ALTERNATIVE DISPUTE RESOLUTION IN SMALL CONSENSUAL LITIGATION: TOO MUCH OF A GOOD THING?

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I. INTRODUCTION

Survivor Lisa Shea remembered the incident this way: “The whole place got tons of black smoke. We were breathing black smoke . . . I got knocked on the ground. People were standing on my back, my head. I was holding my head, and I said, ‘I’m going to die here.’”1 Brian Butler also managed to escape the inferno, but soon realized he was one of the lucky ones: “I went back around the front again and that’s when you saw people stacked on top of each other trying to get out of the front door. And by then the black smoke was pouring out over their heads, out the side windows on the other side.”2 Witness Harold Panciera recalled that “there were people [lying] all over the parking lot and they were just smoldering.”3 This was the scene at The Station, a West Warwick, Rhode Island nightclub, when it caught fire on the night of February 20, 2003.

The rock band Great White gave a live performance at The Station, and the small, wooden building was packed with hundreds of concertgoers when the fire broke out.4 The band’s tour manager was responsible for firing pyrotechnics off the stage, which ignited the highly flammable polyurethane foam that the owners of the club, Jeffery and Michael Derderian, had installed in the walls of the building as soundproofing.5 The crowd’s reaction was delayed, as most thought it was all part of the show. The blaze escalated quickly, soon causing mass panic. As hundreds of patrons moved

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3 Id.
4 At Least 96 Killed in Nightclub Inferno, supra note 1.
5 Id.
for the exit, many were trampled and trapped. In all, the incident resulted in 100 deaths, along with more than 200 injuries.6

In the aftermath of the fire, more than 300 victims and their survivors filed lawsuits that are now pending in U.S. District Court.7 The U.S. District Court for the District of Rhode Island has employed several alternative dispute resolution (“ADR”) tools in its effort to fairly and efficiently dispose of these cases. These techniques, however, do not always serve their intended purposes. In Gray v. Derderian, 365 F.Supp. 2d 318 (D.R.I. 2005), the court unnecessarily ventures outside the realm of traditional adversarial litigation in the name of judicial efficiency.

The evolution of equity in tort has brought about the use of alternative methods of dispute resolution in reaching settlements in mass tort cases:8 “Indeed, equity is a progressive force in the law. When formal adjudication cannot provide a plain, adequate, and complete remedy, the system of ADR should be flexible enough to deliver individualized justice.”9 It appears, however, that the use of ADR is not always a prudent exercise of the court’s power, nor is it always conducive to individual justice. This Note examines the Gray case, in which the court appointed a special master, thereby assigning one man the duty of appropriating the settlement of a mass tort. This Note argues that in certain cases, such as Gray, the court system works a disservice to plaintiffs and to the core tenets of ADR. In such cases, the parties and the system would be better served by expanded use of Plaintiffs’ Steering Committees (“PSC”) or passive mediation, thereby better preserving the attorney-client relationship. This Note will first examine the increasing role of the special master in tort settlements, with particular attention to the distribution scheme created for the Gray v. Derderian case. Next, this Note will consider examples of successful ADR methods used in Gray, contrasted with the inequitable and dangerous results of the settlement distribution matrix as it relates to judicial activism and attorney-client conflict. Finally, there is an examination of successful use of the special master in non-tort civil suits.

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9 Id. at 330–31.
II. THE MASS TORT CHALLENGE

Over the last century, tort law in the United States has become significantly more complicated.\(^{10}\) As science and the economy continue to grow more complex, they foster new, challenging legal relationships for the court system to handle.\(^{11}\) One of the most significant areas of litigation to arise in the last few decades is the mass tort. The mass tort is a type of group litigation that can come in either consensual or non-consensual forms. Consensual group litigation is comprised of mass actions in which “each plaintiff has an engagement agreement with the attorney(s) acting for the group.”\(^{12}\) The Gray case is one such action. On the opposite side of the spectrum of group litigation is non-consensual litigation, which frequently takes the form of class actions.\(^{13}\) In these actions, and like matters, attorneys are not required to obtain consent from all plaintiffs before acting on their behalf, although plaintiffs may opt out of representation so they are not bound by any verdict or settlement.\(^{14}\) Both of these types of actions can consist of hundreds, or even thousands of plaintiffs in the group and present challenges to both the parties and the court.

As a relatively new development, mass tort litigation has been a learn-as-you-go process, and legislatures have been less than helpful in providing structure. In the absence of state and federal legislation to control mass torts, and no workable social welfare scheme for compensating victims, the courts have acted on their own to adapt to the new challenges.\(^{15}\) The greatest challenge is maintaining the individual character of litigation while not overburdening the court system.\(^{16}\) The system must “provide each plaintiff and each defendant with the benefits of a system in mass torts that treats him or her as an individual person.”\(^{17}\) Additionally, “each person [must] obtain the respect that his or her individ-

\(^{11}\) \textit{Id.}
\(^{13}\) \textit{Id.}
\(^{14}\) \textit{Id.}
\(^{16}\) \textit{Weinstein, supra note 10.}
\(^{17}\) \textit{Id. at 3.}
uality and personal needs should command in an egalitarian democracy such as ours.\textsuperscript{18}

Ordinary tort litigation is too burdensome and unworkable a process when it tries to accommodate hundreds of plaintiffs and multiple defendants in suits relating to the same core set of facts; multiple plaintiffs and lawyers with the same claims, motions, and discovery needs inundate and overwork the system. Courts have therefore instituted principles of equity to supplant the substantive common law theories of tort.\textsuperscript{19} One tool courts have employed is ADR. While, generally speaking, ADR and litigation are fundamentally opposed (ADR being an “alternative” to courtroom litigation), the realm of ADR has become so expansive that judges have been able to employ its principles in their efforts to guide parties through complex litigation.

ADR has two main objectives in the litigation context. The first is the fair and expeditious compensation of numerous victims, and the second is the maximization of judicial efficiency and the minimization of transactional costs of compensation.\textsuperscript{20} To increase efficiency, Congress created the Judicial Panel on Multidistrict Litigation by passing 28 U.S.C. § 1407 in 1968. The Panel is made up of seven circuit and district judges, all from different circuits, periodically appointed by the Chief Justice of the United States Supreme Court.\textsuperscript{21} The law permits the transfer “to any district for coordinated or consolidated pretrial proceedings” of civil actions “involving one or more common questions of fact [that] are pending in different districts.”\textsuperscript{22} The Panel can consolidate cases on its own authority, or upon motion by one of the parties.\textsuperscript{23} While the Panel on Multidistrict Litigation has been used successfully in maximizing efficiency and minimizing transaction costs, it falls short of addressing the core challenge of mass tort litigation. Plaintiff consolidation preserves the autonomy of individual plaintiffs and combats the flood of problems that repetitive claims in a mass tort would produce under common law.

The remaining problem is how to compensate the injured fairly and expeditiously.\textsuperscript{24} It is important to understand how frequently those two goals are at odds with one another; after all, the

\textsuperscript{18} Id.
\textsuperscript{19} Id. at 127.
\textsuperscript{20} Id. at 125.
\textsuperscript{22} 28 U.S.C. § 1407(a) (2006).
\textsuperscript{23} Id.
\textsuperscript{24} WEINSTEIN, supra note 10, at 125.
fairest way to litigate is with one plaintiff, one defendant, and one outcome, but this is also the least efficient. The challenge is to achieve both these goals of fairness and efficiency at the same time, and the method that courts, including the court in *Gray*, have frequently employed is the use of a special master to determine distribution of a capped settlement in lieu of traditional, one-on-one negotiations between the parties.

### III. ADR in Mass Tort Settlements

Special masters are appointed by the court to, among other things, expedite the process of settlement negotiation and/or settlement distributions. The court draws this power to appoint from one of two sources. The appointment of a special master can be justified simply by the inherent power of the court. Courts have power over the conduct of judicial proceedings; they must be able to “manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” This aspect of inherent power implies a broad authority in courts “to exert a high degree of affirmative case management if they choose to do so.” As court dockets become increasingly crowded, the courts need flexibility to maintain stability and process cases. If the “inherent power” argument was too ambiguous, however, the power of the federal courts to manage their proceedings was formalized in the Federal Rules of Civil Procedure. Rule 53 governs the appointment of masters, providing in pertinent part that a “court may appoint a master . . . to perform duties consented to by the parties,” and that the master may “take all appropriate measures to perform the assigned duties fairly and efficiently.” The court has broad authority to appoint masters and to delegate their responsibilities.

Traditionally, the court delegates judicial powers to a master to preside at hearings, receive evidence, find facts, and reach conclusions of law. Historically, the issues most often involved financial matters such as accountings and damage calculations; in these

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26 Id.
27 Id. at 356 (quoting Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805, 1807 (1995)).
28 Id.
matters the role of the master was purely ministerial.32 Recent developments, however, have given the special master a much more intimate role in the litigation process—that of putting a value on various injuries, and even the loss of life.

IV. ROLE OF THE SPECIAL MASTER IN GRAY: BENEFITS AND SHORTCOMINGS

The role of Special Master Francis McGovern in Gray is to formulate a plan that operates on two point systems, one for death and the other for injury: “Under the plan, the survivors who were most badly burned and were hospitalized the longest will receive more money than several of the families who lost loved ones in the fire.”33 After all the plaintiffs have been assigned a number of points, the total points will be divided into the total settlement amount ($176M) to determine the value of each point.34 The report of Special Master McGovern was filed contemporaneously with the report of Guardian ad litem William A. Poore.35 Mr. Poore, a Providence attorney, was appointed by the court to represent the interests of the minor plaintiffs and beneficiaries in the lawsuit.36 Special Master McGovern acknowledged both the benefits and shortcomings of his plan in the opening paragraph in his report:

The plan of distribution cannot solve all the inequities created by the Station fire. The plan of distribution cannot solve, or even address, every problem for every beneficiary. The plan of distribution cannot increase the amount of funds available for distribution. The goals of the plan of distribution are much more modest. These goals involve a methodology for distributing settlement funds that can be applied in a principled manner to every beneficiary. The methodology is not perfect, but is sufficiently acceptable so that there can be rapid payments made at low cost to each beneficiary.37

32 Deason, supra note 25, at 351.
34 Id.
36 Breton, supra note 6.
In his opening statements, Mr. McGovern outlined why alternative dispute resolution has become so popular in mass tort disputes as well as its significant shortcomings. One of the most dangerous shortcomings of distribution matrices is the loss of individuality that is so important to American civil law. McGovern attempted to avoid this issue with “twenty meetings [i]n nine days [between] the special master, Professor Francis E. McGovern, and approximately 306 victims and their families and lawyers.” 38 The meetings lasted from forty five minutes to ninety minutes and were attended by as many as forty people at a time. 39 While it seems unlikely that a meeting lasting for an hour and a half could convey to the special master the extent of injury, both physical and emotional, suffered by many of the Station plaintiffs, McGovern felt that this procedure resulted in a “consensus approach among the beneficiaries, their families and their lawyers.” 40 Discussion topics included different approaches to a plan of distribution, with question-and-answer interaction between McGovern and the victims, their attorneys and families. 41

Under McGovern’s point plan, death claims would receive 100 points outright, with additional points awarded for age (more points for younger victims), spousal consortium, minor children, and income (more points for earnings above $50,000). 42 For personal injury claims there would be a minimum point value of four points and claimants would receive additional points relative to increased medical expenses. 43 Expenses up to $5,000 add half a point, those between $5,000 and $12,000 add one point and each $2,000 above that earns another point.

The four point minimum means that as long as a plaintiff can document any type of injury stemming from his presence at the nightclub on the night of February 20, 2003, he will receive compensation. 44 This of course necessitates document verification to protect against fraudulent claims. All of the required documents are to be submitted to a neutral expert, 45 whose fees and expenses will come out of the settlement pot. One goal of the ADR process

38 Id. at 11.
39 Id. at 11–12.
40 Id. at 12.
41 Id.
42 Id.
44 Id. at 14.
45 Id. at 14–16.
in this type of mass tort litigation is to reduce the duplicative costs that occur with traditional group litigation. When the costs associated with the special master are spread out over fewer plaintiffs, however, the savings are less per plaintiff and come out of a presumably smaller settlement pot. In a mass tort with tens of thousands of claims and a settlement pot of hundreds of millions, if not billions of dollars, it makes sense to consolidate the distribution process. In a case with over 300 claimants, 148 of whom are minors all represented by a guardian *ad litem*, however, the expense of hiring a special master to interview all the claimants, a neutral expert to “verify that each completed form is accurate and accompanied by the requisite documentation” and an additional “expert who is limited [in an appeal] to reviewing a determination of points based upon mathematical errors or errors in the application of points . . . [and who] shall not have authority to increase or decrease awards based upon discretion” are taken out of a substantially smaller settlement pot. Furthermore, were the settlement negotiations to be carried out by the individual attorneys, the verification of documentation would likely be a cost incurred by the defense in the form of attorney fees and court costs, in addition to whatever settlement figures the parties would reach.

V. EQUITABLE CONFLICT RESOLUTION IN GRAY

A. Guardian *ad Litem*

Of the 306 claimants in the Station Fire litigation, 148 are minors represented by special master William A. Poore. Since all of the minor claimants’ interests are represented by this single attorney there appears to be no risk of conflict of interest (an issue discussed within), and the use of a distribution matrix seems much more reasonable for roughly 150 claimants all represented by the same person. Additionally, the guardian *ad litem* is appointed by the court for the sole reason of representing the best interests of

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48 Id. at 15.
the minors. He has no contingent fee agreement and is paid an hourly rate determined by the court.\textsuperscript{50} To further prove this point, Mr. Poore provided the services involved with developing his report \textit{pro bono}.\textsuperscript{51} Most importantly, the guardian is bound, at least in Federal Court (where \textit{Gray} is taking place), to abide by the U.S. District Court Local Rules for the District of Rhode Island. Local Rule 39.4(c) pertains to settlements on the behalf of minors or incompetents.\textsuperscript{52} The rules provide a clear structure of the guardian’s powers and responsibilities. Under these rules the guardian \textit{ad litem} provides many of the same documents that the special master would require for verification of injuries, etc., and is appointed by the court for the singular purpose of representing the interests of the minor claimants. It seems that fairness and efficiency are indeed both served by the guardian \textit{ad litem} system. Mr. Poore concluded in his report that, “[w]hile there is no perfect formula for the resolution of such a tragic event, replete with such horrific consequences, the proposed distribution plan inures to the benefit of the minor children as a group.”\textsuperscript{53} Further, “[t]he minors benefit by consistency of results which would not necessarily be provided in a judicial setting” and that the “[c]osts and expenses associated with


\textsuperscript{51} \textit{Id.} at 9 n.5.

\textsuperscript{52} U.S. Dist. Ct. R. \textsection 39.4(c) (2009), Settlements on Behalf of Minors or Incompetents. In order to obtain court approval of any settlement on behalf of a minor or incompetent, a motion for approval must be filed and approved by the Court. Motions for approval shall be accompanied by the following:

1. a report from the guardian \ldots \textit{ad litem} \ldots explaining why the proposed settlement is in the best interest of the minor or incompetent and should be approved;
2. a statement setting forth the terms of the settlement and precisely how and to whom the settlement proceeds will be distributed, including the amounts to be paid to counsel as fees and/or reimbursement for expenses incurred;
3. a copy of any settlement agreement and/or release that is to be executed on behalf of the minor or incompetent;
4. an explanation as to how the process payable to the minor or incompetents are to be safeguarded to ensure that they will be applied to his or her benefit;
5. a copy of any trust or other document establishing the method by which the funds payable to the minor or incompetent will be safeguarded to ensure that any amounts payable to the minor or incompetent will be applied for the minor’s or incompetent’s benefit; and
6. in personal injury cases, a complete description of the injuries sustained, whether any of them are permanent, copies of all relevant medical reports, and an itemized statement of all past and future medical expenses that may have been or are likely to be incurred.

\textit{Id.}

intricate and complex litigation would . . . unnecessarily burden and tax the eventual recovery to any child.”54 Since both equity and efficiency seem to result from the use of the guardian ad litem, neither the guardian, nor the 148 minor claimants are the subject of this Note, leaving instead the 158 adult claimants and their various privately retained counsel.

B. Plaintiffs’ Discovery Committee

The litigation in Gray is the consensual form of group litigation, and as the 158 adult plaintiffs are not represented by a class, there are many different groups of plaintiffs, large and small, all represented by various counsel.55 Since the suit arises out of a single and distinct event, all of the plaintiffs have similar pre-trial needs as far as discovery and requests for production from the multiple defendants. The only element that differentiates the plaintiffs is the extent of their injury, and that distinction is only pertinent in the settlement negotiation process.

In order to handle the extensive, but repetitive, discovery needs, the court in Gray created a Plaintiffs’ Discovery Committee to determine the appropriate production requests for the group of plaintiffs as a whole.56 This is an excellent example of the appropriate use of equitable principles in mass litigation. There were a few caveats that the court imposed on the Committee to ensure that fairness would be compromised for the sake of efficiency. First, membership in the Committee was open to any and all plaintiffs’ attorneys who desired to participate.57 Additionally, any request for production was without effect unless first approved by the committee.58 The result of this effort was that 306 plaintiffs, represented by several attorneys, did not file identical motions for production.59 At the same time, each plaintiff’s attorney had the opportunity to be on the Committee and have his or her voice heard.60

54 Id.
56 Id. at *77.
57 Id. at *76.
58 Id.
59 See id.
This is a clear example of positive, equitable alternative dispute resolution used by the court system. At this stage of litigation, the plaintiffs as a whole are really dealing with the same core set of facts. Each of their claims requires obtaining the same information by way of depositions and requests for production because they are all suing the same defendants in connection with the same incident. In its decision, the Court explained that the creation of the Committee was to ensure that “parties and persons are deposed only once and not subjected to overly long and/or repetitious questioning; [and that] depositions are noticed well in advance . . . at a suitable location which is able to accommodate all counsel who are interested in attending.”61 This approach effectively balances the interests of both parties with the interests of the court. Without the Committee, the Court would be inundated with countless and duplicative motions and memoranda of law. Additionally, it eliminates the possibility of overburdening the defendants, while still giving the plaintiffs a say in what depositions will be taken and what requests for production will be made. Transferring the responsibility from individual plaintiffs to the Committee keeps the decision-making power with the parties and at the same time significantly decreases the workload of the Court.

VI. Inequitable Dispute Resolution in Gray

A. Judicial Discretion

A shortcoming of the special master’s distribution plan is the danger of increased involvement by the judge in his or her role as trial manager.62 As the incidence of group litigation increases, so does judicial involvement in settlements. The availability of court-appointed experts, special masters, and magistrates offers judges options for encouraging settlements short of time-consuming and potentially problematic personal involvement.63 It would not be difficult for a judge to parlay this lawful authority into an abuse of power that marginalizes the goals that the use of masters is supposed to achieve. Indeed, “[i]t is safe to say . . . that just as there is no consensus on the appropriate role of a judge in settlement, there is no consensus among judges on the utility or appropriate-

61 Id. at *77.
62 See Deason, supra note 25.
63 Id. at 356.
ness of appointing an expert as an aid to settlement.”64 The growth of ADR has contributed to a revolutionary change in courts’ conception of their role from that of a passive provider of trials to an active, problem solving case manager.65 Whether this is a positive or a negative change is the question, and the answer depends on the particular case that is being tried. The need for special masters should always be the criterion by which courts decide how and when to use them.

The next issue is the determination of that need. While every mass tort is characterized by many plaintiffs suing from the same core set of facts, the size and workability of cases within this category spans a broad spectrum.66 In asbestos cases, or similar product liability cases with thousands of plaintiffs, extensive ADR employed by the court is more reasonable than if it were a more manageable mass tort, such as in Gray. It must be remembered that “asbestos injury was not only a mass tort, but a mass tort of huge proportions, far beyond the scope of a single airplane accident or building failure.”67 The number of possible plaintiffs in asbestos litigation is virtually infinite, whereas a mass tort that is “limited in time, place, and number of casualties,”68 like Gray, provides an excellent example of a mass tort in which the need for judicial involvement in the settlement procedure is far lesser. The singular event of the Station Fire, while tragic, resulted in nowhere near the number of injuries and subsequent claims that widespread asbestos exposure did. The Station Fire litigation resulted in 306 claims for injuries and death.69 That number would seem important, since “[i]n determining whether ADR may be successfully implemented in a particular case, the attorneys, clients, and judge should take into account various factors, including causation, complexity, and the likelihood of conflicts of interest.”70

It is when the issues become germane to the individual plaintiff that the system of consolidation falters. When District Court

64 Id. at 367.
65 Main, supra note 8, at 391.
66 Compare the Station Fire litigation with, e.g., In re Dalkon Shield, 693 F.2d 847, 853 (9th Cir. 1982).
68 Id.
Judge Ronald R. Lagueux appointed a special master to determine the payouts to all plaintiffs, the Court abused the discretion it has to employ equitable, alternative methods in resolving mass tort litigation. Federal Rule of Civil Procedure 53 grants the power of appointment to the judge but also limits that power. It provides that a master may “recommend findings of fact on issues to be decided without a jury if appointment is warranted by . . . the need to resolve a difficult computation of damages.” The Third Circuit noted that “when master is appointed only to help the court in a case where the help is needed . . . . The master operates as an arm of the court. Surely he has no wider scope of activity than the court itself.” The rule goes on to limit the court’s discretion by requiring that the court “consider the fairness of imposing the likely expenses on the parties and . . . protect against unreasonable expense or delay.” These are the factors that should be weighed by the court in every mass tort case before assigning a special master to preside over what is arguably the most important phase of the litigation.

It is no secret that the vast majority of civil suits settle or are dismissed before a verdict is handed down. As of 2001, only about three percent (3%) of all civil cases went to trial and most were settled beforehand. As a result, in many cases the defendant’s only acknowledgement of wrongdoing comes in the form of a cash payment. The most personal element of the litigation to the plaintiff is how badly he or she was injured by the defendant. The degree of injury is expressed, however coldly, by how much money ends up in the plaintiff’s pocket after settlement. This element should not be given to an uninterested third party. In the Gray case, the special master is Francis McGovern, a highly respected professor of law at Duke University, who has performed similar duties in fifty other cases involving complex litigation, including the Dalkon Shield intrauterine device litigation and the silicone

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71 Breton, supra note 6.
72 FED. R. CIV. P. 53.
74 Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 319 (1944).
75 FED. R. CIV. P. 53(a)(3).
77 See id.
breast implant cases.\textsuperscript{79} There is a critical difference in these cases, however, that is highlighted by the court in \textit{In re Dalkon Shield}:

In products liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor’s affirmative defenses . . . may depend on facts peculiar to each plaintiff’s case.\textsuperscript{80}

It is this distinction that makes a special master appropriate for some settlement matters and not for others; the gains in efficiency far outweigh the loss of equity. Additionally, in the \textit{Dalkon} litigation there were more than 300,000 claims filed by the time the statute of limitations expired.\textsuperscript{81} In a case like this, ADR is undeniably appropriate. In a smaller case of group litigation like \textit{Gray}, the balancing of equities requires a different conclusion. In these types of consensual group litigation, there are essentially two different options for settlement and distribution:

The first practice involves negotiating a lump sum to cover a group of cases and then carving individual settlement payments from it, sometimes assigning plaintiffs to disease categories or slots on payment grids. The second practice works the opposite way. An individual payment is separately negotiated for each plaintiff, with the total for the group equaling the sum of the individual payments.\textsuperscript{82}

These two alternatives represent both the option that is currently being employed in the \textit{Gray} litigation and the option this Note proposes as an alternative. In smaller mass tort cases, it is not unreasonable to suggest that an individual payment be separately negotiated for each plaintiff. Either way, “there is no apparent economic difference between the two approaches.”\textsuperscript{83} In theory, whether splitting up a pot between plaintiffs or settling individually, the aggregate total should be the same.\textsuperscript{84} If this is indeed the case, it is difficult to justify paying an uninterested third party to

\textsuperscript{79} Id.

\textsuperscript{80} \textit{In re Dalkon Shield}, 693 F.2d 847, 853 (9th Cir. 1982).


\textsuperscript{82} Silver & Baker, \textit{supra} note 12, at 1471–72.

\textsuperscript{83} Id. at 1472.

\textsuperscript{84} Id.
2009] ALTERNATIVE DISPUTE RESOLUTION 277

substitute for one’s retained attorney, whose job is to zealously represent the interests of the injured.

B. The Aggregate Settlement Rule

Rules pertaining to attorney conduct were traditionally founded in terms of a “simple, elegant paradigm that centered on a one-to-one personal relation between the layman and the professional.”85 Ethical theories in the early twentieth century did not, and could not contemplate complex litigation such as the mass tort litigation in which the attorney might have little or even no contact with a given client.86 To remedy this problem, scholars and disciplinary authorities have created and recreated, over the past few decades, a set of norms that attempts to embrace new and emerging patterns of the attorney-client relationship.87 The aggregate settlement rule states, in pertinent part:

[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.88

The rule highlights the intimate relationship between the injured party and his attorney. This relationship should be preserved, whenever possible, at every stage of the litigation process. The Comment to Rule 1.8 states that the rules “protect[] each client’s right to have the final say in deciding whether to accept or reject an offer of settlement.”89

By appointing a special master, the system effectively diminishes the decision-making power of the plaintiff, and compromises the attorney-client relationship. This is so because of the limited options available to the plaintiff in cases like Gray. After the special master finishes his calculation, the only option available to the claimants is an appeal to a neutral expert who will “not have the

86 Id. at 541.
87 Id. at 542.
88 Model Rules of Prof’l. Conduct R. 1.8(g) (2009).
89 Id.
authority to increase or decrease any award."90 While the plaintiffs retain the right to accept or reject the amount of the capped settlement, as well as their distribution, individual payout decisions are functionally binding.91 The effort and expense involved in going against the grain of efficiency by rejecting the distribution would likely be enough to dissuade plaintiffs from opting out. In combination with the fact that each plaintiff only spent an average of one hour with the master, it appears that each plaintiff’s autonomy was significantly compromised throughout the process.

At the heart of ADR is the ability of the parties, with the aid of their attorneys, to come to agreement without the added time and expense of the court system. According to Main, “ADR has empowered parties by giving them ownership in the dispute resolution process.”92 Undoubtedly, the Gray court succeeds in removing the decision-making power from the court, but carelessly reallocates it by putting a single, unrelated entity in charge of putting a price on the lives of the victims. Court papers in the Gray case indicated that “[t]he appointment of a special master is necessary to provide all plaintiffs with a neutral and independent person with the expertise to develop a distribution formula that will be fair and equitable.”93 When Special Master McGovern sets out the distribution plan for all 306 plaintiffs, no matter how expertly tailored, there will undoubtedly be some disgruntled plaintiffs who are unsatisfied with their share; they will feel compelled, however, to accept the offer after waiting for the whole process to play out, all the while paying for not only their attorney’s services but the services of the special master and various additional experts.

C. Attorney-Client Relationship

In consensual group litigation such as that in Gray, difficult issues in the attorney-client relationship also arise:

Through the coordinated work of multiple firms, whether in formally aggregated or formally separate lawsuits, plaintiffs in mass litigation may find themselves relying on the work of counsel with whom they have no lawyer-client relationship, over whom

90 Breton, supra note 33.
92 Main, supra note 8, at 391.
93 Breton, supra note 7.
They have no control, and whose loyalty is directed toward collective interests.94

These circumstances are not new to the legal forum. In non-class litigation there is a lack of the procedural safeguards, found in class litigation, that protect the plaintiff from attorney malpractice.95 The methods of aggregating non-class group litigation, such as joinder, consolidation, and Multidistrict Litigation do not impose on the attorney a duty to represent clients on a group-wide basis, and therefore plaintiffs may very well be represented by lawyers to whom they have no relation.96 This presents a perilous position for both the plaintiffs and the attorneys in mass tort litigation. While this Note is not meant to discourage consensual group litigation, it does make the argument that the already attenuated attorney-client relationship in non-class aggregations should, whenever possible, resist further attenuation by relinquishing the disbursement powers of the settlement pot to third parties.

Indeed, there are great economies of scale that are created in non-class aggregations.97 These efficiencies should be used for the benefit of individual settlements:

Scale economies result from the sharing of information and divvying up of work among coordinating lawyers. The pooling of resources permits greater investment in the litigation. To the extent lawyers coordinate their negotiation efforts, enhanced bargaining leverage may result as well.98

For many plaintiffs’ attorneys, the only way to “level the playing field” with defendants is to cooperate with other attorneys and pool resources to compete with well-financed defendants.99 The aggregation also creates advantages for plaintiffs’ attorneys in settlement negotiations.100 It is less clear whether that advantage trickles down from the attorney to the client. The answer is once again dependant on the scale of the litigation. For instance, in mass toxic tort litigation, the amassing of large numbers of plaintiffs with weak claims creates leverage against the defense on account of the sheer size of the plaintiff pool.101 The catch is that the

95 See FED. R. CIV. P. 23.
96 Erichson, supra note 94, at 541.
97 Id. at 542.
98 Id.
99 Id. at 576.
100 See id. at 577.
101 Id. at 549.
plaintiffs will usually accept a discounted settlement pot, given the uncertainty of trial outcome for many of the weaker claims.\footnote{Id.} In a case like \textit{Gray}, however, we are not dealing with thousands of hard-to-prove cases; there was one incident, with a set, manageable number of people involved.\footnote{Breton, \textit{supra} note 7.} Aggregating the plaintiffs and reaching a discounted deal with the defense for a capped settlement with third party distribution is unnecessary when the plaintiff group is comprised largely of easily provable claims, and when the number of said claims is not so high as to prove unworkable on a claim-by-claim basis.

Attorney-client conflicts of interest can arise when, by representing the interests of the group as a whole, the attorney disserves the interests of individual plaintiffs.\footnote{Erichson, \textit{supra} note 94, at 519.} Contrariwise, an attorney representing an individual plaintiff might be neglecting the group.\footnote{Id. at 561.} A major goal of group litigation like \textit{Gray}, however, is for the multiple plaintiffs’ attorneys to work together to create efficiencies unavailable to the clients in individual representation. Therefore, there is no reason why the attorneys, through cooperation and resource pooling, could not successfully settle each individual case instead of grouping everyone together for a discounted settlement pot. This would increase plaintiff autonomy and may result in increased individual payouts as well.

The group litigation in \textit{Gray} is functionally similar to the “limited fund” non-opt out class action, and the Supreme Court has now “recognized the potential for collusion in class action settlements”\footnote{John C. Coffee, Jr., \textit{Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation}, 100 COLUM. L. REV. 370, 372 (2000).} and the “‘greater . . . likelihood of abuse.’”\footnote{Id. (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999)).} The conflicts that may arise in group litigation include, among others, external conflicts that arise because group members or their attorneys have reason to encourage a settlement that does not serve the interests of the other group members.\footnote{Id. at 386.} Additionally, conflicts may arise over the control of the litigation.\footnote{Id.} While traditionally these issues relate to class actions, the same problems may arise in consensual group litigation as well. In \textit{Gray}, the potential for external conflict has already surfaced. The defendants are worried
that once the special master distributes the settlement, “minor children who stand to receive money for the loss of a parent may try to void their settlements and reopen the cases to try to get additional money once they become adults.”

This is the type of concern that tempts attorneys in settlement negotiations to create “side settlements” in which the plaintiffs’ attorneys “agree to serve as class counsel in an action seeking to resolve the rights of future claimants.” This type of agreement is not in the best interest of attorneys’ current clients.

VII. SUCCESSFUL ADR AS EQUITY DEVICE IN MASS TORT: PLAINTIFFS’ STEERING COMMITTEE

A very similar case to the Gray case in Rhode Island came out of Puerto Rico in 1997. In re San Juan Plaza Hotel Fire Litigation v. Chesley involved a deadly New Year’s Eve hotel fire in San Juan, Puerto Rico that resulted in the deaths of ninety-seven people. What ensued was a similar legal battle involving hundreds of claims against a host of defendants. As in Gray, the Judicial Panel on Multidistrict Litigation was called upon and consolidated all the claims in the U.S. Federal Court for the District of Puerto Rico. The litigation was consensual, with each plaintiff having already hired a private attorney, collectively the Individually Retained Plaintiffs’ Attorneys (IRPAs). With the relatively high number of plaintiffs and IRPAs, the court formed a Plaintiffs’ Steering Committee (PSC). The court wanted to ensure that the PSC, “served as plaintiffs’ lead counsel . . . coordinating discovery, settlement negotiations and, if necessary, trial matters common to all plaintiffs.” The committee was to be comprised of eleven plaintiffs’ attorneys who all had expertise in mass tort litigation. While the power became concentrated in these eleven individuals,

110 Breton, supra note 33.
111 Coffee, supra note 106, at 388.
112 111 F.3d 220 (1st Cir. 1997).
113 Id. at 222.
114 Id. at 223.
115 Id.
116 Id.
117 In re San Juan Dupont Plaza Hotel Fire Litig. v. Chesley, 111 F.3d 220, 223–24 (1st Cir. 1997).
118 Id. at 223.
119 Id.
the eleven PSC members nonetheless retained their respective roles as IRPAs, directly representing approximately seventy percent of the individual plaintiffs. The IRPAs were to focus their efforts on litigation tasks germane to their respective clients’ cases.120

The procedure in Gray is, unfortunately, inapposite. Whereas the IRPAs in Chesley maintained control over the elements of the case germane to their clients, in Gray, the decision of who gets how much money is taken entirely out of the hands of the plaintiffs and IRPAs and put into the hands of a judicially-approved special master. In spite of the fact that the attorneys proposed the special master system with their clients’ permission, it is an unnecessary departure from traditional litigation that disserves plaintiffs who may not have grasped the full ramifications of their consent. It is in the best interest of the attorney to have the court appoint a special master to preside over settlement distribution; such an appointment significantly lessens the workload for the attorney and provides a court-endorsed, “take it or leave it” situation after the special master has finished his calculations. Where it is feasible for the attorneys to fulfill their obligations to their clients completely, they should do so, and the PSC may be a satisfactory compromise. Fewer plaintiffs121 and a twenty percent smaller settlement common fund in Gray are even better reasons to reject the use of a third party. With a committee already appointed for pre-trial matters and plaintiffs represented by IRPAs, it was unnecessary to take the final negotiations out of the parties’ control.122 The Committee for Discovery in Gray would have been better utilized as a general PSC acting as mediator between the IRPAs and defense counsel to determine individual settlement amounts.

It is true that “[i]n highly volatile, emotion-laden cases . . . the special master serves many purposes.”123 These should include acting as a buffer between the court and parties while also serving as conduit between them.124 As a mediator, the special master can meet privately with both sides to bring them together. This function is not served by the special master in Gray. In Gray, Special Master McGovern’s duties do not include mediation or negotiation. All 306 plaintiffs place their collective faith in one person to unilaterally decide who gets what, to decide which deaths and

120 Id.
121 Breton, supra note 33.
122 Chesley, 111 F.3d at 223.
123 Weinstein, supra note 10, at 145.
124 See id.
which life-altering injuries are worth more than others. And while the plaintiffs have a right to appeal the award given them to an expert, he "will review the disputed amount for mathematical errors but will not have authority to increase or decrease any award."

Proponents of the special master argue that if parties are allowed to settle individually, the result will be award discrepancies, backlogged courts, compensation delays, and increased transaction costs. But in Gray, a small mass tort case, using a PSC (consisting of attorneys also serving as IRPAs for nearly all of the plaintiffs) throughout the process would keep transaction costs down and limit redundancy while keeping the power with the plaintiffs (by preserving their attorney-client relationship with the IRPAs). The PSC would act as a quasi-mediator, governing the settlement from negotiation through disbursement, but all the while acting in the best interest of the injured parties through the adversarial process.

VIII. SUCCESSFUL USE OF ADR IN NON-TORT SETTLEMENT NEGOTIATION: MEDIATOR

There is no shortage of examples of non-tort litigation in which ADR methods have been successfully used. Sklar v. Clough, a 2007 case out of the Northern District of Georgia, is one such case. The issue in Sklar concerned a Motion for Substitution of Mediator in a discrimination case due to a conflict of interest. The Sklar court observed that "a court-appointed mediator has none of the powers that come with the appointment of a special master . . . ." While Federal Rule of Civil Procedure 53 lays out the notice of conflicts of interest for masters, a mediator is under no such restriction as he has no concrete decision-making power.

Therefore, the threat of bias created by a PSC acting as a mediator of sorts between the plaintiffs and the defendants is mitigated because the PSC would still have to come to an agreement

126 Breton, supra note 33.
127 WEINSTEIN, supra note 10, at 155.
129 Id. at *4.
130 Id.
with the defendants that is suitable for both parties. While still working in the interests of their individual clients, efficiency is served by concentrating the negotiating power in a small committee of experts who are also interested in an expeditious settlement that will pay their fees. In Gray, if the PSC were to work through the settlement process, it would have the complimentary interests of timely settlement and optimal payouts. Also, since the PSC would comprise attorneys representing nearly all, if not all, the plaintiffs, the risk of incongruous payouts among similar plaintiffs would be lessened.

DeRolph v. State of Ohio presented another example in which the use of a mediator, and in this case, a special master (again, Francis McGovern) acting as a mediator, was employed by the court. Once again, the use of the mediator furthered the overarching goal of keeping party interests in the hands of the parties. In DeRolph, the Ohio Supreme Court grappled with the General Assembly with regard to constitutionally deficient funding of the public school system. After numerous deficient spending bills and overly general “fix-it” orders from the Court, the Supreme Court decided to employ a special master. Unlike the special master in the Gray case, its power in Ohio was restricted: “This court has supported and promoted mediation since at least 1989 . . . [W]e adopted S. Ct. Prac. R. XIV(6), which authorizes the court to refer cases to a settlement conference, at which a master commissioner presides. In practice, the master commissioner often serves as a mediator.”

The fact that mediation is traditionally used in education and public policy disputes should not weaken its application in a mass tort like Gray. On the contrary, mass torts involve the most personal issues of litigation, namely life and death, and the price to be paid for affecting them. While it is easier to use a mediator in a traditional two party litigation like that in DeRolph, it is more important to keep that power with the parties in mass torts, where litigation has a highly emotional element.

132 Id.
133 Id. at 1114.
134 Id.
IX. NON-CONSENSUAL GROUP LITIGATION: THE CLASS ACTION

Since their inception, the aggregative devices employed by many courts have been criticized as sacrificing “individual justice in the name of judicial efficiency and economic expediency.”\textsuperscript{135} Critics argue that “[m]assing claims . . . distorts the proper attorney-client relationship.”\textsuperscript{136} When applied to the broad spectrum of mass torts, these arguments can vary greatly in persuasiveness. In instances such as the Agent Orange litigation, with 250,000 claims, or the asbestos litigation, with 175,000 claims (as of 1991),\textsuperscript{137} the critics’ arguments are less persuasive because in these cases the sheer number of claims would be uncontrollable under the common law. When the numbers are significantly smaller, such as the 306 (158 adult) claims in \textit{Gray}, these arguments are more persuasive because the cases are much more manageable by traditional methods. That being said, the modern day class action, authorized by Federal Rule of Civil Procedure 23, is still a better alternative, in terms of maintaining the plaintiff’s property right to control his or her claim, than the overly broad use of third party special masters in consensual group litigation.\textsuperscript{138}

Different types of class actions have different requirements for the plaintiffs. Mandatory classes restrict the ability of plaintiffs to opt out of the class and pursue private litigation. This does not restrict the plaintiffs’ individuality as much as it may appear, for restricting class members from opting out of the class increases the incentives for the plaintiffs to aggressively pursue an adequate settlement. Defendants, knowing the “high stakes” plaintiffs cannot opt out and later sue, will be more amenable to compromise.\textsuperscript{139} There should be no need for an empowered special master to decide settlement allocation when class settlement agreements likely will have built-in apportionment guidelines.

\textit{Turner v. Murphy Oil USA, Inc.}\textsuperscript{140} was a case arising from the destruction of Hurricane Katrina. A major oil spill caused by the hurricane resulted in a massive class action with a compensation fund totaling over $330 million. The court set up several commit-

\textsuperscript{135} Weinstein & Hershenov, \textit{supra} note 15, at 276.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 269.
\textsuperscript{138} \textit{Id.} at 276.
\textsuperscript{140} Turner v. Murphy Oil, Inc., 472 F. Supp. 2d 830, 838 (E.D. La. 2007).
tees to handle the pretrial matters; these included the PSC, Plaintiffs’ Executive Committee, and Plaintiffs’/Defendant’s Liaison Counsel.141 These groups worked with a special master, at times through mediation, to come to a settlement agreement. An important point is that the special master was appointed for a limited purpose, namely to “assist in resolving any objections or allocation disputes . . . .”142 If this PSC/Defendant Liaison Counsel system can work for a large class action, there is no reason to place all the allocation power in one person, unaffiliated with either party, unnecessarily compromising the adversarial system.

*County of Suffolk v. Alcorn*143 was a case that involved a class of over a million plaintiffs suing under the RICO statutes. While the court did appoint a special master to assist in the settlement discussions, “[t]he participation of the court-appointed mediator in the negotiating process helped ensure that the proceedings were free of collusion or undue pressure.”144 Massive group litigation often comes in the form of class actions and it appears that the system has been able to effectuate justice in these cases and maximize individual autonomy. While individuality necessarily decreases as the number of plaintiffs increases, the thousands of plaintiffs in the class actions discussed still had their interests protected through the entire process by committees appointed for their benefit. When third parties were involved, their role was one of advisor, or mediator, but never decision maker. In smaller group litigation like *Gray*, there is even less need to empower a third party with the responsibility of settlement distribution. The responsibility should remain with the parties through their attorneys, in an effort to maintain individuality in the most inherently individual stage of personal injury litigation resulting in settlement.

X. Ethical Issues in Mass Tort Settlement

In determining whether settlements are fair or ethical, one must consider the negotiators’ conduct in reaching a settlement and the fairness of the outcome.145 In the *Gray* case, this consider-

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141 Id. at 836.
142 Id. at 838.
144 Id. at 1436.
Alternative Dispute Resolution

Georgetown University Law Professor Carrie Menkel-Meadow asks the important question of whether these neutrals should be held to the Judicial Code of Conduct, or to other rules such as the Model Rules of Professional Conduct.146 The use of these neutrals also brings about possible challenges from the defense as to the activities of the third parties after the settlement has been consummated.147 This possibility has already manifested itself in the Gray case in the form of defense concerns regarding the nature of the settlement distribution as it pertains to minor plaintiffs.148 The use of capped settlements and special masters in non-class group litigation has had its positive effects, but it always runs a risk of further complicating matters because of the murky ethical standards that pertain to third party neutrals.

XI. Conclusion

Bonnie Hoisington, whose daughter, Abbie, died in the Station Fire, stated the issue bluntly: “It’s sad, that this is what you boil down to—that you have a formula that makes your life worth points.”149 This simple statement from a grieving parent speaks volumes about the importance of individuality in modern tort litigation. Columbia Law School Professor John C. Coffee sums up this challenge:

Easy as it is to point out that mass tort litigation involves high transaction costs, one must move on to the inevitable next question: “compared to what?” Here, the costs (both private and public) of alternative approaches must be evaluated in terms of their likely actual operation, not their utopian potential. To date, few have done so. In the race to a new system of group litigation in which lawyers represent “interests,” rather than individuals, few in particular have looked for the perverse incentives that almost inevitably arise at such junctures when client control over attorneys is weakened.150

The “likely actual operation” of Special Master McGovern in Gray v. Derderian can be summarized by a few points in a recent news-

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146 Id. at 1185.
147 Id.
148 Breton, supra note 33.
150 Coffee, supra note 139, at 1347.
paper article. While McGovern was able to establish a matrix determining individual payouts, “[i]t now appears highly unlikely that they will get any money before year’s end [2008].”\textsuperscript{151} Since the disbursement plan was proposed, defendants have filed motions, objecting to the plaintiffs’ plan to expedite the process. They are concerned that minor children will “void their settlements and reopen the cases to try to get additional money once they become adults.”\textsuperscript{152} Additionally, the major defendants will have months after final approval of the plan, which as of November 2009 had yet to occur, to pay their share of the settlement pot to the plaintiffs.

This result is the exact expense and delay that the court is mandated to consider under Rule 53 of the Federal Rules of Civil Procedure.\textsuperscript{153} Since there may be appeals, motions, and delays, why should the plaintiffs pay a special master when committees comprised of the attorneys they are already paying have proven quite capable of performing the master’s role? “If not actually collusive, non-adversarial settlements have all too frequently advanced only the interests of plaintiffs’ attorneys, not those of the class members.”\textsuperscript{154} When a court is confronted with a small mass tort, one of consensual group litigation, it should remember the roles of the attorneys in civil litigation as well as the rights of the plaintiffs and take pains to contemplate the real consequences to the adversarial system before taking decision-making power out of the hands of parties and attorneys and putting it into the hands of a third party master.

\textsuperscript{151} Breton, supra note 33. 
\textsuperscript{152} Id. 
\textsuperscript{153} FED. R. CIV. P. 53. 
\textsuperscript{154} Coffee, supra note 139, at 1347–48.