

**McCurdy, Lauren**

---

**From:** Difuntorum, Randall  
**Sent:** Wednesday, October 28, 2009 11:11 AM  
**To:** avoogd@stanfordalumni.org  
**Cc:** linda.foy@jud.ca.gov; hbsondheim@verizon.net; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kemohr@charter.net; McCurdy, Lauren; martinez@lbbslaw.com; Jerome Sapiro Jr.; 'Ellen Peck (E-mail)'; 'Karpethics@aol.com'; Lee, Mimi; mtuft@cwclaw.com; Vapnek, Paul W.  
**Subject:** RRC November Assignment for III.K. Class Action Rule; III.L. Time Billing Rule  
**Attachments:** Proposed Rule 1.5 [4-200].pdf; 1-15 - Completed - Table - (NEW 06-03-09).pdf; Proposed Rule 1.7 [3-310].pdf; 2008-179b Gerald Phillip.pdf

Tony:

As the lead drafter for the Class Action Rule and Time Billing Rule, I want to let you know what is expected. Selected excerpts from Commission action summaries and Kevin's meeting notes are pasted below. You will see from the excerpts that these topics have been previously discussed, but that finality has not been reached. The concept of a Time Billing Rule should, in part, be reassessed in light the Commission's proposed Rule 1.5 [4-200] (re unconscionable fees, see attached) and proposed Rule 1.15 [4-100] (re trust accounts, see attached). The concept of a Class Action Rule should, in part, be reassessed in light of the comment language (Cmt. [32]) included in proposed Rule 1.7 [3-310] (re conflicts, see attached).

At the November meeting, the Commission will be working on all of the Batch 6 rules that the Board is scheduled to issue for public comment at the Board's January 2010 meeting. Batch 6 is set to be the last batch of rules to be issued for an initial public comment distribution. Any rule proposal, not already finalized, that is expected to be included in the Commission's final comprehensive report to the Board must make the train for Batch 6.

If you and the respective codrafters on a Class Action Rule or a Time Billing Rule are in agreement that the Commission should abandon consideration, then a simple email reporting that recommendation is all that is needed for the November agenda materials. If, on the other hand, the codrafters wish to bring forward a rule to be included in Batch 6, then a revised draft of the rule is needed together with an explanation of why the rule is desirable. The explanation should be consistent with the recent Commission practice of explaining rule amendment proposals to the Board in relation to the ABA Model Rules as representative of a national standard. For the moment, don't worry about Dashboards or comparison charts for a Class Action Rule or Time Billing Rule. The goal is to place a recommendation before the Commission as to whether a Class Action Rule or a Time Billing Rule should be pursued. Hope this helps clear up the assignment. –Randy D.

P.S.

Please include Diane Karpman on your Class Action Rule ( [Karpethics@aol.com](mailto:Karpethics@aol.com) ). For the Time Billing Rule, you might want to include Gerald Phillips ( [gphillips@plllaw.com](mailto:gphillips@plllaw.com) ) as he has written informal comment letters in support of a time billing rule (see attached letter from 2008).

SELECTED ACTION SUMMARY EXCERPTS:

**Honesty in Billing/Recording Time - Proposed New Rule – COMMISSION CONSIDERATION HISTORY (2001-2007)**

**5/2/03 Meeting:**

The Commission considered a recommendation for a proposed new rule submitted by Mr. Voogd, in consultation with the Chair. Mr. Voogd's recommendation presented the following discussion draft.

"Rule \_\_\_\_\_. Recording Time.

A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in whole or in part upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request."

The Chair asked for a discussion of whether the concept of this proposal should be pursued? Among the points raised during the discussion were the following:

- (1) As a disciplinary rule, there are interpretation problems that would need to be addressed by further drafting.
- (2) The Commission must determine whether this rule is needed given the legal profession's current industry practices.
- (3) Bus. & Prof. Code §6148(B) obviates the need for this rule.
- (4) The proposed standard of contemporaneous record-keeping would be impossible to meet in actual practice.
- (5) Consideration should be given to a different approach that focuses on the problem of falsified billing practices.
- (6) The proposal includes one component that is not addressed in existing authorities and that is a requirement for maintaining billing records. Rule 4-100 sets a records retention standard for trust account records but there is no comparable standard for billing records.
- (7) In evaluating this proposal, the Commission should review the State Bar Court's interpretation (in the Fonte case) of an attorney's duty to render an appropriate accounting.
- (8) Regarding assumptions about an onerous burden imposed by a contemporaneous record-keeping standard, medical doctors seem to have developed methods for similar documentation practices and this may be model for considering possible changes in law firm culture.
- (9) It is not uncommon to find, in both civil and State Bar matters, that lawyers and their clients have not kept or have destroyed billing records.

Following discussion, it was agreed that Mr. Voogd would consider all of the comments and prepare a revised recommendation. Ms. Peck volunteered to serve as back-up on the assignment.

#### **7/11/03 Meeting:**

Mr. Voogd presented his June 23, 2003 memorandum recommending a revised draft of a proposed new rule on "recording time." As the set forth in the memorandum, the proposed new rule would be as follows:

"Rule \_\_\_\_\_. Recording Time.

A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in upon the time expended by the member. Such records shall briefly describe the services provided and shall be founded upon written or electronic notations made at or about the time of the expenditure. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of five years."

In addition to Mr. Voogd's memorandum, members were directed to Ms. Peck's June 29, 2003 memorandum offering placement alternatives for rule language addressing "recording time." The alternatives were: (1) a new paragraph (C) in RPC 4-200; (2) a new standard to RPC 4-200 creating a presumptive violation of the rule; (3) a recommendation that the Board refer the matter to the State Bar Committee on Mandatory Fee Arbitration for consideration of an amendment to Bus. & Prof. Code §6148; (4) a recommendation that the Board refer the matter to the Judicial Council for consideration of an amendment to the California Rules of Court Standards for Judicial Administration; and (5) placement in a new "guidance" section to the RPC's. The Chair asked for a general discussion of whether the concept of the proposed new rule should be pursued. Among the points raised during the discussion were the following:

(1) Although the ABA report and other agenda materials make a compelling case for lawyer accountability issues in billing practices, it is still not clear whether the promulgation of a new RPC is the appropriate response to these issues.

(2) As a topic, billing procedures seems to fall into the category of law office management rather ethics.

(3) Assuming this would not be a stand alone rule, including this concept as an unconscionability factor under RPC 4-200 or as discussion text to that rule still seems to be out of place. The concept probably belongs in the Bus. & Prof. Code as part of the written fee agreement statute.

(4) In one sense, this issue is analogous to the question of 'how long to keep closed client files' because both are real world concerns in the practice of law that do not present an immediate satisfactory answer as a rule of professional conduct proposition.

(5) The anecdotal and other evidence of abuse should be taken as a given but implementation of a disciplinary standard as a remedy is a serious policy question.

(6) Bus. & Prof. Code §6148 addresses much of this concern and any new rule text should not be redundant of existing law.

(7) Billing fraud should be the target not billing practices.

(8) Billing fraud is covered by moral turpitude and criminal sanctions but clients are in need of protection against lazy and non-existent billing records. Absent clear and precise billing statements and records, how would a client know that they have been defrauded?

(9) An ethical obligation to generate and maintain billing statements is an appropriate topic for the rules because the concept is similar to the fiduciary trust account record-keeping standards already present in RPC 4-100.

(10) The PCLM case includes the proposition that billing records can be created after the fact.

(11) From the public's perspective, it should not be a bid deal to expect contemporaneous billing records from a professional service provider who charges by the hour. If contractors can provide a daily invoice then lawyers should be able to do so as well.

(12) The common practice of documenting billable hours to support court awarded fees is distinguishable from the instant issue because an across-the-board new rule on billing practices would intrude into the contractual relationship negotiated between nearly every attorney and client.

(13) In the legal services arena time records ordinarily are for the benefit of third-party payors rather than indigent clients.

(14) Estimated hours and rounded hours offend the general fiduciary duty of a lawyer to prefer a client's best interest over that of the lawyer's.

(15) From the perspective of State Bar prosecutorial discretion, billing issues are matters that may be diverted to fee arbitration or other civil remedies; however, if RPC 4-200 is changed from unconscionable to unreasonable fees then this could change.

(16) As a prohibition, unconscionability and RPC 4-200 are triggered by a complete failure in the billing relationship between lawyer and client. This is different from a standard intended as a general business practice guideline. Put another way, although charging an unreasonable fee can and should taint enforceability, it should not necessarily implicate discipline.

Following discussion, a consensus vote revealed that the Commission supported the concept of a “recording time” standard as a new component to be placed somewhere in the rules (rule text, discussion text, or Board adopted standard). The codrafters were asked to prepare a further draft and recommendation in accordance with the points raised in the discussion. Mr. Melchior was added as a new codrafter.

**9/5/03 Meeting:** Matter carried over.

**10/24/03 Meeting:** Matter carried over.

**2/20/04 Meeting:**

The Commission considered a February 5, 2004 revised draft of a proposed new rule on recording time. As an alternative to a new rule, it was suggested that a new factor be added to RPC 4-200 regarding factors to consider in determining whether a fee charged is unconscionable. It was also suggested that a records retention period be specified in the proposed new rule. After this brief discussion, the co-drafters were asked to prepare a redraft for the next meeting.

**5/7/04 Meeting:**

The Commission considered a March 25, 2004 memorandum by Mr. Voogd presenting a revised draft new rule. The Commission discussed possible options for variations on the concept Mr. Voogd’s

On a proposal to explore a new rule or rule amendment addressing honesty in billing practices (patterned on current rule 2-400 that requires a civil finding before any disciplinary sanction), the Commission voted 8 yes, 1 no, and 1 abstain.

Among the points raised in the course of the discussion were the following.

(1) The report from the ABA Solo Practice Section includes findings indicating public concerns that lawyers charge too much and are unwilling to account for fees and billing practices.

(2) Feedback offered at the 2004 State Bar Annual Ethics Symposium suggests a level of interest in self-regulating this area.

(3) It may be possible to address the asserted concerns under RPC 4-200 rather than in a new rule.

(4) The Commission should seek to establish necessary public protection standards but should not pander to public approbation of lawyers.

(5) Maintaining public confidence is a valid purpose of the RPCs.

- (6) Micro-managing billing is not an appropriate function of the RPCs. The rocky relations between insurance defense lawyers and insurance companies would likely be exacerbated by billing standards under penalty of State Bar discipline.
- (7) Billing fraud is difficult to prove in a civil matter. A new rule would be helpful.
- (8) Billing fraud is already covered by B&P Code sec. 6106.
- (9) Many excessive and double-billing claims are dependent upon the actual terms of the specific fee agreement at issue and the conduct of the lawyer and client in abiding (or not abiding) by those terms. A one size fits all standard that is successful in imposing certainty in these situations may be difficult to construct.
- (10) Law firm culture could be positively impacted by the State Bar's leadership role in cleaning-up billing practices that are tantamount to fraud. The Legislature has demonstrated an interest in reforming consumer protection in the hiring of lawyers.

### 8/27-28/04 Meeting:

The Commission considered an 8/1/04 draft suggested by Robert Sall, COPRAC Liaison. Mr. Voogd presented the background of the proposed new rule. The Commission considered a motion to defer any discussion of this proposal until the Commission considers RPC's 4-100 and/or 4-200. This motion passed by a vote of 5 yes, 0 no, and 3 abstain.

### SELECTED MEETING NOTES EXCERPTS:

\*Kehr  
Melchior  
Mohr  
Snyder  
VAPNEK

**A. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests**  
[anticipated 1 hour discussion or until completed]  
(Materials enclosed.) **[pages 1 – 20]**

### Materials prepared for/considered at meeting:

- 9/9/07 Kehr Cover Memo to Randy Difuntorum & Lauren McCurdy, cc Drafters [1]<sup>[1]</sup>
- Red-line Comment Draft 8.1 (9/9/07) compared to Draft 7 (8/6/07) [3-19]
- Rule Draft 5 (8/16/2006) (previously approved by RRC)
- 2/26/2007 Memo #2A from Drafters re Advance Waivers
- 2/26/2007 Memo from Drafters re Thrust-upon [Unforeseeable] Conflicts [includes *Gould v. Mitsui & Ass'n Bar of NYC Ethics Op. 2005-05*]
- Proposed Rule 1.7 paragraph re unforeseeable conflicts
- March 15, 2007 Richard Zitrin Memo to Leadership, cc to Randy Difuntorum & KEM (transmitted by Lauren McCurdy on 3/16/07): 51<sup>[2]</sup>
- September 5, 2007 Kehr E-mail to Drafters: 74
- September 9, 2007 Kehr E-mail to Staff, cc to Drafters: 75
- September 15, 2007 Kehr E-mail to Vapnek & Drafters: 75
- September 15, 2007 Kehr E-mail to Sondheim & Drafters: 75
- September 15, 2007 Kehr E-mail to Drafters: 76
- September 15, 2007 Sondheim E-mail to Kehr, cc to RRC: 76
- September 15, 2007 Sondheim E-mail to Kehr, cc Difuntorum & KEM: 76
- September 15, 2007 Kehr E-mail to Sondheim, cc to Difuntorum & KEM: 77
- September 16, 2007 Sondheim E-mail to Kehr, cc to Difuntorum & KEM: 77
- September 14, 2007 Difuntorum E-mail to Class Action Drafters & Leadership: 77
- September 14, 2007 KEM E-mail to Class Action Drafters & Leadership: 78
- September 14, 2007 Sondheim E-mail to Voogd, Class Action Drafters & Leadership:79
- September 16, 2007 Karpman E-mail to Sondheim, Class Action Drafters & Leadership:79
- September 16, 2007 Sondheim E-mail to Karpman, Class Action Drafters & Leadership:79

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- . September 16, 2007 Tuft E-mail to Voogd, Drafters & Leadership: 81
- . September 16, 2007 Sondheim E-mail to Voogd, Drafters & Leadership: 81
- . September 17, 2007 McCurdy E-mail to RRC: 81
- . September 17, 2007 Sondheim E-mail to RRC (including 9/16/07 Voogd E-mail to Class Action Drafters re comment [33]): 82
- . September 17, 2007 Karpman E-mail to Voogd, Class Action Drafters & Leadership: 83
- . September 17, 2007 Voogd E-mail to Karpman, Class Action Drafters & Leadership: 84
- . September 17, 2007 Ira Spiro E-mail to Class Action Drafters & Leadership: 84
- . September 18, 2007 Karpman E-mail to Class Action Drafters & Leadership: 85
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- . September 20, 2007 Voogd E-mail to RRC List: 86
  
- . September 21, 2007 Julien E-mail to RRC: 86
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- . September 22, 2007 Voogd E-mail to RRC List (transmitted by KEM): 86
- . September 23, 2007 Kehr E-mail to RRC: 87
- . September 23, 2007 Kehr E-mail to KEM: 88
- . September 23, 2007 KEM E-mail to Kehr: 88
- . September 23, 2007 Ira Spiro E-mail to RRC List: 90
- . September 24, 2007 Difuntorum E-mail to Rule 1.7 & Class Action Drafters: 90
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- . September 24, 2007 Voogd E-mail to Class Action Drafters: 91
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- . September 24, 2007 Kehr E-mail to KEM (Reply to September 23, 2007 KEM E-mail to Kehr:): 91
- . September 24, 2007 KEM E-mail to Kehr (Reply to September 24, 2007 Kehr E-mail to KEM:): 92
- . SUMMARY OF RECOMMENDATIONS/PROPOSALS RE COMMENT [25]: 93
  - . The Drafters (revised to incorporate Ira Spiro's Comments): 93
  - . Bob Kehr (revised to incorporate Ira Spiro's Comments): 93
  - . KEM (revised to incorporate Ira Spiro's Comments): 93
- . September 25, 2007 Kehr E-mail to RRC List<sup>[3]</sup>

## **ADVANCE WAIVERS**

\* \* \* \* \*

## **COMMENT [33]**

24. Comment [33]. Three different proposals:<sup>[4]</sup>

**The Drafters** (revised to incorporate Ira Spiro's Comments):

"[33] When a lawyer represents or seeks to represent a plaintiff class of plaintiffs or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [a] party opposing [a] party in a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."

**Bob Kehr**<sup>[5]</sup>

"[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the

class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.”

**KEM** (revised to incorporate Ira Spiro’s Comments):

“[33] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not ~~by reason of such status~~ considered to be clients of the lawyer for purposes of applying ~~part~~ (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client ~~which~~ who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

25. **MOTION** (Tony): Adopt last draft that appears on page 31 of the Class Action E-mail compilation (page 91 of 3-310 compilation).

“KEM (revised to incorporate Ira Spiro’s comments):” — limited to (a) and (c).

Friendly amendment: “For purposes of this Rule ...” [vs. limited to (a) and (c)], i.e., it would now provide:

“[33] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not ~~by reason of such status~~ considered to be clients of the lawyer for purposes of applying ~~part~~ (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client ~~which~~ who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

YES: 8 NO: 1 ABSTAIN: 2

- a. Bob: Does not like the proposal.
  - (1) Leaves out the idea that the lawyer *does* represent the named class representative.
  - (2) Also believes that the comment should apply to all paragraphs of the rule.
- b. Stan: Agrees.

26. **MOTION** [to address Bob’s concern at ¶.25(a)(1)]: Add in line 367 on page 16 of material to the beginning of comment [33]:

This Rule applies to a lawyer’s representation of named class representatives.

YES: 7 NO: 0 ABSTAIN: 3

27. **MOTION:** Add line 370 on page 16 of the Materials (page 14 of Memo):

A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

YES: 8      NO: 0      ABSTAIN: 3

28. **SUMMARY OF COMMENT [33] FOLLOWING PRECEDING VOTES:**

“[33] This Rule applies to a lawyer’s representation of named class representatives. For purposes of ~~paragraphs (a) and (c) of~~ this Rule, an unnamed current or potential member of a plaintiff class or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to get the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.”

# UNFORESEABLE (“THRUST UPON”) CONFLICT ISSUE

\* \* \* \* \*

\*\*\*\*\*

Randall Difuntorum  
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[1] Bracketed numbers are page numbers in 9/28-29/07 Meeting Materials.

[2] Numbers refer to page numbers in E-mail Compilation dated 8/20/07.

[3] This e-mail was circulated too late for inclusion in the e-mail compilation but was considered at the meeting.

[4] The drafters' and KEM's proposals are found in the e-mail compilation dated 9/24/07, at page 93. Please note that the comments in the compilation were incorrectly numbered “[25],” the number for the analogous ABA comment. The correct number in the RRC's draft is [33].

[5] From 9/25/07 Kehr E-mail to RRC List.



## McCurdy, Lauren

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**From:** Jerome Sapiro Jr. [jsapiro@sapirolaw.com]  
**Sent:** Wednesday, October 28, 2009 11:39 AM  
**To:** 'Ellen R. Peck'; Difuntorum, Randall  
**Cc:** avoogd@stanfordalumni.org; linda.foy@jud.ca.gov; hbsondheim@verizon.net; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kemohr@charter.net; McCurdy, Lauren; martinez@lbbslaw.com; Karpethics@aol.com; Lee, Mimi; mtuft@cwclaw.com; 'Vapnek, Paul W.'  
**Subject:** RE: RRC November Assignment for III.K. Class Action Rule; III.L. Time Billing Rule

Be careful, Ellen. Second prize for us may be two life sentences.

Seriously, I agree with Ellen that we should not resurrect the time billing rule.

Best to all,

Jerry

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-----Original Message-----

**From:** Ellen R. Peck [mailto:pecklaw@prodigy.net]  
**Sent:** Wednesday, October 28, 2009 11:26 AM  
**To:** Difuntorum, Randall  
**Cc:** avoogd@stanfordalumni.org; linda.foy@jud.ca.gov; hbsondheim@verizon.net; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kemohr@charter.net; McCurdy, Lauren; martinez@lbbslaw.com; Jerome Sapiro Jr.; Karpethics@aol.com; Lee, Mimi; mtuft@cwclaw.com; Vapnek, Paul W.  
**Subject:** Re: RRC November Assignment for III.K. Class Action Rule; III.L. Time Billing Rule

Tony:

While I am sympathetic to the concept of the proposed time billing rule, I think that we will not be able to reach consensus concerning a proposed standard. Therefore, as a member of the drafting team, I propose that we abandon the project. This issue can be taken up by the RRC II.

If you want to continue, I will support you. However, I think life is too short for this one. All the best, Ellen

Difuntorum, Randall wrote:

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> on the problem of falsified billing practices.  
>  
>  
>  
> (6) The proposal includes one component that is not addressed in  
> existing authorities and that is a requirement for maintaining billing  
> records. Rule 4-100 sets a records retention standard for trust  
> account records but there is no comparable standard for billing records.  
>  
>  
>  
> (7) In evaluating this proposal, the Commission should review the  
> State Bar Court's interpretation (in the Fonte case) of an attorney's  
> duty to render an appropriate accounting.  
>  
> (8) Regarding assumptions about an onerous burden imposed by a  
> contemporaneous record-keeping standard, medical doctors seem to have  
> developed methods for similar documentation practices and this may be  
> model for considering possible changes in law firm culture.  
>  
>  
>  
> (9) It is not uncommon to find, in both civil and State Bar matters,  
> that lawyers and their clients have not kept or have destroyed billing  
> records.  
>  
>  
>  
> Following discussion, it was agreed that Mr. Voogd would consider all  
> of the comments and prepare a revised recommendation. Ms. Peck  
> volunteered to serve as back-up on the assignment.  
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>  
> \*7/11/03 Meeting:\*  
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>  
> Mr. Voogd presented his June 23, 2003 memorandum recommending a  
> revised draft of a proposed new rule on "recording time." As the set  
> forth in the memorandum, the proposed new rule would be as follows:  
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>  
>  
> "Rule \_\_\_\_\_. Recording Time.  
>

>  
>  
> A member shall maintain accurate records of time expended on legal  
> services for a client where the member's fee is based in upon the time  
> expended by the member. Such records shall briefly describe the  
> services provided and shall be founded upon written or electronic  
> notations made at or about the time of the expenditure. Copies of  
> such records shall be provided to the client promptly upon request and  
> shall be maintained for a period of five years.”

>  
>  
>  
> In addition to Mr. Voogd's memorandum, members were directed to Ms.  
> Peck's June 29, 2003 memorandum offering placement alternatives for  
> rule language addressing "recording time." The alternatives were: (1)  
> a new paragraph (C) in RPC 4-200; (2) a new standard to RPC 4-200  
> creating a presumptive violation of the rule; (3) a recommendation  
> that the Board refer the matter to the State Bar Committee on  
> Mandatory Fee Arbitration for consideration of an amendment to Bus. &  
> Prof. Code §6148; (4) a recommendation that the Board refer the matter  
> to the Judicial Council for consideration of an amendment to the  
> California Rules of Court Standards for Judicial Administration; and  
> (5) placement in a new "guidance" section to the RPC's. The Chair  
> asked for a general discussion of whether the concept of the proposed  
> new rule should be pursued. Among the points raised during the  
> discussion were the following:

>  
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>  
> (1) Although the ABA report and other agenda materials make a  
> compelling case for lawyer accountability issues in billing practices,  
> it is still not clear whether the promulgation of a new RPC is the  
> appropriate response to these issues.

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>  
> (2) As a topic, billing procedures seems to fall into the category of  
> law office management rather ethics.

>  
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>  
> (3) Assuming this would not be a stand alone rule, including this  
> concept as an unconscionability factor under RPC 4-200 or as  
> discussion text to that rule still seems to be out of place. The  
> concept probably belongs in the Bus. & Prof. Code as part of the  
> written fee agreement statute.

>  
>  
>  
> (4) In one sense, this issue is analogous to the question of 'how long  
> to keep closed client files' because both are real world concerns in  
> the practice of law that do not present an immediate satisfactory  
> answer as a rule of professional conduct proposition.

>  
>  
>  
> (5) The anecdotal and other evidence of abuse should be taken as a

- > given but implementation of a disciplinary standard as a remedy is a
- > serious policy question.
- >
- >
- >
- > (6) Bus. & Prof. Code §6148 addresses much of this concern and any new
- > rule text should not be redundant of existing law.
- >
- >
- >
- > (7) Billing fraud should be the target not billing practices.
- >
- >
- >
- > (8) Billing fraud is covered by moral turpitude and criminal sanctions
- > but clients are in need of protection against lazy and non-existent
- > billing records. Absent clear and precise billing statements and
- > records, how would a client know that they have been defrauded?
- >
- >
- >
- > (9) An ethical obligation to generate and maintain billing statements
- > is an appropriate topic for the rules because the concept is similar
- > to the fiduciary trust account record-keeping standards already
- > present in RPC 4-100.
- >
- >
- >
- > (10) The PCLM case includes the proposition that billing records can
- > be created after the fact.
- >
- >
- >
- > (11) From the public's perspective, it should not be a bid deal to
- > expect contemporaneous billing records from a professional service
- > provider who charges by the hour. If contractors can provide a daily
- > invoice then lawyers should be able to do so as well.
- >
- >
- >
- > (12) The common practice of documenting billable hours to support
- > court awarded fees is distinguishable from the instant issue because
- > an across-the-board new rule on billing practices would intrude into
- > the contractual relationship negotiated between nearly every attorney
- > and client.
- >
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- >
- > (13) In the legal services arena time records ordinarily are for the
- > benefit of third-party payors rather than indigent clients.
- >
- >
- >
- > (14) Estimated hours and rounded hours offend the general fiduciary
- > duty of a lawyer to prefer a client's best interest over that of the
- > lawyer's.
- >



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>  
>  
> On a proposal to explore a new rule or rule amendment addressing  
> honesty in billing practices (patterned on current rule 2-400 that  
> requires a civil finding before any disciplinary sanction), the  
> Commission voted 8 yes, 1 no, and 1 abstain.  
>  
>  
>  
> Among the points raised in the course of the discussion were the  
> following.  
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>  
> (1) The report from the ABA Solo Practice Section includes findings  
> indicating public concerns that lawyers charge too much and are  
> unwilling to account for fees and billing practices.  
>  
>  
>  
> (2) Feedback offered at the 2004 State Bar Annual Ethics  
> Symposium suggests a level of interest in self-regulating this area.  
>  
>  
>  
> (3) It may be possible to address the asserted concerns under  
> RPC 4-200 rather than in a new rule.  
>  
>  
>  
> (4) The Commission should seek to establish necessary public  
> protection standards but should not pander to public approbation of  
> lawyers.  
>  
>  
>  
> (5) Maintaining public confidence is a valid purpose of the RPCs.  
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>  
>  
> (6) Micro-managing billing is not an appropriate function of  
> the RPCs. The rocky relations between insurance defense lawyers and  
> insurance companies would likely be exacerbated by billing standards  
> under penalty of State Bar discipline.  
>  
>  
>  
> (7) Billing fraud is difficult to prove in a civil matter. A  
> new rule would be helpful.  
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>  
>  
> (8) Billing fraud is already covered by B&P Code sec. 6106.  
>  
>  
>

> (9) Many excessive and double-billing claims are dependent  
> upon the actual terms of the specific fee agreement at issue and the  
> conduct of the lawyer and client in abiding (or not abiding) by those  
> terms. A one size fits all standard that is successful in imposing  
> certainty in these situations may be difficult to construct.

> (10) Law firm culture could be positively impacted by the State  
> Bar's leadership role in cleaning-up billing practices that are  
> tantamount to fraud. The Legislature has demonstrated an interest in  
> reforming consumer protection in the hiring of lawyers.

> \*8/27-28/04 Meeting:\*

> The Commission considered an 8/1/04 draft suggested by Robert Sall,  
> COPRAC Liaison. Mr. Voogd presented the background of the proposed  
> new rule. The Commission considered a motion to defer any discussion  
> of this proposal until the Commission considers RPC's 4-100 and/or  
> 4-200. This motion passed by a vote of 5 yes, 0 no, and 3 abstain.

> SELECTED MEETING NOTES EXCERPTS:

> \*Kehr

> Melchior

> Mohr

> Snyder

> VAPNEK \*A. Consideration of  
> Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the  
> Representation of Adverse Interests\*

> [anticipated 1 hour discussion or until completed]

> (Materials enclosed.) \*/[pages 1 - 20]/\*

> \*Materials prepared for/considered at meeting:\*

> . 9/9/07 Kehr Cover Memo to Randy Difuntorum & Lauren  
> McCurdy, cc Drafters [1]^^[1] <#\_ftn1>

> . Red-line Comment Draft 8.1 (9/9/07) compared to Draft

> 7 (8/6/07) [3-19]  
>  
> . Rule Draft 5 (8/16/2006) (previously approved by RRC)  
>  
> . 2/26/2007 Memo #2A from Drafters re Advance Waivers  
>  
> . 2/26/2007 Memo from Drafters re Thrust-upon  
> [Unforeseeable] Conflicts [includes /Gould v. Mitsui/ & Ass'n Bar of  
> NYC Ethics Op. 2005-05]  
>  
> . Proposed Rule 1.7 paragraph re unforeseeable conflicts  
>  
> . March 15, 2007 Richard Zitrin Memo to Leadership, cc  
> to Randy Difuntorum & KEM (transmitted by Lauren McCurdy on 3/16/07):  
> 51^^[2] <#\_ftn2>  
>  
> . September 5, 2007 Kehr E-mail to Drafters: 74  
>  
> . September 9, 2007 Kehr E-mail to Staff, cc to  
> Drafters: 75  
>  
> . September 15, 2007 Kehr E-mail to Vapnek &  
> Drafters: 75  
>  
> . September 15, 2007 Kehr E-mail to Sondheim &  
> Drafters: 75  
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> . September 15, 2007 Kehr E-mail to Drafters: 76  
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> . September 15, 2007 Sondheim E-mail to Kehr, cc to  
> RRC: 76  
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> . September 15, 2007 Sondheim E-mail to Kehr, cc  
> Difuntorum & KEM: 76  
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> . September 15, 2007 Kehr E-mail to Sondheim, cc to  
> Difuntorum & KEM: 77  
>  
> . September 16, 2007 Sondheim E-mail to Kehr, cc to  
> Difuntorum & KEM: 77  
>  
> . September 14, 2007 Difuntorum E-mail to Class Action  
> Drafters & Leadership: 77  
>  
> . September 14, 2007 KEM E-mail to Class Action Drafters  
> & Leadership: 78  
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> . September 14, 2007 Sondheim E-mail to Voogd, Class  
> Action Drafters & Leadership:79  
>  
> . September 16, 2007 Karpman E-mail to Sondheim, Class  
> Action Drafters & Leadership:79  
>  
> . September 16, 2007 Sondheim E-mail to Karpman, Class  
> Action Drafters & Leadership:79  
>

> . September 16, 2007 Karpman E-mail to Sondheim, Class  
> Action Drafters & Leadership:80  
>  
> . September 16, 2007 Sondheim E-mail to Karpman, Class  
> Action Drafters & Leadership:80  
>  
> . September 16, 2007 Voogd E-mail to Class Action  
> Drafters & Leadership: 80  
>  
> . September 16, 2007 Tuft E-mail to Voogd, Drafters &  
> Leadership: 81  
>  
> . September 16, 2007 Sondheim E-mail to Voogd, Drafters  
> & Leadership: 81  
>  
> . September 17, 2007 McCurdy E-mail to RRC: 81  
>  
> . September 17, 2007 Sondheim E-mail to RRC (including  
> 9/16/07 Voogd E-mail to Class Action Drafters re comment [33]): 82  
>  
> . September 17, 2007 Karpman E-mail to Voogd, Class  
> Action Drafters & Leadership: 83  
>  
> . September 17, 2007 Voogd E-mail to Karpman, Class  
> Action Drafters & Leadership: 84  
>  
> . September 17, 2007 Ira Spiro E-mail to Class Action  
> Drafters & Leadership: 84  
>  
> . September 18, 2007 Karpman E-mail to Class Action  
> Drafters & Leadership: 85  
>  
> . September 18, 2007 Melchior E-mail to Class Action  
> Drafters & Leadership: 85  
>  
> . September 18, 2007 Karpman E-mail to Class Action  
> Drafters & Leadership: 85  
>  
> . September 20, 2007 Voogd E-mail to RRC List: 86  
>  
>  
> . September 21, 2007 Julien E-mail to RRC: 86  
>  
> . September 21, 2007 Tuft E-mail to RRC: 86  
>  
> . September 22, 2007 Voogd E-mail to RRC List  
> (transmitted by KEM): 86  
>  
> . September 23, 2007 Kehr E-mail to RRC: 87  
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> . September 23, 2007 Kehr E-mail to KEM: 88  
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> . September 23, 2007 KEM E-mail to Kehr: 88  
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> . September 23, 2007 Ira Spiro E-mail to RRC List: 90

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> . September 24, 2007 Difuntorum E-mail to Rule 1.7 &  
> Class Action Drafters: 90  
>  
> . September 24, 2007 Kehr E-mail to Rule 1.7 & Class  
> Action Drafters: 90  
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> . September 24, 2007 Voogd E-mail to Class Action  
> Drafters: 91  
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> . September 24, 2007 Sapiro E-mail to RRC: 91  
>  
> . September 24, 2007 Kehr E-mail to KEM (Reply to  
> September 23, 2007 KEM E-mail to Kehr:): 91  
>  
> . September 24, 2007 KEM E-mail to Kehr (Reply to  
> September 24, 2007 Kehr E-mail to KEM:): 92  
>  
> . SUMMARY OF RECOMMENDATIONS/PROPOSALS RE COMMENT  
> [25]: 93  
>  
> . The Drafters (revised to incorporate Ira Spiro's  
> Comments): 93  
>  
> . Bob Kehr (revised to incorporate Ira Spiro's  
> Comments): 93  
>  
> . KEM (revised to incorporate Ira Spiro's Comments): 93  
>  
> . September 25, 2007 Kehr E-mail to RRC List^^[3] <#\_ftn3>  
>  
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> \*\_ADVANCE WAIVERS\_\*  
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> \*\_COMMENT [33]\_\*  
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> 24. Comment [33]. Three different proposals:^^[4] <#\_ftn4>  
>  
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>  
> \*\_The Drafters\_\* (revised to incorporate Ira Spiro's Comments):  
>

> “[33] When a lawyer represents or seeks to represent a plaintiff  
> class of plaintiff\_s\_ or defendants class in a class-action  
> lawsuit, whether before or after certification of the class, unnamed  
> members of the class are [ordinarily] not by reason of such status\_\_  
> considered to be clients of the lawyer for purposes of applying  
> part\_(a)(1) of this Rule. Thus, in that situation the lawyer does  
> not [typically] need to get the consent of such a person before  
> representing a client which who is adverse to that [suing the]  
> person in an unrelated matter. Similarly, a lawyer seeking to  
> represent a[n] party opposing [nent in] a class action does not  
> [typically] need the consent of any unnamed member of the class whom  
> the lawyer represents in an unrelated matter in order to do so.”

> \*Bob Kehr\*<sup>5</sup> <#\_ftn5>

> “[33] For purposes of this Rule, a lawyer who represents a plaintiff  
> class or a defendant class in a class-action lawsuit, whether before  
> or after certification of the class, represents the named class  
> representatives. For purposes of this Rule, the lawyer does not, by  
> reason of the representation of a class, represent unnamed members of  
> the class. A lawyer representing a class may owe civil duties to  
> unnamed class members, and this Comment is not intended to alter those  
> civil duties in any respect.”

> \*\_KEM\_\* (revised to incorporate Ira Spiro’s Comments):

> “[33] When a lawyer represents or seeks to represent a class of  
> plaintiff\_s\_ or defendants in a class-action lawsuit, unnamed  
> members of the class are [ordinarily] not by reason of such status\_\_  
> considered to be clients of the lawyer for purposes of applying  
> part\_(a)(1) of this Rule. For purposes of paragraphs (a) and (c)  
> of this Rule, an unnamed current or potential member of a plaintiff  
> class of plaintiffs or defendant class in a class-action lawsuit  
> is not, by reason of that status, a client of a lawyer who represents  
> or seeks to represent the class. Thus, in that situation the  
> lawyer does not [typically] need to get the consent of such a person  
> before representing a client which who is adverse to that [suing  
> the] person in an unrelated matter. Similarly, a lawyer seeking to  
> represent a[n] party opposing [nent in] a class action does not  
> [typically] need the consent of any unnamed member of the class whom  
> the lawyer represents in an unrelated matter in order to do so.”

> 25. \*\_MOTION\_\* (Tony): Adopt last draft that appears on page 31  
> of the Class Action E-mail compilation (page 91 of 3-310 compilation).

> “KEM (revised to incorporate Ira Spiro’s comments):” – limited to (a)  
> and (c).

> Friendly amendment: “For purposes of this Rule ...” [vs. limited to  
> (a) and (c)], i.e., it would now provide:

>  
> “[33] When a lawyer represents or seeks to represent a class of  
> plaintiff\_s\_ or defendants in a class-action lawsuit, unnamed  
> members of the class are [ordinarily] not \_by reason of such status\_  
> \_considered to be clients of the lawyer for purposes of applying  
> \_part\_(a)(1) of this Rule. \_For purposes of paragraphs (a) and (c)  
> of this Rule, an unnamed current or potential member of a \_\_plaintiff  
> \_class of plaintiffs \_or defendant \_\_class \_\_in a class-action lawsuit  
> is not, by reason of that status, a client of a lawyer who represents  
> or seeks to represent the class. \_Thus, \_in that situation \_the  
> lawyer does not [typically] need to get the consent of such a person  
> before representing a client which \_who \_\_is adverse to that\_ [suing  
> the] person in an unrelated matter. Similarly, a lawyer seeking to  
> represent a[n] \_party \_oppos\_ing\_\_ \_[nent in]a class action does not  
> [typically] need the consent of any unnamed member of the class whom  
> the lawyer represents in an unrelated matter \_in order to do so\_.”

>  
> YES: 8 NO: 1 ABSTAIN: 2

> a. Bob: Does not like the proposal.

> (1) Leaves out the idea that the lawyer /does/ represent the  
> named class representative.

> (2) Also believes that the comment should apply to all  
> paragraphs of the rule.

> b. Stan: Agrees.

> 26. \*\_MOTION\_\* [to address Bob’s concern at ¶.25(a)(1)]: Add in  
> line 367 on page 16 of material to the beginning of comment [33]:

> This Rule applies to a lawyer’s representation of named class  
> representatives.

> YES: 7 NO: 0 ABSTAIN: 3

> 27. \*\_MOTION\_\*: Add line 370 on page 16 of the Materials (page  
> 14 of Memo):

> A lawyer representing a class may owe civil duties to unnamed class  
> members, and this Comment is not intended to alter those civil duties  
> in any respect.

> YES: 8 NO: 0 ABSTAIN: 3

>  
>  
> 28.           \*\_SUMMARY OF COMMENT [33] FOLLOWING PRECEDING VOTES\_\*:  
>  
> “[33]        \_This Rule applies to a lawyer’s representation of named  
> class representatives.  \_For purposes of paragraphs (a) and (c) of  
> this Rule, an unnamed current or potential member of a plaintiff class  
> or defendant class in a class-action lawsuit is not, by reason of that  
> status, a client of a lawyer who represents or seeks to represent the  
> class.  Thus, the lawyer does not need to get the consent  of such a  
> person before representing a client who is adverse to that person in  
> an unrelated matter.  Similarly, a lawyer seeking to represent a party  
> opposing a class action does not need the consent of any unnamed  
> member of the class whom the lawyer represents in an unrelated matter  
> in order to do so.\_  A lawyer representing a class may owe civil  
> duties to unnamed class members, and this Comment is not intended to  
> alter those civil duties in any respect.\_”

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> \*\_UNFORESEABLE (“THRUST UPON”) CONFLICT ISSUE\_\*

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> ^^[1] <#\_ftnref1> Bracketed numbers are page numbers in 9/28-29/07  
> Meeting Materials.

>  
> ^^[2] <#\_ftnref2> Numbers refer to page numbers in E-mail Compilation  
> dated 8/20/07.

>  
> ^^[3] <#\_ftnref3> This e-mail was circulated too late for inclusion  
> in the e-mail compilation but was considered at the meeting.

>  
> ^^[4] <#\_ftnref4> The drafters' and KEM's proposals are found in the  
> e-mail compilation dated 9/24/07, at page 93. Please note that the  
> comments in the compilation were incorrectly numbered "[25]," the  
> number for the analogous ABA comment. The correct number in the RRC's  
> draft is [33].

>  
> ^^[5] <#\_ftnref5> From 9/25/07 Kehr E-mail to RRC List.

>  
  
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## McCurdy, Lauren

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Tuesday, April 07, 2009 1:07 PM  
**To:** Anthonie Voogd; Jerome Sapiro; Raul L. Martinez; Diane Karpman  
**Cc:** Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr  
**Subject:** RRC - CLASS ACTION RULE - Materials  
**Attachments:** RRC - Class Act - KEM Meeting Notes - CUMUL (04-06-09).pdf; RRC - Class Act - E-mails, Etc. - REV (09-30-07)2.doc

Greetings drafters - Tony, Raul, Jerry & Diane:

As members of the drafting committee, I'm sending you an e-mail with materials I have concerning the proposed "Class Action" Rule. Tony is lead drafter.

I've attached the following:

1. My cumulative meeting notes from meetings at which the class action rule or concerns re class actions were considered, in PDF. Most of the notes are excerpts from the discussion of Rule 1.7 and its comment on class action conflicts.
2. An E-mail Compilation that includes all the RRC's class action-related correspondence of which I'm aware.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

I believe that Raul might have some additional research on this Rule in the event the drafting team determines it should be pursued.

**Finally, please note that this Rule is not calendared until the December 2009 meeting.**

However, some of you have requested being provided with the relevant materials in the interim.

Please let me know if you have any questions. Thanks,

Kevin

--

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**RRC – Class Action Rule – CUMULATIVE**  
**April 7 & 8, 2006 KEM Meeting Notes re Rule 1.7 [3-310]**

\* \* \*

10. **Tony's Comments** (3/14/2006 Memo to RRC).<sup>1</sup>
- a. Tony #1. "Direct conflicts of the type described in MR 1.7(a)(2) (personal interest of the lawyer) should be included."
    - (1) Sean: Direct conflicts – are covered in 1.7(d)(4).
    - (2) Tony: Problem in that it is disclosure rule, not a prohibition.
  
  - b. Tony #2. "The aggregate settlement prohibition of Rule 3-310(D) should be included."
    - (1) KEM: They will appear as 1.8.7 (MR 1.8(g)).
  
  - c. Tony #3. "With regard to footnote 12 and the reference to motions to disqualify it seems to me that we should ignore the secondary consequences of the rule in drafting it. Our charge is to draft disciplinary rules, not rules of civil procedure. Comment [2] of Rule 1.0 describes the effect of the rule on disqualification: "A violation of [a] Rule may have other non-disciplinary consequences." But we undertake too much if we propose to puzzle out all those consequences, including protection of the integrity of the trial process."
    - (1) Sean: Already spoke to this. We will address this later.

- d. Tony #4. Class Actions need to be addressed.
  - (1) Harry: Tony will investigate this further with Ellen and Diane. Also Mark will be involved.
  - (1) Mark: Is comment [33] intended to speak to class action conflicts? There are many conflicts situations.
  - (2) Bob: Not intended to be the only rule on this.
  - (3) Harry: Tony will lead investigation on this. Subcommittee can send drafts to Richard Zitrin.
  - (4) Mark: Need to at a minimum cross-reference FRCP 23.
  - (5) **CLASS ACTION DRAFTING TEAM**: Tony (lead drafter), Ellen, Mark, Diane.

\* \* \*

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<sup>1</sup> At page 24 of 4/4/2006 E-mail compilation.

\* \* \*

13. **Note 15.** *Re Comment [33].* Waiting for information from Class Action drafting team.
- a. Harry: Tony is lead. Have something for us by the next meeting.
  - b. Also on team: Peck, Tuft.

\* \* \*

\*Voogd,  
Peck,  
Tuft

I. **Class Action Subcommittee – Report & Recommendations**  
[anticipated ½ hour discussion]  
(Materials enclosed.) **[pages 207 – 216]**

**Materials prepared for/considered at meeting:**

- August 15, 2006 Tuft E-mail to Drafters (8/29/06 E-mail compilation at p. 1)
- August 16, 2006 Diane Karpman E-mail to Drafters re Pre-certification (2)
- August 16, 2006 Diane Karpman E-mail to Drafters re Fee Splitting (3)
- August 16, 2006 Diane Karpman E-mail to Drafters re Disclosure Requirements (4)
- August 16, 2006 Diane Karpman Memo to Drafters re Process (5)
- August 28, 2006 Diane Karpman Memo re Substantive Issues in "Aggregate Litigation" (8)
- August 29, 2006 Ira Spiro E-mail/Memo to RRC (14)

1. Tony: We have a large amount of material but no recommendations on a proposed rule.
  - a. The more he analyzes this, the more he is convinced that the resolution of this issue comes down to the attorney-client relationship.
  - b. As a practical matter, there is no client, and the matter is solely within the control of the lawyer. Where is the A-C relationship?
  - c. Involved in VISA litigation. All that was done is that costs were imposed on VISA, which eventually will be imposed on the customers, purportedly represented, who got nothing.
2. Diane: In Cal., we have aggregate litigation, and also look to fed class action.
  - a. Representative litigation is the only way that some folks have any representation in the legal system, e.g., prisoner litigation.
  - b. This is entrepreneurial litigation – lawyer-run, etc. – and lawyers don't have a good idea of their duties.
    - (1) "Clienthood" is a big issue here.
3. Tony: Based on the materials we have seen, should we go forward with a class action rule?
4. Mark: Diane's memo re process is a good roadmap as to how to approach this problem.
  - a. If Diane can get us a the tentative draft that the ALI was considering, that would be a good first step. See page 213 of the materials.
  - b. Can't conceive of a separate class action rule.
  - c. Rather, more likely that it would involve comments in the rules already in existence.

**RRC – Class Action Rule – CUMULATIVE  
September 1, 2006 KEM Meeting Notes**

- d. Becky will look for class action materials in the ABA Ethics 2000 material.
  
- 5. Kurt: Has had a lot of experience with class actions since 1971. Also belongs to ALI's consultant group on aggregate litigation.
  - a. The real issues are settlement of class actions and benefit to the class members.
  - b. Concern re payoffs to class representatives, who purportedly are fiduciaries.
  - c. Those issues have been ignored by ALI.
  - d. We need to address this; California is the 6<sup>th</sup> largest economy in the world and we have a lot of this litigation.
  - e. Judges sign off on settlements to get it out of the court.
  - f. Class actions have been very valuable instruments in prisoner suits, desegregation suits, and overcharge cases, etc.
  
- 6. Harry: Do you want a separate rule or do you want to deal with this by a pervasive method?
  - a. Kurt: Thinks the committee should explore this and come up with a more definitive recommendation.
  - b. Tony: Agrees with that approach – will view that as subcommittee's "sailing orders".
  
- 7. Bob: Not clear on what the subcommittee is supposed to do.
  
- 8. Ellen: Can have a group of rules that apply at pre-certification stage, and another group that applies at post-certification stage.
  - a. Need to do a "blended" approach to the rules.

- |  |
|--|
| <ul style="list-style-type: none"><li>9. Harry: Kurt can work with the class action subcommittee.<ul style="list-style-type: none"><li>a. Kurt: Depends on time constraints in practice.</li></ul></li></ul> |
|--|

- |  |
|--|
| <ul style="list-style-type: none"><li>10. Bob: Make statement on the web site to the effect that we have not considered the rules' possible effect on class actions.<ul style="list-style-type: none"><li>a. Harry: So deemed.</li><li>b. Randy &amp; Kevin will work on this.</li></ul></li></ul> |
|--|

**RRC – Class Action Rule – CUMULATIVE**  
**August 24-25, 2007 KEM Meeting Notes re Rule 1.7 [3-310]**

\* \* \*

34. **Comment [33] & note 22.**

- a. Harry: If class action team (Tony, Ellen, Dom & Diane) does not provide language before the next meeting, this language will become part of the Rule.

\* \* \*

\* \* \*

### **COMMENT [33]**

24. Comment [33]. Three different proposals:<sup>2</sup>

**The Drafters** (revised to incorporate Ira Spiro's Comments):

"[33] When a lawyer represents or seeks to represent a plaintiff class of ~~plaintiffs~~ or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."

**Bob Kehr**<sup>3</sup>

"[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect."

**KEM** (revised to incorporate Ira Spiro's Comments):

~~"[33] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."~~

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<sup>2</sup> The drafters' and KEM's proposals are found in the e-mail compilation dated 9/24/07, at page 93. Please note that the comments in the compilation were incorrectly numbered "[25]," the number for the analogous ABA comment. The correct number in the RRC's draft is [33].

<sup>3</sup> From 9/25/07 Kehr E-mail to RRC List.

**RRC – Class Action Rule – CUMULATIVE**  
**September 28-29, 2007 KEM Meeting Notes re Rule 1.7 [3-310]**

25. **MOTION** (Tony): Adopt last draft that appears on page 31 of the Class Action E-mail compilation (page 91 of 3-310 compilation).

~~“KEM (revised to incorporate Ira Spiro’s comments):” – limited to (a) and (c):~~

Friendly amendment: “For purposes of this Rule ...” [vs. limited to (a) and (c)], i.e., it would now provide:

~~“[33] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get obtain the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a[n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”~~

YES: 8      NO: 1      ABSTAIN: 2

- a. Bob: Does not like the proposal.
- (1) Leaves out the idea that the lawyer *does* represent the named class representative.
  - (2) Also believes that the comment should apply to all paragraphs of the rule.
- b. Stan: Agrees.

26. **MOTION** [to address Bob’s concern at ¶.25(a)(1)]: Add in line 367 on page 16 of material to the beginning of comment [33]:

This Rule applies to a lawyer’s representation of named class representatives.

YES: 7      NO: 0      ABSTAIN: 3

**RRC – Class Action Rule – CUMULATIVE**  
**September 28-29, 2007 KEM Meeting Notes re Rule 1.7 [3-310]**

27. **MOTION:** Add line 370 on page 16 of the Materials (page 14 of Memo):

A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

YES: 8      NO: 0      ABSTAIN: 3

28. **SUMMARY OF COMMENT [33] FOLLOWING PRECEDING VOTES:**

“[33] This Rule applies to a lawyer’s representation of named class representatives. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to get-obtain the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.”

\* \* \*

\* \* \*

45. **Comment [34].**

[34] This Rule applies to a lawyer’s representation of named class representatives in a class action, whether or not the class has been certified.<sup>4</sup> For purposes of this Rule, an unnamed ~~current or potential~~ member of a plaintiff ~~class~~ or a defendant class ~~in a class action lawsuit~~ is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to obtain the consent of ~~such a person~~ an unnamed class member before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed class member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

- a. OCBA: Does not question the comment’s accuracy but argues this topic is too complex to be covered here.
- b. Bob: Make some minor drafting changes – **see above.**

c. Harry: Deemed approved.
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<sup>4</sup> **KEM Note:** At the 9/28-29/07 meeting, the RRC approved the first sentence as it appeared in the Public Comment Draft. It had been presented with the language that Bob suggests adding but did not vote to include it. See 9/28-29/07 KEM Meeting Notes, III.A., at ¶. 26. This should be called to the attention of the members in the 10-day Ballot, just a simple note calling their attention to it. I don’t think there is a problem with adding it.



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**August 16, 2009 Voogd Memo to RRC:**

The communications set out below from Mark Tuft and Diane Karpman admirably identify rules and considerations involving class actions. My class action concerns arise out of my experiences as a member of various classes. Each of these actions settled following a pattern. No effort had been made by class counsel to resolve the matter complained of prior to filing suit. Class counsel were handsomely rewarded in the settlements. Members of the class got nothing or essentially nothing. Defendants were willing to pay large settlements against weak claims simply to avoid the ever-growing costs of defense. Large amounts of scarce judicial resources were wasted litigating the cases and I suspect the judges approved the settlements to end the waste. In the last class action, I got zero (not even a worthless coupon or some phony injunctive relief) while class counsel got \$1.5 million.

Our system of legal ethics is founded upon the protection of the professional relationship between attorneys and his clients. Yet class actions proceed in circumstances where the relationship for all practical purposes is non-existent. Is this a problem that should be addressed by a rule of professional conduct or is the problem inherent in class action law?

**August 15, 2006 Tuft E-mail to Drafters:**

Dear fellow Class Action Subcommittee Members:

Here is my humble contribution for our assignment under Item III.J for the September 1 meeting.

1. The rules in Batch 1 that I believe raise possible class action issues are proposed rules 7.1, 7.2, 7.3, 2-200 and possible 1.4 (3-500 and 3-510)
  - a. The primary issue is the interplay between the advertising and solicitation rules and court's ability under FRCP 23 to control communications with potential class representatives and class members. In my experience, the means by which a lawyer is able to attract lead plaintiffs and potential class members and the extent to which courts can control a lawyer's communications prior to class certification are issues that frequently face potential class counsel. As one example, I was involved in a case several years ago where the complaint alleged wage and hour violations on behalf of temporary employees, permanent employees and middle managers and supervisors of the defendant company. Plaintiffs counsel sought to communicate with potential class members in each of the three proposed subclasses after the case was file and before the case was certified as a class action. Company counsel claimed (among other things) that counsel's letters and email communications to middle managers and supervisors violated rule 1-400(B)(2)(b) [proposed rule 7.3(b)(3)]. I am not convince, however, that the issue of how the rule applies in pre-class certification communications warrants a separate comment. Note that proposed rule 7.2, Cmt [4] already picks up Model Rule 7.2, Cmt. [4] that rules 7.2 and 7.3 are not intended to prohibit communications authorized by law, although we struck the phrase: "such as notice to members of a class in class action litigation."
  - b. A separate issue is whether class counsel from different firms must comply with rule 2-200 (1.5(e)) in arrangements for sharing awards of attorney's fees in class action cases. Rest.3d section 47, Cmt. h. states that ". . . agreements governing how any fee award will be divided ordinarily do not violate this Section, provided that the division is in

proportion to the services performed by each firm or each firm assumes joint responsibility for the representation." Would the same apply to rule 2-200 as proposed? The comment further provides that where the agreement provides for payment that are disproportionate to the services performed or funds advanced, or for a distribution that differs from what the court determine, disclosure should be made to the court, who may set it aside. See, FPI/Agretech Securities Litigation (9th Cir. 1997) 105 F3d 469 - court has power to set aside agreements between class counsel.

- c. Does rule 1.4 apply to communications with class members (in contrast to class representatives, who are clearly clients)? See, e.g., *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir 1973) - lawyer's duty to ensure that class members receive proper notice of proposed settlement.
2. In Batch 2, rules 2-100, 3-310 and 3-600 raise possible class action issues. In the example above, defense counsel also claimed the communications with the company's middle managers also violated rule 2-100. On the other hand, defense counsel is not free to communicate directly with class members. See Rest.3d section 99, Cmt. I. Again, I am not recommending that a separate comment is needed to address the application of the rule in class action cases.
- a. Rule 3-600 and rule 3-310 pose different issues - is a class an organization? I don't think so. Nevertheless, is there a duty on the part of the lawyer when the lawyer knows or reasonably should know that a class member or potential class member reasonably believes the lawyer is providing that person with legal services and advise. See Rest. 3d. section 14 and Cmt f. ("Class actions may pose difficult questions of client identification." See Rest.3d section 99, Cmt I - members of the class are considered "clients" of class counsel once the class has been certified for purposes of the "anti-contact" rule.
  - b. Model Rule 1.7, Cmt [25] provides that putative class members are not considered clients for purposes of representing adverse interests under rule 1.7(a)(1). However, Rest.3d section 128, Cmt d(iii) discusses the issue of representing class members with competing objectives and interests and the procedural remedy of creating subclasses. Qualification of class counsel is typically determined under FRCP 23 standards and case law.
  - c. Another issue involves the application of the aggregate settlement rule under 3-310(D). Class action settlements typically require class notice and court supervision. There is a protocol for class members objecting to the proposed settlement. Rest.3d Section 125, Cmt f. addresses some of the personal interest conflicts of interest in initiating and settling class actions and other multi-client matters. For example, the comment addresses conflicts in setting and negotiating class counsel's fee.

Let me know what you think of this survey.

**August 16, 2006 Diane Karpman E-mail to Drafters re Pre-certification:**

Dear Colleagues:

Mark suggested that pre-certification communications does not require a separate rule or mention.

I would suggest otherwise, and do not believe that reliance on the "unless otherwise authorized by law" takes care of the problem. Actually, reliance upon that section, only further complicates a murky issue for CA lawyers (see citation from Parris, below).

"Otherwise authorized by law" suggests to a lawyer that they must obtain pre-communication approval by the court, which is true just about everywhere else but in California (see Parris below). Note, that Parris relied upon Justice Mosk's expansive interpretation of the CA Constitution in Gerawan Framing, 24 Cal. 4th 468, in which he maintained that the CA Constitution grants vastly greater free speech rights than the US Constitution. So it is again, uniquely Californian.

There are 3 Major Law Review Articles on Pre-Cert. Communications, which I can't put my hands on right now, but I maintain a separate file for this topic alone -- because it is such a repeat player.

I would think that if CA was vastly different on an ethics issue than the rest of the United States of America, that maybe that should justify some mention?

Very Best,

Diane

### **Parris v. Superior Court (2003) 109 Cal.App.4th 285**

"In the only published decisions addressing the propriety of precertification notice to potential class members, two Courts of Appeal have upheld the role of the trial court in screening the content of the proposed notice and authorizing the communication only if the court determines "there is no specific impropriety." ( Atari, supra, 166 Cal. App. 3d at pp. 870-871; Howard Guntz Profit Sharing Plan v. Superior Court (2001) 88 Cal.App.4th 572, 575-576, 105 Cal. Rptr. 2d 896 (Howard Guntz).) In Howard Guntz Division Four of this court held leave of court was required before a notice could be sent to potential class members in order to identify a new class representative after the original class representative had been found inadequate. ( Id. at pp. 575-576.) The court concluded the necessity to regulate class action proceedings trumped free speech concerns, holding: "Plaintiffs contend that since their communication with potential class members is protected commercial speech under the First Amendment, the only limitation is that it not be false, misleading, or deceptive. (See Shapero v. Kentucky Bar Assn., supra, 486 U.S. at p. 472 [108 S. Ct. at p. 1921 ].) We disagree. In the context of a class action, it is the court's authority and duty to exercise control over the class action to protect the rights of all parties, and to prevent abuses which might undermine the proper administration of justice. (See Gulf Oil Co. v. Bernard[(1981)] 452 U.S. [89,] 100-103 [101 S. Ct. at pp. 2200-2201].)" ( Id. at p. 581.) Accordingly, it held that precertification communications are properly subject to prior court approval: " Precertification communication carries the potential for abuse. Thus, any 'order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.' [Citation.] The trial court should identify the potential abuses and weigh them against the rights of the parties under the circumstances. [Citation.]" ( Howard Guntz, supra, 88 Cal.App.4th at p. 580.)

C. Requiring Judicial Approval for Precertification Communications Constitutes an Impermissible Prior Restraint of Protected Speech (6a)

We respectfully disagree with the free speech analysis of our colleagues in Division Four. n5 The requirement of court approval for precertification communications is a classic example of a prior restraint on speech. ( Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 554 [95 S. Ct. 1239, 43 L. Ed. 2d 448] [prior restraint on speech exists if in order to engage in protected speech, (1) advance approval of the government is required, (2) the approval depends on affirmative action by a government official and such action requires the exercise of judgment, and (3) the government official may render that judgment based on the content of the speech].) "

**August 16, 2006 Diane Karpman E-mail to Drafters re Fee Splitting:**

Mark raises the issue of fee splits among firms in a class action. This is a major issue especially because fees are a primary issue in the Class Action Fairness Act of 2005. Pursuant to Rule 23, the Court in the fairness hearing has special duties to verify that, the class received benefit from the lawyers performance.

And, this creates significant problems in practice. If fees are based upon performance, then what happens is that firms will churn cases, take needless depositions, and have employee's that unnecessarily engage in acts in order to substantiate the eventual fee applications.

Yet you cannot escape the fact that these cases need to be funded, and lawyers like anyone else expect to recover on their investments.

These are tough issues.

**August 16, 2006 Diane Karpman E-mail to Drafters re Disclosure Requirements:**

One of the reasons that I believe there should be a separate rule for Class Actions is that the paradigm of litigation is entirely different.

The court acts as a fiduciary for the absent class members (Cal Pak), a lawyer has enhanced duties of honesty, that are similar to Bankruptcy Court.

If a lawyer was asked a question by a court then ordinarily he may be able to deflect the inquiry; whereas if the client asked the question....total and complete honesty would be expected. So if the court steps into the shoes of the client- greater disclosures are mandated. None of the folderol that could occur in the context of a typical court proceeding would be permitted.

So for example, in a well known bankruptcy case, a lawyer was criminally convicted for misrepresenting the existence of a conflict to a bankruptcy court. This is the John Gellene case where a Millbank partner was sent to prison, for 3 instances of failing to disclose a conflict in a bankruptcy proceeding. That level of enhanced honesty is also present in class actions, where like bankruptcy lawyers have greater duties. Actually the ALI is focusing upon bankruptcy cases as a sort of model for the Principles project.

Now, it would probably be a good idea if we let lawyers know about this because often-- they don't have a clue. Especially with the Class Action Fairness Act, court's are directed to become more aggressive in requesting lawyers to disclose information.

Court's often have to be reminded of their amplified obligations, they just can't approve a settlement but are required to investigate thoroughly. The reason that they have to fully evaluate the "deal" is because it is not unheard of for defendant's to cook up "sweetheart deals." They will assist plaintiff's counsel in being appointed as lead counsel if a proposed settlement is reached at a certain price.

You can't very well tell the defense counsel-- don't protect your client, allow the class action to be brought, allow the stock prices to decrease due to the disclosure on SEC (10 Q's or 10 K's), allow your client to be harmed. Yet, agreeing to a collusive settlement is--well I think that you all understand the problems.

**August 16, 2006 Diane Karpman Memo to Drafters re Process:**

### **CLASS ACTION PROCESS OPTIONS**

There are at least three options that we could discuss in terms of process with the Commission. We could suggest an entirely separate rule designed to govern lawyer conduct in aggregate litigation or class actions.<sup>1</sup> We could tweak each Rule that causes a problem. (See states that have employed this method below.) A third option would be to provide lawyers with as sort of generic band aid, which would indicate that the rules are not applied in a "knee jerk" manner in class actions. Each of the three methods is considered below, and of course you may have different suggestions or solutions.

#### **Separate Distinct Rule**

This was suggested at the final meeting of the American Law Institute *Restatement of the Law of Lawyers*, by Professor Roger Cramton in 1998.<sup>2</sup> It was unsuccessful because many others felt that drafting a new section would further delay the process, and the ten-year process needed closure. The American Law Institute is currently drafting a publication titled, "Principles of Aggregate Litigation."<sup>3</sup> The Members Consultant Group will be meeting on October 14, 2006 in Philadelphia. Several ethics lawyers are involved, and some of them think that this may take care of the holes in the *Restatement of the Law of Lawyers*.<sup>4</sup>

This separate Rule was also suggested by Richard Zitrin to the Ethics 2000 Commission both in written and in oral testimony to the commission. Professor Nancy Moore discusses the position that the Commission took on this proposal in her *Uni. of Ill. Law Review*. Consider:

"Zitrin did not propose any specific language at all, but rather urged the adoption of an ethics rule directly addressing representation of a class, utilizing existing case law as a

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<sup>1</sup> The American Law Institute is employing this term as opposed to "class actions." They believe it is all encompassing.

<sup>2</sup> Full disclosure, I voted for this proposal.

<sup>3</sup> I am attempting to obtain electronic versions of their tentative drafts for all of us.

<sup>4</sup> The Restatement has 32 sections that mention "class actions." I have a copy of an old Westlaw search, but it was scanned and is illegible. I am certain many other sections consider issues involving aggregate settlements.

basis for determining the content of such a rule. Testimony of Richard Zitrin before the Ethics 2000 Commission, *supra* note \_\_\_\_\_. Aside from its lack of specificity, I have two problems with the Zitrin approach. First, I do not believe that the nuances of class action law can be adequately captured in code format. See Moore, *supra* note [21] ("code format may be insufficiently flexible to adequately communicate the duties of class counsel"). Second, I believe that the obligations of class action counsel toward the members of the class should be codified or otherwise formulated by those who draft, interpret and apply the rules of civil procedure, as well as the constitutional underpinnings of class action law, and not by those who draft, interpret and apply the rules of professional ethics. See *infra* [Part IV]."

Also consider:

"Waid proposed a new Model Rule 3.10 as follows: Rule 3.10.

Responsibility of Class Counsel

The lawyer representing a class of individuals in a class action owes a primary duty of loyalty to members of the class defined by the original pleadings filed on behalf of the class, until such definition is amended by leave of court."<sup>5</sup>

### **Tinkering with Specific Rules**

Incidentally, that is what California has done in the past, see Rule 3-510, and Rule 3-310 (D), Official Discussion.

"Although no state has adopted a separate class action rule, several states have adopted additional language in either the text or comments to the rules regarding various aspects of class action litigation: none of these additions are comprehensive. See, e.g., Indiana Rules of Prof'l Conduct, Rule 7.3(d) (adopting provision similar to solicitation exception provision of Model Code); Kansas Rules of Prof'l Conduct, Rule 7.3(b) (same); Mass. Rules of Prof'l Conduct, Rule 1.7, Comment [14A] (regarding simultaneous representation of two class actions against a single defendant and the lawyer's duty to consider whether the creation of subclasses is required); Rule 3.3, Comment [16] (applying duty of candor in *ex parte* proceeding to joint petitions to a tribunal, including a joint petition to approve a class action settlement); North Dakota Rules of Prof'l Conduct, Rule 1.8(g) (specifically exempting class actions from coverage under aggregate settlement rule); Texas Rules of Prof'l Conduct, Rule 1.02 Comment 3 (stating as an exception to rule that it is for client to accept or reject settlements the ability of a class action lawyer to recommend settlement over the objections of named plaintiffs). Jurisdictions that follow the Model Code format typically retain the provision allowing limited solicitation in class actions. See, e.g., Iowa Code of Prof'l Responsibility DR 2-104. California's rules, which are not based on either the Model Code or the Model Rules, has a single reference to class actions. See California Rule 3-510 (regarding communication of settlement offer to a client, defining "client" to refer to the named representatives of a class in a class action)."<sup>6</sup>

In addition to CA Rule 3-510, we have 3-310 (D)'s statement in the Official Discussion, "Paragraph (D) is not intended to apply to class action settlements subject to court approval." Note that some have suggested that since, this part of 3-310 specifically

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<sup>5</sup> Moore, Nancy J., "Who Should Regulate Class Action Lawyers?" University of Illinois Law Review, No. 5, p. 101. 2003.

<sup>6</sup> Moore, Nancy J., "Who Should Regulate Class Action Lawyers?" University of Illinois Law Review, No. 5, p. 101. 2003.

exempts class action settlements, that inferentially the other aspects of the Rule, and possibly other rules would apply. (Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road* (1995) 80 Cornell L.Rev. 1159, 1193.)

### **Overall Band Aid**

There is lots of authority that the Rules in Class Action are not applied in a knee jerk manner. I don't quite know where this would go in the grand scheme of things. But we could include a proviso that in aggregate or class litigation, axiomatic application of the rules is not mandated. Consider:

"Koniak, supra note \_\_\_\_ at 1121 ("off-made remark"). See also, e.g., *In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 19 (2d Cir. 1986) ("the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J. concurring) ("courts' cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context"); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999) (citing and quoting both *Agent Orange* and Judge Adams's concurring opinion in *Corn Derivatives*)."<sup>7</sup>

Or, consider the authority to not apply the conflict of interest rules in a formalistic manner:

"For judicial recognition that conflicts of interest rules cannot be simplistically applied to class actions, see, for example, *In re Austrian and German Bank Holocaust Litigation*, 317 F.3d 91, 102 (2d Cir 2003) (quoting *In re "Agent Orange" Products Liability Litigation*); *Lazy Oil Co v Witco Corp*, 166 F.3d 581, 589-90 (3d Cir 1999); *Bash v Firstmark Standard Life Insurance Co*, 861 F.2d 159, 161 (7th Cir 1988) (noting that "strict application of rules on attorney conduct that were designed with simpler litigation in mind might make the class-action device unworkable in many cases"); *In re "Agent Orange" Products Liability Litigation*, 800 F.2d 14, 18-19 (2d Cir 1986) (noting that "the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 163 (3d Cir 1984) (Adams concurring) (noting that "traditional model cannot be carried over unmodified to the class action arena, since no clear allocation of decision-making responsibility has emerged between the attorney and class members"). Academic commentators also acknowledge that class actions present special problems. See, for example, Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *Fordham L Rev* 71, 127 (1996) ("The conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules."); Brian J. Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct*, 27 *Loyola L Rev* 1047, 1048-49 (1981) (noting that ethics rules provide inadequate guidance for class actions)."<sup>8</sup>

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<sup>7</sup> Moore, Nancy J. (2003) "Who Should Regulate Class Action Lawyers?" *University of Illinois Law Review*, No. 5, p. 101, at footnote 8.

<sup>8</sup> Sorry, I do not have a cite for this.

August 28, 2006 Diane Karpman Memo re Substantive Issues in “Aggregate Litigation”:

## REPRESENTATIVE LITIGATION CONSIDERATIONS

### Introduction<sup>1</sup>

This memo is intended to highlight some of the issues we may want to be considering with class actions, mass torts, multi-district, representative, share holder derivative, or what the America Law Institute is labeling as "aggregate litigation."<sup>2</sup> This would involve concepts that generally fall within Federal Rule of Civil Procedure 23.

Representative litigation is entrepreneurial and "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions."<sup>3</sup>

"Class counsel thus has potential duties in three directions: to the named plaintiffs, to the absent class members, and to the "public interest." The primary problem with identifying any one of these as *the* client is that none can be said to exercise control over class counsel . . . If anyone controls the lawyer, it is the court, which does so for the benefit of the class."<sup>4</sup>

### Clienthood<sup>5</sup>

This is a critical issue, because it shades all the other difficult issues presented in aggregate litigation. If some consensus can be reached on this issue, then many cases, which seem inconsistent with the Rules, are capable of explanation.

Consider:

"Class Counsel" or "lead counsel" lacks a traditional attorney-client relationship with each class member, but nevertheless is in a fiduciary relationship with the members of the class. Thus, "while lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class."<sup>6</sup>

A traditional attorney-client relationship would exist between lead counsel and lead

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<sup>1</sup> Thank you Ira Spiro, who maybe the best editor.

<sup>2</sup> Last year the American Law Institute issued a preliminary draft of the Principles of Aggregate Litigation. The next meeting of the Members Consultant Group for that draft publication is October 14, 2006.

<sup>3</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1450. Citing to *Greenfield v. Villager Industries* 483 F. 2d 824, 832 n. 9 (3<sup>rd</sup> Cir. 1973).

<sup>4</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1453.

<sup>5</sup> This term is employed by Professor Ted Schneyer to explain how clients and lawyers have different expectations and duties depending on the case. For example, if a client's case involves family law or criminal issues, they justifiably expect full obligations and duties. Where if the client is a member of a thousand plus person class, and does not know that such a class exists, then it is questionable if they have any expectations.

<sup>6</sup> *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867, 879; see also *In re McKesson HBOC, Inc. Securities Litigation* (N.D.Cal. 2000) 126 F. Supp. 2d 1239, 1245.

plaintiffs, since communications would exist that would engender expectations.<sup>7</sup> Even when a lawyer disclaims the relationship, the court in representative litigation can nevertheless create the relationship based on the expectations of a prospective client.<sup>8</sup>

The existence or non-existence of an attorney-client relationship may be based, on the type of action or relief being sought. For instance, there are numerous disqualification motions that deny disqualification of counsel based on a conflict of interest, since conflicts are anticipated in representative litigation due to the sheer size or volume of the prospective client pool. Whereas, if the claim involves professional negligence vis-a-vis-a-vis-a-vis the standard of care, then the duty of competent performance extends to every member of the class.<sup>9</sup>

MR 1.7, Comment [25] to Model Rule 1.7 provides as follows:

"[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter."<sup>10</sup>

Written fee agreements, rarely exit and even if a named plaintiff has executed an agreement, it will not bind the absent class members or the court.<sup>11</sup>

### **Communications**

In addition to Rule 3-510, communications with the prospective or actual members of the class are regulated more aggressively outside of California. Some maintain that pre-certification, a potential member is not a party<sup>12</sup> within the penumbra of the anti-contact rule. National authority permits such contact as long as a district court is monitoring, pursuant to the court's duty and authority to issue appropriate orders.<sup>13</sup> California construes communications with prospective class members to be constitutionally protected speech. Therefore, a blanket requirement for prospective approval of an intended communication would constitute an impermissible prior restraint on freedom of speech, absent evidence of abuse or confusion.<sup>14</sup>

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<sup>7</sup> This is consistent with Rule of Professional Conduct 3-510, which mandates the communication of settlement offers to lead plaintiffs.

<sup>8</sup> *Barton v. U.S. Dist. Court for Central Dist. of Cal.* (9th Cir. 2005) 410 F. 3d 1104.

<sup>9</sup> *Janick v. Rudy, Exelrod & Zieff* (June 22, 2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>10</sup> Added by the Ethics 2000 Commission, and adopted by the House of Delegates, February 2002.

<sup>11</sup> *Long Beach City Employees Assn., Inc. v. City of Long Beach* (1981) 120 Cal. App. 3d 950, 959, 172 Cal. Rptr. 277.

<sup>12</sup> In Rule 23 class action, pre certification communication by defense counsel with prospective members is generally permitted, "because no attorney client relationship exists." *Babbitt v. Albertson's Inc.*, 1993 U.S. Dist. LEXIS 18801 (N.D.Cal. 1993); *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867.

<sup>13</sup> *Gulf Oil Co., et al. v. Bernard, et al.* (1981) 452 U.S. 89.

<sup>14</sup> *Parris v. Superior Court* (May 29, 2003) 109 Cal. App. 4<sup>th</sup> 285. This case specifically disagreed with *Howard Guntz Profit Sharing Plan v. Superior Court* (Greenwood) (2001) 88 Cal. App. 4<sup>th</sup> 572. In *Parris*, the court relied on the California Constitution, with grants broader free speech rights.

The right or possibility of communicating with prospective class claimants becomes crucially important in the application of the advertising or solicitation rules. In federal class actions, direct contact with potential members of the class is permitted, and not considered to be improper solicitation.<sup>15</sup> Solicitation regulations have been known to "give way to the interests of the class."<sup>16</sup>

In addition to the always relevant issue of plaintiff's lawyers satisfaction of the adequacy requirement, a lawyer may want to contact potential claimants prior to certification:

- A. To notify them that the class is pending, that they need to preserve evidence, and that there may be tolling of the Statute of Limitations for filing an individual action,<sup>17</sup> in order to investigate facts as to both class certification and merits issues, to locate new class representatives if the named plaintiff's are unsuitable, either because they are not "adequate" or not "typical" of the class, or are not "adequate" as a fiduciaries for the class.
- B. The courts have held that a plaintiff's lawyer may conduct discovery to locate new class representatives, if the court has concluded that the class could otherwise not be certified.<sup>18</sup> Additional contact can be justified to solicit new clients with a similar fact pattern, in case a class is not certified, or to prepare a list of class members for the notice program.<sup>19</sup>
  1. Other prospective plaintiff's lawyers or firms may attempt to compete in contact with prospective claimants to garner the largest number of plaintiffs in their client pool, before the appointment of lead counsel. The number of plaintiffs represented by counsel, can be a factor considered by the court in the appointment of lead counsel.<sup>20</sup>
- C. Defendant's lawyers may want to contact potential claimants prior to certification to investigate the claim as to class certification and the merits, to develop an affirmative defense, and to settle with the named plaintiff or with the potential class.
- D. Defense lawyers may also contact in order to "pick off" specific class members or a named plaintiff. This will not terminate the claims of other claimants in California.<sup>21</sup> Defendant's may attempt to contact prospective claimants to encourage them to opt-out.
  1. Wage and Hour cases present special problems, because an employer can

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<sup>15</sup> *Gulf Oil Co., et al. v. Bernard, et al.* (1981) 452 U.S. 89.; *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867.

<sup>16</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1457.

<sup>17</sup> Mitchell Bruce, Class Actions California (2005). The entire section of reasons is drawn from this publication.

<sup>18</sup> *Budget Finance v. Superior Court* (McDowell) (1973) 34 Cal. App. 3d 794; *La Sala v. American Savings & Loan Association* (1971) 5 Cal. 3d 864, 874; *Best Buy v. Superior Court* (2006) 137 Cal. App. 4<sup>th</sup> 772.

<sup>19</sup> Defendants can be required to provide this information, and pay the cost of the lists.

<sup>20</sup> This is particularly true in securities class actions, and required by the Private Securities Litigation Reform Act of 1995.

<sup>21</sup> *Kagan v. Gibraltar Savings & Loan Association* (1984) 35 Cal. 3d 582. Note, in *Gulf*, (fn. 13), it was the plaintiff's lawyers contact that was restricted.

intimidated employees, take their declarations to use against them in the litigation, threaten that the business will fail, etc. In FLSA cases, prospective plaintiffs may "opt-in" to create an attorney-client relationship.<sup>22</sup>

### Adequacy or Competency

Competency or adequacy of counsel is at all stages of the litigation subject to review and close monitoring by the court. Class counsel is subject to a "heightened standard."<sup>23</sup> "Adequacy" and "competency" in general have the same definition<sup>24</sup> which is substantially greater than the minimum level of conduct which results in discipline.<sup>25</sup>

- A. The courts are mandated to aggressively and closely scrutinize the qualifications of class counsel.<sup>26</sup> This has historically increased from Rule 23 cases; to the Private Securities Litigation Reform Act (1995); to and including the Class Action Fairness Act (2005).
- B. A determination of adequacy is a two-pronged test, involving the evaluation of plaintiff and counsel in terms of their ability to represent the interests of the group. The major focus today is on the adequacy of counsel. Some factors which are considered in the evaluation of adequacy:
  1. Prior experience in other cases: "Affidavits submitted to the district court show experience prosecuting dozens of high profile class action cases and products liability litigation."<sup>27</sup>
  2. Past acts are appropriate to consider in determining whether an attorney is competent to satisfy the adequacy requirement of representation for class or lead counsel.<sup>28</sup>
  3. The attorney's ethics in handling the class suit and other matters, such as the manner of solicitation and conflicts of interest are relevant considerations in determining the adequacy of counsel.<sup>29</sup>
  4. In addition to performance, which would fall within the penumbra of a lawyer's standard of care,<sup>30</sup> other fiduciary-like duties are anticipated and owed to class members. Thus, having the capacity to communicate with the entire class can be important.
  5. In order to satisfy these obligations, it is important that lead counsel have the financial, physical, and staff resources to fund, supervise, and monitor the litigation. This requires considerable financial resources, committed staff, who

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<sup>22</sup> *Parks v. Eastwood*, 235 F. Supp. 2d 1082 (2002).

<sup>23</sup> *Cal Pak Delivery, Inc. v. United Parcel Service* (1997) 52 Cal. App. 4<sup>th</sup> 1.

<sup>24</sup> *Davis v. Apple* 2005 Cal. App. Unpub. Lexis 7190.

<sup>25</sup> *Hawk v. Superior Court (People)* (1974) 42 Cal. App. 3d 108.

<sup>26</sup> *Cal Pak Delivery, Inc. v. United Parcel Service* (1997) 52 Cal. App. 4<sup>th</sup> 1.

<sup>27</sup> *Hanlon v. Chrysler Corporation* (1998) 150 F. 3d 1011, 1021.

<sup>28</sup> *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1996) 52 Cal. App. 4<sup>th</sup> 1.

<sup>29</sup> Schwarzer, Tashima, Wagstaffe: (2000) California Practice Guide Federal Civil Procedure Before Trial, Rutter Group, Chapter 10 (C).

<sup>30</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

are capable of dealing with and communicating with large numbers of class members, and in some cases, the physical strength to oversee the administration of the case.

6. Generally, "until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession."<sup>31</sup>
- C. Class counsel can be sued for violations of the standard of care,<sup>32</sup> or the standard of conduct<sup>33</sup> which are not faux collateral attacks on litigated issues.<sup>34</sup> Therefore, "collateral attack upon a judgment entered in a class actions on the ground that the interests of the absent class members were not adequately represented" is permitted.<sup>35</sup>
1. In order to avoid subsequent claims of professional negligence, counsel should bring the potential alternative claim to the attention of lead plaintiff, or if it involves a duty owed to the absent class members, guidance from the court may be sought.<sup>36</sup>
  2. A certification order does not excuse or ameliorate the duty of competency.<sup>37</sup>

### **Conflicts**

Conflicts are anticipated and endemic in representative litigation, because there can be thousands of claimants. "Every class action presents a potential conflict-of-interest problem."<sup>38</sup> Some courts and authorities take the position that the Rules do not apply in representative litigation.<sup>39</sup>

Examples of the conflicts, other than those that exist inherently within the class, include: suing a current client; prior relationships with a named defendant; the concurrent representation of individual claims<sup>40</sup> and the class; settlements driven by collusion; the simultaneous negotiation of fees and the claim; subsequent representation of class dissidents as objectors; and lawyers/staff/ friends/family acting as lead plaintiffs.

The conflicts rules are substantially relaxed in class actions and are not applied in a knee jerk manner. For example, it could be "virtually impossible" to obtain client consent<sup>41</sup> from the entire class, although the class notice process furnishes a constructive consent. Yet, authorities have suggested that since Rule 3-310 (d) specifically exempts class actions, that inferentially

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<sup>31</sup> *Dolgow v. Anderson* (1968, ED NY) 43 F.R.D.472, from ALR, 16 A.L.R. Fed 883.

<sup>32</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>33</sup> *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1996) 52 Cal. App. 4<sup>th</sup> 1.

<sup>34</sup> Unsuccessful objectors have been known to refashion their claims into standard of care/conduct issues.

<sup>35</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>36</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>37</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>38</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1247. The article maintains that conflicts of interest are acute in representative litigation.

<sup>39</sup> Herbert B. Newberg, Special Conflicts of Interest Rules Apply in Class Actions, 10 No. 5, Verdicts, Settlements, & Tactics, 149, May 1990.

<sup>40</sup> These are common and logical, since the lawyer is often made aware of the potential class claim by a single claimant.

<sup>41</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1451.

the other aspects of Rule 3-310 apply.<sup>42</sup> Some practitioners will satisfy the requirement of consent, by obtaining it from lead plaintiff, or in the alternative, after full disclosure to the court, often in an adequacy determination.<sup>43</sup>

- A. **Fees:** Professor Moore compellingly argues that this topic does not properly fit within 1.7, and should be addressed within the context of 1.5. The "Conflict-of-interest rules do not purport to regulate circumstances that are common to *all* lawyers, but only circumstances that are unique to *particular* lawyers."<sup>44</sup>

Because all lawyers and all clients could have a conflict as to fees, it is generic and not within the parameters of 1.7. It is an "unavoidable" conflict, as opposed to one involving a specific lawyer.

- B. **Loyalty:** Inadvertently suing a former or current client is a possibility, particularly in large actions. Therefore, per se disqualification is not applied. In one case, denial of pro hac vice status occurred because the defendant objected, and was not considered "an obscure member of a large class."<sup>45</sup>

1. In the "fairness" hearing some class members, and even lead plaintiffs, may object to the settlement. Lead counsel has been permitted to continue to represent some of the members in objecting to the settlement.<sup>46</sup>
2. Loyalty is compromised where the lawyer has a personal interest or relationship with the lead plaintiff. Close relationships in business, husbands, sisters in laws, or partners in law firms have resulted in disqualification of lead counsel.<sup>47</sup>
3. Counsel, can file the action as a place holder, and in the litigation require that defendant provide information regarding more suitable plaintiffs.<sup>48</sup>

### **Other Issues**

Simultaneous negotiations of settlement and attorney fees; advocate witness; fees and coupon settlements; restrictions on future cases; referral fees or fee splits; and enhancement fees paid to lead plaintiff; copy-cat litigation.

Diane Karpman,  
August 28, 2006

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<sup>42</sup> Carrie Menkel-Meadow, Ethics and the Settlement of Mass Torts: When the Rules Meet the Road (1995) 80 Cornell L.Rev. 1159, 1193. She suggests that consent could be presumed from silence, but that such a presumption would require a rule change in California, which requires consents to be in writing.

<sup>43</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1456.

<sup>44</sup> Moore, Nancy, Who Should Regulate Class Actions Lawyers? 2003 U. Ill. L. Rev. 1477.

<sup>45</sup> *Fuchs v. Schick*, 2002 U.S. Dist. LEXIS 6212 (S.D.N.Y. April 10, 2002).

<sup>46</sup> *Lazy Oil Co. v. Witco Corp.* 166 F. 3d 581 (3d Cir. 1999); *In Re Agent Orange Prod. Liab. Litigation*, 800 F. 2d 14 (2d Cir. 1986); c.f. *In Re: Corn Derivatives Antitrust Litigation*, 748 F. 2d 157 (3<sup>rd</sup> Cir. 1984), *Banyai v. Mazur*, 2004 U.S. Dist. LEXIS 17572.

<sup>47</sup> *Petrovic v. Amoco Oil Co.* 200 F. 3d 1140 (8<sup>th</sup> Cir. 1999).

<sup>48</sup> *Best Buy v. Superior Court* (2006) 137 Cal. App. 4<sup>th</sup> 772.

**August 29, 2006 Ira Spiro E-mail/Memo to RRC:**

To: Members, COMMISSION FOR REVISION OF RULES OF PROFESSIONAL CONDUCT  
(Pardon me if you receive this twice. I wasn't sure what email address to use.)  
From: Ira Spiro  
Date: August 28, 2006  
Re: SOME COMMENTS FROM THE TRENCHES ON PROFESSIONAL CONDUCT RULES  
AND CLASS ACTIONS

I truly regret I will not be able to attend the September 1 hearing of the Commission. That day I have to attend a deposition in - a class action. As I think most of you know, my law firm's practice is devoted entirely to representing plaintiffs and classes in class actions and the similar type of proceeding under the Fair Labor Standards Act, representative actions, also called collective actions. Most of our cases are for wages and wage-related claims.

(FLSA representative actions are in many ways similar to class actions. The most important differences are that persons other than the initial named plaintiffs, in order to be included in an FLSA representative action, must file with the court a consent to become what the FLSA calls a "party plaintiff," a term that is not defined in the statute, and really not in the cases either. A corollary is that while "absent class members" are included in a class action unless they "opt-out," "absent class members" in an FLSA representative action must "opt-in" to be included.)

I also regret I have not been able to continue my participation in work of the Commission, as I did in the first year or so. I truly was not able. Because of that, some of my comments here might not take into account the Commission's work and its proposed revised rules.

I have found that in class actions unusual problems arise in application of the Rules of Professional Conduct, so I agree with the idea included in the memo by Diane Karpman, that there should be a rule or comment that the rules may apply differently in aggregate or class litigation than in other contexts.

However, that is vague and is not enough. Also, just saying this does not explain why such a rule or comment is needed. It seems to me that can only be done by specific examples dealing with specific rules.

I do believe there is a need to include language in specific rules to address problems particular to class actions. (When I say "class actions," I mean to include representative actions under the Fair Labor Standards Act.)

**I. SOLICITATION**

An issue that arises a great deal in wage class actions is claims, or fears of claims, of pre-certification solicitation by the named plaintiff(s) of co-workers. The fear is that it will be claimed that the named plaintiff solicited other clients for the plaintiff's attorneys. But the plaintiff certainly has a right to talk to co-workers, and former employees, about the case, especially under California's broadly interpreted free speech rights, as exemplified in the Parris case.

So when a named plaintiff talks to a co-worker about the case, there is a fine line, or maybe lack of a line, because there is no record of what is said. Some class action lawyers use ways to see

to it that the plaintiffs do not solicit for me. For instance, the plaintiffs can be instructed in writing not to solicit, and not even to give the names of their attorneys unless the co-workers ask.

But many see this as not only artificial, but an improper restriction on free speech rights.

Also, there is good authority that any restriction on employees speaking to co-workers about a wage class action is a violation of the right to engage concerted activity under the National Labor Relations Act. The US Supreme Court has held that multi-party litigation by employees against their employer is a form of protected concerted activity. (Sorry, I don't have the cite at hand.)

Here are some passages in the Rutter Group practice book by Paul, Mark, Ellen and Justice Weiner. I realize they raise the possibility that resolution of the issues is not completely in the hands of the State Bar, but also with the legislature.

[2:224] Statutory Regulation (State Bar Act): Solicitation by lawyers is principally regulated under CRPC 1-400(B) and (C) (¶¶ 2:254 ff.). However, attorneys are subject to discipline and civil and criminal liability for solicitation under the State Bar Act. [Bus. & Prof.C. §§ 6129, 6150-6154]

Cross-refer: For a discussion of other (non-State Bar Act) anti-solicitation statutes, see ¶¶ 2:366 ff. (criminal penalties for wrongful solicitation), ¶¶ 2:373 ff. (soliciting false or fraudulent insurance claims), and ¶¶ 2:665 ff. (soliciting workers' compensation services).

a. [2:225] Unlawful solicitation (including use of 'runners and cappers'): It is unlawful for any person or entity to:

.. act as a 'runner' or 'capper'; or

.. 'solicit any business' for an attorney on public or private property. [Bus. & Prof.C. § 6152(a)(1)]

(1) [2:226] 'Runners' and 'cappers':

\* \* \*

(2) [2:231] 'Soliciting any business': the statute also prohibits 'any person' or entity from 'soliciting any business' for an attorney on public or private property. [BUS. & PROF.C. §§ 6152(A)(1)]

() [2:232] No agency relationship required: it need not be shown that the person 'soliciting any business' was in fact an agent of the lawyer. [Hutchins v. Mun.Ct. (People) (1976) 61 CA3d 77, 90, 132 CR 158, 167--'an agency relationship (with the lawyer) is not essential to violation of ... section 6152' (parentheses added)]

\* \* \*

[2:254] Solicitation Prohibited by CRPC: In-person and telephonic 'solicitation' of prospective clients by or on behalf of an attorney is prohibited by the CRPC except where:

.. there is a preexisting family or professional relationship with the persons involved; or

.. the solicitation is in discharge of the lawyer's continuing professional duties to such persons (e.g., warning present or former clients of change in law which may require legal work); or

.. the solicitation is constitutionally protected. [See CRPC 1-400(B),(C)]

One reaction might be that the problem is not particular to class actions, but I believe it is, or at least it is much more important in class actions. Why? Because by the very nature of a class action, the goal, even the responsibility of the attorneys for plaintiff is to represent the entire class. There is no comparable responsibility in other types of cases. Thus, communication by initial clients, i.e. named plaintiffs, to other potential clients is, in one sense, an important part of representing a class or potential class (I don't like the term "putative class," because it reminds one of "putative spouse"!).

The named plaintiffs, the entire class, should communicate with each other for many reasons, and there are good arguments that attorneys for the class or potential class should encourage such communication. For instance, in nearly all class actions, there is a need to get evidence from members of an actual or potential class. The need to get evidence from witnesses exists in any case, but in class actions the witnesses are also necessarily potential clients, or at least quasi-clients if they are "absent class members." But clients or quasi-clients, the inquiries about evidence will necessarily involve the rights and claims of the witnesses themselves.

On the other hand, there undoubtedly is simply out-and-out improper solicitation by attorneys who hope to find a client to bring a class action. Is it different if the attorney already has one client? Many think so, and I suppose many do not.

FLSA actions create an additional complication. Any employee or former employee who joins an existing FLSA representative action is, by statute, referred to as a "party plaintiff." Those words suggest that the person is a direct client of the attorneys for the original plaintiffs, and that they are parties in the fullest sense. But "party plaintiff," as far as I can tell, is simply a term that was inserted by Congress without consideration of whether these people would be true parties or true clients. There are many cases that apply traditional Rule 23 analysis to these "party plaintiffs," suggesting that they are not true plaintiffs and not true parties. There is very little law on this. In fact, the term "certification," has come into use in these actions only in fairly recent years.

## II. NO-CONTACT RULE

This is a very thorny issue in wage class actions. Perhaps thorniest is when the action is for employees whose titles are "manager," a very common type of class action. True managers are exempt from overtime. There have been scores, probably hundreds of class actions in which it was alleged that "managers" are not truly managers under the wage laws, and thus the employer unlawfully failed to pay them overtime. The leading California case on class certification, *Sav-On* (2004) 17 Cal.4th 319, is one such case.

So, if the class is a class of managers, and the attorney for the class wishes to speak with "managers" who have not engaged the attorney, and the class has not been certified, how does

that square with the no-contact rule and the term "managing agents"? The rules do not address this, although some cases have.

Defense counsel has some thorny issues here too. The problem is when counsel for an employer communicates with employees who are also members of a potential class, and does not advise them that the attorney represents the employer, not the employee, and that the interests of the employer and the employee are adverse with respect to the class action. Defense counsel in California have come close to disqualification in such situations, and have been criticized by courts. There may have been disqualifications, but I am not aware of any.

### **III. AGGREGATE SETTLEMENTS**

Obviously it is difficult to comply strictly with the aggregate settlement rules when the class is hundreds, thousands, tens of thousands or millions. The process of notice to the class can result in consent, and sometimes actual written consent if a claim form is required. But the process is imperfect, because inevitably the notice will not reach many class members, a fact which is recognized and accepted by the court in the due process balancing that goes into the court's decision on what is the proper notice procedure in a case.

### **IV. DUTY OF LOYALTY, CONFLICTS OF INTEREST**

Who is the client? The initial named plaintiff is the initial client. But the plaintiff has a fiduciary duty to the class, and must recognize that his or her attorney cannot place his or her interests above those of the class. If the plaintiff objects to the settlement, or to a strategy decision, the attorney at times can be permitted to pursue the settlement or decision over the plaintiff's objections, and at times the attorneys are permitted by the court to seek a new named plaintiff.

### **V. IS REPRESENTING CLASSES CONSISTENT WITH THE PROPER ROLE OF LAWYERS?**

It well past midnight and I have to leave town tomorrow night. But as you might expect, I cannot stop without addressing the comments by my friend, Tony Voogd, concerning class actions that he and many perceive as doing no one any good except the lawyers who get fees, as not pursuing the interests of any client. I do want to point out that in wage class actions, the class members usually get amounts from the low thousands to the mid to high tens of thousands.

But let's consider the consumer or securities class action in which the class member might get a trivial amount but the attorneys get millions. Without more factors than that, it seems wrong. But the courts have recognized that there are many other very important factors. There are a couple of fine quotations from a leading "early" California class action, 1971, which is still quoted by our state and federal courts today. I've highlighted them. The last one is the best.

The California Supreme Court recently repeated the quotation in *Discover Bank v. Super. Ct.* (2005) 36 Cal.4th 148:

"Before addressing the questions at issue in this case, we first consider the justifications for class action lawsuits. These justifications were set forth in Justice Mosk's oft-quoted majority opinion in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808 (*Vasquez*): 'Frequently numerous consumers are exposed to

the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.'

\* \* \*

'A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation. The problems which arise in the management of a class action involving numerous small claims do not justify a judicial policy that would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity.'

California laws and policies promote "the fullest and most flexible use of the class action device[,]" particularly in consumer protection litigation. Hopkins, 2005 WL 1020868 at \*2 (citations omitted); Blakemore, 129 Cal. App. 4th at 58 (identifying numerous consumer fraud cases allowed to proceed as class actions); Lebrilla v. Farmers Group, Inc. (2004) 119 Cal. App. 4th 1070, 1087 (rev. denied) (citing Corbett v. Super. Ct. (2002) 101 Cal. App. 4th 649, 658 (rev. denied)) ("certifying a UCL claim as a class action furthers the purposes and goals underlying both of these actions."). Thus, post-Prop. 64 cases continue to hold that:

The California Supreme Court directed the courts of this state to use the class action device to fashion "an effective and inclusive group remedy," where "numerous consumers are exposed to the same dubious practice by the same sellers so that proof of the prevalence of the practice as to one consumer would provide proof for all."

Hopkins v DeBeers, unreported case at 2005 WL 1020868 at \*2 (internal citations omitted).

**September 14, 2007 Difuntorum E-mail to Drafters & Leadership:**

The ABA opinion described in the message below may be of interest to your subcommittee. Regarding the anticipated discussion at the September meeting, you might want to focus your efforts on considering the draft comments to Rule 1.7 (see pp. 1 - 20 of the agenda materials) to determine if any changes, including any recommended new comments, are warranted to give guidance on class action issues. -Randy D.

**ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 07-445**

The ABA Ethics Committee determined that prior to class certification, defense counsel may contact putative class members without seeking permission from attorneys for the named plaintiffs; however, defense counsel must comply with Model Rule 4.3, which regulates attorney contact with unrepresented persons. The Committee also determined that counsel for the putative class has the same rights and obligations.

Click on the link to view the full Alert or visit the following internet address:

[http://www.hinshawlaw.com/knowledge/alert\\_detail.aspx?id=1296&type=5303](http://www.hinshawlaw.com/knowledge/alert_detail.aspx?id=1296&type=5303)

ABA Ethics Committee Concludes That Defense Counsel May Contact Putative Class Members Without Permission From Plaintiffs' Counsel

September 13, 2007

ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 07-445

**Brief Summary**

The ABA Ethics Committee determined that prior to class certification, defense counsel may contact putative class members without seeking permission from attorneys for the named plaintiffs; however, defense counsel must comply with Model Rule 4.3, which regulates attorney contact with unrepresented persons. The Committee also determined that counsel for the putative class has the same rights and obligations.

**Complete Summary**

The Committee addressed the propriety of defense or plaintiffs' attorneys in a class action contacting putative class members prior to class certification. The Committee concluded that such contacts are appropriate unless prohibited by court order because, among other things, it cannot be said that the putative class members have counsel within the meaning of Model Rule 4.2. The Committee noted, however, that the attorneys who make such contacts must refrain from making material misrepresentations, must not harass the individuals whom they contact and must comply with Model Rule 4.3, which regulates lawyers contact with unrepresented persons.

The Committee also noted that restricting pre-certification contact by defense attorneys with putative class members could prevent a defendant from taking remedial measures to remedy a harmful condition or from attempting to reach

conciliation agreements with members of the potential class. Similarly, plaintiffs' counsel may have an interest in contacting potential class members. The Committee also noted that the Model Rule 7.3 restrictions on attorney contact with prospective clients would not apply when potential class members are contacted as witnesses as long as the contacts comply with the Model Rules.

The Committee also noted that in particular circumstances, a court might be able to limit or prohibit such contacts, but this was expected to be the exception and not the general rule.

### **Significance of Case**

This opinion settles a point of controversy that has often arisen in class action litigation and reaches a conclusion consistent with the majority of cases that have addressed the issue.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*

### **September 14, 2007 KEM E-mail to Drafters & Leadership:**

I've attached a copy of the ABA opinion, 07-445, for your review.

### **September 14, 2007 Sondheim E-mail to Voogd, Drafters & Leadership:**

Randy has advised me that, because of a misunderstanding, your subcommittee was going to try to submit materials this week (i.e. beyond the deadline previously set). I will assume that this will be done by Sunday or else the class action subcommittee may be deemed to have no special rules or comments for consideration in regard to any of the rules we will be discussing at the next meeting. Out of fairness to the Commission, adequate time must be given to its members to consider whatever recommendations are made by the class action subcommittee and thus I would like the materials to be sent out no later than Sunday. If more time is needed for the subcommittee to act, please let me know as soon as possible so that further consideration can be given to a cut off date, although this is not intended to mean that Sunday may still be the deadline.

### **September 16, 2007 Karpman E-mail to Sondheim, Drafters & Leadership:**

1. I don't have access to when- materials are due and was praying most of last week. Also I don't know what will be discussed at the next meeting- yes I may have received this but as a quasi voyeur- it is sometimes difficult to follow what is going on.
2. At the last meeting you mentioned Rule 1.7 (which I believe was on page 11 of 14), and my comment addresses [33].
3. Our proposed comment appears to be consistent with the intent of the ABA/BNA practice guide, at 51:108, that maintains: "*unnamed members of the class ordinarily are not the*

*lawyer's clients and therefore may be sued by the lawyer in an unrelated matter without their consent. Likewise, a lawyer for the defendant in a class action does not need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter."*

4. So it seems to me that the issue is that the MR's uses "**does not ordinarily**" as opposed to our "**by virtue of that representation alone.**" Personally I prefer the Model Rule's articulation, but I believe they are saying just about the same thing.
5. In the area of formal class actions, you are getting perilously close to preemption issues since they are strictly governed by Rule 23. Geoff Hazard maintains that state ethics rules have little if any application in certified class actions, his position is based upon- *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991), a well reasoned opinion by Judge Easterbrook.
6. Note, on Oct. 6th I will be attending the ALI's Aggregate Litigation Members Consultant Group in Austin they are grappling with many issues but I don't believe they have addressed 1.7 yet. They have suggested a radical modification of 1.8, that is quite controversial.

**September 16, 2007 Sondheim E-mail to Karpman, Drafters & Leadership:**

Subject to a discussion at the next meeting of any suggestions by the class action subcommittee which may be submitted this weekend (such suggestions are already overdue as the result of a misunderstanding), the rules on the agenda hopefully will be completed at the next meeting and therefore "sometime addressing class actions" will not "wait until the rules are drafted."

For example, Kevin's notes [re Rule 1.7] for the last meeting show the following:

**34. Comment [33] & note 22.**

- a. Harry: If class action team (Tony, Ellen, Dom & Diane) does not provide language before the next meeting, this language will become part of the Rule.

**September 16, 2007 Karpman E-mail to Sondheim, Drafters & Leadership:**

That was the subject of my a.m. email (see below). I would just like to understand why the language which was suggested was considered "better" than the MRs.

**September 16, 2007 Sondheim E-mail to Karpman, Drafters & Leadership:**

I leave it up to the Class Action subcommittee to decide (hopefully today) as to whether it wishes to recommend the MR language. If so, we can vote on this change at our Sept. meeting.

**September 16, 2007 Voogd E-mail to Drafters & Leadership:**

Please refer to Rule 1.7 [3-310] which includes as note [33] the following MR language:

“Representation of a Class.

This Rule applies to lawyer's representation of named class representatives. A lawyer who represents a class of plaintiffs or defendants in a class action does not, but virtue of the representation alone, represent unnamed members of the class for purposes of this Rule. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.”

It seems to me this language is flawed.

1. The first sentence is an unnecessary truism.
2. The second sentence fails to indicate when the lawyer does represent an unnamed member of the class. Accordingly, it is so general as to be meaningless. Moreover, the comment changes the rule, it does not explain the rule.
3. By reason of the fact that the comment is the only reference to class actions in the rules, the comment gives rise to the possible inference that the lawyer does not represent unnamed members of the class for purposes of other Rules.
4. The last sentence is also troublesome. Why should we should trouble to explain the obvious, namely that a comment can't change civil law? Moreover, I can't get enthused about the undefined civil law rights of unnamed class members. The members probably can't effectively sue the lawyer considering the costs involved and the fact the lawyer probably can assert failure to opt out as a defense.

The MR provision (2002) is limited in scope and specific to Rule 1.17:

“[25] When a lawyer represents or seeks to represent a class of plaintiff or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”

This language strikes me as appropriate.

However, we are still left with the fundamental issue. Are unnamed members of a class clients entitled to the protection of the rules? While exceptions may apply, it seems to me we do not advance the public interest by depriving them of the protection of the rules.

**September 16, 2007 Tuft E-mail to Voogd, Drafters & Leadership:**

Tony, I believe the first sentence in Comment [33] is important. Many class action lawyers do not appreciate the fact that the named plaintiffs are joint clients whether or not the class is certified. However it is not clear from either Comment [33] or previous Comment [25] whether the comment is addressing the representation of a class prior to certification, a class that has been certified, or both. Also, the reference to owing "civil duties" to unnamed class members is unclear. In practice, FRCP 23 plays a significant role in resolving claims of conflicts in class action cases in state as well as federal courts and there is body of case law under rule 23 that deals with these issues.

**September 16, 2007 Sondheim E-mail to Voogd, Drafters & Leadership:**

Thanks. Hopefully your subcommittee can arrive at some consensus by noon Tuesday, Sept. 19, as to whether the MR should be used in lieu of Comment 33 and as to what needs to be done in the rules in response to your fundamental issue. Let's deem that your deadline for transmitting recommendations to the entire Commission.

**September 17, 2007 Karpman E-mail to Voogd, Drafters & Leadership:**

1. It's not "us" who are depriving them of the protection of the rules. Putative members or absent class members possibly don't even know that the case is progressing. Remember that the court becomes a fiduciary for the absent class members, so the court is owed what are referred to as heightened duties. So for example, the court is obligated to seriously evaluate the proposed settlement, and this obligation was further enhanced with the Class Action Fairness Act of Feb. 2005. Consider:

"Class Counsel" or "lead counsel" lacks a traditional attorney-client relationship with each class member, but nevertheless is in a fiduciary relationship with the members of the class. Thus, "while lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class." *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867, 879; see also *In re McKesson HBOC, Inc. Securities Litigation* (N.D.Cal. 2000) 126 F. Supp. 2d 1239, 1245.

"Class counsel thus has potential duties in three directions: to the named plaintiffs, to the absent class members, and to the "public interest." The primary problem with identifying any one of these as the client is that none can be said to exercise control over class counsel . . . If anyone controls the lawyer, it is the court, which does so for the benefit of the class." *Developments in the Law, Conflicts of Interest in the Legal Profession*, 94 *Harvard L. Rev.* 1244, 1453.

A traditional attorney-client relationship would exist between lead counsel and lead plaintiffs, since communications would exist that would engender expectations. Note that in the existing CRPC, "lead plaintiff's" are the recipients of information regarding settlement (Rule 3-510 (B)), however the court can override the plaintiff's approval and often will. Even when a lawyer disclaims the relationship, the court in representative litigation can nevertheless create the relationship based on the expectations of a prospective client. *Barton v. U.S. Dist. Court for Central Dist. of Cal.* (9th Cir. 2005) 410 F. 3d 1104.

2. The court in the class action paradigm is required to aggressively supervise the litigation. Written fee agreements, rarely exit and even if a named plaintiff has executed an agreement, it will not bind the absent class members or the court. *Long Beach City Employees Assn., Inc. v. City of Long Beach* (1981) 120 Cal. App. 3d 950, 959, 172 Cal. Rptr. 277.
3. But Tony, the “client” is protected from a lawyer’s professional negligence, and can successfully sue for garden variety legal mal. *Janick v. Rudy, Exelrod & Zieff* (June 22, 2004) 119 Cal. App. 4th 930. Also, the lawyer has liability for breach of fiduciary duty, *Cal Pak Delivery, Inc. v. United Parcel Service* (1997) 52 Cal. App. 4th 1-- although that was initially a motion for disqualification.

**September 17, 2007 Voogd E-mail to Karpman, Drafters & Leadership:**

1. Good stuff, but I still think unnamed members of the class are entitled to some protection.
2. We are legislating when lawyers might be disciplined. None of the cases you refer to foreclose legislation in this area.
3. Consider the following set of circumstances. A non-lawyer unnamed member of the class gets a notice requiring objection to a settlement agreement. The member wants to object but cannot object in timely manner because the notice was sent out late. What what is the member to do? Call the judge? That won't work - for good reason access to judges is limited. Sue someone for malpractice or breach of a fiduciary duty? That is not an effective remedy. The logical solution is to call a lawyer for the class. When called the the class attorney should take the necessary steps to obtain a extension of time to file objection.
4. Whenever a member contacts the class lawyer there are more than enough indicia of the traditional attorney-client relationship to warrant imposing discipline on the lawyer who ignores the contact. I think we should at least consider such a rule rather than foreclosing the possibility of such a rule with the language of [33] under consideration.

**September 17, 2007 Ira Spiro E-mail to Drafters & Leadership:**

1. Unnamed/absent class members DO have the protection of the rules. As the cases hold, counsel for plaintiff has a measure of fiduciary duty to them, and it can be an ethics violation for a lawyer to violate fiduciary duties, of course. They also have the protection of many other rules, such as 1-400 and, when the class is a class of ees, 3-600 with regard to counsel for the employer. But the law says they are not clients of counsel for plaintiff in the full or traditional sense. Many people have the benefit of the rules even when then are not full clients.
2. It is very apparent, isnt it, that it would be impossible to treat a class of hundreds, thousands, tens of thousands, as clients? Maybe in very tiny classes it could be done, but not really until a much later stage of the case, because how can you have a client whose name and contact info you dont have?

3. And let me tell you from my own experience, judges have become very conscious of their duties to protect the class, as they should be.
4. If attys for plaintiffs had to try to be attys for each of the absent class members, it would be impossible to do one's duty as atty for plaintiff in a class action. Thus, it would be impossible to have class actions. That, in the view of the Supreme Courts of the US, Cal, and probably every other state, would be against the public interest. Most recent pronouncement on that is Gentry case from our Cal SCt on Aug 30.
5. Could counsel for a corporation function if he or she were also the atty for the shareholders in the traditional sense? Is anyone complaining that they do not have the benefit of the rules?

**September 18, 2007 Karpman E-mail to Drafters & Leadership:**

I like all of [33].

**September 18, 2007 Melchior E-mail to Drafters & Leadership:**

Please note some clarifications and stylistic suggestions below. With those changes, I prefer this version.

“[25] When a lawyer represents or seeks to represent a class of plaintiff~~s~~ or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which is adverse to that [su~~ing~~ the] person in an unrelated matter. Similarly, a lawyer seeking to represent a[n] party opposing [ne~~er~~ in] a class action does not [typically] need in order to do so the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”

**September 18, 2007 Karpman E-mail to Drafters & Leadership:**

I like this clarification but think we should eliminate the second “the” in the 6th sentence.

**September 20, 2007 Voogd E-mail to RRC List:**

The recommendation of the Class Action subcommittee is that the variation or the related MR comment suggested by Kurt and set out below be adopted in place of [33].

“[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need in order to do so the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”<sup>1</sup>

**September 22, 2007 Voogd E-mail to RRC List (transmitted by KEM):**

Please consider the following revision of the comment suggested by Kevin:

“[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

The only change is to move the phrase "in order to do so" to the end of the last sentence in the comment.

**September 23, 2007 Kehr E-mail to KEM:**

Kevin: I see some problems with this that I thought I would try to work out with you if we can. Among other things, our Rule has no paragraph (a)(1), and a decision therefore needs to be made about whether this paragraph will apply to some or all of the Rule (all, in my view). Also, the MR version and this revision are not clear about whether there is any difference between

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<sup>1</sup> **Consultant's Note:** I recommend either moving the phrase “in order to do so,” which is in the next to last line, to the end of the sentence, so it would provide:

Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

Alternatively, the phrase should be set off by commas:

Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need, in order to do so, the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”

classes that have been certified or have not yet been (when is someone a member of a class?). Finally, there is no “part” in our terminology. What about this --

“[25] For purposes of this Rule, an unnamed current or potential member of a class of plaintiffs or defendants in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class.”

I suggest this by done so briefly b/c I think the drafting becomes Byzantine if one attempts to track each of the four Rule paragraphs. Any thoughts?

**September 23, 2007 KEM E-mail to Kehr:**

Bob:

1. I agree with the points you make about the Class Action team's proposed draft. However, I'm not sure that a single sentence as you proposed below is sufficient (or were you simply suggesting that only the first sentence of the comment be replaced, and keep the second & third sentences re consent?)
2. Although we don't have a paragraph (a)(1), it seems to me that our paragraph (a) was intended to capture MR 1.7(a)(1). Am I off-base on that? We're a bit more wordy but I think we're saying essentially the same thing.
3. MR 1.7 has only two prohibitions, (a)(1) and (a)(2). Paragraph (a)(1) prohibits direct adversity. Paragraph (a)(2) is the material limitation provision. Paragraph (b) provides the exception to the prohibitions in paragraph (b).
4. In effect, it strikes me that MR 1.7, cmt. [25] is saying that you are not simply by virtue of representing a class, also representing the unnamed members of the class (most of whom the lawyer wouldn't know from Adam) so, for purposes of (a)(1), you will not be deemed directly adverse to those class members.
  - a. However, by limiting the comment's application to (a)(1), the drafters are telling lawyers that there is still a possibility that your representation of the second client against an unnamed class member (or even a group of unnamed class members) might materially limit your representation of the second client. If that is the case, then you are still obligated to obtain a waiver under paragraph (b).
5. Our rule has paragraph (a), which as I mentioned, I think is analogous to MR 1.7(a)(1). Comment [25] would be applicable to paragraph (a).
6. We also have (b)(1) and (2) [current 3-310(C)(1) and (2)], which apply to joint representation situations. I'm not sure when comment [25] would apply to such situations. If one of the joint clients was an unnamed member of the class and the other not? Would that possibly create a "materially limited" representation situation?
7. Our proposed paragraph (c) is current 3-310(C)(3). Comment [25] would apply to this situation as well.

8. Finally, our proposed paragraph (d) [current 3-310(B)] is akin to MR 1.7(a)(2) in that it identifies the kinds of situations that might result in the lawyer's representation of a client being materially limited by his or her representation or relationship with another client, past or present, or the lawyer's own personal interest. MR 1.7, comment [25] is not applicable to MR 1.7(a)(2). I don't think it should apply to our proposed paragraph (d) either.

9. Summary. Therefore, I'm OK with your proposed sentence if (1) it is intended as a revision to the first sentence in Kurt & Tony's proposed comment [25] and (2) its application is limited to paragraphs (a) and (c). How about the following:

[25] ~~When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a class of plaintiffs or defendants in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [not in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.~~

I've added "paragraphs (a) and (c) to your proposed fix, and tacked on the last two sentences of the Class Action team's comment. I've also deleted the phrase "in that situation" from their second sentence.

Of course, if I am wrong in my assumptions about our proposed paragraphs (a) [similar to MR 1.7(a)(1)] and (d) [similar to MR 1.7(a)(2)], then the foregoing will not be the answer.

### September 23, 2007 Ira Spiro E-mail to RRC List:

As one who practices in this field every day, I like this rule and others that clarify the ethics rules applicable to class counsel.

Comments:

1. If I get your drift, the change below in the first line, using the term "certification of the class" already is implicit in the proposed language, but I think it's a good idea to make it explicit. I do think this change will eliminate a possible uncertainty in the draft rule. Someone might construe "represents or seeks to represent" to mean "before or after the commencement of the lawsuit." But as I understand it, what you all mean is "before or certification of the class."

2 I think the terms "plaintiff class" and "defendant class" are better than "class of plaintiffs" or "class of defendants," For instance a "class of plaintiff," is a bit of a misnomer, since the unnamed members of the class actually are not plaintiffs in the usual sense, because a plaintiff is a party and the unnamed class members are not. Same with defendants.

3. I suggest one other change that isn't very important at all -- it's pedantry. But here it is anyway. The phrase "client which" sounds wrong to my ear -- "client who" sounds right. I

realize that the client could be an entity, but "who" can be applied to an entity, can't it? Anyway, as we all know, a corporation is a "person" for many purposes (to the dismay of some people I know). And the draft does use the word "person" all over the place.

Change could also be to "client that." I learned -- about 45 years ago -- that in this usage "client that" is better English than "client which".

“[25] When a lawyer represents or seeks to represent a plaintiff class of ~~plaintiffs~~ or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are ~~[ordinarily]~~ not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not ~~[typically]~~ need to get the consent of such a person before representing a client which who is adverse to that ~~[suing the]~~ person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing ing ~~[not in]~~ a class action does not ~~[typically]~~ need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

#### **September 24, 2007 Difuntorum E-mail to Rule 1.7 & Class Action Drafters:**

Should the reference to “part (a)(1)” be changed to “paragraph (a)” or to “paragraphs (a) and (c)” or should it be a reference to "this Rule"?

#### **September 24, 2007 Kehr E-mail to Rule 1.7 & Class Action Drafters:**

Randy: I made a suggestion to Kevin about this over the weekend. My view is that the class action paragraph should refer to all of Rule 1.7. I will try to work something out with him that we can take to a wider audience.

#### **September 24, 2007 Voogd E-mail to Class Action Drafters:**

In light of the variety of comments submitted, it might be useful for you to try a redraft incorporating Robert Kehr's thoughts.

#### **September 24, 2007 Kehr E-mail to KEM (Reply to September 23, 2007 KEM E-mail to Kehr:):**

Kevin: My suggestion was to use a single sentence. It seems to me to be complete. If one attempted to add a more elaborate explanation, then our checklist approach would require that the application to each paragraph be handled separately. My attempts at that lead to the Byzantine quagmire about which I cautioned. My single sentence covers each of our four paragraphs, each of which arguably could be triggered by the representation of unnamed members of a class or potential class. I think the second and third sentences interfere with the clarity of this absolute point - the representation of unnamed class members does not by itself amount to a representation under Rule 1.7.

**September 24, 2007 KEM E-mail to Kehr (Reply to September 24, 2007 Kehr E-mail to KEM (Reply to September 23, 2007 KEM E-mail to Kehr):):**

Bob:

1. I don't agree that the comment should apply to the entire rule. As I explained in my e-mail of yesterday, I believe the comment applies only to paragraphs (a) and (c). This is analogous to the Model Rule, which does not have our proposed 1.7(b) [current 3-310(C)(1) and (2) - joint clients] and goes with "material limitation" in its (b)(2) vs. our checklist approach in proposed 1.7(d) [current 3-310(B)]. The rule speaks to direct adversity.

a. When would representation of an unnamed client in a joint client situation be relevant? If you are representing both joint clients against an unnamed class member, then 1.7(a) would be applicable. I'm not sure whether even the State Bar would argue that you should contemplate that one member of a joint representation might in the future become a named member of a class that would create a situation that is directly adverse to the other joint client.

b. Are there any of the contemplated situations in 1.7(d) [3-310(B)] where the lawyer should not at least **disclose** to the client that he or she represents a class in which one of the opposing parties is an unnamed member (or at least is most likely an unnamed member given the parameters of the class)? For example, if you are representing a class in wage and hour litigation, wouldn't you likely be able to determine whether a person who is adverse in the current matter is a member of that class by virtue of that person's profession or job? Why shouldn't you at least be required to disclose that? Shouldn't that trigger the obligation under 1.7(d). Note that this is not as burdensome as MR 1.7(a)(2) [material limitation], which requires that the lawyer obtain the client's informed consent under 1.7(b) to accept or continue the representation.

One other thought. Perhaps the introductory clause to 1.7(d) should state that the paragraph applies only where the lawyer "knows" of the relationship to be disclosed (with the same definition for "know" as in the MR's). Would that assuage concerns about keeping 1.7(d) in play in the class action context?

c. I would like to run our debate by the Class Action drafters for their input. I'm not sure there's time for us to resolve this tonight and I need to get get out the e-mail compilation by tomorrow so I can attend to my day job tomorrow and Wednesday.

2. I agree that attempting to address each of the rule paragraphs in the comment would result in a Byzantine quagmire, but I'm not sure I understand why we would need to address each. If we only had to address (a) and (c), then I don't see the problem. However, even if the Commission were to agree the comment applies to the entire rule (and I don't concede that point), I don't see why we would have to do it. I think the second and third sentences are an important clarification and don't think they detract from the main point.

3. I would also revise your first sentence to state (per Ira's e-mail):

" . . . an unnamed current or potential member of a **plaintiff** class of plaintiffs or defendant **class** in a class-action lawsuit . . . "

## SUMMARY OF RECOMMENDATIONS/PROPOSALS RE COMMENT [25]:

### The Drafters (revised to incorporate Ira Spiro's Comments):

"[25] When a lawyer represents or seeks to represent a plaintiff class of ~~plaintiffs~~ or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are ~~[ordinarily]~~ not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation, the lawyer does not ~~[typically]~~ need to get the consent of such a person before representing a client which who is adverse to that ~~[suing the]~~ person in an unrelated matter. Similarly, a lawyer seeking to represent a ~~[n]~~ party opposing ~~[n]~~ in a class action does not ~~[typically]~~ need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."

### Bob Kehr (revised to incorporate Ira Spiro's Comments):<sup>2</sup>

"[25] For purposes of this Rule, an unnamed current or potential member of a plaintiff class of ~~plaintiffs~~ or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class."

### KEM (revised to incorporate Ira Spiro's Comments):

~~"[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.~~

### September 25, 2007 Kehr E-mail to RRC List:

Several drafts of the class action Comment have circulated in the last few days (mistakenly numbered as Comment [25], which is its number in the MR). I want to make my own proposal for this topic. B/c my changes are so substantial, I am not providing a marked version. This draft incorporates elements of my earlier draft as it appears in the September agenda, the class action subcommittee's suggestion, the comments from Ira Spiro, and suggestions made by Kevin Mohr. A few points of preliminary explanation ---

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<sup>2</sup> Superseded by 9/25/07 Kehr E-mail.

1. The agenda draft starts with the affirmative statement that a lawyer who represents a class is deemed to have a lawyer-client relationship with the named class representatives. I believe it is needed for the Comment to be complete. This is the first sentence of my proposal, below.
2. The agenda draft includes that statement that a lawyer for a class might owe civil duties on which this Comment does not bear. This Comment should be strictly limited to the application of the Rule 1.7 to class action representations and implies nothing about a lawyer's civil duties. This is the final sentence below and is taken exactly from my current agenda draft. I recommend that we keep it.
3. Most significantly, I believe that the non-representation of unnamed class members should apply to each paragraph of Rule 1.7. I take it from the e-mail traffic that there is no dissent from the idea that the Comment should apply to Rule 1.7(a) and (c), and I therefore won't discuss them. The Comment, in my view, also should apply to paragraph (b) and (d). For example, when an argument is made that a class should be divided into two or more classes b/c of alleged differences in interests among class members, a lawyer who represents the class should not be faced with the argument that his current representation violates paragraph (b). This should not be used as a club against the lawyer, it shouldn't be part of a motion to disqualify the lawyer, and it shouldn't be reported to the State Bar. Taking that example one more step, the lawyer who represented the single class should not be faced with the argument, following the granting of the motion to divide the class into two or more classes or to remove certain members from the class, that he is subject to discipline b/c he failed to make a disclosure under paragraph (d)(3). I believe that all the issues that otherwise might arise under this Rule with respect to unnamed class members should be handled by the court under class action concepts. I therefore conclude that the first sentence should say, in substance, that, for purposes of this Rule, a lawyer for a class represents named class representative, and the second sentence should say, in substance, that the lawyer does not represent unnamed class members for purposes of this Rule.
4. The recently circulated versions included second and third sentences that gave examples of when consent is not needed with respect to unnamed class members. I oppose those sentences for three reasons. First, no example of the non-application is needed if we simply say the Rule does not apply. That statement is complete and needs no explanation in my view. Second, the two examples do not cover the entire range of Rule 1.7 and, as I have explained, I believe a class lawyer should not be deemed to represent unnamed class members for any purpose under Rule 1.7. Third, I don't believe we could supplement the two sentences with others to give examples of when paragraphs (b) and (d) don't apply without being impossibly complex and opaque. I therefore suggest ----

[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

**September 30, 2007 Ira Spiro E-mail to RRC List:**

1. Something occurred to me on an issue being considered by the Commission, which Bob Kehr stated as follows:

“The agenda draft starts with the affirmative statement that a lawyer who represents a class is deemed to have a lawyer-client relationship with the named class representatives. I believe it is needed for the Comment to be complete. This is the first sentence of my proposal, below.”

2. As I understand it, the draft of the rule is as follows:

[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

3. My concern has to do with the traditional duty of loyalty a lawyer owes the client. It is oddly complicated in a class action.
4. It a true statement, of course, that the lawyer has an atty-client relationship with the plaintiff. But the attorney-client relationship between counsel for plaintiff/class action counsel and the plaintiff/class representative is an odd one. It is odd with respect to the duty of loyalty. After class certification, the class representative has a fiduciary duty to the entire class, and must put the interests of the class ahead of his or her own interests. So does the attorney for the class representative, who is also the attorney for the class.
5. Even before class certification, the plaintiff has some ill-defined degree of duty to the unnamed class members, also called putative class members. The attorney for the plaintiff also has a similar duty.
6. So what happens to the duty of loyalty owed by the attorney to the plaintiff/class representative? It certainly is different from a normal duty of loyalty. Perhaps some comment should be added to this rule to highlight this.
7. Seems to us at our firm there is a potential conflict of interest between the plaintiff and the putative class from the very start of the case. We get a signed waiver of the potential conflict right at the beginning of the case.
8. I have not practiced in the field of trusts in quite some years. An analogy might be made to the lawyer for a trustee. However, doesn't the analogy break down? I really do not recall the answer to this, but isn't it true that although the attorney for a trustee aids the trustee in fulfilling the trustee's duties to the trust beneficiaries, the attorney does not have a direct duty to the beneficiaries? That makes the situation different from class action, in which after class certification, class counsel definitely has strong fiduciary duties to the class, and before class certification class counsel still has some level of duty to the putative class.

Well, I'm not offering any answers. All I have at this point are issues.

**September 30, 2007 Voogd E-mail to RRC List:**

Regrettably, these emails were not available at the time of the meeting. However, what we came up with is not much different from what you suggested. I will send along a copy when the minutes are available. Further consideration to these issues will be given with regard to a possible rule addressed expressly to class actions.



# NOTES

## Saving the Class Action: Developing and Implementing a Model Rule of Professional Conduct for Class Action Litigation

JULIE KLUSAS\*

### I. INTRODUCTION

*Q: Why do courts allow class actions where the consumer members of the class action get only a small recovery while the lawyers make millions? That doesn't seem fair.*<sup>1</sup>

Increased participation in class action lawsuits has brought class action practices into the public eye and under public scrutiny. Many people have begun to question the propriety of class action lawsuits and the ethics of attorneys, who settle these cases.<sup>2</sup> The questioning intensifies with news of class action lawsuits where the attorneys receive millions of dollars in attorney's fees, but class members receive, for example: a \$1,000 coupon toward the purchase of a new truck but no repair for the explosion-on-impact prone fuel tank in their current truck;<sup>3</sup> the assurance that a donation will be made to charity but no direct compensation for the years of price gouging they suffered;<sup>4</sup> the ability to claim part of a settlement but only if they can produce credit card receipts from several

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1. This question was asked by a reader in the "Legally Speaking" column of the St. Louis Post-Dispatch. Michael Ferry, *Legally Speaking: Class-Action Lawsuits Can Be an Important Tool*, ST. LOUIS POST-DISPATCH, Feb. 11, 2002, cited in Trial Lawyers for Public Justice, *Current Cases*, at [http://www.tlpj.org/News\\_PDF/CAAPP.St.Louis.1.pdf](http://www.tlpj.org/News_PDF/CAAPP.St.Louis.1.pdf).

2. See Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 180 (2001) ("Many ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys."); see also Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 28 (2002) ("Class actions have thus reached what seems to many a dead end.")

3. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1367-68 (1995) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995)).

4. *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600 (D.N.J. 1994), cited in Coffee, *supra* note 3, at 1368-69.

years ago;<sup>5</sup> or nothing because they contracted cancer too late.<sup>6</sup>

With public confidence in the class action device beginning to wane and questions about the integrity of legal professionals on the rise, the environment is ripe for reform of both the class action device and the ethical rules that govern class action attorneys. The Advisory Committee on the Federal Rules of Civil Procedure (FRCP) is currently proposing changes to FRCP 23, the procedural rule governing class actions.<sup>7</sup> To date, however, the American Bar Association (ABA) Commission on the Evaluation of the Rules of Professional Conduct has not attempted to address the requirements for ethical class action litigation practices by amending the current ethical rules.<sup>8</sup>

This Note addresses the ethical requirements of attorneys who are settling class actions by suggesting an ethical rule suitable for promulgation in the ABA *Model Rules of Professional Conduct (Model Rules)*. Part II of this Note briefly discusses the jurisdiction of courts to review class action settlements and provides background to the process generally employed in proposing *Model Rules*. Part III proposes a new Model Rule for attorneys who utilize the class action device. This Rule attempts to prevent opportunities for unethical practices where clients and the integrity of the legal profession can be injured. Part IV discusses the arguments in favor of promulgating this Model Rule and attempts to dispel potential arguments against this Model Rule. Part V proposes a specific strategic plan for having this Model Rule enacted by the ABA and then by the States.

## II. CLASS ACTION SETTLEMENTS & THE *MODEL RULES*<sup>9</sup>

### A. SETTLEMENT REQUIREMENTS UNDER FRCP 23

Throughout the class action settlement process there are multiple junctures at which attorneys are presented with ethical decisions. It is precisely because of the potential for unethical or collusive behavior between attorneys that FRCP 23(e)

5. An eighty-eight-year-old retired farmer cannot recover from the common fund because he cannot produce his credit card receipts even though he can document losing \$28,990. Pamela Sherrid, *Class Action Crumbs: A Con Man's Deal with Victims' Lawyers Falls Short*, U.S. NEWS & WORLD REPORT, Mar. 25, 2002, cited in Trial Lawyers for Public Justice, *Current Cases* [http://www.tlpj.org/News\\_PDF/CAAPP.USNews.1.pdf](http://www.tlpj.org/News_PDF/CAAPP.USNews.1.pdf).

6. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 251 (2d Cir. 2001) (While Judge Weinstein's decision was overturned on appeal to the Second Circuit, Supreme Court certiorari was granted on November 4, 2002 so this issue remains far from resolved. *Stephenson v. Dow Chem. Co.*, 123 S.Ct. 485 (2002).)

7. *Witnesses Urge Reform of State Class Actions at Federal Civil Rules Committee Hearing*, 3 Class Action Litigation (BNA) No. 2, at 35-36 (Jan. 25, 2002), cited in Trial Lawyers for Public Justice, *Current Cases*, at <http://www.tlpj.org/News.PDF/CAAPP.BNA.1.pdf> [hereinafter *Witnesses Urge Reform*].

8. The Ethics Commission last proposed changes to the *Model Rules of Professional Responsibility (Model Rules)* in a report submitted to the House of Delegates at the August 2001 meeting. The proposed changes were discussed and voted on in February 2003. Center for Professional Responsibility, Ethics 2000 Commission, available at <http://www.abanet.org/cpr/ethics2k.html>.

9. It is imperative to begin with a few disclaimers. First, not all class action settlements are collusive, and not all class action settlements that use the devices discussed below are inherently unfair to any of the parties. When specific methods of settlement are discussed, it is only an indication that those methods can be used collusively and not that their use only results in collusion.

includes a requirement that the court must approve all dismissals of claims or settlements.<sup>10</sup> Specifically, the rule provides that:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.<sup>11</sup>

Under this requirement, the court should scrutinize the settlement for (1) fairness to the absent class members<sup>12</sup> and (2) the possibility of attorney collusion.<sup>13</sup> Even with the inherent protections of FRCP 23, many settlements have not received proper scrutiny by the courts.<sup>14</sup> This lack of intense scrutiny has resulted in the rejection of some of these settlements on appeal.<sup>15</sup> Commentators have suggested that class action settlements do not receive the court's attention due to constraints on judicial time and lack of candor from attorneys who do not disclose to the court the potential problems or the objections to the settlement.<sup>16</sup> Although it is extremely difficult to alleviate the constraints

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Second, because the issue of potentially questionable ethical practices most often occurs when an attorney's personal interest in a contingency fee conflicts with the interest of her client, the following discussion and the proposed rule will not apply to attorneys who are litigating a class action where a fee-shifting statute applies. In fee-shifting cases, unlike in common fund cases where the attorney will be paid out of the same fund as the class members, defendants have a real incentive to limit Class Counsel's fees, and do so effectively through the adversarial process. See Klement, *supra* note 2, at 32-33.

10. See *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) ("It is because of the potential risk that plaintiff's attorneys and defendants will team up to further parochial interests at the expense of the class that the Rule 23(e) protocol . . . includes scrutinizing settlements for indicia of collusion.").

11. F.R.D. R. Civ. P. 23(e).

12. See *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982) (The primary concern is "the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties.").

13. See *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989) ("In evaluating a proposed settlement of a class action, the district court is required to examine the terms of the settlement and the process by which the settlement was arrived at, to make sure that the terms are reasonable and that the settlement is not the product of fraud, overreaching, or collusion.").

14. On average, judges spend 34.5 hours per certified case while only 2.8 hours of that time is spent considering and ruling on proposed settlements. Thomas E. Willging, Laura L. Hopper & Robert J. Niemic, *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES*, 177 (1996), cited in Darren M. Franklin, Note, *The Mass Tort Defendants Strike Back: Are Settlement Class Actions a Collusive Threat of Just a Phantom Menace?*, 53 *STAN. L. REV.* 163, 180 (2000).

15. The settlements in *General Motors*, 55 F.3d 768 and *Stephenson*, 273 F.3d 249 were both rejected on appeal to the Second and Third Circuits, respectively. While it could be argued that the appellate courts are handling this issue, thus reducing the need for a Model Rule, it could also be argued that the appellate courts' rejection of these settlements is an indication of their disdain for these types of settlements and a further indication of the need for a Class Action Model Rule. In addition, requiring parties to wait for appellate review of a collusive settlement instead of attempting to prevent a collusive settlement, could create a greater feeling of contempt for the class action device and could create even greater backlog in an already overburdened judiciary.

16. See *Coffee*, *supra* note 3, at 1369 ("courts are eager to see such cases settled and may tend not to examine the basis for settlement with the same skepticism"); Howard Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 *NEB. L. REV.* 646, 699 (1994) ("Most settlement hearings are cheerleading sessions in which class counsel and class opponents present the court with minimal

on judicial time, the behavior of the attorneys can be modified by a change to the *Model Rules* governing attorneys' ethical behavior.

#### B. THE MODEL RULES

Since 1908, the ABA has promulgated a "model" set of standards to guide the ethical conduct of attorneys.<sup>17</sup> The *Model Rules*, which followed the promulgation of the *Model Code of Professional Responsibility* and *Canons of Professional Ethics*, began as standards for what attorneys "should do" but evolved into rules instructing attorneys on what they are required to do.<sup>18</sup> When the *Model Rules* were officially adopted by the ABA in 1983, they were not binding on any state. Rather, as is the practice today, each state individually chooses whether to adopt the ethical rules for its jurisdiction. Most states have followed the ABA's lead and have officially adopted some version of the *Model Rules*.<sup>19</sup>

As of its last meeting, the ABA has not promulgated any specific Model Rule that would govern an attorney's ethical practices in class action litigation. Further, many commentators believe either that the current *Model Rules* do not sufficiently cover the differences in class action litigation or, at least, that class action attorneys cannot be held accountable to the *Model Rules* in the same way that traditional litigation attorneys can.<sup>20</sup> Thus, the lack of a specific rule and the widespread belief in the inapplicability of the general *Model Rules* has created a situation that leaves attorneys with virtually no guidance for ethical decision-making in class action litigation.

Because attorney accountability under the *Model Rules* is low, many unethical abuses of classes are permitted. In traditional litigation, no court would allow an attorney to settle a claim when the client did not consent, to represent persons with significantly conflicting interests, to stop communicating with a client, or to let opposing counsel speak to a represented person. Yet, the ABA and state bar associations do not prohibit these behaviors in the class action context.

Action must be taken to alleviate the public's concerns because public inquiry into the propriety of using class actions and the ethics of class action attorneys

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information."); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L. REV. 81, 126 (1998) ("When the parties as former adversaries appear before the court as fellow cheerleaders for the amicable disposal of their dispute, the circumstances are hardly conducive to scrutinizing judicial review.").

17. See Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 209 (2001).

18. *Id.*

19. As of 1999, forty-one states and the District of Columbia had adopted the *Model Rules* in full or in part, and several more states were contemplating adoption. See Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002).

20. See Sylvia Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 316 (1985); Downs, *supra* note 16, at 659.

can quickly snowball into the public calling for the end of the class action device. The Advisory Committee to the FRCP is addressing the procedural defects in FRCP 23; therefore it is time for the ABA to address the ethical issues in class action litigation. In sum, saving the class action device necessitates the promulgation of a Model Rule requiring attorneys to treat class-clients in the same manner as individual clients. Ultimately, this Model Rule will probably make class actions more difficult to manage for plaintiffs' attorneys and more difficult for both plaintiffs and defendants to settle. But, with public dissonance snowballing, it is time to address this growing concern.

### III. PROMULGATING A NEW RULE

The class action device can be rescued from the sea of public dissonance with the same life preserver that attorneys have clung to for the last hundred years—self-regulation under the *Model Rules*. The most likely reasons that a specific class action Model Rule has not previously been adopted are: (1) the increased use of the class action device, especially in the FRCP 23(b)(3) context, has only occurred in the past twenty years;<sup>21</sup> and (2) in general, it is in the best interest of both the plaintiffs' and defendants' bar not to promulgate a rule that would make it more difficult to bring and settle class actions.<sup>22</sup>

The increasing public concern over the ethical practices of class action attorneys may eventually be sufficient to spur the state bars to take action.<sup>23</sup> When the state bar associations consider adopting an ethical rule for class actions, it would be useful to have the guidance of an accepted ABA Model Rule.

For this purpose, this Note proposes the following rule:<sup>24</sup>

#### Rule 9.1 Duties in Class Action Litigation

(a) A lawyer's duty to the class-client includes the duty that a lawyer:

(1) Shall abide by a class-client's decision concerning the objectives of the litigation. A lawyer shall also abide by a class-client's decision whether to accept a settlement.<sup>25</sup>

(2) Shall act with commitment to the interests of the class-client and with zeal in advocacy of the class-client's interests.<sup>26</sup>

(3) Shall not represent a class-client and maintain an interest in an individual-client if the representation of the individual-client's interests will be

21. See Coffee, *supra* note 3, at 1356 ("Mass tort actions matured during the 1980s.").

22. See Sherrid, *supra* note 5 (when asked about a more judicially scrutinized settlement, Susan Koniak, professor at Boston University School of Law said, "Neither defendants' nor plaintiffs' lawyers have an interest in that change.").

23. See discussion, *infra* Part V.

24. As any astute student of the *Model Rules* will recognize, parts (a) & (b) of this rule are drawn from the current ABA *Model Rules* for traditional litigation. This is intentional as this Note will point out that the spirit underlying the professional responsibility of class action attorneys is the same as in traditional litigation.

25. See MODEL RULES Rule 1.2.

26. See *id.* at Rule 1.3 cmt.

adverse to the class-client's interests.<sup>27</sup> If at any time during the litigation the lawyer becomes aware that the lawyer's previous individual-client or the lawyer's personal interests are adverse to the class-client's interests, the lawyer must immediately withdraw from the conflicted representation to protect the individual-client's or the class-client's interests.

(4) Shall keep a class-client informed of the status of the class action through the class representative, and the lawyer shall keep attuned to the desires of the class-client as relayed by the class representative.<sup>28</sup>

(b) A lawyer for a party opposing a class action must not speak to a named plaintiff or unnamed class member concerning any matter related to the litigation after the lawsuit has been filed.<sup>29</sup>

(c) In order to represent a class-client's interests in a class action:

(1) A lawyer's fee may be contingent on the outcome of the matter but must be no more than a reasonable percentage of the actual class-client recovery.

(2) A lawyer must not engage in any form of negotiations with a potential opposing lawyer about a lawsuit that has not yet been filed.

(3) A lawyer shall provide notice of the class action to all class members.

(d) This rule does not apply to class actions involving fee-shifting statutes.

## COMMENT

### Duties to Class

[1] Loyalty to the class-client must be preserved above all else. Loyalty includes allowing the class-client to dictate the objectives of the litigation through the class representative. As long as the representative is adequately chosen, as required by FRCP 23(a)(4), and remains in communication with the class, the loyalty requirement will be satisfied.

[2] When litigation requires sub-classes, there is a presumption that each sub-class will need separate counsel to ensure that its interests will be met. Sub-classes of future plaintiffs should not be permitted except in the context of a FRCP 23(b)(1)(B) class action.

[3] At all times the interests of the class-client must come before the interests of any individual class member, class counsel, or the defendant.

[4] Part of understanding the objectives of the class-client is to have a full understanding of who composes the class. To those ends, class counsel is required to provide the best notice practicable to all potential class members who can be found regardless of the requirements under FRCP 23.

[5] Fees for plaintiff's counsel should be derived solely from the *actual* gain by the class. For example, if plaintiffs' counsel consents to settlement of a class action by coupons, plaintiffs' counsel is entitled to a percentage of the coupons in coupons or a percentage of the cash value of those coupons utilized by class members.

27. See *id.* at Rule 1.7.

28. See *id.* at Rule 1.4.

29. See *id.* at Rule 4.2.

[6] No lawyer should attempt to negotiate any kind of agreement for a class action that has not yet been brought in a court. Because there are no court-sanctioned class-clients, any interests expressed for the purpose of litigation can only be self-interests and should be strictly prohibited.

#### IV. WHY THIS RULE RESOLVES ETHICAL ISSUES

Noting that one Model Rule cannot encompass all the potential ethical issues that could arise in a class action, this Model Rule addresses many of the reoccurring ethical issues and establishes a new viewpoint for class action litigation ethics. The dominant existing viewpoint is that the current *Model Rules* do not apply to class actions.<sup>30</sup> Although true from a strict textual perspective,<sup>31</sup> the rationales underlying the *Model Rules*—(1) to protect the interests of persons who seek legal services<sup>32</sup> and (2) to protect the integrity of the legal profession<sup>33</sup>—remain the same. Despite the fact that these protections may increase the cost and duration of litigation and decrease the prospects of settlement, generations of attorneys have established their belief, through their adherence to the *Model Rules*, that these protections are essential.<sup>34</sup> These essential protections should be provided in class actions and are replicated in Proposed Model Rule 9.1(a)-(b).

Furthermore, recognizing that class actions are representative litigation where class members are not intimately involved with each decision, class members need extra protection. Drawing on the spirit of the *Model Rules*, Model Rule 9.1(c) attempts to rectify this situation by increasing restrictions on class action attorneys and proposing affirmative duties beyond what may be required under FRCP 23. These changes are proper because they are in accord with the policy underlying the professional responsibility requirements.

By utilizing the spirit for the *Model Rules* as a guide, Proposed Model Rule 9.1 provides a framework for approaching future ethically challenging situations that current lawyers have not imagined yet. The following are illustrations of requirements underlying the *Model Rules* in several ethically questionable situations that tend to arise in class action litigation.

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30. See *supra* note 20 and accompanying text.

31. For example, the defined "client" in traditional litigation is different than the amorphous "client" in a class action.

32. Whether acting in the role of an advisor, advocate, negotiator, intermediary between clients, or an evaluator, a lawyer has the responsibility of protecting her client's interest. See MODEL RULES pmb1.

33. Because the legal profession is self-regulating, "the profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." MODEL RULES pmb1.

34. For example, it would be less time consuming if defendant's attorneys were allowed to circumvent plaintiff's counsel and go directly to a plaintiff to coerce him into low-value settlements. Lawyers might be able to make more money if they were allowed to represent people on both sides of a dispute. Civil settlements may come much quicker and easier if a lawyer never has to consult with or explain anything to her client. Of course, none of these behaviors are permitted under the *Model Rules*.

#### A. PLAINTIFF'S ATTORNEY AGREEING TO IMMATURE SETTLEMENT OFFERS

When a plaintiff's attorney agrees to an immature settlement offer without the class-client's consent, the attorney's own financial interests are met because the attorney receives the same contingency attorney's fee, but the class is deprived of the opportunity to set the objectives of the litigation and, often times, is also deprived of the zealous advocacy of their interests.<sup>35</sup> In many class actions, the attorney stands in for the client and makes decisions regarding the litigation objectives and settlement.<sup>36</sup> Supporters of attorney-directed class actions argue that this practice is necessary because communication with the entire class would be cost prohibitive and class representatives lack the knowledge, ability, and interest to exercise any control in the litigation.<sup>37</sup>

Communicating with each class member over all aspects of the litigation would be time consuming and unnecessary in a class action where class members have a class representative "standing in" for them. But, if class members are relying on representation vis-à-vis the class representative, then the class representative must be permitted to set the litigation objectives and to make settlement decisions as all traditional litigation clients do.<sup>38</sup> Further, if the class representative is an adequate voice of the class, as required by FRCP 23 (a)(4), then there should not be a problem with a lack of knowledge, ability, or interest. Even if the class representative did lack the skill or interest, the legal profession would still require that an attorney permit the client, not the attorney, to set the objectives of the litigation.<sup>39</sup>

The Supreme Court seems to agree with the notion that the class, rather than the class counsel, has the power to dictate the objectives of the class action representation.<sup>40</sup> For instance, although the court did not allow the *res judicata* attack on the judgment in *McDowell v. Brown*, the Court suggested that had McDowell been able to show that a substantial number of class members did

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35. In this type of situation, an attorney is able to retain the same attorney's fee for less hours worked. If the settlement is for \$1M and the attorney receives 30% (\$300,000) it is far better for the attorney to receive that after 100 hours of work (\$3,000 dollars per hour) instead of 1,000 hours of work (\$300 dollars per hour). Even if the settlement would increase with the hours worked (i.e., \$3M settlement where the attorney receives \$1M but worked 3,000 hours (\$300 dollars per hour), the settlement may still be inferior, from an attorney's fee perspective, to a lower but quicker settlement. Clearly, the client would prefer the \$3M settlement. See Downs, *supra* note 16, at 665.

36. See Downs, *supra* note 16, at 691.

37. See Lazos, *supra* note 20, at 317-18.

38. See MODEL RULES Rule 1.2(a). See also *Prate v. Freedman*, 583 F.2d 42, 48 (2d Cir. 1978) ("In our legal system, an attorney is the client's agent.").

39. See MODEL RULES Rule 1.2(a) (As long as the client is not completely unreasonable or engaging in illegal actions, in traditional litigation, "a lawyer shall abide by a client's decision concerning the objectives of the representation.").

40. *McDowell v. Brown*, 5 Vet. App. 401, 410 (1993) (*McDowell* was barred from challenging the settlement under *res judicata* because the class representative provided fair and adequate representation.).

want the petition for a *writ of certiorari* filed, then that course of action should have been pursued instead of the course of action chosen by the attorney.<sup>41</sup>

Consulting with clients on the objectives of the litigation and settlement offers as well as requiring attorneys to zealously represent the interests of the client are protections that attorneys have deemed essential.<sup>42</sup> Proposed Model Rules 9.1(a)(1) and (a)(2) extend those essential protections to class-clients by requiring communication to the class-client via the class representative and by requiring zealous representation of class-client's interests.

#### B. PLAINTIFF'S ATTORNEY NOT TELLING A CLASS MEMBER TO OPT OUT

When an attorney becomes class counsel for a FRCP 23(b)(3) class action, she has a financial incentive to encourage a class member to remain in the class even if it is better for the individual class member to opt out.<sup>43</sup> If the attorney's loyalty to the individual client conflicts with the attorney's financial interest in receiving attorney's fees for this client as an individual client and as a class member, the attorney has a conflict of interest and the representation should not continue. Opponents of this position argue that the court can overlook this conflict of interest because class actions are more judicially scrutinized than traditional litigation.<sup>44</sup>

Although class actions may receive more judicial attention than traditional litigation, the court spends so little time evaluating class action settlements that it is highly unlikely that courts are looking for conflicts of interest between individual class members and class counsel.<sup>45</sup> But even if courts were scrutinizing settlements for these conflicts, scrutiny at settlement alone would be

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41. See *id.* at 410. (By citing the fact that the class member who was trying to challenge the application of *res judicata* did not show that "the decision to file a petition for a writ of certiorari was supported by a substantial number of the other members of the plaintiff class," the Court suggests that the objectives preferred by the class can overcome the objective expressed by the class counsel.)

42. See MODEL RULES Rule 1.2(a), MODEL RULES Rule 1.3 cmt. 1. For a description of the origin of the zealous representation duty, see also CHARLES WOLFRAM, MODERN LEGAL ETHICS 578 n.73 (1986) (quoting Lord Brougham's 1820 defense of Queen Caroline) in Catherine J. Lactot, *The Duty of Zealous Advocacy and the Duty of the Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 960 (1991):

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

43. This incentive stems from the fact that the attorney would receive double compensation as the individual attorney for this plaintiff and as the class counsel for this class.

44. See Downs, *supra* note 16, at 657.

45. See Priddy, 888 F.2d 438, and the text accompanying note 13 for a more detailed discussion of time spent on approving settlement agreements.

insufficient because class-clients deserve an attorney's loyalty and unbiased advice throughout the representation. In traditional litigation an attorney may be suspended, disbarred, or reprimanded for assuming to represent the interests of adverse parties.<sup>46</sup> This includes situations where it is the attorney's *financial* interest that conflicts with a client's interests.<sup>47</sup>

Proposed Model Rule 9.1(a)(3) and Comment [3] recognize that representing parties with a conflict of interest undermines the protections of clients and the integrity of the legal system.<sup>48</sup> Thus, when these conflicts of interest occur, the Rule requires that the attorney withdraw and ask the court to recommend that the individual client seek independent legal advice to protect his interests. Because having a non-conflicted attorney is fundamental to having a fair adjudication, when an attorney does not excuse herself, she should be subjected to the same disciplinary actions that would be available in traditional litigation.

### C. DEFENDANT'S ATTORNEY NEGOTIATING WITH A CLASS MEMBER BEFORE CERTIFICATION

When a defendant's attorney attempts to negotiate a settlement with a class member after the class action has been filed but before the class is certified, the defendant's attorney has an unfair advantage because she knows that there is active litigation, but the individual class member may not even know that a case has been filed or that someone is trying to protect his interests. This difference in knowledge, coupled with the fact that if the defendant can settle with enough class members the defendant can defeat the numerosity requirement under FRCP 23(a)(1) and prevent class certification, provides the plaintiffs with unequal protection. The lack of protection from opposing party communications stems from the Supreme Court holding that communication with a potential class member should only be limited when there is a "clear record and specific findings" weighing the potential abuse against the rights of the party.<sup>49</sup>

Although theoretically sound, this standard developed in response to a *defendant's* attorney trying to preclude a *plaintiff's* attorney from communicating with potential class member.<sup>50</sup> Because the Supreme Court was attempting only

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46. Full disclosure and consent are not enough when the interests are clearly conflicted. See *People v. Cole*, 760 P.2d 1108 (Colo. 1988); *Florida Bar v. Clark*, 513 So. 2d 1052 (Fla. 1987); *In re Farr*, 340 N.E.2d 777 (Ind. 1976); *In re Kelly*, 244 N.E.2d 456 (N.Y. 1968).

47. See *Florida Bar v. Vining*, 721 So. 2d 1164 (Fla. 1998) (issuing a six month suspension for an attorney who had a personal material conflict of interest with a client.).

48. See Nancy Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 U.C.L.A. L. Rev. 1, 28-52 (1980) (stating that the policy rationales for not permitting conflicts of interest are (1) the need to protect clients from the dangers of multiple representation; (2) the interest of the clients in certain objectives which can best be achieved through multiple representation; and (3) the preservation of lawyers' reputations through an avoidance of apparent impropriety.).

49. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 (1981).

50. See *id.* at 99-100.

to assist a plaintiff's attorney by allowing him to speak with the pre-certification class members, and because the rationale for not permitting attorney communication with represented persons is that persons may be exploited in a settlement by the disparity in legal skill,<sup>51</sup> communication from defendant's counsel prior to certification should be prohibited.<sup>52</sup>

Under Proposed Model Rule 9.1(b), once a class action has been filed, communication from the defendant to the class members would be prohibited. In conjunction with the intent of the Supreme Court and the protections that attorneys have required for the community and the integrity of the legal profession, the proposed rule minimizes the disparity in legal knowledge and evens the playing field.

#### D. ATTORNEYS AGREEING TO SETTLEMENTS THAT BIND FUTURE PLAINTIFFS<sup>53</sup>

When attorneys attempt to negotiate on behalf of people who have not yet been identified, the attorneys are consenting to bind the rights of people based solely on the attorney's speculation as to what the future plaintiff's interests and needs will be. The plaintiff's attorneys in this situation retain the attorney's fees for future plaintiffs and the defendant's receive final resolution of the matter but it is difficult to see what the future plaintiffs receive other than the assurance that some money may be there if they become ill before the common fund is depleted or before it expires.<sup>54</sup> Supporters of settlements that bind future plaintiffs argue that future plaintiffs should be represented as a sub-class because they have an interest in preserving as much of the common fund as possible for later injuries.<sup>55</sup>

While this argument is not without force, without more information, it is impossible to know if the future plaintiff sub-class interests are adequately protected; and, unless the common fund is limited, there is no reason that the future plaintiffs would want their rights adjudicated now. The Supreme Court has not looked at this issue specifically but has held that class members who have suffered injuries cannot adequately represent the interests of class members who have been exposed but not injured.<sup>56</sup> The classes in *Amchem* and *Ortiz* failed the FRCP 23(b)(4) adequacy of representation requirement because the interests of

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51. See *Polycast Tech. Corp. v. Uniroyal*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (noting that Model Rule 4.2 is designed to protect an opposing party from exploitation).

52. After certification, parties are considered represented under the *Model Rules* and any communication from the defendants has to go through the plaintiff's counsel. See MODEL RULES Rule 4.2.

53. Future or exposure-only plaintiffs are persons who were exposed to whatever substance originally caused the harm but who have not yet become ill or injured.

54. See *Coffee*, *supra* note 3, at 1420-21.

55. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

56. Under FRCP 23 there are four requirements for class certification: (a) numerosity, (b) commonality (c) typicality and (d) adequacy of representation. FED. R. CIV. P. 23(a). In *Amchem*, the Supreme Court held that the class the District Court certified failed, in part, because it did not meet the adequacy of representation

injured class members in taking as much as possible from the common fund conflicted with the future plaintiff's interest in leaving as much as possible in the common fund for future withdrawal.<sup>57</sup> *Ortiz* specifically instructs:

[I]t is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interest of counsel.<sup>58</sup>

Although it seems that the Court would have allowed sub-classes in these cases, it is questionable whether sub-classes could truly protect the interests of the class.<sup>59</sup> Before the court could explore this issue, counsel would have to find a potential future plaintiff to be the representative for this sub-class and would need independent counsel for the sub-class. Second, all sub-classes must independently be able to satisfy FRCP 23(a).<sup>60</sup> Because no one knows who will later become injured or who will later be born, no one knows if the FRCP 23(a)(1) numerosity requirement will ever be satisfied. Further, in many of these cases, there may not be clear data about how exactly exposure only or secondary exposure will affect people, so any attempt to fulfill the FRCP 23(a)(2) requirement of commonality would only be speculation. Because we do not know if the future plaintiff class representative will become injured, we do not know if her claims are typical or if she can serve as an adequate class representative, thus, not fulfilling FRCP 23 (a)(3) or (a)(4).<sup>61</sup>

Even where the Court has been convinced that sub-classes are proper, Proposed Model Rule 9.1 (a)(3) as well as Comments [1], [2], and [3] seek to protect future plaintiffs from being represented by counsel with a conflict of interest and from litigation of their claims until they have more certainty about

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requirement in 23(a)(4). In *Ortiz*, the court reiterated the finding. *Amchem*, 521 U.S. at 613; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1997).

57. *Amchem*, 521 U.S. at 627-28; *Ortiz*, 527 U.S. at 853.

58. *Ortiz*, 527 U.S. at 856.

59. The Third Circuit also seemed concerned with the adequacy of representation and typicality requirements for a future class:

Even if this case included only future plaintiffs, we would be skeptical that any representative could be deemed typical of the class. In addition to the problem created by differences in medical monitoring costs, the course of each plaintiff's future is completely uncertain. . . . Given these uncertainties, which will ultimately turn into vastly different outcomes, the future plaintiffs share too little in common to generate a typical representative.

*Georgine v. Amchem Prods.*, 83 F.3d 610, 632 (3d Cir. 1996).

60. *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993).

61. In addition, future claimants are usually apathetic about future legal claims until they develop injuries and need to be compensated. See *Coffee*, *supra* note 3, at 1362.

their needs for compensation.<sup>62</sup> Because lawyers believe that protecting the interests of the community and the integrity of the legal profession are essential, and because an attorney cannot determine the needs of a future plaintiff, representation of future plaintiffs should not be permitted in the majority of circumstances.

Assuming that a judge is willing to take judicial notice of the FRCP 23(a) requirements, an exception would be permitted in Comment [2] for class actions brought under FRCP 23(b)(1)(B).<sup>63</sup> In this situation, representation is permitted because if there are any future plaintiffs and no one acts to protect their interest in obtaining a share of the limited fund, the future plaintiff's chance at any future recovery is non-existent.

#### E. ATTORNEYS PLACING STRICT RESTRICTIONS ON COMMON FUND RECOVERY

When attorneys craft settlements in such a way as to make it difficult for a class member to obtain recovery, defendants can safely deposit large sums of money in the common fund, knowing that the money will revert back to them because few class members will meet the restrictions. The plaintiff's attorney can take the agreed-upon percentage of the available common fund in attorney's fees,<sup>64</sup> and the class members will be left with little, if any, recovery. In contrast, supporters of a restrictive common fund may argue that the attorneys are attempting to ensure that compensation is available for the most injured persons or that they are trying to ensure that only persons with legitimate claims can collect.

Although this argument may sound persuasive, when the restrictions preclude class members with legitimate claims, they become hard to justify.<sup>65</sup> To prevent these kinds of results, Proposed Model Rules 9.1(a)(3) and (c)(1), as well as Comments [2] and [3], seek to require plaintiff's attorneys to zealously represent the interests of the client, namely—actual recovery of the common fund. Protecting the interests of persons seeking legal services and the integrity of the legal profession requires providing settlements that actually benefit the injured parties.

The Proposed Model Rule attempts to ensure compliance with this policy rationale by requiring payment of the attorney's fees contingent not on the value

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62. Further, there is psychological evidence that courts feel comfortable awarding far less to a "hypothetical" class of future claimants than they would award to actually injured victims appearing before them in individual cases. See Coffee, *supra* note 3, at 1362.

63. FRCP 23 (b)(1)(B) class actions are cases where the common fund is fixed. The rationale behind a class action in this context is that it is fairer for everyone to have their rights adjudicated at one time and have the common fund divided as opposed to having only the early claimants recover for their injuries.

64. Although the percentage of an attorney's fee in each case could be different, the standard recovery for a plaintiff's attorney is 25-30%. See Downs, *supra* note 16, at 710.

65. See Sherrid, *supra* note 5, for an example of restrictive eligibility requirements where a legitimate class member cannot obtain relief because he has not retained the original credit card receipts from several years ago.

of the common fund, but on the *class recovery* of the common fund.<sup>66</sup> Although some may argue that this type of restriction is overly burdensome on plaintiff's attorneys, as long as the settlement is crafted in such a way that class members are able to obtain relief, plaintiff's attorneys should be able to obtain attorney's fees without delay.

#### F. ATTORNEYS CERTIFYING CLASSES FOR SETTLEMENT PURPOSES ONLY

When plaintiff's and defendant's attorneys negotiate the resolution to a class action that has not been brought yet, and then attempt to certify the class for settlement purposes only, they deprive the court of its supervisory role and make it more difficult for judges to assess the fairness of the settlement because the attorneys have removed the adversarial element. In addition, having these discussions without court supervision increases the possibility that plaintiff's-attorney-shopping<sup>67</sup> will occur. Plaintiff's-attorney-shopping is extremely dangerous to the recovery of the class because it essentially entails a race to the bottom. Unlike every other litigation scenario, if the plaintiff's attorney pursues the negotiation too vigorously for the defendant's taste, the defendant can walk away and look for a new plaintiff's attorney.<sup>68</sup> Even while a plaintiff's attorney is non-vigorously negotiating a settlement, another plaintiff's attorney can come in and offer to settle the non-existent case for even less. Because the new plaintiff's attorney can file the settlement class action with the defendant and prevent the original plaintiff's attorney from recovering any attorney's fees, the original plaintiff's attorney has an incentive to offer to settle for even lower, thus, further depriving the class of just compensation.

Some commentators have touted the use of the settlement-only class. These commentators argue that class members receive more complete, consistent and certain compensation for their injuries.<sup>69</sup> They also argue that there is increased economic efficiency and flexibility in settlement-only cases and a judge can appoint guardians if she is concerned.<sup>70</sup>

While these arguments are not without merit, a class will receive the same level of complete, consistent and certain compensation through court-observed negotiations, and, in court-observed negotiations, plaintiff's-attorney-shopping is less likely to occur. Further, even though the class action was developed in part

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66. This solution was recently suggested by the Rand Institute for Civil Justice. Sherrid, *supra* note 5.

67. Plaintiff's-attorney-shopping occurs when a defendant goes from one plaintiff's attorney to another plaintiff's attorney to see who will agree to settle the case for the least amount of money.

68. See Franklin, *supra* note 14, at 165; see also Coffee, *supra* note 3, at 1378 ("Nothing better facilitates collusion than the ability on the part of the defendants to choose the counsel who will represent the plaintiff class.").

69. For a more detailed discussion of these perspectives, see Franklin, *supra* note 14, at 172-74.

70. *Id.* at 173.

for judicial efficiency,<sup>71</sup> courts do not allow mere efficiency to justify depriving someone of his right to a fair adjudication in the adversarial system.<sup>72</sup> Finally, taking away the plaintiff's attorney's best weapon in negotiations—the threat of going forward with trial—allows for absurd results where the interests and protections of the class are abandoned.<sup>73</sup>

Proposed Model Rule 9.1(c)(2) and Comment [6] seek to prohibit attempts to certify a class for settlement purposes only. Because the main function of a lawyer is to protect the interests of her client,<sup>74</sup> questions arise as to whose interests the lawyer is protecting when the lawyer begins negotiating on behalf of a client who does not exist. If no client exists and the lawyer is acting on her own behalf, then she will have a conflict of interest with any future plaintiff who seeks consultation on this issue and must withdraw and ask the court to recommend that independent legal counsel represent the future-client-turned-actual-client's interests. If the plaintiff's attorney is speaking to the defendant's attorney on behalf of an actual client, then the lawyer needs to protect that client's interests by filing the class action. By not filing, the attorney is implicitly allowing the defendant's attorney to speak to the client and may be allowing the defendant's attorney to negotiate a settlement with the client that does not meet the client's needs.<sup>75</sup>

#### G. ATTORNEYS AGREEING TO UNREASONABLE SETTLEMENTS FOR NON-PECUNIARY RELIEF

When attorneys agree to unreasonable settlements for “coupons”<sup>76</sup> or donations to charity instead of recovery by the injured class, the plaintiff's attorney receives attorneys fees based on the monetary value of the settlement, the defendant receives global release of claims and a potential for increased sales with the use of the coupons, but the injured class receives little, if any, compensation. Supporters of non-pecuniary relief argue that these settlements should be permitted because in certain situations (i.e. where the class members cannot easily be found or when the value is too low to justify the administrative cost), the class action becomes cost-prohibitive and there are no repercussions for defendant's unjust enrichment.

In these limited situations, non-pecuniary relief may be appropriate. But in situations where the class members are known or where the monetary value is

71. See *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

72. See *Cent. Wesleyan Coll.*, 6 F.3d at 189 (acknowledging inefficiencies in the use of sub-classes for a class of approximately 480 colleges and universities dispersed nationwide, but approving the use of the sub-classes regardless).

73. See *Franklin*, *supra* note 14, at 176.

74. See MODEL RULES Rule 1.3 cmt. 1.

75. See *supra* Part IV.C.

76. The coupons provided in settlements usually allow the class members to purchase more of the defendant's product at a discount.

significant, it is absurd to compensate the plaintiff's attorney for her time, and provide the defendant with protection from future claims, while the class members receive little compensation for their injuries. A prohibition on non-pecuniary settlements when class members are easily known or when the compensation is significant is needed to protect the community and the integrity of the legal profession.

Proposed Model Rule 9.1(c)(1) and Comment [5] prevent attorneys from settling for non-pecuniary "damages." Under this rule, when a coupon settlement is utilized, the plaintiff's attorney will only be able to obtain a percentage of total coupons used or the attorney's fee percentage payable in coupons.<sup>77</sup> When a charitable donation is made as part of the settlement agreement, there would be no recovery of attorney's fees.<sup>78</sup> Using this schema, the attorney will be inclined to use coupons or charitable donation only when direct class compensation cannot be granted.<sup>79</sup>

#### H. PLAINTIFF'S ATTORNEYS NOT PROVIDING NOTICE TO CLASS MEMBERS

When class actions are filed under FRCP 23(b)(1) or (b)(2), the majority of courts have held that class members do not need to receive notice<sup>80</sup> because the absent class member's due process rights are protected as long as there is an adequate class representative.<sup>81</sup>

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77. One court has actually already required this. See *In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 593 (S.D.N.Y. 1973), cited in Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810, 826 (1996) [hereinafter *In-Kind Class Action Settlements*] ("[B]ecause [plaintiffs' counsel] have expressed faith and confidence in the value of the settlement for their clients, it is not unreasonable to require them, to some extent, to stand equally with the plaintiffs in sharing in the distribution in kind.")

78. Although forbidding the recovery of attorney's fees will discourage this type of settlement, it would not prohibit settlement of the claims in general as various other settlement arrangements can be made. Further, even though profit-based law firms would probably no longer bring class actions where such an outcome was likely, public interest and consumers' rights attorneys, who do not rely strictly on attorney's fees, would continue to bring these cases.

79. Some may argue that Proposed Model Rule 9.1 does not solve the problem because the defendant would still be free to overcompensate the plaintiff's attorney with coupons so that the attorney could recover the same fee in a secondary market for the coupons. (In a coupon settlement where the coupons are transferable, it is common for a secondary market to develop where coupons can be bartered or sold.) See *In-Kind Class Action Settlements*, *supra* note 77, at 826. But, at least in this situation, the plaintiff's attorney has ensured that the coupons can be disposed of in a secondary market for some value. In addition, there is no reason to believe that the court would scrutinize this settlement any less than any other settlement. Thus, if 100 class members are each receiving one coupon valued at \$50 and the plaintiff's attorney receives 200 coupons valued at \$50, the court should take notice.

80. See *McDowell*, 5 Vet. App. at 407 ("In a class action maintained under subsections (b)(1) or (b)(2) of Rule 23 . . . the representatives are not required to afford potential members with notice of the class action and an opportunity to request exclusion from the class prior to judgment. . . . the majority of courts have held that Rule 23 does not require prejudgment notice in class actions maintained under subsections (b)(1) or (b)(2)." (citations omitted)).

81. See *Ives v. W.T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975); *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981). *Contra Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (In FRCP 23(b)(3) class

Although the courts say that due process rights are protected, questions arise as to how to ensure that class representation is adequate when the composition of the class is not fully known.<sup>82</sup> More information about classes is needed. Under FRCP 23(b)(1)(A), the court needs to ensure that all constituent interests are represented;<sup>83</sup> under 23(b)(1)(B), the court needs to know the specific injuries to each sub-class so the limited fund can be divided fairly; under FRCP 23(b)(2), the court needs to assess the superiority requirement and ensure that all perspectives are represented.<sup>84</sup> Further, without notice, some class members will not know that they can intervene to present claims or defenses and may have those rights forever foreclosed.<sup>85</sup>

Proposed Model Rule 9.1(a)(1), (a)(4), (c)(3), and Comment [4] require plaintiff's attorneys to provide notice of an impending class action regardless of the requirement under FRCP 23.<sup>86</sup> This affirmative duty is in accord with the policy behind the *Model Rules* because attorneys need to know who their clients are in order to protect their client's interests.<sup>87</sup> Even though the class representative can act as the spokesperson for the class in determining the objectives of the litigation, the court must be satisfied that the class representative can represent the interests of the class before the class can be certified under FRCP 23. In order for the court to be assured that the class representative can adequately represent the class, the attorney must know who comprises the class and what their interests are.

Those who oppose this affirmative duty may argue that the cost of notice will prohibit plaintiffs from bringing class actions. Although it is true that a notice requirement such as this may prohibit some class actions as cost-prohibitive, the notice requirement is necessary for the attorney to fulfill her responsibilities to the class and to the legal profession. In other notice requirement cases, the Supreme Court has preferred the protection of clients to the saving of costs.<sup>88</sup>

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action, the Supreme Court held that class members need notification and an opportunity to opt out of the class because a higher level of protection is needed for monetary remedies.).

82. As is required by FRCP 23(a)(4) in all types of class actions, the class representative needs to be adequate.

83. See generally Downs, *supra* note 16, at 672-76.

84. See generally *id.* at 675-77.

85. See generally *id.* at 678.

86. Although notice is only currently required in FRCP 23(b)(3) class actions, the proposal to amend FRCP 23 includes a requirement for notice in FRCP 23(b)(1) and (b)(2) class actions. This discussion will only apply in the (b)(1) and (b)(2) context. See *Witnesses Urge Reform*, *supra* note 7.

87. See Gary A. Munneke & Theresa E. Loscalzo, *The Lawyers Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391, 426-27 (1989) ("The Comments to Rule 1.4 [similar to Proposed Model Rule 9.1(a)(4)] make clear that it pertains to the matters covered in Rule 1.2(a) [similar to Proposed Model Rule 9.1(a)(1)], and the two Rules together establish an unequivocal duty to inform the client about fundamental aspects of the representation.").

88. In order to protect due process rights of the class members in a FRCP 23(b)(3) class action, the Supreme Court required individual notice to the 2,250,000 class members over the plaintiff's objections that this would make the suit cost-prohibitive. See *Eisen*, 417 U.S. at 178-89.

V. IMPLEMENTATION<sup>89</sup>

## A. WHY NOT PURSUE THESE CHANGES AS CHANGES TO FRCP 23?

Some of the ethical changes proposed in Model Rule 9.1(c) may seem like procedural changes, better addressed by the Advisory Committee to FRCP 23. Even though some changes may affect procedural issues, these changes govern the relationship between attorney and client and thus can be regulated by the *Model Rules*. By dealing with these issues proactively, attorneys can use the *Model Rules* to reform the class action litigation device and quell public concern.

In addition, if these changes were proposed as amendments to FRCP 23, many of these changes would be prevented by the plaintiff's bar, the defendant's bar, and many large corporations who reap the benefits of the current system and are adept at organizing and lobbying Congress. Many lawyers would be less likely to advocate for this change because this change would make bringing and settling class actions more difficult, time consuming and expensive. The only likely supporter of these kinds of class action reform—which make class actions more difficult but arguably more ethical—would be public interest groups who are concerned with the erosion of the class action. For these reasons, the battle is more easily fought within the context of the *Model Rules*.

## B. PURSUING PROPOSED RULE 9.1

Though probably easier than passing an amendment to FRCP 23, the passage of a Model Rule is not without its own barriers. The following is a potential strategy for promulgating Model Rule 9.1 as an ABA Model Rule and then as an ethical rule in each State.

## 1. PICKING THE PEOPLE

The first step in pursuing the promulgation of Model Rule 9.1 is finding a spokesperson to propose the change. Ideally this person would be an attorney with a significant class action practice as opposed to someone well versed in traditional litigation or someone who is solely an academician. This attorney should also be well respected in the legal community and preferably have worked with the ABA Model Rules Committee previously.<sup>90</sup> A good place to look for someone like this would be in a public interest law firm that may be interested in speaking out against class action abuses.<sup>91</sup>

89. In Part V, this Note proposes one potential implementation plan. However, there are a multitude of other actions that could be taken to realize the same goal.

90. This will enable quicker movement because he or she will already know the process for promulgating a new rule and will already have formed relationships with the people on the Commissions and ABA House of Delegates, who ultimately make the decision.

91. Groups such as Public Citizen and Trial Lawyers for Public Justice would be excellent resources for suggestions.

After the attorney who will orchestrate the proposal of the Rule is in place, several sympathetic class members should be chosen. Particularly good candidates may include the elderly, disabled persons or veterans. These sympathetic class members should be persons who were participants in class actions with egregious results. For instance, a good candidate would be an eighty-eight-year old man who could not collect on the common fund secured in a class action for life insurance fraud because he does not have his original receipts.<sup>92</sup> Other potential candidates might include low-income families, who must continue to drive a faulty truck because they cannot afford to use the discount coupon they received as a settlement for the purchase of a new truck, or children who contracted cancer too late to recover from the common fund set aside for persons exposed to a dangerous chemical substance. Once the faces and real-life stories of class action abuse have been found, the public education phase will be ready to begin.

## 2. EDUCATING THE PUBLIC

The organizing lawyer and the sympathetic class members will need to begin their education plan by assembling a team of people who are dedicated to class action reform. Because many attorneys in the plaintiff's and defendant's bar may oppose this proposal, the organizing lawyer will need to look outside of the traditional legal circles to gain support. Good team members may include: public interest law firms, consumer protection groups, the AARP, veterans' groups, and law students.

Once the team is in place, the organizing lawyer should educate the team about the current state of class action litigation: what class actions were intended to accomplish, how class actions can help groups of people, how class actions can hurt groups of people, and what the end result would look like if class action litigation was forced to change because of a new ethical rule imposed on attorneys. It is essential that the positive uses of class actions are stressed so that the team understands the true value of class actions. After the team is sufficiently educated, they should return to their communities and begin teaching others about class action abuse.

While the team is instructing their local communities, the sympathetic class members will need to grasp the attention of the media through public demonstrations. The public interest law firms and law students should begin publishing reports that catalogue class action abuse throughout the country. These reports can serve as background information for newspaper and magazine articles or spotlights on television news stories. Again, it is essential that the focus stay on the positive uses of class action litigation. Once the public is informed and incited, and the team has begun to demand a response from the

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92. See Sherrid, *supra* note 5.

legal community, Model Rule 9.1 should be proposed to the ABA Ethics Commission by "one of their own."

### 3. PROPOSING THE RULE

As a respected member of both the legal and the class action community, the lawyer-organizer will be able to propose a viable solution that ensures the livelihood of the class action device but prevents the class action abuses that have been highlighted in the media and in the local communities. The Ethics Commission would most likely discuss and amend Proposed Model Rule 9.1 and then set it aside for public comment.<sup>93</sup> It is imperative that as many public interest organizations, law student groups and legal ethics organizations as possible submit comments in support of this rule. The plaintiff's and the defendant's bar may actively oppose all or part of Model Rule 9.1 so the volume of comments in favor of the Rule must be at least equal if not greater. In the end, the ABA Ethics Commission will consider all of the comments and arguments for and against this rule and allow the ABA House of Delegates to make a decision about the fate of Proposed Model Rule 9.1.<sup>94</sup>

### 4. TAKING MODEL RULE 9.1 TO THE STATES

Assuming the ABA accepts Proposed Model Rule 9.1, the next battlegrounds are in the states. For the states that have adopted the *Model Rules* as written or in large part, it probably will not be difficult to get Model Rule 9.1 passed, as the rule would be adopted with the other *Model Rules*.<sup>95</sup> For the states that have not adopted the *Model Rules*, the team, sympathetic class members, public interest lawyers and law students will be needed. In conjunction with increasing awareness through public education, the group should look for local persons who have been the victims of class action abuse. By attaching a local face to the problems of class action abuse, the community will be more likely to call for action by the state bar association.

If the state bar association still refuses to adopt a class action rule similar to Model Rule 9.1, individual class members can attempt to sue the class lawyer in their cases for malpractice by conflict of interest under the state rule for traditional litigation and sue the state bar association for not preventing this conduct. As part of the relief sought, the class member may ask for a court order

93. See Love, *supra* note 19.

94. In some ways the process of requesting a Proposed Model Rule to be promulgated is similar to the process utilized in lobbying for legislation in Congress. The key difference is that in this scenario we are using the political process to create a need for the rule and relying on the strength of the argument to carry the passage of the Proposed Model Rule. In a purely political process, the power of the united plaintiff's and defendant's bar would quash this action before it ever had any real consideration before Congress.

95. See *supra* note 19 and accompanying text.

requiring the state bar association to adopt an ethical rule specifically for class actions.<sup>96</sup> Even if the lawsuit is unsuccessful, it could be used to bring class action abuses back into the attention of the media and incite the team and community to, again, call for action by the state bar association.

## VI. CONCLUSION

The class action device, if used in the proper manner, is one of the strongest tools a litigator can use to adjudicate multiple claims. Because of the power involved in litigating several claims at one time, there is an increased potential for abuse. As the public becomes increasingly aware of abuses, they are more likely to call for the end of the class action device.

Proposed Model Rule 9.1 seeks to ensure the survival of the class action device by removing the practices that would not be permitted in traditional litigation and by providing for some additional protections of class members. The underlying spirit of the *Model Rules*—protecting the client and the integrity of the legal profession—have guided the development of the *Model Rules* in traditional litigation and must be applied to the class action context in order to save the class action.

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96. Although this may be a somewhat unconventional path to adopting a Model Rule, the *Model Rules* provide that "to the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated." But, on the other hand, it also seems to suggest that when lawyers are not meeting the obligations of their professional calling, governmental regulation is appropriate. See MODEL RULES pmb1.

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**August 16, 2009 Voogd Memo to RRC:**

The communications set out below from Mark Tuft and Diane Karpman admirably identify rules and considerations involving class actions. My class action concerns arise out of my experiences as a member of various classes. Each of these actions settled following a pattern. No effort had been made by class counsel to resolve the matter complained of prior to filing suit. Class counsel were handsomely rewarded in the settlements. Members of the class got nothing or essentially nothing. Defendants were willing to pay large settlements against weak claims simply to avoid the ever-growing costs of defense. Large amounts of scarce judicial resources were wasted litigating the cases and I suspect the judges approved the settlements to end the waste. In the last class action, I got zero (not even a worthless coupon or some phony injunctive relief) while class counsel got \$1.5 million.

Our system of legal ethics is founded upon the protection of the professional relationship between attorneys and his clients. Yet class actions proceed in circumstances where the relationship for all practical purposes is non-existent. Is this a problem that should be addressed by a rule of professional conduct or is the problem inherent in class action law?

**August 15, 2006 Tuft E-mail to Drafters:**

Dear fellow Class Action Subcommittee Members:

Here is my humble contribution for our assignment under Item III.J for the September 1 meeting.

1. The rules in Batch 1 that I believe raise possible class action issues are proposed rules 7.1, 7.2, 7.3, 2-200 and possible 1.4 (3-500 and 3-510)
  - a. The primary issue is the interplay between the advertising and solicitation rules and court's ability under FRCP 23 to control communications with potential class representatives and class members. In my experience, the means by which a lawyer is able to attract lead plaintiffs and potential class members and the extent to which courts can control a lawyer's communications prior to class certification are issues that frequently face potential class counsel. As one example, I was involved in a case several years ago where the complaint alleged wage and hour violations on behalf of temporary employees, permanent employees and middle managers and supervisors of the defendant company. Plaintiffs counsel sought to communicate with potential class members in each of the three proposed subclasses after the case was file and before the case was certified as a class action. Company counsel claimed (among other things) that counsel's letters and email communications to middle managers and supervisors violated rule 1-400(B)(2)(b) [proposed rule 7.3(b)(3)]. I am not convince, however, that the issue of how the rule applies in pre-class certification communications warrants a separate comment. Note that proposed rule 7.2, Cmt [4] already picks up Model Rule 7.2, Cmt. [4] that rules 7.2 and 7.3 are not intended to prohibit communications authorized by law, although we struck the phrase: "such as notice to members of a class in class action litigation."
  - b. A separate issue is whether class counsel from different firms must comply with rule 2-200 (1.5(e)) in arrangements for sharing awards of attorney's fees in class action cases. Rest.3d section 47, Cmt. h. states that ". . . agreements governing how any fee award will be divided ordinarily do not violate this Section, provided that the division is in

proportion to the services performed by each firm or each firm assumes joint responsibility for the representation." Would the same apply to rule 2-200 as proposed? The comment further provides that where the agreement provides for payment that are disproportionate to the services performed or funds advanced, or for a distribution that differs from what the court determine, disclosure should be made to the court, who may set it aside. See, FPI/Agretech Securities Litigation (9th Cir. 1997) 105 F3d 469 - court has power to set aside agreements between class counsel.

- c. Does rule 1.4 apply to communications with class members (in contrast to class representatives, who are clearly clients)? See, e.g., *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir 1973) - lawyer's duty to ensure that class members receive proper notice of proposed settlement.
2. In Batch 2, rules 2-100, 3-310 and 3-600 raise possible class action issues. In the example above, defense counsel also claimed the communications with the company's middle managers also violated rule 2-100. On the other hand, defense counsel is not free to communicate directly with class members. See Rest.3d section 99, Cmt. I. Again, I am not recommending that a separate comment is needed to address the application of the rule in class action cases.
- a. Rule 3-600 and rule 3-310 pose different issues - is a class an organization? I don't think so. Nevertheless, is there a duty on the part of the lawyer when the lawyer knows or reasonably should know that a class member or potential class member reasonably believes the lawyer is providing that person with legal services and advise. See Rest. 3d. section 14 and Cmt f. ("Class actions may pose difficult questions of client identification." See Rest.3d section 99, Cmt I - members of the class are considered "clients" of class counsel once the class has been certified for purposes of the "anti-contact" rule.
  - b. Model Rule 1.7, Cmt [25] provides that putative class members are not considered clients for purposes of representing adverse interests under rule 1.7(a)(1). However, Rest.3d section 128, Cmt d(iii) discusses the issue of representing class members with competing objectives and interests and the procedural remedy of creating subclasses. Qualification of class counsel is typically determined under FRCP 23 standards and case law.
  - c. Another issue involves the application of the aggregate settlement rule under 3-310(D). Class action settlements typically require class notice and court supervision. There is a protocol for class members objecting to the proposed settlement. Rest.3d Section 125, Cmt f. addresses some of the personal interest conflicts of interest in initiating and settling class actions and other multi-client matters. For example, the comment addresses conflicts in setting and negotiating class counsel's fee.

Let me know what you think of this survey.

**August 16, 2006 Diane Karpman E-mail to Drafters re Pre-certification:**

Dear Colleagues:

Mark suggested that pre-certification communications does not require a separate rule or mention.

I would suggest otherwise, and do not believe that reliance on the "unless otherwise authorized by law" takes care of the problem. Actually, reliance upon that section, only further complicates a murky issue for CA lawyers (see citation from Parris, below).

"Otherwise authorized by law" suggests to a lawyer that they must obtain pre-communication approval by the court, which is true just about everywhere else but in California (see Parris below). Note, that Parris relied upon Justice Mosk's expansive interpretation of the CA Constitution in Gerawan Framing, 24 Cal. 4th 468, in which he maintained that the CA Constitution grants vastly greater free speech rights than the US Constitution. So it is again, uniquely Californian.

There are 3 Major Law Review Articles on Pre-Cert. Communications, which I can't put my hands on right now, but I maintain a separate file for this topic alone -- because it is such a repeat player.

I would think that if CA was vastly different on an ethics issue than the rest of the United States of America, that maybe that should justify some mention?

Very Best,

Diane

**Parris v. Superior Court (2003) 109 Cal.App.4th 285**

"In the only published decisions addressing the propriety of precertification notice to potential class members, two Courts of Appeal have upheld the role of the trial court in screening the content of the proposed notice and authorizing the communication only if the court determines "there is no specific impropriety." ( Atari, supra, 166 Cal. App. 3d at pp. 870-871; Howard Guntz Profit Sharing Plan v. Superior Court (2001) 88 Cal.App.4th 572, 575-576, 105 Cal. Rptr. 2d 896 (Howard Guntz).) In Howard Guntz Division Four of this court held leave of court was required before a notice could be sent to potential class members in order to identify a new class representative after the original class representative had been found inadequate. ( Id. at pp. 575-576.) The court concluded the necessity to regulate class action proceedings trumped free speech concerns, holding: "Plaintiffs contend that since their communication with potential class members is protected commercial speech under the First Amendment, the only limitation is that it not be false, misleading, or deceptive. (See Shapero v. Kentucky Bar Assn., supra, 486 U.S. at p. 472 [108 S. Ct. at p. 1921 ].) We disagree. In the context of a class action, it is the court's authority and duty to exercise control over the class action to protect the rights of all parties, and to prevent abuses which might undermine the proper administration of justice. (See Gulf Oil Co. v. Bernard[(1981)] 452 U.S. [89,] 100-103 [101 S. Ct. at pp. 2200-2201].)" ( Id. at p. 581.) Accordingly, it held that precertification communications are properly subject to prior court approval: " Precertification communication carries the potential for abuse. Thus, any 'order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.' [Citation.] The trial court should identify the potential abuses and weigh them against the rights of the parties under the circumstances. [Citation.]" ( Howard Guntz, supra, 88 Cal.App.4th at p. 580.)

**C. Requiring Judicial Approval for Precertification Communications Constitutes an Impermissible Prior Restraint of Protected Speech (6a)**

We respectfully disagree with the free speech analysis of our colleagues in Division Four. n5 The requirement of court approval for precertification communications is a classic example of a prior restraint on speech. ( Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 554 [95 S. Ct. 1239, 43 L. Ed. 2d 448] [prior restraint on speech exists if in order to engage in protected speech, (1) advance approval of the government is required, (2) the approval depends on affirmative action by a government official and such action requires the exercise of judgment, and (3) the government official may render that judgment based on the content of the speech].) "

**August 16, 2006 Diane Karpman E-mail to Drafters re Fee Splitting:**

Mark raises the issue of fee splits among firms in a class action. This is a major issue especially because fees are a primary issue in the Class Action Fairness Act of 2005. Pursuant to Rule 23, the Court in the fairness hearing has special duties to verify that, the class received benefit from the lawyers performance.

And, this creates significant problems in practice. If fees are based upon performance, then what happens is that firms will churn cases, take needless depositions, and have employee's that unnecessarily engage in acts in order to substantiate the eventual fee applications.

Yet you cannot escape the fact that these cases need to be funded, and lawyers like anyone else expect to recover on their investments.

These are tough issues.

**August 16, 2006 Diane Karpman E-mail to Drafters re Disclosure Requirements:**

One of the reasons that I believe there should be a separate rule for Class Actions is that the paradigm of litigation is entirely different.

The court acts as a fiduciary for the absent class members (Cal Pak), a lawyer has enhanced duties of honesty, that are similar to Bankruptcy Court.

If a lawyer was asked a question by a court then ordinarily he may be able to deflect the inquiry; whereas if the client asked the question....total and complete honesty would be expected. So if the court steps into the shoes of the client- greater disclosures are mandated. None of the folderol that could occur in the context of a typical court proceeding would be permitted.

So for example, in a well known bankruptcy case, a lawyer was criminally convicted for misrepresenting the existence of a conflict to a bankruptcy court. This is the John Gellene case where a Millbank partner was sent to prison, for 3 instances of failing to disclose a conflict in a bankruptcy proceeding. That level of enhanced honesty is also present in class actions, where like bankruptcy lawyers have greater duties. Actually the ALI is focusing upon bankruptcy cases as a sort of model for the Principles project.

Now, it would probably be a good idea if we let lawyers know about this because often-- they don't have a clue. Especially with the Class Action Fairness Act, court's are directed to become more aggressive in requesting lawyers to disclose information.

Court's often have to be reminded of their amplified obligations, they just can't approve a settlement but are required to investigate thoroughly. The reason that they have to fully evaluate the "deal" is because it is not unheard of for defendant's to cook up "sweetheart deals." They will assist plaintiff's counsel in being appointed as lead counsel if a proposed settlement is reached at a certain price.

You can't very well tell the defense counsel-- don't protect your client, allow the class action to be brought, allow the stock prices to decrease due to the disclosure on SEC (10 Q's or 10 K's), allow your client to be harmed. Yet, agreeing to a collusive settlement is--well I think that you all understand the problems.

**August 16, 2006 Diane Karpman Memo to Drafters re Process:**

### **CLASS ACTION PROCESS OPTIONS**

There are at least three options that we could discuss in terms of process with the Commission. We could suggest an entirely separate rule designed to govern lawyer conduct in aggregate litigation or class actions.<sup>1</sup> We could tweak each Rule that causes a problem. (See states that have employed this method below.) A third option would be to provide lawyers with as sort of generic band aid, which would indicate that the rules are not applied in a "knee jerk" manner in class actions. Each of the three methods is considered below, and of course you may have different suggestions or solutions.

#### **Separate Distinct Rule**

This was suggested at the final meeting of the American Law Institute *Restatement of the Law of Lawyers*, by Professor Roger Cramton in 1998.<sup>2</sup> It was unsuccessful because many others felt that drafting a new section would further delay the process, and the ten-year process needed closure. The American Law Institute is currently drafting a publication titled, "Principles of Aggregate Litigation."<sup>3</sup> The Members Consultant Group will be meeting on October 14, 2006 in Philadelphia. Several ethics lawyers are involved, and some of them think that this may take care of the holes in the *Restatement of the Law of Lawyers*.<sup>4</sup>

This separate Rule was also suggested by Richard Zitrin to the Ethics 2000 Commission both in written and in oral testimony to the commission. Professor Nancy Moore discusses the position that the Commission took on this proposal in her *Uni. of Ill. Law Review*. Consider:

"Zitrin did not propose any specific language at all, but rather urged the adoption of an ethics rule directly addressing representation of a class, utilizing existing case law as a

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<sup>1</sup> The American Law Institute is employing this term as opposed to "class actions." They believe it is all encompassing.

<sup>2</sup> Full disclosure, I voted for this proposal.

<sup>3</sup> I am attempting to obtain electronic versions of their tentative drafts for all of us.

<sup>4</sup> The Restatement has 32 sections that mention "class actions." I have a copy of an old Westlaw search, but it was scanned and is illegible. I am certain many other sections consider issues involving aggregate settlements.

basis for determining the content of such a rule. Testimony of Richard Zitrin before the Ethics 2000 Commission, *supra* note \_\_\_\_\_. Aside from its lack of specificity, I have two problems with the Zitrin approach. First, I do not believe that the nuances of class action law can be adequately captured in code format. See Moore, *supra* note [21] ("code format may be insufficiently flexible to adequately communicate the duties of class counsel"). Second, I believe that the obligations of class action counsel toward the members of the class should be codified or otherwise formulated by those who draft, interpret and apply the rules of civil procedure, as well as the constitutional underpinnings of class action law, and not by those who draft, interpret and apply the rules of professional ethics. See *infra* [Part IV]."

Also consider:

"Waid proposed a new Model Rule 3.10 as follows: Rule 3.10.

Responsibility of Class Counsel

The lawyer representing a class of individuals in a class action owes a primary duty of loyalty to members of the class defined by the original pleadings filed on behalf of the class, until such definition is amended by leave of court."<sup>5</sup>

### **Tinkering with Specific Rules**

Incidentally, that is what California has done in the past, see Rule 3-510, and Rule 3-310 (D), Official Discussion.

"Although no state has adopted a separate class action rule, several states have adopted additional language in either the text or comments to the rules regarding various aspects of class action litigation: none of these additions are comprehensive. See, e.g., Indiana Rules of Prof'l Conduct, Rule 7.3(d) (adopting provision similar to solicitation exception provision of Model Code); Kansas Rules of Prof'l Conduct, Rule 7.3(b) (same); Mass. Rules of Prof'l Conduct, Rule 1.7, Comment [14A] (regarding simultaneous representation of two class actions against a single defendant and the lawyer's duty to consider whether the creation of subclasses is required); Rule 3.3, Comment [16] (applying duty of candor in *ex parte* proceeding to joint petitions to a tribunal, including a joint petition to approve a class action settlement); North Dakota Rules of Prof'l Conduct, Rule 1.8(g) (specifically exempting class actions from coverage under aggregate settlement rule); Texas Rules of Prof'l Conduct, Rule 1.02 Comment 3 (stating as an exception to rule that it is for client to accept or reject settlements the ability of a class action lawyer to recommend settlement over the objections of named plaintiffs). Jurisdictions that follow the Model Code format typically retain the provision allowing limited solicitation in class actions. See, e.g., Iowa Code of Prof'l Responsibility DR 2-104. California's rules, which are not based on either the Model Code or the Model Rules, has a single reference to class actions. See California Rule 3-510 (regarding communication of settlement offer to a client, defining "client" to refer to the named representatives of a class in a class action)."<sup>6</sup>

In addition to CA Rule 3-510, we have 3-310 (D)'s statement in the Official Discussion, "Paragraph (D) is not intended to apply to class action settlements subject to court approval." Note that some have suggested that since, this part of 3-310 specifically

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<sup>5</sup> Moore, Nancy J., "Who Should Regulate Class Action Lawyers?" University of Illinois Law Review, No. 5, p. 101. 2003.

<sup>6</sup> Moore, Nancy J., "Who Should Regulate Class Action Lawyers?" University of Illinois Law Review, No. 5, p. 101. 2003.

exempts class action settlements, that inferentially the other aspects of the Rule, and possibly other rules would apply. (Carrie Menkel-Meadow, Ethics and the Settlement of Mass Torts: When the Rules Meet the Road (1995) 80 Cornell L.Rev. 1159, 1193.)

### **Overall Band Aid**

There is lots of authority that the Rules in Class Action are not applied in a knee jerk manner. I don't quite know where this would go in the grand scheme of things. But we could include a proviso that in aggregate or class litigation, axiomatic application of the rules is not mandated. Consider:

"Koniak, supra note \_\_\_\_ at 1121 ("off-made remark"). See also, e.g., In re Agent Orange Product Liability Litigation, 800 F.2d 14, 19 (2d Cir. 1986) ("the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J. concurring) ("courts' cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context"); Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999) (citing and quoting both Agent Orange and Judge Adams's concurring opinion in Corn Derivatives)."<sup>7</sup>

Or, consider the authority to not apply the conflict of interest rules in a formalistic manner:

"For judicial recognition that conflicts of interest rules cannot be simplistically applied to class actions, see, for example, In re Austrian and German Bank Holocaust Litigation, 317 F3d 91, 102 (2d Cir 2003) (quoting In re "Agent Orange" Products Liability Litigation); Lazy Oil Co v Witco Corp, 166 F3d 581, 589-90 (3d Cir 1999); Bash v Firstmark Standard Life Insurance Co, 861 F2d 159, 161 (7th Cir 1988) (noting that "strict application of rules on attorney conduct that were designed with simpler litigation in mind might make the class-action device unworkable in many cases"); In re "Agent Orange" Products Liability Litigation, 800 F2d 14, 18-19 (2d Cir 1986) (noting that "the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); In re Corn Derivatives Antitrust Litigation, 748 F2d 157, 163 (3d Cir 1984) (Adams concurring) (noting that "traditional model cannot be carried over unmodified to the class action arena, since no clear allocation of decision-making responsibility has emerged between the attorney and class members"). Academic commentators also acknowledge that class actions present special problems. See, for example, Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, 65 Fordham L Rev 71, 127 (1996) ("The conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules."); Brian J. Waid, Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct, 27 Loyola L Rev 1047, 1048-49 (1981) (noting that ethics rules provide inadequate guidance for class actions)."<sup>8</sup>

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<sup>7</sup> Moore, Nancy J. (2003) "Who Should Regulate Class Action Lawyers?" University of Illinois Law Review, No. 5, p. 101, at footnote 8.

<sup>8</sup> Sorry, I do not have a cite for this.

August 28, 2006 Diane Karpman Memo re Substantive Issues in “Aggregate Litigation”:

## REPRESENTATIVE LITIGATION CONSIDERATIONS

### Introduction<sup>1</sup>

This memo is intended to highlight some of the issues we may want to be considering with class actions, mass torts, multi-district, representative, share holder derivative, or what the America Law Institute is labeling as "aggregate litigation."<sup>2</sup> This would involve concepts that generally fall within Federal Rule of Civil Procedure 23.

Representative litigation is entrepreneurial and "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions."<sup>3</sup>

"Class counsel thus has potential duties in three directions: to the named plaintiffs, to the absent class members, and to the "public interest." The primary problem with identifying any one of these as *the* client is that none can be said to exercise control over class counsel . . . If anyone controls the lawyer, it is the court, which does so for the benefit of the class."<sup>4</sup>

### Clienthood<sup>5</sup>

This is a critical issue, because it shades all the other difficult issues presented in aggregate litigation. If some consensus can be reached on this issue, then many cases, which seem inconsistent with the Rules, are capable of explanation.

Consider:

"Class Counsel" or "lead counsel" lacks a traditional attorney-client relationship with each class member, but nevertheless is in a fiduciary relationship with the members of the class. Thus, "while lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class."<sup>6</sup>

A traditional attorney-client relationship would exist between lead counsel and lead

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<sup>1</sup> Thank you Ira Spiro, who maybe the best editor.

<sup>2</sup> Last year the American Law Institute issued a preliminary draft of the Principles of Aggregate Litigation. The next meeting of the Members Consultant Group for that draft publication is October 14, 2006.

<sup>3</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1450. Citing to *Greenfield v. Villager Industries* 483 F. 2d 824, 832 n. 9 (3<sup>rd</sup> Cir. 1973).

<sup>4</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1453.

<sup>5</sup> This term is employed by Professor Ted Schneyer to explain how clients and lawyers have different expectations and duties depending on the case. For example, if a client's case involves family law or criminal issues, they justifiably expect full obligations and duties. Where if the client is a member of a thousand plus person class, and does not know that such a class exists, then it is questionable if they have any expectations.

<sup>6</sup> *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867, 879; see also *In re McKesson HBOC, Inc. Securities Litigation* (N.D.Cal. 2000) 126 F. Supp. 2d 1239, 1245.

plaintiffs, since communications would exist that would engender expectations.<sup>7</sup> Even when a lawyer disclaims the relationship, the court in representative litigation can nevertheless create the relationship based on the expectations of a prospective client.<sup>8</sup>

The existence or non-existence of an attorney-client relationship may be based, on the type of action or relief being sought. For instance, there are numerous disqualification motions that deny disqualification of counsel based on a conflict of interest, since conflicts are anticipated in representative litigation due to the sheer size or volume of the prospective client pool. Whereas, if the claim involves professional negligence vis-a-vis-a-vis-a-vis the standard of care, then the duty of competent performance extends to every member of the class.<sup>9</sup>

MR 1.7, Comment [25] to Model Rule 1.7 provides as follows:

"[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter."<sup>10</sup>

Written fee agreements, rarely exit and even if a named plaintiff has executed an agreement, it will not bind the absent class members or the court.<sup>11</sup>

### **Communications**

In addition to Rule 3-510, communications with the prospective or actual members of the class are regulated more aggressively outside of California. Some maintain that pre-certification, a potential member is not a party<sup>12</sup> within the penumbra of the anti-contact rule. National authority permits such contact as long as a district court is monitoring, pursuant to the court's duty and authority to issue appropriate orders.<sup>13</sup> California construes communications with prospective class members to be constitutionally protected speech. Therefore, a blanket requirement for prospective approval of an intended communication would constitute an impermissible prior restraint on freedom of speech, absent evidence of abuse or confusion.<sup>14</sup>

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<sup>7</sup> This is consistent with Rule of Professional Conduct 3-510, which mandates the communication of settlement offers to lead plaintiffs.

<sup>8</sup> *Barton v. U.S. Dist. Court for Central Dist. of Cal.* (9th Cir. 2005) 410 F. 3d 1104.

<sup>9</sup> *Janick v. Rudy, Exelrod & Zieff* (June 22, 2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>10</sup> Added by the Ethics 2000 Commission, and adopted by the House of Delegates, February 2002.

<sup>11</sup> *Long Beach City Employees Assn., Inc. v. City of Long Beach* (1981) 120 Cal. App. 3d 950, 959, 172 Cal. Rptr. 277.

<sup>12</sup> In Rule 23 class action, pre certification communication by defense counsel with prospective members is generally permitted, "because no attorney client relationship exists." *Babbitt v. Albertson's Inc.*, 1993 U.S. Dist. LEXIS 18801 (N.D.Cal. 1993); *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867.

<sup>13</sup> *Gulf Oil Co., et al. v. Bernard, et al.* (1981) 452 U.S. 89.

<sup>14</sup> *Parris v. Superior Court* (May 29, 2003) 109 Cal. App. 4<sup>th</sup> 285. This case specifically disagreed with *Howard Guntz Profit Sharing Plan v. Superior Court* (Greenwood) (2001) 88 Cal. App. 4<sup>th</sup> 572. In *Parris*, the court relied on the California Constitution, with grants broader free speech rights.

The right or possibility of communicating with prospective class claimants becomes crucially important in the application of the advertising or solicitation rules. In federal class actions, direct contact with potential members of the class is permitted, and not considered to be improper solicitation.<sup>15</sup> Solicitation regulations have been known to "give way to the interests of the class."<sup>16</sup>

In addition to the always relevant issue of plaintiff's lawyers satisfaction of the adequacy requirement, a lawyer may want to contact potential claimants prior to certification:

- A. To notify them that the class is pending, that they need to preserve evidence, and that there may be tolling of the Statute of Limitations for filing an individual action,<sup>17</sup> in order to investigate facts as to both class certification and merits issues, to locate new class representatives if the named plaintiff's are unsuitable, either because they are not "adequate" or not "typical" of the class, or are not "adequate" as a fiduciaries for the class.
- B. The courts have held that a plaintiff's lawyer may conduct discovery to locate new class representatives, if the court has concluded that the class could otherwise not be certified.<sup>18</sup> Additional contact can be justified to solicit new clients with a similar fact pattern, in case a class is not certified, or to prepare a list of class members for the notice program.<sup>19</sup>
  1. Other prospective plaintiff's lawyers or firms may attempt to compete in contact with prospective claimants to garner the largest number of plaintiffs in their client pool, before the appointment of lead counsel. The number of plaintiffs represented by counsel, can be a factor considered by the court in the appointment of lead counsel.<sup>20</sup>
- C. Defendant's lawyers may want to contact potential claimants prior to certification to investigate the claim as to class certification and the merits, to develop an affirmative defense, and to settle with the named plaintiff or with the potential class.
- D. Defense lawyers may also contact in order to "pick off" specific class members or a named plaintiff. This will not terminate the claims of other claimants in California.<sup>21</sup> Defendant's may attempt to contact prospective claimants to encourage them to opt-out.
  1. Wage and Hour cases present special problems, because an employer can

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<sup>15</sup> *Gulf Oil Co., et al. v. Bernard, et al.* (1981) 452 U.S. 89.; *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867.

<sup>16</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1457.

<sup>17</sup> Mitchell Bruce, Class Actions California (2005). The entire section of reasons is drawn from this publication.

<sup>18</sup> *Budget Finance v. Superior Court* (McDowell) (1973) 34 Cal. App. 3d 794; *La Sala v. American Savings & Loan Association* (1971) 5 Cal. 3d 864, 874; *Best Buy v. Superior Court* (2006) 137 Cal. App. 4<sup>th</sup> 772.

<sup>19</sup> Defendants can be required to provide this information, and pay the cost of the lists.

<sup>20</sup> This is particularly true in securities class actions, and required by the Private Securities Litigation Reform Act of 1995.

<sup>21</sup> *Kagan v. Gibraltar Savings & Loan Association* (1984) 35 Cal. 3d 582. Note, in *Gulf*, (fn. 13), it was the plaintiff's lawyers contact that was restricted.

intimidated employees, take their declarations to use against them in the litigation, threaten that the business will fail, etc. In FLSA cases, prospective plaintiffs may "opt-in" to create an attorney-client relationship.<sup>22</sup>

### **Adequacy or Competency**

Competency or adequacy of counsel is at all stages of the litigation subject to review and close monitoring by the court. Class counsel is subject to a "heightened standard."<sup>23</sup> "Adequacy" and "competency" in general have the same definition<sup>24</sup> which is substantially greater than the minimum level of conduct which results in discipline.<sup>25</sup>

- A. The courts are mandated to aggressively and closely scrutinize the qualifications of class counsel.<sup>26</sup> This has historically increased from Rule 23 cases; to the Private Securities Litigation Reform Act (1995); to and including the Class Action Fairness Act (2005).
- B. A determination of adequacy is a two-pronged test, involving the evaluation of plaintiff and counsel in terms of their ability to represent the interests of the group. The major focus today is on the adequacy of counsel. Some factors which are considered in the evaluation of adequacy:
  1. Prior experience in other cases: "Affidavits submitted to the district court show experience prosecuting dozens of high profile class action cases and products liability litigation."<sup>27</sup>
  2. Past acts are appropriate to consider in determining whether an attorney is competent to satisfy the adequacy requirement of representation for class or lead counsel.<sup>28</sup>
  3. The attorney's ethics in handling the class suit and other matters, such as the manner of solicitation and conflicts of interest are relevant considerations in determining the adequacy of counsel.<sup>29</sup>
  4. In addition to performance, which would fall within the penumbra of a lawyer's standard of care,<sup>30</sup> other fiduciary-like duties are anticipated and owed to class members. Thus, having the capacity to communicate with the entire class can be important.
  5. In order to satisfy these obligations, it is important that lead counsel have the financial, physical, and staff resources to fund, supervise, and monitor the litigation. This requires considerable financial resources, committed staff, who

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<sup>22</sup> *Parks v. Eastwood*, 235 F. Supp. 2d 1082 (2002).

<sup>23</sup> *Cal Pak Delivery, Inc. v. United Parcel Service* (1997) 52 Cal. App. 4<sup>th</sup> 1.

<sup>24</sup> *Davis v. Apple* 2005 Cal. App. Unpub. Lexis 7190.

<sup>25</sup> *Hawk v. Superior Court (People)* (1974) 42 Cal. App. 3d 108.

<sup>26</sup> *Cal Pak Delivery, Inc. v. United Parcel Service* (1997) 52 Cal. App. 4<sup>th</sup> 1.

<sup>27</sup> *Hanlon v. Chrysler Corporation* (1998) 150 F. 3d 1011, 1021.

<sup>28</sup> *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1996) 52 Cal. App. 4<sup>th</sup> 1.

<sup>29</sup> Schwarzer, Tashima, Wagstaffe: (2000) California Practice Guide Federal Civil Procedure Before Trial, Rutter Group, Chapter 10 (C).

<sup>30</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

are capable of dealing with and communicating with large numbers of class members, and in some cases, the physical strength to oversee the administration of the case.

6. Generally, "until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession."<sup>31</sup>
- C. Class counsel can be sued for violations of the standard of care,<sup>32</sup> or the standard of conduct<sup>33</sup> which are not faux collateral attacks on litigated issues.<sup>34</sup> Therefore, "collateral attack upon a judgment entered in a class actions on the ground that the interests of the absent class members were not adequately represented" is permitted.<sup>35</sup>
1. In order to avoid subsequent claims of professional negligence, counsel should bring the potential alternative claim to the attention of lead plaintiff, or if it involves a duty owed to the absent class members, guidance from the court may be sought.<sup>36</sup>
  2. A certification order does not excuse or ameliorate the duty of competency.<sup>37</sup>

## **Conflicts**

Conflicts are anticipated and endemic in representative litigation, because there can be thousands of claimants. "Every class action presents a potential conflict-of-interest problem."<sup>38</sup> Some courts and authorities take the position that the Rules do not apply in representative litigation.<sup>39</sup>

Examples of the conflicts, other than those that exist inherently within the class, include: suing a current client; prior relationships with a named defendant; the concurrent representation of individual claims<sup>40</sup> and the class; settlements driven by collusion; the simultaneous negotiation of fees and the claim; subsequent representation of class dissidents as objectors; and lawyers/staff/ friends/family acting as lead plaintiffs.

The conflicts rules are substantially relaxed in class actions and are not applied in a knee jerk manner. For example, it could be "virtually impossible" to obtain client consent<sup>41</sup> from the entire class, although the class notice process furnishes a constructive consent. Yet, authorities have suggested that since Rule 3-310 (d) specifically exempts class actions, that inferentially

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<sup>31</sup> *Dolgow v. Anderson* (1968, ED NY) 43 F.R.D.472, from ALR, 16 A.L.R. Fed 883.

<sup>32</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>33</sup> *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1996) 52 Cal. App. 4<sup>th</sup> 1.

<sup>34</sup> Unsuccessful objectors have been known to refashion their claims into standard of care/conduct issues.

<sup>35</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>36</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>37</sup> *Janick v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4<sup>th</sup> 930.

<sup>38</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1247. The article maintains that conflicts of interest are acute in representative litigation.

<sup>39</sup> Herbert B. Newberg, Special Conflicts of Interest Rules Apply in Class Actions, 10 No. 5, Verdicts, Settlements, & Tactics, 149, May 1990.

<sup>40</sup> These are common and logical, since the lawyer is often made aware of the potential class claim by a single claimant.

<sup>41</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1451.

the other aspects of Rule 3-310 apply.<sup>42</sup> Some practitioners will satisfy the requirement of consent, by obtaining it from lead plaintiff, or in the alternative, after full disclosure to the court, often in an adequacy determination.<sup>43</sup>

- A. **Fees:** Professor Moore compellingly argues that this topic does not properly fit within 1.7, and should be addressed within the context of 1.5. The "Conflict-of-interest rules do not purport to regulate circumstances that are common to *all* lawyers, but only circumstances that are unique to *particular* lawyers."<sup>44</sup>

Because all lawyers and all clients could have a conflict as to fees, it is generic and not within the parameters of 1.7. It is an "unavoidable" conflict, as opposed to one involving a specific lawyer.

- B. **Loyalty:** Inadvertently suing a former or current client is a possibility, particularly in large actions. Therefore, per se disqualification is not applied. In one case, denial of pro hac vice status occurred because the defendant objected, and was not considered "an obscure member of a large class."<sup>45</sup>

1. In the "fairness" hearing some class members, and even lead plaintiffs, may object to the settlement. Lead counsel has been permitted to continue to represent some of the members in objecting to the settlement.<sup>46</sup>
2. Loyalty is compromised where the lawyer has a personal interest or relationship with the lead plaintiff. Close relationships in business, husbands, sisters in laws, or partners in law firms have resulted in disqualification of lead counsel.<sup>47</sup>
3. Counsel, can file the action as a place holder, and in the litigation require that defendant provide information regarding more suitable plaintiffs.<sup>48</sup>

### **Other Issues**

Simultaneous negotiations of settlement and attorney fees; advocate witness; fees and coupon settlements; restrictions on future cases; referral fees or fee splits; and enhancement fees paid to lead plaintiff; copy-cat litigation.

Diane Karpman,  
August 28, 2006

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<sup>42</sup> Carrie Menkel-Meadow, Ethics and the Settlement of Mass Torts: When the Rules Meet the Road (1995) 80 Cornell L.Rev. 1159, 1193. She suggests that consent could be presumed from silence, but that such a presumption would require a rule change in California, which requires consents to be in writing.

<sup>43</sup> Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harvard L. Rev. 1244, 1456.

<sup>44</sup> Moore, Nancy, Who Should Regulate Class Actions Lawyers? 2003 U. Ill. L. Rev. 1477.

<sup>45</sup> *Fuchs v. Schick*, 2002 U.S. Dist. LEXIS 6212 (S.D.N.Y. April 10, 2002).

<sup>46</sup> *Lazy Oil Co. v. Witco Corp.* 166 F. 3d 581 (3d Cir. 1999); *In Re Agent Orange Prod. Liab. Litigation*, 800 F. 2d 14 (2d Cir. 1986); c.f. *In Re: Corn Derivatives Antitrust Litigation*, 748 F. 2d 157 (3<sup>rd</sup> Cir. 1984), *Banyai v. Mazur*, 2004 U.S. Dist. LEXIS 17572.

<sup>47</sup> *Petrovic v. Amoco Oil Co.* 200 F. 3d 1140 (8<sup>th</sup> Cir. 1999).

<sup>48</sup> *Best Buy v. Superior Court* (2006) 137 Cal. App. 4<sup>th</sup> 772.

**August 29, 2006 Ira Spiro E-mail/Memo to RRC:**

To: Members, COMMISSION FOR REVISION OF RULES OF PROFESSIONAL CONDUCT  
(Pardon me if you receive this twice. I wasn't sure what email address to use.)  
From: Ira Spiro  
Date: August 28, 2006  
Re: SOME COMMENTS FROM THE TRENCHES ON PROFESSIONAL CONDUCT RULES  
AND CLASS ACTIONS

I truly regret I will not be able to attend the September 1 hearing of the Commission. That day I have to attend a deposition in - a class action. As I think most of you know, my law firm's practice is devoted entirely to representing plaintiffs and classes in class actions and the similar type of proceeding under the Fair Labor Standards Act, representative actions, also called collective actions. Most of our cases are for wages and wage-related claims.

(FLSA representative actions are in many ways similar to class actions. The most important differences are that persons other than the initial named plaintiffs, in order to be included in an FLSA representative action, must file with the court a consent to become what the FLSA calls a "party plaintiff," a term that is not defined in the statute, and really not in the cases either. A corollary is that while "absent class members" are included in a class action unless they "opt-out," "absent class members" in an FLSA representative action must "opt-in" to be included.)

I also regret I have not been able to continue my participation in work of the Commission, as I did in the first year or so. I truly was not able. Because of that, some of my comments here might not take into account the Commission's work and its proposed revised rules.

I have found that in class actions unusual problems arise in application of the Rules of Professional Conduct, so I agree with the idea included in the memo by Diane Karpman, that there should be a rule or comment that the rules may apply differently in aggregate or class litigation than in other contexts.

However, that is vague and is not enough. Also, just saying this does not explain why such a rule or comment is needed. It seems to me that can only be done by specific examples dealing with specific rules.

I do believe there is a need to include language in specific rules to address problems particular to class actions. (When I say "class actions," I mean to include representative actions under the Fair Labor Standards Act.)

**I. SOLICITATION**

An issue that arises a great deal in wage class actions is claims, or fears of claims, of pre-certification solicitation by the named plaintiff(s) of co-workers. The fear is that it will be claimed that the named plaintiff solicited other clients for the plaintiff's attorneys. But the plaintiff certainly has a right to talk to co-workers, and former employees, about the case, especially under California's broadly interpreted free speech rights, as exemplified in the Parris case.

So when a named plaintiff talks to a co-worker about the case, there is a fine line, or maybe lack of a line, because there is no record of what is said. Some class action lawyers use ways to see

to it that the plaintiffs do not solicit for me. For instance, the plaintiffs can be instructed in writing not to solicit, and not even to give the names of their attorneys unless the co-workers ask.

But many see this as not only artificial, but an improper restriction on free speech rights.

Also, there is good authority that any restriction on employees speaking to co-workers about a wage class action is a violation of the right to engage concerted activity under the National Labor Relations Act. The US Supreme Court has held that multi-party litigation by employees against their employer is a form of protected concerted activity. (Sorry, I don't have the cite at hand.)

Here are some passages in the Rutter Group practice book by Paul, Mark, Ellen and Justice Weiner. I realize they raise the possibility that resolution of the issues is not completely in the hands of the State Bar, but also with the legislature.

[2:224] Statutory Regulation (State Bar Act): Solicitation by lawyers is principally regulated under CRPC 1-400(B) and (C) (¶¶ 2:254 ff.). However, attorneys are subject to discipline and civil and criminal liability for solicitation under the State Bar Act. [Bus. & Prof.C. §§ 6129, 6150-6154]

Cross-refer: For a discussion of other (non-State Bar Act) anti-solicitation statutes, see ¶¶ 2:366 ff. (criminal penalties for wrongful solicitation), ¶¶ 2:373 ff. (soliciting false or fraudulent insurance claims), and ¶¶ 2:665 ff. (soliciting workers' compensation services).

a. [2:225] Unlawful solicitation (including use of 'runners and cappers'): It is unlawful for any person or entity to:

.. act as a 'runner' or 'capper'; or

.. 'solicit any business' for an attorney on public or private property. [Bus. & Prof.C. § 6152(a)(1)]

(1) [2:226] 'Runners' and 'cappers':

\* \* \*

(2) [2:231] 'Soliciting any business': the statute also prohibits 'any person' or entity from 'soliciting any business' for an attorney on public or private property. [BUS. & PROF.C. §§ 6152(A)(1)]

() [2:232] No agency relationship required: it need not be shown that the person 'soliciting any business' was in fact an agent of the lawyer. [Hutchins v. Mun.Ct. (People) (1976) 61 CA3d 77, 90, 132 CR 158, 167--'an agency relationship (with the lawyer) is not essential to violation of ... section 6152' (parentheses added)]

\* \* \*

[2:254] Solicitation Prohibited by CRPC: In-person and telephonic 'solicitation' of prospective clients by or on behalf of an attorney is prohibited by the CRPC except where:

.. there is a preexisting family or professional relationship with the persons involved; or

.. the solicitation is in discharge of the lawyer's continuing professional duties to such persons (e.g., warning present or former clients of change in law which may require legal work); or

.. the solicitation is constitutionally protected. [See CRPC 1-400(B),(C)]

One reaction might be that the problem is not particular to class actions, but I believe it is, or at least it is much more important in class actions. Why? Because by the very nature of a class action, the goal, even the responsibility of the attorneys for plaintiff is to represent the entire class. There is no comparable responsibility in other types of cases. Thus, communication by initial clients, i.e. named plaintiffs, to other potential clients is, in one sense, an important part of representing a class or potential class (I don't like the term "putative class," because it reminds one of "putative spouse"!)

The named plaintiffs, the entire class, should communicate with each other for many reasons, and there are good arguments that attorneys for the class or potential class should encourage such communication. For instance, in nearly all class actions, there is a need to get evidence from members of an actual or potential class. The need to get evidence from witnesses exists in any case, but in class actions the witnesses are also necessarily potential clients, or at least quasi-clients if they are "absent class members." But clients or quasi-clients, the inquiries about evidence will necessarily involve the rights and claims of the witnesses themselves.

On the other hand, there undoubtedly is simply out-and-out improper solicitation by attorneys who hope to find a client to bring a class action. Is it different if the attorney already has one client? Many think so, and I suppose many do not.

FLSA actions create an additional complication. Any employee or former employee who joins an existing FLSA representative action is, by statute, referred to as a "party plaintiff." Those words suggest that the person is a direct client of the attorneys for the original plaintiffs, and that they are parties in the fullest sense. But "party plaintiff," as far as I can tell, is simply a term that was inserted by Congress without consideration of whether these people would be true parties or true clients. There are many cases that apply traditional Rule 23 analysis to these "party plaintiffs," suggesting that they are not true plaintiffs and not true parties. There is very little law on this. In fact, the term "certification," has come into use in these actions only in fairly recent years.

## II. NO-CONTACT RULE

This is a very thorny issue in wage class actions. Perhaps thorniest is when the action is for employees whose titles are "manager," a very common type of class action. True managers are exempt from overtime. There have been scores, probably hundreds of class actions in which it was alleged that "managers" are not truly managers under the wage laws, and thus the employer unlawfully failed to pay them overtime. The leading California case on class certification, *Sav-On* (2004) 17 Cal.4th 319, is one such case.

So, if the class is a class of managers, and the attorney for the class wishes to speak with "managers" who have not engaged the attorney, and the class has not been certified, how does

that square with the no-contact rule and the term "managing agents"? The rules do not address this, although some cases have.

Defense counsel has some thorny issues here too. The problem is when counsel for an employer communicates with employees who are also members of a potential class, and does not advise them that the attorney represents the employer, not the employee, and that the interests of the employer and the employee are adverse with respect to the class action. Defense counsel in California have come close to disqualification in such situations, and have been criticized by courts. There may have been disqualifications, but I am not aware of any.

### **III. AGGREGATE SETTLEMENTS**

Obviously it is difficult to comply strictly with the aggregate settlement rules when the class is hundreds, thousands, tens of thousands or millions. The process of notice to the class can result in consent, and sometimes actual written consent if a claim form is required. But the process is imperfect, because inevitably the notice will not reach many class members, a fact which is recognized and accepted by the court in the due process balancing that goes into the court's decision on what is the proper notice procedure in a case.

### **IV. DUTY OF LOYALTY, CONFLICTS OF INTEREST**

Who is the client? The initial named plaintiff is the initial client. But the plaintiff has a fiduciary duty to the class, and must recognize that his or her attorney cannot place his or her interests above those of the class. If the plaintiff objects to the settlement, or to a strategy decision, the attorney at times can be permitted to pursue the settlement or decision over the plaintiff's objections, and at times the attorneys are permitted by the court to seek a new named plaintiff.

### **V. IS REPRESENTING CLASSES CONSISTENT WITH THE PROPER ROLE OF LAWYERS?**

It well past midnight and I have to leave town tomorrow night. But as you might expect, I cannot stop without addressing the comments by my friend, Tony Voogd, concerning class actions that he and many perceive as doing no one any good except the lawyers who get fees, as not pursuing the interests of any client. I do want to point out that in wage class actions, the class members usually get amounts from the low thousands to the mid to high tens of thousands.

But let's consider the consumer or securities class action in which the class member might get a trivial amount but the attorneys get millions. Without more factors than that, it seems wrong. But the courts have recognized that there are many other very important factors. There are a couple of fine quotations from a leading "early" California class action, 1971, which is still quoted by our state and federal courts today. I've highlighted them. The last one is the best.

The California Supreme Court recently repeated the quotation in *Discover Bank v. Super. Ct.* (2005) 36 Cal.4th 148:

"Before addressing the questions at issue in this case, we first consider the justifications for class action lawsuits. These justifications were set forth in Justice Mosk's oft-quoted majority opinion in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808 (*Vasquez*): 'Frequently numerous consumers are exposed to

the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.'

\* \* \*

'A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation. The problems which arise in the management of a class action involving numerous small claims do not justify a judicial policy that would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity.'

California laws and policies promote "the fullest and most flexible use of the class action device[,]" particularly in consumer protection litigation. Hopkins, 2005 WL 1020868 at \*2 (citations omitted); Blakemore, 129 Cal. App. 4th at 58 (identifying numerous consumer fraud cases allowed to proceed as class actions); Lebrilla v. Farmers Group, Inc. (2004) 119 Cal. App. 4th 1070, 1087 (rev. denied) (citing Corbett v. Super. Ct. (2002) 101 Cal. App. 4th 649, 658 (rev. denied)) ("certifying a UCL claim as a class action furthers the purposes and goals underlying both of these actions."). Thus, post-Prop. 64 cases continue to hold that:

The California Supreme Court directed the courts of this state to use the class action device to fashion "an effective and inclusive group remedy," where "numerous consumers are exposed to the same dubious practice by the same sellers so that proof of the prevalence of the practice as to one consumer would provide proof for all."

Hopkins v DeBeers, unreported case at 2005 WL 1020868 at \*2 (internal citations omitted).

**September 14, 2007 Difuntorum E-mail to Drafters & Leadership:**

The ABA opinion described in the message below may be of interest to your subcommittee. Regarding the anticipated discussion at the September meeting, you might want to focus your efforts on considering the draft comments to Rule 1.7 (see pp. 1 - 20 of the agenda materials) to determine if any changes, including any recommended new comments, are warranted to give guidance on class action issues. -Randy D.

**ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 07-445**

The ABA Ethics Committee determined that prior to class certification, defense counsel may contact putative class members without seeking permission from attorneys for the named plaintiffs; however, defense counsel must comply with Model Rule 4.3, which regulates attorney contact with unrepresented persons. The Committee also determined that counsel for the putative class has the same rights and obligations.

Click on the link to view the full Alert or visit the following internet address:

[http://www.hinshawlaw.com/knowledge/alert\\_detail.aspx?id=1296&type=5303](http://www.hinshawlaw.com/knowledge/alert_detail.aspx?id=1296&type=5303)

ABA Ethics Committee Concludes That Defense Counsel May Contact Putative Class Members Without Permission From Plaintiffs' Counsel

September 13, 2007

ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 07-445

**Brief Summary**

The ABA Ethics Committee determined that prior to class certification, defense counsel may contact putative class members without seeking permission from attorneys for the named plaintiffs; however, defense counsel must comply with Model Rule 4.3, which regulates attorney contact with unrepresented persons. The Committee also determined that counsel for the putative class has the same rights and obligations.

**Complete Summary**

The Committee addressed the propriety of defense or plaintiffs' attorneys in a class action contacting putative class members prior to class certification. The Committee concluded that such contacts are appropriate unless prohibited by court order because, among other things, it cannot be said that the putative class members have counsel within the meaning of Model Rule 4.2. The Committee noted, however, that the attorneys who make such contacts must refrain from making material misrepresentations, must not harass the individuals whom they contact and must comply with Model Rule 4.3, which regulates lawyers contact with unrepresented persons.

The Committee also noted that restricting pre-certification contact by defense attorneys with putative class members could prevent a defendant from taking remedial measures to remedy a harmful condition or from attempting to reach

conciliation agreements with members of the potential class. Similarly, plaintiffs' counsel may have an interest in contacting potential class members. The Committee also noted that the Model Rule 7.3 restrictions on attorney contact with prospective clients would not apply when potential class members are contacted as witnesses as long as the contacts comply with the Model Rules.

The Committee also noted that in particular circumstances, a court might be able to limit or prohibit such contacts, but this was expected to be the exception and not the general rule.

### **Significance of Case**

This opinion settles a point of controversy that has often arisen in class action litigation and reaches a conclusion consistent with the majority of cases that have addressed the issue.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*

### **September 14, 2007 KEM E-mail to Drafters & Leadership:**

I've attached a copy of the ABA opinion, 07-445, for your review.

### **September 14, 2007 Sondheim E-mail to Voogd, Drafters & Leadership:**

Randy has advised me that, because of a misunderstanding, your subcommittee was going to try to submit materials this week (i.e. beyond the deadline previously set). I will assume that this will be done by Sunday or else the class action subcommittee may be deemed to have no special rules or comments for consideration in regard to any of the rules we will be discussing at the next meeting. Out of fairness to the Commission, adequate time must be given to its members to consider whatever recommendations are made by the class action subcommittee and thus I would like the materials to be sent out no later than Sunday. If more time is needed for the subcommittee to act, please let me know as soon as possible so that further consideration can be given to a cut off date, although this is not intended to mean that Sunday may still be the deadline.

### **September 16, 2007 Karpman E-mail to Sondheim, Drafters & Leadership:**

1. I don't have access to when- materials are due and was praying most of last week. Also I don't know what will be discussed at the next meeting- yes I may have received this but as a quasi voyeur- it is sometimes difficult to follow what is going on.
2. At the last meeting you mentioned Rule 1.7 (which I believe was on page 11 of 14), and my comment addresses [33].
3. Our proposed comment appears to be consistent with the intent of the ABA/BNA practice guide, at 51:108, that maintains: "*unnamed members of the class ordinarily are not the*

*lawyer's clients and therefore may be sued by the lawyer in an unrelated matter without their consent. Likewise, a lawyer for the defendant in a class action does not need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter."*

4. So it seems to me that the issue is that the MR's uses "**does not ordinarily**" as opposed to our "**by virtue of that representation alone.**" Personally I prefer the Model Rule's articulation, but I believe they are saying just about the same thing.
5. In the area of formal class actions, you are getting perilously close to preemption issues since they are strictly governed by Rule 23. Geoff Hazard maintains that state ethics rules have little if any application in certified class actions, his position is based upon- *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991), a well reasoned opinion by Judge Easterbrook.
6. Note, on Oct. 6th I will be attending the ALI's Aggregate Litigation Members Consultant Group in Austin they are grappling with many issues but I don't believe they have addressed 1.7 yet. They have suggested a radical modification of 1.8, that is quite controversial.

**September 16, 2007 Sondheim E-mail to Karpman, Drafters & Leadership:**

Subject to a discussion at the next meeting of any suggestions by the class action subcommittee which may be submitted this weekend (such suggestions are already overdue as the result of a misunderstanding), the rules on the agenda hopefully will be completed at the next meeting and therefore "sometime addressing class actions" will not "wait until the rules are drafted."

For example, Kevin's notes [re Rule 1.7] for the last meeting show the following:

**34. Comment [33] & note 22.**

- a. Harry: If class action team (Tony, Ellen, Dom & Diane) does not provide language before the next meeting, this language will become part of the Rule.

**September 16, 2007 Karpman E-mail to Sondheim, Drafters & Leadership:**

That was the subject of my a.m. email (see below). I would just like to understand why the language which was suggested was considered "better" than the MRs.

**September 16, 2007 Sondheim E-mail to Karpman, Drafters & Leadership:**

I leave it up to the Class Action subcommittee to decide (hopefully today) as to whether it wishes to recommend the MR language. If so, we can vote on this change at our Sept. meeting.

**September 16, 2007 Voogd E-mail to Drafters & Leadership:**

Please refer to Rule 1.7 [3-310] which includes as note [33] the following MR language:

“Representation of a Class.

This Rule applies to lawyer's representation of named class representatives. A lawyer who represents a class of plaintiffs or defendants in a class action does not, but virtue of the representation alone, represent unnamed members of the class for purposes of this Rule. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.”

It seems to me this language is flawed.

1. The first sentence is an unnecessary truism.
2. The second sentence fails to indicate when the lawyer does represent an unnamed member of the class. Accordingly, it is so general as to be meaningless. Moreover, the comment changes the rule, it does not explain the rule.
3. By reason of the fact that the comment is the only reference to class actions in the rules, the comment gives rise to the possible inference that the lawyer does not represent unnamed members of the class for purposes of other Rules.
4. The last sentence is also troublesome. Why should we should trouble to explain the obvious, namely that a comment can't change civil law? Moreover, I can't get enthused about the undefined civil law rights of unnamed class members. The members probably can't effectively sue the lawyer considering the costs involved and the fact the lawyer probably can assert failure to opt out as a defense.

The MR provision (2002) is limited in scope and specific to Rule 1.17:

“[25] When a lawyer represents or seeks to represent a class of plaintiff or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”

This language strikes me as appropriate.

However, we are still left with the fundamental issue. Are unnamed members of a class clients entitled to the protection of the rules? While exceptions may apply, it seems to me we do not advance the public interest by depriving them of the protection of the rules.

**September 16, 2007 Tuft E-mail to Voogd, Drafters & Leadership:**

Tony, I believe the first sentence in Comment [33] is important. Many class action lawyers do not appreciate the fact that the named plaintiffs are joint clients whether or not the class is certified. However it is not clear from either Comment [33] or previous Comment [25] whether the comment is addressing the representation of a class prior to certification, a class that has been certified, or both. Also, the reference to owing "civil duties" to unnamed class members is unclear. In practice, FRCP 23 plays a significant role in resolving claims of conflicts in class action cases in state as well as federal courts and there is body of case law under rule 23 that deals with these issues.

**September 16, 2007 Sondheim E-mail to Voogd, Drafters & Leadership:**

Thanks. Hopefully your subcommittee can arrive at some consensus by noon Tuesday, Sept. 19, as to whether the MR should be used in lieu of Comment 33 and as to what needs to be done in the rules in response to your fundamental issue. Let's deem that your deadline for transmitting recommendations to the entire Commission.

**September 17, 2007 Karpman E-mail to Voogd, Drafters & Leadership:**

1. It's not "us" who are depriving them of the protection of the rules. Putative members or absent class members possibly don't even know that the case is progressing. Remember that the court becomes a fiduciary for the absent class members, so the court is owed what are referred to as heightened duties. So for example, the court is obligated to seriously evaluate the proposed settlement, and this obligation was further enhanced with the Class Action Fairness Act of Feb. 2005. Consider:

"Class Counsel" or "lead counsel" lacks a traditional attorney-client relationship with each class member, but nevertheless is in a fiduciary relationship with the members of the class. Thus, "while lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class." *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867, 879; see also *In re McKesson HBOC, Inc. Securities Litigation* (N.D.Cal. 2000) 126 F. Supp. 2d 1239, 1245.

"Class counsel thus has potential duties in three directions: to the named plaintiffs, to the absent class members, and to the "public interest." The primary problem with identifying any one of these as the client is that none can be said to exercise control over class counsel . . . If anyone controls the lawyer, it is the court, which does so for the benefit of the class." *Developments in the Law, Conflicts of Interest in the Legal Profession*, 94 *Harvard L. Rev.* 1244, 1453.

A traditional attorney-client relationship would exist between lead counsel and lead plaintiffs, since communications would exist that would engender expectations. Note that in the existing CRPC, "lead plaintiff's" are the recipients of information regarding settlement (Rule 3-510 (B)), however the court can override the plaintiff's approval and often will. Even when a lawyer disclaims the relationship, the court in representative litigation can nevertheless create the relationship based on the expectations of a prospective client. *Barton v. U.S. Dist. Court for Central Dist. of Cal.* (9th Cir. 2005) 410 F. 3d 1104.

2. The court in the class action paradigm is required to aggressively supervise the litigation. Written fee agreements, rarely exit and even if a named plaintiff has executed an agreement, it will not bind the absent class members or the court. *Long Beach City Employees Assn., Inc. v. City of Long Beach* (1981) 120 Cal. App. 3d 950, 959, 172 Cal. Rptr. 277.
3. But Tony, the “client” is protected from a lawyer’s professional negligence, and can successfully sue for garden variety legal mal. *Janick v. Rudy, Exelrod & Zieff* (June 22, 2004) 119 Cal. App. 4th 930. Also, the lawyer has liability for breach of fiduciary duty, *Cal Pak Delivery, Inc. v. United Parcel Service* (1997) 52 Cal. App. 4th 1-- although that was initially a motion for disqualification.

**September 17, 2007 Voogd E-mail to Karpman, Drafters & Leadership:**

1. Good stuff, but I still think unnamed members of the class are entitled to some protection.
2. We are legislating when lawyers might be disciplined. None of the cases you refer to foreclose legislation in this area.
3. Consider the following set of circumstances. A non-lawyer unnamed member of the class gets a notice requiring objection to a settlement agreement. The member wants to object but cannot object in timely manner because the notice was sent out late. What what is the member to do? Call the judge? That won't work - for good reason access to judges is limited. Sue someone for malpractice or breach of a fiduciary duty? That is not an effective remedy. The logical solution is to call a lawyer for the class. When called the the class attorney should take the necessary steps to obtain a extension of time to file objection.
4. Whenever a member contacts the class lawyer there are more than enough indicia of the traditional attorney-client relationship to warrant imposing discipline on the lawyer who ignores the contact. I think we should at least consider such a rule rather than foreclosing the possibility of such a rule with the language of [33] under consideration.

**September 17, 2007 Ira Spiro E-mail to Drafters & Leadership:**

1. Unnamed/absent class members DO have the protection of the rules. As the cases hold, counsel for plaintiff has a measure of fiduciary duty to them, and it can be an ethics violation for a lawyer to violate fiduciary duties, of course. They also have the protection of many other rules, such as 1-400 and, when the class is a class of ees, 3-600 with regard to counsel for the employer. But the law says they are not clients of counsel for plaintiff in the full or traditional sense. Many people have the benefit of the rules even when then are not full clients.
2. It is very apparent, isnt it, that it would be impossible to treat a class of hundreds, thousands, tens of thousands, as clients? Maybe in very tiny classes it could be done, but not really until a much later stage of the case, because how can you have a client whose name and contact info you dont have?

3. And let me tell you from my own experience, judges have become very conscious of their duties to protect the class, as they should be.
4. If attys for plaintiffs had to try to be attys for each of the absent class members, it would be impossible to do one's duty as atty for plaintiff in a class action. Thus, it would be impossible to have class actions. That, in the view of the Supreme Courts of the US, Cal, and probably every other state, would be against the public interest. Most recent pronouncement on that is Gentry case from our Cal SCt on Aug 30.
5. Could counsel for a corporation function if he or she were also the atty for the shareholders in the traditional sense? Is anyone complaining that they do not have the benefit of the rules?

**September 18, 2007 Karpman E-mail to Drafters & Leadership:**

I like all of [33].

**September 18, 2007 Melchior E-mail to Drafters & Leadership:**

Please note some clarifications and stylistic suggestions below. With those changes, I prefer this version.

“[25] When a lawyer represents or seeks to represent a class of plaintiff~~s~~ or defendants in a class-action lawsuit, unnamed members of the class are [~~ordinarily~~] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [~~typically~~] need to get the consent of such a person before representing a client which is adverse to that [~~suing~~ ~~the~~] person in an unrelated matter. Similarly, a lawyer seeking to represent a[~~n~~] party opposing [~~next in~~] a class action does not [~~typically~~] need in order to do so the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”

**September 18, 2007 Karpman E-mail to Drafters & Leadership:**

I like this clarification but think we should eliminate the second “the” in the 6th sentence.

**September 20, 2007 Voogd E-mail to RRC List:**

The recommendation of the Class Action subcommittee is that the variation or the related MR comment suggested by Kurt and set out below be adopted in place of [33].

“[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need in order to do so the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”<sup>1</sup>

**September 22, 2007 Voogd E-mail to RRC List (transmitted by KEM):**

Please consider the following revision of the comment suggested by Kevin:

“[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

The only change is to move the phrase "in order to do so" to the end of the last sentence in the comment.

**September 23, 2007 Kehr E-mail to KEM:**

Kevin: I see some problems with this that I thought I would try to work out with you if we can. Among other things, our Rule has no paragraph (a)(1), and a decision therefore needs to be made about whether this paragraph will apply to some or all of the Rule (all, in my view). Also, the MR version and this revision are not clear about whether there is any difference between

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<sup>1</sup> **Consultant's Note:** I recommend either moving the phrase “in order to do so,” which is in the next to last line, to the end of the sentence, so it would provide:

Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

Alternatively, the phrase should be set off by commas:

Similarly, a lawyer seeking to represent a [n] party opposing [n] in a class action does not [typically] need, in order to do so, the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter.”

classes that have been certified or have not yet been (when is someone a member of a class?). Finally, there is no “part” in our terminology. What about this --

“[25] For purposes of this Rule, an unnamed current or potential member of a class of plaintiffs or defendants in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class.”

I suggest this by done so briefly b/c I think the drafting becomes Byzantine if one attempts to track each of the four Rule paragraphs. Any thoughts?

**September 23, 2007 KEM E-mail to Kehr:**

Bob:

1. I agree with the points you make about the Class Action team's proposed draft. However, I'm not sure that a single sentence as you proposed below is sufficient (or were you simply suggesting that only the first sentence of the comment be replaced, and keep the second & third sentences re consent?)
2. Although we don't have a paragraph (a)(1), it seems to me that our paragraph (a) was intended to capture MR 1.7(a)(1). Am I off-base on that? We're a bit more wordy but I think we're saying essentially the same thing.
3. MR 1.7 has only two prohibitions, (a)(1) and (a)(2). Paragraph (a)(1) prohibits direct adversity. Paragraph (a)(2) is the material limitation provision. Paragraph (b) provides the exception to the prohibitions in paragraph (b).
4. In effect, it strikes me that MR 1.7, cmt. [25] is saying that you are not simply by virtue of representing a class, also representing the unnamed members of the class (most of whom the lawyer wouldn't know from Adam) so, for purposes of (a)(1), you will not be deemed directly adverse to those class members.
  - a. However, by limiting the comment's application to (a)(1), the drafters are telling lawyers that there is still a possibility that your representation of the second client against an unnamed class member (or even a group of unnamed class members) might materially limit your representation of the second client. If that is the case, then you are still obligated to obtain a waiver under paragraph (b).
5. Our rule has paragraph (a), which as I mentioned, I think is analogous to MR 1.7(a)(1). Comment [25] would be applicable to paragraph (a).
6. We also have (b)(1) and (2) [current 3-310(C)(1) and (2)], which apply to joint representation situations. I'm not sure when comment [25] would apply to such situations. If one of the joint clients was an unnamed member of the class and the other not? Would that possibly create a "materially limited" representation situation?
7. Our proposed paragraph (c) is current 3-310(C)(3). Comment [25] would apply to this situation as well.

8. Finally, our proposed paragraph (d) [current 3-310(B)] is akin to MR 1.7(a)(2) in that it identifies the kinds of situations that might result in the lawyer's representation of a client being materially limited by his or her representation or relationship with another client, past or present, or the lawyer's own personal interest. MR 1.7, comment [25] is not applicable to MR 1.7(a)(2). I don't think it should apply to our proposed paragraph (d) either.

9. Summary. Therefore, I'm OK with your proposed sentence if (1) it is intended as a revision to the first sentence in Kurt & Tony's proposed comment [25] and (2) it's application is limited to paragraphs (a) and (c). How about the following:

[25] ~~When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a class of plaintiffs or defendants in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [not in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.~~

I've added "paragraphs (a) and (c) to your proposed fix, and tacked on the last two sentences of the Class Action team's comment. I've also deleted the phrase "in that situation" from their second sentence.

Of course, if I am wrong in my assumptions about our proposed paragraphs (a) [similar to MR 1.7(a)(1)] and (d) [similar to MR 1.7(a)(2)], then the foregoing will not be the answer.

### September 23, 2007 Ira Spiro E-mail to RRC List:

As one who practices in this field every day, I like this rule and others that clarify the ethics rules applicable to class counsel.

Comments:

1. If I get your drift, the change below in the first line, using the term "certification of the class" already is implicit in the proposed language, but I think it's a good idea to make it explicit. I do think this change will eliminate a possible uncertainty in the draft rule. Someone might construe "represents or seeks to represent" to mean "before or after the commencement of the lawsuit." But as I understand it, what you all mean is "before or certification of the class."

2 I think the terms "plaintiff class" and "defendant class" are better than "class of plaintiffs" or "class of defendants," For instance a "class of plaintiff," is a bit of a misnomer, since the unnamed members of the class actually are not plaintiffs in the usual sense, because a plaintiff is a party and the unnamed class members are not. Same with defendants.

3. I suggest one other change that isn't very important at all -- it's pedantry. But here it is anyway. The phrase "client which" sounds wrong to my ear -- "client who" sounds right. I

realize that the client could be an entity, but "who" can be applied to an entity, can't it? Anyway, as we all know, a corporation is a "person" for many purposes (to the dismay of some people I know). And the draft does use the word "person" all over the place.

Change could also be to "client that." I learned -- about 45 years ago -- that in this usage "client that" is better English than "client which".

“[25] When a lawyer represents or seeks to represent a plaintiff class of ~~plaintiffs~~ or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are ~~[ordinarily]~~ not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not ~~[typically]~~ need to get the consent of such a person before representing a client which who is adverse to that ~~[suing the]~~ person in an unrelated matter. Similarly, a lawyer seeking to represent a ~~[a]~~ party opposing ~~[a]~~ party in a class action does not ~~[typically]~~ need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

#### **September 24, 2007 Difuntorum E-mail to Rule 1.7 & Class Action Drafters:**

Should the reference to “part (a)(1)” be changed to “paragraph (a)” or to “paragraphs (a) and (c)” or should it be a reference to "this Rule"?

#### **September 24, 2007 Kehr E-mail to Rule 1.7 & Class Action Drafters:**

Randy: I made a suggestion to Kevin about this over the weekend. My view is that the class action paragraph should refer to all of Rule 1.7. I will try to work something out with him that we can take to a wider audience.

#### **September 24, 2007 Voogd E-mail to Class Action Drafters:**

In light of the variety of comments submitted, it might be useful for you to try a redraft incorporating Robert Kehr's thoughts.

#### **September 24, 2007 Kehr E-mail to KEM (Reply to September 23, 2007 KEM E-mail to Kehr:):**

Kevin: My suggestion was to use a single sentence. It seems to me to be complete. If one attempted to add a more elaborate explanation, then our checklist approach would require that the application to each paragraph be handled separately. My attempts at that lead to the Byzantine quagmire about which I cautioned. My single sentence covers each of our four paragraphs, each of which arguably could be triggered by the representation of unnamed members of a class or potential class. I think the second and third sentences interfere with the clarity of this absolute point - the representation of unnamed class members does not by itself amount to a representation under Rule 1.7.

September 24, 2007 KEM E-mail to Kehr (Reply to September 24, 2007 Kehr E-mail to KEM (Reply to September 23, 2007 KEM E-mail to Kehr):):

Bob:

1. I don't agree that the comment should apply to the entire rule. As I explained in my e-mail of yesterday, I believe the comment applies only to paragraphs (a) and (c). This is analogous to the Model Rule, which does not have our proposed 1.7(b) [current 3-310(C)(1) and (2) - joint clients] and goes with "material limitation" in its (b)(2) vs. our checklist approach in proposed 1.7(d) [current 3-310(B)]. The rule speaks to direct adversity.

a. When would representation of an unnamed client in a joint client situation be relevant? If you are representing both joint clients against an unnamed class member, then 1.7(a) would be applicable. I'm not sure whether even the State Bar would argue that you should contemplate that one member of a joint representation might in the future become a named member of a class that would create a situation that is directly adverse to the other joint client.

b. Are there any of the contemplated situations in 1.7(d) [3-310(B)] where the lawyer should not at least **disclose** to the client that he or she represents a class in which one of the opposing parties is an unnamed member (or at least is most likely an unnamed member given the parameters of the class)? For example, if you are representing a class in wage and hour litigation, wouldn't you likely be able to determine whether a person who is adverse in the current matter is a member of that class by virtue of that person's profession or job? Why shouldn't you at least be required to disclose that? Shouldn't that trigger the obligation under 1.7(d). Note that this is not as burdensome as MR 1.7(a)(2) [material limitation], which requires that the lawyer obtain the client's informed consent under 1.7(b) to accept or continue the representation.

One other thought. Perhaps the introductory clause to 1.7(d) should state that the paragraph applies only where the lawyer "knows" of the relationship to be disclosed (with the same definition for "know" as in the MR's). Would that assuage concerns about keeping 1.7(d) in play in the class action context?

c. I would like to run our debate by the Class Action drafters for their input. I'm not sure there's time for us to resolve this tonight and I need to get get out the e-mail compilation by tomorrow so I can attend to my day job tomorrow and Wednesday.

2. I agree that attempting to address each of the rule paragraphs in the comment would result in a Byzantine quagmire, but I'm not sure I understand why we would need to address each. If we only had to address (a) and (c), then I don't see the problem. However, even if the Commission were to agree the comment applies to the entire rule (and I don't concede that point), I don't see why we would have to do it. I think the second and third sentences are an important clarification and don't think they detract from the main point.

3. I would also revise your first sentence to state (per Ira's e-mail):

“. . . an unnamed current or potential member of a **plaintiff** class of plaintiffs or defendant **class** in a class-action lawsuit . . .”

**SUMMARY OF RECOMMENDATIONS/PROPOSALS RE COMMENT [25]:**

**The Drafters (revised to incorporate Ira Spiro's Comments):**

"[25] When a lawyer represents or seeks to represent a plaintiff class of ~~plaintiffs~~ or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are ~~[ordinarily]~~ not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation, the lawyer does not ~~[typically]~~ need to get the consent of such a person before representing a client which who is adverse to that ~~[suing the]~~ person in an unrelated matter. Similarly, a lawyer seeking to represent a ~~[a]~~ party opposing ~~[a]~~ party ~~[in]~~ a class action does not ~~[typically]~~ need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."

**Bob Kehr (revised to incorporate Ira Spiro's Comments):<sup>2</sup>**

"[25] For purposes of this Rule, an unnamed current or potential member of a plaintiff class of ~~plaintiffs~~ or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class."

**KEM (revised to incorporate Ira Spiro's Comments):**

~~"[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [a] party opposing [a] party [in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.~~

**September 25, 2007 Kehr E-mail to RRC List:**

Several drafts of the class action Comment have circulated in the last few days (mistakenly numbered as Comment [25], which is its number in the MR). I want to make my own proposal for this topic. B/c my changes are so substantial, I am not providing a marked version. This draft incorporates elements of my earlier draft as it appears in the September agenda, the class action subcommittee's suggestion, the comments from Ira Spiro, and suggestions made by Kevin Mohr. A few points of preliminary explanation ---

---

<sup>2</sup> Superseded by 9/25/07 Kehr E-mail.

1. The agenda draft starts with the affirmative statement that a lawyer who represents a class is deemed to have a lawyer-client relationship with the named class representatives. I believe it is needed for the Comment to be complete. This is the first sentence of my proposal, below.
2. The agenda draft includes that statement that a lawyer for a class might owe civil duties on which this Comment does not bear. This Comment should be strictly limited to the application of the Rule 1.7 to class action representations and implies nothing about a lawyer's civil duties. This is the final sentence below and is taken exactly from my current agenda draft. I recommend that we keep it.
3. Most significantly, I believe that the non-representation of unnamed class members should apply to each paragraph of Rule 1.7. I take it from the e-mail traffic that there is no dissent from the idea that the Comment should apply to Rule 1.7(a) and (c), and I therefore won't discuss them. The Comment, in my view, also should apply to paragraph (b) and (d). For example, when an argument is made that a class should be divided into two or more classes b/c of alleged differences in interests among class members, a lawyer who represents the class should not be faced with the argument that his current representation violates paragraph (b). This should not be used as a club against the lawyer, it shouldn't be part of a motion to disqualify the lawyer, and it shouldn't be reported to the State Bar. Taking that example one more step, the lawyer who represented the single class should not be faced with the argument, following the granting of the motion to divide the class into two or more classes or to remove certain members from the class, that he is subject to discipline b/c he failed to make a disclosure under paragraph (d)(3). I believe that all the issues that otherwise might arise under this Rule with respect to unnamed class members should be handled by the court under class action concepts. I therefore conclude that the first sentence should say, in substance, that, for purposes of this Rule, a lawyer for a class represents named class representative, and the second sentence should say, in substance, that the lawyer does not represent unnamed class members for purposes of this Rule.
4. The recently circulated versions included second and third sentences that gave examples of when consent is not needed with respect to unnamed class members. I oppose those sentences for three reasons. First, no example of the non-application is needed if we simply say the Rule does not apply. That statement is complete and needs no explanation in my view. Second, the two examples do not cover the entire range of Rule 1.7 and, as I have explained, I believe a class lawyer should not be deemed to represent unnamed class members for any purpose under Rule 1.7. Third, I don't believe we could supplement the two sentences with others to give examples of when paragraphs (b) and (d) don't apply without being impossibly complex and opaque. I therefore suggest ----

[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

**September 30, 2007 Ira Spiro E-mail to RRC List:**

1. Something occurred to me on an issue being considered by the Commission, which Bob Kehr stated as follows:

“The agenda draft starts with the affirmative statement that a lawyer who represents a class is deemed to have a lawyer-client relationship with the named class representatives. I believe it is needed for the Comment to be complete. This is the first sentence of my proposal, below.”

2. As I understand it, the draft of the rule is as follows:

[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

3. My concern has to do with the traditional duty of loyalty a lawyer owes the client. It is oddly complicated in a class action.
4. It is a true statement, of course, that the lawyer has an attorney-client relationship with the plaintiff. But the attorney-client relationship between counsel for plaintiff/class action counsel and the plaintiff/class representative is an odd one. It is odd with respect to the duty of loyalty. After class certification, the class representative has a fiduciary duty to the entire class, and must put the interests of the class ahead of his or her own interests. So does the attorney for the class representative, who is also the attorney for the class.
5. Even before class certification, the plaintiff has some ill-defined degree of duty to the unnamed class members, also called putative class members. The attorney for the plaintiff also has a similar duty.
6. So what happens to the duty of loyalty owed by the attorney to the plaintiff/class representative? It certainly is different from a normal duty of loyalty. Perhaps some comment should be added to this rule to highlight this.
7. Seems to us at our firm there is a potential conflict of interest between the plaintiff and the putative class from the very start of the case. We get a signed waiver of the potential conflict right at the beginning of the case.
8. I have not practiced in the field of trusts in quite some years. An analogy might be made to the lawyer for a trustee. However, doesn't the analogy break down? I really do not recall the answer to this, but isn't it true that although the attorney for a trustee aids the trustee in fulfilling the trustee's duties to the trust beneficiaries, the attorney does not have a direct duty to the beneficiaries? That makes the situation different from class action, in which after class certification, class counsel definitely has strong fiduciary duties to the class, and before class certification class counsel still has some level of duty to the putative class.

Well, I'm not offering any answers. All I have at this point are issues.

**September 30, 2007 Voogd E-mail to RRC List:**

Regrettably, these emails were not available at the time of the meeting. However, what we came up with is not much different from what you suggested. I will send along a copy when the minutes are available. Further consideration to these issues will be given with regard to a possible rule addressed expressly to class actions.

**April 7, 2009 KEM E-mail to Drafters (Voogd, Martinez, Sapiro & Diane Karpman), cc Chair & Staff:**

As members of the drafting committee, I'm sending you an e-mail with materials I have concerning the proposed "Class Action" Rule. Tony is lead drafter.

I've attached the following:

1. My cumulative meeting notes from meetings at which the class action rule or concerns re class actions were considered, in PDF. Most of the notes are excerpts from the discussion of Rule 1.7 and its comment on class action conflicts.
2. An E-mail Compilation that includes all the RRC's class action-related correspondence of which I'm aware.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

I believe that Raul might have some additional research on this Rule in the event the drafting team determines it should be pursued.

**Finally, please note that this Rule is not calendared until the December 2009 meeting.**

However, some of you have requested being provided with the relevant materials in the interim.

Please let me know if you have any questions.

**April 7, 2009 Martinez E-mail to Drafters, cc Chair, Staff & KEM:**

Attached are some of the materials I have, including Nancy Moore's explanation and support for the ABA's decision not to have a class action rule. Also attached are materials on the simultaneous negotiation of settlement and attorney's fees, which issue raises broader concerns (see ABA Ethics letter re attorneys in contingency fee cases negotiating their fees directly with settling defendants.)

**October 26, 2009 McCurdy E-mail to Drafters (Voogd, Martinez, Sapiro & Diane Karpman),  
cc Chair & Staff:**

Please refer to Kevin's attachments and April 7, 2009 message below for background materials on this rule assignment.

The assignments for the November meeting are due this Wednesday, October 28th.

***Attached:***

Cumulative KEM Meeting Notes  
E-mail Compilation, Rev (9/30/07)

**October 28, 2009 Difuntorum E-mail to Voogd, cc Class Action Drafters & Time Billing  
Drafters (Foy, Peck), Chair & Staff:**

As the lead drafter for the Class Action Rule and Time Billing Rule, I want to let you know what is expected. Selected excerpts from Commission action summaries and Kevin's meeting notes are pasted below. You will see from the excerpts that these topics have been previously discussed, but that finality has not been reached. The concept of a Time Billing Rule should, in part, be reassessed in light the Commission's proposed Rule 1.5 [4-200] (re unconscionable fees, see attached) and proposed Rule 1.15 [4-100] (re trust accounts, see attached). The concept of a Class Action Rule should, in part, be reassessed in light of the comment language (Cmt. [32]) included in proposed Rule 1.7 [3-310] (re conflicts, see attached).

At the November meeting, the Commission will be working on all of the Batch 6 rules that the Board is scheduled to issue for public comment at the Board's January 2010 meeting. Batch 6 is set to be the last batch of rules to be issued for an initial public comment distribution. Any rule proposal, not already finalized, that is expected to be included in the Commission's final comprehensive report to the Board must make the train for Batch 6.

If you and the respective codrafters on a Class Action Rule or a Time Billing Rule are in agreement that the Commission should abandon consideration, then a simple email reporting that recommendation is all that is needed for the November agenda materials. If, on the other hand, the codrafters wish to bring forward a rule to be included in Batch 6, then a revised draft of the rule is needed together with an explanation of why the rule is desirable. The explanation should be consistent with the recent Commission practice of explaining rule amendment proposals to the Board in relation to the ABA Model Rules as representative of a national standard. For the moment, don't worry about Dashboards or comparison charts for a Class Action Rule or Time Billing Rule. The goal is to place a recommendation before the Commission as to whether a Class Action Rule or a Time Billing Rule should be pursued. Hope this helps clear up the assignment. –Randy D.

P.S.

Please include Diane Karpman on your Class Action Rule ( [Karpethics@aol.com](mailto:Karpethics@aol.com) ). For the Time Billing Rule, you might want to include Gerald Phillips ( [gphillips@pillaw.com](mailto:gphillips@pillaw.com) ) as he has written informal comment letters in support of a time billing rule (see attached letter from 2008).

\* \* \*

SELECTED MEETING NOTES EXCERPTS:

\*Kehr  
Melchior  
Mohr  
Snyder  
VAPNEK

**A. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests**  
[anticipated 1 hour discussion or until completed]  
(Materials enclosed.) **[pages 1 – 20]**

**Materials prepared for/considered at meeting:**

- . 9/9/07 Kehr Cover Memo to Randy Difuntorum & Lauren McCurdy, cc Drafters [1]<sup>[1]</sup>
- . Red-line Comment Draft 8.1 (9/9/07) compared to Draft 7 (8/6/07) [3-19]
- . Rule Draft 5 (8/16/2006) (previously approved by RRC)
- . 2/26/2007 Memo #2A from Drafters re Advance Waivers
- . 2/26/2007 Memo from Drafters re Thrust-upon [Unforeseeable] Conflicts [includes *Gould v. Mitsui* & Ass'n Bar of NYC Ethics Op. 2005-05]
- . Proposed Rule 1.7 paragraph re unforeseeable conflicts
- . March 15, 2007 Richard Zitrin Memo to Leadership, cc to Randy Difuntorum & KEM (transmitted by Lauren McCurdy on 3/16/07): 51<sup>[2]</sup>
- . September 5, 2007 Kehr E-mail to Drafters: 74
- . September 9, 2007 Kehr E-mail to Staff, cc to Drafters: 75
- . September 15, 2007 Kehr E-mail to Vapnek & Drafters: 75
- . September 15, 2007 Kehr E-mail to Sondheim & Drafters: 75
- . September 15, 2007 Kehr E-mail to Drafters: 76
- . September 15, 2007 Sondheim E-mail to Kehr, cc to RRC: 76
- . September 15, 2007 Sondheim E-mail to Kehr, cc Difuntorum & KEM: 76
- . September 15, 2007 Kehr E-mail to Sondheim, cc to Difuntorum & KEM: 77
- . September 16, 2007 Sondheim E-mail to Kehr, cc to Difuntorum & KEM: 77
- . September 14, 2007 Difuntorum E-mail to Class Action Drafters & Leadership: 77
- . September 14, 2007 KEM E-mail to Class Action Drafters & Leadership: 78
- . September 14, 2007 Sondheim E-mail to Voogd, Class Action Drafters & Leadership: 79
- . September 16, 2007 Karpman E-mail to Sondheim, Class Action Drafters & Leadership: 79
- . September 16, 2007 Sondheim E-mail to Karpman, Class Action Drafters & Leadership: 79
- . September 16, 2007 Karpman E-mail to Sondheim, Class Action Drafters & Leadership: 80
- . September 16, 2007 Sondheim E-mail to Karpman, Class Action Drafters & Leadership: 80
- . September 16, 2007 Voogd E-mail to Class Action Drafters & Leadership: 80
- . September 16, 2007 Tuft E-mail to Voogd, Drafters & Leadership: 81
- . September 16, 2007 Sondheim E-mail to Voogd, Drafters & Leadership: 81
- . September 17, 2007 McCurdy E-mail to RRC: 81
- . September 17, 2007 Sondheim E-mail to RRC (including 9/16/07 Voogd E-mail to Class Action Drafters re comment [33]): 82
- . September 17, 2007 Karpman E-mail to Voogd, Class Action Drafters & Leadership: 83
- . September 17, 2007 Voogd E-mail to Karpman, Class Action Drafters & Leadership: 84
- . September 17, 2007 Ira Spiro E-mail to Class Action Drafters & Leadership: 84
- . September 18, 2007 Karpman E-mail to Class Action Drafters & Leadership: 85
- . September 18, 2007 Melchior E-mail to Class Action Drafters & Leadership: 85
- . September 18, 2007 Karpman E-mail to Class Action Drafters & Leadership: 85
- . September 20, 2007 Voogd E-mail to RRC List: 86

- . September 21, 2007 Julien E-mail to RRC: 86
- . September 21, 2007 Tuft E-mail to RRC: 86
- . September 22, 2007 Voogd E-mail to RRC List (transmitted by KEM): 86
- . September 23, 2007 Kehr E-mail to RRC: 87
- . September 23, 2007 Kehr E-mail to KEM: 88
- . September 23, 2007 KEM E-mail to Kehr: 88
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- . SUMMARY OF RECOMMENDATIONS/PROPOSALS RE COMMENT [25]: 93
  - . The Drafters (revised to incorporate Ira Spiro's Comments): 93
  - . Bob Kehr (revised to incorporate Ira Spiro's Comments): 93
  - . KEM (revised to incorporate Ira Spiro's Comments): 93
- . September 25, 2007 Kehr E-mail to RRC List<sup>[3]</sup>

### **ADVANCE WAIVERS**

\* \* \* \* \*

### **COMMENT [33]**

24. Comment [33]. Three different proposals:<sup>[4]</sup>

**The Drafters** (revised to incorporate Ira Spiro's Comments):  
"[33] When a lawyer represents or seeks to represent a plaintiff class of plaintiffs or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are [~~ordinarily~~] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation, the lawyer does not [~~typically~~] need to get the consent of such a person before representing a client which who is adverse to that [~~suing the~~] person in an unrelated matter. Similarly, a lawyer seeking to represent a [~~n~~] party opposing [~~ment in~~] a class action does not [~~typically~~] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."

**Bob Kehr**<sup>[6]</sup>

"[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect."

**KEM** (revised to incorporate Ira Spiro's Comments):

“[33] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

25. **MOTION** (Tony): Adopt last draft that appears on page 31 of the Class Action E-mail compilation (page 91 of 3-310 compilation).

~~“KEM (revised to incorporate Ira Spiro's comments):” – limited to (a) and (c).~~

Friendly amendment: “For purposes of this Rule ...” [vs. limited to (a) and (c)], i.e., it would now provide:

“[33] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so.”

YES: 8 NO: 1 ABSTAIN: 2

- a. Bob: Does not like the proposal.  
(1) Leaves out the idea that the lawyer *does* represent the named class representative.  
(2) Also believes that the comment should apply to all paragraphs of the rule.  
b. Stan: Agrees.

26. **MOTION** [to address Bob's concern at ¶.25(a)(1)]: Add in line 367 on page 16 of material to the beginning of comment [33]:

This Rule applies to a lawyer's representation of named class representatives.

YES: 7 NO: 0 ABSTAIN: 3

27. **MOTION:** Add line 370 on page 16 of the Materials (page 14 of Memo):

A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

YES: 8 NO: 0 ABSTAIN: 3

28. **SUMMARY OF COMMENT [33] FOLLOWING PRECEDING VOTES:**

"[33] This Rule applies to a lawyer's representation of named class representatives. For purposes of ~~paragraphs (a) and (c) of~~ this Rule, an unnamed current or potential member of a plaintiff class or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to get the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect."

### **UNFORESEABLE ("THRUST UPON") CONFLICT ISSUE**

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<sup>[1]</sup> Bracketed numbers are page numbers in 9/28-29/07 Meeting Materials.

<sup>[2]</sup> Numbers refer to page numbers in E-mail Compilation dated 8/20/07.

<sup>[3]</sup> This e-mail was circulated too late for inclusion in the e-mail compilation but was considered at the meeting.

<sup>[4]</sup> The drafters' and KEM's proposals are found in the e-mail compilation dated 9/24/07, at page 93. Please note that the comments in the compilation were incorrectly numbered "[25]," the number for the analogous ABA comment. The correct number in the RRC's draft is [33].

<sup>[5]</sup> From 9/25/07 Kehr E-mail to RRC List.

***Attached:***

Rule 1.5 materials

Rule 1.7 materials

Rule 1.15 materials

8/18/08 Gerald Phillips Comment to RRC re hourly billing

**October 28, 2009 Martinez E-mail to Drafters, cc Chair & Staff:**

I agree with Ellen on the time billing rule, but am not convinced that the class action rule should be abandoned.

**October 30, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:**

Regarding the consideration of a class action rule, attached please find a Georgetown Legal Ethics Journal article that actually recommends the text of a proposed new Rule 9.1 "Duties in Class Action Litigation." Julia Klusas is the author of the article and the proposed rule. As you know from Harry's input on this assignment, the goal is to have something concrete to discuss that can facilitate a vote on the concept of a rule.

In addition to the attached materials, Kevin has informed me that there was an article by Nancy Moore several years ago on class actions, Who Should Regulate Class Action Lawyers? 2003 Ill. L.Rev. 1477 (2003). In the article, Nancy Moore concluded that there was no need for such a rule. An abstract if the article is pasted below. This abstract is from SSRN (Social Science Research Network) and is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=316639](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=316639).

**ABSTRACT:**

Ethical issues arise frequently in class action litigation. These issues include conflicts of interest, solicitation, application of the no-contact rule, the reasonableness of attorneys' fees, and the attorney-witness rule. There has been considerable difficulty applying existing rules of conduct to these situations, partly because of confusion regarding the relationship among class counsel, the named class representatives and absent members of the class. Thus as to conflicts of interest - perhaps the most pressing problem facing class action lawyers - it has been said that a "strict reading of the conflict of interest rules in class actions should be tempered, because the very nature of a class action is to combine many divergent interests." Despite the frequency with which the propriety of lawyers' conduct is litigated in class action lawsuits, the Ethics 2000 Commission - which recently proposed comprehensive amendments to the ABA Model Rules of Professional Conduct - declined either to adopt a separate class action rule or to add extensive commentary addressing the application of the rules to class action lawsuits. The purpose of this article is to explain and defend the Commission's decision, focusing on the issue that dominates many discussions of ethics and class actions - the difficulty of applying current conflict-of-interest rules to the myriad of conflicting interests that commonly arise in these lawsuits, including conflicts among class members, as well as between the lawyer and the class and between the class and third persons. Parts I and II of the article demonstrate that the scope of the problem is not nearly as large as it is commonly thought to be. Part I argues that the class should be viewed as an entity client, in which case it becomes clear that conflict of interest rules simply do not apply to conflicts within a class. Part II eliminates from consideration those conflicts - like conflicts arising from the size of the lawyer's fee - that are not addressed by conflict-of-interest doctrine because they are not unique to particular lawyers but are rather a type of agency problem that is endemic to legal practice. Parts III and IV of the article then turn to the types of conflicts that would be addressed by a "strict reading" of the conflict-of-interest rules. These conflicts include those arising from the lawyer's duties to other current clients, both inside and outside the class, as well as former clients. Part III

argues that from the point of view of the non-class client, there is no reason to relax the current conflict rules. These clients are entitled to full disclosure of the conflict and an opportunity to find independent counsel. Part IV addresses these conflicts from the point of view of the class itself. Here it is argued that relaxation (or special application) of the conflict rules may be warranted in some cases, but that it makes sense to leave these issues to be resolved under class action law - under the rubric of a further elaboration of the adequacy of representation requirement of Rule 23 of the Federal Rules of Civil Procedure - rather than by amendments to the rules of professional conduct.

**October 30, 2009 Martinez E-mail to Drafters, cc Chair & Staff:**

Attached is the entire Nancy Moore article that Randy references.

**October 30, 2009 Karpman E-mail to Drafters, cc Chair & Staff:**

Nancy Moore's article discusses Richard Zitrin's proposal that was submitted to E2K. Yesterday I emailed Richard, requesting a copy of his proposed rule, as soon as I get it I will circulate it to the subcommittee.

**October 31, 2009 Sondheim E-mail to RRC:**

In regard to class action rules, please take into account the e-mail below and the attachment.

See **October 30, 2009 Martinez E-mail to Drafters, cc Chair & Staff:**

**October 31, 2009 Sondheim E-mail to RRC:**

In regard to a class action rule, please take into account the e-mail set forth below and the attachments.

See **October 30, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:**

**November 1, 2009 Sondheim E-mail to RRC:**

Since, as far as I can tell, nothing has been received from the class action drafting committee, I propose to do the following with regard to such a rule:

First, taking into account Nancy Moore's explanation and defense of why the ABA Ethics 2000 Commission, "declined either to adopt a separate class action rule or to add extensive commentary addressing the application of the rules to class action lawsuits," we will vote on whether the Commission supports a class action rule. If there is support for such a rule, we will discuss the rule proposed by Julia Klusas to ascertain if the Commission supports the concepts and language of that rule.