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# A Rejoinder To The Rejoinder To *On The Theory Class's Theories of Asbestos Litigation*

Lester Brickman\*

I am grateful to the editors of the Pepperdine Law Review for affording me the opportunity to respond to Professor Silver's rejoinder<sup>1</sup> to an article on asbestos litigation which I published in this Review in January 2004.<sup>2</sup> In that article, I responded to two personal attacks that Professor Silver leveled against me in articles that he previously published.<sup>3</sup> Professor Silver's Rejoinder in this issue is his response to my effort to defend myself from his attacks.<sup>4</sup> Unfortunately, Professor Silver's Rejoinder is inaccurate and misleading in certain major respects. In one respect, though, the Rejoinder does add value to scholarly discourse—by allowing the reader to compare the competing professional views and personal philosophies of Professor Silver and me—a comparison that I address in the conclusion of this response.

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1. Charles Silver, *A Rejoinder to Lester Brickman: On The Theory Class's Theories of Asbestos Litigation*, 32 PEPP. L. REV. 765 (2005) [hereinafter *Rejoinder*].

2. Lester Brickman, *On The Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2003) [hereinafter *Asbestos Litigation*], [www.ssrn.com/abstract=490682](http://www.ssrn.com/abstract=490682).

3. Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 323, 352-54 (2001) [hereinafter *A Critique*]; Charles Silver, *Preliminary Thoughts On The Economics of Witness Preparation*, 30 TEXAS TECH L. REV. 1383, 1400-02 (1999) [hereinafter *Preliminary Thoughts*].

4. In my asbestos litigation article, I responded only to the subset of charges which were germane to my 28-page discussion of Baron & Budd's witness preparation techniques and its use of the Script Memo; I declined, however, to respond to other personal attacks. See *Asbestos Litigation*, *supra* note 2, at 163 n.500. For examples of the latter, see *Preliminary Thoughts*, *supra* note 3, at 1403, 1405 and *A Critique*, *supra* note 3, at 352-54.

In my article, I stated that “Professor Silver wrote an article [*Preliminary Thoughts*] defending Baron & Budd’s use of the [S]cript [M]emo and strongly attacking Skepnek which appeared in a law review symposium; . . . Nowhere in his article, however, did Silver acknowledge that *he had been retained by Baron & Budd to give his blessing to the use of the Script Memo.*”<sup>5</sup> Professor Silver says that the italicized part of my statement is false.<sup>6</sup> In fact, my statement is true. During judicial proceedings dealing with the propriety of the Script Memo,<sup>7</sup> Baron & Budd’s principal, Fred Baron, informed the court that legal ethics experts examined the Script Memo and found it “perfectly appropriate . . . [and that] there has been absolutely no foul committed here.”<sup>8</sup> It would later be revealed that Professor Silver was one of those professors and it was reported that his affidavit was used in the firm’s “coaching-memo defense.”<sup>9</sup>

Professor Silver seeks to bolster his argument that Baron & Budd never retained him for the purpose of “giv[ing] his blessing to the use of the Script Memo,” by citing the fact that “[t]he firm contacted [him] *after* the melee erupted, by which time all use of the memo had stopped. [Hence, i]t would have been impossible for [him] to ‘bless . . . the use of the Script Memo.’”<sup>10</sup> Not so. The fact that Baron & Budd retained Professor Silver after the Script Memo was withdrawn from use is not inconsistent with the fact that he was retained by the firm to defend its use. Indeed, in actual fact,

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5. *Asbestos Litigation*, *supra* note 2, at 161-62 (emphasis added, citation omitted).

6. *Rejoinder*, *supra* note 1, at 774.

7. For the reader not familiar with the relevant events, I set forth the following context. Section VII of my asbestos litigation article dealt with the role of party and witness testimony in specious asbestos claiming. *Asbestos Litigation*, *supra* note 2, at 137. Included in that section was an extensive discussion of the witness preparation techniques used by a leading asbestos law firm, Baron & Budd, and in particular, of the “Script Memo” – a witness preparation document that has received widespread attention after being inadvertently produced by a Baron & Budd attorney. *Id.* at 139-66. In my judgment, the Memo was both unethical and illegal. *Id.* at 146-48, nn. 428-432. In one of the proceedings involving the propriety of the Script Memo, a former Texas Supreme Court Justice and chair of the Court’s Committee on Professionalism, testified that the Script Memo was a “cancer on the legal system” which violated numerous Texas Ethics Rules, including rules against: engaging in conduct involving dishonesty or fraud, assisting a witness to testify falsely, and assisting a client in fraudulent conduct. Testimony of Eugene Cook, former Justice of the Texas Supreme Court, at 65-66, 73, In re All Asbestos-Related Personal Injury or Death Cases To Be Filed in Bexar County, Texas (Tex. Dist. Ct. 1997) (No. 94-CI-10078). Nonetheless, all attempts to conduct discovery into the subject were turned back. In my article, I stated that the firm’s success in suppressing discovery displayed an “awesome power brought to bear by a leading asbestos litigation firm against asbestos defendants and the attorneys seeking to inquire into the use of the Script Memo.” *Asbestos Litigation*, *supra* note 2, at 166. Part of that display of power was the de-clienting of the three defendant attorneys who were seeking discovery with respect to the Script Memo. *Id.* at 157-58. In addition, Baron & Budd instituted 160 separate civil contempt proceedings and sought criminal proceedings against William Skepnek, an attorney who represented the Raymark Corporation and who was the most aggressive of the three attorneys in seeking discovery. *Id.* at 158-61.

8. Tim Wyatt, *Law Firm’s Memo in Asbestos Lawsuit Sparks Debate*, DALLAS MORNING NEWS, Sept. 28, 1997, at 1A.

9. See Thomas Korosec, *Homefryin’ with Fred Baron*, DALLAS OBSERVER, Mar. 29, 2001, at 1, available at <http://www.dallasobserver.com/issues/2001-03-29/feature.html/1/index.html> (last visited Aug. 6, 2003) [hereinafter *Homefryin’*].

10. *Rejoinder*, *supra* note 1, at 776 (emphasis in original).

Baron & Budd argued in court that Professor Silver's affidavit supported their position that there had been no wrongdoing.<sup>11</sup> Moreover, Professor Silver admits that he was retained by Baron & Budd and that, after reading the Script Memo, he "eventually composed an affidavit containing some of [his] opinions."<sup>12</sup> Professor Silver, who did not disclose the contents of his affidavit in his Rejoinder, purports to make the affidavit available on his webpage; however, he does not in fact do so, stating that the webpage is password protected.<sup>13</sup>

Professor Silver also takes issue<sup>14</sup> with my statement that he defended the firm's use of the Script Memo in *Preliminary Thoughts*.<sup>15</sup> Anyone who was aware that Professor Silver had previously been retained by Baron & Budd to aid in its defense of the Script Memo would perceive Professor Silver's article as a defense of the Script Memo – as I did. Moreover, in his article, Professor Silver notes that no one at the firm has ever been sanctioned or disciplined for use of the Script Memo, implying that it violated no rules or laws.<sup>16</sup> He then further justifies the use of such witness preparation techniques by the economics of mass tort litigation,<sup>17</sup> and attacks critics of the use of the Script Memo for failing to condemn William Skepnek,<sup>18</sup> an attorney who took the lead in pursuing discovery of the Script Memo and who was the object of an unprecedented assault launched by Baron & Budd on the grounds that Skepnek had filed false affidavits with regard to his clients' business activities in Texas.<sup>19</sup>

Professor Silver also challenges my statement that in *Preliminary Thoughts*, he failed to acknowledge that Baron & Budd had retained him in its defense of the use of the Script Memo.<sup>20</sup> A Dallas newspaper account confirms the accuracy of my statement:

[Professor Silver's article, *Preliminary Thoughts*], however, failed to mention that Baron & Budd hired him to write an affidavit used in its coaching-memo defense. In it he argued that the firm "did more than duty required" when it stopped using the script document, which he called "awkward or clumsy rather than an effort to perpetrate a fraud."

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11. See Wyatt, *supra* note 8, at 1A.

12. *Rejoinder*, *supra* note 1, at 777.

13. *Id.*

14. *Id.* at 776.

15. See *supra* text accompanying notes 5-6.

16. *Preliminary Thoughts*, *supra* note 3, at 1402 (citations omitted).

17. *Id.* at 1399-1402.

18. *Id.* at 1402-04. See *supra* note 7 and *infra* note 24 for an explanation of Skepnek's role.

19. *Asbestos Litigation*, *supra* note 2, at 157-61.

20. *Rejoinder*, *supra* note 1, at nn.32-50 and accompanying text.

Silver, who testified recently in California in favor of multimillion-dollar trial lawyers' fees, was one of the two ethics experts Baron says he retained to school his firm in ethics in 1998. He did not return several calls for comment.<sup>21</sup>

After admitting the truth of my assertion,<sup>22</sup> Professor Silver seeks to justify his failure to acknowledge his prior retention, stating he believed "that academic debate may be more merits-oriented when professional ties are not disclosed."<sup>23</sup>

I disagree. Standard academic ethics require that any personal interest of an academic writer, such as a retained advocacy relationship, must be disclosed in writing in any essay, the contents of which concern that personal interest. Otherwise readers who do not know the academic's affiliations would not realize that the academic's judgment may have been affected by that personal interest.

Professor Silver levels a second set of charges against me which involve the actions of William Skepnek.<sup>24</sup> In the same time frame as the Script Memo litigation, in an unrelated matter, Skepnek represented 46 plaintiffs

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21. See *Homefryn*, *supra* note 9, at 4.

22. See *supra* text accompanying note 111. Professor Silver further asserts that by my stating that he had failed to acknowledge his retention by Baron & Budd in *Preliminary Thoughts*, I was either stating or implying that he hid his relationship with Baron & Budd. *Rejoinder, supra* note 1, at nn. 42-44 I did neither. I simply stated a fact which is not in dispute. In support of his allegation, he states that he suspects I knew that he did not bill Baron & Budd "for services relating to the witness preparation controversy." *Id.* at n.45 and accompanying text. Not so. I had no knowledge then or now of Professor Silver's financial arrangements with Baron & Budd. He also asserts that I "believe [that he] kept [his] relationship with Baron & Budd a secret." *Id.* at 777-80. However, he does not state the basis for his conclusion that he knew what I believed. In my article responding to Professor Silver's personal attacks, I did not state my beliefs; I stated only facts.

23. *Id.* at 780-82.

24. For the reader not familiar with the relevant events, I again set forth the following additional context. For the purposes of this context, I am relying on a chronology of events prepared by William Skepnek at my request. See e-mail from William Skepnek, Attorney, to Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law, (January 22, 2005) (on file with the author) [hereinafter Chronology]. Four years prior to Skepnek's initial retention in fall 1996 to represent the Raymark Corporation in asbestos cases filed against it in Texas — the retention that led to his attempt to employ discovery to inquire into the uses of the Script Memo which, in turn, led to the retaliatory steps taken by Baron & Budd, see *Asbestos Litigation, supra* note 2, at 157-61, Skepnek was retained by 46 plaintiffs to represent them in a malpractice action against five of the leading plaintiffs' law firms in Texas. Chronology, *supra*. The lawsuit is described in Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, March 24, 1995, at B6 [hereinafter Passell, *Challenge*]. Under the title, *Burrow v. Arce*, 997 S.W. 2d 229 (Tex. 1999), the Texas Supreme Court ultimately sided with Skepnek and his clients on the issue of whether actual damages needed to be shown to proceed with a breach of fiduciary obligation claim against a lawyer. *Id.* at 232. The *Arce* case was first filed in October 1992. Passell, *Challenge, supra*; Chronology, *supra*. After losing in the trial court on summary judgment, Skepnek appealed the case to the 14th Court of Appeals in Houston. *Arce v. Burrow*, 958 S.W. 2d 239, 244 (Tex. Ct. App. 1997). While that appeal was pending, Skepnek was hired to defend Raymark. Chronology, *supra*. In September, 1997, the Texas Court of Appeals ruled in favor of Skepnek in *Arce*. *Id.* The case was then appealed to the Texas Supreme Court. Chronology, *supra*. That same month, the Script Memo appeared. *Asbestos Litigation, supra* note 1, at 142; Chronology, *supra*. By late February 1998, Baron & Budd had filed more than a hundred sanctions motions against Skepnek and sought two criminal prosecutions as well. *Asbestos Litigation, supra* note 2, at 160-61. In July 1999, the Texas Supreme Court affirmed the appellate court decision in *Arce*, 997 S.W. 2d at 229.

who were suing five of the leading plaintiffs' law firms in Texas for breach of fiduciary obligation.<sup>25</sup> This suit resulted in a landmark Texas Supreme Court decision, *Burrow v. Arce*,<sup>26</sup> upholding a client's right to fee forfeiture if the attorney breaches a fiduciary obligation.<sup>27</sup> Skepnek's futile pursuit of the Script Memo had drawn Professor Silver's wrath.<sup>28</sup> Because of *Arce*, which posed a threat to mass tort lawyers, Skepnek was further targeted by Silver, who again targeted me for failing to condemn Skepnek.<sup>29</sup> As noted, I partially responded to his attack in my asbestos litigation article.<sup>30</sup>

Professor Silver takes issue with my characterizing his *Preliminary Thoughts* article as assisting in Baron & Budd's assault on Skepnek.<sup>31</sup> Though his article strongly attacked Skepnek, to the degree that my characterization may be read to suggest that Professor Silver was acting in concert with Baron & Budd's attack against Skepnek,<sup>32</sup> I wish to clarify my position. I have no knowledge that Professor Silver was acting in concert with Baron & Budd and accept Professor Silver's denial of any such relationship. Professor Silver's article, however, even if not written in concert with Baron & Budd, did support the law firm's position.

As for Professor Silver's characterization in his Rejoinder<sup>33</sup> of his attack on William Skepnek at the William & Mary conference and in his subsequent article and my responses, Professor Silver states that I have "never questioned the accuracy of [his] account."<sup>34</sup> This is untrue. Professor Silver has mischaracterized my remarks at the conference and our correspondence thereafter. I stated that I believed some of his statements about Skepnek were in error,<sup>35</sup> that I was not an attorney for Skepnek,<sup>36</sup> and that if Professor Silver was interested in ascertaining the accuracy of his allegations, he should "get in touch with Mr. Skepnek directly."<sup>37</sup> Professor

25. See Passell, *Challenge*, *supra* note 24, at B6.

26. 997 S.W. 2d at 229.

27. *Id.* at 232.

28. See *Preliminary Thoughts*, *supra* note 3, at 1401-02 (concluding that "[i]t is difficult to imagine a more compelling occasion for outrage" than the Skepnek case).

29. Professor Silver wrote an article sharply critical of the Texas Supreme Court's decision in *Arce*, and included a six page "Addendum" titled "The Silence of the Commentators Revisited," devoted entirely to an attack on Skepnek and me. *A Critique*, *supra* note 3, at 352-57.

30. See *supra* note 4 and accompanying text.

31. See *Rejoinder*, *supra* note 1, at n.9 (referring to *Asbestos Litigation*, *supra* note 2, at 161-62, referring to *Preliminary Thoughts*, *supra* note 3, at 1401).

32. Professor Silver characterizes Baron & Budd's orchestrated attack on Skepnek as an "alleged plot." *Id.* at 770. I have spelled out the "alleged plot" in great detail. *Asbestos Litigation*, *supra* note 2, at 160-61. No one can mistake it for other than what it was.

33. *Rejoinder*, *supra* note 1, at 766.

34. *Id.* at 768.

35. See e-mail from Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law, to Charles M. Silver, Professor of Law, University of Texas School of Law (Mar. 30, 2001, 04:16:00 EST) (on file with author).

36. *Id.*

37. See *id.*

Silver's statement that I "provided no documents"<sup>38</sup> is thus quite misleading in implying that I had no basis for challenging his statements. This is especially so because Professor Silver, after acknowledging that he had intentionally failed to contact Skepnek to corroborate his allegations,<sup>39</sup> responded by asking me to contact Skepnek and ask Skepnek to get in touch with him, which I did.<sup>40</sup> After a series of letters had passed between them, Silver withdrew some of his more extreme charges in his article on the *Arce* case that he later published (*A Critique*).<sup>41</sup>

Professor Silver asserts that my statement included in my response to his personal attack that he "had been retained by the Texas tobacco attorneys to give his blessing to their fee request"<sup>42</sup> was a "misstatement."<sup>43</sup> It is, in fact, a correct statement. In Professor Silver's expert affidavit in the tobacco litigation,<sup>44</sup> he stated that he had been retained by the private lawyers<sup>45</sup> and proceeded to argue in favor of the reasonableness of the multi-billion dollar fee request.<sup>46</sup> A reader unaware of this fact would be hard put to notice that in the verbal underbrush of denial there lies - well camouflaged - this specific acknowledgement by Professor Silver: "When the lawsuit settled, several professors, including me, rendered services relating to the lawyers' request for payment . . . ."<sup>47</sup> Instead, a reader who was not already fully informed would likely be misled by Professor Silver's statement that "during the entire period in which the payment of fees [to the private lawyers in the state's suit against tobacco companies] was at issue—I worked without compensation, except for reimbursement of expenses"<sup>48</sup> into believing that he was not compensated for his affidavit.

Professor Silver also asserts that my contradiction of his statement "that political forces opposed to the trial lawyers brought [the outcome in *Arce*] about"<sup>49</sup> is a misstatement.<sup>50</sup> Not so. My rejection of his characterization is not only dead-on accurate, but Professor Silver now acknowledges this to be

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38. *Rejoinder*, *supra* note 1, at 766.

39. *A Critique*, *supra* note 3, at 354-55.

40. *Id.* at 355.

41. *Id.* at 355-56.

42. *Asbestos Litigation*, *supra* note 2, at 163.

43. *Rejoinder*, *supra* note 1, at n.27.

44. Aff. of Professor Charles Silver, *Texas v. The Am. Tobacco Co.*, No. 5:96-CV-0091 (E.D. Tex. Jan. 13, 1998). Because I was retained by the counsel to the Governor of the State of Texas in 1998 to provide an expert's affidavit with regard to the reasonableness of the fee sought in the tobacco settlement (as was Professor Geoffrey Hazard), I was provided with a copy of his affidavit.

45. *Id.*

46. *Id.*

47. *Rejoinder*, *supra* note 1, at 782. This minimization of his role may be usefully contrasted to his statement in a letter to Skepnek that he "was heavily involved in the Texas tobacco case, working for the private attorneys who represented the State." Letter from Charles M. Silver, Professor of Law, University of Texas School of Law, to William Skepnek, Attorney 5 (Apr. 18, 2001) (on file with the author).

48. *Rejoinder*, *supra* note 1, at 783.

49. *Asbestos Litigation*, *supra* note 2, at 163 (referring to *A Critique*, *supra* note 3, at 351 ("In *Burrow*, the Supreme Court of Texas responded to pressure from one such interest group and created a new remedy calculated to destabilize the practices of mass tort lawyers)).

50. *Rejoinder*, *supra* note 1, at 784.

so. Here are the underlying facts. In *A Critique*, Silver noted that Texans for Reasonable Legal Fees (TRLF)—which was on the opposite side of the tobacco fee issue from Professor Silver, having been involved in a futile effort to allow Texas state courts to apply Texas ethics rules to the determination of the reasonableness of the multi-billion dollar fee awarded in the state tobacco litigation<sup>51</sup>—had filed an amicus brief in the *Arce* case.<sup>52</sup> Professor Silver, after arguing that the Texas Supreme Court’s analysis in *Arce* of Texas case law was “misleading,”<sup>53</sup> “distort[ed] Texas law,”<sup>54</sup> and that the rest of the Court’s reasoning was “vague and superficial,”<sup>55</sup> concluded that no other explanation could suffice except that the “Supreme Court of Texas responded to pressure from [the TRLF] . . . and created a new remedy calculated to destabilize the practices of mass tort lawyers.”<sup>56</sup> Even Professor Silver has come to acknowledge that this gale force argument is supported by not even the slenderest of reeds. Backing off from his charge that the Texas Supreme Court “responded to pressure,”<sup>57</sup> he now asserts that “‘political forces’ sought to influence the Texas Supreme Court[.]”<sup>58</sup> Presumably, Professor Silver would include in the ambit of “political forces” the three amicus briefs he filed in *Arce* in favor of the tort lawyers.<sup>59</sup> I take no issue with Professor Silver’s changed position that there were political forces that sought to influence the court, but he is still peering under the wrong tent. In *Arce*, Skepnek took on five of the leading plaintiffs’ firms in Texas, the three leading defendants’ law firms, and a high-ranking member of the Texas judiciary.<sup>60</sup> Truly, this was David versus

51. See Lester Brickman, *Lawyer’s Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 243, 262 n.58 (2001).

52. See *A Critique*, *supra* note 3, at 331.

53. *Id.* at 337.

54. *Id.* at 338.

55. *Id.* at 339.

56. *Id.* at 351.

57. *Id.*

58. *Rejoinder*, *supra* note 1, at 786 (emphasis added).

59. The Texas Supreme Court devoted an entire page to responding to his argument. See *Burrow v. Arce*, 997 S.W.2d 229, 244-45 (Tex. 1999).

60. As related by Skepnek:

The defendants [in *Arce*] were Walter Umphrey, Wayne Reaud, David Burrow, John Eddie Williams, and Ken Bailey, five of the most prominent members of the Texas plaintiffs’ bar. The defense expert, upon whose testimony the defense relied, was Robert Malinak, of the Baker, Botts firm. A critical defense witness was Otway Denny, a partner with Fulbright, Jaworski, the firm which had represented Phillips Petroleum in the underlying aggregate settlement. Fulbright was, in turn, represented by the Vinson, Elkins firm. Another critical defense witness was Texas Appeals Court Judge Alice Oliver Parrott, who was a former partner of Burrow, and the trial judge who presided over the settlement. “Baker Botts”, “Fulbright Jaworski”, and “Vinson Elkins” are the [sic] three of the (if not the largest) largest and most influential defense firms in Houston. We had few friends, and no political, or economic support. Approximately half of my 46 clients, most of them factory workers, came to the courtroom. All of our suit money came from the clients themselves, or out of my pocket.



Goliath. Skepnek's clients had few resources they could contribute beyond their faith in Skepnek, a plaintiffs' lawyer who took their case when no other lawyer in Texas would do so and who continued with the case on appeal even though, in the course of those appeals, he faced 160 sanctions motions filed against him by Baron & Budd, criminal contempt charges, a grand jury investigation, and had no client to financially support his defenses against the multi-pronged attack by Baron & Budd.<sup>61</sup>

## CONCLUSION

Professor Silver explains that the underlying motive for his personal attacks on me—which initiated the exchange that is the subject of this article – was that I “seemed to display a bias in [my] public statements about attorneys.”<sup>62</sup> He characterizes me as an “academic[ ] . . . [who seeks] to generate anger against trial lawyers who represent plaintiffs”<sup>63</sup> and claims that I am engaged in a “propaganda war for control of the civil justice system . . . .”<sup>64</sup> To support his assertions, Professor Silver presents a slanted selection of news media quotes.<sup>65</sup> I will leave to others to decide whether or not I am engaged in a “propaganda war for control of the civil justice system.”

Much of my scholarship, which does focus on the civil justice system, shares a common thematic core: to define the misalignment of legal practice with ethical principles set forth in codes of ethics, which the bar holds out as talismanic shields to fend off social controls in favor of continued self-regulation.<sup>66</sup> The main body of my scholarship concerns contingency fees. In a series of articles, I have argued that: the ethical validity of a contingent fee is a function of the existence of meaningful risk being assumed by the lawyer,<sup>67</sup> if risk is present, then the risk premium must be proportionate to the risk and the anticipated effort that will be put at risk;<sup>68</sup> that contingent fee lawyers charging standard contingent fees are routinely overcharging some claimants because, in many instances, the representation involves no meaningful risk of no or low recovery and therefore the substantial risk premium in these instances yields unearned and unethical windfall fees;<sup>69</sup>

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Chronology, *supra* note 24; *see also* Passell, *Challenge*, *supra* note 24.

61. *See Asbestos Litigation*, *supra* note 2, at 160-61 (describing the events in detail).

62. *Rejoinder*, *supra* note 1, at 766 (footnote omitted).

63. *Id.* at 767 (footnote omitted).

64. *Id.* at n.5.

65. *Id.* at n.28.

66. The legal profession is largely self-governing. . . . [and] is unique in this respect . . . . This . . . is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated.

MODEL RULES OF PROF'L CONDUCT, Preamble (2000).

67. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without The Prince of Denmark?*, 37 UCLA L. REV. 29, 44-84 (1989).

68. *Id.* at 94-99.

69. *Id.* at 70-74; *see also* GEOFFREY C. HAZARD, JR. ET. AL., *THE LAW AND ETHICS OF LAWYERING* 787 (4th ed. 2005).

that a hallmark of the gross overcharging that permeates contingency fee practice is the zero-based accounting system whereby lawyers speciously assign all tort claims a value of zero for purposes of applying their contingent fees to recoveries even though many claims have substantial value at the time the lawyer is retained;<sup>70</sup> and that the gross overcharging of tort claimants is not only in the interest of plaintiff lawyers but also benefits defendants' lawyers, and has received the imprimatur of the American Bar Association.<sup>71</sup>

In addition to my scholarship on contingency fees, I have also addressed, *inter alia*, nonrefundable retainers;<sup>72</sup> advance fee retainers payments;<sup>73</sup> and the development of an entrepreneurial model for nonmalignant asbestos litigation, which explains how hundreds of thousands of specious claims have come to be filed.<sup>74</sup>

I have indeed been outspoken in criticizing actions and policies which I believe expose the bar to opprobrium. For example, I have criticized: the opinion of the New York State Bar Association Committee on Professional Ethics<sup>75</sup> legitimizing the use of a retainer artifice in order to strip the fiduciary protection set forth in Disciplinary Regulation 9-102 (A)(2) of the Model Code,<sup>76</sup> calling the opinion professionally irresponsible;<sup>77</sup> the Massachusetts Supreme Court for making an exception to the "reasonable fee" limit in the state's ethics code based largely on the bar's successful attempt to standardize contingency fee percentages;<sup>78</sup> the opinion of the ABA Committee on Ethics and Professional Responsibility that lawyers may

70. See Lester Brickman, *Effective Hourly Rates of Contingency Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 659 n.12 (2003) [hereinafter *Effective Hourly Rates*].

71. See Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996).

72. See Lester Brickman & Lawrence Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149 (1988); Lester Brickman & Lawrence Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1 (1993); Lester Brickman & Lawrence Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11 (1995); see also *Agusta & Ross v. Trancamp Contracting Corp.*, 751 N.Y.S.2d 155, 158 (Civ. Ct. 2002) (noting that "[t]he leading experts in the United States on permissible fee arrangements by lawyers are Professor Lester Brickman, Professor of Law at Cardozo School of Law and legal ethics expert, and Professor Lawrence A. Cunningham, Professor of Law and Business at Boston College. Their joint writings have been approvingly cited and relied upon by courts of other jurisdictions in decisions discussing what fees lawyers may permissibly recover for their time and services.").

73. Lester Brickman, *The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account?*, 10 CARDOZO L. REV. 647 (1989).

74. See generally *Asbestos Litigation*, *supra* note 2.

75. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 570 (1985).

76. MODEL CODE OF PROF'L RESPONSIBILITY, DR 9-102(A)(2) (1980) (mandating that lawyers may not withdraw amounts due as fees from their trust accounts when clients dispute the fee).

77. See *supra* note 73 and accompanying text.

78. Lester Brickman, *A Massachusetts Debacle: Gagnon v. Shoblom*, 12 CARDOZO L. REV. 1417 (1991).

charge standard contingent fees even when there is no meaningful risk born by lawyers and doing so will result in windfall fees;<sup>79</sup> the proposal contained in the ABA Ethics 2000 Commission report stripping out fiduciary protection for tort victims seeking legal representation,<sup>80</sup> and the use of nonrefundable retainers.<sup>81</sup>

Despite Professor Silver's effusive appraisal of the effects of my efforts,<sup>82</sup> I have realized few successes. The New York Court of Appeals, relying on my writings, did declare nonrefundable retainers unethical and illegal,<sup>83</sup> and Congress did require that the same recordkeeping rules that apply to everyone else with regard to the receipt of income also apply to tort lawyers.<sup>84</sup> Other attempts to influence public policy, however, have fallen short.<sup>85</sup> For example, the "early offer" proposal which I co-authored, which seeks to prevent price gauging by contingency fee lawyers in cases where the lawyer is exposed to no meaningful risk,<sup>86</sup> has not yet been adopted by any state legislature or supreme court, though it has earned a place in virtually all of the major professional responsibility casebooks.<sup>87</sup>

To Professor Silver's suggestion that I and other commentators bear some responsibility for the low esteem in which the bar is held,<sup>88</sup> I demur. That low esteem is not due to criticisms of various practices of lawyers and the bar but rather to the practices which are the object of those criticisms<sup>89</sup>—

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79. Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247 (1996) (criticizing ABA Committee On Ethics and Professional Responsibility, Formal Op. 389 (1994)).

80. Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 *U. ILL. L. REV.* 1181 (2003).

81. See *supra* note 71 and accompanying text..

82. *Rejoinder, supra* note 1, at 792.

83. *Matter of Cooperman*, 83 *N.Y.2d* 465 (1994); see John M.A. DiPippa, *Lawyers, Clients, and Money*, 18 *U. ARK. LITTLE ROCK L. REV.* 95, 112 (1998) (noting that "[t]he *Cooperman* decisions represent a victory for Professors Brickman and Cunningham").

84. See Terry Carter, *Keeping 'Em Honest*, 83 *A.B.A.J.*, Aug. 1997, at 28 (explaining the origin of the legislation to require that 1099s be issued with regard to the proceeds generated by tort litigation).

85. My continuing efforts in the face of this record accords me the distinction of being an honorary citizen of La Mancha.

86. LESTER BRICKMAN ET. AL., *RETHINKING CONTINGENCY FEES: A PROPOSAL TO ALIGN THE CONGTINGENCY FEE SYSTEM WITH ITS POLICY ROOTS AND ETHICAL MANDATES* (1994) [hereinafter *RETHINKING CONTINGENCY FEES*]; see also *Effective Hourly Rates, supra* note 70, at 723-24.

87. STEPHEN GILLERS, *REGULATION OF LAWYERS* 180-81 (6th ed. 2002); GEOFFREY C. HAZARD, JR., ET.AL., *THE LAW AND ETHICS OF LAWYERING* 788 (4th ed. 2005); THOMAS D. MORGAN & RONALD ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 108 (8th ed. 2003); JOHN T. NOONAN, JR. & RICHARD W. PAINTER, *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* 70 (2d ed. 2001); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 805 (4th ed. 2004).

88. *Rejoinder, supra* note 1, 786-90.

89. In one recent survey of public confidence in various institutions in which lawyers were rated near the bottom, 57 percent indicated that "lawyers are more concerned with their own self-promotion than their client's best interests." *Public Perceptions of Lawyers: Consumer Research Findings*, 2002 *A.B.A. SEC. OF LIT.* 7. "[T]he greatest number of complaints arise around lawyers' fees. Consumers say that lawyers charge too much." *Id.* at 14. A *U.S. News and World Report* poll found that "69 percent of Americans believe lawyers are only sometimes honest or not usually honest, and 56 percent say lawyers use the system to . . . enrich themselves." Stephen Budiansky, et.al., *How Lawyers Abuse the Law*, *U.S. NEWS & WORLD REPORT*, Jan. 30, 1995, at 50, 51.

in particular, those practices which are the antithesis of the bar's exhortation that in its collective activities, it should act "in the public interest and not in furtherance of parochial or self-interested concerns of the bar."<sup>90</sup>

The contrast between my views and Professor Silver's reflected in this exchange could not be more vivid. For example, in his *Rejoinder*, Professor Silver states that law professors' self-interest should lead them "to hold pro-lawyer views."<sup>91</sup> That may or may not be so. However, as academics and as ethical role models for our students, law professors have an obligation that trumps any purported self-interest. And in the end, adherence to the highest ethical standards of *our* profession – which is the legal academy and not the legal profession – is the best guarantee of our self-interest. If that requires telling uncomfortable truths about a small, albeit powerful, segment of the legal profession, so be it. This view underpins my scholarship: that identifying what is actually occurring in our legal system is, or at least ought to be, a prime purpose of scholarship; that by identifying these truths and bringing them to the attention of both the academy and the profession, I am providing an opportunity to curb abuses in the legal system; and that focusing on these abuses will ultimately be in the self-interest of the legal profession.

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90. MODEL RULES OF PROF'L CONDUCT, Preamble (2000).

91. *Rejoinder*, *supra* note 1, at 790 ("The Role of Law Professors in Framing Public Discourse About Attorneys"). Furthermore, I plead "guilty" to Professor Silver's accusations that I stated that trial lawyers made substantial and indeed, unprecedented financial contributions to the Kerry/Edwards campaign, that the purpose of the constitutional amendment that the trial lawyers caused to be put on the Florida ballot in November 2004 was to force doctors to settle meritless malpractice actions, and that in asbestos litigation, trial lawyers have targeted companies at risk and made them offers to file pre-packaged bankruptcies that they could not refuse. *Id.* I even plead "guilty" to the charge – if it is brought – that in the article on asbestos litigation that is the subject of his *Rejoinder*, I concluded that hundreds of thousands of specious claims had been filed, supported by bogus medical evidence and witness testimony resulting from implanting false memories. *Asbestos Litigation*, *supra* note 2, at 62-166. Oddly enough, Professor Silver omits from his list of my "lawyer-bashing," my latest statement in this genre. See *President Participates in Asbestos Litigation Conversation* (Jan. 7, 2005), at [www.whitehouse.gov/news/releases/2005/01/20050107-8.html#](http://www.whitehouse.gov/news/releases/2005/01/20050107-8.html#); see also *RETHINKING CONTINGENCY FEES*, *supra* note 86; *Effective Hourly Rates*, *supra* note 70, at 723-24.

