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## SELECTED ETHICAL ISSUES IN ASBESTOS LITIGATION

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### I. INTRODUCTION

When Justice Souter wrote “the elephantine mass of asbestos cases defies customary judicial administration and calls for national legislation,”<sup>1</sup> that cry, despite the valiant attempts of a number of United States Senators, did not resonate with sufficient force. Thus, the Courts were left to deal with the mass or mess that has become the longest running mass tort thus far.

Interestingly, the number of asbestos claims filed against any individual company is not the largest in the mass tort claim area. In the Diet Drug cases alone, at least 100,000 claims were filed against a single company, Wyeth.<sup>2</sup> In the Dalkon Shield Bankruptcy Court, there were well over 350,000 claimants against A.H. Robins, under the supervision of the Bankruptcy Court.<sup>3</sup> While those cases, and others involving heavily

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1. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (reversing the Fifth Circuit’s decision that upheld class certification of asbestos cases for settlement purposes based on FRE 23 (b)(1)(B)).

2. *See In re Diet Drugs (Phentermine, Fen-Fluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. CIV. A. 98-20626, 1999 WL 673066 (E.D. Pa., Aug. 6, 1999); *See also Wyeth Backs Diet Drug Deal Changes*, L.A. TIMES, Jan. 11, 2005.

3. Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 658 (1992).

marketed pharmaceutical and medical device products appeared to be monumental, most were almost fully resolved within several years.<sup>4</sup>

However, because of the multiplicity of courts dealing with asbestos cases, it is difficult to determine how many cases have been filed or resolved in part or whole. But a Report issued by the RAND Institute for Civil Justice (“RAND” or “RAND Report”) estimates the number of asbestos cases to have been 730,000 in 2002, with many thousands of new filings each year, and projects between one and three million.<sup>5</sup> The distinguishing features of the asbestos litigation are the long latency period between exposure and manifestation of disease (up to sixty years),<sup>6</sup> the multiplicity of products manufactured, the large numbers of users of asbestos containing products, the different types of exposure, and the many premises where exposure occurred, all of which has created a pool of defendants numbering over 8,500, up from 300 in 1982.<sup>7</sup> In my court, many plaintiffs sue up to eighty defendants, although summary judgment motions and discontinuances reduce the number that they actually pursue.

The bankruptcies of most of the major raw material providers and product manufacturers have created an incentive for plaintiffs’ lawyers to find what have been termed peripheral defendants or downstream users or consumers of asbestos containing products who either incorporated the products into their manufactured goods, or who recommended use in conjunction with products (furnaces or water heaters), or who owned premises where asbestos was present, or who acquired companies that previously manufactured asbestos containing products.<sup>8</sup> One plaintiffs’ attorney allegedly described this phenomenon as the “endless search for a solvent bystander.”<sup>9</sup>

Since neither time nor bankruptcies have stemmed the litigation tide, federal and state courts, mostly state courts, have grappled with differing approaches, many of which have been described in the numerous articles

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4. *See id.* at 644-45.

5. *See* Richard O. Faulk, *Symposium on Asbestos Litigation*, 44 S. TEX. L. REV. 945, 948 (2003); *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 834 (2005) (citing STEVEN CARROLL, *THE DIMENSIONS OF ASBESTOS LITIGATION* 3 (2004)). Professor Brickman opines that based on various compilations, there were at least 845,000 cases as of 2004.

6. While the RAND Reports state that the latency period is typically twenty to forty years, STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* 15 (2005), I have had cases in 2006 involving mesothelioma victims where the last known exposure was in the Brooklyn Navy Yard during World War II.

7. Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning*, 12 CONN. INS. L. J. 477, 485 (2005-06).

8. *Id.* at 484-85.

9. *Id.* at 485.

written by distinguished experts whose works are cited in footnotes here; many have written extensively on this subject.<sup>10</sup> They report that judges have attempted to restrict the litigation process to individuals who are truly sick, i.e., can demonstrate some objective evidence of functional impairment, or have a malignancy that is related to asbestos exposure by a credible expert or physician.<sup>11</sup> They also report that courts have applied forum non conveniens criteria more restrictively,<sup>12</sup> and have been generous with discovery concerning applications to Bankruptcy Trusts.<sup>13</sup> Defendants can, therefore, obtain information about other alleged exposures, thus making it possible to minimize their own liability.<sup>14</sup> Based on my twenty years of experience as the New York City asbestos judge, I will make some observations concerning ethical issues that I have confronted, with emphasis on those faced by judges. Of course, any discussion of ethics involves lawyers and litigants as well.

## II. ETHICAL CONCERNS

### A. *Deferred Dockets*

Perhaps the most dramatic change since the dawn of the new century has been the restriction of the litigation to the functionally impaired. Courts in Boston, Massachusetts (1986 Judge Hiller Zobel), Cook County, Illinois (1991 Judge Dean Traftlet, and Baltimore Maryland (1992 Judge Richard Rombro), with the consent of parties on both sides of the litigation, devised pleural registries or inactive dockets on which all the cases of all individuals whose disease did not qualify for the process were placed.<sup>15</sup> Professor Peter H. Schuck of Yale Law School urged other judges to follow

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10. Including, among many others, former Attorney General Griffin Bell, Professors Aaron Twerski, Francis E. McGovern, James D. Henderson, Christopher Edley, Jr., Deborah Hensler, Peter H. Schuck, and Lester Brickman, and litigation attorneys Mark A. Behrens, Victor E. Schwartz, Rochelle M. Tedesco, Patrick Hanlon and Anne M. Smetak.

11. Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24:2 REV. LITIG. 253, 262-63 (2005).

12. James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20-23 MEALEY'S LITIG. REP.: ASBESTOS 19 (2006).

13. Amended Case Management Order at 11-14, *In re New York City Asbestos Litig.*, No. 40000/88 (Feb. 19, 2003).

14. See William P. Shelley, et al., *The Need For Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. BANKR. L. & PRAC. 2 ART. 3 (2008).

15. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 568 n.109 (1992).

in an article, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*.<sup>16</sup> Professor Schuck, relying on a court's inherent authority to control its docket, opined that even without consent of parties, imposition of registries would be permissible.<sup>17</sup>

Faced with as many as 21,000 cases, and aware that various authors were claiming that 90 percent of current asbestos filings represented claims of functionally "unimpaired" plaintiffs,<sup>18</sup> I followed Professor Schuck's advice in December 2002. I amended the Case Management Order applicable to all cases filed within the City of New York to restrict the filing of Requests for Judicial Intervention (RJI's)<sup>19</sup> to individual plaintiffs who met the criteria that had been formulated in another jurisdiction and adopted the Maryland model. To my knowledge, I was the first to establish the "Deferred Docket" without the consent of the parties. Six weeks later, my colleague in Syracuse adopted the same model. Other judges in New York State, most of whom have relatively small asbestos dockets, have not followed suit.<sup>20</sup> However, courts and legislatures throughout the country have either judicially or legislatively mandated deferral of cases of claimants who are not really sick.<sup>21</sup> A preliminary estimate indicates that the Deferred Docket reduced the number of cases actually pending in my court by 80 percent. While the Deferred Docket only applied prospectively, to cases clustered for trials after the date of its inception, with the tacit understanding of counsel on all sides, previously clustered cases involving unimpaired plaintiffs are no longer prosecuted.

This raised at least one ethical concern. Was this an arrogation of judicial power or "activism"? Previously, I had feared bankruptcies would end the resources for those who became ill later and that they should get as much as they could now. However, I later realized that the settlements, however small each individual one was, contributed substantially to driving what was then 67 and may now be as many as 85 companies<sup>22</sup> into

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16. *Id.* at 541; see also Mark Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 346 (2002); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 552 (2002).

17. Schuck, *supra* note 15, at 585.

18. Brickman, *supra* note 5, at 836.

19. The method in the New York Supreme Court by which cases are assigned to judges.

20. Hon. Richard Aulisi and Hon. Raymond Cornelius in Northern and Western New York State have not established Deferred Dockets.

21. See Patrick M. Hanlon & Anne M. Smetak, *Asbestos Reform in the States*, SM038 A.L.I. - A.B.A. 31, 35-37 (2006).

22. Brief for Associated Industries of Florida et al. as Amici Curiae Supporting Defendants-Appellees, *Spiewak v. A.C. & S., Inc.*, Nos. 4D07-405 and 4D07-407 (Fla. Dist. Ct. App. 4th Dist.

bankruptcy. Moreover, I had also not appreciated the ingenuity of plaintiffs' counsel in finding new defendants nor that reasonable recoveries are obtained for injured plaintiffs from some of the 524(g) Trusts that have been established by companies emerging from Chapter 11 Bankruptcy.

Does the judge have the ethical right to dismiss or defer masses of cases without individual scrutiny? Under traditional law principles, a judge may not have the right to dismiss or defer masses of cases without individual scrutiny. This is of concern particularly in jurisdictions like New York, where rational fear of disease is compensable,<sup>23</sup> and where juries throughout the country, including those in New York, have previously awarded compensation to functionally unimpaired individuals who have clearly detectable markers of asbestos exposure,<sup>24</sup> whether manifest as pleural plaques or heavy lung fiber burden. The ABA Model Rules of Professional Conduct (Model Rule 1.7(b)) state "[a]n impermissible conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlements of the claims of liabilities in question." Yet deferred docket registries are widely used for claimants with pleural plaques in asbestos cases where a disability from asbestos exposure is only potential. As has been convincingly argued, the deferred docket is merely an extension of the inherent power of a judge to control his or her docket in a rational way.<sup>25</sup>

### B. Aggregations

The managerial role of trial judges has expanded enormously in recent decades. This is true in all civil litigation, regardless of the type of case involved. In all civil cases, judges facilitate discovery and resolve pre-trial issues virtually from the date the case is filed until its ultimate disposition. For that reason, consolidation of cases before a single judge for pre-trial management, as is done in Multi-District Litigation (MDL) cases, is usually considered desirable. Since 2002, the New York State Litigation Coordinating Panel has functioned as a state-wide Judicial Panel for Multi-District Litigation<sup>26</sup> charged with determining whether statewide

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23. *Ferrara v. Galluchio*, 152 N.E.2d 249 (1958).

24. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992).

25. Behrens & López, *supra* note 11, at 265; see David G. Owen, *Against Priority*, 37 SW. U. L. REV., 557 (2008) (arguing that by the time the cases of the most seriously injured are tried, the plaintiff has died; thus it is the living plaintiff, who legitimately fears being stricken with a serious disease, who is most deserving).

26. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.69 (2008).

coordination for pre-trial management of any group of cases is warranted.

Pre-trial coordination has the salutary effect of developing expertise on the part of the judge, efficient management of discovery, standardization of pleadings and interrogatories, uniformity in pre-trial rulings including privilege determinations, *Frye*<sup>27</sup> or *Daubert*<sup>28</sup> hearings and determinations, increased likelihood of coordination with the federal MDL judge if there is one, and fair allocation of resources and trial schedules among attorneys.<sup>29</sup> Ordinarily, either class certification or mass consolidation of cases for trial in a specific jurisdiction or nationally provides a framework for settlement that achieves closure for both sides. In my experience, even in new mass torts, where plaintiffs may not have the signature diseases characteristic of the asbestos injuries, a few trials will accomplish a framework for settlement of most if not all cases.

In his scholarly and readable work, *Individual Justice In Mass Tort Litigation* (hereinafter "*Individual Justice*"), Honorable Jack B. Weinstein devotes five comprehensive chapters to ethical issues facing lawyers, litigants and judges in mass tort litigation.<sup>30</sup> He views mass tort litigation as public interest litigation designed to further the interests of both individuals and the community at large.<sup>31</sup> Mass cases provide a vehicle for "communitarian" justice by means of class certification or consolidation in order to foster a global resolution in a relatively equitable manner.<sup>32</sup> Judge Weinstein was even able to use class certification to resolve the "Agent Orange" litigation, which involved multiple defendants and significant latency periods.<sup>33</sup>

However, consolidation or class certification, consistent with the policies and practices that Judge Weinstein advocates,<sup>34</sup> has not achieved the same beneficial effect in the asbestos litigation. His argument that certifying classes or consolidating cases increases the likelihood of achieving equitable results, furthering the public law or communitarian approach by providing similar recoveries for similar injuries, has not worked in asbestos cases. There have been numerous attempts to resolve the asbestos litigation both nationally and locally by class certification.

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27. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

28. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

29. Helen E. Freedman, *Product Liability Issues in Mass Torts – A View From the Bench*, 15 *TOURO L. REV.* 685, 686-88 (1999).

30. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (Northwestern Univ. Press 1995).

31. *Id.* at 39.

32. *See In re "Agent Orange" Prods. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983).

33. *Id.*

34. WEINSTEIN, *supra* note 30, at ch. 9.

With the exception of a case involving 3000 insulation and construction workers and families in the Beaumont, Texas area, they have failed.<sup>35</sup> In 1990, the Honorable Thomas Lambros of the United States District Court in Ohio, attempted to certify a national asbestos class.<sup>36</sup> The Sixth Circuit vacated the certification on jurisdictional grounds.<sup>37</sup> The Supreme Court in two major decisions, found insufficient commonality and inadequate provision for future claimants when key defendants attempted to reach total resolution of their asbestos liabilities through class actions.<sup>38</sup>

Because of the initial reluctance by plaintiffs to seek class certification, and the subsequent rejection of class actions by appellate courts, trial courts have attempted to clear dockets by means of mega consolidations in Baltimore, Mississippi, and West Virginia of as many as 8,000 cases.<sup>39</sup> There have been smaller consolidations of cases (500 to 600) for claims involving Brooklyn Navy workers in both the New York State Court and the United States Court for the Eastern District of New York.<sup>40</sup> In each of the cases, the results have led to settlements of a huge number of cases, some of dubious value, with major manufacturers of asbestos containing products. But the consolidations have provided “an overly hospitable environment for weak cases.”<sup>41</sup> Professor Francis E. McGovern has deemed this the “elasticity” factor.<sup>42</sup> Ordinarily, in tort situations, 10 to 20 percent of those injured will file suit or seek compensation, in mass tort actions, the percentage who seek recovery for their damages rises close to an estimated 100 percent.<sup>43</sup> In other words, “[i]f you build a superhighway, there will be a traffic jam.”<sup>44</sup> Unfortunately, the highway has ultimately led

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35. See *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998).

36. See *In re Allied-Signal, Inc.*, 915 F.2d 190 (6th Cir. 1990).

37. See *id.*

38. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

39. Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 14-20 (2001); see *West Virginia v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996); *In re Asbestos Pers. Injury & Wrongful Death Asbestos Cases*, No. 92344501, 1992 WL 12019620 (Md. Ct. Spec. App. 2001). The largest consolidation occurred in West Virginia in 2007. There were 8000 plaintiffs and 250 defendants in *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793 (W.Va. 2002); see Behrens & Goldberg, *supra* note 7, at 485; Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 281-83 (2003).

40. *In re Joint S. & E. Dist. Asbestos Litig.*, 993 F.2d 7 (2d Cir. 1993).

41. Freedman, *supra* note 29, at 688.

42. Francis E. McGovern, *Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1827-34 (1995).

43. See *id.* at 1823-24.

44. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

to the bankruptcy courts, that is, the filing of bankruptcy petitions by otherwise solvent companies. One estimate is that up to 60,000 jobs have been lost as a result.<sup>45</sup> Although, Courts and legislatures in some states have finally restricted prosecution of the weak cases in some jurisdictions, as recently as 2007, an 8,000 case West Virginia consolidation, consisting of both strong and weak cases, proceeded.<sup>46</sup>

These unique aspects of the asbestos litigation have raised ethical issues that merit separate consideration, if not concern, because based on current projections the litigation will continue well into the twenty-first century.<sup>47</sup> As soon as one consolidation is resolved, large numbers of new cases are filed. My experience has borne that out. In my first consolidation of some 500 Brooklyn Navy Yard cases in 1990, I devoted four and one half months to a complex trial.<sup>48</sup> At the same time, Honorable Jack B. Weinstein tried a Brooklyn Navy Yard consolidation of about 64 cases.<sup>49</sup> In my second consolidation in 1991, called the Power House consolidation because all the plaintiffs were former workers in electric generating plants, I spent an equivalent amount of time on about 500 to 600 cases.<sup>50</sup> At the same time, the United States District Court for the Eastern District of New York, Honorable Charles Sifton, also tried a large consolidation of Power House cases.<sup>51</sup> However, after it was all over and all but one defendant settled, the Second Circuit determined that “the benefits of efficiency can never be purchased at the cost of fairness” and reversed the entire consolidation on the ground that jurors could not possibly keep track of so many different cases with such a variety of exposures.<sup>52</sup> Although all the cases were resolved or settled in my consolidation, and virtually all were resolved before the reversal in the Eastern District case, I realized that it was at great cost both to litigants in other states, and to future litigants in my jurisdiction. The large consolidations involved plaintiffs with a variety of ailments, many of whom were not seriously ill. It was for that reason, that I determined that large or even mid-sized consolidations contributed to the diversion of resources to individuals and counsel who should not have been at the head of the line.

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45. Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51, 52 (2003).

46. See *supra* note 39 and accompanying text.

47. See Brickman, *supra* note 5, at 835.

48. William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1704-05 (1992).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

In recent years, defense lawyers in my court have resisted even small consolidations of mesothelioma cases (more than two at a time) and have required plaintiffs' counsel to make separate motions for consolidation under New York Civil Practice Act, CPLR 602.<sup>53</sup> Although the motions have been granted by trial courts, defendants have sought stays and appealed inasmuch as a consolidation order is an appealable interlocutory order in New York. Some states have actually barred courts from any trial consolidation at all.<sup>54</sup>

Thus, the asbestos litigation has raised ethical issues that are so particular as to not fit easily into the salutary resolution model that class certification or consolidation would foster in other mass disasters, whether they be the single event disaster (airplane crash, fire, terrorist attack or building collapse) or the pharmaceutical and medical device cases.

### C. *Settlements and Allocations*

Undoubtedly, as long as the asbestos litigation remains profitable, lawyers will file and prosecute claims and defense counsel will vie with each other to obtain clients. Without class certification, courts have little or no ability to control attorneys' fees, costs, or in the case of mass settlements, allocations.

Large consolidations invariably produce mass settlements.<sup>55</sup> The Rules of Professional Conduct, promulgated by the American Bar Association (hereinafter "ABA"), require that when that occurs each client must be apprized of the value of the full settlement, his or her share, and the shares of others who are similarly situated.<sup>56</sup> Model Rule of Professional Conduct, 1.8(g), states that "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims . . . unless each client gives informed consent [and the lawyer discloses] the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."<sup>57</sup> While New York has not adopted the ABA Model Rules, it has a Code of Professional Conduct comprised of Disciplinary Rules (hereinafter "DR"), supplemented by Ethical Canons ("EC"s) which are binding and precatory respectively.<sup>58</sup> DR 5-106 is

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53. N.Y. C.P.L.R. 602 (McKinney 2008).

54. Behrens & Goldberg, *supra* note 7, at 496; Ohio Civ. R. Rule 42(A)(2) (2005); 8/21/06 MICH. LAW. WKLY., 2006 WLNR 14601437.

55. See Behrens & Goldberg, *supra* note 7.

56. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2002).

57. *Id.*

58. N.Y. CODE OF PROF'L RESP. (McKinney 2007).

analogous to Model Rule 1.8(g).<sup>59</sup> It is highly doubtful that compliance with the Model Rule or DR is possible in asbestos litigation because each plaintiff is involved in numerous settlements with individual defendants so that no litigant really can know what another has received. The even less transparent “administrative deals” are more problematic. Administrative deals consist of arrangements worked out between plaintiffs’ lawyers with a high volume of cases and individual defendants, pursuant to which a defendant will make a fixed payment for every case, whether or not filed, as long as there is some evidence of exposure to the product and some minimal medical criteria is met.<sup>60</sup>

The difficulty in complying with the Model Rule is exacerbated by the fact that settlements do not occur all at once. Oftentimes, a lawyer will settle a group of cases with a particular defendant, which may even cover multiple jurisdictions, (groups of New York and New Jersey cases have settled before me), but the clients will have sued other defendants who are no where near settling cases. A plaintiff in any single case may receive settlement amounts with different defendants over a several year period.

In other mass torts, where one or two defendants are involved, a lawyer may settle an inventory of cases at the same time.<sup>61</sup> When that occurs, the court is in a better position to provide supervision. Under my direction in such cases, counsel have initiated a procedure where a special master reviews all or a representative sample of cases and sets up a procedure for assessing value and making fair distribution. Of course, clients are always free to reject settlements, and sometimes do. Some mass settlements are achieved contingent upon a certain or substantial percentage of a particular lawyer’s inventory accepting the settlement.<sup>62</sup> Some aggregate settlements have been consummated with an agreement or understanding that the particular lawyer will not take any more cases or that a lawyer will “fire” (withdraw from representing) those clients who will not go along with the deal.<sup>63</sup> This practice, in effect a buyout, has been deemed unethical in Formal Ethics Opinion 93-371 as an “impermissible restriction on the right to practice which may not be demanded or accepted without violating Model Rule 5.6(b).”<sup>64</sup> DR 2-108 has a similar proscription.<sup>65</sup> The conflict

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59. N.Y. CODE OF PROF’L RESP., DR 5-106 (McKinney 2007).

60. See Brickman, *supra* note 5, at 860.

61. See WEINSTEIN, *supra* note 30, at 74-75.

62. See Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer’s Loyalty*, N.Y. TIMES, Jan. 22, 2008, at A12.

63. *Id.*

64. A.B.A. Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-371 (1993).

65. N.Y. CODE OF PROF’L RESP., DR 2-108 (McKinney 2008).

between the lawyer's ethical obligation to serve his or her current clients (Model Rule 1.2) as vigorously as possible and the lawyer's obligation to the profession to allow future clients "unfettered" opportunity to choose counsel gives way to the latter.<sup>66</sup> While such practices have not been a significant factor in the asbestos litigation, at least in New York, the piece meal settlement patterns (settling with one or two defendants at a time over a long period) have made judicial supervision of settlements and allocations virtually impossible.

#### *D. Advertising and Screening*

The very means by which cases are obtained raise ethical concerns for judges as well as lawyers. First, there are lawyers who advertise over the air waves for such cases, but have no ability to pursue them. Instead, once they amass the cases, they turn them over to experienced lawyers who in turn give them a percentage of the recovery or a fee despite the fact that these lawyers do not perform any legal services. This violates ABA Model Rule of Professional Conduct 7.2(b)<sup>67</sup> and DR 2-103<sup>68</sup> which state that "[a] lawyer shall not compensate or give anything of value to a person . . . for having made a recommendation resulting in employment by a client." Second, there are lawyers who participate with or encourage unions and other groups to engage in mass screenings of potential claimants, those who have been or might have been occupationally exposed to asbestos fibers to procure as many clients as possible. In order to facilitate such screenings, lawyers have paid doctors and other health care workers, some of whose credentials or services are suspect, to read X-rays or perform pulmonary function tests with a mandate to find positive results in a large portion of those screened.<sup>69</sup> Allegedly, plaintiffs are recruited with slogans like, "You May Have Million \$ Lungs."<sup>70</sup> This practice has come under intense scrutiny in recent years.<sup>71</sup> Such practices clearly violate ethical rules.

The late Judge Charles Weiner, the MDL Judge sitting in the Eastern District of Pennsylvania who managed all of the federally filed cases after MDL 875 was established in 1991, dismissed all cases obtained by such

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66. WEINSTEIN, *supra* note 30, at 73.

67. MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (2002).

68. N.Y. CODE OF PROF'L RESP., DR 2-103 (McKinney 2008).

69. A.B.A. Comm'n on Asbestos Litig. Report, 8-9 (2003), *available at* [http://www.abanet.org/leadership/full\\_report.pdf](http://www.abanet.org/leadership/full_report.pdf).

70. *Id.* at 8.

71. Brickman, *supra* note 5, at 836-37.

screenings.<sup>72</sup> United States District Judge John Fullam found that many of the X-Ray interpreters (B Readers) were “so biased that their readings were simply unreliable.”<sup>73</sup> Judges in other jurisdictions have done the same.<sup>74</sup>

The Honorable Janis Jack, the silicosis MDL Judge, sitting in the United States District Court for the Southern District of Texas,<sup>75</sup> after holding *Daubert* hearings during the discovery phase on plaintiffs’ experts, concluded that “these diagnoses were driven by neither health nor justice: they were manufactured for money.”<sup>76</sup> She then recommended dismissal on remand for all but one case of the ten thousand cases assigned to her for pre-trial in the Silica MDL 1553.<sup>77</sup> It was later discovered that the names of prospective plaintiffs for silicosis screening purposes were obtained from claimants who had sought compensation for asbestos disease from the Manville Asbestos Settlement Trust, and an incredibly high number were found positive for silica related abnormalities.<sup>78</sup> Cases obtained through screening have also been targeted for dismissal by the Manville Trust.<sup>79</sup>

Screening alone is not necessarily poor medical practice if it is done professionally and honestly. Workers who were occupationally exposed to asbestos containing products may well have contracted disease that is treatable, although the treatments for the signature asbestos diseases, asbestosis and mesothelioma, are at the moment only palliative. However, where it is done on a mass basis or at facilities designed for quick checks, often by professionals who are paid millions of dollars by law firms, with bonuses or payments only for positive findings, clearly the process is suspect. There is no question that the medical providers in such cases have violated ethical standards, and some have been subjected to congressional inquiry. In fact, grand juries have been convened in Texas and New York with respect to the silica screenings.<sup>80</sup> The role of the unions, who it is said were previously complicit in failing to provide adequate warnings to workers, in perpetuating screening practices merits inquiry as well.

What is the ethical obligation of the judge when apprized of screening practices, or where there is evidence that such activity may have occurred? Certainly, inquiry is appropriate. According to Attorney General Griffin

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72. Administrative Order No. 8, *In re Asbestos Prods. Liab. Litig.* (No. VI) (E.D. Pa. Jan. 16, 2002).

73. *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005).

74. Behrens & Goldberg, *supra* note 7, at 494.

75. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

76. *Id.* at 635.

77. Behrens & Goldberg, *supra* note 7, at 493.

78. *Id.* at 491-94.

79. *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. 2002).

80. Behrens & Goldberg, *supra* note 7, at 493.

Bell, “[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up.”<sup>81</sup> However, does the judge then become the arbiter of what constitutes good medical practice? Assuming there is adequate evidence that cases were brought based on mass screenings, should they all be dismissed? Are not some medical professionals honorable? Could not at least some of the cases be valid?

Plaintiffs’ lawyers contend some of the most serious injuries have been identified through screenings and treatment provided.<sup>82</sup> But, at least some experts have argued that this type of attorney-directed screening is dangerous because it fails to provide the proper follow-up counseling or treatment.<sup>83</sup> Indeed, the very screening itself may cause serious psychological injury which in turn may be compensable in jurisdictions in which fear of disease is a cognizable cause of action; the screening alone produces the case.<sup>84</sup> The American Bar Association Commission On Asbestos Litigation in its Report to the House of Delegates (2003), assisted by the American Medical Association, decried the practice that generated many of the claims filed by “non-sick” that arose from for profit screening companies whose sole practice was to identify large numbers of people with minimal X-Ray changes.<sup>85</sup> As a result the American Bar Association adopted a proposal for the enactment of federal medical criteria standards for nonmalignant claims.<sup>86</sup>

Amassing large numbers of non-malignant cases, in addition to clogging calendars, often puts counsel at odds with each other. Lawyers who accept screened cases or who have large dockets of non-malignant claims vie for the court’s attention with lawyers who concentrate on cases involving malignancies. Additionally, the plaintiffs’ lawyers who entered into the administrative deals that did not even make it into the courts benefited themselves as well as clients by receiving compensation, albeit small amounts. While my court, pursuant to statute,<sup>87</sup> gives priority to cases of living plaintiffs who are “in extremis,” so that those cases are brought to trial under expedited procedures and are treated equally no matter which attorneys bring them, a potential conflict arises among counsel for cases not eligible for the “in extremis” docket. Counsel, who

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81. Griffin B. Bell, *Asbestos & the Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003).

82. See David Egilman & Susanna Rankin Bohme, *Attorney-Directed Screenings Can Be Hazardous*, 45 AM. J. OF INDUS. MED. 305 (2004).

83. *Id.* at 305.

84. A.B.A. Comm’n on Asbestos Litig. Report, *supra* note 69.

85. *Id.*

86. *Id.*

87. N.Y. C.P.L.R. 3403(a)(6) (McKinney 2008).

only represent the estates of those who have died of mesothelioma or other asbestos related malignancies find themselves vying for trial dates with counsel who have less serious cases, albeit only ones that meet the medical criteria for activation.

The judge has several options for dealing with non-malignant cases obtained through screenings. An obvious one is to do nothing and merely calendar cases based on filing date. Another, is to simply put all the cases, or most of the cases that simply report the presence of asbestos markers (pleural plaques or mild asbestosis) on a Deferred Docket, where unless some more demonstrably serious disease develops, the case shall remain. Third, the judge could dismiss all nonmalignant cases produced by screenings as Judge Charles Weiner did and has been done in Ohio and Seattle.<sup>88</sup> The fourth, is to require that the plaintiff in any case that has been brought based on such a screening and that qualifies for the Active Docket based on a screening report, be reevaluated by a physician either acceptable to both sides, acceptable to defendants, or by one of each, and require the plaintiff to undergo further radiological testing. With the consent of the parties, I took a combination approach when confronted with the likelihood that a group of individuals became plaintiffs after union sponsored screening. I successfully encouraged discontinuances of some cases where the medical providers had been previously determined to be unreliable, and required reevaluation of all non-malignant findings that qualified for the active docket. There was no need to do anything with cases qualifying for the Deferred Docket inasmuch as those plaintiffs would have to undergo reevaluation before activation could occur, and in any event, under New York's practice, those cases were not officially assigned to me.

#### *E. Attorneys Fees*

The mass tort plaintiffs' bar is usually fairly small in each community.<sup>89</sup> The up front costs of such litigations coupled with delays in bringing cases to trial and the possibility of never realizing any recovery has served to limit the number of lawyers who actually pursue these cases. However, recovery in asbestos litigation has become virtually guaranteed.<sup>90</sup> Thus the risk factor is no longer an issue. In fact, the monumental success

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88. See Behrens & Goldberg, *supra* note 7, at 491; Behrens & López, *supra* note 11, at 274.

89. McGovern, *Mass Torts for Judges*, *supra* note 42, at 1829; WEINSTEIN, *supra* note 30, at 54, 83.

90. Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989); see also CARROLL ET AL., *supra* note 6, at 48-49.

of asbestos litigation has become a source of funding of other mass torts in which success is less certain.<sup>91</sup>

For that reason, the contingent fee poses an ethical issue that judges are ill equipped to handle. In class actions, the judge has the ability to determine or limit attorney's fees under both federal and state class action statutes.<sup>92</sup> In order to resolve a class action, whether by settlement or trial, a judge must approve counsel fees.<sup>93</sup> Similarly, in wrongful death cases, a judge must approve settlement allocations and attorneys fees.<sup>94</sup> However, in most tort actions, including major mass tort consolidations, there are no vehicles for approving attorney's fees, and most state courts take a dim view of judicial involvement unless some state statute or regulation is implicated.<sup>95</sup> Attorneys assert their contractual rights to deal with each client. The ABA Model Rules of Professional conduct (Rule 1.5(c),<sup>96</sup> New York's DR 2-101(L),<sup>97</sup> and DR 2-106)<sup>98</sup> in effect bless the contingent fee. Assuming that plaintiffs are truly sick and deserving of compensation, does that mean that lawyers are entitled to one third of the recovery plus litigation costs?<sup>99</sup> Professor Lester Brickman argues strenuously that the contingent fee wherein counsel gets anywhere from twenty-five percent to forty percent of a plaintiff's recovery (plus litigation costs) has no place in the asbestos litigation because certainly by 1989 there was no contingency or risk.<sup>100</sup> While this may have still been an exaggeration in 1989, certainly by the 1990's, with all the defendants named in many lawsuits, the risk factor had all but disappeared. Without the class certification or some mode of controlling fees, lawyers may well have received unconscionable fees, but no one has sought legislation restricting the percentage of the fee. In my court, some unions who contracted with specific attorneys, have entered into fee limiting arrangements that reduce fees to twenty-five percent (25%), but most asbestos victims are on their own with no power to

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91. In New York, the same law firms that have reaped substantial rewards from the asbestos litigation have undertaken mass tort claims in the pharmaceutical area. However, the RAND Report indicates that new plaintiffs' firms have entered the arena. CARROLL ET AL., *supra* note 6, at xxi.

92. *E.g.*, FED. R. CIV. P. 23(d); N.Y. C.P.L.R. 909 (McKinney 2008).

93. WEINSTEIN, *supra* note 30, at 81; FED. R. CIV. P. 23(d); N.Y. C.P.L.R. 909 (McKinney 2008).

94. N.Y. EST. POWERS & TRUSTS LAW § 5-4.6 (McKinney 2005).

95. WEINSTEIN, *supra* note 30.

96. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2002).

97. N.Y. CODE OF PROF'L RESP., DR 2-101(L) (McKinney 2007).

98. N.Y. CODE OF PROF'L RESP., DR 2-106 (McKinney 2007).

99. N.Y. COMP. CODES R & REGS. tit. 22, § 603.7(e) (2008); *see* *Gee v. Salem Day Care Ctr.*, 47 A.D.3d 478 (N.Y. App. Div. 1st Dept. 2008).

100. WEINSTEIN, *supra* note 30, at 79-81; *see also* CARROLL ET AL., *supra* note 6, at 48-49.

negotiate with their lawyers.

At the same time, asbestos litigation has provided a bonanza for defense lawyers. At least one lawyer commented that it had put his three children through college and he was hoping it would do the same for his grandchildren. In order to save money, defense counsel is often hired to represent more than one defendant. There is a lot of shifting around of counsel among defendants. While often the interests of defendants are consonant with each other, there is always a danger of conflicting loyalty. DR 5-105 provides that “a lawyer shall not continue multiple employment in behalf of a client . . . if it would be likely to involve the lawyer in representing differing interests” and only “after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.”<sup>101</sup> A judge must be vigilant to assure that defense counsel remain aware of their disclosure obligations, and not violate their clients’ trust, even inadvertently.

Although the courts in mass tort actions usually control discovery so as to avoid excessive delay or “foot-dragging,” some defense counsel have mastered that art. They delay producing relevant documents, particularly those relating to corporate succession or asset purchase agreements until just before trial. Some defendants wait until the last minute before trial to settle, hoping to get a better deal and possibly to increase billable hours. These practices always pose challenges to judges managing asbestos cases.

#### F. Trial Techniques

A trial technique that was popular in New York and Philadelphia courts was the “reverse bifurcation” of asbestos cases.<sup>102</sup> Because there had been so many trials in which liability of primary defendants for failure to warn had been established,<sup>103</sup> plaintiffs and defendants alike preferred trying damages first. Thus, a jury would hear nothing about the actions or inactions of the defendant companies in the face of increasing knowledge of the dangers of asbestos, punitive damages or punitive awards would be avoided, and settlements would occur with most parties before the liability phase even started.<sup>104</sup> Defense lawyers and defendants could pool their resources for trial purposes since in the damage phase they had indistinguishable interests. The conflicts did not arise until it came to the

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101. N.Y. CODE OF PROF'L RESP., DR 5-105(B) (McKinney 2007).

102. Freedman, *supra* note 29, at 689-90.

103. *See, e.g., Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

104. Freedman, *supra* note 29, at 690.

product identification phase, where each defendant sought to minimize the degree of exposure to its products. Plaintiffs, on the other hand, did not have to worry about proving liability or countering the state of the art defense as to any of the defendants.

However, once the bankruptcies of the major product producers and users ensued, peripheral defendants became increasingly unhappy with obviating the need to establish liability. Their willingness to settle before the liability phase diminished because many felt the plaintiffs could not demonstrate that exposure to their product was a significant cause of disease or that they had a realistic duty to warn. Moreover, as long as the bankrupt companies were on verdict sheets, defendants believed that they were in a position to lay most of the blame on those companies. By allowing defendants to obtain copies of a plaintiff's applications to Bankruptcy Trusts, defendants believed that they could obtain sufficient evidence of culpability of others to reduce the percentage of liability allocated to them.<sup>105</sup> On the whole, reverse bifurcation is considerably less popular than it was a decade ago.<sup>106</sup>

### G. Punitive Damages

Many courts, including mine, long ago decided that punitive damages had little or no place in the asbestos litigation. Some states like Michigan and Massachusetts simply do not permit punitive damages in tort cases.<sup>107</sup> Because New York allows imposition of punitive damages in tort cases, rather than merely dismissing the claims, I deferred all punitive claims indefinitely. Needless, to say, that was tantamount to dismissal. It seemed like the fair thing to do for a number of reasons. First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states did not permit punitive damages,<sup>108</sup> and the federal MDL court precluded them,<sup>109</sup> disparate treatment among plaintiffs would result. Finally, no

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105. Amended Case Management Order at 11-14, *In re New York City Asbestos Litigation*, No. 40000/88 (Feb. 19, 2003). This, of course, has caused plaintiffs to refrain from making applications to the Trusts until after cases are tried.

106. *In re New York City Asbestos Litig.*, 41 A.D.3d 299 (1st Dept. 2007).

107. See Behrens & Goldberg, *supra* note 7, at 501-02.

108. E.g., FLA. STAT. ANN. § 774.207(1) (West 2005).

109. *In re Collins*, 233 F.3d 809 (3d Cir. 2000); see also Paul F. Rothstein, *What Courts Can*

company should be punished repeatedly for the same wrong. However, deferral of all punitive damage claims by judicial fiat despite the fact that other jurisdictions allowed them, and, indeed, New York juries had previously awarded them, clearly raises ethical and possibly equal protection issues. Nevertheless, no plaintiff has sought appellate review of that decision.

#### H. *Special Masters*

The practice of appointing special masters in mass tort cases has become common place in the federal courts.<sup>110</sup> While many states, like New York, have no civil practice rule or statute providing for appointment of such individuals, counsel often consent to their appointment. State courts that coordinate with federal courts avail themselves of the services of the special masters appointed by the federal judges.<sup>111</sup> Working together with federal judges during the early years of the asbestos litigation in New York, provided me with the opportunity to enjoy the services of special masters, and to get the state court litigants used to working with them.

Special masters may serve different purposes.<sup>112</sup> They can make discovery rulings, they can organize cases that are ready for trial in a rational way, they can work on settlements, and they can allocate funds after group settlements are achieved.<sup>113</sup> My Special Master, who has done all of these things, has been invaluable in helping manage the asbestos docket because of the large number of cases and the huge number of defendants involved in each case. I am relieved of the burden of figuring out which cases to send out to an individual judge for trials, I avoid hearing about petty squabbles among lawyers, and I benefit from settlement efforts, giving me more time to try resolve motions and try cases. In addition, the Special Master maintains the New York City Asbestos Litigation, NYCAL, website, allowing for immediate dissemination of court orders and other

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*Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 26-27 (2001).

110. Helen E. Freedman & Kenneth R. Feinberg, *The Use of Court-Appointed Special Settlement Masters*, in AM. ARB. ASSOC., INSURANCE A.D.R. MANUAL, 177, 177-203 (1993) (the use of special masters in mass tort cases has been recognized for almost twenty years); see also 28 U.S.C.A § 471 (West 2008) (the Civil Justice Reform Act of 1990 encouraging the use of settlement techniques).

111. See *In re Joint E. & S. Dists. Asbestos Litig.*, 129 F.R.D. 434 (E.D.N.Y. 1990); *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735 (S.D.N.Y. 1990); *In re New York County D.E.S. Litig.*, 142 F.R.D. 58 (E.D.N.Y. 1992); Schwarzer et al., *supra* note 47, at 1718-19.

112. Freedman & Feinberg, *supra* note 110, at 177.

113. *Id.*

important information to the many lawyers involved.<sup>114</sup>

Ethical concerns about the use of special masters have been the subject of several articles and treatises.<sup>115</sup> It is not my purpose to explore all of the concerns that have arisen, but I caution that it is important for a judge who appoints a special master to be vigilant. Special masters serve a quasi-judicial function, but are not chosen to serve in judicial office. They function as court adjuncts but without the transparency characterizing most court proceedings and without the traditional avenues of redress for decisions. Of course, any decision made by a special master may be appealed to the Court, but that privilege is used sparingly. Although arbitrators and mediators also function privately, they do not usually have the ongoing relationship that special masters develop with lawyers and judges in a litigation of this magnitude.<sup>116</sup>

Special masters are subject to most of the same rules that govern judicial conduct.<sup>117</sup> For example, the special master may not have any disqualifying conflicts.<sup>118</sup> Ex parte conversations are limited to situations where the parties consent.<sup>119</sup> However, invariably a level of informality develops.<sup>120</sup> While an ongoing relationship with a particular litigation invariably fosters camaraderie among participants, it is important that the special master not only remain neutral but maintain the appearance of neutrality.<sup>121</sup> Any perception of unfairness or favoritism can be extremely damaging. If a judge is unfair, his or her rulings may be appealed.<sup>122</sup> Most judge's actions and decisions are recorded.<sup>123</sup> On the other hand, the special master works outside of the courtroom, often free of some of the constraints imposed upon judges.

The relationship between the special master and the judge is also complicated. The special master must at the same time retain the confidence of the judge, but remain sufficiently distant so as not to be

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114. <http://www.nycal.net>.

115. See WEINSTEIN, *supra* note 30, at 109-10; see also Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 394-406 (1986); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 663-67, 669-88 (1989).

116. Freedman & Feinberg, *supra* note 110, at 179-80.

117. *Id.* at 198.

118. *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735 (S.D.N.Y. 1990).

119. WEINSTEIN, *supra* note 30, at 109; Freedman & Feinberg, *supra* note 110, at 180.

120. Brazil, *supra* note 115, at 420-22.

121. *Id.* at 422-23.

122. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 82-83 (1987).

123. *Id.*

another law clerk or the alter ego of the judge.<sup>124</sup> Thus, when the special master obtains confidential information from counsel, he or she cannot divulge confidences to the judge.<sup>125</sup> Yet the special master always functions under the aegis of the court and not only must implement the court's dictates, but has a duty to the court to disclose any unethical or improper behavior that may occur.<sup>126</sup> While the special master can recommend a course of action to the judge, it must be done openly and with the knowledge of all of the relevant parties.

### III. CONCLUSION

There are other ethical concerns if not dilemmas that judges must confront in dealing with mass torts, including coordination between state and federal judges, coordination among state judges either within a state or with judges from other states, attendance at conferences sponsored by interested parties, and choice of counsel to represent groups, but these issues are beyond the scope of this article.

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124. Freedman & Feinberg, *supra* note 110, at 200-01.

125. *Id.* at 180.

126. Brazil, *supra* note 115, at 417-18.