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NOTES

CLASS ACTION COUNSEL AS NAMED PLAINTIFF: DOUBLE TROUBLE

INTRODUCTION

When a court renders judgment in a class action suit,¹ all members of the class are bound by the judgment,² regardless of whether they were named parties in the action.³ Because members of the class who are not named plaintiffs ("absent class members")⁴ are bound by the judgment,⁵ courts will not certify a class unless the proposed class satisfies the requirements of Federal Rules of Civil Procedure Rule 23.⁶ Adequacy of

1. Class actions are lawsuits brought by a few individuals on behalf of a group of people similarly situated. See 1 H. Newberg, *Newberg on Class Actions* § 1.01 (2d ed. 1985).

2. A class judgment, in most cases, is *res judicata* as to members of the class. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

3. A named plaintiff, also referred to as a class representative, is a party who sues on behalf of a group of individuals with common claims. The representative is a party to the litigation and "stand[s] in judgment for those who are not." *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

4. Rule 23(a), which lists the prerequisites to a class action, requires that "the class [be] so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Absent class members are class members who are not joined or made formal parties to the suit. See 1 H. Newberg, *supra* note 1, § 1.07, at 11-12. While a party to a lawsuit owes certain obligations, the absent class member "is not required to do anything." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985). He does not have to hire an attorney or appear in court and is not subject to other burdens of litigation. See *id.* He is not "subject to counterclaims or cross-claims, or liability for fees or costs." *Id.* An adverse judgment, however, does extinguish any claims of the absent class member that were litigated. *Id.* To prevent his claim from being adjudicated by others, the absent member is provided with an opportunity to opt out of the class. See *id.* at 810-11. It should be noted that this opt-out opportunity only exists in class actions under Fed. R. Civ. P. 23(b)(3). See Fed. R. Civ. P. 23(c)(2); 7B C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1786, at 188-91 (2d ed. 1986). For a general discussion of the right to opt out, see *id.* at 188-209.

5. Class action represents an exception to the rule that an absent party cannot be bound by judgment in personam. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985). As long as the named parties adequately represent the absent class members, the judgment will bind the absent parties. See *id.*; see also *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 89-90 (7th Cir. 1977) (quoting *National Ass'n of Regional Medical Programs v. Mathers*, 551 F.2d 340 (D.C. Cir. 1976)), *cert. denied*, 445 U.S. 942 (1980).

6. Rule 23(a) lists the following as prerequisites to a class action:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). To "maintain" the class action, however, a lawsuit must fall within one of the subdivisions of Rule 23(b). See Fed. R. Civ. P. 23(b).

representation, one of the Rule 23 prerequisites for a class action,⁷ protects the due process rights of absent class members.⁸ To determine whether representation is adequate, courts often focus on the quality of counsel.⁹ As a result, if an attorney has interests that conflict with those of class members, a court may find his representation of the class to be inadequate.¹⁰

When an attorney seeks to serve as both named plaintiff and class counsel ("dual capacity"), courts face the question of whether he can represent the class adequately. In addressing this question, courts focus on the attorney's qualifications as class counsel rather than his role as named plaintiff.¹¹ Some courts hold that the potential conflicts of interest that arise from the dual-capacity role always require the courts to disqualify the attorney as class counsel.¹² Other courts adopt a fact-specific approach and allow dual-capacity representation under certain circumstances.¹³

This Note examines the policies underlying class action suits and the potential conflicts that arise when an attorney seeks to serve as counsel

7. See *supra* note 6. Adequate representation requires that class counsel be competent and qualified, and that no antagonism exist between the representatives and the class members. See *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968). The would-be class representative bears the burden of proving his adequacy. See *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980); see also 7A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1765, at 273-74 (2d ed. 1986). But see *In re Cohen's Will*, 51 F.R.D. 167, 174 (S.D.N.Y. 1970) (defendant had burden of establishing inadequacy of representation); *Fidelis Corp. v. Litton Indus., Inc.*, 293 F. Supp. 164, 171 (S.D.N.Y. 1968) (same). The court may assume counsel's competence unless defendant challenges it. See *Rodriguez v. Swank*, 318 F. Supp. 289, 294 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971). A court of appeals will reverse a trial court's finding of adequate representation only where an abuse of discretion is shown. See *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980); *Morris v. McCaddin*, 553 F.2d 866, 870 (4th Cir. 1977).

8. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

9. See *Susman*, 561 F.2d at 90; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968); see also 7A C. Wright, A. Miller & M. Kane, *supra* note 7, § 1769.1, at 375 & n.3.

10. See, e.g., *Piambino v. Bailey*, 757 F.2d 1112, 1119, 1129 (11th Cir. 1985) (plaintiffs' counsel had conflicts of interest with class, including being involved in lawsuits against a minority of class members, requiring disqualification), *cert. denied*, 476 U.S. 1169 (1986); *Board of Educ. of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (disqualification should be ordered "where an attorney's conflict of interests . . . undermines the court's confidence in the vigor of the attorney's representation of his client," *id.* (footnote omitted)).

11. See *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1090 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

12. See, e.g., *Zylstra*, 578 F.2d at 104; *Kramer*, 534 F.2d at 1090-92; *Turoff v. May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976).

13. See, e.g., *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1024 (5th Cir. Unit A Feb. 1981), *cert. denied*, 456 U.S. 960 (1982); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 93-94 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980).

for a class of which either he, a close family member, or a legal associate, is a member. It analyzes these potential conflicts and suggests that disqualification never should be automatic. This Note concludes that defendants should not be allowed to use a per se rule of disqualification in order to hamper class certification and, thereby, delay or avoid liability.¹⁴ A case-by-case determination of whether an attorney serving in a dual capacity can represent the class adequately better accords with the policies underlying the availability of class actions under Rule 23 than does a per se rule mandating disqualification.

I. ADEQUATE REPRESENTATION—THE DUAL-CAPACITY PROBLEM

A. *The Class Action Device*

The class action provides an efficient method for adjudicating certain types of lawsuits.¹⁵ A major objective of the class action is to facilitate individual plaintiffs' access to the courtroom in situations in which they may be unable to bring separate actions.¹⁶ Class actions also increase

14. While the possibility of abuse of the class action device by a lawyer seeking to act in a dual capacity exists, see *infra* notes 20-22 and accompanying text, courts must weigh this possibility against the likelihood that a defendant's opposition to class certification is for equally improper reasons. See *infra* note 32 and accompanying text. Adoption of a per se rule of disqualification prevents the courts from considering the latter possibility and thus gives defendants a powerful tool with which to postpone or escape liability. Although permitting an attorney to serve in a dual capacity may not always be appropriate, the question should be consigned to the discretion of the trial court judge in accordance with the power granted to him under Rule 23. See *infra* note 24 and accompanying text.

15. See *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973). The original class action Rule 23 was promulgated in 1937. See Letter of Submittal, 308 U.S. 649 (1937). Historically, its purpose was to promote judicial efficiency. See *Greenfield*, 483 F.2d at 831. Ambiguity as to the meaning of the terms "true", "hybrid", and "spurious", which were used to categorize class actions, see 1966 Amendments to Fed. R. Civ. P. 23, advisory committee's note, 39 F.R.D. 69, 98 (1966) [hereinafter *Comm. Notes*], and the lack of guidance to ensure procedural fairness, caused the Supreme Court in 1966 to amend Rule 23 to its present form. See Amendments to Rules of Civil Procedure, 383 U.S. 1047 (1966).

16. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); 1 H. Newberg, *supra* note 1, § 1.05, at 7; Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969). Economic reasons would prevent some plaintiffs from bringing individual claims. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973); Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 Mich. L. Rev. 308, 311 (1985).

The Supreme Court has recognized that when litigation costs and attorneys fees exceed the potential recovery by each individual, "most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). By enabling these otherwise impractical claims to be brought, Rule 23 deters conduct that causes minor injuries to many individuals.

Class action's deterrence of unlawful activity has saved millions of dollars in damages. See *In re Gypsum Cases*, 386 F. Supp. 959, 967 (N.D. Cal. 1974) (over \$86 million saved), *aff'd*, 565 F.2d 1123 (9th Cir. 1977); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1355 (N.D. Ill. 1974) (\$800 million estimated savings). See generally 1 H. New-

judicial efficiency¹⁷ by allowing trials involving similar claims to be consolidated into one case.¹⁸ This consolidation of claims also prevents the possibility of inconsistent adjudications of like claims.¹⁹

berg, *supra* note 1, § 5.13, at 448. To further the goal of deterrence, courts allow cy pres distributions. See 2 H. Newberg, *Newberg on Class Actions* §§ 10.15, 10.17, at 372-74 (2d ed. 1985). A cy pres distribution deals with the portion of a class recovery that is unclaimed or cannot be distributed to individual class members. *Id.* Rather than returning this portion to the defendant, a cy pres distribution allocates the unclaimed or undistributed funds in such a way as to achieve an indirect prospective benefit to the class. *Id.* at 374. *Market Street Railway Company v. Railroad Commission*, 28 Cal. 2d 363, 171 P.2d 875, *cert. denied*, 329 U.S. 793 (1946), provides a perfect example of this. The excess street railway fares collected by defendant were impossible to distribute to class members. *Id.* at 371-72, 171 P.2d at 880-81. The court, using a cy pres distribution, gave the recovery to the city to improve the railroads. *Id.* at 373, 171 P.2d at 881-82.

17. Cases allowed to be brought under Rule 23(b)(3) are "cases in which a class action would achieve economies of time, effort, and expense." *Comm. Notes, supra* note 15, at 102. Class actions are justified where "the public policy considerations of efficient court administration outweigh the potential prejudice to [absent class members]." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973).

18. See *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 495 (N.D. Ill. 1969); 1 H. Newberg, *supra* note 1, § 5.13, at 447; Kaplan, *supra* note 16, at 497. For a class action to proceed, commonality and typicality of the class members' claims and defenses must exist. See *supra* note 6. If plaintiffs sued individually, the cases would duplicate one another. See *Harper & Row Publishers, Inc.*, 301 F. Supp. at 495; Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. Indus. & Com. L. Rev. 501, 504 (1969); Kaplan, *supra* note 16, at 497. Class actions prevent this waste of judicial resources by allowing adjudication of all of the plaintiffs' claims in one proceeding. See Note, *supra* note 16, at 311.

Rule 23(b)(3) permits class actions, however, only when a court finds that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Once the court finds superiority, and other requisites are satisfied, it adjudicates plaintiffs' actions together, preventing multiple lawsuits. See *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 495 (N.D. Ill. 1969); *Adlerly v. Wainwright*, 46 F.R.D. 97, 99 (M.D. Fla. 1968).

19. One of the objectives of Rule 23 is to prevent inconsistent adjudications. See *Comm. Notes, supra* note 15, at 100 cl. (A); see also *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) ("[t]he justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations"); *Harper & Row Publishers, Inc.*, 301 F. Supp. at 495 ("class actions . . . reduce the likelihood of inconsistent judgments"). If many plaintiffs sued the same defendant in separate actions, the same defendant might be absolved of liability in some actions while found liable in others. See *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1366-67 (1976) [hereinafter *Developments—Class Actions*].

Inconsistent adjudications can result when multiple actions are initiated seeking either injunctive relief or money damages. See, e.g., *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982); *Cass Clay, Inc. v. Northwestern Pub. Serv. Co.*, 63 F.R.D. 34, 36 (S.D.S.D. 1974). In *Goff v. Menke*, a case involving prisoners' rights, if the penitentiary were told in one case that it could continue to restrict the prisoners' exercise, and in a separate case were enjoined from such action, the penitentiary would face problems caused by the inconsistent adjudications. *Goff*, 672 F.2d at 704-05.

In actions for damages, a similar problem arises when many plaintiffs claim against a single fund. See *Cass Clay, Inc.*, 63 F.R.D. at 36-37 ("[I]ndividual suits could exhaust the fund before all members of the class were able to protect their interests." *Id.* at 37 (quoting Comment, *Rule 23: Categories of Subsection (b)*, 10 B.C. Indus. & Com. L. Rev. 539, 541 (1969))). A defendant's liability in the individual suits could exceed the fund, leaving the defendant unable to allocate the fund according to the courts' judgments. A class

Despite the benefits derived from the use of class actions, the device is subject to abuse.²⁰ Possible abuses include strike suits²¹ and suits brought by attorneys for the sole purpose of receiving fees.²² Courts must act to prevent such abuses to protect defendants from harassment and coercion.²³ They also must be concerned with protecting the rights of absent class members,²⁴ and the interests of defendants in the proper

action prevents this problem by allowing "final determination of all the claims" with "separate proof of the amount of each claim and its pro rata share of the fund." *Id.* See generally *Developments—Class Actions*, *supra*, 1366-68 (discussing advantages of class actions when case-by-case adjudication might lead to inconsistent results). *But see In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982) (certification proper only when separate claims will affect later claims), *cert. denied*, 459 U.S. 1171 (1983); *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 789-90 (E.D.N.Y.) (certification denied where no proof was offered to show defendant would become insolvent), *rev'd on other grounds*, 635 F.2d 987 (1980), *cert. denied*, 465 U.S. 1067 (1984).

20. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1090-91 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); *Turoff v. May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976).

21. See Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 716 (1986).

A strike suit is litigation that is used to coerce defendants to settle. Shareholder plaintiffs bring such suits either to receive larger settlements than the corporate defendant normally would agree to, or to receive settlements where the corporate defendant normally would not agree to one. See Note, *supra* note 16, at 324 n.94. Frivolous claims form the basis of most strike suits. See 3 H. Newberg, *Newberg on Class Actions* § 15.29, at 246 (2d ed. 1985). These unsubstantiated actions, however, rarely result in a settlement. See *Class Action Study*, prepared for the United States Senate Commerce Committee, 93d Cong., 2d Sess. (1974), *reprinted in* 62 Geo. L.J. 1123, 1136-37 (1974). In fact, they can result in a substantial loss to the plaintiffs bringing the action. See 3 H. Newberg, *supra*, at 247. Attorneys who bring such suits may be subject to Rule 11 sanctions. See Fed. R. Civ. P. 11; *Gieringer v. Silverman*, 731 F.2d 1272, 1281 (7th Cir. 1984).

22. For this reason class actions are often referred to as "lawyer's lawsuits." See *Developments—Class Actions*, *supra* note 19, at 1605. A "lawyer's lawsuit" occurs, for example, in a suit for damages where there is absolutely no financial gain to the plaintiffs upon victory. See *Austin v. New Hampshire*, 420 U.S. 656, 669 (1975) (Blackmun, J., dissenting).

23. See *supra* note 21.

24. Rule 23 gives courts the power to deny class status when they find that the class representatives would not protect the interests of the absent members. See *supra* notes 6-8 and accompanying text. Where the claims of representatives and absent members are coextensive, the named plaintiff will vigorously prosecute the claims of the absent class in order to be victorious on his own claim. Where no coextensive interests exist, courts will deny certification because the named plaintiff will lack incentive to protect members' interests. See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Machella v. Cardenas*, 653 F.2d 923, 926-27 (5th Cir. 1981); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 88 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980); *Kleiner v. First Nat'l Bank*, 97 F.R.D. 683, 697-98 (N.D. Ga. 1983).

Rule 23 also requires court approval of any dismissal or compromise of a class action. Fed. R. Civ. P. 23(e); see *Umbria v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975) (judicial approval granted only when settlement benefits entire class).

Rule 23's protections seek to ensure that absent class members are not deprived unfairly of their individual claims. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807-

adjudication and finality of suits brought against them.²⁵

Normally, a judgment does not bind an individual who was not a party to the case.²⁶ Class actions represent an exception to this rule in that any judgment usually binds absent members of the class.²⁷ The Supreme Court has held that when absent class members are inadequately represented, due process considerations prevent them from being bound by the judgment.²⁸ Absent class members, therefore, can collaterally attack a judgment by asserting that representation was inadequate.²⁹

A defendant also may object to the adequacy of class representation. Based on his need to bind class members and to prevent future litigation,³⁰ a defendant can object to the class's representation prior to certification.³¹ Practically, however, a defendant may very well object to the adequacy of representation in order to prevent the lawsuit.³² If a court denies certification, the case may be dropped, and the defendant would not face liability. To achieve this outcome, a defendant often will attack the adequacy of representation as tainted by a conflict of interests³³ when

08 (1985). When an absent class member's interests are not protected, he is not bound by any judgment rendered, and his claim remains viable. *Id.* at 808.

25. See *Phillips Petroleum Co.*, 472 U.S. at 808-810.

26. See *Phillips Petroleum Co.*, 472 U.S. at 808; *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

27. See *Phillips Petroleum Co.*, 472 U.S. at 808; *Hansberry*, 311 U.S. at 42-43.

28. See *Phillips Petroleum Co.*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 45. If an absent class member "actually participate[s] in the conduct of the litigation in which members of the class are present as parties" or a specific relationship exists between the absent member and the present parties, the judgment will bind him, even though adequate representation is lacking. *Hansberry*, 311 U.S. at 43.

29. The binding effect of a judgment in a class action suit can be determined only in a subsequent action. See *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1054 (5th Cir. 1979). Plaintiffs can wait and attack any adverse judgment collaterally, arguing it is not binding for want of adequate representation. See *id.* In the subsequent action, the court must ask whether the trial court's determination of adequate representation initially was accurate, and then whether, after the termination of the suit, adequate representation in fact occurred. *Id.* If the court finds both prongs satisfied, the prior determination binds the absent class member. See *Malchman v. Davis*, 588 F. Supp. 1047, 1058 (S.D.N.Y. 1984), modified, 761 F.2d 893 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986). In *Malchman*, 11 absent class members objected to a settlement approved by the court, claiming that, because the named plaintiff was the brother of co-counsel, representation was inadequate. *Id.* at 1052, 1057. The absent class members even objected because one plaintiff was the sister of the chauffeur of a partner at a law firm representing plaintiffs. *Id.* at 1057. The court found that no plaintiff had any interest in the attorneys' fees, *id.*, and that the attorneys acted with "outstanding vigor and dedication", *id.* at 1058, and held the representation to have been adequate.

30. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808-10 (1985); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

31. See *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1021-1023 (5th Cir. Unit A Feb. 1981), cert. denied, 456 U.S. 960 (1982); *Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975).

32. See *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48, 55 (M.D.N.C. 1976); *Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975); *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594 (M.D. Pa. 1974); see also 1 H. Newberg, *supra* note 1, § 5.11, at 444.

33. See cases cited *infra* notes 34-36.

an attorney seeks to serve as counsel for a class of which he,³⁴ a close family member,³⁵ or a legal associate,³⁶ is a member.

B. Potential Conflicts

Courts addressing the question of adequacy of representation in the dual-capacity context generally have discussed three areas of conflict: attorney's fees,³⁷ the attorney as witness,³⁸ and the appearance of impropriety.³⁹ They have adopted two different approaches to determine if disqualification is necessary. Some courts have adopted a per se rule, automatically disqualifying a class counsel who is also a named plaintiff.⁴⁰ Other courts have used a fact-specific approach and have disqualified the attorney only if certain conflicts actually arise.⁴¹ Because the protections built into Rule 23 operate to identify conflicts in each area of potential conflict, blanket rules are unwise and unnecessary.

1. Attorney's Fees

In a typical class action case, each class member's individual recovery comprises a small percentage of the awarded damages.⁴² The size of the entire recovery for the class affects the amount of attorney's fees received by counsel for the class.⁴³ Therefore, a dual-capacity attorney's expected

34. See, e.g., *Turoff v. May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976); *Lowenschuss v. Bluhdorn*, 78 F.R.D. 675, 677 (S.D.N.Y. 1978); *Graybeal v. American Sav. & Loan Ass'n*, 59 F.R.D. 7, 13-14 (D.D.C. 1973).

35. See *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 103 (5th Cir. 1978) (one named plaintiff married to partner in law firm representing the class); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 95 (7th Cir. 1977) (counsel was brother of named plaintiff), *cert. denied*, 445 U.S. 942 (1980); *Stull v. Baker*, 410 F. Supp. 1326, 1337 (S.D.N.Y. 1976) (named plaintiff is the uncle and law partner of class counsel); *Fischer v. International Tel. & Tel. Corp.*, 72 F.R.D. 170, 173 (E.D.N.Y. 1976) (named plaintiff's son serving as class counsel); *Sweet v. Birmingham*, 65 F.R.D. 551, 552 (S.D.N.Y. 1975) (plaintiff's husband was partner in class counsel's law firm); *Stull v. Pool*, 63 F.R.D. 702, 704 (S.D.N.Y. 1974) (wife of attorney as named plaintiff).

Courts also fear champerty when a close relationship exists. See, e.g., *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90-91 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980); *Byrnes v. IDS Realty Trust*, 70 F.R.D. 608, 614 (D. Minn. 1976); *Shields v. Valley Nat'l Bank*, 56 F.R.D. 448, 449-50 (D. Ariz. 1971).

36. See, e.g., *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1023 (5th Cir. Unit A Feb. 1981), *cert. denied*, 456 U.S. 960 (1982); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1087 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); *Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975); *Kruger v. European Health Spa, Inc.*, 56 F.R.D. 104, 105-06 (E.D. Wis. 1972).

37. See *infra* notes 42-79 and accompanying text.

38. See *infra* notes 80-101 and accompanying text.

39. See *infra* notes 102-119 and accompanying text.

40. See *supra* note 12 and accompanying text.

41. See *supra* note 13 and accompanying text.

42. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 801 (1985) (average claim \$100, 28,100 class members, total possible recovery \$2.8 million); *Graybeal v. American Sav. & Loan Ass'n*, 59 F.R.D. 7, 13-14 (D.D.C. 1973) (individual recoveries small in comparison to total class recovery).

43. In class action suits for damages, the fee award increases proportionally with the

attorney's fees may dwarf his possible recovery as a class member.⁴⁴ This creates a potential conflict both at the settlement stage and on final judgment.

a. *Unfair Settlements*

Courts sometimes adopt a per se rule of disqualification in response to a concern that the dual-capacity attorney will settle a case unfairly in order to receive his fees.⁴⁵ When the named plaintiff also serves as the class attorney, for which he may receive fees, he may feel less incentive to question the fairness of a settlement on behalf of the class.⁴⁶ Because named plaintiffs are liable for litigation costs, the attorney serving the dual role actually can lose money if unsuccessful in reaching a favorable verdict.⁴⁷ Some courts argue that the mere possibility that the attorney may act to further his own interests over those of the class presents a conflict mandating disqualification.⁴⁸

Courts requiring disqualification because potential fee conflicts may induce disadvantageous settlements rely on a number of unwarranted presumptions. First, the courts that reason that an attorney will settle a claim unfairly must assume that the attorney will breach his professional and ethical duties, thereby subjecting himself to disciplinary action.⁴⁹ Second, these courts seem to ignore the fact that the size of the fee may

class recovery. See 1 H. Newberg, *supra* note 1, § 3.40, at 251. When an attorney handles a case on a contingent basis, he expects to receive higher compensation in consideration for bearing the risk of not being compensated at all. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973). If an attorney's reasonable compensation, however, represents a large portion of the judgment, then any "increased allowance for the contingent nature of the fee would be minimal." *Id.*

44. See *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 91 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980); *Turoff v. May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976); *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549, 554 (S.D.N.Y. 1972).

45. See *Saylor v. Lindsley*, 456 F.2d 896, 900-01 (2d Cir. 1972) (small settlement could produce a larger recovery to attorney than a larger settlement reached after more work); *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 686 (S.D. Tex. 1976) (attorney may settle to receive "immediate and certain compensation for himself in the form of legal fees"), *aff'd*, 577 F.2d 335 (5th Cir. 1978); see also *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743, 748 (N.D. Ohio 1975) (attorney may settle on unfavorable terms because "a large fee is part of the bargain" (quoting *Graybeal v. American Sav. & Loan Ass'n*, 59 F.R.D. 7, 13-14 (D.D.C. 1973))).

46. See generally cases cited *supra* note 45.

47. Although class members remain liable for expenses, often the attorney will only receive reimbursement upon success. See Note, *supra* note 16, at 314-15. Thus, in cases where the attorney forwards the expenses of litigation, he may choose to settle, realizing that a loss in court would result in a major unreimbursed expense. *Id.*

48. See, e.g., *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1091 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); *Turoff v. May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976); *Graybeal v. American Sav. & Loan Ass'n*, 59 F.R.D. 7, 14 (D.D.C. 1973).

49. See 1 H. Newberg, *supra* note 1, § 3.40, at 251; see also, e.g., Model Code of Professional Responsibility Canons 5 & 9 (1980) (attorney as witness and appearance of impropriety).

increase with the size of the settlement,⁵⁰ thus encouraging an attorney concerned with the amount of his fee to prosecute the class claims vigorously.⁵¹ Third, even if a conflict actually arises, mandatory disqualification presumes that a court's supervision under Rule 23(e) is inadequate to protect the absent members.⁵² Examination of Rule 23(e) demonstrates the fallacy of this last assumption.

Rule 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."⁵³ The Supreme Court has held that this Rule requires that courts afford notice to absent class members and approve the proposed settlement.⁵⁴ This gives absent class members two distinct levels of protection: the court's supervision⁵⁵ and their own ability to attack any proposed settlements.⁵⁶

Rule 23(e) requires courts to play an active role in settlement procedures and provides them with the machinery necessary to do so. It empowers the district courts to protect the class members from fee conflicts by scrutinizing all proposed settlements.⁵⁷ When reviewing settlements, the courts consider, among other things, the likelihood of plaintiff's success on the merits,⁵⁸ the reaction of the class to the settlement,⁵⁹ and the

50. See *supra* note 43 and accompanying text.

51. See 1 H. Newberg *supra* note 1, § 3.40, at 251; 7A C. Wright, A. Miller & M. Kane, *supra* note 7, § 1769.1, at 385.

52. See *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 96 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980). The Seventh Circuit's analysis in *Susman* illustrates some of the flaws in basing disqualification on the risk of unfair settlement. First, the court found that even if the dual-capacity attorney could effectively waive his fee, he would retain pecuniary and non-pecuniary interests in any attorney's fees awarded to his firm. *Id.* at 94. The court held that this "would support a finding of a likelihood of a conflict of interest." *Id.* Then after noting that "'mere imaginative speculation' is not enough" to warrant disqualification, *id.* at 94 n.11 (quoting *Robertson v. NBA*, 389 F. Supp. 867, 899 (S.D.N.Y. 1975)), the court concluded that an "inherent conflict of interest" existed without referring to any factual basis for such a conflict. See *Susman*, 561 F.2d at 94 & n.11. Indeed, the court specifically stated that "we intend no adverse reflection whatsoever, either professionally or personally, upon the individual counsel involved." *Id.* at 96. The court's rationale also seems to contradict its earlier argument that the public perceives an impropriety in dual-capacity representation by law firms. See *id.* at 93.

53. Fed. R. Civ. P. 23(e).

54. *Evans v. Jeff D.*, 475 U.S. 717, 724 n.8, 725 (1986). For a general discussion of the notice requirements, see 7B C. Wright, A. Miller & M. Kane, *supra* note 4, § 1786, at 188-209.

55. See *Fischer v. International Tel. & Tel. Corp.*, 72 F.R.D. 170, 173 (E.D.N.Y. 1976); *Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975).

56. See 3 H. Newberg, *supra* note 21, § 16.29, at 358-59, 359 n.321.

57. See *supra* note 24 and accompanying text. Courts scrutinize both the proposed settlement and the suggested distribution when making their determination as to approval. See, e.g., *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148-49 (11th Cir. 1983) (settlement that favored the named plaintiffs rejected by court); *Franks v. Kroger Co.*, 649 F.2d 1216, 1226-27 (6th Cir. 1981) (overturning settlement favoring two named plaintiffs and class attorney).

58. See *Protective Comm. for Indep. Stockholders v. Anderson*, 390 U.S. 414, 424 (1968). A recent case from the Southern District of New York illustrates the kind of

reasonableness of the amount offered in light of the best possible recovery and the risks of litigation.⁶⁰

Courts reviewing proposed settlements often simultaneously consider the fees requested by the attorneys.⁶¹ Courts may also bifurcate these reviews, considering attorneys' fees and proposed settlements at separate times.⁶² Attorneys furnish affidavits detailing the specific work performed, the number of hours spent on each part of the preparation, and the rate at which each hour was billed.⁶³ This information provides an adequate basis for the court to determine both the fairness of the settlement and the requested fees, making disqualification unnecessary. Thus, disqualification of a dual-capacity attorney based on potential fee conflicts giving rise to unfavorable settlements is not justified. Rule 23 clearly provides an effective mechanism to prevent unfair settlements.

inquiry mandated by Rule 23(e). In *Malchman v. Davis*, 588 F. Supp. 1047, 1052-54 (S.D.N.Y. 1984), *modified*, 761 F.2d 893 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986), the court, after a thorough analysis of the merits, approved a settlement waiving damages. The court first discussed the importance of the settlement relief. *See id.* at 1052. The court then looked at the chief issues on the merits—liability and damages. *See id.* at 1053-54. It found that the question of liability was difficult, and it would be impossible to predict the probable outcome. *See id.* The court then examined potential damage recoveries and concluded that each plaintiff's damages would amount to under \$100. *See id.* The court also determined that if damages were to be litigated, subclasses would have to be created and the litigation, therefore, would require great effort and expense. *See id.* at 1054. Finally, the court noted that few members objected to the settlement and no further litigation had been undertaken, indicating that even parties who had opted out of the class were satisfied with the result. *See id.* at 1057. For another case considering the difficulty of success on the merits, see *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965-66 (3d Cir. 1983).

59. *See, e.g.*, *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *McNary v. American Sav. & Loan Ass'n*, 76 F.R.D. 644, 648 (N.D. Tex. 1977).

60. *See, e.g.*, *In re Traffic Executive Ass'n—Eastern R.R.*, 627 F.2d 631, 633 (2d Cir. 1980) (court rejected settlement that would result in class recovery of approximately \$600,000 where possible class recovery was between \$32 million and \$42 million); *In re South Cent. States Bakery Prods.*, 88 F.R.D. 641, 643 (M.D. La. 1980) (proposed settlement awarding class more than 33 1/3% of possible recovery approved in light of expense and possible duration of lawsuit).

61. Guidelines exist for judicial review of attorneys fees in general. *See, e.g.*, *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973). The court first must multiply the number of hours worked by the hourly rate normally charged by similar attorneys for like work. *See Grinnell Corp.*, 560 F.2d at 1098; *Levit v. Filmways, Inc.*, 620 F. Supp. 421, 423 (D. Del. 1985). The resulting number is called the "lodestar" figure. *See Grinnell Corp.*, 560 F.2d at 1098; *Levit*, 620 F. Supp. at 423. The court then must modify the lodestar by "the contingent nature of success and the quality of the attorneys' work," resulting in the final fee amount. *Levit*, 620 F. Supp. at 423; *see also Grinnell Corp.*, 560 F.2d at 1098; *Malchman v. Davis*, 588 F. Supp. 1047, 1059-60 (S.D.N.Y. 1984), *modified*, 761 F.2d 893 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986). Courts follow these same steps when evaluating fees in class actions. *See Malchman*, 588 F. Supp. at 1060.

62. *See Levit*, 620 F. Supp. at 421-22; *Malchman*, 588 F. Supp. at 1059; *see also Fischer v. International Tel. & Tel. Corp.*, 78 F.R.D. 237, 245 (E.D.N.Y. 1978) (court approved settlement and then moved to issue of fees).

63. *See, e.g.*, *Levit*, 620 F. Supp. at 424; *Malchman*, 588 F. Supp. at 1059.

b. *Excessive Fees at Judgment*

Potential fee conflicts manifest themselves at judgment as well. As discussed above, a dual-capacity class attorney may lack incentive to monitor fees.⁶⁴ With no client to control his actions, he may seek and receive an excessive fee award at judgment.⁶⁵ An award of exorbitant fees results in more money for the named plaintiff in his capacity as class counsel and less for other class members.⁶⁶ Courts adopting a per se disqualification rule hold that this opportunity to seek and receive an excessive fee raises a conflict of interests and disqualify the dual-capacity attorney.⁶⁷

Some courts distinguish between cases in which class attorney's fees will be paid out of a common fund,⁶⁸ and cases in which the fees will be paid directly by the defendant.⁶⁹ When attorneys fees derive from a com-

64. See *supra* note 45 and accompanying text.

65. See, e.g., *Saylor v. Lindsley*, 456 F.2d 896, 900-01 (2d Cir. 1972); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743, 748 (N.D. Ohio 1975); *Graybeal v. American Sav. & Loan Ass'n*, 59 F.R.D. 7, 13-14 (D.D.C. 1973).

66. In common fund cases, see *infra* note 68, attorneys fees are deducted from a total class recovery. See *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1023-24 (5th Cir. Unit A Feb. 1981), *cert. denied*, 456 U.S. 960 (1982). Courts, therefore, are concerned that the "class representative may be too generous with the class's money in granting a fee." *Id.* at 1023. Attorneys fees are deducted in settlement cases as well. See *In re Traffic Exec. Ass'n—Eastern R.R.*, 627 F.2d 631, 633 (2d Cir. 1980).

67. See *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978); *Turoff v. May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743, 747-48 (N.D. Ohio 1975).

68. The common fund doctrine "provides that private plaintiff, or his attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Blacks Law Dictionary* 250 (5th ed. 1979). The Supreme Court recognized this doctrine in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975). In dual-capacity cases in which a common fund is created, some courts argue that the named plaintiff may be overgenerous when awarding attorneys fees. See *supra* note 66. Even in common fund cases, however, the court possesses supervisory powers to curb abuse. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

69. Where the fees are paid directly by the defendant, the named plaintiff does not have the opportunity to be overgenerous with the fees awarded. See *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1024 (5th Cir. Unit A Feb. 1981), *cert. denied*, 456 U.S. 960 (1982); *Spell v. McDaniel*, 616 F. Supp. 1069, 1086 (E.D.N.C. 1985), *aff'd in part, vacated in part*, 824 F.2d 1380 (4th Cir. 1987); *Brewster v. Dukakis*, 544 F. Supp. 1069, 1070-71 (D. Mass. 1982), *modified on other grounds*, 786 F.2d 16 (1st Cir. 1986).

Brewster illustrates how defendants' monitoring and court supervision operate as a check on class counsel fees. 544 F. Supp. at 1071. Plaintiffs' attorney requested fees exceeding \$1.2 million. *Id.* After calculating the basic fee award, to adjust the lodestar the court considered the defendant's cooperation during the case, the fact that any fee would come out of the public treasury, and that other fee applications were still pending. *Id.* at 1082. The fees actually awarded—\$386,204.01—amounted to less than one-third of the fees requested. *Brewster*, 544 F. Supp. at 1085.

When defendant does not oppose attorneys fees, the court must worry about collusion between the plaintiffs' attorney and the defendant. See *Malchman v. Davis*, 588 F. Supp. 1047, 1059 (S.D.N.Y. 1984), *modified*, 761 F.2d 893 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986). For instance, a defendant may agree to a higher attorney fee in return for a lower settlement. See *id.*

mon fund, they reduce the fund before it is allocated to the class.⁷⁰ If the named plaintiff is also the attorney receiving the fees, he possesses no incentive to object to excessive fees.⁷¹ When the defendant pays the attorneys fees directly, the dual-capacity attorney loses his opportunity to approve an unreasonably large fee award because the defendant will challenge any unreasonable fees.⁷²

Courts that disqualify the attorney when fees will derive from a common fund apparently believe that court supervision is inadequate to prevent unfair settlements.⁷³ The Supreme Court has held that courts can supervise common fund cases.⁷⁴ Even if this supervision were insufficient, disqualification would not represent the best solution. Instead of disqualifying the attorney, courts should disregard unreasonable fee requests and should themselves calculate the appropriate fees.⁷⁵ When the court advises the parties to reach a settlement on the merits before discussing fees,⁷⁶ the court eliminates its concern with an attorney's settlement procedures.⁷⁷ Even if practitioners fail to follow the court's advice and discuss fees before reaching a settlement, as the Supreme Court has noted is often the case,⁷⁸ the court's subsequent supervision sufficiently protects the class.⁷⁹

2. The Attorney as Witness

Courts also base attorney disqualification on the possibility that the dual-capacity attorney may be called as a witness.⁸⁰ The attorney-as-witness problem is not unique to class actions. Disqualification also may occur in non-class action suits.⁸¹ The rule that an attorney cannot act as

70. See *supra* notes 66 & 68.

71. See *supra* note 45 and accompanying text.

72. See *supra* note 69.

73. See, e.g., *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1024 (5th Cir. Unit A Feb. 1981), *cert. denied*, 456 U.S. 960 (1982); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1090-91 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

74. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394-95 (1970).

75. See *supra* note 61.

76. See, e.g., *Mendoza v. United States*, 623 F.2d 1338, 1353 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977).

77. The concern is that attorneys who negotiate fees simultaneously with negotiating a class recovery are in a position of conflicting interests. See, e.g., *Mendoza*, 623 F.2d at 1352-53; *Prandini*, 557 F.2d at 1021.

78. See *Evans v. Jeff D.*, 475 U.S. 717, 733-34 (1986); *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 453 n.15 (1982). The Supreme Court has held that simultaneous negotiation is vital to promote settlements because a defendant will not want to settle unless he knows what his total liability will be as a result of the settlement. See *Evans*, 475 U.S. at 733-34; *White*, 455 U.S. at 453 n.15.

79. See *Mendoza v. United States*, 623 F.2d 1338, 1353 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

80. See, e.g., *Bachman v. Pertschuk*, 437 F. Supp. 973, 976-77 (D.D.C. 1977); *Kruger v. European Health Spa, Inc.*, 56 F.R.D. 104, 105-06 (E.D. Wis. 1972).

81. See, e.g., *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983); *MacArthur v.*

both an advocate and as a witness on behalf of a client developed from the rules of evidence.⁸² Courts originally disqualified dual-capacity counsel on the ground that representation rendered him incompetent to testify on the plaintiff's behalf.⁸³ Although most modern courts reject this rationale,⁸⁴ they nevertheless find that other conflicts exist when an attorney testifies in a case he is trying.⁸⁵ Such courts generally base disqualification of the attorney on the breach of ethical standards.⁸⁶

Courts rely on the American Bar Association Model Code of Professional Responsibility (the "Code") to set the guidelines for attorney conduct.⁸⁷ Disciplinary Rule 5-101(B) mandates that an attorney not accept employment in a litigation matter in which he "ought" to be called as a witness.⁸⁸ It has been argued that, because he might be called to testify, a dual-capacity attorney is less adequate than others.⁸⁹ The fact that a better class representative exists, however, does not render counsel inadequate.⁹⁰ Furthermore, courts that permit dual capacity have held that

Bank of New York, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981); *Comden v. Superior Court*, 20 Cal. 3d 906, 912, 576 P.2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied*, 439 U.S. 981 (1978).

82. See 6 Wigmore, Evidence § 1911 (Chadbourn rev. ed. 1976); Manual on Professional Responsibility [BNA Manual], Lawyer as Witness 61:501, 61:503 (1987).

83. See *id.*

84. See, e.g., *Universal Athletic Sales Co. v. American Gym*, 546 F.2d 530, 539 (3d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977); *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 102, 624 P.2d 296, 299 (1981).

85. See, e.g., *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983) (advocate's testimony is impeachable due to his interest in the litigation); *MacArthur v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981) (appearance of impropriety); *Ford v. State*, 628 S.W.2d 340, 342 (Ark. Ct. App. 1982) (counsel may be subject to impeachment).

86. See, e.g., *Groper*, 717 F.2d at 1418; *MacArthur*, 524 F. Supp. at 1208; *Ford*, 628 S.W.2d at 342.

87. See *Ruder, Disqualification of Counsel: Disclosure of Client Confidences, Conflicts of Interest, and Prior Government Service*, 35 Bus. Law. 963, 964-65 (1980); Note, *Ethics—Access of Substitute Counsel to a Disqualified Attorney's Work Product—First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 15 Wake Forest L. Rev. 806, 810 (1979).

88. Model Code of Professional Responsibility DR 5-101(B) states "[a] lawyer shall not accept employment . . . if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. . . ." Model Code of Professional Responsibility DR 5-101(B) (1980) (emphasis added).

89. See *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 91 (7th Cir. 1977) (citing *Kruger v. European Health Spa, Inc.*, 56 F.R.D. 104, 105-06 (E.D. Wis. 1972)), *cert. denied*, 445 U.S. 942 (1980).

90. A representative who is not as capable as other class members is not deemed inadequate. See, e.g., *Bowen v. General Motors Corp. A C Spark Plug Div.*, 542 F. Supp. 94, 102 (N.D. Ohio 1981) (citing *Apanewicz v. General Motors Corp.*, 80 F.R.D. 672, 677 (E.D. Pa. 1978)), *aff'd*, 685 F.2d 160 (1982); *Avagliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562, 583 (S.D.N.Y. 1984) (citing *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 101 (S.D.N.Y. 1981)); see also *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247-48 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 366 (E.D. Pa. 1980); 7A C. Wright, A. Miller & M. Kane, *supra* note 7, § 1765, at 269. If the test was best representation, defendants would be able to raise motions to deny certification based on inadequate representation by showing that

the mere possibility that the attorney will be called as a witness does not mandate disqualification.⁹¹

At a minimum, when evaluating the attorney acting in a dual capacity, courts should apply the same standards used for disqualifying an attorney who may be called as a witness in a non-class action case. The Code requires disqualification of an attorney only when he "ought" to be called as a witness on behalf of his client.⁹² Courts have interpreted the word "ought" to mean that the attorney's testimony is necessary to his client's case.⁹³ Thus, courts should require the disqualification of a dual-capacity attorney only if his testimony relates to material facts,⁹⁴ or facts that could not be elicited from other witnesses.⁹⁵ Absent defendant's proof that the testimony concerns material or otherwise unavailable facts, the representation is adequate and disqualification is unnecessary.

Disciplinary Rule 5-101(B) also provides four exceptions to the attorney-as-witness disqualification rule that permit the attorney to testify about matters described in the exceptions.⁹⁶ A per se rule of disqualification based on the possibility that the class attorney will be called as a

any other class member would be a better representative than the party seeking to represent the class. The rule, however, only requires "adequate" representation. *See* Fed. R. Civ. P. 23(a)(4).

91. *See, e.g.,* *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 91 (7th Cir. 1977) (implying that attorney may be able to proceed without testifying), *cert denied*, 445 U.S. 942 (1980); *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48, 56 (M.D.N.C. 1976) (attorney would have to be disqualified only if his testimony were needed).

92. *See supra* note 88 and accompanying text.

93. The term "ought" has been held to mean testimony that would be of substantial help to the client. *See MacArthur v. Bank of New York*, 524 F. Supp. 1205, 1208-11 (S.D.N.Y. 1981). Another interpretation has left discretion to the attorney and his client. *See Borman v. Borman*, 378 Mass. 775, 789-90, 393 N.E.2d 847, 857 (1979). In *Comden v. Superior Court*, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9, *cert. denied*, 439 U.S. 981 (1978), the court held that a number of factors, including the materiality of matters to which the testimony relates, the testimony's probative value, and the availability of other means of proof, had to be considered. *See id.* at 913, 576 P.2d at 974, 145 Cal. Rptr. at 12.

94. *See* *United States v. Troutman*, 814 F.2d 1428, 1439-40 (10th Cir. 1987); *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48, 56 (M.D.N.C. 1976); *Comden v. Superior Court*, 20 Cal. 3d 906, 913, 576 P.2d 971, 974, 145 Cal. Rptr. 9, 12, *cert. denied*, 439 U.S. 981 (1978).

95. This is consistent with the analysis requiring disqualification only when testimony is needed. *See supra* note 93. A class action attorney occupies a unique position. A prerequisite to class action cases is numerosity. *See supra* note 6. In most cases, therefore, it would appear that any testimony the attorney might provide could be elicited from other named or unnamed plaintiffs. In cases where other plaintiffs could testify concerning the same matters, the attorney would not have to be disqualified. *See Clark*, 72 F.R.D. at 56. In addition, in these instances the attorney's testimony would be cumulative and therefore immaterial, so the attorney could testify. *Cf. United States v. Troutman*, 814 F.2d 1428, 1439-41 (10th Cir. 1987).

96. DR 5-101(B) prohibits a lawyer from testifying in cases in which he or his firm is counsel,

except that . . . he or a lawyer in his firm may testify:

- (1) If the testimony will relate solely to an uncontested matter.
- (2) If the testimony will relate solely to a matter of formality and there is no

witness therefore denies what even the disciplinary rules may permit.⁹⁷

Moreover, in non-class suits, courts have denied disqualification when a defendant uses Disciplinary Rule 5-102(A)⁹⁸ as a dilatory tactic.⁹⁹ Courts refuse to allow defendants to take strategic advantage of the Disciplinary Rules when their argument lacks merit.¹⁰⁰ Likewise, courts should deny motions for disqualification in class actions where the defendant is merely attempting to stall or prevent class action litigation.¹⁰¹

3. Appearance of Impropriety: Canon 9

Some courts hold that the appearance of impropriety stemming from dual-capacity representation also requires disqualification.¹⁰² The title of Canon 9 of the Code of Professional Responsibility states that "A Law-

reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Model Code of Professional Responsibility DR 5-101(B) (1980).

97. For example, in *Kruger v. European Health Spa, Inc.*, 56 F.R.D. 104 (E.D. Wis. 1972), the court held that the "plaintiff has commenced an action under a disability that no other member of the class is likely to have—an inability to testify except at the cost of withdrawal of counsel." *Id.* at 106. The court does not discuss the subject to which the attorney's testimony would relate. DR 5-101(B) permits counsel to testify to matters included under the exceptions. *See supra* note 96. Adopting a per se rule disqualifying the attorney every time he might be called as a witness, as did the court in *Kruger*, would preclude attorneys from ever testifying. It would also always prevent named plaintiffs from acting as counsel to the class. Even the disciplinary rule that provides a basis for the courts' arguments allows some testimony. *See Bachman v. Pertschuk*, 437 F. Supp. 973, 976-77 (D.D.C. 1977); *see also supra* note 96 and accompanying text.

98. Model Code of Professional Responsibility DR 5-102(A) (1980). This disciplinary rule enumerates the same exceptions to withdrawal from representation when counsel must testify as DR 5-101(B) does. *See supra* note 96.

99. *See Council for the Nat'l Register of Health Serv. Providers v. American Home Assurance Co.*, [1 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 1083, 1084 (Dec. 11, 1985) (D.D.C. Civil Action No. 85-2626) (opinion dated Nov. 15, 1985); *S & S Hotel Ventures L.P. v. 777 S.H. Corp.*, 69 N.Y.2d 437, 445, 515 N.Y.S.2d 735, 738, 508 N.E.2d 647, 650 (1987).

100. *See In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 28 (3d Cir. 1980); *American Home Assurance Co.*, [1 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) at 1084.

101. *See Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975); *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48, 55 (M.D.N.C. 1976). When defendants make motions objecting to the adequacy of representation by asserting that the prerequisites in Rule 23 are not satisfied, he hopes to prevent class certification. *See supra* note 6. If class status is denied, the individual claims may be too small to justify separate litigation. *See supra* note 76 and accompanying text. Raising opposition which results in a denial of class status may prevent the defendant from ever having to face trial.

102. *See, e.g., Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1091-92 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

yer Should Avoid Even the Appearance of Professional Impropriety.”¹⁰³ This canon seeks to prevent attorneys from acting in ways that appear unethical to laymen.¹⁰⁴ Attorney conduct that appears unethical could undermine public confidence in the legal profession and the judicial system.¹⁰⁵ These courts acknowledge that situations exist where the appearance of impropriety attaches to an attorney who attempts to serve in a dual capacity in class actions.¹⁰⁶

Some courts have found that attorneys attempting to serve in a dual capacity in class actions involving equitable funds must be disqualified under Canon 9.¹⁰⁷ These courts argue that even if no actual fee conflict exists, the potential attorney fee conflict presents an appearance of impropriety.¹⁰⁸ In *Kramer v. Scientific Control Corp.*,¹⁰⁹ for example, the Court of Appeals for the Third Circuit adopted a limited per se rule under Canon 9, disqualifying class counsel in equitable fund cases. The court held that “it is the *appearance*, not the *fact*, of impropriety which Canon 9 is designed to eliminate.”¹¹⁰ The Fifth Circuit, although originally adopting a per se disqualification rule under Canon 9, now has restricted the rule’s use to equitable fund cases.¹¹¹ In such cases, once these courts find the appearance of impropriety, they hold that Canon 9 mandates disqualification of the attorney attempting to serve in a dual capacity, as well as his partners, attorney-employees, and office associates.¹¹²

Other courts, permitting dual-capacity representation have held, however, that an appearance of impropriety does not always require disqualification.¹¹³ These courts make a distinction between common fund and non-common fund cases, and are concerned with the appearance of im-

103. Model Code of Professional Responsibility Canon 9 (1980).

104. EC 9-2 provides that “[o]n occasion, ethical conduct of a lawyer may appear to laymen to be unethical.” Model Code of Professional Responsibility EC 9-2 (1980); see *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1091 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

105. EC 9-2 states “[A] lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.” Model Code of Professional Responsibility EC 9-2 (1980). “It does not follow, however, that an attorney’s conduct must be governed by standards which can be imputed only to the most cynical members of the public.” *Woods*, 537 F.2d at 813.

106. See *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978); *Kramer*, 534 F.2d at 1091-92.

107. See *Phillips*, 637 F.2d at 1023; *Kramer*, 534 F.2d at 1092.

108. See *supra* note 107.

109. 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

110. *Id.* at 1091.

111. See *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1023 (5th Cir. Unit A Feb. 1981), *cert. denied*, 456 U.S. 960 (1982).

112. See *Kramer*, 534 F.2d at 1092.

113. See, e.g., *Phillips*, 637 F.2d at 1023; *Woods v. Covington County Bank*, 537 F.2d 804, 813 n.12 (5th Cir. 1976).

propriety arising from attorneys' settlement procedures.¹¹⁴ Once a common fund settlement is negotiated by the parties and approved by the court, dual-capacity representation provides no check on the attorneys fees, creating an appearance of impropriety.¹¹⁵ Some courts use the appearance of impropriety argument to bolster their reasons for disqualifying the attorney.¹¹⁶

Canon 9, however, does not require disqualification in every case in which the court finds a reasonable possibility of improper conduct.¹¹⁷ The "court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case."¹¹⁸ Furthermore, it has been held that courts should not resort to Canon 9 as a basis for disqualification when no other ethical or disciplinary rule would justify the attorney's removal.¹¹⁹ Thus, courts should disqualify an attorney only when real misconduct, or a serious risk of the appearance of it, exists, and not base disqualification on the mere appearance of impropriety.

CONCLUSION

When defendants object to the adequacy of representation, their primary motive often is to have certification denied to delay or actually prevent a legitimate class action lawsuit. Attacks on dual-capacity representation often have resulted in the adoption of a per se rule of disqualification.

Most often disqualification is based on one of three areas of potential conflict: attorney's fees, attorneys as witnesses, or the appearance of impropriety. First, court supervision is adequate to protect against any attorney's fee conflict, so the use of such a potential conflict as a ground for disqualification is unwarranted. Second, mandating disqualification whenever an attorney may have to appear as a witness also is inappropriate since it would prohibit some conduct permitted by the Disciplinary Rules of the Code of Professional Responsibility. Third, the appearance

114. See *Phillips*, 637 F.2d at 1023; *Kramer*, 534 F.2d at 1091-92; see also *supra* notes 76, 77 & accompanying text.

115. See *supra* notes 46, 64, 71 & accompanying text.

116. In *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020 (5th Cir. Unit B June), *cert. denied*, 454 U.S. 895 (1981), the Court of Appeals for the Fifth Circuit reviewed the district court's decision to grant defendant's motion to disqualify plaintiff's counsel. See *id.* at 1021. The district court noted that it recognized that even the appearance of impropriety is prohibited by Canon 9. *Id.* at 1032. On appeal, the Fifth Circuit stated "[t]his statement provides us with no basis for determining whether or for what reason the court felt . . . [the] representation . . . was prohibited by Canon 9." *Id.*

117. See *Woods v. Covington County Bank*, 537 F.2d 804, 813 n.12 (5th Cir. 1976); *supra* note 113.

118. *Id.*

119. See *United States v. Troutman*, 814 F.2d 1428, 1442 (10th Cir. 1987); *International Elec. Corp. v. Flanzler*, 527 F.2d 1288, 1295 (2d Cir. 1975).

of impropriety is not always a sufficient reason to deprive a class of its counsel. The interests of the public and the class must be balanced.

Because absent members can protect their interests by objecting to certification of the class it is not necessary to allow defendants to attack adversary counsel arbitrarily. Such a practice can result in the disqualification of the best possible counsel, and the retention of the worst. Such a practice also encourages defendants to oppose the adequacy of representation in an attempt to escape liability. The adoption of per se rules of disqualification not only denies justice to plaintiffs, but also controverts the purpose of Rule 23. Because attorney disqualification should be the exception, not the rule, courts should use a fact-specific approach and disqualify attorneys only when actual conflicts arise. A fact-specific approach furthers the goals of the class action device and gives plaintiffs their day in court.

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