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Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses

BY RICHARD H. UNDERWOOD*

INTRODUCTION

Perhaps no procedural innovation has generated more controversy than the class action. As Professor Arthur Miller has observed, debate over "class action problem[s]" has raged at several different levels.[1] For example, opponents and proponents of class actions disagree on whether such actions produce socially desirable results in an economical fashion and whether an already overburdened judiciary can handle the additional supervisory demands of the class action.[2] Recently, a somewhat more ideological dialogue has addressed the merit of publicly funded class actions.[3] Such questions arise only indirectly in the context of class action litigation. However, a certain hostility toward class actions has surfaced on the front lines, usually prompted by charges of "abuse" of the class action or charges of ethical misconduct directed at lawyers prosecuting class actions. Professor Miller has noted: "[F]rom 1969 to approximately 1973 or perhaps 1974, antipathy to the class action became palpable . . . . The defense bar developed numerous litigation techniques to make the class action venture as unattractive as possible, including attacking class counsel's professional conduct."[4]

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[1] Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

[2] *Id.* at 666-67.

[3] Abascal, Class Actions: *The Right Role For Legal Services: Federally Funded Class Actions Are Vital If Truly Equal Justice Is to Prevail,* 2 CAL. LAW. 842 (1982).

[4] *Miller, supra* note 1, at 679.

This Article examines some of the ethical dilemmas that arise in privately funded class action litigation,[5] typical judicial responses to charges of ethical misconduct, and tactics that, at least to some extent, have been encouraged by such responses.

I. THE REQUIREMENT OF ADEQUATE REPRESENTATION

A. *The Role of Counsel in Class Litigation*

One of the prerequisites to maintaining a class action is that "the representative party [establish that he or she] will fairly and adequately protect the interests of the class."[6] This threshold requirement of "adequate representation" has a constitutional[7] dimension: "[a] judgment in a class action binds the class where the class [has] been adequately represented or where they actually participated in the litigation. An absent member will not be bound if he proves the procedure did not adequately insure the protection of his interests."[8]

Accordingly, a growing majority of judicial opinions has called for closer scrutiny of the representative party or parties, ostensibly to insure that class actions will be litigated vigorously and that conflicts between the interests of such representatives and the interests of class members will be avoided.[9] The published opinions of trial judges who refused to certify actions for class treatment could be compiled into a useful checklist for counsel opposing class certification. Some judges have required that the representative party have a "keen interest in the progress and outcome of the litigation."[10] Others have recently held that a named plaintiff must have some knowledge of the class claims and class action procedures.[11] Even the named plaintiff's health has been

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[5] This article omits any discussion of ethical problems encountered by legal services or legal aid attorneys.

[6] FED. R. CIV. P. 23(a)(4).

[7] Hansberry v. Lee, 311 U.S. 32, 40-43 (1940).

[8] Laskey v. International Union (UAW), 638 F.2d 954, 956 (6th Cir. 1981).

[9] Bergman, *Class Action Lawyers: Fools for Clients*, 4 AM. JUR. TRIAL ADVOC. 243, 262-63 (1980).

[10] *In re* Goldchip Funding Co., 61 F.R.D. 592, 595 (M.D. Pa. 1974).

[11] Massengill v. Board of Educ., 88 F.R.D. 181, 186 (N.D. Ill. 1980); Seiden v. Nicholson, 69 F.R.D. 681, 688-89 (N.D. Ill. 1976). *But see* Brown v. Cameron-Brown

considered in determining if the action would be prosecuted vigorously.[12] Similarly, a named plaintiff may be deemed an "inadequate" representative if he has been shown to be an unreliable witness.[13] Named plaintiffs who were unable or unwilling to bear the costs of the class litigation,[14] those who insisted on more than a *pro rata* share of any recovery,[15] and those who were subject to counterclaims exceeding the representative's potential, individual recovery[16] have also been denied class certification.[17] Thus, there seems to be a basic requirement in all such decisions that the representative party be more than a convenient fiction.[18]

Co., 30 FED. R. SERV. 2D (CALLAGHAN) 1181 (E.D. Va. 1980) (lack of knowledge of antitrust claims on plaintiff's part did not justify dismissal) (dismissed on other grounds), *rev'd*, 31 FED. R. SERV. 2D (CALLAGHAN) 1362 (4th Cir. 1981) (dismissal under Rule 83 for meritless claim reversed, Rule 56 applicable).

[12] Roundtree v. Cincinnati Bell, 90 F.R.D. 7, 10 (S.D. Ohio 1979).

[13] Panziere v. Wolf, 32 FED. R. SERV. 2D (CALLAGHAN) 1277 (2d Cir. 1981); Armour v. City of Anniston, 89 F.R.D. 331, 332 (N.D. Ala. 1980); Stull v. Pool, 63 F.R.D. 702, 704 (S.D.N.Y. 1974). *See also* Cobb v. Avon Prod., Inc., 71 F.R.D. 652, 655 (W.D. Pa. 1976) (character of named plaintiff questioned); Amswiss Int'l Corp. v. Heublein, Inc., 69 F.R.D. 663, 670 (N.D. Ga. 1975) (plaintiff not qualified representative because not credible witness).

[14] *In re* Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. 485, 490 (D. Md. 1982); Parker v. George Thompson Ford, Inc., 83 F.R.D. 378, 380 (N.D. Ga. 1979). See text accompanying notes 92, 102-04 *infra* for a discussion of the plaintiffs' willingness to pay the costs involved in class action suits.

[15] Hooks v. General Fin. Corp., 652 F.2d 651 (6th Cir. 1981); Brame v. Ray Bills Fin. Corp., 85 F.R.D. 568, 582-87 (N.D.N.Y. 1979) (where more than a *pro rata* share of a recovery would reduce the amount that the remaining class members could receive).

[16] Kendler v. Federated Dep't Stores, 88 F.R.D. 688, 694 (S.D.N.Y. 1981). *See also* 83 F.R.D. at 380 (a conflict of interest may tempt the representative plaintiff to compromise the case contrary to the interests of the class).

[17] In Cooper & Kirkham, *Class Action Conflicts*, 7 LITIGATION 35 (1981), the authors caution that:

> It is a grave mistake for the lawyer to minimize the personal commitment required of the class plaintiff to obtain his client's permission to sue. You should warn the client that if suit is filed, he will be a target of discovery and liable for part of the costs . . . One client emerged so shaken at the lunch break of his deposition that he asked to be dismissed as a plaintiff and to participate only as a class member. Most important, explain that for all this inconvenience, the client will receive no more of the recovery than a class member.

[18] Professor Paul Bergman of the University of California at Los Angeles School of Law contends that these new cases do not go far enough to insure that class counsel will not become the *de facto* class representative, exercising "unfettered discretion." Bergman, *supra* note 9, at 257. Bergman argues that in some cases, at least, the courts should create and certify groups or organizations to act as class representatives.

However, even if the named representative party is not disqualified on account of an interest that is antagonistic to the interests of the class, the quality of the representation received by absent class members is likely to turn on the experience and ability of the class counsel.[19] Thus, the attorney who files an action with class claims has an obligation to serve the interests of absent class members,[20] as well as the interests of the named plaintiff.

Courts are particularly concerned with the rights of absent class members, protected primarily by class counsel. "By granting class status, the court places the attorney for the named parties in a position of public trust and responsibility, and in effect creates an attorney-client relationship between the absentee members and the attorney."[21] Counsel's all-important role in class action litigation has spurred a number of courts to inquire into *counsel's* interests, competence, and professional integrity. Furthermore, a sampling of judicial opinions illustrates the skepticism, if not outright hostility, that has surfaced from time to time in the course of such inquiries. One court has stated that the Rule 23 class action "has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees" and that "[o]bviously the only persons to gain from a class suit are not the potential plaintiffs, but the attorneys who will represent them."[22] Arguments for regulating attorney misconduct in the class action framework are compelling, given the "heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceedings."[23] Such

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[19] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds*, 417 U.S. 156 (1974). In Greenfield v. Villager Indus., 483 F.2d 824, 832 n.9 (3d Cir. 1973), the court went so far as to state: "Experience teaches that it is [the] counsel for the class representative and not the named parties, who direct and manage these [class] actions. Every experienced federal judge knows that any statements to the contrary [are] pure sophistry."

[20] *Developments in the Law: Conflicts of Interest*, 94 HARV. L. REV. 1244, 1451 (1981).

[21] *Id.*, quoting Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546, 560 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977) (emphasis added).

[22] City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) (citations omitted).

[23] Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790 (E.D. La. 1977).

pronouncements have led, almost inevitably, to new defense tactics premised on perceived violations of the Code of Professional Responsibility.

B. *Representation Likely to Be Found Less Than Adequate*

Conflicts between the interests of class counsel and the interests of absent class members, as well as factors reflecting on the competence of class counsel are discussed in this section of the Article. Whether other, specific instances of unethical conduct have any bearing on the "adequacy" of representation and, ultimately, the propriety of class certification will be discussed in Part II of the Article.

1. *Counsel's Personal Interest*

Given the fact that class counsel will almost always receive more in attorney fees than any individual class member will receive as his or her *pro rata* share of a class recovery, an overwhelming majority of courts have refused to allow attorneys to act both as class counsel and as class representatives. The conventional wisdom is that

> [i]n any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain . . . . Thus Plaintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class.[24]

More particularized conflicts have also precluded counsel from assuming dual roles. For example, in *Bachman v. Pertschuk*,[25]

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[24] Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973). *See also* Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 450 (D. Ariz. 1972), in which the court remarked:

> [Counsel] has not demonstrated competence to represent the class because he seeks to be not only the attorney for the class and be awarded a fee for his representation, he seeks in the same action, personal relief. The practice involved does not seem to the Court to comport with the high quality of objectivity, duty and integrity required of lawyers practicing in this Court or elsewhere. This case seems to involve a questionable method of soliciting legal business and such solicitation should not be encouraged.

[25] 437 F. Supp. 973 (D.D.C. 1977).

plaintiff brought an action under Title VII alleging racial discrimination against him by the FTC in connection with a promotion decision. It was discovered that one of the class attorneys was employed by the FTC and thus was a member of the purported class of "all blacks presently employed by, denied employment by, or discharged from the FTC."[26] This attorney faced a welter of conflicts of interest. First, the attorney faced the risk of violating duties of loyalty and confidence owed to his employer and was so charged in motions filed by the FTC.[27] Second, the attorney faced a potential risk, albeit remote, of being accused after the fact of providing inadequate representation in return for some personal benefit.[28] Finally, it was noted that the attorney's personal interest as a class member was "limited to the interest of those persons presently employed", and that "the possibility [existed] that he [might have] favor[ed] a settlement . . . [giving] preference to the interests of such persons over those denied employment by or discharged from the FTC . . . [or might have been tempted to] . . . devote a disproportionate amount of time preparing for trial on the issues relevant to the subgroup to which he [belonged]," thereby raising doubts about whether he could adequately "'protect the interests of the [entire] class.'"[29]

When counsel's personal claim or interests might conflict with the interests of class members, counsel may not skirt the conflict by withdrawing as class counsel while acting as a "behind the scenes expert,"[30] or continuing to claim attorney fees, albeit for past work, in excess of his potential recovery as a member of the class.[31]

Similar conflicts of interest arise when the named representative is not the class attorney, but is instead a law partner, spouse, relative, or employee of the attorney for the class. For example, in *Zylstra v. Safeway Stores, Inc.*,[32] the defendant challenged the propriety of counsel's representation because one named plaintiff

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[26] *Id.* at 975.
[27] *Id. Cf* Conway v. City of Kenosha, 409 F. Supp. 344 (E.D. Wis. 1975).
[28] 437 F. Supp. at 975 n.3.
[29] *Id.* at 977 (quoting FED. R. CIV. P. 23(a)(4)).
[30] Shields v. First Nat'l Bank, 56 F.R.D. 442, 444 n.1 (D. Ariz. 1972).
[31] Lowenschuss v. C.G. Bluhdorn, 78 F.R.D. 675, 678 (S.D.N.Y. 1978).
[32] 578 F.2d 102 (5th Cir. 1978).

was the wife of a partner, and another named plaintiff was a partner in the law firm representing the purported class. The court observed:

> An attorney whose fees will depend upon the outcome of the case and who is also a class member *or closely related to a class member* cannot serve the interests of the class with the same unswerving devotion as an attorney who has no interest other than representing the class members.[33]

In addition to these readily identifiable conflicts, some courts continue to be troubled by the spectre of the class action as a procedural device that all too often appears to disproportionately benefit the class attorneys.[34] Thus, concern about the propriety of certifying a class surfaces when the individual class members are unlikely to receive any significant personal benefit *and* the only named class representative is also class counsel, or a relative or business associate of class counsel.[35] However, even in cases in which *other* class representatives are named, courts understandably balk at certifying actions for class treatment if only miniscule recoveries would be received by the non-attorney "clients," and the "principal, if not the only, beneficiaries to the class action are to be the attorneys . . . and not the individual class members."[36]

2. *Simultaneous and Subsequent Representation*

It is elementary that an attorney cannot simultaneously represent more than one client if the clients' interests are adverse or

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[33] *Id.* at 104 (emphasis added). *Accord* Susman v. Lincoln Am. Corp., 561 F.2d 86, 94-95 (7th Cir. 1977); Kramer v. Scientific Control Corp., 534 F.2d 1085, 1086 (3d Cir. 1976); Turoff v. May Co., 531 F.2d 1357, 1360 (6th Cir. 1976); Stull v. Pool, 63 F.R.D. at 704. *But see* Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581, 589 (E.D. Pa. 1975) in which the court held: "[W]hatever inadequacies may have existed have been cured by the intervention of numerous other named plaintiffs. Nothing in the record demonstrates that the intervenors were brought into this suit unethically or are mere straw figures for plaintiff's counsel."

[34] *See, e.g.*, Brown v. Cameron-Brown Co., 30 FED. R. SERV. 2D (Callaghan) at 1198, in which the trial judge observed that when any possibility of legitimate benefit from a lawsuit is substantially outweighed by the costs, "we are not dealing with a lawsuit . . . [but] instead, intended or not, with a 'heist.'"

[35] *See, e.g.*, Cotchett v. Avis Rent A Card Sys., 56 F.R.D. 549, 554 (S.D.N.Y. 1972).

[36] *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974).

potentially adverse.[37] Moreover, an attorney cannot represent a client in an action against a former client if any substantial relationship can be shown to exist between the subject matter of the former representation and that of the subsequent adverse representation.[38] Both of these conflicts of interest are exacerbated when one of the "clients" is a class consisting of absentees who have no opportunity to actively participate in the proceedings.[39]

Conflicts of interest involving simultaneous representation of adversaries have arisen in a number of interesting ways in class actions. For example, in *Hawk Industries, Inc. v. Bausch & Lomb, Inc.*,[40] purchasers of the defendant corporation's stock sought to maintain a class action in federal court against the corporation, a securities analyst, a securities broker, and others on the theory that defendants had selectively disclosed and acted upon material nonpublic information. During proceedings on class certification, defendants presented evidence that co-counsel for the plaintiffs was also counsel in state court in a derivative action "on behalf of [defendant] Bausch & Lomb."[41] The court observed:

> [Counsel] is bound to pursue two actions to the best of his ability and as vigorously as possible. If both are successful, one action would result in a recovery for the corporation [the derivative action]; the other would result in a detriment to the corporation [the federal securities suit]. It is difficult to see how counsel could retain his independence of professional judgment and loyalty to his clients and their interests in both suits . . . . While the firm . . . is counsel for a plaintiff suing derivatively on behalf of Bausch & Lomb in the state court, *it cannot furnish adequate representation* to the plaintiff class here.[42]

A similar conflict arose in *Chateau De Ville Productions v. Tams-Witmark Music*,[43] an antitrust class action brought by theaters and playhouses against a corporation engaged in the licens-

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[37] Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) (simultaneous representation of adverse interests prohibited per se).

[38] Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1976).

[39] Sullivan v. Chase Inv. Servs., 79 F.R.D. 246 (N.D. Cal. 1978).

[40] 59 F.R.D. 619 (S.D.N.Y. 1973).

[41] *Id.* at 623-24.

[42] *Id.* at 624 (emphasis added).

[43] 474 F. Supp. 223 (S.D.N.Y. 1979).

ing of musicals and others. The defendant licensing corporation, Tams-Witmark Music Library, Inc., filed counterclaims against two of the named plaintiffs, and then obtained leave to join the parent company of one of the named plaintiffs as an additional defendant to Tams-Witmark's cross-claim against its co-defendants and alleged antitrust co-conspirators. As it turned out, the same counsel represented this newly added party, Music Fair Enterprises, Inc., as well as the named plaintiff and the purported class. As facts were developed during discovery, Music Fair appeared to be yet another co-conspirator with defendant Tams-Witmark, at least under the theory presented in the antitrust complaint. Accordingly, class counsel was presented with grounds for disqualification.[44]

Conflicts arising as a result of prior representation of an adversary present more subtle grounds for undermining class counsel. These conflicts are based on counsel's obligation not to disclose matters revealed by reason of the prior confidential relationship with the former client, or to use confidences to the disadvantage of the former client. Once it has been established that a substantial relationship exists between the former representation and the subsequent adverse representation, it is presumed that counsel possesses such confidences.[45] This prophylactic rule "enforce[s] the lawyer's duty of absolute fidelity and . . . guard[s] against the danger of inadvertent use of confidential information."[46] An example of such a disabling conflict is illustrated by *Hawkins v. Holiday Inns, Inc.*,[47] a class action brought by a group of hotel and motel franchisees against their franchisor under sections 4 and 16

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[44] Although the court observed that conflicts are often exploited as "tools of the litigation process," it was "better to forestall potential [conflicts that might arise as litigation proceeds] early in the litigation than to wait until the parties are deep in the discovery process." 474 F. Supp. at 225-26. *Cf.* Conway v. City of Kenosha, 409 F. Supp. at 349:

> [P]laintiff's unique position as individual plaintiff, would-be representative plaintiff, and counsel for the class, as well as city attorney for the defendant city, charged by law with conducting the legal business of the city and defending the city and its officers in all litigation would raise conflict of interest problems . . . .

[45] Emle Indus. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

[46] Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975).

[47] 1980-1 Trade Cas. (CCH) ¶ 63,150 (W.D. Tenn. 1979).

of the Clayton Act, asking for damages and other relief for alleged violations of section 1 of the Sherman Act and section 3 of the Clayton Act. Each of defendant's franchisees was a member of the International Association of Holiday Inns, Inc. The antitrust claims were being pursued by Milton Handler and the firm of Kaye, Scholer, Fierman, Hays & Handler. At a hearing on motion of defendant Holiday Inns, it was established that the same counsel had represented Holiday Inns in prior litigation, during the course of which counsel were "made privy to the confidences of Holiday Inns and their executives with regard to the entire spectrum of Holiday Inns' franchise activities, particularly in anti-trust matters."[48]

Finally, it should not be presumed that disabling conflicts arise only from the simultaneous representation of adversaries or litigation against former clients in which the two litigations are "substantially related." For example, in *Sullivan v. Chase Investment Services of Boston, Inc.*,[49] four representative plaintiffs sued for the benefit of over 1500 clients of an investment advisory service, CIS, alleging that CIS and others had committed actionable fraud within the meaning of the federal securities laws. In the course of certification proceedings evidence was presented that class counsel was pursuing another securities fraud case against CIS in another federal district court. The court observed:

> The possibility that assets and insurance of the defendants who may have committed fraud against the plaintiffs will be insufficient to satisfy an alleged liability to the class of over $20 million is great enough to influence litigation strategy. The . . . interest [of plaintiffs in the parallel litigation] in collecting some money from CIS before this class litigation is concluded is obvious, and the diminution of the defendants' assets by payment to [those plaintiffs] would equally obviously affect the interests of this class.[50]

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[48] *Id.* at 77,713-77,714.
[49] 79 F.R.D. at 246.
[50] *Id.* at 258.

3. *The Attorney as a Witness*

Disciplinary Rules 5-101[51] and 5-102[52] provide in pertinent part:

> 5-101(B): A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness . . . .
> 5-102(A): If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue the representation in the trial . . . .

Potential violations of these disciplinary rules arise most often when class counsel is also a member of the putative class. Whenever it can be shown that counsel, as a class member, possesses information relevant to the lawsuit, the opposing party or parties probably will call attention to a potential violation of the Code. As the court observed in *Bachman v. Pertschuck:*[53]

> As a member of the class with information relevant to this lawsuit, [class counsel] may be needed to testify. It might well be a violation of ethics for him to do so; not doing so *may hinder the class's efforts to protect its interests.* Accordingly, it would be inappropriate to allow [counsel] to continue as attorney for the class.[54]

The tactical significance of this seemingly technical conflict of interest is illustrated by *Kriger v. European Health Spa, Inc.*,[55] a class action brought against a health spa and a bank alleging violations of the Truth in Lending Act. The class consisted of approximately 1600 people who had similar contractual arrange-

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[51] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (1978).

[52] *Id.* at DR 5-102.

[53] 437 F. Supp. at 973.

[54] *Id.* at 977 (emphasis added). *See also* Clark v. Cameron-Brown Co., 72 F.R.D. 48, 56 (M.D.N.C. 1976): "While [counsel] might otherwise be able to demonstrate 'forthrightness and vigor,' the potential conflict of interest inherent in such a situation would be obvious if [counsel's] testimony concerned either the material facts of this action or facts that could not be elicited from other witnesses."

[55] 56 F.R.D. 104 (E.D. Wis. 1972).

ments with the defendant spa. They satisfied the first three prerequisites of Rule 23(a).[56] However, the named plaintiff was associated with the law firm representing the class, posing a potential violation of the fourth prerequisite, "adequate representation." After observing that a "burdensome ethical problem" would be raised if plaintiff were called as a witness in the litigation, the court observed:

> A person wishing to represent a class must be able to demonstrate "the forthrightness and vigor . . . which the representative party can be expected to assert." . . . This plaintiff has commenced an action under a disability that no other member of the class is likely to have—an inability to testify except at the cost of withdrawal of counsel familiar with the case from its inception. It is not enough to say that his testimony may not be needed; the possibility of such a need makes him less capable of adequate representation than others in the class.[57]

Because of counsel's potential conflict, the court denied certification of the action as a class action.[58]

4. *Competence and the Problem of Neglect*

The requirement of "adequate representation" demands that plaintiff's counsel be qualified, experienced, and able to conduct the litigation.[59] Accordingly, the trial judge may inquire into counsel's general qualifications, as well as counsel's conduct of the particular litigation, prior to certifying the action for class treatment.[60]

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[56] FED R. CIV. P. 23(a) requires a showing that:

> (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.

[57] 56 F.R.D. at 105-06.

[58] *Id.* at 106. *Cf.* Clark v. Cameron-Brown Co., 72 F.R.D. at 48 (action allowed to proceed, on condition that counsel withdraw if an improper "dual role" were to develop as the action proceeded to trial). *See also* Field v. Freedman, 527 F. Supp. 935 (D. Kan. 1981); Hawkins v. Holiday Inns, 1980-1 Trade Cas. (CCH) at ¶ 63,150 (no showing that counsel "ought" to be called as a witness).

[59] *See, e.g.*, Sullivan v. Chase Inv. Servs., 79 F.R.D. at 258.

[60] *Id.*

It is certainly unwise for inexperienced counsel to undertake class litigation, or for a court to certify an action for class treatment if counsel is unqualified or inexperienced. However, qualification of counsel to represent the class can ordinarily be established to the court's satisfaction early on, by way of affidavit.[61] More difficult problems in assessing whether counsel can provide "adequate representation" arise when the opponent of class certification points to specific errors or omissions by the class counsel during the course of the proceeding that suggest incompetence or neglect.[62] Moreover, many courts have actually encouraged such attacks by adding class action procedures by local rule.[63]

Taub v. Glickman[64] is a leading case standing for the proposition that certification may be denied for lack of "adequate representation" although counsel's conduct is not "necessarily violative of any canon, rule or statute."[65] In that case, plaintiff alleged that the defendant had violated section 17(a) of the Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5, and section 352-C of the New York State General Business Law, by omitting material information from a prospectus. The court refused to certify the action as a class action for the following reasons: 1) counsel's motion for class certification was not filed

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[61] *Cf. In re* Commonwealth Oil/Tesoro Petroleum Sec. Litig., 484 F. Supp. 253, 264 (W.D. Tex. 1979) (adequacy of counsel question may arise again during litigation on motion to deny class certification).

[62] *Id.* at 264 n.1, wherein the trial judge observed:

> [Counsel] has not shown a great deal of interest in this litigation, having appeared for only one of three hearings held to date. In addition, [counsel] attached to his memorandum in support of the motion for class certification the opinion . . . in which Judge Owen noted that [counsel's] firm had violated certain "basic principles" of pleading with regard to allegations of fraud. Finally, the defendants' claim that [counsel] has already committed several errors in the conduct of this lawsuit is not wholly without substance.

[63] Many federal district courts have adopted local rules requiring a motion to certify a class within 90 days of the filing of the complaint. *See, e.g.*, Strozier v. General Motors Corp., 21 FED. R. SERV. 2D (CALLAGHAN) 1096 (N.D. Ga. 1975) (denial of class certification for failure to so move). *See also* Lau v. Standard Oil Co., 70 F.R.D. 526, 527 (N.D. Cal. 1975) (references to local rule 103(b), providing that "counsel shall proceed with reasonable diligence to take all steps necessary to bring an action to issue and readiness for pre-trial and trial").

[64] 14 FED. R. SERV. 2D (CALLAGHAN) 847 (S.D.N.Y. 1970).

[65] *Id.* at 849.

" '[a]s soon as practicable after . . . commencement of . . . [the] action,' " as required by Rule 23;[66] 2) counsel "defaulted in appearing in support of their own Rule 34 motion,"[67] and "failed to respond to defendant['s] . . . motion to extend its time to answer;"[68] 3) counsel submitted memoranda and motion papers that were little more than " 'boiler plate' document[s] prepared without regard to the specific factual situations existing in each case;"[69] and 4) counsel submitted interrogatories consisting of "mimeographed 'stock questions' with a freshly typed caption."[70] The court reasoned that "[s]uch an assembly line procedure in prosecuting [the] suit suggest[ed] that something less than a forthright and vigorous approach [had] been taken . . . ."[71]

In a similar case, *Burns v. Georgia*,[72] the trial court dismissed the claims of one of several named plaintiffs with prejudice and denied class certification on account of plaintiff's failure to make discovery and failure to move for certification until a year and a half after removal of the action to federal court, counsel's display of ignorance of the local rules of court, and counsel's demonstrated lack of familiarity with the federal rules governing discovery.[73]

C. *A Critique of Judicial Responses to Conflicts of Interest*

Admittedly, the preceding survey of judicial opinions provides little more than a skeletal guide for identifying conflicts of interest in class action litigation. However, such a primer not only has some

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[66] *Id.* at 848. The action was commenced in 1967, and the motion was not filed until February, 1970.

[67] *Id.* at 849.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id. See also* Peak v. Topeka Hous. Auth., 78 F.R.D. 78, 84 (D. Kan. 1978).

[72] 25 FED. R. SERV. 2D (CALLAGHAN) 998 (N.D. Ga. 1977). The malpractice implications of such neglect have not yet surfaced in the reported opinions. In this regard, see Burnside v. McCrary, 384 So. 2d 1292 (Fla. Dist. Ct. App. 1980) (attorney not liable in malpractice to former client for a dismissal of claims premised on a failure to move for certification under a local rule and a failure to respond to a motion to dismiss class allegations, when counsel had left the firm pursuing the action prior to the alleged acts of malpractice, or was not personally responsible for said omissions).

[73] 25 FED. R. SERV. 2D (CALLAGHAN) at 1002.

practical value, but also provides a vehicle for addressing the question of whether typical judicial responses to conflicts of interest are consistent with the avowed purpose of protecting the interests of absent class members. In other words, a trial judge must determine what minimum supervisory actions are required to protect putative class members. In many cases, a denial of class status or decertification is unnecessary to protect the remedy's intended beneficiaries; it may, in fact, conflict with their interests and encourage needless and disruptive skirmishing and delays in litigation.

To date, perhaps the most insightful analysis of conflicts of interest in class action litigation appeared in a student commentary in which the following observation was made:

> In [many] cases, something is wrong with the lawyer, not the class. Except for the class counsel—class representative cases in which lawyer and class cannot be separated, the court should disqualify counsel rather than [refuse to certify or] decertify the class . . . . By contrast [a denial or certification or] decertification should be used as a remedy when there is something wrong with the class . . . [such as when] the named plaintiff's suit [is] intensely personal [giving] the plaintiff a higher claim on class counsel's loyalties.[74]

This hypothesis may be tested by reexamining the cases previously surveyed, bearing in mind *all* of the prerequisites of Rule 23, including the typicality of the claims of the plaintiffs and, in the case of Rule 23(b)(3) class actions, the superiority of the class action as a method of adjudication.[75]

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[74] *Developments in the Law: Conflicts of Interest, supra* note 20, at 1454-55.

[75] Federal Rule 23 (Class Actions) provides, with respect to what used to be termed the "spurious" class action:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (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) . . . and in addition:
>
> . . . .
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> (3) . . . that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy . . . .

FED. R. CIV. P. 23 (emphasis added).

First, many conflicts of interest may be resolved by the intervention of other class representatives. For example, in *Sommers v. Abraham Lincoln Federal Savings & Loan Association*[76] each of the five original plaintiff couples in an antitrust class action were employed by class counsel's law firm. Ordinarily, their relationship to the class attorney might require a denial of class certification. However, the court concluded that any inadequacies were cured by the intervention of other named plaintiffs who were not "mere straw figures for plaintiffs' counsel."[77]

Similarly, many conflicts, including conflicts of the "attorney as representative" variety, may be cured by disqualification and substitution of counsel.[78] Assuming that disqualification is timely and will not "deprive the class of . . . [irreplaceable expertise] . . . developed during its pendency,"[79] substitution of counsel has often been found to be a sufficient remedy.[80]

Lowenschuss v. C.G. Bluhdorn[81] is a particularly interesting case discussing the mechanics of substitution. Attorney Lowenschuss had initiated class action litigation, doubling as class representative and class counsel. During the course of the litigation he was forced to withdraw as class counsel because of his inherent conflict of interest. At the time of his withdrawal, he attempted to secure fees previously earned as class counsel by means of a side agreement with the firm of Arnold Levin in which he also retained "the right to approve or disapprove of any action affecting the

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[76] 66 F.R.D. at 581.

[77] *Id.* at 589. *See* Brick v. CPC Int'l, Inc., 547 F.2d 185, 187 (2d Cir. 1976). *Cf.* Seiden v. Nicholson, 69 F.R.D. at 681. The intervention of a new class representative is, in fact, what Professor Bergman has recommended, albeit on a broader scale. *See* text accompanying note 141 *infra*.

[78] *See generally* Hawkins v. Holiday Inns, 1980-1 Trade Cas. (CCH) at ¶ 63,150 (co-counsel and counsel for co-parties permitted to continue representation while one counsel was disqualified for a conflict arising out of prior representation of another party). Hawk Indus., Inc. v. Bausch & Lomb, Inc., 59 F.R.D. at 619 (co-lead counsel without conflict permitted to continue representation while other co-lead counsel estopped from acting as such due to conflict arising out of simultaneous representation of opposing party in unrelated action).

[79] Kramer v. Scientific Control Corp., 534 F.2d at 1092 (3d Cir. 1976).

[80] *Id.* at 1093. *See also* Zylstra v. Safeway Stores, 578 F.2d at 105; Brick v. CPC Int'l, Inc., 547 F.2d at 188 (dissenting opinion); Bachman v. Pertschuk, 437 F. Supp. at 973.

[81] 78 F.R.D. at 675.

rights of the class."[82] Defendants moved to disqualify Lowenschuss as class representative and disqualify the firm of Arnold Levin as class counsel. Noting that "an inordinate amount of time [had] already been expended on issues unrelated to the merits of the action,"[83] the court ruled:

> [D]efendants' motion to disqualify [attorney] Lowenschuss as class representative is granted. Under the circumstances and in view of Canon 9 of the Code . . . requiring a lawyer to "avoid even the appearance of professional impropriety," Arnold Levin, Esq. should withdraw as class counsel. The disqualification and withdrawal should not be made immediately effective, however . . . . As Lowenschuss owed a fiduciary duty to the class, it is his responsibilitiy to seek a substitute representative. Accordingly, he is ordered to send a notice to all members of the class . . . advising them of this decision and seeking a substitute representative and/or intervenors [at his cost] . . . . After a substitute class representative is certified, the order granting . . . [disqualification] will become effective.[84]

Finally, many instances in which the reason for denying class status was that "counsel cannot be separated from the class" actually involved the prerequisites of "typicality" and "suitability." The question of ethics was, in a sense, of secondary importance. In *Garonzik v. Shearson Hayden Stone, Inc.*,[85] the court deemed it unnecessary to "enunciate a belief that there are no circumstances in which it would be appropriate for an attorney to represent a class . . . both as a member thereof and as counsel" because the attorney's claim was not "typical" of the class.[86] Moreover, in many cases in which counsel seeks to serve as the named plaintiff or *de facto* class representative for a class of plaintiffs who will receive, at most, miniscule recoveries,[87] the court

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[82] *Id.* at 677. The agreement recited that compensation for 6500 hours at $300 an hour was "fair and reasonable under the circumstances." *Id.*

[83] *Id.* at 676-77. The disqualification motion was countered with a motion for sanctions under FED. R. CIV. P. 11.

[84] *Id.* at 678.

[85] 574 F.2d 1220 (5th Cir. 1978).

[86] *Id.* at 1221 n.1.

[87] See text accompanying notes 22-23 *supra*.

may be justified in holding that class treatment is not the "superior" means of vindicating the plaintiffs' legitimate interests.[88]

II. SPECIFIC INSTANCES OF ATTORNEY MISCONDUCT UNDER THE CODE

If the requirement of "adequate representation" justifies judicial inquiry into counsel's professional competence, experience, and ability to prosecute class action litigation,[89] the question arises as to whether specific instances of unethical conduct in the initiation and prosecution of a particular lawsuit also are relevant to the propriety of class certification. In other words, do specific violations of Code provisions on the part of the named plaintiff's counsel bear on the propriety of class certification in cases apparently lacking conflicts of interest such as those just discussed, on the theory that such violations raise doubts about counsel's ability to represent the interests of absent class members?

A. *Specific Types of Misconduct*

1. *Maintenance*

Disciplinary Rule 5-103 provides in pertinent part:

> (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.[90]

The traditional justification for this ethical precept is rooted in a conflicts of interest analysis: By advancing costs and expenses, counsel may acquire an interest in the outcome of the litigation, and may, in fact be tempted to settle a case on terms less advan-

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[88] *In re* Hotel Tel. Charges, 500 F.2d at 86; Cotchett v. Avis Rent A Car Sys., 56 F.R.D. at 549; Shields v. Valley Nat'l Bank, 56 F.R.D. at 448.

[89] See text accompanying notes 59-73 *supra*.

[90] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1978).

tageous to the client in order to secure his or her fee and advancements. In addition, the rule is thought to deter "frivolous or speculative litigation designed to enrich [only the attorney bringing the action]."[91] In the abstract, the rule appears to have particular currency in class action litigation.[92] On the other hand, the "costs" associated with class action litigation, for which the named representative must theoretically be responsible, can be significant, including not only the costs of notice,[93] but also the costs of identifying potential class members.[94] Assuming, arguendo, that the typical, qualified class representative could bear such expenses, it seems unlikely that such a person would *willingly* do so in exchange for his or her share as a class member of any ultimate recovery.[95] It is no wonder that some courts have certified class actions despite the fact that class counsel appeared to be advancing significant funds for the costs of litigation without any real guarantee of repayment.[96]

Despite these practical limitations on the utility of strict enforcement of DR 5-103(B) in the context of class action litigation, a significant number of courts continue[97] to permit discovery of the source of funds maintaining a class action, and entertain motions challenging the ethics of class counsel.[98] A few examples of how this "ethical" issue has been injected into litigation, and how some courts have reacted to perceived violations of the disciplinary rules, should illustrate the discomfort that may be visited on class counsel.

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[91] Lynch, *Ethical Rules in Flux: Advancing Costs of Litigation*, 7 LITIGATION 19 (1981).

[92] See text accompanying note 24 *supra*.

[93] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[94] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

[95] *Cf.* Cooper & Kirkham, *supra* note 17. *See also* Lynch, *supra* note 91, at 20.

[96] *See, e.g.*, Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 385 (E.D. Pa. 1974), wherein the court stated: "We cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich."

[97] *See, e.g.*, Miller, *supra* note 1, at 678-79.

[98] Informal Opinions of the American Bar Association have urged a strict application of the Disciplinary Rule in the context of class actions. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1283 (1973) [hereinafter cited as ABA Informal Opinion], which states, "if the client does not agree to be ultimately responsible for the costs so advanced, or authorize the lawyer to proceed with the suit as an individual

In *Stavrides v. Mellon National Bank & Trust Co.*,[99] a suit brought on behalf of the putative class against lending institutions using certain accounting methods in connection with home mortgage loans, defense counsel moved to compel answers to the following deposition questions propounded to a named plaintiff:

> Q. [H]ave you agreed to pay the legal costs involved in this suit if there should be any?
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> . . . .
>
> Q. [H]ave you agreed to reimburse your attorneys any legal costs they might incur in the prosecution of this action?
>
> . . . .
>
> Q. [H]ave you been told that you may be required to pay the cost involved in the prosection of this action?
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> . . . .
>
> Q. Do you have an agreement with your attorney to repay any court costs?[100]

The Court not only held that such questions were "relevant to the subject matter involved in the pending litigation," but also ruled that evidence of "solicitation and maintenance" could result in a denial of class certification.[101]

Similarly, inquiries into the financial arrangements between class counsel and the named representatives were allowed in two recent cases denying class certification. In *Parker v. George Thompson Ford*,[102] the court denied certification primarily on

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one, the lawyer should withdraw." *See also* ABA Informal Opinion 1326 (1975), which states:

> If the original plaintiff does not agree to assume the responsibility of the cost of converting his individual action into a class action, the lawyer should not bring or convert the suit to a class action unless the court permits some other course of action or directs some other parties or class to bear the costs of suit.

[99] 60 F.R.D. 634 (W.D. Pa. 1973).

[100] *Id.* at 637-38.

[101] *Id.* at 637. The court stated:

> We think . . . that it is proper for courts to consider the ethical conduct of plaintiffs' counsel in deciding whether to certify a class . . . . In assessing the ability of the plaintiffs' counsel to carry out his fiduciary duties to absent class members we think the court should use its "broad administrative, as well as adjudicative, power" as "guardian of the rights of the absentees" to see that the absentees are represented by counsel who is ethically as well as intellectually competent to represent them.

[102] 83 F.R.D at 378.

account of an absence of "typicality"[103] and "suitability,"[104] but noted in passing that:

> [the] record does not convincingly show that plaintiff is *willing* and able to assume the costs and expenses associated with bringing a class action. Plaintiff's counsel has allegedly promised to bear responsibility for the costs of this suit, but this can be no more than a guarantee of payment. It is not an adequate substitute for assurance that plaintiff understands her potential obligation of bearing the costs of a class action and is prepared to underwrite these costs.[105]

Other recent opinions echo the same concerns. In *In re Mid-Atlantic Toyota Antitrust Litigation*,[106] answers to defendants' interrogatories asking whether plaintiffs were willing and able to finance the costs of the actions, were equivocal and disclosed that class counsel's policy was "not [to] seek to collect those costs" from class representatives.[107] The court responded adversely to such arrangements, along traditional conflicts of interest lines,[108] and then went on to opine: "If the Court allows attorneys to pay for a class action in which treble damages and attorney's fees are already recoverable, there is a possibility that the proverbial 'ambulance chaser' might be turned into a 'Toyota chaser' . . . ."[109] On the other hand, some courts have questioned whether a denial of class status or decertification is an appropriate way to "safeguard" the interest of absent class members, particularly in light of the fact that few named plaintiffs can realistically be ex-

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[103] *Id.* at 380. A number of class plaintiffs were subject to counterclaims that the named plaintiff would have no incentive to litigate.

[104] *Id.* at 382. Class members could have recovered more for themselves in individual actions.

[105] *Id.* at 380-81 (citing DR 5-103(B)).

[106] 93 F.R.D. at 485.

[107] *Id.* at 489.

[108] The court wrote: "If the client is not financially responsible, the attorneys have free reign over the prosecution of the class action. This is tantamount to the unacceptable situation of the attorney being a member of the class of litigants while serving as counsel." *Id.* at 490.

[109] *Id.* at 491. *See also* Buford v. American Fin. Co., 333 F. Supp. 1243, 1252 (N.D. Ga. 1971) (plaintiffs may not shift the burden of paying for proper notice on the basis of a "hindsight" victory based on the merits).

pected to "willingly" bear the costs of litigation.[110] For example, in *Brame v. Ray Bills Finance Corp.*,[111] a class action brought pursuant to the Truth in Lending Act, the court suggested that not every violation of the Code of Professional Responsibility should result in a denial of class status.[112] Similarly, in *Rode v. Emery Air Freight*,[113] the court went so far as to suggest a compromise solution of limiting the size of the putative class so as to "minimize the conflicts which might be created by the advancement of significant funds by plaintiffs' counsel."[114]

If the concern about class actions, in which otherwise qualified representative plaintiffs are unable or unwilling to bear the costs of litigation, is based on a fear that counsel will "take over the litigation" for his or her own benefit, some enforcement mechanism short of denying class certification would be more fitting. Unless the class action device is to be abandoned in cases in which individual class members are entitled to only small individual recoveries,[115] alternative responses must be considered. Class size might be restricted, or, as Professor Bergman has suggested,[116] an organization of class members might be formed to act as the class representative, thereby providing a "sturdier financial base" for the action.

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[110] It has been held that once the named plaintiffs indicate a "willingness" to bear such costs, further discovery of personal financial information should not be allowed. Such discovery might "invade plaintiffs' privacy" and "have a 'chilling effect' upon" class action lawsuits, contrary to congressional intent. *In re* Nissan Motor Corp. Antitrust Litig., 22 FED. R. SERV. 2D (CALLAGHAN) 63, 65 (S.D. Fla. 1975). Ironically, this approach skirts the ultimate issue of whether it is realistic to apply DR 5-103 to class action litigation; and such a judicial response to discovery unfairly rewards the class representative who simply parrots a well-rehearsed catechism. *But see* Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973) ("willingness" on part of plaintiff insufficient of and by itself).

[111] 85 F.R.D. at 568.

[112] The court avoided the implications of DR 5-103(B) on the ground that plaintiffs' attorneys were legal aid attorneys, and that public or charitable funds were being advanced as opposed to the personal funds of the attorneys. *See also* ABA Informal Opinion 1361 (1976) (no violation of DR 5-103(B) where Legal Aid Society advances money).

[113] 80 F.R.D. 314 (W.D. Pa. 1978).

[114] *Id.* at 317 (quoting Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. at 385).

[115] Presumably these are the very cases for which Rule 23 was designed. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 99-100 n.11 (1981).

[116] Bergman, *supra* note 9, at 274.

Indeed, the propriety of some compromise solution short of denial of class status is supported by the ABA Informal Opinion 1326,[117] as well as Model Rule 1.8(e) of the new Model Rules of Professional Conduct.[118] As previously noted, the ABA Opinion generally condemns the prosecution of a class action out of counsel's pocket. On the other hand, the Opinion permits counsel to solicit funds from class members for expenses, as opposed to compensation, for preparation of class litigation, or for the costs of notice. The Model Rule purports to bring the Code into line with reality, and deter wasteful and intrusive discovery of the arrangements between class counsel and named plaintiffs.[119] Specifically, Rule 1.8(e) provides: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter . . . ."[120]

2. *Solicitation*

Although the disciplinary rules of the Code of Professional Responsibility do not permit a lawyer to recommend his or her employment to laypersons who have not sought his or her advice,[121] or permit a lawyer to request another to recommend his or her employment,[122] Disciplinary Rule 2-104(A)(5) provides that: "If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."[123]

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[117] See note 98 *supra*.

[118] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (E) (Final Draft 1982).

[119] Lynch, *supra* note 91, at 20.

[120] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (Final Draft 1982). *See also In re* Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. at 485, discussed in text accompanying notes 106-09 *supra*, which stated: "Plaintiffs argue that the Court should refuse to enforce DR 5-103(B), pointing to the trend of revision of that Disciplinary Rule . . . . The Court's order [denying class certification] is without prejudice to plaintiffs' renewing their motion should the law change . . . so as to allow the practices of plaintiffs' counsel . . . ."

[121] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1979).

[122] *Id.* at DR 2-103(C).

[123] *Id.* at DR 2-104(A)(5).

The exact meaning of this pronouncement was examined in ABA Informal Opinion 1280 in which the following problem was submitted:

> Your original client, a layman, approached your firm to represent him as plaintiff in a civil action against certain individuals convicted of mail fraud for recovery of money he allegedly lost to them as a result of the fraud. Because the initial outlay of money to purchase a copy of the transcript of the criminal trial and to contact and interview witnesses who are scattered across the country would put a severe burden on your client's personal finances, your client proposed seeking out others who had lost money as a result of the mail fraud and soliciting their joinder and financial assistance in the proposed litigation. This he did by mailing to each member of the potential class a request for an immediate financial contribution of $50 and for a limited power of attorney authorizing your client on their behalf to retain your services and assign to you a contingent fee of 35 percent . . . . Your client did the actual mailing and bore the entire expense of the solicitation; your only participation in the matter was that you drafted the limited power of attorney which your client enclosed for the potential plaintiffs' signatures. As of the date of your letter you had received some $2,250 from approximately forty-five members of the class. You have not been in touch with any of these potential clients except to acknowledge receipt of their money and to answer their inquiries of you about various aspects of the proposed action.[124]

Although the attorney in the above fact pattern obviously knew that his client was contacting other class members and soliciting their joinder, the ABA Informal Opinion found no objectionable solicitation, on the theory that counsel had confined *his* communications with putative class members to "inquiries and acknowledgements of receipt of their advances of costs."[125] The Opinion suggests that some pragmatic compromise may be struck, at least in the context of class actions, so that counsel may fulfill his obliga-

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[124] ABA Informal Opinion 1280 (1973).

[125] *Id. See also* ABA Informal Opinion 1326 (1975) (solicitation of funds to meet expenses of class action suit, including attorney's fees). *But see* DR 1-102(A) ("A lawyer shall not: . . . (2) [c]ircumvent a Disciplinary Rule through actions of another"). However, Opinion 1326 did hold that compensation for the attorney could not be solicited.

tion of zealous advocacy on behalf of the named representative and potential class members without running afoul of time-honored constraints.

Perhaps the most convincing evidence of an impending change in the rules governing "solicitation" in the context of class actions came in the form of a United States Supreme Court opinion in *Gulf Oil Co. v. Bernard.*[126]The case arose as a class action presenting allegations of racial discrimination in employment against the Gulf Oil Company and one of the unions representing employees. In 1976, Gulf entered into a conciliation agreement with the EEOC regarding alleged discrimination against black and female employees at the refinery. As part of a compromise, Gulf sent notices to employees eligible for back pay, offering a certain amount to each person in return for releases of liability. One month after the filing of the agreement, plaintiffs filed a class action on behalf of all present and former black employees and black applicants who had been rejected for employment at the refinery. Among the members of this purported class were many employees who were already receiving offers of settlement from Gulf under the conciliation agreement. When class counsel attended a meeting of class members and recommended that they not settle their grievances under the conciliation agreement, Gulf sought an order prohibiting further communications by the parties or their counsel with class members.[127] The district court issued an order banning communications with class members, citing as authority the Manual for Complex Litigation section 1.41, without making any findings of fact supporting the need for such a limitation.[128]

The Court of Appeals for the Fifth Circuit reversed the district court holding that the trial judge's order was an unconstitutional prior restraint on protected expression. In turn, the United States Supreme Court affirmed the reversal, but on nonconstitutional grounds.

While noting that Rule 23(d) gives a trial judge "broad authority to exercise control over a class action and to enter appropriate

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[126] 452 U.S. at 89.
[127] *Id.* at 92.
[128] *Id.* at 93-96.

orders governing the conduct of counsel and parties,"[129] the Court reasoned that an order limiting communications:

> 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 . . . to insure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23.[130]

It further stated:

> In the present case, we are faced with the unquestionable assertion by respondents that the order created at least potential difficulties for them as they sought to vindicate the legal rights of a class of employees. The order interfered with their efforts to inform potential class members of the existence of this lawsuit, and may have been particularly injurious—not only to respondents but to the class as a whole—because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts. In addition, the order made it more difficult for respondents, as the class representatives, to obtain information about the merits of the case from the persons they sought to represent . . . .
>
> We recognize the possibility of abuses in class-action litigation, and agree with petitioners that such abuses may implicate communications with potential class members. But the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules. There certainly is no justification for adopting verbatim the form of order recommended by the Manual for Complex Litigation, in the absence of a clear record and specific findings of need. Other, less burdensome remedies may be appropriate. Indeed, in many cases there will be no problem requiring remedies at all.[131]

The extent to which *Gulf Oil* may influence future changes in the Code of Professional Responsibility and its application to class actions is difficult to assess. However, many federal district

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[129] *Id.* at 100.
[130] *Id.* at 101-02.
[131] *Id.* at 101-04.

courts have adopted local rules, devised from the Manual of Complex Litigation, prohibiting "all parties thereto and their counsel . . . directly or indirectly, [from communicating] orally or in writing . . . concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the court."[132] The evils that such rules are intended to curb include solicitation of legal representation, solicitation of fees and expenses,[133] solicitation by formal parties of requests by class members to opt out in Rule 23(b)(3) class actions, and misrepresentation concerning "the status, purposes and effects of the action," or of "actual or potential court orders therein."[134] While the *Gulf Oil* opinion suggested that "an order requiring parties to file copies of nonprivileged communications to class members with the court may be appropriate in some circumstances,"[135] the Court rejected the view that a trial court "has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure . . . ."[136] The continued vitality of such local rules is questionable at best.[137] On the other hand, there is certainly a need for some policing of communications with class members.[138]

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[132] Local Rule 2.12 of the Eastern District of Louisiana, upheld in the face of a constitutional challenge in Waldo v. Lakeshore Estates, Inc., 433 F. Supp. at 786.

[133] *But see* ABA Informal Opinion 1326 (1975), discussed in text accompanying notes 117-19 *supra*.

[134] Local Rule 2.12, *supra* note 132.

[135] 452 U.S. at 104 n.20.

[136] *Id.* at 103-04 n.18. The language of the order issued in *Gulf Oil* was identical to the language of the local rule discussed in Waldo v. Lakeshore Estates, Inc., 433 F. Supp. at 782, and quoted in text accompanying note 132 *supra*.

[137] *See* Williams v. United States Dist. Court, 658 F.2d 430 (6th Cir. 1981) (striking down local rule).

[138] *See* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. at 782, 791 n.8:

> In the case at bar, we note that the minutes of the plaintiff organization contain several patent misrepresentations of the suit's status and effect . . . . [D]eclarations are made to the effect that there is an "overwhelming" possibility the plaintiffs will prevail and that the contingency fee arrangement is only made by "attorneys who are certain to win . . . ."

See also Vander Missen v. Kellogg Citizens Nat'l Bank, 481 F. Supp. 742 (E.D. Wis. 1979) (court refused to allow publication of notice in the newspaper seeking witnesses "to aid [plaintiff] in her proof of punitive damages").

B. *Conflicting Approaches to the Relevance of Specific Ethical Misconduct*

Judicial reactions to charges of barratry, maintenance and solicitation have been mixed. A number of decisions have suggested that counsel's violations of Disciplinary Rules 5-103(B) and 2-104(A)(5) justify the denial of class status.[139] On the other hand, many well reasoned decisions recognize that denying class certification because of ethical misconduct not "extremely offensive" and prejudicial to the interests of the class could place too much emphasis on discovery and collateral litigation relating to ethical issues.[140]

If the courts are inclined to deny class status on account of perceived ethical misconduct, the defense bar can hardly be faulted for pursuing such issues tenaciously. However, the "pursuit" may be quite wasteful and the prize, denial of class certification, too draconian. For example, in *Kronenberg v. Hotel Governor Clinton, Inc.*,[141] defendants' initial motion to dismiss a securities fraud action as a class action was denied, and the class was certified. The court then ordered that an opt-out notice be sent to each unnamed plaintiff. When the prescribed notice was sent, it was accompanied by an unauthorized letter from plaintiffs' attorneys who were representing eight potential class members in three separate non-class actions pending in state court and arising from the same securities transaction. These individual plaintiffs, as well as some potential class members, then chose to opt-out of the class action. Defendants thereupon filed a second motion to dismiss alleging, inter alia, that class counsel had misled

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[139] *E.g.*, *In re* Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. at 485; Parker v. George Thompson Ford, Inc., 83 F.R.D. at 378; Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. at 634; Korn v. Franchard Corp., FED. SEC. L. REP. (CCH) ¶ 92,597 (S.D.N.Y. 1970). *See also* Taub v. Glickman, 14 FED. R. SERV. 2D (CALLAGHAN) at 847 (noting that counsel's solicitation in *Korn* could not be "passively ignored" in the case before the court).

[140] *See In re* Nissan Motor Corp. Antitrust Litig., 22 FED. R. SERV. 2D (CALLAGHAN) at 66, where, after noting that any incidental solicitation could not have resulted in prejudice warranting denial of class status, the court observed, "Since further discovery into the area could only result in an administrative morass for all parties and for this court, no substantial purpose can be seen for ordering such discovery . . . ."

[141] 281 F. Supp. 622 (S.D.N.Y. 1968).

the court regarding the intention of these eight state court plaintiffs to join in the class action. It was also suggested that their election to opt-out was in "bad faith." The trial court concluded that the election of these and other class members was permitted by the court-approved notice, and that neither their election to opt-out nor counsel's improper communications accompanying the notice justified decertification or "dismissal." The court weighed the gravity of the alleged "change of circumstances" against the potential impact of decertification on the absent class members:

> The defendants would have the court dismiss the action as a class action because plaintiffs' attorney sent this communication. It must be remembered, however, that what the court is primarily concerned with here is not the interests of the named plaintiffs and their attorneys but the interests of the members of the class. It may be that many members of the class did not elect to exclude themselves from this suit in reliance on the [court-approved] notice . . . believing that their interests as members of the class would be protected by the suit at bar. At the time the present motion to dismiss was made the statute of limitations against such claims was about to run and by now has expired. Thus the only protection available for members of the class lies in the instant suit. I am not prepared to deny them this protection at this stage of the proceedings and on the present record.[142]

In *Halverson v. Convenient Food Mart, Inc.*,[143] the owners of thirty-six retail grocery stores operating as defendant's franchisees brought a class action alleging violations of the antitrust laws. At pretrial, defense counsel suggested that the named plaintiffs had been solicited. This report prompted a hearing and dismissal of the case on motion of the defendant. The specific misconduct involved arose in the following manner. The class attorney had represented an association of the defendant's franchisees in the Chicago area during 1968 and early 1969 to obtain advertising rebates owed by defendant to the association's members under their franchise agreements. Counsel was successful in securing such

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[142] *Id.* at 625-26. Defendant thereafter moved to reargue the motion, which was again denied.

[143] 458 F.2d 927 (7th Cir. 1972).

rebates, so it was natural for an officer of the association to invite counsel to a meeting with some thirty-one members of the association to discuss potential antitrust claims against defendant. Counsel apparently recommended that such an action be pursued and the members present voted to initiate and finance the litigation. However, when the association's president called counsel the next day, it was decided that the association should request the joinder of other store owners. Counsel prepared a letter signed by the association president urging joinder but containing no mention of costs. The letter did say no fee would be charged unless the suit succeeded. Persons who responded with authorization became the named plaintiffs.

The Court of Appeals for the Seventh Circuit reversed the trial court's dismissal of the class action. While noting that counsel committed a "slight breach of ethics," the court felt that such minor misconduct "should not prejudice the rights of his clients."[144] The court remarked:

> Only the most egregious misconduct on the part of plaintiffs' lawyer could ever arguably justify denial of class status. The ordinary remedy is disciplinary action against the lawyer and remedial notice to class members . . . . On remand the district court should consider plaintiffs' request for class status without regard to the pre-suit communication. If class designation is granted, notice to the class members can remedy whatever misleading elements there may have been in the original letter.[145]

This rationale is sound. While the defendant may have standing to challenge the propriety of attorney-financed class actions other remedies less drastic than denial of class status may be available, including the intervention of other individual class representatives or organizations,[146] substitution of counsel,[147] or in some cases, no judicial action at all.[148] Moreover, with respect to solicitation, the interests of absent class members should be of para-

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[144] *Id.* at 931.

[145] *Id.* at 932.

[146] *Cf.* Bergman, *supra* note 9, at 271; ABA Informal Opinion 1326 (1975).

[147] *Cf. In re* Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. at 485.

[148] *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (Final Draft 1982), the relevant portion of which is contained in text accompanying note 120 *supra*.

mount concern. Except in the most extreme instances of misconduct, the use of corrective notices[149] or disqualification and substitution of counsel[150] are preferred to denial of class certification.

III. OTHER RECURRING ETHICAL PROBLEMS IN CLASS ACTION LITIGATION

A. *The Strike Suit*

Opponents of the class action characterize it as "legalized blackmail."[151] It must be conceded that there is a risk that class claims may be asserted merely to provide a "port from which to embark on a large scale fishing expedition."[152] For example, it has been said of antitrust class actions that:

> by pulling everyone in an industry into a complex lawsuit dragnet-style and then selling peace for a price below the costs of defending the lawsuit, the plaintiff can often secure early settlements, thereby augmenting its war chest while simultaneously narrowing the number of parties and reducing its prosecution costs. In this setting, the pragmatic business man is faced with the dilemma of . . . capitulating to save litigation expenses.[153]

A similar complaint was lodged by a senior partner of a large Washington, D.C. law firm, whose experience in defending federal securities law class actions led him to the conclusion that "the fundamental assumption underlying the finding of manageability in

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[149] *See* Halverson v. Convenient Food Mart, Inc., 458 F.2d at 927 (corrective notice is usual remedy).

[150] *See In re* Nissan Motor Corp. Antitrust Litig., 22 FED. R. SERV. 2D (CALLAGHAN) at 66 ("The better disposition should be to substitute counsel to avoid unduly delaying reaching the merits and prejudicing plaintiffs' rights").

[151] Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971). *Cf.* Brown v. Cameron-Brown Co., 30 FED. R. SERV. 2D (CALLAGHAN) at 1181 (antitrust class action characterized as "a heist").

[152] Peak v. Topeka Hous. Auth., 78 F.R.D. at 84.

[153] Durham & Dibble, *Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation*, 1978 B.Y.U. L. REV. 299, 306. *See also* Folding Cartons, Inc. v. American Can Co., 28 FED. R. SERV. 2D (CALLAGHAN) 235, 244-45 (N.D. Ill. 1979) commenting on the so-called "scavenger" antitrust case, in which the "singular key to success . . . is obtaining . . . class certification").

the certification of large user class actions is the court's belief that the case will be settled prior to trial."[154] In a similar vein, the author noted:

> The potential exposure in broad class actions frequently exceeds the net worth of the defendants, and corporate management naturally tends to seek insurance against whatever slight chance of success plaintiffs may have. Such insurance is usually available for a comparatively modest premium in the form of a settlement with the attorney who initiated the litigation and who purports to speak for vast numbers of people who have not retained him.[155]

Because frivolous claims may provide ample leverage for coercing unmerited settlements, a number of courts have emphasized that the attorney filing a class action complaint "has a professional responsibility before signing and filing that complaint to determine that there is a sufficient evidentiary basis to support the class action allegations."[156] This duty of care is already imposed by Rule 11 of the Federal Rules of Civil Procedure. The Supreme Court recently adopted amendments to that rule encouraging its use as a sanctioning mechanism for deterring groundless litigation.[157] The amended rule provides:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief *formed after reasonable inquiry it is well grounded in fact* . . . . If a pleading, motion, or other paper is signed in violation of this rule . . . *the court* . . . *shall impose* . . . an appropriate *sanction*, which may include an order to pay to the other party . . .

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[154] Simon, *Class Actions—Useful Tool Or Engine Of Destruction*, 55 F.R.D. 375, 388 (1973).

[155] *Id.* at 389-90.

[156] Peak v. Topeka Hous. Auth., 78 F.R.D. at 83 (quoting Barnett v. Laborers' Int'l Union, 75 F.R.D. 544, 545 (W.D. Pa. 1977)).

[157] *See* Underwood, *Curbing Litigation Abuses: Judicial Controls of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 642 (1982).

> the amount of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney's fee.[158]

This rule should help the courts police abuses of the class action device in several ways. First, new sanctions provided in the rule will deter counsel from filing frivolous claims against multiple defendants, "dragnet-style," and then settling with the individual defendants for some nuisance value.[159] For example, in *Kinee v. Abraham Lincoln Federal Savings & Loan Association*,[160] class action attorneys filed a complaint naming as defendants 177 mortgage and thrift institutions, alleging that their use of the "escrow" method of collecting tax prepayments violated federal antitrust laws.[161] The defendants were selected from a local telephone book. Forty-six of the defendants were later dismissed voluntarily.[162] On motion, the trial court required plaintiff's counsel personally to reimburse the dismissed defendants for the costs and expenses incurred in appearing and defending.[163]

Second, the new rule should encourage counsel to tailor the class allegations of the complaint to the facts of the particular case, and deter counsel from relying on an initial round of depositions or interrogatories to "discover a claim."[164]

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[158] 51 U.S.L.W. 4501-02 (May 3, 1983) (emphasis added). The new amendments will take effect on August 1, 1983 if approved by Congress.

[159] See text accompanying notes 147-50 *supra*.

[160] 365 F. Supp. 975 (E.D. Pa. 1973).

[161] *Id.* at 982.

[162] *Id.* at 983. The opinion does not reveal whether any of these defendants "bought their peace" for some nominal sum, but does suggest that none used the "escrow" method complained of.

[163] *Id.* at 983. *But see* United States v. Standard Oil Co., 603 F.2d 100, 103 n.2 (9th Cir. 1979) (Rule 11 . . . provides no authority for awarding attorneys' fees against an unsuccessful litigant); Orenstein v. Compusamp, Inc., 19 FED. R. SERV. 2D (CALLAGHAN) 466, 469 (S.D.N.Y. 1974) (holding that attorneys' fees may not be awarded as a sanction under FED. R. CIV. P. 11 in its current form).

[164] See Barnett v. Laborer's Int'l Union, 75 F.R.D. at 545, in which the court observed:

> While it may sometimes be necessary to indulge in discovery to prepare [materials in evidentiary form to support class certification] the amount of such discovery should be limited to this purpose. The time allowed . . . should not be used by the plaintiff's counsel to engage in a fishing expedition to determine whether or not there is any factual support for his allegations.

B. *Defense Counsel's Contacts with Class Members*

As previously noted in connection with solicitation, the Manual for Complex Litigation recommended that courts prohibit unapproved contacts between counsel and potential and actual class members as a matter of course.[165] While the United States Supreme Court opinion in *Gulf Oil v. Bernard*[166] prevents a court from imposing such a gag order on class counsel absent specific findings of abuse, the case does not directly discuss the propriety of orders purporting to restrict *defense* counsel's contacts with class members. Class counsel may desire an order restricting his opponent's contacts with class members to prevent the defendant from buying off individual absent class members. By purchasing individual claims before certification, the defense may be able to cause sufficient "opt-outs" to reduce the size of the class to the point where joinder of the remaining members is practicable. This may result in a dismissal of class claims without judicial review of the settlements.[167]

Not surprisingly, courts that have considered the propriety of such contacts have reached differing conclusions. This is in part due to the difficulty of applying the provisions of the Code of Professional Responsibility in the context of class actions. Disciplinary Rule 7-104 of the Code provides:

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.[168]

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[165] See text accompanying notes 131-33 *supra*.
[166] 452 U.S. at 89.
[167] 3 H. NEWBERG, CLASS ACTIONS § 5030 (1977).
[168] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1981).

Courts in early cases dealing with defense efforts to settle individual claims of absent class members before certification were suspicious of class counsels' demands for protective orders. In a leading case, Judge Friendly stated:

> Plaintiff's . . . [assertion] that once a plaintiff brings a suit on behalf of a class, the court may never permit communications between the defendant and other members, even when, as here, both desire this, is in conflict . . . with elementary considerations of common sense . . . . Indeed, we are unable to perceive any legal theory that would endow a plaintiff who has brought what would have been a "spurious" class action under former Rule 23 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 F.R. Civ. P. 23(e) prohibits.[169]

In this and other cases following its rationale, plaintiff's counsel apparently did not rely on the disciplinary rule as the lynchpin for a protective order.

The problem in applying the disciplinary rule in the class action context is the difficulty of identifying class counsel's client. If a court concludes that counsel's client is the representative party, a simple offer to settle the potential claim of an absent class member, unencumbered by other "advice," may be viewed as permissible. On the other hand, if class counsel is deemed to work "for absent class members,"[170] such contacts may be said to be within the ambit of the disciplinary rule.

The former view, that absent class members are not represented parties in the formal sense of the disciplinary rule, at least prior to class certification, was adopted in *Winfield v. St. Joe Paper Co.*,[171] a Title VII action in which plaintiff sought to prevent defendant from "contacting members of the proposed class in order to obtain relevant information from them."[172] The court refused

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[169] Weight Watchers v. Weight Watchers Int'l, 455 F.2d 770, 773 (2d Cir. 1972). *Accord* Nesenoff v. Muten, 67 F.R.D. 500 (E.D.N.Y. 1974).

[170] *See Developments in the Law: Conflicts of Interest, supra* note 20, at 1447.

[171] 20 Fair Empl. Prac. Cas. (BNA) 1093 (N.D. Fla. 1977).

[172] *Id.* at 1094.

to apply DR 7-104(A)(1) to the facts of the case, noting that the absent class members had not retained class counsel, and were "relatively passive beneficiaries of the efforts of the plaintiffs in their behalf."[173] This relatively mechanical reasoning appears logical if the plaintiff's motion to certify the class is still pending, and appears to be consistent with *Gulf Oil* which recognized the need to consider the legitimate interests of the parties.

More difficult problems of analysis arise when an action has already been certified as a class action. *Impervious Paint Industries v. Ashland Oil,*[174] a "multiple-defendant civil anti-trust" class action, is a case in point. After the action had been certified as a class action, the court had entered a "communications ban" pursuant to the Manual for Complex Litigation. However, some of the defendants moved to vacate the ban, citing as authority the Fifth Circuit decision in *Bernard v. Gulf Oil.*[175] The trial court thereupon agreed to vacate the broad order banning communications, while advising counsel of the ethical proscriptions contained in the Code. Sometime thereafter, plaintiffs' counsel moved for an order prohibiting one of the defendants from contacting class members and "threatening" them with "discovery and other legal procedures" should they fail to opt out.[176] The court appeared to recognize the difficulty of applying DR 7-104(A)(1) literally in the class action context; class counsel "represents" absent class members in the sense that he or she must avoid compromising their rights but for other purposes, such as solicitation, they must be treated to some extent as non-clients. The court correctly observed, however, that defense counsel did have some responsibilities pursuant to DR 7-104 "read as a whole":

> It is essential that the class members' decision to participate or to withdraw be made on the basis of independent analysis of his own self-interest. It is the responsibility of the Court as a neutral arbiter and of the attorneys in their adversary capacity to insure this type of free and unfettered discretion . . . . It must be noted that defendants vigorously campaigned to have included in the

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[173] *Id.*
[174] 508 F. Supp. 720 (W.D. Ky. 1981).
[175] *Id.* at 722, citing Bernard v. Gulf Oil, 619 F.2d 459 (5th Cir. 1980).
[176] *Id.* at 722.

> notice the warning that class members might be subject to discovery or other legal procedures . . . [but] this provision was rejected by the Court . . . . *Bernard v. Gulf Oil* . . . held that prior restraints were justifiable in exceptional circumstances and by a showing of direct, immediate and irreparable harm. We now find such circumstances to exist.[177]

In short, the court did not become needlessly embroiled in the question of whether the absent class members were "parties" represented by class counsel for purposes of DR 7-104(A)(1). Instead, the court relied upon DR 7-104(A)(2) and its supervisory power under Rule 23 to insure that the absent class members would be free to make an independent decision to "opt-out" or participate in the class action.

C. *Settlement*

Even if a class action has been commenced in good faith and the class allegations are well grounded in fact, "the named plaintiffs and their counsel are often tempted [to sacrifice] the interests of the previously asserted class for private gain,"[178] in the form of a premium for the named plaintiffs,[179] or a quick fee for the attorney.[180]

Federal Rule 23(e) was drafted to insure that sweetheart settlements will not be entered into to the detriment of absent class members whether or not the class action has reached the certification

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[177] 508 F. Supp. at 723.

[178] O'Kelly, *Class Actions: Proposals for New Rules of Professional Responsibility*, 5 LITIGATION No. 2, 25 (1979). There is substantial evidence that some counsel merely threaten to add class allegations in the hope of obtaining leverage in negotiating the settlement of individual claims. Litigation attorneys should note well ABA Informal Opinion 1039 (1968), which suggests that a plaintiff's lawyer may not sign an agreement which settles his clients' claims when the settlement agreement contains a convenant that counsel will not represent others, in individual or class suits, against the settling defendants absent court approval. Neither may a defendant's attorney demand such a covenant absent court approval.

[179] *Cf.* Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970), *discussed in* 3 H. NEWBERG, *supra* note 167, at § 5020b.

[180] Of course, counsel may wish to delete class claims that were improvidently advanced. *See, e.g.*, Sutton v. National Distillers Prods. Co., 445 F. Supp. 1319 (S.D. Ohio 1978).

stage.[181] It provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed compromise shall be given to all members of the class in such manner as the court directs."[182]

It is now well-settled that named plaintiffs may not circumvent the necessity of obtaining court approval of any settlement or dismissal of class allegations by such simple expedients as amending the pleadings[183] or entering a voluntary dismissal of class claims prior to certification.[184] The more troublesome question is whether the language of Rule 23(3) relating to "notice of [any] proposed compromise" is mandatory.

Several commentators have urged that notice to class members should be discretionary.[185] While it is difficult to reconcile this view with the language of the rule,[186] recent decisions have adopted this "functional approach."[187] The apparent rationale of allowing no notice when the class is not yet certified is that "it is unlikely that absent class members actually rely upon uncertified class actions."[188] Furthermore, because the filing of class allegations tolls the statute of limitations for the benefit of the class,[189] "there is little danger of prejudice to the class . . . where there has been no class certification, [and] where the dismissal is without prejudice."[190]

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[181] 3 H. NEWBERG, *supra* note 167, at § 5020 (citing Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir.), *cert. denied,* 398 U.S. 950 (1970)).

[182] FED. R. CIV. P. 23(e).

[183] Yaffe v. Detroit Steel Corp., 50 F.R.D. at 481.

[184] Wallican v. Waterloo Community School Dist., 80 F.R.D. at 492.

[185] Almond, *Settling Rule 23 Class Actions at the Pre-Certification Stage: Is Notice Required?*, 56 N.C.L. REV. 303 (1978); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1797 (1972). *See also* O'Kelly, *supra* note 178; Forde, *Settlement of the Class Action*, 5 LITIGATION, Fall 1978, at 23.

[186] The argument would have to be made that the court's power to regulate the "manner" of giving notice provides the court with power to dispose of notice altogether.

[187] Wallican v. Waterloo Community School Dist., 80 F.R.D. at 493.

[188] O'Kelly, *supra* note 178, at 26. *But see* Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971).

[189] Crown, Cork & Seal Co. v. Parker 51 U.S.L.W. 4746 (U.S. June 14, 1983). American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

[190] Forde, *supra* note 185, at 24. *See also* Wallican v. Waterloo Community School Dist., 80 F.R.D. at 494, in which the court noted that "no danger of collusion between the parties or of a 'sell out' of the asserted class appears to be present here. Additionally,

Inasmuch as the court must approve any settlement or dismissal, the trial judge will have ample opportunity to weigh the need for notice against the potential costs, delay, and supervisory time.[191] Presumably the necessity for obtaining court approval before class claims are aborted will deter counsel from acting contrary to the interests of absent class members.

D. *Discovery and the Problem of Delay*

It has been said that "nowhere are the rules of discovery more susceptible to abuses and misapplication" than in class action litigation.[192] Boilerplate class allegations can serve as a launching pad for burdensome discovery directed at obtaining nuisance settlements.[193] By the same token, "[t]he defense lawyer eager to stall and break the will of named plaintiffs—and thus the class—is in especially good position to misuse willfully . . . discovery [on the merits, after certification] . . . aimed at [absent class members]."[194] The threat of discovery from absent class members may coerce "opt-outs" in so-called "spurious" class actions.[195] In addition, the delay and expense associated with wide-ranging discovery from class members may undermine the representative plaintiffs' lawsuit by a process of attrition.[196]

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it appears that this dismissal is well within any statute of limitations period so that . . . any putative class member may still bring suit upon the same controversy."

[191] *See* Muntz v. Ohio Screw Prods., 61 F.R.D. 396 (N.D. Ohio 1973).

[192] Gruenberger, *Discovery from Class Members: A Fertile Field for Abuse*, 4 LITIGATION, Fall 1977, at 35.

[193] See text and accompanying notes 152-64 *supra*.

[194] Gruenberger, *supra* note 192, at 35. Of course, precertification discovery directed at the resolution of "threshold issues concerning class certification" may also be dilatory. *Cf.* 1 H. NEWBERG, *supra* note 167, at § 1010.3f.

[195] *See* Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. at 720 (discussed in text accompanying notes 174-77 *supra*). *See also* United States v. Trucking Employers, Inc., 72 F.R.D. 101, 104 (D.D.C. 1976).

[196] *Cf.* Blackie v. Barrack, 524 F.2d 891, 907 n.22 (9th Cir. 1975):

> The district judge may reasonably control discovery to keep the suit within manageable bounds, and to prevent fruitless fishing expeditions with little promise of success . . . . We think procedures can be found and used which will provide fairness to the defendants and a genuine resolution of disputed issues while obviating the danger of subverting the class action with delaying and harassing tactics . . . .

For an account that could be subtitled "Discovery Wars," see Gruenberger, *supra* note 192, at 53.

Securities fraud class actions are the most likely candidates for defense demands for discovery from individual class members, since individual investor reliance and causation may be placed in issue.[197] Out of concern that the "representative" nature of the action and its efficiencies as a litigation vehicle not be subverted by "class" discovery, several courts have denied such discovery on the theory that absent class members are not "parties" to the lawsuit.[198] However, while Rule 23 does not designate absent class members "parties," it also does not say that they are *not* parties. If discovery is to be restricted, it ought to be restricted on some other, more pragmatic, ground.[199]

Accordingly, most courts now recognize that a decision to allow or disallow discovery from unnamed class members ought to turn on the need of the proponent of discovery, for information necessary to make its case, weighed against the competing interests of the class members in remaining "passive":

> The evolving view . . . seems to be that the court has the power . . . to permit reasonable discovery by way of interrogatories of absent class members when the circumstances of the case justify such action . . . . [The] party seeking such discovery must demonstrate its need for the discovery for purposes of trial of the issues common to the class, that the discovery not be undertaken with the purpose or effect of harassment of absent class members or of altering the membership of the opposing class, and that the interrogatories be restricted to information directly relevant to the issues to be tried . . . with respect to the class action aspects of the case . . . . *Discovery is not to be allowed as a matter of course . . . but only when the Court is satisfied that the required showing has been made.*[200]

By placing the burden of justifying discovery from unnamed absent class members on the proponent of the discovery, and by allowing only the least intrusive and least expensive discovery de-

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[197] *See* Fischer v. Wolfinbarger, 55 F.R.D. 129 (W.D. Ky. 1971).

[198] *See, e.g., id.* at 132.

[199] *See* Commonwealth of Pennsylvania v. Local Union 542, 507 F. Supp. 1146, 1160 (E.D. Pa. 1980) (argument that absent class members are not parties because FED. R. CIV. P. 23 does not designate them as such is "specious at best").

[200] United States v. Trucking Employers, Inc., 72 F.R.D. at 104 (emphasis added). *See also* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977) (collecting cases).

vice to be used, courts have exercised their inherent power to regulate the scope and methods of discovery. That power would be expressly "granted" in the new amendments to the Federal Rules of Civil Procedure aimed at curbing discovery abuse.[201]

CONCLUSION

This article has cataloged many of the ethical dilemmas that arise in the course of class action litigation as well as the tactical significance of perceived ethical violations. Frequently, alert defense counsel can exploit the misconduct of an opponent to defeat class certification or delay or defeat a class action by a process of attrition. All too often, courts encourage unproductive procedural maneuvering by refusing to certify actions for class treatment when other less drastic remedies are more appropriate.

Courts are now reassessing the significance of ethical misconduct in the prosecution of class actions in order to weigh the harm of particular abuses in light of the interests of absent class members. Moreover, many courts are questioning the propriety of defense contacts with class members, as well as class-wide discovery, to insure that absent class members will not be unfairly discouraged from exercising their right to participate as members of a class.

At the same time, certain changes in the Code of Professional Responsibility and the Rules of Civil Procedure have been proposed that may help eliminate abuses attributed to class action litigation without destroying the utility of Rule 23. Only time and continued experience will tell if these new approaches will "rehabilitate" the class action in the eyes of the bench, the bar, and the public.

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[201] *See* 51 U.S.L.W. 4501-02. Rule 26(b) provides the court with authority to limit the use of discovery if "(iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Moreover, Rule 26(g) mandates that every request for discovery be signed by counsel, whose signature certifies that the request is "(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . " *See also* Underwood, *supra* note 157, at 654-68.