city for an on-site inspection. A client is free not to consent to these expenditures, and a sufficient reason for balking is that, in the client's opinion, the cost is too great.[26]

Whatever clients' preferences among the panoply of possible attorney services might be, one would not expect the aggregate settlement rule to have the many salutary effects that Moore and Jensen ascribe to it. Although the aggregate settlement rule is of relatively recent vintage—it first appeared in the Model Code of Professional Responsibility promulgated in 1970[27]—it was not created with mass tort litigation, consensual group lawsuits, consolidations, or class actions in mind.[28] Nor was it intended to solve the many

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a Settlement?, WALL ST. J., Oct. 7, 1996, at B1 (discussing polybutylene plumbing case).

26. Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 231 (1997) ("As a principal, a client can properly decline to follow a lawyer's suggestions, including suggestions that are simply too expensive. No rule requires a client to pay a lawyer for actions a lawyer wants to take. That clients frequently reject expensive suggestions and require lawyers to stick to budgets is a matter to which any experienced lawyer will attest.").

27. *Compare* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-106 (1981), *with* MODEL RULES PROF'L CONDUCT 1.8(g). The only difference between DR 5-106 and Rule 1.8(g) is that only DR 5-106 requires a lawyer to disclose the total amount to be paid to all the plaintiffs in a settlement. We doubt that the difference matters much in practice, since the total size of the settlement is frequently disclosed, or can readily be calculated from the information that is disclosed. *See also* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES PROF'L CONDUCT § 1.8:801, at 277 (2d ed. Supp. 1997). For general discussion of the promulgation of the Model Code in 1970 and of the Model Rules in 1983, see *id.* §§ 202–205, at 12–17 (2d ed. Supp. 1998).

28. Our colleague John Sutton, A.W. Walker Centennial Chair Emeritus at the University of Texas School of Law, was the Reporter on the *Model Code of Professional Responsibility* in which the aggregate settlement rule originated. In a conversation with the authors in July 1997, Sutton indicated that the rule was not designed for group

settlement-related problems that these large-group proceedings entail. Its target was a problem of horse-trading that can arise when an attorney has as few as two *unrelated* cases that happen to involve the same defendant or insurance company.[29] In such a situation, the defendant might offer to pay something to settle the weaker claim(s) in return for the lawyer's agreement to settle the stronger one(s), and to do so at a discount. A plaintiffs' lawyer working under a contingent fee arrangement might well accept this deal if the total amount offered is no less than the total amount he would expect to receive for the cases if he settled them individually. Under this scenario, the plaintiffs' attorney—who negotiates, then allocates, the lump sum payment—will be giving the clients with strong claims less than each likely would have received through individual negotiation of his or her case in order to give the clients with weak claims more.

In the situation just described, the problem is not that the attorney has failed to communicate with the clients. The attorney may have talked with them regularly. Nor has the attorney necessarily neglected the clients' non-economic interests. The clients may feel that the attorney has been quite supportive, or they may care only about the money that is at stake. Nor need the lawyer have failed to develop any of the cases adequately. The lawyer may know and have maximized the value of each. Nor is the lawyer guilty of trying to earn a whopping fee quickly by settling the cases too cheaply. As a group, the cases are being settled for what they are worth. The logical conclusion must therefore be that if the aggregate settlement rule addresses any of these problems in multiple-client representations, it does so by accident, not by design.

That the aggregate settlement rule was not designed to encourage lawyers to form meaningful relationships with clients or to develop each client's case fully may explain why highly individualized settlements fall outside the rule. Consider a hypothetical lawyer with 100 clients, all injured in the same industrial accident, who presents

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litigation. To the contrary, it was intended to cover situations in which a lawyer *separately* represents multiple clients with *unrelated* claims against the same defendant. *See also* Thomas E. Willging, *Mass Torts Problems & Proposals: A Report to the Mass Torts Working Group* 125 (Jan. 1999) ("Both the practitioners' and the academics' views converge in identifying the tension created by the attempt to apply to mass torts a rule designed for a single case or a small number of cases.") (published as Appendix C of the Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States (Feb. 15, 1999)).

29. *See supra* note 28; *see also Allocating Settlement Proceeds*, *supra* note 2, at 1475 n.31.

the common employer with 100 separate settlement demands. The cases and authorities suggest that this is not an aggregate settlement that is governed by Model Rule 1.8(g).[30] Instead, it is a non-aggregate settlement of multiple claims. Under this reading, the rule seems not to encourage individualization of claims but to legitimate lump-sum demands. It authorizes lawyers to settle blocks of cases for lump sums that they will subsequently allocate among their clients so long as the lawyer discloses the terms of the deal to the clients and secures each participating client's consent.

We do not know whether Moore or Jensen would treat the example involving 100 separate demands as an aggregate settlement. Neither author defines the term "aggregate settlement" nor seems to recognize the implication of the rule's use of this technical term. Because the rule explicitly refers to "aggregate" settlements of multiple claims, it seems to imply that "non-aggregate" settlements of multiple claims are also possible.[31] Unfortunately, neither the text of the rule nor the case law to date identifies the characteristics that distinguish an aggregate from a non-aggregate settlement, and neither Moore nor Jensen undertakes to fill this gap.[32] If the category of non-aggregate settlements is not empty, however, those who defend the

30. *See, e.g.*, Attorney Grievance Comm'n v. Engerman, 424 A.2d 362, 368 (Md. 1981) (finding no aggregate settlement when attorney filed a separate claim with the insurance company on behalf of each of the two passengers in a vehicle involved in an automobile collision); Arce v. Burrow, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997) ("An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client."), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999); Scrivner v. Hobson, 854 S.W.2d 148, 152 (Tex. App.—Houston [1st Dist.] 1993, no writ) (discussing aggregate settlement in which "no individual negotiations on behalf of any one client were undertaken").

The same result is suggested by authorities' comments to the effect that aggregate settlements are lump-sum settlements. *See* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 126, 138 n.46 (1990) (using the terms "lump sum" and "aggregate settlement" interchangeably); *see also* Marc Z. Edell & Phillip J. Duffy, *Ethical Pitfalls Confronting the Mass Tort Lawyer*, 166 N.J. LAW. 32, 34 (Jan. 1995) (same); *see also Mass Lawsuits*, *supra* note 2, at 758–59.

In conversation, John F. Sutton, Jr., the Reporter for the *Model Code of Professional Responsibility*, offered his understanding that the Rule does not apply to settlements in which a separate demand is made for each client. Interview with John F. Sutton, Jr., in Austin, Texas (July 1997).

31. Several authorities have so held or implied. *See, e.g.*, sources cited *supra* note 31.

32. It should be noted, however, that Moore gives substantial attention to the related problem of defining a "mass tort." *See* Moore, *supra* note 1, at 156–60. Her quite reasonable concern is that if this category of litigation is to receive special treatment under the ethics rules we should have a clear understanding of what sorts of cases the category includes.

rule should be able to articulate what kinds of deals it contains and explain why they need less regulation than other multiple-client settlements.

III. CLIENT COMPETENCE AND AUTONOMY IN CONSENSUAL GROUP LITIGATION

In large measure, the aim of our reform proposal is to restore to clients a degree of autonomy that the aggregate settlement rule takes from them. Ordinarily, a client can authorize an attorney to accept a settlement offer that meets a particular threshold.[33] A client can even give a lawyer discretion to accept a "reasonable" offer without stating a minimum dollar amount.[34] Once in possession of this authority, a lawyer can settle a claim without communicating again with a client. Clients can also tailor lawyers' duty to communicate information.[35] Only clients who participate in aggregate settlements have no power to confer binding settlement authority in advance or to waive disclosures. Under our proposed reforms, clients would regain these powers.

Given our desire to empower clients, we are surprised that Moore and Jensen contend that our proposal will transfer authority from clients to lawyers, causing the client's case to "belong[] more to the lawyer than the client," in Jensen's words.[36] It is true that our proposal would enable clients to make irrevocable commitments to majority rule. Clients who did so would lose the right to opt out of settlements that they disliked if a majority of their co-litigants wished to accept the settlement offer. The clients would incur this risk knowingly and voluntarily, however. In addition, each would receive an identical commitment from every other client, a commitment that

33. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.6.2 (1986) (discussing express authority to settle).

34. *See, e.g.*, FLOYD R. MECHEM, 2 A TREATISE ON THE LAW OF AGENCY § 2171 n.21 (2d ed. 1914) (citing cases in which amount of settlement was assigned to attorneys' discretion or judgment).

35. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31 cmt. c (Proposed Final Draft No. 1, 1996) ("The appropriate extent of consultation is itself a proper subject for consultation. The client may ask for certain information . . . or may express the wish not to be consulted about certain decisions. The lawyer should ordinarily honor such wishes.").

36. Jensen, *supra* note 1, at 219; *see also* Moore, *supra* note 1, at 180 ("Lawyers who can sign up hundreds or thousands of clients, using standard contingent fee contracts, stand to earn enormous legal fees. Such lawyers have a vested interest in having clients agree to waive any rights they might have that would interfere with the lawyer's ability to negotiate an aggregate settlement with the defendant.") (footnote omitted).

each implicitly values more highly than the option of "holding out" when the settlement offer is made.[37] Finally, although some clients—those in the minority—would turn out to have less freedom under this regime, others—those in the majority—would have more. They would be able to obtain a settlement they want. There would be neither a deadweight aggregate loss of freedom nor a transfer of power from a client to a lawyer. There would instead be a consensual reallocation of rights *among clients*.

From our perspective, the aggregate settlement rule is the anomaly, not our proposal to amend its disclosure and unanimity requirements. The rule is a paternalistic constraint that prevents clients from entering into legal relationships that they desire. Moore and Jensen believe that the anomaly is justified because clients would choose unwisely if denied the protection of the rule.[38] Moore is especially clear on the point. She "seriously question[s] whether the ability to sign less-than-unanimous voting agreements is ever worth sacrificing the benefits afforded individuals under the more traditional lawyer-client relationship," including the ability of each client to decline a settlement offer.[39]

Paternalists must be careful not to exaggerate the danger of bad choices. Jensen, in particular, is not careful enough in this regard. Although he recognizes that "significant economic benefits . . . flow to

37. One reason why a client might be willing to waive his right to "hold out" in exchange for fellow group members' similar waivers is to increase the likelihood of a group-wide settlement, thereby maximizing the net value of his or her own claim. As we have discussed at length elsewhere, "[a] potential advantage of group-wide settlements stems from the fact that defendants who settle these lawsuits want finality and are willing to pay [a premium] for it." *Mass Lawsuits*, *supra* note 2, at 760–63.

38. From Jensen's perspective, clients will scarcely be able to "choose" at all if the rule's requirements are made waivable: "Permitting waiver of the constraints of Model Rule 1.8(g) transforms multiple clients into a single, amorphous, and essentially powerless group that stands at the mercy of the plaintiffs' attorney representing it." Jensen, *supra* note 1, at 225. Jensen is sufficiently concerned about the power and influence that he believes plaintiffs' attorneys wield over their clients that he recommends that, even under the existing rule, "[c]ourts should require plaintiffs' attorneys in mass tort cases to apprise the court of aggregate settlement discussions and should review the contents of proposed disclosures under Model Rule 1.8(g)." *Id.* at 224–25.

Moore is similarly eager to have the courts supervise all group lawsuits, contending that "the monitoring of lawyers by individual plaintiffs [in mass lawsuits] is unlikely to be more effective than judges monitoring the opportunism of class action lawyers." Moore, *supra* note 1, at 170. She observes with approval that in class actions "judges not only supervise the adequacy of the settlement agreed to by the lawyer, but also determine the size of the lawyer's fee," and that "attorneys' fees awarded under the lodestar formula in class actions are typically smaller than those agreed to by individual plaintiffs." *Id.*

39. Moore, *supra* note 1, at 179–80.

clients when lawyers individually evaluate their claims,"[40] he worries that lawyers would fail to develop cases sufficiently if the requirements of the aggregate settlement rule were waived.[41] Jensen's premise undermines his conclusion. If clients reap economic benefits from individualized treatment, then lawyers working for contingent fees should have strong incentives to develop claims individually. The larger the recovery, the larger the fee.

Paternalists also must be consistent. They cannot depict clients as sheep at one point and expect them to act the part of philosopher-kings at another. Both Moore and Jensen are inconsistent in precisely this way, however. They claim that clients follow lawyers' advice blindly, and therefore cannot intelligently opt against full disclosure or for majority rule.[42] Yet, they also expect clients to display Solomonic wisdom when presented with an aggregate settlement. Somehow, clients who earlier desperately needed paternalistic protections suddenly become knowledgeable enough to judge the adequacy of their own settlement payments and the equity of portions earmarked

40. Jensen, *supra* note 1, at 220.

41. *Id.* at 220, 224.

42. *See id.* at 221 ("[P]laintiffs come to lawyers in a vulnerable position, typically knowing little to nothing about their legal rights."); *see also* Moore, *supra* note 1, at 181 ("[T]he typical client has little or no familiarity with the legal system and relies heavily on the lawyer to decide both the initial terms of the engagement and the adequacy of any proposed settlement of the client's claim."); *Id.* at 177–78 ("[P]laintiffs rely almost entirely on their lawyers' advice in assessing the expected value of their individual claims.").

See Moore, *supra* note 1, at 170 n.173 ("The more rights the client is asked to waive at the beginning of the representation, the more difficult it is to assume that the client is capable of making such a decision without the benefit of independent representation. At the outset of mass tort representation, it is doubtful that personal injury clients are capable of deciding whether it is in their best interests to agree to a non-revokable waiver of their right to receive basic information regarding a proposed settlement or to have an opportunity to reject that settlement."); *Id.* at 175 (observing with seeming approval that "[a]s between lawyer and client, the concern [of fiduciary law] is that the lawyer's own interest in realizing a potentially enormous legal fee will cause the lawyer to secure the client's commitment—to abide by the will of the majority or to waive the right to receive information regarding a proposed settlement—by taking unfair advantange of the relationship between the lawyer and client"); *Id.* (observing with seeming approval that under fiduciary law "an agreement between a client and a lawyer that limits 'a duty that a lawyer would otherwise owe to the client' is not enforceable unless 'the terms of the limitation are reasonable in the circumstances'").

See also Jensen, *supra* note 1, at 219 ("According to Professors Silver and Baker, the aggregate economic benefits that will flow to the group from waiver of the individual consent requirement will outweigh the costs of trumping the wishes of the minority. I disagree.... To provide meaningful redress to those who have suffered injuries as a result of corporate misconduct, lawyers must do much more than hand them a settlement check."); *Id.* at 225 (contending that "aggregate resolution of personal injury claims... fails to provide the clients with many of the benefits of the attorney-client relationship to which they are entitled") (emphasis omitted).

for others.[43] These clients also grow wise enough to decide whether to take cash in hand today or to hold out for a trial and catharsis tomorrow.

Unquestionably, some client learning takes place as a client's lawsuit works its way from start to finish, but the number of clients who are changed so completely by the experience must be small. Even the most diligent lawyer has too few conversations with his clients to accomplish this Pygmalion-esque transformation. There also is a surreal quality to Moore and Jensen's implicit suggestion that the unscrupulous lawyers who most need to be watched will teach their clients to monitor them effectively. Even if this degree of education could be achieved so quickly, why would a lawyer who is bent on cheating some or all of his clients do this? Would this lawyer not instead choose to leave his ignorant and trusting clients as they are?

IV. THE COSTS AND BENEFITS OF "DAMAGE AVERAGING"

In a previous article we made clear our view that group litigation is not for every client.[44] Group litigation may offer clients a host of benefits, including reduced per capita litigation costs and increased leverage in settlement negotiations,[45] but it also may impose unique costs. One of these costs—in some cases, and for some clients—may be "damage averaging." Damage averaging occurs when a settlement allocation plan ignores or minimizes differences between claims that could or would affect their expected value at trial.[46]

Consider the following allocation plan for a typical asbestos

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43. *See* Moore, *supra* note 1, at 163 ("Presumably what must be disclosed [under the aggregate settlement rule] is the type of information each client reasonably needs to know in order to decide if the settlement is fair."); *Id.* at 164 n.92 ("The withholding of potentially relevant information [when seeking clients' approval of an aggregate settlement] ought to be the exception, not the general rule, and ought not be *imposed* on plaintiff groups by lawyers speculating about what some or most of them would want.").

See also Jensen, *supra* note 1, at 218 ("Model Rule 1.8(g) reminds lawyers that the case belongs to their clients, and that each client is an individual. The rule reinforces this reminder with its further requirement of disclosure of all allocations in an aggregate settlement. That disclosure requirement ensures that lawyers provide information that most people would regard as reasonably necessary to assess the fairness of a settlement offer. These 'reminders' of the proper respective capacities of attorney and client become very important in the context of collective representation, where the litigation dynamics often tempt lawyers to usurp the role of the client as ultimate decision-maker.").

44. *See Mass Lawsuits*, *supra* note 2, at 749.

45. *See id.* at 743–49.

46. For a more extensive discussion of damage averaging, see *Allocating Settlement Proceeds*, *supra* note 2, at 1480–83.

settlement:

DISEASE	*PAYMENT*
Mesothelioma	$25,000
Lung Cancer	$13,000
Other Cancers	$9,600
Pulmonary Asbestosis	$8,000
Pleural Disease	$4,800

The settlement first places each claimant into one of five categories based on his or her medical diagnosis. Each claimant in a given disease category is then offered the same settlement amount even though in any particular category clients' claims may vary in value. For example, some plaintiffs may be sicker than others, may suffer greater reductions in earnings, may have more dependents, or may be younger.

Whether structured as a mass action or a class action,[47] the settlement of any group lawsuit inevitably involves some degree of damage averaging. All settlement allocation plans necessarily ignore many aspects of individual claims that might affect their value if litigated individually. Group-level deals reflect practical judgments that, at some point, the benefit of a more perfectly individualized settlement allocation plan would not justify the added cost.[48]

Moore and Jensen oppose damage averaging and favor more individualized treatment of cases in group litigation.[49] They contend that the former is inconsistent with justice,[50] but the reasons they give are not completely persuasive. Jensen, for example, asserts that "[c]ollective representation of mass tort victims provides them a great benefit,"[51] presumably because the economies of scale, increased

47. For discussion of the differences between these two forms of group litigation, see *Mass Lawsuits*, *supra* note 2, at 739–43. *See also Allocating Settlement Proceeds*, *supra* note 2, at 1470–83.

48. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 919 n.104 (1987) ("Damage averaging is most likely to be accepted by courts and attorneys where the transaction costs of individualizing the damage determination are the highest."); *see also Allocating Settlement Proceeds*, *supra* note 2, at 1480 ("[I]t was obvious to everyone that the benefits of a more finely tuned allocation formula would not justify the substantial cost. This was explained to the judge at the fairness hearing [in the Texas Double-Rounding Case], and the judge, who approved the settlement, evidently agreed.").

49. *See, e.g.*, Moore, *supra* note 1, at 167–72; Jensen, *supra* note 1, at 216–17, 220–25.

50. *See, e.g.*, Moore, *supra* note 1, at 167–68; Jensen, *supra* note 1, at 220–25.

51. Jensen, *supra* note 1, at 224.

bargaining power, and other advantages of collective representation so frequently provide clients benefits that exceed the costs of not being individually represented.[52] At the same time, however, Jensen argues that "aggregate *resolution* of personal injury claims cuts strongly against our tradition of justice,"[53] in large part because clients "deserve[] to have their unique circumstances taken into account . . . for the purposes of allocating the proceeds of any aggregate settlement."[54]

We are puzzled by this seeming inconsistency in Jensen's views. He surely understands that thoroughly individualized settlement negotiations are much more costly for clients than aggregate settlements with their simplifying allocation formulas and damage averaging. And in the context of what he terms "collective representation,"[55] Jensen applauds clients' willingness to do a cost-benefit analysis and opt for less personalized service at reduced cost.[56] Yet he appears unwilling to consider the possibility that the costs of individual *settlement negotiations* might exceed the benefits, at least for some plaintiffs in some circumstances.[57]

Jensen also opposes damage averaging because he agrees with Moore's contention that aggregate settlements tend to benefit clients with low-value claims at the expense of those with high-value claims.[58]

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52. *Id.* at 216–17 (observing that "without the economies of scale and equalization of risks that stem from joint representation of a group, most mass tort victims will be unable to secure any legal representation at all," and "mass tort victims benefit from joint representation because, through the referral process, their claims tend eventually to be handled by the most-qualified lawyers, those who have specialized in their specific type of litigation").

53. *Id.* at 225.

54. *Id.* at 220.

55. *Id.* at 216.

56. *Id.* at 217 (observing that "[i]n mass tort litigation economies of scale, increased settlement leverage, and equalization of risks are all important realities that favor group representation by a single lawyer or set of lawyers," and acknowledging that Silver and Baker have "demonstrate[d] that, in situations where a common course of conduct has injured a group of victims, those victims stand to benefit significantly by common representation").

57. *Id.* ("I part ways with Silver and Baker only with respect to their conclusion that, in order to encourage aggregate *representation* of individuals harmed by mass torts, the law should also permit aggregate *resolution* of those same claims.").

58. *See id.* at 220 (contending that because each client's unique circumstances are not taken into account during settlement negotiations, "aggregate settlements tend to benefit clients with low-value claims at the expense of those with high-value claims"); Moore, *supra* note 1, at 167–68.

> Those who are most harmed by settlements that pay claimants only the median value of all claims are clearly the 'high stakes' plaintiffs; that is, those with the largest and best potential claims. . . . [T]hose who *benefit* most from

An example will show that this objection rests on a confusion. In the asbestos settlement described above, every mesothelioma victim would get $25,000 and every victim of pleural disease would get $4,800. To conclude that the mesothelioma victims were underpaid, one would need to show either (1) that they would have won more if their cases had been handled individually, or (2) that the ratio between their payments and those awarded to the category of victims with pleural disease is too small. The fact that damages are averaged within disease categories implies neither (1) nor (2). When all group members with mesothelioma receive the same payment, all may be overpaid relative both to mesothelioma victims whose cases are handled individually and to other group members with pleural disease.

It is an empirical question whether group members fare better or worse than claimants with similar injuries who sue alone. However, because under-compensation of persons with large claims is a serious problem throughout the tort system, there is no reason to suppose that group lawsuits are uniquely bad in this regard. According to Professor Michael J. Saks, "[the] pattern of overcompensation at the lower end of the range and undercompensation at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of [individual] tort litigation ready for theoretical attention."[59] We do not know that under-compensation of persons with large claims is an especially serious problem in group lawsuits, and we would not presume that it is.

Indeed, there are reasons for thinking that, in consensual group lawsuits, plaintiffs with the highest-valued claims will be overpaid or paid amounts that more closely reflect the merits of their claims. Defendants are very concerned that plaintiffs with high-value claims will opt out of group settlements, leaving them with expensive settlements in which weak claims predominate.[60] For this reason,

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damage averaging are the victims whose claims are the smallest or the most questionable.

. . . .

[I]t is difficult to justify 'aggregate justice' settlements that facilitate mass actions for the benefit of those with the weakest claims, at the expense of those with the most compelling claims.")

Id. (footnotes omitted).

59. Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1218 (1992).

60. Moore seems to understand this point since she observes that the plaintiffs "with the largest and best potential claims . . . are the individuals most likely to opt out of class action settlements to pursue individual actions." Moore, *supra* note 1, at 167 (citing

defendants often condition their willingness to settle on high rates of participation by plaintiffs with large claims. We have even seen an asbestos settlement that was contingent upon 100% participation by group members with mesothelioma. The easiest way to ensure their participation was to offer them lots of money. When a subset of plaintiffs has this much leverage over a group-wide deal, the possibility of over-compensation cannot be ruled out.

There is nothing inherently obnoxious about damages averaging. Suppose that in the settlement discussed above, victims of pleural disease would each receive $1 million. This is far more money than most victims of pleural disease ever receive, and any reasonable person would regard it as more than ample compensation for the harm inflicted by this mild condition. In this situation, is there any reason to be concerned by the fact that all victims of pleural disease are to receive the same amount? If there is, we cannot see it.

As this example makes clear, the problem with a per se objection to damage averaging is that group lawsuits can yield surpluses that may enable each of the group members to receive more than the amount to which he or she is entitled by any measure of "justice."[61] Moore and Jensen might respond by questioning how often such surpluses actually occur. Moore seems especially likely to deny that they are common given her unflattering perception of plaintiffs' attorneys. She accuses mass tort lawyers of earning large fees by settling cheaply and by attempting "to expand the litigation as far as possible" by "including plaintiffs with highly questionable claims,"[62] and of accumulating cases by advertising aggressively and paying for referrals.[63] Her distrust of plaintiffs' attorneys ultimately causes her to favor class actions over consensual group litigation because, in the former, "judges not only supervise the adequacy of the settlement agreed to by the lawyer, but also determine the size of the lawyer's fee."[64]

Coffee, *supra* note 48, at 925–30).

61. Such a surplus is often created when plaintiffs sue collectively because of four advantages that joint litigation often affords plaintiffs over individual litigation: (1) economies of scale in litigation costs, (2) increased leverage in settlement negotiations, (3) equalization of plaintiffs' and defendants' risks, and (4) conservation of defendants' assets. *See Mass Lawsuits*, *supra* note 2, at 744–49.

62. Moore, *supra* note 1, at 168.

63. *Id.* at 159 ("[P]laintiffs often end up represented by a few lawyers not because these lawyers have unique expertise, but rather because they aggressively advertise, solicit clients, or because clients are steered to them by organizations like unions with whom they have special ties.") (footnotes omitted).

64. *Id.* at 170.

Moore's concerns about mass tort attorneys may or may not be well founded. We are less suspicious of these attorneys than she is, however, perhaps because we have greater faith in the incentives that the contingent fee provides them to do good for their clients in order to do well for themselves. As we have discussed elsewhere, coupon deals and other non-cash settlements that many think disserve plaintiffs occur far more frequently in class actions than in consensual group lawsuits in which attorneys are paid solely in proportion to the results they obtain for their clients.[65]

Even if damage averaging were inherently objectionable, however, the aggregate settlement rule is unlikely to discourage it. Paradoxically, the rule's disclosure and consent requirements may actually reduce the amount of claim individualization that occurs by encouraging plaintiffs' attorneys to divide claimants into a small number of categories based on easily identifiable and uncontroversial characteristics. As any teacher knows, it is often easier to explain to a student why he received a "B" rather than an "A" than to defend giving the student a score of 89 rather than 90. We should therefore not be surprised if plaintiffs' attorneys conclude that it is easier to convince a group of clients to approve a settlement involving a small number of grossly defined claim categories than one involving a large number of subtle distinctions among claimants.

V. CONCLUSION

The application of the aggregate settlement rule to group lawsuits is a fascinating subject of great practical importance that only now is receiving serious analytical study. As often happens, the world of law practice has moved ahead at a rapid pace, and neither law professors nor even reflective lawyers have had time to assess the changes. Many issues relating to the aggregate settlement rule, including questions of doctrine, economics, and ethics, are unresolved. Today it is not even possible to clearly and confidently distinguish an aggregate settlement from a non-aggregate settlement of multiple claims.

Not surprisingly, scholars and lawyers who have thought about the rule and the phenomena to which it relates have reached different

65. *See Allocating Settlement Proceeds*, *supra* note 2, at 1477 ("Mass lawsuits settle with plaintiffs' consent, and usually they settle for money. These are not the lawsuits in which one finds coupon deals, meaningless injunctive reforms, awards of attorneys' fees that exceed the plaintiffs' recoveries, or the use of settlement funds to endow research institutions.") (footnote omitted); *see also id.* at 1477 n.36 (citing cases and other authorities).

conclusions regarding its application. We believe that courts have been too quick to apply the rule to group lawsuits, which it was not designed to cover. We also believe that the rule should be reformed, especially by making the disclosure and unanimous consent requirements waivable.[66] Others, including Professor Nancy Moore and Attorney Steven Jensen, disagree. They believe that the rule protects vulnerable clients from exploitation by unscrupulous lawyers who would sacrifice the clients' interests if given a free hand.

The ambiguities relating to the rule and the academic disagreements concerning its merit and proper application have significant practical consequences for attorneys and clients. They make litigation more expensive and riskier than it ought to be because they prevent plaintiffs' attorneys from confidently taking advantage of opportunities to reduce costs. They expose excellent lawyers and shoddy lawyers alike to charges of having breached the duty of loyalty and to the threat of forfeiting fees.[67] Ultimately, clients pay the bill for this. To cover or reduce their exposure, lawyers have to stay away from group lawsuits or charge higher fees. Both options make clients worse off.

The aggregate settlement rule should be abolished or, at least, made waivable with the clients' consent. Attorney-client relationships are consensual private orderings. A liberal society operates on the premise that the state has no interest in private transactions whose effects befall mainly the transacting parties. Thus, those who defend the aggregate settlement rule on paternalistic grounds must, at a minimum, offer reliable evidence that the benefits that the rule in its present form provides clients, exceed the costs that it simultaneously imposes on them. We believe that the rule's defenders have not yet carried this burden.

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66. *See Allocating Settlement Proceeds*, *supra* note 2, at 1519–39; *Mass Lawsuits*, *supra* note 2, at 756–60, 768–79.

67. *See, e.g.*, Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (holding that "a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client"); *Id.* at 239–40 (observing that "Texas courts of appeals, as well as courts in other jurisdictions and respected commentators, have also held that forfeiture is appropriate without regard to whether the breach of fiduciary duty resulted in damages," and citing authorities). *But see* Amicus Brief of Law Professors Lynn A. Baker and Charles Silver in support of petitioner David Burrow, at 11–12, *Arce*, 997 S.W.2d at 229 (contending that the remedy of fee forfeiture is not appropriate when the "principal is fully protected from harm by the usual compensatory and restitutionary remedies," and that "because the aggregate settlement rule is vague, fee forfeiture in the absence of harm to a client would be a draconian remedy").