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ETHICAL CONSTRAINTS ON AGGREGATED SETTLEMENTS OF MASS-TORT CASES

*Paul D. Rheingold**

I. INTRODUCTION

It is considered unethical for a law firm to settle a group of tort cases for an aggregated amount and then to divide the settlement among the plaintiffs.¹ On the other hand, any lawyer who handles mass-tort litigation is faced constantly with offers by a defendant to settle an inventory of cases at one time. How to handle this dilemma is the subject of this Essay. The reader is cautioned, however, that there is no ready solution to these problems; this Essay, at most, provides some suggestions for possible ways to deal with the serious ethical problems raised by the aggregate settlement of mass-tort claims.

II. THE ETHICAL AND LEGAL REQUIREMENTS

Most states have adopted, as rules for the proper conduct of lawyers, either the Model Rules of Professional Conduct or the Model Code of Professional Responsibility.² Pertinent to the issue of aggre-

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1. See David Austern, *Aggregate Settlements*, *TRIAL*, Mar. 1988, at 13, 13.

2. See *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* (1997); *MODEL RULES OF PROFESSIONAL CONDUCT* (1997). For a general discussion of legal ethics, see GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* (2d ed. 1990). The American Law Institute is currently preparing a Restatement of the law in this area, entitled "The Law Governing Lawyers." Such works tend to have little discussion of the ethical issues in the context of mass-tort litigation. See also PAUL D. RHEINGOLD, *MASS TORT LITIGATION* § 21:14, at 21-21 (1996) (exploring the application of the few guidelines presented in the Model Rules of Professional Conduct and Model Code of Professional Responsibility); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88

gate settlements, they state:

Model Code

A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.³

Model Rules

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.⁴

The ban is not limited to the plaintiffs' lawyer's acceptance of an aggregate settlement; the defendant's lawyer is equally banned from offering it, to prevent temptation.

If one wonders about the necessity of this prescription, a simple example will explain this necessity. A law firm with a large inventory has some cases referred to it, whereby it has to give up a forwarding fee. Other cases came directly from the client. The more the settlements are paid to those who have no forwarder, the more the law firm makes. The law firm will, therefore, be more inclined to favor those clients who came directly to the law firm. Other examples of favoring one client over another include favoring a "squeaky wheel"

Nw. U. L. REV. 469 (1994) (discussing the ethical problems that mass torts present for the traditional model of legal ethics); Austern, *supra* note 1, at 13 (discussing ethics in the context of aggregate settlements); Leonard M. Ring, *The Ethics of Representing Multiple Plaintiffs in the Same Litigation: Guidance Under the Model Code and the Model Rules*, THE BRIEF, Spring 1993, at 30 (discussing conflicts that may arise during the concurrent representation of multiple plaintiffs in the same litigation and the duties imposed by the Model Rules and the Model Code).

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106(A) (1997).

4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1997).

client, favoring a relative, or favoring a friend of the family.

III. THE DIFFERENCE BETWEEN CONGREGATED LITIGATION AND INVENTORY OF CASES WITHIN A LAW FIRM

Before we come to the heart of the problem, an introduction to some distinctions will probably be of value. The first distinction is between a mass settlement made in the context of pending congregated litigation,⁵ such as a class action, and the activity of a single law firm with an inventory of cases. Within the congregated cases, there are important distinctions between a class action and other lesser types of congregation of cases.

A. Settlement of Congregated Litigation

Settlement of congregated litigation involving many law firms and a court is worth studying both intrinsically and because it lends some suggestions for the primary subject of this Essay—the individual law firm settling its cases. At the same time, however, a study of the successful global settlement illustrates the wide chasm between disposition of cases in that setting and local batch settlements.⁶ The legal format of the congregation is the best method for division of the subject of how mass-tort litigations are wound up.

1. The bankruptcy

In a bankruptcy proceeding, the court determines how much the bankrupt estate can and must pay to satisfy the claims, even if the sum is not actually full damages.⁷ Then a fund is set up to pay claims. This situation is at a pole opposite to the individual settlement discussed in Part III.A.3 below because it is all preordained, and the lawyers for the individuals or the bankruptcy tort committee have few, if any, ethical concerns. Good examples are the funds created for the Dalkon Shield IUD bankruptcy of A.H. Robins⁸ and the two

5. For an extended discussion of congregation of cases by class action, multidistrict litigation, and consolidation, see RHEINGOLD, *supra* note 2, at chs. 3-6. This work provides background for the details of many concepts discussed in this Essay.

6. *See id.*

7. Bankruptcy, pursuant to Chapter 11, 11 U.S.C. § 1101 (1994), has provided the means for resolution of many mass torts, such as asbestos, the Dalkon Shield IUD, and currently the Dow Corning breast implants. *See* RHEINGOLD, *supra* note 2, §§ 18:19-25, at 18-16 to -26.

8. *See In re A.H. Robins Co.*, 88 B.R. 742 (Bankr. E.D. Va. 1988); RHEINGOLD, *supra* note 2 § 18:24, at 18-19.

Johns-Manville bankruptcies.⁹ Next, a claims resolution facility is often set up to evaluate and pay claims.¹⁰

2. The class action

In a class action, a settlement between parties may get formulated into a settlement class. Or there may have been a class action pending for some time and then a settlement is worked out, as in the Albuterol litigation.¹¹ Putting aside questions about settlement classes and the impact of the recent Supreme Court decision in *Amchem Products, Inc. v. Windsor*,¹² any sort of settlement which is reached in a class action format and then approved by the court¹³ is virtually insulated from questions about aggregate settlement ethics. Although one could argue that this is just an impermissible aggregate settlement on a grand scale accomplished by many attorneys rather than just one law firm, there has generally been much litigation preceding the settlement; a court has approved the deal as fair with appeals or mandamus often taken; and there is generally a right to opt out in a Rule 23(b)(3) class.¹⁴

The ethical propriety of the class action route is even less questioned as to ethical propriety when there is a "limited fund" situation leading to the creation of a mandatory class under Rule 23(b)(1).¹⁵ Here, by definition, there is only so much to go around, and the dividing is done as with any class settlement.

3. Multidistrict litigation

The most common means of congregation of mass-tort actions, of course, is for federal cases to be joined together in multidistrict litigation (MDL) for preparation purposes.¹⁶ It is not uncommon for

9. See *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984); RHEINGOLD, *supra* note 2, § 18:20, at 18-24.

10. The establishment and operation of claims resolution facilities are discussed in detail in RHEINGOLD, *supra* note 2, § 17:2, at 17-3.

11. See *id.*, §§ 3:63-65, at 3-72 to -75, 14:5, at 14-5 to -6 for a detailed discussion of class actions. The recent settlement of the class action involving Albuterol, a contaminated prescription drug, is covered in § 3:40, at 3-46 to -47 (citing *In re Copley Pharmaceutical*, 158 F.R.D. 485 (D. Wyo. 1994)).

12. 117 S. Ct. 2231 (1997).

13. This procedure is required under Federal Rule of Civil Procedure 23(e) and similar state law provisions. See FED. R. CIV. P. 23(e) (West 1997).

14. See FED. R. CIV. P. 23(b)(3) (West 1997).

15. The concept of the limited fund is that there are probably insufficient monies (from the defendant and the insurer) to pay all foreseeable claims. See RHEINGOLD, *supra* note 2, §§ 2:7, at 2-9, 3:51, at 3-58.

16. Multidistrict litigation is litigation transferred from several federal district

the cases to settle while they are before the transferee judge since the parties are together and are appearing before a federal judge who usually has strong managerial skills.¹⁷

There are a number of good examples of how such settlements have been worked out, both as to overall amount and then individual evaluation.

a. MGM Grand Hotel

The disposition of cases arising out of the 1980 fire at the MGM Grand Hotel in Las Vegas is an example both of individual and aggregated settlement, and it involved an MDL.¹⁸ Early efforts by the MDL judge, Louis C. Bechtle, failed to bring the parties together in a global settlement because of the usual factors—multiple defendants, many of whom were not clear as to the degree of their liability, and plaintiffs litigating in state and federal courts.¹⁹ Judge Bechtle decided to try a few representative cases one at a time in order to set a verdict range and because of the usual pressure it created to settle litigation.²⁰ The latter worked: defendants settled as the first case came up for trial and in later cases.²¹ At the same time, other cases that were in the federal MDL, as well as those in state court, began to settle. As a result, no cases were tried.

After the representative cases settled, a fund was created in 1984 of approximately \$168 million, excluding the \$30 million already paid.²² The amount of this fund was created by parties to each case agreeing on a sum it would take to settle as an individual decision.²³ All parties agreed that if the fund were short, each person's evaluation would be reduced *pro tanto*, but if there were more than enough funds available, each would be enlarged.²⁴ The latter situation turned out to be the case.²⁵

courts to one district court for consolidation and management. See BLACK'S LAW DICTIONARY 1015 (5th ed. 1990). The cases are congregated under multidistrict litigation practices, pursuant to 28 U.S.C. § 1407 (1997). See RHEINGOLD, *supra* note 2, § 4:1, at 4-3.

17. See RHEINGOLD, *supra* note 2, §§ 4:50, at 4-37, 14:6, at 14-6.

18. See *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983).

19. See *id.* at 915-18.

20. See *id.* at 937-38.

21. See *id.* at 913.

22. See RHEINGOLD, *supra* note 2, § 14:18, at 14-12 to -13.

23. See *id.*

24. See *id.*

25. See *id.*

b. Dupont Plaza

The settlement and payment of claims in the 1986 San Juan Dupont Plaza Hotel fire case is illustrative of a litigation, tort-based windup.²⁶ The litigation arose with the filing of 264 suits in federal and state court in Puerto Rico for approximately 2300 injuries and deaths, against more than 200 defendants.²⁷ These cases had been consolidated for pretrial handling in the federal district court in Puerto Rico with Judge Raymond L. Acosta supervising.²⁸ Extensive discovery had taken place over several years. As the massive litigation started to move toward trial, a second federal judge, Louis C. Bechtle from Philadelphia, who had performed a similar role in the MGM Grand case, was assigned by Chief Justice William Rehnquist to work out a possible settlement.²⁹

In 1989, Judge Bechtle hammered together a mass settlement of \$105 million raised by defendants and their insurers.³⁰ This came as the first phase of the trial was under way, in which the liability of parties was being established.³¹ Many defendants had banded together to cut discovery costs by using one source, the Center for Public Resources (CPR), to take the depositions and to coordinate activities.³²

If one were to read literally the restrictions in the ethics rules on aggregate settlement,³³ one would wonder how these hotel fire settlements were worked out. After all, a group of lawyers without the pre-authorization of their clients settled litigation. True, a judge was involved, many lawyers needed to agree, and a sound basis did exist to determine defendants' means and liability. Nonetheless, the plaintiffs were not consulted. Perhaps the best explanation one can give for this action is that the clients were not bound to accept the settlement, and, akin to an opt-out class, they could refuse to settle. Still, that all was settled is perhaps as much evidence of the hurried,

26. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 742 F. Supp. 717 (D.P.R. 1990); see also Peter Carbonara, *Taming a Mass Torts Monster*, AM. LAW., Sept. 1989, at 107 (discussing the size and complexity of the *San Juan Dupont Plaza Hotel Fire Litigation* case).

27. See Carbonara, *supra* note 26, at 108.

28. See *id.*

29. See *id.* at 112.

30. See *id.*

31. See *id.* at 112-13.

32. See *id.* at 112.

33. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106(A) (1997); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1997).

coercive effect of the settlement as it is that the settlement was fair—let alone generous. We are at this point very much on a par with the individual law firm situation discussed in Part III.B below.

4. Bellwether trials and statistical projection of damages

A frequently used mass-tort method of seeking to settle a large number of cases is for the supervising judge to try a few cases initially. These plaintiffs are known as representative or bellwether plaintiffs—or they are the named members of a class.³⁴ The theory is that the experience may help the parties evaluate their cases and, thus, allow them to work out an individual or global settlement.

While not yet put into practice, a further use of the results of bellwether trials has been suggested and even examined in some judicial decisions: the statistical projection of the results to the rest of the cases, resulting in their automatic settlement.³⁵ The argument is that, if scientifically done through the use of advisors to the court, the right representative plaintiffs' cases may be selected and tried. These trials would lead to a figure which would be "correct" for all plaintiffs with similar injuries, and, presto, all such cases would be settled for the sum the jury put on the first batch. While this is an efficient means of disposition of cases, it is unlikely to ever pass muster. Hence, little assistance in overcoming the ethical hurdles of aggregated settlements is portended by this concept.

B. The Law Firm's Inventory of Cases

The analysis of the ethical dilemmas in this section proceeds by examining suggested methods for settling a group of cases. These are ways for which there is at least some precedent in operation, and examples are provided to show how the solutions have fared.

1. Do an aggregate settlement quietly

Although statistically hard to quantify, the aggregate settlement of mass-tort cases goes on to a considerable degree around the country.³⁶ Defense counsel routinely drops the bait and rationalizes that it is the plaintiffs' law firm which is violating any rule when it takes the money. If a defense firm has ever been sanctioned for this conduct,

34. For a detailed discussion of this process, see RHEINGOLD, *supra* note 2, § 16:26, at 16-31.

35. See *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-21 (5th Cir. 1997); RHEINGOLD, *supra* note 2, § 16:33, at 16-38.

36. See Austern, *supra* note 1, at 13.

the writer is unaware of it.

Plaintiffs' counsel explain away their misconduct in a number of ways. They will tell you that the law of their state does not forbid it, even when presented with the pertinent section of their code of conduct. Or they will say that they could not otherwise have obtained such a large sum, and the recipients came out better for it. And, after all, they can be trusted to apportion the money fairly and impartially.

2. All clients knowingly agree

The Model Code and Rules do, after all, make an exception to the ban on aggregate settlement if certain steps are taken. There is no ban if every client is informed of and consents to the following:

- a. The existence and nature of all the claims in the group;
- b. The total amount of the settlement; and
- c. The amount each person is getting.³⁷

To effectuate this, the law firm would first have to work out some sort of tentative settlement with the defendant, not binding on anyone. Next, it would have to devise a method to calculate each client's individual sum. Then it would have to make full disclosure to all members of the group. Finally, it would have to gain their consent individually.

While such a process might be conceivable if one had five to ten clients, what if one had 1000 or 10,000 clients? What if one client disagreed? While other methods discussed below suggest some realistic ways to deal with these problems, literal compliance with the exception to the ban is onerous, if not impossible.

In *Hayes v. Eagle-Picher Industries, Inc.*,³⁸ the court reversed a group asbestos settlement involving eighteen plaintiffs whose lawyer had them vote for approval, with thirteen plaintiffs accepting the settlement and five rejecting it.³⁹ The court held that the agreement violated the notion that each person in the group must accept the overall settlement and the amount allotted to him or her.⁴⁰ The court observed there could be no majority rule, because the attorneys act for each client who retains them and not for the group as a whole.⁴¹

A unique solution to the ethical problems presented here was,

37. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106(A) (1997); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1997).

38. 513 F.2d 892 (10th Cir. 1975).

39. See *id.* at 892-93.

40. See *id.* at 894-95.

41. See *id.* at 894.

perhaps, worked out in the *Stringfellow Dump Site* cases in California.⁴² In these cases, hundreds of plaintiffs agreed by a document signed at the time they retained one law firm that they would abide by certain rules.⁴³ The chief rule was that a steering committee would be selected from among the plaintiffs, with a guardian ad litem for infants.⁴⁴ It would be up to this committee to make the decisions about what issues or claims to settle. The settlement sum would become a fund disbursed by a neutral plaintiff administrator hired by the steering committee and paid out of the fund.⁴⁵ The administrator would set up the criteria by which individuals would be paid.⁴⁶ All clients waived any assertion of conflict of interest which might exist and empowered the law firm to act.⁴⁷

3. The "add up method"

In the "add up method", the attorneys work individually with the clients to get their agreement on what they will take to settle. When the law firm has its total, it goes to the defendant and settles for a total sum. This approach is deceptively simple, because there is no way to know if the defendant will pay the aggregated sum. Indeed, the defendant often offers a sum which is less than the total sum of each client's wish, and some negotiation by the attorneys is required. An evidently successful use of this "add up" approach was achieved, however, by a Minneapolis firm in IUD litigation.⁴⁸

4. A three-step, grid solution

A three-step, grid method used by the author and others involves three steps. First, the defense counsel and the law firm tentatively agree to sums which will settle each individual case, generally placed into categories of injuries, or grids, as described below. Second, the law firm goes to its clients individually, to get all or a majority of them to agree. Last, the law firm returns to the defendant and settles for sums per case or an aggregate sum, with no difference be-

42. See *United States v. Stringfellow*, No. CV83-2501 JMI, 1993 WL 565393 (C.D. Cal. Nov. 30, 1993); RHEINGOLD, *supra* note 2, § 21:14, at 21-21 & n.52.

43. See George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 537 (1997).

44. See *id.*

45. See Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 99-100 (1990).

46. See *id.* at 100.

47. See Priest, *supra* note 43, at 537.

48. See RHEINGOLD, *supra* note 2, § 14:14, at 14-9 to -10.

tween the two at that point.

This technique, which in many instances may be the best there is, raises many ethical problems, including the following:

(a) The law firm is negotiating tentative settlements without the consent of the clients. About the only response is that they are just tentative.

(b) The law firm, working with the defendant, is making categories of cases. At least initially, the law firm is placing cases into these categories based upon their specific facts without the client's input.

For example, in some DES cases handled by the author, plaintiff and defense counsel analyzed all of the pending 174 cases for categories of injuries—for example, infertility, spontaneous abortion, or cancer—and then assigned average values to these categories.⁴⁹ Then, special factors were identified which would increase or decrease a claim within that group—for example, age, medical bills, mental distress, whether there was a statute of limitations defense, and market share. Finally, through a long series of meetings, it was determined how each case fit into the categories and how the special factors played in. Often there was a conflict which had to be resolved as to the precise facts of an individual case.

(c) There is selling of the settlement to the client. The clients have to be informed of the overall plan, how divisions are made, how sums are assigned, and how their individual case is worked out. Here is where the greatest risk of unethical conduct may exist. Where is the line between convincing the client that this is proper, and coercion, which we can assume is unethical? There is the temptation to indicate that, for the greater good, all would accept their amount, which was somehow "scientifically" determined. There actually can be no greater good ethically, as noted above; it is an individual decision.

(d) Must all agree? Clearly it would be wrong to coerce a client by saying that the whole plan fails unless everyone agrees. But what to do if there is, as there always is, a small number of persons who will not take the sum upon which the lawyers have agreed. One practice would be to have a slush fund set aside, by agreement with the defendant, to pay off the complainers. This would be unfair, however, to the non-complainer.

A possible solution is for the opposing counsel to agree that the

49. See *In re DES Market Share Litig.*, 605 N.Y.S.2d 1009 (N.Y. App. Div. 1993); RHEINGOLD, *supra* note 2, § 14:15, 14-10 to -11.

plan goes through if a certain number less than all accept it. The defense counsel may well be reluctant to agree to this escape valve, since they want peace across the board, and they are also planning to get rid of the plaintiffs' law firm after settlement. However, if a small enough opt-out number is established—for example, no more than 5% of the cases—many defendants will agree as an expedient solution. Such an agreement relieves the pressure on the law firm to obtain 100% compliance.

(e) Fate of the opt outs. The agreement to allow a few plaintiffs to refuse the group settlement scheme raises another, more serious ethical problem. What is to become of these cases? The plaintiffs' law firm may not want to carry on a few cases, especially since, having rejected an offer, the individual case is probably headed to trial and yet is of little value to the firm. The defendant may have intended, or at least hoped, that it would force plaintiffs' law firm out of business in these cases. Ethics decisions state that it is unethical for the plaintiffs' firm to agree to take no more cases, and that indeed it is wrong for the defense counsel to ask.⁵⁰ Yet, as with aggregate settlements, such agreements are made all the time, usually orally, of course, but counting on the word of the plaintiffs' firm.

The next layer of problems—and one which does arise frequently—is the desires of the claimants who have opted out of the plan. They might insist on having their current lawyer represent them—yet the law firm does not want to, as noted above. Or, equally likely, they may no longer trust the attorney who wanted to settle their cases for what they perceived as less than they were worth and who may have appeared to act coercively. Of course, the latter plaintiff can get a new lawyer at any time, but what if the outgoing lawyer asserts a lien for services? Can it be said that the firm was discharged for cause and hence not entitled to a fee? Further, since cases are being settled en masse and the costs of handling a single

50. While neither the Model Rules nor the Code expressly states that it is unethical for counsel to agree to take no more cases of a certain type, they have been so interpreted in ethics opinions. Model Rule 5.6(b) and Model Code DR 2-108(b) were so interpreted in ABA Comm. on Ethics and Professional Responsibility, Formal Ops. 93-371 & 94-381 (1994). This point of view was criticized by Professor Stephen Gillers. See Stephen Gillers, *A Rule Without a Reason*, A.B.A. J., Oct. 1993, at 118; see also, RHEINGOLD, *supra* note 2, § 21:17, at 21-26 (discussing justification for a ban on agreements not to take on additional litigation); Joanne Pitulla, *Co-opting the Competition*, A.B.A. J., Aug. 1992, at 101 (discussing restrictions on the lawyer's right to practice); Weinstein, *supra* note 2, at 519-20 (discussing buyouts of clients and corporate buyouts of claimants).

case through trial appear prohibitive, what if no one wants the client? What if the hold-outs achieve a bigger settlement as time goes along and as the defendant is more willing to pay larger sums to get rid of the litigation? The law firm can only look back uncomfortably at their advice to their earlier clients to settle for less and may have to answer pointed questions.

(f) Failure of the deal. Suppose the deal falls through because there was a handful of plaintiffs who would not accept the sums, and now those who would have accepted it demand their money. Could those claimants try to force their attorneys to get the money for them? If that did not succeed, could they demand new lawyers?

5. Evaluations made by some impartial party

There is precedent for a group settlement to be worked out through the assistance of a judge, special master, or some other neutral person. The argument here is that the law firm is not dividing a fund between its clients on its own, but rather that some authority is doing it.⁵¹

There are examples of the use of this technique. Some of the settlements of mass torts in the congregated form, considered in Part III.A, are applications of this approach. Some of the Albuterol cases were recently settled in this fashion, through the use of a retired judge,⁵² and asbestos cases have been disposed of through evaluation by a special master in federal courts.⁵³

While this technique sounds soothing because there is a judge or equivalent in the picture, in fact much of the vice of aggregate settlement still exists. The defendant is offering the same aggregate sum which is wrong in part because there is no one to say the total is fair. The judge is merely working out a supposedly equitable division of a fixed sum among heterogeneous groups of claimants. Still, the attraction lies in the judge making the decision. This lends an air of impar-

51. See RHEINGOLD, *supra* note 2, § 14:16, at 14-11 to -12; Weinstein, *supra* note 2, at 521.

Where a judge is involved in a mass settlement, the role the court plays is highly significant. At the one extreme, the judge may be a major player in pushing for the settlement and distribution of the monies, since it clears the docket. As Judge Weinstein has written, "Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases." Weinstein, *supra* note 2, at 521. At the other extreme, the judge might play the role of moralist and prevent the parties, or at least caution them, from entering into what is an unethical arrangement.

52. See RHEINGOLD, *supra* note 2, § 3:40, at 3-46.

53. See *id.* at § 14:16, at 14-11.

tiality and probably helps convince claimants that they are getting their fair share.

A further vice in the impartial solution is that average judges or similar impartial people will not know much about the cases. They will not know what makes causation weaker or stronger in cases, or what other proof problems might exist, although they could have a good sense of damages for injuries. Who will educate them? Frequently the plaintiffs' lawyer will. Thus, some of the evaluation of the lawyer may creep back in, and indeed, if truly objective, it would be better than that of the judge, as it would be more knowledgeable.

A further uncertainty in the impartial approach is what degree of authority, if any, is required. Obviously, if the person making the assessments is a judge who has worked with the cases, the work will be well respected, but few judges would take the time to do this in hundreds of cases. From there one goes down to lower authority—to the special master, to the magistrate, and then to the ex-judge who is running a mediation or ADR system, or even to a lawyer who occasionally works as a mediator. The risk with these people is that the clients view them as they do a judge, yet they lack authority. On the other hand, skilled mediators might be the best choice because of their ability to cut through complexities and still be concerned about individual fairness.

A hybrid of the impartial approach and the grid solution would be for the parties to set up grids, or even an average sum per case, and then bring in the neutral decision maker to make more specific decisions. For example, where there is an average, the neutral decision maker might suggest factors which make individual cases go above or below the average—again probably looking to the law firm to learn what counts.

Another method using impartial individuals arises when mature litigation is involved, a term describing mass-tort litigation that has been around so long that values have been attached over and over to a type of injury.⁵⁴ Asbestos suits fall into that category. The judge or other neutral decision maker could study what the going rate for a type of injury is, and then apply that to the cases in the law firm's inventory which match the profile. This is such an obvious method of evaluation, however, that the parties might be able to work this out individually, and the plaintiffs would readily accept going-rate settlements.

54. On the mature tort concept, see RHEINGOLD, *supra* note 2, § 2:6, at 2-7.

IV. CONCLUSION

This analysis of settlement practices in the mass-tort field reveals the wide chasm which exists between professional ethics rules and actual practice. Similar discontinuities exist in many other aspects of practice in the mass-tort field.⁵⁵ Perhaps the best solution would be to revise the Canons of Ethics for mass-tort actions and large actions more generally involving large numbers of plaintiffs. Until such a day comes—it probably never will—we must continue to count on the creativity of the bench and bar to work out practical solutions for mass settlements. These solutions can be expected to do much more, of course, than merely wink at the requirements of the Code or Rules, but at the same time rather liberal interpretation of their strictures must be allowed.

55. See RHEINGOLD, *supra* note 2, §§ 21:1-:30, at 21-2 to -43; Weinstein, *supra* note 2, at 493-95. Judge Weinstein has also written a book on the subject, JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATIONS: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995).

An ethical concern beyond the scope of this paper is how the law firm came to represent many plaintiffs all at once. There are provisions in the Code and Rules which could inhibit this type of conduct. For example, the Code forbids multiple representation if there are differing interests or possible adverse effects. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (1997). The corresponding Rule is a little more liberal. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997). For present purposes in the mass-tort field, plaintiffs' firms represent large numbers of clients all at once without perceived ethical impropriety. And the alternative must be considered: how efficient would it be, for the clients and the system, for 100,000 claimants to be represented by 100,000 lawyers? See RHEINGOLD, *supra* note 2, § 21:3, at 21-4 to -5.