

# Up the Ethical Creek Without a Paddle: How Impossible Demands on Plaintiffs’ Attorneys in the Flint Water Crisis Class Actions Demonstrate the Need to Redefine Ethical Duties in Mass Tort Cases

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## INTRODUCTION

The American public is familiar with the Flint Water Crisis (“the crisis,” or “FWC”)—the general causes, the impact, and the injustice. It has been a “hot topic” over the past several years with multiple documentaries, books, and news accounts providing platforms for residents’ stories of being poisoned by lead in their city’s water.<sup>1</sup> While the crisis is fading from the news, recent litigation (both civil and criminal) has kept it on the legal landscape. In the wake of the crisis, legal scholarship has analyzed emergency manager laws (such as the Michigan statute<sup>2</sup> which triggered the chain of events eventually leading to the water crisis<sup>3</sup>). This recent scholarship focuses almost entirely on the unconstitutionality of such laws.<sup>4</sup> Some legal scholars, however, have also asserted that the *Model Rules of Professional Conduct* should be amended to reflect a modern society in which mass torts are increasingly common because lawyers representing

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1. See, e.g., ANNA CLARK, *THE POISONED CITY: FLINT’S WATER AND THE AMERICAN URBAN TRAGEDY* (2018); BENJAMIN J. PAULI, *FLINT FIGHTS BACK: ENVIRONMENTAL JUSTICE AND DEMOCRACY IN THE FLINT WATER CRISIS* (2019); Stephanie Ebbs & Janet Weinstein, *Five Years After Flint Water Crisis, City Battles Widespread Mistrust* (ABC News, Apr. 25, 2019, 4:08 AM), <https://abcnews.go.com/Politics/trust-eroded-years-flint-drink-water/story?id=62582926> [<https://perma.cc/9D5K-6L69>]; FAHRENHEIT 11/9 (Universal Pictures 2018); FROM FLINT: VOICES OF A POISONED CITY (Janson Media 2016); POISONED WATER: WHAT EXACTLY WENT WRONG IN FLINT—AND WHAT DOES IT MEAN FOR THE REST OF THE COUNTRY? (NOVA television broadcast May 31, 2017), <https://www.pbs.org/wgbh/nova/video/poisoned-water> [<https://perma.cc/XH7B-UK3K>].

2. See Local Financial Stability and Choice Act, Mich. Comp. Laws Ann. §§ 141.1541–1575 (West 2020) [hereinafter P.A. 436].

3. See CLARK, *supra* note 1, at 14–17.

4. See, e.g., Collin Weyers, *Death by Denominator: Reconsidering Constitutional Intra-State Deference in an Age of “Emergency Management”*, 2018 WIS. L. REV. 1261 (2018); PETER D. JACOBSON ET AL., *EMERGENCY MANAGER LAW PRIMER: PROTECTING THE PUBLIC’S HEALTH DURING FINANCIAL EMERGENCIES—LESSONS LEARNED FROM THE FLINT WATER CRISIS* (Jan. 2018), [https://www.networkforphl.org/\\_asset/b5208r/Emergency-Manager-Law-Primer.pdf](https://www.networkforphl.org/_asset/b5208r/Emergency-Manager-Law-Primer.pdf) [<https://perma.cc/Q9JS-UYTX>].

hundreds or thousands of victims cannot zealously represent clients on individual bases to an adequate extent.<sup>5</sup>

Scholarship has yet to connect, however, Flint residents' disenfranchisement and disempowerment *pre-crisis*<sup>6</sup> with the resultant impairment on plaintiffs' attorneys to fully execute their ethical duties to their clients—impacted Flint residents—*post-crisis*.<sup>7</sup> If attorneys are required to zealously fight for their clients so that those clients feel empowered and fairly represented, attorneys representing Flint residents, already feeling disempowered to start with, must swim against an impossible current, thus never fully satisfying that ethical duty.

This Note argues that Flint's historical disempowerment—combined with exacerbated disenfranchisement under a series of emergency managers and the resultant trauma from the crisis itself—renders ordinarily adequate zealous advocacy from plaintiffs' attorneys insufficient for those representing Flint residents. This conundrum highlights the need to amend the *Model Rules* with additional ethical duties specifically tailored to plaintiffs' attorneys in mass tort cases.

First, this Note provides background information on the FWC, including relevant history of Flint. Second, this Note analyzes the ethical duties of plaintiffs' attorneys in mass tort cases against the backdrop of the crisis.<sup>8</sup> Third, this Note asserts that a trifecta of harms against Flint residents—historical disempowerment, emergency manager appointment over Flint, and the ensuing water crisis and associated traumatic effects—further exacerbated pre-existing challenges for attorneys to fulfill their ethical obligations to harmed clients. Finally, this Note argues for amendments to the *Model Rules of Professional Conduct* to more appropriately reflect modern society in which mass torts are more common. The *Model Rules* should establish additional ethical duties uniquely tailored to attorneys representing clients in mass torts cases in order to ameliorate impairments in trying to zealously advocate for, respect the autonomy of, and communicate with their clients.

## I. BACKGROUND AND OVERVIEW OF FLINT WATER CRISIS

In order to grasp the ethical challenges facing plaintiffs' attorneys in the FWC class action cases, it is necessary to understand Flint's unique historical background. Flint, Michigan, a beleaguered city seventy miles northwest of Detroit<sup>9</sup> with a population of 95,000,<sup>10</sup> has a long history of hardship and oppression but

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5. See, e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 44 (1995).

6. See *infra* Part I.

7. See *infra* Part II.

8. See *infra* Part III.

9. Augustus Campbell & Alia Vinson, *II. What Went Wrong in Flint, Michigan?*, 2018 TXCLE-CFWR 20. II, 2018 WL 3421252, at \*1.

10. U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/flintcitymichigan> (last visited Feb. 23, 2020) [<https://perma.cc/YG6E-CC2S>].

also resilience.<sup>11</sup> While Flint has seen more than its fair share of economic woes, the current crisis traces back to the state's appointment of a series of emergency managers over the financially devastated city beginning in 2011.<sup>12</sup> This led to the eventual switch of the city's water from Lake Huron to the Flint River in 2014 as a cost-saving measure.<sup>13</sup> Almost immediately, residents began to complain about the odor and discoloration of the water<sup>14</sup> as well as severe negative health impacts they were experiencing—not realizing they were suffering from effects of lead in their water.<sup>15</sup> However, residents' complaints went mostly unheard for many months,<sup>16</sup> and it was over a full year and a half before plans were announced to switch Flint's water source back to Lake Huron via the Detroit water system.<sup>17</sup> But by then, the damage had been done. Residents were left with water they did not feel safe drinking (a cruel irony for citizens of the Great Lakes State), long-lasting physical ailments, psychological trauma, and a permanent distrust in government officials.<sup>18</sup>

After being ignored and shut down for years, Flint residents turned to the civil litigation system to fight back and make their voices heard.<sup>19</sup> Flint residents filed their first federal class action lawsuit in November 2015.<sup>20</sup> Ten class action suits were consolidated into *In re Flint Water Cases* in 2017.<sup>21</sup> By December 2019, over twelve lawsuits had been filed against the State of Michigan, the city of Flint, engineering firms, and the Environmental Protection Agency (EPA).<sup>22</sup> Allegations in the various suits include knowingly exposing Flint residents to

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11. See generally PAULI, *supra* note 1.

12. See Victoria Morckel & Kathryn Terzano, *Legacy City Residents' Lack of Trust in Their Governments: An Examination of Flint, Michigan Residents' Trust at the Height of the Water Crisis*, 41 J. URB. AFFAIRS 585, 585–86 (2019); Campbell & Vinson, *supra* note 9, at \*2–3.

13. Morckel & Terzano, *supra* note 12, at 585.

14. CNN Editorial Research, *Flint Water Crisis Fast Facts*, CNN (Dec. 13, 2019, 9:27 PM), <https://www.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/index.html> [<https://perma.cc/2S9G-2UQC>] (noting that iron in the pipes was being eroded and turning the water brown because there was no anti-corrosive agent added to the water).

15. *Id.* (“About half of the service lines to homes in Flint are made of lead and because the water wasn’t properly treated, lead began leaching into the water . . .”).

16. Courtney A. Cuthbertson et al., *Angry, Scared, and Unsure: Mental Health Consequences of Contaminated Water in Flint, Michigan*, 93 J. URB. HEALTH 899, 900 (2016); PAULI, *supra* note 1, at 143.

17. PAULI, *supra* note 1, at xxv.

18. See CLARK, *supra* note 1, at 7 (“When residents noticed that there was something odd about their water, they asked for help. But they were routinely dismissed. Among the many ravages attributed to the water crisis—the rashes, the hair loss, the ruined plumbing and pipes, the devalued homes, the diminished businesses, the homeowners who left the city once and for all, the children poisoned by lead, the people sickened or killed by Legionnaires’ disease—the lost faith in those who were supposed to be working for the common good was among the most devastating.”); Cuthbertson, *supra* note 16, at 900.

19. Campbell & Vinson, *supra* note 9, at \*5–7.

20. *Mays v. Snyder*, No. 17-CV-10996, 2017 WL 3484498 (E.D. Mich. Aug. 14, 2017). The original complaint was filed in the District Court for the Eastern District of Michigan on November 13, 2015.

21. *In re Flint Water Cases*, Case No. 16-cv-10444 (E.D. Mich. July 27, 2017) (order granting consolidation of class actions).

22. See CNN, *supra* note 14.

toxic drinking water and violating the federal Safe Drinking Water Act by not treating the water with an anti-corrosive agent.<sup>23</sup> As for remedies, plaintiffs are seeking monetary compensation for the lead poisoning itself and refunds for water bills, repairs to homes and other private properties, medical monitoring, and early education and intervention programs.<sup>24</sup>

#### A. ROOTS OF DISEMPOWERMENT: HISTORICAL SYSTEMIC RACISM AND THE ECONOMIC PLIGHT OF BLACKS IN FLINT

Today, Flint's population is 57% black.<sup>25</sup> In the middle of the twentieth century, thousands of blacks, drawn by the lure of large auto companies such as General Motors, relocated to Flint from all over the country with hopes of finding both a job and prosperity.<sup>26</sup> Residents of "Vehicle City" felt collective pride in contributing to the nation's auto industry, a pride that swelled during World War II when factories paused their car production and Flint became the primary supplier for our nation's defense industry.<sup>27</sup> Those feelings began to crumble in the 1950s and the decades that followed, however, as the auto industry was overhauled; factories shut down, residents lost jobs, and the local economy shriveled up in what was "both an economic cataclysm and a social trauma."<sup>28</sup>

Recovery from this economic devastation throughout the latter half of the twentieth century was an uphill climb for the city and ultimately unsuccessful. Flint was a hotbed of mid-century racial tension<sup>29</sup>—a tension which directly impaired Flint's financial state and compromised the city's ability to rebound economically. In the 1950s, as suburbs surrounding Flint grew and became self-sustaining economically, a plan for New Flint emerged with the aim of merging the suburbs with Flint in a single municipality.<sup>30</sup> However, though city officials and General Motors were onboard with New Flint, suburbanites and African Americans alike opposed the proposal: Suburban dwellers resisted official incorporation with black urbanites, while black Flint residents were upset that they were not included in the planning.<sup>31</sup> During the middle of the twentieth century, discriminatory housing and lending policies—such as redlining (even by the federal government itself through the Federal Housing Administration), racially

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23. Jennifer Calfas, *New Federal Lawsuit Alleges State Violated Safe Drinking Water Act in Flint*, MICHIGAN RADIO NPR (Jan. 27, 2016), <https://www.michiganradio.org/post/new-federal-lawsuit-alleges-state-violated-safe-drinking-water-act-flint> [<https://perma.cc/4QBD-S2VE>]; Cohen Milstein, *Flint Water Crisis Class Action Litigation*, <https://www.cohenmilstein.com/case-study/flint-water-crisis-class-action-litigation> [<https://perma.cc/ACB5-YHSH>]; CNN, *supra* note 14.

24. See CNN, *supra* note 14; Cohen Milstein, *supra* note 23.

25. See CLARK, *supra* note 1, at 43.

26. *Id.* at 43–44.

27. *Id.* at 44.

28. *Id.*

29. See *id.* at 45–49.

30. *Id.* at 51.

31. *Id.* at 52.

restrictive covenants, and segregation—further oppressed Flint’s black residents.<sup>32</sup> This effectively silenced black residents’ voices, disempowering them and instilling in them a distrust of the government and those with social power while reinforcing systemic inequality that would last for generations.<sup>33</sup>

To make matters worse, in the 1980s General Motors downsized its Flint operations, causing further significant decline in Flint’s financial state; thousands began fleeing the city.<sup>34</sup> As the mass exodus continued over the next couple of decades, by the turn of the new millennium, Flint was still crumbling financially—the city had an unemployment rate of 8.3% in 2002 and was \$40 million in debt.<sup>35</sup> In 2002, without any say from residents, the state appointed Flint an Emergency Financial Manager (EFM, or EM) by the state to address the devastating economic conditions which continued to impoverish an alarmingly high number of its people.<sup>36</sup> However, conditions did not improve, and between 2002 and 2015, Flint was subject to a series of seven separate EMs.<sup>37</sup> Seeing no real economic renewal during these years, today Flint suffers from a poverty rate of over 41% and a median household income of less than \$25,000.<sup>38</sup>

#### B. HERE TO SAVE THE DAY?: EMERGENCY MANAGERS COME TO TOWN

Underlying state emergency manager laws is the premise that when a municipality is not capable of managing its own finances or finds itself in financial distress, the State may appoint an emergency manager to take over the authority of (or sometimes partner with) local officials.<sup>39</sup> EM laws are openly intended “to be an extreme measure to meet extreme need,”<sup>40</sup> and while some EM laws are simply an attempt to financially “rescue” the municipality, others are clearly intended to overhaul the city’s finances completely.<sup>41</sup>

During the first several years of the twenty-first century, at the same time Flint was struggling to get on its financial feet, the State reapportioned its own budget,

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32. *Id.* at 45–47.

33. *See id.* at 205; Collen Healy Boufides et al., *Learning from the Flint Water Crisis: Restoring and Improving Public Health Practice, Accountability, and Trust*, 47 J. L., MED. & ETHICS 23, 24 (2019).

34. Trymaine Lee, *The Rust Belt: Once Mighty Cities in Decline*, MSNBC, <http://www.msnbc.com/interactives/geography-of-poverty/ne.html> [<https://perma.cc/D6F9-VYBZ>]; Campbell & Vinson, *supra* note 9, at \*1.

35. *See* Ashley E. Nickels et al., *How Municipal Takeovers Reshape Urban Democracy: Comparing the Experiences of Camden, New Jersey and Flint, Michigan*, URB. AFFAIRS REV. 1, 17 (2019).

36. *See id.*

37. PAULI, *supra* note 1, at 76 (providing a table of the EMs/EFMs in place in Flint, as well as the dates in office and the applicable EM law). Emergency Managers (EMs) and Emergency Financial Managers (EFMs) are functionally equivalent, with the title depending on which EM law was in effect at the time of appointment. *See id.*

38. Campbell & Vinson, *supra* note 9, at \*1. Poverty rate and median household income are referenced according to 2018 figures.

39. *See* JACOBSON ET AL., *supra* note 4, at 1–2.

40. *See* CLARK, *supra* note 1, at 124.

41. *See* JACOBSON ET AL., *supra* note 4, at 2–4.

denying Flint (and other cities) substantial and much needed funds over a couple decades.<sup>42</sup>

Between 1998 and 2016, Michigan diverted more than \$5.5 billion that would ordinarily go to places such as Flint to power streetlights, mow parks, and plow snow. Instead, the state used the money to plug holes in its own budget. . . . As Michigan made cuts, forty-five other states managed to increase revenue sharing to their cities . . . , despite a national economic downturn that affected everyone. Among the five states where revenue sharing declined, Michigan slashed more than any other, by far. For Flint, this translated into a loss of about \$55 million between 2002 and 2014. That amount would have been more than enough to eliminate the city's deficit, pay off its debt, and still have a surplus. But the money never came, and, as the same time, Flint was thumped with the Great Recession, the mortgage crisis, a major restructuring of the auto industry, and a crippling drop in tax revenue.<sup>43</sup>

What amounted to economic abandonment by the State was a double blow to Flint—stripped of much needed funds while also confronted with the nationwide economic downturn.<sup>44</sup> In the midst of this, Governor Rick Snyder declared a financial emergency in Flint in 2011.<sup>45</sup> Shortly after, on the very day that Flint's new mayor was elected, the governor capitalized on Michigan's most recently enacted EM law and appointed an emergency manager over Flint.<sup>46</sup> This appointment effectively removed all powers from Flint's city executives and duly elected local governmental officials and placed authority in a sole manager who answered only to the governor himself.<sup>47</sup>

This was not the first time Flint had come under emergency management. However, 2011 was a different situation because of the severity of Flint's economic desperation and the broad scope of authority granted to the EM under Public Act 4 (P.A. 4), 2011's version of Michigan's EM law and the predecessor to the current law.<sup>48</sup> In fact, after Michigan voters repealed P.A. 4 by referendum

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42. See Brentin Mock, *Beyond Flint: Should States Take Over in an Emergency?*, CITY LAB (Feb. 3, 2016), <https://www.citylab.com/equity/2016/02/emergency-managers-state-takeover-flint-michigan-water-crisis/459381/> [<https://perma.cc/K73J-5BK8>] (“Local budgets regularly tank because the state itself has created conditions that inhibit a city’s abilities to remedy its situation.”); CLARK, *supra* note 1, at 5.

43. See CLARK, *supra* note 1, at 5.

44. *Id.*

45. See Boufides, *supra* note 33, at 23.

46. PAULI, *supra* note 1, at 71 (“At 5 p.m., still three hours before the polls closed, the story [of the newly appointed EM] broke, and Flint voters learned that the person they were in the process of electing would be, institutionally speaking, powerless.”).

47. See Nickels et al., *supra* note 35, at 18 (“Mike Brown was appointed by Governor Snyder to serve as the EM. Within the first week, Brown had eliminated the positions of seven political appointees, cut the salaries and benefits of the mayor and city council, set strict guidelines for city procurement as well as the process for submitting resolutions and ordinances, and eliminated the Office of the Ombudsman and the Civil Service Commission.”).

48. See Local Stability and Choice Act, Municipal Financing—Local Governments and School Districts—Fiscal Accountability, Mich. Comp. Laws Ann. § 141.1503–1531 (West 2011) (repealed 2012 by Local

in 2012, one month later the State legislature responded by passing Michigan's current EM law—P.A. 436, the Local Financial Stability and Choice Act.<sup>49</sup>

Though intended to “safeguard and assure the financial accountability of local units of government” and “preserve [their] capacity . . . to provide . . . services essential to the public health, safety, and welfare,”<sup>50</sup> P.A. 436 is one of the most extreme in the country.<sup>51</sup> It confers more absolute authority in the EM—allowing the EM to take “any . . . actions considered necessary” and to use their “discretion to achieve the objectives of the financial and operating plan”—while also prohibiting repeal of the law by referendum.<sup>52</sup> While roughly twenty states<sup>53</sup> have EM laws providing for state takeover of financially strapped cities in at least some capacity, most of those EM laws allow only limited takeover, with many states requiring coordination and collaboration with local officials in decision-making.<sup>54</sup> P.A. 436, however, confers in the emergency manager the most expansive authority compared to other states' EM laws, removing all legal authority from local elected officials.<sup>55</sup> From 2011 to 2015, Flint was subjected to four different EMs; in total, those EMs “issued more than [one hundred] executive orders, resolutions, and directives for Flint,” including radical cuts to Flint's utility services<sup>56</sup>—all without residents' votes or input. Thus, not only was Flint in dire straits economically, but the democratic voices of its people were replaced by a State-appointed manager who had absolute control over decisions directly impacting Flint residents.

Emergency management of Flint highlights the reality that EM laws are inherently problematic on multiple fronts, a reality with which much legal scholarship grapples.<sup>57</sup> Many legal scholars and civil rights activists have challenged the

Financial Stability and Choice Act, 2012 Mich. Legis. Serv. P.A. 436 (S.B 865)); PETER D. JACOBSON ET AL., LEARNING FROM THE FLINT WATER CRISIS: PROTECTING THE PUBLIC'S HEALTH DURING A FINANCIAL EMERGENCY 3 (Jan. 2018), <https://www.debeaumont.org/wp-content/uploads/2018/02/FlintReport.pdf> (“A unique aspect of Michigan's emergency manager law is the extent to which it removes all power from locally elected officials, hence completely displacing local democracy.”) [<https://perma.cc/A94H-39UL>].

49. See Josh Hakala, *How Did We Get Here? A Look Back at Michigan's Emergency Manager Law*, MICHIGAN RADIO NPR (Feb. 3, 2016), <https://www.michiganradio.org/post/how-did-we-get-here-look-back-michigans-emergency-manager-law> [<https://perma.cc/TR7H-UK9U>]; P.A. 436, *supra* note 2; Nickels et al., *supra* note 35, at 19.

50. See P.A. 436, *supra* note 2.

51. See CLARK, *supra* note 1, at 126, 128; JACOBSON ET AL., *supra* note 48, at 3.

52. See P.A. 436, *supra* note 2, at §§ 141.1551(1)(f); CLARK, *supra* note 1, at 128.

53. See JACOBSON ET AL., *supra* note 4, at 2.

54. See *id.* at 2–4. The method and scope of EM takeover vary from one jurisdiction to the next. See *id.* Various forms include oversight by state receivers, state agency, or control board, while in Michigan a single individual is appointed as EM. See *id.*

55. See *id.*; PAULI, *supra* note 1, at 78 (providing organizational charts comparing the structure of the Flint city government under Flint's city charter and under emergency management).

56. See Nickels et al., *supra* note 35, at 19.

57. See, e.g., Courtney L. Anderson, *Taking Flint*, 17 HOUS. J. HEALTH L. & POL'Y 107 (2017) (arguing that EM laws are inconsistent with the Fourteenth Amendment's Equal Protection clause). However, as proponents will point out, EM laws are not always or entirely problematic, as sometimes they are used in ways which benefit a city's residents without stripping them of their democratic power. This is more likely when EM laws are

constitutionality of EM laws (and particularly Michigan’s P.A. 436), asserting that these laws violate the First and Fourteenth Amendment and thus inhibit democracy.<sup>58</sup> Opponents of EM laws also point out that an emergency manager may cause more problems than it solves, particularly in the long run, often leaving a city “even more vulnerable to structural and systemic decline” in the future with long-term debt and financial problems that the city must eventually address, even with a dwindling population and resultant smaller tax base.<sup>59</sup> Indeed, long after the EM’s tenure has ended, the city is left to deal with structural and regime changes that impact residents far into the future.<sup>60</sup>

C. “WATER, WATER EVERY WHERE, NOR ANY DROP TO DRINK”:<sup>61</sup>  
POISONED, DISEMPOWERED, AND POST-TRAUMATIC STRESS

The 2011 emergency manager takeover in Flint slashed the city’s budget, including to utility services. Most notably, in 2014 the city’s water source was

more flexible and less authoritarian, such as Rhode Island’s law, which uses a commission that includes the mayor and a council member, or Oregon’s version, which requires intergovernmental approval from the local governing majority. *See* CLARK, *supra* note 1, at 204–205 (discussing the Michigan Civil Rights Commission’s recommendation that EM laws be restructured or replaced); JACOBSON ET AL., *supra* note 4, at 3–4; Mock, *supra* note 42.

58. Some EM law opponents believe that voting is a form of speech, thus insisting that EM laws implicate First Amendment self-expression and self-determination. *See, e.g.,* Weyers, *supra* note 4, at 1289–1290. Though the Supreme Court has never explicitly considered voting as “speech,” political participation itself might be closely enough associated with speech to invoke First Amendment concerns when that right to participate is threatened or eliminated, particularly at the local level where elections have more direct impact on a person’s daily life than those at the state or federal levels. *See id.* Because EM laws allow the removal of duly elected officials, replacing them with unelected authorities, many civil rights groups argue that EM laws disregard citizens’ due process rights by stripping their fundamental voting rights. *See* Sydney L. Hawthorne, *Do Desperate Times Call for Desperate Measures in the Context of Democracy: Michigan’s Emergency Manager Law & the Voting Rights Act*, 41 N.Y.U. REV. L. & SOC. CHANGE 181, 184 (2017) (arguing that P.A. 436 violates the Voting Rights Act). In violating voting rights, because EM laws are often applied along racial lines (unintentionally or not), they may violate equal protection rights as well. *See id.* Thus, opponents assert that the laws, in disenfranchising citizens, violate both the Fourteenth Amendment and the Voting Rights Act. *See* Weyers, *supra* note 4, at 1265–1266. However, the Sixth Circuit Court of Appeals in *Phillips v. Snyder* determined that EM laws do not infringe on Fourteenth Amendment rights of voters in local elections because citizens of a city are on “equal footing” with each other, even if that city’s residents are not treated the same of residents of another city. *Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344, at \*9, 20 (E.D. Mich. Nov. 19, 2014). Flint residents and their advocates, of course, have continued to insist that EM laws are unconstitutional. *See* Mock, *supra* note 42; Nickels et al., *supra* note 35, at 3.

59. *See* David Fasenfest, *A Neoliberal Response to an Urban Crisis: Emergency Management in Flint, MI*, 45 CRITICAL SOC. 33, 35 (2019); Mock, *supra* note 42; Nickels et al., *supra* note 35, at 3 (“[U]nelected officials are making decisions that carry consequences beyond their tenure.”).

60. PAULI, *supra* note 1, at 71 (quoting Flint Democracy Defense League, “The State of Flint Under Emergency Management” (“Democracy is what makes Flint work. The dismantling of democracy in Flint is poisonous.”)); Nickels et al., *supra* note 35, at 7 (“[M]unicipal takeover reshapes local governance in the long-term by (1) preferencing austerity tools, like privatization, at the local policy level; (2) creating a shock that destabilizes the political status quo, diminishing the capacity of local government, and minimizing democracy . . . ; and (3) realigning new constituencies through resources and incentives allocated through policy design.”).

61. SAMUEL TAYLOR COLERIDGE, *THE RIME OF THE ANCIENT MARINER* ln. 121–22 (Frederick H. Sykes ed., Scribner English Classics 1908) (1798).

switched from Lake Huron to the Flint River as part of a longer-term plan to save millions of dollars.<sup>62</sup> Even though decisionmakers were aware that water from the river was extremely corrosive (even more than water from the previous source), they considered anti-corrosive agents not cost effective and chose not to treat the water; lead-lined pipes thus began leaching iron and lead into the water coming into residents' homes.<sup>63</sup>

Almost immediately, residents began noticing discoloration of the water and an unusual smell.<sup>64</sup> Many reported sudden hair loss; parents reported unusual rashes and other mysterious symptoms in their children.<sup>65</sup> Tragically, an outbreak of Legionnaires' disease led to the deaths of twelve residents.<sup>66</sup> Residents complained to the authorities and medical doctors reported their preliminary findings, but even so, authorities dismissed complaints as insignificant and unrelated to the water switch.<sup>67</sup> In fact, authorities were not forthcoming about tentative results showing a connection between the water and emerging illnesses,<sup>68</sup> and those in power gaslighted residents by suggesting that these symptoms and illnesses were hyperbolic or merely imagined.<sup>69</sup> This treatment of Flint residents as uninformed and ignorant led to feelings of anger and abandonment and a sense of disillusionment in government officials whom residents felt did not care about their plight.<sup>70</sup>

By the time complaints were taken seriously, water test results acknowledged, and the city's water source switched back a year and a half later, the damage had been done.<sup>71</sup> Residents were left to deal with both short- and long-term physical, cognitive, emotional, and mental ramifications. Because no threshold amount of lead is considered safe and no known cure exists, the scope of the effects might never be fully known, but includes infertility, fetal deaths and impaired fetal growth, delayed puberty, increased blood pressure and heart problems, reduced kidney function, and neurological damage.<sup>72</sup> As for cognitive effects, lead poisoning leads to decreased IQ in children, specific cognitive delays, increased

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62. See Nickels et al., *supra* note 35, at 20.

63. See Daniel J. Kruger et al., *Toxic Trauma: Household Water Quality Experiences Predict Posttraumatic Stress Disorder Symptoms During the Flint, Michigan, Water Crisis*, 45 J. COMMUNITY PSYCHOL. 957, 958 (2017); Anderson, *supra* note 57, at 130 (attributing to the MDEQ—the Michigan Department of Environmental Quality—responsibility for the decision to not add corrosion inhibitors); CLARK, *supra* note 1, at 33–34, 75 (citing lack of corrosion control in water from new source); CNN, *supra* note 14.

64. Cuthbertson, *supra* note 16, at 900; Nickels et al., *supra* note 35, at 20.

65. CLARK, *supra* note 1, at 7; Campbell & Vinson, *supra* note 9, at \*2.

66. See CLARK, *supra* note 1, at 174–76. Twelve residents died in the Legionnaire's disease outbreak; authorities refused to link it to the water source switch. See *id.*

67. See *id.* at 7; Cuthbertson, *supra* note 16, at 900.

68. See generally CLARK, *supra* note 1, at 174–76; Nickels et al., *supra* note 35, at 21.

69. PAULI, *supra* note 1, at 143.

70. Cuthbertson, *supra* note 16, at 900.

71. Campbell & Vinson, *supra* note 9, at \*4.

72. NIH NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, LEAD AND YOUR HEALTH 2 (Oct. 2013), [https://www.niehs.nih.gov/health/materials/lead\\_and\\_your\\_health\\_508.pdf](https://www.niehs.nih.gov/health/materials/lead_and_your_health_508.pdf) [<https://perma.cc/94AH-VF3J>]; Cuthbertson, *supra* note 16, at 905.

behavioral problems, and attention-deficit hyperactivity disorder (ADHD).<sup>73</sup> Studies show these impacts are more detrimental on the poor (which describes most Flint residents), who have less access to healthcare.<sup>74</sup>

Perhaps most tragic of all are the long-term emotional and mental impacts of the FWC, including widespread post-traumatic stress disorder (PTSD) among residents.<sup>75</sup> PTSD—a mental disorder often resultant in persons who experienced trauma—involves recurring, intrusive thoughts in which the sufferer psychologically reexperiences the traumatic events.<sup>76</sup> Symptoms, such as flashbacks, avoidance of similar situations, depression, and hyperarousal, may last for years or even a lifetime and can significantly impair an individual’s ability to function in everyday life as well as permanently alter one’s worldview and ability to trust.<sup>77</sup> In Flint, this phenomenon has been both triggered and exacerbated by residents’ feelings of abandonment by the government and the sense of violation affected individuals have expressed: “The threat invaded the most intimate spaces of people’s lives: their bodies, their homes, their meals, the baths they gave their children, the formula they fed their babies.”<sup>78</sup> Further, stress (both acute and chronic) resulting from the FWC has led to increased rates of anxiety, depression, and substance abuse disorder, so that even persons not directly impacted by lead toxicity are indirectly affected by relationships with those who have been.<sup>79</sup> The fact that this occurred “in the Great Lakes State, which is surrounded by one fifth of all the freshwater on the face of the Earth, makes it all the more haunting” and tragically ironic.<sup>80</sup>

Lastly, while plaintiffs’ attorneys must be sensitive to the numerous negative impacts of the FWC, the widespread feelings of disempowerment require the most attention and are thus most relevant to attorneys’ ethical duties. This sense of disempowerment intensifies residents’ need for zealous advocacy while also challenging attorneys’ abilities to sufficiently provide it. Because Flint residents’ sense of trust in the government was already compromised by decades of systemic racism and economic depression in their city,<sup>81</sup> confidence in authorities was already below baseline when the FWC erupted.<sup>82</sup> The FWC then compounded that distrust and validated residents’ pre-existing beliefs that their voices

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73. NIH, *supra* note 72, at 2.

74. *See* CLARK, *supra* note 1, at 98.

75. Kruger et al., *supra* note 63, at 957–58.

76. *See id.* at 957.

77. *See id.* at 958.

78. CLARK, *supra* note 1, at 7; *see also* Cuthbertson, *supra* note 16, at 904.

79. Cuthbertson, *supra* note 16, at 902–03.

80. CLARK, *supra* note 1, at 7.

81. *See id.* at 43–47.

82. Victoria Morckel & Kathryn Terzano, *Legacy City Residents’ Lack of Trust in Their Governments: An Examination of Flint, Michigan Residents’ Trust at the Height of the Water Crisis*, 41 J. URB. AFFAIRS 585, 586 (2019).

do not matter and that those in power do not care.<sup>83</sup> After all, residents trusted authorities who told them the water was safe to drink; finding out later that they were being poisoned decimated any confidence, however tenuous, that was left, so that residents were hesitant to believe any subsequent communications concerning water safety.<sup>84</sup> This further loss of confidence in government leaders created a sense of abandonment in those impacted, exacerbating the negative mental health effects already at play.<sup>85</sup> As one survey respondent impacted by the FWC explained, “[H]ow do you describe the feeling(s) of abandonment by those who you have put some degree of confidence in to protect you[?]”<sup>86</sup> By the time, then, that attorneys came along to represent victims of the FWC in the class action litigation, a deep sense of helplessness and loss of agency—a trauma in itself—had already blanketed the class.<sup>87</sup>

## II. INSUFFICIENCY OF ATTORNEY ETHICAL DUTIES IN MASS TORT CLASS ACTIONS<sup>88</sup>

The underlying purpose of the ethical duties of attorneys as outlined in the *Model Rules* is to promote a sense of autonomy in plaintiffs while ensuring loyalty from their attorneys.<sup>89</sup> According to the Honorable Jack Weinstein of the Eastern District of New York, a federal judge who has written extensively and heard numerous cases on mass torts, an attorney’s loyalty to her client encompasses two basic ethical duties: 1) to zealously and effectively advocate; and 2) to communicate.<sup>90</sup> In addition to these duties, the 1993 update to the *Model Rules* suggests an additional “duty”—the responsibility to justice on behalf of the public.<sup>91</sup> According to the amended Preamble, a lawyer is a “public citizen” who

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83. See *id.* at 595 (comparing lack of trust before, during, and after crisis).

84. See CLARK, *supra* note 1, at 2, 155; PAULI, *supra* note 1, at 134.

85. Cuthbertson, *supra* note 16, at 904.

86. See *id.*

87. See Debra J. Davidson, *Evaluating the Effects of Living with Contamination from the Lens of Trauma: A Case Study of Fracking Development in Alberta, Canada*, 4 ENVTL. SOC. 196, 198, 203 (2018).

88. Mass torts and class actions are similar in that both involve consolidation into a single case and large numbers of plaintiffs. However, while in class actions the plaintiffs are treated as one whole (the “class”), in mass torts the plaintiffs are typically still treated as individuals. That said, the two can be combined into a mass tort class action, which involves an injury on a large scale affecting a large number of plaintiffs, but those plaintiffs consolidating into a class instead of litigating as individuals. See MASS TORT VS. CLASS ACTION, <https://searcymasstort.com/what-are-mass-torts/mass-tort-vs-class-action/> [<https://perma.cc/GU3R-ZJD7>].

89. See WEINSTEIN, *supra* note 5, at 53 (“The lawyer is required to be an absolutely loyal surrogate for the client. This ensures justice is served and that the client receives the full and fair hearing to which he or she is entitled.”).

90. See *id.*

91. See MODEL RULES OF PROF’L CONDUCT pmb1. [1], [6], [8] [hereinafter MODEL RULES]. In 1993 the preamble to the Model Rules was amended to incorporate duties to justice and the furtherance of confidence in the legal system. See Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 HOWARD L.J. 677, 707–10 (2008).

should work toward “reform of the law” as well as “further[ing] the public’s understanding of and confidence in the . . . justice system.”<sup>92</sup>

[L]egal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.<sup>93</sup>

Further, the Preamble advises that a “lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious” so that a lawyer can advocate zealously while ensuring justice.<sup>94</sup> As far as communication is concerned, the Preamble notes that “preserving client confidences . . . serves the public interest because people are more likely to seek legal advice . . . when they know their communications will be private.”<sup>95</sup> In short, lawyers are to seek justice on behalf of individuals because doing so serves the public good.

Plaintiffs in civil suits have basic needs and expectations: competent representation, zealous advocacy from the representing attorneys, communication as often as appropriate and feasible, and just compensation in the damages award.<sup>96</sup> While even in the simplest cases attorneys might face challenges in satisfactorily meeting their obligations toward plaintiffs, that difficulty unsurprisingly is exacerbated in cases where plaintiffs are numerous (such as mass torts, class actions, multi-district litigations, etc.).<sup>97</sup> Attorneys might struggle to zealously advocate for clients on individual bases, and conversely, plaintiffs often feel as if they are treated en masse instead of as individuals.<sup>98</sup> Of course, the duty to zealously advocate on behalf of clients comes directly from the *Model Rules of Professional Conduct*.<sup>99</sup> But that duty and those Rules—which are meant to provide a standard expectation applicable to all attorneys in *all* types of cases even today—were established well before mass torts came to be and thus were not

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92. MODEL RULES pmb. [1], [6].

93. MODEL RULES pmb. [6].

94. MODEL RULES pmb. [8].

95. *Id.*

96. MODEL RULES pmb. [2], [4], [8]; R. 1.1 (Competence); R. 1.3 (Diligence); R. 1.4 (Communication). These needs and expectations form the backbone of the *Model Rules*.

97. See Christopher A. Seeger & James A. O’Brien, III, *Administrative Housekeeping and Ethical Matters in Mass Torts MDLs and Class Actions*, 13 SEDONA CONF. J. 171, 172 (2012) (noting that courts should “identify and appoint counsel who are vigorous advocates, constructive problem solvers, and are civil with their adversaries and each other”); WEINSTEIN, *supra* note 5, at 1–2.

98. WEINSTEIN, *supra* note 5, at 3.

99. MODEL RULES pmb. [8]; R. 1.3 (Diligence).

intended to address situations involving large numbers of plaintiffs in a single case.<sup>100</sup>

Thus, a plaintiffs' attorney in typical mass tort cases who does their best to fulfill their ethical duties under the current *Model Rules* will likely still fall short of zealously advocating on behalf of each individual as required, communicating sufficiently with each client, and furthering the clients' confidence in the legal system while upholding public justice.

#### A. DIFFICULTIES IN ZEALOUSLY ADVOCATING FOR INDIVIDUALS IN MASS TORT CASES

Advocating zealously on behalf of clients first requires knowing the wishes of individual clients.<sup>101</sup> However, because mass tort cases involve anywhere from hundreds to tens of thousands of plaintiffs, it is a practical impossibility to know each individual client's desires to any significant degree (if at all).<sup>102</sup> Instead, mass tort cases require that individual plaintiffs sacrifice their individuality for the collective whole.<sup>103</sup> Judge Weinstein warns:

Chief among our current concerns should be the "individual" aspect of mass litigations. How can we provide each plaintiff and each defendant with the benefits of a system in mass torts that treat him or her as an individual person? How can each person obtain the respect that his or her individuality and personal needs should command in an egalitarian democracy such as ours?<sup>104</sup>

The unfortunate answer is that attorneys in mass tort cases cannot provide these benefits to clients while also treating those clients as individuals. Nor will clients in mass tort cases be given the full respect due them. Therefore, the ethical obligation to treat clients as individuals is an unattainable standard for plaintiffs' attorneys in mass tort cases.

Second, zealous advocacy demands that clients be involved in decision-making.<sup>105</sup> In mass tort cases, it is not logistically feasible that every plaintiff have equal say in the process. In mass tort class actions specifically, where the plaintiffs are treated as one "whole," the law does not even require each plaintiff to have an individual voice in the litigation.<sup>106</sup> Therefore, because only the

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100. See WEINSTEIN, *supra* note 5, at 1; Seeger & O'Brien, *supra* note 97, at 175 (recognizing that plaintiffs' attorneys—despite challenges unique to mass torts and class actions—must still "represent their individual clients zealously within the bounds of the law"). Further, while the *Model Rules* do address some possible difficulties with common representation, they were not intended to address situations involving thousands of plaintiffs in a single case (i.e., mass tort class actions). See MODEL RULES R. 1.7 cmt. 29–33.

101. See MODEL RULES R. 1.2, 1.4(a)(2).

102. See Seeger & O'Brien, *supra* note 97, at 175–76.

103. See, e.g., Geoffrey C. Hazard, Jr., *Reflections on Judge Weinstein's Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 569, 578 (1994).

104. WEINSTEIN, *supra* note 5, at 3.

105. See MODEL RULES R. 1.2; 1.4.

106. See FED. R. CIV. P. 23(a)(4).

representative parties will be involved in the decision-making, the non-representative class members will have little to no say. In fact, class actions by their nature require the sacrifice of individual autonomy as decisionmakers for the sake of the whole, so that inherent in a mass tort class action is an individual plaintiff's diminished control over the case.<sup>107</sup> For that reason, attorneys in mass tort class actions may themselves have to sacrifice zealous advocacy for individuals' needs in order to zealously advocate for the needs of the whole to even litigate a case at all.

In the same way, while attorneys in mass tort cases may zealously advocate for the needs of the plaintiffs as a single entity, it is unreasonable to expect that the individual needs of each plaintiff will be met by those same attorneys. Further, individual plaintiffs will have their own priorities.<sup>108</sup> Therefore, even if an attorney were able to be more personal in their approach to each plaintiff and advocate as zealously as the attorney finds acceptable, the individual plaintiffs might find the "zealousness" unsatisfactory in meeting their unique, personal needs.

Finally, in mass tort cases, it is possible that plaintiffs are so numerous that plaintiffs' attorneys do not feel a compelling degree of accountability to their fiduciary duties to their clients. For example, in simpler cases with a single lawyer and a single plaintiff, the plaintiff likely is more keenly aware of how much their attorney will get paid and has at least some power to attempt to negotiate the fee; however, in more complex cases with many multiples of plaintiffs, that same awareness and power are likely not the reality.<sup>109</sup> Thus, an attorney's zealous advocacy in mass tort cases might be compromised by their prioritizing money over their clients' interests because no single plaintiff is holding the attorney to account or negotiating fee arrangements.

## B. INSUFFICIENT COMMUNICATION

Model Rule 1.4 mandates that attorneys prioritize communication with their clients.<sup>110</sup> Specifically, an attorney is to promptly inform the client when informed consent is required; consult with clients about how to accomplish the client's objectives; reasonably inform on the case's status; and promptly fulfill client requests for information.<sup>111</sup> As emphasized above, these duties are challenged when the number of plaintiffs is so substantial that an attorney is not able to sufficiently communicate with clients on individual bases.<sup>112</sup> Instead,

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107. See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 750–51 (2002).

108. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 503 (1994).

109. See *id.* at 503–04; Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1, 18 (2009).

110. See MODEL RULES R. 1.4.

111. *Id.*

112. See Weinstein, *supra* note 108, at 495.

communication must be on a mass scale so that the entirety of the group is relatively informed.<sup>113</sup>

Though most attorneys will attempt to take appropriate measures to enhance communication with their clients (even in mass torts/class actions), and the digital era certainly facilitates that, still it is not unusual for individual plaintiffs to feel as though communication is lacking.<sup>114</sup> Calls to attorneys' offices may be more likely to be ignored than in single-plaintiff cases. This can lead to frustration in the clients, a loss of interest in the case on their part, the belief that no progress is being made in their case, and that they will never attain justice for the harms done to them.<sup>115</sup> Each of these negative effects diminishes the plaintiff's sense that their lawyer is zealously advocating on their behalf and is heightened in mass tort class actions, where non-representative plaintiffs may feel even further detached.<sup>116</sup>

### C. COMPROMISING CONFIDENCE IN THE LEGAL SYSTEM

The Preamble to the *Model Rules* was amended in 1983 to emphasize the attorney as a public citizen and to incorporate an ethical duty to justice for society at large.<sup>117</sup> The end goal, according to the amended Preamble, is to reinforce public confidence in the justice system.<sup>118</sup> When lawyers zealously advocate for their clients and communicate appropriately, hopefully ultimately achieving justice for their clients, confidence in the legal system is reinforced.

But when that ideal is not met in clients and instead the opposite occurs (i.e., trust in the legal system is diminished), it is arguable that an attorney has thus fallen short of her ethical duties—even if she tried her best. Of course, in cases with one or few plaintiffs, this duty is easier to fulfill because both zealous advocacy and sufficient communication are reasonably attainable. However, as this Note has demonstrated, in mass torts those ethical duties are more difficult to fulfill.<sup>119</sup>

Thus, it follows that individuals' confidence in the legal system in mass tort cases is at greater risk of being compromised. For example, when a plaintiff feels as though his attorney has not adequately and zealously advocated for him, he may feel that he cannot count on the system to provide him justice in the future. When a client is not regularly updated on the case or is unsatisfied with the

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113. *See id.* at 498–99.

114. *See* WEINSTEIN, *supra* note 5, at 10, 53; Weinstein, *supra* note 108, at 495–97.

115. *See* Weinstein, *supra* note 108, at 495. Weinstein notes that “[t]he more the litigant believes he or she is ‘hurt,’ the more tender loving care from the system is required—a sound rule for parceling out ‘TLC’ in all situations.” *Id.* This can make satisfactory communication with large numbers of plaintiffs in mass tort cases extremely difficult. *Id.*

116. *See, e.g.,* Kenneth R. Feinberg, *Lawyering in Mass Torts*, 97 COLUM. L. REV. 2177, 2179 (1997) (urging “greater effort be made to keep the clients informed about their case”).

117. *See* Colbert, *supra* note 91, at 708–09, 714.

118. MODEL RULES pmb. [6].

119. *See* WEINSTEIN, *supra* note 5, at 3.

information shared, she may feel further ostracized from a system meant to empower her. This is especially true in mass tort cases where serious harms have occurred, causing clients to feel disempowered and removed from justice even before seeking legal restitution.<sup>120</sup>

### III. HOW FLINT'S HISTORY OF OPPRESSION CREATES EXTRAORDINARY ETHICAL BURDENS ON FWC PLAINTIFFS' ATTORNEYS

To reiterate, clients in civil cases have specific needs and rights, and the ethical rules outlined in the *Model Rules of Professional Conduct* are intended to satisfy those interests.<sup>121</sup> For the reasons described in this Note, plaintiffs' attorneys in mass tort cases must overcome numerous obstacles in order to fulfill their ethical duties.<sup>122</sup> However, plaintiff attorneys in mass tort *class actions* face the greatest challenges in adhering to their duties to their clients in the three areas explained above—zealous advocacy, communication, and promoting confidence in the legal system.<sup>123</sup>

This point is illustrated even more acutely in the FWC class actions. As this Note argues, because of Flint residents' well established history of disempowerment, residents impacted by the poisoning of their water were already doubtful of the legal system before joining any civil action.<sup>124</sup> Further, the emergency manager appointment over the city—which led to the poisoning—stripped Flint residents of their autonomy and democratic voice.<sup>125</sup> The water crisis effectively cemented residents' lack of trust in the government and city officials as well as the entire justice system itself, so that by the time plaintiffs' attorneys arrived on the scene, potential plaintiffs had little faith they would ever see justice. Attorneys representing FWC plaintiffs, therefore, bear extraordinary burdens in attempting to seek justice for their clients while also meeting the ethical duties imposed by the *Model Rules*.

#### A. EXTRAORDINARY BURDEN ON ATTORNEYS DUE TO HISTORICAL DISEMPOWERMENT AND LACK OF VOICE IN FLINT

Historical disempowerment in Flint—from systemic racism and economic oppression—means that Flint was silenced before it even opened its collective mouth to speak up about its water. The city has been well acquainted with disenfranchisement given that blacks across the United States were denied the right to vote through much of the twentieth century.<sup>126</sup> This hit Flint especially hard as a

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120. *See id.* at 10.

121. *See supra* Part II.

122. *See id.*

123. *See id.*

124. *See supra* Part I.B.

125. *See* Nickels et al., *supra* note 35, at 2.

126. Because Flint is majority black, most of the city's population did not fully gain the right to vote until the passage of the Voting Rights Act of 1965. *See* CLARK, *supra* note 1, at 128.

majority black community, and the sense of disempowerment resulting from official disenfranchisement is still felt today.<sup>127</sup>

This historical lack of voice compromises the purpose of the ethical duties imposed by the *Model Rules* and impedes FWC plaintiff lawyers' ability to fully satisfy them. For example, while Model Rule 1.4 requires an attorney to keep her clients "reasonably informed," mass tort victims in a historically disempowered community may disagree with their attorney on what constitutes "reasonably informed."<sup>128</sup> Therefore, the expectation that a lawyer "promptly comply with reasonable requests for information" may mean one thing to the lawyer, but to those already denied a voice—who had no say in the switch of their water source and subsequent lead poisoning of themselves and their children—it might mean another.<sup>129</sup> Thus, Flint residents who have been harmed by the water crisis may experience greater frustration at any lack of information from their attorney because of the initial silence from municipal authorities concerning the poisoned water in the first place. This means that the implicit bar for FWC plaintiff attorneys is higher for Flint residents who already feel underrepresented.

#### B. BURDEN ON ATTORNEYS TO REINFORCE PUBLIC TRUST IN THE GOVERNMENT AND LEGAL SYSTEM DUE TO FALLOUT FROM EMERGENCY MANAGER INSTALLATION

In the same way that historical oppression in Flint creates extra difficulties for attorneys seeking to meet their ethical duties to clients, so too does the installation of a series of emergency managers over the city. Model Rule 1.2 requires that an attorney "abide by [their] client's decisions concerning objectives of representation" and how they wish the case to proceed.<sup>130</sup>

Plaintiffs in mass tort class action cases typically have less say in the litigation due to the impracticality of each plaintiff having individual input.<sup>131</sup> Understandably, this can be extremely frustrating for plaintiffs. In FWC plaintiffs, this frustration is even more pronounced because Flint residents lacked a say in the first place when they were denied a voice in the installation of an emergency manager (and even more so when that resulted in the infamous water source switch). This denial of voice stripped residents of their autonomous democratic power, so when attorneys stepped in to seek justice on behalf of Flint residents, the parties they were representing would require more of a voice than a

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127. Cuthbertson, *supra* note 16, at 903 (quoting a Flint resident, "It was hard living here with all the negative reporting about crime and the economy. It's even harder living here now. . . . People look and sound defeated.").

128. *See* MODEL RULES R. 1.4.

129. *See id.*

130. *See* MODEL RULES R. 1.2.

131. *See* WEINSTEIN, *supra* note 5, at 54 ("Injured persons may find that they have surrendered their rights to a system in which they have little or no input. Even with the best-intentioned lawyers, some alienation of the individual seems inevitable.").

typical client. Thus, ordinary measures by plaintiffs' attorneys would not suffice in FWC cases.<sup>132</sup>

Moreover, because Flint residents already distrusted authorities, FWC attorneys face an extraordinary burden. In order to overcome that distrust, attorneys must "overcommunicate" with their clients and discern whether that communication is reasonably satisfactory to the clients. Otherwise, the expectation that attorneys work toward reinforcing public trust in the legal system will be thwarted.<sup>133</sup> This doubtlessly creates an extraordinary burden on FWC plaintiffs' attorneys who will need to alter their ordinary standard of practice in order to meet that burden.

### C. INCREASED BURDEN ON FWC ATTORNEYS DUE TO EFFECTS OF TRAUMA ON RESIDENTS

The effects of trauma are indicated by the "loss of agency" or "abrupt loss of a sense of mastery over [one's life], in the face of powers beyond one's control."<sup>134</sup> The documented effects of trauma on Flint residents resulting from the FWC are numerous and further exacerbate their unique needs as plaintiffs in a mass tort class action. Besides the long-term physical impacts of lead poisoning, associated cognitive impairment, and financial distress,<sup>135</sup> Flint residents are left to deal with PTSD, depression, anxiety disorders, and other related psychological effects.<sup>136</sup> PTSD may involve mentally reliving the traumatic event, avoiding situations that remind the person of the traumatic event, negative changes in belief, and hyperarousal.<sup>137</sup> While the toxic contamination is the acute source of trauma, these mental health consequences—resulting from the lead contamination but also the felt betrayal from public officials<sup>138</sup>—affect residents' ability to mobilize and organize in order to confront those very officials and seek appropriate restitution for harms done.<sup>139</sup>

Moreover, the trauma imposed on Flint residents was a bodily violation which stripped affected persons of their bodily autonomy, but the sociopolitical backdrop against which this trauma occurred exacerbated those trauma-related effects.<sup>140</sup> When authorities failed to respond to the outcries of individuals, the sense of bodily violation and stripping of autonomy were exponentially

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132. See *infra* Part IV.B.

133. See MODEL RULES pmb. [6].

134. See Davidson, *supra* note 87, at 198.

135. See *supra* Part I.

136. See Kruger et al., *supra* note 63, at 957 (examining relationship between water quality experiences and symptoms of PTSD during FWC).

137. See *id.* at 958.

138. See CLARK, *supra* note 1, at 7; Cuthbertson, *supra* note 16, at 904 ("Lead in the water has caused not only physical issues but being misled by city and state officials about the severity of the problem has caused stress, emotional, and mental issues, quality of life is down.").

139. See Davidson, *supra* note 87, at 206.

140. See *id.* at 197.

increased.<sup>141</sup> Thus, the sense of helplessness<sup>142</sup> among Flint residents post-crisis was profound, especially since this feeling, albeit less intensified, pervaded the community even before the crisis. This helplessness leads to a general hyperarousal in victims of a crisis; what security they had before the crisis (however little) does not return, and in its place is a distrust of others, most especially of authorities.<sup>143</sup>

For attorneys representing victims in the FWC, this means they must be extra vigilant to meet their duties to their clients. Many Flint residents suspect that plaintiffs' attorneys might be trying to capitalize on the crisis, and feel like "prey to the vultures who come to feed off of the pain of this issue and all of the repercussions resulting."<sup>144</sup> Victims of trauma, due to a lack of sense of control, may react to infrequent communication or a lack of information in a way that an attorney not educated on trauma might find unreasonable. For example, if a FWC plaintiff requests information on the status of the case and that request is unheeded for a period of time, that delay might trigger the individual's PTSD because it invokes a sense of powerlessness and lack of trust in authorities. If the attorney is not aware of that possibility and does not adjust their practice accordingly, she will not satisfy her ethical duty to appropriately communicate with their clients and to increase public confidence in the legal system.<sup>145</sup>

However, because victims of trauma—through no fault of their own—sometimes have unreasonable expectations due to their sensitivities, the lack of confidence in the legal system might be nearly insurmountable by FWC plaintiffs' attorneys. In other words, no matter how hard an attorney tries to fulfill the ethical duties and ideals imposed by the *Model Rules*, she cannot magically restore a client's sense of autonomy nor fully uphold it. While some might assert that any lawyer is better than no lawyer, this is not necessarily true if that lawyer causes further harm to vulnerable clients by failing to alter his advocacy efforts based on his clients' sensitivities.

Therefore, in order to meet ethical expectations, plaintiffs' attorneys in the Flint cases must adjust their ordinary practices in way uniquely tailored to victims of trauma, thus demonstrating a unique burden on the attorneys. Therefore, in order to meet ethical expectations, plaintiffs' attorneys in the Flint cases must adjust their ordinary practices in way uniquely tailored to victims of trauma, thus demonstrating a unique burden on the attorneys.

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141. *Id.* at 199 ("The responses of members of victims' families and communities, and local authorities, . . . have a powerful influence on the recovery process.")

142. *Id.* at 203.

143. *Id.* at 204.

144. Cuthbertson, *supra* note 16, at 904.

145. See MODEL RULES pmb. [2], [6]; R. 1.4.

#### IV. SUGGESTIONS FOR PLAINTIFFS' ATTORNEYS IN MASS TORT CLASS ACTIONS AND PROPOSED CHANGES TO MODEL RULES IN LIGHT OF THE FLINT WATER CRISIS FALLOUT

In contrast to cases where plaintiffs did not experience extraordinary trauma and resultant PTSD, lawyers in the FWC class action cases must go the extra mile in zealously advocating for their clients. This advocacy involves being sensitive to the unique expectations trauma victims may have regarding communication. Additionally, it may require an increased need for information in order to feel empowered, as well as more focused attention on the part of the attorney on protecting and promoting the public trust in the justice system.

While this Note has focused singularly on Flint, the same principles can be applied in other mass tort and class action cases where numerous victims have been disempowered by a harm and trust in authorities and the legal system is tenuous. As attorney Kenneth Feinberg—special master in multiple well known mass torts cases—points out, the “traditional ethical rules governing lawyer conduct are flawed in that they do not reflect the practical reality of a lawyer representing so many clients simultaneously.”<sup>146</sup> Thus, because the *Model Rules* as they stand today are not sensitive to the needs of mass torts plaintiffs, specialized rules should be included in order to equip attorneys to better meet their clients' unique needs and thus fulfill their ethical duties more appropriately.

##### A. SUGGESTIONS FOR PLAINTIFFS' ATTORNEYS IN MASS TORT CLASS ACTION CASES

The following are suggestions for plaintiffs' attorneys seeking to better fulfill ethical duties to their clients in mass tort actions such as the FWC cases:

First, attorneys should assign specific associate attorneys or other staff to serve as active liaisons. Each liaison can be matched to specific clients with whom they will maintain regular contact during the litigation process. This will increase the likelihood of satisfactory communication on the parts of all parties.

Second, if practical, attorneys can hold “town hall”-style fora regularly for affected parties to voice their thoughts, questions, and concerns. While this provides an outlet for plaintiffs to feel they are “heard,” it also promotes a sense that attorneys are interested in their clients' voices. When this is not geographically feasible—as is often the case in mass tort actions where plaintiffs span the country—these meetings could take place via teleconferencing or web meetings.

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146. See Feinberg, *supra* note 116, at 2178. Feinberg was the special master in the September 11th Victim Compensation Fund and the BP Deepwater Horizon Disaster Fund. He is now overseeing the distribution of funds to the families of 737 MAX crash victims. See Sara Randazzo & Micah Maidenberg, *Boeing Hires Kenneth Feinberg to Handle 737 MAX Claims*, WALL ST. J. (July 17, 2019, 4:27 PM), <https://www.wsj.com/articles/boeing-hires-kenneth-feinberg-to-handle-payments-to-crash-victims-families-11563377446> [<https://perma.cc/LL2G-FXP7>].

Third, attorneys should survey their clients regularly to ascertain client interests, wishes, and concerns. This creates the sense that plaintiffs' voices matter while also providing the attorney with helpful information in designing case strategy moving forward.

Finally, attorneys who wish to promote public trust in the legal justice system should advocate for the end or restructuring of EM laws so that individuals' sense of autonomy is not violated unnecessarily, especially by the government.

#### B. PROPOSED CHANGES TO THE *MODEL RULES*

While attorneys' actions can greatly impact the sense of empowerment and trust in their clients, changes to the *Model Rules* would also serve to ensure that mass tort plaintiffs' needs are met. First, amending the *Model Rules* would imply acknowledgement of the unique demands on plaintiffs' attorneys in mass tort cases. Second, these changes would provide a framework for attorneys to strive toward in order to fulfill the current ethical duties of zealous advocacy, communication, and promotion of the public trust.

Toward that end, the following modifications to the *Model Rules* should therefore be considered. First, insert additional sections under Rule 1: Client-Lawyer Relationship that are specific to Plaintiffs' Attorneys in Mass Tort Cases. For example, an additional section (c) could be added to Rule 1.4: Communication, stating:

In a mass tort and/or class action case or any case where the group of plaintiffs is large enough cause administrative difficulties, a lawyer shall consider alternative measures in order to effectively communicate with clients. Measures might involve web conferences, regular emails, a web site specific to plaintiffs in the case, and other relevant measures.

Or, alternatively, insert a new rule altogether for Client-Lawyer Relationship in Mass Tort and Class Action Cases (Proposed Rule 9). This new Rule 9 could expand on any of the pre-existing Rule 1 subsections which require tailoring of subject matter for this special category of cases (e.g., Rule 9.1: Diligence; Rule 9.2: Communications; Rule 9.3 Fees).

Modifications to the *Model Rules* also require adjusting the rules so that references to "client" are pluralized as appropriate and the rules themselves tailored accordingly (note that "client" is singular throughout the *Model Rules*, evidence that the Rules were designed with singular clients in mind). Perhaps most importantly, the *Model Rules* should include an explicit rule requiring plaintiffs' lawyers in mass tort cases to proactively seek to increase clients' confidence in the legal system—confidence that has been diminished due to the harms they have suffered.

Of course, other possible modifications exist, as this list of suggestions is not exhaustive. And while these modifications might seem radical to some, and duties are not perfectly attainable or enforceable, the goal is to make good faith efforts

to strive toward these ideals. In doing so, plaintiffs' interests are better served, and attorneys can properly devote themselves to the ethical duties implemented by the *Model Rules*.

### CONCLUSION

As the FWC demonstrates, mass torts often disproportionately impact marginalized groups—individuals who often are already disempowered prior to infliction of any harm alleged in the lawsuit. Residents of Flint, who suffered decades of economic challenges and sociopolitical oppression before being poisoned by their water, have legitimate reasons to be doubtful of attorneys' abilities to address their needs while catering to their unique sensitivities. While the national spotlight has focused primarily on Flint, Flint is only a representative example; it is certainly not an aberration, especially as mass torts have become more common in recent years. Thus, it is worth acknowledging the ethical challenges the FWC has illuminated and extrapolating those challenges to plaintiff representation in mass torts generally. Doing so warrants thoughtful consideration of potential modifications to the *Model Rules* so that the Rules better reflect realities in cases where the number of plaintiffs is so numerous as to present unique challenges for representing attorneys. Therefore, the American Bar Association should prioritize redefining ethical duties and obligations on plaintiffs' attorneys in mass tort cases. Doing so will ensure that the seemingly impossible demands on plaintiffs' attorneys in such cases are somewhat more manageable and ethical ideals more attainable.