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Foreward

Howard M. Erichson
Fordham University School of Law

Benjamin C. Zipursky
Fordham University School of Law

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SYMPOSIUM

LAWYERING FOR GROUPS: CIVIL RIGHTS, MASS TORTS, AND EVERYTHING IN BETWEEN

FOREWORD

Howard M. Erichson & Benjamin C. Zipursky***

This much is clear: to pursue legal rights effectively, similarly situated persons often need collective legal representation. This applies in many lawyering settings but perhaps especially in large multiplaintiff litigation. For claimants, collective representation—whether by class action or by various forms of nonclass collective lawyering—enhances efficiency, multiplies leverage, and increases lawyers’ investment of time and resources. It is no exaggeration to say that in many cases the economic viability of plaintiffs’ claims depends upon collective lawyering.

A lawyer’s representation of similarly situated claimants may resemble, in certain ways, a lawyer’s representation of a corporation or other entity. Incorporation or other entity formation makes it possible for the organization to pursue or defend its interests as a collective. When a lawyer represents an organization, the lawyer’s duty runs to the entity itself, not to its officers, employees, shareholders, or other individual constituents or stakeholders.¹ Similarly, to harness the power of collective representation, a lawyer pursuing claims on behalf of multiple claimants must to some extent treat those claims as a collective set of interests. The class action device makes such collective representation explicit by the authorization of representative litigation and the appointment of class counsel.² But even in

* Professor of Law, Fordham University School of Law. We are grateful to the Stein Center for Law and Ethics and the Fordham Law Review for sponsoring this Symposium. In particular, we thank Stein Center Associate Director Sherri Levine and Professors Bruce Green and Russell Pearce for all of their work and for their steadfast support of this project.

** James H. Quinn Professor and Associate Dean for Research, Fordham University School of Law.

1. See MODEL RULE OF PROF’L CONDUCT 1.13(a) (2012) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

2. See FED. R. CIV. P. 23(g)(4) (“Class counsel must fairly and adequately represent the interests of the class.”); FED. R. CIV. P. 23(g)(1)(B) advisory committee’s note (2003 amendment) (“[T]he primary responsibility of class counsel, resulting from appointment as

nonclass settings, attention to collective interests may be both appropriate and inevitable. Lawyers may find that the best way to comply with their duty to each client is to prioritize the interests of the group.³

But just as the interests of entity stakeholders sometimes diverge, so may the interests of a group of similarly situated clients, even if those interests are generally aligned. Although a civil rights attorney may purport to represent the collective interests of a group, the preferences and values of group members may point in different directions.⁴ A mass tort lawyer may purport to represent the collective interests of users of a product, persons exposed to an environmental contamination, or victims of tortious conduct, but the interests of those claimants may line up in varying ways over the course of the litigation and especially in the construction and allocation of a settlement.⁵ Even in seemingly uniform contexts such as antitrust claims, fault lines may divide group interests.⁶ Despite the fact that plaintiffs' interests do not line up perfectly, collective representation offers sufficient advantages that claimants often rationally prefer representation by lawyers who represent other similarly situated claimants.⁷ In both the entity setting and the multiple-claimant setting, lawyers largely pursue collective interests even as they recognize potentially divergent interests among stakeholders.

There are important differences, however, between the entity lawyer and the multiple plaintiffs' lawyer. And within the multiplaintiff setting, there are important differences between class and nonclass representation. The formation of a corporation creates a legal entity with duties, rights, and the capacity to sue or be sued. The entity possesses claims and liabilities that flow from its rights and duties under substantive law. When a lawyer represents a corporation in litigation, the lawyer advances claims or defenses that the substantive law provides to the entity itself. When the lawyer represents a group of claimants, by contrast, the claims belong to the claimants, not to the group as a whole. Even though the claims are pursued through collective lawyering, the claims do not belong to the collective. A

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. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it.”).

3. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 529 (explaining duties to clients who have opted for collective representation: “The lawyer’s duty of loyalty runs to each individual client, but in group representation, the lawyer fulfills that duty of loyalty by focusing first and foremost on collective interests.”).

4. This was the point made most famously by Derrick Bell concerning school desegregation litigation. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

5. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 282 (2011).

6. See, e.g., *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc) (upholding certification of a nationwide settlement class action encompassing claimants from states that allowed indirect purchaser claims as well as states that did not allow such claims).

7. See Erichson, *supra* note 3, at 543–50.

class action carries the distinctive feature that class representatives, with appointed class counsel, are authorized to pursue claims on behalf of other members of the class,⁸ but even in a class action, the claims belong to the class members.⁹

Thus, while the entity analogy is helpful for thinking about collective representation and especially class actions,¹⁰ it cannot explain fully the relationship between a lawyer and a group of clients or class of represented persons. It would be a mistake to think of group lawyering purely in entity terms. Even as a lawyer advances clients' interests on a collective basis, the lawyer must remain cognizant of the individual interests being represented.

Thinking about out how to strike this balance—on the one hand, the necessity of group lawyering, and on the other, the recognition of the interests of individual group members—was the primary goal of the *Lawyering for Groups* Symposium. Often, these issues are encountered and contemplated within the confines of a particular substantive context—mass torts, civil rights, securities, antitrust, consumer litigation, and so on. And often, these issues are discussed as matters relating to particular procedural forms—class actions, multidistrict litigation, aggregate settlements, and others. By engaging issues of group lawyering across multiple substantive and procedural contexts, the Symposium sought to bring new insights. We are very grateful to all of the participants for making the event so stimulating and for filling this issue of the *Fordham Law Review* with thoughtful accounts of the problems encountered by lawyers who represent groups in various settings.¹¹ Needless to say, the questions of group lawyering do not admit of neat solutions that will satisfy all; sometimes the best that can be hoped for is clear-eyed recognition of the intractability of certain problems and the unavoidability of tensions and choices.

8. See FED. R. CIV. P. 23(a) (delineating the circumstances under which “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members”).

9. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (noting that class certification “leaves the parties’ legal rights and duties intact and the rules of decision unchanged”).

10. See David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

11. Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043 (2013); Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085 (2013); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013); Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193 (2013); Troy A. McKenzie, *“Helpless” Groups*, 81 FORDHAM L. REV. 3213 (2013); Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs’ Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013).