

## LEGAL ETHICS & CLIENTS' RIGHTS: CASUALTIES OF ASBESTOS LITIGATION?

by

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The consequences of greed are nothing new, and justice is often poetic. In Greek mythology, for example, the person who disregarded the gods' directives against avarice suffered a particularly horrid penalty. He was cursed so that "no abundance shall ever satisfy him," so that he would "starve in the very act of devouring food." The greedy mortal, who could never obtain enough money to satisfy his needs, "turned upon his own body and devoured it until he killed himself." See Edith Hamilton, MYTHOLOGY, at 421-22 (1998).

*The Reality of Expanding Asbestos Litigation.* Is there a modern parallel? The current asbestos litigation controversy may present a comparable paradigm. For several decades, the asbestos plaintiffs' bar has pursued defendants allegedly responsible for injuring thousands of victims afflicted with asbestos-related diseases. Their first targets were obvious — the manufacturers and suppliers of asbestos-containing materials. Unfortunately, the asbestos bar's massive recoveries created a feeding frenzy that exhausted the resources of asbestos suppliers. As a result, new defendants were identified: premises owners, including oil companies and transportation companies that used asbestos to control heat and fire hazards, and other companies who merely added asbestos to strengthen their products and protect their customers from flammability. An entirely new feeding frenzy arose and companies and insurers untouched by the original controversy suddenly found themselves at risk.

This expansion set a dangerous new precedent. No longer were law suits limited to a specific industry, such as insulation manufacturing and supply. Now, *any* premises owner, no matter what their business, could be sued. *Any* product manufacturer or supplier, no matter how innocent their use of asbestos in their products, was fair game. All that was required was the presence of asbestos simultaneously with the presence of a plaintiff, however brief and however minimal. With those facts, thousands of persons allegedly suffering from asbestos-related illnesses again flooded the courts, and the feeding frenzy intensified. Plaintiffs' lawyers quickly discovered how incredibly ubiquitous asbestos was — and that thousands of new defendants were available to be sued. The resources available to pay settlements and judgments must have seemed unlimited.

Asbestos lawsuits often named hundreds of plaintiffs who sued every possible defendant. In some instances, the same lawyer or law firm represented all plaintiffs. The term "asbestos mill" was used by some to describe operations in such firms. Day after day, month after month, massive groups of clients were screened and a tremendous volume of litigation was filed as counsel raced each other to the end of the rainbow.

The lawyers did not have to run far. Juries were very receptive to asbestos claimants, repeatedly awarding massive punitive damages verdicts to punish defendants repeatedly for the same course of conduct. State laws typically held each defendant responsible to plaintiffs for the entire award, even if a particular defendant's conduct only contributed minimally to the plaintiffs' injuries. After some initial resistance, courts approved vast aggregations of claims and used creative "short cuts" that increasingly limited the parties' traditional rights to their "day in court" — techniques that were justified by "necessity" rather than individual due process. Despite this havoc, Congress and the state legislatures were remarkably unconcerned.

Faced with mountains of new lawsuits, punitive juries, overcrowded and impatient courts, and indifferent legislatures, defendants were often willing to settle for “costs of defense,” even when those costs climbed into the six figures. More and more, less work was required by plaintiffs’ counsel to settle cases with these “willing” defendants. When defendants resisted, they risked becoming “targets” in hundreds of cases, thereby inflating their defense costs exponentially and risking large jury verdicts in forums where corporate defendants in general, and asbestos defendants in particular, were extremely unpopular. So, with some notable exceptions, defendants settled, and settled, and settled again, often in massive “aggregate settlements” where thousands of claims were resolved by the defendants’ “lump sum” payments. Many plaintiffs’ lawyers found themselves at the end of a huge financial pipeline, funded by scores of settling defendants and contingent fee agreements that sliced off huge chunks of their clients’ recoveries, despite the relative ease of recovery.

***Consolidation of Claims and Clients’ Rights.*** With the expansion, asbestos litigation began looking less like traditional private litigation on behalf of individual litigants and more like a massive capitalistic enterprise—an enterprise using America’s courts as its marketplace. If for no other reason, the sheer volume of claims threatened the hallowed relationship between individual plaintiffs’ lawyers and individual clients. Clients looked more like customers, or worse, like raw materials for the “asbestos mills.”

But lawyers’ clients are not customers, and the practice of law is not an exercise in unrestricted capitalism. There are special rights and duties created by the attorney-client relationship, and they go far beyond preserving the secrecy of communications. When things go well, complaints are relatively few, but when things do not work out as planned, dissatisfied clients who feel they have been improperly represented may turn on their former advocates. This client dissatisfaction is growing within asbestos litigation.

Unfortunately for everyone involved, both plaintiffs and defendants, there are no “unlimited resources.” At an ever-increasing pace, defendants’ resources are being depleted. Bankruptcy filings are common and compensation opportunities are dwindling. As the pool of resources shrinks, some clients are questioning whether their lawyers have lived up to their ethical responsibilities. Not surprisingly, these clients have found new lawyers to sue their former advocates for selling out the clients’ rights in pursuit of the advocates’ own financial interests.

***Asbestos Clients Fight Back.*** In February, the dam finally burst in Pittsburgh when a group of outraged asbestos clients filed their own class action lawsuit against their former lawyers. *See* Plaintiffs’ Class Action Complaint, *Huber v. Taylor*, No. 02-0304 (W.D. Pa., filed Feb. 6, 2002). The alleged class consists of over 2,500 persons who were represented by the lawyers in asbestos litigation. *Id.* at 2. Allegedly, the lawyers and their law firms “defrauded a group of hard-working union members in blue-collar trades.” *Id.* These persons, who are “unsophisticated and have little experience” with the legal system, were “recruited” as plaintiffs for “mass” asbestos actions. *Id.* The complaint vividly describes the experience of individual clients lost in a giant capitalistic enterprise:

[The lawyers] viewed their clients as mere inventory that could generate enormous legal fees with relatively little effort. They told their clients nothing about the lawsuits in which they were included. They told them nothing about the thousands of other clients whom they were simultaneously representing. They told them nothing about the colossal, aggregate settlement agreements which they executed (supposedly on the clients’ behalf), agreements that sacrificed the clients’ rights and interests to the lawyer’s greed. The victims received a few *thousand* dollars for their injuries while the lawyers amassed tens of *millions* of dollars in fees. Instead of serving their clients’ interests, these lawyers viewed their clients as serving them. *Id.*

Of course, these are only allegations. However, if the facts alleged in the complaint are true, they present serious risks to the lawyers who perpetuated these practices. Now, like the defendants they once sued, they may be forced to justify, in detail, conduct that took place in the dim past. Now, like the defendants they once sued, it is they, as the beneficiaries of wealth, who may be targeted by injured parties in unsympathetic forums. Now, like the defendants they once sued, all of their files may be obtained in discovery, circulated

widely, and subjected to creative and potentially misleading interpretations.

Unlike their former opponents, these lawyers are in no position to argue that their clients were not injured by asbestos, that they caused their illnesses through their own neglect, or that the diseases were caused by alternative causes. In addition, these lawyers cannot necessarily rely upon the attorney-client privilege to shield their files from discovery. The privilege's protection usually fails where, as here, clients claim fraud and intentional misconduct. Indeed, these lawyers not only face awards of damages, but also injunctions forcing them to disgorge the fees they collected while representing their aggrieved clients. In short, if the allegations are true everything is at risk — firm assets, personal assets, and even the lawyers' very right to practice law.

**The Legal Authority.** The legal authority underlying the complaint's allegations springs from Rule 1.7(b) of the ABA Model Rules of Professional Conduct, which addresses a lawyer's duties and a client's rights where an advocate represents multiple plaintiffs in a single suit:

A lawyer shall not represent a client if the representation of that client will be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

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

Clearly, the primary thrust of Section 1.7 is the *client's rights*, not the lawyer's discretion. The proper question is not whether the lawyer can justifiably withhold information, but rather whether clients are entitled to know enough to make up their own minds about how their claim is handled. "Ultimately, the attorney, as the person bound by the rules of ethics and professional responsibility, is the person expected to grasp the nuances and implications of multi-party representation and to bear the responsibility for educating the client so that the client — each client — makes a fully informed decision on legal representation." MacDowell, *Ethics of Counsel Sharing and Multi-Party Representation*, ABA TORT AND INSURANCE PRACTICE COMMITTEE CONFERENCE, Phoenix, Arizona (Mar. 21, 2002).

Waiving future conflicts in the original contingent fee agreement cannot easily cure these problems. The duty to disclose is a *continuing* obligation and cannot necessarily be waived "once and for all." The ABA Committee on Professional Ethics takes a "guarded view" of such waivers:

[O]ne principle seems certain: no lawyer can rely with ethical certainty on a prospective waiver of objection to future adverse representations simply because the client has executed a written document to that effect. No lawyer can assume that, without more, the "coast is clear" for undertaking any and all future conflicting engagements that come within the general terms of the waiver document. Even though one might think that the very purpose of a prospective waiver is to eliminate the need to return to the client to secure a "present" second waiver when what was once an inchoate matter ripens into an immediate conflict, there is no doubt that in many cases that is what will be ethically required.

ABA Comm. on Prof. Ethics, Opinion 93-372. Thus, the existence of a waiver does not excuse the lawyer from reconsidering conflicts *as the case progresses* to ensure that changed circumstances do not require additional disclosures and consultations, and possibly new consents from clients. Counsel may need to

withdraw completely despite the existence of a prior waiver. Nothing in the ABA Code excuses counsel from a meticulous concern for their clients' and interests throughout the pendency of representation.

Mass settlements, which occur so often in asbestos litigation, also present ethical problems. Rule 1.8(g) of the ABA's Rules of Professional Conduct stress the importance of disclosure and client consent:

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

Similarly, DR 5-106(A) of the ABA Code of Professional Responsibility provides:

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.

***Reform through Ethics Lawsuits?*** Clearly, the plaintiffs in *Huber* have pleaded themselves carefully within these provisions. If these allegations are true, the altruistic goal shared by many plaintiffs' lawyers has been perverted by others into an exercise of self-enrichment, and these asbestos clients have suffered insults from the indifference of the very persons they trusted for help. With apologies to Pogo, the beloved comic page character, some asbestos lawyers may legitimately say, "we have met the enemy, and they are us."

Over two thousand years ago, the Greeks recognized that persons with greedy appetites are insatiable. Inevitably, they will turn and devour and destroy themselves in heedless disregard for their own fate. At this time, it is impossible to know whether the abuses alleged in *Huber* truly occurred or whether they are pervasive within the asbestos plaintiffs' bar. But history shows that the asbestos controversy has pursued every possible source of compensation relentlessly. If we have learned anything about the asbestos beast after forty years of litigation, it is that *no one* is safe from its bite.

But is any of this carnage really necessary? Will the pain of self-consumption finally stop the engine of lawsuit abuse? Will legislatures finally restore reason to our tort systems and halt the endless pursuit of the next *de minimis* defendant? Will courts finally realize that the crisis partially resulted from their own ineffective management by failing to use all available tools to evaluate, defer and, when necessary, dismiss claims filed by persons who are not legitimately impaired? One can only hope that influential persons are now willing to act. Otherwise, the road ahead looks like a dead end for everyone involved.

It would be ironic if real asbestos reform resulted from actions taken by the injured parties against their own lawyers. For decades, eager plaintiffs' lawyers have looked for the "next asbestos." Perhaps now that the full extent of this national tragedy is becoming clear, even they will join the rest of us, including their clients, in saying, "enough is enough."