Foreword

Complex Litigation Ethics as Distinct

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The Authors of the collection of Essays in this Issue of the *Hastings Law Journal* presented their ideas at the first annual conference on Complex Litigation Ethics at the University of California College of the Law, San Francisco (UC Law SF) in the fall of 2022. The conference took place under the auspices of the Center for Litigation and Courts at UC Law SF and Huntington Bank. The proceedings of that conference and its future iterations will shape and be shaped by the first treatise on complex litigation and class action ethics, a volume that Candice Enders and I will edit and in part author. It is forthcoming by Lexis Nexis. The conference, the treatise, and these Essays are meant to fill somewhat of a gap in the scholarly and practical literature: a systematic account of what is ethically required, prohibited, and authorized for lawyers in class actions and other complex litigation.

A fair question, however, is whether complex litigation ethics is a distinct topic. The ABA's Model Rules of Professional Conduct can be read to suggest that it is not. Those Rules generally do not make explicit accommodations for lawyers participating in class actions or other complex litigation. A rare exception is the comment to Rule 1.8(g) on so-called "aggregate settlements," and even that comment is coy. It explains in relevant part:

> Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.[1]

Note that the comment does not create an explicit exception to Rule 1.8(g) for class action settlements. It merely concedes—somewhat begrudgingly—that

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1. MODEL RULES OF PRO. CONDUCT r. 1.8(g) cmt. 10 (AM. BAR ASS'N 1983).

class members "may not have a full client-lawyer relationship" with class counsel. That is strange.

Class counsel routinely act inconsistently with Rule 1.8(g). For instance, the Rule requires lawyers who represent two or more clients to obtain informed written consent, signed by each client, for any aggregate settlement. But plaintiffs' class counsel virtually never, if ever, follow that procedure. Nor should they. Federal Rule of Civil Procedure 23(e) sets forth its own process for settling litigation on a class basis, a form of aggregate settlement.[2] That process extends a set of protections to absent class members, including, in appropriate cases, notice, opportunities to opt out of or object to a settlement, and court approval.[3] Rule 23(e) does *not* include a requirement that plaintiffs' class counsel obtain informed written consent from each absent class member.[4] And courts virtually never, if ever, require plaintiffs' class counsel to take that step. One might then wonder why the Model Rules do not state more clearly that Rule 1.8(g) does not apply to absent class members.

A possibility is that the ABA did not want to engage the potentially controversial issue of whether the Model Rules—or other ethical codes that govern lawyers—should be adapted in class actions and other complex litigation. Nor may it have wanted to grapple with the even more formidable issues of when and how the Model Rules should be adapted. It may have preferred to leave to courts to decide whether, when, and how to adjust the ethical rules in complex litigation, including based on the provisions of Federal Rule of Civil Procedure 23.

A result, arguably, has been unfortunate confusion. Courts lacking experience or sophistication with class or other complex litigation may apply the Model Rules—or a variant of them adopted by the relevant state—in an inappropriately wooden fashion. The burden may fall on the relevant lawyers to persuade judges that the ethical rules do not mean what they say. That can be a heavy burden to carry.

Judges understandably may be skeptical if lawyers contend, for example, that they are ethically permitted—even ethically required—to act in ways that the plain text of the ethical rules appears to prohibit. Nonetheless, it may be true. Rule 23, or other sources of law, can warrant adjustments to the ethical rules or how they apply, even if the Model Rules and similar ethical codes fail to acknowledge that or use language that is equivocal.

At any rate, that view finds support—and challenges—in the Essays in this Volume. Consider the piece that Candice Enders and I have written, *The Ethics of Defense Counsel's Communications with Absent Class Members Before Class Certification*. We seek to provide better guidance than has generally been available for how courts tend to rule and correlatively how lawyers should

2. FED. R. CIV. P. 23(e).
3. *See id.*
4. *See id.*

conduct themselves. We also note that the pattern of judicial decisions is better explained in terms of Rule 23 and the policies that animate it than in terms of the relevant ethical rules. The legal ethics of defense lawyers communicating with the absent members of a proposed class, we contend, are systematically different from the legal ethics of lawyers communicating in other contexts.

Next consider Melissa Mortazavi's thoughtful and thought-provoking Essay, *Where Neutrality Stops and Reality Begins: Why Considering Identity Is Vital to Lead and Class Counsel Selection*. Her argument is that in class and other representative actions, courts should deviate from the "neutral partisan model": the principle that lawyers' identities are irrelevant to the representation of their clients. When courts appoint plaintiffs' lead and class counsel, she contends, aspects of lawyers' identities do and should matter. Part of the reason, Mortazavi suggests, is that clients exercise less control over litigation in representative actions than in individual actions. As a result, she claims, lawyers in some ways act not just as agents, but also as surrogate principals.

Here, again, we see a claim that legal ethics are different in complex litigation than in individual litigation. Moreover, her argument extends beyond class actions—where Rule 23 provides a relatively convenient legal hook for adapting ethical principles and rules—to nonclass multidistrict litigation (MDL)—where no such obvious legal hook is available and judges may have to rely on their inherent powers. Her main point is about how best to select lead and class counsel. However, her trenchant analysis also has theoretical implications, including that we may do best to adapt legal ethics to complex litigation.

Similar points pertain to Roger Michalski's enlightening Essay, *Ethics by Appointment: An Empirical Account of Obscured Sanctioning in MDL Cases*. He has done yeoman's empirical work studying ethical sanctions in MDL proceedings. He finds that sanctions are relatively infrequently requested or imposed in complex litigation as compared to individual litigation (controlling for the number of individual actions or representations that constitute an MDL). He offers as a possible explanation that courts may regulate attorney conduct in complex litigation more frequently through appointment of plaintiffs' counsel to leadership roles than through sanctions. If that hypothesis proves correct—and likely even if it does not—Michalski's study suggests that legal ethics function differently in complex litigation than in individual litigation, and that the differences extend beyond class actions to nonclass MDLs.

We see similar phenomena at play in Brad Wendel and my Essay, *Complex Litigation Funding: Ethical Problem or Ethical Solution?* We argue in a favor of a few points: (1) the ordinary ethical rules, properly interpreted, do not necessarily prohibit third-party litigation funding of lawyers in complex litigation, if funding agreements are structured properly; (2) whether courts should be skeptical or supportive of third-party litigation funding depends on its costs and benefits in a particular area of practice; (3) robust empirical evidence suggests that third-party litigation funding may tend to *improve* the level of

private enforcement of U.S. antitrust law; and (4) such funding may also *enhance* diversity among the plaintiffs' lawyers who pursue class actions and other complex litigation. Again, these points apply both to class actions and nonclass MDLs. The pertinent theoretical implications of our analysis may be modest because our position is consistent with the same ethical rules and principles obtaining in complex and individual litigation, although as applied they may yield different results. On the other hand, distinguishing between rules or principles and their applications is not always easy.

Lauren E. Godshall's insightful Essay, *The Ethics Gap: MDL Leadership Versus the Attorney-Client Relationship*, poses a potential challenge to adapting ethical rules to complex litigation, as well as potential evidence that courts should and already do so. Godshall raises a troubling concern: Under a standard interpretation of the ethical codes that apply to lawyers, the plaintiffs' steering committees ("PSCs") that courts often appoint to take the lead in nonclass MDLs control much of the litigation, but they may have no attorney-client relationship with most of the plaintiffs whose interests their conduct affects and no ethical obligations to those plaintiffs. Godshall characterizes this issue as involving an "ethical gap." Godshall makes a credible case that such a gap should not exist. What is less clear is that it does. It is true that ethical codes tend to ignore this situation. But, as noted above, they tend to ignore class actions and complex litigation generally. Courts, however, may not do so. And they have powerful levers in overseeing attorney conduct. Judges can play a pivotal role, for example, in determining how much compensation PSC and non-PSC lawyers should receive in nonclass MDLs, relying in part on their inherent authority over lawyer ethics.[5]

In other words, courts may operate according to ethical principles and rules (or standards) in supervising PSCs, even if those principles, rules, or standards are not embodied in an ethical code. As Godshall notes, judges and commentators sometimes treat the PSC as a fiduciary of the MDL plaintiff body. Perhaps the "ethical gap" Godshall identifies, then, is primarily a gap in our *recognition* of how courts should and do operate, and less so a gap in legal ethics. The cure may be to gather and explain existing law in ways that will dispel confusion on the parts of judges, lawyers, and scholars—an effort that Godshall's Essay itself advances admirably.

Of the Essays in this Issue of the *Hastings Law Journal*, the most direct challenge to the approach suggested in this Preface is found in Eli Wald's excellent and provocative piece, *Class Actions' Ethical "KISS": The Class Action Lawyer's Client Is the Class*. He suggests that standard ethical codes—including the Model Rules of Professional Conduct—can fit the class context, provided we recognize that the class and only the class is the client of class counsel. The class, he suggests, should be treated as an entity client, much as

5. *See generally, e.g.*, Morris Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine To Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J.L. ETHICS 59 (2013).

corporations are. He notes that some scholars in the past have adopted a similar view, acknowledges that significant work would need to be done to ensure that a class can function effectively as an entity client, and offers preliminary thoughts on what that work would entail. He suggests that the work can be done, and, once it is, that legal ethics in class actions would be simpler and more predictable than they currently are. His arguments should be taken seriously and, if they are contested, that should be done with care. This Preface is not the place to undertake that effort.

Nevertheless, I offer three observations about the potential themes of a contrary position. The first is that while Wald's suggested approach to class action ethics may be simple, it risks being too much so. As Wald acknowledges, courts tend to recognize various obligations of class counsel to individual class members that vary by context. Simplicity is a value that must compete with others, including adaptability and nuance.

Second, it is not clear that Wald's proposal would simplify class action ethics rather than substituting one set of complexities for another—possibly more complex—set. Instead of systematizing and organizing what courts already do, he proposes creating new governance structures in class actions that might recreate most or all the existing complexities, and even add new ones. Indeed, his proposal could just introduce another layer of complexities on top of the ones that already exist, as established lines of precedent tend to endure even if the law is reformed with the goal of eliminating them.

Third, and for the same reasons, Wald's approach might not ameliorate unpredictability, but rather preserve or exacerbate it. Lawyers may find themselves having to anticipate how courts and others will contend not only with the current, insufficiently explicated doctrines that relate to class actions ethics, but also with the novel and unanticipated challenges that arise in building an extra layer of governance structures on top of the current provisions of Rule 23.

To be sure, identifying these potential themes is not the same as supporting them. Wald may be right and, even if he is not, his Essay helps sharpen the relevant issues. So do the other Essays in this fine collection. Each one addresses an issue that is important for its own sake. Each also provides a concrete and compelling example of the challenges of dealing with ethical issues in complex litigation. I believe they support the view that complex litigation ethics are distinct from individual litigation ethics. But you, gentle reader, can be the judge of whether I am right.

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