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## WHO SHOULD REGULATE CLASS ACTION LAWYERS?

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## “WHO SHOULD REGULATE CLASS ACTION LAWYERS?”†

Nancy J. Moore\*

*In this article, Professor Nancy Moore explores ethical issues implicated by class action litigation. She begins by pointing out that neither the Model Code of Professional Responsibility nor the Model Rules of Professional Conduct deal specifically with the ethics of class action lawyers. The author, who acted as Chief Reporter of the Ethics 2000 Commission, argues that the Commission’s decision not to draft rules directly addressing the ethics of class action litigation was appropriate. Focusing on the problem of conflicting interests, she argues that the confusion surrounding the ethics of class action lawyers can be significantly reduced by recognizing, first, that the class itself is the client and, second, that much of what are currently described as “conflicts of interest” were never meant to be addressed by traditional conflict-of-interest doctrine. Even if there are some situations in which relaxation of the ethics rules may be justified in order to accommodate class actions, these situations are better addressed by case law interpreting Rule 23 of the Federal Rules of Civil Procedure. The author argues that in addressing adequacy of representation issues under Rule 23, courts should still take into account many of the principles and concerns motivating Model Rules of Professional Conduct Rule 1.7.*

### INTRODUCTION

Ethical issues arise frequently in class action litigation.<sup>1</sup> These issues include conflicts of interest,<sup>2</sup> solicitation,<sup>3</sup> application of the no-

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1. See, e.g., Brian V. Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect by the Drafters of the Proposed Model Rules of Professional Conduct*, 27 LOY. L. REV. 1047, 1047–48 (1981). See generally HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 15 (3d ed. 1992) (section entitled “Class Action Abuses and Legal Ethics”).

contact rule,<sup>4</sup> the reasonableness of attorneys' fees,<sup>5</sup> and the attorney-witness rule.<sup>6</sup> 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.<sup>7</sup> Thus, it is often said that "the ethics rules cannot be mechanically applied to class actions."<sup>8</sup> As for conflicting interests—perhaps the most pressing problem facing class action lawyers—some courts go even further to state 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.<sup>9</sup>

Despite the frequency with which the propriety of lawyers' conduct is litigated in class action lawsuits, neither the Model Code of Professional Responsibility<sup>10</sup> (Model Code) nor the Model Rules of Professional Conduct<sup>11</sup> (Model Rules) specifically addresses the ethics of

2. See, e.g., NEWBERG & CONTE, *supra* note 1, §§ 15.24–15.25 (simultaneous or subsequent representation of adverse clients, opt-outs, and class members); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); Waid, *supra* note 1, at 1061–74; Gregg H. Curry, Comment, *Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit*, 24 J. LEGAL PROF. 397 (2000); Note, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1447–57 (1981) [hereinafter *Developments*].

3. See, e.g., NEWBERG & CONTE, *supra* note 1, § 15.04.

4. See, e.g., *id.* §§ 15.05–15.20 (discussing communication with class members and potential class members, including contacts by class counsel and counsel for adversary); Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353 (2002) (same).

5. See, e.g., Ass'n of the Bar of the City of New York, Comm. on Prof'l Responsibility, *Financial Arrangements in Class Actions, and the Code of Professional Responsibility*, 20 FORDHAM URB. L.J. 831 (1993); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Heather M. Williams, Note, *Attorney Fees in Class Action Lawsuits: Implementing Change to Protect Plaintiffs from Unethical Attorney Behavior*, 7 KAN. J.L. & PUB. POL'Y 68 (1998).

6. See, e.g., NEWBERG & CONTE, *supra* note 1, § 15.23.

7. See, e.g., Waid, *supra* note 1, at 1048.

8. Koniak, *supra* note 2, at 1121 (referring to this statement as an "oft-made remark"); see also, e.g., *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 589–90 (3d Cir. 1999) (both citing and quoting *Agent Orange* and Judge Adams's concurring opinion in *Corn Derivatives*); *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 19 (2d Cir. 1986) ("[T]he 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 Litig.*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) ("[C]ourts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context . . .").

9. See *Lazy Oil Co.*, 166 F.3d at 589–90.

10. MODEL CODE OF PROF'L RESPONSIBILITY (1981). The Model Code of Professional Responsibility was replaced by the Model Rules of Professional Conduct in 1983. See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.4 (1986).

11. MODEL RULES OF PROF'L CONDUCT (2001) (previous version of the Model Rules prior to extensive amendments in February 2002 resulting from the recommendations of the Ethics 2000 Commission).

class action lawyers to any significant extent.<sup>12</sup> Given this lack of guidance, both the Kutak Commission, which drafted the Model Rules,<sup>13</sup> and the Ethics 2000 Commission<sup>14</sup> (the Commission), which recently proposed comprehensive amendments to the Model Rules,<sup>15</sup> were urged to adopt a separate class action rule.<sup>16</sup> Neither did so, nor has any state court adopted such a rule.<sup>17</sup> As Chief Reporter to the Ethics 2000 Commission,<sup>18</sup> I want to address the question of whether, at this late date, with all of the publicity surrounding allegations of class action

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12. The Model Code contained but a single reference to class actions. See MODEL CODE DR 2-104(A)(5) (allowing limited solicitation in class actions). As adopted in 1983, the Model Rules contained no references to class actions in the text of the rules, and only a few references in the comments. See MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. (1983) (referring to law prescribing a procedure for determining a fee); *id.* R. 1.8 cmt. (stating that consent to payment of legal fees by third party “may be obtained on behalf of the class by court-supervised procedure”); *id.* R. 6.1 cmt. (1983) (referring to class actions in connection with the provision of pro bono services); *id.* R. 7.2 cmt. (1983) (stating that solicitation rules do not prohibit “communications authorized by law, such as notice to members of a class in class action litigation”). There were no additional references to class actions as of 2001, and the Ethics 2000 Commission recommended only one additional reference to class actions in the Comment to Rule 1.7. See *infra* note 20.

13. See WOLFRAM, *supra* note 10, § 2.6.4.

14. In 1997, the American Bar Association (ABA) created the Commission on the Evaluation of the Rules of Professional Conduct, generally known as the Ethics 2000 Commission. See E. Norman Veasey, Chair's Introduction and Executive Summary, Comm'n on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates (Aug. 2001) [hereinafter Ethics 2000 Report], at <http://www.abanet.org/cpr/e2k-report.html> (last visited Mar. 1, 2003). The Commission was charged with conducting a comprehensive review of the Model Rules. See *id.* The Commission issued its report in August 2001. The ABA House of Delegates met in August 2001, again in February 2002, and adopted the vast majority of the Commission's recommendations. See Summary of House of Delegates Action on the Ethics 2000 Commission at the August 2001 Annual Meeting, at <http://www.abanet.org/cpr/ethics2k.html> (last visited Oct. 16, 2002).

15. Report 401, as filed by the Ethics 2000 Commission in August 2001 and as filed with revisions in February 2002, can be found at the Commission's website. See <http://www.abanet.org/cpr/ethics2k.html> (last visited Oct. 16, 2002).

16. See Waid, *supra* note 1 (proposal made to Kutak Commission); see also *Ethics 2000 Atlanta Hearing* (Aug. 5, 1999) (written statement of Richard A. Zitrin) [hereinafter Zitrin Testimony], at <http://www.abanet.org/cpr/rzitrin.html> (last visited Feb. 15, 2003).

17. 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, however. See, e.g., IND. RULES OF PROF'L CONDUCT R. 7.3(e) (1996) (adopting provision similar to solicitation exception provision of Model Code); MASS. RULES OF PROF'L CONDUCT R. 1.7 cmt. 14(A) (2002) (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); MASS. RULES OF PROF'L CONDUCT R. 3.3 cmt. 16 (1998) (applying duty of candor in ex parte proceeding to joint petitions to a tribunal, including a joint petition to approve a class action settlement); N.D. RULES OF PROF'L CONDUCT R. 1.8(g) (2002) (specifically exempting class actions from coverage under aggregate settlement rule); TEX. RULES OF PROF'L CONDUCT R. 1.02 cmt. 3 (1998) (stating that the ability of a class action lawyer to recommend settlement over the objections of a named plaintiff is an exception to the general rule that it is for the client to accept or reject settlements). 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 (2002). California's rules, which are not based on either the Model Code or the Model Rules, have a single reference to class actions. See CAL. RULES OF PROF'L CONDUCT R. 3-510 (1996) (regarding communication of settlement offer to a client, defining “client” to refer to the named representatives of a class in a class action).

18. It goes without saying (but I will say it anyway) that this Article represents my own views only and, except where specifically stated, does not represent the views of the Ethics 2000 Commission.

abuses,<sup>19</sup> the Commission was justified in declining either to adopt a separate class action rule or to add extensive commentary addressing the application of the rules to class action lawsuits.<sup>20</sup>

Not surprisingly, my answer is that yes, the Commission's silence was justified,<sup>21</sup> although I concede that there are a few places where

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19. See, e.g., Tom Collins, *Rulings Focus on Public Policy, Ethics in Attorney Cases: Judge Blasts Attorneys Suing Cruise Line*, 224 LEGAL INTELLIGENCER, Mar. 16, 2001, at 4 (reporting judge who slashed class counsels' legal fees and ordered that a quarter of the legal fees be paid in the same travel vouchers to be provided to plaintiff class under negotiated settlement); Karen Donovan, "Huh? I'm the Lead Plaintiff?" NAT'L L.J., May 24, 1999, at A1 (discussing investor who was put forward as a "lead plaintiff" without his knowledge or consent and whose lawyers refused to answer his questions regarding his status in the litigation); Barry Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1 (reporting criticism of class action abuses, including coupon settlements and marginal claims packaged for the "sole purpose of snaring fat fees"); see also, e.g., Koniak, *supra* note 2, at 1057-64 (alleging possible collusion between class counsel and defendants in negotiating a "futures class" by class counsel simultaneously representing inventories of plaintiffs who apparently received a better deal outside the class settlement); Edwin Lamberth, *Injustice by Process: A Look at and Proposals for the Problems and Abuses of the Settlement Class Action*, 28 CUMB. L. REV. 149, 163 (1998) (discussing numerous alleged abuses, including a case in which an absent class member ended up being assessed attorneys fees greater than his award in negotiated settlement).

20. The only additional reference to class action lawsuits in the Ethics 2000 Commission amendments is contained in a new paragraph to the Rule 1.7 Comment. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 25 (2002) (stating that unnamed class members are ordinarily not considered to be clients for purposes of determining "directly adverse" conflicts; as a result, a lawyer representing a class may file a lawsuit against an unnamed class member on an unrelated subject without informing or seeking consent from that member). The Commission considered but rejected a proposed comment along the lines of the Massachusetts Rules. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (Working Draft No. 5, 1998) (discussing proposed new comment 16A); Minutes of the Ethics 2000 Commission (Sept. 27-28, 2000), at <http://www.abanet.org/cpr/e2k/092798mtg.html> (last visited Oct. 22, 2002). The Commission also considered but rejected a suggestion that a new paragraph be added to the Rule 4.2 Comment regarding communications by an opposing lawyer with members of a class in a class action. See MODEL RULES R. 4.2 (Working Draft No. 4, 1998) (discussing proposed comment 9); Minutes of the Ethics 2000 Commission (July 7-8, 2000), at <http://www.abanet.org/cpr/070700mtg.html> (last visited Oct. 22, 2002) (noting that the Commission decided against adding comment regarding communications with members of a class in a class action).

21. A fuller explanation of the meaning of the Commission's silence is probably called for, particularly in light of Richard Zitrin's testimony, which specifically called for the adoption of a separate class action rule. The minutes of the Commission's meetings do not indicate any discussion of that proposal. Of course the Commission was aware of the proposal, which was made both in written and oral testimony. See *supra* note 16 (citing testimony of Richard Zitrin). Accordingly, the Commission's silence means that neither the reporters nor any member of the Commission put the proposal on the Commission's agenda for discussion. My recollection is that there was informal discussion that any necessary clarification regarding the ambiguity of the ethical obligations of class action lawyers should come from law other than the Rules of Professional Conduct. My own views at the time are reflected in rather brief remarks I made in a symposium on mass torts litigation. See Nancy J. Moore, *Ethics Matters, Too: The Significance of Professional Regulation of Attorney Fees and Costs in Mass Tort Litigation—A Response to Judith Resnick*, 148 U. PA. L. REV. 2209, 2221-22 (2000) (acknowledging the failure of lawyer codes to address ethical dilemmas of class action lawyers). That piece goes on to conclude that "the code format may be insufficiently flexible to adequately communicate the duties of class action counsel" and further, that:

[g]iven that the resolution of ethical issues often depends on the principles set forth in other law, it may be preferable to continue to look to courts to provide further guidance, either by promulgating additional procedural rules or by addressing the ethical obligations of class lawyers while ruling on various procedural aspects of class action litigation.

*Id.* In writing this Article, however, I have engaged in additional research, reflection, and discussion with colleagues. Thus, this Article reflects my current thinking, which is similar, but not identical, to the views I earlier held and expressed.

additional commentary would have been useful.<sup>22</sup> There are two reasons for my answer. First, I believe that much of the confusion surrounding the application of the ethics rules to class action lawyers could be significantly reduced without revising the ethics rules. In my view, this could be done by resolving the issue of client identification in favor of the view that the class is an entity client,<sup>23</sup> even at the precertification stage of the litigation,<sup>24</sup> and by recognizing that much of what are currently described as “conflicts of interest” issues are in fact the type of agency problems that were never meant to be resolved under conflict-of-interest doctrine.<sup>25</sup> Second, acknowledging that there are some situations in which relaxation (or special application) of the ethics rules may be necessary to accommodate the unique needs of a class action lawsuit, I believe that whether and when such rules are to be relaxed is a question more properly decided under the law of class actions—primarily Rule 23 of the Federal Rules of Civil Procedure<sup>26</sup> (FRCP) and the case law applying that rule—rather than under rules of professional conduct or by ethics committees and courts applying such rules.<sup>27</sup>

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22. For example, the Commission considered a proposal drafted by Associate Reporter Carl Pierce to add a paragraph to the Rule 4.2 Comment to indicate how that Rule applied to class actions. See MODEL RULES R. 4.2, at 3, 9 (Proposed Rule 4.2 Draft No. 4, 1998) (discussing proposed Comment 9). Under that proposal, after either certification of the class or expiration of the opt-out period, a lawyer representing a client in a class action must treat all class members as persons represented by the lawyer who is representing the class; prior to that period, the rule would apply only to communications with members of the class known to be individually represented by a lawyer. *Id.* The proposal was based primarily on the Restatement of the Law Governing Lawyers, which in turn reflected the majority of court decisions addressing this issue. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99, cmt. 1 & Reporter’s Note (2000). Given that the issue has been addressed by courts overseeing class actions, and that there appears to be a clear majority opinion, I believe it would have been helpful to practicing lawyers if the Rule 4.2 Comment had adopted this approach. I would, however, prefer to word the provision differently in order to avoid the implication that post-certification class members are in fact clients of class counsel. In my view, it would have been better to treat individual class members as constituents of the class and the class itself as the lawyer’s client. See *infra* text accompanying note 53.

23. See *infra* notes 40–48 and accompanying text.

24. See *infra* notes 50–54 and accompanying text.

25. See *infra* notes 71–83 and accompanying text.

26. FED. R. CIV. P. 23. For a summary of the general requirements of Rule 23, as completely revised in 1966, see Charles A. Wright, *Class Actions*, 47 F.R.D. 169 (1970). Class action law also includes constitutional concerns; for example, due process requirements for binding absent members of the class. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–47 (1999) (stating that mandatory class actions implicate the due process principle that a person is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process and that there is an applicable exception for class actions that depends on adequate representation by someone with same interests who is not a party); see also Koniak, *supra* note 2, at 1086–1126 (discussing Supreme Court’s due process jurisprudence as applied to district court opinion in class action involving attempted settlement of class composed of persons who had not yet suffered injury from asbestos exposure).

27. In some instances, the application of rules of professional conduct and class action law will overlap, as when a judge determines the size of a reasonable fee to be awarded to class counsel in a class action lawsuit. Cf. Moore, *supra* note 21, at 2222 n.61 (suggesting that judges ruling on class action issues may also expand on the ethical duties of lawyers, as when “stating the circumstances under which lawyers are entitled to be reimbursed for the costs and expenses of litigation”). In other

In this article, I focus 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 class action 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. In part I, I argue 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. In part II, I eliminate 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. In part III, I argue that from the point of view of the nonclass client, that 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 (or, in some cases, to refuse to bring the action as a class action). Finally, in part IV, I address these conflicts from the point of view of the class itself. Here I agree that relaxation (or special application) of the conflict rules is probably warranted, because, although there are risks associated with the conflict, there may be some situations in which the risk is low in relation to the benefit the class may receive by permitting the representation to continue. I consider several ways to achieve this end, arguing that it makes the most sense to leave these issues to be resolved under class action law—namely, under the rubric of a further elaboration of the adequacy of representation requirement of FRCP Rule 23. Although I urge that it is class action law that should regulate this aspect of class counsels’ conflicts, I explain why I think it would be useful for courts to consider the principles and concepts underlying the ethics rules in their Rule 23 analysis.

#### I. THE CLASS SHOULD BE VIEWED AS AN ENTITY CLIENT

Much of the confusion surrounding the ethics of class action lawyers results from a mistaken belief that a “strict reading” of the ethics rules would make class action litigation either impossible or highly inefficient. Consider the question of conflicts of interest. It is undeniable that conflicts of interest are inherent in class actions, as it is inevitable that

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instances, the application of class action law will be similar to, but not identical, to an analysis that would be conducted under rules of professional conduct. *See infra* Part IV.

there will be divergent interests among the various members of the class itself, particularly in the remedy stage.<sup>28</sup> Nevertheless, it is not necessarily the case that such conflicts would doom class actions if the conflict-of-interest rules are strictly applied in class action lawsuits.

Model Rule 1.7 of the Model Rules is the general ethical rule addressing concurrent conflicts of a lawyer.<sup>29</sup> Under this Rule, a potentially impermissible conflict exists whenever “there is a significant risk that the representation of one or more clients may be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”<sup>30</sup> Given such a conflict, the lawyer must refuse the representation, or withdraw from existing representation, unless “each affected client gives informed consent” and the “lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”<sup>31</sup> According to Brian Waid, an early proponent of a separate class action rule, Rule 1.7, if strictly construed, would prevent lawyers from handling class actions at all because “‘the lawyers’ ability to consider, recommend or carry out a course of action’ on behalf of the class, a subclass or the class representative may be ‘adversely affected by the lawyer’s responsibilities’ to one of the other categories of ‘clients.’”<sup>32</sup> Moreover, such “conflicts” cannot be cured by informed consent, due to the lawyer’s inability to obtain the consent of absent class members.<sup>33</sup>

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28. See, e.g., *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) (“[C]onflicts of interest are built into the device of the class action, where a single lawyer may be representing a class consisting of thousands of persons not all of whom will have identical interests or views.”); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 11.12, at 11–33 (3d ed. 2002) (“It is almost inevitable that class members will have some divergent views on the advisability of settlement and other issues.”); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiff’s Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1483–1500 (1998) (arguing the unreality of suggestion that due process prohibits conflicts among class members).

29. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002).

30. *Id.* R. 1.7(a)(2) (2002).

31. *Id.* R. 1.7(b) (2002).

32. Waid, *supra* note 1, at 1071–72 (quoting ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (proposed final draft May 30, 1981)). As a result of the 2002 amendments recommended by the Ethics 2000 Commission, Rule 1.7 has been reorganized; however, with the exception of a new requirement that waivers be confirmed in writing, there was no intended change in substance. See Ethics 2000 Report, *supra* note 14. Waid was commenting on an earlier draft of the 1983 version of Rule 1.7. Waid, *supra* note 1, at 1049 n.8 and accompanying text (referring to May 30, 1981 proposed final draft).

33. Cf. Waid, *supra* note 1, at 1072 (discussing “conflict” created by class counsel’s interest in recovery of fees). Waid does not discuss the comment to Rule 1.8(f), which provides, with respect to third party payment of legal fees, that “[w]here the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.” ABA Commission on Evaluation of Professional Standards, Model Rules of Prof’l Conduct, Rule 1.8 Comment (proposed final draft May 30, 1981); see also MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. (2001). The reason may be either that he was unaware of this provision, that he thought the provision applied only to consent given under that rule, or that he was aware that courts have not developed any procedures to consent to conflicts affecting a class. That statement has been eliminated from the Rule 1.8 Comment as a result of the 2002 amendments. See *id.* R. 1.8 cmt. (2002).

In Part IV of this Article, I consider, but ultimately reject, the use of consent by a court or supervised by a court as a means of satisfying the requirements of Rule 1.7 in class actions. In my

Under this analysis, it is self-evident that a strict reading of the conflict rules must be tempered if the inherently diverging interests in class actions are to be accommodated.<sup>34</sup>

But this analysis assumes that each class member is or should be considered a “client” for purposes of this Rule.<sup>35</sup> There is no single view of who is the “client” of a class action lawyer.<sup>36</sup> According to the *Restatement of the Law Governing Lawyers*, the named class representatives are clients of the lawyers *for some purposes*,<sup>37</sup> and even other class members may have “some characteristics” of clients.<sup>38</sup> At least one court has declared that there is “in effect” an “attorney-client relationship between the absent class members and the attorney.”<sup>39</sup>

But these are strained and unhelpful readings of many of the cases. The problem with characterizing either named representatives or

view, when the question is one of protecting the members of the class who are not otherwise represented by the lawyer, it is better to suspend application of the conflicts rules, deferring to a judicial determination of the adequacy of representation under Rule 23—a determination that should be “informed by” the concepts of those rules but that does not literally apply the rules. *See infra* Part IV.

34. *Cf.* THIRD CIRCUIT TASK FORCE ON THE SELECTION OF CLASS COUNSEL, FINAL REPORT 28 n. 69 (2002) [hereinafter SELECTION OF CLASS COUNSEL] (describing result in *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999)).

35. Waid, *supra* note 1, at 1071 (lamenting that the word “client” remains undefined for purposes of a class action).

36. *See, e.g.*, NEWBERG & CONTE, *supra* note 1, § 15.03 (discussing three different perspectives on relationship between class representative or counsel and absent class members); *Developments, supra* note 2, at 1449–54 (discussing various unitary and multiple client theories). The issue is addressed only indirectly in the Model Rules, with ambiguous and conflicting implications. *See, e.g.*, MODEL RULES R. 1.7 cmt. 25 (2002) (“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 [the “directly adverse” conflicts provision] of this Rule.”); *id.* R. 1.8 cmt. 13 (2002) (“Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class.”); *id.* R. 7.3 cmt. 4 (2002) (stating that rules prohibiting solicitation of clients “do not prohibit communications authorized by law, such as notice to members of a class in class action litigation”). This ambiguity and conflict merely reflect the unsettled state of the law as reflected in other sources. *See infra* notes 37–38 and accompanying text.

37. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f. (2000). There is a cross-reference here to § 125, Comment f, for conflict of interest issues, but that section does not address the question of who is the client in a class action lawsuit.

38. *Id.* § 14 cmt. f. The cross-references here are to § 70, Comment c (providing indirect support for the proposition that the confidential communications of a class action member to the class lawyer may be privileged) and to § 99, Comment l (stating that opposing counsel may not be free to communicate with class members except through class action counsel). In my view, rather than characterizing these sections as treating class members as clients, or as having characteristics of clients, it would be better to view them as recognizing that class members are constituents of an entity client—the class—just as individual corporate employees are constituents of a corporate client, who may provide privileged communications to corporate counsel and be off-limits to opposing clients under the no-contact rule. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981) (holding that certain corporate employees’ communications to corporate counsel were privileged communications of the corporation); MODEL RULES R. 4.2 cmt. 7 (2002) (application of no-contact rule to prevent contact with certain constituents of an organizational client).

39. *Cullen v. New York Civil Serv. Comm’n*, 435 F. Supp. 546, 560 (E.D.N.Y. 1977); *see also Mandujano v. Basic Vegetable Prods.*, 541 F.2d 832, 834–35 (9th Cir. 1976) (“The class is not the client. The class attorney continues to have responsibilities to each individual member of the class . . .”).

unnamed members of the class as “clients,” or even as having the “characteristics of clients” in some cases, is that for the purposes that appear to count most, these persons are *not* treated like clients. Most notably, class counsel can recommend a settlement over the objections of the named representatives.<sup>40</sup> As a result, it is hard to see how even named representatives can be considered “clients” of the lawyer in any meaningful sense of the word. Moreover, viewing the class as an entity client is *not* inconsistent with recognizing that class counsel has significant responsibilities to the individual class members, just as viewing an estate as an entity client does not preclude a finding that the estate lawyer has responsibilities to either the fiduciary or the beneficiaries.<sup>41</sup> As for decisions prohibiting opposing counsel from contacting class members directly, the same result could be achieved without characterizing class members as “clients” or having “characteristics of clients.”<sup>42</sup>

In my opinion, the better view is that the class itself is an entity client, just as corporations, partnerships, and other voluntary (and even involuntary<sup>43</sup>) associations may be entity clients under Rule 1.13.<sup>44</sup> This view has not been explicitly adopted except by a handful of commentators,<sup>45</sup> but I believe that it has the best fit with class action case

40. See, e.g., *Developments*, *supra* note 2, at 1450.

41. Cf. Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 *FORDHAM L. REV.* 1319, 1335 (1994) (referring to how Model Rule 1.13 envisions the question of who is the attorney’s client). *But see Mandujano*, 541 F.2d at 834 (noting that the class “is not a legal entity”).

42. Cf. MODEL RULES R. 4.2 cmt. 7 (2002) (applying no-contact rule to prohibit contacts with certain constituents of an organizational client).

43. See, e.g., Pennell, *supra* note 41, at 1335 (“Nothing in the operation of Model Rule 1.13 suggests . . . that voluntariness is a requisite to recognition as an organization for purposes of applying this rule.”); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *NOTRE DAME L. REV.* 913, 921–22 (1998) (referring to some entities that are not truly voluntary, such as trade unions and municipalities).

44. MODEL RULES R. 1.13(a) (2002) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”); *id.* R. 1.13(a) cmt. 1 (2002) (describing organizational client as a “legal entity [that] cannot act except through its officers, directors, employees, shareholders and other constituents”). I prefer the term “entity” to “organization” and will use that term throughout this Article. See also sources cited *infra* note 45. The fact that a class can also be viewed as an aggregate or group of individuals does not in itself defeat the concept of a class as an entity client. Cf. ABA Comm’n on Ethics and Prof’l Responsibility, Formal Op. 91-361 n.2 (1991) (stating that partnerships are entity clients under Rule 1.13, even though “for some purposes, often involving the substantive rights and liabilities of partners, a partnership is treated as an ‘aggregate’ or group of individuals”).

45. See, e.g., Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *N.Y.U. L. REV.* 13 (1996); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, in *ETHICS IN PRACTICE* 177, 178–79 (Deborah L. Rhode ed., 2000); Shapiro, *supra* note 43, at 923–34. *But see Mandujano v. Basic Vegetable Prods.*, 541 F.2d 832, 835 (9th Cir. 1976) (“The class is not the client.”); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 *COLUM. L. REV.* 370, 380–99 (2000) (arguing that viewing the class as an entity is a legal fiction that is neither useful nor plausible); *Developments*, *supra* note 2, at 1450–51 (characterizing the view of class as a legal entity as one of several “unitary client” theories, but then rejecting this view).

law<sup>46</sup> and provides the most workable solution for purposes of applying the ethics rules. Indeed, it fits nicely with recently proposed amendments to FRCP Rule 23, under which a new paragraph (g) clearly states that “[a]n attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.”<sup>47</sup> As further explained in the Committee Note, this provision “articulates the obligation of class counsel to represent the interests of *the class*, as opposed to the potentially conflicting interests of individual class members.”<sup>48</sup>

Of course, by its terms, proposed Rule 23(g) would apply only after a lawyer is appointed as class counsel—that is, after the certification stage of a class action lawsuit.<sup>49</sup> Who is the lawyer’s client prior to certification? Must it be the named representatives? In my view, it is possible for the lawyer to view even the putative class as a client, or better yet, a prospective client.<sup>50</sup> This is apparently what is contemplated by proposed Rule 23(g), as evidenced by the drafters’ acknowledgment that “[b]efore certification, counsel may undertake actions tentatively on behalf of the class,” such as “discussion of a possible settlement of the action by counsel before the class is certified.”<sup>51</sup> According to the drafters, such “pre-certification activities anticipate later appointment as class counsel.”<sup>52</sup> Moreover, “by later applying for such appointment counsel is representing to the court that the activities were undertaken in the best interests of the class,” and “[b]y presenting such a pre-certification settlement for approval under Rule 23(e) and seeking appointment as class counsel, for example, counsel represents that the

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46. In particular, it fits with the case law holding that class counsel can recommend a settlement over the objection of the named representatives. See *Developments*, *supra* note 2, at 1450. If the named representatives cannot veto a settlement, then in my view it makes no sense to call them the clients of class counsel. See, e.g., MODEL RULES R. 1.2(a) (2002) (“A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”). And if the named representatives are not the clients, and the class as an entity is not the client, then does class counsel have no client at all? See Donovan, *supra* note 19 (quoting class action lawyer William S. Lerach as having said to *Forbes* magazine, “I have the greatest practice in the world. I have no clients.”). For a discussion of both the entity client theory and the case law treating class members like clients for purposes of the no-contact rule, see *supra* note 38.

47. Letter from David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee (May 20, 2002) [hereinafter Report of the Civil Rules Advisory Committee], at <http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf> (last visited Feb. 17, 2003). The proposal has been approved by the Judicial Conference and is currently pending before the U.S. Supreme Court. See <http://www.uscourts.gov/rules/supct1202.html> (last visited Mar. 6, 2003).

48. Report of the Civil Rules Advisory Committee, *supra* note 47, at 110 (Committee Note) (emphasis added).

49. *Id.* at 108.

50. See, e.g., MODEL RULES R. 1.18 (2002) (clarifying lawyers duties regarding confidentiality and conflicts of interests with regard to prospective clients).

51. Report of the Civil Rules Advisory Committee, *supra* note 47, at 281.

52. *Id.*

settlement provisions are fair, reasonable, and adequate for the class.”<sup>53</sup> This result is analogous to decisions finding that a lawyer who forms a corporation can be deemed retroactively to have represented the corporation, even in the period prior to incorporation.<sup>54</sup>

If the class itself is an entity client, something like a corporation,<sup>55</sup> then the named class representatives are constituents of the class, more like corporate officers or directors than individual clients. Continuing with the analogy, the absent class members can then be viewed as akin to corporate shareholders. Under this view, Model Rule 1.7 simply does not—nor should it—apply to conflicts of interest within the class itself, just as it does not apply to the possibly conflicting interests of the members of the board of directors or the shareholders of a corporate client.<sup>56</sup>

To be sure, a class differs from other types of entity clients under Model Rule 1.13.<sup>57</sup> For one thing, it is the court, rather than a decision-making body within the class itself, that is empowered to make decisions normally reserved for clients.<sup>58</sup> In addition, class members differ from

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53. *Id.*

54. *See, e.g.,* *Jesse v. Danforth*, 485 N.W.2d 63, 67 (Wis. 1992). I disagree with this case in its holding that once the corporation is created, it becomes the *only* client, displacing the corporate organizers, who become “retroactive *non-clients*.” Whether the lawyer should be viewed as having represented *both* the corporation and one or more of the individual incorporators should depend on the facts of each case, e.g., whether the lawyer expressly or impliedly agreed to represent both or whether the incorporator reasonably believed that the lawyer was representing her individually. *See generally* Nancy J. Moore, *Expanding Duties of Attorneys to ‘Non-Clients’: Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659 (1994). For an interpretation of *Jesse* more amenable to this view, see Note, *An Expectations Approach to Client Identity*, 106 HARV. L. REV. 687, 696 (1993) (“Treating pre-incorporation individual representation, *absent evidence to the contrary*, as entity representation accords with an organizer’s reasonable expectations during the incorporation phase of the company’s existence.” (emphasis added)).

55. A class may be “something like” a corporation, but there are significant differences. *See infra* note 98 and accompanying text.

56. Thus, application of Rule 4.2 merely requires identification of which members of the class constitute the client for purposes of the rule precluding an adversary from contacting the client without the consent of the class attorney. *See* MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2002) (applying Rule 4.2 in the case of an organization client like a corporation); *see also infra* note 98.

57. Strictly speaking, it is not necessary to adopt the entity client in order to conclude that Rule 1.7 does not apply to conflicts of interest within the class itself. That view is, in effect, what courts have been doing when they suspend “strict application” of the conflicts rule for various purposes. *See, e.g., supra* note 9 and accompanying text. One important advantage of the entity view, however, is that it makes it relatively easy to apply Rule 1.7 to conflicts that pit the interests of the class as a whole against either the lawyer’s own interests or the lawyer’s duties to another client or a third person. *See infra* Part II.

Koniak and Cohen suggest that Rule 1.13 is geared too much toward the representation of large, publicly held corporations, and thus does not adequately guide lawyers when representing other entities, such as partnerships and limited liability entities. *See* Koniak & Cohen, *supra* note 45, at 183–85. An additional difficulty in representing a class as an entity is the lack of a well-developed body of law that structures the entity, which would make it easier to determine how lawyers should conduct themselves in the representation. *See id.* at 185.

58. Thus, the court determines whether a class action can be maintained, when and how the members of the class receive notice of the class action, whether the class will be divided into

either management or shareholders of a corporation because their rights are directly adjudicated in the class action lawsuit.<sup>59</sup> Moreover, characterizing the class itself as an entity client does not by itself solve the problem of delineating the duties owed by class counsel to the named and absent members of the class, and class counsel certainly need more direction than current law provides.<sup>60</sup> As a result, one could argue that just as lawyers owe *some* ethical duties to *some* non-clients, such as prospective clients,<sup>61</sup> the Model Rules should include either modifications of Rule 1.7 to extend its reach to conflicts within a class<sup>62</sup> or a separate class action rule that delineates class counsel's duties with respect to such conflicts.<sup>63</sup>

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subclasses, and when a class can be dismissed or compromised. See FED. R. CIV. P. 23(c)–(e). In addition, the court appoints class counsel and determines the fee award. See, e.g., COURT AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE, reprinted in 108 F.R.D. 237, 256–57 (1985); SELECTION OF CLASS COUNSEL, *supra* note 34.

59. In addition, the Supreme Court of the United States has held that at least some conflicts among members require the creation of subclasses, with separate representation, and it is the lawyer's duty to bring these conflicts to the attention of the court. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–28 (1997). Finally, it should be noted that the definition of the class—i.e., determining who is a member and who is not—is entirely within the control of the lawyer, at least initially. See, e.g., *Koniak & Cohen*, *supra* note 45, at 178 (noting that “class counsel plays an important, and typically exclusive, role in selecting and controlling the class representatives and shaping the size and purpose of the enterprise”). For a detailed discussion of the problems inherent in one effort to control the shape of the class, apparently for the benefit of class counsel, see *Koniak*, *supra* note 2, at 1137–45 (questioning why three of the named representatives in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), were not included in inventory cases settled outside the class for higher damages than they would receive as class members).

60. See *Koniak & Cohen*, *supra* note 45, at 193 (stating that class action law fails to provide sufficient structure for regulation of class as entity).

61. See MODEL RULES R. 1.18 (2002) (detailing duties to prospective clients, including conflict of interest duties less stringent than those owed to clients or former clients).

62. See e.g., MASS. RULES OF PROF'L CONDUCT R. 1.7, cmt. 14A (2002).

A lawyer who undertakes to represent a class should make an initial determination whether subclasses within the class should have separate representation because their interests differ in material respects from other segments of the class. Moreover, the lawyer who initially determines that subclasses are not necessary should revisit that determination as the litigation or settlement discussions proceed because as discovery or settlement talks proceed the interests of subgroups may begin to diverge significantly. . . . The lawyer has the responsibility to request that separate representation be provided to protect the interests of subgroups within the class.

*Id.*

63. Neither Waid nor Zitrin provided any particular specificity regarding the content of such a rule. Waid proposed a new 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.

Waid, *supra* note 1, at 1075. Such a rule would give only the vaguest of direction to class action lawyers, but according to Waid, would “provid[e] a foundation for the orderly development of a body of ethical opinions and comments” and “would also provide courts with a more stable ground on which to evaluate the conduct of class counsel in appropriate cases.” *Id.* I do not find his proposal to provide much guidance at all. For example, I do not understand what it means to say that class counsel “owes a primary duty of loyalty to the members of the class” (as opposed to the class as a whole—as an entity), because individuals within the class are bound to have differing interests, no matter how many subclasses are created. *Id.* Indeed the proposed rule creates additional uncertainties, e.g., the implied suggestion that ethics rules impose even greater obligations on the part of lawyers toward individual class members than does class action law, which already provides that

Before addressing the question of whether such direction should come from ethics law or from other law, it is important to consider possible conflicts of interest other than those within the class itself—that is, conflicts that pit the interests of the class as a whole against either the lawyer’s own interests or the lawyer’s duties to another client or third person. Here, too, there has been needless confusion regarding the “strict application” of conflict-of-interest rules to class action lawsuits. This confusion results from the failure to recognize that not all conflicts of interest are meant to be addressed by the conflict-of-interest doctrine that is embodied in rules of professional conduct.

## II. CONFLICT-OF-INTEREST DOCTRINE APPLIES TO SOME, BUT NOT ALL CONFLICTS INVOLVING THE CLASS ITSELF

Aside from conflicts within a class, situations that are often viewed as creating at least a potential conflict-of-interest include “a prior relationship with the named defendant in the class action; . . . a greater concern for receiving a fee than for pursuing the class claim; and . . . the settlement of claims by collusion rather than through a fair process where class members’ interests are adequately represented.”<sup>64</sup> Other situations include: the simultaneous representation by class counsel of the class itself and individual clients either inside or outside of the class;<sup>65</sup> representation by former class counsel of dissident class members objecting to a proposed settlement;<sup>66</sup> class counsel serving as class representative;<sup>67</sup> and the simultaneous negotiation of a class settlement and class counsel’s attorneys fees.<sup>68</sup>

All these situations involve conflicts between the class (an entity client) and either the lawyer’s self-interest or the lawyer’s duties to another person. Therefore, on its face, Model Rule 1.7 would seem to

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class counsel has a fiduciary duty toward individual class members. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (THIRD) § 30 (1995) (stating that “attorneys and parties seeking to represent the class assume fiduciary responsibilities, and the court bears a residual responsibility to protect the interests of class members”).

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 basis for determining the content of such a rule. Zitrin Testimony, *supra* note 16. 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, at 2222 (noting that “code format may be insufficiently flexible to adequately communicate the duties of class action 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 rules of civil procedure, as well as the constitutional underpinnings of class action law, and not by those who draft, interpret, and apply rules of professional ethics. *See infra* Part IV.

64. Curry, *supra* note 2, at 397.

65. *See, e.g.*, NEWBERG & CONTE, *supra* note 1, § 15.24.

66. *Id.* § 15.25.

67. *Id.* § 15.23.

68. *Id.* § 15.31; *see also* David Brainerd Parrish, Comment, *The Dilemma: Simultaneous Negotiation of Attorneys’ Fees and Settlement in Class Actions*, 36 HOUS. L. REV. 531 (1999).

apply.<sup>69</sup> Indeed, in some of these situations, courts have reiterated the need to relax the conflict rules to accommodate class action lawsuits.<sup>70</sup> Once again, however, it will be helpful to prune away some situations in which traditional conflicts rules do not (and should not) apply, in order to better determine whether and when a strict reading of these rules poses insurmountable difficulties for class actions. Here I want to distinguish between “conflicts of interest” in the broad sense, which economists characterize as a form of agency problem,<sup>71</sup> and the far narrower “conflict-of-interest doctrine,” which is found in Rule 1.7 and the other conflicts rules.<sup>72</sup>

Conflicts of interest are pervasive in legal practice, and yet only some of these conflicts are regulated by traditional conflict-of-interest doctrine. For example, there is *always* conflict between the client’s interest in having the lawyer devote the most time possible to the client’s cause at the lowest possible price and the lawyer’s interest in devoting the least possible time at the highest possible price. Yet, the types of conflicts that are inherent in establishing fees or in determining how much time to allocate to a client’s cause (when the lawyer could be devoting time to another client’s matter or to the lawyer’s own leisure time) are not addressed by Rule 1.7<sup>73</sup> or by any other conflict-of-interest rule.<sup>74</sup> They are typical of what economists characterize as agency problems—that is, “the misalignment of interests between agents, such as

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69. See *supra* notes 17–22 and accompanying text.

70. For example, courts have permitted former class counsel to represent dissident members of a class in opposition to the class itself, even though the conflict rules prohibit representation adverse to a former client. See *infra* Part III.

71. Koniak & Cohen, *supra* note 45, at 186.

72. See generally Nancy J. Moore, *What Doctors Can Learn from Lawyers About Conflicts of Interest*, 81 B.U. L. REV. 445 (2001) (comparing doctors’ and lawyers’ responses to conflict of interest problems).

73. Prior to the extensive amendments to the Model Rules in February, 2002, the Comment to Rule 1.7 did state that “a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee.” MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 6 (2001). The Ethics 2000 Commission recommended that the sentence be deleted on the explicit ground that “conflicts between lawyers and prospective clients regarding fee arrangements are typically addressed not by ‘conflict of interest’ rules but rather by Rule 1.5, which regulates fees directly.” American Bar Association, Ethics 2000 Commission, Reporter’s Explanation of Changes of R. 1.7, at <http://www.abanet.org/cpr/e2k-rule17rem.html> (last visited May 10, 2003). For a further discussion of the inappropriateness of treating fee arrangements under Rule 1.7 rather than under Rule 1.5, see Nancy J. Moore, *Ethical Duties of Insurance Defense Lawyers*, 4 CONN. INS. L.J. 259, 286–90 (1997) (acknowledging the Rule 1.7 Comment but concurring with Silver’s conclusion, see *infra*, that such fees should not be viewed as presenting a conflict of interest problem under Rule 1.7); Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205 (1997) (criticizing ethics opinion declaring unethical bundled flat fees offered by insurers for representation of insureds).

74. See MODEL RULES OF PROF’L CONDUCT R. 1.8 (2002) (“Conflict of Interest: Current Clients: Specific Rules”); *id.* R. 1.9 (2002) (“Duties to Former Clients”); *id.* R. 1.10 (2002) (“Imputation of Conflicts of Interest: General Rule”); *id.* R. 1.11 (2002) (“Special Conflicts of Interest for Former and Current Government Officers and Employees”); *id.* R. 1.12 (2002) (“Former Judge, Arbitrator, Mediator or Other Third-Party Neutral”).

lawyers, and principals, their clients . . . .”<sup>75</sup> These types of agency problems—the inevitable ones—permeate legal and other professional practice. How they should be regulated is much disputed, but to a large extent they are controllable only by relying on lawyers’ professionalism and their willingness to exercise good judgment and self-restraint.<sup>76</sup> In any event, they are *not* regulated by conflict-of-interest rules, which prohibit the lawyer from undertaking the representation absent the informed consent of the client.<sup>77</sup>

Conflict-of-interest rules do “not purport to regulate circumstances that are common to *all* lawyers, but only circumstances that are unique to *specific* lawyers.”<sup>78</sup> In other words, as I have said elsewhere,<sup>79</sup> “conflict-of-interest doctrine in law does not address the largely unavoidable conflicts, but only those that can be avoided or removed, by permitting (or requiring) clients to seek out other lawyers, that is, lawyers who are not burdened with a particular conflict of interest.”<sup>80</sup> As a result, returning to the class action context, class counsel who has a unique conflict (for example, a lawyer who had a prior relationship with the defendant<sup>81</sup>) is governed by conflict-of-interest doctrine, but lawyers with unavoidable conflicts (for example, conflicts arising from potentially enormous fees<sup>82</sup> or simultaneous negotiation of a class settlement and class counsel’s attorneys fees<sup>83</sup>) are not.

Under this view, Rule 1.7 has no direct relevance to determining the appropriate mechanism for compensating class counsel<sup>84</sup> or determining

75. Koniak & Cohen, *supra* note 45, at 186.

76. See Moore, *supra* note 72, at 450–51. To the extent that lawyers’ conduct can be regulated in these areas of inevitable conflict, the regulations consist of requirements that lawyers represent clients competently; with reasonable diligence and promptness; and that they charge fees that are reasonable. MODEL RULES R. 1.1, 1.3, 1.5 (2002). The structure of such regulation is fundamentally different than the structure of conflict-of-interest rules, which forbid the lawyer from undertaking the representation absent the client’s informed consent. See, e.g., *id.* R. 1.7 (2002).

77. See *supra* notes 73–74.

78. Moore, *supra* note 72, at 451 (emphasis added).

79. See generally *id.*

80. *Id.* at 451.

81. See, e.g., Palumbo v. Telecomms, Inc., 157 F.R.D. 129 (D.D.C. 1994).

82. See *supra* note 27.

83. The conflict of interests is obvious, because “[e]very dollar of reasonable fees awarded serves naturally to reduce the recovery fund available to the class.” NEWBERG & CONTE, *supra* note 1, § 15.31. For a review of different approaches that have been suggested to deal with this problem, see Parrish, *supra* note 68. None of these approaches relies on an analysis of the conflict under Rule 1.7.

84. A draft of the Third Circuit Task Force on the Selection of Class Counsel reported that “fee arrangements generally may create conflicts of interest between lawyers and clients,” invoking the “material limitation” definition of a conflict under Rule 1.7. THIRD CIRCUIT TASK FORCE ON THE SELECTION OF CLASS COUNSEL, DRAFT REPORT 26 & n.54 (2001). The Final Draft deleted the explicit reference to Rule 1.7 but continues to refer to conflict of interest concerns arising from the size of potential fees in class actions as creating “a material limitation on [class counsels’] responsibilities to their clients.” SELECTION OF CLASS COUNSEL, *supra* note 34, at 26–27. Although the change is an improvement, it would have been even better to delete the indirect reference to Rule 1.7’s material limitation conflicts. Instead, the rule should rely on the notion of conflicts between class counsel and the class regarding fee arrangements as a type of agency problem that is particularly acute in class action cases, where the ability of the client to monitor the lawyer is severely curtailed. See *supra* note

whether simultaneous negotiation of a class settlement and attorneys fees should be permitted.<sup>85</sup> Of course, it is conceivable that the Model Rules *could* contain a separate class action rule directing lawyer conduct in the face of such conflicts, but the direction would proceed in an entirely different manner than the conflict-of-interest rules.<sup>86</sup> Moreover, as I will subsequently argue, it may be better that such direction come from class action law, rather than from the ethical rules themselves.<sup>87</sup>

Before leaving current conflict-of-interest doctrine, however, I want to acknowledge that there are some situations in which the doctrine *does* properly apply to lawyers handling class action lawsuits. Here I agree that the continued viability of class actions may sometimes require relaxation—or special application—of the conflicts rules, but I will further argue that this is not always the case. Indeed, it is important to consider the crucial role that traditional ethics rules play in protecting individual clients whom a class lawyer may choose to represent in addition to representing the class as a whole.<sup>88</sup>

### III. WHEN CONFLICT-OF-INTEREST DOCTRINE *DOES* APPLY, THE VIABILITY OF CLASS ACTIONS MAY, BUT DOES NOT ALWAYS, REQUIRE RELAXATION (OR SPECIAL APPLICATION) OF THE CONFLICTS RULES

Conflicts within a class and those arising from the method of determining the lawyer's fee are not regulated by conflict-of-interest doctrine under rules of professional conduct; with respect to these types of conflicts, it is unnecessary to relax or revise the conflicts rules to permit lawyers to represent a class. But there are other types of conflicts that *do* fall within the proper purview of Model Rule 1.7 and the other conflict-of-interest rules. For example, class counsel may have had an attorney-client relationship with the defendant,<sup>89</sup> or with another person,

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6 and accompanying text (arguing that conflicts of interest in fee arrangements should be viewed as governed by Rule 1.5, not Rule 1.7).

85. See *supra* note 84. Similarly, under this view, modifying Rule 1.7 to cover the lawyer's duties regarding conflicts within a class does not make sense, because class members are not "clients" within the meaning of that rule. See *supra* Part I (arguing that the class should be viewed as an entity client). Moreover, such a modification would also not make sense because these conflicts are not unique to a particular lawyer. As a result, they cannot be regulated through the informed consent of the client. See *supra* note 76 and accompanying text.

86. See *supra* note 76 (distinguishing structure of conflict-of-interest rules that focus on client consent after consultation and other, more direct regulation, such as Rule 1.5(a), which requires that lawyer fees be reasonable).

87. See *infra* Part IV.

88. Although I refer here (and subsequently) to "individual" clients, I do not mean to exclude entity clients such as corporations and partnerships. I use the term "individual" to better distinguish between representation of the class itself and representation of other clients, both inside and outside the class.

89. See, e.g., Curry, *supra* note 2, at 399–401 (discussing *Palumbo v. Tele-Communications, Inc.*, 157 F.R.D. 129 (D.D.C. 1994), where court disqualified plaintiff class counsel on ground that he had previously been a part owner and board member of one of the defendant company's affiliates); see

perhaps a class member, who might have been named as a defendant.<sup>90</sup> Indeed, it is not uncommon for lawyers representing a class to simultaneously represent some, but not all of the individual members of the class<sup>91</sup> or to simultaneously represent the class and other clients suing the same defendant with similar<sup>92</sup> or different claims.<sup>93</sup>

Consider, for example, *In re Agent Orange*,<sup>94</sup> in which a plaintiff’s management committee moved to disqualify counsel representing class members who opposed the proposed settlement, on the ground that the lawyers had previously served as class counsel (along with several other lawyers). One of the lawyers had participated in negotiating the proposed settlement on behalf of the class, and both had served as members of the plaintiffs’ management committee.<sup>95</sup> In considering the motion to disqualify, the court noted that traditional principles in nonclass action litigation support disqualification whenever “the former client . . . show[s] no more than that the matters embraced within the pending suit wherein his former attorney appears . . . are substantially related to the matters or cause of action where the attorney previously represented him, the former client.”<sup>96</sup> These principles parallel Rule 1.9 of the Model Rules, which prohibits an attorney from undertaking representation adverse to a former client in the same or a substantially related matter.<sup>97</sup>

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*also In re Joint E. and S. Dist. Asbestos Litig.*, 133 F.R.D. 425, 430 (E. & S.D.N.Y. 1990) (dictum) (“There is no question that prior representation of an adversary in a current matter might give rise to a conflict of interest, especially where the prior representation would enable counsel to disclose confidences.”).

90. *See, e.g.*, *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1338, 1340 (S.D.N.Y. 1988) (A proposed class representative who had been named as co-trustee of one of the investment trusts involved in the class action could not serve as a representative of the plaintiff class; the class counsel had to withdraw from representing that co-trustee in his individual capacity.).

91. *See, e.g.*, *Parker v. Anderson*, 667 F.2d 1204, 1208 (5th Cir. 1982) (The lead class counsel represented a number of the named representatives individually in this employment discrimination action; all but one dismissed him as their attorney because of objections to the proposed settlement.).

92. *E.g.*, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (The class counsel represented inventories of the plaintiffs with asbestos claims who were not included in the class as defined in the proposed settlement.). For an extensive discussion of this decision, see *Koniak, supra* note 2.

93. *E.g.*, *Jackshaw Pontiac, Inc. v. Cleveland Press Publ’g Co.*, 102 F.R.D. 183, 190–93 (N.D. Ohio 1984) (The class counsel also represented the plaintiffs in another action against the defendants—a state court suit brought by the former, rather than the current employees; the former employees and proposed class were seeking to tap the same pool of defendant assets.). Sometimes class counsel attempt to represent two separate classes with different claims against the same defendant. *See, e.g.*, *Fiandaca v. Cunningham*, 827 F.2d 825, 826–31 (1st Cir. 1987) (disqualifying legal services organization from representing a class of female inmates in a gender discrimination action against the state of New Hampshire because it simultaneously represented a class of mentally retarded residents of a state school suing the state over the conditions at the school).

94. *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14 (2d Cir. 1986).

95. *Id.* at 16–17.

96. *Id.* at 17 (quoting *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)).

97. MODEL RULES OF PROF’L CONDUCT R. 1.9(a) (2002) (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a

Given that class counsel formerly represented the class,<sup>98</sup> it follows that under a strict reading of Rule 1.9, these lawyers would have been prohibited from representing dissident class members in an action adverse to the class. Moreover, outside the class action context, these lawyers would normally have been disqualified from continuing the representation.<sup>99</sup> Nevertheless, the *Agent Orange* court did not grant the motion to disqualify, invoking Judge Adams's concurring opinion in *In re Corn Derivatives Antitrust Litigation*,<sup>100</sup> in which he noted that "although automatic disqualification might 'promote the salutary ends of confidentiality and loyalty, it would have a serious adverse effect on class actions.'"<sup>101</sup> This is so because "the class action may be the only practical means of vindicating [the] rights [of many individuals with small claims]" and "[i]n such class actions, often only the attorneys who have represented the class, rather than any of the class members themselves, have substantial familiarity with the prior proceedings, the fruits of

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substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

98. It is not entirely clear from the opinion whether the court viewed class counsel as having formerly represented the class as an entity or its individual members. There is certainly some language suggesting that the court believed there was an attorney-client relationship between counsel and each of the members of the class. See *Agent Orange*, 800 F.2d at 18 (stating that by taking a position favoring one faction of the class, the attorney is "opposing the interests of some of his former clients in the very matter in which he has represented them"). Under the entity view of class representation, class counsel seeking to represent dissident class members attacking a settlement approved by the court might argue that he is not actually *opposing* his former client—the class—but rather is seeking to advance a different view of what action is in the best interests of the class. The situation is analogous to a lawyer for a corporation who attempts to represent the plaintiffs in a shareholder derivative action brought against corporate officers and directors to recover damages to the corporation itself. There, the corporation remains a nominal defendant in the action, and if the representation involves the same or a substantially related matter in which the lawyer had previously represented the corporation, I am confident that the representation would be viewed as a violation of Rule 1.9. Cf. *Goldstein v. Lees*, 120 Cal. Rptr. 253, 257–59 (Cal. Ct. App. 1975) (holding that it was improper for a former in-house counsel to a corporation to represent minority shareholder and director in a proxy fight designed to gain control of the same corporation). On the other hand, continued representation of the class itself, in opposition to the dissident class members, would not violate Rule 1.9. See *infra* note 99.

99. See *supra* note 97 and accompanying text. The court also indicated that it thought traditional rules would warrant disqualification of counsel who *continues* to represent the class, in opposition to dissident class members challenging the settlement, because the lawyer, like former class counsel in *Agent Orange*, "would be opposing the interests of some of his former clients in the very matter in which he has represented them." *Agent Orange*, 800 F.2d at 18. I disagree with this conclusion, however, and therefore believe that the two situations are distinguishable. A lawyer for a class does *not* represent individual class members; rather, she represents the class as a whole, i.e., as an entity. See *supra* Part I. Accordingly, dissident class members are not former clients under Rule 1.9, just as current class members are not clients under Rule 1.7. Continuing with the analogy to a shareholder's derivative action, it is commonly held that corporate counsel may be entitled to represent the corporation in an action brought by a dissident shareholder. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131 cmt. g (2000) ("[I]f . . . disinterested directors conclude that no basis exists for the claim that the defending officers and directors have acted against the interests of the organization, the lawyer may, with the effective consent of all clients, represent both the organization and the officers and directors in defending the suit.").

100. 748 F.2d 157, 162 (3d Cir. 1984).

101. *Agent Orange*, 800 F.2d at 18.

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discovery, the actual potential of the litigation.”<sup>102</sup> Thus, the *Agent Orange* court held:

A motion to disqualify an attorney who has represented the entire class and who has thereafter been retained by a faction of the class to represent its interest in opposition to a proposed settlement of the action cannot be automatically granted. Rather, there must be a balancing of the interests of the various groups of class members and of the interest of the public and the court in achieving a just and expeditious resolution of the dispute.<sup>103</sup>

Finding no allegations that actual prejudice would result if the lawyers were not disqualified, the court denied the motion.<sup>104</sup>

A similar result was reached in *Tedesco v. Mishkin*,<sup>105</sup> although there the court did not expressly confront the implications of the ethics rules. In *Tedesco*, investors involved in various enterprises organized and controlled by the defendants filed a class action lawsuit alleging fraud and racketeering in connection with the investments.<sup>106</sup> After certification of the class, defendants moved to remove certain named plaintiffs and to disqualify plaintiffs’ counsel.<sup>107</sup> The court granted the motion to remove one of the plaintiffs as a named representative on the ground that he was for a time a co-trustee of one of the investment funds and thus might be liable to the class if the class prevailed at trial.<sup>108</sup> But the court refused to disqualify the lawyer for the class, even though he simultaneously represented the co-trustee on an individual basis.<sup>109</sup> The court acknowledged that there was a potential conflict of interest between the class and the co-trustee, which is why he had been removed as a class representative.<sup>110</sup> As a remedy, however, the court did not direct that his lawyer be removed as class counsel, but rather that class counsel be directed to withdraw from representing the co-trustee in his individual capacity.<sup>111</sup> In refusing to disqualify class counsel, the court relied both on the practical difficulties of “[s]ecuring new counsel for the class at this point of the litigation” and the court’s ongoing role in monitoring and protecting the interests of the class.<sup>112</sup>

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102. *Id.* at 18–19; see also *In re Corn Derivatives*, 748 F.2d at 164 (Adams, J., concurring) (“[A] rule requiring automatic disqualification may well penalize dissent, and thereby deprive the court of the important assistance which objecting class members render by challenging the fairness of a class action settlement.”).

103. *Agent Orange*, 800 F.2d at 19; see also *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 588–90 (3d Cir. 1999) (citing and quoting both *Agent Orange* and Judge Adams’s concurring opinion in *Corn Derivatives*).

104. *Agent Orange*, 800 F.2d at 19–20.

105. 689 F. Supp. 1327 (S.D.N.Y. 1988).

106. *Id.* at 1330.

107. *Id.*

108. *Id.* at 1336–37.

109. *Id.* at 1339–40.

110. *Id.* at 1340.

111. *Id.*

112. *Id.* According to the court:

In each of these two cases, the court refused to disqualify class counsel because of what it perceived as special considerations applying to class action lawsuits. Both decisions can be defended; however, the fact that they are justified does not *necessarily* mean that the ethical rules should be modified to reflect their rulings. After all, even in civil litigation outside of the class action context, the standards for disqualification and discipline are not always the same.<sup>113</sup> But the two cases are distinguishable and, as such, illustrate the complex relationship between ethics law and other law.

For example, it makes no sense to view the result in *Agent Orange* as a product of differing ethical standards for disqualification and disciplinary purposes. If the particular needs of class litigation are such that class counsel must be free to switch from representing the class to representing dissident class members opposing a settlement, as *Agent Orange* suggests,<sup>114</sup> then class counsel should not be subject to discipline for doing so. In *Tedesco*, however, the lawyer, it can be argued, *should* have been subject to disciplinary action for violating Model Rule 1.7 when he agreed to simultaneously represent both the co-trustee and the class—that is, if he failed to adequately inform the co-trustee of the risks involved in the simultaneous representation of the co-trustee and the class of which he was a member.<sup>115</sup> After all, the co-trustee was free to retain separate counsel, and insisting that he be permitted to do so at the outset would not have endangered the viability or the efficacy of the class action device.<sup>116</sup>

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Plaintiffs' counsel are experienced in the prosecution of the securities and other fraud class actions and have a record of successful results in such actions. The court has carefully monitored plaintiffs' attorneys through the course of this action. Plaintiffs' counsel competently presented evidence in a five day civil contempt hearing against Mishkin. In addition, they have periodically submitted to the court comprehensive reports on the progress of discovery. The interests of the class would be well served by continued representation by plaintiffs' counsel.

*Id.*

113. See, e.g., Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 73 (1996)

[D]isqualification should not be a *per se* remedy for a violation of a conflict rule. . . . on the contrary, the court's determination should not be based on the conflicts rule at all. The conflict rules, which are designed to apply to a lawyer's decision at the outset of the representation, would be overly restrictive if applied by courts in the disqualification setting after the representation is under way.

*Id.* at 73.

114. See *supra* note 8 and accompanying text.

115. See *supra* note 73 and accompanying text (noting that having a conflict under Rule 1.7, representation is impermissible unless the clients give informed consent and the conflict is determined to be consentable).

116. It is unclear from the opinion whether the lawyer had already decided to pursue a class action lawsuit at the time the co-trustee became a client. It does not matter, however. If the lawyer already represented a putative class, then a conflict of interest arose under Rule 1.7, which required the co-trustee to be fully informed prior to agreeing to be represented by class counsel. If the lawyer had not yet decided to pursue a class action lawsuit, then he was obligated to consult with his co-trustee client regarding both the advantages and disadvantages of bringing the lawsuit as a class action (thus implicating Rules 1.2 and 1.4) and the conflicts of interest inherent in taking on the class as an additional client (thus implicating Rule 1.7). See *supra* text accompanying notes 105–112; see also *infra* notes 136–37 and accompanying text.

There is an important lesson here for class counsel with regard to their relationships with individual class members. For example, it is critically important to determine which, if any, of those class members are or will be individual clients of the lawyer. In cases involving such trivial amounts of money that it makes no sense to bring the action except as a class action,<sup>117</sup> the lawyer is unlikely to want to represent any of the class members individually, including the named representatives. Because these individuals may be confused about the lawyer’s role, however, Model Rule 4.3 requires the lawyer to make reasonable efforts to correct any misunderstanding.<sup>118</sup> Such efforts should include a clear statement that the lawyer will represent the class as a whole, not any individual member, as well as an explanation of the role of both the lawyer and the individual members at various stages of the proceedings.

In other situations—for example, mass torts and employment discrimination—individuals often come to the lawyer with claims sufficiently large to warrant traditional litigation.<sup>119</sup> Here, the lawyer might form an attorney-client relationship with one or more individuals before any decision is made to pursue the claims in a class action lawsuit. Putting aside the lawyer’s obligations to the putative class, the lawyer has clear obligations to her existing clients. First, she must consider whether pursuing the litigation as a class action is in the best interests of the individual clients.<sup>120</sup> If not, then the lawyer may not recommend such action merely because it would benefit other individuals (or the lawyer herself).<sup>121</sup> The second obligation is to consult with the clients to determine whether they agree to participate in a class action.<sup>122</sup> The consultation should include a full description of the extent to which the clients will be relinquishing control of the litigation once the class

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117. These cases are sometimes referred to as “small claim” class actions. *See, e.g.*, Shapiro, *supra* note 43, at 923–24.

118. MODEL RULES OF PROF’L CONDUCT R. 4.3 (2002)

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding . . . .

119. Such cases are sometimes deemed inappropriate for class action treatment at all. *See, e.g.*, Shapiro, *supra* note 43, at 926–27.

120. A client’s interests might include not only the recovery of monetary damages, but also the correction of an injustice on a class-wide basis.

121. *Cf.* Koniak, *supra* note 2, at 1137–39 (discussing client who retained law firm to bring an action for an asbestos-related illness who was asked to be a class representative, even though her individual action could have been settled as one of many “present inventory” cases that were apparently settled on a basis more favorable than the proposed class settlement).

122. *See* MODEL RULES R. 1.4(b) (2002) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”). The decision whether to bring an individual action or a class action should be viewed as an “objective” of the representation, as to which agreement by the client, and not merely consultation, is required. *See id.* R. 1.2(a) (2002) (“A lawyer shall abide by a client’s decisions concerning the objectives of the representation . . . .”); *cf.* Koniak, *supra* note 2, at 1139–41 (suggesting that a client who retained lawyer to bring individual lawsuit agreed to be a class representative because she thought that was the only way to get money from the defendants).

complaint is filed.<sup>123</sup> Finally, the lawyer must avoid the impermissible representation of conflicting interests by informing existing clients of the risks of the lawyer taking on the class as an additional client and obtaining the clients' informed consent to the conflict.<sup>124</sup>

#### IV. PROTECTING THE CLASS AGAINST CONFLICTS ARISING FROM THE LAWYER'S DUTIES TO OTHERS (AND CONFLICTS WITHIN THE CLASS ITSELF)

In *Tedesco*, the lawyer's simultaneous representation of the class itself and an individual class member who could have been sued as a defendant created an obvious conflict of interest affecting the representation of the individual member-client.<sup>125</sup> In the previous part, I argued that this conflict should have been resolved under a straightforward application of Model Rule 1.7.<sup>126</sup> In this part, I will consider the application of Rule 1.7 to the same conflict *as it affects the representation of the class*. The situation is analogous to one of several conflicts in *Georgine v. Amchem Products, Inc.*,<sup>127</sup> in which class counsel represented a large "inventory" of "present claimants" with claims similar to those of the putative "futures class" members but who were not included in the class itself.<sup>128</sup> When a negotiated settlement of the futures class claims was presented for court approval (on the same day the complaint was filed), a group of objectors argued the inadequacy of class counsel on the ground that the simultaneous representation of present and future claimants constituted an impermissible conflict of interest.<sup>129</sup> Two professors of legal ethics testified that such concurrent representation constituted an impermissible conflict under Rule 1.7,<sup>130</sup>

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123. See *supra* note 46 (discussing that class counsel can recommend a settlement over the objection of the named representatives).

124. See *supra* notes 29–31 and accompanying text (discussing Rule 1.7).

125. See *supra* text accompanying notes 105–112.

126. See *supra* notes 115–16 and accompanying text.

127. 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, 519 U.S. 957 (1996), *and aff'd*, 521 U.S. 591 (1997).

128. *Id.* at 294–96. As Susan Koniak has argued, the terminology used by the court may be misleading, because there were members of the class who had already suffered harm and were arguably indistinguishable from the inventory clients who received settlements outside the class itself. See Koniak, *supra* note 2, at 1137–51 (arguing that named plaintiffs could have been included in inventory settlements but were kept out in order to serve as class representatives); see also Carrie Menkel-Meadow, *supra* note 2, at 1190 & n.131 (like Koniak, adopting nomenclature of "present clients" and "future claimants" to more accurately describe the facts in *Georgine*). Nevertheless, this is the terminology used by the court and I believe it is sufficiently clear for my purposes.

129. *Georgine*, 157 F.R.D. at 294–305.

130. *Id.* at 296–97 (discussing testimony of Professor Roger Cramton of Cornell Law School); *id.* at 302–03 (discussing testimony of Professor Susan P. Koniak of Boston University School of Law).

while two other professors testified that class counsel did not have an impermissible conflict.<sup>131</sup>

Under a straightforward analysis of Rule 1.7, I agree that the dual representation created at least a potentially impermissible conflict of interest. From the outset, the risks to the class should have been clear. First, the defendants were reluctant to negotiate with the present claimants until there was at least some assurance that the futures claims would be resolved,<sup>132</sup> creating an incentive for class counsel to sacrifice the interests of the class in order to settle the matter quickly. In addition, the less money the lawyers demanded for the class, the more money there would be available for the present claimants,<sup>133</sup> given that class counsel would almost certainly receive a greater percentage of the amounts recovered under their individual fee agreements with the present claimants than they would from the recovery for the class, they had every reason to favor the present claimants over the futures class.<sup>134</sup> Certainly, any lawyer who simultaneously represented just one present claimant and one future claimant would have had a potentially impermissible conflict under Rule 1.7.<sup>135</sup>

Of course, when lawyers represent individual claimants, potentially impermissible conflicts are typically curable with the informed consent of each client.<sup>136</sup> Similarly, most entity clients can also consent to a conflict through whatever decisional mechanism is available under the law

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131. *Id.* at 297–99 (discussing testimony of Professor Geoffrey Hazard of Yale Law School, then the University of Pennsylvania Law School, and Professor John P. Freeman of the University of South Carolina School of Law).

132. *Id.* at 294 (“In general . . . CCR determined to continue to make inventory settlements only if it could obtain some kind of protection for the future.”).

133. The reverse is also true: the more money the lawyers demanded for the class, the less money there would be available for the present claimants. This aspect of the conflict is one that should have been fully disclosed to the present claimants, whom I have argued deserved the full benefit of a rigorous application of Rule 1.7. *See supra* notes 115–16 and accompanying text (raising this concern).

I am not arguing that the representation of multiple claimants against a single defendant *always* presents a conflict of interest under Rule 1.7(b). If the claims are dissimilar and there is no reason to believe that the settlement value of one will affect the settlement value of another, then arguably there is no conflict. Here, however, there is no question that the defendant viewed the inventory settlements and future class settlement as significantly linked. *See supra* note 132 and accompanying text.

134. *See, e.g.*, Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 661 & n.57 (2002) (comparing typical “benchmark” of 25% in class action fee awards, with the “standard ‘voluntary’ contingency fee of 33% to 40%”; citing 1996 study finding that median rates of recovery ranged in class actions ranged from 2.7% to 3.0%). It is possible that even with a lower percentage award, the overall size of the legal fees likely to be awarded under a settlement of the futures class would be higher than the total legal fees earned in the settlement of the individuals’ claims. If so, then class counsel might have been tempted to sacrifice the interests of some or all of the present claimants in favor of the futures class. This is a risk that should be considered in determining the propriety of the representation of the present claimants under Rule 1.7. *See supra* note 133.

135. Again, I do not want to argue that representing multiple claimants against a single defendant *always* presents a conflict of interests under Rule 1.7(b). *See supra* note 134. Here, however, where every settlement was likely to become a precedent for future settlements, the defendants were necessarily prone to viewing present and future claimants as presenting competing claims.

136. *See supra* note 115 and accompanying text.

governing the particular entity.<sup>137</sup> But class entities do not currently have such a decisional mechanism,<sup>138</sup> which is, presumably, why the two ethics experts testified that the conflict was not merely potentially impermissible, but was in fact impermissible.<sup>139</sup>

If Rule 1.7 is applied straightforwardly, then, I would agree that the dual representation in *Georgine* was clearly unethical, given both the existence of a conflict and the lack of informed consent on behalf of the class. But this is not necessarily the best way of proceeding in cases like *Georgine*, *Tedesco*, and all of the other class actions in which, as is fairly common, class counsel represents individuals—both within<sup>140</sup> and outside of the class<sup>141</sup>—with interests that might conflict with the interests of the class itself.

The particular conflicts in *Georgine* and *Tedesco* were severe and, arguably, so compromised the interests of the class that some form of remedy was desirable. But it is not necessarily desirable to create a *per se* ethical prohibition on the simultaneous representation of both a class and individuals with interests potentially at odds with those of the class. Consider, for example, a class action brought by individuals with substantial employment discrimination claims against a defendant: in all likelihood, the case will begin with the representation of one or more individual employees. A decision will then be made to bring the action as a class action, perhaps in order to bring more pressure to bear upon the defendant. There is no certainty that the putative class will actually be certified, thus it makes no sense for the lawyer to abandon the individual claimants in favor of representing the class alone.<sup>142</sup> And even if a separate lawyer could be found who is willing to represent the class alone, it may be inefficient to have more than one lawyer or law firm involved in the particular case. If the risks to the class are small in relation to the potential benefits of pursuing the action with the same lawyer representing both the class and some or all of the named

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137. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131 cmt. e (2000) (“Consent by an organization can be given in any manner consistent with the organization’s lawful decisionmaking procedures.”).

138. See *supra* note 33.

139. See *supra* note 33 and accompanying text; see also Menkel-Meadow, *supra* note 2, at 1190–93 (concluding, after examining the different expert opinions in *Georgine*, that there was a material limitation conflict in *Georgine* and that the crux of the ethical problem is the difficulty of resolving the consent issue in class actions).

140. See, e.g., *Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982); *Blanchard v. Edgemark Fin. Corp.*, 175 F.R.D. 293 (N.D. Ill. 1997); *Phila. Elec. Co., v. Anaconda Am. Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969); see also NEWBERG & CONTE, *supra* note 1, at 15–46 (stating that when class counsel contacts class members to seek additional plaintiffs, it is not unlikely that such class members would want to retain class counsel as their attorney).

141. See, e.g., *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987); *Jackshaw Pontiac, Inc. v. Cleveland Press Publ’g Co.*, 102 F.R.D. 183 (N.D. Ohio 1984).

142. Nor would it make sense to say that at the moment of class certification the lawyer ceases to be counsel for the individuals and becomes counsel for the class alone, because class counsel owes duties to the class even before it is certified. See *supra* note 60 and accompanying text.

representatives, then, arguably, it is in the best interest of the class to permit this type of multiple representation in at least some cases.

If so, the question then becomes how best to achieve this end without thereby approving multiple representation in all cases. Staying within the framework of Rule 1.7, we could look to the court to give consent on behalf of the class.<sup>143</sup> One problem with this solution is that courts are not available to consent to prefiling conflicts;<sup>144</sup> another problem is that even at the time the class action complaint is filed, the nature and extent of the conflict may not be known. An alternative solution would be to do as was proposed to both the Kutak and Ethics 2000 Commissions and draft an entirely new ethics rule—one that modifies the application of Rule 1.7 in the context of class actions.<sup>145</sup> And, while modifying Rule 1.7 to protect the class against a lawyer’s conflicts, we could simultaneously address the problem of the lawyer’s obligations with regard to conflicts within the class—a problem not currently addressed under conflict-of-interest doctrine because the class itself is the client, not the individual members (or even groups of members) within the class.<sup>146</sup> Professor Richard Zitrin, for example, proposed that the Commission adopt an ethics rule directly addressing representation of a class, utilizing existing class action case law as a basis for determining the content of such a rule.<sup>147</sup>

Here my concern is that ethics code drafters have neither the expertise nor the authority<sup>148</sup> to determine the appropriate relationships between class action counsel and the various constituents of a class. Moreover, given the courts’ current ability (and obligation) to monitor the adequacy of representation as part of the class action lawsuit,<sup>149</sup> I

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143. See *supra* note 33 (discussing R. 1.8); see also Menkel-Meadow, *supra* note 2, at 1193 (discussing the possibility that “the court can consider itself the ‘consenting’ party—in essence, ruling from the basis of the fairness hearing that the parties either have constructively consented or would consent to such a ‘fair’ deal and the work of class counsel”); cf. MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. (2001).

144. Thus, the one commentator who has discussed this solution presumes that the court’s consent would come at the time of the fairness hearing. See Menkel-Meadow, *supra* note 2, at 1193.

145. See *supra* notes 21, 62 and accompanying text. Neither the Waid nor the Zitrin proposal suggested specifically how the conflicts of interest rule should be modified in the context of class actions.

146. See *supra* Part I.

147. See *supra* note 62.

148. See Menkel-Meadow, *supra* note 2, at 1188 (“[T]hese cases also present difficult questions of authority and power.”).

149. Rule 23(a)(4) provides that a class action can be maintained only if “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). Absent adequacy of representation, the attempt to bind absent members of the class may violate due process. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (citing Hansberry v. Lee, 311 U.S. 32, 42–43, 45 (1940)). In making this determination, courts typically seek to determine the ability of the named representatives to adequately represent the class. See, e.g., Robin v. Doctors Officenters Corp., 686 F. Supp. 199 (N.D. Ill. 1988).

The court’s primary concern in determining the adequacy of representation is whether the class representative has a common interest with the class and has vigorously prosecuted its interests. A representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the interests of those he represents.

suggest that what makes the most sense is to leave these issues to be resolved under class action law—namely, under the rubric of a further elaboration of the adequacy of representation requirement of FRCP Rule 23.<sup>150</sup> In other words, when a lawyer has a conflict of interest that might affect her representation of a class,<sup>151</sup> class action law will trump any application of Model Rule 1.7.<sup>152</sup> In addition, the ethics rules will not purport to define a lawyer's obligations to the individual members (or even groups of members), leaving these issues to be addressed by class action law.<sup>153</sup>

This is not, however, the end of the story. It would be useful for class action law to more clearly require courts to consider class counsel's conflicts as an important factor in determining the adequacy of representation under Rule 23.<sup>154</sup> Strictly speaking, the court would not

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*Id.* at 203. In addition, however, courts consider the adequacy of class counsel, including an examination of “the nature of the relationship between the named plaintiffs and counsel; counsel's experience in handling the type of litigation involved; counsel's motivation; counsel's support staff; and counsel's other professional commitments.” *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 401 (N.D. Ill. 1987). An attorney's conflicts of interest have sometimes led to a finding that counsel was inadequate, particularly when the attorney is a member of the class or is related to a member of the class. *See, e.g., Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978); *see also Kurczy v. Eli Lilly & Co.*, 160 F.R.D. 667, 679 (N.D. Ohio 1995) (finding class counsel inadequate when class counsel represented individual plaintiffs in parallel state court action). The relationship between the adequacy of representation determination and rules of professional conduct is not clear. *See, e.g., ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 152 n.8 (2000) (raising questions concerning the standards courts should apply in finding an attorney's conflicts renders the representation inadequate).

Courts also monitor the fairness of any proposed settlement, but determining adequacy of representation and the fairness of a settlement are two entirely distinct inquiries. *Cf. Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999) (affirming district court's approval of class action settlement and order refusing to remove or disqualify class counsel).

150. Currently, there is very little in the way of “class action law” that addresses the question of the adequacy of representation by counsel burdened by a conflict of interest. *See supra* note 149. Indeed, at present, courts will attempt to bypass the procedural requirement by first referring to and then modifying the requirements under ethics law. *See supra* notes 94–104 and accompanying text.

151. I refer here to the type of conflicts traditionally considered under conflict-of-interest doctrine, not the broader type of conflicts that would not typically call for any analysis under Rule 1.7. *See supra* Part II.

152. My thanks to Susan Koniak for making this point. If there were a body of class action law that clearly addressed the adequacy of representation of class counsel burdened by a conflict of interests, then I would suggest adding a comment to Rule 1.7, stating that the ethical propriety of class representation under such circumstances must be determined by reference to such other law. In that case, we would no longer need to view such law as “trumping” Rule 1.7.

153. There is an analogy here to the Ethics 2000 Commission's decision rejecting another of Richard Zitrin's proposals—to adopt an ethics rule prohibiting lawyers from participating in secret settlements when there is a danger to the public. *See Nancy J. Moore, Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923 (2002). There the Commission's reasoning was that lawyers should not be prohibited from advising their clients regarding conduct that is lawful for the client. In other words, ethics rules should not attempt to regulate secret settlements by enacting rules applicable only to lawyers. Similarly, the rights of named representatives and class members should be resolved as a matter of class action law, not ethics law.

154. In ruling on motions to disqualify class counsel on grounds of a conflict affecting the interests of the class, the court should use the same standards as would be applied if the court were ruling on the adequacy of class counsel at a certification hearing, with the caveat that denial of the motion to disqualify does not represent a final determination of the adequacy of class counsel, given that the facts regarding the severity of the conflict may have developed substantially in the intervening period.

be applying Rule 1.7 at all. Nevertheless, many of the principles and concepts underlying that rule could be taken into account in the Rule 23 analysis. Thus, in *Georgine*, the simultaneous representation of “present claimants” and a class of “future claimants” should have led the trial court to scrutinize the adequacy of representation far more carefully than it would have in the absence of such a conflict,<sup>155</sup> particularly in light of persuasive evidence of the significantly different treatment these two groups received under their respective settlements.<sup>156</sup> Similarly, in determining whether the creation of subclasses (with separate representation) was necessary to meet the adequacy of representation requirement under Rule 23, the trial court should have considered the extent of divergence of the interests of various groups within the class, as was subsequently held by the Supreme Court of the United States in that case.<sup>157</sup> Both these determinations can be helpfully informed by the underlying principles and concepts of Rule 1.7: for example, recognizing the extent to which conflicts tempt a lawyer to favor one group over another or to ignore important differences between individuals or groups in order to achieve a resolution of either or both sets of claims, and understanding the concept that some conflicts pose risks so severe that they are deemed nonconsentable.<sup>158</sup>

#### CONCLUSION

Providing greater guidance to lawyers was one of the paramount goals of the Ethics 2000 Commission.<sup>159</sup> Given the current confusion surrounding the ethics of class action lawyers,<sup>160</sup> the Commission was certainly inclined to provide additional guidance in these cases, if at all possible. Nevertheless, it reluctantly concluded that there was little that could be done through the vehicle of an ethics code.<sup>161</sup> After all, it is not for ethics regulators to determine who is the client of a class action lawyer or what specific duties are owed by the lawyer to those persons (such as class representatives or absent class members) who are certainly not clients in any traditional sense.<sup>162</sup> In the Commission’s view, these

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155. Cf., e.g., *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 122 (S.D.N.Y. 1997) (referring to a “‘higher’ or ‘closer’ level of scrutiny that applies to judicial review of settlements involving settlement classes”).

156. The mere fact that the two groups were treated differently does not mean that the settlement was unfair. Adequate representation is determined separate and apart from the overall fairness of the settlement. See *supra* note 147.

157. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). For a critique of the *Amchem* opinion, see Silver & Baker, *supra* note 28, at 1491 (arguing that interclient tradeoffs are inevitable).

158. See *supra* notes 87–91 and accompanying text.

159. Cf. Moore, *supra* note 153, at 930 (“Mindful of the educational role of the Rules, the Commission proposed a number of changes designed primarily to give greater guidance for lawyers, thus enhancing the likelihood of compliance with the Rules as professional norms.”).

160. See *supra* note 1 and accompanying text.

161. See *supra* note 21 and accompanying text.

162. See *supra* notes 36–38 and accompanying text.

are matters for determination and elaboration by rules of civil procedure and courts that interpret and apply such rules.<sup>163</sup>

The scope of the problem, however, may not be nearly as large as is often supposed. If, for example, courts would clarify that the client of a class action lawyer is the class itself—an entity client—then it would be readily apparent that traditional conflict rules, like Model Rule 1.7, simply do not apply to the different, and potentially conflicting, interests of individual class members; therefore, these rules need not be modified in order to accommodate the class action device.<sup>164</sup> Similarly, lawyers should recognize that some conflicts of interest—such as conflicts over the size of the lawyer’s fee—are endemic to law practice and were never meant to be addressed under conflict-of-interest rules. Of course, courts supervising class actions are free to adopt procedures to ensure that class counsel’s fees are reasonable, but they need not worry that they are bypassing the conflict-of-interest rules. As for those conflicts that *are* subject to Rule 1.7—such as the simultaneous representation of a class and persons inside or outside the class—this article has argued that individual clients are entitled to full protection of the conflict rules, so that they can determine for themselves whether they would be better served by retaining independent counsel.<sup>165</sup>

The problem that remains is not insubstantial, however. From the perspective of the class itself, there may be good reason to avoid “strict” application of the conflict rules in some cases, but not necessarily in all cases. In my view, elaborating the circumstances under which these conflicts should be tolerated is best done not by ethics code drafters, but rather by courts interpreting and applying the adequacy of representation requirement of FRCP Rule 23. In doing so, courts should consider the underlying principles and concepts of the ethics rules. They should do so, however, not as a matter of bending the ethics rules, but rather of elaborating the necessary details of class action law—a law upon which ethics codes can then draw in giving further advice to class action lawyers.

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163. See *supra* notes 21–22.

164. As previously noted, it is not necessary to adopt the entity client view to conclude that Rule 1.7 does not apply to conflict of interest within the class, but there are important advantages to doing so. See *supra* notes 43–44 and accompanying text.

165. See *supra* Part III.