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May Class Counsel Also Represent Lead Plaintiffs?

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May Class Counsel Also Represent Lead Plaintiffs?

Bruce A. Green & Andrew Kent*

Forthcoming in the Florida Law Review

ABSTRACT

For decades, courts and commentators have been aware that the potential for conflicting interests among the class representatives, class counsel, and absent class members is inherent in the class action device. Notwithstanding this realization and a substantial amount of scholarly and judicial commentary on class conflicts, one kind of conflict has not received due attention: the conflict that inevitably arises when class counsel also represents class members as individuals. We demonstrate that this conflict—so common to be almost invisible—arises from the very beginning of a putative class representation, and may create a fraught situation for a lawyer concurrently representing both the class (or putative class) and the class representative individually. We examine three situations in which these conflicts are most acute: holdouts (where the class representative holds out against a settlement that would benefit the class as a whole), sellouts (where the class representative could benefit personally by settling individual claims only), and payouts (where the class representative could use class action procedures to benefit personally at the expense of the class). We canvas potential solutions and conclude that radical ones—for instance, banning concurrent representation of a class and a class member individually—would do more harm than good. We therefore recommend more measured responses, primarily (1) greater disclosure of risks to individual clients by their attorneys, (2) greater judicial oversight, and (3) an amendment to Rule 23 of the Federal Rules of Civil Procedure, or its advisory committee notes, calling on courts to police the types of conflict we identify.

Introduction 2

I. Current Law and Practice: Who is the Client and How Should

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Class Conflicts Be Addressed?	10
A. The Unresolved Problem of Identifying the Clients	10
B. The Standard View of Handling Conflicts in Class Action Practice	17
II. Class Counsel’s Conflict of Interest in Representing Class Representatives	19
A. Holdout.....	21
B. Sellouts	24
C. Payouts	29
III. When Does Class Counsel’s Conflict of Interest First Begin?.....	31
A. Nascent Conflicts: The Class Certification Stage	33
B. Nascent Classes: The Beginning of the Lawsuit.....	35
IV. What Should Lawyers Do?.....	40
V. What Should Rulemakers and Trial Courts Do?.....	43
Conclusion.....	50

INTRODUCTION

An attorney seeking to represent a class ordinarily begins by representing one or more plaintiffs individually.¹ The clients may be

¹ See, e.g., 6 WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 19:2 (5th ed. 2011-19) [hereinafter *NEWBERG*] (“[A]n attorney seeking to represent, or representing, a class will almost certainly have an attorney-client relationship with the class representatives . . . If the class is certified, the individual client likely becomes the class representative and remains a client for all purposes.”). Similarly, formation of an individual attorney-client relationship is common when preparing to seek appointment as a lead plaintiff-class counsel tandem in a class action already filed by someone else. This occurs frequently in putative securities class actions, where the relevant statute makes clear that a class member who has not filed a complaint may be appointed to be the lead plaintiff. See 15 U.S.C. § 78u-4(a)(3)(B)(i).

For examples of retainer agreements which provide for an individual representation first, followed by an attempt to obtain class certification and add the class as a client, see Retainer Agreement—Class Action, ECF No. 84-2, *BABB Real Estate LLC v. Bennett Shelaine*, No. 3:10-cv-00119 (W.D. Wisc.); Retainer Agreement for Legal Services, ECF No. 57-1, *Lopez v. Delta Airlines Inc.*, No. 2:16-cv-04497 (C.D. Cal.); Schoengold & Sporn, P.C. Letter of Engagement, https://www.spornlaw.com/class_action.php; Shepherd Finkelman Miller & Shah LLP, Retainer Agreement, <http://www.hallandalebeachfl.gov/files/2012-05->

institutional investors who have potential securities law claims, or individuals with potential consumer law, employment, or civil rights claims, among others.² The practice raises important questions about conflicts of interest. Courts, class actions lawyers, and commentators have not sufficiently appreciated the problem.

Before filing a class action, the lawyer owes ethical and fiduciary duties—for instance, loyalty, competence and confidentiality—exclusively to the clients individually. Even after the lawyer files a class action complaint on behalf of the client, or files a motion for appointment of lead plaintiff and lead counsel in an already-filed action, the lawyer presumably must represent the client individually at least until the court certifies the class, because, until then, the named plaintiff, not the class—which does not yet exist—is the party to the lawsuit. Throughout this time, the individual client may seek counsel’s disinterested legal advice, first, about whether to bring an individual claim or a class action, and whether to apply to serve as a lead plaintiff in a class action, and later, about whether to seek a settlement, and other issues.

Case law, the professional literature, and publicly available retainer agreements³ indicate that as a class action lawsuit progresses, lawyers for the class customarily continue their individual representations.⁴ There is no evidence that the lawyers, perceiving that they have a conflict of interest,

02/Item%209C/SUPP_DOCS/Documents/Doc2.rtf.

² Professor Fitzpatrick’s study of all federal court class actions settled in a two-year period (2006 and 2007) found that the most common kinds of class actions were securities cases (37%), labor and employment (14%), consumer (13%), employee benefits (9%), civil rights (9%), debt collection (6%), antitrust (4%), and commercial (2%). See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEG. STUD. 811, 818 (2010).

³ Although we have not conducted a systematic study, we have reviewed several dozen retainer agreements that are publicly-available on PACER, the websites of class action law firms, and websites devoted to settlements in particular class actions. We limited ourselves to class action litigation in federal courts, and sought agreements from a variety of kinds of class actions. We found no agreements which discussed ending the individual client relationship after class certification. Many of the agreements we reviewed are cited throughout this article.

⁴ An individual representation alongside a class representation is more likely to occur where the litigation could have a more than nominal value to an individual plaintiff. See, e.g., Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. Ill. L. Rev. 1147, 1497-98. Cf. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 388 (2000) (discussing a mass tort action with both individual and class representation by the same lawyers).

commonly seek the informed consent of their individual clients or the approval of the court to the joint representation of both the class and lead plaintiffs as individual claimants.⁵

In a class action in federal court, district court judges principally address a lawyer's conflicts of interest at two stages. First, in deciding which lawyer to appoint as class counsel, and whether that lawyer can "fairly and adequately represent the interests of the class,"⁶ courts may consider whether the loyalty and competence of the lawyer would be compromised by the lawyer's duties to other current or former clients or by the lawyer's own competing interests.⁷ Second, in determining the fairness of proposed settlements,⁸ which are far more common than trials,⁹ judges may consider whether class counsel's negotiations or decisions were compromised by a conflict of interest.¹⁰ (Sometimes courts address

⁵ We have seen the occasional retainer agreement that hints at the issue. *See, e.g.*, Authority to Represent and Retainer Agreement for Class Action Lawsuit, ECF No. 84-2, *In re Ocean Fin. Corp. Prescreening Litig.*, No. 06-C-3515 (N.D. Ill.) ("I understand that if My Attorneys are approved as class counsel, they may owe duties and responsibilities to all members of the class, rather than to me alone. I hereby consent to My Attorneys acting as class counsel if the court so designates them.").

⁶ Fed. R. Civ. P. 23(g)(4). Before subsection (g) was added in 2003 specifically addressing the appointment of class counsel, "courts . . . scrutinized proposed class counsel . . . under Rule 23(a)(4)," Advisory Comm. Notes to 2003 Amendments to Rule 23, Fed. R. Civ. P., which requires that "the representative parties" be able and likely to "fairly and adequately protect the interests of the class." *See also* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626 n.20 (1997) (stating that the adequacy of representation inquiry involves looking at the "competency and conflicts of class counsel").

⁷ *See, e.g.*, Winiger v. SI Management L.P., 301 F.3d 1115, 1122 (9th Cir. 2002) ("[T]he question of whether there is an ethical conflict forms part of the class certification question.").

⁸ *See* Fed. R. Civ. P. 23(e)(2) ("If the proposal [for settlement] would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length . . .").

⁹ Fitzpatrick, *supra* note 2, at 812 ("[V]irtually all cases certified as class actions and not dismissed before trial end in settlement").

¹⁰ *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 856-57 (1999) (reversing approval of a class action settlement because, among other reasons, class counsel represented groups with conflicting interests); Mirfasihi v. Fleet Mortgage Co., 356 F.2d 781, 785 (7th Cir. 2004) ("Because class actions are rife with potential conflicts of interest between class counsel and class members, . . . district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole.") (citations omitted).

conflicts at other procedural stages, for instance, in determining the amount of attorneys' fees to be awarded.) There is a substantial literature on conflicts of interest in class actions.¹¹ But courts, class action lawyers, and commentators have not analyzed, and rarely even acknowledge, a conflict of interest that is ubiquitous in class actions—namely, the conflict of interest that inheres when counsel for a class concurrently represents class representatives as individual clients.¹²

Lawyers may assume that they can continue to represent class representatives throughout the lawsuit because the interests of the class representatives are largely aligned with those of the class. To certify a class, the court will have to determine that these proposed class representatives are “members” of the class, have claims “typical” of the class, and will “fairly and adequately protect the interests of the class.”¹³ Moreover, the class representatives agree to assume fiduciary duties to the class.¹⁴ But, in fact,

¹¹ On intra-class conflicts, that is, on the differing interests of different members of the class see, for example, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581; Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982). For a discussion of the conflict between the class counsel's financial interests and the class's interests, see John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000); Benjamin R. Edwards & Anthony Rickey, *Uncovering the Hidden Conflicts in Securities Class Action Litigation: Lessons from the State Street Case*, BUSINESS LAWYER (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3364470. For a discussion of the conflict when one lawyer represents different classes in different actions against the same defendant, 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 (2008).

¹² For acknowledgements of this problem, see Moore, *supra* note 4, at 1489, 1497-98, 1500-01; Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 393, 396, 398-99 (1987); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1446-54 (1981). For a summary rejection of the suggestion that a conflict could be posed for class counsel by also representing an absent class member individually, see *Borum v. Brentwood Village LLC*, No. 16-1723, 2019 WL 2437686, at *11 (D.D.C. June 11, 2019).

¹³ Fed. R. Civ. P. 23(a). On the standards governing the adequacy of class representatives, see, e.g., *Amchem Products*, 521 U.S. at 624-26 & n.20; Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely ‘Adequate’ Representation in Class Actions*, 38 GA. L. REV. 927, 965 (2004).

¹⁴ See, e.g., *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 704 (7th Cir. 2015) (stating that named plaintiffs have “fiduciary duties to the class”); *In re Cendant Corp. Sec. Litig.*,

the class representatives' interests may diverge from those of the class, either because the individuals' interests are not perfectly aligned with those of the class as a whole,¹⁵ or because the class action procedure enables them to benefit financially at the class's expense.¹⁶ Notwithstanding their fiduciary undertaking, representative plaintiffs may act in their own self-interest.¹⁷ Courts know this, because published decisions describe situations where class counsel could not competently and loyally represent both the class and a self-interested class representative.¹⁸ But courts do not require class counsel to avoid this risk by withdrawing from the representation of individual class members when the class is certified. Nor would that entirely solve the problem, since lawyers are expected to act in the interest of the putative class even prior to class certification, as described below.

This article explores the problem of conflicts arising from class counsel's concurrent representation of a class and individual representative plaintiffs.¹⁹ We analyze lawyers' duties and conflicts from the perspective of both federal court case law and the ethics rules adopted throughout the United States based on the American Bar Association's (ABA) Model Rules of Professional Conduct.²⁰ We acknowledge that ethics

404 F.3d 173, 198 (3d Cir. 2005) (“[T]he lead plaintiff serves as a fiduciary for the entire class.”); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978) (stating that from the time a class complaint is filed, class representatives have “a fiduciary obligation towards the members of the putative class they thus have undertaken to represent”).

¹⁵ See, e.g., 6 NEWBERG, *supra* note 1, § 19:7 (“Counsel in a class action lawsuit represents both one or more individual clients (as class representatives) and a large group of absent class members. It is somewhat inevitable that there will be fissures within such a large group of litigants.”); Miller, *supra* note 11, at 581 (observing that “[c]onflicts of interest pervade class action litigation” in part because of “the potential for members of the class to be differently situated”); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.14 at 492 (1986) (“Conflict is rife within the structure of the class itself. Most obviously, the class representative may have interests and goals that in fact are not shared by represented by absent class members.”).

¹⁶ See Part II, *infra*.

¹⁷ See, e.g., Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1151 (2009) (describing the “indifference” to the class’s interests of “class representatives . . . who are willing to represent the interests of class members only to the extent that such representations serve their own interests”).

¹⁸ See Part I, *infra*.

¹⁹ The same issues may arise when class counsel also represents an absent class member as an individual client. However, we focus on the representation of lead plaintiffs.

²⁰ See American Bar Association, Alphabetical List of Jurisdictions Adopting Model Rules (last updated March 28, 2018),

rules expressly address class actions only sporadically and provide little specific guidance.²¹ Further, as discussed below, some courts and commentators believe in disregarding ethics rules when they conflict with the goals and policies of class actions.²² Nevertheless, exploring the conflicts in class actions through the lens of conflict-of-interest rules²³ and doctrine is illuminating, because the rules encapsulate widely-shared, long-persisting views about conflicts that are deeply influential.²⁴ And the conflict rules govern all lawyers, including plaintiff-side class action lawyers. Even if the rules might be a poor fit for a class representation—a possibility we address below—the rules and the client interests they protect are indisputably relevant to assessing how class action lawyers are treating their individual clients. The rules’ framework provides a valuable benchmark against which to measure how well class action decisional law addresses the conflicts we discuss here. Although we support federal courts’ current approach of addressing conflicts primarily via case-by-case adjudication, highlighting how and where current case law has departed from the rules helps ground our suggestions for reforming case law.

Ethics rules recognize that lawyers have a “concurrent conflict of interest” if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.”²⁵ The conflict can be waived if the affected clients give informed consent in writing and the lawyer “reasonably believes” that he or she “will be able to provide competent and diligent representation to each affected client.”²⁶ Federal courts addressing conflicts issues in class actions often acknowledge this standard but freely adopt their own approach when they disagree with what the Rules seem to require. Federal courts and

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/. California adopted new rules based on the ABA Model Rules effective in November 2018. See The State Bar of California, New Rules of Professional Conduct Effective November 1, <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/new-rules-of-professional-conduct-effective-november-1>.

²¹ See, e.g., Moore, *supra* note 4, at 1478.

²² See *infra* note 68 and accompanying text.

²³ See generally Rules 1.7, 1.8, and 1.9, ABA Model Rules of Professional Conduct.

²⁴ See Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 99 (1996) (“The conflict rules, promulgated by courts based on the ABA models, are rooted in common law principles that are more than a century old.”).

²⁵ Rule 1.7(a), ABA Model Rules of Professional Conduct.

²⁶ *Id.*, Rule 1.7(b).

commentators frequently suggest that conflicts rules cannot be “mechanically” applied to the class action setting,²⁷ and that if ethics rules conflict with the needs of making class actions viable, the ethics rules must be softened or give way entirely.²⁸ For example, courts often do not disqualify class counsel who have what would ordinarily be a disabling conflict of interest.²⁹ This article illuminates what is lost when the Model Rules framework for conflicts is ignored or relaxed in class action practice.

The article begins by exploring the magnitude of the overlooked problem. Because a lawyer’s duties with regard to conflicts can be defined and analyzed by reference to identified clients, Part I of this article provides necessary background by discussing the surprisingly unresolved question of who are the clients of class counsel at various stages of litigation. Part I sets out the standard view among courts and commentators about how class representatives and absent class members should be protected from conflicts. Part II then describes three recurring situations where the respective interests of a class and the class representatives may diverge, at times dramatically, with the result that one lawyer could not loyally and competently serve both the class and its representative. Part III considers whether the joint representation constitutes a conflict of interest even before a class representative begins acting to the class’s detriment. First, it discusses whether the conflict of interest exists at the time of class certification, because, looking ahead, there is a significant risk that the class representative will act self-interestedly. Second, it considers whether lawyers have a conflict of interest even earlier, upon filing the class action, when lawyers first assume fiduciary duties to absent class members or to the nascent class.

The article then considers the implications of the initial analysis for plaintiffs’ lawyers, rulemakers and trial courts. Part IV argues that before lawyers file a class action, they must explain how the class action will limit

²⁷ See, e.g., *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 102 (2d Cir. 2003) (“[T]he traditional rules concerning conflict-free representation, applicable in non-class suits, ‘should not be mechanically applied to the problems that arise in the settlement of class action litigation.’”) (quoting *Agent Orange*, 800 F.2d at 19); 6 NEWBERG, *supra* note 1, § 19:1 (“Class action practice has a peculiar relationship to legal ethics. . . . [C]ourts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context.”).

²⁸ See *infra* note 68 and accompanying text.

²⁹ See, e.g., *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) (declining to disqualify former class counsel from presenting an unnamed class member’s challenge to a settlement, finding the conflict of interest was not sufficiently “serious”).

their ability to act and give advice for the individual's benefit, and how they will respond if a conflict of interest later precludes serving both the client and the class. This Part demonstrates the inadequacy of courts' and commentators' standard approach—namely, that class counsel will give primary loyalty to the class as a whole, and that the district court will monitor for and resolve conflicts when they become overt.

Part V suggests that federal rulemakers should amend Rule 23 to clarify that class counsel's conflicts should be addressed by the courts. Fearing that such an amendment may be unlikely, the remainder of Part V addresses courts' responsibility to protect the class under existing law. It asks whether trial judges have a responsibility under Rule 23 to forbid, or impose conditions on, a lawyer's joint representation of an individual class representative and the class or nascent class. This Part also discusses the implications of this dilemma for courts exercising their responsibility for interpreting both professional conduct rules and civil procedure rules as well as their responsibility for supervising class actions and class counsel to protect the interests of the class and ensure lawyers' compliance with professional expectations. Among other things, we conclude that courts should clarify the applicability of conflict rules; and they should clarify class counsel's responsibilities to the class vis-à-vis class representatives at different stages of the lawsuit.

In undertaking this inquiry, we focus on practice in federal courts, where most class actions are filed.³⁰ Although our analysis may also apply to collective actions brought under the Fair Labor Standards Act (FLSA), we exclude such suits from our coverage here. Both class actions and FLSA collective actions involve lead plaintiffs and lead counsel controlling a suit on behalf of other similarly-situated plaintiffs; however, the FLSA expressly provides that all aggregated plaintiffs have the status of formal parties.³¹ There are thus no "absent" class members in a formal sense in FLSA litigation. Nor do we address non-class aggregate litigation,³² although

³⁰ See Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 843 (2017) (observing that the Class Action Fairness Act of 2005 "has successfully shifted much class practice to federal court.") (citing Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1607-14 (2008)).

³¹ See 29 U.S.C. § 216(b); see also *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 225 (3d Cir. 2016) (discussing this difference between Rule 23 class actions and FLSA collective actions).

³² As it has become harder to certify mass tort cases as class actions, aggregation of those cases has increasingly occurred through the multi-district litigation (MDL) procedures in federal court. See, e.g., Andrew D. Bradt, "A Radical Proposal": *The*

multi-strict litigation (MDL) aggregation has much in common with class action representation.³³ Our analysis may have broader implications, but federal class actions afford a significant enough area on which to focus initially.

I. CURRENT LAW AND PRACTICE: WHO IS THE CLIENT AND HOW SHOULD CLASS CONFLICTS BE ADDRESSED?

Even after decades of litigation under Rule 23,³⁴ basic but crucial questions remain uncertain: Who or what are the clients of the class action lawyer? At what stage do client or client-like relationships begin? What duties and responsibilities do class counsel have? What rights and responsibilities do clients have? Can ethics rules (based on the ABA Model Rules) about client identity, conflicts of interest, and other topics, written for non-class actions, be applied to class actions also, or must ethics rules be ignored or modified in the class action context?

A. *The Unresolved Problem of Identifying the Clients*

Before filing a class action or seeking appointment as lead counsel in a putative class action filed by another, a lawyer ordinarily establishes a lawyer-client relationship in the matter with one or more members of the prospective class.³⁵ The lawyer's ethical and fiduciary duties of loyalty,

Multidistrict Litigation Act of 1968, 165 U. PA. L. REV. 831, 833 (2017); William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISC. 136, 144 n.40 (2013). Mass tort cases aggregated via MDL differ in relevant respects from the class actions we address here: All plaintiffs individually retain lawyers and negotiate individual contracts with them, and those representations continue as both a formal and practical matter throughout the litigation. See, e.g., Morris Ratner, *Achieving Procedural Goals through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J.L. ETHICS 59, 64 (2013).

³³ For instance, the court appoints a small subset of plaintiffs' lawyers as lead counsel to perform common benefit work for all plaintiffs, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal*, 63 VAND. L. REV. 107, 118 (2010), and the lawyers operate largely autonomously from client control, see Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1986 (2011).

³⁴ The modern version of the class action rule (Rule 23) was adopted in 1966. See Advisory Comm. Notes to 1966 Amendments to Rule 23. Use of the class action device increased substantially after these amendments. See generally Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 917, 921 (2017).

³⁵ Some lawyers specify that the relationship extends only to deciding whether to seek appointment as lead plaintiff and class counsel, and litigating any class certification motion

competence, and confidentiality belong exclusively to the individual client. The clarity of the lawyer's role ends here, however.

After filing the class action complaint but prior to certification, counsel has no "formal" attorney-client relationship with the putative class,³⁶ but according to case law and official commentary on Rule 23, "generally must act in the class's best interests."³⁷ Interim counsel for a putative class may be, but need not be, formally designated by the district court under Fed. R. Civ. P. 23(g)(3). Commentary on the Model Rules states that a lawyer seeking to represent a class is not "ordinarily" considered to have a lawyer-client relationship with putative absent class members for purposes of the principal rule on concurrent conflicts of interest, Rule 1.7(a).³⁸

After a class is certified and a lawyer is appointed to serve as class counsel, the lawyer owes the class most—but not all—of the ethical and fiduciary duties of loyalty that lawyers ordinarily owe to clients. Class counsel are said to be fiduciaries for the class as a whole.³⁹ This means that

that the lawyer determines to file, and that the representation will end if the lawyer decides not to proceed or the judge denies appointment. *See, e.g.*, Letter from Samuel H. Rudman, Robbins Geller Rudman & Dowd LLP, to Geoffrey D. Flagstad, ECF No. 80-14, *City of Cape Coral Municipal Firefighters' Retirement Plan v. Emergent Biosolutions, Inc.*, No. 8:16-cv-02624 (D. Md.) ("If the court does not certify the case as a class action, we will discuss representing you on a limited basis.").

³⁶ *See, e.g.*, ABA Formal Ethics Op. 07-445 ("A lawyer-client relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.").

³⁷ 6 NEWBERG, *supra* note 1, § 19:2. *See also* Advisory Comm. Notes to 2003 Amendments to Rule 23, Fed. R. Civ. P. ("Whether or not formally designed interim counsel, an attorney who acts on behalf of the class prior to certification must act in the best interests of the class as a whole.").

³⁸ The rule provides that: "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Rule 1.7, ABA Model Rules of Professional Conduct.

³⁹ *See, e.g.*, *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009) ("[C]lass counsel's fiduciary duty is to the class as a whole."); *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 704 (7th Cir. 2015) (stating that class counsel have "fiduciary duties to the class"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (same); *Keepseagle v. Perdue*, 856 F.3d 1039, 1056 (D.C. Cir. 2017) (same). *See generally* Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class."); 6

class counsel may not serve their own interests, or someone else's interests, such as those of a different client, to the detriment of the class.⁴⁰ In deciding whether to appoint a particular lawyer to serve as class counsel, courts are supposed to look closely at allegations that the lawyer in question owes duties to others or has personal interests that will compromise the lawyer's ability to give undivided loyalty to the class.⁴¹

Importantly, class counsel's duty of loyalty is to the entire class, not to any particular class member.⁴² Most courts and commentators believe that class counsel has a primary duty to the class and only a secondary duty to individual class members, even if there exists an attorney-client agreement to press individual claims in addition to class claims. The Advisory Committee Notes to the 2003 amendments to Rule 23, which added subsection (g) concerning appointment of class counsel, state that:

“[T]he primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients.”

This commentary apparently arose from debates about whether to adopt an “entity theory” of the class, under which the role of class representatives would decline or perhaps be eliminated.⁴³

NEWBERG, *supra* note 1, § 19:20 (“The class counsel-class representative relationship within the class action is treated as an attorney-client relationship.”).

⁴⁰ See, e.g., *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934, 938–39 (8th Cir. 1995) (stating that “certified representatives and the class counsel assume[] certain fiduciary responsibilities to the Class,” and as a result, “the certified representatives may not take any action which will prejudice the Class’s interest, or further their personal interests at the expense of the Class”).

⁴¹ See, e.g., *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Prods. Liab. Litig.*, 895 F.3d 597, 607-08 & n.14 (9th Cir. 2018); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 & n.12 (1st Cir. 2009); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.271 at 279 (2004).

⁴² See, e.g., *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1161, 1167 (9th Cir. 2013) (“Class counsel has a fiduciary duty to the class as a whole.”); *Agent Orange*, 800 F.2d at 18 (“[T]he class attorney’s duty does not run just to the plaintiff’s named in the caption of the case; it runs to all of the members of the class”).

⁴³ See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV.

A leading civil procedure treatise goes further than the Advisory Committee Notes in sidelining the individual in favor of the “class as a whole”:

“The appointed class counsel represents the interests of the class as a whole, however, not the interest of the class representatives, and must be guided accordingly. . . . [A] formal court appointment as class counsel will inevitably shift the attorney’s allegiance from the attorney’s former client (the named plaintiffs) to the attorney’s new client (the class).”⁴⁴

This treatise goes too far in suggesting that the lead plaintiffs have become “former” clients of class counsel. Most lawyers, courts, and commentators view the individual lawyer-client relationship with named plaintiffs as continuing, albeit in modified form.⁴⁵ Retainer agreements we have reviewed suggest that the attorney-client relationship formed prior to class certification generally is understood to continue.⁴⁶ But the treatise does capture the common view that after certification the primary loyalty of the class counsel is to the class as a whole, which must be preferred over lead plaintiffs, whether or not they are also individual clients,⁴⁷ and over

13, 26-327 (1996)

⁴⁴ 5 MOORE’S FEDERAL PRACTICE-CIVIL § 23:120[2][c][i] (citing Fed. R. Civ. P. 23(g)(4)).

⁴⁵ See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) (“Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed.”); *In re “Agent Orange” Prods. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) (“[T]he class attorney’s duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class.”); 6 NEWBERG, *supra* note 1, § 19:2 (“[A]n attorney seeking to represent, or representing, a class will almost certainly have an attorney-client relationship with the class representatives . . . If the class is certified, the individual client likely becomes the class representative and remains a client for all purposes.”).

⁴⁶ See, e.g., *Retainer Agreement—Class Action*, ECF No. 137-34, *Savanna Group, Inc. v. Trynex, Inc.*, No. 1:10-cv-07995 (N.D. Ill.); *Authorization*, ECF No. 16-5, *Pronesti v. Acument Global Tech., Inc.*, No. 2:08-cv-15086 (E.D. Mich.); Letter to Clemens Gaebel, Union Asset Mgmt. Holding AG, from William Narwold, Motley Rice (Nov. 7, 2006), ECF No. 242-4, *In re Dell Inc. Securities Litig.*, No. 1:06-cv-00726 (W.D. Tex.).

⁴⁷ See, e.g., *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978)) (“The attorneys themselves have an obligation to all of the class members, and ‘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.’”); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983)

absent class members.

This “solution” would fail in a regular setting of an attorney with two concurrent clients with conflicting interests. Under the Model Rules, a lawyer who undertakes a joint representation may not favor one co-client over another: doing so would be the very definition of a conflict of interest.

Although class counsel has something akin to an attorney-client relationship with those appointed by the court to serve as class representatives⁴⁸—for example, class counsel must consult with class representatives⁴⁹—this is not an ordinary attorney-client relationship. The

(“Class counsel’s duty to the class as a whole frequently diverges from the opinion of either the named plaintiff or other objectors.”); 6 NEWBERG, *supra* note 1, § 19:25 (stating that, when a class representative and individual client becomes an objector to class action settlement, “class action law unambiguously places upon class counsel a duty to act in the class’s best interest”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d(iii) (stating that, in case of serious differences within class or between class representatives and absent class members, “the lawyer may proceed in what the lawyer reasonably concludes to be the best interests of the of the class as a whole”); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.641 at 323 (2004) (“Class counsel must discuss with the class representatives the terms of any settlement offered to the class. Approval or rejection of the offer by the representatives, however, does not end the attorneys’ obligations, because they must act in the best interests of the class as a whole.”).

⁴⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f (“Class actions may pose difficult questions of client identification. For many purposes, the named class representatives are the clients of the lawyer for the class.”). *See also* 6 NEWBERG, *supra* note 1, § 19:2 (“[R]egardless of whether the class representative was initially an individual client of class counsel, once a court certifies a class and appoints class representatives and class counsel, those parties have an attorney-client relationship with one another.”); *id.* § 19:2 (“[O]nce a class has been certified, the default presumption is that there is an attorney-client relationship between class counsel and the absent class members.”).

⁴⁹ *See, e.g., Doe v. Briley*, No. 3:73-CV-6971, 2016 WL 6125437, at *5 (M.D. Tenn. Oct. 20, 2016) (stating that class counsel violated ethical rules requiring consultation with clients when negotiated on behalf of class without consulting or even knowing how to contact lead plaintiff); *Byes v. Telecheck Recovery Services, Inc.*, 173 F.R.D. 421, 427-29 (E.D. La. 1997) (finding putative class counsel inadequate because, among other reasons, he did not convey information to the class representative about settlement offers). *Cf. Olden v. Gardner*, 294 F. App’x 210, 220 (6th Cir. 2008) (“Class representatives are expected to protect the interests of the class. *See Fed. R. Civ. P. 23(a)(4)*. This requires that the class representatives exercise some oversight of the class counsel so as to avoid simply turning the conduct of the case over to the class counsel.”); *Twelve John Does v. D.C.*, 117 F.3d 571, 575 (D.C. Cir. 1997) (finding proposed class representatives adequate in part because of good “communication between class counsel and the class”). *But see Banyai v. Mazur*, No. 00-Civ-9806, 2004 WL 1948755, at *2 (S.D.N.Y. Sept. 1, 2004) (rejecting motion to replace class counsel and stating that it was not inappropriate for counsel to exclude class representatives from settlement negotiations).

class action lawyer does not take direction from the named plaintiffs, as a lawyer would from a client.⁵⁰ “[A] class representative may not singlehandedly veto a proposed settlement,”⁵¹ while under the Model Rules, a client has an absolute right to reject any proposed settlement.⁵² Under standard agency law principles, a client has the near-absolute right to access the lawyer’s files about her case. But class representatives generally do not have any unfettered right to access.⁵³ In a standard attorney-client representation, the client has the absolute right to fire her lawyer for any reason at any time; the only qualification is that, if litigation has been filed, the client’s discharge of counsel is subject to court approval.⁵⁴ But a class representative has no right to “replace class counsel at will.”⁵⁵ In the typical lawyer-client relationship, the client and lawyer privately negotiate a fee, subject to only extremely loose regulation under disciplinary rules.⁵⁶ In a class action, the court sets class counsel’s fee.⁵⁷

⁵⁰ Class counsel have been called “clientless” lawyers to capture the idea that the lawyer does not take direction from anyone – neither from an individual client nor from a legally authorized representative of a client. See Report of the Senate Judiciary Committee on the Class Action Fairness Act, S. Rep. 109-14 (2005), at 32 (stating the class actions “often involve numerous plaintiffs, each of whom has only a small financial stake in the litigation. As a result, few (if any) plaintiffs closely monitor the progress of the case or settlement negotiations, and these cases become ‘clientless litigation’”); Russell M. Gold, “*Clientless*” Lawyers, 92 WASH. L. REV. 87, 111 (2017) (“[T]he lawyer, rather than the client, has to make the critical decisions in ‘clientless’ litigation.”). See generally Cooper, *supra* note 23, at 27 (“A familiar concern is that class counsel in fact are the class”); Coffee, *supra* note 4, at 384 (“the class representative is usually a token figure, with the class counsel being the real party in interest.”).

⁵¹ Hayes v. Harmony Gold Min. Co., 509 F. App’x 21, 23 (2d Cir. 2013). Accord *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1366 (2d Cir. 1991); *In re FedEx Ground Package Systems, Inc. Employment Practices Litig.*, 2017 WL 632119, at *2 (N.D. Ind. 2017); 5 MOORE’S FEDERAL PRACTICE-CIVIL § 23:120[2][c][ii]. In one case, a court approved a settlement despite objections from ten out of the eleven class representatives. See *Parker v. Anderson*, 667 F.2d 1204, 1207 (5th Cir. 1982).

⁵² See Rules 1.2(a) & 1.8(g), ABA Model Rules of Professional Conduct. See also *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981) (stating that the ordinary rule that an attorney cannot settle without approval of the client is “simply inapplicable . . . [b]ecause of the unique nature of the attorney-client relationship in a class action”).

⁵³ See *Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 12 N.Y.3d 400 (2009).

⁵⁴ See Rule 1.16(a)(3) and (c), ABA Model Rules of Professional Conduct.

⁵⁵ *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995). See also 5 MOORE’S FEDERAL PRACTICE-CIVIL § 23:120[2][c][i].

⁵⁶ See Rule 1.5(a), ABA Model Rules of Professional Conduct (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee.”).

⁵⁷ See Rule 23(h), Fed. R. Civ. P. See also Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1943 (2011) (“The law does not allow class members to

Unlike in an ordinary representation, class counsel is not obligated, or even permitted, to loyally and competently pursue the individual class representative's interests as distinct from those of the class members collectively.⁵⁸ Rather, the lawyer is responsible to do what is in the class's best interest, which may at times be contrary to the named plaintiffs' preferences.

Absent class members' relationship with class counsel is even less like a lawyer-client relationship. Clients ordinarily decide whether or not to sue. But class counsel initiates class actions and seeks certification without the knowledge or approval of absent class members. Many will never have any communication with counsel, or even know the litigation exists, until receiving an opt-out notice or settlement notice. Like class representatives, absent class members lack standard client rights like the ability to veto a settlement. The commentary to the Model Rules recognizes that because "unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying" the conflict-of-interest rule,⁵⁹ class counsel may sue an absent class member in an unrelated matter.⁶⁰ Federal courts and commentary on class action practice agree.⁶¹

The notion that class counsel's primary duty is to an abstract-sounding entity—the class "as a whole"—rather than to individuals, has led some commentators to look for analogies. Many compare the class to a single entity like a corporation.⁶² But class counsel's role differs from that of a corporation's lawyer.⁶³ Corporate lawyers take direction from duly authorized corporate officers,⁶⁴ whereas class counsel makes decisions for

choose their attorney, to fire her, or to determine her compensation.”).

⁵⁸ See, e.g., *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1325 (2d Cir. 1990); *Parker v. Anderson*, 667 F.2d 1204, 1210-11 (5th Cir. 1982).

⁵⁹ Comment 25 to Rule 1.7, ABA Model Rules of Professional Conduct

⁶⁰ *Id.*

⁶¹ 6 NEWBERG, *supra* note 1, § 19:2 (“[C]ourts and commentators have held that absent class members, even after class certification, are not clients for some conflicts purposes, meaning that class counsel may be adverse to absent class members in other matters unrelated to the class action.”).

⁶² See, e.g., David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998); Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 704 (2013); Lahav, *supra* note 57, at 1946.

⁶³ See, e.g., Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 44 LOY. U. CHI. L.J. 577, 578 (2012); Moore, *supra* note 4, at 1482-89.

⁶⁴ See generally *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348

the class. Likewise, class counsel's role differs from that of a lawyer representing a fiduciary such as an administrator of an estate, a court-appointed guardian, or a trustee.⁶⁵ A fiduciary's lawyer takes directions from the fiduciary.⁶⁶ The lawyer owes obligations derivatively to the beneficiary in some circumstances,⁶⁷ and may have some responsibility to protect the beneficiary from the fiduciary's overreaching, but the fiduciary as client still has a wide range of discretion in making decisions regarding the representation. In contrast, in a class action, the lawyer, not the class representative, makes decisions on behalf of the class. Consequently, a lawyer who represented only the class could not properly endeavor to serve the interests of a class representative at the class's expense.

B. The Standard View of Handling Conflicts in Class Action Practice

Case law and leading commentary reflect a standard four-part approach to conflicts in class actions. Although courts and commentators only rarely acknowledge the conflict we address here, the federal judiciary and leading commentators probably assume that this approach sufficiently addresses all of class counsel's conflicts, including any conflict in jointly representing a class and a class representative as an individual.

First, to the extent that applying ethics rules would appear to make class actions less useful or more complex, courts often state that traditional conflicts rules should be relaxed or ignored.⁶⁸ Second, as noted, in resolving

(1985) ("As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation."); Rule 1.13(a), ABA Model Rules of Professional Conduct ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

⁶⁵ Some commentators have pressed the trustee analogy. See, e.g., Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1662 (2014); Sergio J. Campos, *Class Actions & Justiciability*, 66 FLA. L. REV. 553, 565 (2014).

⁶⁶ Cf. Fla. Stat. Ann. § 90.5021 ("[O]nly the person or entity acting as a fiduciary is considered a client of the lawyer."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994) ("The majority of jurisdictions consider that a lawyer who represents a fiduciary does not also represent the beneficiaries, and we understand the Model Rules to reflect this majority view.").

⁶⁷ See, e.g., *Heyer v. Flaig*, 449 P.2d 161, 163 (Cal. 1969) ("An attorney who negligently fails to fulfill a client's testamentary directions incurs liability in tort for violating a duty of care owed directly to the intended beneficiaries.").

⁶⁸ See, e.g., *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 589-90 (3d Cir. 1999) (holding

conflicts issues, courts prefer the class “as a whole” over the individual.⁶⁹

Third, the district court must act as a “fiduciary” for absent class members to protect their best interests.⁷⁰ As the Federal Judicial Center has said, “Unlike other civil litigation, many class action suits do not involve a client who chooses a lawyer, negotiates the terms of the engagement, and monitor’s the lawyer’s performance. Those tasks, by default, fall to the judge.”⁷¹ The notion of a judge as a fiduciary protecting the interests of one side of a contested litigation is, of course, inconsistent with the standard view of our adversary system.⁷²

courts do not apply disqualification rules automatically in class actions, because automatic disqualification “would have a serious adverse effect on class actions”); *In re Agent Orange Prods. Liability Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) (reviewing ordinary ethics rules and suggesting that “[c]lass action litigation presents additional problems that must be considered in determining whether or not to disqualify an attorney”); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) (“Recognizing that strict application of rules on attorney conduct that were designed with simpler litigation in mind might make the class-action device unworkable in many cases, the courts insist that a serious conflict be shown before they will take remedial or disciplinary action.”); *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) (stating that the “traditional” lawyer ethics “model cannot be carried over unmodified to the class action arena”); 6 NEWBERG, *supra* note 1, § 19:25 (“If the normal rule requiring disqualification applied, class actions would be nearly impossible to pursue, and hence the values served by such suits would be compromised.”). *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-03 (1981) (overturning district court order barring solicitation or other communications by putative class counsel with class members on the ground that it interfered with Rule 23 goals for class actions).

⁶⁹ See *supra* notes 39, 44, 47 and accompanying text.

⁷⁰ See, e.g., *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Employees Ret. Sys.*, 814 F.3d 652, 657 (2d Cir. 2016) (citations omitted); *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 968 (9th Cir. 2009); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 225 (5th Cir. 1981); *In re Wireless Tel. Federal Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *In re Lupron Mktg. & Sales Practices Litig.*, 345 F. Supp. 2d 135, 138 (D. Mass. 2004); *Ray v. Mechel Bluestone, Inc.*, No. 5:15-CV-03014, 2018 WL 1309731, at *4 (S.D.W. Va. Mar. 13, 2018); *Jackson v. Innovative Sec. Servs., LLC*, 283 F.R.D. 13, 15 (D.D.C. 2012); 4 NEWBERG, *supra* note 1, § 13:40.

⁷¹ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.27 at 278 (2004).

⁷² A fiduciary must act in the best interests of the client or beneficiary. See, e.g., BLACK’S LAW DICTIONARY 523 (7th ed.1999) (“fiduciary duty” defined in part as “a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person”). But it violates the Due Process Clause for a judge to be actually biased or appear to be biased in favor of one party over another. See, e.g., *Caperton v. A.T. Massey*

Fourth and finally, courts emphasize that class counsel has a duty to inform the court of any “potential” conflicts so they can be aired and, if necessary, resolved by court action.⁷³ The Federal Judicial Center, for example, states that class counsel must disclose to the court “any facet [of a proposed settlement] that may adversely affect any member of the class or may result in unequal treatment of class members.”⁷⁴ This, of course, stands in some tension with an attorney’s ordinary duty to preserve client confidences.⁷⁵

Undue confidence in this approach may have led the judiciary and most commentators to ignore the pervasive conflict we address here, which occurs when class counsel has an individual lawyer-client relationship with a class representative.

II. CLASS COUNSEL’S CONFLICT OF INTEREST IN REPRESENTING CLASS REPRESENTATIVES

A lawyer’s concurrent or joint representation of a class and an individual class representative in connection with a class action lawsuit entails at least the possibility of a conflict of interest, as would a litigator’s joint representation of spouses, of a corporation and its principal, or of any other co-clients. But there is nothing to suggest that lawyers for the class identify this as a conflict-of-interest problem commanding analysis under the conflict rules, which call initially for deciding whether the representation of one client is significantly likely to be limited by the lawyer’s responsibilities to another.⁷⁶ And there is certainly nothing in the professional literature to suggest that lawyers sever their relationships

Coal Co., 556 U.S. 868, 883 (2009).

⁷³ See, e.g., *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1161, 1167 (9th Cir. 2013); *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 103-04 (2d Cir. 2003); *Agent Orange*, 800 F.2d at 18; *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978); *National Ass’n of Regional Medical Programs v. Mathews*, 551 F.2d 340, 346 n.31 (D.C. Cir. 1976); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d(iii).

⁷⁴ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.641 at 324 (2004).

⁷⁵ See Rule 1.6(a), Model Rules of Professional Conduct (deeming confidential “information relating to the representation”). We are not contending that class counsel violates this Rule. Arguably disclosures of the type discussed in the main text are “impliedly authorized in order to carry out the representation.” *Id.*

⁷⁶ ABA Model Rule 1.7.

with the individual class members after filing a class action, or that lawyers are expected to do so.

Further, there are various reasons why, if allowed to do so, lawyers would prefer to maintain the original individual lawyer-client relationships after filing a class action lawsuit. For example: (1) A promise to maintain the individual client relationship even after class certification may help induce the client to hire the lawyer in the first place. (2) If the class action is not certified, the lawyer may want to return to representing the clients in pursuing individual claims, particularly when individual claims have significant monetary value. (3) Preserving the individual relationship may facilitate the receipt of fees for work relating to the individual representation before the class action was filed. (4) Preserving the relationship may (for better or worse) help maintain a good relationship with the class representative in acting as a fiduciary for the benefit of the class. Class counsel might desire this because it would be in the class's best interest or, alternately, because class counsel, seeking to maximize their private interests, desire less oversight by class representatives. (5) Class counsel may perceive it to be disloyal or disadvantageous to the client to terminate the original, individual representation upon appointment as class counsel.

The concurrent representation of a class (or putative class) and an individual serving (or proposing to serve) as class representative would not be problematic if the individual client's interests were always perfectly aligned with those of the class throughout the lawsuit. But their interests may in fact diverge, because the class representative's interest in obtaining the most favorable outcome individually may differ from the class's interest in obtaining the best outcome for the class members collectively, and the class representative may have opportunities to further its individual self-interest at the class's expense.

Divergence of interests between class representatives and the class as a whole could in theory be present in any class action. But in practice, the prevalence and strength of divergence will likely often vary with factors such as the nature of the injury, the nature of the legal claim, and the type of relief sought. For example, a cause of action with a statutory damages cap⁷⁷ will provide different incentives for plaintiffs than one without.

⁷⁷ See, e.g., *Geismann v. ZocDoc Inc.*, 850 F.3d 507, 511 (2d Cir. 2017) (discussing a class action with claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227, which contains damages caps).

Plaintiffs in mass tort class actions involving serious injuries or death likely have very strong interests “in individually controlling the prosecution” of his or her case,⁷⁸ stronger than those of plaintiffs with, for example, very low-stakes consumer law claims.⁷⁹ Keeping in mind the diversity of factors that may influence plaintiffs’ incentives and decisionmaking in the class action context, we review three scenarios in which divergences of interest between class representatives and absent class members are likely to arise.

A. *Holdouts*

Even though a class representative’s claims must be “typical” of those asserted by the class,⁸⁰ that representative’s personal interests may differ from those of class members in ways that may make a settlement more or less advantageous for the individual.⁸¹ For instance, a class representative might have a greater or less appetite for litigation risk than the average class member, or a different preferred time horizon for realizing the expected financial or other gains of the litigation. The class representative may simply disagree with class counsel or other class members about the advisability of a proposed settlement.⁸² In any of these cases, the class may benefit from a settlement that the class representative opposes.⁸³

⁷⁸ *Amchem*, 521 U.S. at 616 (involving claims arising from asbestos exposure).

⁷⁹ *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) (noting that “in consumer class actions . . . the percentage of class members who file claims is often quite low,” well below one percent).

⁸⁰ Rule 23(a)(3), Fed. R. Civ. P.

⁸¹ Jay Tidmarsh addressed this possibility in an article discussing why particular class members may not be adequate representatives of the class. Tidmarsh, *supra* note 17. *See generally* Miller, *supra* note 11, at 622 (“It is often the case that the proposed representative plaintiff has features that differ from the class as a whole which may place this individual in some degree of tension or conflict with other class members.”).

⁸² *See, e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 27, 30 (1st Cir. 2009) (reviewing objections to settlement by one named representative).

⁸³ Of course, a dispute between class counsel and class representatives may also reflect that class counsel is acting self-interestedly, to the class’s detriment. Courts and commentators recognize that class counsel may have systematically different preferences about settlement than class members. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014); *In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001). For example, class counsel have incentives to settle quickly, before investing too many resources in litigation, in a way that often cuts against the interests of the class. *See, e.g.*, Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 38–40 (2002); Coffee, *supra* note 4, at 390-91; Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 358 (1998).

There is obviously a conflict of interest if the class representative holds out against a settlement that class counsel believes to be in the class's best interest: in a fairness hearing,⁸⁴ the lawyer cannot simultaneously advocate for the settlement on behalf of the class while opposing it on behalf of the individual client.⁸⁵ At that point, under a traditional Model Rules approach, the lawyer would have to withdraw from representing the class, the individual client, or both.⁸⁶ In class actions, courts rarely require a conflicted class counsel to withdraw entirely from all representations. For example, in the "Agent Orange" class action, two of the class counsel who served on the plaintiffs' management committee were permitted to stop representing the class but to continue representing individual clients in their objections to a settlement.⁸⁷ In light of the benefit of having the objections put forth by lawyers who were familiar with the litigation, the court declined to apply traditional conflict-of-interest principles, which would likely have precluded the lawyers from acting adversely to the class, which they had previously represented in the same matter.⁸⁸

Conversely, in *Lazy Oil Co. v. Witco Corp.*,⁸⁹ the Third Circuit permitted class counsel to advocate for a settlement on behalf of the class

⁸⁴ See Rule 23(e)(2), Fed. R. Civ. P.

⁸⁵ See, e.g., *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290 (E.D.N.Y. May 18, 2015) ("That Mr. Romero negotiated a settlement on behalf of the class, then helped draft objections to that settlement on behalf of certain class members and, finally, reversed positions again to argue against those objections is most troubling. Worse yet, . . . Mr. Romero has the unbridled temerity to bill for hours spent consulting on objections to the very settlement he negotiated on behalf of the class.").

⁸⁶ See, e.g., Rule 1.7, cmt. 4, ABA Model Rules ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client . . . Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client."); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2005-05 ("[W]hen two clients will not consent to a conflict of interest, and the conflict requires consent, the law firm must withdraw from representation of at least one of the clients.").

⁸⁷ In re "Agent Orange" Product Liability Litig., 800 F.2d 14 (2d Cir. 1986).

⁸⁸ *Id.* at 18-19. Similarly, in *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984), the court permitted class counsel to withdraw from representing the class while continuing to represent former class representatives who opposed a settlement.

⁸⁹ 166 F.3d 581 (3d Cir. 1999).

over the opposition of class representatives who were former clients.⁹⁰ The *Lazy Oil* court did not comment on the problem that gave rise to the conflict of interest in the first place: the lawyers' concurrent representation of the class and class representatives. The court addressed only whether the lawyer, having withdrawn from representing the objecting individual client, could represent the class against the objector. The court may have assumed that this problem could have arisen whether or not the lawyer had jointly represented the class and the individual: the objector would have been a former client even if the lawyer had ended the individual representation as soon as the class was certified.

The courts in *Lazy Oil* and cases like it overlook how class counsel's conflict may have affected the representation before the lawyer chose sides. Suppose, for example, that the individual client in *Lazy Oil* was uncertain whether to support the proposed settlement and asked for the lawyer's advice. If the settlement was in fact disadvantageous to the individual client, the lawyer could not so advise without being disloyal to the class and prejudicing its interests. And, having concluded that the class would benefit from the settlement, the lawyer might not recognize that the individual client should opt out, and perhaps even oppose, the settlement. At that point, class counsel could not give disinterested advice to the individual.

Or suppose that class counsel had not yet decided whether to advocate for a possible settlement, and the individual client strongly opposed the settlement or would be better off without it. At that point, the lawyer could not make a disinterested judgment on behalf of the class. If the lawyer represented the class alone, the lawyer would be required to consider class representatives' views but not necessarily defer to them. If class representatives are also individual clients, however, the duties of loyalty and competence would require the lawyer to seek to carry out their objectives. In the "Agent Orange" class action, where multiple class counsel represented individual claimants with different views, the conflict may not have prejudiced the class. But in a case where a single class counsel owes allegiance to a lead plaintiff who is also an individual client, and who opposes a possible settlement, the lawyer may ultimately decline to advance the settlement, to the class's detriment, out of loyalty to the

⁹⁰ *Id.* at 590 (permitting the representation "as long as the interest of the class in continued representation by experienced counsel is not outweighed by the actual prejudice to the objectors of being opposed by their former counsel"). Although class counsel may seek court approval for a settlement even if the representative plaintiff disagrees, the representative plaintiff's objection cause the court to scrutinize a proposed settlement more closely.

individual. Class counsel may be influenced unconsciously as well as consciously: they may not realize that their assessment of the proposed settlement is influenced by their concern for the class representative's personal interests or preferences.

B. Sellouts

Another conflict may arise when the class representative proposes to settle the individual claim on its own. Nothing in the law forecloses the putative class representative from settling separately with the defendant and, if there are no other class representatives, dismissing the class action lawsuit.⁹¹ Individual claims of a representative of a certified class may also be settled, with the class action remaining in hiatus while a new class representative is sought. The individual settlement may be a legitimate response to uncertainties about the viability of a class action.⁹² In many cases, although the individual will be acting self-interestedly, the absent class members will not be disadvantaged, either because they are uninterested in filing individual or class claims,⁹³ or because they will not

⁹¹ See, e.g., *Mars Steel v. Continental Illinois Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987) (“[A] suit begun as a class action may often and quite properly be settled as an individual action, that is, without preclusive effect on other members of the class”). Cf. *Kulig v. Midland Funding LLC*, No. 13-Civ.-4715, 2014 WL 5017817, at *4-5 (S.D.N.Y. Sept. 26, 2014) (stating that putative class counsel acted unethically by not communicating a proposed settlement offer to individual clients who were seeking to be class representatives); *Victorino v. FCA US LLC*, 322 F.R.D. 403, 407-08 (S.D. Cal. 2017) (same); *Robert Alan Ins. Agency v. Girard Bank*, 107 F.R.D. 271, (E.D. Pa. 1985) (“[I]t is not ‘improper for a potential class representative on his behalf to attempt, before filing suit, to negotiate a settlement for himself.’”). Prior to 2003 amendments, some courts interpreted Rule 23 to require court approval before a putative class representative could settle individually. It is now clear that that is not required. See Advisory Comm. Notes to 2003 Amendments to Rule 23, Fed. R. Civ. P. If a court sees evidence that putative class representatives are using the class allegations to try to extract individual settlements, the court may make appropriate orders to protect against “an unintended use of the class action device.” *Chateau de Ville Prods., Inc. v. Tams-Witmark Music*, 586 F.2d 962, 966-67 (2d Cir. 1978).

⁹² Cf. *Mars Steel*, 834 F.2d at 680 (“Settlement negotiations are made more complicated when the parties don’t know whether they are trying to settle a class action or an action limited to the named plaintiffs, don’t know whether the named plaintiffs would be deemed adequate representatives of the class if the case proceeded to trial, and don’t know the composition and size of the class.”).

⁹³ See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) (“Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims’ actual worth.”).

be prejudiced from now doing so.⁹⁴ But in other cases, the class representative may be essentially selling out the class,⁹⁵ using the class action for its individual benefit and to the detriment of absent class members, who may find it harder to advance their claims because of the passage of time, difficulty locating someone else willing to undertake the burden of being a class representative, or strategic decisions made by putative class counsel before abandoning the lawsuit.⁹⁶

If the individual client expresses an interest in pursuing its financial self-interest by negotiating an individual settlement, the lawyer who jointly represents the individual and the class has a conflict of interest. Presumably it is precisely because a defendant thinks that it will prejudice the class or putative class that that defendant is seeking to settle a class representative's individual claim. The defendant would likely not be willing to settle with the individual if the class action would continue uninterrupted with the quick substitution of another party that would serve equally well as lead plaintiff. But if a settlement is in the individual client's interest, the lawyer cannot pursue it or encourage it without thereby betraying the class. Conversely, if class counsel promotes the best interests of the class as a whole—as courts and commentators suggest—the lawyer will betray the individual client by discouraging or impeding the individual settlement. Even if the lawyer honestly believes that the settlement is not in the individual's interest, the lawyer cannot be certain that this assessment is objective, unaffected by the interests of the class. The conflict makes it ethically perilous to advise the individual client what to do or to

⁹⁴ Individual settlement should not affect class claims as a formal legal matter. See generally *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013) (“[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.”); *Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011) (“Neither a proposed class action nor a rejected class action may bind nonparties.”). An individual settlement does not have a preclusive effect on class claims, see *Mars Steel*, 834 F.2d at 681, and tolling should generally be available to extend the statutes of limitations on class claims, see, e.g., *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007).

⁹⁵ See, e.g., *Munoz v. Arizona State Univ.*, 80 F.R.D. 670, 671-72 (D. Ariz. 1978) (accusing the putative class representative and class counsel of attempting to sell out the class to leverage a higher individual settlement).

⁹⁶ See generally Robert D. Phillips, Jr. & Samuel J. Park, *Ethical Issues in Class Action Settlements*, in 1 MARCY HOGAN GREER ED., *A PRACTITIONER'S GUIDE TO CLASS ACTIONS* 941, 967 (2017) (stating that “settling a putative class action on an individual basis with the named plaintiffs” is a “tactical” approach that “often makes sense from a defense perspective, as settling with the named plaintiffs is less costly than settling with the entire class and doing so may derail the class action”).

negotiate with the defendant on the individual's behalf.

Even if the plaintiff does not initiate an individual settlement, a defendant may seek to “pick off” the named plaintiff by offering an individual settlement, perhaps for as much or more than the full amount claimed.⁹⁷ If the class member is primarily driven by financial self-interest, the proposed settlement will be attractive: the party's claim will be fully satisfied without further delay and the party avoids the further time and expense of representing the class. Presumably, class counsel previously explained the role of class representative and sought some assurance that the client would stay the course, but nothing binds the client to earlier assurances. At that point, the client might turn to class counsel for advice whether to accept the offer or continue to serve in the fiduciary role as named plaintiff. Again, this creates a conflict from the perspective of both clients – the class member and the class. From the named plaintiff's perspective, there is a risk that the lawyer will not render disinterested advice: out of loyalty to the class, the lawyer may discourage a settlement that is in the client's best interest. From the class's perspective, the risk is that the lawyer will act disloyally: the lawyer may encourage the individual client to accept the offer when doing so would harm the class.

As this example reflects, the conflict may be outside class counsel's control and unavoidable: even if the class representative is initially disinclined to act opportunistically, once the defendant makes a settlement offer to the class representative individually, the lawyer must convey it.⁹⁸ Ordinarily, the lawyer must also advise the class representative about the offer's relative merits. The lawyer cannot simply convey the offer and say nothing further, depriving the client of advice altogether.⁹⁹ But the lawyer also cannot give disinterested advice.

Any response to the conflict now is costly. First, the lawyer might seek the court's permission to withdraw from representing the class. If the

⁹⁷ See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Chen v. Allstate Ins. Co.*, 2016 U.S. App. LEXIS 6627 (9th Cir. Apr. 12, 2016).

⁹⁸ See cases cited in *supra* note 91.

⁹⁹ See Rule 1.1, ABA Model Rules of Professional Conduct (“A lawyer shall provide competent representation to a client.”); *id.* Rule 1.2(a) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter.”); *id.* Rule 1.4(a) (“A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules.”).

court approves, co-counsel from other law firms, if available, may pick up the slack. If none are available, the lawyer's withdrawal would impede, if not entirely derail, the class action lawsuit. This may harm the individual as well as the class, since an individual settlement might collapse. Further, if the lawyer must withdraw before advising the individual client and commencing negotiations, the individual may lose the leverage that the class action afforded.

Second, the lawyer might stop representing the class representative individually. But the individual client might then feel betrayed and be disadvantaged by having to retain a new lawyer who is unfamiliar with the case and with whom the individual has no prior relationship. The ability to conclude a favorable individual settlement may be impeded by the delay, while the new lawyer takes time learning the relevant facts. And the time and expense may prove to be for naught if no individual deal is made.

Third, class counsel might limit the scope of the representation of the individual class representative by carving out assistance regarding a possible settlement.¹⁰⁰ Class representatives in this scenario might be required either to negotiate with the defendant on their own or to retain or rely on other lawyers to assist them. Institutional clients, for example, might employ in-house counsel or other outside counsel with whom they already have a relationship. In that event, however, the client would lose the benefit of the lawyer who is most familiar with the lawsuit and who may have had sustained dealings with opposing counsel.

Finally, class counsel might attempt to limit the scope of the representation of the class, so that, in negotiating on behalf of the individual, the lawyer will owe no loyalty duty to the class. This is, of course, another way of saying that the lawyer will be free to be disloyal to the class and to serve the individual's interests at the class's expense. One might justify this limitation on the theory that, as a legal abstraction, the class will not perceive that it is being betrayed and its trust in the lawyer will not diminish as a consequence. But the class may suffer concretely as well. For example, by forgoing counsel's loyalty during negotiations with the defendant, the class may be giving up the opportunity to negotiate a favorable class settlement. Needless to say, a lawyer could not unilaterally limit the representation of the class. The Federal Rules of Civil Procedure

¹⁰⁰ See Rule 1.2(c), ABA Model Rules of Professional Conduct ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

would seem to prohibit this approach.¹⁰¹ But possibly a lawyer might seek a court's authorization to proceed in this manner.

This conflict between the named representative's interest in negotiating an individual settlement and the class's interests arguably exists even if neither the defendant nor the class representative proposes such a settlement, at any point in the representation when an individual settlement is a plausible option that the individual might be open to pursuing. A lawyer has a duty to discuss the possibility of settlement with a client in a lawsuit.¹⁰² Even if the client at the outset had no interest in pursuing an individual settlement, under the Model Rules approach the lawyer could not make it a condition of the retention that the client would not have a change of heart, any more than a criminal defense lawyer can demand that the accused promise not to plead guilty: the decision whether to settle a dispute belongs irrevocably to the client.¹⁰³ Retainer agreements suggest, however, that some lawyers try to bar clients who become putative class representatives from settling individually.¹⁰⁴ Other retainer agreements require putative class representatives to agree to be dropped as clients if a conflict arises with another client¹⁰⁵—a clause that might be invoked if the client wanted to accept an individual settlement over the objection of the class counsel. Notwithstanding these attempts to contract around the rules, a lawyer for individual class members may have an obligation to raise the possibility of an individual settlement. At each such point, if the lawyer also represents the class, the lawyer will have a conflict of interest.

¹⁰¹ See Rule 23(g)(4), Fed. R. Civ. P. ("Class counsel must fairly and adequately represent the interests of the class.")

¹⁰² Cf. Rule 1.4. comment 2, ABA Model Rules of Professional Conduct ("[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.").

¹⁰³ See Rule 1.2(a), ABA Model Rules of Professional Conduct.

¹⁰⁴ See, e.g., Retainer Agreement—Class Action, ECF No. 84-2, *BABB Real Estate LLC v. Bennett, Shelaine*, No. 3:10-cv-00119 (W.D. Wisc.) ("Client understands that it cannot settle a class action lawsuit without protecting the interests of the other class members.").

¹⁰⁵ See, e.g., Letter from Frank E. Marchetti to Christine Anderson, ECF No. 16-1, *Anderson v. PODS of Los Angeles, LLC*, No. 2:13-cv-04893 (C.D. Cal.) ("You understand that Attorney will not be able to represent you if Attorney's representation of you would create a conflict with one of the Attorney's existing clients You expressly agree to immediately consent to Attorney substituting out as your attorney of record after a lawsuit is filed if Attorney learns through discovery of such a conflict.").

C. Payouts

The possibility of payouts is a third recurring situation where conflicts arise between the interests of the class and a class representative who also has an individual attorney-client relationship with class counsel. With some frequency, class representatives seek or are promised by counsel a unique amount of monetary compensation, greater than what other class members will receive, often in conflict with the class's interests.¹⁰⁶ So-called "incentive awards" to class representatives are common,¹⁰⁷ and are typically determined following a settlement.¹⁰⁸ There is nothing inherently wrong with such payouts when they are negotiated after settlement—except in securities class actions where a statute has altered the law.¹⁰⁹ But the case reports are full of examples of class representatives and class counsel negotiating an individual windfall payout to the representative before a settlement is approved, sometimes as a condition of the class representative supporting the settlement.

The most abusive form of these deals involves significant benefits to both class representatives and class counsel, and little or nothing of value for the class. In one case, a disability discrimination class action was settled against the owner of gasoline service stations with a \$5,000 payment to the named plaintiff, \$50,000 in attorney's fees, injunctive relief that simply required the corporation to "meet its legal obligations (or perhaps even less than that required) under the [Americans with Disabilities Act]," and a very broad release of the absent class members' statutory damages claims.¹¹⁰ Another example is a settlement of a Fair Debt Collection Practices Act class

¹⁰⁶ See, e.g., *Fleury v. Richemont North America, Inc.*, 2008 U.S. Dist. LEXIS, *10 n.5 (N.D. Cal. July 3, 2008).

¹⁰⁷ *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) ("Such awards are discretionary, . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."); see generally Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L. Rev. 1303 (2006).

¹⁰⁸ See *Rodriguez*, 563 F.3d at 959.

¹⁰⁹ See 15 U.S.C. § 78u-4(a)(2)(A)(vi) (requiring a putative lead plaintiff in a securities class action to file with the court a sworn certification that "the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court").

¹¹⁰ *Molski v. Gleich*, 318 F.3d 937, 942, 953-54 (9th Cir. 2003) (subsequent history omitted).

suit that provided for \$2,000 to the named plaintiff, a small donation to a law school clinic, \$78,000 in attorney's fees, and a release that left absent class members able to bring their own individual damages suits but not a subsequent class action.¹¹¹ Both settlements were approved by district court judges but reversed on appeal as unfair to the classes.

Defendants are happy to make deals like this, if they can secure approval of class counsel and the courts. The ready possibility of securing deals that sell out the absent class members to benefit the class representative and class counsel puts class counsel in an inherently conflicted position. District and appellate courts do reject some of these settlements as unfair to the class. As a result, a lawyer for the class and class representative individually might argue that he or she has no duty to counsel the individual client about the possibility of a deal, and therefore no conflict between duties to the class and the class representative individually. In our view, however, because not all of these deals are rejected, the conflict remains.

To see why, consider the case of incentive payments to class representatives, negotiated prior to settlement, with the settlement also giving real benefits to the absent class members. For example, the Ninth Circuit recently considered a settlement in Fair Credit Reporting Act case against credit rating agencies which issued credit reports that continued to list debts as delinquent that had been discharged in bankruptcy.¹¹² Absent class members received some value from the settlement. An injunction required the three defendants, which dominate the credit reporting market, to “presume the discharge of certain pre-bankruptcy debts” going forward.¹¹³ Class members who could prove that a negative credit report contributed to denial of employment got \$750; denials of a mortgage or housing rental paid \$500; and denials of consumer credit or auto loans paid \$150. Class members who could not prove actual damages received about \$26 as “convenience awards.”¹¹⁴ Class representatives, however, were promised \$5,000 each—far more than absent class members—on the express condition that they support the settlement.¹¹⁵

¹¹¹ Crawford v. Equifax Payment Services, Inc., 201 F.3d 877, 800 (7th Cir. 2000).

¹¹² See Radcliffe v. Experian Information Solutions, Inc., 715 F.3d 1157, 1161 (9th Cir. 2013).

¹¹³ *Id.* at 1162.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1164-65.

This was a conflict from both the individual client's perspective and the class's perspective. The lawyer could not negotiate on behalf of both the individual class member and the class. Helping the class representatives to a better deal hurt the class, by depriving it of the class representatives' fiduciary role in protecting absent class members, and by directing money away from absent class members into the pockets of the representatives. It is considered axiomatic in the class action literature that defendants care only about the total dollar value of a settlement, but not about how the dollars are divided between class counsel, class representatives, and absent class members.¹¹⁶ Choices by class representatives and class counsel about allocating settlement money are zero-sum and hence necessarily put counsel in a conflicted position when counsel owes duties simultaneously to the class and the class representatives.

III. WHEN DOES CLASS COUNSEL'S CONFLICT OF INTEREST FIRST BEGIN?

As described in Part II, lawyers who jointly represent a class and its individual class representative will have a conflict of interest at least at the point when the class representative opposes a favorable settlement of the class action, seeks a favorable individual settlement that will prejudice absent class members, or seeks an incentive payment or other individual benefit from the settlement of the class action that exceeds the benefits afforded to absent class members. At these moments, the conflicting interests of the class and the individual client make it difficult or impossible for the lawyer to serve both clients competently and loyally. One might say that the lawyer's conflict of interest is now manifest, patent, real or actual.¹¹⁷

One question this raises is, when should lawyers in class actions first address the problem of their clients' differing interests? May lawyers wait to see whether the conflict becomes manifest, as may occur in only a fraction of class actions, or does the risk of a manifest conflict of interest require the court and lawyer to address the problem at the certification stage, or even earlier? This is an important question that judicial decisions

¹¹⁶ See *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.) ("The defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class.").

¹¹⁷ These are all terms used to convey that the problem actually now exists – it is not conjectural or in the future.

and other writings overlook, with the result that lawyers have been free to ignore conflicts of interest until they compromise the representation (and, in some cases, even then).¹¹⁸ Once litigation is well advanced, lawyers, courts, and clients often feel significant pressure to stay the course, even if the conflict is a serious one. This part addresses these questions of timing from the perspective of two points in time.

Part A focuses on the class certification stage. It discusses how professional conduct rules governing conflicts of interest deal with what might be described as “nascent conflicts” or potential conflicts among joint clients – that is, the situation early in the representation when the joint clients’ conflicting interests have not yet put the lawyer in a bind, but when a lawyer can nevertheless envision the possibility that a conflict may become manifest as the representation unfolds.¹¹⁹ Part B looks at the earlier moment in time when the lawyer files a class action complaint on behalf of a putative class representative whom the lawyer also represents individually. It considers whether a lawyer filing a class action lawsuit must address the nascent conflict at the outset, even before the lawyer formally represents the class, because the lawyer’s fiduciary duties to the nascent class give rise to a conflict of interest from the perspective of the individual client, the absent class members, or both.¹²⁰ Although neither the absent class members nor the class itself are clients as a legal matter, and therefore the lawyer is not engaged in a joint representation of clients with conflicting interests, the Advisory Committee Notes to the 2003 amendments to Rule 23, among others, hold that, after filing a class action, the lawyer owes duties to the absent class members or to the nascent or putative class.¹²¹ If so, the lawyer’s representation of the individual may be compromised by

¹¹⁸ Courts are more concerned with the lawyer’s self-interest than with the conflicting interests of the class and the class representatives. *See, e.g.,* *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 72 (S.D. Tex. 1977) (“[I]t is a reality of class action life that the potential for such abuse lies chiefly in the hands of plaintiff’s counsel who, as a negotiator, unfortunately must represent three distinct and inherently conflicting interests: the named plaintiff’s, the asserted class members’ and his own. . .”).

¹¹⁹ *See, e.g.,* Bruce A. Green, “Through a Glass Darkly”: How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 COLUM. L. REV. 1201, 1212 (1989) (distinguishing “an actual or nascent conflict”). More often, particularly in the criminal context, the literature distinguishes between “actual” and “potential” conflicts. *See, e.g.,* *Mickens v. Taylor*, 535 U.S. 162, 165 (2002).

¹²⁰ The term “nascent class” is used occasionally in the literature, *see, for example,* *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1389 (D. Md. 1983), but the term “putative class” is used far more commonly to describe the class before it is certified.

¹²¹ *See supra* note 37 and accompanying text.

the lawyer's conflicting duties, if not by a conflicting representation, and the lawyer's ability to act for the nascent class's benefit may be compromised by the lawyer's duties to the individual client.

A. Nascent Conflicts: The Class Certification Stage

Under the Model Rules, in the situations described in Part II, the lawyer would likely have a conflict of interest at the outset of the joint representation. That is true even if no one anticipates that class representatives will necessarily act in their own interest as distinct from those of the class. Their interests differ now, and there is a risk that, later, the conflicting interests will have implications for the lawyer's work. Conflict of interest rules regulate the risk that trouble will arise later, even if joint clients are harmonious at the start.

The threshold question in representing joint clients, such as a class and a class representative, is whether there is a "significant risk" that the lawyer's representation of one will be materially limited by the lawyer's duties to the other.¹²² This calls for the lawyer to make a prediction in light of the respective clients' interests, the nature of the representation, and the lawyer's experience, among other considerations.¹²³ Further, this judgment must be made against the background of professional writing, including judicial decisions and bar association opinions, that have applied and given meaning to the conflict rule in the past. A joint representation of parties to a lawsuit is frequently a conflict of interest, because the co-clients often have differing interests and, given the nature of litigation, the risk is often "significant" (as opposed to "insignificant") that, at some point, as the litigation progresses, the lawyer's duties to one will compromise the lawyer's representation of the other.¹²⁴

If class counsel intends to represent class representatives

¹²² Rule 1.7(a)(2), ABA Model Rules of Professional Conduct.

¹²³ See generally Rule 1.7 cmt. 8, ABA Model Rules of Professional Conduct ("The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.").

¹²⁴ See N.Y.C. Bar Ass'n Comm. On Prof'l Ethics, Formal Op. 2017-7 ("Joint representation of multiple parties to a litigation . . . often involves a conflict of interest because there is a significant risk that the clients will differ as to, for example, litigation strategy or cooperation and resolution.").

individually after the class is certified, the joint representation almost certainly will constitute a conflict. There will be a “significant risk” that, at some later point, unless the lawyer withdraws from one of the representations or limits its scope, the lawyer’s duties to the class will compromise the lawyer’s representation of the class representative, or versa.¹²⁵ The question is whether, under the conflict rules, the lawyer may undertake or continue the joint representation despite this risk. The rules are somewhat paternalistic: they forbid the joint representation even with the respective clients’ informed consent unless lawyers reasonably believe that they can represent each client competently and diligently despite the conflict.¹²⁶ But the authorities interpreting and applying the rules ordinarily allow joint clients whose interests are generally aligned to assume the risk that, down the road, there will be a parting of the ways. In that event, the lawyer may represent both with the respective clients’ “informed consent.”¹²⁷

The takeaway is that lawyers jointly representing a class representative and the class cannot blithely ignore the risks until a conflict of interest manifests itself. They must assess the likelihood that the class representatives will try to benefit at the class’s expense. If that is the class representatives’ objective from the outset, the joint representation is likely improper, because the risk that the clients will be competing with each other will be too high. In that event, the lawyer might seek to be appointed as class counsel but drop the individual client; or the lawyer might continue representing the individual and try to identify another lawyer to be appointed to serve as class counsel – but the lawyer cannot do both. Case law suggests that class counsel in such a position is not supposed to make these decisions privately. Conflicts and potential conflicts must be called to the district court’s attention,¹²⁸ and counsel must seek the court’s direction for how to resolve the conflict. One reason is that the Rules’ requirement that each affected client give informed consent when joint representations involve conflicts of interest¹²⁹ cannot practically be applied to absent class members, who can number in the thousands in many class actions.¹³⁰

¹²⁵ Cf. Stuhan & Costello, *supra* note 11, at 1200 (“[T]he stakes are typically too high [in class actions] . . . to wait until a conflict becomes manifest and obvious”).

¹²⁶ Rule 1.7(b), ABA Model Rules of Professional Conduct.

¹²⁷ Rule 1.7(b)(4), ABA Model Rules of Professional Conduct.

¹²⁸ See *supra* note __ and accompanying text.

¹²⁹ Rule 1.7(b)(4), ABA Model Rules of Professional Conduct; *id.* Rule 1.4(a) and (b).

¹³⁰ See generally LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 465 (3d ed. 2012) (“It is not practicable to sit down with each member of a large class

B. Nascent Classes: The Beginning of the Lawsuit

Whether a lawyer who files a class action has a conflict of interest even before the class is certified is a difficult question because of the uncertainty regarding the lawyer's duties (if any) to the nascent class. Until the class is certified, the class does not exist as a legal entity, and therefore, the lawyer would seem to have only one client: the prospective class representative who is the plaintiff in the lawsuit.¹³¹ But it is conceivable that the lawyer nevertheless owes duties to absent class members, or to the nascent class, that limit the lawyer's ordinary zeal on behalf of the individual. As noted, the Advisory Committee Notes to the 2003 amendments to Rule 23, and others, conclude that, after filing a class action and before class certification, the lawyer owes a duty to act in the best interest of the absent putative class members or to the nascent or putative class.¹³² Some courts have apparently gone further, stating that lawyers who file a class action lawsuit have fiduciary duties to the absent class members.¹³³ But these decisions have not elaborated on the nature and extent of those duties or explained how a lawyer should address the tension between the individual client's interests and conflicting duties to the

to explain possible conflicts and obtain meaningful informed consent.”); Cooper, *supra* note 23, at 39 (“Counsel for the class seldom is in a position to consult with each class member to determine individual interests and needs, or to measure and reconcile the conflicts among individual interests and needs.”). Class counsel must, however, explain the implications of the joint representation – the benefits, risks and alternatives – and secure the informed consent of class representatives who are also individual clients.

¹³¹ Stuhan & Costello, *supra* note 11, at 1205 & n.43 (“[U]ntil a class is certified, there is no formal attorney-client relationship between the putative class and putative class counsel.”) (citing authority).

¹³² See *supra* note 37 and accompanying text.

¹³³ See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) (“[C]lass attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed”); *Fleury v. Richemont North America, Inc.*, 2008 U.S. Dist. LEXIS, *44 (N.D. Ca. July 3, 2008) (citing authority); see generally Nick Landsman-Roos, Note, *Front-End Fiduciaries: Precertification Duties and Class Conflict*, 65 Stan. L. Rev. 817, 838 (2013): “While there is agreement that counsel owes a fiduciary duty to a certified class, the existence of such a relationship in the precertification stage is far from clear. The majority view is that before class certification, the putative class members are not ‘represented’ by class counsel and thus are not owed a fiduciary duty. Yet a number of courts have held that, even in the absence of class certification, class counsel owes a fiduciary duty to unnamed class members in the precertification period. Regardless of the position taken, these decisions are largely bereft of reasoning.”

putative class. In general, at the pre-certification stage, the conflict with which courts are concerned does not involve the competing interests of the class and class representatives but the risk that the lawyers will give primacy to their own legal fees.¹³⁴ There is no definitive statement to be found about duties to a nascent class in either Rule 23, its case law, or the Model Rules.

That neither the nascent class nor the absent class members are a client at this stage does not mean that the lawyer cannot owe them duties once the class action is filed. There is nothing anomalous about owing duties to a non-client. Lawyers may assume a duty of competence to third parties for whom (in the course of representing a client) they prepare an opinion letter;¹³⁵ they may also assume a competence duty to a client's beneficiaries.¹³⁶ Nor is it unprecedented for lawyers to owe duties to "nascent" clients. Some authorities recognize, for example, that lawyers representing clients in forming a corporation may assume duties to the yet-to-be-formed corporation.¹³⁷

In these examples, however, the lawyer undertakes duties to third parties by express or implied agreement either with the lawyer's client or with the third parties themselves. When a lawyer assumes duties to an unformed corporation, it is because the lawyer has agreed to do so with the individual clients who retained the lawyer to establish the corporation. When a lawyer undertakes duties to a third party for whom the lawyer prepares an opinion letter, it is because the lawyer agreed with the third party to do so. A third party is not necessarily entitled to rely on opinion letters prepared by lawyers exclusively for the lawyers' clients.¹³⁸ But if the lawyer agrees to provide an opinion to a prospective buyer or agrees that

¹³⁴ See, e.g., *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 439 (D.N.J. 2000).

¹³⁵ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2).

¹³⁶ *Id.* § 51(3).

¹³⁷ See, e.g., *Jesse v. Danforth*, 485 N.W.2d 63, 67 (Wis. 1992) (where lawyer represents a person for the purpose of incorporating an entity, following the incorporation the lawyer's earlier representation will be "deemed to be representation of the entity, not the person"); State Bar of Az., Ethics Op. 02-06 (2002) ("[A] lawyer may represent an entity during the formation process, as long as the constituents who are acting on behalf of the yet-to-be-formed entity understand and agree to the entity being the client").

¹³⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. e ("A lawyer may avoid liability to nonclients . . . by making clear that an opinion or representation is directed only to a client and should not be relied on by others.").

the prospective buyer may receive and rely on the lawyer's opinion, the lawyer undertakes a duty of competence to that non-client.¹³⁹

In contrast, it is implausible that a lawyer who files a class action complaint on behalf of an individual seeking to serve as class representative thereby agrees with (1) absent class members, (2) the individual client, or (3) the nascent class, to serve absent class members, or the nascent class, competently or loyally. The filing plainly is not preceded by an agreement between the lawyer and the absent class members: The lawyer may have no interaction at all with absent class members, who, for their part, may be unaware of the lawsuit. Nor does the filing necessarily connote the lawyer's agreement with the individual client to serve absent class members as beneficiaries. As the case law reflects, the individual class members may opt to exploit the class action in various ways for their own benefit. Whether the individuals direct the lawyer to act partly or solely in the interests of absent class members is up to them. And, of course, the lawyer has not agreed with the nascent, legally nonexistent class.

If the lawyer assumes duties to the nascent class, it cannot be by virtue of agreement, but only by operation of law. The law can impose duties on lawyers beyond those to which lawyers agree. For example, rules of professional conduct require lawyers to assume a host of duties to the court that may restrict lawyers' ability to advance clients' interests.¹⁴⁰ Lawyers assume confidentiality duties to prospective clients regardless of whether they agree to do so.¹⁴¹ And, indeed, the duties that lawyers owe to clients are largely established by professional conduct rules and agency law, not by contract.

For reasons others have identified, courts probably should declare, as some have, that lawyers filing class actions assume fiduciary duties to absent class members or to the nascent class. Substantial work is typically performed prior to class certification with the court's expectation that the lawyer is acting for the class's benefit. Recognizing this, Rule 23 was amended in 2003 to allow the appointment of "interim" class counsel prior

¹³⁹ *Id.* (a lawyer owes a duty of care to a nonclient whom the lawyer invites to rely on the lawyer's opinion, if the nonclient reasonably does so).

¹⁴⁰ *See, e.g.*, Rule 3.3(a)(3), ABA Model Rules of Professional Conduct ("If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

¹⁴¹ *See* Rule 1.18(b), ABA Model Rules of Professional Conduct.

to adjudication of a certification motion.¹⁴² As the Advisory Committee Notes discuss, whether or not counsel is formally designated as “interim,” “[b]efore class certification . . . it will usually be important for an attorney to take action to prepare for the certification decision,” such as engaging in discovery relevant to certification, making or responding to other motions, and perhaps discussing settlement.¹⁴³

If one concludes, as a matter of law, that the named plaintiff’s lawyer in a pre-certification class action must act in the best interests of the nascent class, even if it is not a client in a legal sense, the question then becomes, what are the scope and limits of the lawyer’s duties to the nascent class? On this question, the law is not only unhelpful but conflicting. In the context of individuals’ settlements, courts have relatively low expectations of the lawyers. But in the context of pre-certification class settlements, courts have high expectations. A lawyer who explores both individual and class settlements simultaneously cannot give primacy to both the individual’s interests and the class’s interests.

At least in negotiating a settlement on behalf of a class representative individually, it might be argued that the lawyers’ fiduciary duty is, at most, to avoid affirmatively prejudicing absent class members.¹⁴⁴ Prior to the 2003 amendment to Rule 23, courts debated whether court approval was required when the class representative proposed to settle individually and dismiss the class action. Courts expressed concern with settlements that used the threat of a class action to benefit the individual claimant, to the possible disadvantage of the absent class members.¹⁴⁵ Even if absent class members were not legally bound by the settlement, they might have relied to their detriment on the assumption that the class action would be litigated. They may have decided to await the outcome of the lawsuit rather than to take other available measures, such as filing an

¹⁴² Rule 23(g)(3), Fed. R. Civ. P.

¹⁴³ Advisory Comm. Notes to 2003 Amendments to Rule 23.

¹⁴⁴ See Landsman-Roos, *supra* note 133, at 842 (“the scope of those duties is limited to protecting the substantive legal rights of putative class members that form the basis of the class action suit from prejudice”).

¹⁴⁵ See, e.g., *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 66-67 (S.D. Tex. 1977) (“[T]he possibility of ‘legalized blackmail,’ . . . and Rule 23 abuse is at its height during the pre-certification stage when defendant is literally threatened by potential class-wide liability. Because the existence of a class has not been determined, the likelihood increases that plaintiff and his counsel will unduly sacrifice the previously-asserted class interest for private gain.”).

individual action, filing their own class action, or competing to serve as class representative and proposing a different lawyer to serve as class counsel. Courts took various approaches to the problem of individual settlements, with most concluding that notice to absent class members and judicial review were necessary if there was a risk that absent class members would be prejudiced.¹⁴⁶ Rule 23(e) now requires notice and court approval only if class members would be bound by the proposed settlement, which is not ordinarily the case if the defendant compensates the named plaintiff for dismissing the lawsuit before the class is certified. One might infer that the lawyer's duty to the nascent class, if any, is simply to avoid absent class members' detrimental reliance on the lawsuit.

The court will expect more from class counsel, however, if the lawyers negotiated a settlement for the class during the pre-certification stage, and then ask the court both to certify the class and to approve the settlement.¹⁴⁷ At that point, the court's responsibility is to assure that, in negotiating the settlement, the lawyer acted in the best interest of the class, not the named plaintiff.¹⁴⁸ Looking backward in time, this suggests that the court will expect the lawyer to have treated the nascent class as a client during the negotiation stage and, indeed, as between the nascent class and the class representative, to have given primacy to the nascent class's interests. The lawyer may regard loyalty to the nascent class as a fiduciary duty to the nascent class, as an element of competent representation of the individual who brought the class action, or simply as a procedural obligation implicit in Rule 23.

The ideas that lawyers, in the pre-certification stage, may seek to advance the individual's interests in disregard of the absent class members, but at the same time must give primacy to the class's interests with virtual disregard of the individual client's interests, seem hard to reconcilable. But

¹⁴⁶ See, e.g., *Schemmer v. Chartone, Inc.*, 2008 U.S. Dist. LEXIS 35020, *3 (N.D. Ohio 2008); *Anderberg v. Masonite Corp.*, 176 F.R.D. 682 (N.D. Ga. 1997).

¹⁴⁷ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (stating that proposals to jointly certify and settle a class action require the courts to "close" and "heightened" scrutiny to whether the requirements of Rule 23 have been met).

¹⁴⁸ See, e.g., *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279 (7th Cir. 2002) ("The principal issue presented by these appeals is whether the district judge discharged the judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class. This problem, repeatedly remarked by judges and scholars . . . requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.").

one possible explanation is that the duties owed to the nascent class are not static and unchangeable; rather, they may evolve as the class action progresses (e.g., as absent class members' reliance grows) or differ depending on the task being performed.¹⁴⁹

Of course, a distinction between the lawyer's duties pre- or post-appointment as interim lead counsel, or as counsel to a certified class, is artificial.¹⁵⁰ The class is a legal construct that could be constructed at earlier or later points in the lawsuit. Jean Wegman Burns has proposed, for example, that class counsel should be required to represent the class from the time a class action is filed, and that class representatives should be replaced with another mechanism for monitoring class counsel.¹⁵¹ At that point, the conflict of interest problem would have a straightforward solution: barring class counsel from representing individual class members. Even under the current regime, it is unclear why certification should be the dividing line. Absent class members' reliance interests, or other interests, may not change significantly simply because the class is certified. Likewise, it seems odd to think that the lawyer's loyalty to the class in negotiating a class settlement, and therefore the lawyer's approach to the negotiations, should differ depending on whether the lawyer is negotiating for the nascent class prior to certification or for the class as a "client" after class certification.

IV. WHAT SHOULD LAWYERS DO?

That the law is unclear, and that courts seem indifferent, does not relieve lawyers of their ethical duties to individual clients. Class action law may define or inform the nature and scope of a lawyer's duties toward the "class as a whole," absent class members, and class representatives. But if individuals are represented as individuals, a lawyer must still comply with

¹⁴⁹ See *Larkin Gen. Hosp., Ltd. v. American Tel. & Tel. Co.*, 93 F.R.D. 497, 501-02 (E.D. Pa. 1982). One might also consider whether the lawyer's duties expand if the lawyer is appointed to serve as "interim class counsel" under Rule 23(g)(3): Rule 23(g)(4) calls on class counsel to "fairly and adequately represent the interests of the class," and this arguably applies to interim class counsel as well.

¹⁵⁰ See *Landsman-Roos*, *supra* note 133, at 840 ("[I]mposing different pre-and postcertification fiduciary duties is an artificial, counterintuitive distinction. Nothing changes in terms of an absent class member's reliance on an attorney before and after certification. Likewise, the level of control an attorney has over an absent class member's relevant asset - that is, his claim - remains the same pre-and postcertification.").

¹⁵¹ Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representation in Class Actions*, 42 *Hastings L.J.* 165 (1990).

their state-adopted version of the Model Rules governing communications with, and disclosures to, a client – e.g., Rules 1.2(c), 1.4 and 1.7, among others. Lawyers need to explain both how they propose to act in light of the legal uncertainty and how the uncertainty may add to the risks. Therefore, they must take a position in light of the jurisdiction’s law regarding their pre- and post-certification duties.

Lawyers should explain the ground rules of the class action to their individual clients, and talk through important issues and questions that may arise. Will the lawyer’s advocacy on behalf of the individual be limited by legal duties to the class or the lawyer’s own financial (and perhaps reputational) interest in seeing the class certified? Is there a risk that the lawyer’s advice will be untrustworthy, because the lawyer will be taking account of the class’s interests? Is there a risk that the lawyer will have to withdraw from representing the individual in order to continue the class representation? Is there a risk that, if a class is not certified, the lawyer will seek to drop the individual client because the matter is no longer likely to be substantially remunerative? These should be substantial, detailed communications.¹⁵²

In our view, lawyers should at the outset of the representation inform their individual clients of those rights which the pressures and incentives of concurrent class litigation might lead the lawyer to later downgrade or ignore. For example, an individual client might be informed of her absolute right to seek a settlement at any time and to approve or disapprove any settlement offer. An individual client might also usefully be informed of the right to have her attorney keep her reasonably informed of the status of the matter, and to fully inform her about potential conflicts.

One cannot eavesdrop on privileged communications between class actions lawyers and individual clients to know whether these kinds of communications occur. Our sense that they rarely do is based on a dearth of case law or professional literature recommending or mandating such communications, and the fact that almost all of the retainer agreements we reviewed were brief and vague. If our intuition is correct, then any communication along the lines proposed would improve on the status quo.

One approach that some lawyers take seems improper. Some

¹⁵² Cf. Rule 1.4(b), ABA Model Rules of Professional Conduct (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

retainer agreements we reviewed contemplate an individual representation and a filing for class certification, and then state that the client waives all future conflicts,¹⁵³ or agrees to be dropped as a client if any future conflicts arise.¹⁵⁴ Such a barebones waiver provision is antithetical to the concept of “informed consent” in the context of conflicts of interest. Informed consent ordinarily requires an explanation of the facts giving rise to a conflict of interest, and an explanation of the risks, benefits and alternatives.¹⁵⁵ Many courts are skeptical of advanced waivers of conflicts of interest, precisely because the relevant facts giving rise to a conflict are not yet known.¹⁵⁶ At a minimum, for consent to be effective in advance of a conflict arising, there must be an explanation, at least in general terms, of the conflict of interest that is anticipated to arise and the implications. Beyond that, a client cannot be asked to waive all future conflicts without elaboration because not all are subject to waiver, or consent, under the professional conduct rules. Therefore, even for a sophisticated class representative, the pro forma waiver provision will not suffice.

Nor can individual clients be asked to contract in advance that they will follow their lawyer’s direction about whether to settle. Settlement is carved out by the Model Rules as a decision that “must . . . be made by the client.”¹⁵⁷ One might say that clients are actually making the decision if they voluntarily decide in advance to follow the lawyer’s advice. But that seems to violate the clear purpose of the rule, which is to preserve individual client autonomy, informed but not controlled by legal counsel, over the

¹⁵³ See Class Action Engagement Agreement, ECF No. 161-26, *Gazzara v. Pulte Home Corp.*, No. 6:16-cv-00657 (M.D. Fla.) (“[T]he Attorneys will be separately providing legal representation to you at the same time that they will be providing legal representation to other owners of homes, townhomes and condominiums against the builder of your residence [Y]ou and other owners have each agreed to waive any conflict of interest arising out of, and that you will not object to, our representation of each other in the matter described herein.”).

¹⁵⁴ See Letter from Frank E. Marchetti to Christine Anderson, ECF No. 16-1, *Anderson v. PODS of Los Angeles, LLC*, No. 2:13-cv-04893 (C.D. Cal.) (“You understand that Attorney will not be able to represent you if Attorney’s representation of you would create a conflict with one of the Attorney’s existing clients You expressly agree to immediately consent to Attorney substituting out as your attorney of record after a lawsuit is filed if Attorney learns through discovery of such a conflict.”).

¹⁵⁵ Rule 1.0(e), ABA Model Rules of Professional Conduct.

¹⁵⁶ See, e.g., *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356, 1359-60 (N.D. Ga. 1998) (finding waiver language too vague).

¹⁵⁷ Rule 1.2(a) comment 1, ABA Model Rules of Professional Conduct (discussing Model Rule 1.2(a)).

“objectives” of the representation.¹⁵⁸ We therefore think that it is unethical for putative class counsel to ask their individual clients to agree to delegate the settlement decision, whether in an initial retainer agreement or later on.

The concerns we raise, and disclosures we suggest, may be less relevant when the individual client is a sophisticated one—whether a natural person or an entity—and when the client has other representation, whether in-house lawyer employees or outside representation. After the Private Securities Litigation Reform Act, the individual client of class counsel is very likely to be a sophisticated institutional investor with in-house counsel,¹⁵⁹ and so securities litigation may well raise fewer concerns than other types of class actions.

V. WHAT SHOULD RULEMAKERS AND TRIAL COURTS DO?

We have shown that a certain kind of conflict is endemic in class actions and is not being addressed. If courts or other rulemakers were to pay attention to the conflicts problem we have identified, a number of questions would arise. There is the threshold question of whether new rules, standards, or procedures are needed, or whether existing law simply needs to be more vigorously or differently applied. If new guidance is needed, there is the institutional choice question of who should formulate and who should apply it. Relatedly we must ask what a new legal rule, standard, or procedure should say.

As discussed, current law and practice do not appear to understand the conflicts we identify to be serious ones, and thus have not offered solutions. Some change over the status quo is warranted. In the previous section we suggested that class counsel or putative class counsel who also have an individual lawyer-client relationship should consider making certain kinds of disclosures to the individual clients to address potential conflicts, and consider seeking informed consent to waive actual or potential conflicts. But the class also must be protected, and absent class members cannot give consent or receive adequate counseling. Because of their absentee status, and their typically low knowledge or investment in the class litigation, district court judges oversee class counsel and, when

¹⁵⁸ Rule 1.2(a).

¹⁵⁹ See 15 U.S.C. § 78u-4 (3)(B)(iii)(I)(bb) (mandating a rebuttable presumption that the lead plaintiff appointed by the court in a securities class action will be the investor with “the largest financial interest in the relief sought by the class”).

necessary, protect absent class members from potential overreaching or exploitation. Simply making class counsel more aware of the conflicts we identify is not sufficient.

Courts handling class actions are often reluctant to apply the ABA Model Rules or state counterparts addressing conflicts if they think that policies of Rule 23 or the practical imperative to keep moving litigation to a resolution will be hampered thereby. One might ask whether the conflicts we identify could be appropriately addressed if federal courts were willing to simply apply Model Rule 1.7 or other conflict rules as written to the representation of classes.¹⁶⁰ (In the previous section we advocated greater compliance with the Model Rules approach by class counsel when interacting with their individual clients.)

It is not as easy to dismiss the idea that the standard conflict rules should govern the propriety of a lawyer's joint representation of a class and a class representative, just as they would govern the joint representation of a corporation and a corporate officer. There would be nothing exceptional about applying Rule 1.7 in this context, other than that the court's authorization would have to substitute for the class's informed consent.¹⁶¹ If some other standard should apply, the reason is simply that class counsel's conflict is different from the conflicts that Rule 1.7 ordinarily addresses and that courts, in overseeing class actions, are in a position to develop and enforce a standard that makes better sense in this context.

On the other hand, conflict rules are written to cover situations where there are no courts to oversee the lawyers, and may therefore tend to be more protective and more categorical than courts need to be in class action litigation, in which there is substantial judicial oversight.¹⁶² The district courts serve as the gatekeeper of four things that plaintiff-side class action lawyers greatly desire: class certification, appointment as class counsel, approval of settlements, and approval of fees.¹⁶³ District courts therefore inherently have the attention of class action lawyers, and have well-defined points during the litigation in which they interact with and can monitor lawyers.

¹⁶⁰ See generally Kane, *supra* note 12, at 389-90 (advocating for more effective judicial oversight to address the possibility that class counsel may favor the class representatives' interests).

¹⁶¹ See Miller, *supra* note 11, at 588 ("review by the court substitutes for consent").

¹⁶² See, e.g., Green, *supra* note 24, at 127.

¹⁶³ See Rule 23(c)(1)(A), (e)(2), (g), (h).

The Federal Rules of Civil Procedure, as interpreted by courts, already require class counsel to provide information to the court about conflicts as relevant to certification or settlement decisions, and judicial doctrine further requires that even “potential” conflicts be brought to the court’s attention.¹⁶⁴ With this robust structure in place for judicial oversight, overly protective and categorical ethics rules written to be applied by lawyers themselves are arguably inappropriate.¹⁶⁵

If the current Model Rules approach is not the best fit, the question is then who might craft a better approach, and what that approach would be. On the question of institutional choice, one possibility would be for the ABA to develop a Model Rule that addresses conflicts in class actions specifically, including the type on which we have focused. Another possibility would be for the Rules Enabling Act process to be used to amend Rule 23. The federal rulemaking process is likely to involve greater participation by different constituencies¹⁶⁶ than would be the case with an ABA-controlled process. Moreover, some commentators worry that the ABA’s output might tend to be “lowest common denominator” because of the need to reach agreement from the ABA House of Delegates and other factors.¹⁶⁷ Whether or not that is true, there is reason to fear that a new ABA rule would not have as much effect as reform at the federal law. As noted above, many federal courts of appeals have expressly stated that they feel free to depart from ordinary conflicts principles found in the Model Rules when necessary to successfully manage class actions. Outside the

¹⁶⁴ See *supra* note 72 and accompanying text.

¹⁶⁵ See Green *supra* note 24, at 126-28; Jonathan R. Macey, & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 97 (1997). Some commentators would apply, or give considerable weight, to the conflict rules. See, e.g., Bassett, *supra* note 13, at 965 (“Nothing in Federal Rule 23 exempts counsel from the ethical rules, and the rules’ applicability to all practicing attorneys does not take a holiday when an attorney chooses to represent a class rather than an individual.”); Stuhan & Costello, *supra* note 11, at 1206 (“[I]t would be a mistake to jettison ethical considerations in the class certification decision-making process altogether. The rules, while not necessarily controlling, should inform the analysis.”).

¹⁶⁶ See generally Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655 (1995).

¹⁶⁷ WOLFRAM, *supra* note 15, § 2.6.1 at 49; see also *id.* (“Once a number of lawyers defy a code rule (or are believed by other lawyers to have taken a negative stance), the rule will be widely ignored because of competitive pressures and a sense of unfairness. In that view of professional sociology, the area left for regulation is a relatively narrow range that falls between marginally enforceable rules and insubstantial ones.”).

class action context, federal courts exercise supervisory authority (e.g., in ruling on disqualification motions) in common-law fashion to develop and apply their own legal standards governing attorney conflicts.¹⁶⁸ That is, federal courts sometimes deny disqualification even when the lawyer has an impermissible conflict under the rules, because the court recognizes that there are interests at stake for which the rules do not adequately account. Likewise, courts sometimes disqualify lawyers on account of conflicts of interest even when professional conduct rules would permit the representation.¹⁶⁹ The federal courts seem unlikely to relinquish this independent, case-by-case approach even if the ABA wrote a new rule tailored to class action conflicts.

It would be helpful, we think, for Rule 23 to be amended to make explicit that conflicts of interest should receive the sustained attention of courts overseeing class actions. We see no good reason why Rule 23(g)(1)(A) should not expressly mention conflicts.

Unfortunately, it may be too much to expect that an amendment to the Federal Rules of Civil Procedure will be generated to address the conflicts explored in this article. Observers of the last attempts by the Advisory Committee to amend Rule 23 have noted that only relatively uncontroversial and insignificant changes have been approved.¹⁷⁰ The Supreme Court seems to value its ability to effectively write and rewrite rules of civil procedure via adjudication, and to be less interested in using the much more cumbersome rule-making process. Muddling through by lower federal courts, with a slight possibility of clarification by the Supreme Court, may be the best that can reasonably be hoped for.

What should this muddling look like? There are a range of relevant considerations. First, there are considerations of fairness to the individual clients who might be required to forgo their chosen lawyers, with whom they have a sustained relationship. This is a situation for which the individuals are not to blame, and that is essentially unavoidable and intrinsic to class action procedure. Under the present law, the named plaintiff remains an individual client at least until the class is certified, which, in the case of pre-certification settlements, is virtually the end of the case. It may seem unfair to require individual clients to give up their

¹⁶⁸ See Green, *supra* note 24, at 77-78, 120-22.

¹⁶⁹ See, e.g., *Wheat v. United States*, 486 U.S. 153 (1988).

¹⁷⁰ See, e.g., Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1514-16 (2017).

lawyers at a midpoint or late point in the lawsuit. This sometimes occurs in a joint representation when a conflict of interest unexpectedly emerges, but clients in that situation have a choice whether to be jointly represented and assume the risk that a conflict will later require the lawyer to withdraw. And this problem cannot be solved at no cost by appointing a different lawyer to serve as class counsel. It would not be in the class's best interest to be assigned a different lawyer who has no client in the matter and therefore no prior familiarity or relationship with either the matter or the class representatives.

Another consideration is whether disapproving of the joint representation would avert the problems that it poses. Would class counsel, who would now be a class representative's *former* lawyer, favor the class representative to a lesser extent, or would the lawyer's withdrawal from the individual representation be essentially meaningless? Representing the class alone would solve some problems: the lawyer would have no authority to negotiate a deal for the class representative individually and no obligation as a matter of loyalty to encourage the class representative to object to a settlement or to pursue separate compensation. But the literature suggests that class counsel sometimes favor the class representatives, with whom they have personal dealings, over absent class members. In that event, formally terminating the representation in the class action alone is unlikely to diminish the lawyer's loyalty to the class representative.

Yet another question is the frequency with which nascent conflicts become manifest. That is an empirical question on which there appears to be no research. But courts may make assumptions based on their own experience, interactions and study. If courts have not seen the problem arise very often in their own and their colleagues' courtrooms, it is easy to be dismissive.

Courts might also take account of the extent to which a conflict, if it becomes manifest, is likely to be harmful. One's assessment of harm turns, in part, on one's understanding of the class's interests. If one thinks that absent class members do not have a significant reliance interest at the pre-certification stage, then one will not be too troubled by the prospect that the class representative will sell out the nascent class with the lawyer's assistance by leveraging the class action to achieve a favorable personal settlement. This assessment also depends on courts' confidence in their ability to prevent or avert harm to the class by overseeing the class action. If judges believe that they can discern when a lawyer disserved the class

because of a conflict of interest, and believe they have the resources to redress the problem, then there may be little reason to be proactive or restrictive.

And, of course, courts will take account of the administrability and burdensomeness of any alternative to doing nothing until a problem screams out. Courts almost always place weight on the interest in judicial economy.¹⁷¹ Almost any alternative will be more costly than the status quo. Certainly, implementing the conflict rules at the pre-certification or certification stage of a class action will impose a cost on the court, which, as a proxy for the class, would presumably have to hold a hearing and make a ruling on the permissibility of the joint representation. Ordinarily, conflict rules are implemented by the lawyers alone, and therefore courts may be unconcerned about whatever burdens they impose.

While this discussion identifies various unresolved questions, one can understand why trial judges would be inclined to view class counsel's representation of class representatives as a Rule 23 problem to be managed in a contextual, case-by-case manner, not a Rule 1.7 question to be given a more categorical answer. The problem is distinctive in various respects and implicates considerations of class action policy and judicial policy generally. The one-size-fits-all conflict rules may not be best suited to this situation.

One can also understand why courts might tacitly adopt and apply a Rule 23 standard that calls for ignoring the joint representation until a party raises it as a problem. While courts do not appear to have undertaken any explicit analysis, they may tacitly conclude that: it would be unfair to the individual clients to deprive them of their lawyers and disadvantageous to the class to appoint a different lawyer; in most cases, the joint representation will not result in manifest conflict that creates significant harm that could be averted by forbidding or terminating the joint representation; and anyway, the problem is not worth the courts' time. Further, the lawyers involved in class actions have little incentive to disabuse courts of this assumption. In general, no one benefits from a stricter or more labor-intensive approach, since many who vie to be selected as class counsel are likely to have an individual client.

Given the legal framework established by Rule 23, this is a

¹⁷¹ *Cf. Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 (1982) (stating that "efficiency and economy" are "a principal purpose" of the class action).

reasonable approach. It is not feasible for courts to require lawyers for the nascent class to withdraw from representing individual class members, and at the time of class certification, the risks to the class created by the joint representation do not loom large enough to justify requiring class representatives to relinquish the lawyers who represented them prior to filing the class action lawsuit.

Less reasonable is courts failure to acknowledge the problem described in this Article and to develop a jurisprudence that offers guidance to plaintiffs' lawyers in class actions about how to reconcile the ethical and fiduciary duties they owe to a class or nascent class with those they owe to an individual class member at various stages of a class action, including in the context of the holdout, sellout and payout scenarios described in Part II. If the Model Rules are inapplicable or subject to implicit override by the policies of Rule 23, then lawyers need guidance from elsewhere, and courts, which have a supervisory responsibility over class actions and over the bar generally, are the obvious place to look.

Among the questions that courts should resolve are, first, what duties does the lawyer owe prior to class certification to the nascent class or to absent class members and when they arise. Without knowing the scope of the representation, the lawyer cannot know whether serving the interest of the putative class representative at the expense of the nascent class constitutes a fiduciary breach and a conflict of interest or doing so is entirely legitimate. Second, based on the resolution of this question, courts should set forth their expectations when there is a significant risk that the lawyer's duties to the class, or nascent class, will be compromised. Presumably, the Model Rules address the risk to the class representative and, in any event, that is not the court's principal concern under Rule 23. But courts are supposed to develop standards and procedures to address when class counsel is compromising or jeopardizing the class's interests. Courts should whether and when lawyers should raise this problem with the trial court, as they would other conflicts of interest, and, if not, how lawyers should resolve the problem on their own.

Whether courts should seek assurances from plaintiffs' lawyers at the outset of a class action lawsuit that they have reached an appropriate understanding with their individual clients is a harder question. In the absence of an appropriate understanding, class counsel may be under even greater pressure than otherwise to serve the individual client's interests at the expense of the class. If lawyers acknowledge and explain to their individual clients the limits of their loyalty to the client and the scenarios

that may require the lawyer to withdraw, lawyers will find it easier to comply with these expectations. If so, trial courts' responsibility to protect the class may call for some kind of inquiry.

We recommend that, in any class action except those led by sophisticated entity plaintiffs, such as many securities class actions governed by the PSLRA, district courts should inquire at the outset whether class counsel is also representing any class members as individuals and, if so, should require counsel to file with the court any retainer agreements or other documents setting forth the scope and basis of the attorney-client arrangement. If counsel had oral conversations with individual clients about potential conflicts, the court should require that these be reduced to writing. Any documents containing attorney-client privileged information or opinion work product could be filed *in camera* for judicial review only. District courts should also remind counsel of their continuing obligation to bring potential or actual conflicts that develop later to the courts' attention.

Once courts set forth clear expectations, however, there may be no need for oversight other than in the relatively infrequent cases in which problems will be called to their attention. Moreover, it would be burdensome on courts to question class representatives and their lawyers to ensure that they have reached an understanding that will adequately protect not only the individual client but the class or nascent class. Our point, therefore, is not that courts must go to lengths to police lawyers' compliance with judicial expectations, it is simply that courts have been remiss in failing to elaborate on their expectations in the first place

CONCLUSION

For decades, courts and commentators have been well aware that "[i]nherent in any class action is the potential for conflicting interests among the class representatives, class counsel, and absent class members."¹⁷² Notwithstanding this realization and a substantial amount of scholarly and judicial commentary on class action conflicts, we believe that one kind of conflict has not received due attention: the conflict that inevitably arises when class counsel also represents individual class members as individuals. We have shown that this kind of conflict arises from the very beginning of a putative class representation, and predictably

¹⁷² *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077 (2d Cir. 1995). *Accord* *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) ("[C]onflicts of interest are built into the device of the class action.").

will put the lawyer for the class and the individual in fraught positions with regard to the conflicting interests of the class and the individual. The more radical possible solutions—for instance, banning concurrent representation of a class and an individual class member on an individual basis—call to mind the medical adage about avoiding cures that are worse than the disease. We have therefore recommended more measured responses, primarily (1) greater disclosure of risks to individual clients by their attorneys, and (2) greater judicial oversight.