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Who Will Regulate Class Action Lawyers?

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INTRODUCTION

In 2003, I published an article entitled "Who Should Regulate Class Action Lawyers?"[1] In that article, I defended the decision of the American Bar Association's ("ABA") Commission on Evaluation of the Model Rules of Professional Conduct (the "Ethics 2000 Commission"), for which I was Chief Reporter, not to propose any substantial amendments to the ABA Model Rules of Professional Conduct ("Model Rules") concerning the ethical conduct of class action lawyers.[2]

There are many ethical issues that confront class action lawyers.[3] In my 2003 article, I focused on conflicts of interest—an issue that courts and commentators have had difficulty resolving and a subject on which I have frequently written.[4] My defense of the Ethics 2000

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1. Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477 [hereinafter Moore, *Who Should Regulate?*].

2. The Ethics 2000 Commission made this decision in the context of suggestions by several commentators that the Model Rules should specifically address the ethical conduct of class action lawyers. *See* sources cited *id.* at 1479 n.16 (discussing proposals by Brian Waid and Richard Zitrin). For criticism of this decision, see Mohsen Manesh, *The New Class Action Rule: Procedural Reforms in an Ethical Vacuum*, 18 GEO. J. LEGAL ETHICS 923, 946 (2005) ("Rather than deferring to procedural requirements, the *Model Rules of Professional Conduct* ought to specifically address the duties of class action lawyers.") (footnotes omitted). *But cf.* Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 961 (2004) (concluding that modifications of the Model Rules are unnecessary in the class action context because the problem is not that the Model Rules have failed but that, "for the most part, they have not been tried").

3. These issues include solicitation, application of the no-contact rule, the reasonableness of attorneys' fees, and the attorney-witness rule. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1477 & nn.2–3, 1478 & n.4 (noting issues class action lawyers frequently encounter).

4. Moore, *Who Should Regulate?*, *supra* note 1, at 1481–82. *See, e.g.*, Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 FORDHAM L. REV. 2541 (2012) (discussing how to regulate lawyers in a global practice); Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm,"* 18 GEO. J. LEGAL ETHICS 521 (2005) (comparing approaches to professional responsibility problems in the United States and the United Kingdom); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Emerging Issues in the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497 (1998) (exploring conflicts issues that in-house counsel face); Nancy J. Moore, *Restating the Law of Lawyer*

Commission's decision began with an attempt to narrow the scope of the problem. First, I argued that the class should be viewed as a type of entity client, rather than an aggregation of individual clients or quasi-clients with actual or potentially conflicting interest.[5] If the client is the class itself, then the class lawyer can ignore intra-class conflicts that might otherwise pose an ethical problem under conflict of interest rules, such as Model Rule 1.7.[6] Of course, intra-class conflicts do raise important questions concerning the adequacy of representation under Rule 23 of the Federal Rules of Civil Procedure,[7] but they do not, and should not, come within the purview of Model Rule 1.7.

Second, to further narrow the scope of the problem, I argued that conflict of interest rules like Model Rule 1.7 do not address the type of conflict inherent in all principal-agent relationships; that is, the lawyer's temptation to favor her own interest in securing a large fee at the expense of the client's—in this case the class's—interest in recovering a large damage award.[8] These "agency problems"[9] are endemic to *all* lawyer-client relationships and are addressed by other ethics rules, such as Model Rule 1.5, which requires reasonable legal fees.[10] These problems are also addressed whenever a court determines what fee to award a lawyer representing a class.[11] Model Rule 1.7, however, is

Conflicts, 10 GEO. J. LEGAL ETHICS 541 (1997) (offering support for the American Law Institute's *Restatement (Third) of the Law Governing Lawyers* treatment of conflicts of interest); Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819 (1996) (describing situations in which lawyers may encounter conflicts of interest issues when representing children); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982) (arguing for a new general standard based upon client capacity for informed and voluntary consent); Nancy J. Moore, *Disqualification of an Attorney Representing Multiple Witnesses before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1 (1979) (exploring the ethical issues raised by multiple representation of grand jury witnesses and suggesting possible standards for the disqualification of a common attorney).

5. Moore, *Who Should Regulate?*, *supra* note 1, at 1482–89 (arguing that viewing the class as an entity client lends itself to more efficient application of ethics rules).

6. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012).

7. FED. R. CIV. P. 23. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1051 (discussing the need to address the protection of the class against conflict not only with respect to the lawyer's obligations, but also with respect to conflicts within the class).

8. Moore, *Who Should Regulate?*, *supra* note 1, at 1490–91.

9. *Id.* at 1490.

10. MODEL RULES OF PROF'L CONDUCT R. 1.5(a).

11. *See, e.g.*, Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000) (proposing greater judicial intervention to prevent lawyers from putting their own financial interests above the interests of their clients and obtaining unreasonably large fee awards and reimbursement for unreasonable costs and expenses in class actions and other mass tort lawsuits).

reserved for conflicts that arise with respect to a *particular* lawyer; for example, a lawyer who represents individual clients whose interests may conflict with the interest of the class as a whole.[12]

At this point in my 2003 article, having narrowed the scope of the problem to those types of class counsel conflicts that ordinarily present conflict of interest problems under ethics rules such as Model Rule 1.7, I considered a typical conflicts problem in which a lawyer simultaneously represents a plaintiff class and individuals either inside of or outside of the class with interests that might differ from the class as a whole.[13] For example, in *Georgine v. Amchem Products, Inc.*, class counsel represented individual clients who were not part of the class but who had similar claims against the defendants.[14] A material limitation conflict existed because the lawyer's duty to increase the amount paid to the non-class, individual clients conflicted with the lawyer's duty to increase the amount available to the class.[15]

Concerning the risk to the individual clients, I argued that Model Rule 1.7 should apply in full force.[16] In other words, if there is a significant risk that the lawyer's duty to the class will materially limit the lawyer's representation of the individuals, then the individuals are entitled to full disclosure of the existence and implications of the conflict.[17] Of course, under Model Rule 1.7, the individual clients are

12. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1491 (discussing specific examples of conflicts of interest with respect to a particular lawyer, such as a previous relationship with the defendant). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.8 (discussing personal conflicts of interest).

13. Moore, *Who Should Regulate?*, *supra* note 1, at 1493–98.

14. 157 F.R.D. 246, 293–94 (E.D. Pa. 1994), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). For a discussion of *Georgine* and how the case illustrated the application of Model Rule 1.7 to conflicts between the class and non-class clients with claims similar to the class, see Moore, *Who Should Regulate?*, *supra* note 1, at 1498–500.

15. Model Rule 1.7 describes two types of conflicts of interest: a directly adverse conflict, in which the lawyer will be representing one client in a matter "directly adverse to another client," even when the lawyer does not represent the other client in that matter, MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1), and a material limitation conflict, in which "there is a significant risk that the lawyer's representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer." *Id.* R. 1.7(a)(2). In *Georgine*, a material limitation existed because the defendants almost certainly had limited resources with which to satisfy all plaintiffs and wanted to keep their total exposure as low as possible. *See* 157 F.R.D. at 263 ("[F]acing enormous liabilities and overwhelming costs to defend thousands of asbestos-related claims, many asbestos producers were on the road to bankruptcy, including a number of companies previously considered to be immune from financial difficulty.").

16. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1492–98 (arguing a lawyer must avoid representing potential conflicting interests "by informing existing clients of the risks" of taking on a class as an additional client). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012) (providing a definition of informed consent under the Model Rules).

17. For example, in *Tedesco v. Mishkin*, class counsel simultaneously represented a class and

entitled to give their informed consent to the conflict, in which case the lawyer may proceed with the conflicted representation.[18]

The problem concerning the risk to the class, however, is that no mechanism currently exists by which the lawyer may inform the class of conflicted representation and receive its consent.[19] If Model Rule 1.7 applies to this aspect of the conflict, then the most likely answer is that the representation simply cannot proceed because the class client has not given its informed consent.[20] But in my view this is not a satisfactory solution because often the conflict is minimal, and there may be advantages to proceeding with that particular lawyer; for example, the lawyer's familiarity with the underlying facts and legal questions as a result of her existing representation of the individual clients may offer a significant benefit to the class.[21]

I then concluded that the problem could be solved in one of two ways. First, state courts could rewrite the ethical conflicts rules—for example, a state's version of Model Rule 1.7—to take account of this issue.[22] Second, class action law could trump rules of professional conduct in these situations, in which case judges supervising class actions should address the risks to the class when determining the adequacy of class counsel's representation under Rule 23 or its state equivalents.[23]

In my 2003 article, I expressed a strong preference for the second option, arguing that ethics code drafters have neither the experience nor the authority to determine the appropriate relationships between class

an individual member of the class who, as co-trustee of one of the investments funds at issue, could have been named as an additional defendant. 689 F. Supp. 1327 (S.D.N.Y. 1988). Acknowledging the conflicts of interest, the court removed the co-trustee as a named representative of the class, but refused to disqualify class counsel; instead, the court directed that class counsel withdraw from representing the co-trustee on an individual basis. *Id.* at 1330. My opinion is that class counsel violated Model Rule 1.7 when he failed to adequately inform the co-trustee of the risks involved in the simultaneous representation of the co-trustee and the class of which he was a member.

18. MODEL RULES OF PROF'L CONDUCT R. 1.7(b).

19. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1499–1500 (explaining that class entities "do not currently have such a decisional mechanism").

20. *See id.* at 1483 (explaining the general ethical rule addressing concurrent conflicts of a lawyer and the requirement of obtaining informed consent from each affected client). *But see* Sharp v. Next Entm't, Inc., 78 Cal. Rptr. 3d 37, 47, 54 (Ct. App. 2008) (deciding against disqualifying class counsel on the grounds that the class representatives effectively waived class counsel's conflict of interest on behalf of the absent members of the class).

21. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1500–01.

22. *See id.* at 1479 n.16 (citing proposals for amendments to the Model Rules).

23. *See id.* at 1501–03 (explaining that class action law should clearly require courts to consider class counsel's conflicts as a substantial factor in determining the adequacy of representation under Rule 23).

counsel and the class.[24] Moreover, because courts supervising class actions already have an obligation to monitor the adequacy of class counsel representation, they are clearly in the best position to address any threat to the adequacy of that representation when class counsel has an ethical conflict arising from the simultaneous representation of one or more non-class clients.[25]

I. RECENT ACTIVITY (AND THE ABSENCE THEREOF)

Since the publication of my article nearly a decade ago, there have been several developments (or non-developments) that bear on my arguments and my proposed solution.

First, there has been no clear resolution of the identity of class counsel's client; that is, whether class counsel represents the class as an entity client or the individual members of the class (or even whether class counsel has any client at all, in the meaningful sense of that term).[26] Indeed, some problems with the entity theory have been raised with respect to the conduct of class counsel, not only prior to class certification but also during the time prior to the filing of a class action lawsuit.[27] For example, whom does a lawyer represent when the lawyer purports to negotiate the settlement of a potential class action claim when no lawsuit has yet been filed?

I have served as an expert witness in several cases in which this situation arose. In one case, former plaintiffs' lawyer Melvyn Weiss[28]

24. *Id. See also* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2004-01 (2004) [hereinafter N.Y.C. Ethics Op. 2004-1), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2004-opinions/814-lawyers-in-class-actions (stating that the Committee lacked "both the jurisdiction and the ability to promulgate an authoritative theory of class action representation").

25. In addition to conflicts with other current clients, material limitation conflicts may arise under Rule 1.7 when a lawyer has conflicting personal interests or when the lawyer owes conflicting duties to others, including former clients. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2012).

26. *See, e.g.*, Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1941–946 (2011) (discussing the two categorizations of the identity of the class: an aggregation of individuals or an entity); *cf.* Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*, 49 OSGOODE HALL L.J. 1, 13–24 (2011) (discussing a similar issue under Canadian law).

27. This issue was also addressed in my 2003 article. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1486 ("Who is the lawyer's client prior to certification? Must it be the named representatives?").

28. Weiss pleaded guilty to a federal racketeering charge in 2008 in connection with a twenty-five year kickback scheme designed to bring class action clients to his firm. Tom Gilroy, *Criminal Conduct: Melvyn Weiss of Milberg Weiss Agrees to Plead Guilty in Legal Kickback Case*, 24 LAW. MANUAL PROF'L CONDUCT (BNA) 174, 174–75 (2008). He was subsequently disbarred. Carolyn Whetzel, *Criminal Conduct: Milberg Weiss Co-Founder Sentenced to 2-1/2 Years for Kickback Schemes*, 24 LAW. MANUAL PROF'L CONDUCT (BNA) 295, 295 (2008).

negotiated the settlement of a potential class action without having filed a class action lawsuit or even signed up potential class representatives.[29] Although he had individual clients with similar claims, Weiss apparently did not discuss with them the fact that he was negotiating a settlement of their claims in the context of a broad class action until the negotiations were complete.[30] When questioned about his obligations to the putative class at the time he was negotiating a settlement of its claims, Weiss responded that he had no duty to the class because prior to the filing of a lawsuit, no class existed.[31]

Second, new questions have arisen concerning the precise nature of the relationship between class counsel and the named representatives of a class, particularly during the interim period when a class-wide settlement is being negotiated but no class action lawsuit has been filed. Consider the following hypothetical based on another case in which I served as an expert witness.[32] A woman signs an individual representation agreement with a lawyer. The agreement identifies the woman as a client, but also advises her that if and when a class action lawsuit is filed, she will become a class representative with the limited ability to direct or fire the lawyer for the class.

Assume that the lawyer then begins negotiating with the potential

29. *See* Simon v. KPMG LLP, No. 05-CV-3189 (DMC), 2006 WL 1541048, at *9–10 (D.N.J. June 2, 2006) (approving the settlement with brief reference to an earlier motion to disqualify class counsel based on allegations of conflicting interests); Transcript of Proceedings at 23–52, Simon v. KPMG LLP (D.N.J. Oct. 31, 2005) (No. 00-6003) [hereinafter Weiss Transcript] (on file with author) (testimony of Melvin Weiss in hearing). Weiss had individual clients but apparently had not consulted with any of them concerning his class-wide negotiations with the defendant. *See supra* note 28 and *infra* notes 30–31, and accompanying texts (discussing Weiss's belief that he had the freedom to negotiate with the defendants on behalf of his individual clients and his belief that there was no class).

30. Weiss Transcript, *supra* note 29, at 30–31. When asked who had given their permission for Weiss to negotiate a class-wide settlement, Weiss responded, "Our clients always give us the freedom to negotiate resolutions with the defendants who they are suing, and we use our best judgments to get the best result for them." *Id.*

31. *See id.* at 35.

32. Bartle v. Berry, 953 N.E.2d 243 (Mass. App. Ct. 2011) (concerning two class attorneys, one of their firms, and a former class representative, each of whom filed multiple complaints against other attorneys who had filed separate class action lawsuits resulting in the withdrawal of a tentative class action settlement). I was retained by the plaintiffs in that lawsuit after I testified in a related action that went to trial, resulting in a multimillion dollar verdict for the plaintiffs. *See* Glenwood Farms, Inc. v. Ivey, No. 03-CV-217-P-S, 2006 WL 521852, at *1 (D. Me. Mar. 2, 2006) (holding that the defendants' objections to Nancy Moore's expert report were untimely and therefore denied); Andrew Lavoott Bluestone, *$10 Million Legal Malpractice Poland Springs Verdict*, N.Y. ATT'Y MALPRACTICE BLOG (Feb. 15, 2007), http://blog.bluestonelawfirm.com/articles-10-million-legal-malpractice-poland-springs-verdict.html. In *Bartle*, the court affirmed the defendants' motion for summary judgment on various grounds, some of which were contrary to an affidavit I had executed in an earlier proceeding. *See Bartle*, 953 N.E.2d at 256; *Glenwood Farms*, 2006 WL 521852, at *1.

defendant to settle the claims of the putative class. The woman becomes dissatisfied with the lawyer, and attempts to fire that lawyer and hire a different lawyer to continue the negotiations. The lawyer withdraws from the negotiation, as requested, but then begins to represent other individual consumers, in other states. Then, the lawyer files class action lawsuits on behalf of these other consumers against the same company, over the express objection of the woman, who is justifiably concerned that the company will walk away from a tentative settlement if hostile lawsuits are filed at that time.

In the several related malpractice cases in which I served as an expert,[33] the lawyer[34] argued that his actions were justified by a continuing obligation to the putative class.[35] In my view, once he was discharged by the woman, the lawyer owed no such obligation. I further opined that the lawyer failed to adequately confront and resolve the conflict of interests between his new class representative clients and the woman who was now his former client.[36]

Third, another variation on ethical conflicts in class actions that has received increasing attention in recent years is what Richard Stuhan and

33. *See supra* note 32 and accompanying text.

34. There were actually several lawyers and their law firms who were defendants in those cases, but for purposes of simplicity, I refer to a single lawyer in discussing the hypothetical and the actual case. In addition, there were multiple plaintiffs, including not only the former class representative, but also the lawyers who represented the individual plaintiffs, and, in the *Glenwood* lawsuit, individual businesses that had similar complaints against the same defendant but that were not members of the consumer class. The plaintiff lawyers, as well as the defendant-lawyers, were simultaneously representing both the individual businesses and the putative class. *See Glenwood Farms*, 2006 WL 521852, at *1; *Bartle*, 953 N.E.2d at 246.

35. In *Bartle*, the Massachusetts Appeals Court interpreted the woman's attorney-client representation agreement as conceding that the defendant lawyers had a primary duty to the consumer class, rather than to her personally. 953 N.E.2d at 254–55. The court did not address the fact that this part of the contract referred to a situation in which a class action lawsuit had been filed. *Id.* The court further found that once the defendant lawyers had been fired by the woman and retained by new class representatives, the lawyers owed a duty to the class as a whole. *Id.* at 255. The court did not address the question of whether the lawyer continued to owe a duty to the class during that interim period before being retained by the new class representatives or the question of whether agreeing to represent the new class representatives created a conflict of interest with their former client. *See, e.g.*, D.C. Bar Legal Ethics Comm., Formal Op. 275 (Nov. 19, 1997), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion275.cfm [hereinafter D.C. Bar Op. 275] (concluding that law firm contacted by potential class action plaintiff may not, after failing to agree on terms of engagement, seek to identify another client to represent in the same or substantially related matter).

36. *See, e.g.*, Affidavit of Professor Nancy J. Moore, Bartle v. Berry, 953 N.E.2d 243 (Mass. App. Ct. 2011) (No. 06-1858-BLS1). In my affidavit I also addressed conflicts of interest relating to the defendant lawyers' simultaneous representation of both the individual business clients and the class, and the effect of that multiple representation on the propriety of filing class action lawsuits on behalf of their new clients. *Id.* These conflicts were not addressed by the *Bartle* court.

Sean Costello describe as "sibling class actions," in which a lawyer files separate class action lawsuits against the same defendant in different courts, often on unrelated matters.[37] Stuhan and Costello argue that the filing of such lawsuits should be presumed to be inadequate representation under Rule 23,[38] but this contention may not be appropriate in all cases.[39] In any event, the legal malpractice cases I just described involved sibling class actions; that is, the lawyers filed multiple class actions on behalf of different class representatives in different states.[40] It is unclear in these cases whether the current class representatives were aware of each other's existence and whether they had given their informed consent to the filing of separate class action lawsuits. It is possible, however, that they gave their informed consent, and therefore the actions were not competing, but rather were part of a single, overall strategy of attempting to maximize the possibility of finding a court that would treat their claims favorably. Even if this was the case, it is questionable whether any such informed consent would be binding on the putative class once the lawsuits were filed.

Fourth, there has been much less development than I had hoped with respect to case law addressing the adequacy of representation when class counsel has an ethical conflict of interest of the type I have described. As Stuhan and Costello recently observed, this may be because Federal Rule 23(g), adopted in 2003, governs the appointment

37. *See* Richard G. Stuhan & Sean P. Costello, *Robbing Peter to Pay Paul: The Conflict of Interest Problem in Sibling Class Actions*, 21 GEO. J. LEGAL ETHICS 1195, 1198 (2008) (narrowly defining "sibling class actions" and proposing that bringing these kinds of class action suits against the same defendant raises a serious conflict of interest problem for the class attorneys). *See generally* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000) (discussing the problems created by multiple class actions filed on behalf of the same class or overlapping classes, and proposing potential legislative solutions).

38. *See* Stuhan & Costello, *supra* note 37, at 1199 (arguing that, because of competing class interests, the lawyer cannot escape "divided loyalties, [and therefore] cannot adequately represent any of the classes she purports to represent"). According to the authors, the presumptively inadequate nature of the dual representation follows from their characterization of the problem as "structural," although they do not explain what they mean by the use of that term. *Id.* This term is used in a similarly confusing manner in the recently adopted ALI Principles of Aggregate Litigation. *See* AM. LAW. INST.. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1) & cmt. d (2010). For my criticism of the use of this term when referring to conflicts of interest in class actions, see Nancy J. Moore, *The Absence of Legal Ethics in the ALI's* Principles of the Law of Aggregate Litigation*: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 724–28 (2011).

39. *See infra* note 51 and accompanying text (discussing material limitations on a class counsel's conflict of interests).

40. In those cases, however, there was the added complication that the lawyer's former client was attempting to negotiate a class action settlement (through another lawyer) with the same defendant concerning the same claims. *See supra* note 32 (discussing my expert witness service in *Bartle* and *Glenwood*).

of class counsel but fails to mention class counsel's conflicts as a factor a judge must consider in appointing class counsel.[41] Of course, such a factor *may* be considered, along with "any other matter pertinent to counsel's ability to fairly and adequately represent the interest[s] of a class," but there is nothing in the rule itself that directs a judge's attention to the significance of inter-class conflicts, as distinguished from intra-class conflicts.[42] As a result, such conflicts rarely come to the court's attention unless they are raised by opposing counsel, which is unlikely to occur when class counsel and the defendant have already negotiated a class-wide settlement.

II. IMPLICATIONS OF THIS RECENT ACTIVITY

These recent developments have not changed my basic analysis of the issues addressed in my 2003 article, although they have certainly caused me to think more deeply with respect to both pre-filing conflicts of interest and sibling class actions. More importantly, the ongoing uncertainty with respect to the questions presented here has led me to focus more of my attention on possible solutions.

First, I continue to believe that class counsel should be viewed as representing the class as a whole, as a form of entity, not only in the time period subsequent to the filing of a class action lawsuit, but also any time before the filing when the lawyer is actually negotiating a class-wide lawsuit. A recent New York City Bar Committee on Professional and Judicial Ethics (the "N.Y.C. Bar Ethics Committee") opinion concluded that it does not matter whether the lawyer is viewed as representing the class as an entity or whether each class member is considered to be a client, a quasi-client or merely a non-client to whom the lawyer owes fiduciary duties.[43] The N.Y.C. Bar Ethics Committee determined that labels are insignificant because the obligations of class counsel can be addressed on an issue-by-issue basis.[44]

I disagree. In my opinion, it is a bad idea to tell class counsel that they have no real client.[45] William S. Lerach, a well-known plaintiffs'

41. *See* Stuhan & Costello, *supra* note 37, at 1203–05.

42. *See* FED. R. CIV. P. 23(g)(1)(c)(ii) ("In appointing class counsel, the court may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.").

43. N.Y.C. Ethics Op. 2004-01, *supra* note 24, at *1.

44. *Id.* at *4. The Ethics Committee also noted that it lacked "both the jurisdiction and the ability to promulgate an authoritative theory of class action representation." *Id.*

45. Once the class action lawsuit is filed, a class representative is not necessarily an individual client in any meaningful sense of the term, although he or she might be, depending on the nature of the retention agreement. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1497. This is least likely to occur in consumer class actions where individual members do not have a

class action lawyer,[46] famously described the key to his success by boasting, "I have the greatest law practice in the world. I have no clients."[47] I would much rather send class counsel a very different message: "Yes, you *do* have a client, and that client is the class itself."[48]

Second, I continue to believe that individual clients of a lawyer deserve the full protection of the rules of professional conduct, including conflict of interest rules such as Model Rule 1.7. Whether individuals who may or will serve as class representatives are traditional clients of the lawyer should depend largely on the reasonable expectations of these individuals. On the one hand, as in my earlier hypothetical in Part I, if a lawyer signs an individual client retention agreement with a potential class representative, then in my view that individual is a traditional client, that is, up until the time that the lawyer files a class action lawsuit. At that time, class representatives lose some of the attributes of a traditional client, which the lawyer is obligated to explain at the time of the initial retention.[49] On the other hand, if a lawyer does not want to form a traditional lawyer-client relationship with a potential class representative—for example, when the individual has a small claim that cannot be prosecuted except in a class action—

significant financial stake in any potential financial award. *See id.* In any event, once a lawsuit is filed, the class representatives are clearly limited in their ability to direct the lawyer. *See, e.g.*, FED. R. CIV. P. 23(g)(1) advisory committee's note (class representatives have no "unfettered right to 'fire' class counsel" and may not "command class counsel to accept or reject a settlement proposal").

46. Lerach, a former partner of Melvyn Weiss, also pleaded guilty in connection with the same kickback scheme in which Weiss was involved. *See* Michael Parrish, *Leading Class-Action Lawyer is Sentenced to Two Years in Kickback Scheme*, N.Y. TIMES, Feb. 12, 2008, http://www.nytimes.com/2008/02/12/business/12legal.html. Like Weiss, Lerach was disbarred. *See* Lerach on Discipline (Feb. 10, 2009) (No. S169139), *available at* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1900817&doc_no=S169139.

47. Karen Donovan, *Huh?* I'm *the Lead Plaintiff*?, THE NAT'L L.J., May 24, 1999, at A8 (quoting Lerach's comments to Forbes magazine).

48. Although she does not necessarily share my view of the class as an entity client, Professor Alexandra Lahav agrees that it is problematic to view a lawyer as "unmoored from a client." *See* Lahav, *supra* note 26, at 1940, 1946 (proposing an alternative view of "the class [as] a phantom client created by an act of the lawyer's imagination . . . to better understand the tensions and inconsistences in the procedural law," instead of the typical disconnected relationship between lawyer and client in class action suits). The debate among commentators concerning the entity theory of representation in class action continues unabated. *See, e.g.*, David Marcus, *Some Realism about Mass Torts*, 75 U. CHI. L. REV. 1949, 1987–97 (2008) (thoroughly discussing the arguments of both entity theory proponents and opponents and largely siding with the proponents); Bassett, *supra* note 2, at 974 n.232 (noting and explaining disagreement with the entity theory of class action representation).

49. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1497–98; *cf.* N.Y.C Ethics Op. 2004-01, *supra* note 24, at *2 (explaining that a lawyer should consult with clients about the advantages and disadvantages of a class action, including obligations clients will have in representing other class members).

then the lawyer may not owe that individual the duties owed to current, former, or even prospective clients, but only if the lawyer has made it clear from the outset precisely what the relationship entails.[50] In either event, if the lawyer begins negotiating with a defendant to settle potential class claims, then he or she also owes duties to the putative class (as a prospective client), regardless of whether a class action lawsuit has been filed.

Third, as for sibling class actions, there may or may not be conflicts of interest under Model Rule 1.7, depending on the likelihood that the lawyer's duties to either class will be limited by the lawyer's duties to the other class.[51] If there is a conflict of interest, then I agree with Stuhan and Costello that the conflict is one that ought to be resolved as a matter of class action law under Rule 23's requirement of adequate class representation.[52]

At this point, the most important issue for me is not precisely *how* these ethical conflicts are resolved, but rather that they *be resolved* in some fashion. The question then is how, when, and what stakeholder

50. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1497. If, however, the person has revealed confidential information to the lawyer in the process of exploring the possibility of forming a lawyer-client relationship, then the lawyer may owe the person the duties typically owed by a lawyer to a prospective client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18 (2009); D.C. Bar Op. 275, *supra* note 35.

51. *See, e.g.*, Fiandaca v. Cunningham, 827 F.2d 825, 829–31 (1st Cir. 1987) (finding a material limitation conflict when a legal services organization represented two separate plaintiff classes suing the state for inadequate housing facilities when the state made an offer to one class to temporarily house its members on grounds currently occupied by members of the second class over the objection of members of the second class). When two otherwise separate classes are suing for monetary relief on *unrelated* claims, a material limitation conflict should arise only when there is a genuine question of whether the defendant can satisfy both sets of claims or whether the defendant might try to settle them together. *See, e.g.*, Kuper v. Quantum Chem. Corp., 145 F.R.D. 80 (S.D. Ohio 1992) (conflict existed when counsel represented proposed class of stock ownership plan participants in suit against their employer while simultaneously representing class of bondholders in another action against employer; plaintiffs sought recovery from common pool of assets and employees asserted that dividend payment to bondholders "substantially denude[d] [the employer defendant] of its liquid assets and net worth"); Jackshaw Pontiac v. Cleveland Press Publ'g Co., 102 F.R.D. 183, 192 (N.D. Ohio 1984) (finding it "not inconceivable that the amount sought by [both plaintiff classes] will exceed the total assets" of the defendants).

52. *See* Stuhan & Costello, *supra* note 37, at 1199 (arguing that under Rule 23, "any lawyer who purports to bring sibling class actions should *presumptively* be deemed inadequate to serve as class counsel"). In their article, Stuhan and Costello discuss primarily the adequacy of representation under Rule 23; although they briefly mention Model Rule 1.7 as embodying the duty of loyalty owed by lawyers to their clients, they do not further address the application of Model Rule 1.7 with respect to the conflict between sibling class actions, except to note their view that "as a practical matter, ethical canons such as Model Rule 1.7 are simply unworkable in the class action context." *Id.* at 1202–05. They do, however, agree that "it would be a mistake to jettison ethical considerations in the class certification decision-making process altogether" and that "[t]he rules, while not necessarily controlling, should inform the analysis." *Id.* at 1206.

will lead the way. Can state courts or bar ethics committees do more to amend or interpret their rules of professional conduct? What will spur class action courts to address these issues to a greater extent than they have done already?

As for state courts, I continue to be wary of amending the rules of professional conduct, given the lack of expertise among ethics code drafters[53] and the choice of law difficulties for federal class actions posed by the lack of uniformity among the state rules.[54] Yet, I encourage state bar ethics committees to issue opinions addressing conflicts of interest in class action cases, such as the recent N.Y.C. Bar Ethics Committee opinion.[55] Although I do not agree with all of the Committee's conclusions,[56] it did an excellent job of addressing the duties the lawyer owes to individual clients, including individuals who may become class representatives.[57] In addition, the Committee agreed with me that neither class representatives nor individual clients can consent to a conflict. The Committee understood that conflicts affect the interests of the class itself, and that only a court supervising a class action lawsuit has the authority to address that question, thereby making it clear that these are issues that class counsel is obliged to bring to the attention of the court.[58]

As for federal courts, I strongly favor at least some amendments to Rule 23. Such amendments cannot possibly resolve all of the issues I have raised, but they certainly can address some of them. For example, Rule 23 (in either text or commentary) should identify the class as the client of the lawyer, which is consistent with the existing rule and commentary to the effect that class counsel must act in the best interests of the class as a whole, even before class certification.[59] In addition,

53. *See, e.g.*, N.Y.C. Ethics Op. 2004-01, *supra* note 24 (explaining that the ethics code drafter lacked experience and authority to determine appropriate relationships between class counsel and the class).

54. For a discussion of the choice of law problems presented by class actions and other forms of aggregate litigation, in which cases may be filed in different courts and clients may reside in different states, see Nancy J. Moore, *Choice of Law for Professional Responsibility Issues in Aggregate Litigation*, 14 ROGER WILLIAMS U. L. REV. 73 (2009).

55. *See supra* note 43 and accompanying text (describing the conclusions of the N.Y.C. Bar Ethics Committee).

56. *See supra* notes 43–48 and accompanying text.

57. N.Y.C. Ethics Op. 2004-01, *supra* note 24, at *4.

58. *Id.* at *2–3.

59. *See* Moore, *Who Should Regulate?*, *supra* note 1, at 1486 (discussing then proposed Rule 23(g), including a statement of the Civil Rules Advisory Committee that pre-certification activities on the part of class counsel presuppose subsequent appointment as class counsel, and that "by later applying for such appointment counsel is representing to the court that the activities were undertaken in the best interest of the class") (internal quotation marks and citations omitted).

the Rule should require judges supervising class actions to inquire about and consider conflicts of interest arising from class counsel's representation of clients other than the class itself, both when initially appointing class counsel and when reviewing the adequacy of class counsel's representation. Along these lines, I favor Stuhan and Costello's proposal that inter-class conflicts should be treated as presumptively disqualifying or inadequate, thereby shifting the burden to class counsel to convince the court that any such conflicts are unlikely to adversely affect their representation of the class.[60]

Even in the absence of amendments to Rule 23, federal and state judges supervising class actions should clearly consider conflicts of interest and other ethical issues[61] as they are monitoring the performance of class counsel, including initial appointment and the subsequent determination of adequacy of representation. Both class counsel and defense counsel should raise any such conflicts issues with the court,[62] and judges should routinely request counsel to provide them with such information, as they are already permitted to do under Rule 23.

CONCLUSION

In 2003, I asked: "*Who* should regulate class action lawyers?"[63] Now, almost a decade later, I am asking a slightly different question:

60. Stuhan & Costello, *supra* note 37, at 1200. In addition to treating sibling class conflicts in this manner, I would include conflicts between the class and individual clients of class counsel, including clients either inside or outside the class, and any other conflicts arising under Model Rule 1.7. *See supra* note 52 (describing different material limitation conflicts under Model Rule 1.7(a)).

61. Concerning the relevance of both conflicts of interest and other ethical violations, see, for example, *In re* Cardinal Health, Inc. ERISA Litig., 225 F.R.D. 552, 557–58 (S.D. Ohio 2005) (rejecting (as part of selecting class counsel) application of firm on the basis of its conflict of interest problems as well as its "apparent transgressions" in another case in which the firm engaged in settlement negotiations with the defendant without informing the lead plaintiff).

62. As Stuhan and Costello note, defense counsel has an interest in raising such issues because lack of adequacy of representation may result in a collateral attack against a class judgment or settlement. Stuhan & Costello, *supra* note 37, at 1209–10. Nevertheless, defense counsel does not necessarily raise these issues, either because they are unaware of the facts or their implications or because "they may prefer to litigate against a weak or inadequate plaintiff or incompetent counsel." *Id.* at 1210. When class counsel and defense counsel jointly submit a proposed settlement to the court for its approval, the hearing should be viewed as an ex parte proceeding in which both counsel have an obligation to inform the court "of all material facts known to the lawyer that will enable the tribunal to make an informed decision." *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (2009). *See also* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1105 (1996) ("Fairness hearings are more akin to ex parte proceedings than adversarial ones.").

63. *See generally* Moore, *Who Should Regulate?*, *supra* note 1 (exploring the ethical issues implicated by class action litigation).

"Who *will* regulate class action lawyers and *when* will they do so?" The time has clearly come to begin to more seriously address and resolve the ethical issues I raised in 2003, as well as the related issues I have described in this Article.