

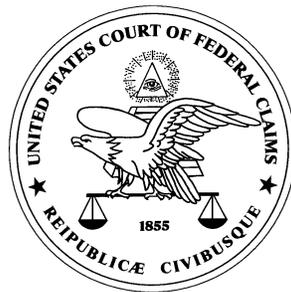
UNITED STATES COURT OF FEDERAL CLAIMS
25th Annual Judicial Conference
November 15, 2012

*Ethical Concerns Raised by Collective Actions and Class Actions in the
Court of Federal Claims*

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**RULES OF THE UNITED STATES
COURT OF FEDERAL CLAIMS**

As amended through July 2, 2012



double liability, RCFC 14 provides the means for summoning a third party.

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. A class action may be maintained if RCFC 23(a) is satisfied and if:

- (1) [not used];
- (2) the United States has acted or refused to act on grounds generally applicable to the class; and
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by class members;
- (C) [not used]; and
- (D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under RCFC 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) [Not used.]

(B) For any class certified under RCFC 23(b), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will include in the class any member who requests inclusion;
- (vi) the time and manner for requesting inclusion;
- (vii) the binding effect of a class judgment on members under RCFC 23(c)(3).

- (3) **Judgment.** Whether or not favorable to the class, the judgment in a class action must include and specify or describe those to whom the RCFC 23(c)(2) notice was directed, and whom the court finds to be class members.
 - (4) **Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.
 - (5) **Subclasses.** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.
- (d) **Conducting the Action.**
- (1) **In General.** In conducting an action under this rule, the court may issue orders that:
 - (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
 - (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:
 - (i) any step in the action;
 - (ii) the proposed extent of the judgment; or
 - (iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
 - (C) impose conditions on the representative parties or on intervenors;
 - (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
 - (E) deal with similar procedural matters.
 - (2) **Combining and Amending Orders.** An order under RCFC 23(d)(1) may be altered or amended from time to time and may be combined with an order under RCFC 16.
- (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
 - (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
 - (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
 - (4) [Not used.]
 - (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court’s approval.
- (f) **Appeals.** [Not used.]
- (g) **Class Counsel.**
- (1) **Appointing Class Counsel.** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:
 - (A) must consider:
 - (i) the work counsel has done in identifying or investigating potential claims in the action;
 - (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
 - (iii) counsel’s knowledge of the applicable law; and
 - (iv) the resources that counsel will

commit to representing the class;

- (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
 - (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
 - (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under RCFC 23(h); and
 - (E) may make further orders in connection with the appointment.
- (2) **Standard for Appointing Class Counsel.** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under RCFC 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
- (3) **Interim Counsel.** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
- (4) **Duty of Class Counsel.** Class counsel must fairly and adequately represent the interests of the class.
- (h) **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
- (1) A claim for an award must be made by motion under RCFC 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to

class members in a reasonable manner.

- (2) A class member, or party from whom payment is sought, may object to the motion.
- (3) The court may hold a hearing and must find the facts and state its legal conclusions under RCFC 52(a).
- (4) [Not used.]

(As revised and reissued May 1, 2002; as amended July 1, 2004, Nov. 3, 2008, Jan. 11, 2010.)

Rules Committee Notes 2002 Revision

RCFC 23 has been completely rewritten. Although the court's rule is modeled largely on the comparable FRCP, there are significant differences between the two rules. In the main, the court's rule adopts the criteria for certifying and maintaining a class action as set forth in *Quinault Allottee Ass'n v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972).

Because the relief available in this court is generally confined to individual money claims against the United States, the situations justifying the use of a class action are correspondingly narrower than those addressed in FRCP 23. Thus, the court's rule does not accommodate, *inter alia*, the factual situations redressable through declaratory and injunctive relief contemplated under FRCP 23(b)(1) and (b)(2).

Additionally, unlike the FRCP, the court's rule contemplates only opt-in class certifications, not opt-out classes. The latter were viewed as inappropriate here because of the need for specificity in money judgments against the United States, and the fact that the court's injunctive powers—the typical focus of an opt-out class—are more limited than those of a district court.

Finally, the court's rule does not contain a provision comparable to FRCP 23(f). That subdivision, which provides that a "court of appeals may in its discretion permit an appeal from an order . . . granting or denying class certification," has its origin in 28 U.S.C. § 1292(e), which authorizes the Supreme Court to promulgate rules that provide for an appeal of an interlocutory

decision other than those set out in Section 1292. Because no comparable statutory authority exists for this court's promulgation of a similar rule, subdivision (f) has been omitted. It should be noted, however, that the Court of Federal Claims may certify questions to the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. §§ 1292(b), 1295.

2004 Amendment

In addition to the rule changes introduced in 2002, the text of the current rule also incorporates the revisions to FRCP 23 effective December 1, 2003. These revisions, which appear as subdivisions (c), (e), (g), and (h) of the rule, adopt the text of the FRCP except where modification in wording was necessary to accommodate the "opt-in" character of this court's class action practice.

2008 Amendment

The language of RCFC 23 has been amended to conform to the general restyling of the FRCP.

In addition, subdivision (h) ("Attorney's Fees and Nontaxable Costs") has been expanded to (i) recognize that an award of attorney's fees may be authorized either by law (as was previously recognized in the rule) or "by the parties' agreement"; and (ii) include the procedural protections accorded class members under FRCP 23(h)(1)–(3) with respect to claims for an award of attorney's fees.

2010 Amendment

RCFC 23(g)(1)(B) has been amended by substituting the word "adequately" for the word "accurately" to conform to the FRCP.

Rule 23.1. Derivative Actions

(a) **Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of

shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) **Pleading Requirements.** The complaint must be verified and must:

- (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;
- (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
- (3) state with particularity:
 - (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
 - (B) the reasons for not obtaining the action or not making the effort.

(c) **Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

(Added May 1, 2002; as amended Nov. 3, 2008.)

Rules Committee Notes

2002 Adoption

This is a new rule. This version of RCFC 23.1 is in conformity with the corresponding FRCP. The Federal Circuit has ruled that under certain circumstances, this court has jurisdiction to hear shareholder derivative suits. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). *Cf. Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995); and *California Housing Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992).

2008 Amendment

The language of RCFC 23.1 has been

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

Currentness

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) **Standard for Appointing Class Counsel.** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) **Interim Counsel.** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) **Duty of Class Counsel.** Class counsel must fairly and adequately represent the interests of the class.

(h) **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Credits

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Editors' Notes

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This is a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L.J. 551, 570 et seq. (1937); Moore and Cohn, *Federal Class Actions*, 32 Ill.L.Rev. 307 (1937); Moore and Cohn, *Federal Class Actions--Jurisdiction and Effect of Judgment*, 32 Ill.L.Rev. 555-567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 Minn.L.Rev. 34 (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn.L.Rev. 501 (1931).

The general test of [former] Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in [former] Equity Rule 38, see Del.Ch. Rule 113; Fla.Comp.Gen.Laws Ann. (Supp., 1936) § 4918(7); Georgia Code (1933) § 37-1002, and see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala.Code Ann. (Michie, 1928) § 5701; 2 Ind.Stat. Ann. (Burns, 1933) § 2-220; N.Y.C.P.A. (1937) 195; Wis.Stat. (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v. Stiglitz*, 260 Ky. 430, 86 S.W.2d 155 (1935). The rule adopts the test of [former] Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich.L.Rev. 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn.L.Q. 399 (1934); Note, 36 Harv.L.Rev. 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v. Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa. 419, 114 Atl. 377 (1921); *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753, 6 L.R.A., N.S., 1067 (1906); *Colt v. Hicks*, 97 Ind.App. 177, 179 N.E. 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America v. Coronado Coal Co.*, 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L.J. 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith v. Swormstedt*, 16 How. 288, 14 L.Ed. 942 (U.S. 1853). Compare *Christopher, et al. v. Brusselback*, 1938, 58 S.Ct. 350, 302 U.S. 500, 82 L.Ed. 388.

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). See also *Terry v. Little*, 101 U.S. 216, 25 L.Ed. 864 (1880); *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596 (D.C.N.Y., 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936); Glenn, *The Stockholder's Suit--Corporate and Individual Grievances*, 33 Yale L.J. 580 (1924); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421 (1937). See also Subdivision (b) of this rule which deals with Shareholder's Action; Note, 15 Minn.L.Rev. 453 (1931).

Clause (2). A creditor’s action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor’s action.

Clause (3). See *Everglades Drainage League v. Napoleon Broward Drainage Dist.*, 253 Fed. 246 (D.C.Fla., 1918); *Gramling v. Maxwell*, 52 F.2d 256 (D.C.N.C., 1931), approved in 30 Mich.L.Rev. 624 (1932); *Skinner v. Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford v. Ellis* (1901) A.C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The “Common Questions” Principle in the Code Provision for Representative Suits*, 30 Mich.L.Rev. 878 (1932).

Note to Subdivision (b). This is [former] Equity Rule 27 (Stockholder’s Bill) with verbal changes. See also *Hawes v. Oakland*, 104 U.S. 450, 26 L.Ed. 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U.S. IX.

Note to Subdivision (c). See McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder’s Suit*, 46 Yale L.J. 421 (1937).

Supplementary Note

Note. Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant “shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law * * *”.

As a result of the decision in *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v. Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes v. Oakland*, 1882, 104 U.S. 450, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift v. Tyson*, 1842, 16 Peters 1, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co. v. Tompkins* in 1938, concerned with the question whether *Hawes v. Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes v. Oakland*, and at the same term, the Court, to implement its decision, adopted [former] Equity Rule 94, which contained the same provision above quoted from Rule 23 F.R.C.P. The provision in [former] Equity Rule 94 was later embodied in [former] Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy v. Steel*, 1887, 120 U.S. 241, 245, 7 S.Ct. 520, the Court referring to *Hawes v. Oakland* said: “In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States.”

Some other cases dealing with [former] Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v. Tompkins* are *Dimpfel v. Ohio & Miss. R.R.*, 1884, 3 S.Ct. 573, 110 U.S. 209, 28 L.Ed. 121; *Illinois Central R. Co. v. Adams*, 1901, 21 S.Ct. 251, 180 U.S. 28, 34, 45L.Ed. 410; *Venner v. Great Northern Ry.*, 1908, 28 S.Ct. 328, 209 U.S. 24, 30, 52 L.Ed. 666; *Jacobson v.*

General Motors Corp., S.D.N.Y.1938, 22 F.Supp. 255, 257. These cases generally treat *Hawes v. Oakland* as establishing a “principle” of equity, or as dealing not with jurisdiction but with the “right” to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no “title” and results in a dismissal “for want of equity.”

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz v. Gould*, 1911, 202 N.Y. 11, 94 N.E. 1088.

The first case arising after the decision in *Erie R. Co. v. Tompkins*, in which this problem was involved, was *Summers v. Hearst*, S.D.N.Y.1938, 23 F.Supp. 986. It concerned [former] Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: “The federal cases that discuss this section of [former] Rule 27 support the view that it states a principle of substantive law.” He quoted *Pollitz v. Gould*, 1911, 202 N.Y. 11, 94 N.E. 1088, as saying that the United States Supreme Court “seems to have been more concerned with establishing this rule as one of practice than of substantive law” but that “whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts.”

He then concluded that, although the federal decisions treat the equity rule as “stating a principle of substantive law”, “[former] Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v. Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule.”

In *Piccard v. Sperry Corporation*, S.D.N.Y.1941, 36 F.Supp. 1006, 1009-10, affirmed without opinion, C.C.A.2d 1941, 120 F.2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was “a matter of practice,” not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v. Tompkins*. In *New York v. Guaranty Trust Co. of New York*, C.C.A.2, 1944, 143 F.2d 503, rev’d on other grounds, 1945, 65 S.Ct. 1464, the court said: “Restrictions on the bringing of stockholders’ actions, such as those imposed by F.R.C.P. 23(b) or other state statutes are procedural,” citing the *Piccard* and other cases.

Some other federal decisions since 1938 touch the question.

In *Gallup v. Caldwell*, C.C.A.3, 1941, 120 F.2d 90, 95 arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that “under the circumstances the proper course was to follow Rule 23(b).”

In *Mullins v. DeSoto Securities Co.*, W.D.La.1942, 45 F.Supp. 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In *Toebelman v. Missouri-Kansas Pipe Line Co.*, D.Del.1941, 41 F.Supp. 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co. v. Tompkins*, or its effect on the rule.

In *Perrott v. United States Banking Corp.*, D.Del.1944, 53 F.Supp. 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

“It seems to me the rule does not go beyond procedure. * * * Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court.”

In *Bankers Nat. Corp. v. Barr*, S.D.N.Y.1945, 9 Fed.Rules Serv. 23b.11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz v. Gould*, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that “in any action brought by a shareholder in the right of a * * * corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law.” At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney’s fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b.) These provisions are aimed at so-called “strike” stockholders’ suits and their attendant abuses. *Shielcrawt v. Moffett*, Ct.App.1945, 294 N.Y. 180, 61 N.E.2d 435, rev’g 51 N.Y.S.2d 188, aff’g 49 N.Y.S.2d 64; *Noel Associates, Inc. v. Merrill*, Sup.Ct.1944, 184 Misc. 646, 63 N.Y.S.2d 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum v. Clinton Trust Co.*, Sup.Ct.1944, 183 Misc. 340, 48 N.Y.S.2d 267; *Noel Associates, Inc. v. Merrill*, supra. In the latter case the court pointed out that “The 1944 amendment to Section 61 rejected the rule laid down in the *Pollitz* case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) * * *”. There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum v. Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc. v. Merrill*, supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc. v. Merrill*, supra, it has been held that even though the statute is procedural in nature--a matter not definitely decided--the Legislature evinced no intent that the provisions should apply to actions pending when it became effective. *Shielcrawt v. Moffett*, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf v. Atkinson*, Sup.Ct.1944, 182 Misc. 675, 49 N.Y.S.2d 703 (constitutional); *Citron v. Mangel Stores Corp.*, Sup.Ct.1944, 50 N.Y.S.2d 416 (unconstitutional); Zlinkoff, *The American Investor and the Constitutionality of § 61-b of the New York General Corporation Law*, 1945, 54 Yale L.J. 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P.L.1945, Ch. 131, R.S.Cum.Supp. 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt v. Moffett*, Sup.Ct.N.Y.1945, 184 Misc. 1074, 56 N.Y.S.2d 134.

See, also generally, 2 Moore’s *Federal Practice*, 1938, 2250-2253, and Cum.Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a

secondary action, although he was not a shareholder at the time of the transactions of which he complains.

1966 Amendment

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called “true” category was defined as involving “joint, common, or secondary rights”; the “hybrid” category, as involving “several” rights related to “specific property”; the “spurious” category, as involving “several” rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in “true” and “hybrid” class actions would extend to the class (although in somewhat different ways); the judgment in a “spurious” class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms “joint,” “common,” etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv. L.Rev. 874, 931 (1958); Advisory Committee’s Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v. Veterans’ Coop. H. Assn.*, 13 F.R.D. 11 (D.D.C.1952); *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F.Supp. 870 (W.D.Pa.1947); *Deckert v. Independence Shares Corp.*, 27 F.Supp. 763 (E.D.Pa.1939), rev’d 108 F.2d 51 (3d Cir. 1939), rev’d, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa.1941), rev’d sub nom. *Pennsylvania Co. for Ins. on Lives v. Deckert*, 123 F.2d 979 (3d Cir.1941) (see Chafee, supra, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as “true” or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word “several” of coherent meaning. See, e.g., *System Federation No. 91 v. Reed*, 180 F.2d 991 (6th Cir.1950); *Wilson v. City of Paducah*, 100 F.Supp. 116 (W.D.Ky.1951); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951); *National Hairdressers’ & C. Assn. v. Philad Co.*, 34 F.Supp. 264 (D.Del.1940); 41 F.Supp. 701 (D.Del.1940), aff’d mem., 129 F.2d 1020 (3d Cir.1942). Second, we find cases classified by the courts as “spurious” in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v. Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), aff’d 230 F.2d 717 (3d Cir.1956); *Giesecke v. Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), rev’d on grounds not here relevant, 326 U.S. 99 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 320 (3d Cir.1944), cert. denied, 325 U.S. 867 (1945). But cf. the early decisions, *Duke of Bedford v. Ellis*, [1901] A.C. 1; *Sheffield Waterworks v. Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown v. Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The “spurious” action envisaged by original Rule 23 was in any event an anomaly because, although denominated a “class” action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the “spurious” category that it would invite decisions that a member of the “class” could, like a member of the class in a “true” or “hybrid” action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore’s *Federal Practice*, pars. 23.10[1], 23.12 (2d ed.1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir.1961), pet. cert. dismissed, 371 U.S. 801 (1963); but cf. *P. W. Hussler, Inc. v. Newman*, 25 F.R.D. 264 (S.D.N.Y.1960); *Athas v. Day*, 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen v. Black*, 234 F.2d 12 (10th Cir.1956), cert. granted, 352 U.S. 888 (1956), dismissed on stip., 355 U.S. 600 (1958); but cf. *Wagner v. Kemper*, 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a “spurious” category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, *supra*, at 230-31; Keeffe, Levy & Donovan, *supra*; *Developments in the law*, *supra*, 71 Harv.L.Rev. at 937-38; Note, *Binding Effect of Class Actions*, 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerosness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v. Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir.1950); *Zachman v. Erwin*, 186 F.Supp. 681 (S.D.Tex.1959); *Bain & Blank, Inc. v. Warren-Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y.1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254, 1259-60 (1961); cf. 3 Moore, *supra*, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist. v. Looney*, 219 F.2d 529 (9th Cir.1955); *Rank v. Krug*, 142 F.Supp. 1, 154-59 (S.D.Calif.1956), on app., *State of California v. Rank*, 293 F.2d 340, 348 (9th Cir.1961); *Gart v. Cole*, 263 F.2d 244 (2d Cir.1959), cert. denied 359 U.S. 978 (1959); cf. *Martinez v. Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir.1955); 3 Moore, *supra*, par. 23.11[2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society,

it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Waybright v. Columbian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn.1939); cf. *Smith v. Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v. Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), aff'd, 230 F.2d 717 (3d Cir.1956); *Giesecke v. Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir.1947); *Speed v. Transamerica Corp.*, 100 F.Supp. 461 (D.Del.1951); *Sobel v. Whittier Corp.*, 95 F.Supp. 643 (E.D.Mich.1951), app. disp., 195 F.2d 361 (6th Cir.1952); *Goldberg v. Whittier Corp.*, 111 F.Supp. 382 (E.D.Mich.1953); *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir.1961); *Edgerton v. Armour & Co.*, 94 F.Supp. 549 (S.D.Calif.1950); *Ames v. Mengel Co.*, 190 F.2d 344 (2d Cir.1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg v. Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir.1942); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); cf. *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir.1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v. Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); cf. *City & County of San Francisco v. Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y.1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 376 U.S. 910, (1964); *Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S.C.*, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *Green v. School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir. 1960); *Northcross v. Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.C.1955, 3-judge court), aff'd 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers,

say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the “tying” condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, *supra*, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v. F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller v. National City Bank of N.Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes v. Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon v. Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v. United States*, 111 F.Supp. 80 (D.N.J.1953); cf. Weinstein, *supra*, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dismissed*, 371 U.S. 801 (1963); cf. *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, *supra*, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is “superior” to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chafee, *supra*, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim “ancillary” jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court’s discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice[,] setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment “describes” the members of the class, but need not specify the individual members; in a (b)(3) action the judgment “specifies” the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a “limited fund,” the judgment, while extending to all

claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, *supra*, par. 23.11[4].

Hitherto, in a few actions conducted as “spurious” class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called “one-way” intervention in “spurious” actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dismissed*, 371 U.S. 801 (1963); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev’d* on grounds not here relevant, 326 U.S. 99 (1945); *Pentland v. Dravo Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed v. Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv. Stat. Assn. v. Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver v. Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D.Tenn.1941); *Kalven & Rosenfield, supra*, 8 U. of Chi.L.Rev. 684 (1941); *Comment*, 53 *Nw.U.L.Rev.* 627, 632-33 (1958); *Developments in the Law, supra*, 71 *Harv.L.Rev.* at 935; 2 *Barron & Holtzoff, supra*, § 568; but cf. *Lockwood v. Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram v. San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D.Calif.1942); *Chafee, supra*, at 280, 285; 3 *Moore, supra*, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See *Restatement, Judgments* § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See *Chafee, supra*, at 294; *Weinstein, supra*, 9 *Buffalo L.Rev.* at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its “class” character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in “limited fund” cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (par. 62869); cf. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 in 4; see also *All American Airways, Inc. v. Elder*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart v. Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, *supra*, at 230-31; *Brendle v. Smith*, 7 F.R.D. 119 (S.D.N.Y.1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v. Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass.1962); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y.1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

1987 Amendment

The amendments are technical. No substantive change is intended.

1998 Amendments

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1291(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate

appeal from the order may materially advance the ultimate termination of the litigation.

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probably benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

2003 Amendments

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class “as soon as practicable after commencement of an action” is replaced by requiring determination “at an early practicable time.” The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made “at an early practicable time.” The “as soon as practicable” exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the “merits,” limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between “certification discovery” and “merits discovery.” A critical need is to determine how the case will be tried. An increasing number of courts

require a party requesting class certification to present a “trial plan” that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification “may be conditional” is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than “the decision on the merits.” This change avoids the possible ambiguity in referring to “the decision on the merits.” Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of “one-way intervention” that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice--including an opportunity to request exclusion--must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court’s authority--already established in part by Rule 23(d)(2)--to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be--and at times was--read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action--such as filing claims--to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under

Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court’s duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint “class counsel.” In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before

certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class “at an early practicable time,” and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation--that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant’s existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court’s later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to “an action certified as a class action.” This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel’s fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies

when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of “reasonable” attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the “common fund” theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in “common fund” cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court’s responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a “reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class”). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court’s Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an “undesirable emphasis” on “the importance of the recovery of damages in civil rights litigation” that might “shortchange efforts to seek effective injunctive or declaratory relief”).

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: “If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.” The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. “Side agreements” regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties--for example, nonsettling defendants--may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

2009 Amendments

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (369)

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23

Amendments received to 7-1-12End of Document

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CLASS ACTIONS¹

I. Introduction

The United States Court of Federal Claims and its predecessor the United States Claims Court heard class actions throughout their histories. The seminal case in the jurisdiction, dating back to the United States Court of Claims, borrowed liberally from district court class action rules to develop a standard for certifying class actions.² *Quinault Allottees*, beyond definitely allowing class actions in the court and identifying a standard for their certification, also bears noteworthiness for certifying an opt-in class rather than an opt-out class.³ The Claims Court and the Court of Federal Claims long followed the *Quinault Allottees* precedent even after adopting a rule authorizing class actions.⁴

In 2002, the Court of Federal Claims altered the Rules of the Court of Federal Claims to conform more closely with the Federal Rules of Civil Procedure. Rule 23, before providing only minimal guidance to the court, was “completely rewritten” while largely adopting the substance of *Quinault Allottees*.⁵ Rule 23(a) now prescribes basically the same requirements for class actions as FRCP 23(a). Because of jurisdictional differences, RCFC 23(b) requires that all class actions involve the United States having acted or refused to act on grounds generally applicable to the entire class, common factual and legal issues predominating over individual issues, and that class action litigation would be superior to separate litigation. Notably, RCFC 23 also rules out opt-out classes.⁶ In short, the court’s standards for class actions have become very similar to, but not identical with, class actions throughout the federal system.

Common class actions in the court include civilian pay⁷ and “Rails to Trails” takings cases.⁸ Each case must satisfy the rules applying to all class actions in the Court of Federal Claims, which this memo exams below. Many class actions end in settlements approved by the court, which this memo also exams below. Finally, the memo will also address various other concerns, including tolling the statute of limitations and collective actions under FLSA.

¹ This overview was written by Jared Haines, student at the University of Chicago Law School, former intern to the Honorable Eric G. Bruggink.

² See *Quinault Allottee Ass’n & Individual Allottees v. United States*, 453 F.2d 1272 (Ct. Cl. 1972).

³ See *id.* at 1276.

⁴ See, e.g., *Crone v. United States*, 538 F.2d 875, 884-85 (Ct. Cl. 1976); *O’Hanlon v. United States*, 7 Cl. Ct. 204, 206-208 (1985); *Buchan v. United States*, 27 Fed. Cl. 222, 224 (1992).

⁵ See Rules Committee’s 2002 Notes on RCFC 23.

⁶ RCFC 23(c)(2)(B).

⁷ See, e.g., *Delpin Aponte v. United States*; 83 Fed. Cl. 80 (2008) (certifying class of Puerto Rico USPS workers seeking overtime pay); *Filosa v. United States*, 70 Fed. Cl. 609 (2006) (certifying class of VA nurses seeking to recover on-call pay); *Barnes v. United States*, 68 Fed. Cl. 492 (2005) (certifying class of non-military Navy personnel seeking premium pay).

⁸ See, e.g., *Rasmuson v. United States*, 91 Fed. Cl. 204 (2010) (denying certification of property owners due to failure to meet numerosity requirement); *Haggart v. United States*, 89 Fed. Cl. 523 (2009) (certifying class of property owners for a “Rails to Trails” takings claim), *Moore v. United States*, 63 Fed. Cl. 781 (2005) (certifying class of property owners for a “Rails to Trails” takings claim).

II. Class Certification

A. RCFC 23 Requirements

After RCFC 23 was “completely rewritten” to conform more closely with FRCP 23,⁹ the court has generally settled on characterizing the new formulation as imposing five requirements: numerosity, commonality, typicality, adequacy, and superiority¹⁰. Owing to the adoption of much of FRCP 23, the court has often been responsive to arguments borrowed from the practice of the rest of the federal judiciary¹¹ as well as arguments about what the United States has conceded in the past.¹² This memo considers how the court has treated of each requirement in turn.

1. Numerosity

The numerosity requirement of RCFC 23(a)(1) has the same language of FRCP 23(a)(1); one can only initiate a class action where “the class is so numerous that joinder of all members is impracticable.” The court has generally considered three factors to determine whether a prospective class warrants certification: actual number of potential class members, the geographical distribution of the potential members, and the size of each claim.¹³

The actual number of potential class members has been considered the most persuasive factor; one court has noted that “generally, if there are more than forty potential class members, this prong has been met.”¹⁴ However, most cases have rejected any presumption in favor of class certification once a potential class reaches a certain size.¹⁵ On two occasions the court has even rejected certification of classes greater than a hundred persons for lack of numerosity.¹⁶ Hence, while the size has been very persuasive, plaintiffs should not rely on size alone despite having more than forty potential class members.

The court has rejected the notion that a plaintiff merely needs speculate that the class includes multitudes of potential members to achieve numerosity. Some actual evidence substantiating an estimate (although not necessarily providing a concrete number) must be

⁹ See Rules Committee’s 2002 Notes on RCFC 23.

¹⁰ See *King v. United States (King I)*, 84 Fed. Cl. 120, 123 (2008); *Barnes*, 68 Fed. Cl. at 495.

¹¹ See, e.g., *King I*, 84 Fed. Cl. at 124 (interpreting RCFC 23 via cases and treatises interpreting FRCP 23).

¹² See *Barnes* and *class size case*?

¹³ *Id.* at 123-24; see also *Haggart v. United States*, 89 Fed. Cl. 523, 530 (2009).

¹⁴ *King I*, 84 Fed. Cl. at 124; see also *Toscano v. United States*, 98 Fed. Cl. 152, 155 (2011) (noting that forty potential class members generally satisfies the numerosity requirement).

¹⁵ See *Singleton v. United States*, 92 Fed. Cl. 78, 83 (2010) (rejecting any presumption in favor of numerosity arising from having forty potential class members); *Rasmuson v. United States*, 91 Fed. Cl. 204, 215-16 (2010) (noting that actual numbers are persuasive but that forty does not create a presumption). See also *Douglas R. Bigelow Trust v. United States*, 97 Fed. Cl. 674, 677 (2011) (rejecting any presumption against numerosity with a potential class size of 25).

¹⁶ See *Rasmuson*, 91 Fed. Cl. at 215-17 (concluding that numerosity had not been met despite having fifty-one potential class members because of geographical concentration and ease of joinder); *Jaynes v. United States*, 69 Fed. Cl. 450, 453-56 (2006).

proffered.¹⁷ Such evidence could be, for example, employer charts of who worked without pay falling within potential class parameters¹⁸ or signed consent forms and GAO reports.¹⁹

Another consideration in determining numerosity has been the geographical dispersion of potential class members. Generally, a wider dispersion tends to contribute to numerosity, while a less-wide dispersion detracts from numerosity.²⁰ However, the court has, on occasion, certified a class without a wide dispersion.²¹

Finally, the court considers the size of each potential claim in determining whether the numerosity requirement has been met.²² If the size of each claim would be such that the benefit of initiating an individual lawsuit would be quickly overshadowed by the attorney's fees, the court will be more likely to determine the numerosity requirement met.

2. Commonality

Commonality covers three different provisions of RCFC 23.²³ First, RCFC 23(a)(2), like FRCP 23(a)(2), requires that there be “questions of law or fact common to the class.” Further, RCFC 23(b)(2) requires that the government have “acted or refused to act on grounds generally applicable to the whole class.” Lastly, RCFC 23(b)(3) requires that the court determine “that the questions of law or fact common to class members predominate over any questions affecting only individual members.”

The court has a low standard for the existence of a common issue under 23(a)(2).²⁴ Thanks to the nature of the court's jurisdiction, a case that satisfies RCFC 23(a)(2) often also satisfies 23(b)(2), which requires that the United States have acted on grounds generally applicable to all members of the class. For example, in class actions over employment pay, the government's failure to compensate workers fitting certain parameters often both creates a common issue and is generally applicable to all potential class members.²⁵ “Rails to trails” cases also evoke this pattern, since one government action both affects the property owners and creates a common question of liability for a Fifth Amendment taking.²⁶

The court has recognized that, analogous to FRCP 23(b)(3) predominance, the predominance requirement here presents a more demanding standard than mere commonality.²⁷

¹⁷ See *Fisher v. United States*, 69 Fed. Cl. 193, 198-99 (2006) (“Speculation as to the number of parties involved is not sufficient to satisfy the requirements of Rule 23(a).”).

¹⁸ See *Filosa v. United States*, 70 Fed. Cl. 609, 616 (2006).

¹⁹ See *King I*, 84 Fed. Cl. at 124.

²⁰ See *Toscano v. United States*, 98 Fed. Cl. 152, 155 (2011) (quoting *King I*, 84 Fed. Cl. at 124-25); *Jaynes*, 69 Fed. Cl. at 454 (“[T]he geographic proximity factor must weigh heavily in the Court's analysis of impracticability.”).

²¹ See *Haggart v. United States*, 89 Fed. Cl. 523, 531-32 (2009) (certifying a class despite admittedly high geographical concentration).

²² See *Douglas R. Bigelow Trust v. United States*, 97 Fed. Cl. 674, 677 (2011); *Singleton v. United States*, 92 Fed. Cl. 78, 83 (2010); *King I*, 84 Fed. Cl. at 125.

²³ See *Filosa*, 70 Fed. Cl. at 617 (discussing the “three inquiries” of commonality); *King I*, 84 Fed. Cl. at 125 (discussing the “three separate issues” commonality involves).

²⁴ See *Filosa*, 70 Fed. Cl. at 617;

²⁵ See, e.g., *King I*, 84 Fed. Cl. at 125-26.

²⁶ See *Singleton*, 92 Fed. Cl. at 84.

²⁷ See *id.*; *Curry v. United States*, 81 Fed. Cl. 328, 334 (2008); *Barnes v. United States*, 68 Fed. Cl. 492, 496 (2005).

Generally, the need for individual determinations such as whether an individual falls under class parameters and the size of an award has not precluded predominance.²⁸ Where the issue of government liability can be resolved for all class members with only minor individual determinations via the existence of an offending systematic policy, the court has often found predominance met.²⁹ Finally, the court has been unwilling to deny class certification when a common issue no longer needs to be decided; in other words, where the United States has been found liable by stipulation or partial summary judgment, class certification may still be granted.³⁰

3. Typicality

RCFC 23(a)(3) requires that the “claims or defenses of the representative parties” be “typical of the claims or defenses of the class.” Whereas the locus of analysis in commonality centered on common issues across all potential class members, typicality considers whether the named party in particular has similarity with the potential class members. Typicality has been satisfied when the named party and potential class members would all be proceeding under the same legal theory or the legal issues arise from the same event or course of conduct.³¹ “Typicality has been found where the named plaintiffs are similarly situated to the rest of the proposed class by virtue of employment history or land ownership, jurisdiction under the same statute, and allegations of an analogous statutory violation.”³² As with commonality, the need for individual determinations of property title in takings cases or backpay calculations in employment cases does not defeat typicality.³³

4. Adequacy

RCFC 23(a)(4) requires the court to determinate that “the representative parties will fairly and adequately protect the interests of the class.” The court has interpreted this requirement to have two elements: first, the named plaintiffs’ counsel, almost always the prospective class counsel, must appear adequate; second, the named plaintiffs and other potential class members

²⁸ See, e.g., *King I*, 84 Fed. Cl. at 126 (concluding predominance obtained despite need for individualized calculations).

²⁹ See *Adams v. United States*, 93 Fed. Cl. 563, 575-76 (2010) (concluding that common issues predominated because liability for all class members would be decided based on a “class-wide basis”); *Curry*, 81 Fed. Cl. at 334 (stating that predominance often results as the “logical outgrowth of a challenge to ‘system-wide failure’”).

³⁰ *Curry*, 81 Fed. Cl. at 334 (“[I]t does not matter whether the common questions have already been summarily adjudicated.”); *Barnes v. United States*, 68 Fed. Cl. 492, 497-98 (2005) (“[T]he case law suggests that a defendant may not thwart class certification by making tactical concessions designed to pare down the list of common issues.”). But see *Abrams v. United States*, 57 Fed. Cl. 439, 441 (2003) (denying class certification after the United States conceded liability because, at that point, only individual factual determinations remained).

³¹ See, e.g., *Toscano v. United States*, 98 Fed. Cl. 152, 155-56 (2011) (concluding that typicality had been met because all class members sought recovery under the same legal theory); *King I*, 84 Fed. Cl. at 126-27 (stating that typicality may be satisfied by class members having claims or defenses based on the same event or same legal theory), *Fisher v. United States*, 69 Fed. Cl. 193, 200 (2006).

³² *Curry*, 81 Fed. Cl. at 335.

³³ See *Singleton v. United States*, 92 Fed. Cl. 78, 84-85 (2010) (certifying a class despite the need for individual determinations of property title); *Barnes v. United States*, 68 Fed. Cl. 492, 498-99 (2005) (“[T]he fact that, of necessity, there will be individualized damage determinations here does not preclude granting plaintiffs’ motion [for class certification].”).

must not have any conflicts of interest that would detract from fair and adequate representation.³⁴ In considering the attorney's adequacy, the court often looks to education and experience both in the subject matter of the case as well as in class actions generally.³⁵ At times, however, the court has applied the class counsel requirements of RCFC 23(g)(1) to assess the attorney's qualifications rather than the more generalized education and experience standard.³⁶ The backing of a law firm has also played into the court's analysis.³⁷ The court has almost never found a class antagonism; generally, having the same legal theory and the ability to opt out of the litigation (a normal part of the court's class action procedure) have satisfied the requirement.³⁸

5. Superiority

In addition to the elements of commonality mentioned above, RCFC 23(b)(3) requires that proceeding as a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." The rule articulates three relevant considerations: class member interests in control over litigation, litigation already begun elsewhere, and "likely difficulties in managing" the class action. In *Barnes*, the court construed this list as nonexhaustive, instead considering anything relevant to superiority in a cost-benefit analysis.³⁹ Subsequent decisions have treated two main kinds of arguments: manageability and the small size of individual claims.⁴⁰ Manageability covers such advantages as time, effort, and expense gained through class action status. The court has often found class actions manageable where potential complexities could require individualized calculations but did not affect an overall legal issue such as liability.⁴¹ Evidence that the cost of proving liability would exceed a small claim in individual lawsuits results in a low likelihood of those individual suits being filed. The court has often counted that as a reason for class certification because, absent certification, justice would be unlikely to be achieved for the vast majority of claimants.⁴²

³⁴ See *Douglas R. Bigelow Trust v. United States*, 97 Fed. Cl. 674, 678 (2011); *Curry*, 81 Fed. Cl. at 336; *Barnes*, 68 Fed. Cl. at 499.

³⁵ See, e.g., *Filosa v. United States*, 70 Fed. Cl. at 621-22 (2006) (concluding the attorney prong of adequate representation had been satisfied by evidence of education and experience in class actions and employment law); *Fisher*, 69 Fed. Cl. at 200-201 (concluding that plaintiff had produced evidence of experience in the subject matter but not in class actions or general education background, defeating adequacy of representation).

³⁶ See *Haggart v. United States*, 89 Fed. Cl. 523, 534-35 (2009); *King I*, 84 Fed. Cl. at 127-28.

³⁷ See *King I*, 84 Fed. Cl. at 127-28.

³⁸ See, e.g., *Adams v. United States*, 93 Fed. Cl. 563, 576-77 (2010) (concluding that the class conflict adequacy requirement had been met despite some class members having different jobs and possibly refusing to opt in); *Curry*, 81 Fed. Cl. at 337 (concluding adequacy had been satisfied despite different jobs and because of the opt-in nature of the class).

³⁹ See *Barnes v. United States*, 68 Fed. Cl. 492, 499 (2005).

⁴⁰ See, e.g., *Curry v. United States*, 81 Fed. Cl. 328, 337-38 (2008).

⁴¹ See, e.g., *Adams*, 93 Fed. Cl. at 577-78 (determining manageability met because individualized calculations were "mechanical" while the court could determine liability once for thousands of claims); *Haggart*, 89 Fed. Cl. at 535-36 (certifying the class action despite individualized determinations because determining liability once manageable); *Fisher v. United States*, 69 Fed. Cl. 193, 205-206 (2006) (determining manageability not met because of complexities in determining exact effect on individuals' taxes of judgment for plaintiff).

⁴² See, e.g., *Curry*, 81 Fed. Cl. at 338 (reasoning that the small size of individuals' claims counseled in favor of class certification); *Fisher*, 69 Fed. Cl. at 205 (rejecting a small claim size argument for lack of any evidential basis for assertion of small claim sizes).

B. Other Certification Issues

A special statute of limitations governs controversies before the Court of Federal Claims; plaintiffs must file claims “within six years after such claim first accrues” in order for their claims not to be barred.⁴³ The court’s statute of limitations is typically considered a strict jurisdictional limitation.⁴⁴ Although the court has reasoned before that the strictness of its statute of limitations should mean that class members must opt in to a class before the statute of limitations period runs,⁴⁵ the Federal Circuit has held that statute of limitations embodied in 28 U.S.C. § 2501 does not prevent members of an opt-in class from joining the class after the six-year period.⁴⁶ In other words, as long as the representative party files a claim and moves for class certification before the six-year period ends, members of the class may join after the period ends.⁴⁷ Further, at least one court has held thus far that even filing a complaint that seeks class certification tolls the statute of limitations for potential class members rather than an actual motion for class certification.⁴⁸

In cases seeking backpay for government employees, the court has at times ordered the defendant to provide plaintiffs with a list of potential class members at the defendant’s own expense.⁴⁹ In doing so the court has considered the greater efficiency that can be obtained by the defendant even though procuring the list largely benefits the plaintiff.⁵⁰ Where the defendant is in sole possession of the list of potential class members, the court has ordered it to provide that information since it can do so “with less difficulty or expense than representative plaintiff[s].”⁵¹ The court has not approved at least one attempt to send out notification prior to class certification, however.⁵²

III. Settlement Approval

Modeled on FRCP 23(e), RCFC 23(e) provides that the “claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”⁵³ The court has looked to guidance from those parts of the federal judiciary bound by the Federal Rules of Civil Procedure in determining whether RCFC 23(e)’s settlement requirements have been met.⁵⁴ The court first provides preliminary approval of a settlement agreement, the inquiry for which centers on ensuring the lack of illegality or collusion in the

⁴³ 28 U.S.C. § 2501.

⁴⁴ See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008).

⁴⁵ See *Fauvergue v. United States*, 86 Fed. Cl. 82, 90-94 (2009) (reversed)

⁴⁶ See *Bright v. United States* 609 F.3d 1273, 1290 (Fed. Cir. 2010).

⁴⁷ See *id.*

⁴⁸ See *Toscano v. United States*, 98 Fed. Cl. 152, 154-55 (2011).

⁴⁹ See, e.g., *King v. United States*, 84 Fed. Cl. 348 (2008). See also RCFC 23(d)(1)(B).

⁵⁰ See *Barnes v. United States*, 72 Fed. Cl. 6, 6-8 (2006).

⁵¹ See *id.* at 9 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 (1978)).

⁵² See *Farmers Co-op. Co. v. United States*, 90 Fed. Cl. 72, 73-74 (2009) (rejecting plaintiff’s “emergency” motion for notification to potential class members).§

⁵³ RCFC 23(e). Compare FRCP 23(e).

⁵⁴ See, e.g., *National Treasury Employees Union v. United States*, 54 Fed. Cl. 791, 797-98 (2002).

negotiation process.⁵⁵ The court next directs notice to class members of the settlement agreement in order to provide an opportunity for them to voice objections, which the court considers before offering final approval.⁵⁶ A settlement has been required to be fair, reasonable, and adequate in order to garner final approval,⁵⁷ and a settlement agreement that has already passed the preliminary approval stage enjoys a presumption of reasonableness that the court's review of objections must rebut.⁵⁸ The fact that both parties' attorneys agree on the proposal also weighs in favor of approval.⁵⁹ More particular factors that the court has considered include those found in several other circuits applying FRCP 23.⁶⁰ The court has very rarely found the factors to weigh sufficiently against settlement to prevent its approval, although it has on one occasion reduced contingency fees paid to class attorneys out of a common fund resulting from a settlement agreement.⁶¹

IV. Collective Actions

Because the court has jurisdiction over claims for backpay against the government, it has sometimes heard those claims as collective actions under the FLSA.⁶² The Court of Federal Claims has largely followed the rest of the federal judiciary in adhering to a "fairly lenient standard" of "similarly-situated" for conditionally certifying collective actions before entering discovery.⁶³ In one case the court has departed from that standard by holding that collective actions under the FLSA must be certified under RCFC 23 because, unlike class actions in the rest of the federal judiciary, those in the Court of Federal Claims have an opt-in requirement similar to the collective action opt-in requirement.⁶⁴ Subsequent opinions have not followed the *Delpin Aponte* logic, however.⁶⁵ Following the same rules as the rest of the federal judiciary and minimizing differences such as class action opt-in procedures whenever possible seems to best adhere to the spirit of the revised Rules of the Court of Federal Claims.⁶⁶

⁵⁵ See *id.*; see also *Williams v. Vukovich*, 720 F.2d 909 (1983).

⁵⁶ See, e.g., *Berkley v. United States*, 59 Fed. Cl. 675, 676 (2004).

⁵⁷ See *Moore v. United States*, 63 Fed. Cl. 781, 783 n 3 (2005) (noting that while RCFC 23 does not mention the "fair, reasonable, and adequate" standard as does FRCP 23, the standard does provide helpful guidance); see also *Christensen v. United States*, 65 Fed. Cl. 625, 628 (2005) (applying the "fair, reasonable, and adequate" standard).

⁵⁸ See *National Treasury Employees Union v. United States*, 54 Fed. Cl. 791, 797-98 (2002) (concluding that the proper negotiation procedures required for preliminary approval produce a presumptively reasonable agreement).

⁵⁹ See *id.* at 797.

⁶⁰ See *Moore v. United States*, 63 Fed. Cl. 781, 783-84 (2005) (citing *In re General Motors Corp. Pick-Up truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3rd Cir. 1995)); see also *Christensen v. United States*, 65 Fed. Cl. 625, 629 (2005) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2001)).

⁶¹ See *Moore*, 63 Fed. Cl. at 785-789.

⁶² See, e.g., *Briggs v. United States*, 54 Fed. Cl. 205 (2002); see also 29 U.S.C. § 216(b).

⁶³ See *id.*; see also *Whalen v. United States*, 85 Fed. Cl. 380, 382-83 (2009).

⁶⁴ See *Delpin Aponte v. United States*, 83 Fed. Cl. 80, 91-92 (2008).

⁶⁵ See, e.g., *Gayle v. United States*, 85 Fed. Cl. 72, 76-77 (2008).

⁶⁶ See Rules Committee's 2002 Notes preceding RCFC 1.

Class Action and Collective Action Overview

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The views and opinions presented by the authors in this outline do not necessarily reflect those of the U.S. Department of Justice.

I. Court's Authority to Certify Case as a Class Action

The class action is considered “a procedural technique for resolving the claims of many individuals at one time, comparable to joinder of multiple parties and intervention.” *Quinault Allottee Association v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272, 1274 (1972) (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968)). The Court is authorized by 28 U.S.C. § 2071 to adopt procedural rules to govern the Court's management of cases that fall within the Court's jurisdiction, and acting under that authority the Court's procedural rules include RCFC 23, which governs the decision to certify a case as a class action and the procedures that must be followed after a class action is certified by the Court.

II. History of Class Actions in the CFC

The ability of this Court to entertain a class action predates the Court's adoption of a formal rule governing the certification of class action and the management of such actions.

In 1972, the Court of Claims was asked to certify a case as a class action by following the procedures set forth in Fed. R. Civ. P. 23 because the Court did not have a parallel rule. *See Quinault Allottee Association v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272, 1273 (1972). The Court of Claims declined at that time to adopt or promulgate any general rule on class actions, but indicated that it would “continue to consider that possibility for the future[,]” noting that “[t]ime, experience, and perhaps experiment should precede the jelling of an over-all formula.” *Quinault*, 453 F.2d at 1275-76. In deciding to proceed on a case-by-case basis, the *Quinault* court articulated the criteria that it had considered in deciding to allow that case to proceed as a class action. Those criteria – which have since been referred to as the *Quinault* factors – are:

- (i) [the members must] constitute a large but manageable class, (ii) there is a question of law common to the whole class, (iii) this common legal issue is a predominant one, overriding any separate factual issues affecting the individual members, (iv) the claims of the present plaintiffs are typical of the claims of the class, (v) the Government has acted on grounds generally applicable to the whole class, (vi) the claims [of the class members] are so small that it is doubtful that they would be pursued other than through this case, (vii) the current plaintiffs will fairly and adequately protect the interests of the class without conflict of interest, and (viii) the prosecution of individual actions by members of the class, some in district courts and some in this court, would create a risk of inconsistent or varying adjudications.

Quinault, 453 F.2d at 1276 (footnote omitted).

Ten years after the *Quinault* decision was issued, the Claims Court formally adopted the following class action rule:

A motion to certify a class action shall be filed with the complaint and comply with Rule 3(c), with service to be made as provided in Rule 4. The court shall determine in each case whether a class action may be maintained and under what terms and conditions.

Rule 23, Rules of the United States Claims Court (effective Oct. 1, 1982), 1 Cl. Ct. XXII-CXLVI (1982). When the Claims Court was renamed the United States Court of Federal Claims in 1992, Rule 23 was not revised. During this time period, because RUSCC 23 did not articulate the standards under which the Court should determine whether to certify a case as a class action, the Court continued to look to and apply the *Quinault* factors. See *Kominers v. United States*, 3 Cl. Ct. 684, 686 (1983) (“there has been no great departure from prior class certification criteria or court decisions through the enactment of RUSCC 23.”).

In 2002, Rule 23 was amended significantly as part of a major revision to the CFC’s rules in an effort “to create a set of rules that conforms to the Federal Rules of Civil Procedure as amended through November 30, 2001, to the extent practicable given differences in jurisdiction between the United States district courts and the United States Court of Federal Claims.” RCFC, 2002 Rules Committee Note.

Although RCFC 23 tracks Fed. R. Civ. P. 23 in many respects, there are significant differences that affect class action practice in this Court. However, under both rules, “[t]he class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Wal-Mart Stores, Inc. v. Duke*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). See also *West Chelsea Building, LLC v. United States*, No. 11-333L, slip op. at ___ (Fed. Cl. Oct. 11, 2011) (same).

III. Rule 23 Requirements

A. Timing

RCFC 23(c)(1)(A) provides that “[a]t an early practicable time after a person sues as a class representative, the court must determine by order whether to certify the action as a class action.”

Note that in the context of opt-out class actions governed by Fed. R. Civ. P. 23, the Supreme Court has held that the filing of a class action complaint “commences the action

for all members of the class as subsequently determined.” *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550-51 (1974). Subsequent Supreme Court decisions confirm that *American Pipe* “established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974). *Accord United Airlines, Inc. v. McDonald*, 432 U.S. 385, 391 (1977); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983). The Federal Circuit has held that this same tolling rule applies to opt-in class actions filed under RCFC 23. *See Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010).

B. Standard of Review and Burden of Proof

A plaintiff seeking class certification “bears the burden of establishing that all of the requirements of Rule 23 are satisfied.” *Jaynes v. United States*, 69 Fed. Cl. 450, 453 (2006). *See also Barnes v. United States*, 68 Fed. Cl. 492, 495 (2005) (“Plaintiffs bear the burden of establishing that action satisfies these [RCFC 23] requirements”); *Abel v. United States*, 18 Cl. Ct. 477 (1989). In assessing whether this burden has been met, the Court has emphasized that the requirements of Rule 23 “are in the conjunctive; hence, a failure to satisfy any one of them is fatal to class certification.” *Barnes*, 68 Fed. Cl. at 494. *See also Curry v. United States*, 81 Fed. Cl. 328, 332 (2008) (“To prevail in their motion to certify a class action, plaintiffs must establish that their proposed class satisfies each element”). Applying this standard, the Court may deny a motion for class certification if a plaintiff fails to meet its burden with respect to any element. *See Radioshack Corp. v. United States*, No. 06-28T, 2012 WL 2512922 (Fed. Cl. June 29, 2012) (tax refund case in which court held that plaintiff’s failure to demonstrate numerosity “standing alone, is sufficient to deny class certification”); *West Chelsea Building, supra*, slip op. at 8-13 (takings case in which court denied motion for class certification due to plaintiffs’ failure to meet their burden with respect to the numerosity requirement).

The Supreme Court recently clarified that “Rule 23 does not set forth a mere pleading standard.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Instead, a “party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Id.* (emphasis in original). The Supreme Court has recognized that court “it may be necessary for the court to probe behind the pleadings” and that “certification is proper only if ‘the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’” *Id.* (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982)). “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim” because “the class determination generally involves

considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Id.* (internal quotations and citations omitted). Thus, “to certify a class, plaintiffs must establish, by a preponderance of the evidence, that the proposed action satisfies each of the five elements” of RCFC 23. *Haggart v. United States*, 89 Fed. Cl. 523, 530 (2009) (citing *Filosa v. United States*, 70 Fed. Cl. 609, 615 (2006)).

C. Elements

RCFC 23 identifies four specific prerequisites that must be met before the Court can certify a class action:

One or more members of a class may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

RCFC 23(a). Rule 23(b) then specifies that a class action “may” be maintained if the four prerequisites listed in Rule 23(a) are satisfied and if:

. . . the United States has acted or refused to act on grounds generally applicable to the class; and

. . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by members of the class; and (C) the difficulties likely to be encountered in the management of the class action.

RCFC 23(b) [check current structure of rule/quote].

IV. Differences Between Class Actions Under RCFC 23 and Fed. R. Civ. P. 23

A. Opt-In vs. Opt-Out

Even when the Court of Federal Claims determines that the certification of a class would provide “discernable advantages over the available alternative methods of adjudication[.]

[t]he court’s rules allow only opt-in classes, not opt-out classes.” *Jaynes*, 69 Fed. Cl. at 460. *See also* RCFC 23, Rules Committee Notes, 2002 Revision (“unlike the FRCP, the court’s rule contemplates only opt-in class certifications, not opt-out classes”); *Curry*, 81 Fed. Cl. at 331 n.8 (noting that the 2002 revision of RCFC 23 “allows only opt-in classes”); *Sabo v. United States*, 102 Fed. Cl. 619 (2011) (same); *Cooke v. United States*, 1 Cl. Ct. 695, 697 (1983) (under Claims Court’s rule, “class members are not bound by adjudication of the class action unless they specifically opt into the case”). The opt-in approach allowed under this Court’s rules “resembles permissive joinder in that it requires affirmative action on the part of every potential plaintiff” in order to join the lawsuit and ‘unidentified claimants are not bound’ by a ruling in defendant’s favor.” *Jaynes*, 69 Fed. Cl. at 460 (quoting *Buchan v. United States*, 27 Fed. Cl. 222, 223 (1992)).

Because RCFC 23 only allows for opt-in class actions, class actions in the CFC differ from opt-out class actions in federal district courts in that:

- The filing of the class action complaint does not bring the claims of the putative class members before the court.
- The court order certifying the action as a class action does not bring those claims before the court.
- When a class is certified, each putative class member must affirmatively join the action through the court’s opt-in process in order to bring his claim before the court.
- Initial eligibility of class members may be determined in connection with the opt-in process based on information that putative class members are required to include as part of the opt-in form or “entry of appearance” required to be submitted as part of the opt-in process.

B. Relief Available

The use of a class action to manage a large number of common claims does not expand the jurisdictional limits on the type of relief available in this Court. As explained in the Committee Notes to the 2002 revision to RCFC 23,

Because the relief available in this court is generally confined to individual money claims against the United States, the situation justifying the use of a class action are correspondingly narrower than those addressed in FRCP 23. Thus, the court’s rule does not accommodate, *inter alia*, the factual situations redressable through declaratory and injunctive relief contemplated under FRCP 23(b)(1) and (b)(2).

RCFC 23, Rules Committee Note, 2002 Revision.

V. Procedures in Class Actions

The decision to certify a class action triggers procedural requirements that affect the management of the case from the date of the order to certify through the final decision.

A. Order to Certify Class Action

Under RCFC 23(c)(1)(B), the Court's order certifying a class action must:

1. Define the class
2. Define the class claims, issues or defenses
3. Appoint class counsel under RCFC 23(g)

Ethics Nodes Raised When the Court Issues an Order Certifying a Class Action:

- The appointment of an attorney as class counsel creates a unique set of relationships between the class counsel and the class representatives, the as-yet-unidentified putative class members, and the class. In describing these relationships, the court has observed that “[t]he named plaintiffs in a class action suit and their counsel who seek to represent an absent class member must maintain a trust relationship with that absent class.” *Kominers v. United States*, 3 Cl. Ct. 684, 686 (1983).
- RCFC 23(g)(4) states that “[c]lass counsel must fairly and adequately represent the interests of the class.”
- In class action context, who is the client? The representative plaintiffs? The class? The putative class members (before they opt-in)? The individual class members who opt-in to the certified class action?
- Model Rule 1.2 Scope of Representation – lawyer must abide by the client's decisions concerning the objectives of representation, but who sets those objectives in a class action?

B. Notice to Class of Certification and Opportunity to Opt-In

When the Court certifies a class action, it “must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” RCFC 23(c)(2)(B). The notice must

include certain required information, stated “clearly and concisely . . . in plain, easily understood language.” *Id.*

C. Opt-In Process

The notice required under RCFC 23(c) must inform class members of “the time and manner for requesting inclusion” in the class. Although the rule does not dictate the manner for requesting inclusion, it’s common practice in this Court for the notice to include an opt-in form that requires the class member to provide or affirm certain information that allows the class counsel and the defendant to make an initial assessment as to the eligibility of that individual to join as a class member.

D. Communications with Class Members During Course of Litigation

In an opt-in class action, there are informal communications between individual class members and the class representatives and/or class counsel, and then there are more formal communications with the class that are required by RCFC 23.

During the course of a class action, the Court has discretion to issue orders governing the conduct of the action. Such orders “require – to protect class members and fairly conduct the action – giving appropriate notice to some or all of the class members of: (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action.” RCFC 23(d)(1)(B).

Ethics Nodes Related to Communications Between Class Counsel and Representative Plaintiffs or Class Members During Course of Litigation:

- Be aware of the intersections between Rule 23 procedures and professional responsibility obligations. Rule 23 requires certain communications, but those communications may not be adequate to meet professional responsibility requirements.
- Model Rule 1.4 Communication
 - 1.4(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- Model Rule 1.7 Conflicts of Interest. The representation of multiple parties can result in conflicts of interest that must be resolved. The management of these

conflicts in the class action context may be affected by how the “client” is defined. See ABA Annotated Model Rules of Prof’l Conduct R. 1.7 cmt. (3d ed. 1996) (“a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.”).

E. Settlement

Under RCFC 23(e), class claims “may be settled, voluntarily dismissed, or compromised only with the court’s approval.” Rule 23 specifies the procedures that apply to a proposed settlement or other resolution of the class claims. Those steps generally include:

- Notice of Proposed Settlement to Class - Rule 23(e) requires the court to “direct notice in a reasonable manner to all class members who would be bound by the proposal.” Prior to ordering that notice of a proposed settlement be provided to the class of a proposed settlement, the court reviews the terms of the proposal to assess, on a preliminary basis, whether the proposal is fair, reasonable, and adequate.
- Hearing and Opportunity for Class Members to Object – If a proposed class action settlement would bind class members, then Rule 23(e) provides that the court may approve the proposal “only after a hearing and on finding that it is fair, reasonable, and adequate.” RCFC 23(e)(3). In addition, for such proposals, any class member may object to the proposed settlement, and those objections “may be withdrawn only with the court’s approval.” RCFC 23(e)(5).

Ethics Nodes Related to Settlement:

- Model Rule 1.2 Scope of Representation – Rule 1.2(a) states that “[a] lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.” Again, how the “client” is defined in a class action affects the application of this rule to settlements in the class action context.
- Model Rule 1.4 Communications – Rule 1.4(b) states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” This requirement applies to the communication of settlement offers.
- Model Rule 1.7 Conflict of Interest

F. Attorney's Fees

In class actions, the court plays an important role in overseeing any award of attorney's fees to the designated class counsel.

At the early stages of the case, when the Court is appointing class counsel, the court "may order potential class counsel to provide information on any subject to the appointment and to propose terms for attorney's fees and nontaxable costs." RCFC 23(g)(1)(C). The court may also "include in the appointing order provisions about the award of attorney's fees or nontaxable costs under RCFC 23(h)." RCFC 23(g)(1)(D).

At the other end of the class action, RCFC 23(h) provides that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Rule 23(h) also sets forth the following procedures for requesting that such an award be made:

- (1) A claim for an award must be made by motion under RCFC 54(d)(2), subject to the provisions of this subdivision (h), at the time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
- (2) A class member, or party from whom payment is sought, may object to the motion.
- (3) The court may hold a hearing and must find the facts and state its legal conclusions under RCFC 52(a),

RCFC 23(h).

Ethics Nodes Related to Attorney's Fee Award in Class Action Context:

- Model Rule 1.4 Communications with Client
- Model Rule 1.5 Fees

VI. Collective Actions under the FLSA and ADEA

A. Statutory Basis

The Fair Labor Standards Act (FLSA) provides that "[a]n action to recover [unpaid minimum wages, overtime, and liquidated damages] may be maintained against any

employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated*. 29 U.S.C. § 216(b) (emphasis added). Such suits are commonly referred to as “collective actions.” This term does not appear in section 216(b), but it was utilized in hearings on the Portal-To-Portal Act amendments to the FLSA to describe suits brought by employees on behalf themselves and others under section 216(b). *See United States v. Cook*, 795 F.2d 987, 992-93 (Fed. Cir. 1986), quoting 93 Cong. Rec. 2182 (Remarks of Senator Donnell). Provisions added by these amendments also refer to such a suit as “a collective or class action,” 29 U.S.C. § 256, or as “a collective or representative action,” 29 U.S.C. § 257. (The term “collective action,” as used here, means an action on behalf of others similarly situated that is *not* a class action under Fed. R. Civ. P. 23 or its Court of Federal Claims (CFC) counterpart, RCFC 23.) Collective actions are also available in suits under the Age Discrimination in Employment Act (ADEA), through 29 U.S.C. § 626(b), which incorporates the remedies provided in section 216(b).

B. Procedures in Collective Actions

1. Court Discretion: Procedures in collective actions, unlike class actions, are largely within the court’s discretion. Collective actions are not subject to the provisions of Fed. R. Civ. P. 23(c)(2) or RCFC 23(c)(2), nor are procedures for collective actions otherwise provided by statute or rule. That procedures in collective actions are a matter of court discretion is implicit in the Supreme Court’s holding in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). There, the Court held “that district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) (1982 ed.), as incorporated by 29 U.S.C. § 626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs.” 493 U.S. at 169. The rule that the Court cited as a source of this discretion was not Fed. R. Civ. P. 23, but Fed. R. Civ. P. 83, under which, the Court observed, “courts, in any case ‘not provided for by rule,’ may ‘regulate their practice in any manner not inconsistent with’ federal or local rules.” 493 U.S. at 172.
2. Individual Written Consent: The FLSA contains one very significant provision affecting collective action and class action procedure. Immediately after the sentence in section 216(b) allowing collective actions, the statute states: “No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” This requirement, which applies to individual actions as well as collective and class actions, is at odds with Fed. R. Civ. P. 23, under which members of a class are parties to the action unless and until they requests exclusion. Fed. R. Civ. P. 23(c)(2)(B)(vi); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807-09 (1985). Thus, “[u]nlike Fed. R. Civ. P. 23, under which a class member must ‘opt out’ not to be bound, a ‘class’ member under [section 216(b)] must ‘opt in’ to be bound.” *Cook*, 795 F.2d at 990, citing *Schmidt v. Fuller Brush*

Co., 527 F.2d 532, 536 (8th Cir.1975) and *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir.1975). See also *Alvarez v. City of Chicago*, 605 F.3d 445, 448 (7th Cir. 2010) (“plaintiffs who wish to be included in a collective action must affirmatively opt-in to the suit by filing a written consent with the court, while the typical class action includes all potential plaintiffs that meet the class definition and do not opt-out”). This conflict between class action procedures and the FLSA’s written consent requirement does not exist in the CFC, because, under RCFC 23(c)(2)(B)(v), only opt-in classes are allowed. Thus, the procedures set forth in this rule may be utilized to implement section 216(b) collective actions in the CFC, if the prerequisites for a class action stated in this rule are met. *Delpin Aponte v. United States*, 83 Fed. Cl. 80, 92 (2008).

3. Certification and Notice: Rule 23 provides that once a class is certified, the court *must* direct the issuance of notice to class members. Fed. R. Civ. P. 23(c)(2); RCFC 23(c)(2). The discretion upheld in *Hoffmann-La Roche* presupposes that a collective action may proceed without certification and/or notice. As the Second Circuit has observed,

while courts speak of “certifying” a FLSA collective action, it is important to stress that the “certification” we refer to here is only the district court’s exercise of the discretionary power, upheld in *Hoffmann-La Roche*, to facilitate the sending of notice to potential class members. Section 216(b) does not by its terms require any such device, and nothing in the text of the statute prevents plaintiffs from opting in to the action by filing consents with the district court, even when the notice described in *Hoffmann-La Roche* has not been sent, so long as such plaintiffs are “similarly situated” to the named individual plaintiff who brought the action. . . . Thus “certification” is neither necessary nor sufficient for the existence of a representative action under FLSA, but may be a useful “case management” tool for district courts to employ in “appropriate cases.” . . .

Myers v. Hertz Corp. 624 F.3d 537, 555 n.10 (2d Cir. 2010), citing *Hoffmann-La Roche*, 493 U.S. at 169.

As the CFC has observed,

different courts have adopted variant procedures to govern a collective action, [including] . . . “a two-step ad hoc approach,” an approach that follows the requirements of Fed.R.Civ.P. 23, and an approach that follows the “spurious class action” that prevailed in the pre-1966 version of Fed.R.Civ.P. 23 However, over the past several years, most courts have generally employed a two-step

approach in determining whether it is appropriate to certify a collective action in a given case. The two-step approach to certification involves a preliminary determination of whether the plaintiffs were subject to a common employment policy or plan, and then, after discovery, an opportunity for the defendant to decertify the collective action on the ground that the plaintiffs are not in fact similarly situated. . . .

Whelan v. United States, 85 Fed. Cl. 380, 383 (Fed. Cl. 2009). As the Court in *Whelan* also noted, however, “[i]n this court, arguably the better practice is to amend a complaint to name all similarly situated employees who file consents to join an action brought under the FLSA. Filing a simple notice of consent to join may not be sufficient.” *Id.* at 384, n.2.

4. Tolling of the Statute of Limitations: As noted above, the filing of a class action normally tolls the statute of limitations for putative class members. However, 29 U.S.C. § 256 expressly states that in an action under the FLSA or the Davis-Bacon Act, the claims of individual plaintiffs are considered to be commenced, for statute of limitations purposes, on the date their written consents are filed.

There is a conflict among the circuits concerning whether this provision applies to ADEA cases. Compare *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463 (3d Cir. 1994) (tolling available because section 256 does not apply to ADEA) with *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996) (tolling not available because section 256 does apply to ADEA).

C. Ethical Issues in Collective Actions

Collective actions raise ethical issues similar to those presented by class actions, especially to the extent that the court adopts procedures similar to those prescribed by Rule 23.

- At the far extreme from a Rule 23 class action, a collective action may be indistinguishable from any other multi-plaintiff suit. As indicated in *Hoffmann-La Roche* and *Myers*, a collective action may proceed with neither certification nor notice, based simply upon the filing of written consents by similarly-situated plaintiffs. If the filing of consents is accompanied – as *Whelan* suggests it should be – by amendment of the complaint to name all similarly situated employees who file consents as plaintiffs, then the action is an ordinary multi-plaintiff action. It may loosely be termed a “collective” action, but it is not a “representative” action; *i.e.*, all of the joined plaintiffs are named plaintiffs.
- If there is no certification or notice, and also no amendment of the complaint naming additional plaintiffs, but only the filing of written consents, then the status of these plaintiffs is uncertain. This may trigger an obligation on the part of plaintiffs’ counsel

to seek certification, not necessarily in order to effectuate notice to other similarly situated employees, but to obtaining a ruling that these employees are indeed similarly situated and are parties to the collective action.

- Under the two-step approach commonly followed by the courts in collective actions, the stage at which a conditional certification and notice are requested presents many of the same issues presented when a motion for class certification is filed, including whether, at this stage, the attorney for the plaintiffs represents all employees who are conditionally determined to be similarly situated and entitled to notice.
- When unnamed plaintiffs join the litigation by filing written consents, whether pursuant to certification and notice or not, the ethical issues arising from the relationship of plaintiffs' attorney to the named representative plaintiffs and the unnamed represented plaintiffs are similar to those in a class action.
- Since collective actions are not governed by Rule 23, there is no requirement that settlements be approved by the court. However, FLSA rights cannot be waived or compromised outside the context of litigation except in a settlement supervised by the Secretary of Labor under 29 U.S.C. § 216(c), *D A Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) (or, in the case of Federal employment, in a settlement of a grievance brought by a union under a collective bargaining agreement, *O'Connor v. United States*, 308 F.3d 1233 (Fed. Cir. 2002)), and some courts have held that even litigation of FLSA claims cannot be compromised without court review and approval of the settlement for fairness, *see, e.g., Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982), at least where the settlement involves a prospective waiver of FLSA rights, *see Hohnke v. United States*, 69 Fed. Cl. 170 (2005).
- The provisions of Rule 23 concerning attorney fees do not apply to collective actions. However, the FLSA provides that in a suit for overtime compensation, "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Typically, plaintiffs' attorneys in collective or multi-plaintiff FLSA suits enter into a contingency fee agreement with each employee who submits a written consent, and any attorney fees recovered under section 216(b) are paid to the plaintiffs to partially reimburse them for the contingency fee they paid. Where attorney fees recovered under this section go to the attorneys rather than the plaintiffs, ethical issues may arise, especially when the fees are included in a settlement of the substantive claims. From the defendant's perspective, the total amount to be paid under the proposed settlement would be a dispositive factor in evaluating its desirability. Therefore, the portion of the settlement amount attributable to fees would come at the expense of the amount to be received by the plaintiffs.

SELECTED ETHICAL ISSUES IN EMPLOYMENT LITIGATION

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I. INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS

Not infrequently, privileged documents are accidentally included in a group of documents produced pursuant to a production request. That raises issues as to whether the attorney/client privilege has been waived not only as to the document itself but as to the entire subject matter discussed or reflected in the document. See *Van Hull v. Marriott Courtyard*, 63 F. Supp. 2d 840 (N.D. Ohio 1999) (no waiver as to documents or subject matter where plaintiff's notes of statements to him by his lawyer were inadvertently disclosed; opposing counsel required to return the notes without using or disseminating them).

In addition, there is the question of what rights or obligations the receiving lawyer has with respect to reviewing, using and/or disposing of the document. On the one hand, the receiving lawyer has a duty to the client, favoring retention and use. On the other hand, there are countervailing "administration of justice" issues underlying the privilege which also come into play. In ABA Formal Opinion 92-368 (10/16/92), the Committee concluded that, upon receipt of apparently privileged material that has obviously been inadvertently transmitted (in production, by fax, etc.), the receiving lawyer should avoid reviewing the material and contact sending counsel for instructions on handling or disposition. However, in ABA Formal Opinion 05-437 (2005) the earlier opinion was withdrawn, based on revisions to Model Rule 4.4(b) which provides only that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender," with an accompanying Comment that "whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived."

In September, 2008, Congress passed and the President signed a law adopting new Federal Evidence Rule 502 relating to waiver of the privilege for substantive evidentiary purposes, again tracking the original ABA Opinion. 502(a) provides that "when the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Then, under the heading "Inadvertent Disclosure", 502(b) provides that "when made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." Further, the Rule states that if the disclosure occurred in a State proceeding, the disclosure "does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this Rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred."

Earlier, effective December 1, 2006, the federal rules were amended to provide a process by which the producing party may claim privilege as to already-produced information, have the receiving party “return, sequester or destroy” or present it to the court under seal, and thereby have the privilege issues resolved. F.R.C.P. 26(b)(5)(B). This process is in addition to that provided for the parties to agree to a “claw back” or “quick look” process for handling inadvertently disclosed privilege materials in the case management process under Rules 16 and 26, and Form 35.

In construing the application of new Rule 502, one court concluded that a pre-existing five-part test should also be used in analyzing whether a waiver occurred, namely (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) any delay in measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would or would not be served by relieving the party of its error. *Peterson v. Bernardi*, 262 F.R.D. 424, 428-29 (D.N.J. 2009) (citing and quoting *Ciba-Geigy Corp. v. Sandoz, Ltd.*, 916 F. Supp. 404, 411 (D.N.J. 1995)) in concluding that plaintiff’s broad, unsupported statements that documents allegedly inadvertently disclosed were protected by the attorney-client privilege and work product doctrine were insufficient to establish that the documents were privileged as required to compel defendant to return the documents under Rule 502).

If a lawyer receives privileged documents through inadvertent disclosure or otherwise, should disqualification occur? Where the disclosure did not result in waiver of the privilege and future proceedings are substantially tainted by opposing counsel’s knowledge of privileged matter, courts have granted disqualification (and sometimes dismissal of claims, particularly where they are based on and the result of improper disclosure). See *Richards v. Jain*, 168 F. Supp. 2d 1195, 2000 (W.D. Wash. 2001) (review by paralegal in plaintiff’s counsel’s office of hundreds of documents marked as privileged from a disk downloaded from plaintiff’s harddrive at work requires disqualification of plaintiff’s counsel months after commencement of suit, particularly where they never notified opposing counsel and made no attempt to return materials or cease review of them). See also *Ackerman v. National Property Analyst, Inc. v. Talansky*, 887 F. Supp. 510 (S.D.N.Y. 1993) (plaintiff’s counsel who deliberately and knowingly affiliated themselves with former counsel for defendants and thereby obtained privileged information were disqualified, and claims based on disclosures were dismissed).

However, where counsel receiving the privileged documents takes appropriate measures to secure the documents from widespread disclosure and seeks a ruling from the court regarding their privileged nature and/or the effect of the disclosure, courts have denied disqualification, particularly where the opposing party has not been substantially prejudiced. See *Milford Power Ltd. v. New England Power Co.*, 896 F. Supp. 53, 58-59 (D. Mass. 1995) (although defendant’s counsel had a clear obligation to return the documents marked privileged, they would not be disqualified where they submitted the documents to the court, did not act in bad faith and plaintiff would not be substantially prejudiced; court also ordered that all copies be destroyed and not used in litigation). See also *In re Nitla SA DE C.V.*, 92 S.W. 3d 419 (Tex. Sup. Ct. 2002) (where first judge held documents were not privileged and handed them to plaintiff’s counsel

who reviewed them notwithstanding defendant's caution that it would seek relief through mandamus, and second judge then held documents were privileged, court denied disqualification since plaintiff's counsel did not act unprofessionally or obtain the documents wrongfully, and there was no evidence that plaintiff's counsel had developed its trial strategy based on the reviewed documents).

II. PURLOINED DOCUMENTS

What is the result if the documents are received not from the opposing party but from another source (such as a current or former employee) who took them without authorization?

In a 1994 Opinion, the ABA Committee noted that one decision had prohibited the receiving lawyer's use of the adverse party's confidential documents provided by a current employee of that party, *In re Shell Oil Refiner*, 143 F.R.D. 105, amended, 144 F.R.D. 73 (E.D. La. 1992), but that three jurisdictions (Maryland, Virginia and Michigan) had concluded that the receiving lawyer has no obligation to disclose to a court or the adverse party that he possesses the adverse party's privileged or confidential information and that the receiving lawyer may use such materials. ABA Formal Opinion 94-382 (7/5/94). Following its earlier Opinion 92-368, discussed above, the Committee concluded that the receiving lawyer should avoid reviewing the material and contact sending counsel for instructions on handling or disposition. Again, however, the Committee withdrew the Opinion (Formal Opinion 06-440 (3/16/06)) but this time on the basis that the Model Rules (including 4.4(b)) have no application in this situation. Most authorities have nonetheless concluded that attorneys do have ethical duties or that parties themselves should be sanctioned. See Philadelphia Bar Ass'n Professional Guidance Committee, Op. 2008-2 (3/08) (duties of lawyer to system and client where client obtains opposing party's e-mails surreptitiously); District of Columbia Bar Opinion No. 242 (9/21/93) (addressing the problem of receiving documents from a client (or prospective client) that appear to be the property of the client's former employer and the duty to return the documents to that employer if they were improperly removed unless to do so would reveal confidences protected by the attorney/client privilege); *Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. Ct. App. 1994) (dismissal of action for improper evidence-gathering affirmed where employee surreptitiously read and purloined several privileged documents from employer's attorney, since the taint was incurable); but see *Kempcke v. Monsanto Co.*, 132 F.3d 442, (8th Cir. 1998) (summary judgment for employer reversed where termination resulted from employee finding and refusing to return internal computerized information regarding "organizational upgrade plan" showing employee on a "probably will not make it" list).

In rendering its opinion in 2008, the Philadelphia Bar Association, in considering the issues presented by the client obtaining his ex-wife's e-mail surreptitiously, stated the "inquiry to be whether the inquirer is constrained by the Pennsylvania Rules of Professional Conduct from (a) reviewing these e-mails and/or (b) making use of them in the litigation between the inquirer's client and the client's ex-wife." The Committee then continued:

"Rule 4.4 Respect for Rights of Third Persons is of paramount concern. It provides that:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. (emphasis supplied)

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or should reasonably know that the document was inadvertently sent shall promptly notify the sender.

The Committee has insufficient information about the manner in which the client gained access to the subject e-mails to state with any certainty whether Rule 4.4 (a) is implicated. However, there is statutory authority in the Commonwealth that renders "unauthorized" access to computer-derived information a third-degree felony under certain circumstances relating to '[U]nlawful us of computer . . .' and 'Computer theft', respectively. The Committee recommends, therefore, in accord with the requirements of Rule 1.1, Competence which provides in part that, 'competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation' and Rule 1.3, Diligence which provides that, 'A lawyer shall act with reasonable diligence and promptness in representing a client' that the inquirer exercise considerable caution by familiarizing himself with any applicable criminal or civil law and then discussing at length with the client the question of how and to what extent he became privy to the subject e-mails before deciding whether or how to proceed. In the event potential civil or criminal liabilities cannot be ruled out under these circumstances and the client ignore the inquirer's advice against using the e-mails and insists that they be used in providing representation to the client, the inquirer should seriously consider withdrawing from the representation under one or both of the following provisions of Rule 1.16, Declining or Terminating Representation:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: . . .

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent . . .

(4) the client insists upon taking action the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

The Committee cautions that such withdrawal must nevertheless be in a manner that does not violate any applicable duty of confidentiality to the client under Rule 1.6 (a).”

III. METADATA MINING

An increasing problem in this era of e-discovery as well as rapid exchange of documents electronically is the transmission of “metadata” which often contain confidential and/or privileged information regarding the history of the document, deleted changes, dates of changes, etc. Whether “mining” this metadata information is or is not ethical has been the subject of continued and recent debate.

Most authorities agree that Model Rule 1.6 regarding maintaining client confidences imposes a duty upon lawyers sending documents that may contain confidential/privilege metadata to take precautions to avoid disclosure of such information. ABA Formal Opinion 06-442 (2006). To avoid the problem, many firms have purchased software that removes or “scrubs” metadata from documents before they are sent. However, that is not yet required, and the problem may equally be avoided by sending a different version of a document by hard copy or scanning or faxing a final version. *Id.*

There is far less agreement among the authorities regarding the duties of a receiving lawyer. In 2001 the New York State Bar Association Committee on Professional Ethics adopted the position that “a lawyer may not make use of computer software application to surreptitiously ‘get behind’ visible documents” NYSBA-Committee on Professional Ethics Opinion 749 (12/14/01). Since then, ethics authorities in Alabama, Arizona, Florida, Maine, New Hampshire and New York County have also reached the same or similar conclusion.¹ The basis for their conclusion derives primarily from the view that metadata mining would damage the attorney-client relationship because clients would be less willing to communicate with counsel out of fear that their communications could not be adequately safeguarded and that in transmitting an electronic document counsel generally does not intend to convey the “hidden” material or information and thus the disclosure is “inadvertent.” In that situation a lawyer reviewing the metadata knowing that it was inadvertently disclosed may violate Rule 8.4(c), as recently also found by the West Virginia Ethics Authority. West Virginia Opinion 2009-01.

However, a different view was taken by the American Bar Association in Opinion 06-442 and by the Maryland State Bar Association in Ethics Docket No. 2007-09. Both concluded that metadata mining should be handled in the same way as inadvertent disclosures generally, that Rule 4.4(b) only requires notice to the sending lawyer of any inadvertent disclosure and that that

¹ Alabama State Bar Office of General Counsel Formal Opinion 2007-02 (limiting its conclusion to the non-litigation context); State Bar of Arizona Ethics Committee Ethics Opinion 07-03; The Florida Bar Ethics Department Ethics Opinion 06-02; Maine Board of Overseers of the Bar Professional Ethics Commission Opinion #196; New Hampshire Bar Association – Ethics Committee Opinion 2008-2009/4 (excluding from its analysis “electronic materials subject to discovery”); NYCLA Committee on Professional Ethics Opinion 738 (March 24, 2008) (same).

Rule gives a lawyer discretion to review misdirected documents, so a lawyer should have the same discretion to review documents for metadata.

Four other bar associations have also concluded that metadata “mining” should be permissible under some circumstances. Thus, the District of Columbia found that a “receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent.” D.C. Opinion 341. Similarly, Colorado permits metadata mining unless the receiving attorney is notified by the sender prior to the recipient’s review of the metadata that the metadata contains confidential information. Colorado Bar Ethics Opinion 119. The Pennsylvania Bar Association adopted a case-by-case inquiry in consideration of several factors, including whether the lawyer could use the metadata as a matter of substantive law, the potential effect on the client’s matter if the lawyer reviews the metadata, and the client’s views about metadata mining. Pennsylvania Bar Association Formal Opinion 2009-100. Finally, West Virginia adopted a somewhat more restrictive view that “if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences.” West Virginia Bar L.E. 02009-01. As that opinion also advises, if the receiving lawyer is not certain whether the disclosure of metadata was inadvertent, the lawyer should (but is not required?) to seek clarification from the sending lawyer before reviewing the metadata.

Thus, determining whether “mining” is permitted requires analysis of the ethics rules and opinions particular to the jurisdiction, as well as consideration of choice of law rules if the transmission occurs from a state barring “mining” to one that permits it (or vice versa).

IV. MEDIATION/NEGOTIATION REPRESENTATIONS

Recognizing the different types and nature of communications made during mediation and settlement negotiations, ABA Formal Opinion 06-439 (2006) differentiated between knowing or affirmative “false statements of material fact or law” and statements which can be considered “puffing.” As the Committee stated:

“ . . . Affirmative misrepresentations by lawyers in negotiation . . . have been the basis for the imposition of litigation sanctions, and the setting aside of settlement agreements, as well as civil lawsuits against the lawyers themselves.

“In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client’s willingness to compromise, or present a client’s bargaining position without disclosing the client’s ‘bottom line’ position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses

of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation.”

As the Opinion states, “the issues addressed herein are governed by Rule 4.1(a) [which] prohibits a lawyer ‘in the course of representing a client,’ from knowingly making ‘a false statement of material fact or law to a third person.’” Comment [2] to that Rule amplifies that a “statement of fact” does not include “estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim.” Additionally, the Opinion states that “Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that related to neither fact nor law.”

Before proceeding further, the Opinion also differentiates the situation where a representation is made in a court proceeding. As the Opinion states in a footnote:

“Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a ‘tribunal.’ It does not apply in mediation because the mediator is not a ‘tribunal’ as defined in Model Rule 1.00(m).

* * *

“Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates.”

Additionally, the Opinion notes that while Rule 8.4(c) broadly prescribes “conduct involving ‘dishonesty, fraud, deceit or misrepresentation,’ [it] does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1.”

Regarding candor in negotiations if the court is involved, the Opinion then quoted from earlier Formal Opinion 93-370 regarding whether a lawyer may in some circumstances ethically decline to answer a judge’s questions concerning the limits of the lawyers settlement authority in a civil matter, as follows:

“While . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party’s actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8/4(c) also prohibits a lawyer from engaging

in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.”

The Opinion then addresses whether there is a higher duty of candor in the mediation context versus other types of negotiations and concluded that the standard is the same. In so concluding, the Opinion states that “a lower standard of truthfulness [is not] warranted because of the consensual nature of mediation,” stating that:

“Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent or implicitly by agreeing to engage in a process in which it is somehow ‘understood’ that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.”

However, in a footnote the Opinion also offers the following counsel:

“There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator’s trust or to provide the mediator with critical information regarding the client’s goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, ‘perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives.’ . . . Thus, in extreme cases, failure to be forthcoming even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer’s duty to provide competent representation under Model Rule 1.1.”

Finally, the Opinion states in its penultimate paragraph:

“We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements ‘of fact,’ are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client’s board of directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to

settle for more than \$50.00. However, it would not be permissible for the lawyer to state that the board of directors had formally disapproved any settlement in excess of \$50.00, when authority had in fact been granted to settle for a higher sum.”

V. THREATS OF CRIMINAL PROSECUTION

Originally, under the Model Code, D.R. 7-105 provided that “a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.” No similar provision was adopted as part of the Model Rules. As the ABA Committees stated in Formal Opinion No. 92-363 (7/6/92), “the deliberate omission of D.R. 7-105(A)’s language or any counterpart from the Model Rules rested on the drafter’s position that ‘extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically.’”

The Committee then reviewed Model Rule 8.4 regarding a lawyer engaging in extortionate conduct, Rule 4.4 prohibiting a lawyer from using means that have no substantial purpose “other than to embarrass, delay or burden a third person,” Rule 4.1 imposing a duty on lawyers to be truthful when dealing with others and Rule 3.1 prohibiting an advocate from asserting frivolous claims. After further discussing each Rule, the Committee then stated:

“Accordingly, it is the opinion of the Committee that a threat to bring criminal charges for the purpose of advancing a civil claim would violate the Model Rules if the criminal wrongdoing were unrelated to the client’s civil claim, if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded, or if the threat constituted an attempt to exert or suggest improper influence over the criminal process. If none of these circumstances was present, however, the threat would be ethically permissible under the Model Rules.”

As the Committee further stated, “a limitation on the lawyer’s duty to the client is not justified when the criminal charges are well-founded in fact and law, stem from the same matters as the civil claim, and are used to gain legitimate relief for the client.”

However, the Committee also stated that:

“This opinion should not be construed as in anyway affecting whatever duty a lawyer may have under that Rule [8.3] to report misconduct of another lawyer. Likewise, threatening to bring criminal charges, or agreeing to forbear doing so in return for a settlement of a civil action, may well have civil or criminal consequences for the forbearing lawyer or client in the relevant jurisdiction. . . .”

Further, the Committee noted that a number of states had continued the old D.R. 7-102 prohibition in their new model rules, including Illinois, Texas, Connecticut, Maine and the District of Columbia, and that New Jersey and Wisconsin had construed their model rules to prohibit such threats as well. See also Ohio Rule 1.2(e) (which also prohibits threats of ethical charges against opposing counsel as leverage).

Thus, whether threats of criminal prosecution do or do not violate ethical principles in a particular jurisdiction requires review of the current version of the Model Rules, ethics opinions by the cognizant authority and potentially construction of the facts and circumstances of the threats even if there is no express prohibition under any rule or opinion.

VI. DEALING WITH THE LYING CLIENT

Lawyers are not infrequently confronted with troublesome clients who say one thing before a deposition (for example) and something different during.

Model Rule 3.3(a) provides that “a lawyer shall not knowingly do any of the following:

- (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

* * *

- (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client or, witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal. . . .”

In Rule 1.0, knowingly or knows “denotes actual knowledge of the fact in question” although “a person’s knowledge may be inferred from the circumstances.” Further, Rule 3.3(b) provides that “a lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable measures to remedy the situation including, if necessary, disclosure to the tribunal.” Courts construing the “knowing” requirement have some times concluded that inconsistent statements or mere suspicion are insufficient to create an ethical problem for the attorney where suspected client perjury is involved. See, e.g., In Re Grievance Committee of the United States District Court, 847 F.2nd 57 (2nd Cir. 1988).

In Formal Opinion 93-376 (1993) the ABA Committee was asked to address the “ethical obligations of a lawyer in a civil case who was informed by her client after the fact that the client lied in responding to interrogatories and deposition questions, and supplied a falsified document

in response to a request for production of documents.” The Committee began by analyzing the principles behind Rule 3.3 and stated that “as was made clear in Formal Opinion No. 87-353, disclosure of a client’s perjury is required by Rule 3.3 where a lawyer has offered material evidence to a tribunal and comes to know of its falsity, or when disclosure of a material fact is necessary to avoid assisting a criminal or fraudulent act by the client.” The Committee then stated: “However, because the client’s misrepresentations took place during pretrial discovery and none occurred in open court, the question arises whether the applicable rule of conduct is Rule 3.3 or Rule 4.1 (‘Truthfulness in Statement to Others’).” As the Committee noted “unlike the duty of candor toward a ‘tribunal’ in Rule 3.3, the duty of truthfulness towards ‘others’ in Rule 4.1 does not expressly trump the duty to keep client confidences in Rule 1.6. If it is Rule 4.1 rather than Rule 3.3(a) that applies in this context, the prohibition on disclosure of client confidences in Rule 1.6 must be given full effect.”

Noting that once a deposition is signed and filed or document produced “there is potential ongoing reliance upon their content which would be outcome determinative, resulting in an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement,” the Committee concluded:

“The Committee is therefore of the view that, in the pretrial situation described above, the lawyer’s duty of candor towards the tribunal under Rule 3.3 qualifies her duty to keep client confidences under Rule 1.6. Continued participation by the lawyer in the matter without rectification or disclosure would assist the client in committing a crime or fraud in violation of Rule 3.3(a)(2). Although the perjured deposition testimony and the altered mail log may not become evidence until they are offered in support of the motion for summary judgment or actually introduced at trial, their potential as evidence and their impact on the judicial process trigger the lawyer’s duty to take reasonable remedial measures under Rule 3.3(a)(4), including disclosure if necessary, according to the complementary interpretation of subsections (a)(2) and (a)(4) in ABA Formal Opinion No. 87-353.”

The Opinion then continues that “it is important to note, however, that the Committee does not assert nor should it be inferred . . . that disclosure to the tribunal is the first and only appropriate remedial measure to be taken . . .” Thus, as the Comment to Rule 3.3 makes clear, “the duties of loyalty and confidentiality owed to her client require a lawyer to explore options short of outright disclosure in order to rectify the situation.” Accordingly:

“ . . . the lawyer’s first step should be to remonstrate with the client confidentially and urge him to rectify the situation. It may develop that, after consultation with the client, the lawyer will be in a position to accomplish rectification without divulging the client’s wrongdoing or breaching the client’s confidences, depending upon the rules of the jurisdiction and the nature of the false evidence.

For example, incomplete or incorrect answers to deposition questions may be capable of being supplemented or amended in such a way as to correct the record, rectify the perjury, and ensure a fair result without outright disclosure to the tribunal. Although this approach would not appear to be feasible in the case at hand, it is nevertheless the type of reasonable remedial measure that should be explored initially by a lawyer when confronted by a situation in which she realizes that evidence she has offered or elicited in good faith is false.”

If those efforts fail, “the lawyer must herself act to see that a fraud is not perpetrated on a tribunal.” First, “at a minimum she must withdraw from the representation so as to avoid assisting the client’s fraud in violation of Rules 3.3 and 1.2(d).” However, since withdrawal alone may not rectify the problem, the Committee then posited that “it is possible that so-called ‘noisy’ withdrawal procedures could be effective in the instant case in a way that is tantamount to disclosure,” citing ABA Formal Opinion No. 92-366 (1992). This approach “is appealing as a remedial measure because it is less intrusive on the confidential relationship between lawyer and client than outright disclosure to the tribunal under Rule 3.3(a)” and “may also have the advantage of directly and expeditiously rectifying the fraud in way that does not compromise the tribunal and prevent the case from proceeding.

“On the other hand, ‘noisy withdrawal’ may not be an entirely effective means of dealing with the type of client fraud likely to occur in the pretrial stages of a case” since it “does not necessarily put either successor counsel or the opposing party on notice as to *why* the documents are being disaffirmed.” Accordingly, the Committee concluded: “Thus, notwithstanding withdrawal and disaffirmance, the fraud could continue to adversely affect the proceedings and ultimate disposition of the case. Direct disclosure under Rule 3.3, to the opposing party or if need be to the court, may prove to be the only reasonable remedial measure in the client fraud situations most likely to be encountered in pretrial proceedings.”

In sum, the handling of client perjury requires careful consideration of a number of factors, frequently in consultation with in-house or outside counsel as to the approach which best fits the circumstances and accomplishes the effective balance of the lawyer’s duties to the client and to the system.

National Employment Lawyers Association
Fall Seminar
“Securing Wages, Protecting Hours: Representing Workers In Individual & Collective Actions
Under The FLSA”

ETHICAL ISSUES IN REPRESENTING WORKERS IN WAGE AND HOUR ACTIONS¹

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I. SOLICITING AND ADVERTISING: MAKING THE FIRST CONTACT

Employment cases often start with just one or two plaintiffs. In assembling a class or collective action, the plaintiffs' lawyer usually must communicate with many additional people who may become clients or witnesses, including potential class representatives, opt-in plaintiffs, declarants, and fact witnesses. These communications must be guided by the ethical rules against improper solicitation, along with the prerogatives that may protect such speech, such as the First Amendment and an attorney's professional duty to prosecute the case.

A. United States Supreme Court Decisions

In *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 454 (1978), the Court upheld a blanket prohibition against any form of in-person solicitation of legal business for pecuniary gain.

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court held that lawyer advertising falls in the category of constitutionally protected commercial speech.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), limited *Ohralik*'s prophylactic ban to in-person and telephonic solicitations and held that the ban does not apply to printed advertisements. In *Zauderer*, the Supreme Court evaluated constitutional limitations on the content of printed solicitations. The State may always regulate false or misleading statements. Other restrictions may be made only "in the service of a substantial governmental interest and only through means that directly advance that interest." *Zauderer* at 638. For instance, the State's desire that attorneys maintain their dignity in communications with the public is not an interest substantial enough to justify abridgement of the First Amendment right. *Id.* at 648.

In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Court held that a State Bar Association may not preclude a lawyer from sending mail advertisements to individuals who are known to require specific legal services. The Court rejected the claim that *Shapero* was *Ohralik*, writing: "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero*, 486 U.S. at 475. The letter sent by Shapero posed much less risk of overreaching or undue influence than in-person solicitation because of the absence of "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer." *Id.* The recipient of a letter is free to ignore the mailing, discard the mailing or if he chooses read it. The personalized mailing is, of course, subject to the same limitation on misrepresentation as any other public communication.

In *re Primus*, 436 U.S. 412 (1978), the Court held that the *Ohralik* prohibition on in-person and telephonic solicitation does not apply to non-profit organizations. The constitutional ability to ban solicitation is limited to situations where the lawyer is motivated by pecuniary gain. The Supreme Court specifically ruled that in cases where there is no motivation for pecuniary gain (public interest litigation), the Bar may not regulate solicitation of prospective clients because of the lawyers right to free association.

B. First Amendment Issues as Developed in Recent Federal Decisions

1. Florida Bar Rule Requiring Advance Submission of Advertisements for Review Not Unconstitutional

In *Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010), the Eleventh Circuit ruled that the Florida Bar’s advertising rule, which required a lawyer to submit television or radio advertisements for review at least 20 days before their planned airing date, did not amount to an unconstitutional imposition on protected commercial speech under the First Amendment. The rule was found to directly advance the Bar’s substantial interests in protecting the public from abusive practices and preserving the reputation and integrity of the legal profession. The court found that the 20-day delay placed minimal burden on attorneys. *Harrell*, 608 F.3d at 1245.

2. New York District court holds that restrictions on attorney solicitation letters must directly advance substantial government interest

In *Gordon v. Kaleida Health*, 2010 WL 3395543 (W.D.N.Y. 2010), the court held that unless shown to be false, deceptive, or relating to illegal activity, restrictions on attorney solicitation letters must be in furtherance of a “substantial governmental interest and only through means that directly advance that interest.” *Gordon*, at *7, (quoting *Shapero*, 486 U.S. at 472). The court discussed solicitation letters in the context of an FLSA collective action and further held that even regulations on attorney solicitations that may more clearly carry the potential for “abuse or confusion” could be no broader than reasonably necessary to prevent the “perceived evil.” *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

3. Second Circuit holds that several New York rules on advertising do not materially advance substantial state interests

In *Alexander v. Cahill*, 598 F.3d 79 (2nd Cir. 2010), a suit brought by a New York personal injury law firm and a not-for-profit consumer rights organization, the Second Circuit ruled on the First Amendment constitutionality of several new attorney advertising rules issued by the New York Code of Professional Responsibility. The court used the *Central Hudson* test to evaluate the New York rules and, in so doing, held that the rules must be in furtherance of a substantial government interest, materially advance that interest, and be narrowly tailored in a reasonable manner to serve that interest. *Alexander*, 598 F.3d at 88 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980)).

The first New York rule, a prohibition on client testimonials of a lawyer or law firm, failed to meet the test. *Alexander*, 598 F.3d at 92. Holding that common sense did not “support the conclusion that client testimonials are inherently misleading,” the Second Circuit contended that not all testimonials mislead, especially those accompanied by disclaimers, and that the defendants failed to show that the rule materially advanced the substantial state interest against deceiving prospective clients. *Id.*

The court further held that a rule prohibiting the portrayal of a judge was similarly invalid. *Id.* at 93. Although it was plainly true that “implying an ability to influence a court” was likely misleading, the defendants were found to have failed to draw “the requisite connection”

between such a “common sense observation” and the “portrayal of judges in advertisements generally.” *Id.* In fact, an advertisement like that used by the plaintiff law firm, in which the judge was portrayed as overseeing the fairness of the trial, was found “informative” rather than “misleading.” *Id.*

The third New York rule that did not pass muster was a prohibition on irrelevant techniques, or attention-garnering techniques, that were unrelated to the selection of counsel, including the portrayal of lawyers demonstrating characteristics unrelated to legal competence. *Id.* at 93. Warning not to conflate “irrelevant” components of advertising with “misleading” ones, the court asserted that “we cannot seriously believe” that “ordinary individuals” would be likely to be misled into thinking that attorneys could indeed tower over local buildings as depicted in their advertisements. *Id.* at 94.

The court then went on to proscribe a fourth New York rule prohibiting nicknames, mottos and trade names. *Id.* It held that the defendants failed to prove that consumers would be misled by names and promotional devices. *Id.*

Notably, the Second Circuit held that even if all of these rules had been shown to materially advance a substantial state interest, they would have still failed the *Central Hudson* inquiry because none of them were narrowly tailored to further the state interest of protecting prospective clients from deception. *Id.* at 96. This was because all of the rules prohibited “potentially” misleading techniques as opposed to “inherently” or “actually” misleading techniques. The “categorical nature” of New York’s prohibitions, where their target was merely latently misleading techniques, “was enough to render the prohibitions invalid.” *Id.*

Notwithstanding these holdings, the Second Circuit found that New York’s moratorium provision – a provision establishing a 30-day moratorium on the soliciting of accident victims – materially advanced a substantial state interest. *Id.* at 97-98.

4. Louisiana case a moderate contrast to Alexander

In a 2009 suit brought by the same not-for-profit group in *Alexander*, a district court in Louisiana interpreted similar rules on advertising somewhat differently. *See Public Citizen Inc., v. Louisiana Attorney Disciplinary Bd.*, 642 F.Supp.2d 539 (E.D. Louisiana 2009). The court in *Public Citizen Inc.* commenced with the same framework as in *Alexander*: if the advertising targeted by the Rules were only “potentially” misleading, rather than “inherently” misleading, then the *Central Hudson* test would be applied to determine whether the restrictions were narrowly tailored to further a substantial government interest. *Id.* at 552 (citing *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566).

The court held that the Louisiana State Bar Association could prohibit client portrayals by actors without an attached intelligible disclaimer. According to the court, such a rule did not violate the First Amendment. *Id.* at 556. Survey results produced by the Association suggested that such advertisements were “potentially” deceptive, such that the state had a substantial interest in preventing such deception and the disclaimer was a narrowly tailored means of prevention. *Id.*

In contrast to *Alexander*, the *Public Citizen* court upheld the constitutionality of a Louisiana rule prohibiting the portrayal of a judge. *Id.* at 557. The court again pointed to survey results indicating that a majority of the public would view ads portraying judges as implying that courts could be manipulated. *Id.*

As another contrast to *Alexander*, the court upheld the Bar's prohibition on mottos or trade names. *Id.* Again, relying on survey results, the Court ruled that such a prohibition furthered the state's substantial interest in preventing deception of prospective clients and was narrowly tailored. *Id.* The similar New York rule discussed in *Alexander* did not meet the "narrowly tailored" prong.

C. ABA Model Rule 7.3: Direct Contact With Prospective Clients

1. Text of Rule

- a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
 - (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.
- c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

2. ABA's Comment to Rule 7.3

- a) There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a

direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

- b) This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.
- c) The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

D. Internet Intake: Privilege and False Advertising Issues

1. Privilege

a. Attorney-Client Privilege

Whether or not online questionnaires may be protected by attorney-client privilege is generally based on the expectations and beliefs of the person completing the form, and the intentions of class counsel in disseminating the questionnaires. Courts tend to hold that if the person completing the questionnaire believed that, in filling out the form, s/he was in the process of seeking potential legal assistance then courts tend to find the material privileged.

Protected

- *Barton v. U.S. Dist. Court for Central Dist. of Cal.*, 410 F.3d 1104 (9th Cir. 2005) (class counsel's online questionnaires regarding antidepressant drug were protected by attorney-client privilege when potential class members submitted answers "in the course of an attorney-client relationship" as they were seeking legal representation at the time.)
- *Gates v. Rohm and Haas Co.*, 2006 WL 3420591, *4 (E.D. Pa. 2006) (paper questionnaires were protected by the attorney-client privilege when "the questionnaires were 'prepared by counsel in anticipation of litigation' and were allegedly distributed only to persons seeking legal advice or representation.")
- *Vodak v. City of Chicago*, 2004 WL 783051, *1 (N.D. Ill. 2004) (paper questionnaires were protected where only persons who were "seeking legal representation or specific advice were requested to complete the form" and where the completed forms were used in subsequent litigation.)

Not Protected

- *Schiller v. City of New York*, 245 F.R.D. 112, 117-8 (S.D. N.Y. 2007) (finding no attorney-client privilege, when the NYCLU provided no evidence that people who submitted an online questionnaire regarding police misconduct had believed that they were seeking representation, as the online form made no mention of providing legal services or confidentiality and NYCLU made no suggestion that it intended to file a class action lawsuit in connection with the questionnaires); *see also Morisky v. Pub. Serv. Elec. and Gas Co.*, 191 F.R.D. 419 (D. N.J. 2000).

b. Work-Product

Any work-product protection given to questionnaires/intake forms seems to extend only to the questions written by the attorneys (i.e. the blank form). Often times, counsel will turn over an example of a blank questionnaire, thus striking any work product protection. *See Morisky v. Public Service Elec. and Gas Co.*, 191 F.R.D. 419, 425 (D.N.J. 2000) ("the actual questions conceived and organized by Tomar are the only arguable work product of the Tomar attorneys. That Tomar produced this portion of the discovery, the only portion they actually created, indicates that they do not regard the actual questionnaire as work product.").

2. False Advertising Issues in Internet Intake

In *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 WL 5038508 (D.Nev.), attorneys who were counsel for a group of employees in a collective action were found to have violated a court order and professional conduct rule by operating a website to advertise for additional opt-in class members. This required the attorneys to make new disclosures to the

employer in the collective action, where the Court held that the attorneys were required, in good faith, to identify all the class members who were secured through the website.

The attorneys, as Plaintiffs in this action, argued that their website was protected as routine legal services. *Id.* at *6. However, the Court found that the site was not a form of truthful commercial speech that would be protected by the First Amendment, since it improperly stated that the class of opt-in Plaintiffs was not restricted to the three states that it in fact was and since the site failed to indicate clearly that the employer in the action had not been held liable. *Id.*, 6-7. The Court additionally sanctioned Plaintiffs for violating the pertinent Nevada ethics rule prohibiting false or misleading communications regarding a lawyer's services. *Id.* at *7.

3. False Advertising Issues in General Internet Advertising

In an August 2010 opinion, the ABA reiterated that lawyer websites, and any information therein about the lawyer or lawyer's services, were subject to the prohibitions against false and misleading statements outlined in Model Rules 8.4(c) and 4.1(a). American Bar Association Committee on Ethics and Professional Responsibility, 2010-8, 10-457, August 2010: http://www.americanbar.org/content/dam/aba/migrated/cpr/mo/10_457.authcheckdam.pdf.

The ABA stressed that no website communication may be false or misleading in either content or omission. The opinion stated that Model Rules 5.1 and 5.3 reinforce this professional obligation to keep information accurate, requiring managerial lawyers in law firms to make reasonable efforts to ensure that "all firm lawyers and non-lawyer assistants will comply with the rules of professional conduct." *Id.* at 1.

The ABA also stressed that the legal information disseminated through lawyer websites was also subject to the rules regarding false advertising and materially misleading information. *Id.* at 2. The opinion emphasized the need for lawyers to ensure the accuracy of their legal information and encouraged them to include qualifying statements or disclaimers to prevent a prospective client from having unjustified expectations. *Id.*

E. Soliciting and Advertising through Virtual Chat Sessions and Social Media: Rule 7.3 Considerations

Social media has offered attorneys new channels for legal marketing. A general consensus has developed that more traditional internet-based communications, such as email, should be considered "direct mail" for the purpose of advertising. By contrast, the more relevant question is whether social media, real-time online conversations, blogging, etc. are considered "real-time electronic contact" under Model Rule 7.3 and its state rule permutations.

With no case wielding the definitiveness of *Shapero* or *Ohralik* on these newer specific issues, the following are snapshots of how various jurisdictions have approached chat and social media solicitations.

1. **Philadelphia: Solicitation by Chat Not Considered Real-Time Electronic Communication**

In June, 2010, the Philadelphia Bar Association Professional Guidance Committee stated its view that solicitation in “chat rooms” did not constitute the “realtime electronic communication” prohibited by Rule 7.3 of the Pennsylvania Rules of Professional Conduct. Philadelphia Bar Association Professional Guidance Committee Opinion 2010-6, June 2010: <http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResource/CMSResources/Opinion%202010-6.pdf>.

The committee defined chat rooms as “electronic forums where individuals generally participate simultaneously with each other having a kind of typed out ‘conversation’ in real time.” *Id.* at 5.

In recognizing that “social attitudes and...rules of internet etiquette are changing,” the Committee contended that chat rooms offer a prospective client the same ability to dismiss the solicitation as he or she would with a letter or email. *Id.* at 5-6.

Chat room participants could readily terminate at their discretion, where leaving the conversation would not be “socially awkward” as in an in-person solicitation. *Id.* at 5.

The Philadelphia Bar applied this same rationale to emails and blog posts, asserting that these communications did not constitute real-time electronic communication, again because of a prospective client’s inherent and exclusive ability to dismiss them. Ultimately, the Bar’s go-to test for assessing electronic communications vis-à-vis Rule 7.3 seemed to be whether such communications would make it “socially awkward or difficult for a recipient of a lawyer’s overtures to not respond in real time.” *Id.* at 6.

2. **Proposed in Kentucky: Limited Bans on Social Media Soliciting**

In late 2010, the Kentucky Bar Association proposed amending its regulations to bar solicitations through social media unless attorneys paid a \$75 filing fee and secured permission from the bar’s Advertising Commission. *See Debra Cassens Weiss, Seeking Clients Via Facebook? In Ky., Bar May Regulate Social Media Comments*, ABA Journal, Nov 18, 2010, http://www.abajournal.com/news/article/seeking_clients_via_facebook_in_ky_bar_may_regulate_social_media_comments. The amendments are currently still under consideration. Under the Rules of the Supreme Court of Kentucky, the new amendments would state, in pertinent part, as follows:

“Advertise” means to furnish any information or communication containing a lawyer's name or other identifying information except the following ... Information and communication by a lawyer to members of the public in the format of web log journals on the internet that permit real time communication and exchanges on topics of general interest in legal issues provided there is no reference to an offer by the lawyer to render legal services, Communications made by a lawyer using a social media website such as MySpace and Facebook that are of a non-legal nature are

not considered advertisements: however those that are of a legal nature are governed by [Kentucky Supreme Court Rules].

As noted above, the proposed amendments include limited exceptions for social media communications, such as those of a non-legal nature or those that pertain to legal issues of general interest.

3. Texas Considers Social Media Use to be Advertising

In the fall of 2010, the litigation section of the State Bar of Texas summarized the current position of the Texas Bar Advertising Review Committee on the use of social media advertising. Dustin B. Benham, *The State Bar of Texas Provides New Guidance to Attorneys Regarding the Proper Use of Social Media and Blogs for Advertising Purposes*, 52 *The Advoc.* (Tex.) 13, Fall 2010. Social media pages on sites such as Facebook or LinkedIn were considered to be advertising and subject to the Bar's regulation, subject to some nuances.

In an Interpretive Comment, the Committee noted that if "landing" pages on Facebook, Twitter, LinkedIn, etc. were "generally available to the public" they are considered to be an advertisement and had to be submitted to the Committee for review. *Id.* On the other hand, if such pages were modified by privacy settings so as to make them of limited visibility, they were not considered advertisements.

Continuing further, the Texas Committee noted that even if a page is made generally available to the public, the page's content must be considered. If the page did not relate to obtaining employment or the availability of a lawyer's services, the page would be exempt from regulation. Moreover, even if such a page did relate to a lawyer's availability of services, the page would be exempt if it contained solely "tombstone" information. A mere display of basic information, such as a lawyer's name or firm, practice areas, and bar admissions was considered "tombstone" information. *Id.*

As for "status updates" that would be posted on various social media sites or blogs, the Committee considered them to be exempt if educational or informational in nature. Ultimately, as with any social media or electronic posting, the Committee placed the burden of ensuring the appropriateness of content on the attorney.

4. Louisiana restrictions on internet pop-up ads held unconstitutional

In *Public Citizen v. Louisiana Attorney Disciplinary Bd.*, discussed *supra*, the court held that a Louisiana rule subjecting pop-up advertisements to the same restrictions as advertisements presented in traditional media were unconstitutional. *Public Citizen*, 642 F.Supp.2d at 559. Articulating that the Louisiana Bar failed to "address the unique considerations with Internet advertising," specifically with the "short length" of pop-up ads and the "multiple variations" used, the court found that the Bar's application of its rule governing traditional media advertisements to pop-up ads, including its associated filing and review requirements, was unconstitutional. *Id.* at 559.

F. Soliciting and Advertising Concerns in the Use of Internet Referral Services

1. Arizona finds that use of for-profit referral service violates prohibition against paid recommendation of services

A number of jurisdictions have commented on the ethical considerations involved in the use of internet referral services. The following is a scenario discussed in a 2005 State Bar of Arizona opinion:

Participating lawyers pay fees to an internet referral service, which may include a one-time application fee in the range of \$500 and an annual fee in the range of about \$4000. The service after verifying the lawyers' credentials, includes the lawyers in its database. The service advertises for prospective clients on the internet, where the home page of the service's website prompts prospective clients to provide information just as they would during an initial consultation with an attorney. Such clients are informed on the site that the information they submit will be sent to lawyers in the specific practice areas and geographic locations that the clients select. The prospective clients, while told that all the lawyers in the referral service are licensed and in good standing with their state bars, are not told that the lawyers pay a substantial sum of money to participate in the service.

State Bar of Arizona Ethics Opinion, 05-08, July 2005,
<http://www.myazbar.org/ethics/opinionview.cfm?id=684>.

The State Bar of Arizona, which illustrated this example, identified Arizona Ethics Rules 7.1, 7.2 and 7.3 as relevant here, which respectively govern Communications Concerning a Lawyer's Services, Advertising and Direct Contact with Prospective Clients. *Id.* at 1. The Bar found unequivocally that participation in the service constituted an improper use of a for-profit referral service, since the lawyers, in paying fees to the service, were providing consideration to an agent that functioned and held itself out to the public as a referral service.

The Bar further found that such use of the referral service violated Arizona Rule 7.1, which prohibits "false or misleading communication about the lawyer or lawyer's services." *Id.* at 2. It began by determining that communications made through an intermediate entity like the referral service could be governed by Rule 7.1 as direct communication could. Accordingly, since the referral service failed to disclose to clients that lawyers pay a substantial fee to be included in the service, coupled with the fact that the service claimed to match clients with the "right" lawyers," this constituted a materially misleading communication.

Interestingly, the State Bar of Arizona found that the lawyers' use of the referral service complied with Rule 7.3, which prevents in-person, telephone or real-time electronic solicitation. *Id.* at 2. While this rule applied to internet communication such as the referral service, the Bar found it determinative that none of the attorneys participating in the service initiated communication with clients. *Id.* at 2.

2. **South Carolina addresses a modified referral situation involving ratings**

In September 2010, the South Carolina Bar illustrated the following example:

A company operates a free website providing information about attorneys nationwide. Lawyers have not actively signed up to have their names listed on the website, since the company has obtained information through publicly available information. Lawyers can “claim” their profiles and update their information. Moreover, attorneys may also give each other peer endorsements. Client ratings are also featured, where anyone can submit a client rating about any lawyer and lawyers may invite current and former clients to submit ratings. Client ratings do not impact an attorney’s internal rating, which is managed by the company, but are featured prominently on the attorney’s listings. While the company monitors and inspects both the client and peer ratings, attorneys cannot control who endorses or rates them.

South Carolina Bar, Ethics Advisory Committee 09-10, 2009:
http://www.scbare.org/member_resources/ethics_advisory_opinions/&id=678

The Ethics Advisory Committee made several determinations associated with the foregoing scenario. First, lawyers featured on the website were not responsible for its content unless and until they “claimed” their listing. *Id.* at 2. Once an attorney claimed his or her listing, this action constituted “placing” or “disseminating” communication regarding their services, such that Rule 7.1 of the South Carolina Rules of Professional Conduct would be invoked. *Id.* In the same vein, any lawyer who adopted, endorsed or updated his or her information listed on directory websites such as Martindale-Hubbell or Superlawyers would then be responsible for its content. *Id.*

Soliciting peer ratings, the Committee determined, did not violate any ethics rules. As long as the rating was presented in a non-misleading way and was independently verifiable, displaying peer ratings was permissible. *Id.* at 3.

However, with regard to client ratings, the Committee did find that they may indeed be proscribed by the rules. Rules 7.1(b) and (d) respectively prohibit client endorsements and testimonials. *Id.* at 3. The Committee defined a testimonial as a “statement by a client or former client about an experience” with a given lawyer, whereas “an endorsement” was a “general recommendation or statement of approval of the lawyer.” *Id.* Lawyers may not solicit endorsements unless they are non-misleading and prevent unjustified expectations, which may be done by attaching relevant disclaimers. As for solicitations, lawyers may not solicit or publish them outright. The Committee recommended that lawyers monitor any “claimed” listing for compliance with these rules governing ratings. *Id.* at 4.

G. Speaking With The Advertisement Recipient

Once the plaintiffs' attorney receives a response to an investigational advertising letter, what can the attorney then say in an interview? What if the person is not only a potential witness but may have a claim and be a potential class member, if not a class representative? On the one hand, the First Amendment principles that permitted the written communication may be insufficient to protect a direct person telephone conversation. On the other hand, what if the recipient initiates a request for legal advice which places the attorney in another position? These issues were illuminated somewhat in *Piper v. RGIS Inventory Specialists, Inc.*, No. C-07-00032 (JCS), 2007 U.S. Dist. LEXIS 44486, at *24 (N.D. Cal. June 11, 2007). There, the interview started with investigative questions, then moved to a fairly direct solicitation.

Defendants moved the Court to invalidate FLSA opt-in consents by accusing Plaintiffs' counsel of having abused the collective action process and acted unethically, by having sent out an improper notice and engaged in improper solicitation. Plaintiffs' counsel had set up an advertising website, "rgisvertime.com" which included an option allowing an interested individual to request information about the FLSA action from Plaintiffs' counsel.

In support of its motion, Defendant relied on an employee who averred that he received an unwelcome telephone solicitation call from Plaintiffs' attorneys. He said he received the call at home from a caller who said he was on a "fact-finding mission" relating to a lawsuit that had been filed involving RGIS. He claimed the caller did not introduce himself as being from the firm of plaintiffs' lawyer until after he had answered the caller's questions. At that point, he told the caller that he was not interested in participating in the lawsuit. The employee stated that he would not have answered the caller's questions if he had realized "he was really calling [him] to try to get [him] to join a lawsuit against [RGIS]."

Plaintiffs' attorneys responded that they were not engaging in telephone solicitation when they called the employee but rather were responding to an inquiry by the employee that was made via the website. Plaintiffs present a copy of an intake record showing that an e-mail inquiry from the employee. Ultimately, the employee denied he made that inquiry — and claimed someone else made it in his name without his knowledge.

According to Plaintiffs, the intake procedure for potential plaintiffs in the RGIS litigation was as follows:

- The firm receives an Internet inquiry from a potential Plaintiff.
- It contacts the individual using the information provided in the e-mail.
- Attorneys prepared a script and list of intake questions to be asked of all potential new clients.
- According to the script, the first thing the interviewer will do when they speak to an individual is introduce him or herself by name, job title, and name of the firm.

- Each interviewer also states that [he] or she is calling regarding the individual's inquiry about the lawsuit against the employer.
- The interviewer also confirms that he or she works with the plaintiffs in the case. . . .
- The interviewer then asks the intake questions drafted by the attorneys.
- After asking the questions, the interviewer provides a summary of the allegations in the lawsuit, including the claim that auditors are not being paid properly for all time worked.
- After outlining the lawsuit, the interviewer will ask if that individual is interested in joining into the lawsuit and if the potential new client has any other questions or concerns.
- During this interview process, the interviewer does not tell a potential new client that he or she is not being properly paid. Rather, the interviewer asks questions about whether the individual is compensated for all the time at work and how each interviewee is compensated. . . .
- If that potential client says that he or she wishes to join the lawsuit, Plaintiffs' counsel sends a packet to the potential client with a cover letter, a copy of a standard retainer form, a copy of the opt-in form, a copy of the operative Complaint for review, and a return envelope.
- Each potential client may call back to the office with more questions, may return the signed forms or may choose not to participate after reviewing the forms

Opinion: The *Piper* Court held the plaintiff's counsel did not act improperly with regard to the website or the calling of the interviewee. It only cautioned Plaintiffs' counsel that names of potential plaintiffs obtained through the website may not have been provided by the individuals themselves but rather, by some other employee. The court ordered the Plaintiffs' counsel to confirm, at the outset of any conversation initiated in response to an inquiry via the Website, that the individual who is being called did submit an information request. It also required plaintiff's counsel to include a warning on their Website warning individuals not to provide contact information for anyone but themselves.

II. POST-FILING COMMUNICATION WITH POTENTIAL/PUTATIVE CLASS MEMBERS

A. First Amendment Protection

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100-103(1981), the Court recognized the need to inform potential class members of the existence of a lawsuit and class representatives' interest in obtaining information about the merits of the case. It held that a district court abused its

discretion by issuing an order prohibiting parties and their counsel from communicating with potential class members without court approval. The Court stated that such restrictions can only be imposed when the court has, on a case-by-case basis, made factual findings that justify such restrictions. The Court recognized that, because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.

B. Privacy Constraints

The disclosure of names, addresses, and telephone numbers can be permitted in the precertification class-action context, so that a lead plaintiff may learn the names of other persons who might assist in prosecuting the case. Such disclosure involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass marketing efforts or unsolicited sales pitches. *See Pioneer Electronics (USA), Inc., v. Superior Court*, 40 Cal.4th 360, 370-371, 53 Cal. Rptr. 3d 513, 150 P.3d 198 (2007); *see also McArdle v. AT&T Mobility LLC*, 2010 WL 1532334 (N.D. Cal. Apr. 16, 2010) (finding plaintiff's need for defendant's customer contact information outweighs defendant's privacy concerns, but finding plaintiff's request overbroad); *Davis v. Chase Bank U.S.A.*, 2010 WL 1531410 (C.D. Cal. Apr. 14, 2010) (holding that defendant failed to demonstrate a sufficiently serious invasion of privacy to preclude disclosure of a sample of potential class members' names, addresses, telephone numbers, e-mail addresses, and billing records); *Guan Ming Lin v. Benihana Nat'l Corp.*, 755 F. Supp. 2d 504, 514 (S.D.N.Y. 2010) (noting that, in the FLSA context, "[c]ourts in the Second Circuit have become progressively more expansive regarding the extent of the employee information they will order defendants to produce ... even at the pre-certification stage[,]” but the “disclosure of employee social security numbers raises obvious privacy concerns.”).

C. Pre-Certification Communications

State bar opinions and court decisions generally agree that plaintiff's counsel's contact with potential class members for the purpose of offering representation (i.e., securing additional plaintiffs/clients) is governed by the rules governing attorney advertising and marketing generally, while communications with putative class members as witnesses is subject to bar rules governing contact with unrepresented persons.

1. No prior court approval needed

In *Parris v. Superior Court*, 109 Cal. App. 4th 285 (2003), Plaintiff's counsel sought: (1) leave to communicate with potential class members prior to class certification; (2) approval of the content of their proposed communication; and (3) to compel the discovery of names and addresses of potential class members. The proposed notice contained the following information: “A class action lawsuit had been filed on behalf of current and former Lowe's employees alleging Lowe's had failed to pay overtime compensation to certain of its hourly employees” (a three-paragraph description of plaintiffs' contentions and a one-paragraph summary of Lowe's defense were also included). It also stated that individuals who worked for Lowe's at any time since October 29, 1997, in an hourly position may be members of the proposed class; the attorneys for the plaintiffs in the lawsuit (who were identified in the proposed notice) wished to

gather information from the recipients of the notice regarding the nature of their work at Lowe's, including any overtime they may have worked. The recipients of the notice were under no obligation to contact plaintiffs' counsel. The recipients of the notice were told the attorneys for Lowe's (who were also identified in the proposed notice) or other representatives of Lowe's might also wish to discuss the case, and they were under no obligation to provide information or to discuss the matter with attorneys for Lowe's or with any supervisor or manager at Lowe's ("[y]our employer may not retaliate against you in any manner for refusing to provide information.") Finally, it stated that further information regarding the lawsuit was available at a Web site set up by the plaintiffs' counsel.

The *Parris* Court reversed the trial court's denial of plaintiffs' motions, and held that plaintiff's counsel needed no prior court approval to communicate with putative class members. In so doing, the *Parris* Court disagreed with the reasoning of two other courts which had upheld the role of the trial court in screening the content of the proposed notice to prevent abuses and improprieties. The first was *Atari, Inc. v. Superior Court*, 166 Cal. App. 3d 867, 212 Cal. Rptr. 773 (1985), followed by *Howard Guntz Profit Sharing Plan v. Superior Court*, 88 Cal. App. 4th 572, 575-576, 105 Cal. Rptr. 2d 896 (2001). The *Parris* Court held that absent specific evidence of abuse, an order prohibiting or limiting precertification communication with potential class members by the parties to a putative class action is an invalid prior restraint.

2. **Cases allowing pre-notice communications while limiting misleading statements**

- a. *Piper v. RGIS Inventory Specialists, Inc.*, 2007 U.S. Dist. LEXIS 44486, at *24 (N.D. Cal. June 11, 2007) (holding courts may limit pre-notice communications where a party has engaged in misleading or improper communications or where they are inconsistent with court-authorized notice);
- b. *Vogt v. Texas Instruments Inc.*, 2006 U.S. Dist. LEXIS 96515 (N.D. Tex. Aug. 8, 2006) (prohibiting use of flyer and e-mail deemed misleading while allowing a mailing to potential class members that contained factual information, was marked "advertisement," and was modeled after court-authorized notice in another case);
- c. *Melendez Cintron v. Hershey Puerto Rico, Inc.*, 363 F.Supp.2d 119 (D.P.R. 2005) (refusing to sanction plaintiffs for pre-certification letter to potential class members that did not make false representations and was not misleading); and
- d. *Maddox v. Knowledge Learning Corporation*, --- F.Supp.2d ---, 2007 WL 2284780 (N.D. Ga.) (it is within the court's discretion to prohibit the plaintiffs from issuing pre-certification statements with putative class members through its case-specific website www.kindercareovertimecase.com that are factually inaccurate, unbalanced, or misleading).

The *Maddox* Court cured the notice (the Court added the words in boldface print), as follows:

| Plaintiff's Original Notice in Maddox | Maddox Court's revisions |
|---|--|
| Each Plaintiff was paid on an hourly basis, was required to work more than 40 hours per week, and did not receive overtime as required by law. | The lawsuit alleges that each Plaintiff was paid on an hourly basis, was required to work more than 40 hours per week, and did not receive overtime as required by law. Knowledge Learning Corporation denies this allegation. |
| Positions eligible to participate include... | Positions that may be eligible to participate include.... |
| Current and former employees who worked for any of KLC's centers are eligible to join this case and seek payment for overtime. | OMIT ENTIRELY |
| In order for you to be eligible to assert a claim in this case, the following must apply: ... (3) You execute a written consent form agreeing to join this case and be represented by Plaintiffs' attorneys | In order for you to be eligible to assert a claim in this case, the following must apply: ... (3) You execute a written consent form agreeing to join this case and be represented by Plaintiffs' attorneys. You are not required to be represented by Plaintiffs' attorneys to opt-in to the lawsuit. You may retain the attorney of your choice to represent you. |
| Even if KLC were to take any action against you, the lawyers in the case stand ready to combat any retaliation on your behalf. | KLC is prohibited by law from taking any action against you for participating in this lawsuit. |

- e. *Jones v. Casey's General Stores*, 517 F. Supp. 2d 1080 (D. Iowa 2007). Without dictating precise changes to be made, the Court ordered plaintiffs to substantially modify their website <http://www.caseysovertimelawsuit.com> finding a host of "one-sided, misleading communications with putative opt-in collective members" and that "Plaintiffs' conduct, if permitted to continue, could easily have the effect of tainting the entire putative class and jeopardizing this entire litigation." *Id.* at 1089.
- f. *West v. Mando America Corp.*, 2008 U.S. Dist. LEXIS 81296 (M.D. Ala. Oct. 2, 2008). The court would not order plaintiff's counsel to cease and desist running advertisements soliciting opt-ins, nor disqualify counsel from representing any solicited opt-ins. The employer complained that plaintiff's advertisement was misleading because it is titled "Notice" rather than "Advertisement" and was misleading because it promised to represent solicited opt-ins at no cost if plaintiffs recover any proceeds from the lawsuit. The court held the advertisement was not misleading and did not require changes to the language because it stated as "claims" not "facts" the allegation of unlawful

deductions from compensation; and it told readers in a certain class that they may have a claim. The promise of no-cost representation was clearly qualified by plaintiffs' recovery and the reader being a class member.

- g.** *Self v. TPUSA, Inc. et al.*, 2008 U.S. Dist. LEXIS 71341 (D. Utah Sept. 19, 2008). Plaintiffs' counsel was permitted to keep its website (and domain name), which provided information about the case and urged employees to join the lawsuit by signing consent forms provided on the website. The court noted counsel had made substantial changes to the website without being ordered to do so. The court ordered the employees to modify the website to qualify or remove the conclusory language and reflect that the statements were merely the employees' contentions rather than uncontested facts in the lawsuit. Relying heavily on *Maddox v. Knowledge Learning Corp.*, 499 F. Supp. 2d 1338, 1344 (N.D. Ga. 2007); see also *Jones v. Casey's Gen. Stores*, 517 F. Supp. 2d 1080, 1089 (S.D. Iowa 2007), the court ordered counsel to send a letter to all opt-in Plaintiffs who signed and returned consent forms, informing them that (1) the factual statements on the website were merely allegations and that no liability had been established; (2) they are not required to join this lawsuit; (3) they may seek counsel of their choice and pursue individual claims against defendants; (4) a class had not yet been certified by this court; and (5) if they wanted to remain in this lawsuit as one of the opt-in plaintiffs, they must fill out and sign another consent form.
- h.** *Frye v. Baptist Memorial Hosp., Inc.*, U.S. Dist. LEXIS 41511 (W.D. Tenn. May 20, 2008). Defendant argued that a letter sent by plaintiffs' counsel to potential collective action members was a direct solicitation in violation *TRPC 7.3*. and that plaintiffs' counsel did not file the website or a copy of the letter with the Tennessee Board of Professional Responsibility ("Board"), that the letter did not contain the words "This is an Advertisement" in conspicuous print on the outside envelope or at the beginning and end of the letter, and that the first sentence of the letter failed to state "If you have already hired or retained a lawyer in this matter, please disregard this message." The defendant also argued plaintiffs' counsel's website was misleading. Noting that counsel made revisions to the website after defendant complained and mailed a revised letter, the court refused to impose a communications ban.
- i.** *Howard v. Securitas Sec. Servs., USA Inc.*, 630 F. Supp. 2d 905 (N.D. Ill. 2009). In a case involving post-certification communications on plaintiffs' counsel's website, defendant argued

that the website contained a host of misleading statements, including “goals” of the litigation and case updates which allegedly implied that liability had already been established, and statements which presented plaintiffs’ allegations as facts. The court found that the statements about “goals” and the case updates were not misleading, but found objectionable those parts of the website which presented plaintiffs’ allegations as facts.

- j. *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, No. 08 Civ. 722, 2009 U.S. Dist. LEXIS 116663 (D. Nev. Dec. 15, 2009). Plaintiffs’ counsel created a website, www.westgatelawsuit.com, three months before the court ruled upon plaintiffs’ motion to circulate notice. The court granted the motion to circulate notice, but restricted circulation of notice by U.S. mail and e-mail and denied four separate forms of notice. After the ruling, plaintiffs’ counsel left up the website, which stated that the case was potentially national in scope when the litigation had already been limited to Nevada, Florida, and Tennessee. The court found that advertising on the website violated the court order restricting notice to U.S. mail and e-mail, even though the order did not specifically prohibit website advertising. *Id.* at *24-28. The court noted that such case specific advertising did not constitute “general advertising,” such as advertising particular categories of cases, such as personal injury or DUI defense. *Id.* at *28 n.1. The court also found that the statement that the case was potentially national in scope was false, not constitutionally protected, and in violation of the Nevada Rules of Professional Conduct. *Id.* at *31-32. Nevertheless, the court in its discretion declined to order sanctions. *Id.* at *32.
- k. *Hobson v. Comm’cns Unlimited, Inc.*, 2010 WL 3062505 (N.D. Ga. Aug. 2, 2010). Plaintiff’s counsel mailed advertisement letters to potential plaintiffs and maintained a website containing information about the case, including information on how potential plaintiffs can get involved in the lawsuit. Defendants sought an emergency motion to cease and desist unauthorized communications to putative class members. The court denied defendants’ motion to the extent that it would require plaintiff’s counsel to cease all communications with putative class members. The court ordered plaintiff’s to correct several statements it deemed inappropriate, however, and suggested language to cure the defects. *Id.* at *2.

When an attorney is approached and asked legal advice by an individual, it is safe to say the response will be immune from charges of unethical conduct. Beyond that, however, it is

sometimes difficult to determine whether a communication falls safely within the boundaries of protection or begins to toe them.

3. **Cases Disapproving Certain Communications to Putative Class Members**

a. **Prohibiting Plaintiff from Sending Pre-Certification ‘Consent-To-Sue’ Forms**

Plaintiffs’ counsel intended to send a letter and “Consent To Sue” form to putative class members prior to the court ruling on its motion for conditional certification. The court held the solicitation to be improper. Specifically, plaintiffs’ counsel sought to send the package to “all registered representatives,” regardless of the title or position the individual held while employed by defendants. The court held plaintiffs had not “established that the various positions that fall under the category of ‘registered representatives’ were similarly situated to their positions, that the positions are similarly situated to one another, or that the employees who occupied the positions are similarly situated to each other or to the named plaintiffs.” Hence, the court found the letter misleading to the extent it suggested putative class members were eligible to participate in this lawsuit collectively. *Bouder v. Prudential Financial, Inc.*, U.S. Dist. LEXIS 83338 (D.N.J. Nov. 8, 2007). *But see Frye v. Baptist Memorial Hospital, Inc.*, U.S. Dist. LEXIS 41511 (W.D. Tenn. May 20, 2008) (limiting *Bouder* to deceptive statements).

b. **Sanctioning Plaintiff’s Counsel for Improper Solicitation**

In *Hamm v. TBC Corporation*, 345 Fed. Appx. 406 (11th Cir. 2009), the court affirmed the district court’s order sanctioning plaintiffs’ counsel for impermissibly soliciting putative class members in violation of Florida Rule of Professional Conduct 4-7.4(a) and Southern District of Florida Local Rule 11.1.C. Plaintiff’s counsel had conceded that its administrative assistant had contacted three current employees of the defendant, who all later opted into the lawsuit. While plaintiff’s counsel argued that the assistant had contacted the employees in order to investigate the case, the employees testified that the assistant had asked them if they wanted to join the lawsuit. In finding that plaintiffs’ counsel had improperly solicited the three employees, the magistrate judge faulted plaintiffs’ counsel for not having a written policy on solicitation, for failing to train the assistant regarding solicitation of clients, and for failing to give the assistant a script from which to work in making calls to current employees. In affirming, the Court of Appeals for the Eleventh Circuit found it irrelevant that the solicitation was made by a non-attorney, and that there was no evidence of attorney knowledge or ratification. *Id.* at 411 n.2.

c. **Prohibiting Plaintiff from Follow-Up Communications**

If a lawyer sends a letter permitted under Rule 7.2 to a client but receives no response to it, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b), according to the ABA 2004 Model Rules Comment to Rule 7.3. Citing this provision, a court denied plaintiffs’ request to send a postcard to potential opt-ins “reminding” them to submit their consent to join forms 30 days before the deadline. *Barnwell v. Corrections Corp. of Am.*, 2008 U.S. Dist. LEXIS 104230 (D. Kan. Dec. 9, 2008).

d. **Prohibiting Plaintiff from Advertising Upon Grant of Conditional Certification**

Prior to the court's grant of conditional certification, plaintiffs' counsel sent "advertisement letters" and posted to their website notices regarding the litigation. While the court did not find that plaintiffs' pre-certification notice efforts were not constitutionally permitted, it held that once the court grants conditional certification "the court controlled mechanism should trump any attorney driven notice." *Ruggles v. Wellpoint, Inc.*, 2008 U.S. Dist. LEXIS 90819 (N.D.N.Y Nov. 9, 2008).

Similarly, in *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 2009 WL 3719483 (W.D. Pa. Nov. 4, 2009), the court denied defendants' motion for sanctions where plaintiffs mailed copies of a "reminder letter" to putative collective action members after the issuance of Court approved notice. Instead, the court, recognizing "the need for Court supervision over the FLSA notice process" ordered the plaintiffs, in the event they find additional mailings necessary, to provide copies to the Court and to opposing counsel and to allow the Court to consider the proposed course of action. *Id.* at *4.

e. **Requiring Defendant to Issue Corrective Notice**

One month before the court conditionally approved the collective class and plaintiff's proposed notice, defendant's counsel sent a letter and a check to eight putative plaintiffs, advising them of a county audit that had revealed certain employees' wages were not adequately paid, attached a check to ensure "compliance with all State and federal laws," and explained reasons for sending the check. The court ordered that defendant send corrective notice to all prior recipients of the letter, notifying them that they may still join the collective action notwithstanding their receipt of the prior letter and check, and that the recipient has an additional 30 days to join the action. *Goody v. Jefferson County*, 2010 WL 3834025 (D. Idaho Sept. 23, 2010).

D. **ABA Opinions: Contact by Counsel with Putative Members of Class Prior to Class Certification**

ABA Formal Opinion 07-445 (April 11, 2007) addresses plaintiff's counsel's communication with potential class members. The opinion neither expressly condones nor forbids communications that seek to inform putative class members of a case or invite their joinder. It merely condones investigation-only communications while withholding its imprimatur from other uses of advertising.

As the opinion states:

"If ... plaintiffs' counsel's goal is to seek to represent the putative class member directly as a named party to the action or otherwise, the provisions of Rule 7.3, which governs lawyers' direct contact with prospective clients, applies. The fact that an action has been filed as a class action does not affect the policies underlying Rule 7.3 that prohibit the types of contact with prospective clients that have serious potential for overreaching and other abuse.

However, *Rule 7.3's restrictions do not apply to contacting potential class members as witnesses, so long as those contacts are appropriate and comport with the Model Rules.*" (Emphasis added.)

Rule 7.3(a) provides, "[a] lawyer shall not by in-person, live telephone or realtime electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (i) is a lawyer; or (ii) has a family, close personal, or prior professional relationship with the lawyer." Rule 7.3(c) states that any permissible communication under Rule 7.3 must include the words "Advertising Material" on the outside of the envelope or at the beginning and ending of any recorded or electronic communication. Rule 7.2 sets out the requirements for advertising.

The ABA Formal Opinion 07-445 further limits the leeway of plaintiffs' counsel by denying the existence of a proto- attorney-client relationship between counsel and putative class members that might have justified freer speech.

"Before the class has been certified by a court, the lawyer for plaintiff will represent one or more persons with whom a client-lawyer relationship clearly has been established. As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established. A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, putative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period."

Earlier ABA informal opinions took a hard-line against solicitation of class members. For example, ABA Informal Op. 1469 (July 6, 1981)) approved of an ad letter publicizing a class action to stimulate joinder, but only because the sender stated he would not represent any additional plaintiffs (suggesting that mailed advertisements to class members offering representation was unethical). However, subsequent decisions and developments have called the reasoning of this ABA informal opinion into question. For example, the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline had this to say about Informal Opinion 1469:

The Board is aware of an advisory opinion issued by the American Bar Association advising that "the sending of a letter by an attorney to potential members of a class informing them of a

possible legal claim is not prohibited under the Model Code of Professional Responsibility if the lawyer's intent is to strengthen the case of his client and if the lawyer will not represent the recipients of the letter." [Citations omitted]. The narrowly tailored advice of this opinion is of limited guidance to the Board in answering the question presented for two reasons. One reason is that the committee did not clearly set forth whether the fact that the lawyer declined to represent any recipient made the direct communication proper. Secondly, the opinion was issued one month after *Gulf Oil* but did not address the *Gulf Oil* decision. In the years since *Gulf Oil*, one state's ethics committee advised that a lawyer may send letters to prospective members of a class action suit provided the letters conform to the advertising rules and the lawyer does not contact individuals by telephone or in person. Alabama State Bar, Op. RO 89-57 (1989). In conclusion, this Board's advice is that the Code of Professional Responsibility does not ban direct mail communications from name plaintiffs and their counsel to potential or actual class members during the pendency of a class action, nor does the Code prohibit the attorney from accepting employment in response to such advertising. However such communications must be in compliance with Disciplinary Rules 2-101 through 2-105.

Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 92-2 (February 14, 1992).

E. New York Opinion: Contact by Counsel with Putative Members of Class Prior to Class Certification

1. New York Ethics Opinion

New York's standing ethics opinion (N.Y. Bar Ass'n. Opinion Comm. Prof. Eth. Op. 676 (1995)) on the subject highlights the importance of joinder in permitting communications with potential class members, while ABA opinions soft-pedal that factor.

"May an attorney ethically publish newspaper or magazine advertisements, or send letters to current or former employees of a particular corporation, stating that the attorney represents clients who intend to bring an employment discrimination class action against the corporation based on certain claims and inviting others who are similarly situated to participate in such a class action or furnish information?"

1. DR 2-104(F) permits a lawyer to accept employment from those contacted for the purpose of obtaining their joinder in class action litigation if success in asserting a client's rights in such litigation is dependent upon the joinder of others, subject to compliance with DR 2-103(A).

2. Congress clearly adopted the opt-in joinder procedures of Section 216(b) of the FLSA (*Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996))
3. DR 2-103(A) in turn, essentially incorporates into the Disciplinary Rules the limitations on solicitation imposed by state law, as it prohibits a lawyer from seeking professional employment from a person who has not sought advice about employment of the lawyer if the lawyer's conduct *would violate any statute or existing court rule in the judicial department in which the lawyer practices.* (emphasis added).
4. Section 479 of the New York Judiciary Law in turn makes it unlawful for any person to solicit legal business.
5. However, the decisions of the Supreme Court may have limited the scope of section 479's prohibitions in providing that such conduct is protected at least to some extent by the Constitution. *See Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371 (1995); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) *cert. denied*, 490 U.S. 1107 (1989); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, *supra*; *In re Koffler*, 51 N.Y.2d 140, 214 N.E.2d 927, 432 N.Y.S.2d 872 (1980) *cert. denied*, 450 U.S. 1026 (1981).
6. Conclusion of the Committee: "A letter or advertisement may be sent or mailed to anyone (including persons who are targeted recipients because they are likely to have similar claims against the corporation) subject to the filing and retention requirements of DR 2-101(F) and any such requirements of the appropriate department of the New York State Appellate Division, and the attorney may accept representation arising from such solicitation; the recipient need not be a current client." (*Citations omitted.*)
7. BOTTOM LINE: The NY rules obviously must be read closely, but an advertisement letter – which is assumed to be a client solicitation ("Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm *N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 [k]*") - that is truthful and properly marked filed and retained, may be sent to potential class members without the sender having to disavow representation of the interested recipient.

2. Amendment to New York Advertising Rules

NOTE: New York amended its lawyer advertising rules on February 1, 2007 (See *N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.1 et seq.*) The amendments included new restrictions on various types of television depictions, computer pop-ups and other ads. Several of those amendments were challenged and voided in *Alexander v. Cahill*, 2007 U.S. Dist. LEXIS 53602 (N.D.N.Y., July. 20, 2007). The amendments and decision do not bear directly on the discussion here.

F. Other Jurisdictions Permitting Lawyers May Communicate With Putative Class Members, Subject to Certain Conditions

- District of Columbia: District of Columbia Bar Ass’n Eth. Op. 302 ((Nov. 21, 2000) (*Soliciting Plaintiffs for Class Action Lawsuits or Obtaining Legal Work Through Internet-based Web Pages*) (permissible for lawyers to use Internet-based web pages to seek plaintiffs for class action lawsuits as long as communications are not vexatious or harassing);
- Massachusetts: Massachusetts Bar Ass’n Eth. Op. 93-5 (Mar. 23, 1993) (lawyer in class action permitted to contact prospective plaintiffs under applicable class action law);
- North Carolina State Bar 2004 Formal Eth. Op. 5 (Jan. 21, 2005) (*Solicitation of Claimants in a Class Action*) (lawyer may send solicitation to prospective class members on wide array of topics prior to class certification, but letter must contain the words “This is an advertisement for legal services.”); and
- Ohio: Ohio Bd. of Comm’rs on Grievances and Discipline Op. 92-3 (Feb. 14, 1992) Ohio Code of Professional Responsibility does not ban direct mail communication from named plaintiffs and their counsel to potential or actual class members during pendency of a class action, nor does Code prohibit lawyer from accepting employment in response to such advertising).
- *See also* Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353 (2002)

III. RELEVANT NOTICE AND OPT-IN PROCEDURES

A. General Rule on Contacting Class Members

1. Gulf Oil General Rule: Contact Acceptable and Limits on Contact Pre-Certification Should be Carefully Tailored After a Finding that Inappropriate Conduct Occurred

The Broad Guideline on contacting class members is provided in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, *101-102 (1981) (Because of the potential difficulties for class member that may arise, “an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing-identifying the potential abuses being addressed-should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.” (Internal footnotes omitted).

2. **Courts are not Uniform on the Status of Pre-Notice Collective Action Members (or Pre-Certification Class Members).**

At least one court likens the relationship between plaintiffs' attorney and a putative class is similar to the relationship between plaintiffs' attorney and individuals in a collective action who have yet to "opt-in" to the lawsuit. *See Parks v. Eastwood Ins. Serv. Inc.*, 235 F. Supp. 2d 1082, 1083 (C.D. Cal. 2002) (finding that a 216(b) collective is analogous to pre-certification class for purposes of determining applicability of professional rules governing ex parte contact).² *Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1225 (S.D. Ala. 2008) (finding that counsel's duty pre-certification to client under § 216(b) is analogous to Rule 23);

a. **Aggressive View: Some Status Pre-Certification**

Although the majority of the case law finds that putative class members are not represented parties, some courts have previously found putative class members to be quasi-represented parties by looking to the position of putative class members in relation to the litigation and have recognized that "unnamed class members do have certain interests in the lawsuit." *Miller v. Federal Kemper Ins. Co.*, 508 A.2d 1222, 1228 (Pa. 1986) (quoting *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1087 (3d Cir. 1980)); *Gates v. Rohn and Haas Co.*, 2006 WL 3420591, *2 n. 2 (E.D. Pa. 2006) (holding that putative class members "are more properly characterized as parties to the action."); *See Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1206-07 (11th Cir. 1985) (stating "defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner") (footnote omitted); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985) (prohibiting defense counsel from contacting putative class members); *Gates v. Rohm & Haas Co.*, 2006 WL 3420591, *2 n. 2 (E.D. Pa. 2006) (finding that putative class members were represented parties for purposes of ex parte communications); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (the "mere initiation" of a class action prohibits defense attorneys from contacting putative class members); *Impervious Paint Indus., Inc v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981) (stating that "[d]uring the time between the institution of a class action and the close of the opt-out period, the status of plaintiffs' counsel in relation to the class members cannot be stated with precision" and limiting defendant's contact with class members); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F.Supp.2d 1239, 1245-46 (N.D.Ca.2000) ("[w]hile lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class."); *Rahman v. Smith & Wollensky Rest. Group, Inc.*,

² Most courts agree that an attorney-client relationship is established for all Rule 23 class members following certification. *See, e.g., Fulco v. Continental Cablevision, Inc.*, 789 F. Supp. 45 (D. Mass. 1992); *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 377 (N.D. Ill. 1982) (same); *see also* Debra Lyn Basset, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 355 (Winter 2002). Some courts find that putative class members are considered "represented persons" in the fullest sense. *See Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1206-07 (11th Cir. 1985) (stating "defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner") (footnote omitted); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985) (prohibiting defense counsel from contacting putative class members).

06 CIV 6198 LAK JCF, 2007 WL 1521117 (S.D.N.Y. May 24, 2007) (the critical question is whether putative class members reasonably believe that they were consulting counsel as lawyers); *Vodak v. City of Chicago*, No. 03 C 2463, 2004 WL 783051, at *3 (N.D.Ill. Jan. 16, 2004) (same).

b. **Middle View: Putative Class Members have a partial attorney-client relationship**

Certification marks the genesis of the fully formed relationship; prior to class certification, only a partially developed attorney-client relationship exists between putative class members and class counsel. *See, e.g., Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 377 n.6 (N.D. Ill. 1982); 5 NEWBERG ON CLASS ACTIONS §15.14 (3d ed. 1992) (Footnote omitted). The MANUAL FOR COMPLEX LITIGATION (FOURTH) states in §21.15 (Precertification Communications with the Proposed Class) at 367-68, and in its footnote 753, that “Rule 23 and the case law make clear that, even before certification or a formal attorney-client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole,” and “the lawyer for the proposed class has a fiduciary obligation”; *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 463 F.2d 470 (3rd Cir. 1972); Thomas A. Dickerson, CLASS ACTIONS: THE LAW OF 50 STATES § 4.06 [2] (1994) (“members of the purported class . . . are deemed represented by counsel for the class representatives as of the time the complaint is filed with the court”).

Likewise, class counsel should consider themselves to owe a significant duty to the class they purport to represent. *See, e.g., Culver v. City of Milwaukee*, 277 F.3d 908, 914–15 (7th Cir. 2002) (dismissal of a putative class action or decertification of a class action may impose on plaintiffs’ counsel the obligation to provide notice to all members of the now uncertified class).

c. **View That No Pre-Certification relationship exists**

- *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827, 830 (N.D. Ind. 2002)
- *Parks v. Eastwood Ins. Serv. Inc.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002) (rejecting the view that putative class members are represented by plaintiffs’ counsel prior to certification)
- *Garrett v. Metro. Life Ins. Co.*, No. 95- CIV-2406, 1996 WL 325725, at *6 (S.D.N.Y. 1996) (noting that “before class certification, the putative class members are not ‘represented’ by the class counsel for purposes of DR 7-104”)
- *Babbitt v. Albertson’s, Inc.*, No. G-92-1883, 1993 WL 128089, at *4 (N.D. Cal. 1993) (stating “the putative class members in the instant case are not represented by class counsel for the purpose of application of the disciplinary rules”)

- *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 376 n.6 (D.C. Ill. 1982) (“Before certification DR 7-104 does not apply because the potential class members are not ‘represented’ by counsel.”);
- *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) (the “mere initiation” of a class action prohibits defense attorneys from contacting putative class members)
- *Impervious Paint Industries, Inc v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981) (stating that “[d]uring the time between the institution of a class action and the close of the opt-out period, the status of plaintiffs’ counsel in relation to the class members cannot be stated with precision” and limiting defendant’s contact with class members).
- *The Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260, 264 (S.D.W. Va. 2007) (holding that putative class members are not represented parties prior to class certification)
- *Parris v. Superior Court*, 109 Cal. App. 4th 285, 135 Cal. Rptr. 2d 90, 2003 Cal. App. LEXIS 793 (Cal. App. 2d Dist. 2003) (no prior court approval is needed for plaintiffs’ precertification communication with potential class members.) COPIED FROM ABOVE, SUPRA SECTION I.
- *Longcrier v. HL-A Co.*, 595 F.Supp.2d 1218, 1225-26 (S.D. Ala. 2008) (“a defendant in a [FLSA class] action is not categorically forbidden from communicating with prospective opt-in plaintiffs,” but is “free to [appropriately] communicate with unrepresented prospective class members about the lawsuit and even to solicit affidavits from them concerning the subject matter of the suit.”)

3. **Court Approved Notice is Designed to Limit Abuses: Putative Class Members Have Right to Accurate Information**

In an FLSA collective action and in a class action under F. R. Civ. P., Rule 23, a district court has “both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties,” and to manage the communications to class members and potential class members. *Hoffmann-La Roche, supra*, 493 U.S. at 171. “Unapproved notice to class members which are factually or legally incomplete lack objectivity and neutrality ... will surely result in confusion and adversely affect the administration of justice.” *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2nd Cir. 1980); *see also Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir., 1985) (noting that “it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action.”); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. at 632 (N.D. Tex. 1994); *Pollar v. Judson Steel Corp.*, 1984 WL 161273 (N.D. Cal. 1984) (defendant’s notice was an attempt to solicit information from class members who are represented by counsel and may seriously prejudice the rights of the absent class members). Thus, “misleading communications, may be countered by court-authorized notice.” *Hoffmann-*

La Roche, supra, 493 U.S. at 171; *Babbitt v. Albertson's Inc.*, 1993 U.S. Dist. LEXIS 18801, *10 (N.D. Cal. 1993); *Parks v. Eastwood Ins. Servs.*, 235 F. Supp. 2d 1082, 1085 (D. Cal. 2002).

In *E.E.O.C. v. Morgan Stanley & Co., Inc.*, 206 F. Supp. 2d 559, 562 (S.D.N.Y. 2002) the court put into place several safeguards to protect the putative class members from abuse from defendant. In *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 WL 5038508 (D.Nev.), attorneys who were counsel for a group of employees in a collective action were found to have violated a court order and professional conduct rule by operating a website to advertise for additional opt-in class members. This required the attorneys to make new disclosures to the employer in the collective action, where the Court held that the attorneys were required, in good faith, to identify all the class members who were secured through the website.

However, in *Gordon v. Kaleida Health*, 2010 WL 3395543 (W.D.N.Y. 2010), the court held that unless shown to be false, deceptive, or relating to illegal activity, restrictions on attorney solicitation letters must be in furtherance of a “substantial governmental interest and only through means that directly advance that interest.” *Gordon*, at *7, (quoting *Shapiro*, 486 U.S. at 472). The court discussed solicitation letters in the context of an FLSA collective action and further held that even regulations on attorney solicitations that may more clearly carry the potential for “abuse or confusion” could be no broader than reasonably necessary to prevent the “perceived evil.” *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

B. Defense Counsel Interviews and The “Declaration Blitz”

Increasingly, defense counsel may be conducting multiple interviews with putative collective action members very shortly after a lawsuit is filed. While such interviews are likely permitted prior to Hoffmann notice being sent out, and may be permitted for non opt-in putative collective action members after notice is sent out, many courts have carefully reviewed the actions of defense counsel. Supervision sidesteps any appearance of wrongdoing, avoids needless and time-consuming collateral litigation over the propriety of the communications, and obviates any danger of the communications “chilling of the rights of the potential class members or . . . seeming to pressure any of them unduly to opt out of the class . . . or . . . creating confusion.” *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 602 (2d Cir. 1986) (quoting *Gulf Oil Co.*, 452 U.S. at 123, 126).

1. General Standard

- a) The communications must be non-coercive, accurate, and must not be an attempt to discourage participation. *See, e.g.*, *The Manual for Complex Litigation*, Fourth (Fed. Judicial Center 2004) defendants, in the course of any communications with potential class members, “may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3).” *Manual* at § 21.12; *See also Carnegie v. H&R Block, Inc.*, 687 N.Y.S.2d 528, 531 (N.Y. Sup. Ct. 1999) (“The test for whether a party, with or without aid of its counsel, has had impermissible contact with potential members of the plaintiff class is whether the contact is coercive, misleading, or an attempt to affect a class member’s decision to

participate in litigation.”); *Lewis v. Huntington Nat. Bank*, ---F. Supp. 2d---, C2-11-CV-0058, 2011 WL 1990567 (S.D. Ohio May 23, 2011); *Gortat v. Capala Brothers, Inc.*, 2010 U.S. Dist. LEXIS 45549 (E.D. N.Y. May 10, 2010) (defense counsel’s unsupervised contact with class members after class certification for the purpose of dissuading class members from participating in the case was improper).

- b) Defense Counsel should be aware that at least some courts view the interaction between employer and employee as inherently coercive. *E.E.O.C. v. Morgan Stanley & Co., Inc.*, 206 F. Supp.2d 559, 562. (“the danger of such coercion between employers and employees sufficient to warrant the imposition of restrictions regarding communication between defendants and potential class members.”) (quoting *Ralph Oldsmobile, Inc. v. General Motors Corp.*, 2001 WL 1035132, 3 (S.D.N.Y. Esp., 2001)); see also *Hampton Hardware v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632 (“Members must necessarily rely upon the defendant for dissemination of factual information . . . They are therefore particularly susceptible to believing the defendant’s comments”); *Ross v. Wolf Fire Prot., Inc.*, 2011 WL 2600659 (D. Md. June 28, 2011) (recognizing inherent coercion, but ruling only when it found actual confusion to occur).

As one district court has observed, “[c]lass members gain no benefit from such [misleading] contact. Quite the contrary, the imbalance in knowledge and skill which exists between class members and defense counsel presents an extreme potential for prejudice to class members rights.” *Bower v. Bunker Hill Co.*, 689 F. Supp. 1033, 1034 (E.D. Wash. 1985).

- c) A remedy is appropriate if the communications at issue create a ‘likelihood’ of abuse, confusion, or an adverse effect on the administration of justice.” *Georgine v. Amchem Products*, 160 F.R.D. 478, 498 (E.D. Pa. 1995); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 757 (9th Cir. 2010) (finding the district court’s remedy was not an abuse of its discretion because coercive conduct pervaded the opt-out period); *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1484 (S.D.N.Y. 1986) (court ordered letter authorized for the purpose of correcting any misconceptions that might have been engendered by defendant’s conduct); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. at 632 (N.D. Tex. 1994) (defendant’s letters constituted the type of misleading communications that justify court intervention); *Longcrier v. HL-A Co., Inc.* 595 F. Supp. 2d 1218 (S.D. Ala. Dec. 9, 2008) (court found defendant’s conduct was “highly misleading” when it engaged in “surveys” with employees that were subterfuge for investigating the pending lawsuit, so it struck 245 declarations obtained by defendants); *Ojeda-Sanchez v. Bland Farms*, 600 F. Supp. 2d 1373 (S.D. Ga. 2009) (court found defendants to be coercive, aggressive and intimidating, thus court granted protective order for personal contacts but allowed letters to be sent); *Abadeer v. Tyson Foods, Inc.*, No. 09 Civ. 125, 2009 U.S. Dist. LEXIS 110685 (M.D. Tenn. Nov. 25, 2009) (noting that defendants had taken affidavits from absent class members

without court approval and submitted them in support of their opposition to class certification, and that the appropriate remedy was for the court not to consider those affidavits on the motion for class certification) *Town of New Hartford v. Connecticut Resources Recovery Authority*, 970 A.2d 592 (Conn. 2009) (in non-employment case, holding under Connecticut law that a class action defendant's inappropriate or misleading communications may properly be considered by a trial court in making a certification decision, and affirming trial court's ruling that defendant's misleading communications tipped the scales in favor of finding numerosity); *Oetinger v. First Residential Mortgage Network, Inc. a/k/a Surepoint Lending*, 2008 U.S. Dist. LEXIS 41281 (W.D. Ky. May 23, 2008) (court refused to find an ethical violation but ordered defendants to refrain from contacting plaintiffs, opt-in plaintiffs, and potential class plaintiffs outside of formal discovery for the purpose of discussing the litigation, except with permission of counsel).

- d) Corporate counsel must explain that the corporation's interests may be adverse to putative class members. *Morgan Stanley*, 206 F. Supp. at 563; *Shahrokhshahi v. Round Table Pizza, Inc.*, Case No. RG05194700, Alameda Superior Court, September 30, 2005 (holding that a corporate attorney in communicating with potential class members must adequately explain that they represent only the corporation's interests, and not those of the putative class members whose interests may be adverse to the interests of the corporation; that the potential class member's rights are at issue in pending litigation; and that the putative class members can obtain their own counsel); *Gutierrez v. Johnson & Johnson*, Civ. 02-5302 (D.N.J.) (a court-appointed Special Master required defendants to give putative class members a sort of "Miranda" warning before having *ex parte* conversations with them.)
- e) Where communications are improper, the court may limit contact, order corrective notice, award fees and costs and extend the opt-in period. *Belt v. EmCare Inc.*, 299 F.Supp.2d 664 (E.D. Tex. 2003) (ordering corrective notice, enjoining future non-approved communications by defendants to absent class members, awarding attorneys' fees and costs against an FLSA defendant and its attorney of record, extending the opt-in period, and reserving the possibility of allowing opt-ins post-verdict, where defendant counsel sent a letter to the class members that failed each of "three independent standards for restriction as an improper communication with absent class members because it is misleading, coercive, and an attempt to undermine the purposes of a collective action." 299 F. Supp. 2d at 669.); *Goody v. Jefferson County*, 2010 WL 3834025 (D. Idaho Sept. 23, 2010) (one month before the court conditionally approved the collective class and plaintiff's proposed notice, defendant's counsel sent a letter and a check to eight putative plaintiffs, advising them of a county audit that had revealed certain employees' wages were not adequately paid, attached a check to ensure "compliance with all State and federal laws," and explained reasons for sending the check. The court ordered that defendant send corrective notice to

all prior recipients of the letter, notifying them that they may still join the collective action notwithstanding their receipt of the prior letter and check, and that the recipient has an additional 30 days to join the action); *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) (court issued corrective notice to the class at defendants' expense); *Pollar*, 1984 WL 161273 at *1 (corrective notice ordered to counteract confusion caused by defendant's conduct); *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1484 (S.D.N.Y. 1986) (court ordered letter authorized for the purpose of correcting any misconceptions that might have been engendered by defendant's conduct)

- f) Even where the right exists to interview employees, improper contact may be corrected by the court. *Mevorah v. Wells Fargo Home Mortgage, Inc.*, 2005 WL 4813532 (N.D. Cal. 2005) (ordering corrective relief after attorneys for a division of Wells Fargo contacted employee putative class members in an overtime case for the purposes of conducting interviews and getting declarations as to the nature of their duties, and did so without making the necessary disclosures as to who they represented and whose interests were at stake); *In re M.L. Stern Overtime Litigation*, 250 F.R.D. 492 (S.D. Cal. 2008) (Plaintiffs claimed as inherently coercive and misleading a survey sent by employers to putative overtime class member Account Executives and settlement and release letter which most of them signed. The court refused to nullify the executed settlement and release agreements and held the letters were not, on balance, an improper, misleading, or coercive pre-certification communication, but ordered an amended letter be sent to the Account Executives, and that all be given sufficient time to consider and respond to the amended letter); *Spence v. Irving Holdings, Inc.*, 2010 WL 5609023 (N.D. Tex., 2010) (requiring plaintiffs to notify Defendant of their proposed communications to potential collective action members at least 14 days before sending out the communication, including the nature of the communication (i.e. letter, phone call, email, etc.) and the content of the communication (i.e. a physical copy of the letter/flier, a transcript of the automated phone call, text of the email, etc.). Upon objection by Defendant, the "Court shall assess Plaintiffs' proposed communication to determine whether it is misleading, coercive, or an attempt to undermine the collective action."
- g) The court may not choose to correct communications that are not sufficiently misleading or where there is no evidence of confusion. See *Gerlach v. Wells Fargo & Co.*, No. C 05-0585, 2006 WL 824652 (N.D. Cal. Mar. 28, 2006) (holding that question and answer document disseminated by defendant to potential class members that described the litigation were not sufficiently misleading or coercive to grant corrective notice, where the document did not mischaracterize the litigation, and no evidence indicated that recipients of the document were misled or coerced); *Kuhl v. Guitar Center Stores, Inc.*, 2008 U.S. Dist. LEXIS 101747 (N.D. Ill. Dec. 16, 2008) (plaintiffs claimed employer's fact-finding interviews with potential class members were an abuse of the class action process designed to discourage

them from participating in the class action. The court found that aside from the interviews themselves, there was no specific action by defendants or counsel discouraging participation in the class action. The court rejected plaintiffs' argument that there is any 'inherently coercive relationship between employer and employee.' Rather, the court found the interviews permissible as part of defendants' internal investigation into the validity of the allegations and related exposure in this case. The court denied plaintiff's request to attend defendant's interviews but allowed plaintiffs to hold their own, and ordered defendants to produce copies of the signed interview statements. Finally, the court refused to order the parties to prepare a neutral and confidential questionnaire, but encouraged them to collaborate on a joint questionnaire); *Kerce v. West Telemarketing Corporation and West Telemarketing, LP*, 2008 U.S. Dist. LEXIS 98281 (S.D. Ga. May 28, 2008) (plaintiff sought to strike declarations claiming defendant's contact with members of the putative class was unauthorized, and possibly coercive or misleading. Denying plaintiff's motion, the Court refused to restrict defendant's free speech rights, and its right to defend itself in this litigation, given the absence of evidence that defendant misrepresented facts about the lawsuit, discouraged participation in the suit, or undermined the class' confidence in, or cooperation with, class counsel); *Cram v. Electronic Data Systems Corporation*, 2008 U.S. Dist. LEXIS 3669 (S.D. Cal. 2008) (Employer sent proposed class member settlement checks and DOL style release receipt forms for their FLSA claims. Plaintiffs sought to compel an urgent follow-up communication to explain plaintiffs' and avoid possible misunderstandings by potential class members at the pre-notice, pre-certification phase in the litigation explaining the distinctions between federal labor law rights and unreleased independent state law claims advanced in this lawsuit. The court found the challenged communication was neither misleading nor improper so as to justify the court's intervention).

C. Limitations on Plaintiffs' Counsel

Cases Prohibiting Plaintiff from Sending Pre-Certification 'Consent-to-Sue' Forms

Plaintiffs' counsel intended to send a letter and "Consent To Sue" form to putative class members prior to the court ruling on its motion for conditional certification. The court held the solicitation to be improper. Specifically, plaintiffs' counsel sought to send the package to "all registered representatives," regardless of the title or position the individual held while employed by defendants. The court held plaintiffs had not "established that the various positions that fall under the category of 'registered representatives' were similarly situated to their positions, that the positions are similarly situated to one another, or that the employees who occupied the positions are similarly situated to each other or to the named plaintiffs." Hence, the court found the letter misleading to the extent it suggested putative class members were eligible to participate in this lawsuit collectively. *Bouder v. Prudential Financial, Inc.*, U.S. Dist. LEXIS 83338 (D.N.J. Nov. 8, 2007). *But see Frye v. Baptist Memorial Hospital, Inc.*, U.S. Dist. LEXIS

41511 (W.D. Tenn. May 20, 2008) (limiting *Bouder* to deceptive statements); *Gordon v. Kaleida Health*, 2010 WL 3395543 (W.D.N.Y. 2010).

In *Hamm v. TBC Corporation*, 345 Fed. Appx. 406 (11th Cir. 2009), the court, in finding that plaintiffs' counsel had improperly solicited the three employees, the magistrate judge faulted plaintiffs' counsel for not having a written policy on solicitation, for failing to train the assistant regarding solicitation of clients, and for failing to give the assistant a script from which to work in making calls to current employees.

D. Agreements to Regarding the Relevant Data Relating to Putative Collective Action Members Prior to Hoffmann Notice.

Where defense counsel offers/agrees to provide the list of putative collective action members prior to the court-approved Hoffmann LaRoche notice being sent out, what duty does counsel have in such communications? See *Payne v. Goodyear Tire & Rubber Co.*, 207 F.R.D. 16, 21 (D.Mass. 2002) (declining to impose restrictions on defendant's pre-notice contact with potential class members where record contained no evidence that defendant was pressuring plaintiffs "or covertly robbing plaintiffs of their opportunity to participate in the instant litigation"); *Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1227 (S.D. Ala. 2008).

Can plaintiffs counsel accept limitations on that communication if counsel agrees to toll the statute of limitations for the relevant time period? See *Lynch v. United Services Auto. Ass'n*, 491 F. Supp. 2d 357, 367 (S.D.N.Y. 2007) (tolling statute of limitations is up to the court when pre-certification contact from defendant is made); *Grayson*, 79 F.3d 1086, 1106 (11th Cir. 1996) (construing § 216(b) as embracing principle that "only a written consent to opt-in will toll the statute of limitations on an opt-in plaintiff's cause of action").

IV. ADDRESSING POSSIBLE INTER-CLAIMS CONFLICTS IN REPRESENTING DIFFERENT GROUPS OF WORKERS

There are various strategy issues involved with crafting the class, *e.g.*, balancing benefits of a larger class against risk of putting too many different groups of employees in one class; and adequacy issues under Fed.R.Civ.P. 23(a) in (for example) having managers in the same class as employees. Also, at settlement, as discussed in the other materials, there are considerations in connection with varying strength of claim valuation. This section, though, focuses more specifically on potential ethical as distinct from strategy issues.

A. General Issues Applicable to All Cases.

MPC 1.7 governs conflicts of interest in representing multiple current clients:

"(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person

or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client [if] (1) the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.”

In addition to issues of concurrent representation, attorneys should be mindful of not only representing different categories of workers, but learning about one lawsuit (or using one representation to help another potential case) even when the clients’ interests do not inherently conflict. In *Gifford v. Target Corp.*, 723 F. Supp. 2d 1110 (D. Minn. 2010), the court held that contacts by employee’s counsel with employer’s senior manager who knew privileged information warranted counsel’s disqualification in FLSA collective action, even though the firm did not solicit information from the (not legally trained) manager and told her not to reveal privileged information.

B. Prospective and Actual Opt-Ins Who Are Later Determined Not to Be Similarly Situated and Class Representatives Who Object.

- You are not required to submit consent to join forms for people you do not believe have valid claims. Sample language: “We will submit consent to join forms only on behalf of people whom we have determined have a potentially valid claim, based on what people have told us about their job duties and other factors. Ultimately, the court will decide if these people can participate in the case or not, and whether their claims are valid.”
- “Where some class representatives object to a settlement negotiated on their behalf, class counsel may continue to represent the remaining class representatives and the class, “as long as the interest of the class in continued representation by experienced counsel is not outweighed by the actual prejudice to the objectors of being opposed by their former counsel.” [*Lazy Oil Co. v. Witco Corp.* (3rd Cir. 1999) 166 F.3d 581, 590; *In re Agent Orange Prod. Liab. Litig.* (2nd Cir. 1986) 800 F.2d 14, 18–19—motions to disqualify class counsel in disputed settlement situations require balancing of interests].” *Id.*

C. Rule 68

A number of recent cases in the wage and hour areas address the impact of a Rule 68 offer, can be an attempt by an employer to create a conflict between a class representative and the class, so is included in this section. There are a couple of recent well-reasoned cases that thwart defendants’ abilities to pick off class and collective actions. See *Symczyk v. Genesis Healthcare Corp.*, --- F.3d ---, 2011 WL 3835404 (3d Cir. Aug. 31, 2011) (FLSA collective

action not mooted by defendant's offering the plaintiff the purported full satisfaction of her individual claim before she moved for collective action certification; relying on the relation back doctrine); *Pitts v. Terrible Herbst, Inc.*, --- F.3d ---, 2011 WL 3449473 (9th Cir. Aug. 9, 2011) (rejected offer of judgment for full amount of putative class representative's individual claim in hybrid case FLSA and Nevada state law case did not moot the class/collective action); *but see Dionne v. Floormasters Enterprises, Inc.*, 647 F.3d 1109 (11th Cir. 2011) (when plaintiff agreed that defendant's tender of full payment to plaintiff and admission of overtime liability mooted overtime claim, plaintiff was not prevailing party entitled to attorneys' fees; case did not address class mootness and standing issues but has generally unfavorable language).

D. Parrilla v. Allcom Construction & Installation Services, LLC.

In *Parrilla*, 688 F. Supp. 2d 1347 (M.D. Fla. 2010), the court rejected a proposed settlement of a collective action case where plaintiffs had never sent notice and never moved to decertify, but moved for approval of a settlement that would have benefitted the pre-certification plaintiffs only, creating a de facto conflict between workers who were otherwise similarly situated. Defendant was in bad financial shape and the addition of more plaintiffs would have triggered bankruptcy or resulted in smaller claims. The court ascribed paramount importance to the fact that the court had granted stage one certification, which mean that counsel had a duty to see it through.

V. ATTORNEYS' FEES

The other papers address the law relating to attorneys' fees in detail. This section highlights a particular issue: the troubling practice of courts in effectively sanctioning plaintiffs' counsel by not awarding them the fees to which they are statutorily entitled.

Attached is the amicus brief NELA (with authors Stephen G. Moscato, David Spalter, and Sam Smith) prepared in the *Sahyers v. Prugh, Holliday & Karatinos* case, opinion at 560 F.3d 1241 (11th Cir. 2009) (holding, in self-proclaimed limited circumstances, that district court did not abuse its discretion in failing to give any attorneys' fees in lawsuit brought by paralegal against law firm due to, among other things, lack of pre-filing notice, despite acknowledgement that such notice not required in FLSA cases). While *Sahyers* has an extreme holding, defendants are citing it in and out of the Eleventh Circuit in attempts to limit attorneys' fees to which prevailing plaintiffs are entitled by statute.

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concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or
2. is not a waiver under the law of the State where the disclosure occurred.

d. **Controlling Effect of a Court Order**—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

e. **Controlling Effect of a Party Agreement**—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

f. **Controlling Effect of This Rule**—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

g. **Definitions**—In this rule:

1. “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
2. “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

E. Alternative Dispute Resolution

Problem 5-7

Negotiation

Analyze and be prepared to discuss the ethical issues raised by the following negotiation situations:

a. In a personal injury case, the insurance company has authorized defense counsel, Dorn, to settle the case for a maximum of \$100,000. At a negotiation session with plaintiff’s counsel, Phillips, Dorn states, “I am authorized to settle this case for \$50,000.” Later in the session, Phillips states, “My client won’t accept less than \$75,000.” In fact, Phillips has discussed settlement with the client, and the client is willing to accept \$60,000 to settle the case.

b. In a wrongful discharge case, may Phillips, counsel for the plaintiff, make a claim in negotiation for plaintiff’s reinstatement to his job even though the plaintiff does not want his job back, using this demand as a bargaining chip for increased damages? May Phillips

claim that the discharge has caused the plaintiff "emotional distress" when in fact the plaintiff has taken the loss of his job in stride?

c. An automobile accident occurred between two vehicles driven by Adams and Benson. Adams's attorney, Phillips, is negotiating with Dorn, counsel for defendant Benson. Phillips states: "Look Dorn, let's don't spend a lot of time here. I understand you have got a \$300,000 policy. My client has very serious injuries. Why don't you go ahead and tender your policy limit and we can settle this case without filing suit?" Benson does in fact have a \$300,000 basic policy, but he also has a \$1 million umbrella policy. Dorn is unsure where Phillips got his information about Benson's insurance coverage. Would it matter that under the procedural rules of the jurisdiction, if Phillips had filed suit, discovery rules would have required disclosure of the amount of Benson's insurance coverage?

d. Emerson is president and chief executive officer of More for Less, Inc., a national retail chain. The audit committee of the company's board of directors learned recently that Emerson has been embezzling substantial sums of money for several years. Matthews, an attorney retained by More for Less, has been meeting with Emerson's lawyers. Matthews says that the company would be willing not to file criminal charges against Emerson if Emerson resigns as president and transfers to the company all stock that Emerson owns in the company.

e. Dorn, counsel retained by the defendant's insurance company in an automobile accident case, has a meeting with plaintiff's counsel, Phillips. When Phillips enters the room, Dorn smells alcohol on Phillips's breath and observes that Phillips is extremely disheveled. Before Dorn can say much, Phillips expresses a willingness to settle the case for \$10,000 if Dorn gets Phillips a check "right away." While outwardly calm, Dorn is shocked by this offer. Dorn and the insurance company had evaluated the case as having a settlement value of \$25,000 to \$50,000. Dorn suspects that Phillips is looking for a quick fee.

f. Dorn represents defendant Harrison in a divorce proceeding brought by Harrison's wife. Dorn is about to meet with opposing counsel to see if they can work out a settlement. Harrison is extremely angry with his wife, and he has evidence of an affair. He tells Dorn, "I want her to get as little as possible out of this divorce. Use all the dirt we've got and anything else you can come up with to make them settle on our terms. Don't pull any punches."

g. Phillips represents the plaintiff in a products liability action against National Tire Company, represented by Dorn. The complaint alleges that the plaintiff suffered permanent injuries resulting from an

accident caused by defective tires manufactured by National. National has offered to settle the case for an amount that Phillips has recommended to the plaintiff and the plaintiff is willing to accept. As part of the settlement National Tire will require that the plaintiff sign a confidentiality agreement in which the plaintiff agrees not to disclose the terms of the settlement or any information obtained during discovery without the consent of National except pursuant to court order. The confidentiality agreement will be incorporated in the court order dismissing the case and the order will state that violation of the confidentiality agreement constitutes contempt of court. The settlement agreement will also require the parties to ask the court to seal all records and discovery. Finally, National requires Phillips to return all discovery material received during the case and to abide by the provisions of the confidentiality agreement.

Read Model Rules 1.2, 3.3, 4.1, 4.3, 4.4, 5.6, 8.4, and comments.

Regardless of the type of practice—civil litigation,¹⁶² criminal defense or prosecution, business, or labor—negotiation is an extremely important part of the work of lawyers.¹⁶³ Ethical issues in negotiation fall into two broad categories: honesty and fairness.¹⁶⁴

Honesty in negotiation: the duty not to engage in misrepresentation

To what extent must lawyers be honest in negotiations? The question can be refined into two questions: To what extent are lawyers prohibited from

162. See ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations, <http://www.americanbar.org/content/dam/aba/migrated/litigation/ethics/settlementnegotiations.authcheckdam.pdf> (visited May 28, 2011). See also Symposium, Ethical Issues in Settlement Negotiations, 52 Mercer L. Rev. 807 (2001).

163. Empirical evidence indicates that the presence of lawyers tends to promote settlement. Professors Ronald Gilson and Robert Mnookin have developed a model for analyzing whether lawyers contribute to cooperation or conflict in resolving disputes. They conclude that lawyers can promote cooperation and thereby reduce the transaction costs involved in disputes. They also identify a number of institutional factors that are more conducive to cooperation. Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509 (1994). See also Jason Scott Johnson & Joel Waldfogel, Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Procedure, 31 J. Legal Stud. 39 (2002) (cases that involve attorneys who interact repeatedly are resolved more quickly and are more likely to settle) and Russell Korobkin & Chris Guthrie, Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer, 76 Tex. L. Rev. 77 (1997) (experimental evidence showing that lawyers share analytical approach that tends to promote higher rate of settlement than clients would achieve on their own).

164. See generally What's Fair: Ethics for Negotiators (Carrie Menkel-Meadow & Michael Wheeler, eds. 2004). For an empirical study of lawyer practices in negotiation, see Scott S. Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 Rev. Litig. 173 (1989).

making false representations in negotiations? When must a lawyer disclose material information to the opposing party in negotiation?

A plausible answer to the question of when lawyers are allowed to make false representations (or, more bluntly, to lie in negotiations) is "never." In an influential article on negotiation, however, Professor James White argues that while lawyers do have a general obligation not to engage in fraud or deceit in negotiation, it is erroneous to claim that lawyers should never engage in misrepresentation in negotiation. According to White, misrepresentation of one's position is essential to negotiation, just as it is to a game like poker:

Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions. That is true of both the plaintiff and the defendant in a lawsuit. It is true of both labor and management in a collective bargaining agreement. It is true as well of both the buyer and the seller in a wide variety of sales transactions. To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.¹⁶⁵

Some scholars have criticized White's view that negotiation inherently involves a degree of misrepresentation. These scholars have argued that White has an adversarial conception of negotiation; they contend that negotiation can and should be cooperative rather than adversarial. In cooperative negotiations, the effectiveness of misrepresentation is substantially diminished.¹⁶⁶ Other scholars have argued that it is simply wrong for lawyers to lie in negotiation, and to the extent that current practice or rules allow misrepresentation

165. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 *Am. Bar Found. Res. J.* 926, 927-928. See also Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 *N.Y.U. L. Rev.* 493 (1989) (necessities of bargaining process produce ethical functionalism with minimal truthfulness and fairness); Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 *Ohio St. J. on Disp. Resol.* 481 (2009) (offering lawyers defensive mind-sets, strategies, and techniques that will enable them to minimize the risk that they will be exploited by lies that are likely to occur in negotiation).

166. See generally Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. Rev.* 754 (1984). For an interesting discussion of this issue, see the exchange between Professor White and Professor Roger Fisher, coauthor with William Ury of *Getting to Yes* (1981), a leading work on cooperative negotiation, in James J. White, *Essay Review, The Pros and Cons of "Getting to Yes,"* 34 *J. Legal Educ.* 115 (1984).

and deceit, these rules should be changed. The leading article expressing this view is Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*.¹⁶⁷

The Model Rules seem to adopt White's view that lawyers have a general obligation of honesty in negotiation but that deceit and misrepresentation are to some degree part of the rules of the game. Model Rule 4.1(a) states that in representing a client a lawyer shall not knowingly "make a false statement of material fact or law to a third person." The comment to Rule 4.1, however, makes clear that some false statements are permissible because they do not amount to statements of material fact. Comment 2 states that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."¹⁶⁸

How does a lawyer decide what misrepresentations under "accepted conventions" do not amount to statements of fact? Comment 2 to Rule 4.1 gives a few examples but does not provide a definition or any criteria for distinguishing permissible from prohibited misrepresentations. Case law, however, does offer some guidance. Improper misrepresentation clearly occurs when a lawyer makes a false statement about the material facts of the case—the testimony of a witness or the existence or contents of a document, for example.¹⁶⁹ Improper misrepresentation also occurs when a lawyer makes false statements about the effect of provisions of an agreement, about procedural aspects of the case, or about insurance coverage.¹⁷⁰ Such a misrepresentation can result in rescission of the agreement,¹⁷¹ subject the lawyer to disciplinary action,¹⁷² or produce civil

167. 35 La. L. Rev. 577 (1975). See also Reed E. Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 Geo. J. Legal Ethics 45 (1994); Deborah Schmedemann, *Navigating the Murky Waters of Untruth in Negotiation: Lessons for Ethical Lawyers*, 12 Cardozo J. Conflict Resol. 83 (2010).

168. See Restatement (Third) of the Law Governing Lawyers §98(1). In Formal Opinion 06-439, the ABA Committee on Ethics and Professional Responsibility stated:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

169. See *Ausherman v. Bank of America Corp.*, 212 F. Supp. 2d 435 (D. Md. 2002) (referring to disciplinary authorities and imposing sanction of attorney fees for misrepresentations by plaintiff's counsel during negotiations about identity of "kingpin" of scheme to unlawfully obtain and sell credit reports).

170. See *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 131 Cal. Rptr. 2d 777 (Ct. App., *review denied* 2003) (holding that insured's judgment creditors stated cause of action against insurer's coverage counsel for misrepresentation about lack of coverage for willful acts).

171. See *Carlson v. Carlson*, 832 P.2d 380 (Nev. 1992) (wife entitled to relief from property settlement agreement based on representations by husband and his attorney that division was essentially equal).

172. See *In re Broome*, 615 So. 2d 1333 (La. 1993) (lawyer disciplined for obtaining personal injury settlement based on false representation that suit had been timely filed).

liability.¹⁷³ Note also that a lawyer's duty not to engage in misrepresentation in negotiations generally parallels a lawyer's duty not to engage in misrepresentation in court proceedings.¹⁷⁴

Lawyers do not act improperly, however, when they misrepresent their true *opinions* about the relative strengths of each side of a case. Lawyers may permissibly say to their opponents that they believe they have very strong cases even though they actually believe that there are serious problems with their positions. Further, in negotiations lawyers may argue for interpretations of relevant law that are most favorable to their clients, even when lawyers believe that their opponents' positions are correct.¹⁷⁵

Representations regarding settlement authority could arise in two ways. First, a lawyer could make a representation regarding settlement authority for the purpose of inducing agreement by the opposing side. Second, the opposing party may ask a question about the lawyer's settlement authority. In either situation, is it improper for a lawyer to make misrepresentations about settlement authority? Comment 2 to Rule 4.1 states that a lawyer may ordinarily make misrepresentations about a "party's intentions as to an acceptable settlement of a claim." Yet while misrepresentations of opinions about the merits of the case are essential to the negotiation process, misrepresentations of settlement authority are not. Further, settlement authority is a matter of fact, not opinion.

Responses to requests by the other side for information about settlement authority pose a more subtle problem. A lawyer's settlement authority will come from discussions with the client. These discussions will often involve confidential information—information received from the client that is subject to either the attorney-client privilege or the work product doctrine, or both. Thus, a question about settlement authority inquires into privileged matters

173. See *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310 (Ind. 1994) (lawyer subject to liability for misrepresenting limits of insurance policy; as matter of law lawyers have right to rely on representations made by opposing counsel about amount of insurance).

174. See Model Rule 3.3(a)(1); *Attorney Grievance Comm. of Maryland v. Gordon*, 991 A.2d 51 (Md. 2010) (in breach of contract action, attorney submitted false signature page); *In re Neitlich*, 597 N.E.2d 425 (Mass. 1992) (one-year suspension administered to lawyer who misrepresented terms of client's pending real estate transaction to court in post-divorce proceeding); ABA Formal Opinion 98-412 (dealing with disclosure obligations of lawyer who discovers that client has violated court order during litigation). Rule 3.3(a)(1) as amended in 2002 is somewhat stronger than Rule 4.1(a) because the misrepresentation to a tribunal need not be material. Rule 3.3(a)(1) as amended in 2002 also makes it improper for a lawyer to "fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." While this duty of disclosure is not explicit under Rule 4.1, the failure to make such a corrective disclosure will often amount to a misrepresentation under that rule as well. See the discussion below.

175. See *White, Machiavelli and the Bar*, 1980 Am. Bar Found. Res. J. at 931-932. See also Restatement (Second) of Contracts §§168, 169 (1981); Restatement (Second) of Torts §542 (1977) (reliance on statements of opinion not justified except in limited situations).

and seeks information that the other party is not entitled to know.¹⁷⁶ In addition, if lawyers and clients know that lawyers must respond truthfully to questions about authority, they can easily devise ways to avoid having to answer the question. Thus, good reasons exist why lawyers should not be required to answer truthfully questions about their settlement authority. At the same time, it is probably unnecessary for the rules to permit lawyers to lie in response to inquiries about settlement authority because such questions can easily be deflected.

Another misrepresentation that is problematic involves a “false demand,” a contention injected into the negotiation process, not because it expresses a serious position by the side making the demand but because a false demand can be used as a bargaining chip to improve the overall settlement. Professor White argues that the false demand is a misrepresentation in the broadest sense because a person making a demand “implicitly or explicitly states his interest in the demand and his estimation of it,” but he goes on to conclude that such demands are “not thought to be inappropriate,” at least in labor negotiations.¹⁷⁷

Honesty in negotiation: the duty of disclosure

So far we have discussed the question of when misrepresentation by lawyers in negotiation is improper. The issue of honesty in negotiation also raises a question of disclosure. When are lawyers required to disclose information to the opposing party in connection with negotiation?

The classic case dealing with a lawyer’s duty to disclose material information is *Spaulding v. Zimmerman*.¹⁷⁸ David Spaulding, a passenger in a vehicle driven by John Zimmerman, suffered severe head and chest injuries in collision with another automobile driven by Florian Ledermann and owned by his father, John. Two individuals were killed in the accident. Because Spaulding was a minor (age 20), the case was brought on his behalf by his father as his natural guardian. Spaulding was represented by a young lawyer, Richard Roberts. Zimmerman’s insurer selected an experienced lawyer, Norman Arveson, to represent him. Attorney Chester Rosengren represented the Ledermanns and their insurer.

Three doctors who treated Spaulding failed to discover that he also suffered from a life-threatening aneurysm of the aorta that may have been caused by the accident. Arveson, counsel for Zimmerman, also retained a physician, Dr. Hannah, to examine Spaulding. Dr. Hannah discovered the

176. Cf. ABA Comm. on Ethics and Prof. Resp., Formal Op. 93-370 (judge does not have right to require lawyer to reveal settlement authority absent client’s consent).

177. White, Machiavelli and the Bar, 1980 Am. Bar Found. Res. J. at 932.

178. 116 N.W.2d 704. For a more complete telling of David Spaulding’s story, see Timothy W. Floyd, *Legal Ethics, Narrative, and Professional Identity: The Story of David Spaulding*, 59 Mercer L. Rev. (2008).

aneurysm and reported it to Arveson about a week before the case was scheduled to go to trial. The report stated:

The one feature of the case which bothers me more than any other . . . is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty. . . . Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death.¹⁷⁹

Roberts never requested a copy of Dr. Hannah's report. The trial court later criticized Roberts for his failure "to use available rules of discovery." Arveson did not inform Zimmerman, Spaulding, or Spaulding's father about the aneurysm. Dr. Hannah also did not inform anyone of the situation, other than Arveson. However, Arveson did make the contents of Dr. Hannah's report known to Rosengren, the lawyer representing the Ledermanns, and it appears that Dr. Hannah's report was also mentioned to one of the insurers.

On the day after the case was called for trial, the parties reached a settlement calling for a payment to Spaulding of \$6,500. In connection with the settlement negotiations, Arveson was careful not to make any representations about the extent of Spaulding's injuries. Roberts then filed a petition with the court seeking approval of the settlement, with copy to defense counsel. Attached to the petition were affidavits from plaintiff's two physicians, but there was no reference to Dr. Hannah's examination or report. The petition described Spaulding's injuries but made no mention of the aneurysm. The court approved the settlement.

Early in 1959, about eighteen months after the settlement was approved, Spaulding was required to take a physical examination by the Army Reserve. He went to Dr. Cain, his family physician, who had originally treated him after the accident. In the course of this examination, Dr. Cain discovered the aneurysm. Dr. Cain, after obtaining another opinion, made arrangements for surgery. While the surgery did remove the aneurysm, Spaulding suffered permanent and significant speech loss, probably as a result of the procedure.

Spaulding then filed a petition to have the settlement vacated and the judgment reopened. The trial court granted the motion, and the Minnesota Supreme Court affirmed. The court found that the trial court did not abuse its discretion in reopening the settlement, but this decision was based on principles applicable to settlements involving minors rather than on any impropriety by defense counsel:

The principles applicable to the court's authority to vacate settlements made on behalf of minors and approved by it appear well established. With

179. 116 N.W.2d at 707.

reference thereto, we have held that the court in its discretion may vacate such a settlement, even though it is not induced by fraud or bad faith, where it is shown that in the accident the minor sustained separate and distinct injuries which were not known or considered by the court at the time settlement was approved. . . . While no canon of ethics or legal obligation may have required [defense counsel] to inform plaintiff or his counsel with respect thereto, or to advise the court therein, it did become obvious to them at the time that the settlement then made did not contemplate or take into consideration the disability described. This fact opened the way for the court to later exercise its discretion in vacating the settlement and under the circumstances described we cannot say that there was any abuse of discretion on the part of the court in so doing. . . .¹⁸⁰

In a comprehensive examination of the case, Professor Roger Cramton and Lori Knowles contend that the court was correct that rules of ethics and discovery rules did not then and did not in 1998 require disclosure. They argued that this result showed that the confidentiality rules were unsound and should be changed.¹⁸¹ The confidentiality provisions of the ABA Model Rules were in fact comprehensively revised in 2002 and 2003. Would counsel for the defendants have an obligation to disclose Spaulding's physical condition under the current version of the Model Rules?

ABA Model Rule 4.1(b) seems to impose only a limited duty of disclosure on lawyers. If a client is engaging in a criminal or fraudulent act, under Rule 4.1(b) the lawyer must disclose the client's conduct if disclosure is necessary to avoid assisting the act, and disclosure is permitted under Rule 1.6. Of course, in many situations a lawyer could avoid assistance of the client's crime or fraud by withdrawing from representation. See Model Rule 1.16(a).

The author of this casebook has argued, however, that it is a mistake to conclude that Rule 4.1(b) is the only basis for a lawyer's duty of disclosure. The lawyer's duty not to engage in misrepresentation under Model Rule 4.1(a) will sometimes require disclosure of material information. Such a duty of disclosure arises when nondisclosure is equivalent to misrepresentation. Comment 1 to Model Rule 4.1 provides that a misrepresentation can occur by partially true statements that are misleading and by "omissions that are the equivalent of affirmative false statements." Comment 3 to Model Rule 3.3 is similar. Note that when the duty of disclosure is based on the obligation not to engage in misrepresentation under either Rule 4.1(a) or 3.3(a)(1), the duty is not qualified by the obligation of confidentiality.¹⁸² In the Kentucky

180. *Id.* at 709-710. The trial court had also noted that there was "no doubt of the good faith of both defendants' counsel." *Id.* at 709.

181. Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 *Minn. L. Rev.* 63 (1998).

182. See Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 *Ky. L.J.* 1055, 1058 (1998-1999). For a contrary view, see Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 *Geo. J. Legal Ethics* 179 (2004).

article I argued that case law supports the existence of a duty of disclosure by lawyers in contract and settlement negotiations in four situations:

- (1) A duty of *corrective disclosure* arises when a lawyer made a representation that the lawyer now learns either was false when made or has become false because of changed circumstances.¹⁸³
- (2) If a lawyer knows that the other party is operating under a *fundamental mistake about the contents of a writing*, the lawyer has a duty to disclose the mistake to the other party. The mistake will typically arise as a result of a "scrivener's error."¹⁸⁴
- (3) Situations in which lawyers will have a *fiduciary duty to the opposing party to disclose material information in negotiation* may arise in some situations. When the opposing party is represented by counsel, a lawyer does not have a fiduciary duty to the opposing party. If the lawyer is dealing with an unrepresented opposing party, the lawyer has an obligation to correct any misunderstanding that the other party may have about the lawyer's role in the negotiations, and the lawyer may not give any advice to an unrepresented person, other than the advice to seek counsel. See Model Rule 4.3. However, a lawyer may properly act to create or adjust a contractual relationship between jointly represented clients on a mutually advantageous basis. See Model Rule 1.7 and cmts. 26-33 and Problem 4-2. Because lawyers who undertake common representation have an attorney-client relationship with both parties, they have a fiduciary duty to disclose material information to both of them. Model Rule 1.7, cmt. 31.
- (4) The broadest and vaguest category of cases in which lawyers have a duty of disclosure occurs when disclosure is *necessary to correct a mistake by the other party about basic aspects of the transaction and the failure to disclose violates standards of good faith and fair dealing*. Probably the most blatant case of nondisclosure that violates the duty of good faith occurs when the lawyer's client dies, but the lawyer fails to reveal this information to the other side while negotiating a

183. See Restatement (Third) of the Law Governing Lawyers §98, cmt. *d* (recognizing duty of corrective disclosure). Cf. Fed. R. Civ. P. 26(e) (duty to supplement responses in discovery).

184. See ABA Comm. on Ethics and Prof. Resp., Informal Op. 86-1518 (lawyer who receives contract containing scrivener's error should immediately notify other lawyer and need not consult with client because client does not have reasonable expectation of receiving erroneous provision); *Stare v. Tate*, 98 Cal. Rptr. 264 (Ct. App. 1971) (property settlement agreement set aside because of lawyer's failure to disclose mathematical mistake made by opposing party in its settlement offer).

settlement agreement.¹⁸⁵ The duty of good faith disclosure extends further, however, to encompass failure to disclose major procedural developments, mistakes about the amount of insurance coverage, and recantation of testimony by a significant witness.¹⁸⁶

In the situations discussed above, the lawyers who failed to disclose information knew that the other party was operating under a mistake, and the mistake related to fundamental information. When these factors are absent, a duty to disclose does not arise. For example, in *Brown v. County of Genesee*,¹⁸⁷ the Sixth Circuit held that a settlement agreement in an employment discrimination case should not be set aside because defense counsel and his client failed to reveal to the plaintiff and her attorney that they were mistaken about the highest pay level that plaintiff would have been entitled to, had she been hired immediately. Defense counsel believed that it was "probable" that the plaintiff was mistaken about pay levels, but there was no way for counsel to know that a mistake had occurred. In addition, it was unclear to the court that the highest level of pay was fundamental to the agreement because there was no such condition in the settlement.¹⁸⁸

With regard to *Spaulding v. Zimmerman*, I argued that the Model Rules, properly interpreted, would require defense counsel to disclose the information about Spaulding's condition because their failure to disclose was under the circumstances the equivalent of a misrepresentation:

[T]he court was wrong in its characterization of the lawyers' conduct. Under the facts of the case, defense counsel's failure to disclose was the equivalent of a misrepresentation. Defense counsel had a duty to disclose because plaintiff's physical condition was a basic fact about which plaintiff was mistaken, and the failure to disclose violated principles of good faith and fair dealing. Indeed, *Spaulding* is probably the clearest case for disclosure that can be imagined because of the threat to the plaintiff's life.¹⁸⁹

185. See *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507 (E.D. Mich. 1983); *Kentucky Bar Assn. v. Geisler*, 938 S.W.2d 578 (Ky. 1997); ABA Formal Opinion 95-397.

186. See, e.g., *Hamilton v. Harper*, 404 S.E.2d 540 (W. Va. 1991) (lawyer failed to reveal that summary judgment had just been granted to insurer in federal court declaratory judgment action on issue of insurance coverage when lawyer accepted outstanding offer from insurance company); *State ex rel. Neb. State Bar Assn. v. Addison*, 412 N.W.2d 855 (Neb. 1987) (lawyer suspended for six months after failing to reveal to hospital administrator the existence of insurance policy in connection with negotiation of release of hospital's lien); *Kath v. Western Media, Inc.*, 684 P.2d 98 (Wyo. 1984) (settlement invalidated because plaintiff's attorney failed to disclose existence of letter in which witness who was previously a lawyer for all parties to action contradicted testimony he had given in deposition).

187. 872 F.2d 169 (6th Cir. 1989).

188. *Id.* at 174-175.

189. *Crystal, The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky. L.J. at 1097.

Fairness of the settlement

The original draft of the Model Rules stated that during negotiations a "lawyer shall be fair in dealing with other participants."¹⁹⁰ Whether the drafters truly intended to include a general obligation of fairness is doubtful since the comment stated that fairness in negotiations implies that representations shall be truthful. In any event, the idea of an obligation of fairness was quickly abandoned in favor of narrower rules focusing on misrepresentation and nondisclosure.¹⁹¹

Why shouldn't rules of ethics impose an obligation on lawyers to refuse to participate in agreements that are unfair? Three reasons could be given. First, there are no objective criteria of fairness that a lawyer or a disciplinary board could use to determine whether an agreement was fair. Thus, an ethical duty not to participate in an unfair outcome would be unworkable. Second, to the extent that rules of ethics prohibit lawyers from participating in settlement agreements that the lawyers know are invalid because of fraud, mistake, or other such cause, the rules already impose a substantial obligation of fairness. Third, a duty of fairness would be inconsistent with the adversarial system, under which the fairness of the outcome is judged by the fairness of the adjudication process. Rules of ethics do not prohibit lawyers from participating in adjudication that produces an outcome that some might consider substantively unfair so long as the process is a fair one. Similarly, the rules should not prohibit lawyers from engaging in negotiations that result in an agreement that some observers might consider unfair.

Some scholars, while agreeing that lawyers should not have an ethical duty to ensure the overall fairness of negotiations, have argued for a narrower proposition: Lawyers should have an obligation not to participate in an agreement that is unconscionable. Professor Lee Pizzimenti has proposed the adoption of the following rule of ethics:

A lawyer shall not assist in the preparation of a written instrument containing terms which are unconscionable. A lawyer may assist in such preparation where there is a basis for concluding the terms are not unconscionable that is not frivolous, including a good faith argument for an extension, modification or reversal of existing law.¹⁹²

190. ABA, Model Rules of Professional Conduct, Rule 4.2(a) (Discussion Draft 1980).

191. See Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. Rev. 181 (1981) (legal regulation of trustworthiness cannot go further than to proscribe fraud because of substantial difference in technical sophistication among lawyers).

192. See Lee A. Pizzimenti, *Prohibiting Lawyers from Assisting in Unconscionable Transactions: Using an Overt Tool*, 72 Marq. L. Rev. 151, 174 (1989).

Improper threats

Even though the Model Rules do not impose a general obligation of fairness in connection with negotiation, there are some limitations on negotiation tactics. One limitation deals with improper threats during negotiation. Disciplinary Rule 7-105(A) of the Code of Professional Responsibility prohibited lawyers from threatening to use the criminal process solely to obtain an advantage in a civil matter. Ethical Consideration 7-21 stated that threatening the use of the criminal process to settle civil claims was a "subversion" of the criminal system that could deter people from asserting their legal rights. Such an abuse diminishes public confidence in the legal system.

The drafters of the Model Rules intentionally omitted the ban on threats of criminal prosecution.¹⁹³ They believed that the prohibition found in the Code was unwise in two respects. First, the restriction was redundant because it was already covered by other rules, particularly by Model Rule 8.4(b), prohibiting lawyers from engaging in criminal conduct that reflects on their honesty, trustworthiness, or fitness to practice law, and by Model Rule 4.4, dealing with respect for the rights of third persons.¹⁹⁴ Second, the drafters concluded that the limitation was overbroad because some threats of criminal prosecution were proper tactics that lawyers should be allowed to use to protect clients' legitimate interests.¹⁹⁵

In Formal Opinion 92-363, the ABA Committee on Ethics and Professional Responsibility advised that when a threat of criminal prosecution amounts to extortion or some other crime under the criminal law of the jurisdiction where the threat occurs, that conduct also violates Model Rule 8.4(b). However, the Committee went on to point out that under the Model Penal Code property obtained by threat of prosecution is not a crime when the property is "honestly claimed as restitution for harm done" in the situation to which the threat relates (quoting Model Penal Code §223.4). In addition to Rule 8.4(b), the Committee warned lawyers that, depending on the circumstances, a threat of criminal prosecution in connection with a civil matter might violate Rule 4.4 (prohibiting conduct that has no substantial purpose other than to embarrass, delay, or harass), Rule 4.1 (imposing a duty not to engage in misrepresentation), or Rule 3.1 (prohibiting frivolous claims).¹⁹⁶ The committee concluded that if a lawyer did not violate any of these rules, a threat of criminal prosecution to settle a civil matter was proper if the crime was *related* to the civil matter. The committee also decided that a lawyer could agree not to report a criminal offense

193. 2 Hazard & Hodes, *The Law of Lawyering* §40.4.

194. See Wolfram, *Modern Legal Ethics* §13.5.5, at 718. See also ABA Comm. on Ethics and Prof. Resp., Formal Op. 94-383 (use of threat to file disciplinary charge against opposing lawyer to obtain advantage in civil matter is constrained by various provisions of Model Rules although not directly prohibited).

195. 2 Hazard & Hodes, *The Law of Lawyering* §40.4.

196. ABA Comm. on Ethics and Prof. Resp., Formal Op. 92-363, at 4-5.

provided such an agreement did not amount to compounding a crime. The opinion refers to rules of ethics and criminal statutes in force in the jurisdiction in which the lawyer practices. The West Virginia Supreme Court largely adopted the approach of ABA Formal Opinion 92-363 in *Committee on Legal Ethics v. Printz*,¹⁹⁷ which held that an attorney may ethically threaten criminal prosecution to obtain restitution of embezzled funds.¹⁹⁸

It should be noted that under the Model Rules a threat may sometimes be improper even if it does not involve a threat of criminal prosecution: for example, a threat that constitutes a tort or that is made for an improper purpose. Thus, courts have held that threats to give undue publicity to the other party's private matters in order to induce settlement are improper. In *State v. Harrington*¹⁹⁹ the Vermont Supreme Court held that a threat made by the wife's divorce lawyer to publicize her husband's adultery, a crime, in order to coerce settlement amounted to criminal extortion. Similarly, in *In re Dienes*²⁰⁰ a lawyer received a public reprimand for making a veiled threat to inform the newspapers about his former employer's business unless the employer withdrew a motion seeking attorney fees from the lawyer.

Approaches to negotiation

Scholars who have studied lawyer negotiations have developed a typology of approaches to negotiation.²⁰¹ Fundamental to lawyer negotiation is a distinction between *style* and *strategy*.

Negotiating style refers to the personality traits that the lawyer presents in negotiation.²⁰² Professor Gerald Williams has identified two basic negotiating styles: competitive (or adversarial) and cooperative (or problem solving). Williams listed the following as personality traits of effective competitive negotiators:

dominating, forceful, attacking, aggressive, ambitious, clever, honest, perceptive, analytical, convincing, and self-controlled.²⁰³

197. 416 S.E.2d 720 (W. Va. 1992).

198. See also *Ruberton v. Gabage*, 654 A.2d 1002 (N.J. Super. Ct. App. Div.), *cert. denied*, 663 A.2d 1358 (N.J. 1995) (in wrongful discharge case, threat by defense counsel to institute criminal charges unless plaintiff accepted settlement not actionable as abuse of process because process not used and because statements made in course of judicial proceeding are absolutely privileged).

199. 260 A.2d 692 (Vt. 1969). See generally Joseph M. Livermore, *Lawyer Extortion*, 20 *Ariz. L. Rev.* 403 (1978).

200. 571 A.2d 1303 (N.J. 1990).

201. See Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating* 390-397 (1990).

202. *Id.* at 390.

203. *Id.* at 391.

He identified the following as personality traits of successful cooperative negotiators:

trustworthy, fair, honest, courteous, personable, tactful, sincere, perceptive, reasonable, convincing, and self-controlled.²⁰⁴

Negotiation strategy refers to the goals of the negotiation. Building on Professor Williams's work, Professor Carrie Menkel-Meadow identified two negotiating strategies: adversarial and problem solving.²⁰⁵ While the strategies appear to be identical to the styles of negotiating, a fundamental difference exists between technique of negotiation (style) and goals of negotiation (strategy). Professor Menkel-Meadow went on to discuss four possible approaches to negotiation that lawyers could adopt; these four approaches represent the logical combinations of the two styles and two strategies:

| | <i>Style</i> | <i>Strategy</i> |
|-----|--------------|---------------------------------|
| (1) | Competitive | adversarial; |
| (2) | Cooperative | adversarial; |
| (3) | Competitive | problem solvers; |
| (4) | Cooperative | problem solvers. ²⁰⁶ |

For example, lawyers who approach negotiations with friendly, courteous, caring attitudes but use these techniques to achieve the highest possible settlements for their clients are employing cooperative adversarial negotiation methods.

How does a lawyer make a choice of negotiating style and strategy?²⁰⁷ Professors Bastress and Harbaugh argue that the choice of approach to a negotiation should be made carefully by the lawyer and client after considering the relevant factors, including the following:

1. The goals of the client and the needs of the opposing party. For example, if the client's only goal is to obtain as much of the only fungible commodity at issue as is possible, then an adversarial strategy is likely to produce the greater gain. On the other hand, if a continuing relationship between the parties is their primary aim, problem-solving may be more appropriate.

2. The configuration of shared, independent, and conflicting needs of the parties. For example, if the needs of the parties do not conflict but are shared or independent, it suggests that a cooperative problem-solving strategy could be very successful.

204. *Id.*

205. *Id.* at 393.

206. *Id.* at 395.

207. For a study supporting the view that a problem-solving approach to negotiation is more effective than an adversarial style, see Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 *Harv. Negot. L. Rev.* 143 (2002). See also Charles B. Craver, *What Makes a Great Legal Negotiator?*, 56 *Loy. L. Rev.* 337 (2010). See generally Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 *Geo. J. Legal Ethics* 137 (2011).

3. The resources, including money, personnel, time, and the like, available to your client and to the opposing party.

4. The ability of the parties to creatively generate additional issues and resources to expand the subject matter of the negotiation. The greater the number of issues and the amount of resources involved in the negotiation, the easier it is to move from adversarial to problem-solving.

5. The comfort or discomfort you (and your client) experience when you behave as a competitive versus cooperative bargainer. While we encourage you to experiment with the four unions of style and strategy, we acknowledge it is difficult to successfully use a negotiation model with which you are uncomfortable. Your client's needs must also be considered. The angry client in a wrongful death case, for instance, may not be satisfied with a cooperative problem-solving approach.

6. The style and strategy combination selected by your opponent. Professor Williams, for example, found that effective competitive negotiators were quite successful when matched with cooperative bargainers.²⁰⁸

Bastress and Harbaugh go on to argue that the choice of approach to negotiation can change during the course of negotiation: Lawyers must plan for negotiation but should also remain flexible.

Model Rule 1.2(a) states that a lawyer must abide by the client's directions about the objectives of representation. However, the attorney has the right to make decisions regarding the means to be used to carry out those objectives after consultation with the client as required by Rule 1.4. Thus, under the Model Rules lawyers have broad discretion regarding tactical matters.

The Bounds of Advocacy adopted by the American Academy of Matrimonial Lawyers embody a modification of the traditional, adversarial role for attorneys: "These AAML Bounds of Advocacy reflect a shift toward the role of constructive advocacy, a counseling, problem-solving approach for a family member in need of assistance in resolving difficult issues and conflicts within the family."²⁰⁹ The following provisions on tactics illustrate this changed conception of the lawyer's role:

1.3 An attorney should refuse to assist in vindictive conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect.

COMMENT

Some clients expect and want the matrimonial lawyer to reflect the highly emotional, vengeful personal relationship between spouses. The attorney should counsel the client that discourteous and retaliatory conduct is

208. Bastress & Harbaugh, *Interviewing, Counseling, and Negotiating* at 402.

209. See American Academy of Matrimonial Lawyers, *The Bounds of Advocacy, Attorney as Counselor and Advocate*, <http://www.aaml.org/library/publications/19/bounds-advocacy> (visited May 20, 2011). Similarly, some attorneys advocate a new approach, which they call "collaborative lawyering." In Formal Opinion 07-447 the ABA Committee described the process of collaborative lawyering and advised lawyers that they could ethically engage in the process with the informed consent of their clients.

inappropriate and counterproductive, that measures of respect are consistent with competent and ethical representation of the client, and that it is unprofessional for the attorney to act otherwise.

Although the client has the right to determine the “objectives of representation,” after consulting with the client the attorney may limit the objectives and the means by which the objectives are to be pursued. [Model Rule 1.2(c).—Ed.] The matrimonial lawyer should make every effort to lower the emotional level of the interaction among parties and counsel. Some dissension and bad feelings can be avoided by a frank discussion with the client at the outset of how the attorney handles cases, including what the attorney will and will not do regarding vindictive conduct or actions likely to adversely affect the children’s interests. If the client is unwilling to accept the attorney’s limitations on objectives or means, the attorney should decline the representation.

Similarly, Rule 6.2 of the Bounds of Advocacy provides as follows: “An attorney should not permit a client to contest child custody, contact or access for either financial leverage or vindictiveness.”

Confidentiality or noncooperation agreements and judicial orders sealing court records

In contemporary litigation, parties often negotiate for confidentiality provisions in connection with settlement agreements.²¹⁰ A wide range of motivations can prompt one or both parties to seek such arrangements. Some cases—sexual harassment matters, for example—may involve information about the private lives of the parties. Other cases may deal with trade secrets, the release of which can be commercially damaging. In some matters, a party may be concerned about adverse publicity resulting from the case. Defendants in product liability cases may be worried that publicity about the existence or settlement of litigation could prompt other cases or could increase settlement values.²¹¹

Confidentiality arrangements can take various forms, but in broad terms they fall into two categories: private confidentiality or noncooperation agreements and court-ordered confidentiality. In the typical confidentiality or noncooperation agreement, the plaintiff agrees not to disclose either the terms of the settlement or any information related to the case without the consent of the defendant. Such agreements usually provide that the plaintiff may reveal such information if required by court order.²¹²

210. See generally Richard Zitrin & Carol M. Langford, *The Moral Compass of the American Lawyer*, ch. 9 (1999).

211. See Erik S. Knutsen, *Keeping Settlement Secret*, 37 Fla. St. U. L. Rev. 945 (2010).

212. See Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics*, 87 Or. L. Rev. 481 (2008); Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 Hofstra L. Rev. 1, 4 (2002).

Defendants may not be satisfied with the protections of private confidentiality agreements and may seek court-ordered protections as well. Court-ordered confidentiality usually comes in two forms. First, as part of the court's order either dismissing the case or approving the settlement, the court can incorporate the terms of the parties' confidentiality agreement and provide that a violation of the agreement constitutes contempt of court. Second, a court can seal all or part of the record in the case.

In most jurisdictions confidentiality agreements are enforceable and court-ordered confidentiality is permissible.²¹³ Some jurisdictions allow private confidentiality agreements but prohibit or limit sealing of court records, presumably based on the policy that courts are public institutions.²¹⁴ The Florida Sunshine in Litigation Act goes further, prohibiting both court orders and private confidentiality agreements dealing with a "public hazard."²¹⁵

Scholars have increasingly criticized confidentiality arrangements. Professor Susan Koniak argues that such provisions should be unenforceable on grounds of public policy.²¹⁶ Professor Stephen Gillers contends that noncooperation agreements violate obstruction of justice statutes and are unethical under Model Rule 3.4(f), which prohibits a lawyer from requesting "a person other than a client to refrain from voluntarily giving relevant information to another party," subject to limited exceptions.²¹⁷ Other scholars have reservations about the consequences of proposals that would create a right of public access to information developed during discovery.²¹⁸

Defendants may be concerned about release of information, not only by the plaintiff but by the plaintiff's lawyer. As a result defendants sometimes ask as part of the settlement that plaintiff's attorney agree not to bring any other litigation against the defendant based on the same product defect or occurrence. Such an agreement is clearly unethical and therefore unenforceable under Model Rule 5.6(b), which provides that lawyers may not participate in settlement agreements that contain a "restriction on the lawyer's right to practice."²¹⁹

213. See Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated through Litigation*, 81 *Chi.-Kent L. Rev.* 375 (2006).

214. S.C. R. Civ. Proc. 41.1; Tex. R. Civ. P. 76a.

215. Fla. Stat. Ann. §69.081.

216. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 *Hofstra L. Rev.* 783 (2002).

217. See Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation are Illegal and Unethical*, 31 *Hofstra L. Rev.* 1, 4 (2002).

218. See Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 *U. Kan. L. Rev.* 1457 (2006); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 *Harv. L. Rev.* 427 (1991); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlement*, 105 *Mich. L. Rev.* 867 (2007).

219. For a criticism of Rule 5.6, see Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 *Geo. J. Legal Ethics* 291 (2005).

In Formal Opinion 00-417 the ABA Committee ruled that an agreement by counsel not to use information was improper because it would as a practical matter prevent the lawyer from representing future clients in violation of Rule 5.6(b). However, the Committee held that a provision in which a lawyer agreed not to disclose (rather than use) information related to the representation was permissible because such a provision was nothing more than what is required by the Model Rules absent client consent. A settlement agreement prohibiting a lawyer from disclosing information obtained in a prior case, but not barring use of such information, would not prevent a lawyer from taking on new cases involving the same products or defendants. A lawyer could use information obtained in a prior case without disclosing the information in several ways. For example, the lawyer could use his knowledge of a prior case to plan strategy and formulate discovery requests without directly disclosing the information.

Based on these authorities, a defendant cannot ethically seek to obtain a settlement in which plaintiff's counsel agrees not to handle future cases against the defendant. However, some narrower restrictions may be enforceable. For example, a defendant could probably require plaintiff's counsel to agree not to disclose the terms of the settlement (for example, by sharing this information with other plaintiffs' lawyers who are handling similar cases). A defendant could also require plaintiff's counsel to turn over any discovery materials produced during the litigation. While counsel could then request such materials in future litigation, the defendant would have control of the materials in the interim.

Problem 5-8

Mediation and Arbitration

a. You represent Martinez Data Systems, Inc. (MDS), a closely held corporation that provides computer consulting services to a wide variety of clients. Raymond Martinez, the president of the company, has asked you to prepare a basic consulting contract that MDS can use when it enters into agreements with customers. In addition to reviewing MDS's current contract, you have researched various form books and checklists for ideas regarding the agreement. One issue raised in the form books is whether the agreement should include some form of alternative dispute resolution provision. Would you suggest that MDS consider including such a provision? If so, what advice would you give if Martinez asked for your recommendation regarding alternative dispute resolution?

b. A partner in your firm has been appointed as a mediator in a divorce case pursuant to court rules that call for court-annexed mediation in domestic cases. Court rules require the mediator to hold an orientation session in which the mediator explains the nature of the

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***205 ETHICAL ISSUES IN CLASS ACTION LITIGATION**

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***209 I. Introduction**

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires

an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct. [FN1]

Thorny ethical questions frequently arise before, during, and after a class action litigation. Unfortunately, the ethical obligations and rules regulating the legal profession and the various court interpretations of those rules, at times, seem at best confusing and at worst entirely inadequate when it comes to deciphering the convoluted relationships between the players in a class action case. Neither the ABA Model Code of Professional Responsibility nor the ABA Model Rules of Professional Conduct specifically addresses the ethics of class action lawyers.

Multiple issues and interests must be carefully and continually balanced in the interests of vindicating the rights of the affected parties while maintaining the integrity of the legal system and goals of class action litigation. Ethical questions often arise when the parties must maintain a continued relationship with each other after the case is over. This happens, most frequently, in the employment context when putative plaintiffs still work for the defendant. Additional questions arise when attempting to align or interpret the interests of putative class members compared to the named class members. Further, class counsel is faced with the challenge of seeking the best remedy for all putative class members while resolving the conflicts that arise with the potential availability of punitive and compensatory damages along with various forms of equitable relief. It is not unusual for cases to splinter into numerous sub-classes or to add or remove named plaintiffs multiple times before actually filing for class certification in order to attempt to manage conflicting or misaligned interests.

This paper seeks to analyze potential ethical issues and dilemmas commonly faced by counsel before, during, and after class action litigation. The costs associated with defending cases where the class continuously shifts like quicksand raises interesting ethical questions about the efficacy of class action litigation generally, but is a topic for another presentation.

***210 II. Pre-Litigation**

A. Solicitation and Pre-Litigation Contact with Putative Class Members

1. Solicitation and Contact with Putative Class Members

Class action suits often present concerns regarding whether it is proper for an attorney representing or opposing a class to communicate directly with non-represented potential class members and when such *ex parte* communications are permissible.

Lawyers seeking to initiate communications with employees involved in a class action must be aware of the applicability of the Model Rules of Professional Conduct [FN2] and Model Code of Professional Responsibility [FN3] (and state bar variants [FN4]) that affect communications in class actions.

Model Rule 7.3 provides that:

(a) *A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.*

(b) *A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:*

- (1) *the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or*
- (2) *the solicitation involves coercion, duress or harassment.*

The Comment to Model Rule 7.3 states that:

*There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services...This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of*211 conveying necessary information to those who may be in need of legal services.*

Model Code DR 2-103(A) states that “[a] lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.”

Despite the instructions against direct client solicitation provided in the Model Rules and Model Code, courts have shown a willingness to protect an attorney's ability to communicate directly with potential clients in Rule 23 class

actions. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), a Title VII class action, the Court showed great deference to the right of class counsel in Rule 23 class actions to communicate with potential class members for the purpose of notification and information, even prior to class certification. The Court approved of communications between class counsel and any actual or potential class members without prior court approval. The Court acknowledged the legitimacy of the ethical concerns regarding client solicitation, but it noted that courts have “broad authority” to exercise control over the conduct of parties to class actions in order to guard against such potential abuses as “barratry” and “‘drum[ming] up’ participation” in litigation. *Id.* at 101. The Court required that “such a weighing...should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.” *Id.* at 102. The ruling in *Gulf Oil* therefore encouraged both plaintiffs and defendants to communicate more actively with existing class members and potential class members.

In the aftermath of the *Gulf Oil* decision, local courts' gag rules and protective orders that prohibit communications with class members have been overruled or vacated because they contravene the class action policies of Rule 23 of the Federal Rules of Civil Procedure, and because they impose unjustifiable restrictions on the constitutional right to free speech and association. Consequently, protective orders and local rules that forbid or restrict communications with potential class members have become generally suspect and thus have been largely abandoned by courts. [FN5] The *Parris v. Superior Court* decision, *212 which was based in part upon the free speech provisions of the California constitution, disagreed with a parallel court of appeal decision holding that pre-certification communication with potential class members may be submitted to prior court approval to determine whether there is a threatened abuse of the class action process. [FN6]

One district court refused to enter an order preventing a product liability defendant from communicating with absent class members regarding the product at issue, notwithstanding prior contact with absent class members. [FN7] In *Payne v. Goodyear*, the plaintiffs sought the gag order after Goodyear had posted its opinions regarding the product on its website, and also offered free inspections, diagnoses and suggested corrective measures to address consumer concerns. The court found that the company's statements on its website concerned disputed issues of fact and therefore were not coercive or misleading so as to justify a gag *213 order. The court further found that the free inspections were not coercive or misleading because no evidence was presented that Goodyear had discussed the litigation with the homeowners whose homes were inspected, nor made any attempt to obtain a release or any type of waiver from them.

While stopping short of prohibiting communications with class members, courts often place limits and controls on such communications. In *EEOC v. Morgan Stanley & Co.*, 206 F. Supp. 2d 559 (S.D.N.Y. 2002), the court held that the employer would be allowed to contact potential class members to prepare its defense, but would have to provide written notice to such employees, on a court-approved form, with specific information concerning the lawsuit and the employees' rights. In *Morgan Stanley*, the court honored the EEOC's contention that, when it litigates on behalf of a class, it has an attorney-client relationship with the claimant-members of the class, and that the defendant may not communicate *ex parte* with those claimants who have taken affirmative steps to participate as claimants in the action. [FN8] In contrast, in *EEOC v. TIC – The Industrial Co.*, No. 01-1776 §§ “I” (2), 2002 U.S. Dist. LEXIS 22728 (E.D. La. Nov. 21, 2002), the court rejected the categorical application of attorney-client relationship to the EEOC's “claimants” in a pattern and practice case under Title VII in the absence of evidence that the individual claimants had contacted the EEOC or wanted the EEOC to represent them. [FN9] However, in the *TIC* case, the court imposed requirements on defendant contacts with the EEOC's claimants similar to those in the *Morgan Stanley* case: In any *ex parte* contacts, the defendant was required to inform the claimants that the EEOC has brought the action, to summarize the claims in the action, to advise the claimants that they may, but are not required to, join in the action, and to tell them that they may contact the EEOC for further information. [FN10] *TIC* was also limited to discussing the facts of the case and was not permitted to attempt to influence the claimants about joining the action, and, if any of the claimants were current employees, the employer was also required *214 to advise that retaliation for participating in the lawsuit is unlawful. [FN11]

Similarly, in *Ralph Oldsmobile, Inc. v. General Motors Corp.*, No. 99 Civ. 4567, 2001 U.S. Dist. LEXIS 13893 (S.D.N.Y. Sept. 7, 2001), the court found a potential for coercion in communications between GM and potential class members (which consisted of GM dealers), but nonetheless refused to order a wholesale ban on communications. Instead, the court ordered GM to provide specific information to any potential class members that it contacted concerning the litigation, how to contact plaintiffs' counsel, and the effect of signing a release. Moreover, the court found that any putative class member who previously had signed a release without notice of the required information would be afforded the opportunity to apply to the court to have such release voided.

In *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672 (N.D. Ga. 1999), the district court held that it had the authority to impose conditions on counsel communications with potential class members. The court further ordered that plaintiffs

and their counsel could communicate with potential class members that contacted them. The court, however, ordered plaintiffs to purge from their website the complaint, its exhibits and a referral to plaintiffs' counsel for fear that such worldwide advertising of the case was causing serious and irreparable harm to Coca-Cola's reputation and might coerce defendants into settlement. The court further held that it would not ban all communications by Coca-Cola to its employees, but required the company to state that: "The foregoing represents Coca-Cola's opinion of this lawsuit. It is unlawful for Coca-Cola to retaliate against employees who chose to participate in this case." The court also severely restricted Coca-Cola's direct communications with potential class members.

In *Kleiner v. First National Bank*, 751 F.2d 1193, 1203 (11th Cir. 1985), the Eleventh Circuit held that "unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent." The plaintiff class in *Kleiner* consisted of borrowers asserting claims for breach of contract and fraud against a bank. During the time pending the class notice mailing, the bank undertook a "communications" campaign in which it called numerous class members "to insure that class members understood *215 the merits of the dispute and their right to opt out." [FN12] The objective was to persuade individuals to withdraw from the class. The conversations were said to be "factual... without arm-twisting or coercion," but the Bank officers making the calls presented a limited, pre-prepared set of facts about the case and kept a running tally of individuals who elected to withdraw from the class. One bank officer who objected to the practice was forced to resign. The district court fined the Bank's counsel, who had approved of the scheme, assessed costs and attorneys' fees for the disciplinary proceedings against the Bank, and issued an order restraining them from further communications with the class members. It pointed out that by law, class members were entitled to "the best notice practicable under the circumstances" in order to protect their rights, and that such a unilateral communications scheme was "rife with potential for coercion" because the class and the class opponent were in an ongoing relationship (lender to borrower). The appellate court upheld the district court's orders and stated that the Bank's communications had "relegate[d] the essential supervision of the court to the status of an 'afterthought'" and had "obliterated... the carefully constructed edifice of check and countercheck, notice and reply" that is present in class actions.

The *Kleiner* case is an extreme example because the facts clearly show the bank was attempting to solicit withdrawals. Other courts, however, also have found it appropriate to restrict communications with class members or potential class members, particularly when there is an ongoing relationship that suggests inherent coercion, such as that of employer and employee. [FN13]

*216 In Age Discrimination in Employment Act ("ADEA") class actions, which are brought under the procedures of the Fair Labor Standards Act and not under Rule 23, the issue of when class counsel may contact unnamed class members has arisen in the context of providing notice to the class. Several circuits have held that notice of pending actions to ADEA class plaintiffs is not required on grounds of statutory interpretation, reasoning that ADEA class members are not bound by a judgment unless they expressly "opt in." Thus, unlike Rule 23 class members who must "opt out" not to be bound, ADEA class members' due process rights are not jeopardized by lack of notice of a suit. [FN14]

Two other circuit courts have gone beyond statutory considerations and examined ethical justifications implicated by communications from class counsel to potential ADEA plaintiffs. In *McKenna v. Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984), the court prohibited class counsel in an ADEA class action from notifying and encouraging potential class members to join in a pending suit. The court's decision rested upon the court's opinion that such notice would be impermissible under Model Code DR 2-103's ethical prohibition against attorneys' direct solicitation of clients. [FN15] The court held that a ban on class counsel's notice to potential class members was necessary in order to safeguard Model Code DR 2-103's primary objective of "preventing exertion of undue influence upon lay persons; protecting the privacy of the general public; and discouraging situations in which a lawyer's judgment may be clouded by pecuniary interest." [FN16]

In contrast, in *Sperling v. Hoffman-La Roche, Inc.*, 862 F.2d 439, 447 (3d Cir. 1988), aff'd, 493 U.S. 165 (1989), the court upheld the district court's order authorizing notice to potential *217 ADEA class members, stating that "[i]t is now clear that the ethical considerations relied on in *McKenna* do not withstand the Supreme Court's decision in *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)."

2. California Rules of Professional Conduct

In some jurisdictions, communication with putative class members is restricted because of ethical requirements. California Rule of Professional Conduct 1-400 governs advertising and solicitation of potential clients and provides:

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member

concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
- (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
- (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
- (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a “solicitation” means any communication:

- (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
- (2) Which is:
 - (a) delivered in person or by telephone, or
 - (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

***218** (D) A communication or a solicitation (as defined herein) shall not:

- (1) Contain any untrue statement; or
- (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
- (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
- (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
- (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
- (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court.

One California district court has recently held that letters to putative class members seeking a new plaintiff were permissible, and not a violation of Rule 1-400. [FN17] In *Rand*, plaintiff's counsel sent a letter to putative class members encouraging them to reach out to plaintiff's counsel to discuss the circumstances of an annuity purchase in order to find another named plaintiff. In an effort to protect the privacy rights of putative class members, the court mandated that counsel include disclosure language that:

Inform[s] each policyholder at the outset of the initial contact that he or she has a right not to speak with counsel and that if he or she chooses not to speak with counsel, counsel will immediately terminate contact and not contact them again. Additionally, counsel will inform the policyholder that his or her refusal to speak with counsel will not prejudice his or her rights as a class member if the Court certifies a class. Finally, counsel is to keep a record for the Court of policyholders who make it known that they do not wish to be contacted. [FN18]

The court determined that the inclusion of the disclaimer language satisfied the Court's prior order and was not an improper solicitation.

***219** California law also prohibits attorneys from communicating with represented parties. Specifically, California Rule of Professional Conduct 2-100 provides in pertinent part:

(A) *While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.*

(B) For purposes of this rule, a “party” includes:

- (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
- (2) An association member or an employee of an association, corporation, or partnership, if the subject of the

communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) *This rule shall not prohibit...*

(3) *Communications otherwise authorized by law.*

This rule clearly prohibits communication with the named plaintiffs because they are parties represented by counsel. Likewise, once the class is certified, a defendant may not communicate directly with the class members on the matters in controversy without court permission. [FN19]

Absent class members, on the other hand, are not generally considered parties represented by counsel. In *Atari, Inc. v. Superior Court*, 166 Cal. App. 3d 867, 873 (1985), the court of appeal clarified that Rule 2-100 does not prohibit attorneys from communicating with prospective class members. The *Atari* court reviewed the trial court's pre-certification order which allowed plaintiffs' counsel to communicate with potential class members, but prohibited communication by defense counsel with those same individuals. [FN20] One basis for the trial court's prohibition against *220 communication by defendants was Rule 2-101. However, the court of appeal stated, "[w]e cannot accept the suggestion that a potential (but as yet unapproached) class member should be deemed 'a party... represented by counsel' even before the class is certified." [FN21]

The *Atari* court did not limit its analysis of the permissible limitations on communication with potential class members to consideration of the ethical rules. In addition to ethical considerations, that court addressed concerns that communications with potential class members would frustrate the rules and policies underlying the class action device. The court of appeal modified the limitation on communication to allow both parties to have equal access to putative class members only after finding no actual or threatened misrepresentation or abuse of the public policies underlying the class action device. [FN22]

This second source of limitations on permissible communications is based on the Supreme Court's analysis in *Gulf Oil*. The Supreme Court in *Gulf Oil* found that the district court abused its discretion since the ban on communications with potential class members was not based on any factual findings:

*[To] the extent that the district court is empowered ... to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record *221 showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties.* [FN23]

Analyzing the scope of a district court's authority to limit communications from named plaintiffs to prospective class members, the Court held that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect *a weighing of the need for a limitation and the potential interference with the rights of the parties.*" [FN24]

When the Supreme Court weighed the need for a limitation and the potential interference with the rights of the parties in *Gulf Oil*, the scale tipped in favor of allowing plaintiffs to communicate with potential class members. The Court balanced the risk of plaintiff's counsel violating the rules prohibiting solicitation of clients against the rights of the plaintiffs to inform potential class members of the litigation. Among the factors that influenced the Court's decision was the fact that the plaintiffs "were represented by lawyers from the NAACP Legal Defense and Education Fund – a nonprofit organization dedicated to the vindication of the legal rights of blacks and other citizens." [FN25] As such, "traditional concerns about 'stirring up' litigation ... were particularly misplaced here." [FN26]

Although *Gulf Oil* addressed contacts by plaintiffs' counsel with potential class members, "there is no reason why *Gulf Oil's* balancing approach should not be equally applicable to defendant's contacts with putative class members." [FN27] Furthermore, *Atari* clarifies that although *Gulf Oil* construes the federal class action rule, Rule 23 of the Federal Rules of Civil Procedure, *222 federal law "may properly be considered in the absence of controlling California authority." [FN28]

When analyzing permissible communications with potential class members by defendants, courts, on the one hand, focus on the need to protect the class action device and the administration of justice. Courts limit communications that (1) discourage potential members from remaining in the class, and (2) mislead potential class members regarding the litigation. [FN29] Courts are, however, also mindful of the need to protect a defendant's right to (1) communicate with potential class members in the ordinary course of business; and (2) negotiate settlements and releases with potential class members. [FN30]

*223 Some courts have allowed defendants to communicate with potential class members outside of the context of

the ordinary course of business or settlement negotiations. In *Babbitt v. Albertson's Inc.*, counsel for defendants interviewed putative class members before the class had been certified in order to evaluate and defend against the lawsuit. Plaintiffs moved for a protective order and sanctions. Applying *Gulf Oil*, the *Babbitt* court denied the motion for sanctions and a protective order, finding that a ban on all communications between defendant and potential class members “would make it impossible for defendant to defend itself in this case.” [FN31]

A key factor in the *Babbitt* court's analysis, however, was the fact that defense counsel provided sufficient disclosures to potential class members during their communications. Specifically, the court noted with approval that:

these attorneys uniformly communicated the same information to employees before conducting interviews: 1) that he/she was an attorney retained to defend Albertson's in the pending action, 2) that he/she was investigating facts in order to evaluate and defend the action, 3) that the interviewee was under no obligation to talk to him/her, 4) that no adverse action would be taken against any interviewee who chose not to talk, and 5) that no interviewee would benefit by choosing to talk to him/her. [FN32]

In fact, virtually all of the reported cases mention or imply that such disclosures were made.

B. When Does the Attorney/Client Privilege Arise? In Other Words, When Does a Putative Class Member Become a Client?

1. The Objective Test – Class Certification

There is also the issue of whether individual class members are “represented” within the meaning of Model Rules 1.7, 4.2 or other ethics rules. Federal Rule of Civil Procedure 23 does not specifically set forth absent class members' rights and obligations. Thus, it has been left to the courts to determine if and when class members are considered parties.

*224 The timing of attorney-client relationship between class counsel and absent class members has been addressed by cases considering issues related to counsel's communications with class members. There appears to be two major views regarding when an attorney-client relationship is established between class counsel and absent class members. Some cases and authorities appear to establish a bright line rule that class members are not represented by counsel for purposes of ethical rules until the class is certified:

As a general rule, unnamed members of the class, prior to certification of a class, are not represented by counsel for the class. After certification, every class member is considered a client of lawyers for the class. [FN33]

Numerous other authorities express a similar view. [FN34]

Other cases and authorities have described the relationship between class counsel and class members differently depending on whether the class members have had an opportunity to opt-out. [FN35] For example, one court has stated that after certification, class counsel “immediately assumes responsibility to class members for diligent competent prosecution of certified claims.” [FN36] This court commented, however, that class members are not “fully” represented by class counsel until they decide to participate in the class action (*i.e.*, by not opting out). [FN37]

Model Rule 1.7, Comment 25 states that “[w]hen a lawyer represents or seeks to represent a class of plaintiffs or defendants *225 in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying [the “directly adverse” conflicts provision] of this Rule.”

Mode Rule 1.8, Comment 13 states that “[I]awyers representing a class of plaintiffs or defendants, or whose proceeding derivatively, may not have a full client-lawyer relationship with each member of the class.”

Prior to class certification, the Supreme Court has described *putative class members* as being “mere passive beneficiaries” to the action. [FN38] But whether an *absent class member* is deemed a “party,” if at all, usually depends on the context under which this issue is considered as well as the views of the particular court considering the issue. As the Supreme Court commented:

Nonnamed class members... may be parties for some purposes and not for others. The label “party” does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context. [FN39]

Some courts have held that class members are to be treated as represented by plaintiff's counsel. [FN40]

In *Babbitt v. Albertson's Inc.*, No. C 92-1883, 1993 U.S. Dist. LEXIS 18801 (N.D. Cal., Jan. 28, 1993), the court addressed whether *ex parte* communications between a defendant's attorney *226 and putative class action plaintiffs were improper. In the absence of a clear federal rule, the court, relying on California state law, found that the potential parties to a class action are not deemed “parties” represented by counsel. After a review of the evidence, the court

found that plaintiffs failed to establish misconduct or abuse by defendant's attorneys. The court thus held that it was appropriate for the defendant to interview its employees ex parte, prior to class certification, as long as defendant's attorneys did not create the impression that employees were required to talk to defendant's attorneys and defendant's attorneys did not deter employees from communicating with class counsel or with union representatives.

In *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25, 1996 U.S. Dist. LEXIS 22396 (M.D. Fla. 1996), vacated by settlement agreement, No. 95-1162-CIV-T-25E, 1997 U.S. Dist. LEXIS 16778 (D. Fla. 1997), the court opined that the defendant's First Amendment rights would be harmed by banning all communications to employees about the status of the class action, since many of the employees were also shareholders. Nevertheless, the court established certain safeguards. The court required that all communications regarding the class action state that the communication was the defendant's "opinion of the lawsuit," that employees could contact plaintiffs' counsel, that defendant provide the telephone number of plaintiff's counsel in all communications, and that it was unlawful for defendant to retaliate against any employees who chose to participate in the case.

The State Bar of Michigan also has dealt with this issue. In State Bar of Michigan Committee on Professional and Judicial Ethics, Opinion RI-219 (1994), the committee held that a lawyer who is in-house counsel for a defendant organization in a class action may respond to communication from unrepresented class members. In contrast, if the communication is initiated by in-house counsel for a plaintiff organization with the in-house counsel of the defendant organization, then all further communications also should be conducted through the in-house attorneys.

A particular issue arises in connection with the representation question in attempts by the class plaintiffs to communicate with members of the putative class who are managerial agents of the defendant. In *Hammond v. City of Junction City*, No. 00-2146-JWL, 2002 U.S. Dist. LEXIS 4093, *3 (D. Kan. Jan. 23, 2002), a race discrimination in employment case, the plaintiffs' attorney communicated with the defendant city's current director of human relations. The communications were not limited to any claims that the director might have had in his personal capacity; they also included the director's participation in document production in the case, the alleged shredding of documents relating to the case and the claims of other class members. [FN41] The court held that the contacts violated the Kansas version of Model Rule 4.2, which prohibited a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer. [FN42] The court also held that there was no attorney-client relationship between plaintiffs' counsel and the director by virtue of his being a potential member of the putative class. [FN43] Under the Model Rule, the court held, an individual managerial employee constituted a "party" for purposes of the rule without regard to whether the individual manager is "adverse" to the corporate employer, and that the Rule barred plaintiffs' counsel from communicating with managerial employees whose acts or omissions might be imputed to the employer or whose statements might constitute admissions on the part of the employer. [FN44] It was clear that the plaintiffs' counsel knew the nature of the director's responsibilities from their very first conversation with him. [FN45] Because of the prohibited contacts, the court disqualified the plaintiffs' entire law firm and required it to pay the defendant's expenses and attorneys' fees in obtaining the disqualification order. [FN46]

Although the weight of authority has not found an attorney-client relationship to exist prior to class certification, [FN47] courts and *228 other authorities found that class counsel has some fiduciary responsibilities to the class they seek to represent. [FN48]

2. California Rules – Class Certification or Opt-In

In California, the attorney-client relationship between class counsel and class members is generally not created unless and until a class is certified. [FN49]

In addition in FLSA collective litigation, an employee who seeks to become a member of a collective action brought pursuant to the FLSA must "opt in" to the class by filing his/her written consent with the court where the action is filed. [FN50] This requirement is in contrast to class actions brought under Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), where the putative class members are generally bound by any judgment or settlement in the class action, unless they expressly "opt out" of the class. In collective action litigation, at least one federal court has held that a putative class member may become a client of class counsel upon opting-in to the putative class. [FN51]

***229 III. Litigation – Conflicts of Interest**

Plaintiff's class counsel often faces the unenviable task of attempting to draw clean lines around inherently diverse

groups of employees in order to create an ascertainable class where the putative plaintiffs share common questions of fact and law.

Model Rule 1.7 details the procedure that should be followed when a conflict of interest arises during the course of representation. Paragraph (a) of the Rule provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. Notwithstanding this Rule, a lawyer may continue to represent a client if four criteria are met:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

The requirement that consent must be confirmed in writing means that the client's informed consent be given in writing or a writing by the lawyer that confirms a client's consent that was given orally.

In the Comments to Rule 1.7, if a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from representation, unless the lawyer has obtained informed consent, confirmed in writing. The lawyer's ability to continue to represent one or more of the client's depends on his ability to comply with the duties he has to his former/other client.

Model Ethical Consideration 5-1 states that “[t]he professional judgment of a lawyer should be exercised ... solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.” The Model Code does not directly address class action conflicts, but Model *230 Ethical consideration 5–14 reflects the problems with representing multiple plaintiffs by stating that

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyers is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Model Ethical Consideration 5/15 goes further to state that “[a] lawyer should *never* represent in litigation multiple clients with differing interests.” (emphasis added). The ABA CANONS OF PROFESSIONAL ETHICS state that “a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.” [FN52]

The California Rules of Professional Conduct are similar to the ABA rules with respect to conflicts of interest that arise during the course of representation. Rule 3-310 (C) provides that a member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a person or entity whose interest in the first matter is adverse to the client in the first matter.

The definition of “informed written consent” under this rule means the client's or former client's written agreement to representation following written disclosures.

A tension always exists between throwing the net over the broadest possible putative class for recovery purposes and the need to create an ascertainable class that avoids as many conflict issues as possible. Dropping, adding, or modifying class members or claims may be the easiest way to accomplish this task. However, depending on the stage of the litigation and other factors such as whether putative class members have sought representation, counsel may not compromise the claims of one client for the benefit of others. In other words, counsel may not drop *231 a small recovery amount client to pursue the larger recovery amount for another pool of clients without facing claims by the first group.

Complicating the issue, counsel must consider the potentially conflicting claims and damages of all putative class members, the potential conflicts between current and former employees of defendant, putative class members who may be members of other cases pending against the defendant, counsel's representation of another class in a different

case, [FN53] business relationships between counsel and defendant or counsel and plaintiffs, [FN54] familial relationships, [FN55] the different class definitions in the case, and whether any collective bargaining agreements may create conflicts between putative class members.

For example in the wage-and-hour misclassification context, it is difficult to group together all employees of an employer into a putative class where various exemptions that may apply to individual job classifications. In discrimination cases, conflicts may arise in a race case if the minority supervisors and managers who made the allegedly discriminatory decisions were included in the overly broad putative class. Where some members of the putative class still work for the defendant employer, counsel must make a decision about the type of compensatory versus equitable relief sought.

In addition to ethical obligations imposed under the Model Rules and Model Code, class counsel owes a duty of loyalty to the putative class and individual putative class members, and further to represent their best interests. [FN56]

IV. Post-Litigation and Settlement

A. Overview

Parties may not settle a class action without court approval, and notice of any proposed settlement must be given to class members in a manner directed by the court. Fed. Rule Civ. Pro. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s *232 approval”). Under Rule 23(e), a court acts as fiduciary guardian of the rights of absent class members, and it cannot accept settlements that proponents have not shown to be fair, reasonable, and adequate. [FN57]

In *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit illustrates a court’s role when reviewing a proposed class action settlement. In *Hanlon*, the appellate court noted that while courts should defer to private consensual agreements between the parties, the court also must determine that the proposed agreement is not the result of fraud or collusion, and that the settlement is “fundamentally fair, adequate and reasonable.” [FN58] *Hanlon* identifies several factors for the court to comprehensively examine and balance: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. [FN59]

Recent cases suggest that courts continue to scrutinize and carefully evaluate the terms of proposed wage and hour class settlements in order to protect the interests of the absent class members. In *Butler-Jones et al. v. Sterling Casino Lines LP et al.*, No. 6:08-cv-01186, 2008 U.S. Dist. LEXIS 102256 (M.D. Fla Dec. 18, 2008), the court rejected a joint motion in support of settlement because the parties failed to provide adequate information for the court to determine whether the settlement was reasonable. Of chief concern to the court was that the parties failed to provide sufficient information for it to determine whether the settlement was reasonable. As the Magistrate Judge wrote, “There is nothing in either the settlement or the notice that purports to explain the basis of the compromise, or why this particular compromise is reasonable.” The magistrate judge took issue with the fact that the motion for approval of the settlement did not explain why the settlement was fair, only that there was no collusion between the parties, and found fault with *233 the contention of the parties that “the court ‘is entitled to rely upon the judgment of experienced counsel for the parties,’ citing a ‘presumption that the compromise is fair and reasonable.’” The magistrate judge also expressed concern that the proposed award of \$40,000 in attorney’s fees was arbitrary and possibly excessive, particularly since plaintiffs would receive less than their original WARN Act and FLSA claims, and that the proposed award of \$40,000 for counsel fees was arbitrary and possibly excessive. In denying the motion to approve the proposed settlement, the court held that while the settlement was not necessarily unreasonable or unfair, the parties would be required to submit a more detailed recommendation for settlement before the court would approve it.

In *Kakani v. Oracle Corp.*, No. C 06-06493, 2007 U.S. Dist. LEXIS 47515 (N.D. Cal. July 19, 2007), the district court rejected a proposed \$9 million settlement because, according to the court, it unfairly threatened to extinguish the rights of class members. Plaintiffs filed a hybrid collective/class action on behalf of themselves and other individuals whom they claimed had been misclassified as exempt sales consultants. At the time when the parties proposed settlement, no class had been certified, no representative had been certified to speak on behalf of the class, and no counsel had been appointed to represent the class. From the outset, the district court expressed serious concerns about the proposed settlement. To begin with, the district court noted that the proposed settlement sought to include and ex-

tinguish claims far beyond the original scope of the lawsuit, even though the plaintiffs had not amended their complaint to include such claims. In addition, the court noted that the settlement would extinguish any and all claims of a nationwide worker class whether or not they had received actual notice of the settlement and whether or not they submitted claims, with all unclaimed amounts reverting to Oracle. The court then detailed its specific concerns about the proposed settlement, which it ultimately rejected.

The proposed scope of the release was overbroad. Although the original complaint had asserted only FLSA and related California overtime claims, the proposed settlement sought to extinguish overtime claims under 150 laws and regulations in 35 states. In addition, the settlement agreement provided that “Settled Claims” means “any and all claims that were asserted or *could have been asserted* in the Complaint.” While commenting that “[w]hat ‘could have been asserted’ is a question of interpretation... the ‘could have *234 been’ language is used to obtain the broadest release possible. In its broadest reach, ... all further state laws would be extinguished as they ‘could have been’ asserted by way of amendment.”

The Claims Procedure Timetable Was Too Compressed. The proposed settlement provided that notice of the settlement would have been mailed on July 6, 2007, and the last date to object, opt-out or to submit a claim would have been August 20, 2007. The district court characterized this time frame as a “fleeting opportunity to file a claim for money.” According to the district court:

Workers who fail to receive the notice (due to changes in address or other delivery problems) or who put it aside unread due to the press of other matters or who simply do not prepare and file a claim on the tight timetable in the notice would lose all rights.

The proposed notice method was deficient. The parties proposed mailing out notice of the settlement to the most current mailing address available to Oracle. Undelivered mail would be forwarded if forwarding addresses were provided. If no forwarding address were provided, a computer search of address information would be attempted, and if that was unavailing, the intended recipient would be bound by the proposed terms of the agreement. The notice method did not contemplate publication or contact via the Internet. The court felt that this method of notice was inadequate. The court comment that in addition to mail delivery, “it would be very effective and highly practicable to provide these current employees with workplace notice, either by hard copy or e-mail.” As to former employees, any actual service by first-class mail (not certified mail) to a *correct* address would be satisfactory. But the court criticized the proposed procedure for failing to show that service on the “last known address” would be good enough. As the court stated:

There are former employees whose employment goes back to 2000. One named plaintiff now lives in Europe. These former workers are now scattered to the winds. We must remember that Oracle is trying to use a California court to erase the workers' rights in 35 states and under 150 different local laws. The present record does not reveal the accuracy rate of the proposed procedure. Nor does it identify alternatives, such as publication and/or the Internet, and explain why they are unacceptable as supplemental modes of notice. As to former workers, it may be necessary to wait and see how effective the delivery rate turns out to be before blessing or not blessing the procedure.

The proposed notice was difficult to understand. The court found the proposed notice to be unsatisfactory because it was difficult to understand, and inadequately explained the subclasses, the benefits *235 and the disadvantages of the proposed settlement. The proposed notice contained what the court deemed confusing terms, legalese, and “cascading incorporations by reference.”

The proposed award of fees to class counsel was inappropriate. The court believed that the proposal to pay class counsel \$2.25 million in fees was inappropriate, because the fees would be paid regardless of the number of claims submitted. The court found that the amount of counsel fees paid could ultimately surpass the amount received by the class in payments. The court further held that it would be inappropriate to consider a percentage allocation of counsel fees without consideration of counsel's time records, which were not submitted.

The parties failed to justify the proposed settlement amount and allocation among class members. The court additionally deemed the proposed settlement amount of \$9 million to potentially be inadequate, because plaintiffs' expert damages report identified a maximum recovery of \$52.7 million. Consequently, the settlement required plaintiffs to forfeit 87% of their claim. The court held that counsel provided inadequate explanation of its assessment of the risks of litigation to permit the court to defer to counsel's assessment in justification of the compromised settlement amount. The court also found that the agreement proposed, through complex terminology, to allocate to California claimants at least twice as much as to non-California claimants, without justification. The court deemed this provision a “warning flag” that what began as a California class action with a collective FLSA opt-in class “was seized upon by Oracle as a vehicle for cheap nationwide absolution of its back-pay obligations.”

The court held that numerous other portions of the proposed settlement provided inadequate, unfair or unreasonable allocation of the award to class members. For example, the court held it to be inappropriate to impose liability on Defendant on a “claims-made” basis, while all workers' rights nationwide would be obliterated regardless of claims made. The court held it to be particularly inappropriate that defendant specifically extracted a concession that all unclaimed settlement amounts attributable to workers would revert to Oracle, while those workers' rights would be forever eliminated.

Stating that the lawsuit gave the “unfortunate appearance that those in charge of this case have been co-opted at the expense of the absent workers,” the court held that the parties could renegotiate the *236 settlement so that it affects only those individuals who opt to accept it, but the court refused to approve the settlement as it was drafted. After renewed settlement negotiations, the parties filed an amended proposed settlement agreement in an effort to address the court's concerns. [FN60] The scope of the class was redefined to include only California overtime claims released for all claimants who did not specifically opt out, and non-California FLSA claims specifically released only for plaintiffs who opted in. The parties proposed greater measures for finding correct addresses for purposes of mailing notices, including public records searches, and extended the time for filing claims. The proposal narrowed the disparity between California claimants' recoveries and non-California claimants' recoveries, providing only a slightly higher amount to California plaintiffs because California law provides for daily overtime compensation while the FLSA does not.

The parties proposed to submit under seal a declaration from class counsel explaining why such a steep discount from the maximum total recovery was justified. The parties further proposed tying any award of attorneys' fees to the amount of actual claims paid out, reducing the incentive payments to class representatives, and clarifying the proposed notice to class members. The proposal also created three proposed classes for which the named plaintiffs were adequate representatives. The court granted preliminary approval to the parties' second amended settlement agreement, but withheld final approval based on several conditions. The parties were required to further clarify the proposed notice language; submit a list of class member who opted in, those who opted out, and addresses that were returned undeliverable; and calculate the amount of attorneys' fees and costs.

When plaintiffs resubmitted their motion for attorney's fees and costs, the district court drastically reduced their requested \$2.25 million in fees and costs, to \$664,000 for fees and \$75,000 in costs. [FN61] In making this determination, the court determined that plaintiffs' lodestar amount was approximately \$332,000, and that a multiplier of 5.6 (to arrive at the \$2.25 million figure) was excessive. The court instead applied a multiplier of 2 in order to arrive at its *237 \$664,000 calculation of fees. The court determined that this multiplier was more in line with awards in similar cases, the risks associated with this litigation, the time and labor required in light of counsel's unacceptable settlement proposal, and the actual results achieved.

B. Tail wagging the dog ... Pennies for Class - Millions for Lawyers

All too often attorney fees become the tail that wags the dog in litigation. [FN62]

Because class counsel often have more money at stake than any individual class member, class counsel generally face immense pressure to settle and even to collude with the defendant to settle the class claims cheaply in exchange for a generous fee. Where the potential recovery by putative class members is eclipsed by the attorney's fees sought for pursuing that recovery, a situation is created where “the tail is wagging the dog” and the fee recovery effectively determines the winner and loser of the case. For example, the California Supreme Court recently rejected an \$871,000 attorneys fee application for an employee who recovered only \$11,500 at trial. [FN63]

Similarly, in the recent *Smith v. Wrigley* [FN64] Eclipse gum case, a putative nationwide class of consumers sued the gum manufacturer for violation of the Florida Unfair and Deceptive Trade Practices Act and breach of express warranty. Plaintiffs alleged that Wrigley's claim that Eclipse was the first gum to include Magnolia Bark extract, which is scientifically proven to help kill the germs that cause bad break were false and deceptive and allowed Wrigley to sell the gum at a premium price. After failing to dismiss the case on the pleadings, the parties announced a settlement where individual claimants can receive up to \$5 for submitting a claim form and \$10 for submitting a claim form and affidavit that they bought the gum and listing dates, locations, and amount of purchase. The attorneys' fee application in the case was for \$2 million, plus “actual out-of-pocket expenses not to exceed \$75,000.” To justify such an amount where actual claims will likely be extremely low, the settlement requires the defendant to establish a settlement fund of \$6 million *238 that will pay for all fees, costs, and claims. The *cy pres* doctrine will deal with the remainder and dole those moneys out to a charity to be named later. Accordingly, class counsel's fee appears to be approximately one third of the settlement, but likely far in excess of any putative individual claimants recovery.

Other class certification and settlement issues include:

- Tailoring Claims to maximize potential for class certification versus the likelihood of prevailing on the merits...i.e. seeking the highest amount of legal fees at the earliest possible stage.
- Abandoning requests for remedies that would make the class members whole but would be harder to certify
- Dropping or adding named plaintiffs to shore up weaknesses in the case or maximize changes of cert regardless of affect on other putative class members or named plaintiffs.

C. Premature Settlement to Avoid Collateral Estoppel

Settlement in one lawsuit may have issue preclusive effect in another lawsuit if the issues and parties were sufficiently the same and a final judgment on the merits was reached. [FN65] This problem is exacerbated in the dueling class action context, as the lawyer representing the class knows that if she does not settle with the defendant, class counsel in another action will. This creates an enhanced incentive for class counsel to attempt to resolve class claims via settlement where another class action is pending. Such pressures can create conflicting motivations where the best interests of the putative class may not be pursued and insubstantial settlements reached.

D. Simultaneous Negotiation of a Settlement and Counsel's Fees

According to the Manual for Complex Litigation, settlement discussions and agreements can raise ethical issues in terms of attorney's fees negotiations. [FN66] "When a defendant offers to settle for a *239 lump sum covering both damages and fees, negotiating the allocation may create a conflict of interest for the plaintiff's attorney." [FN67]

"The Supreme Court, while recognizing that 'such situations may raise difficult ethical issues for a plaintiff's attorney,' has declined to prohibit this practice, reasoning that 'a defendant may have good reason to demand to know his total liability.'" [FN68]

"While proposed settlements arising out of such negotiations should therefore not be rejected out of hand, the court should review the fairness of the allocation between damages and attorneys' fees. The ethical problem will be eased if the parties agree to have the court make the allocation." [FN69]

E. Coupon Settlements and Attorney's Fees

One form of compensation sometimes used in settlements is coupons or gift cards. Such settlements are analyzed for fairness under the usual standard; the court must "determine whether... the settlement is fair, reasonable, and adequate for class members." [FN70]

"Coupon settlements" is an undefined term, but it is presumed that a coupon settlement is any settlement that "provides for a recovery of coupons to a class member." [FN71] Ninth Circuit cases in which coupon settlements were approved have been consumer protection cases; the coupons have related to the goods or services which were at issue in the litigation. Coupon settlements have a more difficult time surviving fairness scrutiny in wage-and-hour cases. Coupon settlements have generally been most successful when the coupons are transferable. [FN72]

Overall, California courts have approved coupon settlements where the coupons:

- Are non-transferable;
- Expire after one year;
- *240 • Are conditional on purchase of new a product or service;
- Have a value that was a fraction of the damages each class member allegedly suffered; and
- Are limited to certain products.

Courts seem to like coupon settlements where the potential damages per class member are relatively small (*i.e.*, less than \$1,000) and/or the actual damages suffered by each class member is unknown or "a mystery." Courts also seem unconcerned about, or are rejecting, arguments that a settlement is unfair because the coupon redemption rate may be low.

1. Illustrative Cases

a. Dunk v. Ford Motor Co. [FN73]

In *Dunk v. Ford Motor Co.*, the plaintiffs brought a class action complaint against Ford alleging several causes of action all relating to an alleged defect in the Mustang Convertible. The class was certified, and the parties entered into a settlement agreement and submitted it to the court for approval. The settlement provided that each class member would receive a non-transferable coupon redeemable for \$400 off the price of any new Ford car or light truck purchased within one year. Ford also agreed to pay attorney fees and costs not to exceed \$1.5 million.

The trial court overruled class members' objections to the terms of this settlement and approved the settlement. An objecting class member appealed. The appellate court affirmed on the following relevant grounds:

- Extensive discovery and pretrial litigation, including a demurrer and motion for summary judgment, had been conducted;
- No instance of personal injury was found;
- At most, the defect caused a poor door fit, resulting in some water leakage, wind noise and minor cosmetic damage, such as paint chipping;
- *241 • The maximum damages to each member of the class was \$600 (the highest repair estimate);
- There were few objectors;
- Although not all class members would redeem their coupon, plaintiff's counsel showed the settlement was of value to the class.

b. Wershba v. Apple Computer, Inc. [FN74]

In *Wershba v. Apple Computer, Inc.*, Apple issued a press release announcing that it would discontinue its prior practice of providing free telephone technical support to purchasers of certain Apple products and start charging for the service. The free support “for as long as you own your Apple product” had been promised in brochures advertising and accompanying the products. Plaintiffs brought a class action lawsuit against Apple alleging several causes of action, including breach of contract and unfair competition claims, based on Apple's withdrawal of free technical service.

The class was certified, and the parties entered into a settlement agreement with the following relevant terms (1) Apple would resume free live telephone technical support; (2) Apple would refund to the class members all monies paid to Apple for technical support during the time free support was unavailable; (3) Apple would reimburse up to \$35 to class members who had paid third parties for technical support; and (4) Apple would provide \$50 coupons to class members who were denied technical support but did not incur any expenses obtaining technical support elsewhere.

Class members objected to the fourth term, above, claiming that the settlement arbitrarily limited damages to those customers who might have recovered more. The court overruled the objections, and approved the settlement. The class members appealed. The Appellate Court affirmed, recognizing that a settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable. It held that the proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial.

***242 c. Campbell v. Airtouch Cellular [FN75]**

In *Campbell v. Airtouch Cellular*, an unpublished decision arising from an appeal from the San Diego Superior Court, the plaintiffs filed a class action against Verizon alleging that Verizon failed to adequately disclose and clearly explain the applicable fees, charges, billing and sales practices, miscalculated airtime usage, made unauthorized changes in the terms of its customers' contracts, and assessed hidden fees on its customers' accounts. The case was certified, and the parties entered into a settlement agreement.

The agreement provided as follows:

- Verizon agreed to injunctive relief, requiring it to change its disclosures and business practices;
- Verizon agreed to mail the class two vouchers (or coupons):
 - The first coupon allowed class members to choose one of the following: (1) \$15.00 off a one-year contract for wireless service with Verizon; (2) \$30.00 off a two-year contract for wireless service with Verizon; (3) six months of limited free text messaging; (4) a 25 percent discount on wireless telephone accessories up to a maximum discount of \$ 15.00; (5) 120 minutes of long distance via a third-party calling card; or (6) a \$3 per bill credit for up to eight months over a two-year contract.
 - The second coupon could be used for either a “hands free earbud” or a \$15.00 credit toward a different

hands-free device.

- Verizon also agreed to pay a 25 percent refund of early termination fees paid by class members, which was one of the hidden fees the class complained about.

Objectors to the settlement asserted that it did not provide enough economic value compared to the claims asserted by the class. The trial court overruled objections to the settlement and approved it. The objectors appealed, and the court of appeals affirmed.

*243 In approving the settlement, the court cited *Wershba* for the proposition that a settlement can be proper even if it “amounts to only ‘a fraction of the potential recovery’” and that settlement relief may be substantially narrower than the claimed damages because “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” The appellate court also noted that the trial court was not required to provide for a minimum volume of redemptions or calculate the redemption rates of the settlement coupons. The court was more concerned about the percentage of class members who would actually receive coupons, as opposed to the percentage who would ultimately use them.

d. Coriell v. Gamestop Corp. [FN76]

In *Coriell v. Gamestop Corp.*, an unpublished decision arising from an appeal from San Francisco Superior Court, the plaintiffs brought a class action alleging that defendants had a practice of selling as “new” videogames and entertainment software that had previously been purchased, played, and returned. The parties settled the case. The parties agreed to certification of the class on a “claims made” settlement. Persons submitting valid claims would receive a coupon entitling them to a five percent discount “on the purchase price of any one piece of Software for Video Consoles then in stock at the retail location where the class member redeems such coupon.”

A class member objected to the settlement claiming that the settlement was “entirely inadequate to remedy the wrong suffered. It does nothing to stop Gamestop's practices. Nor will it compensate in any real way damaged class members. All Class Members get is a 5% coupon *that can only be used in future dealings with Gamestop*. This is a perfect example of a worthless coupon settlement, a species of marketing program masquerading as a valid class remedy.” The trial court overruled the objection and approved the settlement. The objector appealed.

*244 The appellate court affirmed. In its holding, the Court noted that damages actually suffered by members of the class was “a mystery.” Citing *Dunk* and *Wershba*, the court noted that “California courts do not view coupons, even if nontransferable or conditional on a subsequent purchase, as either suspicious or an unacceptable means of ending a class action.” (Although not a subject of this memo, its worth noting that the appellate court held that notice via internet and postings in the defendant's stores was adequate.)

2. CAFA

The Class Action Fairness Act, 28 U.S.C. Sections 1332(d), 1453, and 1711–1715 (“CAFA”), addresses attorney's fees only to the extent that a settlement is found to qualify as a “coupon” settlement. [FN77] Courts have interpreted the meaning of a “coupon” settlement broadly. [FN78]

CAFA provides three statutory categories of fee recovery and corresponding methods of payment:

1. Coupon settlement on a contingency basis. Percentage recovery based on actual coupon redemption.
2. Non-contingency payment or equitable relief. Lodestar payment, potential for a multiplier.
3. Combination of (1) and (2).
 - Portion based on recovery of coupons: Percentage.
 - Portion based on other relief: Lodestar/potential multiplier. [FN79]

F. Settlement May Destroy Jurisdiction

In *Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119 (9th Cir. 2009), the Ninth Circuit held that plaintiffs in an FLSA action did not have *245 standing to appeal a denial of class certification after they had accepted an offer of judgment on their individual claims. [FN80] Plaintiffs twice sought to conditionally certify a nationwide FLSA collective action, but each time the trial court denied plaintiffs' motion because plaintiffs were not similarly situated. At that point, no other putative members of the class had elected to opt-in to the litigation. Plaintiffs then accepted the defendant's F.R.C.P. 68 Offer of Judgment, settling their individual claims. The stipulated judgment stated that plaintiffs agreed to

settle their individual claims but reserved the rights to appeal the denial of certification, and to continue to prosecute the case in the event of a successful appeal. The judgment stated that plaintiffs and their counsel acknowledged that they relied solely on their own legal analysis, and not on any representation by defendants or their counsel, regarding the legal effect of the offer and their standing to appeal.

The Ninth Circuit held that plaintiffs lacked standing to appeal the issue of class certification, because the issue was moot as a result of the stipulated judgment. The court held that, unlike a F.R.C.P. 23 class action, an FLSA case cannot become a collective action until other plaintiffs opt in. A plaintiff seeking to certify an FLSA collective action has no procedural right to represent a class without the consent of other plaintiffs. Because plaintiffs failed to show that other putative class members were similarly situated at the time when plaintiffs stipulated to the judgment, plaintiffs did not represent any putative class when they signed the stipulated judgment. Plaintiff's settlement of their individual claims deprived them of a continuing personal stake in the case and therefore did not preserve appellate jurisdiction. Thus, plaintiffs could not appeal the issue of class certification in hopes of representing a prospective class of similarly situated plaintiffs not yet identified.

In *Ma'Lissa Simmons et al. v. United Mortgage and Loan Investment LLC et al.*, No. 3:07-CV-0496, 2009 U.S. Dist. LEXIS 89036 (W.D.N.C. Sept. 14, 2009), the district court dismissed a group of junior asset managers' overtime suit against United Mortgage and Loan investment LLC after plaintiffs failed to accept the defendant's offer to resolve the case that would have provided the *246 plaintiffs back pay, liquidated damages, attorneys' fees and costs, and would have been open to the named plaintiffs as well as would-be opt-in plaintiffs. According to the court, any concerns about the defendant's ability to settle with individual plaintiffs, would be allayed by the blanket nature of the defendant's offer.

V. Conclusion

The topics addressed in this paper are merely a few of the more common ethical issues faced in class action litigation. As seen in this discussion, the rules and cases do not consistently and clearly establish who is the client of a class action lawyer, what specific duties are owed by the lawyer to those represented named plaintiffs and potentially non-represented putative parties, or bright line guidance for settlement. Often, the answer to these questions depends on the unique facts of a particular case and the jurisdiction in which it is pending. It is important, therefore, that attorneys working in the class action area given very careful thought and consideration to the myriad ethical issues surrounding them. Of course, that's always good advice in any area of the law.

FN1. ABA MODEL CODE OF PROF'L RESPONSIBILITY, PREAMBLE (1980).

FN2. MODEL RULES OF PROF'L CONDUCT (2010).

FN3. MODEL CODE OF PROF'L RESPONSIBILITY (2010).

FN4. A list of states that have adopted the Model Rules of Professional Conduct can be found at: http://www.abanet.org/cpr/mrpc/alpha_states.html. Links to state ethics rules can be found at: <http://www.abanet.org/cpr/links.html>.

FN5. See, e.g., *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1439–40 (9th Cir. 1984) (district court failed to make “specific findings” of potential abuse justifying restrictions on such intra-class communications); *Williams v. United States Dist. Court*, 658 F.2d 430, 436 (6th Cir. 1980) (district court's “gag” order held invalid because unsupported by “evidence of any abuse or potential abuse”); *Lee v. Am. Airlines, Inc.*, No. 3:01-CV-1179-P, 2002 U.S. Dist. LEXIS 18483 (N.D. Tex. Sept. 30, 2002) (mere possibility of abuses does not justify routine adoption of communications ban in class actions); *EEOC v. Primps LLC d/b/a Supercuts*, No. 05 C 4592, 2006 U.S. Dist. LEXIS 15413 (N.D. Ill. Mar. 29, 2006) and *EEOC v. Fun Motions, Inc.*, No. 05 C C6889 (Mar. 29, 2006) (two recent cases from the Northern District of Illinois denying motions for protective orders seeking to limit the EEOC's expected mass communications with potential class members; court refused to allow defendants to review and object to written communications in advance absent any specific record showing particular abuses that were threatened); *McLaughlin v. Liberty Mutual Ins. Co.*, 224 F.R.D. 295 (D. Mass. 2004) (nothing in Rule 23 or ethics rules precludes communications with putative class members from either side of the litigation prior to certification where there is no evidence

such communication would be coercive); *Parris v. Superior Court*, 109 Cal. App. 4th 285, 290, 296, 299–300 (Cal. Ct. App. 2003) (pre-certification communication with potential class members is constitutionally protected speech; blanket requirement of advance judicial approval for such communications is an impermissible prior restraint; specific evidence of actual abuse rising to the level of direct, immediate and irreparable injury is necessary to support a limitation on pre-certification communication with potential class members and can be raised only by an application by the opposing party for an injunction, protective order or other relief).

FN6. *Parris v. Superior Court*, 109 Cal. App. 4th 285, 295 (Cal. Ct. App. 2003); *cf. Atari, Inc. v. Superior Court*, 166 Cal. App. 3d 867, 870–71 (Cal. Ct. App. 1985) (upholding screening of content of proposed communication by trial court to prevent potential abuse)

FN7. *Payne v. Goodyear Tire & Rubber Co.*, 207 F.R.D. 16 (D. Mass. 2002).

FN8. *EEOC v. Morgan Stanley & Co.*, 206 F. Supp. 2d 559, 561 (S.D.N.Y. 2002)

FN9. *EEOC v. TIC – The Industrial Co.*, No. 01-1776 §§ “I” (2), 2002 U.S. Dist. LEXIS 22728, *17 (E.D. La. Nov. 21, 2002).

FN10. *Id.* at **19–20.

FN11. *Id.*

FN12. *Kleiner v. First National Bank*, 751 F.2d 1193, 1198 (11th Cir. 1985).

FN13. *See Bublitz v. E.I. duPont de Nemours and Co.*, 196 F.R.D. 545 (S.D. Iowa 2000) (imposing pre-certification restrictions on communications and asserting that “where the defendant is the current employer of putative class members who are at-will employees... there may in fact be some inherent coercion in such a situation.”); *Bullock v. Auto. Club of S. California*, No. SA CV 01-731-GLT (ANX), 2002 U.S. Dist. LEXIS 7692, at **11–12 (C.D. Cal. Jan. 28, 2002) (FLSA case where court determined defendant's communication to potential opt-in claimants implied that participation in the suit would acknowledge a downgraded compensation status and tend to discourage potential claimants from opting in and ordered the defendant to include a non-retaliation clause in any writing addressed to the putative class). *But cf. Burrell v. Crown Cent. Petroleum*, 176 F.R.D. 239 (E.D. Tex. 1997) (when company sent around e-mail to employees and putative class members stating it believed lawsuit to be union strategy, court found no evidence of coercion or efforts to undermine the purposes of Rule 23: “simply because the company chooses to keep its employees informed of litigation affecting the company does not attach an improper motive”).

FN14. *See, e.g., Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 863 (9th Cir. 1977) (court approved notice not mandated by due process); *Burt v. Manville Sales Corp.*, 116 F.R.D. 276, 278 (D. Colo. 1987).

FN15. *McKenna v. Champion International Corp.*, 747 F.2d 1211, 1215 (8th Cir. 1984)

FN16. *Id.*; *see also Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207, 215–16 (S.D. W. Va. 1985) (while court rejected former court-approved notice in ADEA action, plaintiffs' counsel not precluded from communicating with potential class members as long as they abide by their responsibilities under Model Code DR 2-103).

FN17. *Rand v. American National Insurance Company*, No. C 09-639, 2010 U.S. Dist. LEXIS 80246 (N.D. Cal. Jul 13, 2010).

FN18. *Id.*

FN19. Weil & Brown, *California Practice Guide: Civil Procedure Before Trial*, at 14:87 (citing, *Gainey v. Occidental Land Research*, 186 Cal. App. 3d 1051, 1058 (1986)).

FN20. Specifically, the trial court order found that “communication between plaintiffs and potential class members should not be limited because ‘[s]uch a limitation would be inconsistent with the policies underlying the class action device, and the defendant has failed to present any facts indicating that such communication would result in any abuse of class action procedure,’ but that communication between Atari and the same individuals ‘may constitute a violation of [Rule 2-100] of the California Rules of Professional Conduct, and could present a clear danger of confusion and misrepresentation of the nature and effect of the litigation, contravening the purposes underlying rules relating to discovery from class members in class action proceedings.’” *Atari*, 166 Cal. App. 3d at 871–872, quoting trial court order.

FN21. *Atari, Inc. v. Superior Court*, 166 Cal. App. 3d 867, 873 (1985) (the court explicitly disagreed with federal courts that found similar ethical rules to prohibit defendant's communication with potential class members before certification of the class), citing *Impervious Paint Industries v. Ashland Oil*, 508 F. Supp. 720, 722–723 (W.D. Ky. 1981); see also *Babbitt v. Albertson's Inc.*, 1993 WL 128089, *2 (N.D. Cal. 1993) (“[U]nder California law potential parties to a class action are not deemed ‘part[ies]... represented by counsel.’”); cf. *Pollar v. Judson Steel Corp.*, 33 FEP Cases 1820 (N.D. Cal. 1984)).

FN22. *Atari*, 166 Cal. App. 3d at 873. In addition, the court clarified that both sides remained entitled to seek “any protective order which provable circumstances may make appropriate,” but found that “in the absence of such circumstances neither party should be precluded from investigating and preparing the case which [plaintiffs] initiated.” *Atari*, 166 Cal. App. 3d at 873.

FN23. *Id.* (quoting *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977), *cert. denied*, 434 U.S. 985).

FN24. *Id.* at 101 (emphasis added).

FN25. *Id.* at n.11.

FN26. *Id.*

FN27. *Babbitt v. Albertson's Inc.*, 1993 WL 128089, *5 (N.D. Cal. 1993); see also *Atari*, 166 Cal. App. 3d at 872–873 (applying *Gulf Oil* analysis to communications from defendant to potential class members).

FN28. *Atari*, 166 Cal. App. 3d at 872 (citation omitted).

FN29. See *Pollar v. Judson Steel Corp.*, 1984 WL 161273 (N.D. Cal. 1984) (Defendant violated the “intent and terms” of federal class actions rules by placing improper advertisements in newspaper concerning subject of litigation. The advertisement (1) did not disclose the pendency of the class action, (2) attempted to solicit information from potential class members, and (3) threatened confusion regarding and prejudice of the potential class members' rights in the litigation.) See also 3 Newberg, *Newberg on Class Actions* §§ 15.14 (1992) (Courts are concerned with preventing any communication by defendants that threatens potential class members with legal, economic, or political sanctions if they join in the class or initiate litigation. “When the communications can be shown to be abusive, the defendants may be ordered to retract their statements and are subject to other sanctions. Solicitation of exclusions also poses ethical problems.”)

FN30. See *Jenifer v. Delaware Solid Waste Auth.*, 1999 WL 117762, *4–5 (D. Del. 1999) (Although communications between a defendant and potential class members in the context of an ongoing business relationship carries the threat of coercion, “[t]he communications here relate to a business proposition which potential class members are free to reject.” Since there is no threat of abuse, there is no evidence that justifies an interference with defendant's speech.); *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Internat., Inc.*, 455 F.2d 770, 773 (2d. Cir. 1972) (“[W]e are

unable to perceive any legal theory that would endow a plaintiff ... with a right to prevent negotiations of settlements between the defendant and other potential members of the class who are of a mind to do this; it is only the settlement of the class action itself without court approval that Fed. R. Civ. P. 23(e) prohibits.”); *Nesnehoff v. Muten*, 67 F.R.D. 500, 502 (E.D. N.Y. 1974) (Settlement offer that failed to disclose that offeror's purpose was to reduce the number of potential class members and thereby attempt to defeat a class action was not an unlawful misrepresentation, *especially where each offeree was furnished with a copy of the complaint and each was made aware of the fact that the action was a class action and that he or she was a potential plaintiff.* (emphasis added)). *See also* Weil & Brown, *supra*, §§ 14:87 (“The defendant is apparently free to do whatever it can to ‘defuse’ the class action by placating or negotiating settlements with individual members.” (citations omitted)).

FN31. *Babbitt v. Albertson's Inc.*, 1993 WL 128089, at *8.

FN32. *Id.* at *7.

FN33. Author's Comments to the *Manual for Complex Litigation* §§ 21.33 (4th ed. 2004).

FN34. *See Hammond v. City of Junction City, Kansas*, 167 F. Supp. 2d 1271(D. Kan. 2001); Douglas R. Richmond, *Class Actions And Ex Parte Communications: Can We Talk*, 68 Mo. L. Rev. 813 (Fall. 2003); *Koo v. Rubio's Restaurants, Inc.*, 109 Cal. App. 4th 719, 736 (2003) (potential class members not deemed parties represented by counsel, within the meaning of rule precluding ex parte communications).

FN35. *See generally*, 5 Alba Conte and Herbert Newberg, *Newberg on Class Actions* (“Newberg Treatise”), x§§ 5:16, 15:14 (4th ed. 2002) (describing the relationship between class counsel and absent class members as being a constructive attorney-client relationship).

FN36. *See Kleiner v. First Nat. Bank America*, 102 F.R.D. 754, 769 (N.D. Ga. 1983), *judgment aff'd in part, vacated in part on other grounds*, 751 F.2d 1193 (11th Cir. 1985).

FN37. *Id.*; *see also In re Potash Antitrust Litig.*, 162 F.R.D. 559, 561 n.1 (D. Minn. 1995) (“Certainly, counsel for the class has an obligation to diligently and competently prosecute the class claims, but whether a full attorney-client relationship shall materialize will depend upon the putative class member's decision to accept or reject class standing.”).

FN38. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552 (1974); *compare Katz v. Carte Blanche Corp.*, 53 F.R.D. (W.D. 1971), *rev'd on other grounds*, 496 F.2d 747 (3d Cir. 1974) (putative class members “are more properly non-nominal parties than non-parties”).

FN39. *Delvin v. Scadelletti*, 536 U.S. 1, 9–10 (2002). In *Delvin*, the Supreme Court found that absent class members were parties for purposes of appealing a settlement of a 23(b)(1) class action. There is some question whether its reasoning applies to 23(b)(3) class actions (*see In re General American Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002)), but the Ninth Circuit has followed *Delvin* in such actions. *See Churchill Village, L.L.C. v. G.E.*, 361 F.3d 566, 572–73 (9th Cir. 2004). *see also* Newberg Treatise §§ 16:1 (“[T]he status of such members as parties or nonparties to class action litigation may depend on the particular purpose for which this status becomes relevant as well as the presiding judge's perception of the role of absent class members.”).

FN40. *See, e.g., Impervious Paint Indus., Inc. v. Ashland Oil Co.*, 508 F. Supp. 720 (W.D. Ky. 1981), *appeal dismissed*, 659 F.2d 1081 (6th Cir. 1981). Other courts have considered timing issues and have permitted pre-certification contact. *See, e.g., Fulco v. Continental Cablevision, Inc.*, 789 F. Supp. 45 (D. Mass. 1992) (involving corporate defendant's interviews of its own employees during pendency of efforts to include them in class).

FN41. *Hammond v. City of Junction City*, No. 00-2146-JWL, 2002 U.S. Dist. LEXIS 4093, **22–23 (D. Kan. Jan. 23, 2002)

FN42. *Id.* at **8, 30.

FN43. *Id.* at *13.

FN44. *Id.* at *29.

FN45. *Id.* at 24.

FN46. *Id.* at *30–31.

FN47. Legal research revealed one case that found that the attorney-client relationship between class counsel and class members existed prior to class certification and that putative class members were “parties” to an action under Pennsylvania law. *See Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662 665–66 (E.D. Pa. 2001); *see also Impervious Paint Industries, Inc. v. Ashland Oil*, 508 F. Supp. 720, 722–24 (W.D. Ky. 1981).

FN48. *See In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239 (N.D. Cal. 2000) (“While lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class.”); *Schick v. Berg*, No. 03 Civ. 5513(LBS), 2004 WL 856298, *3–4 (S.D.N.Y. April 20, 2004) (finding that class counsel owes limited fiduciary duties to the class prior to class certification); *see also Janik v. Rudy, Exelrod & Zieff*, 119 Cal. App. 4th 930 (2004) (finding class members could maintain malpractice action based on class counsel's failure to raise an alternative theory that would have entitled them to a larger recovery); but see CRPC 3-510(B) & Bus. & Prof.C. §§ 6103.5(a) (for purposes of communicating settlement offers, class action “client” is limited to named class representatives).

FN49. Los Angeles Bar Ass'n Form.Opn. 481 & fn. 2 (1995); Rest.3d Law Governing Lawyers §§ 14, Comment “f”. “While lead counsel owes a generalized duty to unnamed class members [prior to certification], the existence of such a fiduciary duty *does not create an inviolate attorney-client relationship* with each and every member of the putative class.” *In re McKesson HBOC, Inc. Securities Litigation*, 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000) (emphasis added); *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.*, 52 Cal. App. 4th 1, 11–12 (1997) (attorney-client relationship between class counsel and class members is created by certification of the class); *Martorana v. Marlin & Saltzman*, 175 Cal. 4th 685, 693 (2009) (same).

FN50. 29 U.S.C. §§ 216(b).

FN51. *Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082 (C.D. Cal. 2002).

FN52. ABA CANONS OF PROFESSIONAL ETHICS, CANON 6 (1908). A lawyer may only represent conflicting interests by express consent of all concerned given after a full disclosure of the facts.

FN53. *Fiandaca v. Cunningham*, 827, F.2d 825 (1st Cir. 1987).

FN54. *See Sysman v. Lincoln Am. Corp.*, 561 F.2d 86 (7th Cir. 1977) (putative class representation inappropriate because he shared office space with class counsel).

FN55. *See Zylstra v. Safeway Stores Inc.*, 578 F.2d 102 (5th Cir. 1978) (counsel whose partners or spouses are in the class cannot act as class counsel); *Pashek v. Arizona Bd. Of Regents*, 82 F.R.D. 62 (D. Ariz. 1979) (partner in plaintiff's counsel's firm married to defendant's former counsel).

FN56. *See In Re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 17–18 (2d Cir. 1986).

FN57. See *Grinin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

FN58. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026–27 (9th Cir. 1998). See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.), cert. denied, 516 U.S. 824 (1995); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987).

FN59. *Id.*

FN60. See *Kakani v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 58740 (N.D. Cal. Aug. 2, 2007).

FN61. See *Kakani v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 95496 (N.D. Cal. Dec. 21, 2007).

FN62. *Deane Gardenhome Assn. v. Dentkas*, 13 Cal. App. 4th 1394, 1399 (1993).

FN63. *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010).

FN64. Case No. 09-60646 (S.D.Fla Jun. 15, 2010)

FN65. See, e.g., *Murray v. Sears, Roebuck & Co.*, No. 09-05744 CW, Slip Op. (N.D. Cal. July 21, 2010) (class action barred by the collateral estoppel effect of the denial of certification of an identical nationwide class action).

FN66. *Manual for Complex Litigation*, x23.24 at 182–83 (3d ed. 1995).

FN67. *Id.* (citing *White v. New Hampshire Dept. of Employment*, 455 U.S. 445, 453 n.15 (1982)).

FN68. *Id.* (citing *White*, 455 U.S. at 453 n.15).

FN69. *Id.* (internal citations omitted).

FN70. 28 U.S.C. §§ 1712(e); compare Fed. R. Civ. P. 23(e)(2).

FN71. 28 U.S.C. §§ 1712(a); see also 5–23 MANUAL FOR COMPLEX LITIGATION §§ 23.164.

FN72. See, e.g., *Wolf v. Toyota Motor Sales, USA*, 1997 U.S. Dist. LEXIS 16457 (N.D. Cal. Sep. 24, 1997), at *14–15; *Livingston v. Toyota Motor Sales USA*, 1995 U.S. Dist. LEXIS 21757 (N.D. Cal. May 30, 1995), at *36–37; *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269 (N.D. Cal. Mar. 28, 2007), at *7–8, 12, 28.

FN73. 48 Cal. App. 4th 1794 (Cal. Ct. App. 1996).

FN74. 91 Cal. App. 4th 224 (2001)

FN75. 2006 Cal. App. Unpub. LEXIS 2459 (2006).

FN76. 2005 Cal. App. Unpub. LEXIS 859 (2005)

FN77. See 28 U.S.C. §§ 1712.

FN78. *Fleury v. Richemont North America, Inc.*, 2008 WL 3287154, at *2 (N.D. Cal. 2008) (“While CAFA does not expressly define what a coupon is, the legislative history suggests that a coupon is a discount on another product or

service offered by the defendant in the lawsuit.”); *Perez v. Asurion Corp.*, 2007 WL 2591180, at *2 (S.D. Fla. 2007) (finding that “coupon” settlements included phone cards and vouchers that did not require the class to purchase anything, because they were not cash).

FN79. • 28 U.S.C. §§ 1712.

FN80. *Cf.*, *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2009) (agreeing that an offer of judgment could moot a purported class action if no other similarly situated employees opt in, but remanding for consideration of whether plaintiff timely sought certification of her action).

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The Absence of Legal Ethics in the ALI's *Principles of the Law of Aggregate Litigation*: A Missed Opportunity— and More

Nancy J. Moore*

INTRODUCTION

There is very little discussion of legal ethics in the American Law Institute's ("ALI") recently adopted *Principles of the Law of Aggregate Litigation* ("*Principles*"),¹ in either the blackletter rules or the comments. To be sure, the *Principles* devote several sections in the final chapter to the so-called aggregate settlement rule, i.e., Rule 1.8(g) of the *Model Rules of Professional Conduct*.² In one section, and its accompanying comment, the *Principles* define an aggregate settlement,³ thereby providing the helpful guidance to both lawyers and courts that is otherwise missing from the Model Rule.⁴ In another section, the *Principles* purport to "restate" Rule 1.8(g), including a brief discussion of precisely what sort of information claimants are entitled to receive when their common attorney negotiates and then asks them to approve an aggregate settlement of their claims.⁵ Finally,

* Professor of Law and Nancy Barton Scholar, Boston University School of Law. The author is an ALI member and served on the Members' Consultative Group for the ALI *Principles of the Law of Aggregate Litigation*. As a professional responsibility teacher and scholar, my interest in this project from the very beginning has been the ethical obligations of lawyers involved in aggregate litigation.

1 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010).

2 MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2008).

3 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.16 & cmt. (2010).

4 See Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 396 (2008) (explaining the need for such a definition and the derivation of the ALI's proposed definition).

5 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(a) (2010). Elsewhere I criticized an earlier but substantially similar version of this section because it did not address the level of detail lawyers must provide. Moore, *supra* note 4, at 396–97. Given that clients often want to keep medical and financial information private, it is important to know to what extent their desires can be respected under the current rule. *Id.*; see also Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 162–64 (1999) (arguing that the concern for privacy does not necessarily require changing the aggregate settlement rule to permit clients to give advance consent to a settlement).

in the section that undoubtedly drives the entire discussion, the *Principles* propose a modification of the Rule as it has been adopted and interpreted in all U.S. jurisdictions,⁶ by providing that claimants can agree in advance, under certain circumstances, to be bound by a majority vote in favor of a particular settlement.⁷

I have elsewhere written in opposition to an earlier version of the ALI's proposal to modify the aggregate settlement rule,⁸ and I am not going to rehash that opposition in this Essay.⁹ What I want to do here is to examine other parts of the *Principles* and comment on the implications of the dearth of any meaningful discussion of the ethical rules that apply to lawyers involved in various types of aggregate litigation, including both class actions and nonclass aggregations.¹⁰ I began this investigation with the idea that the primary implication of the absence of legal ethics in the *Principles* was that the ALI had missed an opportunity both to remind lawyers of their ethical obligations in these types of proceedings¹¹ and to propose solutions to some of the ethical

⁶ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. a (2010).

⁷ See *id.* § 3.17(b); see also *id.* § 3.17(c)–(f) (providing additional requirements for use of an alternative to the traditional aggregate settlement rule); *id.* § 3.18 (providing for limited judicial review of aggregate settlements reached pursuant to the alternative to the traditional aggregate settlement rule).

⁸ See Moore, *supra* note 4. See generally Moore, *supra* note 5 (responding to the proposal coauthored by Professor Charles Silver, one of the Reporters to the *Principles*).

⁹ In a nutshell, my opposition was based on the belief that the Reporters had not met their burden to make a persuasive case for change. Moore, *supra* note 4, at 400–01. Specifically, I argued that there is no empirical evidence that advance waivers are necessary to encourage beneficial multiparty settlements. See, e.g., *id.* at 402–06. Also, the proposal is a radical departure from the current law of lawyering, which provides numerous instances of “nonwaivable rights to void agreements likely to have been made on the basis of a lack of information, unequal bargaining power, or coercion.” *Id.* at 401; see also *id.* at 416–20. Based on this opposition, I cosponsored a motion to delete sections 3.17(b) to 3.19 at the May 2008 meeting of the ALI. See LARRY S. STEWART ET AL., AM. LAW INST., MOTION TO DELETE SECTIONS 3.17(B)–3.19 (2008), <http://www.ali.org/doc/Motion-AggLit-Stewart.pdf>. The motion was discussed at that meeting, but no vote was taken, and the Reporters agreed to reconsider those sections. See AM. LAW INST., ACTIONS TAKEN WITH RESPECT TO DRAFTS SUBMITTED AT 2008 ANNUAL MEETING 17–18 (2008), http://www.ali.org/_meetings/6-18-08-ActionsTaken.pdf.

¹⁰ As an active participant in the Members' Consultative Group, I share some responsibility for this omission. Although I did inform the Reporters of at least some of these concerns at the outset of the project and at various subsequent meetings, see, e.g., Letter from author to Professors Samuel Issacharoff, Richard A. Nagareda & Charles Silver (May 24, 2005) (on file with author), I could have pressed harder to identify ethical issues and propose specific language. I will say, however, that it was the general feeling among some of the members with a background in ethics that the Reporters were not terribly interested in adding a discussion of ethics to the *Principles*, even in the comments.

¹¹ In the Introduction, the *Principles* state that “[t]he audience for this project includes judges, legislators, other rule-makers (such as state bar associations and their advisory committees), researchers, and others with control of or interests in civil litigation.” PRINCIPLES OF THE

issues that courts have yet to resolve, particularly in the area of class actions.¹² As I reread these other sections, however, I came to believe that there is an even greater significance to the absence of any meaningful discussion of legal ethics. As set forth below, I argue that in the class action context, the *Principles* appear to have inadvertently taken an unexplained position on the controversial question of client identification in class actions.¹³ More important, the use of the unfortunate term “structural conflict of interest”¹⁴ may seriously undermine the otherwise laudable attempt to clarify judicial determinations of the adequacy of legal representation.¹⁵ With respect to nonclass aggregations, I argue that the *Principles*’ failure to address ethical rules governing communication and conflicts of interest outside the context of aggregate settlements makes it likely that mass tort lawyers will continue to treat their clients as if they were absent members of a class, without the protections afforded a class.¹⁶

I. THE MISSED OPPORTUNITY: CLASS ACTIONS AND NONCLASS AGGREGATIONS

Issues of legal ethics arise frequently in class action litigation, including conflicts of interest, solicitation, communication, the reasonableness of attorney’s fees, and the attorney-witness rule.¹⁷ Despite the frequency with which these issues arise, current rules of professional conduct do little to address the application of these rules in the context of class actions specifically,¹⁸ and the ALI’s *Restatement (Third) of the Law Governing Lawyers* similarly devotes little attention to class action lawyers.¹⁹

LAW OF AGGREGATE LITIG. intro., at 2 (2010). Although this intended audience does not exclude lawyers involved in aggregate litigation, it would appear that the Reporters did not view it is an important part of the project to educate lawyers as to their obligations (ethical or otherwise) when appearing in these types of proceedings. I view this as unfortunate, and I know that my views were shared among a number of ALI members who, like myself, have a background in legal ethics.

¹² See *infra* notes 17–30 and accompanying text.

¹³ See *infra* notes 42–46 and accompanying text.

¹⁴ E.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) (2010).

¹⁵ See *infra* notes 47–56 and accompanying text.

¹⁶ See *infra* note 69 and accompanying text.

¹⁷ Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1477–78.

¹⁸ *Id.* at 1478–80.

¹⁹ The *Restatement* raises a number of issues in the context of class actions but rarely proposes a solution. For example, it notes that “[c]lass actions may pose difficult questions of client identification,” but does not suggest whether it is the class itself or individual class members who should be regarded as the class action lawyer’s client or clients. See RESTATEMENT

In an earlier article, I defended the decision of the American Bar Association's Ethics 2000 Commission not to adopt either a separate class action rule or extensive commentary addressing the application of the rules to class action lawsuits.²⁰ The first reason I gave was that much of the confusion surrounding the application of rules of professional conduct in class actions could be significantly reduced, without revising the ethics rules, if courts would adopt the view that the class is an entity client of the class action lawyer, even at the precertification stage of the litigation,²¹ and if courts would recognize that many so-called "conflicts of interest" issues are the type of agency problems that are not meant to be resolved under conflict of interest doctrine.²² The second reason I gave was that even if there are some situations in which "relaxation (or special application)" of the rules may be necessary in class actions, whether and when such rules are applied is a question more properly decided under procedural class action rules—primarily Rule 23 of the Federal Rules of Civil Procedure and the caselaw applying that rule—rather than under rules of professional conduct or by ethics committees and courts applying those rules.²³ Focusing on the issue that has dominated much of the discussion of ethics and class actions—the application of current conflict of interest rules—I concluded that viewing the class as an entity client makes it clear that conflicts within the class are not properly the subject of conflict of interest rules, such as Rule 1.7 of the *Model Rules of Profes-*

(THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f (2000). Similarly, with respect to proceedings requiring a special degree of candor toward the tribunal, the *Restatement* provides that class counsel "has duties of care toward the class and *may be* taking a position that requires an informed decision by the tribunal. In such circumstances . . . the lawyer must disclose information necessary for the tribunal to make an adequately informed decision." *Id.* § 112 cmt. c (emphasis added). For additional passing references to issues arising in class actions, see *id.* § 22 cmt. c (authorization of settlements); *id.* § 36 cmt. c (client responsibility to pay expenses); *id.* § 99 cmt. g (application of no-contact rule); *id.* § 125 cmt. f (defendant's acquiescence in class counsel's proposed fee award); *id.* § 128 cmt. f (differences within class not creating ethical conflicts of interest).

²⁰ See Moore, *supra* note 17, at 1480–81.

²¹ *Id.* at 1482–89.

²² *Id.* at 1489–92. An example of an agency problem that is not addressed by the conflict of interest doctrine is the "conflict between the client's interest in having the lawyer devote the most time possible to the client's cause at the lowest possible price and the lawyer's interest in devoting the least possible time at the highest possible price." *Id.* at 1490. These types of inevitable agency problems "permeate legal and other professional practice" and are regulated by relying on either lawyer professionalism or on other professional rules, such as those governing competence, diligence, and legal fees. *Id.* at 1490–91. Conflict of interest rules address conflicts that are unique to particular lawyers and that can be avoided or removed by permitting or requiring clients to find another lawyer. *Id.*

²³ *Id.* at 1498–503.

sional Conduct.²⁴ Nevertheless, I also concluded that, when class counsel is currently representing (or has formerly represented) individuals outside the class, such individuals are entitled to the full protection of professional conflict of interest rules.²⁵ There may be danger to the class as well; however, I urged that such danger be resolved not under rules of professional conduct, but rather as part of the court's determination of the adequacy of class counsel's representation under Rule 23 of the Federal Rules of Civil Procedure.²⁶

These issues that I have previously addressed are some of the ethical issues facing class action lawyers that the Reporters could have addressed in the *Principles*—along with issues concerning communication,²⁷ solicitation,²⁸ and the attorney-witness rule²⁹—but chose not to in the rules themselves or even in the comments. I view this as a missed opportunity, both to alert class action lawyers to at least some of the ethical problems they might encounter and to assist courts in untangling the knots these problems present, such as when an individually represented client requests disqualification of class counsel because of an ethical conflict of interest.³⁰

²⁴ *Id.* at 1482–89.

²⁵ *Id.* at 1492–98.

²⁶ *Id.* at 1498–503.

²⁷ See, e.g., ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* §§ 15:5–15:20 (4th ed. 2002) (discussing communication with class members and potential class members, including contacts by class counsel and opposing counsel). See generally Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353 (2002) (same).

²⁸ See, e.g., CONTE & NEWBERG, *supra* note 27, § 15:04.

²⁹ See, e.g., *id.* § 15:23.

³⁰ In 2005, I testified as an expert on behalf of an individual member of a putative class who testified that his law firm had told him that his case would be litigated individually and not as part of a class. When he learned that his law firm had negotiated a settlement of a class action before a class action lawsuit was filed, although he had never been informed of these negotiations, he moved to disqualify his law firm as class counsel because of a conflict of interest between himself and the putative class. The motion was denied after a former federal judge, who had been retained as an expert by the lawyers in question, testified to what he believed was intended in a judicial opinion he himself had written concerning the relaxation of ethics rules when a former class counsel appears on behalf of objectors to a proposed settlement. He was also permitted to testify as to conversations he had with another federal judge concerning the interpretation of this and other similar cases. See *Simon v. KPMG LLP*, No. 05-CV-3189 (DMC), 2006 WL 1541048, at *9–10 (D.N.J. June 2, 2006) (finally approving the settlement with brief reference to an earlier denial of a motion to disqualify); Transcript of Proceedings, *Simon*, 2006 WL 1541048 (No. 05-CV-3189 (DMC)) (Oct. 28, 2005) (on file with author) (including testimony of Hon. Arlin Adams); Transcript of Proceedings, *Simon*, 2006 WK 1541048 (No. 05-CV-3189 (DMC)) (Oct. 31, 2005) (on file with author) (including testimony of Professor Nancy J. Moore).

Outside the class action context, aggregate litigation also raises a myriad of ethical issues, including conflicts of interest,³¹ communication,³² solicitation,³³ referrals,³⁴ and attorney's fees.³⁵ Although some of these issues are briefly mentioned in either the comments³⁶ or the Reporters' Notes,³⁷ they are not discussed in any meaningful way—except with respect to the aggregate settlement rule³⁸—and the references are too fleeting to alert lawyers to the nature of the issues, the applicable rules of professional conduct, or other resources that lawyers might consult.³⁹ Again, the failure to fully address these issues can be viewed as a missed opportunity to give helpful guidance to both lawyers and courts concerning ethics issues that commonly arise in nonclass aggregations.

³¹ See, e.g., Moore, *supra* note 5, at 177–78 (discussing conflicts among multiple claimants that begin as they agree to pursue collective action through common representation).

³² See *id.* at 160–62.

³³ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.3 (2008).

³⁴ See, e.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 535–38.

³⁵ See generally Judith Resnik, *Money Matters: Judicial Market Interventions, Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000) (advocating for stronger judicial regulation of attorney's fees in aggregate litigation); Nancy J. Moore, *Ethics Matters, Too: The Significance of Professional Regulation of Attorney Fees and Costs in Mass Tort Litigation—A Response to Judith Resnik*, 148 U. PA. L. REV. 2209 (2000) (responding to Professor Resnik's article).

³⁶ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. c (2010) (“Speaking generally . . . outside of representational lawsuits the law generally assumes that parties always adequately represent themselves. This assumption may be incorrect in non-class aggregate lawsuits because of deficient incentives, conflicts of interest, or other reasons.”). This is an important statement; however, it appears in a paragraph addressing the due process requirement of adequate representation in class actions. Thus, it does not appear to be intended or likely to alert nonclass lawyers to the conflicts of interest problem that is likely to arise when such lawyers represent hundreds or thousands of clients with similar claims against a common defendant.

³⁷ See, e.g., *id.* § 1.02 reporters' note cmt. b(3) (“Cocounsel representations are subject to professionalism rules that permit lawyers to share fees in proportion to the services rendered or otherwise if all lawyers accept joint responsibility for the matter. Usually, fee sharing is settled by agreement when new attorneys are brought into a case.”); *id.* § 1.04 reporters' note cmt. c (“Agreements among litigants or between litigants and lawyers purporting to establish the objectives of litigation may be governed by contract law, the law governing lawyers, agency law, or other law.”). Because lawyers are less likely to consult Reporters' Notes, it would have been preferable to put discussions such as these in the comments themselves.

³⁸ See *supra* notes 1–7 and accompanying text.

³⁹ See, e.g., *supra* notes 36–37.

II. MORE THAN A MISSED OPPORTUNITY

A. Ethics and Class Actions

There are at least two ways in which I believe the ALI has done more than simply miss an opportunity to highlight and address the ethics of class action lawyers. One is relatively minor.⁴⁰ The other is potentially more significant because it undermines the Reporters' laudable effort to clarify the adequacy of representation requirement under Rule 23 and bears directly on what I believe was the underlying objective of the project—to advance the efficiency concerns of aggregate litigation while simultaneously articulating the manner in which the interests of individual claimants can be protected.⁴¹

First, instead of simply ignoring the fact that courts have not clearly articulated the relationship of class counsel to the individual members of the class, as well as the class itself,⁴² the *Principles* appear to have inadvertently endorsed the view that all members of the class, whether class representatives or absent class members, are individual clients of the lawyer. For example, section 1.04(a) states that “[a] lawyer representing multiple claimants or respondents in an aggregate proceeding should seek to advance the common objectives of those claimants or respondents.”⁴³ This section is clearly intended to address both class and nonclass aggregations,⁴⁴ and yet nothing in either the comment or even the Reporters' Notes addresses the confusion that currently exists regarding the precise nature of the relationship between class counsel and the individual members of a class, particularly the absent class members.⁴⁵ One of the consequences of identifying class members as clients is that it suggests the need to relax

⁴⁰ See *infra* notes 42–46 and accompanying text.

⁴¹ See *infra* notes 47–52 and accompanying text.

⁴² See, e.g., Moore, *supra* note 17, at 1484–85.

⁴³ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04(a) (2010) (emphasis added).

⁴⁴ The term “aggregate proceedings” is elsewhere defined to include not only class actions, but also administrative aggregations and private aggregations, which are “informal collection[s] of the claims or defenses of multiple parties, represented persons, claimants, or respondents proceeding under common nonjudicial supervision or control.” *Id.* § 1.02.

⁴⁵ In the Reporters' Notes, the Reporters appear to take the view that class counsel represent named plaintiffs, who themselves owe a fiduciary duty to the unnamed members of the class. *Id.* § 1.04 reporters' note cmt. a (“Class counsel is thus a fiduciary to a client who is also a fiduciary.”) The Reporters do not note, however, the apparent contradiction between this statement and the blackletter of section 1.04(a). In addition, it may not be the case that class counsel has a typical attorney-client relationship with each of the named plaintiffs, i.e., on the basis of an individual retention agreement, particularly if the amount of their individual claims is so low that the attorney would not be willing to represent them in an individual capacity. See, e.g., Moore, *supra* note 17, at 1497. I have been involved as an expert witness in a lawsuit by a class representative who sued class counsel in a consumer dispute for breach of fiduciary duty. In that lawsuit,

ethical-conflicts rules in order to permit class actions to proceed, whereas viewing the class itself as an entity client makes it clear that conflict of interest rules simply do not apply to intraclass conflicts.⁴⁶

Second, and more important, the *Principles* create unnecessary and potentially serious confusion by using the term “structural conflicts of interest,” particularly in section 2.07(a)(1), which addresses one aspect of the traditional determination of the adequacy of representation as a prerequisite to satisfying the requirements of constitutional due process in binding absent members of the class.⁴⁷ That section is titled “Individual Rights in Aggregation of Related Claims,” and subsection (a)(1) provides as follows:

(a) As necessary conditions to the aggregate treatment of related claims by way of a class action, the court shall

(1) determine *that there are no structural conflicts of interest*

(A) between the named parties or other claimants and the lawyers who would represent claimants on an aggregate basis, which may include deficiencies specific to the lawyers seeking aggregate treatment or

(B) among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.⁴⁸

The use of the term “structural conflicts of interest” is not explained in either the blackletter Rule or the Comment.⁴⁹ The Report-

the class counsel claimed that the plaintiff was merely a named class representative, and not an individual client, even prior to the time that any class action lawsuit was filed.

⁴⁶ Moore, *supra* note 17, at 1482–89.

⁴⁷ See *id.* at 1501 n.149 (discussing the adequacy of representation by class counsel under both Federal Rule of Civil Procedure 23(a)(4) and the Due Process Clause of the U.S. Constitution).

⁴⁸ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) (2010) (emphasis added).

⁴⁹ The Reporters did not originate this term. Its first use in the class action context may have been in a 1983 article by Professor John Coffee, in which he makes three arguments: (1) a plaintiffs’ class counsel has a conflict of interest when the fee award is based on hours worked; (2) defense counsel may take advantage of this conflict to tacitly agree with class counsel to settle at a low amount in return for permitting class counsel to expend more time; and (3) this collusion is “structural rather than conspiratorial” and results in inadequate settlements. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty*

ers' Notes, however, inform us that "[t]he casting of subsection (a)(1) in terms of 'structural conflicts of interest' is designed to lend greater precision to the loyalty inquiry in connection with class actions, an inquiry historically phrased in terms of adequate representation."⁵⁰ The Notes go on to explain that "structural conflicts of interest" are those that are "discernible as part of the determination to aggregate or that emerge as part of that proceeding" and that "speak[] to the legitimacy of the class judgment from its inception and irrespective of its outcome."⁵¹ In other words, the point is to separate those aspects of adequacy that derive from "an improperly constituted class" from those aspects that are "inextricably linked to outcome," for example, the adequacy of a class settlement.⁵²

The term is unfortunate. When these structural conflicts encompass serious conflicts of interest among various groups within the class—the type that requires subclassing in order to avoid the due process problems encountered in decisions like *Amchem*⁵³—the use of the term is both obvious and helpful. Moreover, conflicts among class members are best viewed as completely outside the protection of the profession's conflict of interest rules.⁵⁴ As a result, the failure to reference ethical conflict of interest doctrine creates no particular confusion. However, as used in section 2.07(a)(1), the *Principles* reference not only these types of intraclass conflicts, but also other types of conflicts that *are* covered by traditional conflict of interest rules. Examples include conflicts that arise when a lawyer currently represents individuals outside the class with claims that are similar to those of the

Hunter Is Not Working, 42 MD. L. REV. 215, 247–48 (1983). The term's notoriety, however, was almost certainly the result of its use by the Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n.20, 627 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856–57 & n.31 (1999) (citing *Amchem*). In those two cases, the Supreme Court appeared to be using the term to refer to conflicts within the class itself. The term was also featured prominently in a more recent article by Professor Coffee. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 386 (2000) (discussing "structural conflicts in the mass tort class action" in the following groups: "(1) internal conflicts that exist within the class . . . ; (2) external conflicts that arise because class members (or their attorneys) have some extraneous reason for favoring a settlement that does not truly benefit the interests of all class members; (3) risk conflicts that arise because class members or class counsel have very different attitudes about the level of risk they are willing to bear; and (4) conflicts over control of the litigation"). The use of the term in all of these different contexts is no more helpful than its use by the Reporters in this project, except perhaps when the Supreme Court uses it to reference conflicts within the class that require subclassing.

⁵⁰ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 reporters' notes cmt. d (2010).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Amchem Prods., Inc.*, 521 U.S. at 626 & n.20.

⁵⁴ Moore, *supra* note 17, at 1487–89.

class and conflicts that arise when a lawyer has previously represented a defendant in a substantially related matter.⁵⁵ Section 2.07(a)(1) also encompasses conflicts between members of the class who have individual retainer agreements with the lawyer and those who do not.⁵⁶

It should be the case that when these types of conflicts arise, clients outside the class are entitled to the full protection of the rules of professional conduct, including disqualification of class counsel when necessary to protect the interests of the nonclass clients.⁵⁷ But what about the interests of the class itself? Section 2.07(a)(1) suggests that if there is “a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves,”⁵⁸ then aggregate treatment by way of a class action is inappropriate. In other words, a precondition to such aggregate treatment by way of a class action is a determination that “there are *no* structural conflicts of interest.”⁵⁹ Here, the use of the term “structural conflict of interest” is confusing because the analysis appears to differ in important respects from the treatment of such conflicts under traditional conflict of interest rules.

Under Model Rule 1.7, a potentially impermissible conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”⁶⁰ However, the mere existence of such a conflict does not necessarily render the representation unethical. Rather, if the conflict is consentable, then the lawyer may proceed with the

⁵⁵ See *id.* at 1492–98 (urging straightforward application of the conflict of interest rules in order to protect the interests of the nonclass current or former client).

⁵⁶ See *id.* at 1493. For example, individual retainer agreements may give the lawyer a legal fee that is a larger percentage of the amount received by a claimant than the lawyer would receive as a fee award from the court. *Id.* at 1499 & n.134. That would give the lawyer an incentive to favor the lawyer’s own clients in any settlement agreement. *Id.* at 1499; see also, e.g., Moore, *supra* note 4, at 409 n.83 (describing a recent case involving allegations to this effect in a nonclass aggregate settlement in which plaintiffs’ counsel allegedly had an incentive to favor directly retained clients, as opposed to referred clients, because of differences in the amount of legal fees the counsel would earn upon settlement).

⁵⁷ Moore, *supra* note 17, at 1492–98.

⁵⁸ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07(a)(1) (2010).

⁵⁹ *Id.* (emphasis added); see *id.* § 2.07 cmt. d.

⁶⁰ MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2008).

representation after obtaining the informed consent of each affected client.⁶¹

A conflict is typically consentable if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”⁶² Intra-class conflicts that pose significant risks may be cured by the use of subclassing, in which case the conflict no longer exists and does not need client consent. But subclassing is not an option for the other types of conflicts encompassed by section 2.07(a)(1), i.e., conflicts between the class itself and individually represented clients, either within or outside of the class. Perhaps the *Principles* intend to convey that, in all such conflicts, clients cannot consent and, therefore, a lawyer with such a conflict may not represent the class, but I doubt this is the case. After all, “it is not necessarily desirable to create a *per se* ethical prohibition on the simultaneous representation of both a class and individuals with interests potentially at odds with those of the class” as a whole.⁶³ This is particularly so when the lawyer represents some but not all of the individual members of the class, including some of the absent class members, because the risks to the class may be small in relation to the potential benefits of pursuing the action with a lawyer who is already familiar with the underlying subject matter by virtue of the lawyer’s ongoing representation of individual class members.⁶⁴

When the potential advantages of joint representation outweigh the potential risks, a conflict of interest is typically consentable. But who gives informed consent on behalf of a class? Perhaps the court does so (or could do so) as part of its adequacy of representation determination,⁶⁵ and perhaps this is the type of determination that the *Principles* mean to propose in section 2.07(a)(1). But if this is the case, then the *Principles* do not clearly communicate that, in applying this section, courts should determine not only whether a “structural conflict” of this sort exists, but also whether the particular conflict is sufficiently severe that aggregation cannot proceed unless a lawyer

⁶¹ *Id.* R. 1.7(b); see also *id.* R. 1.7 cmt. 2 (“Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.”).

⁶² *Id.* R. 1.7(b)(1).

⁶³ Moore, *supra* note 17, at 1500.

⁶⁴ *Id.* at 1500–01.

⁶⁵ See *id.* at 1501 (noting that this would not be sufficient with respect to pre-filing conflicts, as when a lawyer negotiates a settlement class action).

without a conflict of interest is substituted as class counsel. Or perhaps the *Principles* intend to suggest that, by definition, a “structural conflict” does not exist unless the particular conflict is of that level of severity such that any potential advantages of representation by this lawyer are clearly outweighed by the risks. But again, if this is the case, then the *Principles* do not clearly communicate the type of analysis contemplated.

In my view, clarification of the proposed analysis necessarily requires an explanation of the relationship between the structural-conflicts analysis contemplated under section 2.07(a)(1) and the analysis more typically conducted under rules of professional conduct, keeping in mind that under Rule 1.7, conflicts are very broadly defined, with the understanding that most conflicts can be waived by the affected clients. Given the inability to obtain the informed consent of the class to the risks of conflicted representation, section 2.07(a)(1) conflicts should probably be much more narrowly defined than Rule 1.7 conflicts. In any event, the failure to address the relationship between section 2.07(a)(1) and Rule 1.7 undermines the ALI’s objective of clearly articulating how the individual interests of individual claimants should and will be protected in aggregate proceedings, including class actions.

B. More than a Missed Opportunity: Ethics and Nonclass Aggregations

As for nonclass aggregations, I am principally concerned with what the *Principles* describe as “private aggregation”⁶⁶ or “informal aggregation,”⁶⁷ particularly situations in which “[m]ass-solicitation efforts, referral networks, and specialization may concentrate large numbers of clients with related claims in the hands of a few attorneys or even a single firm.”⁶⁸ Here, I believe that the *Principles* offer a view of mass representation that is unduly rosy. They not only ignore the application of ethics rules to various aspects of nonclass aggregations, but also affirmatively downplay the risks of such representation and the role that ethics rules play in protecting the individual clients against such risks. These protections become especially important once it is recognized that mass tort lawyers often treat their clients as

⁶⁶ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02(c) (2010).

⁶⁷ *Id.* § 1.02 cmt. b(3).

⁶⁸ *Id.*

if they were members of a class without affording them the judicial protections given to actual class members.⁶⁹

Throughout the document, the *Principles* consistently tout the benefits of individual clients forming “consensual group lawsuits”⁷⁰ and other “litigation groups”⁷¹ (e.g., clients with similar claims who have not yet filed a lawsuit), with no significant discussion of any of the accompanying risks. For example, referral networks are described as entirely beneficial because the referral market corrects the mismatch of clients and lawyers that results in deficient representation.⁷² There is no mention of the risks entailed in such referral markets. For example, some lawyers may refer cases to another lawyer because that lawyer offers a more favorable referral fee or because that lawyer’s own marketing efforts have misled the referring lawyer to believe that he has more experience and expertise than is in fact the case.⁷³ There is also no mention of the likely violation of rules that prohibit lawyers from false or misleading advertising when they market themselves to the public without any indication that their intention is to turn these cases over to other lawyers in return for a referral fee.⁷⁴

⁶⁹ See generally, e.g., L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157 (2004) (proposing conferring judicial authority to oversee and authorize mass tort settlements outside the class action context).

⁷⁰ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. c (2010).

⁷¹ See, e.g., *id.* § 1.02 reporters’ note cmt. b(3) (“[I]ndividuals often have (and may even prefer to have) their day in court as part of litigation groups.”).

⁷² *Id.*

⁷³ See, e.g., Erichson, *supra* note 34, at 536–39. Although it may be true that “it is reasonable to expect that the incentives of the referral market would generally channel referral cases to lawyers competent to handle them and positioned to take advantage of economies of scale and opportunities for bargaining leverage,” *id.* at 537–38 (emphasis added), there are numerous opportunities for the referral market to fail, including the inability or lack of willingness of referring lawyers to discern precisely which other lawyers are best positioned to advance the clients’ interests in maximizing recovery, see *id.* at 537 (discussing criticisms of what some plaintiffs’ lawyers “see as excessive and unethical advertising and referral practices among their colleagues”). These failures may be exacerbated by the referring lawyers’ failures to recognize conflicts of interests among the individual clients they are referring. See *infra* notes 89–94 and accompanying text.

⁷⁴ I have seen numerous television advertisements directed at potential mass tort claimants, but I have never seen a single advertisement stating that the lawyer or law firm plans to refer claimants to other lawyers who will actually handle their cases. The failure to disclose such an intention makes an advertisement false or misleading and therefore unethical. See MODEL RULES OF PROF’L CONDUCT R. 7.1 (2008) (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”).

Similarly, the *Principles* note that “private aggregation helps level the playing field” by making it possible for individual clients to reduce costs by working collectively and presenting a united front,⁷⁵ but there is no significant mention of the risks of aggregation through joint representation, including conflicts of interest among the clients as a result of varying degrees of injury or different statutes of limitations.⁷⁶ To be sure, the *Principles* acknowledge the potential for conflict at the stage when the lawyer proposes an aggregate settlement of the clients’ claims.⁷⁷ But what about the initial decision to aggregate? By the time that an aggregate settlement is proposed, it may be too late for individual clients to protect themselves against the risks of aggregation.⁷⁸

Outside of aggregate settlements, the *Principles* appear to assume that nonclass claimants do not need protection because, unlike absent class members, these claimants are in a position to protect themselves. For example, under section 1.04, “a lawyer representing multiple claimants . . . should seek to advance the common objectives of those claimants,”⁷⁹ and, unless otherwise agreed, the primary common objective is assumed to be “maximizing the net value of the groups of claims.”⁸⁰ Once that net value has been maximized, the common objectives are also assumed to include “compensating each claimant appropriately”;⁸¹ however, the comment acknowledges that “[r]ough justice” or “damages averaging” is normal in aggregate proceedings.⁸² Significantly, the comment further provides that “[t]he possibility of altering the objectives to be pursued exists mainly in consensual group

⁷⁵ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 reporters’ note cmt. b(3) (2010).

⁷⁶ As noted earlier, there is a statement in a subsequent comment acknowledging that parties might not always adequately represent themselves in nonclass aggregations “because of deficient incentives, conflicts of interests, or other reasons.” See *supra* note 36. That statement, however, appears in a paragraph discussing the due process requirements of adequate representation in class actions, *id.*, and hardly serves as a meaningful warning of the risks of aggregation at the outset of the representation of multiple nonclass claimants, i.e., outside the context of aggregate settlements, which arise at a much later time.

⁷⁷ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.16 cmt. a (2010).

⁷⁸ Most important, the client may not have the benefit of the attorney’s independent professional judgment as to whether the client should accept or reject the settlement offer. Both the attorney and the other clients will have a significant financial interest in securing the client’s approval of the settlement if, as is typical, the settlement will not be effective as to any of the claimants unless all or a substantial majority of them approve it. See, e.g., Moore, *supra* note 4, at 406–09.

⁷⁹ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04(a) (2010).

⁸⁰ *Id.* § 1.04(b)(1). Although the *Principles* do not say so explicitly, I assume that the objectives listed in section (b) are placed in rank order of assumed importance.

⁸¹ *Id.* § 1.04(b)(2).

⁸² *Id.* § 1.04 cmt. f.

lawsuits and other proceedings where participants who enjoy high levels of control can meet face to face.”⁸³ But surely this does not accurately describe the situation in which a single lawyer represents thousands of individual clients from all parts of the country and such face-to-face meetings will be next to impossible. And even if the clients could meet, what exactly could they do to alter the objectives if they cannot agree on an alternative? What sort of agreement could they reach that would ensure, at the outset, that appropriate compensation will avoid “rough justice” or “damages averaging”?

The problem, of course, is that the *Principles* assume that in “consensual group lawsuits,” the individual clients have chosen to proceed as part of a “litigation group,” thereby consenting to a certain loss of control over their individual cases. But what ensures that the clients have been adequately informed of both the advantages and the risks of proceeding as part of a “litigation group”? What ensures that the decisions are truly consensual? What the *Principles* ignore is that, without the protections afforded to class members, individual nonclass clients have only the rules of professional conduct to protect them against the potential harms of the “class-action-style procedures [that] have come to be employed in mass-tort lawsuits where class actions could not ordinarily be certified.”⁸⁴

Under rules of professional conduct, individual clients must be fully informed, at the outset of the representation, of any significant risk that the representation may be materially limited by the lawyer’s duty to other clients.⁸⁵ With that information, individual clients might decide that they want to become part of a litigation group represented by this particular lawyer. But some clients might refuse, or they might decide that they prefer to be represented by a lawyer who represents a more narrowly tailored group, such as individuals with very severe injuries or without serious statute of limitations problems. Indeed, under rules of professional conduct, it might be the case that some conflicts among individual clients cannot be waived by consent.⁸⁶ For example, if a lawyer attempts to combine in a single litigation group clients with the type of structural conflicts that would require subclassing if the clients were members of a class,⁸⁷ then the fact that there would likely be no judicial approval of any future settlement may lead

⁸³ *Id.* § 1.04 cmt. c.

⁸⁴ *Id.* § 1.05 cmt. b.

⁸⁵ See *supra* note 60 and accompanying text.

⁸⁶ See *supra* note 63 and accompanying text.

⁸⁷ See *supra* notes 62–63 and accompanying text.

to the inescapable conclusion that adequate representation requires that these groups be represented by different lawyers.⁸⁸

Even when the conflicts are consentable, the risk remains that the lawyer will favor the interests of some clients over other clients, or that the lawyer will favor his or her own interests by settling cases too quickly.⁸⁹ Because no judge will determine the fairness of any proposed settlement, it is up to the clients themselves to monitor the lawyer's conduct. In order to do so, however, the client may need access to more information than class counsel typically provides to absent class members. Unfortunately, the *Principles* do not distinguish between class and nonclass counsel with respect to the lawyer's duty to communicate. For example, the Comment to section 1.05 provides that lawyers *should* communicate with their nonclass clients with respect to important decisions, such as the need to select the best test case for bellwether trials.⁹⁰ What the *Principles* ignore, however, is that rules of professional conduct actually *require* that lawyers reasonably communicate with their clients, not only to enable them to make important decisions, but also to "keep [clients] reasonably informed about the status of the matter" and to "promptly comply with reasonable requests for information."⁹¹ Similarly, although the Comment notes with approval the use of electronic communications for all forms of aggregate proceedings, it simultaneously approves the decision of many lawyers to reserve the use of more expensive telephone banks for "major decisions, mainly settlement"⁹² on the ground that otherwise communication "is simply a burden."⁹³ Nowhere do the *Princi-*

⁸⁸ When subclassing is required in a class action, it is typically the case that each subclass must be represented by separate counsel. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 & n.31 (1999) ("In *Amchem*, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the 'competency and conflicts of class counsel.'").

⁸⁹ See, e.g., Moore, *supra* note 4, at 406–09.

⁹⁰ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. f (2010). Bellwether trials are sample cases tried for the purpose of either voluntarily binding other claimants or providing guidance to the court and others. See *id.* § 2.02 cmt. b. See generally Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

⁹¹ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008).

⁹² PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. i (2010).

⁹³ *Id.* § 1.05 reporters' notes cmt. i ("Communication should be encouraged when it is likely to enable recipients to make informed decisions and when it is likely to generate informed responses. Otherwise, communication is simply a burden. In aggregate proceedings involving large numbers of persons, lawyers should be encouraged to use low-cost methods of communicating routine information. Expensive methods should be employed only when fundamental matters are at hand, such as communications about settlement or required discovery responses.").

ples distinguish between the level and type of communication required of lawyers representing individual clients and that required of class counsel.⁹⁴

CONCLUSION

Aside from a proposal to modify the aggregate settlement rule, the *Principles of the Law of Aggregate Litigation* barely mention the wide-ranging ethical issues that arise in both class actions and nonclass aggregate litigation. From my point of view, this is highly regrettable. First, the ALI has missed an important opportunity both to educate lawyers regarding their ethical obligations in these types of proceedings and to propose solutions to some unresolved issues, such as the identity of class counsel's client and the applicability of ethical conflict of interest rules to class actions. Second, and more important, the ALI's failure to integrate ethics and procedure may actually undermine the underlying objective of the project, which was to advance efficiency while simultaneously articulating how the interests of individual claimants can be protected. In the class action context, the *Principles* propose a treatment of "structural conflicts" that is confusing and misleading precisely because it fails to explain the difference between structural conflicts and ethical conflicts. In the context of nonclass aggregations, the absence of ethics creates the false impression that the primary point at which ethical issues arise is the negotiation of an aggregate settlement, although there are numerous ethical issues that are commonly present from the very outset of any aggregation of individual claims, including both conflicts of interest and communication. The failure to address these issues contributes to the unfortunate tendency of mass tort lawyers to treat their individual clients as if they were absent members of a class, thereby ignoring the reality that the most significant protections afforded to nonaggregate claimants are the rules of professional conduct.

⁹⁴ Elsewhere, in addressing the cost of regularly communicating with nonclass clients, I concluded that, "[g]iven the enormous fees that many of these cases generate, I doubt that lawyers who are required to spend additional money on communication expenses will abandon the field of mass tort litigation." Moore, *supra* note 5, at 162 (citation omitted).

SECURING WAGES, PROTECTING HOURS:
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THE FLSA IN THE FEDERAL SECTOR

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Introduction

Since 1974, federal employees have been covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (“FLSA”), the principal federal statute governing minimum wage and overtime payments. The FLSA provides that employees who work more than forty hours per week must receive overtime pay at a rate not less than one-and-one-half times the employees’ regular rate of pay. *Id.* § 207(a).²

Federal employees are now covered by the FLSA unless they fall into any of the statutory exemptions. It is well established that exemptions from the FLSA are to be “narrowly constructed against the employers seeking to assert them.” *Phillips v. Walling*, 324 U.S. 490, 493 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 at 392 (1960). Thus, an employer must show that employees fit “plainly and unmistakably” within the exemptions carved out for “any employee in a bona fide executive, administrative, or professional capacity” to avoid making double-time overtime payments pursuant to the FLSA. *See id.*

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² *See* 29 U.S.C. § 207(k) for special law enforcement and fire protection overtime provisions.

When Congress made the FLSA applicable to federal employees, it gave a reluctant Civil Service Commission, now the Office of Personnel Management (“OPM”), the authority to administer the provisions of the Act in the federal sector. 29 U.S.C. § 204(f). In so doing, however, OPM has been directed to act in a manner consistent with Department of Labor’s implementation of the FLSA. *Am. Fed’n of Gov’t Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761 (D.C. Cir. 1987). *See, e.g.*, 5 C.F.R. § 551.205 (executive exemption criteria); § 551.206 (administrative exemption criteria); § 557.207 (professional exemption criteria).³

OPM’s FLSA regulations provide that federal employees are *presumed* to be FLSA non-exempt. 5 C.F.R. § 551.202(d). OPM has thus reinforced the broad reach of the FLSA in the federal sector: “if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA non-exempt.” *Id.* As such, the exemption criteria must be “narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.” 5 C.F.R. § 551.202(a) & (b). Moreover, the burden of proof rests with the agency asserting the exemption. 5 C.F.R. § 551.202(c).

There are various procedural difficulties in bringing multi-plaintiff court actions under the FLSA as a result of the Portal-to-Portal Act amendments to the FLSA which came with the great post-WWII right wing backlash in 1947. The Portal-to-Portal Act eliminated class actions under Fed. R.Civ. P. 23 as a method of FLSA enforcement. Instead, the FLSA now provides that “similarly situated” plaintiffs may bring a “collective action.” *See* 29 U.S.C. § 216(b).⁴ While collective actions are frequently termed “opt-in class actions,” they are not classically representative proceedings. An individual is not a party to an FLSA collective action case unless he or she affirmatively “opts in” by filing a consent form with the court in which the action is pending and generally subject to a searching “similarly situated inquiry” later in the case.

³ As the Federal Circuit held in *Billing v. United States*, 322 F.3d 1328, 1328 (Fed. Cir. 2003), “OPM regulations, rather than the Labor Department Regulations . . . govern the application of the [FLSA] to [federal employees]. *To be valid, however, the OPM regulations must be consistent with the Labor Department regulation.*” (emphasis added). *See also*, Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 1974 U.S.C.C.A.N. (88 Stat. 55) 2811, 2837; *Am. Fed’n of Gov’t Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761; *Zumerling v. Devine*, 769 F.2d 745, 750 (Fed. Cir. 1985) (OPM guidelines must “harmonize . . . with the Security of Labor’s regulations.”); *Adams v. United States*, 26 Cl. Ct. 782, 786 (1992) (“the DOL regulations can be used to shed light on the [FLSA]”); FLSA Decision 1810-21-02 (OPM Oct. 16, 2006) (quoting *Billings*).

⁴ Even without the Portal-to-Portal Act amendments, FLSA plaintiffs would be unable to pursue a class section in COFC because “unlike the FRCP, the court’s [collective action] rule contemplates only opt-in class certifications, not opt-out classes.” Rules Committee Notes, 2002 Revision to RCFC 23. For the application of this Rule to a pay case, *see Curry v. United States*, 02-101C, 2008 WL 868038 (Fed. Cl. Mar. 27, 2008)

The Tucker Act: This Is Not Kansas, Dorothy

In the federal sector, federal employees may sue to vindicate their FLSA rights under the Tucker Act of 1887⁵ or the so-called “Little Tucker Act,”⁶ which waives the federal government’s sovereign immunity for certain claims. As distinct from the Tucker Act, the underlying purpose of the Little Tucker Act is to provide a forum for individuals to file claims for relatively small amounts in their home districts instead of having to travel to, and litigate in, Washington, D.C. In contrast, when an employee pursues an FLSA claim against the federal government for more than \$10,000 in damages, there is just one appropriate forum: the Court of Federal Claims (“COFC”), located across the street from the White House in Washington, D.C. The Court was established by statute in 1855.⁷ COFC was established under Article I of the Constitution rather than Article III. *See* 28 U.S.C. § 171. Its sixteen judges are appointed for a term of fifteen years each, and may be reappointed. Although the Court’s principal office is in Washington, D.C., it may conduct its business elsewhere. However, the Court’s active judges must reside within fifty miles of the District of Columbia. 28 U.S.C. § 175(b).

In *United States v. Will*, 449 U.S. 200, 211, n.10 (1980), the Supreme Court recognized that jurisdiction of class actions under the Little Tucker Act is based on a determination that the claims of each individual class member does not exceed \$10,000 in amount. *See also Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997) (concluding that jurisdiction of district courts under Little Tucker Act was “limited to claims not exceeding \$10,000.00, and each of the

⁵ 28 U.S.C. § 1491(a)(1): [Tucker Act]

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

⁶ 28 U.S.C. § 1346: [Little Tucker Act]

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

. . .

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort

⁷ *United States Court of Federal Claims: The People’s Court* (brochure published by the court), available at http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf.

plaintiffs alleges that his or her individual claim is less than this amount”); *Kizas v. Webster*, 492 F. Supp. 1135 (D.D.C. 1980) (holding that under the Tucker Act, the district court was required to either transfer all claims to the Court of Claims or bifurcate the class, with the district court retaining jurisdiction over only those claims under \$10,000). Given that FLSA plaintiffs generally seek back pay and liquidated damages for three years, plus attorneys’ fees, most will be obligated to sue in the COFC rather than in a district court.

However, most courts have recognized that, for purposes of the Tucker Act, a litigant may remain in a federal district court even if his or her claim exceeds \$10,000 provided that the litigant “voluntarily waive[s] his right to recover more than \$10,000.” *Stone v. United States*, 683 F.2d 449, 451 (D.C. Cir. 1982). Since courts look at each individual class member’s claim to determine jurisdiction pursuant to the Little Tucker Act, a court must likewise look for an affirmative waiver from each class member in order to assert jurisdiction over claims in excess of \$10,000. *Roedler v. Dep’t of Energy*, 255 F.3d 1347, 1351 (Fed. Cir. 2001) (“district court may permit multi-plaintiff Little Tucker Act cases to proceed when each plaintiff waives recovery in excess of \$10,000, even when potential liability exceeds \$10,000”); *Schneider v. United States*, 197 F.R.D 397, 402 (D. Neb. 2000) (certifying a class of all persons who own interest in land now occupied or controlled for trail use and “who have been damaged in the amount of \$10,000 or less... or who waive claims exceeding \$10,000”).

Federal employees have had mixed success achieving damages for FLSA violations before the COFC. For example, despite the significant number of FLSA cases brought, there is a relative paucity of cases in which the plaintiffs have prevailed in having notice sent to federal employees who may be similarly situated. Similarly, plaintiffs have not often achieved liquidated damages, pre-judgment interest, or the extended three year statute of limitations. For a variety of reasons, we recommend that employees litigating FLSA collective actions in the COFC try to avoid the traditional two-step process familiar to FLSA litigators, in which plaintiffs opt in under 29 U.S.C. § 216(b), and instead proceed using the COFC’s Rule 20, permissive joinder. While that involves the filing of additional complaints, the cases are usually consolidated, and the filing costs are recoverable under FLSA in any event.

The Few COFC Notice Cases

One of the primary benefits of conditional certification of FLSA collective actions in federal court is the likelihood that the district judge will facilitate notice to potential plaintiffs. The Supreme Court endorsed a robust judicial role in the notice process in *Hoffman-La Roche v. Sperling*, 493 U.S. 165 (1989). Recognizing the need for similarly situated employees to “receiv[e] accurate and timely notice concerning the pendency of the collective action,” the Supreme Court held that district courts could take steps such as requiring employers to turn over contact information for potential plaintiffs. *Id.* at 170. Some courts have also required the employer to post notice at the workplace. *See, e.g., Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 541-42 (N.D. Cal. 2007). Since *Hoffman-La Roche*, district courts have almost uniformly facilitated notice in some way or another in FLSA collective actions. *See, e.g., Castillo v. P & R Enterprises, Inc.*, 517 F. Supp. 2d 440, 449 (D.D.C. 2007); *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 910-11 (N.D. Iowa 2008); *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 798 (S.D. Tex. 2010); *Fisher v. Michigan Bell Tel. Co.*, 665 F. Supp.

2d 819, 830 (E.D. Mich. 2009); *Houston v. URS Corp.*, 591 F. Supp. 2d 827, 836 (E.D. Va. 2008); *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317, 324 (S.D.N.Y. 2007).

In contrast to many district courts, there is a relatively limited record of plaintiffs requesting notice in the s. The reason for this is unclear; perhaps plaintiffs have simply not requested notice in most cases before the Court. We are aware of only two reported cases in which the Court has authorized judicially supervised notice, and in both cases the notice was fairly limited. See *Whalen v. United States*, 85 Fed. Cl. 380 (Fed. Cl. Jan. 13, 2009); *Gayle v. United States*, 85 Fed. Cl. 72 (Fed. Cl. Dec. 17, 2008). In one of those cases, there was a small group of thirty to fifty potential plaintiffs. *Whalen*, 85 Fed. Cl. at 382. In the other, notice was limited to mail, and the plaintiff's proposed class was trimmed to a significantly smaller group of employees. *Gayle*, 85 Fed. Cl. at 79-80. In fairness, plaintiffs submitted very little evidence justifying a more expansive notice.

Liquidated Damages

Congress established liquidated damages under FLSA to compensate employees for the delay in receiving lawfully-owed wages. *Herman v. RSR Sec. Services*, 172 F.2d 132, 142 (2d Cir. 1999). The FLSA creates a presumption that liquidated damages will be awarded to the prevailing plaintiff. Indeed, the case law establishes that “[d]ouble damages are the norm and single damages are the exception.” *Id. Accord Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). To avoid paying double damages, the employer must prove both subjective good faith and “reasonable grounds for believing that his act or omission was not a violation of the FLSA.”⁸ Moreover, courts have required employers to prove that they took “active steps to ascertain the dictates of the FLSA and then act to comply with them.” *Herman*, 172 F.3d at 142.

Federal employees have faced challenges in recovering double damages. In analyzing good faith and willfulness, courts in the federal circuit have sometimes invoked the “presumption of regularity,” which requires courts to assume that public officials have “properly discharged

⁸ 29 U.S.C. § 260. A separate section of statute establishes a defense that shields the employer from *all* liability—including regular and liquidated damages—if it acted in good faith in reliance on a “regulation, order, ruling, approval, or interpretation” issued by the Department of Labor. 29 U.S.C. § 259. In *Berg v. Newman*, 982 F.2d 500, 504 (Fed. Cir. 1992), the Federal Circuit held that “section 259 envisions a separation between the employer and the regulator,” and “[w]hen the Government is both employer and regular ‘the regulations both originate from and apply to the same entity.’” *Id.* As a result:

Application of section 259 to public sector employees could potentially insulate the Government from liability arising from its own faulty regulations. . . . Thus, OPM’s absence from section 259 prevents the Government from both adopting and shielding itself from liability for faulty regulations.

Id.

their official duties” unless there is evidence to the contrary. *Adams v. United States*, 350 F.3d 1216, 1228 (Fed. Cir. 2003); *Huggins v. United States*, 95-285 C, 2005 WL 6112625 (Fed. Cl. Aug. 16, 2005).

Even when the COFC has not cited this presumption, it has seemed understandably reluctant to conclude that government officials have not acted in good faith. The COFC has not often awarded liquidated damages under the FLSA.⁹ Instead, the Court has frequently found good faith based on its conclusion that the case was a close one and that, therefore, a reasonable person might have mistakenly thought that there had been no FLSA violation. In *Astor v. U.S.*, for example, the Court found good faith based on “the nature of plaintiffs’ job descriptions and daily duties,” which apparently made it reasonable for managers to assume that the plaintiff would be exempt. 79 Fed. Cl. 303, 320 (Fed. Cl. Nov. 13, 2007). The Court used the same reasoning in *Statham v. U.S.*, finding good faith where, although the plaintiff, essentially a security guard protecting the Secretary of Energy, was not exempt as an administrative employee, he nevertheless was a “highly trained, highly educated individual who indeed exercised independent judgment.” 00-699C, 2002 WL 31292278, at *10 (Fed. Cl. Sept. 11, 2002).

Consequently, the “substantial burden” on employers in proving good faith under the FLSA, *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1415 (5th Cir. 1990), has been somewhat lessened where the federal government is the employer.

The Three Year Statute of Limitation for Willfulness

The COFC has also rarely held that government employers violated the Act willfully, a finding that extends the statute of limitations from two years to three. *See* 29 U.S.C. § 255(a). The Court has found willfulness in a handful of circumstances. In one case, managers committed violations of the Act even after receiving unambiguous emails and oral communication from the Office of Personnel Management informing them of the violations. *Moreno*, 88 Fed. Cl. 266, 277-78 (Fed. Cl. July 27, 2009).

Another case, litigated by NELA board member David Kern, started in Texas federal district court on behalf of sixty canine enforcement officers employed by Customs and Border Protection within the Department of Homeland Security. The case was transferred to the COFC, and, following a trial using representative plaintiffs, the Court held that the plaintiffs were entitled to FLSA back pay, liquidated damages and a three year statute of limitations. *Bull v.*

⁹ For three cases where the COFC did award liquidated damages, *see Moreno v. United States*, 88 Fed. Cl. 266 (Fed. Cl. July 27, 2009) (awarding liquidated damages where managers had been informed by the Office of Personnel Management that they were in violation of FLSA); *Bull v. United States*, 68 Fed. Cl. 212 (Fed. Cl. Sept. 27, 2005) (awarding liquidated damages where evidence indicated that managers had “full knowledge” of FLSA violations); *Angelo v. United States*, 57 Fed. Cl. 100 (Fed. Cl. June 27, 2003) (awarding liquidated damages for some plaintiffs based on the government’s failure to present any reasonable basis for its belief that there was no FLSA violation).

United States, 68 Fed. Cl. 212, 272-74 (Fed. Cl. Sept. 27, 2005). The Federal Circuit affirmed. 478 F.3d 1365 (Fed. Cir. 2007). The Court recited the standard of *McLaughlin v. Richland Shoe, Inc.*, 486 U.S. 128, 133 (1988), requiring plaintiffs to demonstrate that the agency “either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” According to the Federal Circuit,

In finding that Customs had in fact acted willfully, the court below relied upon extensive testimony to establish Customs knew the plaintiffs were working off duty without compensation, as well as an internal memo predicting such work “could open Customs management to compensation issues because the [canine enforcement officers] are using their off duty time to meet Customs requirements.” The [COFC] also found that [a management] memorandum (directing that previously off-duty work was to be performed during working hours) was “an admission by defendant that it knew it had been engaging in activity in possible violation of the FLSA.” This evidence is plainly sufficient to support a finding of willfulness.

Bull, 479 F.3d at 1379 (internal citations omitted).

Interest in the COFC

In FLSA suits against private employers, prevailing plaintiffs often recover some form of interest. First, prevailing plaintiffs can recover postjudgment interest essentially as a matter of course.¹⁰ This interest accumulates between the entry of judgment and the date of payment to the defendant. Second, most courts of appeals have held that prejudgment interest is available in those cases where the plaintiff does not recover liquidated damages.¹¹ Plaintiffs receive a small but significant increase in their awards through prejudgment and postjudgment interest.

¹⁰ Under 28 U.S.C. § 1961, postjudgment interest is available for civil judgments in federal district court against private parties essentially as a matter of course. The statute mandates that postjudgment interest “shall be allowed on any money judgment in a civil case recovered in a district court.” 28 U.S.C. § 1961. Courts of appeals will generally find an abuse of discretion where a district court fails to award postjudgment interest. *See, e.g., Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986); *Reeves v. Int'l Tel. & Tel. Corp.*, 705 F.2d 750 (5th Cir. 1983); *Lopez v. Richardson*, 668 F.2d 1376, 1381 (D.C. Cir. 1981).

¹¹ *See, e.g., Brock v. Claridge Hotel & Casino*, 664 F. Supp. 889, 903, 905, 908 (D.N.J. 1986), *aff'd*, 846 F.2d 180 (3d Cir. 1988); *Cline v. Roadway Express*, 689 F.2d 481, 489 (4th Cir. 1982); *Hultgren v. County of Lancaster*, 913 F.2d 498, 510 (8th Cir. 1990); *Briggs v. Wilson*, 1 F.3d 1537, 1540 (9th Cir. 1993); *Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128 (10th Cir. 2000). Prevailing plaintiffs cannot obtain prejudgment interest when they also recover liquidated damages, since liquidated damages, like interest, serve to compensate employees for delay in payment. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 714-716 (1945). Some courts have suggested that a prevailing plaintiff can obtain prejudgment interest if the court

Due to sovereign immunity, federal employees face a harder path to recover interest than their private sector counterparts. The federal government is shielded from awards of prejudgment and postjudgment interest, absent a waiver of that protection. In *Doyle v. U.S.*, the Federal Circuit held that the FLSA did not constitute a waiver of sovereign immunity for interest awards. 931 F.2d 1546, 1550 (Fed. Cir. 1991). Plaintiffs responded to the ruling by claiming interest under the Back Pay Act (“BPA”) of 1966. The Act authorizes interest for federal government employees who are affected by an “unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction” of the employee’s pay. 28 U.S.C. § 5596(b)(1). Where applicable, the Back Pay Act provides a waiver of immunity for both prejudgment interest and post-judgment interest. 5 U.S.C. 5596(b)(2)(B).¹² Because the *Doyle* Court did not consider the Back Pay Act, it left open another way to seek interest in FLSA suits.¹³

The courts of appeals have disagreed on the scope of the Back Pay Act’s waiver of sovereign immunity.¹⁴ Some courts have held that the Act waives sovereign immunity for all claims in which the plaintiff seeks back pay from the federal government, including claims under statutes such as FLSA and Title VII of the Civil Rights Act of 1965.¹⁵ In an opinion by then Circuit Judge Ruth Bader Ginsburg, for example, the D.C. Circuit held that the Back Pay Act and Title VII should be read as “complementary,” so that plaintiffs pressing claims under Title VII can recover interest from the government so long as the requirements of the Back Pay Act are

awards *some* liquidated damages, but not enough to exceed the amount of interest that would be due. See *McClanahan v. Mathews*, 440 F.2d 320, 326 (6th Cir. 1971).

¹² Interest under the Act accumulates starting on the date of the violation and ending thirty days prior to the date when the government pays the employee the lost wages.

¹³ See *Angelo v. United States*, 57 Fed. Cl. 100, 110 (“In *Zumerling v. Marsh*, and *Doyle v. United States*, the Federal Circuit held that FLSA itself does not waive the United States’ sovereign immunity for payment of interest... Neither of these cases, however, squarely addresses the issue of whether FLSA claims fall under the umbrella of the Back Pay Act (BPA), the position Plaintiffs urge the Court to adopt.”).

¹⁴ There is one point of consensus: As in the private sector, prejudgment interest is not available when the plaintiff recovers full liquidated damages.

¹⁵ See, e.g., *Brown v. Sec. of Army*, 918 F.2d 214, 218 (D.C. Cir. 1990) (finding that the Back Pay Act waives sovereign immunity for interest awards until Title VII); *Edwards v. Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994) (adopting D.C. Circuit’s position); *Adam v. Norton*, 636 F.3d 1190, 1192 (9th Cir. 2011) (holding that the Back Pay Act waives sovereign immunity for interest arising from claims under the Age Discrimination in Employment Act); *Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) (suggesting that the Back Pay Act may constitute a waiver of sovereign immunity for claims brought under other statutes).

also satisfied. *Brown v. Sec'y of Army*, 918 F.2d 214 at 218 (D.C. Cir. 1990).¹⁶ The D.C. Circuit later noted that the same logic applies to the FLSA. *Security Admin. v. FLRA*, 201 F.3d 465, 468 (D.C. Cir. 2000) (applying *Brown* in describing the “Back Pay Act as a congressional waiver of sovereign immunity from interest claims on awards arising under other statutes, *such as the FLSA*” (emphasis added)).

Other courts have held that the Back Pay Act (“BPA”) waives sovereign immunity only for claims brought directly under the Act. *Arneson v. Callahan*, 128 F.3d 1243, 1246-47 (8th Cir. 1997). In reaching that conclusion, the Eighth Circuit reasoned that the Act does not provide the kind of “clear and unequivocal” consent necessary to waive sovereign immunity under any other statute such as the FLSA. *Id.* at 1247. Indeed, the text of the BPA does not explicitly waive sovereign immunity for interest awards in claims arising under any statute other than the BPA itself.

Courts in the Federal Circuit have not established a clear answer to this question. On the one hand, in *Adams v. U.S.*, the Federal Circuit held that plaintiffs cannot take advantage of the waiver contained in the Back Pay Act if they do not “include a claim under the BPA” in their complaint. 350 F.3d at 1230. The court refused to award interest in a suit that “rested solely on the FLSA,” stating, “[i]f the Plaintiff desired BPA remedies, they should have included a BPA claim.” *Id.*

Yet, in *Astor v. U.S.*, the COFC applied *Adams* in a way that makes it relatively easy for plaintiffs to side step the limitations of sovereign immunity. 79 Fed. Cl. 303. As the Court noted, the plaintiffs’ claim in *Astor* was based solely on the FLSA requirements for overtime pay. *Id.* Still, the plaintiffs included a claim under the Back Pay Act in their complaint. *Id.* Although the BPA claim led to no primary relief, the *Astor* Court awarded interest. It noted that the plaintiffs’ FLSA claim met the requirements of the Back Pay Act because the government’s failure to provide overtime compensation was an “unwarranted and unjustified personnel action” that led to the “withdrawal or reduction of all or part of [the plaintiff’s] pay.” 5 U.S.C. § 5596(b)(1). Presumably, this will always be the case in a successful FLSA action against the government. Indeed, the *Astor* Court assumed a BPA violation from the existence of a FLSA violation without requiring any additional evidence or engaging in any additional reasoning. 79 Fed. Cl. at 319. Thus, under the *Astor* approach, FLSA plaintiffs can recover interest so long as they mention the Back Pay Act in the complaint. Consequently, sovereign immunity does little to prevent recovery of interest; adding a few sentences to the complaint should suffice to preserve the plaintiff’s ability to recover interest. As of yet, the Federal Circuit has neither questioned nor approved this approach.¹⁷

¹⁶ The court denied interest on other grounds.

¹⁷ In a case decided before *Adams* and *Astor*, the COFC took a position that seems inconsistent with *Astor* in reasoning if not result. The Court denied interest under the Fair Labor Standards Act, finding an irreconcilable conflict between the inclusion of liquidated damages in FLSA, which presumably compensate plaintiffs for delay in receiving compensation, and the mandatory grant of interest under the BPA, which fulfills the same purpose. *Angelo v. United*

Two Paradigms For FLSA Cases in the COFC

FLSA practitioners are well acquainted with the two step process for the certification of opt-in cases under Section 216(b) that permit plaintiffs to bring suit on behalf of “themselves and other employees similarly situated.” The COFC has also used this two-step approach when faced with FLSA collective actions over the past ten years. *See Whalen v. United States*, 85 Fed. Cl. 380 (Fed. Cl. Jan. 13, 2009); *Gayle v. United States*, 85 Fed. Cl. 72 (Fed. Cl. Dec. 17, 2008); *Briggs v. United States*, 01-552C, 54 Fed. Cl. 205 (Fed. Cl. Nov. 4, 2002). Both cases are instructive for those who are not familiar with the process.

While Judge Sypolt in *Briggs* set forth the paradigm, Judge Lettow gave it more extended treatment in *Gayle*. After discussion of alternative approaches, *i.e.*, using Rule 23 or the pre-1966 “spurious class” analysis, both settled on the two-step approach. *Briggs*, 54 Fed. Cl. at 206; *Gayle*, 85 Fed. Cl. at 77. The first step only requires the named plaintiff to make a “modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.” *Gayle*, at 77, citing *Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249, 161 (S.D.N.Y. 1997).

The second step occurs following discovery if the defendant moves to decertify the collective action. In this more probing review, the court “determine[s] whether there is sufficient similarity between the named and the opt-in plaintiffs to allow the matter to proceed to trial on a collective basis.” *Gayle*, citing *Heckler v. DK Funding, Inc.*, 502 F.Supp.2d 777, 779 (N.D.Ill. 2007). “A more stringent inquiry is appropriate under the second step because “at the early stages of litigation, plaintiffs have not had time to conduct discovery and marshal their best evidence.” *Gayle*, citing *Davis v. Charoen Pokphand (USA), Inc.*, 303 F.Supp.2d 1272, 1276 (M.D. Ala. 2004). The second stage analysis presents a serious risk. If the court finds that the plaintiffs and the opt-ins are not similarly situation, the claims of the opt-ins are dismissed without prejudice and the named plaintiffs proceed to trial.

FLSA litigants would fare better by avoiding the two step certification process with opt-in plaintiffs and relied instead upon Rule 20. Like other federal courts, the COFC allows permissive joinder when claims arise from a single “transaction, occurrence, or series of transactions or occurrences” and there is a common question of law or fact. RCFC 20(a). *See, e.g., Whalen*, 85 Fed. Cl. at 383 (“RCFC 20(a) is available to join plaintiffs in a collective action brought under the FLSA.”)

The law firm of Bernstein & Lipsett, P.C., with whom we are co-counsel, has represented a large number of law enforcement plaintiffs in the COFC in a series of mostly consolidated cases in which every FLSA claimant is a plaintiff. *Adams*, 350 F.3d 1216. A case under Rule 20 more efficiently channels the inquiry into the liability and damages, avoiding the typically

States, 57 Fed. Cl. 100, 111 (Fed. Cl. June 27, 2003). Thus, in the Court’s view, Congress could not have intended the BPA to apply to claims under the FLSA. *Id.* There is no indication in the opinion as to whether the plaintiffs in *Angelo* had mentioned the Back Pay Act in their complaint.

protracted discovery and briefing to determine whether opt-ins are similarly situated with the named plaintiffs. Furthermore, this approach poses much less risk to plaintiffs, because the remedy for a violation of the joinder rule generally is to sever the suits, while decertification results in dismissal of plaintiffs who are not similarly situated. Finally, although the joinder approach may result in higher filing fees, prevailing plaintiffs can recover those fees from defendants in FLSA suits. *See Franconia Associates v. United States*, 61 Fed. Cl. 335, 338 (Fed. Cl. July 16, 2004) (after finding a violation of Rule 20, ordering the court’s clerk to “treat the claims of each of these plaintiffs as separate actions and . . . assign separate docket numbers to each of those cases”); *See, e.g., Astor*, 79 Fed. Cl. 303, 320 (ordering the government to pay reasonable attorneys’ fees and costs in a FLSA action). Additionally, increased fees may be offset by savings from avoiding two rounds of briefing and argument on certification.