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Compliance and Ethics Committee

Upcoming Ethics & Compliance Committee Event

December 14, 2007
1-2:30 pm
1.5-1.8 CLE Ethics Credit Available

Internal Investigations for Multi-National Corporations: Strategies in Light of Global Attorney-Client Privilege Decisions

INSIDE THIS ISSUE

ANTITRUST COMPLIANCE PRACTITIONER SPOTLIGHT: MARJORIE DOYLE
James B. Kobak, Jr. and Jeffrey R. Coleman, Hughes Hubbard & Reed LLP 2

THE ANTITRUST COMPLIANCE PROGRAM AND THE CHIEF ETHICS AND COMPLIANCE OFFICER
Joe Murphy, Compliance Systems Legal Group 5

COMPETITION LAW AND LENIENCY REFORM:
SOUTH AFRICA PREPARES TO MODIFY ITS CORPORATE LENIENCY POLICY
Andrea C. Clarke, King & Spalding 9

CLASS COUNSEL: CONFLICTS BETWEEN DUTIES TO THE CLASS REPRESENTATIVE AND TO THE CLASS.
Tracy D. Rezvani, Finkelstein Thompson LLP 18

FROM THE CHAIR . . .

Slightly more than two years after the Compliance and Ethic Committee's creation in 2005, our membership stands at approximately 150. Our members are a rich mix of private practitioners, in-house counsel, academics, and government lawyers. Several are from other countries.

A number of Committee members have participated in our programs and projects. A core group has contributed to the success of our newsletter (and we thank them for the high quality of this fourth issue). Other Committee members contributed to the translation of the lysine cartel videotapes into several languages. And several members are playing central roles in programs, including two teleseminars now in the planning stage.

On behalf of the Committee's leadership, I specifically invite our members to communicate with us about their interests. If you believe we should put together a program on a given topic, please let us know -- and let us know whether you'd be willing to serve as a moderator or panelist. Likewise, if you

(continued on page 28)

Class Counsel: Conflicts Between Duties to the Class Representative and to the Class

By Tracy D. Rezvani

Class actions provide an exception to the traditional confrontation between plaintiff and defendant. *Class Actions: The Law of the 50 States*, at 1-1 Law Journal Seminars Press (2007). Class actions permit one or more people to represent the interest of others with similar claims. As opposed to individual litigation, the client in a class action can either be the class representative or consist of numerous unnamed class members or both. *See Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981).

Federal Rule of Civil Procedure 23 (and similar state counterparts) governs class actions and provides the court with the parameters to ascertain whether a putative class action should proceed. Of the factors that are analyzed by the court, FRCP 23(a)(4) is relevant to this discussion. Rule 23(a)(4) requires the court to determine if the putative class representative and class counsel are adequate to serve the class in their respective functions and thereby determines who is in charge of the absentee class members' rights.

This article will look at the ethical bind placed on counsel when the course of action demanded by the class representative, in counsel's estimation, is not in the class' best interests. Part I of this article discusses the roles of the class representative and class counsel, and class counsel's dual obligations to her individual client (the class representative) and the class. In Part II, this article examines the settlement context in which conflicts between the class representative and class counsel most typically arise.

Courts have been inconsistent in resolving conflicts between the class representative and class counsel, as discussed in Part III. One solution is substitution of the class representative; however, it is not uncommon for a class representative to take on the role of an objector, thereby raising several ethical concerns that may result in the withdrawal or removal of class counsel.

Finally, in Part IV, this article discusses the steps that counsel should take to minimize conflicts, including providing class representatives with a clear explanation of their rights and responsibilities and those of class counsel at the outset of the representation; drafting retainer agreements to specifically address class actions; and implementing practices and procedures for providing continuous communication with the class representative throughout the litigation.

Class Counsel: Conflicts Between Duties to the Class Representative and to the Class

I. The Participants in a Class Action

A. Role of the Class Representative

Once the class is certified, the role of the litigant and his counsel automatically convert to that of class representative and class counsel. Yet, the post-class certification duties of class representatives, as compared to that of class counsel, remain relatively "unchartered legal territory." *Maywalt v. Parker & Parsley Petroleum Co.*, 155 F.R.D. 494, 496 (S.D.N.Y. 1994). The only evident universal principle seems to be that the interests of the class representative must not be in conflict with those of the absent class members. *See, e.g., Graybeal v. American Savs. & Loan Assoc.*, 59 F.R.D. 7, 13-14 (D.D.C.1973); *Maywalt*, 155 F.R.D. at 496. Although, "Rule 23 was designed and has been interpreted to accommodate the tension between the goals of representative action and potential conflict and dissent among absent class members," the relationship between the class action attorney and absent class members is not characterized in Rule 23. *See Maywalt*, 155 F.R.D. at 496.

Absent class members whose rights and obligations are determined by class actions are assured that the court has ascertained the adequacy of their representation by the class representative and class counsel. The class representative possesses standing in her or his own right to prosecute or defend the action, and these individual interests of the class representative provide the necessary adversary context. The theory is that if the class representative zealously advances his own interests, then he also advances the interests of the class. The duties class representatives owe to absent class members have not often been discussed by the courts expressly. Nor does certainty exist as to the precise nature of the relationship between the class representative and absent class members. *See Newberg on Class Actions* § 15.03, 15-9 (3rd ed. 1992).

What is clear is that individual litigants and class representatives have similar functions. They must be knowledgeable about the litigation, be aware of major filings with the court, engage in discovery, be available to execute affidavits and appear at major hearings and trials. *See Law of the 50 States*, at §2.02 [1]. Class counsel thus fulfills the task of protecting absent class members' interests which subjects the relationship of class counsel with class members to substantial scrutiny by the court. *Newberg on Class Actions* § 15.03, 15-9.

B. Role of Class Counsel

FRCP Rule 23(g) governs the appointment of class counsel, and given the above, the role is significant and of the utmost importance. The primary responsibility of class counsel is to represent the entire class as she believes appropriate. *See* Advisory Committee Note, Fed. R. Civ. P. 23(g) ("obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members"); *see also Greenfield v. Villager Indus., Inc.*, 483 F.2d

824, 832 (3d Cir.1973) (class counsel possess fiduciary obligations to those not before the court). Selecting and appointing competent and adequate class counsel is a decision by courts given that they are responsible for every major and minor decision in the case, strategy for prosecution, discovery, negotiations, and trial. Thus, they have to serve not only their individual clients' interests, but the interests of the entire absent class.

What happens when the class representative's zealous advocacy of his own interests actually *conflicts* with the class' interests? To start answering this question, one must ask a more basic question: who is the client once the class has been certified? Or must class counsel somehow serve two masters: her client and the class? As the Fifth Circuit noted:

> Necessarily, much of what counsel does for the class is by and through the class representatives, but that is neither the ultimate nor the key determinant. The compelling obligation of class counsel in class action litigation is to the group which makes up the class. Counsel must be aware of and motivated by that which is in the maximum best interests of the class considered as a unit.

Parker v. Anderson, 667 F.2d 1204, 1210-11 (5th Cir. 1982). [1]

But is this the end of the inquiry? If the "client" in a class action consists of numerous unnamed class members as well as the representatives, and because "(t)he class itself often speaks in several voices ..., it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole ...." *Kincade*, 635 F.2d at 508 (citing *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)). In essence, court decisions have held that class counsel not only serves two masters but has to, in effect, place one master (the class) above the other (the individual client). *But see Alberts v. Franklin*, No. D040310, 2004 WL 1345078, at *19-20 (Cal. App. 4th Dist. June 16, 2004); Model Rule 1.8 comment 13 ("Lawyers representing a class of plaintiffs …, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class."). This places counsel in a bind *viz a viz* the American Bar Association's Model Rules of Professional conduct ("Model Rules").

C. Serving Two Masters

[1] Often times, the class representative retains a firm that ultimately is not designated as class or lead counsel. This places counsel in a position of representing the class representative yet having no control over the litigation and the manner in which it is prosecuted on his client's behalf. Although not in the proverbial driver's seat, such counsel must be included in all major decisions and be fully apprized of the status of the litigation. *See generally* Model Rules 1.2-1.4, 4.2. Even more often, a myriad of filed cases are consolidated and transferred by the Judicial Panel on Multidistrict Litigation to one forum. One client and his lawyer, then, if not chosen to act as counsel and representatives for the class, are effectively excluded from litigating as this will be done on their behalf. Yet that attorney still has obligations to safeguard and advance his client's interest. Class counsel must not impede that obligation but must respond to inquiries by these non-participating counsel regarding the procedural and substantive status of the action.

Class Counsel: Conflicts Between Duties to the Class Representative and to the Class

The rules of professional conduct governing conflicts of interest are in place to avoid the problems inherent in serving two masters. The Model Rule prohibits a lawyer from representing a client if the representation involves a "current conflict of interest" which is defined as:

> (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. (emphasis added)

Exceptions to this rule permits a lawyer to represent the client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law; . . . and
>
> (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7 (emphasis added); *see also* Model Rule 1.2. Thus, class counsel, at the outset of the litigation, is in compliance with Rule 1.7 in that his representation of the class representative is not directly adverse to the class, his representation of the client fulfills his responsibilities to the class, and the representation is court approved and permitted by Federal Rule of Civil Procedure 23. But what happens when the class representative and the class have different interests on a fundamental issue in the litigation? The Model Rules anticipate that the lawyer will discuss the potential conflict with his clients, and then obtain a waiver or consent to the conflict in writing. This, obviously, cannot happen in a class action context. Most often, the identity of class members is not readily known or number in the thousands. Under these circumstances, Rule 1.7 is simply unworkable.

The prevailing principles in individual representation cannot be imported wholesale into a class action setting. *See Parker*, 667 F.2d at 1211; *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 163 (3d Cir.1984) (Adams J., concurring). The Fifth Circuit recognized this inherent tension between the ethical rules and the realities of class litigation:

> Although the lawyer has some freedom to make tactical choices during litigation without consulting his client, the lawyer is expected to defer to the client's wishes on major litigation decisions. … Unfortunately, it remains unclear whether this model can be carried over to the class action context, as no clear concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged. … Certainly it is inappropriate to import the traditional understanding of the attorney-client relationship into the class action context by simply substituting the

> named plaintiffs as the client. The interests of the named plaintiffs and those of other class members may diverge, and a core requirement for preventing abuse of the class action device is some means of ensuring that the interests and rights of each class member receive consideration by the court. Were the class attorney to treat the named plaintiff as the exclusive client, the interests of other class members might go unnoticed and unrepresented.

Pettaway, supra at 1176-77; *see also Parker*, 667 F.2d at 1211. Moreover, a fear that class representatives can hold class counsel and the class hostage advocates not applying the ethical rules strictly to class actions:

> In many class actions, one or more class representatives will object to a settlement and become adverse parties to the remaining class representatives (and the rest of the class). If, by applying the usual rules on attorney-client relations, class counsel could easily be disqualified in these cases, not only would the objectors enjoy great " leverage," but many fair and reasonable settlements would be undermined by the need to find substitute counsel after months or even years of fruitful settlement negotiations. 'Moreover, the conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules.' [citation omitted]

Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 591 (3d Cir. 1999). But this does not mean that class counsel can ignore the wishes of the class representatives. *See Leib v. 20th Century Corp*., 61 F.R.D. 592 (M.D.Pa.1974)("[a]n attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved."). So how does class counsel serve two masters without being held hostage by his duties and running afoul of them at the same time?

II. The Devil is in the Settlement

As real as this potential conflict is in all class litigation, it almost always materializes in connection with settlements. *See* J. Chambers, *Class Action Litigation: Representing Divergent Interests of Class Members*, 4 U. Dayton L.Rev. 353, 356 (1979). Class counsel, having spent a considerable time litigating the case, knows the risks of victory and defeat better than anyone. Whatever the reason, at one point, all parties engage in settlement negotiations. After painstaking negotiations, a settlement agreement is negotiated that, in class counsel's opinion, takes into account the real risks of litigation while providing a meaningful benefit to the class as whole. The settlement proposal is then presented to the class representative(s) for review and approval. But what if approval is not forthcoming from some

or all of the class representatives? What if the client is not concerned with the litigation risks when reviewing the settlement offer and opts to reject it? What does class counsel do if she feels the settlement offer is in the class' best interest anyway?

"Representative suits carry with them an accepted structural risk that conflicts may arise between groups of class members." *Mendoza v. United States*, 623 F.2d 1338, 1344 (9th Cir.1980), *cert. denied sub nom., Sanchez v. Tuscon Unified Sch. Dist. No. 1*, 450 U.S. 912 (1981); *see also* Model Rule 1.8 comment 13. "The duty owed to the client sharply distinguishes litigation on behalf of one or more individuals and litigation on behalf of a class." *Parker*, 667 F.2d at 1211. Thus, the fairness and adequacy of counsel's performance cannot be gauged in terms of the representation of the named plaintiffs. *Parker*, 667 F.2d at 1211; *Kincade*, 635 F.2d at 508; *see also Pettway*, 576 F.2d at 1216.

While an individual client could reject a settlement on his own behalf (Model Rule 1.2(a)), a "class representative cannot alone veto a settlement . . . ." *Manual For Complex Litigation*, § 21.642 (4th ed. 2002); *see also Reed v. Gen. Motors Corp.*, 703 F.2d 170, 174 (5th Cir.1983); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 n. 19 (4th Cir.1975); *Thomas v. Christopher*, 169 F.R.D. 224, 243 (D.D.C.1996). If class counsel believes the proposed settlement is in the best interests of the class, class counsel must submit the proposed settlement to the court for approval. *See Manual*, § 21.642.

A. Class Counsel acts against the Individual Desires of the Representatives

It is rare when class counsel feels compelled to advocate against the wishes of all the class representatives. The *Pettway* decision, involving claims of employment discrimination by black employees, is perhaps unique in that there, all class representatives and 70% of the class objected to the settlement. Once the settlement was nevertheless approved by the court as fair, the objectors sought an appeal which class counsel refused. *Pettway*, 576 F.2d at 1176. The Fifth Circuit grappled with the identity of the appropriate decision maker for the class. On the limited issue of appeal, the Fifth Circuit held that it was initially the decision of the class, and not its counsel, to appeal. *Id.* at 1177; *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). However, according to the Fifth Circuit, if class counsel feels that the class representatives arguably have failed to adequately represent the interests of the class, class counsel should point out potential inadequacies or conflicts of interest to the court. *See Pettway, supra* at 1178. It is the district court's role to exercise its discretion in deciding whether to overrule class counsel and allow the named plaintiffs to execute their decision on behalf of the class or support class counsel and halt its execution. *See id.*

B. When the Interests of the Class Representatives and the Class diverge

There have been many instances where class counsel has been trapped between the class representatives and the class; her obligations to the class necessitating a course of conduct flatly refused

by the client. Given that the case law permits class counsel to reject her individual client's order for the sake of the class, is she safe in disregarding her client's express orders? Generally, the answer is maybe.

In recent years, there have been many accounts of this battle between class representatives and the class and its counsel. In the fen/phen diet drug litigation, class counsel spent a significant amount of time negotiating a complex settlement of the entire litigation spanning injuries from refunds, to medical monitoring to personal injury of varying degrees. The settlement was deemed fair and adequate by class counsel and *some* of the class representatives. The remaining class representatives took an adverse position against the settlement. More recently, in the Bar/Bri antitrust litigation, three of the seven class representatives objected to the settlement and began an online petition against the settlement and its terms. Far from being a problem unique to the American legal system, the Supreme Court of British Columbia was faced with a similar scenario where class counsel agreed to a settlement over only one client's objection and faced removal. *See Richard v. British Columbia*, 2007 BCSC 1107 (July 23, 2007). The way these conflicts have been treated by the courts is discussed below.

III. Judicial Treatment

The fact patterns that give rise to these conflicts are matched only by the patchwork treatment given by the courts. First, courts have permitted the substitution of class representatives, which effectively removes the conflict. Second, courts have permitted withdrawals or forcible removal of class counsel. The third, and most common approach, occurs when objecting class representatives fire their counsel, obtain new counsel, and object to the settlement. Although these approaches seem diametrically opposed, and to some extent they are, they can be harmonized by the fourth and most integral actor in this drama: the court and its role as the final arbiter of fairness and adequacy.

A. Substitution of the Class Representative

Courts have broad discretion in managing a class action, determining its course, imposing conditions, and otherwise acting for the protection of absent class members. FRCP 23(d). Courts have held that if a class representative is no longer adequate, then "the appropriate step is substitution of a new representative." *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617-18, *reh'g denied*, 712 F.2d 1416 (5th Cir. 1983). Substitution is also available when the class representative, for personal reasons, opts to withdraw from the case. *See, e.g.*, *Ceisler v. First Pennsylvania Corp.*, No. 89-9234, 1991 WL 83108 (E.D. Pa May 13, 1991). More recently, in the fen/phen litigation, class counsel sought and was permitted to substitute class representatives when it appeared that the original representatives had contact with objectors' counsel and would likely take on an adversarial role. *See In re Diet Drugs Products Liab. Litig.*, PTO 1288 (E.D. Pa. May 2, 2000). The substitution of class representatives, under these circumstances, is a valid approach to protecting the interests of the class. Does a lawyer,

who seeks to strip power from his client, somehow violate the duty of loyalty? *Cf.* Model Rule 1.7 comment 1, 31, 33. This question has not been answered and it is unclear if the court in *Diet Drugs* would have entertained a motion to substitute the class representative if formal objections had been filed. *Cf. Richard, infra*.

B. Conflicts When Class Representatives Act As Objectors

Most often, the unhappy class representative obtains new counsel to object to the settlement and formally takes on an adversarial role. *See, e.g., Reed , supra.* The *Maywalt* court specifically noted the importance and efficacy of this adversarial role:

> They may hire Attorney House who is free, and indeed encouraged, to vigorously lodge their objections to the Proposed Settlement. The fact that four of the five Representative Plaintiffs object to the Proposed Settlement will weigh heavily in the Court's evaluation as to the fairness, adequacy and reasonableness of the Proposed Settlement.

Maywalt, 155 F.R.D. at 497. But this places class counsel in a position of conflict arising from the relationship with her current and/or former clients.

1. Model Rule 1.7

Under ordinary circumstances, the comments to Model Rule 1.7 state that if a conflict arises after representation has been undertaken, the lawyer

> 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.

Rule 1.7 comment 4. The comments extensively discuss the special considerations afforded "common representations." *Id.* at comments 29 ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."); 31 ("the lawyer has an equal duty of loyalty to each client"); 33 (each client in the common representation has the right to loyal and diligent representation and the client also has the right to discharge the lawyer).

In the class context, however, class counsel has been at the helm of the litigation since its inception, has conducted all the discovery, briefed every motion, and engaged in every strategic decision. This knowledge base is not easily replaced and the class can be greatly damaged if it is forced to switch horses mid-race. *See e.g., generally Lazy Oil*, 166 F.3d at 589; *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18-19 (2d Cir.1986). This places class counsel in the unenviable position of either

withdrawing and harming the class or violating Model Rule 1.7 and protecting the class. Perhaps the rule, however, should be read to mean that counsel should withdraw not on behalf of the class, but on behalf of the clients with whom class counsel has the conflict. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1159 (1st Dist. 2000).

2. Model Rule 1.9

In addition to the rules on conflict, the Model Rules still provide guidance to lawyers who are representing current clients in adversarial roles to former clients. Thus, if her client obtains new counsel and serves as an objector, class counsel continues to represent the class (the current clients) and has an adversarial role against a former client (class representative/objector). Model Rule 1.9(a) clearly prohibits the subsequent representation in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. The comments clarify by stating:

> When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited…. Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute.

Model Rule 1.9 comment 2-3. The *Corn Derivatives* court disqualified class counsel, Citing Model Rule 1.9, concluding that the prejudice to the former clients would be too great to justify counsel's continued representation of the objector. *Corn Derivatives*, 748 F.2d at 162. But the converse has not held true: namely class counsel may continue to represent the class while former clients have objected and assumed an adversarial role. *See, e.g., Reed, supra*; *Maywalt, supra*; *Lazy Oil, supra*.[2]

How is Model Rule 1.9 harmonized in the class context? Some courts look to a balancing test in deciding whether and how to apply Model Rule 1.9. The factors balanced are: (a) the information in the attorney's possession, (b) the availability of the information elsewhere, (c) the importance of this information to the disputed issues, (d) actual prejudice that could flow from the attorney's possession of the information, (e) the costs to class members of obtaining new counsel and the ease with which they might do so, (f) the complexity of the litigation, and (g) the time needed for new counsel to familiarize himself with the case. *See In re Agent Orange*, 800 F.2d at 19

Based on these decisions, it would seem that class counsel must choose to represent the class, and not objectors, and yet still face potential disqualification. Note that in situations where more than one firm is designated lead class counsel, any disqualification of one firm does not ordinarily impute to the other(s). *See Hawk Indus., Inc. v. Bausch & Lomb, Inc.*, 59 F.R.D. 619, 624 (S.D.N.Y.1973) (where co-

[2] There is no inconsistency since in *Corn Derivatives*, the current and former clients had both entered into individual and private agreement with class counsel. *Id.* at 161; *see also id.* at 163 (Adams J., concurring). The *Corn Derivatives* court specifically stepped away from any impact its opinion should have to the class as current "clients" of class counsel. *Id.* at 161.

counsel was found to have conflict of interest, class was nonetheless certified because co-lead counsel had no such conflict and could therefore adequately represent the class).

3. Parameters to follow

Despite the plethora of case analysis, no clear path exists to guide class counsel when engaged in dual representation. Each court has been swayed by the specific facts of the case and have, at best, provided a balancing test to gauge when an impermissible conflict has occurred or where class counsel's actions mandate disqualification. Yet all these rules guide the court after the dispute has arisen and provide no meaningful guidance in avoiding the conflict in the first place. Perhaps the most concise listing of the rights and responsibilities of class counsel comes from a Canadian decision. Although not binding on any court in the United States, its lessons may prove instructive to practitioners nonetheless.

In *Richard*, one class representative (McArthur) sought to remove class counsel for failing to execute an order to reject the settlement otherwise acceptable to the other representative (Richard). Class counsel (Poyner Baxter) accepted the settlement believing it in the best interest of the class and sought to remove McArthur as a class representative and thus took a direct adversarial position against his client. McArthur, alleging a conflict of interest and breach of the duty of loyalty, sought counsel's removal. *Richard*, at ¶17; *cf.* Model Rule 1.7 comment 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.")

Poyner Baxter frankly admitted that had he been acting for an individual client, the steps he had taken would certainly be contrary to provisions of the Professional Conduct Handbook. However, he argued, in line with United States case law that when acting as class counsel, other considerations must be taken into account. Specifically, once the action had been certified, he argued that any steps taken by class counsel must be governed by class counsel's view of the entire class' best interest. *Id.* at ¶18. However, the British Columbia Supreme Court ruled that counsel had breached its duty of loyalty citing, inter alia, the retainer agreement:

> The retainer agreement is succinct. It provides that Mr. McArthur retains Poyner Baxter "as my lawyers to represent me in a claim for damages ...and hereby authorise them to institute a class action pursuant to the *Class Proceedings Act* naming myself as representative plaintiff...and to take such actions and conduct such proceedings as they may consider necessary or proper" on certain terms. … There is nothing in the retainer agreement limiting or modifying the duties owed by Poyner Baxter to Mr. McArthur because the action is a class proceeding.

Id. at ¶22; *accord Corn Derivatives*, 748 F.2d at 162.

In discussing conflict of interest, the Canadian court first took an unrestrained view of attorney-client relationship and held that the duty was not owed to the class as a body but to each individual class

member. *Id.* at 23. The court was also moved by the actions taken by counsel to the detriment of his client McArthur. *Richard*, at ¶43-44; *accord Alberts*, 2004 WL 1345078, at *19-20 (Franklin's actions negatively impacted Alberts' parallel individual action). Rejecting American precedent, and finding a conflict of interest, the court removed Poyner Baxter as class counsel. *Id.* at ¶49-50.[3]

C. Court Serving as Guardian

In *Richard*, class counsel's major mistake was not seeking court guidance to resolve the conflict and instead moved against his client. Although case law places significant emphasis on the role of class counsel in protecting the absentee class members, the *Richard* court found that the comments "regarding role of the court are particularly apposite." *Richards*, at ¶40. Much like the Class Proceedings Act, FRCP 23(d), gives courts the power to determine the course of the proceedings and give whatever orders are necessary to protect the absentee class members. Thus, intra class conflicts should be reported to the court for appropriate decision making. *See* Developments in the Law: Class Actions, 89 Harv. L. R. 1318, 1595-96 (1989).

As *Parker* noted, "[i]t has been held that agreement of the named plaintiffs is not essential to approval of a settlement *which the trial court finds to be fair and reasonable*." *Parker*, 667 F.2d at 1211 (emphasis added) (citations omitted). The court, therefore, guards against the risk that counsel or representatives, in violation of their fiduciary responsibilities, would place their individual interests ahead of the class'. *See In re Bank of Am. Corp. Sec. Litig.*, 210 F.R.D. 694, 703 (E.D. Mo. 2002). In fact, the *Bank of America* court counseled that "the notice of the settlement hearing should usually indicate any terms about which the class counsel and class representatives differ" as a means of full disclosure of the difference of opinion. *Id.* Thus, when a conflict arises, it is the court's province to

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[3] The court in *Maywalt*, by contrast, denied the application to discharge class counsel *Maywalt*, 155 F.R.D. at 497. *But cf. Pettway supra*. In disqualifying counsel, the *Richard* court outlined principles for class representative and class counsel and the manner in which conflicts should be resolved:

(1) The representative plaintiff has the mandate to act in the best interests of the class as a whole.
(2) The representative plaintiff has a significant role to play in the proceedings after certification. He or she acts in the class' best interest by directing litigation, instructing class counsel and authorizing settlement.
(3) Class counsel has a solicitor-client relationship with class members and owes the duties and obligations that arise as a result of that relationship to the class members. Class counsel also has a duty to act in the best interests of the class as a whole.
(4) Class counsel also has a solicitor-client relationship with the representative plaintiff and owes the duties and obligations that arise as a result of that relationship to the representative plaintiff. This includes a duty of loyalty to the representative plaintiff, which includes the duty to avoid conflicting interests, the duty of commitment to the client's cause and the duty of candor.
(5) While class counsel has a significant role to play in the conduct of proceedings, class counsel may not ignore the wishes of the class representatives in making fundamental litigation decisions and may not prosecute an action with unfettered discretion.
(6) Given the relationship between the class, class counsel and the representative plaintiff, there is a risk that conflicts may arise. Class counsel must be conscious of the conflicts that may arise between the representative plaintiff and other class members, or between his or her own interests and the interests of the class members.
(7) When conflicts arise and cannot be resolved between the class members, class counsel and the representative plaintiff, an application for directions under s. 12, or for approval of the settlement pursuant to s. 35, should be made to resolve the conflict.
(8) The ultimate responsibility to ensure that the interests of the class members are not subordinated to the interests of either the representative plaintiff or class counsel rests with the court. Richard, at ¶ 42.

stand as arbiter of the dispute and determine fairness and adequacy. With this role fulfilled, due process considerations are satisfied. *See Kincade*, at 507-08.

However, this rule fails to take into consideration an important factor. Settlement negotiations are generally kept confidential. Placing a settlement offer before the court, in open proceedings, may not be something the parties envision when first embarking on that path. Moreover, the revelation that settlement talks are underway may result in financial impact on the corporate party, political ramifications with shareholders, and unwanted scrutiny in the media. Thus, if recourse to the court is to work, it must be done by letter to chambers (where permitted) or filings under seal.

IV. Steering through the Quagmire

There are many options available to class counsel facing these conflicts. She can withdraw as class counsel, withdraw as counsel for the objecting class representatives, substitute in new class representatives, or seek guidance from the court. But which option is best for the class, for the litigation, and for counsel? That there is no clear answer leaves a lawyer certified by the court as class counsel in murky waters. Thus, the best course is to take steps to insure that the risk of intra-class conflicts are minimized.

First, at the outset, a clear explanation of the rights and responsibilities of class representatives and class counsel should be given. Although as a client, the class representative has rights in the prosecution of the litigation, he also has responsibilities to the class—as does class counsel. If these responsibilities are explained at the outset, and the client is made aware of them early on, then the risk of selfish motives (that ordinarily drive FRCP 23) to derail the litigation will be minimized. *Cf. Parker, supra*.

Second, to take a lesson from *Richard*, counsel should also consider modifying their standard retainer agreement to one specifically aimed at class actions. In particular, the comments to Model Rule 1.8 state:

> Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. …

Model Rule 1.8 comment 13. Thus, conflicts can be waived in advance if the conflict is fully explained (including impact of conflict and waiver), the waiver sought is specific yet limited, and informed consent is obtained in writing. *See* Model Rule 1.7 and comment 22; *see also* District of Columbia Ethics Opinion 309.

Moreover, "[i]t is old, settled law that persons may alter by express agreement the legal relationship they would normally have had by operation of law." *Ress v. Barent*, 378 Pa. Super. 397, 408 (1988). This has applied to retainer agreements with courts recognizing that such agreements can contain terms limiting duties to the client provided the terms are clearly explained and informed consent is obtained in

writing. *See In re Egwim*, 291 B.R. 559, 571 (N.D. Ga. 2003); *Armor v. Lantz*, 535 S.E.2d 737, 747 (W.Va. 2000). Thus, arguably, the retainer can include terms, inter alia, that the client understands that class counsel's obligations will include a duty to the class as a whole and not just to the client. There is, naturally, no specific guidance on whether such a limitation is "reasonable" and compliant with Model Rule 1.1.

For a review of class retainers accepted and rejected, *see, e.g.*, *Thomas v. Powell*, 247 F.3d 260, 264 (D.C. Cir. 2001)(settlement issue ruled by majority of representatives); *In re Ocean Bank*, No. 06-3515, 2007 WL 1063042, *6 (N.D. Ill. Apr. 9, 2007)(retainer invalid as it ceded control to counsel); *Inerclaim Holdings Ltd. V. Ness, Motley, Loadholt, Richardson and Poole*, No. 00-7620, 2001 WL 1313799 (N.D. Ill. Oct. 29, 2001)(provision aimed at addressing unique conflict); *Glenwood Farms, Inc. v. ivey*, 03-217, 2005 WL 2716497 (D. Me. Oct. 20, 2005)(conflict explained and waiver specifically inserted); *Rodriguez v. West Publishing Corp.*, No. CV05-3222, 2007 WL 2827379 at *19 (C.D. Cal. Sept. 10, 2007)(terms regarding incentive awards created conflict).

Finally, and perhaps most importantly, constant communication with one's client throughout the litigation is important. *See* Model Rule 1.4; *see also generally Maywalt*, 155 F.R.D. at 497. An informed litigant will understand the posture of the case better and will understand risk assessments when presented. *See generally Parker*, 667 F.2d at 1211-12. Moreover, settlement negotiations should not be withheld from the class representatives until a deal is finalized. *See Bank of Am.*, 210 F.R.D. at 703; *Manual*, § 21.641 ("Class Counsel must discuss with the class representatives the terms of any settlement offered to the class."); *In re Hager*, 812 A.2d 904 (D.C. 2002). Oftentimes defendants insist on secrecy for fear of, inter alia, affecting stock prices if the information reaches the public. However, this approach is arguably counter to Model Rule 1.4 (comment 3, 7) and disclosure to the class representative can be addressed with admonitions to keep the fact of the negotiations confidential. It is likely the "surprise settlement offer" that causes many a class representative to balk and object. *See Bank of Am*, 210 F.R.D. at 703. ("objections to a settlement, moreover, may be symptomatic of strained attorney-client relations…").

IV. Conclusion

Class actions serve a very important and useful function in the American legal system. They provide an avenue for small grievances to be efficiently addressed. However, the system has inherent risks of conflict embedded in the roles of class counsel and class representative. Lawyers who opt to enter this area of practice walk a precarious tight-rope and must be extra vigilant in their service of two masters.

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