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# LAWYER CONDUCT IN THE "TOBACCO WARS"

*Roger C. Cramton\**

## INTRODUCTION

My assignment is to comment briefly on the Redish<sup>1</sup> and Green<sup>2</sup> articles that discuss the conduct of the corporate defense lawyers who provided counseling, strategic advice, and litigation defense to the tobacco companies throughout the years during which it became apparent that their products were related to the injuries and deaths of millions of people. In addition, I have some equally brief comments on a subject the articles do not address: the ethical conduct of some of the plaintiffs' lawyers who were major participants in the "Tobacco Wars."

## II. THE CONDUCT OF THE TOBACCO LAWYERS

The Redish and Green articles do not deal with one set of charges against the tobacco companies' lawyers: strategic and abusive litigation conduct designed to delay trials, obstruct discovery of relevant documents, and run up the costs of the plaintiffs' lawyers who finance these cases. It is clear that the companies and their lawyers adopted and continue to follow a deliberate strategy in individual smoker cases of resisting discovery, rarely settling, and appealing every adverse decision.<sup>3</sup> Nor is there any doubt that the companies and their lawyers have pursued scorched-earth litigation tactics. In the mid-1980s, an R.J. Reynolds lawyer boasted to a shareholder audience about his success in forcing ten California smoking victims to dismiss their cases voluntarily:

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1. Martin H. Redish, *The Adversary System, Democratic Theory and the Constitutional Rule of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359 (2001).

2. Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407 (2001).

3. See RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 18-30 (1996). For further discussion of tobacco companies' litigation strategies, see Patricia Bellew Gray, *Tobacco Firms Defend Smoker Liability Suits with Heavy Artillery*, WALL ST. J., Apr. 29, 1987, at 1; Alison Frankel, *Was Budd Lerner Another Smoking Victim?*, N.J.L.J., July 12, 1993.

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making the other son of a bitch spend all of his.<sup>4</sup>

An unsophisticated layperson might view this statement as admitting abusive litigation conduct, such as running up the other side's costs in a successful effort to defeat a claim. Those more familiar with the codes governing lawyers and the practice of disciplinary bodies know that excessive adversary zeal almost never results in lawyer discipline.<sup>5</sup> The professional rules that deal with matters such as delay,<sup>6</sup> frivolous assertions,<sup>7</sup> discovery abuse,<sup>8</sup> and harassment of adverse parties or witnesses are cast in general terms and contain qualifying language that make them largely meaningless for purposes of professional discipline.<sup>9</sup> The organized bar opposes efforts to clarify the rules, which is clearly a difficult task, and usually opposes procedural rules, such as Rule 11 of the Federal Rules of Civil Procedure, that give judges greater authority to sanction such conduct as it arises in litigation.<sup>10</sup> If lawyers for tobacco defendants have crossed the line in civil litigation, the only likely remedy is a sanction in a specific proceeding. I know of no study that reports whether or not the tobacco lawyers have been sanctioned in cases involving smokers or, if so, whether the frequency is any greater than that of defense lawyers in other fields of high-stakes product liability litigation.

Now I turn to the topic discussed in the Redish and Green articles: Did the tobacco lawyers engage in professional misconduct by aiding and abetting their clients' criminal or fraudulent conduct? To con-

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4. See NADER & SMITH, *supra* note 3, at 27.

5. See GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK & ROGER C. CRAMTON, *THE LAW AND ETHICS OF LAWYERING* 382-387, 404-431 (3d ed. 1999) (discussing professional rules and attitudes toward excessive adversary zeal, resulting in little or no professional discipline; the unavailability of tort remedies for abusive litigation conduct; and the development of sanctions in judicial proceedings as the principal current remedy).

6. See, e.g., MODEL RULES OF PROF'L CONDUCT [hereinafter MODEL RULES] R. 3.2 (1983) (prohibiting delaying tactics unless "consistent with the interests of the client").

7. See, e.g., MODEL RULES, *supra* note 6, R. 3.1 (stating that an assertion is not prohibited "unless there is [no] basis [for its assertion] that is not frivolous"; further, comment 2 states that the lawyer has no duty to make a full inquiry about underlying facts before making the assertion).

8. See, e.g., MODEL RULES, *supra* note 6, R. 3.4(d) (prohibiting a "frivolous discovery request or fail[ing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party").

9. See, e.g., MODEL RULES, *supra* note 6, R. 4.4 (prohibiting harassing tactics "that have no substantial purpose other than to embarrass, delay, or burden a third person").

10. FED. R. CIV. P. 11.

clude that they did requires evidence establishing: (1) the tobacco companies at some point in time were engaged in a criminal or fraudulent conspiracy to deceive smokers, the public, and government agencies concerning the health hazards of tobacco products; (2) the lawyers knew that the companies were engaged in this wrongful conduct; and (3) the lawyers did one or more acts that substantially facilitated the fraud.<sup>11</sup>

Elihu Root who said that “[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop”<sup>12</sup> also contributed another well-known saying to the profession’s lore: “The client never wants to be told he can’t do what he wants to do; he wants to be told how to do it, and it is the lawyer’s job to tell him how.”<sup>13</sup> The unremarkable conclusion of the Redish and Green articles is that the tobacco lawyers followed the second course rather than the first. The more unusual conclusion of the two articles is that, in the Redish version, the tobacco lawyers were doing what the Constitution encourages them to do, and, in the Green version, that it is not clear that the lawyers violated any professional rules or other law in taking an aggressive “hired gun” posture in representing the tobacco companies.

Three normative formulations of a lawyer’s duty have contended for the profession’s allegiance. First, Samuel Johnson’s *ipse dixit* of long ago is often referred to today as the “total commitment to client” model of representation: “A lawyer should do everything (other than advising or assisting criminal or fraudulent conduct) that the client would do if the client had the lawyer’s knowledge and skill.”<sup>14</sup> Second, the profession’s current publicly stated norm: “A lawyer may, but need not, do for the client anything unfair, unconscionable or over-

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11. See *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.C. 1978). This was a leading case setting out the tripartite standard for aiding and abetting a client’s fraud. See also, Geoffrey C. Hazard, Jr., *How Far May a Client Go in Assisting a Client in Unlawful Conduct?*, 35 U. MIAMI L. REV. 669 (1981) (spelling out the tripartite test for whether a lawyer’s conduct may lead to civil or criminal liability).

12. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 37 (1994) (quoting Elihu Root).

13. *Id.* at 76.

14. This is an abbreviated version of Samuel Johnson’s Eighteenth Century statement:  
A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled.

JAMES BOSWELL, *THE JOURNAL OF A TOUR TO THE HEBRIDES WITH SAMUEL JOHNSON* 34-35 (Norton ed., 1955).

reaching, even if not unlawful."<sup>15</sup> Finally, Professor Lon Fuller's 1953 statement of a lawyer's responsibilities, embodying the "wise counselor" image: "A lawyer must not do for the client anything unfair, unconscionable, or overreaching, even if not unlawful."<sup>16</sup>

Redish appears to adopt, or at least defend, total commitment to client norm; his emphasis on constitutional principles suggests that this model is required and not merely permissive. Green recognizes that the "hired gun" role is not obligatory, but speculates that it has become everyday practice, at least in high-stakes matters. But Green does not outline a normative view of the lawyer's duty to clients, third persons, and courts to which individual lawyers should aspire or the profession seeks to bring about. His concluding paragraph suggests that the organized profession should consider reining in the "hired gun," but does not outline steps by which this might be accomplished.<sup>17</sup>

15. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673, 679, 685 (1978). My statement is a summary of ABA Ethical Consideration 7-8, which reads as follows:

In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by the Disciplinary Rules, the lawyer may withdraw from the employment.

MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1981). The Model Rules of Professional Conduct permit a lawyer to adopt this norm of representation. Rule 2.1 requires a lawyer to "exercise independent professional judgment and render candid advice" and permits advice on "moral, economic, social and political factors." MODEL RULES, *supra* note 6. Rule 1.2(c) permits the lawyer, with the client's consent, to "limit the objectives of the representation." *Id.* Rule 1.16(b)(3) permits a lawyer to withdraw, even if the client will be materially adversely affected, if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." *Id.*

16. This is my summary of a longer statement:

The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality. In saving himself from this unworthy involvement, the lawyer cannot be guided solely by an unreflective inner sense of good faith; he must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do.

ABA-AALS Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) (a statement prepared by a joint committee of the ABA and the AALS, and Professor Lon Fuller of Harvard is said to be the principal author). See Schwartz, *supra* note 15.

17. See Green, *supra* note 2, at 433.

Both authors implicitly concede that the tobacco lawyers may be subject to moral criticism for their conduct, even if they conformed to the profession's minimal norms and did not assist crime or fraud. Redish and Green reach this conclusion on the basis of limited facts concerning the actual representation provided. Whether a particular activity involves a crime or a fraud on the part of a principal and whether agents aided or abetted that fraud are issues totally controlled by the underlying facts. I wish that they had explored the available documentary evidence bearing on these two questions. But even under the handicap of inadequate facts, it is worthwhile to stress the risks that lawyers run when the "hired gun" model takes them repeatedly to the edge of what is legally permissible. Moreover, normative concern about repetitive behavior of this kind is appropriate because routinely going to the edge of what is permissible runs the risk of occasionally going over the edge.<sup>18</sup>

My own view is that we know enough about the conduct of at least some of these lawyers to conclude that their conduct was morally objectionable. But a more detailed examination of the immense documentary record that has come to light since 1995 is necessary to reach an objective conclusion whether they aided and abetted a client's criminal fraud. The two articles do not provide such an examination, although Green provides a partial one.

#### A. *The Redish Article*

Redish's article, *The Adversary System, Democratic Theory and the Constitutional Role of Self Interest: The Tobacco Wars, 1953-1971*, addresses "hypothetical contingencies of conceivable . . . attorney behavior [by lawyers representing the major tobacco companies] during that period."<sup>19</sup> As its title indicates, the article explores arguments of political and social theorists concerning the adversary system broadly viewed as encompassing public debate, as well as adversary litigation. The article responds to criticisms that adversary representation by lawyers in these arenas harms the public interest by pursuing narrow self-interest, hindering the search for truth, and encouraging social conflict. Redish argues that our constitutional democratic system, es-

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18. The study of abusive litigation behavior by large firm lawyers in high-stakes cases suggests a legal culture in these firms that leads lawyers to go to the edge, and sometimes beyond, in handling discovery requests. See ABA Section of Litigation's Special Task Force, *Report, Ethics: Beyond the Rules*, 67 *FORDHAM L. REV.* 691, 691-895 (1998) (especially note the preface and editorial introduction, outlining the study and summarizing its results; the individual papers by six scholars provide a great deal of informative detail and surmise).

19. See Redish, *supra* note 1, at 360 n.1.

pecially the right of free expression and procedural due process, supports his view of "liberal democratic adversary theory" rather than the more traditional "pluralistic adversary theory."<sup>20</sup>

This highly abstract theorizing about "adversary theory and the Constitution" clearly supports a right of interested persons and organizations to utilize the services of lawyers, as well as other professionals, in advancing their interests and their right to diligent and committed representation by a lawyer in public proceedings. Although moral arguments can be made against this conclusion, surely these representational rights are part and parcel of our current understanding of lawyers' function in society and within the adversary system. So it is not surprising that Redish concludes a lawyer may promote a client's objectives "within the bounds of the law."<sup>21</sup>

Redish states conclusions that parallel the codes governing lawyer conduct but expresses them in somewhat differing language: lawyers may assist clients in a course of conduct that may be viewed as morally objectionable, providing the conduct is not criminal or fraudulent; and they may make arguments and devise strategies that put facts and law most favorably to the client as long as they do not knowingly assist a client's crime or fraud.<sup>22</sup> The lawyer's own personal beliefs at various times as to whether the client's product causes harm or whether consumers are aware of the severity of the possible harm are irrelevant; if the lawyer in good conscience is unable to take lawful steps that would further the client's interests, the lawyer should resign from the representation.

I am left with several disappointments. First, the pages that discuss, in general fashion, the application of these principles to the lawyers representing the tobacco companies during 1953-1971 deal with hypothetical circumstances rather than the much more detailed factual picture that has emerged since 1994.<sup>23</sup> Redish essentially defends the tobacco lawyers' conduct, conceding only that if false representations were made would misconduct have occurred. With respect to the "special projects" in which research decisions were made directly by the lawyers, he states only that "any detailed discussion of the nature

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20. *Id.* at 368-371.

21. This is a phrase used in the MODEL CODE OF PROF'L RESPONSIBILITY, but not mentioned by Redish.

22. Redish does not make it clear that "fraud" includes material statements that mislead by omission as well as affirmative falsehoods, nor that the required intent is satisfied by "willful blindness" and by reckless disregard of whether statements that are made are true or false. See HAZARD, KONIAK AND CRAMTON, *supra* note 5, at 104-122, 289-303 (discussing the elements of aiding and abetting a client's fraud, including intent).

23. See Redish, *supra* note 1 at 395-405.

of these projects would require considerably more focus on the facts than I consider helpful or appropriate for what is primarily a theoretical analysis.”<sup>24</sup> But judgments about the conduct can only be made on the basis of a full understanding of the facts.

Second, the failure to consider representation during the period 1971-1998 is puzzling, because documentary evidence concerning the conduct of the tobacco companies and their lawyers only became public beginning in 1990.<sup>25</sup> This was a period in which it was plausible to assume much greater knowledge on the part of the industry’s lawyers concerning the causal relationship between smoking and various diseases, the addictive quality of nicotine, and other issues relating to whether the tobacco companies were engaged in fraudulent deception of the public and in making false statements to public bodies. Perhaps Redish’s role as an expert witness for the companies on lawyer conduct has given him confidential information relating to the later period, requiring his “hypothetical facts” approach to be limited to the earlier period of representation.

Finally, Redish’s article, by failing to address the moral question of whether a good lawyer should have withdrawn at some point from representing the tobacco companies, suggests that moral criticism of the choices lawyers make in undertaking and continuing representation of wealthy corporate clients is inappropriate. I disagree. Although lawyers do not adopt the views or values of their clients by representing them, the decisions they make in choosing clients and continuing representation are subject to moral criticism except in situations not involved here, such as the lawyer appointed to represent an indigent defendant or one representing an unpopular defendant seeking the assistance of “the last lawyer in town.”<sup>26</sup>

### B. *The Green Article*

Green’s article, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the “Wise Counselor” Given Way to the*

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24. *Id.* at 401 n.151.

25. The initial disclosure was in the trial court decision of Judge Sovokin in *Cippollare v. Liggett Group Inc.*, 893 F.2d 541 (3d Cir. 1990) (quoting Sovokin’s ruling applying the crime fraud exception to the attorney-client privilege and summarizing lawyer involvement in research decisions). Subsequently, some thirty million pages of documents were produced in the extensive discovery in Minnesota. The factual allegations of the state complaints in Minnesota and Wisconsin provide a summary of this evidence, but clearly a partisan one.

26. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 569-578 (1986) (discussing the lawyer’s detachment from the views and actions of the client; the professional freedom to choose clients; and the moral obligation to assist in the provision of representation for indigent and unpopular clients and to accept court appointments). See also MODEL RULES, *supra* note 6, R. 1.2(b) (discussing scope of representation of the client).

"Hired Gun"?,<sup>27</sup> provides more factual detail on the tobacco lawyers' behavior and an affirmative answer to the question it poses. Whether or not the wise business counselor of the past really existed, the case study of the representation of the tobacco companies provided by Glantz's 1996 book, *The Cigarette Papers*, based on Brown & Williamson documents leaked to Glantz in 1994, indicates that these lawyers provided zealous representation untempered by moral advice and concerns for public responsibility.<sup>28</sup> Green suggests that advocacy to the limits of the law is now the standard in corporate representation: the "wise counselor" has been replaced by the "hired gun."

Although "*The Cigarette Papers* portray corporate lawyers playing a pervasive, long-term and critically important part in 'protecting [the tobacco industry's] ability to market an addictive product that kills its customers in epidemic numbers,'"<sup>29</sup> Green, like Redish, concludes it is unclear that these lawyers "knowingly assisted B&W in criminal or fraudulent conduct" or in conduct that was necessarily tortious.<sup>30</sup> Although the company's public relations campaign was deceptive, "it is far from clear that this was actionable fraud and that the lawyers *knew* at the time that it was actionable fraud."<sup>31</sup> The bogus claim of attorney-client privilege and work-product immunity for unfavorable research results and the destruction or shipment overseas of damaging documents may have been morally objectionable, but it may not have been criminal. In short, the current codes governing lawyers permit a lawyer to assist a client in immoral and objectionable actions so long as the lawyer does not counsel or assist criminal or fraudulent conduct.

Green is correct in his statement of the current limits on lawyers' conduct and may be right in suggesting that current corporate practice tends to push advocacy to the limits. But he fails to consider the risks that lawyers take in pushing things to the limit. Civil and criminal liability, rather than professional discipline, are the more likely risks faced by lawyers who are thought to have assisted commercial fraud.

Green's emphasis on the ABA Model Rules of Professional Conduct gives a somewhat skewed picture of the rules that are actually applicable to lawyer conduct. The rules that govern false statements and fraudulent conduct in the vast majority of states are more demanding and explicit than the ABA Model Rules because they

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27. See Green, *supra* note 2.

28. STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

29. See Green, *supra* note 2, at 436.

30. *Id.* at 426.

31. *Id.* (emphasis in original).

broaden the limited exceptions to confidentiality stated in ABA Model Rule 1.6.<sup>32</sup> According to an analysis of state codes by the Attorneys Liability Assurance Society, the leading malpractice insurer of large U.S. law firms, a lawyer may or must reveal confidential information of: (1) a client's intention to commit a *future* criminal fraud likely to result in injury to the financial interest or property of another party (forty-one jurisdictions); (2) a client's *prior* commission of a crime or fraud, using the lawyer's services, resulting in injury to the financial interest or property of another party (eighteen jurisdictions); and (3) a client's *ongoing* criminal or fraudulent act (forty-six jurisdictions).<sup>33</sup> Essentially the same positions are taken by the American Law Institute's Restatement (Third) of the Law Governing Lawyers<sup>34</sup> and the rule changes recently proposed by the ABA's Ethics 2000 Commission.<sup>35</sup>

The law firms that did Charles Keating's bidding during the savings and loan crisis of the 1980s argued that they were merely providing vigorous advocacy; yet their reputations were sullied and their pocket-books were damaged in subsequent malpractice and third-party liability actions.<sup>36</sup> Jurors who know, after the fact, that a client has engaged in fraud, are prone to assume that lawyers who facilitated fraudulent transactions had a greater knowledge of the client's fraud than perhaps the lawyers did.<sup>37</sup> Although professional discipline does not pose much of a threat in these situations, civil liability is and should be a

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32. See MODEL RULES, *supra* note 6, R 1.6 (setting forth guidelines for confidentiality of information).

33. See Attorneys' Liability Assurance Society, Inc., Memorandum, *Ethics Rules on Client Confidences* (2000), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134-151 (2001).

34. See AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 (1998) (using or disclosing client information to prevent, rectify, or mitigate substantial financial loss); AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (duty of care to certain nonclients).

35. The Commission's proposed amendments to Model Rule 1.6 would permit a lawyer to disclose confidential client information to prevent or rectify a client crime or fraud reasonably certain to cause financial injury to a third person in furtherance of which the client has used the lawyer's services.

36. See HAZARD, KONIAK & CRAMTON, *supra* note 5, at 739-759 (reprinting *In Re American Continental Corp./Lincoln Savings and Loan Securities Litigation* (Jones Day), 794 F. Supp. 1424 (D. Ariz. 1992), and discussing civil liability of law firms for thrift industry representation that aided and abetted client fraud); see also William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 241-372 (1998) (including comments by other scholars and a Simon reply).

37. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (applying one of the best-established findings of cognitive psychology—the tendency of all human beings to exaggerate the extent to which an event that they know has happened could be anticipated in advance—to legal issues such as lawyer liability for client fraud).

major concern. Given the solvency and deep pockets of the tobacco companies, smoking victims have no reason to pursue riskier claims against the companies' lawyers. But if the tobacco companies were to become bankrupt, some law firms might find themselves in the position of defendants.

Green recognizes that millions of tobacco documents have become available in addition to the B&W documents leaked to Glantz in 1994.<sup>38</sup> Since 1997, a succession of tobacco cases has held that documents previously protected by the companies' attorney-client privilege were admissible under the crime-fraud exception.<sup>39</sup> Such a finding rests on the establishment of a prima facie case that the client has used the lawyer's services to assist a fraud.<sup>40</sup> The determination, however, usually rests on an assumption that the lawyer did not know that the client was engaged in the fraud. As indicated earlier, a lawyer is civilly or criminally liable for client fraud only if it can be established: (1) the client was engaged in fraudulent conduct; (2) the lawyer at some point acquired knowledge of the fraud; and (3) the lawyer performed some substantial act or acts that furthered the fraud.<sup>41</sup> The case against the tobacco lawyers, however, cannot be viewed as established on the basis of allegations alone; a convincing showing based on the full record is necessary.

At a 1997 conference on the 1996 global settlement, Professor Frank Turkheimer, a criminal law expert and former prosecutor, evaluated the publicly available information to determine whether the tobacco lawyers were guilty of criminal conduct.<sup>42</sup> Using the detailed facts alleged in the civil complaint filed by Wisconsin and assuming their truthfulness, he concluded that the assumed facts would support a criminal conspiracy charge under federal law for deliberate and knowing misrepresentation of smoking hazards to various federal

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38. See Michael Ciresi, *Panel Discussion on the Tobacco Litigation and Attorneys' Fees*, 67 *FORDHAM L. REV.* 2827, 2838 (1999) (stating that thirty-three million documents were produced in the case after extensive privilege fights).

39. See, e.g., *Burton v. R. J. Reynolds Tobacco Co.*, 177 F.R.D. 491 (D. Kan. 1997); *American Tobacco Co. v. State of Florida*, 697 So.2d 1249 (Fla. Dist. Ct. App.1997); *Humphrey v. Philip Morris, Inc.*, 1998 WL 257214 (Dist. Ct. Minn. Mar. 7, 1998).

40. For discussion of the crime-fraud exception to the attorney-client privilege, see HAZARD, KONIAK & CRAMTON, *supra* note 5, at 240-254.

41. See HAZARD, KONIAK & CRAMTON, *supra* note 5, 104-122, 289-303 (discussing the elements of aiding and abetting a client's fraud, including intent).

42. Conference on the So-Called Global Tobacco Settlement: Its Implications for Public Health and Public Policy, Institute for Legal Studies, University of Wisconsin Law School, Madison, WI (proceedings of the conference were published and are available). For a convenient summary, see Peter Carstensen, Marc Galanter & Gerald Thain, *The So-Called Global Tobacco Settlement: Its Implications for Public Health and Public Policy—An Executive Summary*, 22 *So. Ill. U. L.J.* 705 (1998).

agencies and congressional committees. Because of the central role of lawyers in the industry's wrongdoing, he speculated that they were also at risk if evidence of requisite knowledge was available.

During 1998 and 1999, a federal grand jury investigation was said to be considering the conduct of company lawyers. Although no indictments resulted, presumably because prosecutors thought the risks of conviction problematic, the investigation itself was a cause of concern to the law firms involved.<sup>43</sup> Since then, a number of smoking victims have named company lawyers as codefendants in their lawsuits.

In short, without a more elaborate examination of available evidence, it is hazardous to speculate whether the tobacco lawyers did or did not counsel or assist criminal or fraudulent conduct.

### III. CONDUCT OF THE PLAINTIFFS' LAWYERS

Some of the plaintiffs' firms who are now receiving massive fee payments under the Master Settlement Agreement of 1998, signed by all states, acted with disregard for the rules governing concurrent conflicts of interest in their various representations against the tobacco companies.<sup>44</sup> Several of them, including the Ness Motley firm, relied on the massive inventory settlements related to two giant asbestos class actions to fund their move into tobacco litigation.

In *Amchem Products, Inc. v. Windsor*,<sup>45</sup> the Supreme Court held that intra-class conflicts of interest between currently injured members of the class and "futures"<sup>46</sup> required rejection of the class certification. Two years later in *Ortiz v. Fibreboard Corp.*,<sup>47</sup> the Court's rejection of the second giant settlement rested on the concurrent conflict of interest arising from class counsel's inventory settlements on different and less favorable terms than those provided in the proposed class action settlement to future claimants. Ness Motley was class counsel in both cases, and the decisions implicitly hold that the firm engaged in simultaneous representation of clients with differing inter-

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43. See Milo Geyelin & Ann Davis, *Tobacco Foes Target Role of Lawyers*, WALL ST.J., Apr. 23, 1998, at B1; Diana Henriques, *Tobacco Lawyers' Role Is Questioned*, N.Y. TIMES, Apr. 23, 1998, at A18; and Geoffrey C. Hazard, Jr., *Tobacco Lawyers Shame the Entire Profession*, NAT'L L.J., May 18, 1998, at A22.

44. For discussion of the Master Settlement Agreement of 1998, see Hanoch Dagan & James J. White, *Governments, Citizens and Injurious Industries*, 75 N.Y.U. L. REV. 354, 360-382 (2000), and W. Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 CUMB. L. REV. 523 (1999).

45. 521 U.S. 591 (1997).

46. In other words, those who would suffer a legal injury in the future as a result of past exposure.

47. 119 S.Ct. 2295 (1999).

ests and this conflict impaired the firm's representation of future claimants.<sup>48</sup>

Concurrent conflicts of interest continued once these plaintiffs' lawyers moved into the tobacco field. First, they undertook to represent some individual smoking victims who were seeking compensatory and punitive damages against the tobacco companies.<sup>49</sup> Second, after a failed effort to certify a class including all smoking victims nationwide, they brought a number of cases involving statewide classes. These cases also sought both compensatory and punitive damages for smoking victims. Then the plaintiffs' lawyers agreed to represent Mississippi and Florida in reimbursement actions brought by those states against the tobacco companies. These actions, later expanded to include twenty-two states, were settled in a June 1997 agreement that capped the liability of the tobacco companies to smoking victims and, when implemented by Congress, prohibited punitive damages.<sup>50</sup> The lawyers abandoned the relief that they were claiming on behalf of individual claimants in negotiating the global settlement on behalf of the states. A lawyer violates the concurrent representation conflict of interest rules when the claims of some clients (smoking victims) are subordinated to those of other clients (the states).

When Congress proved unwilling to accept the proposed settlement, the plaintiffs' lawyers then negotiated the Master Settlement Agreement of 1998, which was eventually signed by all states.<sup>51</sup> That agreement provides for payment of about \$250 billion to the states over twenty-five years. The 1998 agreement does not protect the industry from class actions or punitive damages, or cap their liability to smoking victims. But the agreement does make the states and their lawyers co-venturers with the tobacco companies, because the compa-

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48. See MODEL RULES, *supra* note 6, R. 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . unless (1) the lawyer reasonably believes the representation will not be adversely affected." See also *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987) (disqualifying lawyer for simultaneously representing two separate classes when defendant's settlement offer with respect to one class created a concurrent conflict of interest with the other class).

49. One such case, *Ness Motley's* representation of the widow of a Mississippi barber who died of lung cancer, was widely reported. See *Estate of Butler v. Philip Morris, Inc.*, 94-5-53 (Miss. Cir. Ct., Jones County). See also Milo Geyelin, *Tobacco Plaintiff Files Suit Against Her Ex-Attorney*, WALL ST. J., Aug. 19, 1997, at B8; Bob Van Voris, *Tobacco Negotiations Created Sharp Client Conflicts*, NAT'L L.J., Aug. 4, 1997, at A8-A9. A subsequent story indicated that *Ness Motley* entered into a confidential settlement after *Ms. Butler* brought a \$1.5 million damage action against the firm alleging conflict of interest violations. She alleged that the firm did not inform her of the conflicting interests and she did not consent to them. See NAT'L L.J., Sept. 22, 1997, at A5.

50. See *supra* note 42 and accompanying text for a discussion of the 1996 Global Settlement.

51. See *supra* note 44 and accompanying text.

nies have to be kept solvent or the goose that lays the golden eggs will be driven into bankruptcy. Thus far, less than ten percent of the state reimbursement payments has been devoted to reducing the number of smokers.<sup>52</sup> And the entire cost of the state payments and the plaintiffs' lawyers' fees is being borne by smoking victims through cigarette price increases in the amount necessary to fund the payments.

Thus, the original clients of the plaintiffs' lawyers—individual smoking victims—are left with the check for the state payments and the lawyers' fees. It is ironic that the very claims asserted on their behalf—that they were poor, deceived about the real hazards of smoking, and addicted to nicotine—have been answered by placing the cost of tobacco price increases solely on the addicted victims. Because smokers are older and poorer than the general population,<sup>53</sup> the increase, which is essentially a national tax on cigarettes created without any federal legislation, is one of the most regressive in history.

An impermissible conflict of interest occurred when these plaintiffs' lawyers, without any communication with these individual clients or even an attempt to withdraw from pending litigation, abandoned these clients and sought enormous fees for themselves in negotiating deals on behalf of the states with the same defendants.

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52. Michael Janofsky, *Tiny Part of Settlement Money Is Spent on Tobacco Control*, N.Y. TIMES, Apr. 11, 2001, at A11.

53. Patrick Jamieson & Daniel Romer, *A Profile of Smokers & Smoking*, in *SMOKING—RISK, PERCEPTION & POLICY* 29, 38-39 (Paul Slovic ed.) (discussing demographic data showing, for example, that adults with only high school diplomas are about three times as likely to be smokers as are those who have a college degree and the higher income that flows from more education).

