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## Ethics and the Settlement of Mass Torts: When the Rules Meet the Road

Carrie Menkel-Meadow

*Georgetown University Law Center*, meadow@law.georgetown.edu

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# ETHICS AND THE SETTLEMENTS OF MASS TORTS: WHEN THE RULES MEET THE ROAD

Carrie Menkel-Meadow†

† Professor of Law, UCLA; Visiting Professor of Law, Georgetown Law Center. I come to this project as someone who would not sign on to the "Law Professors' Brief" in *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994). As a legal ethicist, however, I agreed with some of what was written in that brief, most notably that the strict application of some of the ethics rules suggests that there may have been some violations of those rules in that class action settlement of asbestos cases. I also think that there may have been some "troubling" activity on the part of the participants to the case that would not necessarily constitute formal ethical violations, but that might offend our notions of justice, fairness, equity, "proper" attorney client relations, and the like.

Like others contributing to this symposium, I will situate myself in relation to this particular case, as I make claims for what I think the larger issues are for our system to resolve. I attended the closing arguments in *Georgine*. I have read many, though clearly not all, of the legal documents filed, as well as many of the transcripts of the fairness hearing in *Georgine* and several other of the recent "mass torts class action settlements" that have provoked this symposium. I have been a mediator for the Wellington Asbestos Claim Facility (WACF), mediating disputes between manufacturers and their insurers. The WACF is the predecessor to the Center for Claims Resolution (CCR). See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13 (1990); Harry H. Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-85). I am currently serving as an arbitrator in the Dalkon Shield Claimants' Trust litigation. See Georgene Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992); see also Kenneth Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79 (1990). As a practicing lawyer, I served most often as a plaintiffs' lawyer and used the class action device most often in institutional (prison and welfare) reform and employment discrimination cases. I teach and write about legal ethics, and I have spent most of my legal career (as a law professor, practicing attorney, and third party neutral) teaching, writing and practicing on issues having to do with settlement, negotiation, and achieving what I call "quality solutions" to difficult legal problems. As a clinical teacher I facilitate students and lawyers in learning how to counsel clients and negotiate with other parties in disputes and transactions.

The specific issues implicated in mass tort class action settlements raise very significant general issues about the ethics of settlements. This forces me to combine my scholarly questions with the observations I have made as a participant in some of these cases. As I suggested in Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Legal Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH L.J. 287 (1988), we have much to learn from engaged empirical study (such as structured participant observation) in actual cases, but it is also clear that many of the participants in this symposium (myself included) may have to confront the problem of how participation and commitment to positions also leads to potential biases. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990), Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413, and Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987), for thoughtful discussions about how our "positionality" affects what we conclude about the world. It is because I have been involved in the contextual complexity of these cases that I could not sign a brief that expressed more abstract and general positions.

I must thank those who contributed in one way or another to my ongoing thinking on these difficult issues and who read or commented on various drafts: Robert Meadow, Laura Macklin, Wendy White, Roger Cramton, Geoffrey Hazard, Sam Dash, Susan Koniak,

"Determining when interests are so adverse that the concurrent representation should not be permitted is often a *difficult* question."<sup>1</sup>

### INTRODUCTION

The settlement of mass torts through the class action device presents some difficult and troubling issues, including important questions of due process, fairness, justice, efficiency, equality, equity, and ethics. In this context, some of these foundational values conflict with each other and must be "resolved" by judges who must decide actual cases. In analyzing the applicable laws and rules (class action rules, constitutional provisions, and ethics rules) we find answers or suggestions that are often ambiguous or contradictory. All of these unresolved ambiguities raise the question of whether mass torts are any different from any number of difficult cases our legal system faces.<sup>2</sup> I do think that mass torts present us with some novel issues<sup>3</sup> that question the transsubstantivity of our laws and rules. While others in this symposium focus on the procedural and substantive issues raised by such cases, I will focus on the ethics of such settlements in two senses: First, at the level of professional ethics, I will examine what is ethically permissible behavior in the way in which such settlements are arranged. Second, at the higher, broader level of ethics, I

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Lisa Heinzerling, Mark Spiegel, Howard Lesnick, Gary Schwartz, and those at the symposium, especially Charles Wolfram and John Leubsdorf who formally commented on the paper. I also thank the lawyers and special masters in some of the discussed cases for letting me interview them, both formally and informally. For excellent research assistance, I thank Sheryl Lincoln.

<sup>1</sup> GEOFFREY HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERS* 621 (2d ed. 1994) (emphasis added). In *Georgine*, Geoffrey Hazard testified as an expert on behalf of the settling parties that there was no conflict of interest in the representation by class counsel of current claimants even though class counsel owed the class of future claimants the duties of a fiduciary. *Georgine*, 157 F.R.D. at 302. Roger Cramton and Susan Koniak, *id.* at 302-03, both testified as experts for the objectors that there was a conflict of interest in the concurrent representation of class counsel for the "future claimants" (including those not yet impaired, as well as those who had not yet filed claims) and current clients of those same counsel (including an inventory of about 14,000 cases that were settled in some instances contemporaneously with the negotiations for the class settlement). Thus, the quotation by a very knowledgeable group of coauthors in their case book not only proved true but prophetic. At least two of the experts, Professors Cramton and Koniak, think their disagreements with Professor Hazard were "mostly factual." Letter from Roger Cramton, Professor of Law, Cornell Law School, to the author (Nov. 21, 1994) (on file with author); Letter from Susan P. Koniak, Professor of Law, Boston University Law School (Nov. 26, 1994) (on file with author).

<sup>2</sup> See John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990 (1995).

<sup>3</sup> And so I disagree with Professors Siliciano, Trangsrud, and Mullenix. Linda S. Mullenix, *Mass Tort as Public Law: A Paradigm Mislplaced*, 88 NW. U. L. REV. 579 (1994); Siliciano, *supra* note 2; Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69. But compare Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Linda S. Mullenix, *Federalizing Choice of Law for Mass Tort Litigation*, 70 TEX. L. REV. 1623 (1992).

will examine the nature of an "ethically" just or fair settlement. Although lawyer ethics are only part of the larger considerations of what makes a settlement "ethical," the professional responsibility questions raised in recent mass torts cases reveal a bigger problem for legal ethics generally. This problem involves situations where rules are so ambiguous or self-contradictory that they cannot govern behavior clearly.<sup>4</sup>

In this Article I hope to explore these ambiguities and dilemmas by exploring the interests not only of lawyers, but of other participants in the mass torts cases—victims of harm (whether present or future claimants), judges, other court adjunct personnel, defendants, including corporations and insurers, and others affected by these cases (for example, current employees of mass tort "producers"). Exploring these interests reveals that regulating attorney ethics is not the most effective way to answer the difficult questions raised by mass tort case resolution. We probably need to recraft some of our ethics rules (conflicts of interests, attorney client relations, and attorneys' fees) to take account of new forms of action and representation. We must also, however, focus on the bigger questions of what constitutes a "just" settlement in our legal system. If living in a mass society<sup>5</sup> means we produce mass harms and the need for "mass compensation," we will have to confront the question of how we can provide fair "mass justice." This will be a difficult issue for our society, which is based on a culture of individualistic notions of justice and fairness, to confront. However, judges face this issue often, and as academics we have a duty to explore it and provide guidance, if only in raising issues that must be considered.<sup>6</sup>

In this Article I will explore some of the interests at stake in these recent cases, the specific legal ethics issues that have been presented,

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<sup>4</sup> In other words, when there are good arguments on both sides and distinguished legal ethicists disagree as they do in these cases, how is a lawyer to decide what to do? Can ethics "rules" provide clear answers to ethics "problems," or can they only provide aspirations for an "ethical" process of decisionmaking?

<sup>5</sup> See WILLIAM KORNHAUSER, *THE POLITICS OF MASS SOCIETY* (1959). Mass torts are the unfortunate effect of the mass production, distribution, and consumption of goods and services. Even "mass accidents," often treated differently from mass product liability, are the result of mass transportation systems or exposure of masses of people to objects or chemicals. It is true that "mass harms" certainly occurred before modern industrialization (the "plague," fires, shipwrecks, mine accidents, etc.), but it is because modern law is more willing to treat these as compensable events that mass production causes strains on our justice system, which is not modeled on "mass" processing principles but on individualism. Whether we do in fact provide "assembly line" justice in some areas (large caseload criminal law, domestic relations, etc.) is a debatable question. Nevertheless, we still adhere to the rhetoric and beliefs of a system based on individual justice values.

<sup>6</sup> Many, of course, believe that legislatures are the bodies that should deal with these issues, even if they "delegate" the issue by creating administrative agencies to deal with mass harms and injuries. See, e.g., Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 *YALE L.J.* 813, 827 (1989).

and the larger "ethics of settlement" questions that are implicated. I will then suggest some solutions that point us in the direction of what might be acceptable mass justice. I believe that both process and substance questions are implicated, and conclude that we must have either very strong process protections or a deeper scrutiny of substantive outcomes in our settlement processes. We need to consider not only the procedural and ethical requirements for lawyers and parties, but also the appropriate level of substantive review our public legal system should supply for "mass" events that affect the public when cases are settled in private fora but lawyers and parties seek or require court approval.<sup>7</sup> When "mass torts" become public events, they entail public, as well as private, responsibilities.

*The Scene:*<sup>8</sup> *Federal District Court, Eastern District of Pennsylvania, Philadelphia. Outside of the tall formal air-conditioned court building (not in any way a "house") are two lines of picketers, mostly, but not exclusively black men. On one side they carry signs sporting AFL-CIO labels, "Approve the Settlement." On the other, a smaller circle carry signs saying "Sell-Out—Reject the Settlement." Early in the morning the cabs start arriving, and the "suits" climb out. Expensive suits for all, super-millionaire plaintiffs' lawyers, well-heeled corporate law firm lawyers for defendants, manufacturers, producers and insurers, a few union lawyers, a few government lawyers, some younger and earnest and not as well dressed public interest lawyers, a few academics—mostly white men, of various ages and social classes. As lawyers shed their mobile phones at the security gates, a few former asbestos workers (one in a wheelchair), mostly shipbuilders, but a variety of others, slowly make their way through the security gates and enter the elevators. There is little interaction between these groups. Today is a "law" day—closing arguments will be made. This is not a "fact" day—no witnesses will be heard. As the large and spacious courtroom is filled, I count close to one hundred suited lawyers in attendance. So many, in fact, that they sit in the jury box and on their litigation bags in the back. Scattered in this sea of dark suits and white shirts, the few women lawyers stand out, though none of them speak this day. The workers, no more than twenty-five of them, mostly black men, in brightly colored shirts and caps and scruffy shoes, sit alternately attentively and bored as the lawyers argue. The judge, a distinguished-looking man, walks in and calmly sets the schedule for the rest of the day. He allocates the scarce resource of time to speak, as he will preside over the allocation of scarce financial resources to pay injured and diseased workers, an apparent model of judicial temperament, clarity, control, and politeness. A few members of the press (and at least one academic) grip their pens and begin to take notes. In an unusual alignment at counsel table, two of the nation's most*

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<sup>7</sup> See *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhosue Assoc.*, 800 F.2d 339 (3d Cir. 1986) (holding that parties seeking court approval of a privately negotiated settlement cannot shield settlement from public access).

<sup>8</sup> Closing Argument, *Georgine v. Amchem Prods., Inc.*, May 23, 1994.

successful plaintiffs' lawyers sit next to the partners of a well-established Washington, D.C. law firm representing twenty of the most solvent asbestos producers. They are here together to argue for the approval of a "global settlement" of future asbestos claims. Sitting at other tables are a few plaintiffs' lawyers (sometimes collaborators with, sometimes competitors of, the plaintiffs' lawyers for the settlement), a government lawyer, a union lawyer, and a public interest lawyer. These are the objectors. In the "pews" and in the jury box sit the lawyers for the hundreds of insurance carriers and other asbestos defendants who will also, one way or another, be paying for this settlement or the fallout or "opt-outs" of it. Also in the courtroom is a local law professor of national reputation who has served as a "special master" to assist the judge in evaluating the formulas of settlement.

The case begins, and Gene Locks, a local Philadelphia counsel made rich by years of asbestos litigation, begins by likening himself to Abraham Lincoln—the man who sought justice for "the little guy." Thus begins a full day of argument in which multiple sets of lawyers, aligned in very different ways in other cases, will line up on one of the two sides our adversary system requires to argue for or against one of the largest and most complex settlements of what we now call a "mass tort." In this case the settlement, filed as a class action, is of tens of thousands of asbestos-related injuries and diseases.

At the end of the day Judge Reed will have to confront some of the biggest challenges to the operation of the legal system any judge has ever faced. He will have to decide whether people who don't yet have any physical impairment can be bound to a settlement of their potential future claims, whether they have been given adequate notice of this settlement, whether the lawyers sitting at counsel table are "adequate representatives" for people they have never met and whether the settlement is "fair, adequate, and reasonable." For many of these issues he will not be guided by any precedent or standards. Indeed, earlier in this courtroom, several of the nation's most distinguished legal scholars (and co-authors of a leading text) have given opposing expert opinions on some of these very questions. He is not alone in facing these issues. A few weeks later Judge Sam Pointer will face a similar set of issues with a more complex array of lawyers, claimants, scientists, and experts in Birmingham, Alabama as he confronts the settlement of breast implant litigation.<sup>9</sup> Neither of these judges is totally alone—other judges have had to face similar challenges,<sup>10</sup> if in somewhat different forms.<sup>11</sup> These judges know what it means to see the law as a "seamless

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<sup>9</sup> *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.) Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (approval of settlement).

<sup>10</sup> Judge Jack Weinstein has recently dealt with some similar issues in the most recent round of the Johns Manville Trust and bankruptcy. See *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473 (E.D.N.Y. & S.D.N.Y. 1995).

<sup>11</sup> I will not recount the facts (and now first round of published opinions) in these cases as they are well canvassed by others in this symposium. I will merely refer to those issues presented that bear on my own topic—the ethics of settlement.

*web.*" These cases ask them to decide issues involving the facts and law of procedure, torts, ethics, contracts, agency, labor, and bankruptcy—all of these bodies of law entwined with each other in ways not contemplated by the people who drafted them.

*The Stakes:* For the people in this room, the stakes are enormous. Millions of dollars will be allocated to different groups of injured workers. Millions of dollars will be allocated to the small group of lawyers who process their claims and represent them. There are fears that those dollars will not be enough to compensate for the life-ending diseases suffered by thousands, perhaps millions, of workers. Corporations and insurers hope to cap those dollars allocated to this problem and move their resources on to other "productive" uses. Precedents will be set by this case that could affect potentially millions of other similarly harmed people. These are the hard "fact" issues and stakes.

For many in the room, and for millions of people not in the room, there are other stakes—the "law" issues and the consequences and effects of this case and decision for cases like it and for the justice system as a whole. These law issues include deciding who should pay for what injuries, harms, and misfortunes we suffer; what processes should be used to determine these issues; who should represent us and how should they be paid; how should we decide who gets paid; what should judges and courts be doing; how should claimants, clients, lawyers, judges, and other third party "neutrals" behave toward each other. In short, how can our legal system provide justice for all when there may not be enough justice to go around?

## I

### THE ISSUES AND QUESTIONS:<sup>12</sup> WHAT IS AN ETHICAL SETTLEMENT?

Mass tort class action settlements raise a host of ethical issues on both macro justice levels and more micro lawyer behavioral levels. In considering whether a settlement is "ethical," fair, or just<sup>13</sup> we are con-

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<sup>12</sup> At the symposium the commentators suggested that I asked too many questions and provided very few answers. To this I plead guilty. As an academic ethicist, I see scores of unanswerable issues and dilemmas raised by these cases. As a practitioner (formerly as an advocate, now as a third party neutral, always as a clinical teacher), I know we must answer these questions. Thus, I will offer some solutions at the end, but I think it is important to recognize that we are, as Robert Rabin suggested, "midstream" in our working out of these problems and issues in mass tort litigation. See Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases: A Comment*, 80 CORNELL L. REV. 1037, 1044 (1995). Thus, I offer questions and issues to guide our consideration of the factors that need to be confronted as we attempt to craft solutions to these difficult problems. Judges must judge and frame questions that can be "judged"—academics can raise deep, if more intractable, issues that we must deliberate about before we can fully answer the questions.

<sup>13</sup> These are not equivalents. They are likely to lead to different standards, both as philosophers would define them and as legal standards would regulate them.

cerned with the process by which the settlement was reached<sup>14</sup> (including who the negotiators were and how they conducted themselves) and the fairness of the outcome. Our laws (substantive, procedural, and ethical) are, in general, remarkably silent on these issues. They prefer to treat most negotiations as matters of private ordering<sup>15</sup> with little public scrutiny.<sup>16</sup> Whether or not one agrees with the distinctions drawn between private negotiations and actions taken in more publicly scrutinized litigation, it is clear to me that recent developments in the use of alternative dispute resolution,<sup>17</sup> increased judicial management of cases,<sup>18</sup> and the encouragement of settlement in general<sup>19</sup> have resulted in a hybrid of private and public settlement processes that present us with the question of what standards to apply.<sup>20</sup> While these issues will be confronted in a wide variety of indi-

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<sup>14</sup> This may implicate constitutional issues of due process in some cases. See *Phillips Petroleum v. Stutts*, 472 U.S. 797 (1985) (including potentially troublesome state action issues if judges and other court personnel become "involved" in settlements).

<sup>15</sup> See Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rule Making*, 89 HARV. L. REV. 637 (1976).

<sup>16</sup> By now many commentators have written about and decried the lack of regulation of negotiation and its treatment as private ordering, especially when ethical rules prescribe some rules for actions taken in a courtroom. See, e.g., Eleanor H. Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975); Michael H. Rubin, *The Ethics of Negotiations: Are There Any?* (ALI-ABA, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, 1994); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990).

<sup>17</sup> See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993); Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 LAW & CONTEMP. PROBS. 227 (1991).

<sup>18</sup> See Civil Justice Reform Act of 1990, 28 U.S.C. § 473 (Supp. V 1993); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnik, *Managerial Judges*].

<sup>19</sup> See Stephen M. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992); Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Carrie Menkel-Meadow, *Pursuing Settlement in An Adversary Culture: A Tale of Innovation Co-opted, or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) [hereinafter Menkel-Meadow, *For and Against Settlement*]. Settlement is "encouraged" in our system for different reasons. These include what I and others have labeled "quantitative-efficiency" grounds (docket clearing) or "qualitative-fairness" grounds (producing solutions that are either more Pareto optimal than limited court resolutions or that are more "creative" or varied than what courts may be authorized to do. Pareto optimal solutions are those in which joint gains have been maximized, and no party could benefit any more without making another party worse off. See HOWARD RAIFFA, *THE ART OF SCIENCE OF NEGOTIATION* 139 (1982). Mass tort class action settlements are designed to meet both of these elements of settlement.

<sup>20</sup> Is a mediation session conducted in a courthouse a matter before a "tribunal" so that rules of candor to the tribunal would apply?, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993) [hereinafter MODEL RULES], or is it a private negotiation?, MODEL RULES, *supra*, Rule 4.1. Is an early neutral evaluation proceeding ordered by the court but occurring in a private law office governed by court and litigation ethics rules or the more permissive private negotiation rules?



vidual cases, the recent spate of mass tort cases raises these issues dramatically because of the large numbers of people affected by the settlements reached, and because the processes and legal issues dealing with mass torts are particularly complex.<sup>21</sup> What should the ethics rules or standards be in the negotiation and settlement of individual cases, class actions, and mass torts (or other particular substantive areas<sup>22</sup>)? Should our standards depend on the public or private nature of the activity (where the negotiation is conducted and who it affects), how many people are affected (whether there is an individual action with a fully represented party or a class action in which clients never meet their lawyers), or what kind of a case or legal issue is involved (the substance of the dispute or transaction)? Thus, while we consider the specifics of the ethics of settlements of mass tort class actions, these cases force us to consider more "meta-ethical" concerns in legal ethics—is it possible to have transsubstantive ethical rules in legal practice or must our rules be process (negotiation vs. litigation) or substance (do crimes and injuries to the person suggest different rules than injuries to objects or property<sup>23</sup>) sensitive? The issues presented in the class action settlement of mass torts thus present an important case study of what happens when the rules meet the road, and our attempts at abstract rulemaking do not adequately guide our efforts to solve real world problems.<sup>24</sup>

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<sup>21</sup> Other articles in this symposium have addressed the issue of whether mass torts are any different from other torts. See Siliciano, *supra* note 2; Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941 (1995). This issue is also implicated in the question of the ethics of settlement with which this paper is concerned—do mass torts present such a special case that they require special ethics rules? See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 471 (1994); see also Geoffrey Hazard, *Reflections on Judge Weinstein's Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 569, 570 (1994). Or, the question could be put at the procedural, not substantive level: Do class action settlements require different ethical rules than individual settlements? Under what circumstances do we ever scrutinize the effects of individual case settlements? (only when there are claims of fraud, unconscionability, or in other very limited circumstances).

<sup>22</sup> As a result of some other complex and troubling moments in our legal history, such as the savings and loan crisis and the junk bond crisis, some commentators have suggested that we need specific ethical rules in those areas as well. See George H. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637 (1994); Ted Schneyer, *From Self-Regulation to Bar Corporation: What the S&L Crisis Means for the Regulations of Lawyers*, 35 SO. TEX. L. REV. 639 (1994); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993).

<sup>23</sup> This distinction is made in the permissibility of disclosure of client confidences to prevent bodily harm, but not, in most states, to prevent economic fraud, see MODEL RULES, *supra* note 20, Rule 1.6(b)(1).

<sup>24</sup> For me the intellectual attraction of this project was to test my more abstract views as a strict legal ethicist (arguing for strong enforcement of conflicts of interests rules, for example) against the needs of "the real world" to find fair and efficient solutions to the problems of compensation and redress for the millions of people harmed by our modern technological world. Throughout the symposium, lawyers and judges who participated in the cases we write about tried to remind us of the constraints and realities of the real world

In canvassing the complex ethical and legal issues of mass tort settlements, I hope to suggest some principles or bases from which we can determine when settlement is appropriate and how settlements can be made to be as just as possible.<sup>25</sup>

In the most recent mass torts class action settlements, "ethics" became an issue in the specific context of whether, under Federal Rule 23(a)(4),<sup>26</sup> class counsel were "adequate" to represent the classes of litigants. These classes comprised, depending on the specifics of the litigation, present clients, potential future claimants, domestic claimants, foreign claimants, and a variety of other groups. Objections were raised to class counsel claiming, among other things: (1) that they had conflicts of interests (which violated the state equivalents of Model Rule 1.7(b)) in representing classes of clients and claimants with different interests;<sup>27</sup> (2) that they colluded with defense counsel to reach a settlement<sup>28</sup> (presumably in violation of their duties to zealously advocate for their clients<sup>29</sup>); (3) that they have conflicts of inter-

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as we debated different approaches to these problems. Sociologically speaking, we are all products of our occupational choices—academics, judges, and lawyers—and these positions or ("points of view") clearly affect the ways in which we seek to solve the problems presented here.

<sup>25</sup> For many, the baseline of fairness of settlements is what would happen if the case were tried. In mass tort cases this cannot be the standard: Well over 90% of all cases settle and many mass torts cases result in jury verdicts for the defense (resulting in a base of zero for the individual plaintiff). Furthermore, some evidence suggests that defense verdicts are increasing in torts cases. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992); see also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991).

<sup>26</sup> FED. R. CIV. P. 23(a)(4).

<sup>27</sup> Most commentators consider these "concurrent" conflicts under MODEL RULES, *supra* note 20, Rule 1.7. See, e.g., Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995).

<sup>28</sup> For a statement of the law on collusion in settlements, see *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981) (collusion established by scrutiny of the settlement terms).

<sup>29</sup> The Model Rules have formally dropped the duty to be "zealous." They now require counsel to be "diligent." MODEL RULES, *supra* note 20, Rule 1.3. "Zeal" is retained, however, in the comments. *Id.* cmt. 16. The exact legal framework for analyzing collusion remains somewhat murky and is related to the larger justice of settlement issues I raise here. Some commentators claim that lawyers have "sold out" the class, acted in bad faith or have committed fraud, either by not negotiating the same deal for similarly situated claimants or for receiving a "premium" in attorneys' fees for compromising class members' settlement values. See John C. Coffee, Jr., Summary, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995) [hereinafter Coffee, Summary]; Koniak, *supra* note 27. The latter criticism actually reflects another conflict of interest: the conflict every lawyer-client relationship presents in how fee structures affect the lawyer's work habits. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?* 37 UCLA L. REV. 29, 47 (1989); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993); Herbert M. Kritzer, *Fee Arrangements and Negotiation*, 21 LAW & SOC. REV. 341 (1987) [hereinafter Kritzer, *Fee Arrangements*]; Herbert M. Kritzer, *Rhetoric and Reality . . . Uses and Abuses . . . Contingencies and Certainties: The Political Economy of the American Contingent Fee*, GEO. L.J.

ests when serving in the dual capacity of monitors or auditors of the claims processing while simultaneously representing claimants within the claims process (thus granting them access to "inside information" not available to other claimant's counsel<sup>30</sup>); (4) that they violated Model Rule 5.6 by agreeing to limitations on their practice when they agreed to advise all future claimants to follow the standards of the settlement criteria; and (5) that they agreed to aggregate settlements of concurrent clients in violation of Model Rules of Professional Conduct Rule 1.8(g). In addition to these explicit and formal ethical issues, several other ethics issues lurk beneath the surfaces of these cases and have generally not been raised by the parties or fully explored by the courts. These include the appropriate counseling of clients as to acceptance of settlement offers<sup>31</sup> or offers to become class representatives<sup>32</sup>—in short, issues relating to the content and form of the attorney-client relationship.<sup>33</sup>

In assessing the fairness of a class action settlement under Rule 23(e) of the Federal Rules of Civil Procedure, courts must also consider broader "ethics" questions. By what standards, for instance, should a court measure the fairness of a settlement?<sup>34</sup> The few judges who have confronted the "ethics of settlement" in the mass tort context have had little to guide them except a jurisprudence and an ethics code that generally shun substantive review of bargaining.<sup>35</sup> Thus,

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(forthcoming 1995) (Conference on Law and Economics of Litigation Reform May 7, 1994) [hereinafter Kritzer, *Rhetoric and Reality*]; Herbert M. Kritzer et al., *Understanding the Costs of Litigation: The Case of the Hourly Fee Lawyer*, 1984 AM. B. FOUND. RES. J. 559; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

<sup>30</sup> This conflict probably stems from legal obligations created under agency and fiduciary law and from the prohibitions in MODEL RULES, *supra* note 20, Rules 1.7, 1.8 (forbidding a lawyer's "other interests" from conflicting with their representational interests).

<sup>31</sup> See MODEL RULES, *supra* note 20, Rules 1.2, 1.4, 1.8(g); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) [hereinafter MODEL CODE].

<sup>32</sup> The choice of class representatives and how they were "recruited" to the litigation involves not only counseling issues. It has, in past class action litigation (although probably not in this particular case), raised issues of solicitation as well. See MODEL RULES, *supra* note 20, Rule 7.1. What constitutes solicitation of clients remains a complicated question involving both state ethics law (and continuing attempts to prohibit certain forms of in-person solicitation) and federal constitutional law. When an attorney advises potential clients of their legal rights, that communication implicates the First Amendment, in which case federal law trumps state law. See, e.g., *Shapiro v. Kentucky Bar Assoc.*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re Primus*, 436 U.S. 412 (1978).

<sup>33</sup> Judge Weinstein calls these the "communication" issues between attorney and client. See Weinstein, *supra* note 21, at 493.

<sup>34</sup> See, e.g., *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975).

<sup>35</sup> As more fully discussed *infra* text accompanying notes 208-24, the law has traditionally refused to scrutinize most substantive contractual bargains, collective bargaining agreements (the duty to bargain is a process not a substantively enforced right, see cases under § 8(a)(5) and (b)(3) of National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988), e.g., *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943); *White v. NLRB*, 255 F.2d

courts assess settlements principally from a process perspective.<sup>36</sup> The *Georgine* court, for example, stated that "this court may have more confidence in the fairness of a settlement . . . negotiated by experienced counsel [who engage] in a long, deliberative process."<sup>37</sup> Judges assessing the fairness of settlements in mass torts are clearly affected by the complexity of the issues, and by the difficult and important social and judicial context in which mass torts are situated. So, as Judge Reed says in *Georgine*, "the settlement must be evaluated in light of the practical realities of the litigation from which the settlement arose."<sup>38</sup> Judges evaluating mass tort class action settlements under Rule 23(e) of the Federal Rules of Civil Procedure thus scrutinize the deal only to be sure that the deal appears to give the claimants something they would not have otherwise received. This reflects the age-old notion that a good negotiated result is one that leaves all the parties unhappy.<sup>39</sup>

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564 (5th Cir. 1958); see generally Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958)), and legal settlements generally. Efforts to require lawyers to act candidly in negotiations and to discipline lawyers for entering into unconscionable settlements were defeated in debates about the Kutak Ethics Committee's original draft of the Model Rules of Professional Conduct. See MODEL RULES OF PROFESSIONAL CONDUCT RULES 1.6, 4.1, 4.2 (proposed official draft 1983); CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES (1987); Theodore Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989); see also Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 4 (1978) (arguing that lawyers should be more accountable for what they do outside of court than what they do in the presence of a judge in litigation); James J. White, *Machiavelli and the Bar: Ethical Limits on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (arguing that we cannot hold lawyers to a standard of candor or unconscionability in negotiations because such activities are private and not measurable). For a recent argument that we cannot assess what goes on in the "black box of settlement," see Geoffrey Hazard, *The Black Box Of Settlement*, Lecture delivered at Boston University Law School (Oct. 27, 1994).

<sup>36</sup> See Weinberger v. Kendrick, 698 F.2d 61, 73-76 (2d Cir. 1983).

<sup>37</sup> *Georgine*, 157 F.R.D. at 322.

<sup>38</sup> *Id.* at 321.

<sup>39</sup> Judge Reed, like other judges assessing settlements, viewed the *Georgine* settlement as fair because it represented a "compromise." *Id.* at 320-21 (citing *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989), *aff'd sub nom.* *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992)). At the symposium, Professor Coffee said he understood the lack of dissatisfaction on the part of the settling parties in *Georgine* as indication of a "collusive" settlement. In a good negotiated settlement, he said, both parties are unhappy. For arguments that this is an outmoded concept of successful negotiation, see ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984). Modern negotiation theory suggests that we can find Pareto optimal settlements in which both parties need not "compromise" everything nor feel dissatisfaction with the deal. Perhaps in the next round of mass tort settlement litigation, negotiation theorists will be called as experts to testify as to what standards should be applied in considering what is a good and fair (and high "quality") settlement.

These recent questions raise a variety of general concerns about assessing the ethics of settlements in mass torts:

1. What guidance, if any, do the ethical rules for lawyers provide for assessing the propriety of lawyer behavior in negotiating mass tort class action settlements?

2. Is it possible to develop transsubstantive ethical rules that apply across all areas of practice or do ethical considerations come in contextual packages, necessitating more detailed and context-sensitive rules?<sup>40</sup>

3. What are the ethics of settlement and to whom should they apply? This includes an assessment of the ethics of the process by which parties reach settlements, that is, the ethics of negotiation<sup>41</sup> as well as the "ethics" or "justice" of the outcome.<sup>42</sup> Must we alter our

<sup>40</sup> I am on record (not in the scholarly literature, but in the Los Angeles and California press) as opposing most forms of conflictual representation in the entertainment industry even as entertainment lawyers argue vociferously for "special treatment" for their particular, specialized practice of being "lawyers for the deal." See Corie Brown, *That's Entertainment*, CAL. LAW., June 1993, at 38; Alan Citron & Robert W. Welkos, *The Pope of Hollywood: Ziffren's Representation of Studios, Stars is Challenged*, L.A. TIMES, Aug. 23, 1992 at D1. For discussions of conflicts of interest in legal representation, see GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965) (commenting on the ethical problems made apparent during Brandeis's appointment to the Supreme Court); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 967 (1987) (arguing for a lawyer for the community). Are mass torts cases different? Should conflicts of interest rules differ for various practice environments? Judge Weinstein has begun to lay the groundwork for substance-based ethical variations. See Weinstein, *supra* note 21. The Model Rules already recognize some forms of "contextual ethics" in providing different standards for prosecutors, lawyers for indigents, and government lawyers. See MODEL RULES, *supra* note 20, Rules 3.8, 1.8(e)(2), 1.11 (allowing legal services attorneys to finance litigation costs and providing special rules by which former government lawyers screen clients). For recent arguments that banking and securities lawyers should operate under different standards of disclosure, see Brown, *supra* note 22 (proposing a mandatory disclosure system in which the traditional lawyer-client confidentiality rules would be eased). A variety of groups have promulgated different ethics standards for categories of lawyers, see ABA Standards Relating to the Administration of Criminal Justice; American Academy of Family Mediators, Standards for Mediators, SEC Rules; Disreputable Conduct, 31 C.F.R. § 10.51 (1994); cf. Fred Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

<sup>41</sup> See, e.g., Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982); Eleanor H. Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990). These articles virtually all assume that the ethics of negotiation are vested in counsel. There are few explorations of the ethical obligations that clients have to each other. See, e.g., *Stare v. Tate*, 98 Cal. Rptr. 264 (Ct. App. 1971) (contracts case in which husband informed wife that his lawyer had taken advantage of her lawyer's error in divorce negotiation); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1518 (1986) (examining lawyer's duty to correct error in submitted contract without consulting client).

<sup>42</sup> Some scholars have taken up the complex philosophical question of whether it is ever "just" or ethical to settle a claim or compromise a legal right. See, e.g., COMPROMISE IN ETHICS, LAW AND POLITICS (J. Roland Pennock & John W. Chapman eds., 1979); Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*,

ideals of *individual justice* to deal with a world in which technology and modernity bring mass harms that may require *aggregate justice*?

4. As in any law-making activity, what relationship exists between rule and experience, standard and discretion? Can we craft, in advance, rules or standards that will meet the challenges of rapid technological and legal change?<sup>43</sup>

5. *Who* owes duties to *whom* in considering the ethics of mass torts settlements? Do clients and potential claimants ("fellow" victims) owe duties to each other to bring their claims in a mutually responsible way?<sup>44</sup> Do judges and their assistants, such as third party neutrals and special masters, have special duties with respect to the settlement of such claims?<sup>45</sup> Can we craft ethical rules for classes of people who

51 MD. L. REV. 1 (1992); Robert J. Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 85 (1985) [hereinafter Condlin, "Cases on Both Sides"]; David Luban, *Ethics of Settlement, Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397 (1985).

<sup>43</sup> On one hand, the adaptation of the class action form to mass tort settlements is a slow process. Early courts rejected class treatment in mass tort cases. See, e.g., *In re Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986). More recently, class actions in mass torts have gained approval and acceptance. See, e.g., *In re A.H. Robins Co.*, 880 F.2d. 709 (4th Cir. 1989). Commentators speculate that this acceptance occurred when defendants began to seek, rather than resist, class action treatment. See Coffee, Summary, *supra* note 29, 851-52. On the other hand, the adaptation of class actions to mass torts has been a fast process when we consider how quickly we have come from the 1966 determination that mass torts were inappropriate for class action treatments. See Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5 [hereinafter Resnik, "Cases" to "Litigation"]. Lawyers and other actors are quick to adapt to legal rules and create new forms to solve old problems. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (Political Action Committee adaptations to campaign finance reform). See Judge Schwarzer's attempt to specify clear standards for class action settlement approvals in his proposed new Rule 23(f) of the Federal Rules of Civil Procedure. William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995).

<sup>44</sup> Our legal system has privileged the "first come, first served" rule in many contexts: first to the courthouse, first to record the deed, first to file a security interest, first to convert the property to use, etc. Susan Koniak finds the first-come basis of our litigation system to be random and therefore more "just" than non-random prioritization such as the deferment of plural thickening claims. See Koniak, *supra* note 27, at 1079-80 n.162. For different views about the justice of ordering of claims, see Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL'Y 541 (1992); Weinstein, *supra* note 21 (referring to the loss of claims of later arrivals to the Manville Trust). These authors argue for communitarian ethics in which similarly injured people think of themselves as comprising a group requiring some form of solidarity in efforts to collect damages. I realize it is heretical to suggest that some principle other than individual first come, first served should form the basis for gaining relief in our legal system, or that an individual rights-based system like ours could contemplate a "client's code of ethics."

<sup>45</sup> Some commentators suggest that when judges actively engage in the facilitation of settlements, they should refer the class action settlement fairness hearing to another judge. See, e.g., *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 258 (E.D. Pa. 1994) (referral by Judge Charles Weiner of fairness hearing to Judge Reed); *Day v. National Lead*, 864 F. Supp. 40 (S.D. Ohio 1994) (order transferring review of fairness of settlement on ground that presiding judge had participated actively in the settlement); S. Arthur Spiegel, *Settling*

may have very different interests?<sup>46</sup> Which interests are protected by currently existing rules?<sup>47</sup> By those we might draft?

6. Finally, who should make the rules, judgments, and policies that will enforce standards of ethics or justice in this area: judges, legislators, expert witnesses, crafty (meant positively) lawyers, professors, ethics committees, corporate executives, financiers, insurance actuaries, or victims?<sup>48</sup>

This Article presents a simple argument: *The current ethical rules on conflicts of interests, limitation of practice, and ethics in negotiation and litigation (although they appear to deal with the general issues of law practice) were not drafted with the special issues of mass tort class action settlements in mind, and do not, in my view, provide adequate guidance for how these issues should be resolved. Our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for "aggregate" justice.*

Our current rules do not provide adequate guidance for resolving these issues, either at the system level or at the individual case level. I have no easy answers to any of the questions I will raise here. I only hope to describe some of the problems, interests, and issues; elucidate what the important principles and values should be in our system of justice and ethics; and then offer some suggestions for reform.

In my view, the settlements of mass torts raise ethical issues of a different magnitude and quality than those raised by the idealized version of individual attorney-client representation on which the current rules are based. Two forms of romanticism<sup>49</sup> have created our rules: *litigation romanticism*<sup>50</sup> and *romanticism about the individual attorney-client*

*Class Actions*, 62 U. CIN. L. REV. 1565 (1994); see also Carrie Menkel-Meadow, *Ex Parte Talks with Neutrals: ADR Hazards*, 12 ALTERNATIVES 109 (Sept. 1994) [hereinafter *Ex Parte Talks*]; Carrie Menkel-Meadow, *Professional Responsibility for Third Party Neutrals*, 11 ALTERNATIVES 129 (Sept. 1993) [hereinafter *Third Party Neutrals*].

<sup>46</sup> Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

<sup>47</sup> Legal profession scholars have studied the political, economic, and class interests that drive ethics rulemaking. See, e.g., Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Schneyer, *supra* note 35; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992).

<sup>48</sup> It is ironic that in the area of mass tort settlements judges are criticized for fashioning legislative-like solutions without authority in an area where Congress has not acted. See Mullenix, *supra* note 3; Siliciano, *supra* note 2, at 1004-05; Schuck, *supra* note 21, at 941. At the same time, Congress is criticized for usurping judicial power in regulating civil procedure in the Civil Justice Reform Act. See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1993); Symposium, *Reinventing Civil Litigation: Evaluating Proposals for Change*, 59 BROOK. L. REV. 659 (1993).

<sup>49</sup> I do not mean to use this term pejoratively. I consider myself a romantic about a number of things, our legal system being one of them. But to continue to love an idea or institution realistically we need to see the object of our love as it really is.

<sup>50</sup> See Resnik, *Managerial Judges*, *supra* note 18. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnik, "Cases" to "Litigation,"

*relationship*.<sup>51</sup> In order to maintain our commitment to justice and ethics in our legal system we need to confront the realities of the situations that test our rules. Exposure to the ethics of mass tort settlement will inform us not only how to judge the ethics of mass tort settlements but also whether we may need to change our rules in other areas as well.<sup>52</sup>

## II

### THE INTERESTS: WHO CARES ABOUT THE ETHICS OF SETTLEMENT?

One of the difficulties in crafting or interpreting rules of ethics in these cases is that attempts to create rules flexible enough to deal with a variety of situations results in the kind of rule ambiguity that allows adversary argument and interpretation to flourish. Thus, even experts will differ on the meanings and significance of words, and the players will have different interpretations based on where they are situated in the case. The class action settlements of mass torts provide one of those environments with a multiplicity of interest groups<sup>53</sup> and enough ambiguity of language to provide rich and conflicting argument. What makes the interest groups in these cases so interesting is that they no longer (if they ever did) fit simple cleavages between plaintiffs and defendants or lawyers and clients. Interests in the settlement of mass torts divide the parties, divide the bar (including those on the same "side"), divide the experts (this is more usual), and will likely also divide the judicial decisionmakers. These new issues and

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*supra* note 43; Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 650 (1994).

<sup>51</sup> See DOUGLAS ROSENTHAL, *ATTORNEY-CLIENT: WHO'S IN CHARGE?* (1973); Mark Spiegel, *Lawyers and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

<sup>52</sup> Class actions are not the only forms that raise these ethical issues. Other forms of consolidation or multiple-client representation raise issues involving communication and conflicts of interests. Legal services lawyers have long faced the issue of lawyer rationing, if not in fees, then in time. See Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Carrie Menkel-Meadow & Robert Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL'Y Q. 237 (1983); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990). Settlements of inventories of cases or "bulk" settlements (with allocation by plaintiff's counsel of money paid to plaintiffs), criminal plea bargains of repeat play defender-prosecutors, and entertainment and sports lawyers negotiating on behalf of separate but multiple clients with scarce resources (time in TV programming, salary caps for teams) all raise issues of concurrent client conflicts as well as attorney-client communication issues.

<sup>53</sup> For other thorough reviews of the interests implicated in mass tort litigation, see generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); Mark Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 LAW & CONTEMP. PROBS. 227 (1991).



new alignments provide a kind of "postmodern" perspective on legal ethics—the "centers" of interests will not hold long enough for us to craft clear rules. In dealing with the uncertainties of how successful the settlements will actually be, we cannot see clearly enough to make predictive statements of what good lawyering behavior should be.

Before reviewing my own analysis of what the ethics of settlement here should be, I will briefly review the varied interests of the "participants" in these class action settlements.

#### A. The Claimants: Injured People

Those harmed by products, accidents, services, chemical substances, and other forms of modern "exposures" are not all similarly situated. Whether or not mass torts are different from other torts in how they are processed through the legal system, it is clear that not all mass torts are alike and not all mass torts victims are harmed in the same ways. Thus, those that are injured as a result of a "mass accident"<sup>54</sup> have discrete events causing their injuries, even if their injuries may be varied. Those harmed by medical or industrial products, drugs, or chemicals such as silicone gel breast implants, Dalkon Shields, DES, asbestos, toxic wastes, and now, electromagnetic fields,<sup>55</sup> may suffer more gradual injuries such as cancers, reproductive disorders, and auto-immune diseases that may take time to manifest and may cause psychological harm in the fear and anticipation that such conditions may develop. Some injuries are life threatening (and in the case of heart valve failure may cause rapid death) and others are long lasting and partially debilitating.<sup>56</sup> Some may already know of their exposure and injury; others may know of their exposure but not their injury; others may not even know of their exposure to possible harms that could lead to liability. Some have ready access to counsel or others who can advise them (like unions, physicians, the media<sup>57</sup>)

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<sup>54</sup> See, e.g., *In re Beverly Hills Fire Litig.*, 695 F.2d 207 (6th Cir. 1982), cert. denied, 461 U.S. 929 (1983) (restaurant fire); *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), vacated, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982) (hotel disaster); JAMES S. KAKALIK ET AL., COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION (1988).

<sup>55</sup> See, e.g., Eileen Abt, *Coping With the Risk of Cancer in Children Living Near Power Lines*, 5 RISK, HEALTH, SAFETY & ENV'T 65 (1994); Ann Bostrom et al., *Preference for Exposure Control of Power-Frequency Fields Among Lay Opinion Leaders*, 5 RISK, HEALTH, SAFETY & ENV'T 4 (1994); Edward Gerjuoy, *Electromagnetic Fields: Physics, Biology and the Law*, 35 JURIMETRICS J. 55 (1994); Roy Krieger & Michael Witney, *EMF and the Public Health*, 9 NAT'L RESOURCES & ENV'T 3 (1994).

<sup>56</sup> Infertility caused by the Dalkon Shield may be permanent and not life threatening, but the psychological and emotional harm (stemming from the absence of children or loss of marriage) can be devastating.

<sup>57</sup> There may be a significant difference between access to "notice" such as coverage in the media and someone who can give advice or counsel, such as doctors, lawyers, and union representatives. Access to information in our society, like most things, is related to social class.

and others may not have access to information about their injuries (as is the case with some of the foreign claimants who have been "exposed" to American products or chemicals).

There are also the families of injured parties who, depending on state law, may or may not have claims against the producers of harmful products. Some were exposed while working for the government, as in the military service of Agent Orange victims, or for public or governmental purposes, as the shipbuilders in the Brooklyn Navy yard who aided the World War II effort; others worked in private companies or were engaged in the extremely "private" enterprise of child bearing.<sup>58</sup> Others may simply have been at the wrong place at the wrong time (e.g., living in houses located near toxic waste dumps or electromagnetic fields before we knew the dangers involved).

Increasingly, claimants have expanded to an ever larger number of people included in the penumbras of harm caused by modern life.<sup>59</sup> In the asbestos cases one hears of primary (workers), secondary (family members), and now tertiary (neighborhoods) layers of exposure and claims against manufacturers and distributors of asbestos materials and products.<sup>60</sup> Recently, the largest settlement to date of property damage claims provided for settlements of replacement costs of pipes to households, including those who might suffer plumbing problems in the future from defective plastic plumbing.<sup>61</sup> In addi-

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<sup>58</sup> The gender-related differences in the treatment of mass torts have begun to gain some attention. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Torts*, 38 J. LEGAL EDUC. 3 (1988); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848; Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989). Women may suffer harms differentially recognized by the legal system. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987). This raises issues about how "mass torts" are created, defined, and legally recognized. Is the failure to provide safe and lighted facilities a "mass tort" against women who are assaulted and raped differentially from men? For an argument that women's childbearing should be recognized as an act of "citizenship" similar to men's soldiering, see CAROLE PATEMAN, *DISORDERLY WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* (1989); *FEMINIST INTERPRETATION AND POLITICAL THEORY* (Carole Pateman & Mary Shanley eds., 1991). This could become relevant if we consider the locus of injury as a significant factor in compensation schemes.

<sup>59</sup> This inspired one television program called *The Blame Game: Is Everyone a Victim?* (ABC television broadcast, Special Report, Oct. 25, 1994) (illustrating laws and lawyers that "encourage" lawsuits by increasing the classes of "protected persons" in a variety of areas including employment, products liability, and defamation).

<sup>60</sup> See, e.g., PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985); B. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* (2d ed. 1986).

<sup>61</sup> Maryann Haggerty & Ann Mariano, *Plastic Pipe Settlement Reached: Firms to Pay At Least \$750 Million to Cover Home Water Damages*, WASH. POST, Oct. 25, 1994, at A1. This settlement has just been disallowed by the court. Maryann Haggerty, *Settlement is Thrown Out in Suit Over Plastic Pipes*, WASH. POST, Feb. 22, 1995, at F1.

tion, when mass torts cause companies to seek the "protection" of bankruptcy, some have argued that a further class of claimants is created in the current employees and other creditors of such companies who will lose jobs, money, and other benefits as a result of reorganizations or full-scale liquidations. Finally, if one considers other users of the legal system displaced by the massive volumes of mass tort cases, then those "harmed" by mass torts includes those members of the public whose access to the legal system is impaired by the resources, legal services, and personnel utilized for these cases in lieu of others.<sup>62</sup>

Given the different classes of claimants, there are a wide variety of objectives such claimants will hope to achieve from a lawsuit. Some will want immediate financial compensation; some will want vindication and the right to a public trial and denouncement or punishment of the "evil wrongdoers;" others will want privacy or insurance-like protections of available cash or medical monitoring and treatment should diseases manifest themselves; some want quick resolutions (particularly those who are dying); and others prefer longer litigation until the extent of their full injuries are known. Thus, the problem of class treatment and class settlement of such claims is evident.<sup>63</sup> Although questions of law and fact may be similar in large numbers of cases (causation, epidemiology of the applicable disease), other facts (which manufacturer, exposure) may not be subject to group treatment and the interests and needs of the claimants for particular remedies may or may not be similar or "gridable."<sup>64</sup>

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<sup>62</sup> In this sense, any lawsuit's use of the legal system displaces other possible uses. Thus it is only the "mass" aspects of these tort cases that makes them any different than other cases, in terms of the effects of caseload displacement of access to the legal system. Whether the large number of mass tort cases have a disproportionate impact on delay nationally, or discretely in different districts, also raises questions of disparate treatments of different litigants. For an analysis of equilibria in caseloads, see George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989) (suggesting that if particular state courts or federal districts have large numbers of mass torts cases, delay will be longer in those districts and may serve as a disincentive for filing lawsuits in those courts).

<sup>63</sup> This explains why the drafters and revisers of FED. R. CIV. P. 23 did not think "mass accidents" would be appropriately handled through the class action device. Memorandum of Benjamin Kaplan, Advisory Committee, 1966 Amendments to Rule 23 cited in Resnik, *supra* note 43.

<sup>64</sup> See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?* 13 CARDOZO L. REV. 1819 (1992) (arguing for an administrative solution to widely varying jury verdicts and unpredictable settlements in asbestos cases). Whether some mass torts are more susceptible than others to schedules of benefits or "grids" like those employed in social security disability and worker's compensation determinations remains to be seen. See grids established in *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, (Lindsey v. Dow Corning Corp.), Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 U.S. Dist. LEXIS 12521, at \*6 n.6 (N.D. Ala. Sept. 1, 1994) (discussing the Schedule of Benefits and Disease Schedule attached to the Settlement Notice).

On what basis should competing or dissimilar interests of claimants be resolved? Solutions to this problem include the appointment of sub-classes in class actions, separate counsel for different classes,<sup>65</sup> guardians ad litem for different classes (especially those who may be impaired in legal decisionmaking<sup>66</sup>) and voting or plebiscite procedures for committees of claimants. Here a variety of competing values must be resolved—should the “worst go first”<sup>67</sup> through such devices as pleural registries in asbestos or those oldest with needs for reproductive surgeries as occurred in the special fund in Dalkon Shield<sup>68</sup> or should the usual rule of “first come, first served” control rationing of potentially limited funds?<sup>69</sup> Who should make these decisions—lawyers in settlement, legislators creating legislative or administrative schemes,<sup>70</sup> judges or clerks controlling dockets or reviewing settlements? Should claimants have duties toward each other?<sup>71</sup>

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65 See, e.g., *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.), Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 U.S. Dist. LEXIS 12521, at \*50-\*53 (discussing appointment of separate counsel for foreign claimants in silicone breast implant class action on plaintiff's negotiating committee and different treatment of foreign claimants).

66 See MODEL RULES, *supra* note 20, Rule 1.14.

67 Schuck, *supra* note 44.

68 See RICHARD SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 129-35 (1991).

69 Many scholars and practitioners in the legal system assume the fairness of first to file, first to collect. I, however, have never been persuaded that this is the fairest way to distribute our system's limited legal goods. Can I shift the burden of persuasion to those who still believe this is the best way to allocate limited legal resources? For an argument that rationed legal services should be allocated on a first come, first served or “lottery” basis, see Marshall Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281 (1982).

70 See Robert L. Rabin, *Some Thoughts on the Efficacy of A Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993).

71 If the value to be expressed here is horizontal equity, should clients have a duty to each other? While it is beyond the scope of this Article, the question of a client's code of ethics would be interesting to pursue. Judge Weinstein has suggested that some form of “communitarian ethics” might be appropriate where there is some solidarity in the source of injury. See Weinstein, *supra* note 53, at 46-52. Thomas Shaffer also recognizes that legal ethics must be considered within the context of group and family memberships. See, e.g., THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITY* (1991); Shaffer, *supra* note 40, at 967. Claimants have already begun to act in this area by forming support groups of various kinds. The interesting question here is how many of these groups are controlled and managed by claimants and how many are “formed” and managed by plaintiffs' counsel. I have raised the question of whether lawyers, as well as clients, can be encouraged to explore altruistic and empathetic responses to the plight of others. See Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385 (1992). Of course, the argument in our culture is that, unlike professionals who have agreed to be duty bound to professional values, the courts, and each other, clients owe no duty to each other and indeed live in a Hobbesian, Darwinian world of “survival of the fittest” and maximizing individual gain. This may be how the world is, but it is not, in my view, an “ethical” way of being. For illustrations of client-plaintiff support groups, see KAREN HICKS, *SURVIVING THE DALKON SHIELD: WOMEN V. THE PHARMACEUTICAL INDUSTRY* (1994) (describing Dalkon Shield newsletters); Jennifer N. Carleton, *Giving a Voice to the Silenced: Dalkon Shield Survi-*

## B. Defendants: Manufacturers, Producers, Distributors, Insurers

Those who are sued for committing "mass torts" have interests too. Although we have long assumed defense denials and protracted litigation, there is some evidence that at least some corporations wish to acknowledge their wrongdoing, either for ethical or corporate responsibility reasons or instrumentally for cost reduction or public relations reasons.<sup>72</sup> Corporate defendants seeking to maintain their viability need predictable and finite liability in order to insure profitability and access to capital. Defendants demonstrate an increasing concern with capping transaction costs. This concern extends not merely to their own costs (contained through defense cooperation committees and use of in-house counsel) but plaintiffs' costs as well (contained through direct negotiation of attorneys fees as part of settlement).<sup>73</sup> Some defendants also express concern about "equitable distributions" among competing claimants. Defendants, like plaintiffs, encounter a variety of conflicting interests. These include a number of common insurer-insured conflicts including tensions among efforts to cooperate on liability defense, cross-complaints on coverage,<sup>74</sup> and other litigation with insurers.<sup>75</sup> Further, defendants may compete with each other as they seek to shift liability among themselves and their respective insurers.<sup>76</sup>

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*vors Tell Their Stories*, 9 WIS. WOMEN'S L.J. 95 (1994) (describing Dalkon Shield support groups).

<sup>72</sup> For a comparison of corporate culture in acknowledging fault and providing redress in other cultures, see Hiroshi Wagatsuma & Arthur Rosett, *Cultural Attitudes Toward Contract Law: Japan and the United States*, 2 UCLA PAC. BASIN L.J. 76 (1983); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC. REV. 461, 468 (1986) (using apologetic behavior of the president of Japan Air Lines following the crash of a DC-8 to contrast American and Japanese legal cultures).

<sup>73</sup> See *Evans v. Jeff D.*, 475 U.S. 717, 727-29 (1986) (noting that it is not a breach of ethics for defense to precondition a settlement on a waiver of statutory eligibility for attorneys' fees for plaintiffs' lawyers).

<sup>74</sup> Defendants, like plaintiffs' counsel, see Menkel-Meadow, *supra* note 39, suffer from classic Prisoner's Dilemma problems in strategic decisions to cooperate or "defect," see ERIC RASMUSSEN, *INTRODUCTION TO GAME THEORY* (1991), both with other defendants in cooperative liability committees and with their insurers.

<sup>75</sup> Insurers, for example, may want to collaborate with their insureds in contesting liability and thus may want to work with defense cooperative committees. This does not preclude them from then contesting their own liability under coverage, reckless conduct, or other insurance defenses.

<sup>76</sup> One adaptation to this problem has been defendant cooperation agreements assessing liability based on market share or other formulas for liability. See Harry H. Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-85). As more companies seek bankruptcy protection, more defendants attempt to shift liability to others with court stays or other protections so they can avoid assessment of damages to them. The first final approval of a mass tort class action settlement involved class settlement of claims against Aetna, insurer of the Robins company in the Dalkon Shield litigation. This move was welcomed by the initial defendant, because it increased the contribution to the claimants' trust funds. See *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.

### C. Plaintiffs' Counsel

In one sense the disputes in *Georgine* and *Lindsey* are simply disputes between and among different groups of plaintiffs' lawyers. Some repeat players in these litigations want to settle their large inventory of existing cases, particularly in the mature cases.<sup>77</sup> Others prefer to try well-prepared and more lucrative cases. In *Georgine*, defendants sought to effectuate a "global peace" by settling the future as well as present claims. The defendants allegedly accomplished this by "choosing" which plaintiffs' counsel to negotiate with, thus drawing a line between those repeat players who were able to negotiate the settlement and those who were left out.<sup>78</sup> By contrast, the *Lindsey* settlement at least attempted to include a greater variety of claimant groups by providing for a plaintiffs' committee comprised of openly differing plaintiffs' lawyers.

Plaintiffs' lawyers are divided, as Professor Coffee notes,<sup>79</sup> by the use of the class action device itself for mass tort settlements. Use of this method provides an opportunity for "class action" settlement lawyers (those more familiar with the arcane requirements of the class action device or who are more interested in fast settlements) to displace the trial lawyers who specialize in preparing and trying tort cases. In its most stark form, this represents a competition for the mass tort "market" between "law" lawyers and "fact" lawyers.<sup>80</sup> Indeed, so much is at stake, both in terms of the vast attorneys' fees and the precedents set as to how these cases will be settled in the future, that there are splits even within the "fact" and "law" groupings.<sup>81</sup>

Plaintiffs' lawyers worry about how the settlement of one case will affect another: is it wrong to settle too early, accepting smaller

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1989). Defense cooperation is further complicated by attempts to equalize or use market share as a basis for liability so as to avoid use of litigation as a competitive strike on competitors' prices. Are there antitrust implications to defense cooperation agreements if their effect is cartel-like behavior in controlling and coordinating costs with anticompetitive effects on prices?

<sup>77</sup> See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

<sup>78</sup> Such counsel are not really left out; they may not like the terms of *Georgine*, but they can still file their clients' claims and receive attorneys' fees through the settlement process.

<sup>79</sup> John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. (forthcoming 1995).

<sup>80</sup> This division was clear in the rhetoric of argument used in motions and closings in some of the mass tort settlement fairness hearings. Repeat play plaintiffs' lawyers are comfortable with juries, and some appear less willing or able to adapt to the arena of judge-heard legal argument.

<sup>81</sup> Should we think in antitrust terms here—that some plaintiffs' attorneys will, by virtue of their role in the settlements, have too large a "market share" of total attorneys' fees awarded in particular mass torts? With contingent fees, there is no "claim" for the clients of price consequences; those "hurt" are other lawyers who want a bigger piece of the pie.

amounts per claim while avoiding potentially dangerous proof problems (the "Scylla" encountered in the Bendectin<sup>82</sup> and Agent Orange<sup>83</sup> cases), or is it better to try (the "Charybis" of risk in any trial) the "better" cases in order to establish larger benchmark verdicts and to use early large punitive awards to force more into the settlement kitty? Thus, plaintiffs' lawyers are locked into obvious competition over fees. Yet the competition goes further and extends to issues of control over the cases and strategy (with the obvious implications for who will extract the ultimate attorneys fees<sup>84</sup>). Thus, while some argue that attorneys have a "craft" interest in how they do their work,<sup>85</sup> others, like Macey and Miller, suggest that plaintiffs' lawyers may be locked in a battle over their "property rights" to handle (and perhaps sell off) their cases<sup>86</sup> that may pit them against each other, as well as against their clients.<sup>87</sup> Thus, plaintiffs' lawyers, like defendants and their lawyers, are faced with a practical and classical prisoners' dilemma: whether to cooperate with other plaintiffs' lawyers in terms of strategy and information gathering, or to adopt a course that maximizes their own share of the tort claims market or captures a greater proportion of attorneys' fees. These dilemmas have produced "races to the courthouse" to see who can file, try, or settle first, as well as "races to the bottom" to see who can get earlier, quicker settlements, or earlier trials with some punitives awarded that leave little available cash for later players; all of these strategies result in less horizontal equity among players (both clients and lawyers).

Such differences in approaches to cases have begun to reveal some cracks in the usual political cooperation of the plaintiffs' bar. While ATLA and local trial lawyers groups have successfully engaged in law reform efforts in attempting to block mandatory arbitration<sup>88</sup>

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<sup>82</sup> See, e.g., *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988).

<sup>83</sup> See *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

<sup>84</sup> And what the claimants will receive. Mass tort settlements develop a pattern of higher recovery for the less injured and lower recovery for the more severely injured.

<sup>85</sup> See Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Mark Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 126-33 (1979).

<sup>86</sup> Jonathan R. Macey & Geoffrey P. Miller, Comments at the *Cornell Law Review Symposium* (Oct. 23-24 1994).

<sup>87</sup> The inherent conflict of interest between lawyer and client in the plaintiffs' contingency fee has long been recognized. See, e.g., Kritzer, *Fee Arrangements*, *supra* note 29, at 342-43; ROSENTHAL, *supra* note 51, at 96-112. The conflict, however, has been largely ignored in the ethics rules, although disclosure is mandatory, and some states have imposed capping in areas like medical malpractice. See CAL. BUS. & PROF. CODE § 6146 (West 1990) (California's Medical Injury Compensation Reform Act).

<sup>88</sup> See Judicial Amends Act of 1994, 140 CONG. REC. S12104 (daily ed. Aug. 18, 1994); ABA meeting, House of Delegates Resolution Against Mandatory Arbitration, New Orleans (Aug. 1994).

or to prevent secrecy in public health and safety settlements,<sup>89</sup> it is clear that not all plaintiffs' lawyers think alike on these issues. Some see alternative dispute resolution as a forum for faster and earlier settlements, while others view it as the road to the demise of the more lucrative contingent fee at trial. Here, splits in the plaintiffs' bar along lines of risk aversion may demonstrate new cleavages and stratifications in the bar that affect lobbying and rule-drafting efforts on the part of the once "unified" plaintiffs' bar.<sup>90</sup>

Both practitioners and academic commentators<sup>91</sup> raise concerns that not all class actions are alike and differentiation of the plaintiffs' bar may cause more internal conflicts. Securities cases and consumer cases, with large numbers of plaintiffs and low economic stakes, may present very different dynamics than high-loss bodily harm cases of mass torts. It is not even clear how expertise in one mass tort necessarily leads to expertise in another.<sup>92</sup>

Yet, in other ways plaintiffs' lawyers who are seeking to settle large numbers of torts claims through class actions present few problems not already known to the practice of law that challenge our ethics rules, especially conflicts of interests. Mass torts lawyers have long been settling "inventories" of cases in which they settle for large amounts of "fixed funds" and then allocate specific awards themselves to individual plaintiffs.<sup>93</sup> Sports lawyers representing players with

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<sup>89</sup> See TEX. R. CIV. P. 76(a); FLA. STAT. ch. 69.081 (1990). See generally Arlin Thrush, *Public Health and Safety Hazards v. Confidentiality*, 1994 J. DISP. RESOL. 235 (preventing secrecy in certain types of settlements and discovery proceedings). See also Carrie Menkel-Meadow, *Public Access to Private Settlements*, 11 ALTERNATIVES 85 (June 1993).

<sup>90</sup> It is not clear whether the plaintiffs' bar was ever more unified than any segment of the bar. While the American Trial Lawyers Association (ATLA) and local and state equivalents have always been effective lobbyists for rules affecting lawyers, there has always been stratification of this segment of the bar, which may have recently intensified as a result of the huge sums won by a small group of plaintiffs' lawyers. See, e.g., JEROME E. CARLIN, *LAWYERS ON THEIR OWN* (1962); EMILY COURIC, *THE TRIAL LAWYERS: THE NATION'S TOP LITIGATORS TELL HOW THEY WIN* (1988); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 232-73 (1982). One wonders how the plaintiffs' bar would take to a uniform rate of recovery (set attorneys fees) in mass torts.

<sup>91</sup> See Coffee, Summary, *supra* note 29; Resnik, "Cases" to "Litigation," *supra* note 43, at 6-16.

<sup>92</sup> Entrepreneurial plaintiffs' lawyers now call themselves "specialists in women's health claims" and have moved from Dalkon Shield to breast implants, even though the medicine involved in these cases is totally different. Further, asbestos lawyers are moving, perhaps with slightly greater claims to expertise, to tobacco cases, claiming the disease processes are quite similar (even if the warning and liability issues may be somewhat different). See Weinstein, *supra* note 53, at 18. See Broin v. Phillip Morris Co., 641 So. 2d 888, (Fla. Dist. Ct. App. 1994) (reversal of dismissal of class action suit on behalf of class of nonsmokers claiming injuries from inhalation of second-hand smoke).

<sup>93</sup> Without client consent, this is a violation of MODEL RULES, *supra* note 20, Rule 1.8(g). One wonders how often this "violation" is monitored, either by courts, disciplinary bodies, or in malpractice actions. Is such "bundling" of individual settlements any better than the claimed violations of individual rights in the future claimant settlements?



team salary caps are in a sense advocating for concurrent clients with possible fixed fund conflicts. Entertainment lawyers representing writers and producers who are seeking limited air time from network decisionmakers also represent concurrent clients with a conflicting interest in seeking "limited fund" allocations.<sup>94</sup> Criminal lawyers who either subtly or more overtly plea bargain for multiple defendants (or who signal differences in repeat play negotiations with prosecutors<sup>95</sup>) are also engaged in "conflicting" representation of concurrent clients, often without the kind of overt and informed consent contemplated by the rules. So, contend the mass tort plaintiffs' lawyers, concurrent representation is "common practice."<sup>96</sup>

#### D. Defense Counsel

Like their clients, diverse defendants and insurers, and like their often detested opponents, the plaintiffs' lawyers, defense counsel also face prisoners' dilemmas with each other and conflicts with their clients. Decisions to cooperate and share information have led to group defenses designed to minimize defendants' total liability, but a single defection can prove costly to those who remain.<sup>97</sup> Like their brothers and sisters who have conflicts over contingent fees, hourly fee lawyers also have conflicts with clients over lavish hourly billing that can almost equal the huge verdicts plaintiffs' lawyers trade on.<sup>98</sup>

Defense counsel also may have an interest in seeking predictability in the handling of such cases. Managing litigation is one of the services offered to large corporate clients, and with increasing competition for legal services the ability to guarantee results and cap liability certainly militates in favor of seeking the finality of some forms of class action settlements. Giant defendants, notorious for their preference

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<sup>94</sup> In California, the common practices of entertainment lawyers representing concurrent clients competing over limited resources, or worse yet, representation of "all sides of the deal" have led to a spate of new litigation challenging some of the leading entertainment lawyers. See Citron & Welkos, *supra* note 40 at D1; Richard Leary, *The Rules Against Conflict of Interest: Can Hollywood Honor Them?* (unpublished manuscript, on file with author).

<sup>95</sup> See, e.g., MILTON HEUMAN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE LAWYERS* (1978); LYNN MATHER, *PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE DISPOSITION* (1979); PAMELA UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978).

<sup>96</sup> This position is supported by the expert testimony of Professor Geoffrey Hazard, though it does not necessarily include these same examples. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 297 (E.D. Pa. 1994) (discussing Professor Hazard's testimony).

<sup>97</sup> In this sense bankruptcy is one form of defection that leaves more solvent defendants "holding the bag."

<sup>98</sup> Defense counsel are more likely to have their fees policed by clients these days, both in the new approaches to billing by insurers and larger corporations, and by in-house counsel who put pressure on firms to monitor billing practices and create fee incentives for settlement. See Stephen Salop & Robert Litan, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE 191 (1994).

for delay and the resulting putting off of liability, recently shifted the traditional assumptions of litigation with their efforts to quickly settle and determine total liability. The end result is that defendants, who need to cabin their liability exposure, may seek to settle claims faster (and cheaper) than plaintiffs' lawyers, who may need to develop the case law or worry about low settlement values as precedents.

Like their ideologically committed brothers and sisters in the plaintiffs' bar, many defense counsel believe they are performing an important social and public function; here, the conservation of corporate resources for more productive uses.<sup>99</sup> Lawyers thus attempt to morally "justify" settlements from both sides of the litigation tables. Yet these defense counsel must be careful about how they choose their settling partners. If any of the charges of "collusion" in these cases are sustained, defendants may find that the class action process that they have so recently come to embrace will be foreclosed.

#### E. The Courts and Judges

Perhaps most concerned about the ambiguity of rules and principles for settling mass torts are the judges who are asked to approve these settlements under Federal Rules of Civil Procedure Rule 23(e). It is they who must interpret the rules and decide whether counsel are adequate, current ethics rules are violated, and if settlements are fair. Judges deciding these issues in the current seas of ambiguity must first face their own existential crises of role. They must decide whether to take an activist role such as Judges Jack B. Weinstein (E.D.N.Y.), Robert R. Merhige (E.D. Va.), S. Arthur Spiegel (N.D. Ohio), Charles Weiner (E.D. Pa.), Samuel C. Pointer (D. Alabama), Robert Parker (E.D. Texas), Thomas Lambros (N.D. Ohio), Richard Ensalen (W.D. Mich.), and others who actively engage in the settlement or case management process, or whether to remain more passive and disinterested from the settlement. *The Code of Judicial Conduct* provides little guidance, and few standards in the rules or cases set limits on when a judge should refrain from examining the fairness of a settlement he has helped broker.<sup>100</sup> As some have argued recently, judges may also be interested parties in these proceedings, seeking their "self-interest,"<sup>101</sup> either in fame or personal and social satisfaction from han-

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<sup>99</sup> This is a rationale I have heard from asbestos defense lawyers, particularly those working on property damage and asbestos removal cases, where the effectiveness of asbestos removal (measured against its cost) is not entirely clear. Interview with Stephen Madva, Esq., counsel for defense of national class action school cases, in Philadelphia, Pa. (July 1990) ("Shouldn't money be preserved for educational purposes if it is not clear that asbestos is 'friable' [dislodged in the air] in the schools?").

<sup>100</sup> See Day v. NLO, 864 F. Supp. 40 (S.D. Ohio 1994); Spiegel, *supra* note 45.

<sup>101</sup> See Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994); Jonathan R. Macey, *Judicial Preferences, Public Choice*

dling big "public" cases, or efficiency by settling masses of "tedious" cases.

Moreover, judges must decide such difficult questions as when and how to invoke the ethical rules as standards for the "adequacy of counsel" under the class action rules;<sup>102</sup> how deeply to inquire into such questions as whether counsel really are adequate in the substantive as well as procedural or ethical sense; how much the conduct of lawyers should be scrutinized in assessing the fairness of the deal; and how much the court can, should, or must evaluate the substantive fairness of the negotiated deal. Ironically, critics assail judges for displacing the legislature by approving class action settlements that look very much like legislative or administrative schemes, although Congress itself essentially forced the courts to focus on increasing the use of settlement as a method of case management.<sup>103</sup> Judges have faced the important social, political, and practical issues of how to deal with such massive numbers of claimants equitably, while others, including Congress, have refused to act.<sup>104</sup> Thus, some judges confronted the

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*and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); see also Coffee, Summary, *supra* note 29, at 857.

<sup>102</sup> Judge Reed in *Georgine* and most federal courts see ethical standards in the federal courts as an issue of the federal courts' authority to manage themselves. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 326 (E.D. Pa. 1994); *Bell Atlantic Corp. v. Bolger* 2 F.3d 1304, 1316 (3d Cir. 1993) ("[E]thical standards imposed on attorneys in federal courts are a matter of federal law."). The ethics rules that are applied, however, are state rules. Thus, *Erie* problems may exist, not just with the displacement of state substantive torts standards in federal class action settlements, but with the interpretation by federal courts of state ethics rules. See Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); see also Linda Mullenix, *Multi-forum Federal Practice: Ethics and Erie*, GEO. J. LEG. ETHICS (forthcoming 1995). This is no small matter. In California, if there is a conflict of concurrent clients' interests, clients must consent *in writing* to continue the joint representation. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310(C) (Supp. 1995). Would this mean that in a mass tort class action settlement in California that written consent would have to be obtained from every class member? If a federal court in California holds otherwise, as a matter of federal law, what does that tell us about a federal common law of ethics? The Ninth Circuit has held that in California federal courts, the California rules apply. See *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986) (reversing sanctions, under FED. R. CIV. P. 11, against law firm that did not reveal adverse authority to the federal district court, as required by the ABA MODEL RULES, *supra* note 20, Rule 3.3(a)(3), but not by the California Rules or under Rule 11 of the Federal Rules of Civil Procedure as interpreted by the majority); see also *Nix v. Whiteside*, 475 U.S. 157, 176-77 (1986) (Brennan, J. concurring) (suggesting that lawyers' ethics rules are state rules that should not be federalized or "constitutionalized," even in Sixth Amendment claims of ineffective assistance of counsel). There may also be choice of law issues in determining which state's ethics rules should apply with legal activities occurring in a variety of states. See Mullenix, *supra*.

<sup>103</sup> See Civil Justice Reform Act, 28 U.S.C. § 471 (Supp. V 1993). For critiques that Congress usurped the courts' powers to control their own functioning, see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992).

<sup>104</sup> For fuller details and explanations for why Congress has not acted, using public choice and other theories, see, for example, Coffee, Summary, *supra* note 29; Schuck, *supra* note 21; Siliciano, *supra* note 2.

question of whether to exercise power in a legislative vacuum. These decisions touch on important separation of powers issues.<sup>105</sup>

#### F. Other Third Party Neutrals

In the context of deciding these questions, courts have increasingly looked to a new breed of "third party neutrals" or court adjuncts, raising important issues about the standards or rules of ethics to be applied to these actors.<sup>106</sup> Are special masters, court-appointed mediators, and others who assist the parties in negotiation or the judge in evaluating the formulas set for settlement, to be judged by the Judicial Code of Conduct or by other rules, such as the lawyers' Model Rules of Professional Conduct?<sup>107</sup> Such third parties often meet with the parties privately, learn confidential and proprietary information, often suggest settlement frameworks themselves,<sup>108</sup> and may have conflicts of interests of their own, based on past advocacy work or prior third party neutral roles. How much such third parties share with the judges they work for may also affect how "neutral" the judge is when called upon to judge the fairness of the settlement.<sup>109</sup> As in *Agent Orange*,<sup>110</sup> when some disgruntled parties later challenged the role of third party neutrals who expressed the "views" of Judge Weinstein in settling the case,<sup>111</sup> challenges to the activities of third party neutrals may occur when the settlement is consummated or has "gone bad" with one of the parties. All of these issues may be further

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<sup>105</sup> These decisions implicate political issues as well. If Congress has been unable to act because of the gridlock caused by the balance of powerful corporate interests and the organized plaintiffs' bar, then what should the courts do as a nondemocratic, but accountable, institution? As others have suggested, an institutional and political balance may have been struck by the courts acting and Congress' failure to correct or change what the courts have done. See Schuck, *supra* note 21.

<sup>106</sup> See, e.g., *Third Party Neutrals*, *supra* note 45; *Ex Parte Talks*, *supra* note 45; see also *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735 (E.D.N.Y. & S.D.N.Y. 1990) (Judge Weinstein's decision on Special Master Kenneth Feinberg's conflicts of interest holding that standards of Judicial Code of Conduct apply).

<sup>107</sup> A group comprised of the American Bar Association (ABA), American Arbitration Association (AAA), and Society for Professionals in Dispute Resolution (SPIDR) have drafted an ethics code for mediators, to be considered at this year's ABA annual meeting, but some are troubled by the proposed rules' failure to deal with some of these new court-adjunct roles and the roles that institutions (courts and private providers) play in assigning and assessing third party neutrals. The Commission on Ethics and Standards in Alternative Dispute Resolution, formed by the Center for Public Resources in New York, will consider these issues. Annual Center for Public Resources Meeting, New York (Jan. 25, 1995).

<sup>108</sup> See Kenneth R. Feinberg, *Creating Alternatives for Asbestos Claims*, 45 ARB. J. 3 (1990); Francis E. McGovern, *Toward A Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

<sup>109</sup> It was Judge Charles Weiner's prior relationship with the Center for Claims Resolution (CCR), the defendant in *Georgine*, that caused him to refer the fairness hearing to Judge Reed. See Spiegel, *supra* note 45, at 1565.

<sup>110</sup> See sources cited *supra* note 83.

<sup>111</sup> See SCHUCK, *supra* note 83, at 155-67 (1986).

complicated when cases are referred out "for settlement purposes" to private third party neutrals who may or may not be working with full authority of the court.<sup>112</sup>

### G. Legislatures—Administrative Agencies

Standing by, as we debate the role of parties, attorneys, and courts in the settlement of mass tort class actions, are those bodies that might be better suited to solving the compensatory and other policy aspects of "resolving" the mass tort "crisis." While I will not review the debate here about whether an administrative structure might not be better suited to determining compensation,<sup>113</sup> it is clear that the legislatures (both federal and state) and possible administrative agencies (why not a Federal Emergency Management Agency for mass torts?) are interested parties in these issues. If the current group of mass tort class action settlements prove successful (*i.e.*, are sustained on appeal and prove to be efficient devices for settlement), then the legislatures are likely to prefer the status quo. If, on the other hand, interest groups are dissatisfied with the administration and fairness of settlements achieved through litigation and settlement, there may be increased demand for legislative and administrative action. Though beyond the scope of the present Article, it is useful, in assessing what an appropriate settlement process is in these cases, to consider whether legislative and administrative (such as reg-neg<sup>114</sup>) processes with inputs *ex ante* from interest groups might produce better "settlement" processes (that is, more participatory), as well as results, (depending on how "captured" the respective groups are by interested parties).

We should also consider the reasons for legislative failure—interest group politics, campaign financing,<sup>115</sup> and other modern determinants of political failure. Is it appropriate or desirable for the courts to act in these arenas of important public policy when the legislative bodies are stalemated by powerful interests? What ought the relations

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<sup>112</sup> Whether third party neutrals working in the private sector but referred by the court will have both the authority and "protections" of court rules, judicial immunity, or standards for work is an important unresolved issue. For cases holding that court-appointed third party neutrals do serve under judicial standards, see *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995) (holding mediator was protected by quasi-judicial immunity); *Howard v. Drapkin*, 271 Cal. Rptr. 893 (2d Dist. 1990) (holding court appointed psychologist to judicial immunity standard).

<sup>113</sup> See Rabin, *supra* note 70, at 964; Brickman *supra* note 64, at 1821.

<sup>114</sup> See Philip J. Harter, *Negotiating Regulations: A Cure For Malaise*, 71 GEO. L.J. 1 (1982); Stephen Goldberg, *Reflections on Negotiated Rule-Making*, WASH. LAW., Sept.-Oct. 1994, at 42.

<sup>115</sup> See, e.g., *Tommy's List*, WALL ST. J., Nov. 8, 1994, at A22 (editorial reporting on contributions of lawyers, specifically the ATLA, to congressional political campaigns). Of course an editorial from the other end of the political spectrum could have examined the role of insurance companies in similar financing campaigns.

of one institution be to another? How do state regulatory bodies, like lawyer disciplinary bodies, relate to other institutions like the courts?<sup>116</sup>

#### H. The Public or Polity

While the average citizen may not be concerned with the more arcane aspects of negotiation and conflict of interest ethics, it is clear that the public should have an interest in the larger issues implicated here—to whom should we trust the allocation of scarce resources, both money for injuries suffered and time and facilities for our public institutions? The public ought to also have an interest in how ethics rules are made and enforced. Ethics rules may influence the esteem with which lawyers are held by their potential clients, and whether the profession can adequately police itself clearly has implications for the legitimacy of its use by people who need lawyers. Even for those who are not currently “injured” in a mass tort, the likelihood that some family member or friend might someday be injured gives most members of the public a stake in how these issues are decided.<sup>117</sup> Finally, the treatment of these cases in the legal system, as covered by the media, affects the public’s sense of accessibility to and legitimacy of the legal system. The resolution of mass torts implicates important financial issues as well, not just the use and financing of the legal system, but the “public” costs of increased prices for hazardous goods, drugs, and other substances as the costs of damage awards are passed on to the consumer.

Thus, we all have a stake in how these questions of the fairness of mass torts settlements are decided. How, then should they be decided?

### III

#### THE PROBLEMS: ANALYSIS OF THE ETHICS ISSUES IN MASS TORT CLASS ACTION SETTLEMENTS

At the core of the problems in analyzing the ethics issues in the settlement of mass torts through class action is the assumption made

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<sup>116</sup> For example, if appeals on the conflicts of interests issues fail in the federal courts, could disgruntled class members file disciplinary charges? Professor Koniak has already suggested that class members might have malpractice actions against class counsel for conflicts of interests or for the quality of the settlements achieved. Koniak, *supra* note 27, at 1141, 1145-47.

<sup>117</sup> Some think that it is precisely because injury by a product or in an accident is so remote to most people that mass tort victims have been unable to successfully organize for political and statutory relief. If the new rash of tobacco cases is successful, classes defined to include anyone who has ever smoked a cigarette may be a large and concrete enough incentive to facilitate such political organizing.

by the ethics rules of individual attorney-client representation<sup>118</sup> and what the content of such a relationship should be. Mass torts, by definition, affect groups of people, and all attorneys representing masses or groups of clients are likely to have conflicts of interests.<sup>119</sup> At another level, although the Kutak Commission's redraft of the Code of Professional Responsibility did begin to draft rules for lawyers in different roles<sup>120</sup> and to acknowledge some of the differences in the types or areas of practice,<sup>121</sup> the Model Rules still represent an ethics for lawyers who are presumed to be engaged in a generic practice, with a focus on litigation—even transactional problems are analyzed with an assumption of the adversary model.<sup>122</sup>

Thus, the application of the current ethics rules do present some issues for lawyers and courts who would seek to use the class action to settle masses of cases outside of more conventional representation relationships. The existing rules, though they can be "adapted" to meet these problems (see suggestions for solutions below in Part V), do not really contemplate either the kind of lawyer-client relations that exist in the settlement of mass torts or the kinds of tasks and activities engaged in by the legal actors in these situations. Thus, at issue is the transsubstantive claims of the rules, and the recognition, from applications to unusual cases, that the rules do not provide adequate guidance either in unusual cases or even in the presumed "typical" representation situation.

These cases also present difficult questions of authority and power. Given the difficulty in applying the ambiguous rules,<sup>123</sup> who will be responsible for definitive judgments about the standards by which we measure lawyer conduct and settlement outcomes—federal judges?<sup>124</sup> state disciplinary boards? ethics committees of various level

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<sup>118</sup> There is some recognition in the rules that some attorneys represent entities, organizations, or the government, *see, e.g.*, MODEL RULES, *supra* note 20, Rule 1.13, but even this rule doesn't deal with some forms of group representation such as unions. Further, there is no explicit ethics rule that deals with the ethical issues in class action representation (which has been dealt with under the rubric of class action decisional law).

<sup>119</sup> *See infra* part III.A.1.

<sup>120</sup> *See, e.g.*, Lawyer as Advisor, MODEL RULES, *supra* note 20, Rule 2.1; Lawyer as Prosecutor, *id.* Rule 3.8.

<sup>121</sup> The Model Rules allow lawyers for indigents to pay costs of litigation but prohibit estate lawyers from receiving a bequest in wills drafted. *See id.* Rules 1.8(c) & (e)(2).

<sup>122</sup> *See id.* Rule 2.2 (describing the lawyer as intermediary between two represented parties, giving no guidance for the lawyer who acts as a mediator between parties who are not "represented" in a conventional adversary sense).

<sup>123</sup> I refer here not only to the ambiguity or different interpretations of the ethics rules as evidenced by the disputes among the expert witnesses in these cases, but also to the relationship of the ethics rules to the fairness determinations under FED. R. CIV. P. 23(e).

<sup>124</sup> *See* Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969 (1992).

bar associations? the American Law Institute (ALI)?<sup>125</sup> state judges? lawyers and experts<sup>126</sup> who craft arguments and opinions? parties who may or may not accede to both the representational relationships they are in or to the specific outcomes of settlements?<sup>127</sup>

## A. The Rules

### 1. *Conflicts of Interests*

The application of conflicts of interests rules in mass torts class action settlements reveal a series of problems of interpretation or policy unanswerable by the current rules:

1) How can groups of people, with potentially differing interests, be represented by a single lawyer?

2) How can members of a class "consent" to potentially conflicting representation? How can they evaluate whether their lawyers have a "reasonable" belief that there will be no material adverse impact on their representation?

3) How do the underlying values of loyalty and confidentiality find expression in group representation?

4) Is class action representation really so different from other forms of multiple party representation that lead inevitably to conflicts of interests? If such representation and conflicts are so common, do our current rules reflect or effectively police actual practice?<sup>128</sup>

5) Should conflicts of interests rules be used to express other legal profession values? (Is the public better served with wider dispersion of legal services to a greater number of lawyers for increased competition, and "lower prices," but perhaps with lower levels of expertise?<sup>129</sup>)

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<sup>125</sup> In its present draft the RESTATEMENT (DRAFT) OF THE LAW OF LAWYERING does not provide much guidance on ethical issues implicated in the handling of mass torts. See Mullenix, *supra* note 3; Weinstein, *supra* note 21. Would it be possible for the ALI groups on Complex Litigation, Products Liability, and the Law of Lawyering to compose a joint group to deal with such issues? (Is there not yet enough law to "restate" the standards?)

<sup>126</sup> Although judges are using experts on the ethical issues in mass tort class action settlements they don't need to. The ethics rules are "law" which could appropriately be interpreted by judges, as any law.

<sup>127</sup> How should all of those with interests canvassed in Part II of this Article be involved in the decisionmaking process required here?

<sup>128</sup> For a recent argument that corporate lawyer "conflicts" within the entity being represented have long been tolerated while other "collective" conflicts have not, see William Simon, *The Dark Secret of Progressive Lawyers: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 401 (1995).

<sup>129</sup> This question, of course, raises an interesting empirical question. Does the concentration of lawyers in a given sub-specialty really lead to efficiencies or benefits of expertise? How difficult is it for a new lawyer to "master" the liability rules, facts, medical, and insurance issues at stake in particular mass torts?



6) Can lawyers perform more than one function in a single case (negotiating settlements, representing and advocating for particular claims, and monitoring the settlement funds)?<sup>130</sup>

In considering whether class counsel (settling future claimants' claims against specific defendants, as in both *Georgine* and *Lindsey*) have inappropriate conflicts of interest (since class counsel represent different possible groupings of future claimants, as well as present "clients"<sup>131</sup>) we look to Rule 1.7(b) and 1.8(g) of the Model Rules. Although Professor Hazard testified, in *Georgine*,<sup>132</sup> that there was no violation (indeed no application) of Rule 1.7 since the future claimants (members of the class) were not clients of class counsel, other experts, notably Professors Cramton and Koniak, testified that there was a conflict, specifically because future claimants did not receive the "same deal" as present clients received in the settlement of the asbestos inventories of the class counsel. In Professor Hazard's view, (adopted by the court in *Georgine*), although there was no formal client relationship, class counsel owed the class members a similar duty of loyalty and diligence, derived from the fiduciary obligations of class action lawyers.

A strict reading of Rule 1.7(b) indicates that if clients (or third persons<sup>133</sup>) have interests that would be "materially limiting" on the representation, the lawyer must 1) determine (based on his reason-

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<sup>130</sup> I have not focused here on the more obvious conflicts of interests that arise when lawyers serve the multiple roles, as in the *Georgine* settlement, of monitoring and auditing the settlement and claims processing, since Judge Reed himself recognized that issue and offered the remedy of expanding the monitoring team. A more open and participatory auditing committee of plaintiffs' lawyers (as in *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994)) may be one practical solution that doesn't really eliminate the conflict of interest, it just distributes it more broadly and attempts to assure a better monitoring process. The existence of this kind of fiduciary and representational conflict reveals other lapses in our rules. Except for such rules as MODEL RULES, *supra* note 20, Rule 2.2 (dealing with intermediary representation of two or more parties in the same transaction), the rules do not deal with a variety of nonrepresentational roles that lawyers play that could interfere with representational roles (*e.g.*, audit functions, serving as a receiver or master, mediators and other third party neutrals, serving on the board of directors, or simultaneously being a member and representative of an organization).

<sup>131</sup> Like Professor Koniak, I have adopted the nomenclature of present clients and future claimants. The use of these words does seem to put the rabbits in the hats—future claimants are pretty close to "future" clients, which could implicate not only the rules pertaining to concurrent clients, MODEL RULES, *supra* note 20, Rule 1.7, but successive clients, *id.* Rule 1.9, if present and future clients are seen as having "materially adverse interests" in competing for the same funds.

<sup>132</sup> See Transcript of Fairness Hearing at 30-67, *Georgine v. Amchem Prods., Inc.*, No. 93-0215 (E.D. Pa. Feb. 25, 1994) (testimony of Geoffrey Hazard) [hereinafter Fairness Hearing].

<sup>133</sup> Thus, for me, whether the future claimants are clients or not does not matter since the potentially materially adverse interests of any "third parties" to existing clients raises issues under MODEL RULES, *supra* note 20, Rule 1.7.

able belief) that such representation will not be adversely affected and 2) obtain the client's consent after consultation. Most of the attention in the cases has been paid to the first prong, through a "back-end" analysis of whether the settlement is "fair" to both "sets" of claimants, as "evidence" that the class lawyers could not have had a "reasonable belief" that their various "relationships" to parties were "materially limiting" each other. Settling lawyers claim that since the negotiated bargain was fair (as between plaintiffs' lawyers and defendants for the future claimants) there was no adverse impact on these potential future claimants. The court, in treating the claim that future claimants were treated differently in the settlement than those who have already filed their claims (most specifically in the provision of settlements and no immediate damages for those with pleural thickening), found that there are rational reasons for the differences in treatment. The *Georgine* court concludes that current litigants have already born the expense and other costs of litigating, and future claimants can be paid settlement amounts based on lower transaction costs.<sup>134</sup>

While there clearly are rational "differences" between these two classes of claimants, it is hard to see how different costs and experiences of the legal system would be a rational basis for treating pleural claimants differently in the settlement than in litigation, since non-pleural clients in the current inventories also experienced these differences. This is clearly a difference in "legal" treatment as claimed by many of the critics—the settlement alters state law (in some states) by creating different benefits for pleural claimants than they would receive by litigating (in some states<sup>135</sup>). The class groupings are not

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<sup>134</sup> As an illustration of how these issues became conflated in the decision, consider that the court treats the comparison of the inventory clients with the settlement claimants as an issue pertaining to fraud or collusion (based on Professor Coffee's argument that the settling counsel "colluded" to give future claimants less than what was extracted for present clients), rather than as an issue of whether one "representation" materially affected the other "representation." Perhaps most troubling to me is the court's "finding" that the class action settlement was not entered into "for the purpose of settling [the] pending cases." *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 296 (E.D. Pa. 1994). This seems contrary to testimony on all sides of the case. That there were still contingencies in the finality of the class settlement when the present inventories were settled is clear, but it also seems most likely that the present client inventory settlements were made because the "global peace" sought by the defendants was at hand.

<sup>135</sup> Compare *Busfield v. A.C. & S., Inc.*, 434 Pa. Super. 424 (1994) (holding that with pleural thickening, an "asymptomatic" asbestos disease, plaintiff could not recover for fear of cancer) with *Marinari v. Asbestos Corp.*, 417 Pa. Super. 440 (1992) (holding that claimant can bring action at discovery of thickening of the lungs). See also *Volterano v. Works Comp. Bd.*, 639 A.2d 453 (1994) (holding that pleural thickening is not an "occupational disease" for recovery purposes under Worker's Compensation scheme); *Giffear v. Johns-Mansville Corp.*, 632 A.2d 880 (Pa. Super. Ct. 1993) (en banc) (holding that "without physical symptoms, impairment or disability, pleural thickening is a noncompensable injury and therefore, does not give rise to a cause of action" and explicitly overruling cases allowing a cause of action for pleural thickening such as *Morrison v. Fibreboard Corp.*, 630 A.2d 436 (Pa. Super. Ct. 1993)).

necessarily related to differential experiences (and costs) of the legal system, but rather do represent the groupings made by lawyers settling different classes of cases.<sup>136</sup>

The ethics experts and courts seem to have analyzed the problem this way, looking at the actual settlement as a reflection of the adequacy of the representation in order to avoid the complex problem of client consent. By doing so they define away the conflicts issue and treat it somewhat differently than if the two or more groups of clients and claimants were recognized as having different, and possibly adverse, interests. The court adopts Professor Hazard's views that there is no conflict because the lawyers have satisfied their fiduciary duties to the class (in negotiating adequately and getting a good deal) and rejects the objectors' claim there is a conflict and that counsel failed to obtain adequate consent. The analytic question here is whether class counsel can reasonably conclude that there is no materially adverse interest among groups of clients and claimants because they (counsel) are so good and able that they can negotiate effectively for all.<sup>137</sup> In my view, a conflict (or the potential for it) exists, and thus I turn to the question of whether it is so material or so adverse that it cannot be consented to (a "nonconsentable" conflict).<sup>138</sup> As Judge Reed found in *Georgine*, enough adversity existed between plaintiffs and defendant, and negotiations were sufficiently "long [and] deliberative" to support the conclusion that counsel were adequate representatives of the different groups.<sup>139</sup> This invokes a "process" view of the representation. This view holds that by themselves, long and hard

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<sup>136</sup> See Koniak, *supra* note 27, at 1059-64.

<sup>137</sup> For a discussion of the applicability of subjective and objective tests for this standard, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 341-42, 352-58 (1986) (reviewing law as of 1985 and suggesting that "non-litigation" conflicts are more likely to be tolerated). Should the future claimant class conflicts issue be measured by a litigation or transactional standard?

The current situation raises the question of whether representation outside of a formal litigation context in court (*i.e.*, in negotiation) should be measured differently depending on the task performed by the lawyer. Note that one could easily apply the "obvious" standard of the Model Code in this situation because the negotiation is in the context of adverse litigation for the present claimants, and there is no litigation pending for future claimants. The lawyers are merely engaging in a negotiated "transaction" in which they believe that they can adequately represent a variety of parties. Thus, the question arises as to how the lawyers' reasonable belief should be measured—by looking inside the on-going negotiation (process) or by evaluating the negotiated deal (substantive review).

<sup>138</sup> This is a question about which courts and experts have differed because of the values of allowing clients the opportunity to "choose" their lawyers versus competing interests of the appearance of impropriety for the profession and courts and a "paternalistic" concern that clients will not be able to take care of themselves in this arena.

<sup>139</sup> *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 320 (E.D. Pa. 1994). Judge Pointer reached a similar conclusion in *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994). In that case there were different groups of plaintiffs' lawyers negotiating for

negotiations support the conclusion that plaintiffs' lawyers bargained hard (and well?) for their various groups of clients. Much like judges who are hesitant to grant disqualification motions because of the cost to the system and clients' choice of counsel,<sup>140</sup> the courts in these cases pursue practical interests when they fail to pursue the conflicts issues. The consent issue in class action settlements is hard to resolve under current ethics and class action rules. In my view, if the courts accept the finding that there is a potential conflict (and I believe there is) then, if it is not a disqualifying nonconsentable conflict, *the clients (and the claimants) must consent.*<sup>141</sup>

Thus, the difficult question unavoidably arises of what constitutes consent in mass class action settlements. There are several possible approaches. First, in the class action context, the court can consider itself the "consenting" party—in essence, ruling from the basis of the fairness hearing that the parties either have constructively consented or would consent to such a "fair" deal and the work of class counsel.<sup>142</sup> Second, the notice of the class action settlement could provide a description of the potential conflicts<sup>143</sup> along with an individual client waiver form. Consent can be presumed from silence,<sup>144</sup> while the ex-

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different interests, but not for all of them. Counsel for foreign claimants objected that the interests of their clients were not adequately met.

<sup>140</sup> See GEOFFREY HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 627 (2d ed. 1993).

<sup>141</sup> For a related argument that consent decree settlements that affect third parties (even in injunctive relief) should require consent of the affected party, see Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103; Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011 (1992-93) (suggesting that class representatives and the procedural protections of the class action device could be enough for "consent" to a settlement). Thus, I am only extending this analysis of class consent to a settlement to class consent to a conflict of interest. This would require information about the potential (and actual) conflicts to appear in the notices of class action settlement, advising parties of their rights to opt out. No such language appeared in the *Georgine* notices.

<sup>142</sup> The difficulty with this is that the ethical rules contemplate consent prior to representational acts, not after the work has been "completed." Consent given at the beginning of a representation can turn out to be inadequate if new circumstances develop that increase the "adversity" of the interests or render the conflicts more "real."

<sup>143</sup> The colloquy at the symposium between Professor McGovern (explaining the content of the *Lindsey* settlement) and Professor Henderson made clear that explications of the substantive terms of class action settlements are difficult enough even in person. James A. Henderson, Jr. & Francis E. McGovern, Comments at the *Cornell Law Review Symposium* (Oct. 24, 1994). Such notices become even more complex when potential conflicts and requests for waivers are added to written class action notices. This raises the difficult issue of how much counseling is required for an adequate waiver of conflicts. Do clients understand better from oral and interactive counseling sessions with lawyers than through printed notices? Or would modern technology, such as videos and computer programs or telephone hotlines that explain legal notices and offer interactive questioning opportunities, be more effective?

<sup>144</sup> This would require a change of law in some states, such as California, which require consents to conflicts of interests to be in writing. See CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310(C) (Supp. 1995).

tent and depth of consent can be measured from the number of "opt-outs."<sup>145</sup> Third, a class representative for each group (comprised of actual clients or potential claimants) could be considered "the client" for purposes of ascertaining consent. Also, as has happened in some cases, the court could appoint a guardian ad litem to assess the "fairness" of the settlement or to "consent" for the differing classes of claimants.<sup>146</sup> Unfortunately, none of these solutions to the consent problem are "authorized" by the ethics rules, which seem to require individual consent and assume a single attorney-client relationship. Efforts to justify some of these alternative modes of notice or consent have not yet passed appellate muster.

In addition to the difficult consent issues in the class action context, there is also Professor Hazard's persuasive testimony that these kinds of "conflicts" are quite common in multiple client contexts. How then can one square the language of the rules with the reality of law practice?<sup>147</sup> The testimony in *Georgine* refers to classic multiple party situations, such as whole families involved in car accidents suing the same defendant, but having slightly to very different interests.<sup>148</sup> Other examples in the law abound: husband and wife or sibling wills;<sup>149</sup> sports or entertainment lawyers representing several clients against contracting parties with limited or fixed resources; criminal lawyers with "repeat play" relations who trade one case off against another. These constitute conflicts of interests as well and may present more direct harm, given the presumed loyalty of the individual lawyer-client relationship. We know that the rules require consent in such cases, and we know that consent is not always obtained.<sup>150</sup> Thus, the conflicts of interests rules may be presenting some of the same problems that led Professor White to conclude, many years ago, that negotiation behavior could not be regulated by ethics rules.<sup>151</sup> Wide-

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<sup>145</sup> This is in essence what is being described in the aftermath of these two major settlements. If too many people opt out, we will know either that they think the settlement is substantively unfair, or that the potential claimants would prefer a chance to litigate or settle with their own lawyers, outside of the specified processes developed by the settlement. See David R. Olmos & Henry Weinstein, *Breast Implant Settlement In Peril*, L.A. TIMES, May 5, 1995, at 1.

<sup>146</sup> See *Ahearn v. Fibreboard Corp.*, No. 93-526 (E.D. Tex. Oct. 12, 1993) (appointment of Professor Eric Green as Special Master to assess fairness of settlement); Report of Guardian Ad Litem, Eric D. Green, *Ahearn v. Fibreboard Corp.*, No. 6:93-526 (E.D. Tex. Feb. 9, 1995).

<sup>147</sup> See MODEL RULES, *supra* note 20, Rule 1.8(g) (requirement that in cases of aggregate settlements of cases with multiple clients, each client must consent).

<sup>148</sup> See Fairness Hearing, *supra* note 132, at 33-38 (Feb. 24, 1995).

<sup>149</sup> See Shaffer, *supra* note 40, at 967.

<sup>150</sup> See articles cited *supra* note 94, referring to entertainment cases in which absence of consent in conflict situations has become an issue. In California, consent in the MODEL RULES, *supra* note 20, Rule 1.7(b) situation requires written consent. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310(C) (Supp. 1995).

<sup>151</sup> See White, *supra* note 35, at 926-27.

spread ignorance or disobedience of these rules might lead to disparagement and loss of legitimacy of all of the rules. That the requirement of consent is overlooked in a wide variety of cases is no justification that consent should be ignored or "waived" in the context of mass torts. Conflicts rules should be enforced where they are clear—the question is what happens if the rules don't seem to contemplate a particular situation? Are conflicts in mass tort class actions different from conflicts in other areas?

The difficulty of analyzing and then enforcing the conflicts rules in the mass tort class action settlement context merely reveals the difficulties with conflicts issues more generally.<sup>152</sup> Several groups of lawyers who commonly work with groups or limited sets of clients, such as entertainment lawyers,<sup>153</sup> suggest that the current conflicts rules don't reflect the reality of their practices.<sup>154</sup>

These conflicts between classes or other "groupings" of individual clients (such as present clients and future potential claimants)<sup>155</sup> may well be different from conflicts involving concurrent individual clients. A discussion of how both the conflicts rules and the class action rules may need to be redrafted to reflect these differences may be in order. We should at least openly debate the differences and issues implicated here, rather than simply assimilate different situations to rules that were clearly not drafted with these varieties of lawyer-client-claimant arrangements in mind.<sup>156</sup>

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<sup>152</sup> And if judges and scholars are having problems with them, practitioners are having greater difficulties. As a teacher of "pervasive ethics" at UCLA, I questioned a large number of lawyers in Los Angeles about what their greatest (in number and in difficulty to resolve) ethics problems were. For most practitioners, regardless of field of practice, the most troubling issue was that of conflicts of interests. Practitioners regard these rules as restraints on trade without adequate justification. They feel quite capable of switching sides or clients without offending the underlying principles of loyalty or confidentiality. In many practitioners' eyes it is clients who are jumping ship and moving from law firm to law firm and so law firms need to be able to represent all comers, regardless of prior relationships as long as confidences are protected and actual current conflicts are monitored. This is what has led to the use of "screens" in private practice, even when the rules authorize them only in cases involving movement from government to private practice. Compare *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980) with *LaSalle Nat. Bank v. Lake County*, 703 F.2d 252 (7th Cir. 1983).

<sup>153</sup> See articles cited *supra* note 94.

<sup>154</sup> I think they do and should be enforced. See discussion *supra* notes 40, 94, *infra* note 165.

<sup>155</sup> Could MODEL RULES, *supra* note 20, Rule 1.8(g) be redrafted to consider separate rules for class action settlements that would still require some ex ante consent under Rule 1.7(b) before the negotiation starts and another "consent" once the negotiated agreement has been consummated? See Menkel-Meadow, *supra* note 39, at 783.

<sup>156</sup> The rules and comments do refer to the relationship between counsel and client as possibly being affected by potential or actual conflicts. The rules convey an image of a relationship between an individual client and lawyer, and fail to consider the relationship of a class lawyer to a class member who may be a potential claimant, future client, or no client at all.

From the client's perspective, the underlying interests sought to be protected by conflicts of interests rules are confidentiality and loyalty. In the settlement of mass torts, the claim is that loyalty is compromised when classes of individual cases are traded off against each other. This claim implicates the ethics rules requiring "zealous" representation<sup>157</sup> and assumptions that loyal and zealous representation require individual maximization<sup>158</sup> (usually of monetary claims).<sup>159</sup> Thus, the conflicts of interests are measured by the "quality of the deal," and loyalty is presumed to be compromised if differential treatment between the classes can be shown.<sup>160</sup> Yet, how can loyalty to groups or classes of claimants be demonstrated? Even if inventory settlements of present claims were loyally and diligently negotiated, it is a common practice for plaintiffs and defendants to agree to global sums to be divided by plaintiffs' attorneys, so the notion of individually negotiated settlements may largely be a myth. If the concern with the future class settlement is that loyalty must be measured comparatively between classes, then the comparisons between individuals in any group claim should also be considered.<sup>161</sup> What loyalty have class action lawyers shown any number of future claimants in other contexts—school desegregation,<sup>162</sup> prison reform, employment

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<sup>157</sup> Compare MODEL CODE, *supra* note 31, DR 7-101; with MODEL RULES, *supra* note 20, Rule 1.3 (moving "zeal" to the comments and replacing it with requirements of diligence and competence). The Comments to MODEL RULE 1.3 state that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2."

<sup>158</sup> In any representational arrangement there will also be the problem of conflicts of interests in the fee arrangements that will provide different interests and incentives for the lawyers to play mini-max games with lawyer effort and client recovery. There are different conflicts in both contingent fee and hourly rates. See Murray B. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125, 1126 (1970). There is also a "conflict" in the allocation of scarce time and resources for lawyers on salary—government lawyers, in-house lawyers, public defenders, and legal services lawyers. See Menkel-Meadow & Meadow, *supra* note 52, at 239.

<sup>159</sup> For a longer explication of how our legal system of advocacy presumes an individual maximization model in advocacy in both litigation and negotiations, see generally Menkel-Meadow, *supra* note 39.

<sup>160</sup> This appears to be the basis of Professors Coffee's and Koniak's assessments—the future claimants were "sold out" because they received a deal that was worth less than the presently settled inventory of cases and thus class counsel were disloyal to part of the class. In this sense the disloyalty of the "bad deal" signals to them not only an impermissible, nonconsentable conflict of interest, but also a "fraud" under the standards of approval of the class settlement under Fed. R. Civ. P. 23(e).

<sup>161</sup> Does this analysis lead us to a kind of "equal protection" analysis for classes or subclasses in court certified class actions that does not apply in privately negotiated individual claims? What if the legal system awards similarly situated claimants different amounts for similar claims? See Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995).

<sup>162</sup> One could argue that the well-intentioned actions of civil rights lawyers seeking desegregation of schools has actually contributed to the resegregation of schools, a "disloyal" act to future claimants seeking a quality, integrated education. See Derek Bell, *Serv-*

discrimination, welfare reform—where settlements are entered into that clearly affect future entrants to the system?<sup>163</sup> The concept of loyalty underlying the concurrent conflict of interests rules becomes problematic in a number of areas. Just because there are loyalty problems in other forms of representation, however, does not mean that conflicts rules should be ignored or rationalized here. Rather, I hope to expose how difficult it is to enforce our present conflict rules in any context.

Conflict of interest rules also support other less well-recognized values in our regulation of the legal profession. Concern for maintaining the confidences and loyalty of clients has led to some redistribution of legal services. As modern litigation has proliferated, increasing the numbers of parties and issues in lawsuits, conflicts rules require the appointment or retention of separate counsel for more people and issues in particular lawsuits.<sup>164</sup> This is, in essence, the real value underlying the conflicts of interest challenges in many cases, including mass torts: plaintiffs' lawyers want the "rewards" of contingent fees spread among them. Conflict of interest challenges are used strategically, not only to remove particular law firms or lawyers from representation, but to break up perceived "monopolies" of representation.<sup>165</sup> Conflict of interests rules may serve some lawyer interests, as well as client interests, and these interests may or may not be in tension in particular cases. The rules also pit lawyers against each other, and the motions to disqualify, disciplinary complaints, and

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*ing Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976).

<sup>163</sup> The argument is often made here that these institutional reform cases only involve declarative or injunctive relief and not monetary relief. *But see* Laycock, *supra* note 141. This distinction seems largely false to me—in both employment discrimination cases (future hires or future promotees) and welfare cases (changes in eligibility requirements) there are clearly monetary issues, even if they are not formally labeled damages, and "settlements" and judgments in those class actions bind, whether wittingly or not, future potential claimants of those institutions.

<sup>164</sup> This development can be seen not only in large scale private litigation involving liability, insurance, securities, and corporate claims, but also in bankruptcy, criminal defense, child abuse and domestic relations, environmental law, civil rights law, and virtually any area where joinder of more than two parties is necessary to resolve disputes or to plan transactions.

<sup>165</sup> In the entertainment cases, for example, conflicts issues are often raised by clients after a deal has gone bad and a client is looking for a way to void or challenge a transaction. When lawyers use conflicts of interest challenges to disqualify a particular lawyer or law firm, they often do so midstream, with the effect, if successful, of the appointment of another firm or lawyer. Thus, in the entertainment context, for example, the conflicts rules could be used to break up the "monopoly" of a few lawyers who claim expertise and the knowledge required to put a deal together. To the extent that the settlement in *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994), was more inclusive of plaintiffs' lawyers at the negotiating stages, some of these problems were avoided.



challenges to settlements like these reveal, in a very public way, the real conflicts of interests—competition among lawyers.<sup>166</sup>

## 2. Collusion

Though not formally attached to a particular ethics rule, the claim of collusion or “picking off” of a particular set of plaintiffs’ lawyers leading to an alleged “sell out” in the settlement has also raised issues of what constitutes zealous and loyal representation in these cases. Once again, the problem of evaluating such a claim arises at several levels. First, in group representation is it unethical for parties to select particular negotiators for a deal that will bind a larger group? This might lead to a challenge earlier in the proceedings, at the point of negotiation, rather than at the post-deal fairness hearings.<sup>167</sup> Second, is it possible to determine whether the lawyers are inappropriately “colluding” by looking at the actual negotiation process, or must we assess collusion only by *post hoc* evaluation of outcomes? Third, by what standards do we measure collusion? In *Georgine*, Special Master Burbank evaluated the historical values of settlements of present claims; Judge Reed then used this evaluation for his findings of fact in support of a conclusion of fairness for the value of settlements of future claims.<sup>168</sup>

Both Professors Coffee and Koniak vigorously dispute those calculations. While I will not rehearse those disputes here (leaving it to the Third Circuit to determine what standards best apply), it is clear that our ethics rules provide little guidance on the question of which lawyers may do what with which lawyers.<sup>169</sup> The rules provide even less guidance on the question of what standards should be used to

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<sup>166</sup> Do these strategic uses of the conflicts rules undermine public confidence in lawyers? I wondered what the 25 claimants at the *Georgine* hearing thought the lawyers were arguing about.

<sup>167</sup> Query how the parties here could have raised questions about the improprieties of counsel choices or activities during the negotiation process with no formal lawsuit filed? This is why commentators such as Professors White and Hazard suggest that we cannot regulate negotiation activity, which is necessarily private, and in cases prior to the filing of lawsuits, outside the purview of courts or other agencies. Though I am realistic enough to think it will not be practically possible, one could “regulate” negotiation activities with process and substantive rules of fairness and create a body to deal with complaints under such rules (such as disciplinary bodies with both lawyers and lay members). Like me, Judge Weinstein has suggested a two-tiered “fairness” hearing—one prior to notice of settlement (which could consider such issues as adequacy of counsel) and another after consummation of the settlement. Remarks of Judge Weinstein at ABA Section of Litigation, 10th Annual Mid-Year Products Liability Meeting (Feb. 25, 1995) (Panel on Ethical Dilemmas in Mass Tort Litigation).

<sup>168</sup> See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 307-10 (E.D. Pa. 1994).

<sup>169</sup> This “hands off” attitude is merely an expression of our values of free choice and open access to the legal system.

evaluate the outcomes achieved by lawyers.<sup>170</sup> Rapacious actions on the part of defense lawyers who seek to settle with particular plaintiffs' lawyers seem a product of the age of "hostile takeovers" and other competitive acts. To regulate these issues as a matter of ethics, we must determine both how much freedom clients actually have in the choice of their lawyers and what ability those clients possess to refuse consent in an environment where disparities of information may be enormous. These problems are compounded in situations, like *Georgine*, where some claimants may not yet even know they are injured.

### 3. *Restrictions on Practice*

Model Rule 5.6(b) prohibits lawyers from making agreements that restrict that lawyer's right to practice as part of the settlement of a controversy between parties.<sup>171</sup> To avoid the application of that rule in *Georgine*, Judge Reed found that the agreement to process future claims along the medical and other criteria of the settlement of future claims was "not intended" to restrict practice but was merely a "guideline" for client counseling and screening.<sup>172</sup> The amended provision of the settlements with the firm of Ness, Motley, Loadholt, Richardson & Poole states that:

Plaintiff Counsel therefore agrees, unless in the exercise of its independent professional judgment, given some unforeseen circumstances, it determines otherwise, to recommend that its clients seriously consider, and accordingly will use its best efforts to encourage, each client to accept this alternative dispute resolution procedure.<sup>173</sup>

Though the court found this to be either a screening device or a description of client advice, it does appear to be a restriction on practice, if practice includes the advice and counseling provided to clients.<sup>174</sup> Though the final agreement was drafted to allow counsel "in appropriate circumstances" to conclude otherwise, one wonders how often the settling lawyers will not urge the medical criteria on future claimants (and, if they fail to do so, what recourse the defendants will have under the agreement). The interpretation thus given to Model Rule 5.6, that absent intent the attorneys could not violate the

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<sup>170</sup> Professor Hazard has recently argued that we must simply accept that an important part of the work of our legal profession just cannot be regulated. See Hazard, *supra* note 35.

<sup>171</sup> MODEL RULES, *supra* note 20, Rule 5.6.

<sup>172</sup> *Georgine v. Amchem, Prods., Inc.*, 157 F.R.D 246, 303 (E.D. Pa. 1994).

<sup>173</sup> *Id.* at 301.

<sup>174</sup> Alternatively, it is possible that the court agreed with Professor Hazard's testimony, and concluded that even if there was a violation of MODEL RULES, *supra* note 20, Rule 5.6 (b), it was not a significant or material violation that would undercut the loyalty or diligence of the lawyers who negotiated the deal. See *Georgine*, 157 F.R.D at 301.

ethical rules, creates a new standard under the ethics codes. One can hope that this decision will be limited to the context in which it occurred: cases determining whether a violation of Model Rule 5.6 rendered the lawyers inadequate counsel under the requirements of Rule 23 of the Federal Rules of Civil Procedure and where such a violation (in Professor Hazard's view) would be so insignificant as not to disturb the "adequacy" of counsel under Rule 23.<sup>175</sup>

Though I disagree with the court's treatment of this issue on the merits of whether Model Rule 5.6 was violated (I think it was, despite the "weasel" language), *Georgine* illustrates several of the difficulties in applying the ethics rules to class action settlements. First, Judge Reed and Professor Hazard give interpretations to an ethics rule in the context of a class action rule standard that changes the meaning of the ethics rule itself.<sup>176</sup> Does *Georgine* recognize a new standard of liability ("intent to violate ethics rules"), demonstrating that when the rules do not seem "appropriate" for the situation, the rule interpretation will be manipulated? The practical significance of this decision is the revelation that the ethics rules "don't work" in this context. The very essence of the settlement of future asbestos cases is a restriction on practice. Future claims will be processed through the agreed upon ADR procedure (a process limitation on representation), and claims will be evaluated by the medical standards suggested in the settlement (a substantive restriction of practice). That this is styled a counseling session in which "clients will be encouraged" to accept these terms of representation does not diminish the fact that it imposes a restriction on practice. Either we will have to prohibit future claims settlement or the ethics rules will have to adapt to these particular substantive contexts.

Thus, it should be evident that the professional responsibility rules for lawyers do not adequately address the issues that arise when

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<sup>175</sup> The court chose to rely on Professor Hazard's expert testimony for reasons stated in the opinion. Professor Hazard alternately testified on issues of ethics and their relation to the class action standards. Academics know that Professor Hazard is an expert with respect to both ethics and civil procedure, but it is not clear from the transcripts whether Professor Hazard was formally "qualified" on the stand with respect to both areas of law. This fact of double expertise clearly seems to have affected Judge Reed's determinations with respect to the credibility and trustworthiness of the multiple experts. Judge Reed discounted the expert testimony of Professors Coffee, Koniak, and Cramton because they did not have familiarity with asbestos cases. Whether wittingly or not, Judge Reed is suggesting that experts must have "substantive ethics expertise"—that experts on ethics must also have expertise with respect to the subject matter of the litigation about which they are testifying. Since this is not a malpractice or disciplinary matter, one could wonder why expert testimony was required at all.

<sup>176</sup> And one can wonder what effect this will have on interpretation of MODEL RULES, *supra* note 20, Rule 5.6(b) in ethics contexts. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 371 (1993), which preceded this agreement and was invoked in the *Georgine* testimony.

assessing whether a particular settlement should be approved.<sup>177</sup> What standards, then, should we apply?

### B. Non-Rule Standards of Ethics or Fairness

To assess the fairness and ethical merits of a settlement, courts and practitioners should ask some questions that the parties in *Georgine* failed to raise.<sup>178</sup> These questions include:

1. What constitutes adequate client counseling about the consequences of such settlements or of choosing or agreeing to be “class representatives”?
2. How do attorney fee structures relate to what attorneys negotiate for and agree to in substantive settlement agreements?
3. By what standards should a court evaluate the quality of a “privately” negotiated settlement? Does the standard change when parties seek the court’s imprimatur in approving the settlement?
4. Who is qualified to represent and judge claims that are not yet “ripe” but still have an effect on the resolution of currently existing claims of others?
5. What roles of intervention by judges, special masters, magistrates, private third party neutrals, and groups of lawyers are appropriate for the achievement of “global peace” in mass litigation (and by what standards should those roles be measured)?
6. Do settlements of mass torts cases require their own ethics (as well as procedural) rules?
7. How should the ethics or justice of any settlement be measured, as compared to a litigated case?

Several types of arguments and proposed standards have been advanced on the issue of the “ethics” of settlement. Commentators like Professors White and Hazard have suggested that we cannot know what goes on in the “private black box” of settlement and therefore, cannot easily judge how the parties have allocated their “zones of agreement” or “cooperative surpluses.”<sup>179</sup> If the parties seem to have negotiated at arms length and are “satisfied” with their deal, then the

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<sup>177</sup> Even “adequacy of counsel” under the class action requirements involves more than the ethics issues. Indeed, there is a tension between the requirements of the adequacy rule and the ethics rules. Ronald L. Motley and Joseph F. Rice, appointed class counsel, *see Georgine*, 157 F.R.D. at 258, have “conflicts” precisely because they are so “adequate.” If counsel here were not so expert and did not have so many cases pending, they never would have been in the position of negotiating this settlement in the first place. In this sense they are just like the entertainment lawyers who say they have to represent everyone in the deal because they are the only ones who know how to do it. The “adequacy” makes the conflict.

<sup>178</sup> Note, for example, that most of Professor Koniak’s analysis of the *Georgine* settlement focuses on the “macro” justice questions of the fairness of the settlement and not on specific ethical rule violations. *See* Koniak, *supra* note 27.

<sup>179</sup> *See* Hazard, *supra* note 35.

court should leave them alone or at least confine itself to a review of the bargaining process. Note that this begs the question of how to evaluate settlements like those in mass torts class actions, where the parties may not have fully "consented" to the result.<sup>180</sup>

In contrast, other commentators lament that settlements fail to track the principles of law and thus allow private parties to avoid the dictates of public policy and publicly ordered values.<sup>181</sup> Others have suggested that because negotiation processes are private and not subject to the discipline of a third party judge or neutral we should more stringently regulate attorney conduct in settlement negotiations. Such regulations would include a duty of candor and a duty not to enter into unconscionable agreements.<sup>182</sup> In a similar vein, some have suggested that specific rules cannot govern or cabin the complexities of modern law practice but that we should be accountable for "ethical discretion"<sup>183</sup> or "civic responsibility"<sup>184</sup> in our lawyering.

My own view (more fully elaborated in other places<sup>185</sup>) is that negotiated settlements offer us an opportunity to solve problems that the litigation system cannot solve with its "limited remedial imagination" of money damages or injunctions, based on the adjudication of past facts or disputes with a few exceptions for ordering future relations.<sup>186</sup> Moreover, cases involving serious injuries and repetitive issues of fact and causation generate enormous transaction costs that detract from claimant awards. As a result, claimants themselves might prefer alternatives to litigation.<sup>187</sup>

<sup>180</sup> The ethical rules do require counsel to transmit settlement offers to clients for their decision. See, e.g., MODEL RULES, *supra* note 20, Rule 1.4; MODEL CODE, *supra* note 31, EC 7-7.

<sup>181</sup> See, e.g., Condlin, *supra* note 42; Fiss, *supra* note 50; Luban, *supra* note 42.

<sup>182</sup> The primary proponent of this view is my colleague Murray Schwartz. See Schwartz, *supra* note 35 (arguing that nonadvocates cannot claim immunity from moral accountability). This argument "lost" in the final version of MODEL RULES, *supra* note 20, Rule 4.1. But Professor Koniak urges such a requirement of "greater candor" in mass torts settlement. See Koniak, *supra* note 27, at 1127. Finally, I read Professor Hazard as suggesting that if the settlement process is a black box, it might be important for us to demand great "moral responsibility" for our profession when we act in that task. See Hazard, *supra* note 35.

<sup>183</sup> William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1135 (1988).

<sup>184</sup> See Robert Gordon & William Simon, *The Redemption of Professionalism?*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL SYSTEM 230-57 (Robert L. Nelson et al. eds., 1992).

<sup>185</sup> See, e.g., Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905; Menkel-Meadow, *supra* note 19; Menkel-Meadow, *supra* note 39; Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, GEO. L.J. (forthcoming 1995).

<sup>186</sup> See OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

<sup>187</sup> One study reveals that criminal defendants were likely to perceive the outcomes of plea bargains as fairer than the outcomes of trials. See Jean M. Landis & Lynne Goodstein,

If ever there were situations calling for the "solving of problems," mass torts like asbestos cases certainly seem to be them. Because mass torts implicate important public issues and resources,<sup>188</sup> the resolution of these cases through a hybrid of private negotiation and public approval (through court imprimatur of settlements) necessitates the development of standards for measuring the ethics and fairness of negotiated outcomes that are in the "public domain." Though some may dispute that mass torts are different from private, individual cases,<sup>189</sup> it is clear that since products liability rules began to expand responsibility to include multiple defendants, more than two parties have been involved in most cases,<sup>190</sup> and the structure of litigation and the relationships it creates has dramatically changed. While it is not clear that all mass torts are themselves alike or that all require public or similar treatment, when courts are called upon to approve mass class action settlements, public institutions and interests are invoked, and we must therefore consider what standards they are to be judged by. Thus, because I believe that ethical settlements are both possible and capable of achieving good, if not perfect, solutions to important public problems like mass torts, I will next consider the principles we need to consider to craft just and ethically arrived at solutions to the settlements of mass tort cases and offer some concrete proposals.

#### IV

##### PRINCIPLES FOR THE ETHICAL SETTLEMENT OF MASS TORTS

Here I examine some of the foundational challenges in our principles and underlying values that I see emerging from recent mass tort litigation.

##### A. Preserving Individual Justice

Must our ideals about *individual justice*<sup>191</sup> be compromised or reshaped to provide some form of *justice in mass disasters*? This is not

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*When is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate*, 1987 AM. B. FOUND. RES. J. 675, 675 (1987).

<sup>188</sup> I do not think it is merely the "numbers" that distinguish mass torts from ordinary cases, although this might be enough to justify public scrutiny of case settlements. Mass torts raise issues of public responsibility in the production, distribution, and use of goods and services. Thus, it is not only the numbers, but the type of issues, and the effects such cases have had on our procedural system (due to their complexity, as well as their numerosity) that create their "differentness."

<sup>189</sup> See, e.g., Siliciano, *supra* note 2.

<sup>190</sup> See descriptions of modern products and enterprise liability in MARC FRANKLIN, *TORT LAW AND ITS ALTERNATIVES* (1992); Gary Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 616 (1992); Rabin, *supra* note 6, at 817.

<sup>191</sup> The constitutional parameters for what may be required for individual members of money damages class actions are set out in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797

only a question about how competing plaintiffs can obtain fair legal process and a just outcome, but how "justice" can be obtained by all who are affected by a "mass" tort. For example, should we consider the fates of present employees of corporations who threaten or use bankruptcy to avoid mass tort payments of past employees? Should claimants suffering similar injuries have a "communitarian" responsibility to one another, contrary to the ethic suggested by the individual advocacy model?<sup>192</sup> Such a difference is suggested not only in Judge Weinstein's proposals for ethics in mass torts,<sup>193</sup> but also by legal services lawyers and academics confronting the problem of providing scarce resource legal services to masses of eligible clients.<sup>194</sup>

In my view, individual justice can still be achieved in mass cases by using different processes and procedures than those currently used in full trial adjudication. For example, the fast-track ADR procedure currently being utilized in Dalkon Shield litigation<sup>195</sup> provides individual hearings and determinations of some issues (causation and damages) after "class determination" of other issues (liability and product defect). Where parties seek individualized process and confrontation with a "defendant" or where they desire definitive rulings from a neutral third party, some form of hearing that is less than full-scale adjudication in court and more than an administered mechanical

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(1985). Due process requires notice, an opportunity to be heard, and the opportunity to opt out (in nonmandatory class actions). *Id.* at 812-14. The Second Circuit, in ruling on challenges to the Agent Orange settlement, did not apply *Shutts* to class actions composed of unknowing plaintiffs. *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1126 (1994). Thus, it remains unclear what is constitutionally required for claimants who do not yet know that they are potential plaintiffs.

<sup>192</sup> This question implicates important issues of democratic theory that I do not discuss here. For example, what is the role of the individual in a mass society? What responsibilities do members of a society have to each other? What responsibility does a legal system have to treat like cases alike? Would equal protection of the law as applied to courts require judges to "grid" civil verdicts in particular cases the way mandatory sentencing attempts to "equalize" criminal punishment?

<sup>193</sup> See generally Weinstein, *supra* note 21.

<sup>194</sup> See, e.g., Bellow & Kettleson, *supra* note 52; Breger, *supra* note 69; Menkel-Meadow & Meadow, *supra* note 52; Tremblay, *supra* note 52.

<sup>195</sup> See Feinberg, *supra* note 2; Dalkon Shield Claimants Trust Second Amended Rules Governing Alternative Dispute Resolution (Jan. 1994) [hereinafter Second Amended Rules of ADR].

application of a grid or formula<sup>196</sup> may be necessary. This can be made a party option.<sup>197</sup>

In the quest for efficient aggregate settlements versus full-scale litigated justice, we must be mindful of the fact that parties are not all alike. The advantages of a variety of ADR forms is that parties may choose what process they want.<sup>198</sup> While it may be expensive and difficult to administer choices about how to process cases, claimants would gain both greater access to the legal system and a feeling of participation in a system that is otherwise the product of a compromise of full litigation and lawyer-dominated settlement.<sup>199</sup> Choices could also be structured by claimants' committees voting on a variety of alternative process choices.

Thus, in my view, we must take account of aggregate justice needs—the availability of process and funds to all eligible parties—as we consider what individuals would consider just. Like those who have struggled with the problem “in the real world,” I believe some hybrid process would be useful, but I do not believe it needs to be conceived of as a “compromise” of process values.

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<sup>196</sup> The issue here is whether parties will be willing to have their claims heard by other than federal (or state) judges. Most ADR procedures use nonjudicial personnel. Thus, while individualized hearings could be conducted, the question is whether mass tort claimants, more than other claimants, have to give up their “right” to a judicial officer. From an administrative perspective, the crucial question is what matters judges should hear and what consequences will befall the system if individual cases are removed to other tribunals. For an argument that certain kinds of cases are more likely to be considered less deserving of judicial time, see Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

<sup>197</sup> In my experience as a Dalkon Shield arbitrator, some claimants desire a hearing of some sort (though virtually all seem to want private hearings, given the nature of their injuries and the issues involved) and others prefer no contact at all with the “process” as long as they feel they have received a fair amount of compensation (within the limits provided by the settlement). For a discussion of the policies and procedures governing the Dalkon Shield claims process, see Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found?)*, 61 FORDHAM L. REV. 617 (1992).

<sup>198</sup> Recall Judge Learned Hand's comment that he dreaded a lawsuit “beyond almost anything else short of sickness and death.” Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 89, 105 (1926). Others, of course, relish the thought of going to trial and making sure there is a public airing of a troublesome issue.

<sup>199</sup> Too often, in my view, mass tort settlements select one particular form of ADR (usually some form of arbitration) without examining the advantages and disadvantages of different processes for different parties. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 9 NEG. J. 49 (1994). Some courts have experimented with a “menu” of ADR options and some versions of the recently drafted Health Care Act offered a menu of ADR possibilities for medical malpractice claims. See Health Security Act (Clinton Bill) § 5301(b)(1); Senate Finance Comm. (Malpractice Reform) Bill; Senate Labor Committee Bill § 5301 (drafts, proposed June 17, 1994).



## B. The Relationship Between Client and Attorney

What is a good *relationship* between lawyer and client? What forms of *communication* can we require between professionals and their clients for truly "informed" consent to be made about both process choices and settlement possibilities? How much individual counseling must or can there be in cases affecting many people? How *loyal* must or can that lawyer be to an individual client? How and when is loyalty compromised when single groups of lawyers represent many claimants in a particular litigation and "trade" on their aggregation of claims?<sup>200</sup>

Does such multiple representation provide countervailing advantages, such as economies of scale or expertise, that need to be considered? Some clients will need and want individual relationships with lawyers; others may be perfectly content with accurate information dispensed by mass mailings or computer and video programs.<sup>201</sup> We need to explore the ideal of the individualized lawyer-client relationship in all cases. Victims of mass torts may provide greater comfort to each other in support groups than overworked and routinizing lawyers, as long as information conveyed is accurate. Accordingly, we need to explore other methods of providing representation.<sup>202</sup> It is ironic that so many of the critics of mass torts class actions are former civil rights class action lawyers. We should remember the group meetings with tenant associations, welfare rights organizations, workers' organizations and unions, prison reform groups, and parent groups, that provided the only contact some class members had with a lawyer in their search for rule and institutional changes, as well as compensation.<sup>203</sup>

Can *committees* of lawyers representing committees or communities of clients effectively represent groups of people? This has been attempted in a number of mass tort cases.<sup>204</sup> This is a radical departure from our notion of individual lawyers representing individual

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<sup>200</sup> Such actions are not necessarily class actions. Others include inventories or "bundles" of settlements.

<sup>201</sup> Including those which may be interactive and allow questioning and response.

<sup>202</sup> Including lay representation in some matters. I am not suggesting that it would be appropriate in asbestos cases although some pro se claimants have represented themselves very ably in Dalkon Shield cases, despite somewhat complicated medical issues.

<sup>203</sup> We should also remember that the issues raised here in mass tort class actions are not new. Derrick Bell raised issues about conflicts of interests between attorneys and clients and different client groups in the context of school desegregation cases with respect to both the litigation strategies and settlements. See Derek A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>204</sup> See, e.g., *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (hotel disaster); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994).

person or entity clients. Do we know enough about what makes a good relationship between lawyers and clients to be able to regulate uniformly what that relationship should consist of outside of the one-to-one paradigm?<sup>205</sup>

### C. Fee Structures

What are the effects of *lawyer payment structures* on relations to clients, as well as quality of outcomes? Should the macro effects on the legal profession, legal system, and potential clients (*i.e.*, the public) be considered in rule making and ethical decisionmaking? For example, should conflict of interest rules be strictly enforced to spread more diffusely representation of clients to a greater number of lawyers, redistributing work and wealth to lawyers on a market competition theory of ensuring both quality of work and efficiency (demonstrated by lower prices)?<sup>206</sup> Should legal fees, especially contingent fees, be capped in relation to settlements?<sup>207</sup> If punitive damage awards are capped or limited in mass torts settlements, perhaps windfall "rewards" should be capped as well. Both limits are designed to return more dollars to claimants in "real damages," even if they diminish other values of the legal system, such as deterrence for defendants and incentives for policing and claiming by plaintiffs and their lawyers.

### D. Outcome Fairness vs. Process Fairness

What is the relationship of assessments of *fairness of process to fairness of outcomes*? Critics of *Georgine* complain about the "likely" unfair-

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<sup>205</sup> Here I am moved by the colloquy of two of my former colleagues, Howard Lesnick and Mark Spiegel. See ELIZABETH DVORKIN ET AL., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* 200-02 (1981). It may not matter who actually makes the decision—attorney or client—what matters is the quality of the human dialogue between them. See also Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979) (discussing lawyer-client relations). We also know that failure to communicate is one of the largest sources of client complaints about lawyers. See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY AND THE STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, *SURVEY ON LAWYER DISCIPLINE SYSTEMS* (1989) (approximately 20% of malpractice claims are due to "poor client relations").

<sup>206</sup> This is the basis of my analysis in the entertainment cases. See Menkel-Meadow, *supra* note 39. Should I treat mass torts differently because of the quality of legal and factual expertise required to accomplish economies of scale and justice in this arena? Entertainment lawyers would retort, "It's not what you know, but who you know!" Is this "expertise"?

<sup>207</sup> This is a difficult issue. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (holding attorneys' fees awarded under civil rights statute could not be limited in relation to damage award received by plaintiffs). In other contexts, such as medical malpractice, fee caps have been sustained. Can we consider the "justice" of fee awards? Should we credit the reward to plaintiffs' lawyers who successfully uncover new causes of action and pursue cases, yet at the same time limit the magnitude of those "rewards" when they exceed the value of the work done in a particular case? See, e.g., Brickman, *supra* note 29, at 125-26.

ness produced by the "collusion" of defendants and carefully selected plaintiffs' counsel and the conflicts plaintiffs' counsel have with respect to different classes of clients. How much of this would we still care about if we thought the ultimate outcomes were fair and just?<sup>208</sup> With threatened and actual bankruptcies deflating settlement values, how can we know what a "fair" return to an injured person is in a particular mass tort?<sup>209</sup> In my view, much of the legal system's focus on process rules is merely an avoidance of scrutiny of the fairness or justness of substantive outcomes. Can we imagine a rule system in which we tried to do the latter? Consider the effort of drafters to include a substantive "unconscionability" standard in the Model Rules of Professional Conduct in negotiation.<sup>210</sup>

What is a "fair" process? As noted above, I am not persuaded that a "first in, first compensated" system is fair. It is, however, the bulwark of our legal system in many areas such as procedure, property, and commercial transactions. Settlements in mass torts have attempted to create processes that are considered, at least by some, to be "fairer" in allowing the more seriously injured to be compensated first. This alters our principles of process as much as the registry of pleural claims may alter our substantive tort rules. Much of the criticism leveled at the attorneys in these cases assumes that these attorneys will not bargain "hard" enough for their various clients or constituencies (given

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<sup>208</sup> In my view it is the absence of a clear and workable legal standard for assessing the fairness of settlements that has led to the dilemmas in these cases. While some judges and others suggest that FED. R. CIV. P. 23(e) does not permit effective substantive scrutiny, the opinions in both *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1194), and *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994), clearly review the terms and quality of the substantive settlement. As process challenges are raised against settlements, courts have responded with substantive assessments (*i.e.*, to determine whether a legitimate reason exists for differences in treatment between various classes of claimants). See *Georgine*, 157 F.R.D. at 329-33. I would prefer that we articulate openly what we are doing and try to craft some standards. See Judge Schwarzer's attempt to do so, Schwarzer, *supra* note 43. Judge Weinstein has expressed dissatisfaction with the limited standard of "up or down" review of settlements in mass torts cases, see Weinstein, *supra* note 21; see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, Nos. 94-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219, 1995 WL 223209 (3d Cir. Apr. 17, 1995) (sustaining a class for settlement purposes under Fed. R. Civ. P. 23 with discussion of settlement evaluation by reference to both "substantive inquiry into terms of the settlement relative to the likely rewards of litigation," and "a procedural inquiry into the negotiation process").

<sup>209</sup> For example, prebankruptcy Dalkon Shield cases were settled for an average of \$11,000 (a figure that includes very high verdicts in a few tried cases). See Vairo, *supra* note 197. Under the ADR arbitration system in place, postbankruptcy claims can be awarded up to \$20,000. See PRIVATE ADJUDICATION CENTER, DUKE UNIVERSITY, ANNUAL REPORT (1991-1992); Second Amended Rules of ADR, *supra* note 195.

<sup>210</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rules 4.1, 4.2 (Discussion Draft Jan. 30, 1980) (proposed rules in original Robert J. Kutak draft); Schwartz, *supra* note 35; White, *supra* note 35.

their personal fee interests and the varieties of sub-classes of clients to be served). But would we feel differently if we knew that this was the best or only deal possible?<sup>211</sup> Thus, we use process protections and concerns as a proxy for predicting or measuring what we cannot really evaluate—the quality of a particular settlement against both no settlement at all or other possible settlements.<sup>212</sup> What if we knew that another group of lawyers with no conflicts at all (*i.e.*, not repeat players in the asbestos litigation) could not achieve as good a result for either individual claimants or a class of future claimants?<sup>213</sup>

What is a *fair outcome*? The current legal standard under Federal Rule of Civil Procedure 23(e) is that the settlement must be fair, adequate, and reasonable to be approved.<sup>214</sup> This does not mean that the settlement has to be the best settlement possible,<sup>215</sup> but it does mean

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<sup>211</sup> At the symposium, Wendy White, counsel for CCR, the defendant-settling party in *Georgine*, described how firm the bargaining was, how “hard,” sharp, and expert the plaintiffs’ lawyers were and how unlikely it was that defendants would have settled anything at all if this deal was not made. Thus, the comparison for purposes of assessing the settlement is not only what would have happened if there had been no settlement (and the cases continued in the tort system), but also what other settlements might have been achieved.

<sup>212</sup> In negotiation theory we refer to this as measuring the settlement against the Alternatives to a Negotiated Agreement (ATNA) (adapted from Fisher & Ury’s BATNA—assessment of the Best Alternative to a Negotiated Agreement, *see* FISHER & URY, *supra* note 39, at 97-106) as a way for a negotiator to evaluate whether a good result has been achieved in a negotiation. Is this settlement as good as or better than what will happen if there is no settlement (return to the tort system) or are there other possible settlements that could be made that are more Pareto optimal (making one side better off without harm to the other side)? Courts have typically refused to enter into these substantive analyses of negotiated results. Under FED. R. CIV. P. 23 they may accept or deny a settlement, but they may not change it. *See* *Evans v. Jeff D.*, 475 U.S. 717, 126-27 (1986).

<sup>213</sup> Indeed, the irony here is that some are dismayed by the “premium” paid claimants in the settlement based on who their lawyers are (settlements are based on historical recoveries by particular law firms in the *Georgine* settlement). Critics view this as another form of self-dealing by particular plaintiffs’ lawyers, yet these values express the experience derived from the litigation records of these “repeat play” expert lawyers. Newer or less expert “players” generally do less well. To “conflict out” the experienced lawyers might make for a “fairer” looking process with more dispersed and less cartel-like lawyer behavior, but it could lead to lower recoveries for plaintiffs. Whether different mass torts or other areas actually require the degree of expertise claimed remains an interesting, as well as an under-studied, empirical question.

<sup>214</sup> FED. R. CIV. P. 23(e).

<sup>215</sup> Negotiation theorists and practitioners are continuing to explore this difficult question. We can only assess the real value of a settlement if we know the private bargaining values and information from both sides (this explains why negotiators often employ mediators—to produce more private information, *see* Howard Raiffa, *Post-Settlement Settlements*, in *NEGOTIATION THEORY AND PRACTICE* 323 (J. William Breslin & Jeffrey Z. Rubin eds., 1991)) which are generally not known either *ex ante* or *post hoc* in any negotiated settlement. Thus, in evaluating whether a settlement is “good” or “wise,” there are any number of criteria that may be used, and there are both analytic and ideological criteria that divide us. Is the purpose of a negotiation for each side to maximize individual gain (*i.e.*, traditional, adversarial, and distributive bargaining goals) or to make a Pareto optimal solution for all negotiation parties (a more integrative, problem-solving, social, other-directed approach to bargaining goals)? For fuller statements of these differences, *see*

that a court or evaluator of a settlement process, not to mention the participants, should know something about what criteria can be used to assess a settlement.<sup>216</sup> Ironically, it may be that we will have to emphasize different points of evaluation in different cases. If we trust the parties' "consent" to an outcome in a private and dyadic negotiation, we may use outcome satisfaction as the criteria for judging fairness. In the "mass" case where we may not be able to ascertain consent, we may have to provide procedural protections such as the class action and ethics rules. Alternatively, if these protections prove impracticable in particular cases, as they may in cases of unknowing claimants, then we will have to more fully scrutinize outcomes. The latter approach appears to be what the court and its critics have done in *Georgine*.

Here I attempt to specify some principles that could be used to assess a settlement under a regime of increased court scrutiny of such settlements. First, we must consider what the realistic *baselines* of comparison are. If *Georgine* and *Lindsey* had not been settled, what would actually happen to the claimants? Some would return to the tort system, where some would have trials, but most would effectuate individual or group negotiated settlements that might be better or worse in individual cases from what is achieved in the class settlements. Second, we must determine whether the settlement is as close to a Pareto-optimal settlement as one can determine it to be based on available information to the decisionmaker. This determination turns on whether there are obvious ways in which the deal could have been made better for one set of parties other than at the expense of the others.<sup>217</sup> Third, were the negotiators qualified to conduct the negotiations?<sup>218</sup> Fourth, was the negotiation achieved without undue transaction costs, as compared with the costs involved in alternative ways of

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FISHER & URY, *supra* note 39, at 56-80; LAX & SEBENIUS, *supra* note 39, at 29-45; RAIFFA, *supra* note 39, at 44-65; Menkel-Meadow, *supra* note 39. Given the different criteria that could be used, *see* Menkel-Meadow, *supra* note 39, at 760-61, and the differences among negotiation theorists it is not difficult to see why judges have a hard time applying any set of standards to the evaluation of settlements in hard cases.

<sup>216</sup> Here I part company with Professors Hazard and White, who propose that we cannot evaluate what goes on in the black box of settlement. *See* Hazard, *supra* note 35; White, *supra* note 35. In my view, although it will be difficult, what we need are some standards for assessing settlements when court approval is required or sought. *See* Bank of Am. Nat. Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339 (3d Cir. 1986) (holding that parties that seek court confirmation of settlements expose themselves to different levels of public scrutiny than those who settle claims privately without court approval).

<sup>217</sup> An example here might be the availability of a more flexible ADR process for claimants, though that could prove more costly for defendants.

<sup>218</sup> This is where adequacy of counsel under Fed. R. Civ. P. 23 and the ethics challenges to counsel would be appropriately analyzed.

disposing of the dispute?<sup>219</sup> In other words, does the settlement itself reduce transaction costs over other ways of solving problems?<sup>220</sup> Fifth, does the settlement treat similarly situated people similarly, but not necessarily identically? Is there horizontal equity? Sixth, can party "satisfaction" with the settlement be ascertained?<sup>221</sup> Seventh, is the settlement as "objectively" fair as can be determined?<sup>222</sup> Eighth, was the settlement produced with an appropriate amount of information and participation by those with affected interests?<sup>223</sup> Ninth, is the settlement realistic, practicable, durable, or mutually adaptive?<sup>224</sup>

### E. Creating New Standards

*How should we make and interpret standards?* Are we better off with vague, transsubstantive standards that allow us to interpret individual cases using the "facts" of context and the expediencies of practicality?<sup>225</sup> A deeply cynical reading of the record of the expert testimony

<sup>219</sup> If negotiations become too long and expensive, it may be better to just return to the conventional dispute resolution system. I have observed that in some areas ADR is being used to add another layer of costs, expenses, and delay rather than to promote more efficient ways of resolving disputes. Where that is the case it may be better to simply try the cases. See Menkel-Meadow, *For and Against Settlement*, *supra* note 19, at 493-98.

<sup>220</sup> This inquiry could include scrutiny of such transaction costs as attorneys' fees.

<sup>221</sup> This inquiry might encompass claimant voting, opt-out procedures, fairness hearings, and other court devices for scrutinizing whether those who have settled really understand what has happened and thus testing the lawyer-counseling function. I defer for the moment the difficult question of what party satisfaction is. Some define successful negotiations as those where everyone is unhappy (inferring that a hard bargain or a compromise was reached); others of us believe that it is possible for both parties to view a settlement both realistically and positively.

<sup>222</sup> This is where considerations of law and principle, economic evaluations of the "deal," common practices, and public and community standards are appropriate to consider. Note that some would see legal standards as being the sole determinant of fairness. See Condlin, *"Cases on Both Sides," supra* note 42; Luban, *supra* note 42. I believe that negotiated settlements can be objectively fair and not necessarily track legal principles in several situations: where the law is "unjust," where the rules that legislatures have drafted for the many are inapplicable to the few of a particular dispute; where the parties are able to craft their own rules, standards, principles, or objective criteria for their own dispute (as long as they are not unlawful); where the parties can develop solutions that would be not authorized by court or legislative powers, such as future arrangements and in-kind exchanges, again as long as solutions are not themselves unlawful; where the law is silent or contradictory on particular issues; and finally, where the law is simply not the most salient aspect of a dispute.

<sup>223</sup> While this appears to be a "process" concern, it goes to the issue of whether the outcome adequately reflects all of the factors that should have been considered—both in terms of people participants and factual, expert, and legal information.

<sup>224</sup> These particular measures of a good outcome are derived from Menkel-Meadow, *supra* note 39, at 760-61, and Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 *NEG. J.* 105 (1985). I offer them as a starting point for framing the kinds of questions judges and other evaluators of negotiated settlements need to ask to consider the fairness of settlements.

<sup>225</sup> I see the judicial acceptance of the conflicts "screen" in the private law firm as an illustration of this. See *MODEL RULES, supra* note 20, Rule 1.11. The "screen" rule in the Model Rules applies technically only to government-private successive and vicarious con-

and decision in *Georgine* could lead one to conclude that good lawyers and judges interpret vaguely drafted standards to justify positions that are actually dictated by their views of the "expediency or justness" of their desired outcome. But do the ends of results justify the means of self-serving interpretation?

When should we interpret the correctness of lawyer behavior? In one sense I wonder whether *Georgine* was ripe on the issues of lawyer ethics. At first reading, there might be an appearance of "collusion" or "conflict," but do we need to wait and see how well the settlement works before we can conclude that the bargaining was actually faulty?<sup>226</sup> Should we craft different rules to deal with different categories of mass tort cases, such as completed injuries (accidents and some products liability), on the one hand, and injuries that produce more gradual or latent harm on the other?

#### F. Societal Implications

Do the arguments about process (ethics, procedure, and class action) obscure the real social justice, economic, and legal issues that our society must deal with, such as who should pay for the individual and community harms of mass torts<sup>227</sup>—private industry alone, government, or other forms of more socialized risk compensation?<sup>228</sup> What should be the responsibility of a society or community to its members in this modern age of science and technology? Are we entitled to compensation for the harms caused by modern life or have we assumed the risk? How should serious wrongdoers be punished?

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flict situations, but many courts have accepted it in the arena of movement from one private law firm to another, given the need to permit client choice of counsel and recognition of modern lawyer mobility.

<sup>226</sup> Here I think of the contrasts of successes of the Manville Bankruptcy Trust and Dalkon Shield Claimants' Trust, see Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 LAW & CONTEMP. PROBS. 1-205 (1990) (special editor, Francis E. McGovern). Is the difference that in the latter the injuries were "over," while still latent in the former, with new claims being filed everyday? Does the use of class action settlements or bankruptcies with notices actually increase the amount of claiming?

<sup>227</sup> Settlement of the Buffalo Creek disaster litigation has come under much attack in recent years for focusing on individual monetary settlements and not enough financial and other support for the underlying community that was destroyed. See KAI T. ERICKSON, EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD (1976); GERALD M. STERN, THE BUFFALO CREEK DISASTER (1976); THE BUFFALO CREEK FLOOD: AN ACT OF MAN (Appalshop Films 1979); BUFFALO CREEK REVISITED (Appalshop Films 1984).

<sup>228</sup> See, e.g., Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827 (1993); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Rabin, *supra* note 6; Schuck, *supra* note 21; Brickman, *supra* note 64; Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990); Richard Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982); Michael J. Saks, *Do We Really Know About the Behavior of the Tort Litigation System—and Why Not?* 140 U. PA. L. REV. 1147 (1992).

## V

SOME PROPOSED SOLUTIONS: MAKING MASS TORTS CLASS  
ACTION SETTLEMENTS BETTER

If there are problems and issues about the ways in which the asbestos and breast implant cases have been settled recently, I do not think it is the current ethical rules that should bear the weight of bringing them down. As a relatively strict ethicist but also as a "practical negotiator," I think our system has to confront and recraft standards and solutions to the issues presented by the collective settlement of mass torts. Unlike many of my ethicist colleagues and plaintiff lawyer friends, I am not convinced we make Faustian deals with the devil when claims are aggregated for settlement, whether through formal class action or in other aggregated forms (like post-tort bankruptcies or multi-district litigation). I think that the aggregation of claims is here to stay, and we need to craft intelligent rules to deal with it.<sup>229</sup>

Here I offer some proposals for reform of some of the rules and practices implicated in achieving fair aggregate claims settlement.<sup>230</sup> In brief, these proposals call for more participation in the negotiation process, by lawyers, parties, and perhaps court personnel; more varied forms of assisted negotiation and ADR to achieve settlements; more varieties of processes for administering claims settlements; some substantive rule changes (specifically on fees and conflicts of interests); and most radically, more sequencing of and greater substantive review of the settlement process and the outcomes themselves. I realize some of these proposals may appear costly in terms of economics, time, and wear and tear on the legal system, but I believe these reforms are necessary if we are to have public acceptance of privately negotiated solutions to difficult social problems. I do believe that mass tort class action settlements, which are clearly needed, can be fair, just, and ethical; but reforms may be necessary to keep them legitimate, acceptable, and legally sustainable.

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<sup>229</sup> Has anyone else noted the irony that many of the critics of mass tort class action settlements were often proponents of class actions in other contexts—civil rights, consumer fraud, etc.? See Mullenix, *supra* note 3; see also Brief of Law Teachers as Amici Curiae, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215) (submitted Apr. 1, 1994) (amicus brief opposing designation of proposed class counsel).

<sup>230</sup> Note how many of these proposals have been suggested by others already, most notably Judge Weinstein, *supra* notes 21, 53, and scholars like Peter Schuck, *supra* note 44, and Robert Rabin, *supra* note 180. Why doesn't the RESTATEMENT OF THE LAW OF LAWYERING take up more of these difficult "substance-based" ethical issues? Other groups may fill the vacuum, such as the newly formed Center for Public Resources' Commission on Ethics and Standards in ADR (1995) of which I am Chair.



## A. Participation in Settlement: Parties, Lawyers, and Courts

1. It may be appropriate for communities of interests, such as committees of clients and their representatives, to participate in the negotiation of settlements in mass tort cases. This would ensure a full airing and representation of the differing interests. This appears to be why many commentators are more sanguine about the breast implant settlement, which involved greater inclusiveness and attempts to deal with the divergent interests of plaintiffs' lawyers and the interests they represent,<sup>231</sup> than the asbestos settlements.

If we pursue this line of reform, where interests coalesce into groupings or sub-classes, we will need clearer rules for and understanding of the practice of what negotiation theorists call "coalitional" bargaining.<sup>232</sup> Such negotiations are conducted differently and raise issues beyond those of the dyadic adversarial model contemplated by the current ethical rules and the ideological justifications for our adversary system. Issues of confidentiality, who can bind whom, and what constitutes consent are some of the legal issues to be addressed.

On the practical level, clear lines of adversary alignment become more complicated as groups of defendants and insurers line up against other defendants, or plaintiffs split according to those who wish to settle fast and others who prefer to wait, along the lines discussed above. As a variation on the committee theme, some courts have appointed independent masters, guardians ad litem,<sup>233</sup> or independent counsel to assess offers, determine support for particular proposals, or to represent classes or sub-classes of litigants. Thus, courts may increase involvement in settlements by looking to others to participate in the process outside of the interested lawyers and litigants.<sup>234</sup>

2. The use of special masters, magistrates, and other court-appointed third party neutrals may make sense in order to insulate the potential trial judge from ruling on some of the preliminary motions and ethical issues, separate from the final fairness hearings.<sup>235</sup> Separate hearings on some of these matters may reduce what some see as

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<sup>231</sup> I am told by those close to the litigation that there will be large numbers of opt-outs in the breast implant cases and that as a class the foreign claimants have raised issues about fairness not unlike those of the pleural claimants in *Georgine*. See *Georgine*, 157 F.R.D. 246, 319-25 (E.D. Pa. 1994).

<sup>232</sup> See, e.g., Gary Goodpaster, *Coalitions and Representative Bargaining*, 9 OHIO ST. J. ON DISP. RESOL. 243 (1994).

<sup>233</sup> See sources cited *supra* note 146 (noting role of Eric Green, guardian ad litem for purposes of assessing fairness of another asbestos settlement).

<sup>234</sup> Undoubtedly, challenges will be raised about the court's authority to appoint others to participate in a party-initiated adversary proceeding.

<sup>235</sup> This was, in part, the reason for appointments of both a special master and a new judge in aspects of rulings in *Georgine*. See also *Day v. National Lead*, 864 F. Supp. 40 (S.D. Ohio 1994).

the pressure for judges to approve settlements (and the practices that led to them) in order to reduce their dockets, or because the judges themselves were actively engaged in the settlement discussions. Such court-appointed third party neutrals can serve in a variety of capacities, most of which are currently unregulated as well. Magistrates and special masters have been appointed to facilitate settlement, manage discovery, make independent assessments on fairness and other factual and legal issues, and to conduct hearings or portions of hearings. Although one judge has ruled that such special masters are governed by the Judicial Code of Conduct,<sup>236</sup> it remains somewhat unclear what rules will govern those who provide such court adjunct services.

## B. More Varied Processes Both for Settlement Negotiations and Claims Processing

1. With the use of court neutrals, class committees, and independent lawyers or masters it may be possible to develop new forms of negotiation for the settlement of mass claims. Portions of negotiations might be made relatively more "public," with opportunities for parties, class representatives, or groups of lawyers to present offers for response, or, as in the case of summary jury trials, formal in-court hearings on interim issues. Thus, one of the difficulties with the *Georgine* negotiation process may be the assumption of the traditional secretive dyadic negotiation process. Some privacy and secrecy will clearly be needed to negotiate most of the complexities of mass tort settlements and their financing, but it might be possible to conduct aspects of the negotiation in stages, and with some greater participation of those with interests. Both private and public mediators may serve useful functions here.

2. When settlements are crafted, we might also take a broader look at how they are administered—in short, what process should be due a settled claim. Here I believe greater flexibility and less polarized thinking about trial versus settlement possibilities might provide some opportunities for some forms of individualized hearings within the context of mass "administered" settlements. Settlements need not mean that all cases should be assigned merely for economic evaluation to medical or other expert panels. In my view, the Dalkon Shield ADR procedure successfully allows the opportunity for a relatively inexpensive hearing in which the claimant may "confront" (I would prefer a more mediative process to the current arbitration process) the claims facility and have a "day in court" for the expression

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<sup>236</sup> *In re* Joint E. & S. Dists. Asbestos Litig., 737 F. Supp. 735, 739-40 (E.D.N.Y. & S.D.N.Y. 1990) (ruling by Judge Weinstein that Special Master Ken Feinberg's alleged conflicts of interests were to be measured by the standards set in the Judicial Code of Conduct).

(and often cathartic effects) of experienced pain and suffering and outrage at corporate wrongdoing.<sup>237</sup> Different issues may require different treatment. Liability and certain aspects of causation may be "determined" through settlement documents, but other individualized issues (such as specific damages) may lend themselves to hearings of various kinds.

Here I believe, as does Judge Weinstein,<sup>238</sup> that some claimants will want personal contact with some third party, perhaps not only a judge or an arbitrator, who can demonstrate some human empathy for what has happened as well as award appropriate damages. Other claimants will simply want their money. In the use of such hearings clients should have choices about representation, including lawyers and other possible hearing representatives.

Here representation of many cases by a single lawyer demonstrates the complex advantages and disadvantages of multiple representation of similarly situated clients and demonstrates (to me) that conflicts of interests are quite common outside of the formal class action form. Presentation of many cases with similar issues provides for clear economies of scale and other efficiencies in representation. It also poses the danger of signaling to the decisionmaker which cases are better than others. While such representation presents a potential violation of the requirement of "zealous advocacy" in the individual case, it probably provides overall "effective" advocacy for a group of cases.<sup>239</sup> Providing varied forms of claims processing (such as choices to litigate, settle for a specified amount, arbitrate, or mediate) allows clients to choose among different fora, depending on what process and substantive issues matter most to them. Such a selection process allows individuals who are otherwise part of a large mass class to obtain some sense of individualized choice.<sup>240</sup> "Back-end" opt-outs are another process choice that may make settlements more likely to be approved.

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<sup>237</sup> See, e.g., TOM TYLER & ALLAN LIND, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (studies on the importance of process and the need for "voice" in party assessments of fairness in procedural justice research).

<sup>238</sup> Weinstein, *supra* note 21, at 53.

<sup>239</sup> This has been my experience in hearing close to one hundred Dalkon Shield cases with several "repeat play" claimants' lawyers. Here of course the "conflict" is based on the repeat play lawyer having overall credibility (in order to maximize overall fees) by not maintaining strong advocacy on weak claims.

<sup>240</sup> Though I have not observed counseling sessions in which plaintiffs' lawyers have advised their clients about the pros and cons of the various process choices under the Dalkon Shield Claimants' Trust Agreement, the choices provided do allow clients to choose from a number of different alternatives. Data not yet available from the Private Adjudication Center will eventually tell us how many claimants chose which process and what the satisfaction rates were for each process. See PRIVATE ADJUDICATION CENTER, *supra* note 209.

### C. Revisions to Some Regulation

1. Where some of the problems associated with mass tort class action settlements are related to fees and other economic incentives, it may make sense to explore some regulation of fees. As our legal system is reluctant to prescribe substantive standards in a variety of areas, such as the quality of the duty to bargain or the fairness of contract terms, it has been reluctant to limit fees, for reasons of access to justice, as well as antitrust considerations, except in a few situations.<sup>241</sup> Yet substantive fee regulation might do more to cure the "ills" complained of here than other reforms. Possibilities include capping percentages, prohibiting contingent fees in certain case types,<sup>242</sup> or providing for court review of fees.

### D. Sequencing and Substantive Review of Class Action Settlements

Much of what makes the resolution of class action settlements so difficult is our legal system's need for binary rulings. Some suggest that this is precisely what the legal system and adjudication offer. Settlements can be more flexible but court rulings cannot. If it were possible to design a more flexible process (in terms of timing and substance) to deal with the issues that have arisen in the settlement of mass torts, I believe we could come closer to our aspirations for justice.

1. Courts may need to explore conflicts of interest issues at several intervals in a mass settlement. If consent is required to potentially conflicting representation at the beginning of negotiations (such as in the case of current, past, and future claimants on a particular fund), then courts may have to use the devices of class committees, votes, and guardians ad litem, as well as opt-out notices at later (post-settlement) stages. Courts may revisit conflicts issues at the time of fairness or confirmation hearings<sup>243</sup> and perhaps later, when instances of actual harm are identified (such as self-dealing from the

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<sup>241</sup> Medical malpractice fee caps have been sustained in a number of states. *See, e.g.*, CAL. BUS. & PROF. CODE § 6146 (West 1990).

<sup>242</sup> Contingent fees are prohibited in most of the world and are prohibited in the United States in some forms of action, including domestic relations and criminal defense. *See* MODEL RULES, *supra* note 20, Rule 1.5(d). Rule 1.5(c) also acknowledges that "other law" may prohibit contingent fees. I think the limitation of contingent fees would be a good idea in some cases (*i.e.*, where the risk of recovery is close to zero or the contingent fee provides incentives for lawyers to settle for "themselves" and not for their clients or to receive cash windfalls for minimal recovery for plaintiffs). I am realistic enough, however, to realize that this is not a likely occurrence given the powerful lobbying efforts on the part of the plaintiffs' bar.

<sup>243</sup> Courts may also consider conflicts issues when negotiations are concluded, as occurred in *Georgine*.

dual monitor role, vastly differential treatment of similarly situated individuals in different classes, and the like).

2. I am most interested in exploring a tiered method for assessing the approval of mass tort settlements. Some issues have to be dealt with prior to negotiations, such as whether particular lawyers are "adequate" for the representation, and so forth. But in my view, we need both more regulation of what should occur in the settlement process and more scrutiny of the outcomes of mass tort settlements. This includes provisions for re-entry of the court if certain conditions develop, such as inadequacy of funding or ADR processes that are established by the settlement process. Thus, if the *Georgine* and breast implant settlements were approved by courts anxious to clear dockets and utilize various forms of ADR, then I would urge the consideration of some very limited forms of "back-end" appeals, continuing jurisdiction for monitoring purposes and mid-course evaluation by the court of how the processes are actually working and how the conflicts issues have actually manifested themselves.<sup>244</sup> The breast implant settlement comes close to this with its provisions for several stages of opting-out and "ratcheting down" at various stages of claims processing.<sup>245</sup> Obviously, the danger here is more uncertainty and less absolute capping of liability for defendants, but it does make agreement more likely and may actually decrease the number of opt-outs if the process is deemed fair.

3. Most problematically, and radically, I would shift some of the present scrutiny of ethics and "process" issues to greater scrutiny of the outcomes of settlements, recognizing that this introduces the kind of uncertainty that defendants and defendants' insurers do not want in their settlement agreements. In the long run, however, such scrutiny should do more to combine the best elements of a mass tort settlement process that makes flexible and creative use of the public functions of courts.<sup>246</sup> If the courts are to reduce their case loads by facilitating settlements, then they must also take responsibility for assuring that the settlements which occur not only "in the shadow of the court," but often inside of it, are fair and justify dismissal of the under-

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<sup>244</sup> I say this based on my experience with the Dalkon Shield litigation, which appears to be, so far, a relatively successful form of ADR. It serves individual justice and catharsis functions for litigants, while producing few appeals. So far Judge Merhige has heard very few appeals from an ADR proceeding (which are technically final and binding). See, e.g., *Reichel v. Dalkon Shield Claimants Trust*, No. 85-01307-R (E.D. Va. Bankr. Ct., Dec. 2, 1994). In my view, there should be a slightly broader standard of review. As a lowly arbitrator I have more "final order" power than most circuit courts of appeals judges.

<sup>245</sup> Proposed Settlement Agreement *In re* Silicone Gel Breast Implant Prods. Liab. Litig. (*Lindsey v. Dow Corning Corp.*), Nos. CV-92-P-10000-S, CV-94-P-11558-S, MDL No. 926, 1994 WL 114580, at \*10 (N.D. Ala. Apr. 1, 1994).

<sup>246</sup> See standards to be used in evaluating outcomes in *Menkel-Meadow*, *supra* note 39, at 760-64; Schwarzer, *supra* note 43 (Judge Schwarzer's proposal for a new Rule 23(f)).

lying individual lawsuits. For those who think that mass tort cases are not like public litigation, it is important to consider whether mass tort class action settlements are, since settlements divest litigants of their rights to pursue their legal claims. If the courts approve settlements then that public function and state action must be governed by standards and exercised with public responsibility and accountability.<sup>247</sup>

## VI

### CONCLUSION: WHAT THE SETTLEMENT OF MASS TORTS CLASS ACTIONS CAN TEACH US ABOUT JUSTICE AND ETHICS

Like Judge Weinstein, I believe a "humanitarian" tort system must consider the fate of potential future claimants as well as presently injured clients when large scale or global settlements are made. When there are multiple claimants competing over limited or potentially limited funds there are conflicts of interests for parties as well as for lawyers. For me, the ethical inquiry does not simply end with either the recognition of conflicts and the disqualification of counsel, or the expedient approval of settlements with tacit, if not explicit, approval of some very troublesome behavior. I understand fully the practical pressure to confirm the settlements in cases such as *Georgine*. Yet there are substantive, procedural, and ethical solutions to some of the problems raised in this symposium<sup>248</sup> that strike me as more just than binary answers with respect to the disqualification of particular groups of lawyers,<sup>249</sup> or the up or down approval of the settlement. There may be differences in how cases can be handled depending on who the responsible parties are. Single defendant cases may be easier to settle and manage than multiple defendant and government defendant cases, although the latter two case types often provide greater assets, if more complicated negotiation processes.

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<sup>247</sup> Some might note the irony of my taking this position. For someone who began by arguing that negotiations were a way to avoid some of the formalism and formalized solutions of adjudication and courts, I am now suggesting we return some settlements to the scrutiny of the courts. This is because I think some settlements have public consequences, requiring court review (especially if they have made use of court programs or facilities).

<sup>248</sup> These problems include notice of conflicts, consent or substituted consent (*i.e.*, guardians ad litem), choices of procedures for claims processing, different remedies for different injuries, medical monitoring, returning additional funds to claimants at the end of specified accounting periods, waiting to disburse funds till actually needed, sequenced court involvement in what have to be considered hybrid public-private settlements.

<sup>249</sup> Was the only remedy for finding conflicts on the part of class counsel Locks and Motley, *see* discussion *supra* note 177, disqualification, or could the court have forced more open negotiations by adding counsel? This is especially problematic to contemplate here since some plaintiffs' counsel specifically rejected the deals being offered.

What the current "crisis"<sup>250</sup> of cases teaches us is that our paradigms for dispute settlement may not be working anymore. We can no longer (if we ever did) promise every individual with a legally cognizable claim a full jury trial,<sup>251</sup> nor do we seem to be able to provide every potential client with a humanly meaningful relationship with a lawyer. Thus, I believe we need to search for new ways to fairly process claims and allow people who are harmed<sup>252</sup> (or believed they are harmed<sup>253</sup>) to have both a fair process and some compensation for their injuries. It is questionable whether or not we can agree on enough changes of ethical rules or the larger issues implicated in the settlement of mass torts to effectuate change through lawyer-directed rule making. Nevertheless, it may be that eventually either the federal or state legislatures will take up some of these issues as the legal liability for mass torts continues to be a major social and economic problem.<sup>254</sup> Whatever the successes of the conventional tort system, global settlements incorporating proper protections, innovative claims procedures, and clearer and more demanding standards seem to offer a greater possibility of equity and fairness to claimants than our current version of individual litigation roulette. This does not mean that I endorse all of the details of the current mass tort settlements; it means that I think we should develop more specific and sensitive substantive rules to facilitate speedy, creative, and just settlements of these cases.

How we will craft new legal institutions and new legal rules, and how we will pay for them, remains to be seen, but these cases and the problems they raise demonstrate how our legal system works. When real cases and controversies reach the courts, issues are decided that lead to more cases, and in turn, to proposals for legislative and administrative changes. If other branches of government do not step in, the courts respond. The appellate courts, academic commentators, and

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<sup>250</sup> Whether or not mass torts are a crisis, see Siliciano, *supra* note 2, these cases have provided "crises" for the courts in raising deeply troubling questions about how our litigation system functions and what courts have authority to do. See Abram Chayes, *The Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

<sup>251</sup> The "proceedings" in the murder trial of O.J. Simpson currently make clear how our system would fall apart if everyone had the ability to use and test every legal theory or tactic available for those who can afford to pay for full litigation. In a recent interview Los Angeles District Attorney Gil Garcetti reported that once the "three strikes and you're out law" becomes fully operational, none of the 541 courtrooms in the county of Los Angeles would be available for civil trials as more and more criminal defendants would refuse to plead guilty to a third offense that would lead to permanent incarceration. *All Things Considered* (National Public Radio Broadcast, Oct. 21, 1994), available in LEXIS, NEWS Library, NPR File.

<sup>252</sup> Are we ready for "no-fault" for all products liability? A Consumer's Compensation scheme? A FEMA for products, accidents, and waste dumps?

<sup>253</sup> Should there be a uniform standard for fear of cancer claims, emotional distress, and so forth?

<sup>254</sup> I am, however, less sanguine about the likelihood of this occurring after our recent effort to deal legislatively with health care reform.

rule drafters will speak on these issues and will perhaps revise what is currently done on either a large or incremental scale. At each juncture of rule making or institutional change, we may get pushed by particular "crises" or "eruptions." I think mass torts cases are one example of that. We have already reversed the position of the 1966 Rules Committee that thought that class actions could never be used for mass accidents.<sup>255</sup> Now we have to explore the contours of how procedure, torts, and ethics rules may have to adapt to these new forms of action and then see whether specific rule changes cause too much disruption in our desires for transsubstantive procedural and ethical rules. If mass torts cases demonstrate some of the strengths of our incremental, precedent building, common-law system<sup>256</sup> then we should look at these "problems" as opportunities for continuing participation in an ongoing law reform effort, seeking new rules and practices that may be more fair and just than what we can currently offer. I don't know whether a more open and participatory negotiation process, with court sequenced and substantive review of global settlements, will work any better than what we have, but I'd be willing to try. Or, as a wise woman once said to me, we can see how we might make lemonade out of lemons.

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<sup>255</sup> Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995).

<sup>256</sup> See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (providing recent statements of the strengths of our common-law system); Schuck, *supra* note 21, at 922-25 (same).