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## Lawyer Ethics on the Lunar Landscape of Asbestos Litigation

Roger C. Cramton

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# Lawyer Ethics on the Lunar Landscape of Asbestos Litigation<sup>\*</sup>

Roger C. Cramton<sup>\*\*</sup>

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<sup>\*</sup> This article was prepared for a conference on "Asbestos Litigation and Tort Law: Trends, Ethics, and Solutions," held at Pepperdine University School of Law on April 5, 2003.

<sup>\*\*</sup> Roger C. Cramton is the Robert S. Stevens Professor of Law Emeritus, Cornell University Law School. The author would appreciate e-mail comments on the article, which should be addressed to <rc10@cornell.edu>.

## I. INTRODUCTION

The publication last year of an “interim report” on “Asbestos Litigation Costs and Compensation” by the Rand Institute for Civil Justice led a number of legal commentators to conclude that plaintiff asbestos lawyers were largely responsible for a litigation epidemic that harms the American economy and results in injustice.<sup>1</sup> Stuart Taylor, Jr., a reflective and intelligent legal journalist, wrote a hard-hitting piece in *Legal Times* under the following lead: “The Greedy v. The Sick: Lawyers are using asbestos claims to cheat the rest of us.”<sup>2</sup> “This scandal,” Taylor argued, “...dramatizes how our lawsuit industry often operates as an engine of injustice – and as a drain on the economy, an inadequate vehicle for compensating people actually harmed by corporate wrongdoing, and a transparent fraud in its pretensions to punish those responsible for such wrongdoing.”<sup>3</sup>

Roger Parloff’s lengthier article in *Fortune* had the following leads: “The \$200 Billion Miscarriage of Justice; Asbestos lawyers are pitting plaintiffs who aren’t sick against companies that never made the stuff – and extracting billions for themselves.”<sup>4</sup> Parloff, a knowledgeable and able legal commentator, concludes that “[t]he course of asbestos litigation over the past 30 years has been shaped less by the law of torts than by the law of unintended consequences. At every turn, well-intentioned court rulings have, in the fullness of time, backfired...” [by stimulating plaintiff lawyers to file many cases involving claimants with little or no disability].<sup>5</sup>

Defendants, faced with huge case aggregations that threatened bankruptcy if a trial were lost, entered into settlements that inevitably put a relatively high price tag on the less serious claims. The result, predictably: even more cases and inevitable bankruptcy.<sup>6</sup> Parloff concludes that the injustice can only be cured by piggybacking global settlements onto bankruptcy proceedings (a form of judicial activism) or, if a number of leading plaintiff law firms cooperate, targeted federal legislation that would have a similar result.<sup>7</sup>

Lester Brickman, who earlier proposed an administrative scheme for resolution of asbestos claims,<sup>8</sup> views the current situation as a “malignancy in the courts” that primarily benefits only the twenty or so plaintiff law firms

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1. Stephen J. Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report*, RAND INST. FOR CIV. JUST. (2002) [hereinafter 2002 Rand Report].

2. Stuart Taylor, Jr., *The Greedy vs. The Sick*, LEGAL TIMES, Sept. 30, 2002, at 60 [hereinafter Taylor, *Greedy Lawyers*].

3. *Id.* at 60.

4. Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154 [hereinafter Parloff, *Miscarriage of Justice*].

5. *Id.*

6. *Id.*

7. *Id.*

8. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819 (1992) [hereinafter Brickman, *Asbestos Litigation Crisis*].

who recruit asbestos claimants, process their claims in the courts and through the trust funds established by bankrupt asbestos-related defendants, and take a large amount of the total expenditures on asbestos litigation.<sup>9</sup> The malignancy came about:

because asbestos litigation today has come to consist, mainly, of non-sick people, suing in jurisdictions where asbestos litigation is one of the main industries supporting the local economy, claiming compensation for non-existent injuries [from increasingly non-culpable defendants], often testifying according to prepared scripts with perjurious contents, and often supported by specious medical evidence.<sup>10</sup>

Brickman, unlike the other commentators, characterizes asbestos litigation as a “massively fraudulent enterprise,” suggesting that criminal fraud has occurred.<sup>11</sup>

The Rand study, to be followed by further analysis and detailed consideration of policy choices, provides a neutral and relatively objective factual basis on which to assess these charges. My conclusion is that asbestos litigation provides a good example of how the good intentions of judges can go awry because they fail to take account of the likely consequences of their actions on the behavior of self-interested participants, including their own preoccupation with clearing dockets. The asbestos swamp also illustrates the failure of Congress to provide a public interest solution to a problem that may be incapable of being resolved satisfactorily, consistent with the Constitution and the rule of law, by activist judges working with self-interested plaintiff lawyers and defendant companies.

My assignment, however, is not these broad policy questions but whether or not the current handling of asbestos cases violates the disciplinary rules of the legal profession.<sup>12</sup> First, have the plaintiff lawyers

9. Lester Brickman, *Asbestos Litigation: Malignancy in the Courts?*, 1 MEALEY'S ASBESTOS BANK. REP. #12 (July 2002) [hereinafter Brickman, *Malignancy in the Courts*] (citing his earlier article containing extensive discussion of his claims of forum shopping, improper coaching of claimants' testimony, and use of false medical evidence); Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243 (2001) [hereinafter Brickman, *Aggregative Litigation*]; *id.* at 258-65 (forum shopping); *id.* at 275-81 (witness coaching); *id.* at 281-93 (false expert evidence).

10. Brickman, *Malignancy in the Courts*, *supra* note 9.

11. *Id.* Brickman's closing paragraph states that “[t]he issues posed by [today's] asbestos litigation . . . should be seen less as matter of civil justice reform than as matters of law enforcement.” Referring back to criticism of lawyer failures in the savings-and-loan scandals, he asks, “Where are the prosecutors?” *Id.*

12. In this article I focus almost entirely on the conduct of plaintiff asbestos lawyers. I do so because it is their conduct which critics have attacked as one of the root causes of the asbestos crisis. The defense lawyers, it should be noted, sometimes are implicated in some of the same conduct: e.g., they negotiate settlements with plaintiff firms that violate the aggregate settlement rule or involve impermissible conflicts of interest among the aggregated plaintiffs. If the plaintiff lawyers have

violated ethics rules through the mass screening techniques that produce the thousands of unimpaired claimants whose recoveries have bankrupted the culpable defendants and now threaten many other companies whose culpability is limited or nonexistent? Second, in presenting the claims of these asbestos claimants, do plaintiff lawyers improperly coach the testimony of claimants, especially with respect to causation issues (exposure to asbestos products related to a particular defendant) or offer expert testimony they know or should know is false? Third, do these lawyers, who often are representing hundreds or even thousands of claimants against the same defendants, violate the duty of communication with clients, the client's control over settlement, and the profession's aggregate settlement rule? Fourth, in negotiating for these large and amorphous groups of claimants, containing many unimpaired claimants and a smaller number of seriously injured asbestosis and mesothelioma victims, are the conflict of interest rules being violated? Finally, are the fees the plaintiff lawyers garner from settlement awards excessive and unreasonable?

My conclusions are bound to be a disappointment to anyone who hopes for confident and unambiguous judgments. There is insufficient evidence concerning nearly all of the issues listed above to reach a confident conclusion that ethics rules have been violated. The two exceptions involve the aggregate settlement rule<sup>13</sup> and the presence of pervasive conflicts of interest. But no one seems to care about any of these issues except for a few academic writers. Defendants and their counsel, who demand broad settlements and want but cannot get global peace after *Amchem Products v. Windsor*<sup>14</sup> and *Ortiz v. Fibreboard Corp.*,<sup>15</sup> cannot and do not complain about these ethical violations. Individual clients, who could raise the issues, have neither the time nor the resources to pursue these issues. State and federal judges who handle asbestos cases appear to be totally uninterested in adding professional responsibility concerns or hearings to the already

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violated ethics rules by their conduct, the defendant lawyers may also have done so by inducing or assisting another lawyer to violate a professional rule. See MODEL RULES OF PROF'L CONDUCT R. 8.4(a), stating that it is "professional misconduct for a lawyer to . . . knowingly assist or induce another to [violate the Rules of Professional Conduct], or to do so through the acts of another." In addition, defense lawyers may have been implicated in the asbestos industry's earlier coverup of its knowledge of the harmfulness of asbestos products. See Roger C. Cramton, *Lawyer Conduct in the "Tobacco Wars,"* 51 DEPAUL L. REV. 435, 436-37 (2001) (discussing coverup issues in tobacco representation).

13. The aggregate settlement rule, discussed *infra* at notes 77-86, refers to the lawyer's duty not to participate in a settlement involving more than one client unless each client gives informed consent in writing to the terms of the settlement. See Charles Silver & Lynn Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997) [hereinafter Silver & Baker, *Aggregate Settlement Rule*]; Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999) [hereinafter Moore, *Changing the Aggregate Settlement Rule*]; Steve B. Jensen, *Like Lemonade, Ethics Comes Best When It's Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215 (1999) [hereinafter Jensen, *Old-Fashioned Ethics*]; Lynn Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227 (1999) [hereinafter Baker & Silver, *Settlement Rule and Ideals of Client Service*].

14. 521 U.S. 591 (1997); see *infra* note 87.

15. 527 U.S. 815 (1999); see *infra* note 88.

overwhelming task of clearing dockets of pending asbestos cases. Finally, state disciplinary bodies will not address them on their own initiative and appear totally disinterested in launching major investigations in the few instances in which grievances have been filed.<sup>16</sup> Like the manufacture of sausage, asbestos litigation is a messy endeavor, and no one really wants to know how the ingredients are put together.

## II. ETHICS ISSUES IN ASBESTOS LITIGATION

### A. Solicitation of Claimants

Once courts established some special rules for asbestos cases that eased a plaintiff's burden of proving exposure to a defendant's asbestos products and the causal relationship between that exposure and the plaintiff's medical condition, the prospects of plaintiff victory in a jury trial, while still chancy, were good.<sup>17</sup> The law in a number of jurisdictions also made it possible for a claimant to recover substantial damages for a nonmalignant claim involving mild asbestosis or pleural plaques not resulting in serious impairment (i.e., inability to work or to carry on other activities of daily living).<sup>18</sup> As a result, plaintiff lawyers had a great incentive to recruit as many claimants as possible and to confront defendants in favored forums<sup>19</sup> with a large caseload of cases ranging from the most severe (mesothelioma) to many cases involving limited or no impairment.<sup>20</sup> Confronted by potentially huge defense costs and worried about errant juries that would occasionally award

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16. *See infra* notes 48-57 (discussing the Baron & Budd memorandum in which the Texas disciplinary body brushed off the grievance, apparently accepting the law firm's unsworn statements at face value and not conducting an independent factual investigation).

17. Lester Brickman discussed the "special asbestos tort law" developed by state and federal judges to ease the difficulties of proof of exposure and causation in Brickman, *Asbestos Litigation Crisis*, *supra* note 8, at 1840-52. Special rules in a number of jurisdictions applying only in asbestos product liability cases, he concludes, include: disallowing the state-of-the art defense; permitting proof of exposure through circumstantial and hearsay evidence by other employees; permitting recovery in cases of mild asbestosis in which undisputed evidence showed that the plaintiff worked full time and led an active life; permitting recovery for fear of cancer by those with pleural plaques but no other physical impairment. *Id.*

18. *Id.* at 1844-52 (discussing *Dunn v. Owens-Corning Fibreglas*, 774 F. Supp 929 (D.V.I. 1991)).

19. Asbestos claims have tended to migrate to jurisdictions that are viewed as "plaintiff friendly" with favorable tort rules and procedural practices that favor aggregation. 2002 Rand Report, *supra* note 1, at 32-37 (discussing the high concentration of asbestos litigation in states and counties having these characteristics).

20. *Id.* at 23, 35 (stating that litigation dynamics shifted in favor of plaintiffs in the mid-1980s when "plaintiff law firms . . . learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together and negotiating with defendants on behalf of the entire group." "Consolidation [of asbestos cases] tilts the playing field against defendants, rather than against plaintiffs").

very large sums for slightly injured asbestos victims, defendants pushed for settlements of all pending cases brought by a plaintiff firm.

Experience demonstrated that these aggregate settlements of large numbers of cases had the effect of reducing the recoveries of those most seriously injured (who were also threatened with the danger of dying before their cases were reached for trial) and providing a substantial recovery for claimants who had limited or no impairment.<sup>21</sup> Plaintiff attorneys responded by attempting to recruit any and all of those with occupational exposure to asbestos whose lung X-rays, when examined by a radiologist regularly employed by the particular law firm, would find pleural plaques or other lung scarring that might be attributed to asbestos exposure. By encouraging the filing and settlement of low-value claims, the consolidation efforts, designed to dispose of cases efficiently, had the opposite effect. The Rand study concludes “it is highly likely that the steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved.”<sup>22</sup>

By the mid-1980s, plaintiff lawyers, often with the cooperation of labor unions, were organizing (and presumably financing) mass screening procedures in which a van equipped with mobile radiographic equipment would appear at or near a work site and workers over a certain age would be invited to receive a free chest X-ray. The most detailed description of the process is found in a 1998 investigative report in the Dallas Observer describing the process by which Baron & Budd, a leading plaintiff firm in the asbestos field, obtained new clients through a health screening arranged by another law firm and a trade union:<sup>23</sup>

Together, the union and the local law firm round up a group of the skilled laborers who constitute Baron & Budd’s clientele, sending out notice of the free screening. The men, many of whom know someone who died from asbestos disease, come from miles around.

According to trial testimony from doctors, the union and the law firm pay for a lung doctor to examine up to 200 men a day using equipment rented from a local hospital or hauled in by the doctor in a tractor-trailer rig. The union men are X-rayed, and the

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21. Over time, “the average severity of claims is declining in the sense that a growing fraction of claims are for less severe injuries.” *Id.* at 41. Claims for less severe injuries (nonmalignant claims) are growing in number at a much faster rate and now constitute ninety percent of all claims. *Id.* at 45-46. About two-thirds of all dollars paid to asbestos claimants go to those with nonmalignant injuries. *Id.* at 65-66. The situation is complicated by the differences in state law concerning whether pleural plaques resulting from asbestos exposure give rise to a legal claim separate and distinct from one arising from a subsequent serious impairment or a medical monitoring or fear-of-cancer claim. See *Norfolk & W. Ry. v. Ayers*, 123 S. Ct. 1210 (2003) (finding that fear of cancer was a recoverable injury).

22. 2002 Rand Report, *supra* note 1, at 26.

23. Christine Biederman et al., *Toxic Justice*, DALLAS OBSERVER, Aug. 13, 1998 (quoted and discussed in Brickman, *Aggregative Litigation*, *supra* note 9, at 273-81).

films are usually developed on the spot. Frequently, an attorney is standing by to sign up anyone whose examinations show any evidence of asbestos exposure.

After the workers are X-rayed and referred to a lawyer, the local attorney typically sends the case to [the Firm]. . . . According to [a principal of Baron & Budd,] . . . the referring firm usually gets up to one-third of Baron & Budd's 40 percent contingency fee.<sup>24</sup>

For non-union workers or those who are dispersed or retired, advertisements in newspapers, other publications or the electronic media are used to recruit claimants. For example, a newspaper ad in the Cleveland Plain Dealer in 1991 read in part: "ATTENTION: Railroad Workers and Retirees – X-ray screening to determine the presence of asbestos related lung disease . . . [o]ffered at no out of pocket cost to you."<sup>25</sup> Stewart Taylor reports the punch line of another advertisement: "Find out if YOU have MILLION DOLLAR LUNGS."<sup>26</sup>

Do these and other efforts to attract legal business violate the profession's rules prohibiting in-person solicitation? It is clear that the commercial advertisements, although they may be subject to criticism for bad taste, are constitutionally protected<sup>27</sup> and not reached by the ethics rules.<sup>28</sup> Written solicitation of particular matters in the form of a personalized form letter that provides information about a possible legal problem (e.g., asbestos disease) and the lawyer's availability to provide assistance, is also constitutionally protected.<sup>29</sup>

24. Brickman, *Aggregative Litigation*, *supra* note 9, at 274 n.95 (quoting Biederman, *supra* note 23).

25. CLEVELAND PLAIN DEALER, Dec. 9, 1991, at 2C (quoted in Brickman, *Asbestos Litigation Crisis*, *supra* note 8, at 1854 n.144).

26. Taylor, *Greedy Lawyers*, *supra* note 2.

27. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 655 (1985) (striking down a state disciplinary action against a lawyer whose newspaper ad invited Dalkon Shield claims to contact the lawyer concerning a possible personal injury claim).

28. MODEL RULES OF PROF'L CONDUCT R. 7.2(a): "Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media." [Hereinafter the A.B.A. Model Rules will be cited as "Model Rule #"]. Neither Model Rule 7.1 nor Model Rule 7.3 prohibits advertising through public media that targets a particular class of potential clients.

29. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478-80 (1988) (finding personalized letters informing home owners facing foreclosure of possible legal problems and the lawyer's availability to handle them constitutionally protected). *But see, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 634-35 (1995) (holding a Florida bar rule prohibiting personal injury lawyers from sending targeted mail to accident victims or their relatives for thirty days following an accident or disaster). Similar prohibitions have been adopted in a number of states. These prohibitions do not reach injuries from asbestos exposure that occurred many years ago.



The general prohibition against solicitation extends to indirect solicitation through the use of agents.<sup>30</sup> If a law firm employed a medical screening outfit, paying it to offer free screening to certain persons in return for the screening organization referring those with certain characteristics to the law firm, the solicitation rules may be violated. However, proceeding through a union or other employee organization, or perhaps limiting the provision of help and advice to members of a particular organization, raises associational issues that may very well privilege the conduct.<sup>31</sup> Moreover, the effort to build aggregations of cases against the same defendant is analogous to solicitation of members of a class for purposes of bringing a class action.<sup>32</sup> Thus, well-established exceptions to the prohibition of solicitation may be invoked when unions or health organizations assist workers in learning whether they have a health problem and simultaneously refer them to a lawyer. Moreover, it is not clear that the plaintiff asbestos lawyers are financing all of the testing arrangements; there is the further complication in the Baron & Budd situation that the actual solicitation was done by a local lawyer, who then referred the cases to the asbestos law firm. Presumably the presence of associational interests and other complications is responsible for the failure of asbestos defendants to file disciplinary grievances against asbestos plaintiff firms. I am not aware of any discipline or judicial sanctions being applied to the methods used by plaintiff lawyers to recruit asbestos clients.

Prominent asbestos lawyers, such as Fred Baron, argue strongly that their efforts to inform workers of what may be a dangerous health condition is a major public benefit. "I think it's a wonderful thing," Baron says. "If I have a disease, I want to know about it, and I want to be able to seek treatment for it."<sup>33</sup> Even though the medical benefits of screening are dubious<sup>34</sup> and the quality of the testing provided is subject to question (see

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30. See Model Rule 8.4 (stating a lawyer may not violate the professional rules through the acts of another) and Rule 7.2(b) (containing prohibitions on paying someone to recommend a lawyer's services).

31. In *In re Primus*, 436 U.S. 412, 438-39 (1978), the Court held that in-person solicitation on behalf of a public or charitable organization could not be prohibited, at least if the solicitation was not for pecuniary gain and furthered the organization's purposes (lawyer wrote to a woman who had been sterilized as a condition of continuation of Medicaid benefits, offering her free representation by American Civil Liberties Union). Other cases have upheld solicitation where associational rights are involved. See, e.g., *In re Teichner*, 387 N.E.2d 265, 276-77 (Ill. 1979) (lawyer visited and solicited victims of train accident and their families; although his motives were predominantly pecuniary, his actions furthered community interests in comprehensive relief program and were "tinged" with associational values); *In re Appert*, 315 N.W.2d 204 (Minn. 1981) (lawyers who generated new cases by distributing brochures to inform women of their right to recover for injuries from intrauterine contraceptive device, and by accepting referrals from non-lawyers, served "significant public interest" by implicating associational rights). The line of Supreme Court decisions upholding labor union referral services are also relevant. See, e.g., *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971).

32. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); see also Model Rule 7.2, cmt. 4 (stating "communications authorized by law, such as notice to members of a class in class action litigation" are not prohibited).

33. Parloff, *Miscarriage of Justice*, *supra* note 4.

34. Mesotheolomia is an untreatable disease. Moreover, National Cancer Institute studies suggest that X-rays catch lung cancer too late to reduce mortality. Thus, the major effect of testing

the discussion of expert testimony below), Baron's argument has a large popular appeal. A grievance body that examines and possibly punished the recruitment methods would be subject to much public criticism and hostility.

### B. Presenting False Expert Testimony

Medical evidence of asbestos disease is provided in every asbestos case, but critics, including an occasional judge, assert that much of that evidence is "specious."<sup>35</sup> The doctors who interpret the X-rays and provide expert testimony are chosen by the plaintiff law firms. The same physicians are used in hundreds, perhaps thousands, of cases. The medical evidence provided to courts and bankruptcy trusts always supports the existence of some lung condition that is consistent with asbestos exposure.

Evidentiary support for allegations of abuse is provided by a number of independent studies of the testing process. During one three-year period in the 1990s, for example, seventy percent of the evaluations received by the Manville Trust were supplied by eight physicians, leading the trust to initiate an independent reevaluation of the medical testimony. That study by independent doctors, using procedures that would confirm the submission if any reviewing doctor agreed with it, led to the conclusion that thirty-eight percent of the audited claimants suffered from no asbestos-related condition, while twenty-eight percent had conditions milder than had been asserted by the claimants' experts.<sup>36</sup> Similarly striking differences in outcome occurred when a federal district judge, rejecting the expert testimony of sixty-five claimants, appointed independent experts to evaluate their medical records. Only ten of the sixty-five (fifteen percent) were found to have contracted asbestosis.<sup>37</sup> Other recent studies, commissioned by asbestos defendants, have found that from two-thirds to ninety percent of all current claimants have not suffered an impairment affecting their ability to perform activities of daily living.<sup>38</sup> The 2002 Rand study concludes more modestly that "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily living."<sup>39</sup>

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may be to increase the anxiety of those tested who are found to have lung scarring or pleural plaques.

35. See Brickman, *Aggregative Litigation*, *supra* note 9, at 281-94 (arguing that plaintiff asbestos lawyers retain only X-ray readers who are the most likely to conclude that lung scarring or other signs that may be related to asbestos exposure are present).

36. See Brickman, *Aggregative Litigation*, *supra* note 9, at 285-94 (discussing *In re Manville Pers. Injury Settlement Trust Med. Audit Procedures Litig.*).

37. See Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 39 (1991), discussed in Brickman, *Aggregative Litigation*, *supra* note 9, at 284-85 & n.113.

38. 2002 Rand Report, *supra* note 1, at 20.

39. *Id.* at 21.

Ethics rules provide that a “lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false . . .”<sup>40</sup> and that a “lawyer shall not . . . falsify evidence, [or] counsel or assist a witness to testify falsely . . .”<sup>41</sup> Under the disciplinary rules, “knows” or “knowingly” refers to “actual knowledge,” although “knowledge may be inferred from circumstances.”<sup>42</sup>

Knowledge of falsity cannot be inferred from the choices that plaintiff lawyers have made of their expert witnesses in asbestos cases. It is customary for lawyers to search for another expert when those first consulted are unwilling to provide the necessary supporting evidence. Moreover, everyone concedes that a large subjective element is involved in the examination of chest X-rays to reach a diagnosis of asbestosis or a determination that lung scarring has been caused by asbestos exposure. The president of the Manville Trust’s claims-paying arm “says that the high audit-failure rates probably do not reflect fraud on anyone’s part, but rather the intrinsic subjectivity of X-ray interpretation, especially when the alleged diseases are so mild. ‘It’s more art form than science.’”<sup>43</sup>

Under these circumstances, it is difficult to conclude that plaintiff asbestos lawyers “know” the medical evidence they submit is “false,” although they clearly know it is partial and one-sided. The remedy lies not in professional discipline but in steps that the courts need to take to ensure reasonably accurate medical testimony is provided: (1) inquiries under the *Daubert* rule into the scientific accuracy of the type of testimony routinely provided;<sup>44</sup> (2) procedures that provide defendants with the medical evidence well before trial and permit defendants to obtain an independent medical examination of each plaintiff;<sup>45</sup> and (3) the appointment of a panel of independent medical experts to assess each claimant’s medical condition in occasional large-scale cases where the stakes justify additional transaction costs.<sup>46</sup>

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40. Model Rule 3.3(a)(3).

41. Model Rule 3.4(b).

42. Model Rule 1.0(f) (defining “knowingly,” “known,” and “knows”).

43. See Parloff, *Miscarriage of Justice*, *supra* note 4, at 7. Brickman, who characterizes the expert evidence submitted by plaintiff firms in asbestos cases as “specious” or “fraudulent,” concedes that “[i]n many cases, reading the X-ray is like taking a Rorschach test; whatever is there is totally in the eyes of the beholder.” Brickman, *Aggregative Litigation*, *supra* note 9, at 283. Nevertheless, lawyers who select an expert witness when past experience provides knowledge that there is a high probability that the witness will provide a favorable opinion are skirting the edge of professional misconduct even though they are not knowingly falsifying evidence. See Model Rule 8.4(a) (inducing another to violate the law) and 8.4(d) (conduct prejudicial to the administration of justice).

44. See David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. (forthcoming Dec. 2003) (discussing the need for use of *Daubert* procedures in asbestos litigation).

45. Until 2003, Mississippi, one of the leading forums for asbestos litigation, had no procedure by which a trial court could order a medical examination of a personal injury plaintiff. In other states, it is reported that defendants in multi-claimant consolidations set for trial are frequently given the medical evidence only a short time before the scheduled trial, preventing examination and deposition of the plaintiffs’ experts. See Brickman, *Aggregative Litigation*, *supra* note 9, at 258-65.

46. This was the approach followed by Judge Rubin in a federal court case involving 65 tire workers who claimed asbestos exposure injuries. See Carl B. Rubin & Laura Ringenbach, *The Use*

### C. Improper Coaching of Claimants' Testimony

Presentation of an asbestos claim requires the claimant to testify about the presence of the asbestos products manufactured or sold by the defendants named in the case. Presentation of such testimony poses great difficulties. Asbestos products disappeared from the marketplace in the mid 1970s. The exposure of most plaintiffs dates back thirty to forty years. The claimant's work history can usually be recreated from Social Security records, but the claimant's knowledge or recollection of which company manufactured the products that were present at particular work sites at specified times long ago is likely to be dim or nonexistent. Because of the difficulties of proof and a knowledge that the most severe asbestos claims, such as mesothelioma, have been caused by occupational exposure to asbestos fibers, a number of courts have assisted plaintiffs by allowing the exposure requirement to be satisfied by the hearsay testimony of another employee concerning the presence of a product at a particular work site.

But there is a further problem. The principal manufacturers of asbestos products in the United States were sent into bankruptcy a number of years ago and the trusts that distribute the funds set aside in the bankruptcy proceeding for future claimants have either been exhausted or pay pennies on the dollar.<sup>47</sup> The plaintiff lawyer has the task of establishing that the solvent defendants named in today's litigation were the major contributors to the plaintiff's injury. This involves a "recollection" or "learning" process that leads to charges of improper coaching and false testimony.

A rare inside glimpse of suspect witness coaching came to light in 1997 when a 20-page document entitled "Preparing for Your Deposition" used by Baron & Budd, one of the largest of the plaintiff firms, was inadvertently given to defense counsel in a pending case.<sup>48</sup>

The memo suggests the following scenario in the likely situation that the client cannot remember what products containing asbestos were used at the work site. When that occurs, the paralegal conducting the witness

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of Court Experts in Asbestos Litigation, 137 F.R.D. 35 (1991) (discussed in Brickman, *Aggregative Litigation*, *supra* note 9, at 284-85 & n.113). The migration of asbestos cases from federal to state courts may limit the availability of this option because state judges have less authority and willingness to appoint neutral experts than do federal judges. *Id.*

47. Manville, Raymark, and other leading manufacturers of asbestos products have gone into bankruptcy. The bankruptcy created trusts that administer compensation plans for the benefit of future claimants. Current claimants lose because many trusts pay only a tiny fraction of agreed upon losses (the Manville Trust currently pays at the rate of five cents on the dollar). As of 2002, sixty companies had filed for bankruptcy because of asbestos liabilities. As these companies go bankrupt, non-bankrupt firms become the target of more litigation. 2002 Rand Report, *supra* note 1, at 67-68.

48. For discussion of the Baron & Budd memorandum, see Lester Brickman & Ronald Rotunda, *When Witnesses Are Told What to Say*, WASH. POST, Jan. 13, 1998, at A15; Brickman, *Aggregative Litigation*, *supra* note 9, at 275-81; Joan C. Rogers, *Ethics of Witness Preparation*, ABA/BNA, 14 LAW. MAN. PROF. CONDUCT 48-54 (Feb. 18, 1998). The following discussion in the text is based on these sources, which excerpt and discuss the memorandum.

preparation informs the client that other employees have testified that certain products were used at that site in those years (this information comes from the firm's extensive data base built up during years of asbestos litigation). The client is given lists and photographs of asbestos products used at particular job sites and is instructed to memorize the names and descriptions of asbestos products: Remember to say you saw the NAMES on the BAGS. . . . The more often you were around the product, the better for your case. . . ." Should the defendant ask how you (a plaintiff) were able to recall so many product names, "[t]he best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!"

The memorandum also gave explicit instructions regarding knowledge of danger:

It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it. . . . It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER. . . . You will be asked if you ever used respiratory equipment to protect you from asbestos. Listen carefully to the question! If you did wear a mask for welding or other fumes that does not mean you wore it for protection from asbestos! The answer is still 'NO'!

The client is also instructed to say that there were certain products with which he did not come into contact (the products of bankrupt companies): "Do not mention product names that are not listed on your Work History Sheets."<sup>49</sup> The memorandum contains a lengthy discussion of the effects of asbestos disease and asks the client to think about them: "If you can give good, concrete examples of how your life has been damaged by your exposure to asbestos products made by these manufacturers they will want to offer you a settlement instead of taking the chance that a jury will award you more money."

On its face the memo appears to "counsel or assist a witness to testify falsely," since the directions involve the creation of testimony and go far beyond the neutral stimulation of recollection. If lawyers in Baron & Budd knew of the use of the memo (suggested by the fact that it was inadvertently turned over by one lawyer to defense counsel in a pending asbestos case), those lawyers would at least be culpable for failing to provide proper supervision to firm paralegals.<sup>50</sup>

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49. Brickman, *Aggregative Litigation*, *supra* note 9, at n.104. As the leading asbestos manufacturers went bankrupt, it was essential for plaintiff lawyers to find new defendants and provide evidence that the solvent defendants were largely responsible for the plaintiff's asbestos condition. Prior evidence that Manville products were dominant in some work settings (perhaps as high as eighty percent of the products used at some shipbuilding sites) had to be replaced by testimony that the products of other manufacturers were responsible. See Brickman, *Aggregative Litigation*, *supra* note 9, at 277 n.105.

50. See Model Rule 5.3(c) (providing that a partner or a supervisory lawyer who knows of misconduct by a non-lawyer employed by the firm "shall be responsible for conduct of such a person

After the memorandum became known, lawyers for Baron & Budd denied knowledge of its use and stated that it had been employed in no more than 110 cases handled by one paralegal at the firm. That paralegal signed an affidavit in which she took sole responsibility for writing the memo.<sup>51</sup> According to Parloff, Fred Baron, a name partner of the firm, “argues in an interview that the memo doesn’t actually counsel anything improper, especially when taken in context with other materials the firm provided to plaintiffs, which advised them, for instance, to tell the truth.”<sup>52</sup> The firm also argued, ultimately successfully, that the memo, labeled as “Attorney Work Product,” was protected by the attorney-client privilege.<sup>53</sup> The firm was successful in blocking an investigation into the use of the memo, knowledge of its use by the firm’s lawyers, and inquiries of other clients as to whether they had seen the memo.<sup>54</sup>

In civil proceedings, a panel of the Texas appellate court held that the memo was protected by the attorney-client privilege and the crime-fraud exception was inapplicable because there was no evidence that the client was using the lawyer’s services to perpetrate a fraud.<sup>55</sup> A defense motion to disqualify Baron & Budd from representing clients in asbestos cases in Dallas was denied. A referral by a Dallas County judge to Texas disciplinary authorities resulted in a letter to Fred Baron stating that bar counsel had dismissed a grievance against him “since it does not state, on its face, a violation of a disciplinary rule.”<sup>56</sup> Academic experts and

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that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer”).

51. Parloff, *Miscarriage of Justice*, *supra* note 4.

52. *Id.*

53. See *In re Brown*, 1998 WL 207793, \*2 (Tex. App. Apr. 30, 1998) (unpublished opinion holding that the crime-fraud exception to the attorney-client privilege did not apply because “[t]here was no evidence that the clients were aware that the Memo was part of any crime or fraud”). This interpretation of the crime-fraud exception is unsound and has been rejected by federal court decisions. See *In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213 (3d Cir.1989) (crime-fraud exception applicable when lawyer, but not the client, engaged in criminal conduct). In *Impounded*, a law firm, asserting the privilege on behalf of its innocent clients, claimed that the crime-fraud exception did not apply when the alleged criminality was solely that of the law firm. *Id.* The court rejected the argument, holding that the privilege would have to yield to the societal interest of bringing to justice lawyers engaged in criminal activities. *Id.* at 1214. Moreover, use of documents to refresh a witness’ recollection often results in waiver of the privilege. *Id.*

54. See Walter Olson, *Creative Deposition*, 34 CIV. JUST. MEMO 3-4 (Manhattan Inst., May 1998) (describing Baron & Budd’s efforts to avoid use of the memo against it in other asbestos cases). *But cf.* *State ex rel. Abner v. Elliott*, 706 N.E. 2d 765, 771 (Ohio 1999) (Ohio Supreme Court denied a writ of prohibition sought by Baron & Budd to stop an Ohio trial judge supervising a large group of asbestos cases from compelling the firm to produce documents and testimony concerning its witness preparation practices, or face a curative instruction if it did not). Subsequently Baron & Budd took a voluntary dismissal of its Ohio cases, which were presumably refiled elsewhere.

55. *In re Brown*, 1998 WL 207793, at 2\*-5\* (unpublished opinion).

56. Parloff, *Miscarriage of Justice*, *supra* note 4. The Texas trial judge, outraged at the dismissal of the grievance, referred the matter to a grand jury, but that also ultimately came to nothing. See Olson, *supra* note 54.

commentators took opposing views on the question of whether use of the memorandum was an ethics violation.<sup>57</sup>

The ethics rules have very little to say concerning lawyer behavior that constitutes improper coaching of a witness. The rules are limited, in effect, to a prohibition of suborning perjured testimony repeated several times in somewhat different words.<sup>58</sup> In the Baron & Budd incident, the absence of a full factual inquiry left the law firm's assertions unchallenged: a document that clearly was very aggressive in communicating facts to a client was used in a number of cases by the single paralegal responsible for it; the firm's lawyers were unaware of its use, and there was no evidence that false testimony had been given in any prior cases.

The difficult questions that arise concerning improper coaching involve a lawyer's recitation to a client of facts required for a recovery prior to seeking the client's recollections; telling the witness what the facts are or have to be (e.g., "maintain that you never saw any warning or danger labels"); or explaining the legal effect of answers in a way that directs the witness' testimony (e.g., "never give specific quantities of brand names since that may lead defendants to say that they were not responsible for your illness").<sup>59</sup> Existing authority on the subject of improper coaching is almost entirely confined to clear and egregious instances of suborning perjury. In the absence of ethics opinions, disciplinary decisions and cases involving judicial sanctions dealing with improper coaching as an ethics violation, patterns of "aggressive" coaching are prevalent in many sectors of the litigation bar.<sup>60</sup> Its presence in asbestos litigation is not surprising, given the lack of guidance and the special problem that all cases involve asbestos exposure that took place thirty to forty years ago.

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57. Lester Brickman, who served as a defense expert, concluded that parts of the memo violated Texas ethics rules and suborned perjury; William Hodes, an expert witness for the firm, took an opposing position. See *Ethics of Witness Preparation*, 14 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 48, 49-51 (Feb. 18, 1998); see also Lester Brickman & Ronald Rotunda, *When Witnesses Are Told What to Say*, WASH. POST, Jan. 13, 1998, at A-15.

58. Model Rule 1.2(d): "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Model Rule 3.3(a)(3) prohibits a lawyer from "knowingly . . . offer[ing] evidence that the lawyer knows to be false . . ." Model Rule 3.4(b) states that a lawyer "shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law . . ." Model Rule 8.4(c) states that "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

59. See Liisa Renee Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135 (1999); Richard Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995).

60. See Lawrence J. Fox, *Ethics: Beyond the Rules*, 67 FORDHAM L. REV. 691-895 (1998) (reporting a substantial study of the tendency of litigators to push procedural rules to their limits, especially in discovery practice, and sometimes leading to law violations). The study was supported by the ABA Section of Litigation and carried on by a number of prominent academics, each of whom wrote an article on the study. *Id.*

*D. Individualized Justice Versus Mass Justice (Communication with Clients, the Client's Control of Settlement, and the Aggregate Settlement Rule)*

The recent Rand report summarizes the evolving dynamics of asbestos litigation in the United States: A period of extensive individual case litigation eventually resulted in jury verdicts over vigorous manufacturer opposition. Judicial decisions and statutory developments eased the way on proof of exposure, causation of injury, and statutes of limitation.<sup>61</sup>

Litigating individual claims against these major corporations was expensive and risky for plaintiff law firms and few were willing to take on asbestos workers' claims. By the mid-1980s, however, plaintiff law firms in areas of heavy asbestos exposure . . . had learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together and negotiating with defendants on behalf of the entire group. Often defendants would agree to settle all the claims that were so grouped, including those claims that were questionable, to reduce their overall costs of litigation. By agreeing to pay questionable smaller-value claims in exchange for also settling stronger and larger-value claims, defendants could also contain their financial risk. Some plaintiffs might receive lower values for claims that were settled as part of a group. But litigating claims en masse lowered the cost and risk per claim for plaintiff law firms.<sup>62</sup>

This strategy required the recruitment of claimants that has already been described. The efforts of courts to handle the flood of new cases led to the consolidation of cases first for pre-trial but eventually for trial as well. Large group settlements were encouraged by such consolidation. "Typically, cases were consolidated by law firms representing the plaintiffs or by plaintiffs' place of employment, not by injury severity or strength of the legal claim."<sup>63</sup>

As some corporations emerged from bankruptcy and established trusts to pay claims, the bankruptcy trust administrators also developed claims processing procedures that would minimize transaction costs. . . . In this way, asbestos litigation was transformed in fact – although not in form – into a quasi-administrative regime, with some, if not all, of the transaction cost

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61. 2002 Rand Report, *supra* note 1, at 22-23.

62. *Id.* at 22-23.

63. *Id.* at 25.



benefits that one would expect as a result of such a transformation.<sup>64</sup>

“Importantly, reducing per-case transaction costs made filing small claims financially viable for more people, thereby encouraging mass filings ... [I]t is highly likely that the steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved.”<sup>65</sup>

These changes were accompanied by a greater concentration of asbestos cases in a small number of plaintiff law firms. “By 1995, ten firms ... represented *three quarters* of the annual filings against defendants ... The leading firms had standing settlement agreements with the major defendants. Virtually all cases settled.”<sup>66</sup>

Asbestos litigation also tends to be concentrated in a small number of states, although their identity has shifted over time as litigation dynamics have changed: relaxed venue rules, consolidation practices perceived to benefit plaintiffs, and perceptions that particular locales were especially “plaintiff friendly.”<sup>65</sup> From 1998-2000 two-thirds of all asbestos filings were concentrated in five states: Texas, Mississippi, New York, Ohio, and West Virginia, in that order. Mississippi and West Virginia, although they have less than two percent of the U.S. population, received almost one-quarter of the 1998-2000 filings. Three jurisdictions which permit joinder of any asbestos case against the same defendants with a case in which the plaintiff is a resident or was exposed to asbestos within the state (Texas, Mississippi and West Virginia) are now receiving over forty percent of new filings.<sup>68</sup>

The American tradition of individualized justice (the right of every person to due process and a jury trial) is also reflected in the single client-single lawyer focus of the legal profession’s ethics rules. Since the 1960s, however, there has been an enormous growth in collective litigation: class actions were spurred by the rule changes of 1963 and other developments; and consolidation practices have evolved that would have been unthinkable forty years ago. Recently, the Supreme Court declined to stop a West Virginia asbestos proceeding which originally involved joinder of more than 8,000 asbestos plaintiffs and 259 defendants.<sup>69</sup> The exposure, causation, and injury circumstances of many plaintiffs were individual and unique; the

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64. *Id.* at 26.

65. *Id.*

66. *Id.* at 30.

67. *Id.* at 32-37 (discussing concentration of asbestos litigation in a relatively small number of states; the migration of those cases from one group of states to another and from federal courts to states influenced by perceptions that certain state courts provided a more “plaintiff friendly” environment; and the large number of cases brought in a small number of counties (sometimes referred to as “magnet courts”).

68. *Id.* Until reform legislation was enacted in 2003, trial courts in Mississippi lacked authority to order an independent medical examinations of plaintiffs, a rule that helps plaintiffs and hurts defendants. Thirteen percent of total asbestos filings from 1998-2000 were in two Mississippi counties. *Id.*

69. See Lisa Starsky, *Unusual Battle in W.Va. Asbestos Case*, 24 NAT’L L.J. No. 58, Oct. 28, 2002, at A12, A14.

plaintiffs resided and had been occupationally exposed in a number of different states, although a majority were occupationally exposed in West Virginia; the defendants had little in common except that each was alleged to be responsible in part for the plaintiffs' injuries. After the West Virginia Supreme Court failed to stop the consolidated trial, most of the defendants settled. When the U.S. Supreme Court also refused to address the defendants' due process argument, all the remaining defendants except one settled. A jury verdict on the liability phase was later rendered against Union Carbide, the only defendant left standing.<sup>70</sup>

For a number of years some of the leading judges and academics who supported collective litigation have argued that procedural and ethical rules should not stand in the way of developments that are thought to be more efficient and fairer than individual adjudication with its high transaction costs and erratic verdicts. The degree of autonomy granted to individual litigants, they argue, is inconsistent with collective justice, in which the plaintiff lawyer (whether class counsel or the lawyer for a thousand claimants in a consolidated proceeding) necessarily must exercise a degree of control in formulating strategy for the group as a whole, making decisions that compromise the claims of some members of the group, and deciding whether and on what terms to settle the proceeding.<sup>71</sup> The increased efficiency of aggregative procedures provides a "rough justice" that is better than an individualized justice that is ineffective because of cost and delay.

An opposing school of thought is troubled by the quick expansion of aggregative methods and their many problems: the inability of claimants to effectively monitor the conduct of the lawyer for the class or aggregation; the tendency of the plaintiff attorney to make decisions on the basis of the timing and amount of fees to be earned in relation to the legal effort required; a willingness of many such attorneys to make collusive deals with defendants that sacrifice the interests of plaintiffs who have valuable claims; the conflicts of interest within the aggregation over which the attorney is given virtually unchecked discretion.<sup>72</sup>

### 1. The lawyer's duty of communication

Model Rule 1.4, as revised in 2002, now contains an expanded statement of what constitutes the "reasonable communication" necessary for

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70. *Id.*

71. See, e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 84-88 (1995) [hereinafter Weinstein, *Mass Tort Litigation*]; Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1213 (1995) [hereinafter Carrie Menkel-Meadow, *Settlement of Mass Torts*].

72. See, e.g., Moore, *Changing the Aggregate Settlement Rule*, *supra* note 13; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

the client effectively to participate in the representation. The rule now requires a lawyer to communicate “promptly” on two matters: any decision or circumstance that requires the client’s informed consent (including the client’s authority as to “whether to settle a matter”) and the client’s reasonable requests for information. “Reasonable” information or consultation is required about the means by which the client’s objectives are to be accomplished and the status of the matter. In addition, the lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation and consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the rules or other law.

Judge Weinstein is among those commentators who believe that mass tort actions are here to stay and that they provide a rough justice, more satisfactory than the results of the traditional tort approach with its erratic results, windfalls, and enormous delays. Weinstein states:

The mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation. This diffuse relationship inevitably will yield some level of client dissatisfaction and, because of compromises the attorney must make to formulate strategy for the group as a whole, may result in less-than-zealous advocacy for positions of particular clients.<sup>73</sup>

Weinstein concludes that the virtues of aggregative litigation outweigh the benefits of individual representation and client autonomy. Ethics rules should be relaxed or modified accordingly. A number of academic commentators agree.<sup>74</sup> The principal focus of attention with respect to consolidations of the individual cases of numerous plaintiffs represented by a single law firm, as distinct from class actions, is the profession’s rule concerning aggregate settlements. But the challenge also deals with other rights of the individual client, including the duty of communication and avoidance of serious conflicts of interest in simultaneous representation.

Judge Weinstein and others believe that it is not possible for a lawyer to provide adequate communication to a large number of individual clients who have a common attorney in a single matter, such as an asbestos case in which many claimants are suing a score of asbestos defendants.<sup>75</sup> Nancy Moore and Steve Jensen, on the other hand, argue that the duty of communication is more flexible than its critics suggest and that individual clients can be kept informed through a variety of techniques: e.g., group meetings, distribution of information by mail and e-mail, telephone responses by paralegals to inquiries, and use of referring attorneys, when

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73. WEINSTEIN, MASS TORT LITIGATION, *supra* note 71, at 85.

74. *See, e.g.,* Menkel-Meadow, *Settlement of Mass Torts*, *supra* note 71; Silver & Baker, *Aggregate Settlement Rule*, *supra* note 13.

75. Weinstein, *Mass Tort Litigation*, *supra* note 71, at 85.

they are involved, to keep their individual clients informed.<sup>76</sup> I agree with Moore and Jensen that the case for modification of the duty of communication has not been made.

The agreements that many plaintiff asbestos firms have made with various asbestos defendants present a special issue of client communication. A new client whose asbestos exposure is covered by such an agreement will receive a predetermined amount from those defendants. A client in that position should be informed at the outset of any such agreements and of its significance on the timing and amount of any recovery. I have no information on how the problem is currently being handled.

## 2. The aggregate settlement rule

Model Rule 1.8(g) provides:

[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for 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 or pleas involved and of the participation of each person in the settlement.

The rule has received very little attention in the courts or academic literature. An initial and highly useful illumination of the rule and its threat to aggregative litigation has been provided by Charles Silver and Lynn Baker.<sup>77</sup> They argue that the rule is a grave threat to aggregative litigation and that it should be modified by permitting a lawyer to obtain an advance and irrevocable authority to settle the case without further consultation when the settlement is approved by a majority or super-majority of participating plaintiffs.<sup>78</sup> The change is necessary, they argue, because individual consultation with hundreds or thousands of individual clients is not feasible and the group commitment to a negotiated settlement provides the attorney with the leverage against defendants that is required to obtain an adequate settlement.

Nancy Moore has criticized the proposed reform.<sup>79</sup> She argues that the communication and aggregate settlement rules are more flexible than Silver and Baker recognize and that the denial of any sense of individual

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76. Moore, *Changing the Aggregate Settlement Rule*, *supra* note 13, at 161-62; Jensen, *Old-Fashioned Ethics*, *supra* note 13, 223-25.

77. Silver & Baker, *Aggregate Settlement Rule*, *supra* note 13; Baker & Silver, *Settlement Rule and Ideals of Client Service*, *supra* note 13.

78. Silver & Baker, *Aggregate Settlement Rule*, *supra* note 13, at 778-79.

79. Moore, *Changing the Aggregate Settlement Rule*, *supra* note 13.

participation comes at too high a cost, especially given the dangers of self-interested behavior on the part of the lawyers who have created and control these aggregative cases. I agree with her. The dangers of self-interested, and even collusive, behavior by plaintiff lawyers have been recognized as a serious problem in class action cases. Consolidated cases that involve hundreds or thousands of claimants involve an even greater problem because all of the protections of class actions have been eliminated: the lawyer representing the aggregated individual plaintiffs is self-appointed, not selected by the court; there is no screening of cases by the certification requirement; the right of a class member in a personal injury class action to opt out at the time of notice (and perhaps at the settlement stage as well)<sup>80</sup> is not available in the aggregated case context; the judge must consider and approve the adequacy and fairness of the class action settlement, but has limited or no control over an aggregated settlement; finally, the judge in the class action must approve class counsel's fee, a right that has no parallel when individual litigation is involved. All of these important procedural rights are lacking in the consolidated action.

The paper prepared by Charles Silver for this symposium argues that mass tort lawyers (including both class counsel and lawyers who represent many claimants in an aggregated proceeding) are motivated primarily to maximize the total amount available to the class or plaintiff aggregation.<sup>81</sup> Therefore, it is in the best interest of the class or group to have a lawyer who has wide discretion to craft a settlement providing a maximum recovery, even though some individuals and groups within the class may be less well treated than they would be in litigation. He does not discuss the overwhelming evidence that class counsel are motivated by total return from their point of view, a calculus that takes into account the effort required and the timing and amount of the attorney fee.<sup>82</sup> Nor does he discuss the large amount of evidence that suggests class counsel is under great pressure to make collusive deals with defendants to prevent the defendants from dealing with lawyers for competing classes.

While the latter problem is less evident in lawyer representation of large aggregations of asbestos claimants, the major disconnect between the interest of the group and that of their lawyer is even stronger because of the lawyer's lack of any control in Silver's scheme of things.<sup>83</sup> Silver wants the

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80. The proposed changes in Rule 23 of the Federal Rules of Civil Procedure include the right of a class member to opt out when given notice of the settlement of the class action.

81. Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 Pepp. L. Rev. (forthcoming Dec. 2003).

82. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 399 (2000); John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Koniak, *supra* note 72; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) (noting prevalence of collusive settlements).

83. The characterization of a lawyer as a "trustee" suggests fiduciary duties to beneficiaries and a tribunal to enforce those duties. The law of trusts is an arena in which trustees are supervised by a court in everything they do, required to make periodic reports to the court, and their fees approved by the court. Silver adopts the term "trustee" but not in its regulatory context. The lawyer for the claimants that the lawyer has aggregated are left without any supervision or control except the after-

lawyer for the aggregate to possess all the power and authority of class counsel while being totally unregulated: the lawyer recruits the claimants and is not selected by the trial judge; there is no certification procedure to determine whether aggregated treatment is appropriate and fair to all plaintiffs and all defendants; members of the group have no right to opt out at any stage, including at the time they learn of their participation in the group settlement; no judge will review the fairness and adequacy of the settlement; and the lawyer's fees need not and will not be approved by the court.

If a lawyer wants the degree of authority that Silver would invest in that lawyer, the lawyer should bring the case as a class action rather than pushing for a consolidated proceeding of many individual cases. The latter approach is taken by most plaintiff asbestos firms, I believe, precisely because their fees in such proceedings are unregulated. They know that a class action settlement of many millions of dollars would result in an attorney's fee of perhaps ten percent of the award, not the one-third or more that results from the aggregated proceeding.

In short, the lawyer who chooses to aggregate individual cases should be judged by all of the procedural and ethical rules applicable to individual representation.

The most troubling aspect of the Silver and Baker proposal is the elimination of a client's right to revoke settlement authority and to discharge the lawyer. This is tolerated in the class action context because of the opt-out rights and the other protections provided by class action procedure. When those are taken away, the individual client is left at the mercy of lawyers who are likely to act in a self-interested fashion knowing that judicial scrutiny will not occur. Moreover, the individual client will provide an irrevocable consent to a settlement that has majority approval when the client signs the retainer agreement. Individual personal injury clients are not in a position to make an informed decision when they first meet with a lawyer, and I doubt very much whether the mass recruitment techniques that enlist them provide adequate information and consultation on the settlement issue.

Although the aggregate settlement rule appears to be frequently violated, the rule is almost never enforced. Nearly all the few cases discussing aggregate settlement problems arise in situations where a judge is required to pass on a settlement, such as in a bankruptcy proceeding or a shareholder's derivative action.<sup>84</sup> I am aware of only one case in which a lawyer was disciplined for violation of the aggregate settlement rule; in that

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the-fact possibility, exceedingly unlikely, of a malpractice action by an unsatisfied former client and the even less likely prospect of a disciplinary proceeding.

84. See, e.g., *In re Jaeger*, 213 B.R. 578 (Bankr. C. D. Cal. 1997).

case it was only one of multiple and serious grounds for discipline.<sup>85</sup> The absence of academic discussion of the rule reflects the fact that violations are almost never pursued. Defendants and their lawyers, who induce the violation, will not raise the issue; and individual plaintiffs affected by it rarely have the knowledge and resources to file a malpractice action against their former lawyer or file a disciplinary grievance. Judges eager to clear their dockets ignore the issue. The aggregate settlement rule, like the duty of a lawyer to report the misconduct of another lawyer,<sup>86</sup> is at odds with day-by-day law practice. That deficiency in enforcement should be remedied. Judges presumably have inherent authority to vacate an aggregate settlement that involves a violation of a client's rights, but they are disinclined to exercise that authority in the absence of client complaint.

### *E. Conflicts of Interest*

Conflict of interest problems in aggregative litigation have been endemic for a long time. The Supreme Court decisions in *Amchem Products Inc. v. Windsor*<sup>87</sup> and *Ortiz v. Fibreboard Corp.*<sup>88</sup> dealt with two troublesome conflicts of interest that arise in settlement class actions attempting to provide a global solution for asbestos claims that will be filed in the future. In *Amchem*, the Court held that class counsel did not provide adequate representation when it represented a class consisting of both currently injured asbestos victims and persons occupationally exposed to asbestos who had not yet suffered injury but might do so in the future. The common representation of those currently injured and "futures" provided "no structural assurance of fair and adequate representation for the diverse groups...affected . . . ."<sup>89</sup>

Two years later in *Ortiz* the Court considered the even more serious conflict faced by class counsel who simultaneously negotiated a settlement of a large inventory of individual asbestos cases and a class action that provided different and probably less generous terms for future claims. *Ortiz* did not condemn intraclass allocations made as such, but found that the class settlement was "deficient" and lacked "fairness" and "equity" because of the conflict of interest of class counsel in negotiating both the inventory settlements and the class action settlement. The two cases suggested that the use of the class action device to provide a global solution of the asbestos problem, one that would deal with the claims of "futures" (i.e., exposed persons not currently injured who might later develop an injury) as well as those who are now injured, might be impossible.

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85. *State ex rel. Okla. Bar Ass'n v. Watson*, 897 P.2d 246, 252-53 (Okla. 1994) (lawyer disciplined for lying to clients and failing to maintain proper accounts; violation of aggregate settlement rule mentioned in passing).

86. *See* Model Rule 8.3.

87. 521 U.S. 591 (1997).

88. 527 U.S. 815 (1999).

89. *Amchem*, 521 U.S. at 594.

Lawyers who aggregate the individual claims of many asbestos plaintiffs in a consolidated case face some of the same conflicts of interest considered in *Amchem*, but not the most severe one: the inclusion in the class actions of those who have not yet suffered a legal injury but may have such an injury in the future. Nevertheless, the interests of those who are severely impaired (the minority of individual claimants who have mesothelioma, another cancer caused by asbestos exposure, or very severe asbestosis) are not the same as those of the vast bulk of claimants who have a legal injury from asbestos exposure but have suffered no current impairment of the ability to carry on daily life or an extremely modest impairment.<sup>90</sup> The universal experience in settlements of either class actions or aggregated cases is that the most severely injured claims of malignancy are reduced in value in order to provide funds for those with questionable or less severe claims. The defendants want a total settlement of all or nearly all outstanding claims, and the price of that settlement is the “rough justice” of reducing compensation for the one group to provide it to the other.<sup>91</sup>

A further conflict of interest arises for those plaintiff firms that are engaged both in negotiating large scale class action settlements on a state or national level (e.g., Ness Motley) while also handling huge numbers of individual cases. This simultaneous representation sometimes results in the same firm agreeing to abandon punitive damages for members of the class while simultaneously asserting such claims in damage cases involving individual claimants, who may be members of the class.<sup>92</sup> The same type of conflict may arise with respect to other issues that arise in the two procedural contexts.

*Amchem* and *Ortiz* were litigated because several wealthy plaintiff asbestos firms, committed to aggregation of individual asbestos claims, were threatened with loss of their future business by class action settlements that provided for administrative resolution of future claims and capped attorneys’ fees at a low level. These lawyers had the resources and know-how to intervene in the class action proceedings and mount a broad attack on the two settlements. They spent millions of dollars in building records in the trial court and successfully prosecuting the appeals all the way to the Supreme Court. Their success in overturning both settlements will probably be more than recouped in their earnings from handling future asbestos

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90. 2002 Rand Report, *supra* note 1, at 64-65 (summarizing 1991-2000 data). The study estimates that mesothelioma claims (three percent of total claims) receive about seventeen percent of total compensation; other malignancy claims (seven percent of total claims) receive about eighteen percent of total compensation; and nonmalignant claims (eighty-nine percent of total claims) receive almost two-thirds of total compensation, sixty-five percent.

91. *See id.*

92. *See* Cramton, *supra* note 12, at 446 n.49 (2001) (discussing a case in which Ness Motley was involved in the simultaneous representation context in its tobacco victim representation).



claimants in their preferred manner: the quasi-administrative process of handling a large number of individual cases using aggregative methods.

In the normal situation conflict of interest questions are much less likely to be raised and successfully litigated. Defendants, eager to obtain something as close to global peace as possible, will not raise the issues. Individual claimants lack neither the information nor the resources to mount such an attack; disciplinary authorities generally have neither the resources nor will to deal with such complex factual situations, even if a grievance were to be filed.<sup>93</sup> In the absence of large divisions within the tightly concentrated plaintiff asbestos bar, these questions are unlikely to be raised and litigated.

#### *F. Reasonableness of Fees*

Transaction costs in asbestos litigation are extremely large. The 1983 Rand Study concluded that asbestos claimants received about thirty-four percent of the dollars expended by defendants and insurers in handling asbestos litigation; about sixty-six percent of the billions of dollars involved was devoted to litigation costs and plaintiff attorney fees.<sup>94</sup> Defense costs at that time were considerably larger than those of plaintiff expenses and fees.

Rand's 2002 study estimates that the total outlay on asbestos claims through 2000 was about \$54 billion, with asbestos defendants paying about \$20-24 billion and their insurers paying the remainder.<sup>95</sup> Analysts' projections of total claimants and costs vary dramatically but range from one to three million claimants and total cost of between \$200 billion to \$265 billion.<sup>96</sup>

Transaction costs have declined somewhat since 1983 but the decline has been entirely on the defense side, which has benefited from joint defense efforts, insurance coverage agreements, and agreements with many plaintiff firms to settle claims according to a schedule of payments by claim type.<sup>97</sup> As a result, the share of total costs that plaintiffs receive as compensation has increased to about forty-three percent of the total, with transaction costs consuming the remaining fifty-seven percent. Rand concludes "the proportion of the money paid claimants that went to plaintiffs' attorneys remained the same [approximately thirty-one percent of total costs]."<sup>98</sup> Informed interviewees "said that they had not seen any evidence that plaintiff attorneys' fees were reduced."<sup>99</sup>

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93. Note that Texas bar authorities apparently dismissed a grievance complaint concerning the Baron & Budd deposition preparation practices without a detailed factual inquiry into the actual use of the memorandum in question, knowledge of the memo or its use of lawyers in the firm, and testimony of former clients who had been given the memo. See the discussion *supra* notes 48-60 and accompanying text.

94. 2002 Rand Report, *supra* note 1, at 60 (summarizing the 1983 data).

95. *Id.* at 52-55.

96. *Id.* at 77-78.

97. *Id.* at 60-61.

98. *Id.* at 61.

99. *Id.*

The experience of the Manville Trust, one of the trusts established by a bankrupt asbestos defendant to assume claims liability, indicates that average operating expenses are about five percent of the total cost of the claims process (dollars paid to asbestos claimants plus the Trust's administrative expenses).<sup>100</sup> Attorneys' fees are limited to no more than twenty-five percent and claimants received about seventy percent of the total dollars spent by the Trust. The results indicate the savings that are possible through an administrative compensation system.

The flow of compensation to claimants through disease schedules, embodied in the bankruptcy trusts and in the many settlement agreements solvent defendants have made with many plaintiff firms, raises the question of why the share of total costs spent on plaintiff attorney expenses and fees has remained constant over time and not decreased, as defense costs have. Are current attorneys' fees in asbestos litigation reasonable and not excessive?

There are reasons why plaintiff attorney fees in the asbestos field may be unresponsive to competitive forces. As indicated earlier, asbestos litigation is concentrated primarily in ten plaintiff law firms with another ten or so firms handling nearly all of the remainder. Some of these firms litigate in only one or a few jurisdictions; a few operate nationwide. New entrants are limited to attorneys, trained in one of the existing firms, who go out on their own. The costs of entry are high: a large information base of work sites at which asbestos products were manufactured, assembled or handled has to be assembled; relations with union officials, other worker representatives, and referring attorneys have to be established; a reputation must be built that leads major defendants to extend their standing agreements to a newcomer. Moreover, trends in asbestos litigation may be increasing risk and cost: the shrinkage by bankruptcy of defendants with large culpability or large asbestos involvement makes pursuit of new defendants, who have less culpability and market presence, more risky and costly; the recruitment of new claimants by extensive media advertising may be necessary but involves great expense.

Under these circumstances, it is not surprising that price competition is not evident either in lawyer advertising in the asbestos field or in the comments of the informed individuals interviewed by Rand. The indications are that the one-third contingency fee (forty percent when a referral lawyer is involved) continues to be prevalent. Newcomers, who bear large entry costs, compete in terms of service rather than price, needing the cushion of current fee levels to finance some of the entry costs. The structural factors that have been mentioned dampen price competition. An alternative thesis is

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100. *Id.* at 62 (reporting data from 1994-2000).

that asbestos litigation, like a number of other service fields, is a “winners take all” market.<sup>101</sup>

Model Rule 1.5(a) requires that “a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” The reasonableness of a fee is determined by a laundry list of eight factors which point in different directions and make the ultimate conclusion indeterminate and subjective. Except in situations of egregious overreaching of individual and uninformed clients, disciplinary enforcement of the requirement is virtually nonexistent. Fee litigation (e.g., former client versus lawyer) is the primary mechanism by which fee issues are contested and come to light. Special situations, such as class actions, in which a judge must approve the fee, sometimes lead to fee litigation in which a lawyer intervener, representing one or more class members, challenges class counsel’s fee requests. None of these enforcement mechanisms are set up to determine whether or not there are market imperfections that make plaintiff attorneys’ fees in asbestos litigation excessive and unreasonable. A foundation for confident judgments about the reasonableness of current asbestos litigation fees can only be made if empirical research provides more information.

### III. CONCLUSION

The injuries caused by occupational exposure to asbestos caused the early deaths of more than 225,000 Americans.<sup>102</sup> The corporate malefactors that concealed the dangers of asbestos from their workers inflicted a great harm on them as well as the society as a whole. Yet the justifiable desire to punish the wrongdoers and compensate the victims has led to a litigation regime that fails to achieve any of the objectives of the tort system. Many of the most seriously harmed victims die before the legal system provides them with a remedy; those that survive receive reduced compensation because the system that has been created attempts to compensate everyone that can successfully claim exposure whether or not they have suffered an impairment that adversely affects the activities of daily living. Special liability rules relating to proof of exposure and compensation lead asbestos litigation to be concentrated in a relatively small number of court systems, many of which also offer plaintiffs with favorable venue rules, procedural practices that favor plaintiffs by aggregating claims, and plaintiff-friendly judges and juries. In combination, some of these developments implicate due process and “rule of law” concerns.

Deterrence objectives are no longer served by asbestos litigation. The defendants who engaged in wrongdoing many years ago have disappeared from the scene; asbestos itself disappeared from the marketplace nearly

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101. See ROBERT FRANK & PHILIP COOK, *THE WINNER-TAKE-ALL SOCIETY*, *passim* (Free Press 1995) (market characteristics in business, law, entertainment and many other sectors lead to a limited number of people in superstar positions reaping huge rewards, which has adverse effects on the economy and society).

102. 2002 Rand Report, *supra* note 1, at 16.

thirty years ago. The defendants today are a large and expanding group of companies that had some role in using an asbestos component, selling or distributing such a product, or acquiring a company that brought with it some asbestos liability. The costs of asbestos litigation today fall primarily on those many companies and their insurers, and both categories of deep pockets are in danger of ultimate bankruptcy. Their shareholders will be the ultimate losers.

The conduct of lawyers engaged in the prosecution or defense of asbestos claims is not a pleasant or edifying subject. The failure of Congress to enact an administrative compensation system has put asbestos lawyers in a situation of doing the best they can under difficult circumstances. Like most lawyers, they are primarily interested in the field because of its potential of providing everything from a good living to great wealth. Many of these self-interested actors have displayed great ingenuity in their attempts to devise substitutes for the absence of a compensation system of legislative creation. Sometimes their work has placed in doubt the fundamental rights of the justice system or threatened the rule of law by turning private deals between interested parties (class counsel and corporate defendants) into massive public regulatory schemes.

As this paper has shown, the legal profession's ethics rules are relevant to a number of aspects of asbestos litigation. The rules appear to have a clear purpose only rarely and with respect to some issues, especially conflicts of interest and the aggregate settlement rule. Yet even there the rules are rarely discussed and almost never applied. On other issues, such as the mass recruitment of clients, the coaching or improper use of testimony, and the reasonableness of fees, suspicious circumstances abound but there is insufficient empirical evidence to determine whether professional rules that are rarely enforced are in fact being violated.

