Attorney Withdrawal in Mass Actions: A Proposal for Change

Jean Raveney *

Introduction

The Problem: The ABA Model Rules of Professional Conduct enable a client to fire her attorney for any or no reason.[1] This is not true for the attorney. The Rules require a lawyer to receive permission from the court to withdraw from representing a client whose case has been filed in that court.[2] However, even when the lawyer may have cause to withdraw from representation, withdrawal is uncertain and problematic.

Recently, a federal district court denied a motion to withdraw by the plaintiff's counsel in a mass action.[3] This case, *McDaniel v. Daiichi Sankyo, Inc.,* is interesting because the circumstances of the withdrawal motion appear to be such that it should have been granted. The lawyers appeared to have good cause to withdraw because (1) they fundamentally disagreed with the client on how to proceed, (2) they had already achieved a settlement offer for the client, and (3) they contended that to pursue the litigation would result in an undue financial burden on their firm.[4] Yet, the

* Third-year student at the University of Texas School of Law. The author thanks Professor Lynn A. Baker for helping him develop and refine the ideas in this article.

1. MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(3) (AM. BAR ASS'N 2016); *see also id.* r. 1.16 cmt. 4 (stating "[a] client has a right to discharge a lawyer at any time, with or without cause").
2. MODEL RULES r. 1.16(c).
3. McDaniel v. Daiichi Sankyo, Inc., 343 F. Supp. 3d 427, 431 (D.N.J. 2018).
4. *See* McDaniel, 343 F. Supp. 3d at 431.

motion was denied.[5] The court sharply rejected the motion stating, "counsel must accept the good with the bad."[6]

This case illustrates one of several problems that may arise for attorneys seeking to withdraw in the context of mass litigation. Because the cost of trial is so high in mass actions, plaintiffs are often at a disadvantage when litigating their individual cases against a corporate defendant.[7] Even so, a defendant might offer to settle with a large group of plaintiffs who have comparatively weak cases in order to clear the cloud of litigation.[8] In such cases, the defendant requires a high degree of acceptance because it wants finality.[9] But if one client rejects the offer, the lawyer is required to continue representing that client even though there is disagreement about whether to accept the offer.[10] Thus, the fact that the lawyer cannot withdraw from representing that one client in order to focus on the needs of the many seems inequitable and burdensome.

Another problem arises from the fact that plaintiff's lawyers in mass cases generally work for contingency fees.[11] The lawyer fronts all costs and

5. *Id.*

6. *Id.* at 434.

7. These are so-called "negative-value" cases where the costs of individual litigation for a plaintiff exceed the value of the claim. *See,* e.g., Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 MINN. L. REV. 1459, 1487 (2015) (discussing negative-value cases as they relate to "trial by statistics").

8. *See* Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1497 (2004) (noting that corporate defendants will settle even frivolous lawsuits to avoid the high costs of litigation in class actions).

9. *See* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1944 (2017) (arguing that finality in mass actions is a global goal: "[f]or both plaintiffs and defendants, resolution is the goal of litigation.").

10. MODEL RULES r. 1.16(b)(4) (enabling withdrawal where the client and lawyer have fundamental disagreements).

11. *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1042-43 (1993)

hopes to recover expenses and make a profit by winning at trial or, most often, from negotiating a settlement.[12] Because any individual plaintiff in a mass action faces a high bar to overcome due to the high costs of trial, virtually all such cases will be "negative value" cases.[13] If the lawyer successfully negotiates a settlement offer, it is generally thought that the lawyer has achieved a good outcome for the client.[14] But in a case where most of the clients accept an offer, any one client can choose to refuse to accept the settlement even if the lawyer has explained that litigating may bring in less for that client.[15] A lawyer can request to withdraw from representing such a holdout, but the lawyer might have to state weaknesses in the client's case in order to be given permission to withdraw.[16] This may prejudice the client's case. Additionally, if the court denies the request, the lawyer must remain with that client and continue to finance that one case (likely at a loss).

Proposed Solution: This paper proposes an amendment to the Model Rules of Professional Conduct pertaining to a lawyer's ability to withdraw under specific circumstances. The proposed rule will apply only to mass actions. Essentially, the new rule states that if a plaintiff's lawyer negotiates or receives a settlement offer that at least 90% of the clients consent to, then the lawyer may withdraw from continued representation of any

(discussing the contingency fee structure and the risks plaintiff's lawyers face in mass actions by funding the litigation up front and hoping to recoup on the back end).

12. *Id.*

13. *See supra* note 7.

14. The vast majority of cases never go to trial, and settlement is far more typical in civil litigation. *See* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1953 (2009) (discussing settlement rates).

15. *See* MODEL RULES r. 1.4 cmt. 2, (noting that a lawyer must disclose and explain any settlement offer to the client).

16. *See id.* r. 1.16 cmt. 3 (stating, "[a] court may request an explanation for the withdrawal").

client who does not accept the settlement offer. The proposal is keyed to a rationality principle. Requiring a minimum percentage of clients to accept the offer would be the trigger for the lawyer to withdraw from those few clients who reject the offer. So, if 90% of the client-base accepts the settlement offer, then it is deemed to be a "good" or "fair" settlement, creating a presumption that the lawyer can withdraw.

The proposed rule would also create a way for the lawyer to avoid a court turning down the request to withdraw, as happened in *McDaniel*.[17] The current Rules state that, if applicable law requires, a lawyer must stay with a troublesome client unless permission is granted to withdraw.[18] Indeed, courts may feel obligated to deny a withdrawal motion because they know a difficult client will not find another lawyer. The proposed rule fixes this problem because it provides an "emotionless" release. That is, if the settlement acceptance threshold is met, the court can use the rule to grant withdrawal and encourage the client to accept the settlement, rather than strike out alone. So, the new rule would protect the court from having to deal with troublesome *pro se* plaintiffs if withdrawal is granted because there would be a new mechanism to encourage settlement, which will aid finality. The advantage of the rule would be that it does not force the client to heed her lawyer's advice. But it also would not force the lawyer to stay with a client when the outcome of the litigation would not improve, and the lawyer's financial burden would increase.

Further, the proposed amendment would not only take pressure off the lawyer, but it would also have implications for plaintiffs. Under the new rule, the lawyer would not have to disparage the client's case in order to withdraw. Instead, she would only have to meet the threshold for withdrawal required by the new rule. So, the client is helped because the lawyer

17. *See* McDaniel, 343 F. Supp. 3d at 431.

18. MODEL RULES r. 1.16(c) (stating, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation").

would not have to provide detailed reasons why she thinks the client's case is problematic. Ultimately, the proposed rule would help lawyers and judges while protecting the client by preserving her case.

Summary

In Part 1, I provide some background and context by discussing the current rules for lawyer withdrawal, mass litigation, and aggregate settlements. I then present a recent case, *McDaniel*, where a law firm was denied permission to withdraw. The goal in this section is to set the stage and provide support for why a proposed amendment might be helpful at the intersection of withdrawal, mass litigation, and the ethical rules.

In Part 2, I present the proposed rule and deploy the main arguments for adopting it. First, I argue that the new rule benefits both plaintiff and defense lawyers because it allows the former to withdraw in a mass action if 90% clients accept a settlement, and it is conducive to finality for the latter. Second, I contend that the proposed rule would benefit courts in providing a mechanism to encourage settlement and end a mass case while fixing some problems that courts currently face with withdrawal. Third, I argue that the proposed rule would benefit clients because it would not force the lawyer to articulate negative reasons for withdrawal that would be entered into the record. For a client who chooses to reject an offer, the rule would thus protect her case and allow her to have more control and autonomy because the lawyer could leave without tainting the client's case. Finally, I apply the proposed rule to the *McDaniel* case and suggest that the it would provide a more equitable outcome in such situations.

In Part 3, I raise two objections to the proposed rule, and I respond to each. The first objection is of the "parade of horribles" variety. The second objection alleges that the proposed rule would incentivize bad behavior on the part of plaintiff's lawyers. In response, I argue that the proposed rule increases client information and knowledge, so it benefits the

client. Also, the rule affords more protection in cases where the client has a weak claim or where she acts irrationally. I then argue that the proposed rule would actually decrease the incentives for lawyer malfeasance, and it would therefore protect the client. Thus, the rule would be beneficial to both clients and lawyers.

Part 1:

1.1. Current Withdrawal Rules

Under the Model Rules, a lawyer can withdraw from representing a client in only limited situations.[19] Withdrawal can be mandatory or voluntary.[20] This paper focuses on voluntary withdrawal. Rule 1.16(c) states that a lawyer must "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation."[21] Further, when seeking to withdraw, a lawyer must show "good cause" and may be asked to give reasons for the withdrawal.[22] The Model Rules are not legally binding, nor are they the ruling standard in any state or court. However, the Model Rules are typically drawn upon when drafting state ethical rules, and thus most state rules track them.[23] This paper focuses on the Model

19. *See* MODEL RULES r. 1.16(a)-(b).
20. *Id.* r. 1.16(a)(3) (mandatory withdrawal); r. 1.16(b) (voluntary withdrawal).
21. *Id.* r. 1.16(c).
22. *Id.* r. 1.16(b)(7); *id.* r. 1.16 cmt. 3 (stating, "[a] court may request an explanation for the withdrawal").
23. *See id.* preface, at vii (stating, "the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession").

Rules because a change to them would provide helpful guidance for states when they adopt their own ethics rules.[24]

1.2. Mass Actions & Aggregate Settlements

A mass action involves individual lawsuits filed by many plaintiffs who are harmed or negatively affected by a single product or event.[25] Mass actions are typically mass tort claims that can be consolidated as a class action or a multidistrict litigation (MDL).[26] MDL and class actions are governed by statute and the Federal Rules of Civil Procedure.[27] A class action might be appropriate if a group of cases are numerous and sufficiently alike (i.e., stemming from the same cause and having common questions of law or fact).[28] Class actions have been used with asbestos or toxic tort related cases.[29] By contrast, in an MDL, the cases are varied and are sufficiently different from each other such that while they involve common questions of fact, they cannot be a class. The MDL device allows the temporary transfer of a group of cases to a single court to conduct coordinated pretrial proceedings for purposes of efficiency and efficacy, often

24. *See* Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of Aggregate Litigation: A Missed Opportunity - And More,* GEO. WASH. L. REV. Vol. 79, 717 (2011) (discussing the lack of ethical consideration in the ALI and ABA rules).

25. *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1068-69 (2012) (providing a general definition of mass tort litigation).

26. *See, e.g.*, Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. at 5 (1991) (discussing the history, evolution, and changing perceptions of the class action and MDL in mass actions).

27. *See* FED. R. CIV. P. 23 (codified as 28 U.S.C § 1332(d), and 28 U.S.C § 1407 (2012)).

28. FED. R. CIV. P. 23(a).

29. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (providing seminal examples of class actions in asbestos related cases).

with the use of "bellwether trials."[30] The use of MDL has been used in drug related cases where thousands of individuals ingest a drug, but some users are negatively affected.[31] Because the thousands of other individual users face fear of future harm, a mass action ensues. For clarity and focus, this paper has the latter type of litigation in mind.[32]

Rule 1.8(g) provides guidance on aggregate settlements.[33] The rule mandates that a lawyer who represents multiple clients in the same matter cannot engage in an aggregate settlement unless two requirements are met: (1) a lawyer discloses to each client information on the terms of the settlement offer, including "the existence and nature of all claims . . . and of the participation of each person in the settlement"[34]; and (2) the lawyer obtains signed consent from each client in written form agreeing to the settlement.[35] A defendant might offer to settle a mass action to achieve

30. *See* Eldon E. Fallon et. al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323-67 (2008) (providing an overview of the MDL device and the use of bellwether trials as a tool to resolve this type of litigation).

31. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., No. 05-md-1657 (E.D. La. Nov. 9, 2007); *In re* Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 542 (E.D.N.Y. 2006); *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

32. Taking this focused approach provides a more straightforward analysis of the effects that the proposed rule would have on mass actions. However, the rule would also work just as well in class actions and other mass litigation settings.

33. MODEL RULES r. 1.8(g).

34. *Id.*

35. *Id.*; *see also* Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291 (2016) (discussing problems with aggregate settlements and offering a way to understand the aggregate settlement rule and its underlying motivations).

finality.[36] This is sometimes referred to as a "peace premium."[37] A peace premium represents a supplement that the defendant is willing to pay in order to bring the litigation to an early end.[38] If a defendant makes an aggregate settlement offer, it is typically conditioned on either all, or the vast majority, of the plaintiffs accepting the offer for the matter to close. This "walkaway" condition is included because defendants do not want to enable strategic behavior, where the money paid out in a settlement is used to fund continued litigation.[39]

1.3. The *McDaniel* Case

In a recent case, the United States District Court for the District of New Jersey denied a motion to withdraw by the plaintiff's counsel in a mass settlement.[40] The plaintiff's counsel had successfully negotiated a settlement offer that most of the clients had accepted.[41] However, one client refused to accept the settlement because he mistakenly believed he

36. *See* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1944 (2017) (stating that "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").

37. *Id.*; *see also* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176 (2017) (discussing the value of peace in mass actions).

38. *See* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 90-91 (2019) (assessing the value of a "peace premium" for both defendants and plaintiffs).

39. Under such a "walkaway" provision, a defendant can unilaterally terminate the settlement offer unless a set number of claimants (often 100%) accept the offer under the specified terms. However, while such walkaway provisions are common in group settlement offers, defendants rarely enforce them if most defendants (or at least, all the strong cases) accept the offer. *See* Baker *supra* note 35, at 297.

40. McDaniel, 343 F. Supp. 3d at 431

41. *Id.* at 430 (out of more than 2000 plaintiffs, only five did not accept the settlement).

could request a different settlement amount.[42] After the client disregarded his lawyer's advice and explanation of the settlement terms, the lawyer sought permission from the court to withdraw from representing the client under Rule 1.16.[43]

In the request to withdraw, the lawyer first argued that withdrawal would not materially affect the client's case because discovery had not been completed and the case was in the early stages.[44] Second, counsel claimed that to continue litigating would result in financial hardship for the firm.[45] The firm was working on a contingency fee basis, so it was fronting all costs.[46] Moreover, counsel believed that accepting the settlement offer was in the best interest of the client because it estimated that the take-home amount from the settlement would likely be more than what the client could get at trial.[47] So, counsel would take a loss by going to trial because the firm would have to pay for the enormous costs of discovery and trial and the gross recovery at trial, if any, would likely be less than the settlement offer. Finally, counsel noted that the retainer agreement the client had signed allowed counsel to withdraw.[48]

However, the court denied the motion to withdraw.[49] The court held: (1) the client would likely be unable to find new representation, (2) the client acting *pro se* was insufficient,[50] and (3) if the lawyer was "scared off"

42. *Id.* Doc. No. 15 "letter from Terry McDaniel" dated 8/6/18 (entered: 08/13/18).
43. *Id.* at 432.
44. *Id.* at 431.
45. *Id.* at 432.
46. *Id.* at 433.
47. *Id.* at 430
48. *Id.* at 433.
49. *Id.* at 434.
50. *Id.* at 431 (the court stated that one reason for the denied motion to withdraw came from the fact that, "an attorney's withdrawal in the MDL context has particular potential to . . . become burdensome on the Court").

by the thought of funding trial, then the lawyer should never have taken the case in the first place.[51] Ultimately, once the client met with the judge personally and understood he could not dictate his own settlement amount, the client accepted the settlement and the matter was resolved.

However, this case illustrates a problem with the current rules on withdrawal in mass actions. It seems problematic that a court can deny a request to withdraw when the lawyer brings about a fair settlement that is accepted by the vast bulk of her clients, and there are additionally good reasons to accept the settlement.

Part 2:

2.1. The Proposed Rule

The proposed rule is intended to be narrow and apply to only mass litigation.[52] The rule would provide guidance for both clients and lawyers to consider when forming a legal relationship. The proposed rule is also intended to be simple to administer. Further, it would have significant effect, providing great relief to plaintiff's lawyers on the occasions it is used. The rule is also designed to not harm the client or affect her control of the case because of its limited scope. Rule 1.16 of the Model Rules might be the best place to add this proposed rule. Or it could stand alone as a

51. *Id.* at 432.

52. This is an important distinction for the purposes of this paper. In contrast to personal injury claims or smaller value tort cases, here, we envision large value cases that involve thousands of plaintiffs, with serious medical symptoms and effects that involve scientific disputes over long term prognoses, and large publicly traded corporate defendants (e.g., pharmaceutical manufacturers) who are repeat players and who have significant interests at stake. *See supra* note 31 for examples of this type of mass litigation.

rule pertaining specifically to aggregate litigation.[53] The proposed rule assumes that the Rule 1.8(g) factors of consent and disclosure regarding aggregate settlements are met.[54]

Essentially, the proposed amendment would allow a plaintiff's lawyer to withdraw in a mass action under certain circumstances. The proposed rule is presented as follows:

> In the event that an aggregate settlement offer is made to a group of clients who are represented by the same lawyer or the same law firm and at least 90% of the group accept the settlement offer, there will be a presumption that the court will grant permission to withdraw to the lawyer or law firm representing those clients who do not accept the offer.

A comment could also be added to the proposed rule, stating:

> Each client will retain the right to decline the settlement offer and to continue litigating. However, the lawyer will not be required to continue representing a client who declines the offer if acceptance is above 90%. The 90% acceptance rate would indicate that the lawyer or law firm has fulfilled its obligation to the client to bring about a desired result for the vast majority of clients because each client must consent to the offer after receiving full disclosure and explanation of the settlement. Accordingly, additional cause or reasons to withdraw need not be shown by the lawyer or law firm before it can withdraw because there is a presumption that, if the settlement has met the threshold of 90%, the lawyer does not have to remain with the client. This protects clients who reject settlements from the court's requirement that the lawyer disclose negative information to the court about the client's case to show cause to withdraw. Currently, this information remains on record

53. MODEL RULES r. 1.16.

54. *Id.* r. 1.8(g).

and thus discourages any future lawyer from taking the client. Thus, the proposed rule may allow clients to maintain control over their claim and to pursue other options for new representation.

2.2. The Rule is Good for Plaintiff Lawyers

The proposed rule is good for plaintiff's lawyers. Under the current rules, a lawyer who has successfully negotiated a settlement and has received the consent of almost all of her clients might nonetheless be stuck with a client who rejects the settlement offer (as happened in *McDaniel*). In such a case, the lawyer might be denied permission to withdraw from representation even though the matter could be immediately resolved through settlement. Due to the nature of mass actions, a holdout would likely result in significantly increased costs for the lawyer. Increased costs could result in undue financial burdens on the lawyer if (a) the lawyer is working on a contingency basis, (b) she has already secured a settlement offer that is worth more than pursuing litigation, or (c) the holdout case is relatively weak compared to the costs of additional discovery and trial. Extending the litigation process might also prevent the lawyer from taking new cases or, at minimum, from focusing attention on new cases. Finally, plaintiff's lawyers in mass actions have faced an increasing number of lawsuits stemming from alleged infractions of the aggregate settlement rule.[55] In many of these cases, former clients have raised breach of fiduciary duty claims and claimed they were coerced into accepting a settlement offer by the former lawyers.[56] These claims have resulted in ongoing litigation, fee

55. *See* Baker, *supra* note 35, at 291-92.

56. *See* Arce v. Burrow, 958 S.W.2d 239, 244 (Tex. App.—Houston [14th Dist.] 1997), aff'd in part, rev'd in part, 997 S.W.2d 229 (Tex. 1999) (the plaintiffs alleged their former lawyers breached their fiduciary duties by, *inter alia,* coercing their former clients into accepting a settlement).

forfeiture, and disgorgement.[57] Additionally, the lack of clarity on interpreting Rule 1.8(g) and its state equivalents[58] have led some scholars to criticize the use of aggregate settlements in mass actions.[59]

The proposed rule would alleviate these problems. Under the new rule, if 90% of the represented clients accept the offer, then there is a presumption that the lawyer has fulfilled her duty to the clients and can therefore withdraw from representing the clients that reject the settlement offer. As a result, the lawyer would not have to continue to pay for the costs of litigation for the holdout clients, and she could end her part in representing that client and move on to new cases. The rule thus helps to speed up the litigation process and would decrease delays in compensation for both clients and lawyers (assuming the lawyer is working on a contingency-fee arrangement).

The proposed rule also clarifies the relationship between lawyers and clients in a mass action because the lawyer would have to explain the effect of the rule to the client prior to representation.[60] This would ensure that

57. *See, e.g.*, Burrow v. Arce, 997 S.W.2d 229, 232 (Tex. 1999) (holding that breach of fiduciary duty may result in fee forfeiture even without proof of actual damages); Hendry v. Pelland, 73 F.3d 397, 399 (D.C. Cir. 1996) (holding that a client need only prove that the lawyer breached a fiduciary duty for disgorgement to be used as a remedy).

58. Scholars differ on how to interpret Rule 1.8. *Compare e.g.,* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1809–10 (2005) (arguing against interpreting Rule 1.8(g) to allow ex ante consent agreements in aggregate settlements), *with* Charles Silver & Lynn A. Baker*, Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 771 (1997) (contending that Rule 1.8(g) should allow ex ante agreements because they lead to greater client autonomy, providing freedom of choice in mass actions).

59. *See* Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1022 (2010) (raising problems with aggregate settlements in mass actions and arguing that lawyers will favor their own interests over the client).

60. It should be noted that if adopted, the proposed rule would integrate with the current ABA rules requiring the lawyer to communicate and explain any matters

the client understands what will likely occur if a settlement is reached and it would help shape the initial contractual relationship between the client and attorney. This initial clarity, and the subsequent rule enabling withdrawal, could help cut down on the rash of liability claims that have been filed against plaintiff's lawyers in mass actions over the last few decades.[61] Specifically, it would help alleviate the "threat of coercion" complaint by a client who blames the lawyer who encourages settlement by enabling the lawyer to have a presumptive right to withdraw if the threshold is met. Moreover, the client is presumed to understand what is going on because the lawyer would have explained the rule prior to forming the client-lawyer relationship. The proposed rule thus provides lawyers with a mechanism to set clear boundaries for the scope of representation while relieving lawyers of the need to "push for settlement" because withdrawal is an option.

2.3. The Rule Also Benefits Defendants

The new rule might also prove to be beneficial to the defendant. In a mass action, the defendant fundamentally seeks finality.[62] Finality is sought by the defendant because it removes the shadow of litigation, it can boost the defendant's publicly traded stock value, and it allows the defendant to move on from the distraction of litigation.[63] So, when a defendant in a mass case agrees to settle, it seeks to end the matter once and for all.

that are necessary for the client to make informed decisions. *See* Model Rule 1.4(b).

61. *See supra* note 56.

62. *See* Baker, *supra* note 36; *see also* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760-63 (1997) (stating that defendants "want finality and are willing to pay for it").

63. *See* Baker, *supra* note 36, at 1944 n.1 (noting that on the day that Merck announced its $4.85 billion settlement of over 50,000 Vioxx claims in 2007, Merck's stock rose 2.3%, suggesting that settlement has positive aspects for defendants).

The proposed rule would allow plaintiff's lawyers to more easily withdraw if the threshold is met. If the threshold is met, the litigation essentially comes to an end because most of the claims have settled, and the defendant will not likely be worried about a few cases that hold out. The defendant can either try those remaining cases, or it can settle later with the holdouts. Historically, the defendant's view has been that it will only be willing to settle if the number of plaintiffs that accept a settlement offer is close enough to a majority.[64] The only exception would be if the strongest cases hold out. However, the proposed rule would not apply to strong cases because in those situations the lawyer would likely want to remain with the client. The reason for this distinction is that in mass actions of the type discussed in this paper, there are typically only a few (sometimes only a handful of) "strong" cases.[65] The strong cases are typically the only "positive value" cases in a group that can compose thousands of plaintiffs who have not experienced clear causal harm or negative effects.[66] For example, where a pharmaceutical company releases a new drug, thousands of individuals may take the drug with little or no effect. However, a few individuals may suffer harm after ingesting the drug, which motivates the mass action.[67] In such cases, the few "strong" cases are those that have potential to receive any (and the larger) settlement offers. So, the lawyer will likely never desire to withdraw from such clients

64. *See supra* note 59, at 979 ("When defendants settle litigation involving multiple plaintiffs, they often insist that they will settle only if they obtain releases from all or nearly all of the plaintiffs in the group. If a defendant is going to spend money to resolve claims, it prefers to take its hit and move on.").

65. Here, "strong" is loosely defined as a plaintiff who has suffered significant harm, or even death, after taking a particular prescription drug, and there are no other mitigating circumstances (e.g., the plaintiff was in good health and condition prior to taking the drug). So, a viable argument can be made in these cases to show a causal link between the harmful effects and the ingestion of the drug. *See* Silver & Baker *supra* note 62, at 761 (discussing strong cases in mass actions).

66. *See supra* note 7 (discussing negative value cases).

67. *See supra* note 31 (e.g., the Vioxx litigation).

because these strong cases ultimately lead, or even direct, much the rest of the group. Nonetheless, in a mass action, if the bulk of the plaintiffs accept a settlement offer, the matter is essentially resolved. Therefore, the proposed rule would provide greater certainty to the defendant that the matter would end and thus that finality would be achieved.

To achieve finality, Lynn A. Baker, a professor at the University of Texas School of Law, has noted that defendants generally seek to include five core components in the terms of a mass settlement.[68] One of these core components is a "withdrawal provision" wherein the plaintiff's lawyer agrees to seek permission from the court to withdraw from representing any clients that reject the settlement offer. However, controversy surrounds this type of provision because, under Rule 5.6, a lawyer is prohibited from entering into a settlement agreement that restricts her right to work.[69] Professor Baker points out that though the plain text of Rule 5.6 bars a *mandatory* withdrawal provision, defendants use a "workaround" by using language that encourages the lawyer to use "all necessary steps to disengage and withdraw from the representation."[70] Moreover, Rule 2.1 requires a lawyer to determine whether she can in good faith recommend participation in a settlement offer to her clients prior to agreeing to it.[71] Accordingly, if the lawyer decides through an exercise of her professional judgment that the settlement offer is good for her clients, then there will not be an ethical violation.[72] Still, this outcome is controversial and has been subject to strong criticism.[73]

68. *See* Baker, *supra* note 36, at 1962.

69. MODEL RULES r. 5.6.

70. *See* Baker and Silver, *supra* note 62.

71. MODEL RULES r. 2.1.

72. *Supra* note 62, at 779.

73. *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 318-20 (2011) (discussing problems with aggregate settlements); *see also* Erichson, *supra* note 59.

The proposed rule responds to this type of problem because it allows the defendant to have a rule that supports—and makes explicit—a withdrawal provision. This would bolster the ability of the lawyer to withdraw in mass actions that use an aggregate settlement. The concern of violating other ethical rules would be diminished since the new rule would give guidance and a standard to govern withdrawal in aggregate settlements. The defendant would therefore not have to rely on the "workaround" option but could cite the proposed rule as a term in the agreement. Accordingly, the rule would aid the pursuit of finality, which benefits the defendant.

2.4. The Rule Could Prove Useful to Courts

The proposed rule could also be beneficial to courts in solving two problems that arise when attorneys request to withdraw from representing clients. The first problem concerns the welfare of clients when lawyers withdraw. The second problem relates to the fact that courts might have to deal with *pro se* clients if the attorney withdraws and a replacement lawyer cannot be found. To illustrate these problems, the proposed rule can be applied to the *McDaniel* case.

First, the court might deny an attorney's motion to withdraw if it believes the client will be adversely affected by withdrawal. A client's case could be adversely affected by withdrawal if the withdrawal would halt or stall the litigation process. For example, if withdrawal would result in the client being unlikely to find new representation, the court might require the attorney to remain with the client.[74] This is because clients might not be able to find a new lawyer after a withdrawal, especially if the record shows that the client has been irrational or uncooperative.

74. *See* MODEL RULES r. 1.16(c); *see also id.* cmt. 7 (noting the conditions necessary to request withdrawal).

Under the current rules, a withdrawal request can expose information about the client's case because the lawyer may be required to give reasons for the withdrawal that will be entered into the public record.[75] If it becomes known that the case has problems or is deemed to be weak, it is less likely that a new lawyer will want to take the case. In *McDaniel*, the record showed that the client both did not listen to his attorneys and misunderstood the terms of the settlement, despite his lawyers informing him of the terms.[76] The court held that the client would be "substantially and materially prejudiced" if the lawyer withdrew, because the court doubted that the client would be able to retain new counsel.[77] This all suggests that the client was problematic.

By contrast, the proposed rule would allow the attorney to not cite any reasons for the withdrawal if the threshold requirement is satisfied. This would enable the client to find a new lawyer more easily because all the reasons ordinarily presented by the lawyer in her withdrawal motion would not be entered into the public record. Therefore, a new lawyer would evaluate the case without a shadow hanging over the case. This would protect the client and possibly persuade the court to allow the withdrawal because the cause of the withdrawal is not made public. Thus, the client has a better chance of retaining new counsel.

The proposed rule would also provide the court with a mechanism to allow the lawyer to withdraw if the necessary criteria are met. For example, in *McDaniel*, the court was very cognizant that the plaintiff was involved in a mass tort case. But it is strange that the court did not acknowledge that there is a difference between a mass action and a single-client representation because the plaintiff in the mass action benefits from being in a group. In particular, in a mass action there might only be a small number

75. *Id.* r. 1.16, cmt. 3.

76. *Supra* note 42 ("Doc. No. 15").

77. McDaniel, 343 F. Supp. 3d at 431.

of cases that have a positive value, and which are considered strong on their own (due to the merits and circumstances of the specific plaintiff's case).[78] So, by contrast, the large majority of cases in the group are individually weak and would cost more to litigate than what can be recouped through either settlement or victory at trial. Nonetheless, a group increases bargaining power for all the plaintiffs and provides significant benefits.[79] The weaker cases are thus benefitted by being part of a group because a defendant has to take the strong cases seriously, and it will be more likely to include the weaker cases in a global settlement to bring finality to all related cases in that matter. Therefore, being a part of a group strengthens the chances of the client receiving something from the defendant. It also allows the client to pool resources, increase bargaining power, and cut upfront costs (since the lawyer initially pays for the mass action). In *McDaniel,* the client had a weak case that would have been a negative-value case on its own, without the group, due to the high costs of litigating a mass tort. Thus, the court in *McDaniel* recognizing the mass case while failing to acknowledge that the plaintiff had already benefited from the group creates an odd asymmetry. Further, the effect of the opinion would not only require that the lawyer pay for the ongoing litigation, but it also means that society at large will have to pay the court costs as the case moves to trial instead of being resolved through settlement. So, why does this not factor into the opinion?

The second problem is that, if a court grants withdrawal, there is a real possibility that the court will be left with a *pro se* plaintiff. Generally,

78. *See infra* at page 15 for a discussion of strong cases.

79. *See* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 91 (2019) (arguing that plaintiffs in a mass action are benefitted by being in a group because "working together increases the plaintiffs' leverage against the defendant. By aggregating their claims, plaintiffs can pool resources, share risk, coordinate litigation strategy, disable holdouts, and present a unified negotiating position—all things that offset some of the defendant's repeat-player advantage.").

courts do not want this because of the additional time, effort, and cost of dealing with a client who is not trained in the law or procedure. Further, courts do not want to be put in the position of having to relay bad news to clients if the case is weak or if it is likely to be poured out. By keeping the lawyer on the case, there is an intermediary between the client and the court. So, a virtue of the proposed rule is that it gives the court some cover. It is important to note that, under the proposed rule, judicial discretion remains.[80] However, the rule would help courts because they could use the rule to tell clients what may happen if they do not accept a settlement offer. In *McDaniel*, the fact that the court denied the motion was strange because the lawyer seemed to have good cause. Hence, the court may have denied the motion because it did not want to be left with an uncooperative *pro se* litigant who would not heed legal counsel.

Under the proposed rule, this problematic scenario would not occur. The rule effectively encourages the client to accept a fair settlement (and so, end the litigation) because it clarifies the role of the lawyer and the nature of the client-lawyer relationship from the start. As discussed above, the lawyer would be required to explain the rule and let the client know what will occur in the event of a settlement (i.e., that the lawyer will be able to request withdrawal if the 90% threshold is met). Under the proposed rule, the lawyer in *McDaniel* would have met the acceptance threshold and, presumptively, would have been able to withdraw from representing that one client (after obtaining approval from the court). Therefore, the court would have a mechanism to encourage settlement because it can

80. It should be clarified that the Model Rules do not bind a judge or court. They merely provide guidance. But courts could adopt the proposed rule as a court rule. So, the proposed rule could serve merely as a recommendation to the court on how to handle withdrawal in mass actions. This would preserve the judge's ability to refuse a request to withdraw in certain cases while providing a manner to allow withdrawal in cases that fit the criteria.

point the uncooperative client to the rule and note that, if the threshold is met, the offer is considered "good" or "fair."

If the client does not accept the offer, the court can remind the plaintiff that if the lawyer withdraws, the case may be poured out because that one case may not be stronger than the other 90% of cases resolved through settlement. This results in the court being able to wrap up the litigation by either encouraging settlement or eventually pouring out the case. Either way, the court has a method to handle uncooperative *pro se* plaintiffs without the vast majority of clients being harmed.

Therefore, the new rule would directly address and alleviate the problems raised in a case like *McDaniel* because it would either keep the client's information off the record or it would encourage settlement and resolution to the matter.

2.5. The Rule Benefits and Protects Clients

The proposed rule is good for clients because it increases client knowledge up front. Specifically, lawyers would have to let prospective clients know about the rule and to explain the nature of the rule as it applies in mass actions. So, a client would better understand the extent of the lawyer's obligations. This could help speed up the litigation process and decrease delays in resolving the matter because it clarifies the relationship between the lawyer and the client in a mass action. As a result, this would allow the client to choose whether to join a mass action or to find separate, and individual, representation before signing on to the mass litigation.

Importantly, the types of cases that the proposed rule aims to address are primarily those where the client acts irrationally in not heeding the advice of the lawyer. If the client had a strong case, the problems sketched out above would not be encountered. [81] Strong cases in many ways steer

81. *See infra* at page 15.

or guide a mass action since they are the most valuable claims of the group (by definition of being strong cases).[82] Accordingly, the attorney is motivated to remain with such clients even if such clients reject a settlement offer because any hope of receiving a settlement or winning at trial depend on having the strong cases.[83] So, the lawyer would be more likely to agree to continue litigating. Therefore, the issue of a plaintiff's lawyer being unable to withdraw in a mass action would most often arise in weak cases where clients reject the offer for reasons that are either due to the clients' misunderstanding or irrationality.

Finally, the proposed rule would protect the client's case more than the current rules on withdrawal. Under the proposed rule, if the acceptance threshold is met, the presumption is that lawyers can withdraw without having to give additional reasons. Therefore, lawyers do not need to spill all or any of the "dirty laundry" of the client when requesting to withdraw. This allows the client's record to stay free from any negative factors that might adversely affect the client before the court or discourage another attorney from taking the case. So, this feature of the rule benefits the client by enabling the client to seek a new attorney without worrying that her dirty laundry has been aired in the motion to withdraw.

82. *See* Silver & Baker, *supra* note 62, at 761 (providing examples illustrating the distinction between strong and weak claims and how they affect defendants' willingness to settle).

83. *See* Bradt & Rave, *supra* note 38, at 113.

Part 3:

3.1. Parade of Horribles Objection

The first objection is of the "parade of horribles" variety.[84] The objection claims that if we allow plaintiff's lawyers to withdraw in mass cases, clients will be cut adrift and lose all hope of litigating their claim because they will be unable to find a replacement lawyer, they will lose valuable bargaining power, or they will be unable to build their case to continue onward. The upshot of the objection is that the rule would decrease a client's autonomy over her case.

In response: far from reducing client control of their cases, the proposed rule would promote increased transparency, increased communication, and a better understanding of the litigation process and chances of victory for clients. The rule would require that lawyers explain the withdrawal clause prior to engagement and educates clients on what it would mean if a settlement is reached in the aggregate. Clients would thus be able to better choose whether to hire mass-action lawyers at the start, providing a better understanding of the process and outcome. Better understanding leads to increased knowledge, and increased knowledge leads to better control of cases by clients. Therefore, the rule is good for clients.

3.2. Erichson-Style Objection

A second objection is one that draws from the work of mass-action scholars such as Howard M. Erichson. The objection is about potential lawyer malfeasance arising out of conflicts of interest. In response to the

84. *See*, *e.g.*, Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S. Ct. 1773, 1783 L. Ed. 2d 395 (2017) (rejecting a parade of horribles argument raised by the respondents that lack of specific jurisdiction in that case would result in a series of negative repercussions).

objection, the proposed rule is shown to be able to either directly address these concerns or mitigate the likelihood that there would be conflict.

Erichson has criticized various aspects of mass settlements.[85] Broadly, Erichson worries that plaintiff's lawyers are incentivized to misrepresent settlement offers to their clients because, by obtaining consent from the clients on the settlement, lawyers can resolve the mass litigation and thereby gain a large payout from contingency fees.[86] Accordingly, Erichson argues against advance consent waivers by plaintiffs, notwithstanding the recommendation of the American Law Institute to the contrary.[87] Centrally, Erichson contends that aggregate settlements and consent waivers compromise client autonomy because lawyers are motivated to push these devices and subsequently shortchange the client to obtain fees from settlement.[88]

In response: the proposed rule may help alleviate the concern raised by Erichson. Erichson argues that lawyers are incentivized to accept large settlement offers.[89] So, they are prone to either misrepresent the nature of the settlement offer or gain advance consent from clients, allowing them to accept an offer on behalf of the group.[90] However, under the proposed amendment, if a client rejects a settlement that is agreed to by the vast majority of clients, then that lawyer is able to withdraw from representing the lone plaintiff who rejects the settlement and the lawyer therefore is no longer incentivized to either misrepresent the settlement or push the client into accepting it. Further, under the proposed rule the lawyer does not need to receive the consent of all the plaintiffs for a settlement to go

85. *See* Erichson & Zipursky, *supra* note 73, at 321.

86. Erichson, *supra* note 59, at 1017-22.

87. *See* Am. Law Inst., Principles of the Law of Aggregate Litigation, § 3.17(b) (2010).

88. Erichson & Zipursky, *supra* note 73, at 1007-10.

89. *Id.*, at 1008-09.

90. *Id.* at 1018.

through because the threshold requires only 90% to accept the offer. So, there is no additional motivation for the lawyer to push for all the clients to consent to the settlement. Accordingly, the threat of coerced consent-seeking is diminished.

Professor Baker has also given a rebuttal to Erichson's concerns.[91] Baker points out that Erichson's worries are not only unpersuasive, but he also gets the problem of participation requirements in aggregate settlements backwards.[92] In particular, Erichson worries that plaintiff's lawyers working for contingency fees are incentivized to get their clients to accept a settlement, even bad ones, because most aggregate settlements are conditioned on all or almost all plaintiffs accepting the offer. So, if all plaintiffs in a group do not accept the settlement, the defendant is able to retract the offer, which means the lawyer will not get paid at that point.[93] Erichson concludes that the threat of the lawyer prioritizing his own financial interests over the client is more severe in mass actions than in single representation cases.[94] However, Baker points out that this worry is actually more applicable to the single representation case because mass actions actually provide plaintiffs with more leverage because defendants seek finality.[95] In fact, Baker notes that twenty years of experience in working with mass actions indicate that defendants will never withdraw an offer that is accepted by almost all clients even if the offer is conditioned on 100% acceptance.[96] So, even if some plaintiffs reject an aggregate settlement that is conditioned on 100% acceptance, as long as the vast majority

91. *See* Baker, *supra* note 36.

92. *Id.* at 1949-50.

93. Erichson, *supra* note 59, at 1009.

94. *Id.*

95. Baker, *supra* note 36, at 1950 (arguing that "Erichson's concerns with the impact of a 100 percent participation threshold on the plaintiffs' attorney's fees have things exactly backward.").

96. *Id.* at 1951.

of cases accept the offer, the settlement still goes through. Thus, the lawyer in the mass action will get paid for all the cases that settled, even if a few hold out.[97] In contrast, a single representation plaintiff who rejects a settlement will result in no contingency fee for the attorney, which turns Erichson's worry around to suggest that in reality, it is the single representation attorney that will be more concerned with his financial stake and so may be suspected of pushing settlement on his client.[98]

Baker also notes that even where a defendant requires withdrawal as a term of a settlement offer, lawyers are not obligated to seek withdrawal if there is not good cause under Rule 1.16.[99] Thus, the concern of lawyer malfeasance is perhaps exaggerated because the Rules already provide safeguards and require lawyers to exercise good faith, best judgement, and unwavering loyalty.[100] So, in the context of aggregate settlement and withdrawal, a lawyer does not have to seek withdrawal even where there is good cause.[101]

Ultimately, the fact that a defendant includes a withdrawal provision or offers a large aggregate settlement does not imply that plaintiff's lawyers are incentivized to act nefariously. Plaintiff's lawyers benefit in the short and long-term from large settlement offers that compensate many clients because their success will become known to future clients. If plaintiff's lawyers in mass actions accepted only quick and low-value settlement offers, then clients would not be happy, and the mass action lawyers would likely suffer from malpractice suits or a lack of business because of the poor track record. So, rather than see suspicious motivations for aggregate settlements, we contend that lawyers are likely to encourage settlement

97. *Id.* at 1950-51.

98. *Id.* at 1950.

99. *Id.* at 1964.

100. *See, e.g.*, MODEL RULES r. 1.2, r. 1.7, r. 2.1.

101. *See* Baker, *supra* note 33, at 1964-65.

primarily when it benefits clients and when they believe settlement is a good outcome overall for the clients.

Conclusion

This paper has presented a proposed amendment to the ABA Model Rules of Professional Conduct. The proposed rule would allow lawyers representing multiple clients in a mass action to withdraw without having to give additional reasons if certain criteria are met (and if the court grants the request). The requisite criteria would be that (1) a settlement offer is presented by the defendant, (2) the lawyer discloses and explains the settlement offer to all the clients, and (3) a minimum of 90% of the clients accept the offer and consent to it in writing. This minimum percentage is the threshold that must be met for the rule to trigger. In most cases, a reasonable settlement offer will result in virtually all the plaintiffs accepting the offer. For those clients who reject a settlement, those who have strong cases will not be harmed by the new rule because the lawyer would either not withdraw, or the client would be able to find new representation based on the strength of the case. However, the proposed rule would primarily apply to weak cases where a client rejects a settlement based on irrationality, or in spite of a lawyer's advice to accept.

The current Model Rules require the lawyer to request permission from the court to withdraw. The court can deny this request. In a recent example, a district court denied a motion to withdraw in a mass tort after the lawyer had secured a settlement agreement that was accepted by almost all the clients. The one holdout refused the settlement because he incorrectly believed he could ask for a different amount. Due to this disagreement, the client's attorneys requested to withdraw, but were denied. The proposed rule would thus address this type of problem and provide a mechanism for the court to allow the lawyer to withdraw from the client if the above-mentioned criteria are met. Moreover, if the criteria are met, the lawyer would invoke the rule and would not have to present further

reasons for why she wants to withdraw. This would protect the client's case and allow the client to seek new counsel without a fear of tainting her case. Lastly, the rule would help defendants achieve finality in mass actions because the rule would provide more certainty that a defendant could require plaintiff's lawyers to withdraw if a settlement is offered. Accordingly, the proposed rule benefits clients, lawyers, and the judicial system through its efficiency, simplicity, and narrow application.