

ETHICS MATTERS, TOO: THE SIGNIFICANCE OF  
PROFESSIONAL REGULATION OF ATTORNEY FEES  
AND COSTS IN MASS TORT LITIGATION—  
A RESPONSE TO JUDITH RESNIK

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Professor Resnik begins her paper, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, by noting what she regards as the obvious insufficiency of current law regarding the payment of attorney fees and costs in mass tort lawsuits.<sup>1</sup> According to Professor Resnik, there is a “shared sense that ‘something’ needs to be done,”<sup>2</sup> but there is no consensus on what that “something” is.<sup>3</sup> Professor Resnik’s solution appears to be increased regulation by judges,<sup>4</sup> including heightened attention to the relationships among differently situated lawyers; for example, lawyers who are class counsel or members of a plaintiffs’ steering committee and lawyers who represent individual clients.<sup>5</sup>

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<sup>1</sup> Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2120 (2000) [hereinafter Resnik, *Money Matters*] (“I have no need to rehearse the arguments about the different methods used for paying lawyers or the insufficiency of current law.”).

<sup>2</sup> *Id.*

<sup>3</sup> *Cf. id.* (“But I do need to explain why figuring out *what to do* is difficult.”).

<sup>4</sup> Professor Resnik suggests a range of increased regulatory activity on the part of judges overseeing mass tort class action lawsuits and multidistrict litigation (“MDL”). *See, e.g., id.* at 2170 (“Judges must seek out other participants in order to discharge judicial obligations to test (if not ensure) the adequacy of representation.”); *id.* at 2162-63 (“Judges, now required to regulate advocacy by lawyers, will have to refashion the incentives of lawyers to ensure that subclasses of varying economic values all receive quality representation.”); *id.* at 2171 (“Judicial regulation of contractual fee agreements in tort litigation has already begun to increase.” (footnote omitted)); *id.* at 2181 (recommending “[j]udicial oversight of negotiations”).

<sup>5</sup> *See, e.g., id.* at 2187 (suggesting that judges will have to learn about economic relationships among the lawyers in a mass tort lawsuit in order to monitor the quality of

I teach and write in the area of lawyer ethics, not civil procedure or mass torts. As an ethicist who is not as familiar as others with what is happening in the world of mass torts, I hope I will be forgiven if I have not fully understood the nature and extent of the problem that Professor Resnik is attempting to solve.<sup>6</sup> I have been much informed by Professor Resnik's paper, as well as by her earlier work, including several collaborative efforts that describe, in rich detail, what she refers to as the elaborate "layers of lawyers" who perform various roles in these lawsuits.<sup>7</sup>

In *Money Matters*, Professor Resnik addresses two fundamental problems involving the ethical propriety of lawyer conduct in mass tort litigation.<sup>8</sup> The first problem is directly related to the payment of attorney fees and costs. The concern is that given the enormous amount of money at stake, lawyers are putting their own financial interests above the interests of their clients; that is, lawyers are receiving unreasonably large fee awards<sup>9</sup> and are being reimbursed for unrea-

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representation received by subclasses of claims with different economic values).

<sup>6</sup> Prior to being asked to participate in this Symposium, my only foray into the subject was a paper I wrote on the aggregate settlement rule in mass tort litigation. See Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. (forthcoming 2000) [hereinafter Moore, *The Aggregate Settlement Rule*] (prepared for the Spring 1999 South Texas Law Review Symposium on "Emerging Professional Responsibility Issues in Litigation"). In addition, as Chief Reporter to the ABA Commission on the Evaluation of Rules of Professional Conduct ("Ethics 2000 Commission"), I have solicited and considered various proposals to change the Model Rules in light of developments in mass tort lawsuits, including a helpful, detailed letter from Professor Resnik herself. See *infra* note 46 (suggesting that regulation of fee arrangements should focus "on which lawyer is actually paid what amount of money"). Of course, the views expressed in this paper are mine alone and should not be attributed to the Ethics 2000 Commission.

<sup>7</sup> See, e.g., Dennis E. Curtis & Judith Resnik, *Commentary: Contingency Fees in Mass Torts: Access, Risk and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425 (1998); Judith Resnik, *From 'Cases' to 'Litigation'*, 54 LAW & CONTEMP. PROBS. 5 (1991); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996) [hereinafter Resnik et al., *Individuals Within the Aggregate*].

<sup>8</sup> Professor Resnik also discusses the extent to which aggregate litigation presently offers "subsidies" to litigants to enable them to bring their claims to the attention of courts. See, e.g., Resnik, *Money Matters*, *supra* note 1, at 2155 (explaining that "the civil justice system . . . now offers subsidies and incentives to enter [the system], at least for those whose alleged injuries are widely shared"); *id.* at 2191 (discussing the possibility of additional allocation of public resources to subsidize more process for individual litigants and class members). This article will not respond to the issues raised by this discussion, as they are primarily procedural and not ethical in nature.

<sup>9</sup> Cf. *id.* at 2172 n.180 (citing cases in which judges limited fees to which attorneys would have been entitled under fee agreements, on the ground that such contracts would have "overcompensated" the attorneys).

sonable costs and expenses.<sup>10</sup>

The second problem involving attorney conduct does not relate directly to the payment of fees and costs, but rather reflects concern for the adequacy of a lawyer's representation in a mass tort lawsuit. Here, Professor Resnik makes three separate arguments. First, she notes that lawyers have an interest in obtaining the most money they can get for the least amount of work and then argues that acting on this interest sometimes leads plaintiffs' lawyers to enter into collusive settlements with defendants.<sup>11</sup> Second, she worries that lawyers do not adequately represent the diverse and conflicting interests among different classes of litigants; for example, claimants with strong, high-end claims may be favored while claimants with weak, low-end claims may be neglected.<sup>12</sup> Third, she argues that there is an unfortunate ten-

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<sup>10</sup> See *id.* at 2142 (discussing need to monitor attorneys' submission of requests to be reimbursed for costs).

<sup>11</sup> See *id.* at 2161 (explaining that defendants' and plaintiffs' lawyers are sometimes placed in the role of "co-venturers"). In this section of her paper, Professor Resnik discusses the implications of two recent U.S. Supreme Court cases: *Amchem Products v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999). In both cases, the Court rejected settlement classes, in part because of concerns that the lawyers for the classes were not adequately representing the members of the class. See Resnik, *Money Matters*, *supra* note 1, at 2167-68. As Professor Resnik notes, the Court observed in *Ortiz* that "an 'enormous fee' can 'relax' the 'zeal for the client.'" *Id.* For an extended critique of the conduct of class counsel in the case that gave rise to the *Amchem* opinion, see Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995) (describing the collusion between class counsel and defendants that occurred in that case). For a detailed discussion of the dangers of collusion in mass tort lawsuits generally, see, for example, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995). See also Moore, *The Aggregate Settlement Rule*, *supra* note 6 (manuscript at 102, on file with the *University of Pennsylvania Law Review*) (discussing problems with class actions, including "faulty incentive mechanisms for class action lawyers").

This argument is related to but not identical with the first problem mentioned. Here the concern is not merely that the attorney has been overcompensated for the amount or value of the legal services performed, but rather that the prospect of extraordinarily high legal fees may cause the lawyer to compromise the lawyer's fiduciary obligations to the client or clients. See *id.* (manuscript at 126) (stating that there is a concern that the lawyer's interest in realizing a potentially enormous legal fee will cause the lawyer to take unfair advantages of his client).

<sup>12</sup> See Resnik, *Money Matters*, *supra* note 1, at 2169 (explaining that lawyers might favor some claims over others). The conflicts between various subgroups within the class were the primary focus of the Court's concern in *Amchem*. An additional problem present in that case was the fact that class counsel was representing not only various subgroups within the class, but also individual claimants with pending cases outside the class. See generally Koniak, *supra* note 11, at 1064 (noting that "CCR and class counsel settled over 14,000 asbestos cases outside the class framework while they were negotiating the *Georgine* class action" (citation omitted)). For a discussion of the nature of the conflicts of interest between "high-end" and "low-end" claims, see Moore, *The Aggregate*

dency among some lawyers to focus exclusively on achieving financial outcomes, thereby ignoring the needs and desires of litigants to be involved in the litigation process.<sup>13</sup>

As to the first problem, there is no question that some lawyers charge or seek excessive fees in mass tort (and other) litigation.<sup>14</sup> Professor Resnik does not discuss in detail what makes some fees excessive, so neither will I. Rather, she simply urges judges to actively monitor lawyer conduct in this area.<sup>15</sup>

I agree that judges should actively monitor attorney fees and costs. I do not agree, however, that there is any need for vigorous justification of this aspect of a judge's role. In particular, I reject the argument that judges in aggregated cases function effectively as clients<sup>16</sup> and that it is *because* they do so that they should actively monitor attorney fees and costs.<sup>17</sup>

*Settlement Rule*, *supra* note 6, (manuscript at 119) (discussing that "high stakes" plaintiffs benefit the least from class actions, while victims whose claims are the smallest or most questionable benefit most from "damage averaging").

<sup>13</sup> See Resnik, *Money Matters*, *supra* note 1, at 2128, 2166-67 (explaining that the need of clients to engage in the justice system is often ignored due to the focus on economic outcomes as a measure of litigation success). As Professor Resnik notes, this argument received extended treatment in her earlier collaborative work. See generally Resnik et al., *Individuals Within the Aggregate*, *supra* note 7, at 381-401 (explaining the role of courts in providing opportunities for public participation).

<sup>14</sup> See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912, 922 (D.P.R. 1991) (modifying contingent fee contracts exceeding 25% for minors and incompetent plaintiffs and 33% for adult clients).

<sup>15</sup> See Resnik, *Money Matters*, *supra* note 1, at 2172 ("Judicial regulation of contractual fee agreements in tort litigation has already begun to increase." (footnote omitted)).

<sup>16</sup> A pervasive theme of *Money Matters* is that judges are serving not only as "fiduciaries" of an aggregate, but also are serving "functionally" as clients. *Id.* at 2163; see also *id.* at 2129 ("My argument is that, in mass torts, judges *are* the market. Judges now have the power of payment, serving more like clients and consumers . . ."); *id.* at 2162 ("Return to the image of judges as purchasers and allocators of legal services."). This theme was even more pronounced in an earlier draft of the article. See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation* 13 (Nov. 11, 2000) (unpublished manuscript, on file with the *University of Pennsylvania Law Review*).

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Here is where money matters. Who pays whom for the work done on behalf of the civil justice system that now refuses to accede to multi-party agreements without assurances of multi-faceted representation? . . .

Return to the image of judges as purchasers and allocators of legal services. Understand now that the "value" of aggregation accrues not only to the litigants but also to the civil justice system; a system concerned with the processing of a high volume of disputes, eager to accomplish inter-litigant equity, and desirous of policing inappropriate attorney behavior. In fact, settlements of aggregates help to vindicate a range of public aspirations for the civil justice

The ability to determine a fee award in the absence of individual fee agreements<sup>18</sup> does *not* turn judges into fee-paying clients. Indeed, the law of lawyering has never equated payment of legal fees with client status.<sup>19</sup> Moreover, given the perceived need to enhance attorney loyalty to the litigants themselves—including both individual clients and members of a class<sup>20</sup>—I believe it is potentially dangerous to rely on the metaphor of judge as client or purchaser of legal services in order to justify judicial activism in valuing the legal services performed.<sup>21</sup> Rather, I would prefer to rely on the more traditional role of a judge in a quantum meruit action, in which judges commonly award attorney fees in the absence of valid fee agreements, valuing the benefits conferred by lawyers to their clients.<sup>22</sup>

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system. Therefore, the “value” of such tort aggregates cannot only be measured by the dollars paid to the litigant cohort but also must take into account the benefits bestowed on the civil justice system, which becomes able to process a group of similarly situated claimants in a fashion that does not undermine the legitimacy of courts.

Resnik, *Money Matters*, *supra* note 2, at 2162.

<sup>18</sup> As Professor Resnik notes, judges derive their power to award fees and costs in mass tort lawsuits through the common law common fund doctrine, as well as under specific statutes. *See id.* at 2139, 2143 n.71; *see also* Resnik et al., *Individuals Within the Aggregate*, *supra* note 7, at 337 (explaining that judges turn to the common fund when the case does not involve either a class action or a statutory fee shift).

<sup>19</sup> *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1999) (providing that a lawyer may “accept compensation for representing a client *from one other than the client*” under certain conditions, including obtaining the informed consent of the client (emphasis added)). For a discussion of the ethical dilemmas associated with so-called “third-party payment,” *see generally* Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585 (1997).

Judges making fee awards pursuant to either the common law common fund doctrine or statutory fee-shifting schemes would not ordinarily be viewed as “third-party payers.” If, however, judges come to view themselves as “purchasers of legal services,” some of the dangers associated with third-party payment may arise. *See infra* notes 20-21 and accompanying text.

<sup>20</sup> *See supra* notes 11-13 and accompanying text (discussing concerns raised in *Amchem* and *Ortiz* regarding potential conflicts of interests among various claimants in class action suits); *see also* Moore, *The Aggregate Settlement Rule*, *supra* note 6, at Part V.B.2 (discussing the incentives arising from the aggregation of large numbers of claims for lawyers to promote their own financial gain at the expense of their clients).

<sup>21</sup> *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 443 (1986) (noting that the central concern underlying ethical rules regulating third-party payment is that “the lawyer’s loyalty may be influenced by the fee-payer’s interests and those may conflict with the interests of the lawyer’s client”).

<sup>22</sup> *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 51 & cmt. a (Proposed Final Draft No. 1, 1996) (setting forth “a lawyer’s right to recover a fair fee in quantum meruit for legal services provided to a client when a lawyer and client have not agreed upon another fee”). Judges also value legal services provided when they determine whether a particular fee charged by a lawyer is greater than is reasonable under the circumstances, whether in adjudicating fee disputes between lawyers and

Similarly, I see no need for any elaborate justification of a judge's ability to regulate even in situations where lawyers have entered into written fee agreements with individual plaintiffs. If, as in *In re Copley Pharmaceutical, Inc.*,<sup>23</sup> a judge reduces the percentage of fees recoverable under these private agreements, in order to pay for the attorney fees of class counsel or members of a plaintiffs' steering committee,<sup>24</sup> I see nothing startling or radical in that judicial conduct.

Rather, I would analogize this particular form of judicial activism to the traditional role of a judge who monitors the reasonableness of attorney fee agreements.<sup>25</sup> This monitoring occurs in disciplinary proceedings (albeit rarely) and more frequently in actions to collect a fee or void a fee agreement.<sup>26</sup> In addition, judges have traditionally reviewed the reasonableness of certain fee agreements before approving settlements, for example, in cases involving minors.<sup>27</sup>

Turning now to the second set of problems—that is, those related to the fairness of settlement agreements and the adequacy of the lawyer's representation<sup>28</sup>—I believe Professor Resnik is saying that the way in which attorney fees and costs are paid in mass tort lawsuits exacerbates attorney loyalty problems inherent in both class action and con-

clients or when courts are asked to discipline a lawyer for charging excessive fees. See *id.* § 46 cmt. a (explaining the prohibition on unreasonable fees as it applies in various contexts).

<sup>23</sup> 1 F. Supp. 2d 1407 (D. Wyo. 1998).

<sup>24</sup> In *Copley Pharmaceutical*, the court ordered that each private attorney would receive only one third of his or her bargained-for contingency fee in order to help provide for class counsel's fee award of 13% of the \$150 million common fund created. The court also reduced each class claimant's award by 13% for class counsel's award and by a further 2% for payment of expenses. See *id.* at 1418 (determining attorneys' fees using the percentage method).

<sup>25</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 22, § 46 ("A lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law.").

<sup>26</sup> See *id.* § 46 cmt. a ("In many jurisdictions, authorities have been reluctant to discipline lawyers on such grounds. For a variety of reasons, discipline might be withheld for charging a fee that would nevertheless be set aside as unreasonable in a fee-dispute proceeding."). For an example of judicial regulation in this area, see *United States v. Strawser*, 800 F.2d 704 (7th Cir. 1986) (affirming order requiring a lawyer to return more than half of his trial fee to U.S. Treasury, which was paying appointed counsel on appeal from conviction of former client, on the ground that the fee was "exorbitant and unreasonable"); and *Bushman v. State Bar*, 522 P.2d 312 (Cal. 1974) (disciplining lawyer for charging an excessive fee in a child custody case).

<sup>27</sup> See WOLFRAM, *supra* note 21, § 9.3.2, at 523-24 (discussing prohibitions on fees not approved by court for wards of court and other vulnerable parties).

<sup>28</sup> See *supra* notes 11-13 and accompanying text (introducing Professor Resnik's concerns regarding inadequate representation in mass tort lawsuits).

tingency fee litigation.<sup>29</sup> If this is so, then this is clearly a problem that needs to be addressed.

In addition, however, she may be saying something else that is far more controversial—that judges should be using the payment of fees and costs as a means of changing the behavior of lawyers in socially desirable ways. For example, judges should structure fees in a way that increases the lawyer's attention to the diversity of interests among litigants or that increases the participation of litigants in the lawsuit.<sup>30</sup> I have serious concerns about whether increased judicial activism of the sort proposed by Professor Resnik is either necessary or desirable. Indeed, more traditional aspects of ethics and the law of lawyering have a substantial role to play, at least in the case of lawyers representing individual clients.

For example, lawyers representing individual clients are already under an ethical obligation to keep their clients informed of the status of a matter and to comply with reasonable requests for information.<sup>31</sup> It is unclear why we need additional financial incentives to get lawyers to do what they are already required to do,<sup>32</sup> even when their role is

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<sup>29</sup> In this respect, the problem appears to be that when lawyers represent either large numbers of individual clients or classes composed of large numbers of members, neither individual clients nor class members are in a position to monitor the lawyer's conduct; thus, courts must step in and perform a more active monitoring role. See Resnik, *Money Matters*, *supra* note 1, at 2160-61 (discussing adequacy of settlement agreements); *id.* at 2176-77 ("Measures used to value attorneys' work need to be revisited.").

<sup>30</sup> See *supra* note 17. Thus, when Professor Resnik says that judges should be "paying for process," what she means is that judges should structure payment incentives to encourage lawyers to perform tasks that are ordinarily not rewarded in the current fee award regime. Resnik, *Money Matters*, *supra* note 1, at Part IV.B (urging courts to structure aggregate litigation to maximize the role of individually retained plaintiffs' attorneys).

#### Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

#### MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1999).

<sup>32</sup> Although there are certainly difficulties associated with keeping a large number of clients informed regarding the status of a case, there are various mechanisms that lawyers can and do employ to keep their clients reasonably informed. See Moore, *The Aggregate Settlement Rule*, *supra* note 6, at Part IV.A (discussing the variety of ways attorneys are able to communicate with their clients). It may be true that many (perhaps most) lawyers in mass tort lawsuits do not in fact maintain appropriate relationships with their clients because of their unwillingness to devote the necessary time and energy to do so. See *id.* (manuscript at 112 n.78) (questioning "whether most attorneys do in fact maintain appropriate relationships in mass cases"). But it is also true that

somewhat circumscribed by a plaintiffs' steering committee.<sup>33</sup> Similarly, lawyers representing individual clients are already under an obligation to avoid impermissible conflicts among their clients.<sup>34</sup> Moreover, under the aggregate settlement rule, lawyers are prohibited from entering into block or aggregate settlements without first informing the clients of the existence and nature of all the claims and the par-

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"even in simple, bi-polar litigation, it is not uncommon for lawyers to fail to keep their clients adequately informed." *Id.* The fact that many lawyers violate their ethical obligations under existing rules is not, in itself, a reason that judges should create special financial incentives to motivate them to comply with these obligations. *Cf. id.* (arguing that the failure of lawyers to comply with their obligations under Rule 1.4 is not a reason to relax the requirement of that rule).

<sup>33</sup> See Resnik, *Money Matters*, *supra* note 1, at 2176 (asserting that it will be "insufficient [to rely] on self-review by steering committee members or oversight from [other] lawyers" for several reasons, including the fact that "difficult and costly work is entailed in digesting accountants' reports of moneys spent by lead lawyers and their staffs"). For example, Professor Resnik cites and critiques the decision in *In re Dupont Plaza Hotel Fire Litigation*, 111 F.3d 220, 238 (1st Cir. 1997), in which the court rejected the complaints of lawyers representing individual clients regarding alleged overspending by members of the plaintiffs' steering committee, in part because the complaining lawyers did not monitor costs more closely during earlier phases of the litigation. According to Resnik, "[t]o put such burdens of reconstruction and evaluation [of PSC bills and expense reports] on lawyers representing individual clients in a mass tort case is to misperceive both those lawyers' capacities and incentives." Resnik, *Money Matters*, *supra* note 1, at 2175 n.187 (emphasis added). Certainly, such lawyers ought not be required to do more than is reasonably within their capacities, but the fact that they do not have sufficient *financial incentive* to do so is irrelevant. If they are continuing to be paid under their contingent fee contracts (even if reduced somewhat to help reimburse the PSC, see *supra* note 24 and accompanying text), then they are required to perform some work to earn their fees, that is, unless they are being paid a pure referral fee, which is unethical in many jurisdictions. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1999) (stating that fee division among lawyers is proper only if "the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation").

<sup>34</sup> The *Model Rules of Professional Conduct* provide:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1999). For a discussion of the application of Rule 1.7(b) to the representation of individual clients in mass tort lawsuits, see Moore, *The Aggregate Settlement Rule*, *supra* note 6, (manuscript at 125) (including the ethical propriety of a lawyer asking multiple clients to be bound by a majority or super-majority vote to accept an aggregate settlement offer).



participation of each person in the settlement.<sup>35</sup>

Professor Resnik might well respond that it is all well and good that lawyers have these obligations under current ethical rules, but that these rules are regularly violated with impunity. This may well be true, although I think that she gives insufficient attention to the role played by professional norms in shaping lawyers' conduct.<sup>36</sup> In any event, what she calls a tradition of "laissez-faire lawyering"<sup>37</sup> has never depended on an assumption that individual clients could effectively monitor the performance of their lawyers.<sup>38</sup> Indeed, the extent to

<sup>35</sup> The *Model Rules of Professional Conduct* provide:

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1999). For contrasting views of the pros and cons of this rule in mass tort lawsuits, compare Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997) (arguing that the rule should be abolished), with Moore, *The Aggregate Settlement Rule*, *supra* note 6 (arguing that the rule should be retained).

<sup>36</sup> See, e.g., Robert L. Nelson & David M. Trubeck, *New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* 1, 22-23 (Robert L. Nelson et al. eds., 1992):

The norms, traditions and practices that make up [professionalism] serve a variety of purposes. They generate the claims that allow lawyers to maintain jurisdiction over work. They become part of each lawyer's professional identity, to some extent providing coherence and meaning in everyday life and allowing lawyers to respond to new situations in "appropriate" ways. [Professionalism] provide[s] a set of dispositions that lawyers use to interpret their situations and orient their choices according to an internalized world view which delimits but does not necessarily determine action.

Aside from the pull of professional norms, it is sometimes in a lawyer's self-interest to comply with professional rules. For example, one mass tort lawyer argues that one way to enhance the likelihood of plaintiffs agreeing to accept an aggregate settlement offer is to develop the attorney-client relationship by regularly providing plaintiffs with as much information as possible about the progress of the lawsuit and affording them opportunities to consult regularly with members of the lawyer's staff. See Moore, *The Aggregate Settlement Rule*, *supra* note 6 (manuscript at 116 n.98).

<sup>37</sup> Professor Resnik uses the term "laissez-faire lawyering" throughout the article and contrasts it with what she calls "regulated advocacy." See Resnik, *Money Matters*, *supra* note 1, at Part II.C. The former refers to a lack of judicial intervention, whereas the latter refers to a "bundle of efforts by the judiciary to direct lawyers to pursue certain goals," including settlement. *Id.* at 2142.

<sup>38</sup> An example of Professor Resnik's view of the underpinnings of what she calls "laissez-faire lawyering":

[U]nder current law, judges need make no inquires when dismissing cases or entering consent judgments. The unregulated attorney-client unit is a contractually-bound unit. Agency-principal relations are presumed sufficient, in that the lawyer is imagined to be monitored by the client and the charter for representation controlled by that client. Consent by the participants to

which clients are necessarily dependent on the trustworthiness of their lawyers is what justifies the role of the lawyer as a fiduciary.<sup>39</sup> Rather, if judges do not typically review settlement agreements in individual cases or otherwise actively monitor attorney-client relationships, it is because lawyers, as professionals, are expected to adhere to professional norms.<sup>40</sup> Nevertheless, contrary to Professor Resnik's image of "laissez-faire lawyering," courts have always maintained a significant oversight role.

In addition to the role that judges play in directly monitoring attorney fees and costs,<sup>41</sup> there are a number of traditional routes by which litigants seek redress for attorney misconduct. For example, violations of conflict of interest rules are sanctionable through legal malpractice and breach of fiduciary lawsuits.<sup>42</sup> Perhaps of even greater concern to mass tort lawyers today is the recent decision of the Texas Supreme Court in *Burrow v. Arce*, in which the court held that lawyers may be subject to total or partial fee forfeiture as a sanction for serious

agreements therefore avoids the need for adjudicatory processes.

*Id.* at 2169.

<sup>39</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 22, ch. 2 introductory note ("A lawyer is a fiduciary agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity."); see also Moore, *The Aggregate Settlement Rule*, *supra* note 6, at Part V.C.1 (applying the fiduciary model to argue in favor of retaining the aggregate settlement rule, under which multiple clients are not permitted to consent, *ex ante*, to commit themselves to follow the vote of a majority or super-majority of the clients to accept an aggregate offer of settlement).

<sup>40</sup> Indeed, one of the hallmarks of a "profession" is that it is self-regulating. See, e.g., ABA COMM. ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) (approving sociologist Eliot Freidson's definition of a profession as "[a]n occupation whose members have special privileges, such as exclusive licensing, that are justified by" a number of assumptions, including "[t]hat the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest"). For a discussion of various theories of the professions, see Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773.

<sup>41</sup> See *supra* notes 25-27 and accompanying text (discussing the traditional role of judges monitoring the reasonableness of fee agreements in disciplinary actions, in adjudicating fee disputes, and in cases involving minors).

<sup>42</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 22, § 201 cmt. f (discussing sanctions for violation of lawyer conflict of interest rules, including discipline, malpractice and fee forfeiture); see also *id.* § 72 (Tentative Draft No. 8, 1997) (noting that for purposes of civil liability, the lawyer owes the client a duty to fulfill fiduciary duties to the client). For a discussion of the extent to which malpractice and breach of fiduciary lawsuits are increasingly important in the regulation of lawyers' conflict of interest duties, see Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 541-44 (1997).

violations of an ethical rule.<sup>43</sup> *Burrow* involved allegations that mass tort lawyers breached their fiduciary duties to their clients by violating the aggregate settlement rule.<sup>44</sup>

Perhaps legal ethics can and should do more to ameliorate what Professor Resnik sees as serious lapses in lawyers' ethical conduct in mass tort lawsuits. I doubt, however, that much can be done by way of amending rules of professional conduct. For example, fee agreements that structure the "layers of lawyers"<sup>45</sup> in aggregate litigation<sup>46</sup> are already governed by Rule 1.5.<sup>47</sup> In addition, Rule 1.5 requires that

<sup>43</sup> 997 S.W.2d 229, 246 (Tex. 1999).

<sup>44</sup> *Burrow* involved a plant explosion in which most of the victims were represented by a single law firm with 126 clients. See Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6. In their subsequent lawsuit against the law firm, the claimants alleged that the lawyers did not develop or evaluate their claims individually, but rather reached an aggregate settlement without prior authority, at which time they "summoned" the claimants for a 20-minute meeting to discuss the settlement. See *Arce v. Burrow*, 958 S.W.2d 239, 243 (Tex. App. 1997), *rev'd*, 997 S.W.2d 229 (Tex. 1999) (presenting the facts underlying the claimant's lawsuit); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 22, § 49 (discussing when fee forfeiture may be appropriate).

<sup>45</sup> See *supra* note 7 and accompanying text.

<sup>46</sup> Professor Resnik is concerned that the fee arrangements among these lawyers may impair the structural integrity of a settlement agreement because they may weaken an attorney's loyalty to a subgroup of clients or class members. See Resnik, *Money Matters*, *supra* note 1, at 2186-87 & n.218 (discussing how loyalty to clients may be affected by such things as referral fees); see also Letter from Judith Resnik, Professor, Yale Law School, to Nancy J. Moore, Professor, Boston University School of Law 2 (July 19, 1999) (on file with the *University of Pennsylvania Law Review*) [hereinafter Resnik Letter]:

The issue of who is to be compensated turns on what fee arrangements exist among the layers of lawyers participating in any given litigation. As you know, many courts have not insisted on learning the financial arrangements but have simply given a kind of "block grant" to a firm or a particular lawyer, who may then redivide it. If regulation is to be effective, it has to be focused on which lawyer is actually paid what amount of money. However, judicial incentives to regulate are thinned by judicial dependence on lawyers within aggregates to agree to settlements.

<sup>47</sup> Rule 1.5:

(e) A division of fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and
- (3) the total fee is reasonable.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1999).

Professor Resnik notes the existence of this rule and argues that its enforcement requires judges to "inquire into the financing of the litigation and the organizational

all fees be "reasonable."<sup>48</sup> It might help to clarify that one of the factors that determines whether a contingent fee is reasonable is the degree of risk to the lawyer taking the case,<sup>49</sup> but whether particular fee arrangements are proper may be best left to courts to decide on an individual basis.<sup>50</sup> Similarly, although litigation costs and expenses should also be "reasonable,"<sup>51</sup> it is doubtful that ethics codes can

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structure of the lawyering units to learn whether subclass lawyers . . . have reasons to be loyal to a subgroup of clients and the degree to which their own fiscal and professional well-being turns on being a team player within a lawyer cohort." Resnik, *Money Matters*, *supra* note 1, at 2187. Rule 1.5(e), however, may not apply to lawyers representing a class, i.e., a lawyer with no individual clients. *Cf. infra* note 58 and accompanying text (stating that although the lawyer owes a fiduciary duty to each member of the class, unnamed members of class are not clients of the class lawyer). For a discussion of the extent to which the Rules of Professional Conduct might be amended to directly address class representation, see *infra* notes 53-60 and accompanying text.

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#### Rule 1.5

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1999).

<sup>49</sup> The Ethics 2000 Commission has tentatively proposed amending Rule 1.5(a) (8) so that a court or disciplinary agency would consider not merely "whether the fee is fixed or contingent," as provided by current Rule 1.5(a) (8), but rather "the degree of risk assumed by the lawyer when the fee is fixed or contingent on the outcome of the matter." ABA Ethics 2000 Comm'n on the Evaluation of the Rules of Prof'l Conduct, Proposed Rule 1.5, Public Discussion Draft (Nov. 15, 1999) Rule 1.5(a) (8), *available at* <<http://www.abanet.org/cpr/rule15draft.html>>.

<sup>50</sup> Professor Resnik suggests that lawyer codes might be amended to provide for better timing of "lawyer payouts" in various forms of aggregated litigation, i.e., that "fee distributions should occur periodically but final payments should not be made until all aspects of the claims process (including the provision of auxiliary services that sometimes is a part of large scale remedies) have been completed." Resnik Letter, *supra* note 46, at 2; *see also* Resnik, *Money Matters*, *supra* note 1, at 2181 n.204 (suggesting periodic payment of lawyer fees to ensure legal assistance until all claimants have received benefits). This type of regulation appears better suited for courts overseeing particular litigation than for codification in disciplinary rules.

<sup>51</sup> *Cf. Resnik, Money Matters, supra* note 1, at 2175-77 (noting the need to monitor costs and expenses of lead counsel).

themselves specify what charges are appropriate in particular cases.<sup>52</sup>

There is, of course, a substantial gap in the lawyer codes, and that is the failure to address the ethical dilemmas of class action lawyers.<sup>53</sup> The ABA has been urged repeatedly to fill this gap, but unfortunately, it has been difficult to identify specific standards that would be useful in this complex and evolving area of the law.<sup>54</sup> Professor Resnik has suggested that codes should clarify who is the "client" to whom the lawyer is ethically obliged,<sup>55</sup> but there simply is no easy answer to this difficult question.<sup>56</sup> In any event, the unnamed members most at risk

<sup>52</sup> Professor Resnik suggests that the codes might address "the forms of expenses permitted to be charged." Resnik Letter, *supra* note 46, at 2; cf. Resnik, *Money Matters*, *supra* note 1, at 2177 n.191 (referring to "formulas for the recoupment of costs", such as guidelines for government employees). As Professor Resnik herself recognizes, however, identifying the sorts of "costs" that are appropriately charged in litigation is a complex question that may depend on the nature of the litigation, for example, whether the fee is contingent or hourly. *Id.* at 2174 n.184 (discussing different systems employed by contingent fee and hourly wage lawyers). At present, lawyers are expected to discuss with their clients at the outset of the representation not only how the fee will be determined, but also the lawyer's method of billing and what items will be charged as costs. *See id.* (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993), which notes that all attorneys are expected to specify billing methods and costs in advance); *see also* ABA Comm'n on Evaluation of the Rules of Professional Conduct, Rule 1.5(b) (Proposed Rule 1.5 Public Discussion Draft Nov. 15, 1999) (requiring a lawyer to communicate the basis for both the legal fee and costs, in writing, at the outset of the representation).

<sup>53</sup> *See, e.g.*, Brian J. Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct*, 27 LOY. L. REV. 1047, 1048-49 (1981) (noting that the Model Rules of Professional Conduct and the Code of Professional Responsibility provide little ethical guidance to the class action practitioner).

<sup>54</sup> For example, one commentator who decries the ABA rule drafters' "continuing neglect" of the ethical problems of class action lawyers, offers a rule proposal of such generality that it would provide virtually no guidance to practitioners:

Rule 3.10 Responsibility of Class Counsel

The lawyer representing a class of individuals in a class action owes a primary duty of loyalty to members of the class defined by the original pleadings filed on behalf of the class, until such definition is amended by leave of court.

*Id.* at 1075 (suggesting that the rule could "provide a foundation for development of a coherent body of ethical opinions and comments to guide counsel involved in class actions").

<sup>55</sup> *See* Resnik Letter, *supra* note 46, at 2 (suggesting that lawyers should identify clients to whom they are ethically obliged when considering aggregate settlements).

<sup>56</sup> *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 22, § 26 cmt. f ("Class actions may pose difficult questions of client identification."); *see also* HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 15.02-03 (3d ed. 1992) (discussing risks to absent class members and protection of such members); Note, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1247, 1447-57 (1981) (noting that the code's premise of a unitary client is undermined by the number of individuals considered to be the "client"). Client identification is also problematic in a number of other different areas. As a result, lawyer codes typi-

are almost certainly *not* clients in the normal sense,<sup>57</sup> although a class lawyer owes fiduciary duties to each member of the class.<sup>58</sup> Even here, the extent of the duty owed may differ according to the setting.<sup>59</sup> In the final analysis, the code format may be insufficiently flexible to adequately communicate the duties of class action counsel. Given that the resolution of ethical issues often depends on the principles set forth in other law, it may be preferable to continue to look to courts to provide further guidance,<sup>60</sup> either by promulgating additional procedural rules or by addressing the ethical obligations of class lawyers while ruling on various procedural aspects of class action litigation.<sup>61</sup>

From my point of view, the significance of Professor Resnik's paper is that it appears to be the first scholarly examination that I know of (other than that contained in her prior work) that addresses the ethical problems associated with attorneys fees and costs in mass tort litigation, particularly those arising from the intricate "layers of lawyers" in many of these cases.<sup>62</sup> Until recently, legal ethics professors have effectively ignored the practices of lawyers in mass tort cases, par-

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cally leave it to "principles of substantive law external to [the codes to] determine whether a client-lawyer relationship exists." MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Scope, & Terminology para. 15 (1999).

<sup>57</sup> See, e.g., Note, *supra* note 56, at 1453 (stating that neither the named representatives nor the absent class members control the lawyers' actions). But see NEWBERG & CONTE, *supra* note 56, § 1503 (describing a perspective in which the relationship between class counsel and absent class members is viewed as a "constructive attorney-client relationship" in order to analyze issues like solicitation and communication).

<sup>58</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 22, § 26 cmt. f ("Lawyers in class actions thus have duties to the class as well as to the class representatives.").

<sup>59</sup> For example, the lawyer's duties may differ depending on whether the class has been certified. See, e.g., Waid, *supra* note 53, at 1063-64 (discussing differences in duties based on certification, such as the ability to negotiate settlements).

<sup>60</sup> See WOLFRAM, *supra* note 21, at 493 ("[T]he matter has been left, correctly, to regulation through the close judicial supervision that ideally attends class actions.").

<sup>61</sup> In saying so, I do not mean to point back toward the type of procedural reforms that Professor Resnik suggests when she urges judges to use their power to award attorneys fees and costs as a means of forcing lawyers to comply with their ethical duties. Rather, I have in mind either the promulgation of additional rules of civil procedure or the adoption of judicial opinions that clearly state the obligations of lawyers in class actions such as obligations that must be satisfied in order for a class to be certified or a settlement approved. In the course of such opinions, judges may also expand on the ethical duties of lawyers, e.g., stating the circumstances under which lawyers are entitled to be reimbursed for the costs and expenses of litigation. Such precedent will create guidance that is helpful to lawyers, even though it is not expressly codified in the rules of professional conduct.

<sup>62</sup> See *supra* note 7 and accompanying text (discussing multiple roles played by plaintiffs' lawyers in class actions).

ticularly those concerning the lawyer's role in consolidated individual actions.<sup>63</sup> Although these issues are sufficiently complex that they are unlikely to be resolved by amendments to codes of professional ethics, they are certainly deserving of more extensive scholarly treatment by legal ethics professors. I congratulate Professor Resnik for recognizing and bringing these questions to the surface, and I hope that we ethicists will accept the challenge to assist her and other proceduralists in searching for the answers to these and other ethical dilemmas of mass tort lawyers.

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<sup>63</sup> See Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1474-75 (1998) ("[C]ase law concerning counsel's permitted role in consensual group lawsuits, as in class actions, is ambiguous and immature."); Silver & Baker, *supra* note 35, at 736 ("[S]cholarly examination of the aggregate settlement rule and the practices to which it relates is long overdue."). For other examples of recent attention by legal ethics scholars to issues raised by mass tort lawsuits, see *The 1998 Mass Tort Symposium: Legal Ethical Issues at the Cutting Edge of Substantive and Procedural Law*, 17 REV. LITIG. 419 (1998); Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995).

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