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Class Actions and Client-Centered Decisionmaking

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Lawrence M. Grosberg*

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I. INTRODUCTION

Most class action litigators do not believe that client control or even client consent is required in the conduct of a class action. A class of hundreds or thousands of individuals cannot control a class action and often cannot even make its individual voices heard. Class action commentators have called the class device a "subversive element" in the traditional context of "individual party control,"¹ and have charged that the tension caused by class actions "produces . . . contortions in the way we otherwise think about litigation."² But it is clear that adherence to a rigid requirement of

1. Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 562 (1987). Professor Rosenberg further writes: "[g]enerally, there is no reality to the notion that claimants have significant personal influence or involvement, let alone control regarding the course of litigation and settlement other than wielding some degree of ultimate veto power over the settlement price." *Id.* at 582 n.86.

2. S.C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 7 (1987).

individual consent would effectively destroy class actions.³ The governing procedural⁴ and ethical rules⁵ do not define the relative roles of the lawyer and the client(s) in making important decisions in class actions and the decisional law addresses the issues only when there are open and notorious conflicts among the clients and lawyers.⁶ To the extent there are rules, they have been accurately characterized as schizophrenic.⁷ At best, the courts approach these decisionmaking issues in a reactive and ad hoc way.⁸

When the conflicts among clients and lawyers are not immediately apparent, there is simply no official guidance. It is unclear whether the client should play any decisionmaking role, how the client should play such a role, what if anything the class lawyers must or should do to facilitate client participation⁹ and even who the client is. In contrast, the decisionmaking responsibilities of the lawyer and client in the typical individual client-lawyer relation-

3. Cf. Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 91 n.172 (utility of class actions would be "greatly diminished").

4. For purposes of this Article, governing procedural rules mean the Federal Rules of Civil Procedure, and in particular Rule 23. Nothing in Rule 23 directly deals with the decisionmaking roles of clients or lawyers (see FED. R. CIV. P. 23); Rules 23(a)(4), 23(d)(2), 23(d)(3) and 23(e), however, implicitly affect these matters. See *infra* notes 94-192 and accompanying text.

5. Neither the Model Code of Professional Responsibility nor the Model Rules of Professional Conduct explicitly delineate the role of the "client" in class actions; numerous provisions in both ethical codes do deal with the decisionmaking role of clients generally and with the subject of conflicts of interest between clients and lawyers. See *infra* notes 25-42 and accompanying text.

6. See, e.g., *infra* notes 109-29 and accompanying text. See generally Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (comprehensive discussion of applicable case law relating to resolution of open conflicts in class actions and suggestions as to how lawyers and courts can try to accommodate such differences).

7. See Yeazell, *From Group Litigation to Class Actions Part II: Interest, Class and Representation*, 27 UCLA L. REV. 1067 (1980); see also G. HAZARD & J. VETTER, *PERSPECTIVES ON CIVIL PROCEDURE* 218 (1987).

8. See H. NEWBERG, *CLASS ACTIONS*, §§ 15.02, 15.03 (2d ed. 1985); cf. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385 (1987). Professor Kane wrote that the courts have not been very "creative" in dealing with these decisionmaking issues. See Kane, *supra* at 399. She concluded that a more effective partnership is necessary between the class lawyer and the court and that the court should assume a more active monitoring role in managing class actions. Whereas Professor Kane is concerned principally with more efficient management of the class action and how the class lawyer may be induced to aid in the accomplishment of that goal, the focus here is on whether and how client-centered values can be better reflected in effectively conducted class actions.

9. I refer to steps beyond notice to members of the class after a Rule 23(b)(3) certification (giving members an opportunity to opt out) or a Rule 23(e) notice of settlement hearing (giving members an opportunity to state an objection to a proposed settlement).

ship are dealt with explicitly in the ethical codes.¹⁰ In addition, considerable commentary addresses both the individual client's role and the lawyering skills necessary to achieve client-centered decisionmaking.¹¹

The principle of informed consent is now firmly imbedded in our governing ethical norms.¹² Clients, at least individual clients, must be given enough information so that they can meaningfully consent to the actions that lawyers take on their behalf. Client-centered decisionmaking, as a mode or style of lawyering, takes the doctrine of informed consent a few steps further and urges the lawyer to involve the client more actively in the decisionmaking process.¹³ Clients should not simply accede to the lawyers' decisions or even passively consent, but rather should actually participate in making the key decisions affecting their legal rights.¹⁴ More partic-

10. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) (the authority to make decisions [affecting the merits] is exclusively that of the client) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (a lawyer shall abide by a client's decision concerning the objectives of representation) [hereinafter MODEL RULES]. The outer bounds of client control are, of course, the lawfulness and morality of those directives. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 38-42, 151-52 (1978).

11. See, e.g., D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 147-53 (1977) (leading law school text on teaching the skills required to implement client-centered lawyering); Ellman, *Lawyer and Clients*, 34 UCLA L. REV. 717 (1987) (critique of some of the Binder and Price techniques for being too manipulative of the client); Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA REV. 811 (1987) (analysis of how client-centered counseling can be integrated into skillful negotiation without undermining the efficacy of either the counseling or the negotiation); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (comprehensive examination of origins of the doctrine of informed consent and its application to the lawyer-client relationship); Tremblay, *On Persuasion and Paternalism: Client Decisionmaking the Questionably Competent Client* 1987 UTAH L. REV. 515 (thorough discussion of the considerable difficulties a lawyer faces when deciding whether to follow the directions of a client, seek appointment of a guardian, thereby excluding the client altogether, or follow lawyer's own conception of what is in the client's interest); R. Dinerstein, *How Lawyers Present Choices to Their Clients: Some Notes on Putting Client-Centeredness Theory Into Practice* (May 1, 1987) (unpublished paper presented to Columbia Law School Clinical Theory Workshop, May 1, 1987) (presentation to client of choices which had not been contemplated by the client may be done without violating client-centered values). This Article is in the same vein as all of these recent analyses of aspects of client-centered lawyering—how the doctrine of client-centered decisionmaking applies or fits into the context of class actions.

12. See *infra* notes 25-63 and accompanying text.

13. See, e.g., D. BINDER & S. PRICE, *supra* note 11, at 147-53.

14. There are contrasting views that posit a more authoritarian conception of the lawyer's role and concomitantly a much less central (if not non-existent) role for the client. See

ularly, the clients, not their lawyers, should weigh the various non-legal consequences of a course of action.

This Article examines whether client-centered norms may appropriately be applied to the class action, and particularly, the relevance of those client-focused concerns when the class members are passive or reticent. The client—even the notion of a client—is different in a class action. An individual client can be the primary decisionmaker. If the lawyer gives the proper information to the typical client and if the lawyer facilitates the client's consideration of non-legal factors, and, of course, if the client is not seeking to accomplish unlawful goals, the client can make key decisions such as whether to file suit, where to file, whom to sue, and whether to settle.¹⁵ Class action clients, by contrast, cannot collectively be the primary decisionmaker, especially if the class is large or its members have conflicting interests. How then can a class action lawyer abide by the wishes of the client(s)? Is it possible to follow client-centered norms without destroying the class action? I believe it is possible, but recognize that a class lawyer must reach out affirmatively to listen to the views of the representative class members, and at the same time, play a larger decisionmaking role in a class action than in a case involving an individual client.¹⁶

D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* 13-19 (1974). Rosenthal describes the traditional paternalistic view of the lawyer's role; Rosenthal's own model for the lawyer-client relationship is what he calls a "participatory approach" which is similar to the client-centered model set forth in the work by Binder and Price (*supra* note 11). For a view, somewhat in the middle, see Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 485-86 (1984), where it is suggested that there ought to be vigorous, non-hierarchical dialogue between client and lawyer, but that ultimately the lawyer takes the lead in making the key decisions.

15. In a recent article, Professor Simon proposed a model of discretionary ethical decisionmaking for lawyers which adds a major factor—whether the lawyer's assistance will further justice—and then, implicitly, with respect to decisionmaking, gave the primary if not exclusive role for making all key decisions to the lawyers. See Simon, *Ethical Discretion In Lawyering*, 101 HARV. L. REV. 1083 (1988).

16. Though it frequently is difficult to generalize about class actions, I will attempt to do so in this Article. I proceed on the presumption that class actions not only are an existing part of our procedural system but are crucial to the effective operation of our judiciary and to the assurance of utilizable remedies to multiple victims of wrongdoing. There certainly are debates, however, as to the efficacy of class actions of a particular type, or at least as to the adequacy of current rules for a particular type. Compare Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983) with Rosenberg, *supra* note 1 (regarding their respective negative and positive views as to the efficiency and desirability of mass tort class actions). Nevertheless, this Article will try to examine generally, the decisionmaking roles of class client(s) and

Indeed, the class lawyer and not the clients must make the decisions in class actions. But because there is no individual client who can determine the course of a class action, it is doubly important that a class lawyer reach out to a sampling of class members to ascertain its views and feelings on a variety of non-legal considerations about which only clients should voice opinions. It is necessary to alter the concept of the class lawyer's duties and obligations. Instead of acting as an advocate and advisor, the lawyer must be an advocate and guardian of the class.¹⁷ To effectuate this change, the applicable ethical and procedural rules should be revised. These revisions should address not only cases when conflicts are blatant among class members, class representatives or class lawyers, but also cases when conflicts or differences of opinion are quiescent and not readily apparent.¹⁸

In both situations the class lawyer should act in a way that reflects proper respect for individual class members (even those whose reticence and passivity requires skillful client-centered lawyering to encourage active client participation), and yet, also reflects the lawyer's duty to mediate and ultimately to act in the best interests of the class. In the case of the passive class, the wishes or opinions of class members, because generally unstated, presumably will not even be known to the class lawyer, or the court for that matter. This may be so whether the silent class members disagree or agree with a particular course of action proposed or taken by the class lawyer. Some reticent class members may have a unique or even an irrational view point about litigation.¹⁹ In most class

class lawyers.

17. As Professor Simon has written, there ought not to be a presumption that the mere fact of differences among class members means dissipation of an effective class action. See Simon, *supra* note 14, at 480-81. A fundamental responsibility of the class lawyer in this context may be to act vigorously to try to resolve the differences, and then, in any event, to take action in her trustee capacity in accordance with her views as to the best interests of the class.

18. See Rhode, *supra* note 6; *infra* notes 227-35 and accompanying text; see also *Piambino v. Barley*, 757 F.2d 1112, 1145 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Cf. Ricciuti, *Equity and Accountability in the Reform of Settlement Procedures in Mass Tort Cases: The Ethical Duty to Consult*, 1 GEO J. LEGAL ETHICS 817 (1988) (author concludes there is too much abuse of the class action device and proposes with respect to settlement of mass tort class actions that a "consultation unit," composed of class members, be used by the class lawyer so that the court's guardianship role may be better performed).

19. See, e.g., N. KITTRIE, *THE RIGHT TO BE DIFFERENT* (1971); see also *infra* note 88 and accompanying text.

actions today, the views of passive class members are almost never considered by other class members, counsel, or the court.

This Article will suggest ways to achieve at least some of the goals of informed consent and client-centered decisionmaking in class actions and yet preserve, if not enhance, the strength and vitality of this important procedural device. Part II reviews the incorporation of client-centered lawyering norms into the ethical rules of the profession, and explains the moral and practical reasons underlying this development. Part III addresses the rationale of class actions and discusses specific provisions of Federal Rule of Civil Procedure 23 that might be used to further client-centered lawyering. Finally, Part IV considers several ways to implement client-centered values in class actions and argues for an expansion of the class lawyer's authority to act on behalf of the class. By gathering more information from class members, the lawyer can properly act as a fiduciary for the class. I propose an ethics code provision that would effectuate these suggestions.

II. CLIENT-CENTERED LAWYERING

A. *Traditional Client-Lawyer Model*

Traditionally, most lawyers made all of the important decisions for their clients.²⁰ Supporters of this approach defend it on several grounds: it is what the client wants and expects;²¹ it is more efficient and therefore less costly than conducting time-consuming client interviews;²² the lawyer, as the professional, unquestionably knows what is best, and professional autonomy ought not to be constrained in any way.²³

Very practical notions of lawyering underlie the traditional approach. Lawyers related to clients in the way that seemed most

20. Empirical and anecdotal evidence confirm that this approach was the norm. See D. ROSENTHAL, *supra* note 14, at 13-19.

21. *Id.*; cf. Epstein, *Medical Malpractice: The Case for Contract, 1976 Law and Social Inquiry*, AM B. FOUND. RES. J. 87 (with respect to the role of patients, author concludes it is essentially a question of contract reflecting the patient's expectations and desires). For a thorough critique of Epstein's view, see Spiegel, *supra* note 11, at 78-85; see also A. BENJAMIN, *THE HELPING INTERVIEW* 34-37 (1974).

22. But see Spiegel, *supra* note 11, at 110-12.

23. *Id.* at 114-17; cf. Berger, *The Supreme Court and Defense Counsel: Old Roads and New Paths—A Dead End*, 86 COLUM. L. REV. 9, 33-37, 46-49 (1986). In criminal defense work, the argument is made that defendants may not unduly interfere with the lawyer's representation. Professor Berger essentially accepts the validity of the argument. See *id.*

efficient and consonant with lawyers' perceptions of their standing and role in society.²⁴ Regulation of the relationship was minimal at best. Aside from prohibitions against criminal conduct and fraud, lawyers were free to relate to clients as they chose. Substantive and procedural law and the ethics codes neither approved nor prohibited this authoritarian mode of lawyering. The law and the codes simply did not address the matters. The client under this model was an unavoidable distraction to be tolerated at best and totally manipulated at worst. Put bluntly, lawyers did not accord clients much human dignity and autonomy unless a powerful client demanded decisionmaking authority or the occasional lawyer gave his client the power.

B. 1969 and 1983 Ethics Codes Changes

1. Client Control

The paternalistic vision of the dominant lawyer did not begin to change until 1969, when the Code of Professional Responsibility (Code) was promulgated. Ethical Consideration (EC) 7-7 of the Code stated that the authority to make decisions "affecting the merits" of a case rested "exclusively" with the client.²⁵ While considerable ambiguity remained as to what decisions affected the merits and the scope of a lawyer's discretion,²⁶ EC 7-7 significantly changed the nature of the client-lawyer relationship. The requirement of informed client consent as a lawyering norm became

24. See D. ROSENTHAL, *supra* note 14, at 13, 22.

25. MODEL CODE EC 7-7. This provision reads in principal part as follows:

[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer"

Id. Ethical Consideration 7-8 states, *inter alia*: "[i]n the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." *Id.*

26. The lawyer's unilateral decisionmaking authority clearly is not limited to purely ministerial matters. See, e.g., MODEL CODE EC 7-9.

[i]n the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

Id.; accord Spiegel, *supra* note 11, at 66-67.

firmly established. Lawyers tried to use the substance-procedure dichotomy to decide which decisions affected the merits.²⁷ As in other contexts, however, the line between substance and procedure proved illusive and hard to define.²⁸ The courts have gone both ways on such issues as whether it is procedural or substantive to decide to call a witness to testify,²⁹ to waive an issue for trial,³⁰ or to cross-examine a witness.³¹ Nevertheless, EC 7-7 was a real step forward because it endorsed the principle of informed consent.³² The recently promulgated Model Rules of Professional Conduct (Model Rules) continue the approach of the Code.³³

2. *Information Dispensing Requirement*

Both the 1969 Code and the 1983 Model Rules require lawyers to give relevant information to clients.³⁴ This follows axiomatically, for if the client is to make decisions affecting the merits of a case, the client must have the information necessary to make those deci-

27. See Spiegel, *supra* note 11, at 49-65.

28. Matters of "substance" and matters of "procedure" are talked about as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key words to very different problems. Neither "substantive" nor "procedure" represents the same variants. Each implies different variables depending upon the particular problem for which they are used. See *Guaranty Trust Co v. York*, 326 U.S. 99, 108 (1945); cf. *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117 (1988).

29. See Spiegel, *supra* note 11, at 48-49.

30. Compare *Duffy v. Griffith*, 206 Cal. App. 2d 780, 24 Cal. Rptr. 161 (1962) (counsel can unilaterally withdraw an issue) with *Harness v. Pacific Curtainwall Co.* 235 Cal. App. 2d 485, 45 Cal. Rptr. 454 (1965) (client consent required to withdraw issue). These cases are discussed in Spiegel, *supra* note 11, at 57-58.

31. *Id.* at 124 n.11. Professor Spiegel argues that even this decision should be the client's, though he does say a client cannot tell the lawyer specifically how to cross-examine. See *id.*

32. See *supra* note 25.

33. See MODEL RULES Rule 1.2(a): "[a lawyer] shall consult with the client as to the means by which [the objectives] are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter . . ." *Id.*

34. Regarding the dissemination of information, Model Code EC 7-8 reads as follows: [a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice for a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative . . .

Id. Rule 1.4 of the Model Rules states as follows: "[c]ommunication: (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.*

sions. If the information is to be used effectively, the lawyer must provide it in an understandable form. While there may be uncertainty as to the kind or amount of information the lawyer must provide, the obligation to inform is unambiguous.³⁵

The Model Rules have gone beyond the Code and have expanded the lawyer's obligation to give information to the client.³⁶ In addition to the requirement that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions," Rule 1.4(a) mandates that the lawyer "keep" a client informed as to the status of the case and also that the lawyer "promptly comply with a reasonable request for information."³⁷ Further, the Model Rules are directive (in contrast to the precatory "ethical considerations" of the Code).³⁸ Actual lawyering behavior, however, most likely lags behind all of these newly codified rules, and the dominant lawyer model "probably" remains the norm. As Dean Paul Carrington has stated: "[w]hile some have decried this attitude [of 'authoritarianism' and lawyer 'domination' of the client], it is probably the norm for attorney-client relations in many areas of practice."³⁹

Unfortunately, however, the ethics codes generally speak of the client in the lawyer-client relationship as if there were a single prototypical client.⁴⁰ This is a simplistic conception. Not only is the named plaintiff in a class action different from a domestic relations client, but each is also qualitatively different from a corporate client, a mentally disabled client or an indigent criminal defendant. Indeed, for the district attorney who prosecutes criminal

35. See Spiegel, *supra* note 11, at 68-72. The standard varies based on the sophistication and knowledge of the client. *Id.*

36. Compare MODEL CODE EC 7-8 with MODEL RULES Rule 1.4.

37. See *supra* note 34.

38. As the rules commentators stated with respect to the two key rules on client authority (Model Rules 1.2(a) and 1.4), there were "no direct counterparts in the Code of Professional Responsibility." (The Code's client-centered norms, it should be recalled, are contained only in the admonitory "ethical considerations" and not in the mandatory "disciplinary rules").

39. Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291, 1298; accord C. WOLFRAM, MODERN LEGAL ETHICS 148 (1986). At least in the area of mass tort litigation, recent empirical studies have shown that this dominant lawyer model still prevails. "A majority of the litigants felt they had little or no control over how their case was handled." Hensler, Resolving Mass Toxic Torts: Myths and Realities, at 8 (paper presented to AALS Civil Procedure Section, January, 1989, New Orleans, La.). And most "attributed this to their lawyer." *Id.* Ms. Hensler is employed at the RAND Corporation.

40. See *supra* notes 25, 33-34.

defendants, it generally is said that there is no client at all, "except the community at large," since the crime victim is in "no sense" being represented by the district attorney.⁴¹ The ethics codes recognize some, but not all of these differences.⁴² Each of these "clients" cannot play the same role in deciding his respective legal courses of action.

C. *Reasons for Client Involvement*

Several moral and pragmatic rationales have been offered in support of the principle that clients, not their lawyers, make the basic decisions affecting their legal rights or, at the very least, consent to the decisions. Perhaps most fundamentally, client-centered decisionmaking reflects respect for the individual.⁴³ The integrity, autonomy and dignity of the person is protected when clients make the decisions affecting their lives. As the owner of a legal claim, the client should have a "presumptive right of control."⁴⁴ It is "the client who will have to live with the outcome."⁴⁵ As Rosenthal points out, even if the client simply ratifies the logically correct choice proposed by the lawyer, the process of sharing decisionmaking responsibility psychologically reassures" the client.⁴⁶ On a more pragmatic level, Rosenthal's major empirical study of the lawyer-client relationship demonstrates that clients are much more satisfied with and accepting of lawyering results (positive or negative) when they participated in making the decisions that led to those results.⁴⁷ It also seems indisputable that when a client is more actively involved in the decisionmaking process, the lawyer is better informed and therefore makes better decisions.⁴⁸ Rosenthal concludes: "active participation can actually promote effective prob-

41. Uviller, *Cops and Robbers*, COLUMBIA MAGAZINE Feb. 18, 1988, at 6.

42. See *infra* notes 216-40 and accompanying text. At least with respect to children and persons with disabilities, the Model Rules are a bit more forthright than the Model Code. Compare MODEL RULES Rule 1.14 (Client Under a Disability) with MODEL CODE EC 7-12.

43. See Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15-21, 23-24 (1975), excerpted in G. HAZARD & D. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 280 (1985) and S. LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* 35 (1988) ("party control . . . affirms individuality").

44. Spiegel, *supra* note 11, at 73.

45. D. ROSENTHAL, *supra* note 14, at 20.

46. *Id.*

47. *Id.* at 169; see also Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1045 (1981) (authoritarian lawyering model cultivates mistrust).

48. See D. BINDER & S. PRICE, *supra* note 11, at 147-53, 197-210.

lem solving [C]lients can . . . fill gaps, catch mistakes . . . and help the professional . . . focus on the relevant aspects"⁴⁹ Finally, client decisionmaking ensures that non-legal factors (such as the psychological or financial impact) are properly weighed by the person best able to assess these consequences—the client.⁵⁰

Interestingly, the increased recognition of the values of client-centered decisionmaking occurred more or less at the same time that critics assailed lawyers as the amoral agent of the disreputable client, the so-called "hired guns."⁵¹ But client-centered lawyering does not require an attorney to carry out the wishes of the client unquestioningly. Rather, the client-centered lawyer should skillfully present the client with choices that are based on clearly stated legal opinions and then equally skillfully facilitate the client's consideration of the emotional or psychological consequences of each option.⁵² If a client then elects a course of action that is illegal or immoral, the lawyer is not obliged to effectuate that choice.⁵³ While in one sense the client-centered lawyer is simply an agent, she must not blindly acquiesce in a client's instructions regardless of their reasonableness, propriety, or legality. Commentators are correct, therefore, when they suggest that a good client-

49. D. ROSENTHAL, *supra* note 14, at 169.

50. See D. BINDER & S. PRICE, *supra* note 11, at 148-50. "[L]awyers cannot know what value clients really place on various consequences . . . clients' values are uniquely personal." *Id.* Such values would include the economic, social or psychological consequences of a decision. "We therefore conclude that usually the lawyer should leave the final decision for the client to make on the bases of the client's own intuitive weighing process." *Id.*

51. Compare Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) with Fried, *The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1061-65 (1976). Then-Professor Fried argued that the lawyer's assistance to clients to maintain their autonomy against the legal system (as long as it is within the law) is the appropriate lawyering role even if the clients' position is not morally admirable, and indeed even if it is contrary to the public interest. Fried, *supra* at 1080-82.

52. See Simon, *supra* note 15, at 1115-18.

53. See G. HAZARD, *supra* note 10, at 148-51. Professor Spiegel recently addressed the issue of whether corporate clients are sufficiently strong and independent so that the doctrine of informed consent is inappropriate in the case of corporate clients. He is concerned with the argument that informed consent simply becomes a lawyer's rationalization for the immoral consequences of the action decided on by a corporate client. He concludes, however, that the solution is not to abandon informed consent but rather to put "limits on lawyers participating in behavior that harms others." See Spiegel, *Lawyers and Professional Autonomy: Reflections on Corporate Lawyering and the Doctrine of Informed Consent*, 9 W. NEW ENG. L. REV. 139, 150 (1987). Professional control of a client's actions is not the answer; rather the lawyers should have to assume responsibility for their own actions, their own participation in the implementation of the corporate client's questionable actions. *Id.*

centered lawyer can aggressively present every conceivable choice to a client (even ones not contemplated by the client).⁵⁴ Furthermore, a lawyer can vigorously debate with a client about the proper course of action⁵⁵ or even can refuse to take a particular course of action because it would produce an unjust result.⁵⁶ Thus, a lawyer can respect the client's decisionmaking authority without becoming simply a "mouthpiece."⁵⁷

The development of client-centered lawyering followed similar changes in the doctor-patient relationship.⁵⁸ There also, the respect due the individual required the patient's participation in medical treatment decisions. Ironically, lawyers first helped develop the medical malpractice law requiring doctors to obtain patients' consent,⁵⁹ and only later applied the same principles to their own legal practice. But lawyers, like other professionals, are slow to impose additional obligations upon themselves. Nonetheless, the moral and practical reasons requiring informed consent are similar in both fields. Both clients and patients are entitled to control their own lives.⁶⁰ Both lawyers and doctors will provide better representation or treatment if the clients or patients participate actively.⁶¹

As suggested above, while the concepts of informed consent and client-centered decisionmaking are integrally related, they are not the same. Assuming clients receive the proper information, mere consent to a proposed course of action generally is a passive

54. See R. Dinerstein, *supra* note 11.

55. See Simon, *supra* note 14, at 488-89.

56. See Simon, *supra* note 15.

57. In some instances, even the client-centered lawyer may manipulate the client. See, e.g., Tremblay, *supra* note 11 (manipulation often is appropriate in the case of the incompetent client); cf. Ellman, *supra* note 11, at 753-78 (not all manipulation is bad).

58. See generally Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315 (1987).

59. See Spiegel, *supra* note 11, at 42, 46-48. Despite resistance by many doctors, changes also are occurring in the medical field and patients are becoming more involved in their cases. See Strauss, *supra* note 58, at 342-43.

60. See generally Symposium on J. Katz, *The Silent Doctor and Patient*, 16 LAW, MED. & HEALTH CARE 190-228 (1988). See also C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 10 (1984).

61. See *id.* at 11-23 (summary of standards and exceptions to doctrine of informed consent in medical area). Douglas Rosenthal, relying on works by Carl Rogers and Szasz & Hollender, observed that psychoanalysts also "tend to agree that client participation per se is constructive rather than harmful." D. ROSENTHAL, *supra* note 14, at 11.

act. Client-centered decisionmaking, in contrast, is much more of a participatory act by the client. The client's role can be viewed as a three-step process. First, the client receives the requisite legal information, including legal opinions and an appropriate array of choices.⁶² Second, with the guidance of the lawyer, the client should evaluate the uniquely personal non-legal consequences of each of the options. Third, the client should weigh the various legal and non-legal factors and then choose a course of action. Ideally, the client does not simply acquiesce to a lawyer's opinion, but actively discusses the alternatives with the lawyer and then affirmatively makes a choice based on an assessment of the relative importance of the legal and non-legal consequences. If the lawyer is cajoled into making a recommendation,⁶³ at the least, then, the client consents, after having been fully informed of the bases for the decision. While the ethics codes require informed consent by clients, they do not require the more participatory client-centered decisionmaking.

D. *Two Hypotheticals*

The difficulty in implementing the lawyering norms—informed consent and client based decisionmaking—can best be demonstrated by considering two hypothetical cases, one involving racial discrimination and the other a toxic tort.⁶⁴ I will first consider how the goals of informed consent and client-cen-

62. The lawyer's presentation of a particular choice (e.g. use of alternative dispute resolution to avoid litigation) may be viewed by some as manipulative; others see it as good, aggressive client-centered lawyering. See, e.g., R. Dinerstein, *supra* note 11.

63. Some commentators have concluded that lawyers should give their view as to the proper course of action only as a last resort, after all else has failed to persuade the client to make the choice herself. See D. BINDER & S. PRICE, *supra* note 11, at 154-55.

64. The two fact patterns are based on cases with which I have some familiarity; the first is a housing discrimination claim similar to ones I have litigated, both on an individual level (e.g. *Brown v. Van Plaza*, 15 Eq. Oppor. in Housing (P-H) 409 (E.D.N.Y. Dec. 15, 1981)), as well as class actions (e.g. *Arthur v. Starrett City*, 98 F.R.D. 500 (E.D.N.Y. 1983)); the second is a mass disaster claim similar to one I have used extensively in my teaching (see Grosberg, *The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course*, 37 J. LEGAL EDUC. 378 (1987)).

While there are many other types of class actions, the two examined here provide a useful context in which to consider the respective roles of lawyer and client in class actions. To the extent that different kinds of class actions require qualification of any generalizations I offer, I will so indicate; e.g., the reduced need for extended class member input when the amounts of loss to each class member are minimal. See *infra* notes 265-69 and accompanying text.

tered decisionmaking can be achieved if the cases are brought on behalf of one, or at most a few clients. I will then demonstrate how much more difficult it is to achieve these goals if the cases are pursued as class actions.

Assume that Jack Smith visited Diane Greenblatt, a lawyer with a public interest law office, in connection with a possible racial discrimination claim. Smith, a black man, explained that he tried to rent an apartment in a 2500 unit complex in Queens, New York. He submitted an application but he was never offered an acceptable unit over a twelve month period. In addition, the apartment rental office refused to give him any clear indication as to why he had not been given an apartment or when he might get one. Smith was convinced he had been given a run-around because of his race. Greenblatt arranged a test. She sent a white and a black person, both with characteristics similar to Smith to the complex to see if they were treated differently. The white person was offered an apartment and the black person was not. Greenblatt told Smith she would take his case.

In the second case, Daniel Morris consulted a private attorney, John Bradley, regarding extremely bad odors in the backyard of the Morris home. The Morris family members had become increasingly ill, and Daniel Morris was convinced that the odor was the cause. After interviewing Morris, arranging for medical examination of the five members of the Morris family, and conducting toxicological investigations of the backyard, Bradley suspected that he had discovered a Love Canal situation; that is, a disastrous toxic tort attributable to chemical dumping by a large nearby chemical manufacturer. One family member was in the incipient stages of cancer. A second had stomach ailments. Both problems, doctors assured Bradley, were reasonably attributable to chemical leakage in the backyard. Bradley agreed to represent the Morris family.

1. Bringing Individual Actions: The Decisionmaking Process

Assume that in both cases effective initial interviews were conducted and that preliminary investigations were completed. Greenblatt and Bradley had collected enough information to form legal opinions as to the propriety of filing claims. Assume further that in each case, after considering a negotiated solution, proper lawyering decisions were made to consider only individual lawsuits on behalf

of Smith and the Morris family members.⁶⁵ A variety of questions must be resolved in both cases before filing, including what substantive claims to assert, whom to sue, where to sue, and what kinds of relief to seek. Even if the lawyers took the narrow view of the clients' decisionmaking role, each would have to obtain, at a minimum, informed consent to the filing of a lawsuit and general approval of the relief being sought.⁶⁶ If the lawyers took a broader view of the client's role, they would discuss with the client such issues as the selection of the court, selection of claims, selection of defendants, and jury demands since these matters arguably are relevant to the "merits" of the claim (EC 7-7) and to the "objectives of the representation" (Model Rule 1.2(a)). Even more importantly, if the two lawyers were adherents of client-centered decisionmaking, they would facilitate their clients' consideration of a variety of non-legal factors. For example, in racial discrimination cases different clients have different emotional reactions to the victimization. They also often have quite different psychological responses to the option of waging a lengthy lawsuit rather than settling quickly. Only the individual clients can evaluate the importance of these factors and weigh them in the context of the lawyer's legal opinions. Similarly, those injured from toxic torts, like discrimination victims, may have strong altruistic needs to prevent recurrence of the violations. A client-centered lawyer would ensure that the client considered these issues before proceeding.⁶⁷ As indicated, even under the narrower view of the client's role, Greenblatt and Bradley, at a minimum, were required to talk to their clients, explain the options, and obtain their consent to the basic litigation decisions.

Several assumptions are implicit in the decisionmaking process just described. One is that a lawyer can transmit information in a comprehensible way to a client and yet still remain neutral, or

65. Even if a client does not propose the possibility of a class action or even know of it as a possibility, the lawyer still ought to consider it as an option, if only from the strictly narrow perspective of what is the best way to assist that particular client. In these two cases, for example, both Greenblatt and Bradley certainly should have considered the option of a class action. See *infra* notes 80-93, 241-80 and accompanying text (regarding the manner in which the lawyer ought to be resolving this threshold question).

66. See MODEL CODE EC 7-7, MODEL RULE Rule 1.2(a). For the principal texts of these two rules, see *supra* notes 25, 33.

67. See D. BINDER & S. PRICE, *supra* note 11, at 21-103 (skills that are required to effectively complete such a client-centered interviewing and counseling session).

at least non-manipulative, so that the client and not the lawyer makes the decisions. As Professor Ellman recently wrote, avoiding manipulation may be quite difficult.⁶⁸ He urges sensitivity in order to avoid subtle undermining of client autonomy.⁶⁹ But, he also argues that it is entirely appropriate for a lawyer to give a candid opinion to the client about how a client should proceed, since the client should be considered competent enough to accept or reject the lawyer's advice.⁷⁰ Similarly, Professor Dinerstein suggests that a lawyer can be properly respectful of a client's individual dignity, and yet still aggressively ensure that a client considers all possible courses of action, including alternatives to litigation, even if the client had not yet considered them or had even rejected them.⁷¹ Professor Simon goes further still and argues that the lawyer ought to inject her own view as to the course of action that would lead to the most just results, even at the expense of a client's control.⁷² In any event, in the Smith and Morris hypotheticals, we assume that the lawyers can provide their clients with the information necessary to decide, without pre-determining the decisions.

Assuming then that attorneys Greenblatt and Bradley have successfully walked the fine line between good client-centered

68. See Ellman, *supra* note 11, at 733-39. Professor Ellman concludes, for example, that even lawyering attempts to evince non-judgmental understanding can be manipulative. See *id.* One commentator goes further: "[i]t is impossible so to organize my behavior that it is not manipulative." Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1978), excerpted in L. RISKIN & J. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 83 (unabridged ed. 1987).

69. See Ellman, *supra* note 11, at 733-39.

70. *Id.* The same thesis has been espoused with respect to further development of informed consent principles in the context of the patient-doctor relationship. Alan J. Weisbard has argued that rather than using either the traditional paternalistic model or what he calls the "mirror image of that model "consumer sovereignty" which relegates the professional to the passive role of a "body mechanic" or "technician," he proposes that what is needed is a collaborative shared decisionmaking process based on "mutual respect." Weisbard, *Informed Consent: The Law's Uneasy Compromise with Ethical Theory*, 65 NEB. L. REV. 749-67 (1986). He even suggests that the term "informed consent" may not adequately describe this process. I agree; it sounds much more like client-centered (i.e., patient-centered) decisionmaking.

71. See R. Dinerstein, *supra* note 11, at 11-13. A more extreme example of the possibility that manipulation can occur is in the case of the incompetent client such as a mentally disabled individual or a child. Professor Tremblay discusses the extraordinary challenges and difficulties of adhering to client-centered norms in these contexts. See generally Tremblay, *supra* note 11.

72. See Simon, *supra* note 15, at 1143-47; cf. MODEL CODE EC 7-13 (prosecuting attorney's exercise of discretion to prosecute or not prosecute a criminal action).

lawyering and unacceptable manipulation, the hypotheticals also assume that the lawyers have properly identified the possible clients and have effectively communicated with all of them.⁷³ In the case of Jack Smith, the discrimination victim, and continuing to put aside for the moment class action considerations, that identification seems relatively straightforward, though even here the situation may be deceptive. For example, if Jack Smith were married, or planned to share the apartment with a roommate, should that person also be a client? Should the black tester be a client if he wanted to sue?⁷⁴ Should Greenblatt's organizational employer (or a sister advocacy organization) be a plaintiff and therefore a client?⁷⁵ Assuming individual client competency, Greenblatt certainly could talk with Smith and any possible individual co-plaintiff. The question of including the organization raises slightly more difficult though resolvable questions. Greenblatt would have to sensitively interview Smith to see what his views and wishes were on the issue of joining forces with co-plaintiffs. The potential conflicts between these possible "clients" even in this relatively uncomplicated case suggest the still greater problems in a class action context.

The backyard odors case raises similar problems of identification and communication. For example, Daniel Morris is the only one of the Morris family members who has so far talked to Bradley. Must Bradley talk to each one? What if the family member with early cancer is the eleven year old daughter? Should Bradley talk to her, her father or mother on her behalf or seek appointment of a guardian ad litem? What if there are or could be conflicts of interest among the family members? One could posit even more complicating facts.⁷⁶ But here, as in the Smith case, there are only

73. This often is a large assumption as the main text following this footnote suggests. Neither the identity of the client nor the assurance of an effective way to communicate with the client is always easily at hand. See G. HAZARD, *supra* note 10, at 45.

74. See *Havens Realty Corp. v. Coles*, 455 U.S. 363 (1982) (Supreme Court held that a black tester had standing to sue for a violation of the anti-discrimination laws).

75. For example, in two recent significant civil rights cases the NAACP was a principal plaintiff. See *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988); *United States & NAACP v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1185 (2d Cir. 1987). Even in simpler, basically individual claims, civil rights organizations often are co-plaintiffs. See, e.g., *Mealing v. Liu*, 15 Fair Housing-Fair Lending (P-H) 538 (E.D.N.Y. 1986) (co-plaintiffs included the individual victim, the tester, and a civil rights organization).

76. For example, if the husband or wife were mentally incompetent a guardian might have to be appointed. The potential conflicts become even greater between and among the lawyer, the guardian and the incompetent. See Hazard, *Triangular Lawyer Relationships*:

a small number of persons whose consent is required. Bradley must explain to the Morris parents and probably the eleven-year-old cancer stricken daughter⁷⁷ the possible conflicts of interest between persons whose physical injury is actual compared to persons whose injury has not yet become visible. Further, the lawyer must explore, with some sensitivity, the emotional and psychological consequences of the daughter waging a litigation battle separate from her parents. A client-centered lawyer must encourage the Morris family to weigh these non-legal factors, as only the directly affected individuals may do.⁷⁸ Ultimately, the family would decide and Bradley could obtain meaningful consent, even formal consent, as to how to proceed.⁷⁹

Both the Smith and Morris cases illustrate that while complications about who to talk to and how to implement client-oriented decisionmaking can arise even in the seemingly simple case, these kinds of possible conflicts of interests usually can be resolved satisfactorily in accordance with the applicable ethics code provisions and by effective application of client-centered lawyering skills. Such conflicts need not be and usually are not an insuperable obstacle to good client-centered lawyering. Full disclosure, meaningful consent and skillful facilitation of active client participation are viable tools to deal with cases such as these that involve multiple clients.

2. *Bringing Class Actions: The Decisionmaking Process*

If the Smith and Morris claims are brought as class actions, however, achieving the goals of informed consent and client-centered decisionmaking is a much more difficult undertaking. Let me return to the Smith case and add some facts. Assume that in the past five months Smith is the third person who has consulted Greenblatt's office about alleged racial discrimination at the

An Exploratory Analysis, 1 GEO. J. LEGAL ETHICS 15 (1987).

77. See *infra* notes 218-31 and accompanying text (regarding the lawyer's obligation to try and work with child clients to explain adequately the consequences of a course of action and to obtain their consent).

78. See D. BINDER & S. PRICE, *supra* note 11, at 147-53.

79. Under the applicable ethics code provisions, if the lawyer concludes that the interests of the clients can be harmonized, the clients may consent to joint representation after full disclosure by the lawyer. See generally G. HAZARD & W.R. HODES, *THE LAW OF LAWYERING* 121-54 (1936).

Queens complex. The first two did not choose to pursue their claims for reasons unrelated to the strength of their claims; in one of the two instances, Greenblatt's office conducted a successful test and though a tester lawsuit was theoretically available, it was not filed. These additional facts raise a question as to whom Greenblatt should consult in making the various pre-filing decisions. If she wishes to consider a class action, should she talk only to Smith or to the other possible claimants as well? Greenblatt certainly would talk to Smith regarding the same issues noted above in an individual client context, such as what relief Smith wants to seek. Smith and Greenblatt might conclude that a class action is likely to achieve the most successful results for Smith himself. On the other hand, the greater complexity of a class suit might delay or reduce relief for Smith.

To a large extent the resolution would depend on Smith's objectives. If altruism were a major motivation (the elimination of discrimination often is of great concern to civil rights victims), Smith might favor a class action. This is exactly the kind of weighing process—assessing such non-legal factors—that a good client-centered lawyer would encourage her client to pursue. More often, however, the victim's motives are mixed, a desire for individual reparation, as well as societal redress. If we assume further that more testing and investigation of the housing complex suggest that the discrimination is widespread, should Greenblatt present this information to Smith and urge him or invite him to be a named plaintiff in a class suit? The danger here is that even with the best of motives, Greenblatt may be improperly influencing Smith to go along with a decision that she has already made.⁸⁰

Certainly, the challenge to resist manipulating the client can be extraordinary in the class context. Because so much more time

80. See, e.g., M. Hermann, *Rhem v. Malcolm*—A Case Study of Public Interest Litigation: Pretrial Detention (unpublished Masters Thesis, Harvard Law School) (May, 1977). Professor Hermann analyzed the development and conduct of a major class action test case which sought improvement of prison conditions. She concluded that class members played no meaningful role in the litigation decisionmaking and indeed may have actually opposed the lawsuit had they been made aware of a potential adverse consequence—namely, the closing of the prison (the "Tombs") and the resultant severe problems of family visitation with inmates. For a similar realistic view on the non-existent role of clients in a quite different category of class actions, see NATIONAL CONSUMER LAW CENTER, *CONSUMER CLASS ACTIONS—A PRACTICAL LITIGATION GUIDE* (1987). As with other litigators' "how-to-do-it" manuals, this guide proceeds on the implicit presumption that clients are but a perfunctory though unavoidable necessary evil in filing and conducting class actions.

and resources are needed for the class action, fee pressures alone can transform the ostensible fiduciary into a selfish entrepreneur. Moreover, the fundamental underlying rationale of client-centered lawyering—that only the clients as the affected persons can weigh the non-legal consequences of one outcome or another—has even greater significance in the class context. If the class lawyer cannot possibly talk to all of the class members, it becomes even more critical that she talks to some, and that she obtains at least a sampling of client input on the important non-legal considerations.

Even the basic obligation to give information to the client can overwhelm the class action lawyer. For example, assume Greenblatt identified a potential class of 250 black people who had applied for apartments unsuccessfully over the prior two year period. Should she write to them before filing? If so, should she then meet with each individually? To whom is she obligated to give the information? Should the communications be kept confidential? Should she poll them on the various questions posed earlier—which defendants, which court, what are the goals of a lawsuit, what kind of relief to seek?⁸¹ Moreover, if Greenblatt does take these information-gathering steps, unanimity is unlikely. What should she do in the face of such differing positions? The existence of differences of opinion among class members does not mean that the class action should die. To the contrary, group action may still be the best course of action for the class. It is in this situation, Professor Simon asserts, that the opinion of the class lawyer in favor of a class action may be particularly appropriate.⁸² Neither the class action

81. See, e.g., Bergman, *Class Action Lawyers: Fools for Clients*, 4 AM. J. TRIAL ADVOC. 243 (1980). Professor Bergman concludes that the lawyers are the real clients in class actions and voices concern that lawyers' decisionmaking will therefore inappropriately intrude on the individual personal values of class members. He suggests that class members be organized to represent and then speak for the clients. While this analysis is thoughtful, his solution that class members organize themselves in order to present a unitary client view is, I believe, unworkable. Cf. M. Hermann, *supra* note 80, at 71 (argument that the class lawyer should train clients to know how to assume their responsibility as clients). The difficulty in answering the questions in the text is not made easier even if the scenario did not include the existence of two prior discrimination complaints. For even if there were only the single Smith allegation, if Greenblatt had been able to discover that the 2500 unit complex was ninety-nine white, that still would suggest a possible class action. Statistical inferences can be probative of discrimination in housing. See, e.g., *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 962, 929 (2d Cir. 1988).

82. See Simon, *supra* note 14, at 480-81. Professor Coffee goes further and states that "class clients are not entitled to their preference (i.e., financial or ameliorative relief) . . . and that [class] client objectives should not always control litigation decisions, even in the

law, which I will discuss shortly, nor the ethics codes assist Greenblatt. With respect to all of these questions, therefore, Greenblatt must operate with no real lawyering guidance.

The situation is no simpler for Bradley in the toxic tort case. Indeed, in some ways, it will be even more procedurally complex.⁸³ The client-centered issues just noted in the discrimination case are essentially the same and no more easily resolved in the tort case. Assume, for example, that there were 500 homes affected in substantially the same way as the Morris' home. Should Bradley consider a class action? If some potential class members have consulted other attorneys, how is he to handle the lawyer turf battles that may ensue?⁸⁴ Even from a defensive perspective, Bradley probably would be derelict in not assessing a class action as the most effective vehicle for the Morris family.⁸⁵ Who decides? Who is the client?⁸⁶ Should Bradley talk to the owners of the other 499

settlement context." Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 632 n.23 (1987).

83. In some mass tort cases, the extent of the injury suffered, and therefore, the amount of damages sought by each class member victim will be much greater than is typically the case in a civil rights or consumer fraud case. See, e.g., *In re Federal Skywalk Cases*, 680 F.2d 1175, 1187 (8th Cir. 1982), cert. denied, 459 U.S. 1988 (1983). As a result, class members may vigorously contest in every conceivable way, procedural or otherwise, any aggregation of claims which might diminish the value of any individual claim. In other mass torts, causation problems can complicate resolution of the issue of whether a class action is the optimal device, either from an individual perspective or a systemic judicial vantage point. See, e.g., *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875 (D.C. Dak. 1982) (denial of class certification in DES case where it is unclear which manufacturer produced the particular drug that induced injury); Rosenberg, *Toxic Tort Litigation: Crises or Chrysalis? A Comment On Feinberg's Conceptual Problems and Proposed Solutions*, 24 Hous. L. Rev. 183, 194-96 (1987) (in favor of toxic tort class actions).

84. For example, the comment of the late Irving Younger regarding the opposition of local lawyers to his filing of a class action in the Kansas City "Skywalk" case serves as an illustration: "[i]n Kansas City, I'm still referred to as the anti-Christ." Martin, *The Rise and Fall of the Class Action Lawsuit*, N.Y. Times, Jan. 8, 1988, at B7, col. 1.

85. Defensive evaluation is necessary in order to be prepared to contest another victim's use of the class action in the event, for example, that Bradley concluded that the Morris family would be best served by individual and not class litigation. See, e.g., *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (extraordinarily intense litigation occurred among the lawyers fighting for or against class certification; see also *Civil Litigation in Mass Disasters: The Hyatt Skywalks Collapse*, 52 UMKC L. Rev. 141-338 (1984) (collected articles).

86. The question or problem of the identity of the client is not confined to the mass tort or civil rights cases like the two hypotheticals discussed here. A lawyer may also, for example, have difficulty in identifying: a) the corporate client in a takeover battle—the corporate entity, the board of directors of the target, the officers, the employees, or the shareholders of the target (see Karmel, *Duty to the Target: Is an Attorney's Duty to the Corpo-*

homes? How should the communication take place? Most importantly, again assuming Bradley discerned the true views of the class members, how is he to synthesize the information obtained and then act on it? Even the ostensibly egalitarian suggestion that class members elect a representative is not a panacea. As Professor Hermann has persuasively written regarding a prison conditions case, the elected representative often will be the most articulate, frequently the most radical, but not necessarily the most representative of the views of class members.⁸⁷ Conversely, if a class member takes a position that seems irrational, that does not mean it ought to be accorded any less weight than it would be given in the individual client context. For example, a cancer victim of the toxic tort might wish to seek maximum punitive damages, literally as revenge.⁸⁸

Class action lawyers struggle with these difficult questions everyday. The ethical rules governing conflicts of interest in representing multiple clients do not meaningfully assist the class action attorney.⁸⁹ Even the Model Rules only hint at how the client-centered rules may be applied in the class action context. Model Rule 1.13 governs the "Organization as Client." While this rule most obviously is intended to encompass the attorney's relationship with a

ration a Paradigm for Directors?, 39 HASTINGS L.J. 677 (1988)); or b) a child or incompetent. See *infra* notes 218-40 and accompanying text.

87. See M. Hermann, *supra* note 80, at 55-56.

88. See Barrett, *For Many Dalkon Shields Claimants Settlements Won't End the Trauma*, Wall St. J., Apr. 12, 1988, at 42, col. 4. In questioning the adequacy of the settlement procedures, various class member victims were quoted: "I lost most of my adult life and I won't go quietly," "I'd like to get Robins officials across the table and get them to apologize to me. That would be worth millions," and "I want revenge, people thrown in jail, huge money awards, public punishment. The quiet efficient bureaucracy of the [settlement] doesn't satisfy me." *Id.*; see also Blum, *Class Action Filed in Flight 811 Case*, Nat'l L.J., May 1, 1989, at 3. (A lawyer for one of the accident victims and a member of the putative class said: "[m]y client does not want [to sue] . . . People have a right not to sue." In response, the class lawyer said there are "different motivations for law practice."); Glaberson, *Determined to Be Heard*, N.Y. Times Mag., Oct. 2, 1988, at 32 (profiles of four persons whose cases were argued in the Supreme Court; focuses on the highly individualistic reasons why these persons would spend five to ten years waging a legal battle; e.g., altruism, self-punishment, obsessiveness, justice, self-improvement, frustration, etc.).

89. See G. HAZARD & W.R. HODES, *supra* note 79, at 57-62. As with other ethical provisions, the rules relating to multiple representation and conflicts of interest seem to envision two or more individual clients or organizations and not a class of individuals. See MODEL CODE DR 5-105, EC 5-14 to -20; see also MODEL RULES 1.7, 1.9. See generally Note, *Developments In the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1446-58 (1981).

corporation or other similar legal entities, two commentators assert that it "may also apply to informal groups who have come together only for the purpose of seeking legal representation."⁹⁰ But even if that is a reasonable interpretation, it does not address the issue of who will work with the class lawyer in making the decisions for the class. Model Rule 1.13, like all other Model Rules and Code provisions, does not mention class actions. Thus, the class lawyer is left with no direction as to how to implement client control even if she wanted to do so.

Further, as Professor Wolfram writes in his excellent ethics treatise, requiring client autonomy could deny "the possibility of public interest representation."⁹¹ Recognizing the importance of class actions, he suggests that the class lawyers should be permitted "to make critical decisions themselves . . . by honestly consulting their own best conception of what public interest dictates."⁹² Should this solution be adopted or should we perpetuate the myth that clients control class actions?⁹³ I prefer the former choice.

III. CLASS ACTIONS

Before suggesting ways to implement the principles of informed consent and client-centered decisionmaking in class actions, I must review briefly the doctrinal basis for class actions and discuss the specific provisions of Civil Procedure Rule 23 that might be used to facilitate the accomplishment of these goals. Rule 23 does not explicitly address these concerns and the courts thus far have refrained from using the existing provisions of the rule to ensure effective participation by class members.

A. *Doctrinal Rationale*

Class actions enable the judiciary to adjudicate multiple

90. G. HAZARD & W.R. HODES, *supra* note 79, at 241.

91. C. WOLFRAM, *MODERN LEGAL ETHICS* 940 (1986). But for at least one commentator that may be an appropriate resolution of the issues under consideration here. See Breger, *Accountability and the Adjudication of the Public Interest*, 8 HARV. J.L. & PUB. POL'Y 349 (1987).

92. C. WOLFRAM, *supra* note 91, at 941.

93. See Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW & CONTEMP. PROBS. 293, 295 (1984); see also Rhode, *supra* note 6, at 1262 (Professor Rhode uses the word "fiction" to describe the rules governing the role of clients in class adjudication).

claims that are identical or similar in the most efficient way possible. It is a procedural vehicle which allows hundreds or thousands of people to litigate the same claim in a single action rather than in individual lawsuits.⁹⁴ Moreover, class actions permit the small consumer or other under-represented persons to obtain relief that might otherwise be unobtainable.⁹⁵

Two fundamental procedural norms are integral to the fair and effective use of class actions. With certain exceptions, principles of claim and issue preclusion make the judgment in a properly certified class action binding on all members of the class and the opposing party.⁹⁶ Thus, if the defendant wins, a member of the plaintiff class ordinarily will not be permitted to bring a subsequent individual action that raises claims identical to those adjudicated in the class action.⁹⁷ Due process, in turn, requires that the class members be given their figurative, if not literal, day in court if they are to be bound. Due process is satisfied only if the representative parties (and their attorneys) "adequately" represent the interests of the members of the plaintiff class.⁹⁸

With this cursory review in mind, do the procedural rules give the class "client" a decisionmaking role comparable to an individual client? Neither the Federal Rules of Civil Procedure nor comparable state procedural rules contain class action provisions explicitly defining the respective decisionmaking roles of representative plaintiffs, class members, or class counsel. For that matter, the procedural rules also do not deal with this issue in the

94. See generally H. NEWBERG, *supra* note 8, § 1.01; see, e.g., *Stots v. Media Real Estate*, 355 F. Supp. 240 (E.D. Pa. 1973) (one of nine cases contesting constitutionality of Landlord-Tenant Act).

95. See Ford, *Federal Rule 23: A Device of Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969).

96. See J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 756 (1985). The major qualification is the (b)(3) class action which permits class members to opt out, thereby avoiding any preclusion effects.

97. Preclusion does require that there be an identity of claims. See, e.g., *General Tel. v. Falcon*, 457 U.S. 147 (1982); see also *C.A. Wright, A. Miller & M. Kane*, *FED. PROC. & PROCEDURE* 273-74 (2d ed. 1986).

98. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940). The Supreme Court has never clearly resolved whether procedural due process requires notice to members of the class. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court ambiguously relied on a due process decision, *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950) (reasonable efforts to effect notice are required), in support of its interpretation of the Rule 23 requirement that notice is required at least in Rule 23(b)(3) class actions. See *Eisen*, 417 U.S. at 173-75.

context of individual actions. Only ethics codes expressly address the respect for and autonomy of clients, and for the most part, as previously discussed,⁹⁹ the codes only address representation of the individual client.

B. Procedural Rules Relating to Client Decisionmaking in Class Actions

While there are several provisions of Civil Procedure Rule 23 that at least implicitly deal with the respective roles of representative plaintiffs and unnamed class members,¹⁰⁰ courts rarely discuss what decisionmaking responsibilities should be exercised by class clients.¹⁰¹ Justice Stevens has written that even the status of the absent members "has always been difficult to define accurately."¹⁰² Typically, courts discuss the role of class members if an open conflict erupts among class members or between one or more class members and a named plaintiff or class counsel.¹⁰³ If a conflict is not apparent or is not raised by a class member or a third party either at the time a class is certified or at the time a class settlement is approved, the issue of what role clients played in decision-making ordinarily is not addressed by the courts. In that sense

99. See *supra* notes 25-42 and accompanying text.

100. See FED. R. CIV. P. (23)(a)(4) (adequacy of representation); FED. R. CIV. P. 23(d)(2), (3) (judicial authority to order certain steps to be taken to protect the interests of parties); FED. R. CIV. P. 23(e) (requirement of judicial approval of all class settlements).

101. A noted exception is *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (discussed extensively *infra* notes 140-57 and accompanying text).

102. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 343 n.3, *reh'g denied*, 446 U.S. 947 (1980) (Stevens, J., concurring). The Court, in *Roper*, held that defendants' tender of maximum recovery to named plaintiffs cannot moot class claim insofar as the named plaintiffs' right to appeal a denial of class certification. Other courts have referred to absent class members as "passive parties" (pre-class certification), see *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and "derivative parties", see *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977); cf. *Sosna v. Iowa*, 419 U.S. 393 (1975). In dissenting to the *Sosna* holding that a named plaintiff, whose claim became moot after class certification, can still prosecute a class action, Justice White concluded: "[i]n reality, there is no longer a named plaintiff in the class, no member of the class before the court. The unresolved issue, the attorney, and a class of unnamed litigants remain. None of the anonymous members of the class is present to direct counsel and ensure that class interests are being properly served." *Sosna*, 419 U.S. at 412.

103. See, e.g., *Shimkus v. Gersten*, 816 F.2d 1318 (9th Cir. 1987) (directing the lower court to permit competing minority groups to intervene as sub-classes to resolve how a limited affirmative action pie would be divided up).

class actions are the same as individual actions.¹⁰⁴

1. Rule 23(a)(4)

a. *Conflicts of Interest*

Rule 23(a)(4), which requires that the class representatives “adequately and fairly” represent the class,¹⁰⁵ has been the principal vehicle for judicial resolution of open conflicts of interest between clients or conflicts between lawyer and clients.¹⁰⁶ It is also used, although much less frequently, to examine the decisionmaking role of the client, or at least the representative plaintiff, in the conduct of class actions.¹⁰⁷ Under Rule 23(a)(4), courts have considered the extent to which named plaintiffs actually must be involved in the conduct of the class action and be familiar with the underlying factual circumstances supporting the class claim.¹⁰⁸

The paradigm Rule 23(a)(4) conflict of interest case is presented when the explicitly stated interests of the class lawyer or the named plaintiffs are antagonistic to those of other class members.¹⁰⁹ These open conflicts might be tactical,¹¹⁰ practical,¹¹¹ or

104. Other than in articles or texts on lawyering skills (*see, e.g.*, D. BINDER & S. PRICE, *supra* note 11, at 147-53), the allegation that a lawyer violated the strictures of client-centered decisionmaking or more narrowly, the informed consent requirements, or even the discussion of this principle, ordinarily will arise only in a disciplinary proceeding or a legal malpractice case when a client makes the assertion. *See, e.g.*, Spiegel, *supra* note 11, at 67-72; *see also* R. COVER, O. FISS & J. RESNIK, PROCEDURE 784-88 (1988).

105. Rule 23(a) reads as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 class and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

106. *See, e.g.*, Piambino v. Bailey 757 F.2d 1112, 1119 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

107. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978); *see also infra* notes 140-57 and accompanying text (extended discussion of *Pettway*).

108. Compare *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594-95 (M.D. Pa. 1974) (named plaintiffs required to have first-hand knowledge of underlying facts to satisfy “adequacy” requirement) with *Piel v. National Semi Conductor Co.*, 86 F.R.D. 357, 366 (E.D. Pa. 1980) (named plaintiff need not be familiar because court has oversight responsibility to ensure adequate protection of class members), *cert. denied*, 474 U.S. 903 (1985).

109. *See, e.g.*, Wetzel, 508 F.2d at 247. *See generally* H. NEWBERG, *supra* note 8, §§ 3.22-25, 3.16; Note, *supra* note 89, at 1447.

sometimes ideological or political.¹¹² One commentator suggests that there is an inherent conflict between clients and a lawyer in class actions because the lawyer is more an entrepreneur than a fiduciary.¹¹³ In some cases, there may be only an appearance of a conflict, such as when class counsel has a close or familial relationship with a named plaintiff.¹¹⁴ Typically, in the case law, the conflict either is apparent on the face of the litigation (such as when the class lawyer is closely related to a class representative, or indeed is one and the same)¹¹⁵ or is brought to the court's attention

110. See, e.g., *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 331 (5th Cir. 1982), cert. denied, 480 U.S. 931 (1987). In this antitrust class action challenging an airport's restrictions on taxicabs, two factions of the plaintiff class were at loggerheads with respect to nearly all aspects of the conduct of the litigation. As a result, the Fifth Circuit concluded that in all probability the representatives of neither faction could adequately represent the other.

111. See, e.g., *Bailey v. Ryan Stevedoring Co.*, 521 F.2d 551, 553 (5th Cir. 1976), cert. denied, 429 U.S. 1052 (1977). Class certification denied when most members of a Black union opposed a Black union member class in an action seeking integration with a white union. The opponents of class certification, in essence, felt the status quo employment arrangements were better than what they would get in a consolidated union.

112. In school desegregation cases there may be disputes, for example, between those seeking to improve segregated Black schools and those seeking busing to desegregate. See, e.g., *Armstrong v. City of Milwaukee*, 616 F.2d 305, 323 (7th Cir. 1980); cf. *NAACP v. Button*, 371 U.S. 415, 448-70 (1963) (Harlan, J., dissenting) (plaintiff's lawyer has a conflict between fiduciary obligation to his client(s) and ideological duty to his employer, the NAACP). See generally Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

113. 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, 726 (1986). Professor Coffee argues that the plaintiffs' attorney in class actions is quite different from the agent-lawyer in the individual client relationship and should be so recognized. *Id.* at 683-84. To minimize the lawyer-client conflict, he urges a restructuring of fee arrangements so that the class lawyer's entrepreneurial interests parallel the class interests in a more mutually reinforcing manner. Were this the case, he goes further and suggests that: "an economic answer might be to eliminate the plaintiff-attorney relationship entirely by permitting the plaintiffs' attorney to acquire all the clients' rights in the action." *Id.* at 691; see also Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); Garth, Nagel and Player, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 391-94 (1988). Authors acknowledge Coffee's thesis about the desirability of better fee incentives to lessen conflicts between lawyer and clients, but ultimately, are not overly optimistic that his reforms are achievable in context of present class action structures.

114. See Rhode, *supra* note 6, at 1186 (delineating a taxonomy of intra-class conflicts). A familial relationship between named plaintiff and counsel sometimes is allowed as long as the court is persuaded that the lawyer is not more interested in a fee to the detriment of the class. See, e.g., *Malchman v. Davis*, 706 F.2d 426, 432 (2d Cir. 1983).

115. See, e.g., *Zylstra v. Safeway Stores Inc.*, 578 F.2d 102, 104 (5th Cir. 1978). See

by a dissident class member. If a conflict is neither apparent nor raised by a class member, it is not explored.¹¹⁶

But even as to the open and notorious intra-class conflicts, Rule 23 and existing legal doctrine, to use Professor Rhode's apt language, is "singularly laconic;" and offers "little guidance to courts and counsel who confront intra-class schisms."¹¹⁷ In the last part of this Article, I address the need to establish clearer rules for all class actions. My concern is that whether conflicts are open or not, the class lawyer must facilitate active client participation, and yet assume the ultimate decisionmaking responsibility.

b. Adequacy of Named Plaintiff

The Rule 23(a)(4) requirement that the named plaintiff be an adequate representative of the class also is relevant to client-centered decisionmaking. Some courts demand greater involvement by named plaintiffs than by unnamed class members.¹¹⁸ Thus, class certification has been denied when the named plaintiffs apparently did not have knowledge, interest, or experience in the matters being litigated.¹¹⁹ Other courts insist only that representative plaintiffs be alert and basically aware of what is going on in the litigation.¹²⁰ A sophisticated understanding by the named plaintiff of the underlying subject matter is not necessary.¹²¹ Thus, most courts have recognized that if they demand too much of the named

generally Note, *Class Action Counsel as Named Plaintiff: Double Trouble*, 56 FORD. L. REV. 111 (1987).

116. This raises one of the questions in this Article—namely, whether the class attorney has a client-centered lawyering obligation to affirmatively seek out the views of the class "clients." I conclude that the class lawyer does have such a duty. *See infra* notes 241-58 and accompanying text.

117. Rhode, *supra* note 6, at 1191.

118. *See Piel v. National Semi Conductor Co.*, 86 F.R.D. 357, 366 (E.D. Pa. 1980); *In re Goldchip Funding*, 61 F.R.D. 592, 594-95 (M.D. Pa. 1974).

119. *See, e.g., Greenspan v. Brassler* 78 F.R.D. 130, 133-4 (S.D.N.Y. 1978); *Goldchip Funding*, 61 F.R.D. at 592.

120. *See, e.g., Michael v. Ambassador Group*, 110 F.R.D. 84, 90 (E.D.N.Y. 1986); *In re New York City Mun. Sec. Litig.*, 87 F.R.D. 572, 579 (S.D.N.Y. 1980); *cf. Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 728 (11th Cir. 1987) (class certification should be denied when named plaintiff is nothing more than a mere figurehead), *cert. denied*, 108 S. Ct. 1220 (1988).

121. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373, *reh'g denied*, 384 U.S. 915 (1966). Lack of comprehension of the business transaction is not a bar to satisfy adequate representation requirement. Rules of procedure must be applied "as nearly as possible [to] guarantee that bona fide complaints be carried to an adjudication on the merits." *Id.*

plaintiff, redress of multiple wrongdoing cannot be achieved.¹²² These cases reflect tensions in Rule 23 about the role named plaintiffs and absent class members should play in class actions. If these decisions are based on the illusory premise that class members in fact play meaningful decisionmaking roles, they perpetuate a myth about client involvement.¹²³ If they seek to cast the named plaintiff in the useful role of information source¹²⁴ or as a watchdog to spur the class lawyer,¹²⁵ these decisions offer constructive guidance to class lawyers. Courts might also, as I suggest below,¹²⁶ rely on the named plaintiff as a representative class member whose feelings and views on non-legal considerations are effectively integrated into the class lawyer's decisionmaking.

One decision imposed particularly demanding requirements on the named plaintiffs because of the court's concern that "naive plaintiffs" would be taken advantage of or exploited by aggressive entrepreneurial lawyers.¹²⁷ This is, of course, a legitimate concern in any client-lawyer relationship, as discussed above. But the solution is not to eviscerate class actions by establishing requirements that are too stringent to satisfy.¹²⁸ Instead, courts should foster more skillful and effective lawyer-client communication.¹²⁹

2. Rule 23(e)

Rule 23(e), which concerns termination of class actions, ostensibly seeks to satisfy the principle of informed consent. Unfortunately, however, it is rarely applied to achieve this goal. Rule 23(e) explicitly requires the court to approve any settlement or dismissal of a class action, but it only requires notice to class members in

122. See *id.*; see also *Piel*, 86 F.R.D. at 107.

123. See *Kirkpatrick*, 827 F.2d at 728.

124. See *Goldchip Funding*, 61 F.R.D. at 594 (representative plaintiff can "offer personal knowledge of the factual circumstances").

125. See *Municipal Sec. Litig.*, 87 F.R.D. at 579 (named plaintiff can help to ensure "vigorous prosecution of the claims").

126. See *infra* notes 208-10 and accompanying text.

127. See *Goldchip Funding*, 61 F.R.D. at 594; see also *supra* notes 113-15 and accompanying text.

128. See, e.g., the accountability requirements proposed by one author. Breger, *supra* note 91.

129. See *Gulf Oil v. Bernard*, 452 U.S. 89 (1981) (Supreme Court began the effort of facilitating communication by eliminating unreasonable barriers to communication between class lawyer and class members); see also *infra* notes 184-89 and accompanying text.

"such manner as the court directs."¹³⁰ When courts use that discretion to ensure that all class members receive actual notice, the class clients at least have an opportunity to voice public objections if they wish to do so.¹³¹ For a variety of reasons, not the least of which is the frequently incomprehensible form of the notice,¹³² the right to object is rarely exercised. Instead, class members passively consent, acquiesce or cynically disregard the notice—the choice of characterization depending on one's perspective and attitude. Class lawyers are even less inclined to reach out to the class members at settlement than at earlier stages in the litigation. At the settlement point, the class lawyer already has invested her energy and skills in reaching a compromise, so there is a natural hesitancy to ferret out critics.¹³³ Neither the ethical nor the procedural rules require the class lawyer to do more than satisfy the Rule 23(e) notice directive.

As a result, most class settlements get approved with little objection and generally little judicial involvement.¹³⁴ If class mem-

130. *Compare* FED. R. CIV. P. 23(e): "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs" with FED. R. CIV. P. 23(c)(2) for notice in all Rule 23(b)(3) class actions: "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(e), 23(c)(2); *see also* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

131. Typically, however, prior to the point when notice is given to class members, counsel for both sides will have expended much time and energy in reaching a mutually acceptable compromise, and the court often will have played some kind of a supportive, if not mediating, role in the efforts to produce a settlement. Thus, at the time when the vast majority of class members are first invited into the decisionmaking process relating to settlement, the other critical parties (i.e. the class lawyers, defense lawyer, most probably the defendant and perhaps the court) have invested substantial energy and resources in the propriety of the settlement and there already is an extraordinary momentum in support of the proposed decree.

132. *See* Rhode, *supra* note 6, at 1234-42. The author offers two examples of responses to a class notice in an antitrust damages case on behalf of antibiotic purchasers (giving class members a chance to opt out) to illustrate the point:

Dear Sir: I received your pamphlet on drugs which I think will be of great value to me in the future. Due to circumstances beyond my control, I will not be able to attend this class at the time prescribed on your letter due to the fact that my working hours are from 7:00 until 4:30.

Dear Sir: Our son is in the Navy, stationed in the Carribean some place. Please let us know exactly what kind of drugs he is accused of taking. From a mother who will help if properly informed. A worried mother.

See also Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973)

133. *See supra* note 131; Rhode, *supra* note 6, at 1205-12 (referring in particular to views expressed by various class action lawyers in interviews with Professor Rhode).

134. In terms of the substantive terms of the settlement, many courts in applying a loose standard of what is "fair, reasonable and adequate under the circumstances" essen-

bers do voice objections, some courts assume an active monitoring role while others rely on counsel to resolve the conflicts.¹³⁵ In my view, conflicts can best be resolved, if not prevented, by affirmatively soliciting the views of class clients (in some viable way—perhaps randomly) early in the litigation and encouraging them to participate in the formulation and then the approval of a settlement.¹³⁶ Ultimately, as the advocate-trustee for the class, the class lawyer must present the settlement plan to the court.¹³⁷

The court's role at settlement must also be assessed. Just how involved should a court be in a settlement process?¹³⁸ Typically, judicial discussions of settlement disputes focus on the resolution of open conflicts and do not address the process of representation or the proper division of decisionmaking responsibilities between client and lawyer.¹³⁹

tially defer to whatever the lawyers have negotiated. See *Patterson v. Stovall* 528 F.2d 108, 114 (7th Cir. 1976); C. WRIGHT, *MANUAL FOR COMPLEX LITIGATION* § 30.44 (2d ed. 1985). Rarely do settlements terms get modified. "It is thus the unusual case where the objections of absent class members result in a changed settlement." Ricciuti, *supra* note 18, at 833. This hands off attitude has been severely criticized by Professor Owen Fiss. Professor Fiss believes that a class action consent decree "transform[s] the social function of adjudication from interpreting and actualizing public values into one of maximizing the satisfaction of the preference of the parties. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1, 9 (1987). Then, he asserts, the court ceases to perform its necessary "legitimizing" function and becomes instead, simply an "instrumental" functionary of the parties. *Id.* at 14.

135. For example, courts generally do not interpret Rule 23(e) to require a trial or even an evidentiary hearing. See, e.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974). Rather, pursuant to the Manual for Complex Litigation, the court simply "must be provided with adequate information . . . to assume [inter alia] that there is no collusion." *Id.* § 23.14. There is a "presumption of correctness . . . to a class settlement reached in arms length negotiations . . ." *Id.* § 30.41. "Counsel for the parties are the main source of information concerning the settlement." *Id.* § 30.42.

136. It appears to me that one justification for client-centered lawyering—namely, that client participation in the decisionmaking will produce greater ultimate client acceptance and satisfaction than if there is no such participation—is equally applicable to class actions. Cf. D. BINDER & S. PRICE, *supra* note 11, at 147-53. Accordingly, if class members first learn of a settlement at the last stages of a fairness hearing, the likelihood of conflict is great. If they get involved earlier, conflicts may be diminished.

137. See Rhode, *supra* note 6, at 1253-57 (suggestions as to how to resolve conflicts when they surface at the point when a court evaluates a proposed settlement).

138. There has been considerable criticism of the role performed by the courts in approving Rule 23(e) settlements. See generally Fiss, *supra* note 134; Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 50-63. Though less categorical than Fiss, Professor Resnik is critical of courts playing a negotiating as well as an approving role regarding consent decrees. The approval, Resnik asserts, is a judicial act but not a judicial judgment and there are few guidelines for courts to follow in carrying out this act.

139. Rule 23(e) "protects the parties only against the most egregious and blatant

The *Pettway v. American Cast Iron Pipe Co.*¹⁴⁰ decision is one of the few that explicitly discusses the decisionmaking roles of the class attorney, the representative plaintiffs, and the class members.¹⁴¹ *Pettway* involved open and clear conflicts between class members and between class members and counsel. Plaintiffs were current and former Black employees of American Cast Iron Pipe Company (ACIPCO), and they alleged that they were victims of racial discrimination in employment. The action was certified as a (b)(2) class action, and after some preliminary skirmishes, the trial court found that certain of the ACIPCO practices had an adverse racial impact on plaintiffs and violated the applicable law.¹⁴² From that point in 1971, however, until issuance of a sixty-six page opinion by the Fifth Circuit in 1978,¹⁴³ there were intense and protracted disputes about what relief should be granted. There were three basic areas of conflict: 1) what injunctive relief was necessary to correct the effects of the prior wrongs and prevent any recurrence; 2) whom among the class were entitled to back pay awards, and 3) what was the appropriate amount of the back pay award.¹⁴⁴

Well before the 1978 opinion but after a third reversal and remand by the Fifth Circuit,¹⁴⁵ the trial court encouraged settlement discussions and actively participated in the negotiations.¹⁴⁶

abuses." Kane, *supra* note 8, at 403. Professor Kane urges a more active cooperative effort on the part of the court and the class attorney in ensuring that settlements protect the interests of class members. *Id.* Some courts assume a more involved role than others in assessing the adequacy of settlements. Compare *Weinberger v. Kendrick*, 698 F.2d 61, 69 (2d Cir. 1982) (court is guardian of class members), *cert. denied*, 464 U.S. 818 (1983), with *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976) (deference to counsel's negotiated agreement).

140. 576 F.2d 1157 (5th Cir. 1978).

141. Two key factors, however, limit the precedential impact of *Pettway*. See *Pettway*, 576 F.2d at 1157-1223. First, the organizational skills of the members of the plaintiff class (242 employees or former employees) were extremely unusual. Second, the particular procedural and substantive facts in the cases were complex and unique. The issues the *Pettway* court grappled with in 1978 remain essentially unresolved in 1989.

142. *Id.* at 1166; see also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

143. See *Pettway*, 576 F.2d at 1157-1223.

144. *Id.*

145. See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

146. As Professor Resnik suggests, however, when a "sophisticated trial judge" carefully times his views on the propriety of a proposed settlement, the resulting decree becomes more like a coercive judicial "judgment," and the court's role more like the decisionmaker than a mediator. See Resnik, *supra* note 138, at 61. Integration of the "client(s)" into this decisionmaking process regarding class settlements, makes the process even more complicated.

The parties reached a partial agreement and a final order was entered by the trial court on November 20, 1975, ordering certain injunctive relief and awarding aggregate back pay of \$1 million to a sub-class of 841 people.¹⁴⁷ During the extensive discussions among the parties, counsel, and the court that preceded the entry of the judgment, seventy percent of the 2200 class members made their objections to the settlement terms known to the court.¹⁴⁸ The objectors included five of the nine named plaintiffs and a very well organized elected committee of all of the Black ACIPCO employees. To further complicate the situation, the class lawyer informed both the class and the court that he would not appeal the November 20th judgment because he thought it was fair. Despite the objections, the judgment was entered and then appealed to the Fifth Circuit.

The court of appeals addressed several issues, including 1) whether dissatisfied class members could appeal the judgment, and 2) who was the appropriate decisionmaker for the class. As a preliminary matter the court concluded, that although the trial court's decision was denominated a "judgment," it was in fact part consent decree and part judgment.¹⁴⁹ As to the judgment, the Fifth Circuit held that it was not adequately supported by findings of fact and conclusions of law.¹⁵⁰ As to the settlement, the Court held that the trial judge failed to satisfy the Rule 23(e) procedural requirements regarding notice to class members of a proposed settlement.¹⁵¹

The Fifth Circuit observed that it was an issue of first impression whether the objectors (even if they constituted a majority of the class) could appeal the judgment despite the refusal of class counsel to do so.¹⁵² With refreshing candor, Judge Goldberg noted

147. See *Pettway*, 576 F.2d at 1166-67, 1214 n.70.

148. *Id.*

149. *Id.* at 1168. The court itself described its role with respect to reviewing the action of the trial court as "entering the twilight zone." *Id.* at 1168. See generally Fiss, *supra* note 134, at 41.

150. See *Pettway*, 576 F.2d at 1169.

151. *Id.* at 1214.

152. *Id.* at 1177. "We are not aware of any cases in which the named class representatives and a large position of the class desired to prosecute an appeal of a district court's judgment, yet the class attorney refused to do so." *Id.* at 1176. The Fifth Circuit, however, had previously held that class members who objected to a settlement did have standing to appeal the approval of the settlement. See *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

that the ethics code “remains unclear” as to whether provisions giving individual clients the right to make “major litigation decisions” apply to class actions.¹⁵³ He considered the possible decisionmakers—the class lawyer, the named plaintiffs and the class members. The court concluded that previously active named plaintiffs who objected to the judgment could properly appeal, and that the trial court abused its discretion in refusing to allow a substitution of counsel which would have permitted the objectors to appeal.¹⁵⁴

The court appropriately placed substantial reliance on the fact that the plaintiff class was highly organized, and that the class members’ elected committee representatives also vigorously objected to the trial court’s judgment.¹⁵⁵ The court, noting that the sentiment of the class as a whole is only one factor in resolving the appealability question, also considered the fact that most of the representative plaintiffs opposed the judgment. Despite the court’s recognition of the abilities and sincerity of class counsel, it concluded that the plaintiffs’ “choice [to appeal] should have been honored” by counsel.¹⁵⁶

The court in *Pettway* rested its principal decision on two relatively non-controversial principles of class action jurisprudence: 1) the Rule 23(e) requirement that class members receive notice of a settlement, and 2) the principle that the vociferous objections of class members should be given great weight.¹⁵⁷ The court did not indicate how to resolve the decisionmaking issue if there is proper notice to a class and if there is a much less active or even totally passive class. Indeed, the *Pettway* opinion implicitly suggests that the class lawyer’s decisions are presumptively correct in the absence of either open conflicts of interest or vociferous objection from class members. But as this Article suggests, the silence of class members does not necessarily mean that class members agree

153. *Pettway*, 576 F.2d at 1176.

154. *Id.* at 1180.

155. *Cf. Bergman, supra* note 81, at 43. Professor Bergman suggests that the class lawyer help organize the class. *Pettway*, however, clearly demonstrates that even when a class is organized, it does not mean that decisionmaking will be simple or that conflicts will be avoided. *See Pettway*, 576 F.2d at 1157.

156. *Id.* at 1180.

157. *Id.* at 1178. But, the fact that a majority of the class or even the majority of the named plaintiffs oppose a settlement does not mean the settlement should be disapproved. *See, e.g., Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982).

with the lawyers' decision.

Pettway demonstrates the difficulties caused by the absence of any decisionmaking guidelines for class actions; not only was the plaintiffs' lawyer presumably at a loss as to how to negotiate and consummate a settlement, but the trial court was similarly left to flounder. While it is unlikely that the *Pettway* conflicts could have been avoided, it is also clear that the problems were greatly exacerbated by the lack of any applicable ethical or procedural rules. The frankness of the Fifth Circuit highlights this point. Unfortunately, with the exception of the limited precedential guidance of *Pettway*, little else has changed which would make it any easier today for the parties, counsel or the courts to handle a repetition of the *Pettway* case.

As Professors Fiss and Resnik point out, class action settlements, at least those embodied in consent decrees, involve critical systemic considerations beyond the questions of what role the class client does or should play in effecting class settlements.¹⁵⁸ Because of the public interest, the court must assume its obligation to oversee the propriety of terminating a class action. The parties should not be able to construct and impose a settlement that the court must enforce.¹⁵⁹ If the settlement does not result in a consent decree necessitating the continuing involvement of the court, the situation is different;¹⁶⁰ while the court still has a Rule 23(e) approval role, it is less significant, and the settlement is much more likely to affect only private interests.¹⁶¹ In either case, the variable of the courts' role must be integrated into the decisionmaking equation. While the values underlying client-centered decisionmaking must be respected at the class action settlement stage, it is clear that the concerns for individual dignity and autonomy and the importance of the client's evaluation of non-legal factors do not now play, nor

158. See *supra* notes 134, 138.

159. Cf. Simon, *supra* note 15, at 4. Like Owen Fiss, Professor Simon views the litigation process, and even the lawyering process generally, as encompassing broader concerns than simply those reflective of a desire to expeditiously effectuate client wishes. For Simon, the lawyer is an integral participant in our system of justice and must exercise discretion in a way to maximize the pursuit of justice, even if, (he implicitly suggests) that occasionally necessitates taking actions contrary to the wishes of the client.

160. The consent decree is "something more than a voluntary contract . . . [i]t represents an exercise in public power that has not been preceded by the processes that serve as the source of the legitimacy and authority of that power." Fiss, *supra* note 134, at 17.

161. Cf. Easterbook, *Justice and Contract in Consent Judgments*, 1987 U. CHIC. LEGAL F. 19, 30-31.

should they play in class actions, the paramount role they do in individual cases.¹⁶²

3. Rules 23(d)(2) and (3)

These two class action provisions, Rules 23(d)(2) and (3), give courts discretionary authority to act to protect the interests of class members.¹⁶³ As with other existing rules, Rules 23(d)(2) and (3) do not deal explicitly with the respective decisionmaking responsibilities of a class lawyer, named plaintiff and class members.¹⁶⁴ Rather, these open-ended provisions allow judges to respond to complaints or conflicts brought to their attention, and to ameliorate some of the harsher consequences of Rule 23. For example, (b)(2) class actions do not require pre-certification notice, nor are members of a (b)(2) class ordinarily permitted to opt out.¹⁶⁵

162. If the individual consent of each class member were required, disapproval of class settlements would occur when even a single class member objected. As Professor Resnik writes: "such a rule would simplify the inquiry and would locate it squarely on the question of consent. However, the utility of class action litigation might be greatly diminished." Resnik, *supra* note 138, at 91, 172. Indeed, it is that recognition of the tension between client-centered norms and class actions which underlies this Article.

163. See FED. R. CIV. P. 23(d).

Orders in Conduct of Actions: In the conduct of actions to which this applies, the court may make appropriate orders: . . . (2) requiring, *for the protection of the class* or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any steps in the action, or of the proposed extent of the judgment, or of the *opportunity of members to signify whether they consider the representation fair and adequate*, to intervene to present claims or defenses or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors.

Id. (emphasis added)

164. *Id.*

165. The Rule 23 framework is paradoxical in that the rule requires notice to class members and an opportunity to opt out of Rule 23(b)(3) class actions, whereas no such notice is required nor is a chance to opt out afforded to class members in Rule 23(b)(1) or (b)(2) class actions. Thus, in Rule 23(b)(3) class actions, assuming there is actual notice, there is consent of sorts (either tacit or explicit) of all class members. A Rule 23(b)(1) or (b)(2) class action does not require even this limited form of consent. These latter two types of class actions may proceed when the interests of the class appear to be congruent, "[s]o long as the [the class counsel's] articulation of that [common] interest does not strike the court as entirely bizarre." Yeazell, *supra* note 7, at 1201. Professor Rhode usefully notes that even when adhering to the Edmund Burke concept of the class lawyer as the enlightened trustee of the class (as opposed to the instructed delegate) it is important to the efficacy of this system of representation, that there be "some measure of consent." Rhode, *supra* note 6, at 1. She cites *J.H. Ely, Democracy and Distrust: A Theory of Judicial Review*, in support of her proposition that a participatory foundation is especially important in class actions when self-appointed class lawyers assume legislative and administrative type

Nevertheless, pursuant to their (d)(2) discretion, courts have allowed class members to opt out of (b)(2) class actions.¹⁶⁶ Conversely, judges have allowed class members to intervene under (d)(2).¹⁶⁷ Although intervention generally is not necessary in certified class actions for a class member to benefit from a judgment,¹⁶⁸ nor required to avoid statute of limitations problems,¹⁶⁹ it can be ordered if the court concludes it would be helpful to the court,¹⁷⁰ or necessary to protect the rights of absent class members. But intervention under (d)(2) is not an automatic right and Rule 24(a) intervention as of right requires a finding of inadequate represen-

responsibilities. Rhode, *supra* note 6, at 1201. Yet the common interest of a class may be much more easily articulated by a class lawyer, for example, in a (b)(3) consumer overcharge class action (*e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)) than in a Rule 23(b)(2) school desegregation class action where the interests and wishes of class members are more complex and may differ significantly. In the latter class action, however, even the tacit consent of the class members is not required. *See* Yeazell, *supra* note 7, at 1201. Professor Yeazell aptly describes this Rule 23 reality as "ideological schizophrenia." *Id.*

For purposes of this Article, however, Professor Yeazell's analysis does not go quite far enough. While the class action rules seem to afford certain class members (namely, those in a Rule 23(b)(3) class action) more rights than other class members (in a Rule 23(b)(1) or (b)(2)), the notice-consent requirement in many Rule 23(b)(3) actions is for all practical purposes, a meaningless one. Certainly, in terms of the give and take process of obtaining informed consent from an individual client (or even more obviously, obtaining effective client participation) compliance with Rule 23(b)(3) notice requirements rarely results in any meaningful client-centered decisionmaking. Thus, the occasional use of formal notice may do no more than contribute to the illusion that class members participate in decisionmaking. The additional Rule 23(b)(3) requirement still may have the adverse consequences of squelching a class action *See, e.g., Eisen*, 417 U.S. at 175-76. As suggested below, to the extent that the rules ought to be changed to better reflect client-centered values, they also should ensure that class actions be easily utilizable. The Rule 23(b)(3) notice requirement, as construed in *Eisen*, undermines that objective. Any rule changes also should avoid, as Professor Yeazell points out, the apparent conflict in the way Rule 23 now treats different kinds of class actions. *See* Yeazell, *supra* note 7, at 1201. As a conceptual matter the decisionmaking role of class members should be the same in all class actions.

166. *See, e.g., Allen v. Isaac*, 100 F.R.D. 373, 375-77 (N.D. Ill. 1983) (conclusion that a (b)(2) action in which monetary relief was sought was in reality a hybrid (b)(2) and (b)(3), and therefore, pursuant to Rule 23(d)(2), the court could protect the due process of class members by permitting class members to opt out); *see also* *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 659 (9th Cir. 1977). *But see* *Cox v. American East Iron Pipe*, 784 F.2d 1547, 1554 (11th Cir.) (no automatic right to opt out of hybrid (b)(2)-(b)(3) at certification stage, although perhaps at relief stage), *cert. denied*, 107 S. Ct. 274 (1986).

167. *See generally* H. NEWBERG, *supra* note 8, at 3.

168. *Id.*

169. *See* *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, *reh'g denied*, 415 U.S. 952 (1974).

170. *See, e.g., Hill v. Western Elec. Co.*, 672 F.2d 381, 390 (4th Cir. 1982); *see also* *United Bank v. Sun Mesa Corp.*, 119 F.R.D. 430, 434 (D. Ariz. 1988).

tation by named plaintiffs.¹⁷¹ In a (b)(3) class action, dissatisfied class members can simply opt out, but that is generally not possible in a (b)(2) or (b)(1) action,¹⁷² and those are the situations when a court might permit (d)(2) intervention. In essence, permitting such intervention strengthens the representation of the entire class.¹⁷³

Rule 23(d)(2) also allows an unnamed class member to enter an appearance by counsel.¹⁷⁴ Such an appearance is explicitly authorized in Rule 23(c)(2) for (b)(3) class members, and is within the court's discretion under (d)(2) for (b)(2) and (b)(1) cases. Putting aside for the moment that (b)(1) and (b)(2) class members may not even be aware of the class action (since no notice is required), allowing a class member to appear (though not intervene) may effect client-centered values,¹⁷⁵ or at least help achieve more client input before decisions are made on behalf of the class.¹⁷⁶

More generally, Rule 23(d)(2) and (d)(3) raise basic questions about a court's monitoring responsibilities. Sometime ago, the Third Circuit referred to the court in the class action as the "guardian of the rights of the absentees."¹⁷⁷ Other courts defer to class counsel.¹⁷⁸ The court cannot seek out the views of class mem-

171. See, e.g., *Woolen v. Surtran Taxicabs*, 684 F.2d 324, 332 (5th Cir. 1982) (in resolving whether named plaintiffs are adequate representatives in a Rule 23 (b)(2) class action and whether the class members should be permitted to intervene under Rule 24(a), the trial court should proceed with some sensitivity to the need to have all class interests adequately presented to the court).

172. See *supra* note 165.

173. See, e.g., *Gatter v. Cleveland*, 87 F.R.D. 66, 70 (E.D. Pa. 1980).

174. See *Lamb v. United Sec. Life*, 59 F.R.D. 44 (S.D. Iowa, 1973).

175. See *infra* notes 241-80 and accompanying text.

176. It is important to distinguish between a class lawyer's client-centered lawyering duty to ascertain the wishes of her class clients and the class lawyer's duty to act in the best interests of the class. Once the lawyer gets the client input, there may not be and need not be unanimity among class members before the class lawyer acts. Indeed, even if ten of eleven named plaintiffs object to an action it may still be the class lawyer's obligation to take that action. See, e.g., *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982). Similarly, even if a significant segment of the class generally opposes waging a class action attack, the class lawyer may still appropriately act to seek relief which is beneficial to all class members. See *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968).

177. *Greenfield v. Villager Indus.*, 483 F.2d 824, 832 (3d Cir. 1973).

178. See *Rhem v. Malcolm*, 432 F. Supp. 769 (S.D.N.Y. 1977) (prison conditions case) where Judge Lasker relied heavily on the decisionmaking judgment of the class lawyer. He was, according to Professor Hermann: the "traditional passive adjudicator." See M. Hermann, *supra* note 80, at 24.

bers and try to carry out their wishes without seriously disrupting the adversary system in class actions. As was suggested in the discussion of class action settlements¹⁷⁹ and has been suggested in other contexts,¹⁸⁰ it may be quite difficult if not impossible for the court to be both the protector or advocate of the class and an impartial adjudicator.¹⁸¹ In any event, in the absence of ethics code guidance, the court's open-ended monitoring authority under Rule 23(d)(2) has not yet been particularly useful in achieving the goals of client-centered decisionmaking. The primary obligations should be on class counsel to find out what her clients want.¹⁸² Those responsibilities as set forth below should be more clearly delineated.¹⁸³ The court may then, perform its necessary but properly limited Rule 23(d) monitoring role.

4. *Communication With Class Members*

The Supreme Court advanced client-centered decisionmaking in class actions in *Gulf Oil v. Bernard*,¹⁸⁴ where it held that a trial court may not issue orders barring communication between class

179. See *supra* notes 134, 138 and accompanying text (thesis of Professors Fiss and Resnik that the courts can play too intrusive and unregulated a role in effecting class action consent decrees).

180. Cf. *Bahr v. Galonski*, 80 Wis. 2d 72, 83, 257 N.W. 2d 869, 874 (1977) (in the child-client context, the child needs an "advocate" in court, and the "court cannot play that role" in our adversarial system).

181. See Kane, *supra* note 8. Professor Kane asserts that a more cooperative partnership between the court and the class lawyer is both achievable and necessary to ensure protection of the rights of class members. I am not certain that it is the court's effort to cultivate cooperation that is crucial as much as it is the court's creation of a litigation environment which is conducive to active but manageable client participation in class actions. As Professor Hermann wrote, regarding Judge Lasker's decision in *Rhem v. Malcolm*, had the court paid more attention to the pleas of class members it "would have encouraged improved communications" between lawyer and clients and perhaps have produced a result more protective of class members' interests. M. Hermann, *supra* note 80, at 99; see also *McGriff v. A.D. Smith Corp.*, 51 F.R.D. 479 (D.S.C. 1971). "[I]t is not the responsibility of the Court to sift laboriously through all the records and circumstances in order to ferret out every possible grievant." See H. NEWBERG, *supra* note 8, at 2. *Contra Ricciuti*, *supra* note 18, at 861 ("the judge would also examine the feelings of the [class] members . . . to determine their reaction to the settlement proposal [and the judge is the] guardian of class interests . . .").

182. "Experience teaches it is counsel for the class representatives and not the named parties who direct and manage the actions." *Greenfield v. Villager Indus.*, 483 F.2d at 832, n.9.

183. See *infra* pages 777-79 and accompanying text (including proposed rule setting forth more clearly defined decisionmaking responsibility).

184. 452 U.S. 89 (1981).

counsel and class members unless there is clear evidence of abuse by the class lawyer.¹⁸⁵ While attorneys may abuse the class device,¹⁸⁶ a blanket prohibition on such communication, the Court held, would undercut the basic class action policy of facilitating adjudication of multiple claims arising out of the same wrongdoing.¹⁸⁷ The *Gulf Oil* opinion did not directly address class client decisionmaking.¹⁸⁸

The Court did acknowledge, however, the need for the representative plaintiffs (and presumably the class counsel) "to obtain information about the merits of the cases"¹⁸⁹ from class members,

185. See *Gulf Oil*, 452 U.S. at 103.

186. The two kinds of abuse the *Gulf Oil* trial court was concerned with were: 1) solicitation of clients, and 2) misrepresentation of status or purpose of the class action. *Id.* at 95. The Supreme Court recognized that such potential abuses can occur, but concluded there was no evidence of abuse here. See *id.* at 104. Regarding solicitation, the Court increasingly has made it clear that the ethical concerns about avoiding solicitation cannot be permitted to undermine other important policies. See, e.g., *In re Primus*, 436 U.S. 412, 434 (1978); see also *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1924 (1988). Moreover, the potential abuses of solicitation and misrepresentation are also possible in non-class actions. While courts should be sensitive to the greater consequences of class action abuse, it would no more make sense to completely prohibit class lawyers from talking to their clients than to stop a lawyer from speaking with an individual client. That is not the way to deter abuse.

187. See *Gulf Oil*, 452 U.S. at 104. In a later case, the Ninth Circuit, relying on *Gulf Oil*, reversed an order which improperly restricted communication between the class lawyer and class members. See *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984). The court stated:

[i]t is obvious that few if any of the claimants could afford private counsel. The availability of a federal magistrate to help claimants is no substitute for an advocate who will help claimants present their claims in the best possible light. The trial court seems unnecessarily concerned that counsel would be overzealous in the pursuit of claims. The advocacy system is designed to correct for excesses through response from opposing counsel, rather than through court-imposed restrictions which interfere with legal assistance to class members. The restrictions are particularly inappropriate where class members have no other effective means to secure counsel.

Id. at 1441.

188. The Court also refrained from resting its unanimous opinion on constitutional grounds. See *Gulf Oil*, 452 U.S. at 103-04. Plaintiffs' main argument was that the trial court's communication ban violated their first amendment rights. *Id.* at 93. This was also the basis of the Fifth Circuit's *en banc* decision vacating the ban. *Id.* at 98. The Supreme Court stated, "we do not reach the question of what requirements the First Amendment may impose in this context. Full consideration of the constitutional issue should await a case with a fully developed record concerning possible abuses of the class action device." *Id.* at 101-02 n.15. But the court later stated, "[a]lthough we do not decide what standards are mandated by the First Amendment, we do observe that the order involved serious restraints on expression." *Id.* at 103-04.

189. *Id.* at 101; accord Waid, *Ethical Problems of the Class Action Practitioner: Continued Neglect By the Drafters of the Proposed Model Rules of Professional Conduct*, 27 Loy. L. Rev. 1047, 1050-60 (1981) (discussion of ethical dilemmas created by absence of rules

and to assist them in deciding whether to accept a settlement offer. The Supreme Court might also have relied on the ethics code provisions requiring counsel to communicate with her clients and to follow the clients' directions. Instead, the Court rested its decision on the importance of furthering basic Rule 23 procedural policies.

Before *Gulf Oil*, the Manual on Complex Litigation suggested that a class lawyer not be allowed to communicate with unnamed class members.¹⁹⁰ Without such communication, neither informed consent, nor client-centered decisionmaking is possible in any meaningful sense. At least the Court now has concluded that such communication is "presumptively proper."¹⁹¹ *Gulf Oil* certainly moves us closer to informed consent in class actions, even though the Court did not affirmatively require compliance with the principles of informed consent or client-centered decisionmaking.

5. *Limitations of Procedural Rules*

Clients play almost no decisionmaking role in class actions because the procedural rules do not explicitly address the matter, and also because courts have chosen not to exercise their discretionary authority under the existing rules to ensure participation by class members. If the nature of the class lawyers' ethical obligations to the entire class were made clearer, the existing procedural framework probably would be adequate.¹⁹² At least for the more assertive judge, the discretionary authority is provided to the court in Rule 23(d)(2) and (d)(3) to ensure appropriate recognition of client views. The obligation of the class lawyer to solicit class member views should be made clearer and more specific. Also, the scope of the class lawyer's decisionmaking authority and the nature of the courts' supervisory responsibility over the class lawyer's obligation to and relationship with the class should be clarified; all are discussed below.

regulating manner in which class members are contacted).

190. See MANUAL FOR COMPLEX LITIGATION 1.41 (4th ed. 1977).

191. See H. NEWBERG, *supra* note 8, at 216. For a discussion of why class lawyer's investigative communication with class members should not constitute improper solicitation, see *infra* note 214.

192. Later in this Article, I will propose the addition of a rule to our ethics codes to clarify the class lawyer's duties to class members. See *infra* pages 777-79 and accompanying text. This should make it easier for courts to exercise their Rule 23 supervisory responsibilities for the purpose of ensuring class member participation.

IV. APPLICATION OF CLIENT-CENTERED DECISIONMAKING VALUES IN CLASS ACTIONS

The decisionmaking context in which class action lawyers operate is a difficult one. In dealing with individual clients, lawyers are faced with a clear ethical mandate to obtain meaningful client consent. With respect to class actions, however, there are no comparable ethical guidelines and the procedural rules seem to be premised on efficiency and paternalism with minimal concern for client choice. Yet the reality is that even if individual class members wanted to, they could not possibly dictate the course of a class action. By trying to incorporate some but not all client-centered values into class action lawyering practices, there may be a way out of the dilemma for the class lawyer. I set forth below a series of suggestions that, on the one hand, require the class lawyer affirmatively to seek out the views of class members both in face-to-face meetings and otherwise and, on the other hand, expand the class lawyer's authority to act on behalf of the class. At the same time, the class lawyer can increase client input while informing class members that ultimate decisionmaking responsibility rests with the class lawyer, through the pragmatic, but, I believe, principled adaptation of the doctrine of informed consent to class actions. The objective is to provide clearer guidance to the class lawyer (and ultimately to the court) by trying to bridge the gap between client-centered decisionmaking norms and class action practice. To that end, I propose, in Part C of this section, the adoption of a new ethical rule embodying the norm that class action decisionmaking authority be given to class lawyers, but only on the condition that certain outreach steps be completed.

Class action lawyers in some ways are like public officials: both take actions on behalf of their constituencies and both must resolve how best to acknowledge and respect the wishes of those constituents. Like an elected official, the class lawyer must reconcile the tension filled representative impulse to act both as an instructed delegate and an enlightened trustee.¹⁹³ And just as an

193. See Yeazell, *supra* note 7. Professor Yeazell notes that Rule 23 makes the class representative responsible both to ask the class members for direction and to tell them; the latter he analogizes to Edmund Burke's political theory of representation in which the representative acts not as the agent of the constituents but as their enlightened trustee. See also *supra* note 165 and accompanying text.

elected official achieves validation or legitimation through participation by the beneficiaries of the official's actions (either through the electoral process or more personalized meetings), so too must the class lawyer seek out class members to participate in the decisionmaking process.¹⁹⁴ There is a role for the individual class member to play in the class action—a role that can ensure both the efficacy of the class action (for it is most fundamentally a procedural device to achieve efficiency and access) and the consensual propriety of class actions. But it is not the central role that the client assumes in the individual client context.¹⁹⁵

A. *Confronting Group Conflict*

It is hardly surprising that unanimity will rarely prevail among any group of individuals grappling with complex issues of concern to them. An emotional example is the 1976 debate between Professor Derrick Bell and Nathaniel Jones, then the General Counsel to the NAACP, on the appropriate goals and means for civil rights litigators seeking to eliminate segregated schools.¹⁹⁶ NAACP Legal Defense Fund lawyers had pursued numerous school desegregation lawsuits on behalf of classes of black parents and children. Professor Bell argued that the plaintiffs' lawyers were insensitive to the contrasting views of many Blacks in the various plaintiff classes who did not want desegregation and busing, but rather better quality education. In essence, Professor Bell asserted that the class lawyers acted in disregard of many if not most of their clients' wishes in violation of the client-centered norms discussed in this paper.¹⁹⁷

This kind of an intra-class conflict, while more intense than most, would not appear to be an unusual class situation.¹⁹⁸ Even in a case as seemingly straightforward and innocuous as a class action

194. Unlike democratic governments, however, the majoritarian principles often are not viable operating norms for class actions. See *infra* notes 241-42 and accompanying text.

195. See *supra* text accompanying notes 184-94; *infra* text accompanying notes 196-231.

196. See Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976), reprinted in H. KALODNER & J. FISHMAN, *LIMITS OF JUSTICE* 569, 605 (1978) (text at notes 121-22); Letter from Nathaniel R. Jones to Editors of Yale Law Journal, reprinted in H. KALODNER & J. FISHMAN, *supra*, at 614.

197. See *supra* text accompanying notes 20-63.

198. See, e.g., *Rhem v. Malcolm* (prison conditions case) discussed in Hermann, *supra* note 80; *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982).

alleging illegal credit card overcharging, it is almost inevitable that there will be differences among class members. For example, some may want maximum monetary recovery while others may want to punish the offender. How then can the individual wishes of class members first be ascertained and then, if conflicting, be reconciled? Most importantly, the class lawyer cannot wait until conflicts surface. Just as the effective client-centered lawyer must gently but persistently work with the totally passive individual client to achieve client participation, the class lawyer also must affirmatively seek out class members. Professor Rhode describes the present practice of failing to solicit class member views as "see-no-evil, hear-no-evil."¹⁹⁹ Because class lawyers do little to solicit class views, they rarely discover conflicting opinions. Some commentators have suggested that certain limited forms of notice should suffice to bring the views of class members to a court's attention.²⁰⁰ I believe the class lawyer ought to conduct more face-to-face discussions with class clients and that class client involvement should begin even before the class action is filed.

B. Client-Centered Lawyering From the Outset of A Class Attorney's Work

Focusing first on the pre-filing stage, let us return to our two hypotheticals to examine how client-centered lawyering principles might work well in advance of even the slightest indication of conflict among class members. Lawyer Greenblatt, you will recall, was representing Jack Smith in a housing discrimination matter,²⁰¹ and lawyer Bradley was representing Daniel Morris in the backyard odor, toxic tort case.²⁰² What should each of the lawyers do prior to

199. Rhode, *supra* note 6, at 1247. She does acknowledge, however, that some public interest law firms have specific policies designed to maximize input from class members. See *id.* at 1205.

200. Professor Rhode writes that in "the vast majority of cases . . . some combination of public announcements, . . . regular mailing [and public meetings] . . . should suffice to apprise the court of significant unrepresented constituencies." *Id.* at 1248. Without specifying whether she was referring to a face-to-face meeting or a personalized notice, she goes on to recognize that "sampling or individual notice may be warranted." *Id.* Professor Rhode's focus is different from mine. While we are both concerned with appropriate disclosure of divergent class member views to the court, my focus is on how to bring the class member more actively and meaningfully into the decisionmaking process of the class lawyer and not how to ensure that the court collects more data.

201. See *supra* text accompanying note 64.

202. Insofar as the economics of litigation are concerned, it is highly probable that the

filing to determine whether or not the lawsuit should be a class action; how should that decision be made and by whom? A second series of questions might be asked after class actions are filed with respect to the conduct and settlement of the litigation.

1. *Pre-Filing (Conflicts Not Yet Apparent)*

a. *Consent of Named Plaintiffs*

Two broad concerns appear at the pre-filing stage: first, what investigative steps should be taken as a matter of good lawyering and to ensure compliance with procedural and ethical investigation requirements;²⁰³ and second, who will make the key decisions that individual clients ordinarily make such as whom to sue, what relief to seek, etc? While these two concerns do overlap, I will focus only on the second—who makes the decision(s)? As a threshold matter each lawyer must discuss the consequences of filing a class action with the person who came to see her.²⁰⁴ In particular, the lawyer must make clear that in a class action suit the individual client will lose control of the action and the case may last longer and will certainly be more complex than in an individual suit. If Mr. Smith

individual claims in both of these hypotheticals could profitably be litigated, both from the client's and lawyer's perspective. In this respect, the hypotheticals differ markedly from both the institutional reform case (where plaintiff seeks injunctive relief only, as in school desegregation or prison improvements cases) and the consumer fraud case (where the amount of each victim's loss is too small to justify an individual suit). Of course, in both cases, as well as in our two hypotheticals, a public interest lawyer (who by definition is less interested in fees) could bring either an individual or a class action. While the role of fees in class actions is well beyond the scope of this Article (*see, e.g.*, Coffee, *supra* notes 16, 113), the thesis of this Article as to the desirability of more active participation by class members is consistent with any fees theory. The issue of fees, as is the case with individual clients (*e.g.*, the contingent fee), is simply one of the issues to be discussed by lawyer and client(s).

203. *See generally* Grosberg, *Illusion and Reality in Regulating Lawyer Performance; Rethinking Rule 11*, 32 VILL. L. REV. 575, 630-33 (1987). Rule 11 of the Federal Rules of Civil Procedure is a procedural rule which requires lawyers to make reasonable inquiries into facts and law before filing a lawsuit; the rule parallels both ethical code provisions and generally accepted standards of good lawyering as to what any effective lawyer would do before embarking on a litigation path.

204. "Of course, in the case of any proposed class action, it is the individual client who must make the decision to expand the suit into a class action after a full explanation of all of the foreseeable consequences." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974). Also, as with any potential lawsuit, the lawyers in both the Smith and Morris cases must have concluded that there were valid claims; that each client wanted to sue; and that each was fully aware of the risks, burdens and potential rewards of litigation.

or Mr. Morris rejects the class action proposal, then his respective lawyer must either comply with his wishes or terminate the client-lawyer relationship. If lawyer Bradley chooses the latter course, that concludes the matter unless some other victim of the tort seeks his assistance. If lawyer Greenblatt decides not to represent Mr. Smith, she still may have a live lawsuit, perhaps even a class action. She still could file a tester claim.²⁰⁵ As a public interest lawyer, she might seek out other victims of discrimination from the Queens complex.²⁰⁶

Even if the two individual victims choose to be named plaintiffs in class actions, both lawyers must still evaluate the representativeness of Smith and Morris. First, each victim must, of course, satisfy the formal Rule 23(a) requisites of typicality, commonality and adequacy of representation.²⁰⁷ Second, even more importantly in terms of client-centered values, each lawyer ought to be confident that the proposed named plaintiffs can articulate some of the non-legal concerns that only clients can voice.²⁰⁸ For example, if Smith otherwise satisfies Rule 23(a) but is quite reluctant to express any views on the wide range of values that may be important to victims of civil rights violations,²⁰⁹ he may not be very well

205. See *supra* note 74 and accompanying text (regarding the propriety of tester suits).

206. See *In re Primus*, 436 U.S. 412 (1978) (supporting such action). *Primus* indicates that in our hypotheticals, Greenblatt, unlike Bradley would not be seeking pecuniary gain, and therefore would not be foreclosed from seeking out discrimination victims. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (restricting solicitation); see also MODEL RULES Rule 7.3. The Code is more ambiguous on the subject of solicitation of class representatives or class members: "[i]f success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder." MODEL CODE DR 2-104(A)(5). This would permit the class lawyer to talk to class members. As to those class members desired as class representatives, the class lawyer could "accept" "but not seek" employment. Further, this ambiguous direction is the same for both lawyers, Greenblatt and Bradley. No distinction is made based on whether the lawyer does or does not seek pecuniary gain. Compare ABA Comm. On Professional Ethics, Informal Op. 1469 (1981) (allowing letter to potential class members) with Informal Op. 1483 (1981) (prohibiting direct contact with class member).

207. See FED. R. CIV. P. 23(a).

208. See D. BINDER & S. PRICE, *supra* note 11, at 147-53. Only the clients, ultimately, can weigh all of the factors and determine which decision will bring the greatest client satisfaction.

209. For example, each civil rights victim must assess the psychological consequences of a courtroom cross-examination about the emotional impact of the original violation. Similarly, the victims should evaluate whether it is more important to obtain immediate compensatory relief, long-term equitable relief or greater punitive sanctions against the offenders. These are factors that clients must weigh whether they are individual or class clients;

sued to be a named plaintiff. As I discuss below, the class lawyers should reach out beyond the named plaintiffs to discern class members' views about these non-legal concerns. But, it seems both logical and preferable that the named plaintiffs play the lead role regarding these issues. Lawyers Greenblatt and Bradley therefore ought to make every effort to have named plaintiffs who wish to stay involved and who will provide meaningful client input on the non-legal considerations.²¹⁰

Assuming the two clients do not veto the proposed class actions, is the decision to file a class action solely that of the lawyers? As a matter of good lawyering and in compliance with Rule 11, neither of the lawyers could make class action allegations as to typicality, commonality and other Rule 23 requirements without first undertaking a "reasonable inquiry" to obtain support for the allegations.²¹¹ In the discrimination case, lawyer Greenblatt should verify the prior two complaints, preferably through in-person interviews with the bias victims, and should do some additional confirmatory investigation by seeking out the views of a sample of the putative class. Bradley should interview other residents in the neighborhood. This is simply good lawyering.²¹² What lawyer, for example, would want to file a class action with a single named plaintiff, only to discover three months later that the factual circumstances of other class members, if there are any, are substantially different so that a class certification motion would be denied? If additional confirmatory information is not reasonably

and the clients should regularly give those subjective assessments to their lawyer, including the class lawyer.

210. It is especially important in class actions that the class lawyer receive such client input easily and regularly. In the individual client context, even if the client is reticent or chooses not to express feelings on such non-legal concerns, the lawyer must still inform the client and allow the client, ultimately, the chance to veto a course of action that affects the merits of a lawsuit. Because no class client has comparable authority to restrain the lawyer's decisionmaking, it is doubly important for the class lawyer to solicit client input.

211. See *Univil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1987) (holding that plaintiffs' counsel had failed to "conduct a reasonable inquiry into whether he should bring the class claims"); *Child v. Beame*, 412 F. Supp. 593, 600 (S.D. N.Y. 1976) (where under the prior version of Rule 11 requiring lawyer had faith in order to trigger sanctions, the court held that plaintiffs' class counsel had sufficiently investigated the class claims so as to preclude the imposition of Rule 11 sanctions); see also O'Kelly, *Class Actions: Proposals for New Rules of Professional Responsibility*, 5 LITIGATION 25 (Winter 1978) (discussing proposal that new ethical rules be promulgated to require the class lawyer to conduct an appropriate pre-filing investigation before making class allegations).

212. See *supra* note 203 and accompanying text.

obtainable prior to filing, that of course is another matter.²¹³ If Greenblatt interviewed the two prior complainants and perhaps two other persons who are probable discrimination victims and if Bradley talked to individuals in four or five different households, both lawyers may reasonably confirm the validity of the various class action allegations relating to the patterns and practices of discrimination.²¹⁴

But what if three of the four wanted nothing to do with any litigation for any one of a variety of reasons and the fourth wanted to sue for himself rather than in a class action? It is at this point when the decisionmaking problem emerges. Unlike the ordinary individual client situation, there is no "client" in the discrimination case who can be informed and then consent to the decisions. The "client" is a group and as is true with most groups, there are differing views among group members on most issues. Thus, the lawyer must decide. It may very well be that, based on the investigation and outreach, the lawyer takes steps (to narrow the class definition, establish sub-classes or obtain separate lawyers for conflicting groups) that reflect disparate class views,²¹⁵ but the decision to

213. See, e.g., *Kamen v. AT&T Co.*, 791 F.2d 1006 (2d Cir. 1986).

214. It is possible that an argument could be made that such investigative efforts constituted improper solicitation. See *supra* note 206. But at least three key points distinguish this kind of information-seeking from the *Ohralik* solicitation of a client and bring it closer to *Primus*. See generally *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978). First, lawyers Bradley and Greenblatt already have clients who want these lawyers to represent them; the only question is, therefore, whether they should do so in individual claims or class actions. Second, because there are class actions being contemplated (and investigated), by their very nature they are more similar to the public interest efforts in *Primus* than the pure pecuniary gain in *Ohralik*. Third, *Ohralik* upheld the rule against solicitation because it served "to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be divided by his own pecuniary interest." *Ohralik*, 436 U.S. at 461. In the class context, when a class lawyer talks to members of the putative class under my proposed rule, it is after the named plaintiff has been secured. This kind of solicitation, therefore, is precisely for the opposite purpose of the solicitation prohibited by *Ohralik*—to prevent overreaching and solitary and paternalistic decisionmaking by the lawyer. Also, the pre-filing investigation requirements apply to class action lawyers as well as lawyers representing individuals. If Bradley and Greenblatt did not conduct the outreach efforts to putative class members, I do not believe they could comply with the Rule 11 investigation requirements for Rule 23 class action allegations. See Waid, *supra* note 189, at 1050-60. With respect to a class lawyer's communication with members of a certified class, Professor Wolfram concludes: "[t]here seems little reason, other than partisan advantage, to resist a rule that would leave the class lawyer free to contact members of the class for any purpose" C. WOLFRAM, *supra* note 91, at 789.

215. For example, in the school desegregation litigation which is the subject of Profes-

take those steps must initially be made by the lawyer and not the clients. There is no direct legal support that confirms the propriety of this course.

b. Similar Amorphous Clients

The class action, however, is only one of a number of contexts in which the "client" is an amorphous one. There are several client-lawyer situations that are comparable in the sense that a "client" cannot make the usual client decisions. While no easy answers emerge, it is useful, for example, to look briefly at two of these situations where lawyers and commentators have struggled to develop sensitive client-centered lawyering skills: the child-client²¹⁶ and the mentally incompetent client.²¹⁷ Class action lawyers similarly must try to adjust their practices to reflect this relatively new recognition of the importance of client participation.

i. The Decisionmaker for a Child

Consider the child-client. As between the child-client and the lawyer, who make the decisions? What is the role of the lawyer? While these questions have received some attention,²¹⁸ it is clear that complete deference to the wishes and decisions of the child-client, as if the child were a competent adult, certainly is not the answer. Both the ethics code and the courts have attempted to provide some guidance to the child's lawyer but broad grants of discretion still entrust the lawyer with very difficult questions to resolve.²¹⁹ For example, when a lawyer represents a child in a custody proceeding, reconciling the obligation to zealously advocate on behalf of the child and the obligation to promote the best inter-

sor Bell's critique, a good client-centered class lawyer should have discerned certain of the key class conflicts prior to filing. See *supra* note 196 and accompanying text (discussing Professor Bell's critique). While that recognition may have resulted in narrowing of class definitions or establishment of sub-classes (possibly with separate counsel), it does not mean that the class lawyer must cease being a strong advocate or the person who makes at least the initial decisions on behalf of the class.

216. See generally Long, *When the Child is a Client: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607 (1983); Strauss, *supra* note 58.

217. See generally Tremblay, *supra* note 11.

218. See *supra* note 216 and the sources cited therein.

219. For example, Rule 1.14(a) directs a lawyer to maintain a "normal client-lawyer relationship" with a child-client "as far as reasonably possible," but Rule 1.14(b) permits the lawyer to seek appointment of a guardian if the "lawyer believes the client cannot adequately act in the client's own interest." MODEL RULES Rule 1.14(a), (b).

ests of the child is quite challenging if not frustrating, and is usually performed on an ad hoc basis.²²⁰ Typically, the lawyer essentially muddles through, trying to be sensitive to the wishes of the client and yet acting in a manner that the lawyer alone concludes is consistent with the best interests of the child.²²¹ Often the lawyer also is the guardian and therefore the ultimate decisionmaker.²²²

One response to this somewhat vaguely defined dual role of the lawyer is to separate the two tasks by giving the advocacy role to a lawyer and the best interests responsibilities to an independent guardian to act as the child's alter ego. Recent draft model legislation incorporated this approach.²²³ Rather than appoint a single lawyer to act as both guardian ad litem and lawyer for the child, the court would first appoint a guardian ad litem and then a lawyer to represent the child through the guardian.²²⁴ Alternatively, a separate guardian ad litem would be appointed only if the child's lawyer recognized a conflict between the advocacy and best interests roles. Either of these approaches would provide a compe-

220. See, e.g., *duPont v. Southern Nat'l Bank*, 771 F.2d 874, 882 (5th Cir. 1985) (stating that the lawyer performs a "hybrid role" advising the court and a party), *cert. denied*, 475 U.S. 1085 (1986); *Allen v. Allen*, 78 Wis. 2d 263, 267-68, 254 N.W. 2d 244, 247 (1977) (the lawyer has a "concurrent obligation to infant" and to make an objective report to court). See generally Long, *supra* note 216 (advocating a general rule which urges sensitivity to the individuality of each child's situation).

221. See MODEL CODE EC 7-12. "If a client under disability has no legal representatives, his lawyer may be compelled in court proceedings to make decisions on behalf of the client." *Id.* See generally Schwartz, *A New Role for the Guardian Ad Litem*, 3 OHIO ST. J. DISPUTE RESOL. 117, 162-63 (1987) (in many ways the child's guardian performs both fact-finding and advocacy functions in trying to represent the child's best interests to the court, similar to the role of a mediator).

222. See *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (stating that the lawyer appointed as a guardian ad litem is given authority to "prosecute, control and direct" the litigation).

223. IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, COUNSEL FOR PRIVATE PARTIES (1980); U.S. DEP'T OF JUSTICE, NATIONAL ADVISORY COMM. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR ADMINISTRATION OF JUVENILE JUSTICE (1980).

224. Ordinarily, when a child is involved in a non-custodial disposition proceeding, the child's parent or permanent guardian works with the lawyer representing the child. Only if there is a conflict between one parent (or guardian) and another parent or the state, and the child, would the lawyer for the child have to resolve whether to seek the appointment of a guardian ad litem. See Long, *supra* note 216, at 620. Cf. *Ad Hoc Committee of Teachers v. Greenburgh Union Free School Dist.*, 873 F.2d 25 (2d Cir. 1989) (teachers in a school for emotionally disturbed children were appointed guardians for the children in a lawsuit alleging racial discrimination in the educational institution because the children's parents or permanent guardians were unable or unwilling to act to vindicate the rights of the children).

tent client to instruct the lawyer. In essence, a traditional lawyer-client relationship would be established between the guardian and the lawyer. But adding a representative for the child would increase the expense and complexity of any child custody proceeding, and some commentators have criticized this approach as impractical and unwise.²²⁵ Moreover, it would not necessarily eliminate possible conflicts of interest. If a dispute arose between the infant and the guardian, it might even exacerbate conflicts with the lawyer.²²⁶

The analogy in the class context would be to give named plaintiff(s) a fiduciary or trustee responsibility similar to that of a guardian ad litem for a child, or alternatively, appoint a separate guardian ad litem to represent the class. The class lawyer then could be directed by the class guardian just as the child's lawyer might be guided by the guardian ad litem.²²⁷ This division of class action decisionmaking responsibility could probably be made under existing procedural and ethical rules.²²⁸ But two key differences distinguish the class action model from the child-client model. First, the class is not a unitary client; the child is. While neither generally can give a single set of coherent instructions, a class guardian would have a much more complicated task than the child's guardian ad litem in communicating with class members, ascertaining the wishes of class members, and then synthesizing those views. The use of a guardian would simply add a layer to the decisionmaking machinery and may very well push the class clients even further away from those who will make decisions for them.

225. See Long, *supra* note 216, at 614, n.22.

226. See Hazard, *supra* note 76, at 15.

227. See, e.g., *Century Brass v. International Union*, 795 F.2d 265, 275 (2d Cir.), *cert. denied*, 107 S. Ct. 433 (1986); *In re Amatex*, 755 F.2d 1034, 1043 (3d Cir. 1985). With respect to the use of a guardian for the class at the settlement stage of class actions, see generally Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian Ad Litem During Pre-Trial Settlement Negotiations*, 84 MICH. L. REV. 308 (1985). Aside from the additional cost problem presented by such an appointment, the author's proposal does not address client-centered decisionmaking values. See *id.* at 331. It simply would substitute a court appointed third party to assume the decisionmaking ordinarily performed by the class lawyer; the role of the class clients and the nature of the division of decisionmaking responsibilities between them and the lawyer and the guardian would remain vague and undefined. The guardian idea, nevertheless, may be a useful device in class action situations when conflicts become open and notorious.

228. *Id.*; see also *Miller v. Mackey Int'l, Inc.* 70 F.R.D. 533, 535 (S.D. Fla. 1976) (guardian appointed for class because of conflict of interest between class members and class lawyer over size of fee).

Second, as a matter of historical reality, named plaintiffs in class actions usually have not been able to or were not inclined to assume such a trustee role but rather have deferred, often almost completely, to the decisionmaking of the class lawyer.²²⁹

But even in the child-client context, while the use of a separate guardian ad litem remains a theoretical choice, it simply is not used that often because of the added expense and complexity, and because it may not succeed in avoiding the conflict of interests for which it was designed.²³⁰ The more prevalent model is the lawyer who tries to be respectful and responsive to the child-client's wishes but ultimately accepts responsibility for making the decisions the lawyer thinks are in the best interests of the child.²³¹ It is just such a less neat and multifaceted role that also seems to be the behavioral norm for class lawyers. Both as to the lawyer representing a child and the class action lawyer, it may also be the most appropriate model.

ii. The Decisionmaker for a Mentally Incompetent Client

The decisionmaking role for the mentally incompetent client is similarly vague. Once again, while the Model Rules at least include a rule explicitly dealing with the "disabled client," Model Rule 1.14, neither the rule nor the comment on the rule fully resolve all of the complex dilemmas facing the lawyer who represents an incompetent client.²³² Professor Tremblay suggests that a lawyer representing a client who may not be competent, basically has four choices: 1) disregard the indications of incompetence and implement the client's wishes even if they seem preposterous; 2) seek the appointment of an independent guardian to speak for the client; 3) make all decisions for the client (lawyer as "de facto" guardian); or 4) try to explain and then persuade and cajole the client (notwithstanding the mental disability) to make choices which the lawyer thinks are more consistent with the client's apparent interests.²³³ Tremblay thoughtfully concludes that the first

229. See Kane, *supra* note 8, at 393-94.

230. Cf. Long, *supra* note 216, at 614 n.22; Hazard, *supra* note 76, at 27.

231. See Long, *supra* note 216, at 639.

232. The most closely analogous provision in the Model Code of Professional Responsibility is EC 7-12 (see *supra* note 221 and accompanying text) and it offers similar, although somewhat vague, guidance to the lawyer regarding the circumstances under which an incompetent should assume all or any of the decisionmaking responsibility.

233. See Tremblay, *supra* note 11, at 519.

choice is unconscionable if it means a lawyer simply watches while the client hurts himself.²³⁴ The second choice has such severe intrusive consequences (a guardian could take over all of a client's decisionmaking responsibilities) that it should only be pursued in the most extreme circumstances.²³⁵ He asserts the third choice—that the lawyer simply make all decisions for the client—is a gross usurpation of the client's right to self determination.²³⁶ Professor Tremblay concludes, therefore, that the preferred choice is for the lawyer to try to persuade the client to act in what seems to be the client's best interests; this conclusion is reached with full awareness of the necessity of sensitivity on the lawyer's part if coercion, manipulation,²³⁷ or even unduly paternalistic persuasion is to be avoided.²³⁸

The Tremblay analysis is instructive here because in the class action context the class "client," as such, is similarly incapable of assuming decisionmaking authority, although for different reasons of disability than the typical incompetent individual client. In class actions, the client is amorphous and often not capable of speaking with one voice. Indeed, the cacophony of voices or the absence of any voice could be analogized to the incoherence or extreme passivity of a mentally disabled client. The class action lawyer's basic choices are similar to the ones Tremblay outlines. The lawyer could disregard any conflicts among class members and simply follow the loudest voices, despite the possibility that what they suggest is irrational or tends to sacrifice the interests of quieter class members. On rare occasions, courts have appointed a guardian for the class (Tremblay's second choice).²³⁹ A guardian is generally seen as redundant, however, because the named plaintiffs supposedly play such a role. Further, a guardian simply adds a participant to the decisionmaking process. The class lawyer, named

234. See *id.* at 517.

235. Cf. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 STAN. L. REV. 625, 630 (1979). In the case of more severely disabled clients such as one who is profoundly retarded, this option may be more appropriate and less avoidable than in the more ambiguous cases focused on by Professor Tremblay.

236. See Tremblay, *supra* note 11, at 570-76.

237. See generally Ellman, *supra* note 11; Lehman, *supra* note 68.

238. See Tremblay, *supra* note 11, at 577-83.

239. See *Miller v. Mackey Int'l Inc.*, 70 F.R.D. 533, 535 (S.D. Fla. 1976). See generally Note, *supra* note 227, at 326-32.

plaintiffs and class members remain. If anything, the decisionmaking authority of the class members would be diminished. The class action lawyer could simply do what she thinks best without taking any consultative steps (Tremblay's third option). The inappropriateness of such a course is by this time obvious. And the fourth choice—to try to persuade the “client class” to take a particular course of action—seems inapposite because of the absence of a unitary client. Who is it that the class lawyer would try to persuade? In some ways, then, it is more difficult to practice client-centered lawyering in class actions than it is when representing an incompetent client.²⁴⁰

c. Outreach to Members of Putative Class

i. Rationale

Returning to our toxic tort case, assume that lawyer Bradley's investigation discloses that neighbors of the Morris family also have noxious odors in their backyards and similar physical ailments. If Bradley files a class action without consulting these other members of the putative class, the filing decision is not one that reflects client-centered values. Conversely, if Bradley polls the 499 other homeowners (with a eighty percent response rate) and learns that 40% oppose the filing of a class action or even that 60-70% oppose a class action, that does not necessarily mean that a class

240. There are several other client-lawyer situations where the client is either amor- phously defined or where it may be difficult for a lawyer to discern client choices. For exam- ple, from whom does the lawyer for the corporation take direction: the Board of Directors, the chief executive officer, the shareholders, or the employees? Under the Model Rules, the corporation lawyer represents the entity (MODEL RULES Rule 1.13) and not the several dis- tinct interests underlying the corporation. See G. HAZARD & W.R. HODES, *supra* note 79, at 241-42; see also Karmel, *supra* note 86. This position has been criticized as unrealistic be- cause the lawyer will have a relationship with individuals, and therefore the loyalty should be to the board and not simply the entity. See Jonas, *Who is the Client?: The Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617, 622 (1988). Who are the clients for government lawyers? Attorneys general should look to their public agency clients for decisionmaking on merits questions and not to the lawyers' conception of what is in the public interest; if there are conflicts between different agencies, special counsel should be sought. Josephson & Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict*, 29 How. L.J. 539 (1986). But see *Feeney v. Commonwealth*, 373 Mass. 359, 366, 366 N.E.2d 1262, 1266 (1977) (the attorney-general may appeal a decision even if his client, the Governor, directs him not to appeal; as chief law officer, the attorney general “assumes primary control over the conduct of litigation” and “is not constrained by the parameters of the traditional attorney-client relationship”).

action should not be brought; nor does such a plebiscite always constitute an effective form of client-centered decisionmaking. Majoritarianism is not a solution to the class action decisionmaking dilemma, both because the will of the majority may disregard valid minority concerns²⁴¹ and because the vote itself may not be representative or informed.²⁴² Also, as a practical matter it would be impossible for a class lawyer to repeatedly put to a vote the many litigation questions that arise in a class action.

In the housing discrimination case, for example, assume that lawyer Greenblatt speaks with six randomly selected members of the putative class of 250 discrimination victims and five of the six tell her they want nothing to do with the lawsuit. Does that mean a class action should not be filed? Not necessarily. Assuming the five victims confirm the facts supporting an inference of discrimination, the reasons for their desired noninvolvement might include, among others, a lack of time, fear of reprisal, cynicism, or resignation. None of this information should discourage Greenblatt from filing a class action. Indeed, it is precisely this kind of a situation for which the class action was intended as a remedy—namely, when there is evidence of repeated violations of the law but the victims for one reason or another cannot or will not seek recompense. In this context then, were Greenblatt to file a class action with but one or two named plaintiffs, her decision would, I believe, be consistent with both client-centered lawyering values and class action doctrine. And yet indisputably, it is lawyer Greenblatt who is making this decision for the 500 class members.²⁴³ Are the last two sentences contradictory? I do not believe so. There are steps that both lawyers Bradley and Greenblatt could take, even at this pre-filing stage, that would reflect respect for the client-centered values of autonomy and dignity of the individual, as well as the importance of client assessments of non-legal considerations. And they could be done in a way to ensure meaningful client participation in the decisionmaking. Clearly, neither Greenblatt nor Bradley

241. See, e.g. *Parker v. Anderson*, 667 F.2d 1204 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982).

242. See Rhode, *supra* note 6, at 1232-42.

243. This assumes that the one or two named plaintiffs understand and consent to their role as class representatives. It also assumes that Greenblatt obtained certain other information from the interviews of five class members (relating to their views in non-legal consequences) confirming the desirability and propriety of a class action.

could fully replicate the kind of client-centered lawyering which they might do in non-class action situations. But each could communicate with class members collectively and individually. They also could let all of the potential class members know that these efforts were being made.

If the rule I propose²⁴⁴ were to be implemented, Bradley would have to interview a sample of the other 499 homeowners—perhaps five, possibly more depending on the distinctions among the homeowners. During those interviews, Bradley should make every effort to have the putative class members weigh such non-legal factors as: the negative consequences on the reputation of their neighborhood if it is confirmed that a toxic dump is under their homes,²⁴⁵ the diminution in the value of their homes from the publicity even if the legal claim is successful, the divisiveness a lawsuit is likely to have on the community, the time and emotion involved in the proposed lawsuit, and the possibility that they would have to move out of their homes.²⁴⁶ Regarding the use of a class action, Bradley also should talk to his class member sample about the additional complexity of a class action and the greater amount of time it may take. Most importantly, Bradley should try to discern any actual or potential conflicts among the class members, especially as to those class members whose injuries or losses are likely to be most severe.²⁴⁷

In the discrimination case, Greenblatt similarly should pursue with those six randomly selected class members a variety of non-legal considerations. Do the class members fear retaliation? Do they feel that the Queens apartment complex is sufficiently desirable so that it is the best place to wage battle? Are they motivated enough to provide the minimum cooperation necessary to wage an effective class action? These are questions the clients should

244. See *infra* pages 777-79 and accompanying text (text of proposed rule).

245. See Schmitt, *Anger Lives in Canal's Uninhabitable Zone*, N.Y. Times, Sept. 29, 1988, at B1 (description of some of the many problems faced by the residents of Love Canal in response to toxic waste problem).

246. *Id.*; see also Schmitt, *Axelrod Says 220 Love Canal Families Can Return*, N.Y. Times, Sept. 28, 1988, at B1.

247. To the extent that the class claims affect class member interests that are substantial in financial, social or political terms, the class lawyer should make even greater efforts to seek information and input from class members. See *infra* page 778 (section 2.4(a)(5) of the proposed rule).

address.²⁴⁸

If the class lawyers did not seek this information, or sought it and disregarded it, it would be at the expense of client-centered values. Likewise, if the lawyers did not solicit class member views on the whole range of litigation issues, their lawyering decisions would be less well informed.²⁴⁹ The quality of the lawyering product would suffer. The pre-filing communication with putative class members could be through the kind of sampling interviews discussed above or through more impersonal polling or questionnaire methods. No single set of results, however, should be dispositive.

This is where the fiduciary responsibility of the class lawyer comes into play. That lawyer must synthesize all of the various forms of information. And the class lawyer outreach is necessary even in the absence of any sign of conflict or divisiveness among putative class members. Indeed, a principal reason for affirmatively soliciting class member views is to discover as early as possible if there are conflicts which would make a class action inappropriate. It also is pragmatic to bring class members into the decisionmaking process early in the litigation and on a continuing basis. By doing so, the class lawyer is likely to have an easier time obtaining class member acceptance of the ultimate resolution.²⁵⁰

What other pre-filing issues should be covered in this outreach effort by the class attorney? Consider, for example, the relatively simple question of whether the discrimination or toxic tort cases should be filed in a state court or federal court (assuming the choice were available); or, whether pre-trial tactics should include every conceivable discovery and motion practice or a more economical and efficient version of a pre-trial discovery plan. Under an authoritarian model, the lawyer would simply tell the individual client of the attorney's decision.²⁵¹ Under a client-centered theory, the lawyer would skillfully elicit information from the individual

248. See D. BINDER & S. PRICE, *supra* note 11, at 147-53.

249. See Spiegel, *supra* note 11, at 87, 100-04. One of Professor Spiegel's principal arguments for informed consent is that lawyers require input from clients if proper lawyering decisions are to be made. Another—that the client plays a constraining role on the lawyer—is much less transferable to the class context.

250. While the empirical evidence in support of this proposition is limited to individual clients, the logic seems equally applicable to class actions. See D. ROSENTHAL, *supra* note 14, at 63-93.

251. See Spiegel, *supra* note 11, at 123-26. These are examples he uses of issues for clients to decide.

client, often "non-legal" data such as the client's "values or feelings."²⁵² The lawyer would give the client information about the number of months or years it might take in each court; whether the judges or juries are different or might produce different results in the two court systems; and whether the costs would be different. Similar questions would be posed to the client on the cost and quantity of discovery. The limitations of interrogatory answers versus deposition testimony would be explained, along with the possibility of monetary fines if the court concluded there was frivolous motion practice. Such data is the prerequisite to informed consent.²⁵³ Providing this information in a clear, comprehensible and non-condescending fashion is integral to the skill of counseling and in turn to client-centered lawyering.

In the Smith and Morris cases, the lawyers could not possibly conduct interviews covering all of these issues in this manner with all potential members of the two classes. Nor should they ever be expected to do so. Each lawyer, however, could easily conduct interviews as to these and similar issues, with a sampling of putative class members. While a critical client-centered component would be missing—namely, actual decisionmaking by the client²⁵⁴—other important benefits of client-centered lawyering are achievable. In addition to getting feedback on the tactical and procedural choices, it might produce the kind of good data that only skillful client-centered interviewing can produce. Assume, for example, that lawyer Bradley interviewed family members from three other households (a total of thirteen individuals) regarding the odor and its consequences, discovering that, while the ailments of these other persons varied significantly (from eye burning to headaches), one of the thirteen had precisely the same kind of cancer as the eleven-year-old Morris girl.²⁵⁵ Having obtained such information, lawyer

252. See D. BINDER & S. PRICE, *supra* note 11, at 21-37, 104-23; see also MODEL RULES Rule 2.1.

253. Regarding the requirement that lawyers provide enough information to the client to make an informed decision, see MODEL RULES Rule 1.4.

254. When a class lawyer meets with class members, and in any written notices to class members, the lawyer must make it clear that individual class members do not and cannot control the class action.

255. Among other things, discovery of this information about the vastly different ailments suggests very serious problems about causation, and, in particular, whether there is a common question of fact tying the odor to the ailments of the various residents. Thus, the information may preclude the propriety or wisdom of a broadly defined class action. Cf. *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 (D.N.H. 1983). On the other hand, the newly

Bradley is obviously in a much better position to act on behalf of a putative class or to establish sub-classes—indeed, even to define or redefine the class—than had the outreach not taken place. As self evident as this may seem, the client-centered goal of simply getting full and accurate information is often more easily stated than achieved.²⁵⁶

Very specifically, there are two ways to facilitate class member participation in decisionmaking of the sort just described.²⁵⁷ The first is to encourage or require the class lawyer to use various techniques and procedures to reach out to class members. The second is to require the class lawyer to maintain certain records reflecting those outreach efforts. This in turn would facilitate judicial monitoring of the class lawyer's compliance.²⁵⁸

ii. *Class Lawyer Steps*

The lawyer's information gathering methods should include collective and individual contacts with class members. Thus, public announcements, group meetings, regular mailings, written polls or questionnaires, and written or published notices should be used to whatever extent possible and appropriate. The class lawyer should also conduct selected meetings with individual class members, using all of the available interviewing and counseling techniques that are used for individual client-centered lawyering.²⁵⁹ There need not

obtained data on a second cancer victim may strengthen the desirability of a class that is limited to cancer victims.

256. See D. BINDER & S. PRICE, *supra* note 11, at 48-52, 112-18.

257. This Article concludes that the promulgation of a new ethical rule would achieve this goal. See *infra* pages 777-79 and accompanying text (text of the proposed rule). With respect to the need for revising the procedural rules, there probably is enough discretionary authority in Rule 23(d) for the federal courts to ensure compliance with the suggested changes in the ethical rules. One revision of Rule 23 that has been proposed elsewhere, however, may be appropriate here as well. The change would make the notice requirement less rigid as to (b)(3) but more demanding as to (b)(1) and (b)(2). Such a revision would be completely complimentary to the changes proposed in this Article. See Report and Recommendations of the Special Committee on Class Action Improvements, ABA, 110 F.R.D. 195, 206-08 (1986).

258. See Rhode, *supra* note 6, at 240.

259. See *supra* note 200 and accompanying text. Professor Rhode suggests that the expense of individualized contacts probably is prohibitive in most cases. I would reverse the presumptions and urge that a sampling of interviews with individual class members be conducted unless the class lawyer can demonstrate that it is not possible. If actual interviews are not feasible, class counsel might find it useful to role-play a class member in simulated interviews.

be any iron-clad rule as to the requisite number of direct or indirect individual or group contacts between the class lawyer and class members.²⁶⁰ The key point to emphasize is the adoption of the principle that client communication and client input are integral to the performance of the class lawyer's responsibilities.

All class actions are not the same. Logically, therefore, the extent to which the class lawyer should solicit class member input should vary based on some reasonable set of criteria. Three standards seem appropriate to assess the adequacy of a lawyer's outreach efforts: the degree of intrusiveness of the lawsuit into the privacy of class members, the financial impact, and the importance of non-legal factors.²⁶¹ Perhaps the most important factor is the first, the degree to which the class action affects matters that intrude upon the lives of class members—the more intrusion there is, the more input and involvement that is needed from class members.

For example, toxic gas fumes entering the homes of the Morris family and their 499 neighbors, and causing illness and perhaps death, is about as invasive of the privacy of the victims as the underlying cause of a potential class action might be.²⁶² In contrast, consider a class action alleging a Truth-in-Lending Act violation that results in a credit card overcharge of \$1 per month per customer. Less client involvement can be expected in this case than we would reasonably expect in our toxic tort case. The Smith housing discrimination case probably lies somewhere in the middle of the two above mentioned examples. There is much more of an encroachment of their rights to be free of violations of the law than the credit card violation, but less of a personal trespass than the case of infiltrating gas fumes.²⁶³ Ironically, as noted previously, the

260. I have purposely refrained from suggesting any numbers or percentages as to the minimum number of contacts or interviews necessary to satisfy this outreach requirement because the numbers probably should vary substantially depending on the size and nature of the class action. The crucial point is that the outreach obligation be recognized and then carried out. As with all aspects of class actions, the court has oversight responsibility regarding compliance. Class counsel record keeping requirements should facilitate this compliance review.

261. See *infra* pages 777-79 (section 2.4(a)(5) of proposed ethical rule).

262. Cf. FED. R. CIV. P. 23(b)(3)(A). This provision of the Federal Rules enables individual class members to assert that their particular interests are so important and so unique as to outweigh any benefits from a class action. See also H. NEWBERG, *supra* note 8, § 4.29, at 332-35.

263. The school desegregation cases probably are closer to the toxic tort case on the

procedural rules now demand more of the class lawyer in terms of notifying class members in the credit card case (likely a Rule 23(b)(3) class action) than in the housing discrimination case (more often a (b)(2) class action).²⁶⁴

The second suggested standard, the financial impact of the class action, similarly brings to mind the Rule 23(b)(3)(A) criteria for determining when class certification is appropriate.²⁶⁵ The rule states that one of the "matters pertinent to the findings" that a (b)(3) class action is "superior to other methods for the fair and efficient adjudication of the controversy" is: "(A) the interest of members in individually controlling the prosecution or defense of separate actions."²⁶⁶

Typically, when class members have large dollar claims, such as in a mass disaster situation,²⁶⁷ their desire for individual control is to maximize their recovery. This is often enough to defeat the class action.²⁶⁸ Likewise, the more significant the monetary impact on individual class members the more input a class lawyer should seek from class members. Indeed, it is just such increased communication between class lawyer and class members that may lead to the conclusion that a (b)(3) class action is inappropriate. This is not necessarily a bad result.²⁶⁹

invasion of privacy spectrum. As to each housing discrimination victim, the illegal incident is a single act barring someone from obtaining a desired unit. Theoretically, the victim, though emotionally scarred, can seek and obtain housing elsewhere, possibly in an integrated area. In the school case, however, the illegal acts and their consequences may have been recurring over a long period of time, and even more importantly, the remedies of bus-ing or improved quality to local schools will have to be lived with for years to come. Though the school segregation victim conceivably could move to another area, the disruptiveness to the victim is much greater than that suffered by the homeseeker who can seek housing elsewhere.

264. See *supra* note 257 and accompanying text; see also FED. R. CIV. P. 23(b)(2), (b)(3).

265. See FED. R. CIV. P. 23(b)(3)(A).

266. *Id.*; see also *supra* note 262.

267. See, e.g., *Daye v. Commonwealth*, 344 F. Supp. 1337, 1342-43 (E.D. Pa. 1972); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970).

268. See, e.g., *Causey v. Pan American World Airways*, 66 F.R.D. 392, 399 (E.D. Va. 1975).

269. If greater communication with, and involvement of, class members demonstrates that the individual interests of class members are in irreconcilable conflict, then the class should not be certified as originally defined. Currently, Rule 23 notice requirements facilitate a class member's opting out for personal reasons only for Rule 23(b)(3) class actions. See FED. R. CIV. P. 23. The class action decisionmaking standards suggested in this Article would apply to all class actions.

Finally, I propose a highly subjective criterion, the importance of non-legal factors as one indicia of the amount of input a class lawyer should seek from class members. If the lawsuit affects very private matters,²⁷⁰ or highly emotional issues,²⁷¹ the class lawyer must make a vigorous effort to obtain class member views. Though it may be easier to apply this standard in some cases²⁷² than others,²⁷³ it remains useful as an aid to the class lawyer who is making decisions on the desired amount of class member input.

The class lawyer should maintain records of all of the outreach efforts she pursues. Those records may then be the basis for complying with any reasonable reporting requirements that a court might institute. Disclosure of the results of the outreach efforts need not take place, unless of course, the information necessitates further steps by the class lawyer, such as a request for sub-classing or the appointment of separate counsel.

iii. Judicial Steps

There are at least three kinds of actions that courts might take to effectuate a new client-centered class action ethical rule. First, by word and deed, courts must communicate to class lawyers that differences of opinion or dissension among class members need not result in the death of a class action. Denial of class certification or decertification should not necessarily follow the disclosure of conflict. Rather, there are a number of much less ominous

270. For a discussion of several family law class actions raising issues of a highly private nature, see Paulsen, *Family in Law Review*, 19 CLEARINGHOUSE REV. 1101 (1986), particularly the discussion on *Thomas v. City of Los Angeles*, No. 000572 (Super. Ct., Los Angeles Co. 1979) (class of battered women seeking relief against police department), and *Mack v. Rumsfeld*, No. 85-6184 (2d Cir. 1985) (class of single mothers contesting policy precluding armed forces enlistment unless custody of child relinquished)).

271. See, e.g., Smothers, *Judge Seals Verdict as Trial in Suit Against Klan Ends*, N.Y. Times, Oct. 6, 1988, at A18, col. 1 (class action against Ku Klux Klan members for disrupting civil rights demonstrations; two of the named plaintiffs sought to withdraw at the conclusion of a jury trial because they decided it was "improper to seek money damages from Klan members"); see also Bell, *supra* note 196 and accompanying text.

272. For example, in the consumer credit class action in which plaintiffs allege a failure to make required disclosures, the non-legal considerations generally seem less consequential. See, e.g., *Ingram v. Joe Conrad Chevrolet, Inc.*, 90 F.R.D. 129 (E.D. Ky. 1981).

273. In consumer fraud class actions where part of the dispute arises from alleged face-to-face misrepresentations, the victims may have a strong personal and subjective involvement in the prosecution of the class action. Here, it may be more difficult to discern the non-legal considerations of the class members. See, e.g., *Vasquez v. Superior Court*, 94 Cal. 2d 796, 484 P.2d 964 (1971).

ways for the class lawyer and the court to respond to conflict.²⁷⁴

Much freer use of sub-classes, for example, is one antidote to class differences.²⁷⁵ If necessary, separate counsel could be sought for different sub-classes. Allowing class members to "appear" in contrast to permitting them to intervene, may be an appropriate way to accommodate different views.²⁷⁶ Of course, intervention is available and the standards for its use should be clarified and probably eased up.²⁷⁷ Within limits, therefore, the class action should accommodate divergent views, provided that the class lawyer is given adequate authority to act for the class.²⁷⁸

By firmly establishing the class lawyer's responsibility to collect and synthesize the views of class members, the class lawyer has an additional incentive to seek client input, even if it uncovers some conflict, because the class lawyer's fiduciary decisionmaking

274. See Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 Nw. U.L. REV. 492, 515-20 (1982); see also Rhode, *supra* note 6, at 1251-62. Cf. Kane, *supra* note 8, at 408 (regarding the need for clarification of the class lawyer obligation to disclose conflicts).

275. See, e.g., *Securities Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358 (C.D. Cal. 1985). It should be noted that sub-classes usually are less necessary in (b)(3) class actions where class members may opt out. In (b)(1) and (b)(2) class actions, the use of sub-classes may be the only way to accommodate moderate class conflict.

276. The "appearance" device is explicitly provided for only as to Rule 23(b)(3) class actions. See FED. R. CIV. P. 23(b)(3). The notice in such a class action shall provide that "(c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." *Id.* 23(c)(2)(c). This is a procedure by which class members may participate "through counsel if they are dissatisfied with the adequacy of their representation by the class representative but do not wish to assume the responsibilities associated with intervention." H. NEWBERG, *supra* note 8, at 306; see, e.g., *Milne v. Berman*, 384 F. Supp. 206, 213 (S.D.N.Y. 1974), *rev'd on other grounds sub nom. Lavine v. Milne*, 424 U.S. 577 (1976).

277. *Contra United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984). Intervention was denied because potential intervenors had failed to establish that there was "inadequate representation" of the class. Rule 24(a)(2) (intervention as of right) was narrowly construed when the government was the plaintiff suing to enjoin water pollution and four environmental groups sought to intervene.

278. There clearly is a limit to the desirable number of spokespersons in a class action. In her article, Professor Rhode cites, quite appropriately, the Los Angeles school desegregation case as an example of pluralism gone awry—a trial with "as many as twenty-four to twenty-eight attorneys." Rhode, *supra* note 6, at 1227 (referring to *Bustop v. Superior Court*, 69 Cal. App. 3d 66, 137 Cal. Rptr. 793 (1977) (reversing denial of intervention pursuant to a state statute similar to Federal Rule 24.)) Professor Rhode quotes the trial judge describing his role "as somewhat akin to a trainer in the middle ring of a circus." *Id.* Regarding the use of experts or third parties to facilitate the litigation of class actions, see Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 395-98 (1986).

responsibility would be expressly recognized under my proposal. Thus, it is assumed that differences among class members exist, and that the class lawyer resolves the disputes and then acts on behalf of the class. Only if the conflicts were deep and could not be surmounted, would certification be denied or decertification ordered. Otherwise, lesser remedies such as those mentioned above would be used.

Second, courts may require class lawyers to report in some fashion that they have sought class member input. This need not be burdensome to the lawyer or the court. For example, the class lawyer could briefly describe her outreach efforts in the motion papers seeking class certification. The same thing could be done at the time approval of a settlement is sought. Depending on the nature of the class action, reports might be requested at other times as well.²⁷⁹

A final supportive step that courts could take is to reward the effective client-centered class lawyer with appropriate fees that recognize the additional time and effort necessary to effectuate client-centered lawyering.²⁸⁰

2. *Post-Filing (Pre- and Post-Class Certification)*

These concepts of client contact should be followed as much after, as before, the class action is initiated.²⁸¹ Currently, however, when there is seeming acquiescence among class members, there is no obligation on the class lawyer under existing ethical or procedural rules (other than the (b)(3) notice requirements) to solicit the views of class members. Rule 23(a)(4) simply requires "adequate" representation.²⁸² If no class member objects, and if the asserted class position seems reasonable, there apparently are no decisions which conclude that a lawyer's representation is inadequate for failure to affirmatively seek out class views. Neither the ethical

279. At a minimum, class lawyer outreach efforts and the concomitant report to the court would be required under any proposal prior to settlement of a class action. *See infra* page 779 (section 2.4(c) of proposed ethical rule). None of these reports, however, at any stage of the class litigation, need disclose confidential information or work product. Rather, the reports simply would indicate that the class lawyer had taken various information gathering steps.

280. *See Rhode, supra* note 6, at 1250.

281. *See H. NEWBERG, supra* note 8, at 204-27.

282. *See* FED. R. CIV. P. 23(a)(4).

nor the procedural rules address this ostensible non-conflict situation in class actions.

A principal goal of the solicitation of information is to provide class members with a sense of participation.²⁸³ The manner of solicitation, therefore, should be conveyed to the class members so that they are persuaded of the randomness and fairness of the individual meetings, and of the integrity of the class lawyer's absorption of the information thus ascertained.²⁸⁴ To do this, the class lawyer should use the same skills used for one-on-one client-centered interviewing and counseling. An important caveat is for each class member to be informed that, though each is a client, his views are not determinative. Rather, each individual is providing critical input to the lawyer who ultimately will decide.²⁸⁵ This disclosure will avoid any misrepresentation to class members; an integral component of effective client-centered lawyering.²⁸⁶

Professor Bergman has argued that the way for a class action lawyer to honor client-centered values, is to take steps to ensure that the class members organize so that the class may speak with a unitary voice to the class lawyer.²⁸⁷ In this way the client-lawyer relationship in class actions may proceed as it should in all situations. But, I believe this suggestion begs the question. It assumes that all classes may be organized, a highly questionable assumption.²⁸⁸ It also assumes that the class lawyer will have no role to

283. Other goals, of course, are to solicit class member views on non-legal considerations and to confirm the class nature of the wrong and the appropriate class relief, or, conversely, to discern divergent or conflicting interests and propose necessary corrective steps.

284. Absent class members are likely to be more amenable to acceptance of the ultimate results if they are told at an early stage, and later as well, that a certain number of class members were chosen at random to speak with class counsel; that their names are Miller, Jones, etc; that the class lawyer did talk to these representative class members; and that the class lawyer sought to incorporate the views of these representatives in the actions taken on behalf of the class. In essence, this is the way in which class member participation (direct and representative) would legitimate the actions which the class lawyer takes on behalf of the class. See *supra* note 165 and accompanying text.

285. The class lawyer may also want to talk to others in connection with any litigation that could have a large impact on society. This aspect of the responsibilities of the class lawyer has been much discussed and is beyond the discussion of this Article. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

286. Misrepresentation by the class lawyer to a class member can easily result in manipulation or exploitation by the lawyer. Cf. Ellman, *supra* note 11, at 747-48 (omissions by a lawyer can be a form of manipulation).

287. See generally Bergman, *supra* note 81.

288. For example, how would a class lawyer begin to organize a four or five million member consumer fraud class? Even if a class could be organized, that then raises the ma-

play in mediating the inevitable disputes in any class, or in informing the court of such disputes so that the court may order any of the appropriate remedial steps discussed in this paper. Just as it seems likely that there will be differences among class members, it seems unavoidable that at some point in the conduct of a class action, the class lawyer will have to weigh the various views and make a decision in the best interests of the class.

One final observation is appropriate regarding settlement procedures. Too often, class settlements are negotiated with little if any input from class members. Ordinarily, in the case of an individual client, negotiation should proceed on behalf of the client only after thorough counseling takes place.²⁸⁹ The same principle should apply in class actions. Thus, the class lawyer should obtain input from class members before and during any negotiation process that might lead to a proposed consent decree.²⁹⁰ Typically, class members become involved only at that point when a completed agreement is formally presented to class members in compliance with Rule 23(e) notice requirements.²⁹¹ The values underlying client-centered lawyering call for class member participation at an earlier point.²⁹²

C. *The Class Action Lawyer*

1. *Need for Realistic Ethical Rule*

In certain practical and very critical ways, client-centered lawyering is not possible in class actions. Most particularly, the consent of each class member rarely, if ever, is obtainable. What is possible is that the class lawyer's fiduciary responsibility to the group can be clarified so as to replace any distorted impressions that the class lawyer must have an individual client-lawyer rela-

goritarianism issues noted above. See *supra* notes 241-42 and accompanying text. If sixty percent of a class in a school desegregation case favors busing, that does not necessarily resolve a conflict of interest with class members who favor other remedies.

289. See generally Gifford, *supra* note 11.

290. I have attempted to implement this norm in section 2.4(c) of my proposed rule, *infra* page 779. See generally Ricciuti, *supra* note 16.

291. See FED. R. CIV. P. 23(c).

292. A similar point was made in another field, planning. The late Paul Davidoff asserted that greater public participation in the planning process would enable the planner to make more rational and enlightened policy decisions. See Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. OF PLANNERS, No. 4 (Nov., 1965).

tionship with every member of the class.²⁹³ The clarification should give express decisionmaking authority to the class lawyer. The counterweight is the suggestion set forth above that the class lawyer be required to affirmatively solicit input from class members. The objectives of these two changes are: to provide more guidance to class lawyers; to reflect greater respect for client-centered values; and to preserve the strength and vitality of class actions.²⁹⁴ These suggestions are not likely to lessen conflicts in class actions, nor lessen the pressures on class lawyers to settle and obtain fees rather than maximize the benefits to the class.²⁹⁵ Instead, the goal here is a modest one: accept the reality of the limited role of class clients, but firm up that role by revising the applicable rules to

293. Unless the class member is deemed not to be a "client," the only theoretical way to apply the existing informed consent requirements to class actions is to adhere to the proposition in the text—namely, that the class lawyer would have to obtain each class member's individual consent. As noted in the first paragraph of this Article, this generally is impossible, and therefore, would destroy class actions. *See, e.g.,* *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832 (9th Cir. 1976). At least in part due to the court's application of the ethics code informed consent requirements, the Ninth Circuit reversed a trial court's approval of a class action settlement; i.e. since class members did not consent, the settlement could not be acceptable. *Id.* at 836. This way of reconciling consent and class action requirements would undermine the efficacy of class actions.

294. It should be noted that the number of class actions has declined substantially. Whereas 3,061 class actions were filed in 1975, and 1,568 in 1980, only 610 were filed for the year ended June 30, 1987. *See* Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. Times, Jan. 8, 1988, at B7, col. 3. A number of reasons have been offered; perhaps the most persuasive is that lower fee awards have reduced the incentives to class lawyers. Whatever the explanation, however, it is important that any changes, such as those proposed in this Article, not accelerate that decline. With this crucial factor in mind, the suggestions in this Article should not make it more difficult for lawyers to file and maintain class action. Indeed, it is hoped that the additional clarity with respect both to the duties and the authority of the class lawyer, should make it easier for class lawyers.

295. There is no empirical evidence in support of the proposition that application of client-centered lawyering to class actions will necessarily lessen conflicts, nor even make it easier to resolve the conflicts. It is even possible that conflicts will be discovered that would not otherwise have been uncovered, and that the result would be to make a class action unmanageable or, at a minimum, more complicated and time consuming. But that need not necessarily be the case. A similar argument often is made with respect to the use of client-centered techniques with individual clients—namely, that it is too time-consuming. When one considers the diminished possibility of later conflicts with and among class clients as a result of the earlier and ongoing communication with the class, the supposition that client-centered values will unduly complicate class actions is debatable. There certainly are enough examples of endless conflicts and wasteful and excessively time-consuming lawyering in class actions where the principles of client-centered decisionmaking were not being followed. *See, e.g., In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 70-78 (E.D. Pa. 1983), *rev'd on other grounds*, 751 F.2d 562, 600-01 (3d Cir. 1984). Therefore, it seems at least arguable that client-centered lawyering in class actions cannot make the situation any worse.

reflect that reality.

Numerous courts have already recognized the fiduciary role of class lawyers.²⁹⁶ The procedural and ethical rules, however, have not yet incorporated this principle, and the result is both a lack of clarity as to how class lawyers are to relate to class clients, and a mixed record, at best, of carrying out client-centered lawyering values. Whereas the Model Rules of Professional Conduct now have separate rules delineating the lawyer's responsibility to an "Organization as Client"²⁹⁷ and a "Client Under a Disability,"²⁹⁸ and even a new provision reflecting the increasing use of lawyers as mediators,²⁹⁹ neither the Model Rules nor the Code of Professional Responsibility has any comparable provision with respect to class actions. That is the gap I suggest filling. There ought to be a rule that reflects both the unique function of class actions and the important, if not central, role of clients in the class lawyer-client relationship.

2. *Proposed Ethical Code Provision*

Using the Model Rules of Professional Conduct as the context, I propose that a new rule be added to the lawyering roles part of the Model Rules.³⁰⁰ It would read:

Rule 2.4

296. The class lawyer "serves in something of a position of public trust. Consequently, he shares with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorneys' fees." *Alpine Pharmacy v. Chas, Pfizer*, 481 F.2d 1045, 1050 (2d Cir. 1973). "[N]o one class member's interests are ever represented with 'undivided loyalty': counsel's loyalty is necessarily owed to the goals shared by the class as a whole." *Payne v. Travenol Laboratories*, 673 F.2d 798, 835 (5th Cir.) (Goldberg, J. dissenting), *cert. denied*, 469 U.S. 1082 (1982).

297. See MODEL RULES Rule 1.13.

298. See *id.* at Rule 1.14.

299. See *id.* at Rule 2.2. This rule and the accompanying comment are intended to facilitate a lawyer's representation of different clients (with their consent) whose interests are partially or totally in conflict.

300. Part II of the Model Rules now contains rules for the lawyer as an advisor (Rule 2.1), the lawyer as an intermediary (Rule 2.2) and the lawyer whose advice may be relied on by third parties (Rule 2.3). See MODEL RULES Rule 2.1 - 2.3. My class action rule would be Rule 2.4. See Waid, *supra* note 189, at 1075 (where the author proposed the following new ethical rule: "[t]he lawyer representing a class of individuals in a class action owes a primary duty of loyalty to members of the class defined by the original pleadings filed on behalf of the class, until such definition is amended by leave of court."). While this suggestion is an improvement on the current absence of any guidance, it does not address the client-centered lawyering concerns raised in this Article.

Class Action Lawyer

In connection with the representation of a plaintiff class, a lawyer shall:

(a) prior to filing a class action:

(1) comply with all applicable pre-filing reasonable investigation requirements.

(2) survey the views of the putative class members, to the extent feasible, by:

- A. interviewing a reasonable sample of representative class members;
- B. using questionnaires or polling techniques to the extent appropriate and consistent with maintaining the support and confidence of the proposed class representatives to obtain information from or about class members;
- C. seeking the views of such class members on: i) such relevant non-legal considerations as the moral, economic, social, psychological or political consequences of particular courses of action that class members might take; and ii) after explanation, the implications of class representation and the advantages and risks involved.

(3) make reasonable efforts to select the most representative class members to assume the role of named plaintiffs, by:

- A. determining their willingness to consult with the class lawyer;
- B. assessing their ability to articulate their views and desires, taking into account the reasonableness of such an expectation for a particular class.

(4) resolve preliminarily whether there are conflicts of interest among putative class members and the class lawyer, that necessitate:

- A. establishing sub-classes;
- B. soliciting other counsel to represent any one or more sub-class;
- C. representing to court, on filing, that though the class lawyer has determined a class action is appropriate, there are conflicts among class members about which the court should be aware.

(5) determine the extent to which class member views shall be surveyed in accordance with sub-paragraph (a)(2) of this Rule, by:

- A. evaluating the degree of possible intrusiveness in the lives of class members from the class action litigation;

- B. assessing the potential financial impact on class members from the class action;
- C. evaluating the relative importance of non-legal considerations on the decisions to file, maintain and settle the class action.

(b) after filing a class action complaint:

(1) solicit the views of a sample of class members on those issues as to which a lawyer would be obliged to keep an individual client informed and from whom consent would be obtained under these Rules.

(2) use such techniques and criteria in maintaining contacts with class members as are generally set forth in sub-paragraph (a) of this Rule.

(c) prior to notifying class members of a proposed final settlement pursuant to class action notice provisions, survey class members as to their views on potential settlement terms in accordance with the methods set forth in sub-paragraph (a)(2) of this Rule.

(d) maintain records reflecting the lawyering efforts made pursuant to this Rule to inform class members and encourage their participation in the conduct of the class action and submit to the court on request a report setting forth what outreach steps were taken.

(e) make decisions for and act on behalf of the best interests of the class, but only after obtaining input from class members in accordance with this Rule and after resolving any conflict questions in accordance with sub-paragraph (a) of this Rule.

As stated above, there is both recent and older precedent for such a separate rule. Rule 2.2 "Intermediary," for example, is a new Model Rule governing the role of a lawyer who represents two or more clients with conflicting interests, each of whom consents to the common representation.³⁰¹ Divorce lawyers may act as

301. Rule 2.2 Intermediary states that:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is

mediators for the husband and the wife under this provision.³⁰² While the drafters of the rule commented that "there was no direct counterpart to [Rule 2.2] in the [Code],"³⁰³ Professors Hazard and Hodes later wrote regarding this rule that "it could be argued that this Rule's treatment of the lawyer as intermediary is superfluous, for every obligation this Rule places on a lawyer can be found in some other important rule."³⁰⁴ Nevertheless, both commentators defended the soundness of the drafters' decision to include this new rule in the "differing roles" section of the Model Rules.³⁰⁵ It would be equally sound and probably less redundant to add a new and separate rule for class action lawyers.³⁰⁶

From the vantage point of clients, there are now separate ethical rules for the organization as a client and the client with a disability.³⁰⁷ Thus, it also would be logical to include a separate rule for class action clients whose circumstances are unique and different from those of other clients. My proposed rule approaches the task from the lawyer's perspective; it therefore suggests placement in the section relating to differing lawyer roles, but it might also be placed with the Rule 1 client provisions.

The purpose of this rule is to fill the gap between the existing ethical codes that speak generally of informed consent and contemporary class actions where the notion of consent has little meaning. In addition to providing guidance to the class lawyer, it

unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

MODEL RULES Rule 2.2.

302. See generally Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 119-23 (1982) (discussion of some of problems faced by lawyers in this role).

303. MODEL RULES Rule 2.2 comment (1983). Cf. MODEL CODE EC 5-20 (1980).

304. G. HAZARD & W. HODES, *supra* note 79, at 310.

305. See *id.*

306. See MODEL RULES Rule 3.8 (Special Responsibilities of a Prosecutor); see also MODEL CODE DR 7-103 (1980).

307. See MODEL RULES Rule 1.13, 1.14.

should enable courts to conduct more meaningful monitoring. Although class lawyers may have to do more work under this rule, the clear intent is that class actions not be discouraged. Indeed, it is realistic to predict that, ultimately this rule will make it easier (though not necessarily less time consuming) for class lawyers to conduct class actions.³⁰⁸ With this addition to the ethics code, I do not believe it is necessary to amend the procedural rules.³⁰⁹ The rule is intended simply to direct the class lawyer, as is the case for lawyers generally, to pay heed to the values underlying informed consent and client-centered decisionmaking. Importantly, it calls on the courts to recognize that it is the class lawyer and not any individual named plaintiff or class member who ultimately makes the litigation decisions for the class.

3. *Dual Lawyer-Fiduciary Role Not Unusual*

It is not unusual for a lawyer to perform the dual role of an attorney and a guardian or trustee of some sort. Several examples were discussed above. The appointment of the lawyer as a "guardian ad litem" for a child or an incompetent is one such "hybrid" role in which the lawyer is advocating for the client, yet "advising and assisting the court" to reach the right result.³¹⁰ The lawyer-guardian ad litem fulfills these "concurrent obligations" and, with respect to the client who is incapable, makes all of the decisions for the client, subject to the court's oversight of the lawyer's conduct.³¹¹ The lawyer "prosecutes and controls" the litigation.³¹² The class action lawyer performs a similar "officer of the court" function,³¹³ which ought to be recognized explicitly and likewise monitored by the court. With the kind of recordkeeping requirements suggested above, that monitoring responsibility should be greatly facilitated.

308. See *supra* note 295 and accompanying text.

309. Rule 23(d)(2) and (3) provide enough discretion to the courts to oversee compliance with the proposed ethical rule. See *supra* notes 163-83 and accompanying text.

310. See *supra* note 218-40 and accompanying text. *E.g.* *duPont v. Southern Nat'l Bank*, 771 F.2d 874, 882 (5th Cir. 1985). The guardian ad litem is an "officer of the court" as well as an "advisor" to a party. *Id.*

311. See *Allen v. Allen*, 254 N.W.2d 244, 247 (Wis. 1977).

312. See *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974).

313. See *Veazey v. Veazey*, 560 P.2d 382, 390 (Alaska 1977); *cf.* *Shapero v. Kentucky Bar Ass'n*, 109 S. Ct. 1916 (1988) (Court held it was not inconsistent with lawyer's duty to client to also require lawyer to advise court why an appeal would be frivolous).

Performance of the dual role of fiduciary and lawyer for the fiduciary is a common occurrence. In New York, for example, the statutes specifically authorize a lawyer to act both as the executor and the lawyer for an estate,³¹⁴ or both the trustee and the lawyer for a trust.³¹⁵ While it is recognized that such a fiduciary might act in a way to favor her or his interests, the applicable law simply "forbids the disloyal transaction" and provides appropriate remedies in the event of a breach of that fiduciary duty.³¹⁶ These clientless situations have been sanctioned explicitly in the statutes and the case law by approving separate fees to the lawyer-fiduciary for legal work versus fees to the same person for executor, guardian or trustee work.³¹⁷ Even when substantial discretion is given to the fiduciary—for example, a trustee carrying out a charitable trust to support community housing efforts—there is nothing to preclude the lawyer from performing both the legal and trustee functions.³¹⁸ In these cases, as with the child or the incompetent, the lawyer performs legal services without the benefit of very much client direction or, perhaps, without any client input at all.

There are several other contexts in which the lawyer acts either without a client or with a client but where the lawyer is the de facto decisionmaker. Criminal prosecutors, for example, act in the name of the "People"—in the public interest.³¹⁹ Attorneys general

314. See N.Y. Surr. Ct. Proc. Act. Law § 2307 (McKinney 1967 & Supp. 1989); M. TURANO & C. RADIGAN, NEW YORK STATE ADMINISTRATION 369 (1986). *But see* MODEL CODE EC 5-6 (prohibiting a lawyer from unduly influencing a client to select the lawyer as executor).

315. See N.Y. Surr. Ct. Proc. Act. Law § 2309 (McKinney 1967 & Supp. 1989). The same rule applies in Florida, Indiana, Maryland, New Jersey and Wisconsin. See de Furia, Jr., *A Matter of Ethics Ignored: The Attorney-Draftsman As Testamentary Fiduciary*, 36 U. KAN. L. REV. 275, 308 (1988). For reference to the particular statutory citations for each of the states just listed, see *id.* at 308 n. 174.

316. See E. BOGERT, TRUSTS 342 (6th ed. 1987).

317. See, e.g., *In re Von Hofe*, 145 A.D.2d 424, 535 N.Y.S.2d 391 (2d Dep't 1988); *In re Allen's Will*, 280 A.D. 868, 114 N.Y.S.2d 325 (2d Dep't 1952). The broader issue of whether a lawyer can both draft a will and name herself or himself as an executor or lawyer for the estate, or both, has elicited criticism of the permissive ethical rules that allow these dual or multiple functions to be assumed by a single lawyer. See, e.g., de Furia, *supra* note 315, at 299-304.

318. See *supra* notes 315-16; cf. E. BOGERT, *supra* note 316, at 476 (trustee can exercise discretion about how best to carry out charitable purposes).

319. See MODEL RULES Rule 3.8 (Special Responsibilities of a Prosecutor); see also MODEL CODE EC 7-13: "The responsibility of a public prosecutor differs from that of the usual advocate . . . (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client"

likewise may act on behalf of the public in bringing (civil as well as criminal actions) or defending actions, though they may also represent specific individuals.³²⁰ The class action lawyer acts on behalf of class members in a manner that is conceptually quite similar. While the two types of government officials are either elected or appointed, and are obliged by statute to carry out certain law enforcement duties on behalf of the public for extended periods of time, the class lawyer's "public" is limited to the members of the defined class and his or her authority to the duration of the lawsuit. Despite these differences, both the public officials and the class lawyers have similar representative duties—to serve the interests of their constituent groups.³²¹

The development and use of the term "private attorney general" to describe the class action lawyer is a semantic confirmation of the similarity between the lawyering duties of the attorney general and the class lawyer.³²² Like the situation with public attorneys general, the private attorneys general are the decisionmakers and the "clients" typically have played little or no role in the initiation or conduct of such actions.³²³ The role of the private lawyer is viewed as a "necessary supplement" to government enforcement activities;³²⁴ necessary because of the limited resources available to public enforcement of the law.³²⁵ Whether the private attorney general label is used interchangeably with class action attorney or

320. See MODEL CODE EC 7-14; see also Smothers, *Attorney General's Role Is In Question in Georgia*, N.Y. Times, Dec. 17, 1987, at A20, col. 5. A dispute arose as to whether the Georgia State Attorney General could sue a state agency to require them to comply with an open meetings law after having previously counseled the agency on the meaning of the law. See also *supra* note 240.

321. See Yeazell, *supra* note 7 (Professor Yeazell concludes it is the common interest of the group members and not their consent which legitimizes class representation). Cf. G. HAZARD, *supra* note 10, at 58. Quoting a phrase used by J. Brandeis, Professor Hazard describes the lawyer serving more than one client in "a single transaction" as "representing the situation." He goes on, however: "It is not easy to say exactly what a lawyer for the situation' does . . . this role may be too prone to abuse to be explicitly sanctioned." *Id.* at 67.

322. The apparent genesis of the use of the term, "private attorney general," is *New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943) (J. Frank recognized the right of Congress to confer standing on private persons to "vindicate the public interest").

323. See generally Coffee, *supra* note 16. The problems with the private attorney general "follow from the necessarily weak control that the client can exercise over the attorney . . ." *Id.* at 229-30.

324. See, e.g., *J.D. Case v. Borak*, 377 U.S. 426, 432 (1964).

325. *Trafficante v. Metropolitan Life Co.*, 409 U.S. 205, 211 (1972).

used only to describe non-class action injunctive suits, the relative non-role of the clients is the same.³²⁶ At least as to its applicability to class lawyers, that situation would be ameliorated if the suggestions made here were adopted and the clients were given a more defined, though limited, role.

The public-private distinctions are not unimportant, however, and the analogy, therefore, between private class lawyers and government lawyers has definite limitations. The most important difference is that the prosecutor and the attorney general are subject to removal (by the electorate or an elected executive) if their public trust responsibilities are not properly performed. The class action attorney is subject only to the oversight of the court. In stark contrast to the elected or appointed public official, the class lawyer is self-appointed. While the suggested recordkeeping requirements should make judicial monitoring a little easier, that oversight is of a different order from the accountability to the public of government officials. Nevertheless, and notwithstanding all of these differences, it is still useful to analogize the role of the class lawyer to that of the attorney-general. The distinctions should be recognized not by prohibiting a class lawyer from ever acting like a private attorney general, but rather by imposing clear obligations on the class lawyer as well as limitations on the lawyer's authority to so act.³²⁷ That is what the suggestions set forth in this paper attempt to do. And I believe that the judicial regulatory responsibility over class lawyers which is necessary to effectuate these suggestions need not be any greater nor more demanding than it is now—only

326. As previously noted (*see supra* note 323), Professor Coffee has identified as the most distinctive feature of the private attorney general model and the feature that makes it an "inadequate and counterproductive" way to serve "social interests" and the "private enforcement of the law," the fact that "as a practical matter he is unconstrained by the dictates or interests of a specific client." Coffee, *supra* note 16, at 229.

327. *Cf. General Tel. v. EEOC*, 446 U.S. 318 (1980) (Court held that the EEOC was not the same as a private party bringing a Title VII discrimination class action and, therefore, various of the Rule 23 procedural requirements were not applicable to the EEOC). Similar distinctions could be effectuated (either legislatively or through legislative acquiescence to ethical code changes) that would give class lawyers limited governmental type authority to act in the public interest. *See also* Note, *Citizen Suits Under the Clean Water Act*, 38 *RUTGERS L.J.* 813 (1986) (discussion of the citizens' role in initiating enforcement of water pollution laws); Comment, *Qui Tam Action: The Role of the Private Citizen in Law Enforcement*, 20 *UCLA L. REV.* 778 (1973) (discussion of the statute which provides for the recovery of part of any penalties recovered by the government in actions initiated by private individuals against persons allegedly violating the law).

a little better defined.³²⁸

4. *Feasibility of Class Lawyer as Fiduciary*

In response to the suggestion that the class lawyer be recognized as a trustee acting on behalf of the class members, there have been two basic and somewhat contradictory lines of criticism. The first I would characterize as the realist critique—that such a role is a practical impossibility. While viewing the class lawyer as a fiduciary is “unobjectionable in concept, that role definition has frequently proved unworkable in practice.”³²⁹ A differing criticism is one concerned with the lack of accountability, or even the lack of standing because there are no real clients.³³⁰ In contrast to the realists, the proponents of this critique seem much less concerned with the maintenance of effective class actions.³³¹ Both criticisms should be addressed.

The realist asserts that the practical, financial or ideological self-interest of the class lawyer is so overwhelming that it is nearly absurd to talk of a fiduciary obligation to the class as the predominant behavioral motivation for the lawyer. In particular, the class lawyer's interest in or need for a fee is so great that it would be a delusion to expect the class lawyer to put the interests of class members above his or her interest in remuneration.³³² To the extent a class lawyer uncovers and discloses dissension or divergent interests among class members, she risks decertification of the class (and the resulting loss of a large fee), wasteful diversion of

328. I agree with the proposition that it would be desirable to avoid increasing the extent to which courts must regulate class actions. Some of Professor Coffee's suggestions to better correlate fee incentives with the interests of class members would help; nothing in this Article is inconsistent with those proposals.

329. Rhode, *supra* note 6, at 1205; see also Kane, *supra* note 8. Professor Kane recommends a closer and more cooperative working partnership between the court and the class lawyer to compensate for the obstacles to ensure that the class lawyer truly act in the interests of all class members.

330. See, e.g., Breger, *supra* note 91, at 349.

331. Professor Breger observes that while the assumption of the federal rules is that classes are homogenous, in fact they often are quite diverse, and conflicts arise. *Id.* at 350. The class lawyers then resolve the conflicts without any accountability to clients. He concludes, therefore, that public interest lawsuits must be limited “to instances in which there are no conflicts,” unless separate counsel is obtainable for the divergent interests. *Id.* at 354. Cf. Bergman, *supra* note 81 (Professor Bergman, however, seems more concerned with the lawyer's usurpation of the client's right to make decisions affecting the client's values).

332. Coffee, *supra* note 113, at 683-84, 724. Because the class lawyer is much more an entrepreneur than a fiduciary, class actions encourage collusive or extortionate settlements.

resources, a diminution of control—or all of the above. Further, it is argued, the class lawyer may be precluded from representing certain opposing viewpoints for ideological reasons, either of a personal or an institutional sort.³³³ And finally, the usual method of surmounting client-lawyer conflicts—namely, disclosure followed by informed consent—is simply not available in class actions because each class client cannot possibly assent.³³⁴

To begin with the last point, I certainly agree. Indeed, that is the thesis of this article. Ordinary notions of client control, let alone client participation in decisionmaking, are not viable in class actions. But it is precisely for that reason that a clearer explication is necessary of the class lawyer's trustee responsibilities. Two fundamental reasons for the doctrine of informed consent are: 1) to provide a constraint on the lawyer and thereby ensure loyalty to the client; and 2) to ensure that ultimate decisions are made knowledgeably—that the lawyer gets the necessary factual input from the client. That information also is the basis for the lawyer appropriately counseling the client.³³⁵ The outreach suggestions discussed above are an attempt to satisfy those two rationales, at least to some extent.

The present disinclination of class lawyers to disclose conflicts (because too often it could lead to decertification), would change if they were given incentives to disclose.³³⁶ For example, merely knowing that decertification would be an extremely drastic and seldom used response to conflict, would assist in inducing the class lawyer to disclose conflict. Thus, by requiring the class lawyer to take certain investigative steps and then possibly report to the court that the steps were taken, the potential explosiveness of a conflict should be defused. With respect to any ideological bias of the class lawyer, the class lawyer simply must be required to disclose it in some way to class members if it will affect how the lawyer intends to carry out her fiduciary responsibilities. To the ex-

333. A frequently used example of ideological pressures on the class lawyer are the institutional policies of the NAACP Legal Defense Fund in favor of integrated schools. Class lawyers also are affected by criticisms of their lawyering skills which might follow the unsuccessful break-up of class actions. See Rhode, *supra* note 6, at 1210-12.

334. See *id.* at 1212-15.

335. See Spiegel, *supra* note 11.

336. Under my proposal, the existence of disagreement among class members would not necessarily lead to the termination of the class action. See *supra* notes 274-80 and accompanying text.

tent the class lawyer would allow personal interest in fees to override her fiduciary duty to the class (and thus not disclose class conflicts to the court), the situation would be no worse than it is now when there are no recordkeeping or reporting constraints imposed on the class lawyer. And finally, part of the class lawyer's express responsibility would be to act as a trustee for the class in seeking to appropriately reconcile the divergent interests of the class member beneficiaries. This decisionmaking role now would be both explicitly stated and central to the class lawyer's fiduciary responsibility.

Those critiques concerned with the lack of accountability focus on the absence of the central role of the client. There is much less if any concern for the continued efficacy of the class action as a procedural device. The myth of client control should be exposed, says one critic, and strict client accountability should be the norm regardless of the procedural, political or law enforcement consequences.³³⁷ This position may seem deceptively pure in its allegiance to client control. But it is lacking in candor in failing to recognize that many class members might be deprived of access to judicial relief if class actions are made unworkable. It also fails to recognize the numerous other situations when there is little if any client control over the actions of the lawyer. The suggestions here are an attempt to bridge this gap—maintain effective class actions but increase the respect paid to client-centered principles.

Were a new ethical norm established for the class lawyer, such as the one proposed here, it would not eliminate class action conflicts. Nor would it end the necessity for judicial monitoring. It would, however, more accurately reflect the reality of the predominant decisionmaking role of the class lawyer, but it would do so in a way that acknowledges the importance of client-centered values. And it would clarify operationally what it is that the class lawyer ought to be doing, and what the respective decisionmaking roles of client and lawyer are.

V. CONCLUSION

It is a delusion to suggest that the "client" is the decisionmaker in class actions. That simple truth ought to be recognized and then incorporated into operational guidelines pursuant

337. See Breger, *supra* note 91.

to which a class lawyer can pay proper respect to client-centered decisionmaking principles. In doing so, the new rules must also pay heed to the crucial importance of effective class actions. At one and the same time the class lawyer should be called on to reach out and ascertain the views of all class members (even the weak or reticent ones) and then, after synthesizing the information obtained, unilaterally act in a trustee capacity for all class members. The court's monitoring role will be simplified to the extent these guidelines are clarified.