ETHICAL PROBLEMS OF THE CLASS ACTION PRACTITIONER: CONTINUED NEGLECT BY THE DRAFTERS OF THE PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT

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No area of legal work provokes greater nondisciplinary litigation of ethical issues than class action practice.[1] The frequency of

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1. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 n.12 (1981). This result undoubtedly derives from the requirement of FED. R. CIV. P. 23(a)(4) that the class be adequately represented. Class opponents seize upon arguably improper conduct of class counsel as evidence of inadequate representation. Remedy of an ethical violation should ordinarily tend toward disqualification of, or restrictions placed upon, counsel rather than denial or decertification of the class. *See, e.g.*, North American Acceptance Corp. Sec. Cases v. Arnall, Golden & Gregory, 593 F.2d 642, 644-45 (5th Cir.), *cert. denied*, 444 U.S. 956 (1979); Stavrides v. Mellon National Bank & Trust Co., 60 F.R.D. 634, 636-37 (W.D. Pa. 1973); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1454-57 (1981). This article does not address "adequacy of representation" in respect to FED. R. CIV. P. 23(a)(4), except insofar as class counsel's obligation to foresee and avoid problems that might endanger a favorable decision of the class certification issue. However, if propriety of class counsel's conduct is to be an issue in determining adequacy of representation, then evaluation of that conduct should be based upon established ethical standards.

Numerous scholarly discussions of the subject area, most containing copious citations, reflect the extensive litigation of alleged ethical violations by class counsel. The following list is far from all-inclusive: Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?* 56 N.C.L. REV. 303 (1978); Chambers, *Class Action Litigation: Representing Divergent Interests of Class Members*, 4 U. DAYTON L. REV. 353 (1979); Cooper & Kirkham, *Class Action Conflicts*, 7 LITIGATION 35 (Winter, 1981); Forde, *Settlement of the Class Action*, 5 LITIGATION 23 (Fall, 1978); Kaye & Sinex, *The Financial Aspect of Adequate Representation under Rule 23(a) (4): A Prerequisite to Class Certification?* 31 U. MIAMI L. REV. 651 (1977); Lynch, *Ethical Rules in Flux: Advancing Costs of Litigation*, 7 LITIGATION 19 (Winter, 1981); Schoor, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215 (1976); *Developments in the Law—Conflicts of Interest*, 94 HARV. L. REV. 1244, 1446-57 (1981); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1577-1623 (1976); Comment, *The Attorney as Plaintiff and Quasi-Plaintiff in Class and Derivative Actions: Ethical and Procedural Considerations*, 18 B.C. INDUS. & COM. L. REV. 467, 467-85 (1977); Comment, *Restrictions on Communications by Class Action Parties and Attorneys*, 1980 DUKE L.J. 360; Comment, *Class Actions under the Truth in Lending Act*, 26 LOY. L. REV. 333, 338-39 (1980); Comment, *Ethical Obligations of the Attorney Under Rule 23—Abuses and Reforms*, 12 SAN DIEGO L. REV. 224 (1974); Comment, *Class Certification: Relevance of Plaintiff's Finances and Fee Arrangements with Counsel*, 40 U. PITT. L. REV. 70 (1978); Note, 28 CASE W. RES. L. REV. 710, 721-38 (1978); Note, 3 J. CORP. LAW 649 (1978); Note, 51 TEMP. L.Q. 799 (1978).

ethical problems for class counsel, even outside those claims actually litigated, results in part from a lack of clarity in the relationship among class counsel, the named class representative(s) and absent class members.[2] That lack of clarity exacerbates conflict of interest problems inherent in representation of multiple clients,[3] but peculiarly frequent in class actions due to conditions such as enormous fee recoveries and favorable named-plaintiff treatment in settlement. Despite the frequency of class action ethical problems, no clear ethical standards have developed to guide the practitioner.[4] If the courts are to consider the propriety of class counsel's conduct in the class certification process, then generally accepted standards for evaluation of that conduct are essential to both the judicial process and counsel who undertake class representation.

For class counsel the existing *Code of Professional Responsibility*[5] (the Code) provides no firm rules, and little guidance in respect to common ethical problems. Although the Code's silence may very well be attributable to more frequent use of class actions subsequent to the Code's development and later adoption in 1969,[6]

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2. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 343 n.3 (1981) (Stevens, J., concurring) states: "The status of unnamed members of an uncertified class has always been difficult to define accurately." *See* 2 H. NEWBERG, CLASS ACTIONS § 2705-2830 (1977). Newberg also notes the muddled approach of the courts to this subject. For example, American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552 (1974) refers to absent class members as "passive" parties while, in Watson v. Branch County Bank, 380 F. Supp. 945, 960 (W.D. Mich. 1974), absent class members are considered "permissive" parties. 3 H. NEWBERG, *supra*, § 2830. *See* Cherner v. Transitron Elec. Corp., 221 F. Supp. 55, 61 (D. Mass. 1963), *cited in* Comment, *Ethical Obligations of the Attorney Under Rule 23-1—Abuses and Reforms*, 12 SAN DIEGO L. REV. 224, 230 n.38.

3. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1592-93 (1976) [hereinafter cited as *Class Actions*].

4. *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1448 nn.7-15 (1981) [hereinafter cited as *Conflicts of Interest*]; *Class Actions*, *supra* note 3, at 1578.

5. AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as MODEL CODE]. The Code, as adopted by the Louisiana State Bar Association and approved by the Louisiana Supreme Court effective in July, 1970, is incorporated as article XVI of the LOUISIANA STATE BAR ASSOCIATION ARTICLES OF INCORPORATION.

6. The Code was developed by a committee appointed in 1964 and adopted by the ABA in 1969 to become effective in 1970. Symposium, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970).

The Report of the American Bar Association Pound Conference Follow-up Task Force, 74 F.R.D. 159 (1976), concluded that after revision of FED. R. CIV. P. 23 in 1966 "use of the class action became far more widespread, its impact on litigants far more significant, and the governing rules and doctrine highly controversial." 74 F.R.D. at 194. However, the suggestion that the 1966 revision of FED. R. CIV. P. 23 prompted the substantial increase in class actions thereafter has been persuasively refuted by Professor Arthur Miller, who

the accumulated Formal and Informal Ethical Opinions[7] from the American and State Bar Associations' ethical committees shed little additional light on class counsel's responsibilities.

Under these circumstances the drafters of the proposed American Bar Association *Model Rules of Professional Conduct*[8] (Model Rules) would be expected to address either directly or through comment[9] the ethical concerns relevant to class action practitioners. That expectation is heightened by the emphasis of the proposed Model Rules on definition of the lawyer's professional role and its attendant responsibilities.[10] Moreover, the Model Rules continue recognition of the more specialized ethical concerns of certain segments of the bar such as prosecution, corporate and firm-member attorneys.[11]

However, the class action practitioner who expects such ethical guidance will be sadly disappointed, because the Model Rules generally fail to address his concerns.[12] Additionally, because the ethical problems of class counsel can generally be raised in a litigative forum, no incentive exists for the development of ethical opinions to guide the class action practitioner. As a result, class counsel will continue daily to confront ethical problems in respect to which the proper course of conduct is either not discernible or contrary to

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concludes:

> Thus, to blame that revision—or the class action procedure itself—for the increased burdens associated with new patterns of complex litigation seems entirely inappropriate and misdirected. The current density of these cases is a function of forces set in motion by Congress, the Supreme Court, the courts of appeals, societal changes, and the evolving structure of the legal profession. These are the underlying causes and the institutions that should be held accountable by those who object to permitting complex cases or certain types of public law litigation in the federal courts. To focus on the procedural vehicle that has been employed surely is myopic.

Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and "the Class Action Problem,"* 92 HARV. L. REV. 664, 676 (1979).

For the purpose of this paper, it is sufficient to note the general agreement that there has been a decided increase in the use of class actions since development and adoption of the *Code of Professional Responsibility*.

7. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420 (1978) (discusses the purpose of Formal and Informal Opinions as that of providing "guidance").

8. ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (proposed final draft May 30, 1981), [hereinafter cited as MODEL RULES].

9. The function and authority of the MODEL RULES comment is assertedly to explain and illustrate in aid of construction. MODEL RULES at 4.

10. *Id.* at 3-4.

11. *Id.* Rules 3.8, 1.13, & 5.1-.4 respectively.

12. The MODEL RULES make only two express references to class actions. *See* notes 69 & 77 *infra*.

the express position of the Model Rules. Needless to say, this situation creates concern for the practitioner mindful that the Model Rules are represented as "mandatory black letter rules."[13]

A review of several common ethical problems that arise in the course of representing a class will illustrate the need for further attention to class counsel's concerns prior to final adoption of the Model Rules by the states. Following that review will be a proposed addition to the Model Rules, intended as a first step in developing a coherent body of ethical standards for the class action practitioner.

I. COMMON PROBLEMS

A. Solicitation: Finding a Class Representative

Ordinarily, the class representative will be developed from one of four sources: a client who contacts class counsel directly, a referral from other counsel, a client produced through "solicitation," whether direct or indirect, or from the attorney himself. In at least the latter two situations, unique problems arise for class counsel.[14]

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13. Patterson, *An Analysis of the Proposed Model Rules of Professional Conduct*, 31 MERCER L. REV. 645 (1980). Dean Patterson is a consultant to the ABA Commission on Evaluation of Professional Standards, which drafted the MODEL RULES.

As a comparison, the Introduction to the LOUISIANA CODE OF PROFESSIONAL RESPONSIBILITY, which appears in the LOUISIANA STATE BAR ASSOCIATION ATTORNEY'S DESK BOOK states:

> The Code of Professional Responsibility consists of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Canons are statements of axiomatic standards of the professional conduct expected of lawyers in their relationship with the public, with the legal system, and with the legal profession.
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> The Ethical Considerations are asperational [*sic*] and represent the highest objectives toward which each lawyer should strive. They constitute guidelines which the lawyer can employ in many specific situations.
>
> The Disciplinary Rules unlike the Ethical Considerations are mandatory. These rules state the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule.

LOUISIANA STATE BAR ASSOCIATION, LOUISIANA STATE BAR ASSOCIATION ATTORNEY'S DESK BOOK art. XVI.

Inconsistency in maintenance of the distinctions between Ethical Considerations and Disciplinary Rules and the resulting confusion were cited by drafters of the MODEL RULES as primary reasons for the revised format of the MODEL RULES. MODEL RULES at iv-v.

14. Fee divisions after referral from other counsel have been guided by various ethical opinions rendered by the ABA Standing Committee on Ethics and Professional Responsibility; ABA Comm. on Ethics and Professional Responsibility, Formal Op. 204 (1940) (division of fees among attorneys is not an ethical problem unless flagrantly excessive); Formal Op. 63 (1932) (division of fees is a matter of contract); Formal Op. 27 (1930); Informal Op. 932

Class counsel have proven more ingenious in their means of soliciting class representatives than the Code has generally contemplated.[15]

Initially, however, the Louisiana practitioner should be aware of Revised Statute 37:213 which provides in pertinent part: "No person, partnership or corporation shall solicit employment for a legal practitioner . . . . Any natural person who violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both." Whether the statute will survive constitutional scrutiny is open to question;[16] however, class counsel in Louisiana accepts an added element of risk by soliciting.

Generally, under EC 2-3 and DR 2-104 attorneys are not allowed to solicit clients.[17] That standard continues through Model Rule 7.3. After *In Re Primus*[18] and *Ohralik v. Ohio State Bar Association*[19] there has been a general recognition that solicitation for "public" or charitable purposes is not ethically objectionable.[20] This recognition is retained in proposed Model Rule 7.3[21] and

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(1966). *See* Prandini v. National Tea Co., 557 F.2d 1015, 1017 (3d Cir. 1977). The MODEL RULES carry forward these limitations in proposed rule 1.5(d).

In regard to division of fees after referral from a nonattorney, *see* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1280 (1973).

15. Several excellent articles discuss problems of solicitation in the class action context. *See, e.g.*, Schoor, note 1 *supra; Class Actions, supra* note 3, at 1578-91. Comment, *Ethical Obligations of the Attorney Under Rule 23—Abuses and Reforms*, 12 SAN DIEGO L. REV. 224 (1974); Note, 51 TEMP. L.Q. 799 (1978).

16. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), *aff'g*, Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980).

17. *In re* R ___ M.J. ___, 102 S. Ct. 929 (1982).

18. 436 U.S. 412 (1978).

19. 436 U.S. 447 (1978).

20. *Cf.* MODEL CODE DR 2-103 to -104. The LSBA Code, DR 2-104(A)(3) conforms to *Primus*.

21. MODEL RULES Rule 7.3 provides:

(a) Subject to the requirements of paragraph (b), a lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances:

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civil, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or

counsel for such organizations are generally able to solicit.[22]

The existing Code contains a somewhat ambiguous provision, DR 2-104(A)(5), allowing limited solicitation in class actions: "If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."[23] Joinder of others may very well be desirable as a means of providing assistance in payment of costs, including notice costs,[24] attorney's fees, or as persuasive evidence of numerosity or lack of antagonism within the class. In addition, class counsel representing several class members may be able to claim a larger fee[25] without any concomitant increase in responsibility or time demands.

While DR 2-104(A)(5)[26] on its face purports to prohibit contact by class counsel intended to result in his employment, such a restriction is naive and unenforceable as a practical matter. For example, most potential plaintiffs contacted by class counsel for the purpose of securing their joinder will desire and receive substantial information concerning the matter. Unless the potential plaintiffs are already represented by counsel,[27] astute class counsel

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mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress or harassment.

22. *But see* Lewis v. Bloomsburg Mills, Inc., 80 F.R.D. 109 (D.S.C. 1978), which held improper an NAACP cooperating attorney's solicitation of additional class members for a broader class after consensual conditional class certification where attorneys would profit with a broader class. *See also* ABA Standing Comm. on Ethics and Professional Responsibility, Informal Op. 1326 (1975); MANUAL FOR COMPLEX LITIGATION § 1.41 (4th ed. 1977), which refers to solicitation of non-named class members for expense sharing as a "potential abuse."

23. MODEL CODE DR 2-104(A)(5) (1981); *see* ABA Comm. on Professional Ethics, Informal Op. 1469 (1981) (sending a letter to potential class members advising them of a possible claim is allowable as an attempt to strengthen the client's case, if the lawyer will not represent any recipients of the letter); ABA Comm. on Professional Ethics, Informal Op. 1483 (1981) (a lawyer representing a client in a class action, in which joinder of others is desirable, may not use that representation as a basis for soliciting to represent a claimant with a problem related to the subject of the class action pending before an administrative agency). *See also*, 1 H. NEWBERG, *supra* note 2, § 1315j.

24. *Cf.* Blank v. Talley Industries, Inc., 390 F. Supp. 1, 7 (S.D.N.Y. 1975) (the court suggested in dicta that champerty or maintenance by class counsel would preclude a fee award).

25. *See* ABA Comm. on Professional Ethics, Informal Op. 1469 (1981).

26. MODEL CODE DR 2-104(A)(5) (1981).

27. Depending on how one views the relationship between class counsel and absent

will turn them into clients. But class certification has been denied due to improper prefiling communications between class counsel and named plaintiffs.[28] And such communications may also be considered ethically improper.[29]

The Model Rules did not continue the limited solicitation exception currently found in DR 2-104(A)(5), and no comparable provision appears in the proposed Model Rules[30] or its accompanying comments.

Absent guidance from the Model Rules, courts will be on tenuous ground denying certification because of assertedly improper solicitation of class members to join a named plaintiff. More importantly, class counsel is left with no sound basis upon which to determine appropriate conduct, when either action or inaction may be detrimental to the client. Thus, despite their concern with the potential evils of solicitation,[31] the drafters of the Model Rules provide less guidance on the subject for class counsel than that provided by the Code.

Under the Code, class counsel have avoided the solicitation re-

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class members, at least after filing of the complaint, class counsel already represents the person contacted. *See* note 2 *supra*.

28. MANUAL FOR COMPLEX LITIGATION § 1.41 n.40 (citing Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237, 239-40 (N.D. Tex. 1972)); Korn v. Franchard Corp., [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,845 (S.D.N.Y. 1970), *rev'd on other grounds*, 456 F.2d 1206 (2d Cir. 1972)). *But see* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 931-32 (7th Cir. 1972).

29. In Halverson v. Convenient Food Mart, Inc., 458 F.2d at 930-31, the court considered the prefiling communication ethically improper because it failed to mention arrangements that had been made in respect to the payment of costs.

In Korn v. Franchard Corp., [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,845, at 90,169, the court stated in respect to a post-filing letter:

> His conduct in sending out the July 28, 1970 letter also reveals a lack of any respect for basic principles of professional ethics and responsibility. The letter displayed contempt for such fundamental canons as that relating to "Stirring Up Litigation, Directly or Through Agents," which provides that "stirring up . . . litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up . . . causes of action and inform thereof in order to be employed to bring suit . . . or to breed litigation by seeking out those with claims . . . or . . . having any other grounds of action in order to secure them as clients . . . ." Canon 28; ABA Code of Professional Responsibility, Canon 2, EC 2-3.

While the trial court in *Korn* was obviously incensed with the unapproved communications by class counsel, the court made no objection to repeated contact by the defense with members of the class, including solicitation of blanket releases. *See* note 129 *infra* and accompanying text.

30. The MODEL RULES note the existence of MODEL CODE DR 2-104(A)(5) without further comment. MODEL RULES at 195.

31. MODEL RULES at 194.

strictions through the assistance, whether requested or not, of their clients. In Informal Opinion 1280[32] the Committee approved an arrangement whereby the lawyer's client, a prospective named class representative, solicited class members to join the action without the active intervention of the attorney.[33] While there is a mix of ethical opinions in respect to the issue of client solicitation of potential class members,[34] if such solicitation is to be allowed under any circumstances, then the soliciting client should be required by class counsel to advise the nonclient of his right to choose his own attorney.[35] If class counsel is thereafter requested to represent the solicited nonclient, then such a disclosure should be reiterated by class counsel.[36] In the event of error or misrepresentation by the soliciting client, class counsel may bear the burden of corrective notice,[37] thus pragmatically necessitating counsel's acquiescence in and supervision of the solicitation. Even with such precautions, client solicitation of potential class members carries with it the per-

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32. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1280 (1973).

33. *Id.* (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 111 (1943) and distinguishing People v. Ashton, 347 Ill. 570, 180 N.E. 440 (1932) (not improper for attorney to solicit additional plaintiffs for the sole purpose of assisting with expenses)). *See also* Association of the Bar of New York County Lawyer's Associations, Opinions of the Committees of Professional Ethics, Op. 281 (1933), *cited in* O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 274 (1970).

34. *Cf.* 21 Ore. B. Bull. 8, Op. 96 (1961), *cited in* O. MARU, *supra* note 33, at 431 (improper for firm to accept similarly-situated clients solicited by two existing clients; the violation is more serious if the firm initiated the solicitation); 9 Ariz. B.J. 68, Op. 73-32 (1973), *cited in* O. MARU (Supp. 1975), *supra* note 33, at 63; 1970-71 Selected Opinions of the Committee on Professional Ethics of the Florida Bar 42 and 49, Op. 71-11 & Op. 71-22 (1971), *cited in* O. MARU (Supp. 1975), *supra* note 33, at 149-50 (providing that (1) both counsel *and* his client are prohibited from soliciting, and; (2) class counsel may accept, but not seek, employ from persons he has contacted in preparation of a class action); Association of the Bar of the City of New York County Lawyer's Association, Opinions of the Committees of Professional Ethics, Op. 320 & 321 (1934), *cited in* O. MARU, *supra* note 33, at 278 (attorney should not solicit but can advise his client to solicit); 76 Transactions Md. 38 (1971), *cited in* O. MARU (Supp. 1975), *supra* note 33, at 246 (class counsel should not prepare a professional brochure for the client to submit to potential class members); Opinion 3 (unpublished and undated Opinion of District of Columbia Bar), *cited in* O. MARU (Supp. 1975), *supra* note 33, at 139-40 (counsel may solicit facts from class); MODEL CODE EC 2-8 (attorney cannot compensate another for referral).

35. 2 Colo. Law 25, Informal Op. 3-17-73 (1973), *cited in* O. MARU (Supp. 1975), *supra* note 33, at 133-34 (attorney should not solicit class, but may accept plaintiffs provided by his client if he requires the soliciting client to advise nonclients of their right to choose their own attorney and the attorney makes the same disclosure himself).

36. *Id.*

37. L.A. County Bar Ass'n 69, Informal Op. 1966-13 (1966), *cited in* O. MARU (Supp. 1975), *supra* note 33, at 107 (lawyer is obliged to notify unrepresented shareholders to correct an erroneous impression and advise them that they should prosecute their actions individually).

ceived evils of solicitation, unregulated and compounded by the client's self-interest in obtaining financial support for maintenance of the litigation. In complex litigation the risk of misinforming potential class members[38] suggests the propriety of holding class counsel responsible for any solicitation.

A variation on client solicitation of a class representative is the use of a group or association, not necessarily a client, having an interest in the subject matter, to solicit a class representative. Class counsel commonly advises the group of the factual pattern that will provide a basis for raising a particular issue, and the group locates potential class representatives who fit within that factual pattern.[39] The group may also pay the attorney's fee or maintain the lawsuit,[40] and the attorney normally retains any fee recovered.

Aside from the concerns prompted by payment of expenses or fees by a person other than the client,[41] the Model Rule 7.3(a)(3) substantially clarifies, and arguably broadens, the corresponding Code DR 2-103(D) and DR 2-104(A)(3), so that solicitation of prospective class representatives by groups or associations will generally be permissible.[42]

However, solicitation of a class representative by a nonclass member, *e.g.*, a group, differs from solicitation of additional class members, in that the former situation involves finding a class representative for litigation that otherwise might not be brought. Solicitation of additional class members may be consistent with class counsel's responsibilities to the class and serve the legitimate interests of the class.[43] In contrast, although solicitation of a named

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38. *E.g.*, Fauteck v. Montgomery Ward Co., 91 F.R.D. 393, 395 (N.D. Ill. 1980).

39. *See* Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 387 app. A (E.D. Pa. 1974).

40. *See* note 77 *infra*.

41. MODEL RULES Rule 1.8(f) follows MODEL CODE DR 5-107(A)(1) in forbidding payment of fees by a nonclient, absent client approval following full disclosure.

42. The purpose of the Rule 7.3(a) exceptions "is that constitutional protection extends to attorneys affiliated with a group formed for the purpose of furthering a group right or interest *but not to in-person solicitation primarily for the personal gain of the individual attorney.*" MODEL RULES at 196 (emphasis added). Solicitation of a class representative through a group, where the attorney stands to receive substantial personal gain, without furthering a "group right or interest" would thus not appear to fall within the Rule 7.3(a) exceptions. However, the scope of this Rule is not clear. *Cf.* ABA Comm. on Professional Ethics, Formal Op. 8 (1925).

43. *See* text accompanying notes 46-56 *infra; see Conflicts of Interest, supra* note 4, at 1454.

class representative may arguably be justified as furthering the interests of a class, it also has the potential to foment unnecessary litigation[44] with its attendant defense expense.[45] The incongruous position of the Model Rules, which approves of solicitation to create a class action, but is ominously silent concerning solicitation of additional class members for joinder purposes, should be remedied.

The Model Rules do not address the issues involved in client solicitation of other potential clients. Although class counsel should not be able to do indirectly through the class representative what cannot be done directly, the inconsistent ethical opinions on the subject, and the changing rules governing solicitation in general, indicate the uncertainty faced by class counsel.

Assuming that class counsel already has a named plaintiff, a class action is appropriate, but anticipated litigation and notice costs are prohibitive. In addition to the issues of whether the attorney can advance such expenses[46] and whether class counsel may be ethically required to advance such expenses,[47] should class counsel be ethically *required* to solicit additional class representatives in order to improve class certification chances and ease the named plaintiff's burden of expenses?

In *Eisen v. Carlisle & Jacquelin*,[48] the United States Supreme Court held that the named plaintiff must initially bear the cost of individual notice to reasonably identifiable class members.[49] As most class counsel are aware, *Eisen* was a class action brought to recover allegedly excessive charges imposed through fixed commission schedules for odd-lot stock purchases. The Court's decision requiring individual notice to all identifiable class members confronted the class representative with stuffing and mailing costs estimated at $315,000.[50] As a result, the action was terminated short

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44. *See In re* Primus, 436 U.S. at 426; Note, 1980 DUKE L.J. 360, 361-62 nn.7-15. *See also* MODEL CODE DR 2-103.

45. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 4-12 (1971). Professor Handler suggests that class actions frequently become "a form of legalized blackmail." *See also* Almond, *supra* note 1, at 304-07.

46. *Compare* MODEL RULES Rule 1.8(e), which allows counsel to advance court costs, litigation expenses, and necessary living and medical expenses, without any requirement that the client be ultimately liable for repayment, *with* MODEL CODE DR 5-103(B).

47. *See* note 77 *infra*.

48. 417 U.S. 156 (1974).

49. *Id.* at 177-79.

50. *Id.* at 167 n.7.

of a final decision on the merits, and the class obtained no benefit.[51] In contrast, Informal Opinion 1361 specifically states that "poor" clients should not be denied access to the remedy of a class action suit due to an inability to assume the responsibility for costs.[52] Clients who may not fairly be called "poor" may still not be able to pay the potentially sizable costs of class notice. Yet, following Informal Opinion 1361, such clients should likewise not be denied access to the class action device. Accordingly, the obligation to find alternative sources of payment for such costs should properly fall upon class counsel where (a) the client will not be able to afford class notice costs; (b) a class action is the desirable course of action for the client; and (c) certification may be jeopardized due to the client's inability to assume ultimate responsibility for notice costs.

This conclusion is buttressed by DR 7-101(a)(1), which provides that class counsel, as any other attorney, "[s]hall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . ."[53] In addition, EC 7-1[54] imposes upon class counsel the traditional duty of zealous advocacy on behalf of the client. Assuming *arguendo* that the class is counsel's client, then class counsel undertakes the duty of zealously seeking class certification through reasonably available means.

To the extent that solicitation of additional class representatives may benefit his client's cause, class counsel may therefore have an ethical duty to either advise his client to solicit the needed additions or do so himself.[55] The Model Rules provide no guidance on whether such an obligation exists and, if so, its possible extent.[56]

Another problem peculiar to class actions and selection of the class representative occurs when a lawyer tries to be both the class

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51. H. NEWBERG, *supra* note 2, § 2250 n.30 reports that the plaintiff, Eisen, agreed to drop the case after remand for $11,000 in costs when it was held in another case that the courts had no jurisdiction over the NYSE concerning the issue of fixed commission rates.

52. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1361 (1976).

53. MODEL CODE DR 7-101 (A)(1).

54. MODEL CODE EC 7-1.

55. *Class Actions*, *supra* note 3, at 1620 n.175, suggests the propriety of joint financing. *See also* Comment, *supra* note 15, at 226.

56. *But cf.* MODEL RULES Rule 1.2(c) (allows counsel the right to limit the scope of representation after disclosure and consent). *See* notes 71 & 72 *infra*.

representative and counsel or have his firm act as class counsel.[57] Under Code DR 5-102(A), a lawyer who reasonably anticipates that he will be a witness is disqualified from continued employment in the matter, except in the limited circumstances described in DR 5-101(B). The lawyer's firm is likewise disqualified.[58] Nevertheless, attorneys have often filed class action lawsuits, either combining the roles of named class representative and class counsel or having a firm member act as class counsel. As a general rule, the courts have not been receptive to such actions and have denied class certification because class counsel cannot adequately represent the class.[59]

The rationale for Code DR 5-101(B) and DR 5-102(A) is discussed at length in Formal Opinion 339,[60] which states in pertinent part:

> Ethical Considerations 5-9 and 5-10 make clear that the principal ethical objections to a lawyer's testifying for his client as to contested issues are that the client's case will, to that extent, be presented through testimony of an obviously interested witness who is subject to impeachment on that account; and that the advocate is, in effect, put in the unseemly position of arguing his own credibility or that of a lawyer in his firm.
>
> In some situations, the practice may also handicap opposing counsel in challenging the credibility of the lawyer-witness. See EC 5-9.
>
> . . . .
>
> Because a trial advocate clearly possesses such [a financial] interest, his testimony, or that of a lawyer in his firm, is properly subject to inquiry based on such interest, perhaps including elements of his fee arrangement in some instances. Thus, the weight and credibility of testimony needed by the client may be discounted and in

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57. Comment, *Class Actions under the Truth in Lending Act*, 26 LOY. L. REV. 333, 338-39 & nn.37-40 (1980); *Class Actions*—Susman v. Lincoln American Corp.—*Attorney-Client Relationships*, 3 J. CORP. LAW 649 (1978) (analyzing Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977)). Class counsel's ethical responsibility to unnamed class members may very well be breached by failure to secure outside representation for a class action in which he is the named class representative, if that failure results, or may result, in denial of class certification. Compare Kramer v. Scientific Control Corp., 534 F.2d 1085, 1089 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); Turoff v. May Co., 531 F.2d 1357, 1360 (6th Cir. 1976).

58. MODEL CODE DR 5-102(A).

59. Comment, *supra* note 57, at 338 n.38; Comment, *The Attorney as Plaintiff and Quasi-Plaintiff in Class and Derivative Actions: Ethical and Procedural Considerations*, 18 B.C. INDUS. & COM. L. REV. 467, 477 (1977) [hereinafter cited as *Attorney as Plaintiff*].

60. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975).

some cases the effect will be detrimental to the client's cause.[61]

Informal Opinion 899[62] rather weakly suggests that an attorney should not represent himself and others in an action because of possible conflicts and his responsibility to testify. That result is consistent with Code DR 5-101(B) and DR 5-102(A),[63] and becomes even more important in class actions because of the substantial fees in which the witness/class representative/class counsel may share, in addition to any potential recovery as a party.

Although the Model Rules vary slightly[64] from DR 5-101(B) and DR 5-102,[65] the basic tenet of these Disciplinary Rules concerning the attorney/witness[66] remains intact. However, under proposed Model Rule 3.7(a), disqualification is specifically not imputed to the attorney's firm.[67]

If the Model Rules will prohibit a firm from acting as class counsel in a class action in which a firm member is a named class representative, then the prohibition must arise under the more general proposed Model Rule 1.10(a),[68] which can be waived by

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61. *Id.*

62. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 899 (1965).

63. *See* MODEL RULES at 149-53.

64. MODEL RULES Rule 3.7 provides: "(a) A lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness except where . . . ." (emphasis added).

The comments to the proposed MODEL RULES do not mention MODEL CODE DR 5-101(B), relating to acceptance of employment in which the attorney will likely be a witness, apparently relying on the general conflict of interest provision in proposed MODEL RULES Rule 1.7, which declares:

> (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
>
> (b) When a lawyer's own interests or other responsibilities might adversely affect the representation of a client, the lawyer shall not represent the client unless:
>
> (1) The lawyer reasonably believes the other responsibilities or interests involved will not adversely affect the best interest of the client; and
>
> (2) The client consents after disclosure. When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

65. The client cannot waive application of MODEL RULES Rule 3.7(a). MODEL RULES at 152.

66. *See* note 64 *supra*.

67. MODEL RULES at 152. The drafters assert that the interests of Rule 3.7 are not endangered in this situation. Compare *Attorney as Plaintiff*, *supra* note 59, at 474 nn. 47-49.

68. MODEL RULES Rule 1.10(a), concerning imputed disqualification is expressly lim-

consent of the client.[69] Proposed Model Rule 1.7 and its accompanying comments make no reference to the lawyer/witness, but discuss situations in which the lawyer may have an interest:

> A lawyer may represent a client in a matter in which the lawyer has a financial interest . . . only if the lawyer's interests are fully disclosed and the client consents to the representation. Some authorities require that the client be advised to obtain independent representation . . . . If the lawyer's interest is such that the representation is adversely affected, a client's consent upon disclosure will not provide a basis to continue the representation.[70]

The "client" for waiver purposes is either the firm member/witness, who may profit from the waiver,[71] or that person plus a group of unidentified, nonconsenting class members.[72] The consent provision thus becomes either meaningless or impractical in operation.

There appears to be no legitimate justification for an attorney to act as class counsel and named class representative, or for the class representative's law firm to undertake class representation. Absent extenuating circumstances, ethical precepts should expressly prohibit both the attorney and the attorney's firm from acting as class counsel in a class action in which the lawyer is a named class representative. Other counsel will invariably be available to undertake the representation and thereby avoid the conflicts inevitable in the multiple roles.

Despite the apparent violation of Code DR 5-101(B) and DR 5-102(A), attorneys have not been dissuaded from filing class actions in which either they, or a member of their firm, is named as the class representative. Accordingly, Model Rule 3.7(a), standing alone, will not prohibit an attorney from acting as both class counsel and class representative in most cases. Moreover, even if Model Rule 3.7(a) effectively prohibited an attorney from being both class counsel and the class representative, such a proscription would no longer be imputed to the lawyer/class representative's firm. If no

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ited in application and does not apply to Rule 3.7. However, Rule 1.7 disqualification is imputed under Rule 1.10(a).

69. MODEL RULES Rule 1.10(c). A class representative who is also a member of class counsel's firm should not be able to make a waiver on behalf of absent class members in this situation. The comment to Rule 1.8 suggests that where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. *Id.* at 60.

70. *Id.* at 57 (citations omitted).

71. In Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977), the court found irrelevant the named plaintiff's offer to forego any counsel fees in which he might share.

72. *See* note 69 *supra*.

such prohibition is deemed ethically warranted by the drafters of the Model Rules and the states that adopt them, then the courts should reevaluate their opposition to the class representative's firm also acting as class counsel.

B. Class Action Control and Post-Filing Conflicts of Interest

> A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e) and shall consult with the client as to the means by which they are to be pursued.[73]

As a practical matter, class counsel controls the class action.[74] While the attorney must defer to the client in making the decision to file a class action complaint,[75] once that decision is made control shifts to counsel. Class counsel's duties must be allocated among the public interest, the named plaintiff, and the unnamed class members.[76] Pragmatically, class counsel must also resolve his con-

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73. MODEL RULES Rule 1.2(a). "Of course, in the case of any proposed class action it is the individual client who must make the decision to expand the suit into a class action after a full explanation of all of the foreseeable consequences." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974). *See* Cooper & Kirkham, note 1 *supra*, for an excellent discussion of requisite disclosures to the class representative.

Astute defense counsel often seize upon the adequate representation requirements of FED. R. CIV. P. 23(a)(4) and the purpose of Formal Opinion 334 to depose named class representatives on their understanding of class actions in general, the specifics of the particular class action and their obligations as class representatives. Depositions of this type can be especially devastating to a poorly advised class representative, as well as to one unfamiliar with judicial proceedings. Regardless of class counsel's diligence in informing and preparing the deponent, the sheer complexity of most class actions will usually result in the class representative's confusion during the deposition. In this situation, deposition questions concerning communications between counsel and the class representative are objectionable as privileged. Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 386 n.5 (E.D. Pa. 1974). However, the privilege does not extend to questions concerning the deponent's understanding of the pending action and class action in general, even though such questions may be objectionable as immaterial. *Cf.* Aquirre v. Bustos, 89 F.R.D. 645, 648-49 (D.N.M. 1981); Hernandez v. United Fire Ins. Co., 79 F.R.D. 419, 425-28 (N.D. Ill. 1978).

74. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176-78 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973), *cited in Conflicts of Interest, supra* note 4, at 1450 n.29. In Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 353 n.13 (1981) (Powell, J., dissenting), Mr. Justice Powell blames the courts for allowing "clientless" litigation.

75. *See* note 73 *supra*. One must assume, unrealistically, that the attorney has first explained, dispassionately and completely, the advantages and disadvantages of a class action to the client's satisfactory understanding. Understandably, a concern exists that the attorney may broaden the client's claim into a class action to the client's detriment, or against the client's will. *See* Franks, *Rule 23—Don Quixote Has a Field Day: Some Ethical Ramifications of Securities Fraud Class Actions*, 46 CHI.-KENT L. REV. 1, 3-4 (1969).

76. The thoughtful analysis appearing in *Conflicts of Interest, supra* note 4, at 1447-

cern for recovery of costs advanced,[77] either for himself or the financial backers, and recovery of attorney's fees. Few attorneys can resolve these conflicting concerns satisfactorily.[78] Moreover,

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54, defines three duties of class counsel, obedience, confidence, and loyalty, that often conflict in relation to the named plaintiff(s), absent class members and the public interest. While the authors' conclusion that no one controls class counsel is normally correct, the authors' further conclusion and apparent recommendation that the court control class counsel for the benefit of the class is somewhat naive. The most diligent of judges is unlikely to uncover the many varied conflicts that arise in a class action, absent forthright class counsel attuned to such conflicts and willing to spend substantial time and risk fees to bring them to the court's attention. *See* note 79 *infra*. This reality suggests the importance of greater guidance from the MODEL RULES. *See* Bell, *Serving Two Masters: Intergration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 502-05 (1976). *But cf. Class Actions*, *supra* note 3, at 1595-96 (arguing that it is sufficient to rely upon voluntary disclosure by class counsel).

77. MODEL CODE DR 5-103(B) allows an attorney to advance costs and litigation expenses as long as the client remains ultimately liable for repayment regardless of the litigation outcome. *Accord,* MODEL CODE EC 5-8. Of course, such an arrangement renders maintenance of a class action economically inadvisable for most plaintiffs, and prompted the comment that if failure to recover advanced costs from plaintiffs is a violation of MODEL CODE DR 5-103(B) then the rule has not been enforced. *Class Actions*, *supra* note 3, at 1605. In contrast, MODEL RULES Rule 1.8(e) expressly authorizes maintenance of litigation, irrespective of its outcome, and the comments explicitly endorse the view that maintenance is proper in class actions. *Id.* at 64 (citing *Class Actions*, *supra* note 3, at 1618-23). Compare Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 382-86 (E.D. Pa. 1974); P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372, 375-81 (S.D. Fla. 1973). *See also* Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAW. 1667 (1981).

However, in view of the foregoing discussion and the potential detriment to class members who might be prejudiced by not receiving notice, an attorney filing a class action after adoption of the MODEL RULES should be ethically *required* to advance notice costs to the extent necessary to protect absent class members. While such a development would short-circuit examination of the class representative's finances, it would also open class counsel's finances to at least limited discovery.

78. It has been suggested that if the usual ethical rules governing conflicts of interest were applied to class counsel no class actions could be filed. *Class Actions*, *supra* note 3, at 1593 n.67.

In Chambers, *Class Action Litigation: Representing Divergent Interests of Class Members*, 4 U. DAYTON L. REV. 353 (1979), the author recounts his experience of presenting a settlement proposal to 67 members of a class. Two of the class members strenuously objected, leaving him with the awkward prospect of determining whether to represent consenting plaintiffs, all plaintiffs or withdraw as counsel. MODEL CODE DR 5-105(B) & 5-106 would seem to require the withdrawal of counsel absent consent under MODEL CODE DR 5-105(C), even though the dissenting class members may not be able to secure other counsel. Compare Hayes v. Eagle-Picher Indus., 513 F.2d 892, 894 (10th Cir. 1975). The MODEL RULES replace MODEL CODE DR 5-105 with the more general conflict of interest provisions of Rule 1.7, which is set forth in its entirety in note 64 *supra*. Compare Bell, note 76 *supra*.

The MODEL RULES "resolve" the broad and oft-cited conflicts of the class action practitioner through what one might benevolently term a Llewellian drafting philosophy. Such neglect becomes less palatable when one recognizes that the accumulated ethical opinions of the American Bar Association and, so far as can be determined, the states as well have yet to address any of the class practitioner's conflict of interest problems. *See Conflicts of In-*

the lack of guidance from the Code and proposed Model Rules promotes an insensitivity to the ethical issues involved, curbed only by the unlikely chance that an overworked[79] but conscientious judge might discover the existence of a conflict, determine counsel's actions inappropriate and impose some form of sanction. In turn, the judiciary may hesitate to invoke stern sanctions because of the lack of clarity in conflict of interest standards for class counsel. The variety of such conflicts is without limit; however, a few are illustrative.

In all federal[80] class actions the court is required to determine "[a]s soon as practicable" whether an action may be maintained as a class action.[81] Many courts have also adopted local rules setting forth maximum periods within which class counsel must move the court for a certification order;[82] those limits, however, can be, and usually are, extended.[83] Of course, the language of Federal Rule of Civil Procedure 23(c)(1) leaves practicability to the trial court's discretion[84] and does not entail a necessarily speedy certification decision.[85]

Practical consequences flow from class certification that may affect class counsel's desire to proceed promptly toward certification. Among other effects, class counsel will have less flexibility in

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terest, supra note 4, at 1448 n.8.

79. One harried Louisiana trial court judge, who shall remain nameless, in a case in which the author appeared as counsel, actually declined to read a lengthy class action settlement document, or hear counsel explain its terms, stating that he was only too happy to remove another case from his docket. He then inquired as to where he should sign.

80. Louisiana class action procedure differs from federal procedure. LA. CODE CIV. PRO. ANN. arts. 591-597 (West 1960), make no mention of class certification or timing of the certification decision. The issue can be raised by peremptory exception, under Stevens v. Board of Trustees, 309 So. 2d 144, 152 (La. 1975), which places the burden on the class opponent to oppose certification, but also provides the class opponent with control over timing of the exception.

81. FED. R. CIV. P. 23(c)(1).

82. *E.g.*, E.D. LA. R. 2.12(c). *See* Burkhalter v. Montgomery Ward & Co., 92 F.R.D. 361, 362 (E.D. Ark. 1981) (class allegations were struck due to failure to move for certification).

83. AMERICAN COLLEGE OF TRIAL LAWYERS, RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION 25-27 (1981) [hereinafter cited as COMPLEX LITIGATION]. Jones v. Diamond, 519 F.2d 1090, 1098 (5th Cir. 1975) lists factors by which practicability can be evaluated, including: detail in pleadings, amount of discovery pending and completed, the nature of the action, fairness and efficiency.

84. COMPLEX LITIGATION, *supra* note 83, at 25 n.107; 5 H. NEWBERG, *supra* note 2, § 8690(a).

85. In Johnson v. General Motors Corp., 598 F.2d 432, 435 (5th Cir. 1979) the court held that a class action may be maintained even absent a trial court order to that effect. *See also* 5 H. NEWBERG, *supra* note 2, § 8690(a) nn.04-04a.

fashioning a settlement more favorable for a subclass or the named plaintiff(s). Definition of the class, whether for purposes of settlement or manageability, becomes fixed rather than flexible. Notice, with its attendant costs, must be prepared and sent by class counsel.[86] Having been defined, the class is identifiable, and counsel's duties to the class vis-à-vis the class representative are clarified. The resulting narrowing of class counsel's control over the action may prompt a decision by class counsel to delay the certification decision.

Delay in class certification may benefit the named class representative[87] or subclasses for whom class counsel can negotiate a better settlement prior to certification. Delay in class certification for the purposes of negotiating a settlement is particularly useful when class certification is in doubt. In addition, such a delay often serves to identify conflicts within a broad class, thereby allowing more precise definition of subclasses and greater manageability of benefit to all parties and the court. Precision of class definition improves the chances for class certification by demonstrating to the court competency of counsel, manageability of the class[88] and lack of antagonism within the class.

Yet delay may be contrary to the interests of the absent class members if the named plaintiff's claim is mooted and certification denied for that reason,[89] or if class members who later move (or go out of business) and fail to receive notice die, or they are excluded from settlement negotiations due to unawareness,[90] or they are

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86. 2 H. NEWBERG, *supra* note 2, §§ 2420(a) & 2450(d) n.154. *Compare, Johnson*, 598 F.2d at 438, in which the court suggested that notice may be delayed until liability is determined, *with In re* Home-Stake Prod. Co. Sec. Litigation, 76 F.R.D. 351, 380 (N.D. Okla. 1977), stating that notice must be sent as early as possible. *See* Sullivan & Fuchsberg, *Major Class Action Considerations* in CLASS ACTION PRIMER 1, 29 (1973).

87. Often settlements are reached through which only the named plaintiff or a subclass recovers, and claims by the class are dismissed without prejudice prior to certification and notice. COMPLEX LITIGATION, *supra* note 83, at 31-32. Although the class, as defined in the complaint may not be "prejudiced" by such a result, it is difficult to imagine that class counsel has fulfilled any responsibility to the class in such a situation. *See also*, 3 H. NEWBERG, *supra* note 2, § 5020.

88. FED. R. CIV. P. 23(b)(3)(D) imposes manageability as a prerequisite to certification under 23(b)(3). *See* 5 H. NEWBERG, *supra* note 2, § 8685e.

89. This can happen in the FED. R. CIV. P. 23 (b)(1) & (b)(3) context through an individual settlement as discussed in note 87 *supra*; or in the FED. R. CIV. P. 23(b)(2) context; mootness normally occurs through cessation of the allegedly unlawful deprivation of right.

90. If one presumes the fairness and effectiveness of the "opt out" provisions, then exclusion from settlement negotiations may not be prejudicial to those ultimately receiving

otherwise prejudiced.[91]

Whether class counsel assumes an ethical duty to move promptly for class certification depends upon the extent to which class counsel's primary duty is to the class in general[92] as opposed to narrower, more readily identifiable interests of the class representative or a subclass. One cannot merely suggest remedy of such a conflict by withdrawal, because withdrawal would place new counsel in the same predicament. Retention of counsel for different subclasses, while used to some extent, ignores the vast number of potential subclasses in most class actions, and the conflict that division of representation presents to class counsel's control of the action. Defendants, as well, may oppose separation of subclasses, because of the added burden that such a step would place on them in the course of negotiation.

The Model Rules offer an improvement over the Code in proposed Rules 1.3 and 3.2, which provide:

Rule 1.3:

A lawyer shall act with reasonable promptness and diligence in

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notice. However, even for those notified, the opting out opportunity is only marginally useful in many cases. *See* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 & 379; Handler, *supra* note 45, at 10-11.

The MANUAL FOR COMPLEX LITIGATION 48 (4th ed. 1977) stresses that class notices should be "couched in simple terms and should be intelligible to laymen." Experience suggests that a more stern admonition is in order. Simon, *supra*, at 379, however, concludes that small numbers of "opt outs" and claims indicate lack of interest by class members. That conclusion is only valid if one presumes that class members (1) receive the notice; (2) *understand* the notice and (3) can justify, economically, the cost of reconstructing records necessary to support a claim.

91. For example, a class member unaware of the class action might reach a less advantageous settlement with a defendant. COMPLEX LITIGATION, *supra* note 76, at 25 n.110, approvingly quotes language from the MANUAL FOR COMPLEX LITIGATION 65 (Tent. Draft, Fifth Revision Feb. 4, 1980): "If the determination whether the action should proceed as a class action is delayed, serious injustices may result, and avoidable procedural difficulties of great magnitude may ensue." Compare Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973).

92. *Class Actions, supra* note 3, at 1578 states: "[N]o very clear idea of precisely what is meant by a duty to represent a class has emerged . . . ."

Moreover, how is the "class" defined for purposes of ascertaining duty? Is the duty circumscribed by the scope of the initial complaint? If not, does counsel breach that duty by filing a complaint omitting similarly-situated, but perhaps less convenient, manageable or malleable individuals or subclasses? Does the duty preclude amendment of the complaint to narrow and better define the class after filing and discovery? Is the concept of "class" too amorphous prior to certification for counsel to define an ethical duty for himself, absent guidance, that prefers the uncertain perception of the class interests to the ascertainable and better-defined goals of narrower subclasses?

representing a client.[93]

Rule 3.2:

A lawyer shall make reasonable effort consistent with the legitimate interests of the client to expedite litigation.[94]

As its drafters recognized, Rule 1.3 modifies the Code standard[95] by imposing an affirmative duty of promptness on counsel's work.[96] As the Notes to the Model Rules add, even absent prejudice to the client, delay is objectionable because it may cause client anxiety or adversely affect the public's perception of the profession.[97] However, applicability of proposed Model Rules 1.3 and 3.2 to class actions remains unclear because the identity of the "client" to whom the duty runs is not discernible.

Because the interests of the named class representative or a subclass may benefit from delay in certification, class counsel is confronted by a conflict with the presumed, but less determinable, interests of "the class" in receiving speedy notice. Failure of both the Code and Model Rules to provide guidance for resolution of such a problem requires remedy.

Few class actions are ever tried to final judgment, with settlement normally negotiated prior to, or shortly after, certification.[98] Prior to certification, class counsel enjoys virtually unfettered control over settlement negotiations.[99] During the course of negotiation, offers that provide for settlement favorable to only the named class representative or a subclass are not unusual,[100] and create a

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93. MODEL RULES at 23.

94. *Id.* at 123.

95. Informal Op. 1273 (1973) and Formal Op. 335 n.1 (1974) are cited in the MODEL RULES notes for the proposition that the MODEL CODE requires " 'indifference and . . . consistent failure' to attend to a client's matter" in order to justify disciplinary action. MODEL RULES at 25. Compare MODEL CODE DR 7-102(A)(1).

96. MODEL RULES at 25.

97. *Id.* at 24.

98. *Class Actions*, *supra* note 3, at 1373 n.5 (citing Note, 62 GEO. L.J. 1123, 1135 (1974)). *See* Handler, *supra* note 45, at 8.

99. *See* note 74 *supra*.

100. In Deposit Guar. Nat'l Bank v. Roper, 445 U.S. at 340 n.12, the Court noted the complex relationship between the named class representative and the class, but declined the opportunity to clarify that relationship.

MODEL RULES Rule 1.8(g) is nearly identical to MODEL CODE DR 5-106(A), including the prohibition against aggregate settlements of multiparty claims absent disclosure to, and consent by, all clients. The comments to MODEL RULES Rule 1.8(g) do not mention class actions. Presuming appropriate disclosure and consent by the class representative, no conflict arises between counsel's duties to the class and the named class representative when counsel makes or receives a settlement proposal encompassing the class, but less favorable than that obtainable by the class representative independent of the class. However, such a situation

direct conflict between class counsel's obligation of loyalty to class members included within the settlement proposal as opposed to counsel's obligation to those class members omitted. Such a settlement can be achieved procedurally, without notification[101] to the uncompensated class members, through dismissal of the class allegations without prejudice[102] or through a stipulated denial of class certification. Independent of ethical considerations, the courts consistently approve such settlements after ensuring that the named plaintiff and counsel have not been "bought off."[103] Many class actions thus end quietly, with the class members unaware of either their rights or that a lawsuit was pending on their behalf. Defendants have a substantial interest in such a result.[104]

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gives rise to a potential conflict with class counsel's obligations to narrower subclasses, that could potentially obtain more favorable treatment independent of the class. Members of appropriate subclasses receive disclosure only in the form of class notice, and consent only in the sense that they fail to opt out. *See* note 90 *supra; Class Actions*, *supra* note 3, at 1596: "Disaggregation of the class will not always be feasible, and if the suit is to proceed, the lawyer will inevitably have to subordinate interests of some class members to those of others; otherwise advocacy of any interest would be impossible."

101. FED. R. CIV. P. 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Applicability of rule 23(e) to precertification class action settlements has generated differing results in the courts and substantial debate. *E.g.*, Shelton v. Pargo, 582 F.2d 1298, 1303-14 (4th Cir. 1978); Almond, note 1 *supra*. In *Deposit Guaranty*, 445 U.S. at 332 n.5, the United States Supreme Court stated, as *dicta*, that notice is required under rule 23(e) after certification. *Accord*, Sosna v. Iowa, 419 U.S. 393, 399 n.8 (1975). Most practitioners operate from that premise. However, whether one can necessarily infer from the *Roper* and *Sosna* footnotes that the United States Supreme Court has given its blessing, to dispensing with precertification notice of settlement to the class, remains unclear. Courts, in any event, can require notice of such settlements under FED. R. CIV. P. 23(d)(2) as a matter of discretion.

102. FED. R. CIV. P. 41(a) authorizing voluntary dismissals, is subject to rule 23(e). Accordingly, voluntary dismissal of class allegations requires court approval. *See* 3 H. NEWBERG, *supra* note 2, §§ 5000-5050. *See* Comment, *Rule 41(b) Dismissal as a Route to Appellate Review of an Adverse Class Determination*, 48 U. CHI. L. REV. 912 (1981).

103. In *Deposit Guaranty*, 445 U.S. at 339 (Rehnquist, J., concurring), Justice Rehnquist concludes that a class representative cannot be forced to accept a precertification settlement offer of his/her maximum individual claim. *Id.* at 341. As a practical matter, class counsel has great difficulty persuading a class representative not to accept such a settlement offer. *See* Bantolina v. Aloha Motors, Inc., 75 F.R.D. 26, 29-30 (D. Haw. 1977). The only way for class counsel to combat such a defense tactic is to impress the class representative, early on, with the importance of his fiduciary responsibility to the class. *Shelton*, 582 F.2d at 1304-05 (discussing the fiduciary role of the class representative). *But see Deposit Guaranty*, 445 U.S. at 340 n.12 & 358-59 n.21 (Powell, J., dissenting).

104. *See Deposit Guaranty*, 445 U.S. at 339; Almond, *supra* note 1, at 313, refers to precertification notice of an individual settlement, in Title VII litigation as "a devastating give-away" for defendants best described as an "invitation to sue letter" with "irresistible temptation." *See* Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After* American Pipe and Construction Co. v. Utah, 48 S. CAL. L. REV. 771,

But has class counsel, by filing a class action complaint, undertaken an ethical responsibility to ensure that notice is, in fact, given to class members? The scant authority available suggests that, at the very least, notice must be given to those who may be relying on the pendency of the action.[105] As a practical matter, however, class counsel may have no reliable basis for determining which class members are entitled to notice under such a standard.[106] Notice of the dismissal for such class members is especially important in that tolling of applicable statutes of limitations ceases.[107] Moreover, failure to provide notice to the class of a settlement runs counter to counsel's traditional responsibility to communicate reasonable settlement offers to his client.[108] Failure to extend such an obligation to class counsel can only be justified by a distinction between the duties owed by class counsel to the class representative and the duties owed to the class. No persuasive authority exists for such a bifurcated duty,[109] which further suggests

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780-90, 804-09 (1975).

105. *See* Opinion 144 (1950), Advisory Opinions, Oklahoma Bar Association Legal Ethics Committee (West 1960), *cited in* O. MARU, *supra* note 33, at 412 (partnership that has appeared for other parties has no duty to proceed with the case but should advise those "who may be relying" as to possible arrangements). Independent of ethical concerns, many courts have expressed concern for, and required notice to, absent class members who have possibly relied on pendency of the action. *See* 3 H. NEWBERG, *supra* note 2, §§ 4960 & 5020e; *Shelton*, 582 F.2d at 1314-15; Compare H. DRINKER, LEGAL ETHICS 92 (1953). However, the suggestion that absent class members only have a "reliance interest" in receiving precertification settlement notice seems to run counter to the words of Mr. Justice Stewart in American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551-52 (1974), where he states: "Rule 23 is not designed to afford class action representation *only to those who are active participants in or even aware of* the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action." (emphasis added).

106. *Shelton*, 582 F.2d at 1315.

107. *American Pipe*, 414 U.S. at 552-54; *see Deposit Guaranty*, 445 U.S. at 330 n.3. In Louisiana courts voluntary dismissal could arguably trigger LA. CIV. CODE ANN. art. 3519 (West Supp. 1982). *See* State v. Williams, 350 So. 2d 131, 137 n.8 (La. 1977). Class members not receiving notice are, obviously, at a distinct disadvantage in making a determination as to when tolling ceases.

108. ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 326 (1970) states: "[I]t is the duty of a lawyer to inform his client of every settlement offer made by the opposing party." (citing MODEL CODE 7-7 & 7-8).

109. *Compare* Justice Stevens' concurrence in *Deposit Guaranty*, 445 U.S. at 342-43 n.1 *with* Justice Powell's dissent at 445 U.S. 358-59 n.21, in which he states:

> Mr. Justice Stevens indicates that unnamed members of an uncertified class may be "present" as parties for some purposes and not for others. No authority is cited for such selective "presence" in an action. Nor is any explanation offered as to how a court is to determine when these unidentified "parties" are present.

See Greenfield, 483 F.2d at 832; Comment, *Class Certification: Relevance of Plaintiff's Finances and Fee Arrangements with Counsel*, 40 U. PITT. L. REV. 70, 89 (1978), suggesting that exclusive control of the class action settlement by the named class representative may

the need for guidance by established ethical standards.

In addition to precertification conflicts of interest among the class representative, subclasses and the class as defined in the pleadings, counsel normally has a substantial interest in negotiating the amount of attorney's fees[110] to be recovered. Fees are generally recovered on the basis of statutory authority, or the "common benefit" or "common fund" doctrines.[111] The problem arises when alert defense counsel use the offer of a favorable fee settlement to drive a wedge between the interests of class counsel and the class.[112] The conflict is especially acute in class actions because

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deny the class effective representation.

In Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978), *cert. denied*, 439 U.S. 115 (1979), the Fifth Circuit Court of Appeals stated:

> Thus, when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs. In such a situation, the attorney's duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members.

Apparently, then, the court will decide how the action is to proceed. However, such an approach may place the court into an advisory position much like that of counsel, and may make the judge something less than an impartial arbiter of the controversy.

110. Simultaneous negotiation for the settlement fund and for individual counsel fees creates an inherent conflict of interest. *See Class Actions*, *supra* note 3, at 1604-05 nn.111-117; Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 56-61 (1975).

111. *E.g.*, 3 H. NEWBERG, *supra* note 2, §§ 6900-6910; Note, 51 TEMP. L.Q. 799, 803 n.35 & 804 n.46-51 (1978). *Class Actions*, *supra* note 3, at 1606-07.

112. MODEL CODE DR 5-103(A) provides: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client . . . ." DR 5-103(A) is replaced in the MODEL RULES by the general conflicts standard of Rule 1.7 and the more specific conflicts standards of Rule 1.8(a)-(e):

> (a) A lawyer shall not enter into a business, financial or property transaction with a client unless the transaction is fair and equitable to the client.
>
> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after disclosure.
>
> (c) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee.
>
> (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
>
> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> > (1) A lawyer may advance court costs, expenses of litigation, and reasonable and necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
> >
> > (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

See Prandini v. National Tea Co., 557 F.2d 1015, 1020 (3d Cir. 1977) (citing Smith, *Stan-*

of class counsel's enormous control over settlement prior to certification.[113]

The conflict created by potentially sizable attorney fee recoveries prompted the court in *Prandini v. National Tea Co.*[114] to require that settlement of damage claims be negotiated and approved by the court prior to negotiation of attorney's fees.[115] *Prandini* has not met with universal acceptance, in large part because of the practical problems it creates for defense counsel.[116] More specifically, defense counsel is interested in negotiating a total settlement of claims and fees within the bounds of his client's authorization.[117] Accordingly, the defense will normally prefer to propose a total settlement package without regard to the division of the settlement between class members and class counsel.

Class opponents have developed a unique response to *Prandini* and the attorney's fee problem that suffers from ethical problems of its own. By offering a favorable settlement to the named plaintiff or the class, coupled with a proposal that class counsel waive attorney's fees, defense counsel seeks to gain the desired certainty of settlement amount, without the requirement of the *Prandini* two-step hearings. However, such settlement proposals have recently been interpreted as improper[118] due to the conflict of interest that the requested waiver creates for counsel.

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dards for Judicial Approval of Attorneys' Fees in Class Action and Complex Litigation, 20 How. L.J. 22, 73 (1977); Obin v. Dist. No. 9, of Machinists and Aerospace Workers, 651 F.2d 574, 582 (8th Cir. 1981); Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980)).

113. Dam, *supra* note 110, at 58-59. Professor Dam quite rightly states:

> In many cases the representative plaintiff's stake will be so small that he could not afford to invest any time in supervising the lawyer. Moreover, the institutional arrangements in the class action are such that for many questions the lawyer has no greater responsibility to the representative plaintiff than to any other member of the class. Though subject to whatever controls the court may impose, the lawyer loses the constraints on his actions normally imposed by the existence of a client.

114. 557 F.2d 1015 (3d Cir. 1977). *See* text accompanying note 14 *supra*.

115. *Id.* at 1021.

116. *See* Note, 51 TEMP. L.Q. 799 (1978); *cf.* MANUAL FOR COMPLEX LITIGATION § 1.46 (4th ed. 1977), which suggests that the court require all amounts to be paid at the time the settlement is considered.

117. 3 H. NEWBERG, *supra* note 2, § 5525a.

118. Committee on Professional and Judicial Ethics of New York City Bar Association, Op. No. 80-94 (Sept. 20, 1981), 50 U.S.L.W. 2204-05 (Oct. 6, 1981), *discussed in* 68 A.B.A. J. 23 (1982). The Opinion disclaims applicability beyond the "fee waiver" offer in civil rights and civil liberties litigation, but provides a persuasive standard for application to other conflict of interest problems associated with recovery of attorney's fees in class actions generally.

Through lump sum settlements, as described in *Prandini*,[119] defense counsel can create the same conflict as is created by the waiver of fee settlement offer. Accordingly, lump sum settlement offers should also be considered improper.

At least in regard to statutory fee awards, the procedure closest to meeting the goals of avoiding conflict of interest problems and promoting a degree of certainty for defense counsel attempting to settle the class action involves settlement of the class claims with a concurrent agreement by the parties to negotiate attorney's fees prior to submission of any portion of the settlement to the court for approval. In the event that the negotiations on the fee issues are unsuccessful, the class settlement is submitted to the court with a joint motion asking that the court determine fees. If the fee negotiations are successful, then the fee agreement can be incorporated into settlement documents, supported by appropriate affidavits or "on the record" explanation from counsel as to the chronology of settlement negotiations, for approval with the class settlement.[120]

Neither the Code nor the Model Rules provide much guidance to class counsel in regard to these and other fee-related conflicts. Model Rule 1.7,[121] which is the general conflict of interest Model Rule comparable to Code DR 5-105,[122] cannot address conflicting duties class counsel has to the class, subclasses and the class representative because the Rule uses the word "client," and the "client" for the purposes of a class action remains undefined.[123] Technically, Model Rule 1.7 would prevent attorneys from handling class actions because the lawyer's "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

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119. *See* notes 14, 110-117 *supra* and accompanying text.

120. Several different state and federal judges have approved of this approach in cases in which the author has appeared as class counsel.

121. MODEL RULES at 48.

122. MODEL CODE DR 5-105 provides in pertinent part:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

123. *Class Actions*, *supra* note 3, at 1592-93.

responsibilities" to one of the other categories of "clients."[124] Furthermore, class counsel's interest in the recovery of fees would apparently run afoul of Model Rule 1.7, due to the lack of consent from absent class members,[125] the conflict inherent in obtaining such consents and the attorney's personal stake in the litigation.

In addition to conflict of interest problems created by lump sum settlement offers, the conduct of defense counsel also comes into question in the solicitation of "opt outs."[126] By reaching settlements with, or obtaining waivers from, individual class members, either before or after certification, the class opponent hopes to reduce class size below the requisite numerosity,[127] establish antagonism within the class or merely accumulate persuasive evidence for the court to the effect that the "class" is not interested in the claimed wrong, and the class representative is not an adequate representative.[128]

Model Rule 4.2[129] carries forward the provisions of Code DR 7-104(A)(1) substantially intact. Thus, if all class members were considered as clients of class counsel, then from the inception of the litigation until contrary order by the court, solicitation of opt outs

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124. MODEL RULES Rule 1.7(a); *see Class Actions*, *supra* note 3, at 1593 n.67 & 1596.

125. *See* note 69 *supra*. The comments to MODEL RULES Rule 1.8(f) seem to be directed toward the situation in which someone other than the defendant is paying class counsel's fee.

126. MANUAL FOR COMPLEX LITIGATION § 1.41 (4th ed. 1977); 2 H. NEWBERG, *supra* note 2, § 2720d & 3 *id.* § 5030. Opting out of rule 23(b)(3) class actions is authorized by FED. R. CIV. P. 23(c)(2)(A) & 23(c)(3); *see* Comment, *Restrictions on Communications by Class Action Parties and Attorneys*, 1980 DUKE L.J. 360, 377.

127. 3 H. NEWBERG, *supra* note 2, § 5030. The courts have not found opt out solicitation improper for that purpose, because such settlements only affect the class certification issue, and not the class representative. *E.g.*, Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 775 (2d Cir. 1972); Vernon J. Rockler & Co. v. Minneapolis Shareholders Co., 425 F. Supp. 145, 149-50 (D. Minn. 1977); Nesenoff v. Muten, 67 F.R.D. 500, 503 (E.D.N.Y. 1974); *cf. In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.) (involving court review of subclass settlements), *cert. denied*, 444 U.S. 870 (1979).

128. *See* 2 H. NEWBERG, *supra* note 2, § 2720(d) n.88a-89; *But see* Korn v. Franchard Corp., 456 F.2d 1206, 1207-10 (2d Cir. 1972); Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 69 (E.D.N.Y. 1974).

129. MODEL RULES Rule 4.2 provides: "A lawyer shall not communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The comment to Rule 4.2 does not mention class actions, but suggests that it would be improper for counsel to communicate on the subject of the representation with managing agents of a party that is a corporation or organization. MODEL RULES at 165. Since such a rationale has not been extended to absent class members under the MODEL CODE, one should not infer that MODEL RULES Rule 4.2 is to be construed in that fashion.

by defense counsel would be clearly improper.[130] However, if absent class members are not considered to be represented at all times by class counsel, then Model Rule 4.3[131] and Code DR 7-104(A)(2)[132] apply. Model Rule 4.3 differs significantly from its predecessor, Code DR 7-104(A)(2). Model Rule 4.3 would apparently require defense counsel to advise the class member of counsel's interest in having the class member opt out,[133] but would not require defense counsel to advise the class member to seek counsel. Thus, as long as the defense counsel does not mislead,[134] no ethical violation would occur under either Model Rules 4.1 or 4.3 in respect to opt out solicitation.[135] Code DR 7-104(A)(2) could, in con-

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130. 2 H. NEWBERG, *supra* note 2, § 2720d refers to "the constructive attorney-client relationship that exists between counsel for class representatives and members of the class." *See* notes 2 & 26 *supra*.

The class opponent could, even so, communicate information unrelated to the litigation to class members, or could contact class members through permission of class counsel, or by leave of court. *See* H. DRINKER, *supra* note 105, at 203.

131. MODEL RULES Rule 4.3 provides:

> 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 does not understand the lawyer's role in the matter, the lawyer shall make reasonable effort to explain that role.

Thus, MODEL RULES Rule 4.3 would create the proverbial "fox guarding the chicken coop" situation, with the class opponent, normally defense counsel, determining whether the absent class member understands the role of defense counsel in the class action.

132. MODEL CODE DR 7-104(A)(2) provides:

> (A) During the course of his representation of a client a lawyer shall not:
>
> . . . .
>
> (2) Give advise to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

133. The comment to MODEL RULES Rule 4.1 states: "This Rule refers to statements of fact." MODEL RULES at 162. It is difficult, however, to imagine that the class opponent either can or will use only facts to solicit opt outs. More probably, the class opponent will unilaterally conclude that the absent class member understands the lawyer's "role in the matter" and therefore make no disclosure concerning the pending class action. In that fashion, the class opponent would avoid MODEL RULES Rule 4.1 entirely. *See* note 104 *supra*.

134. *See* notes 73 & 75 *supra*. MODEL RULES Rule 4.1(b) provides:

> In the course of representing a client a lawyer shall not:
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> . . . .
>
> (b) Knowingly fail to disclose a fact to a third person when:
>
> (1) In the circumstances failure to make the disclosure is equivalent to making a material misrepresentation;
>
> (2) Disclosure is necessary to prevent assisting a criminal or fraudulent act, as required by Rule 1.2(d); or
>
> (3) Disclosure is necessary to comply with other law.

See note 132 *supra*.

135. *See* note 37 *supra*, suggesting the propriety of ordering corrective notice to class members who may be misled.

trast, be interpreted as requiring defense counsel to advise the solicited class member to secure counsel, thereby limiting opt out solicitation. However, no such gloss has as yet been placed upon the Code.

Opinions under the Code note that an attorney can properly contact any opposing witness;[136] however, that freedom has not been extended to contact with parties[137] represented by counsel.[138] The few courts and commentators that have discussed opt out solicitation have generally expressed concern that some solicited class members may be misled, but have not couched that concern in terms of existing ethical standards.[139]

Class counsel, just as counsel in nonclass litigation, has a substantial interest in protecting his client from self-serving communications from opposing counsel that may tend to undermine the attorney-client relationship.[140] However, that interest is not adequately protected by the proposed Model Rules.

II. A PROPOSAL

The drafters of the proposed Model Rules have chosen generally to ignore the ethical concerns of the class action practitioner, even though those concerns have been extremely well documented over the years. Their omission may be the result of inexperience in the class action arena or reliance on the similar omission by the *Code of Professional Responsibility*.[141] Although the Model Rules anticipate that ethical issues will not be the subject of nondisciplinary litigation,[142] continued litigation of ethical problems in class

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136. ABA Comm. on Professional Ethics, Informal Op. 892 (1965).

137. *See* notes 2 & 105 *supra;* ABA Comm. on Professional Ethics, Formal Op. No. 117 (1934) holds that it is the "party" not the clerk in the store that is represented.

138. ABA Comm. on Professional Ethics, Formal Op. 187 (1938); *cf.* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1362 (1976) (holding that counsel for an association member, who is involved in litigation against the association, must obtain opposing counsel's permission before communicating with the association's legislative counselors and task force members); Formal Op. 58 (1931) (conferring with client's spouse in divorce proceeding is improper because it "might easily lead to the giving of advice to the adverse party"); Formal Op. 102 (1933) (counsel of employer may draft settlement documents for unrepresented worker's compensation claimant).

139. *See, e.g.*, note 127 *supra.*

140. H. DRINKER, *supra* note 105, at 201-03.

141. *See* note 6 *supra.*

142. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of

actions, raised under Federal Rule of Civil Procedure 23(a)(4), seems assured. Failure to adopt at least a general rule guiding counsel involved in class actions means that ethical standards for class counsel will evolve piecemeal with varying standards in different jurisdictions.

While one could arguably add comments and amendments to a variety of the Model Rules in an attempt to address the myriad ethical problems confronting the class action practitioner, it is unlikely that such an approach would provide a foundation for development of a coherent body of ethical opinions and comments to guide counsel involved in class actions. Accordingly, states which adopt the Model Rules should also adopt as an addition to the Model Rules a general class action ethical rule which will provide such a foundation.

In the Model Rules format, proposed Model Rule 3.10 would provide 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.

The continued emergence of ethical problems in class action practice appears assured, perhaps due in part to heightened awareness of ethical concerns in general. Beyond providing a foundation for the orderly development of a body of ethical opinions and comments, the proposed Model Rule 3.10 would also provide courts with a more stable ground on which to evaluate the conduct of class counsel in appropriate cases.[143] Finally, the proposed Model Rule 3.10, and its attendant ethical opinions and comment, would fulfill the purpose of the Model Rules by offering guidance to the practitioner.[144] In their present form the Model Rules do not fulfill

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a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

MODEL RULES at 3.

143. *See* text accompanying notes 1-13 *supra*. The proposed MODEL RULES Rule 3.10 would, for example, also require class counsel to disclose to the court conflicts within the class. *E.g.*, Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). *See also* note 76 *supra*.

144. MODEL RULES, Chairman's Introduction, at i-vi. Professor John Sutton, Jr., suggested four goals for a code of ethics for lawyers, as follows:

(1) A proper code of ethics must appeal to the reason and understanding of the lawyer, and yet it must also serve as a basis for discipline. (2) A proper code of profes-

that purpose for the class action practitioner.

We can, of course, only speculate about the interpretation that might be placed upon proposed Model Rule 3.10 by the American Bar Association and the states; however, a brief review of the problems discussed above in relation to Model Rule 3.10 illustrates the practical results of its application.

For example, class counsel and class members would be allowed, subject to the restrictions of Model Rules 4.1 and 4.3,[145] to solicit *additional* class members. If joinder of additional class members would materially improve the chances of class certification or success, then the interests of the class would place an affirmative duty upon class counsel to solicit such additional members or secure the assistance of others toward that end.

Model Rule 3.10 would prohibit an attorney from combining the role of class counsel and class representative, except in the most unusual of circumstances, because of the substantial conflict of interest inherent in the dual roles and the potential harm to the class interests that such a conflict portends. Disqualification of a class representative from doubling as class counsel would be imputed to the class representative's firm for the same reasons.

Class counsel, under Model Rule 3.10, would be required to guarantee class notice costs, if necessary to obtain class certification or otherwise protect the interests of absent class members. In addition, class counsel would be required to request class certification without delay and in accordance with "reasonable promptness" and "reasonable effort . . . to expedite litigation" standards of Model Rule 1.3 and 3.2.[146] One effect of this application of Model Rule 3.10 would be a greater responsibility for class counsel to investigate claims thoroughly before and after filing class actions and to narrow the class promptly through amendment of pleadings or otherwise.

In the negotiation and settlement context, Model Rule 3.10

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sional responsibility must identify, explain and preserve those principles that are basic to the proper functioning of the legal profession in modern society. (3) A proper code of professional responsibility must provide the lawyer serving as advocate with specific, authoritative standards. (4) A proper code of professional responsibility must be in harmony with proper, modern methods of marketing legal services.

J. Sutton, *Re-evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 133 (1966).

145. *See* notes 131-135 *supra* and accompanying text.

146. *See* text accompanying notes 93 & 94 *supra*.

would clearly place class interests above those of the individual class representative and any subclass. Although settlements providing different recoveries for various subclasses would be generally unaffected by Model Rule 3.10,[147] negotiation of a settlement excluding a portion or all of the class (as defined in the pleadings) would be properly accomplished only after prior amendment of the pleadings accompanied by a concurrent determination of whether class members, whose claims are to be deleted, should be notified.[148] Class counsel may readily accept such a procedure in cases in which modification of the class definition strengthens the likelihood of certification, but resist the requirement that modification of the class definition precede negotiation of a less-than-classwide settlement. However, the essence of such resistance is counsel's desire to use the class definition as leverage to exact a better settlement for less than the entire class. Ethical concerns should not be subordinated to a concern for leverage in negotiation. Class counsel should not be able to negotiate the abandonment of some clients in order to benefit others.[149] Accordingly, class counsel should be required to modify the class definition prior to negotiating a settlement on behalf of a portion of the class.

From the defense standpoint, the prior amendment settlement procedure would obviously reduce the "blackmail" value of a class action. However, it would also render improper defense-initiated sweetheart settlement offers, prompted on occasion by a desire to avoid the effect of class notice,[150] for less than classwide relief. Furthermore, the procedure would substantially strengthen class counsel's position in cases in which the class representative desires either to drop or abandon the case for an attractive individual settlement.[151]

The "plaintiff only" settlement would not become extinct. Such settlements, however, could only result from the class representative and class counsel abandoning all class claims prior to ne-

147. While substantial recoveries for some class members, with very nominal recoveries for others, could be contrary to proposed MODEL RULES Rule 3.10 depending on the circumstances of the case, such a settlement would also undoubtedly result in a higher number of opt outs and objections by absent class members.

148. Independent of ethical considerations, the courts have the discretionary authority to order such notices under FED. R. CIV. P. 23(d)(2). In addition, rule 23(d)(4) expressly authorizes amendment of pleadings as provided in proposed MODEL RULES Rule 3.10.

149. *See* note 100 *supra*.

150. *See* note 104 *supra*.

151. *See* note 103 *supra*.

gotiating such a settlement. Although a bitter pill for class counsel to swallow, the interpretation of Model Rule 3.10 is justified by counsel's ethical responsibilities to the class.

In regard to the negotiation of attorney's fees for class counsel, Model Rule 3.10 would not mandate the *Prandini* two-step approach,[152] since a somewhat more flexible technique can achieve the same result.[153] But the simultaneous negotiation of the settlement of the merits and fees would be improper, regardless of whether a waiver of fees is involved.

Finally, solicitation of opt outs and individual settlements from absent class members by the class opponent would be improper under Model Rule 3.10, unless the solicitation was made with the consent of the class counsel or the absent class member's own counsel. Class counsel would be under an obligation to communicate individual settlement offers or opt out solicitations to members of the class, ordinarily at the class opponent's expense. Refusal of the class counsel to communicate such solicitations by the class opponent would provide the class opponent with a basis for requesting leave of court to proceed on its own with the desired solicitations.[154]

III. CONCLUSION

The use of class actions and the ethical problems that accompany their use will continue to increase in the future. Consideration and adoption of the *Model Rules of Professional Conduct* provide an excellent opportunity for the American Bar Association and the state bar associations to clarify the responsibilities of class counsel and to provide the guidance that class action practitioners and the courts deserve. Model Rule 3.10, proposed as part of this article, furnishes the foundation to achieve those goals.

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152. *See* text accompanying notes 114-117 *supra*.
153. *See* text accompanying note 120 *supra*.
154. *See* H. DRINKER, *supra* note 105, at 201-03.